

TORTS: AN INTRODUCTION

- **Tort:** A civil wrong, not arising from a breach of contract or other agreement. A breach of legal duty that proximately causes harm or injury to another.

- **Civil vs. Criminal Wrong:** A tort is a “civil” wrong, punishable by compensating, or paying damages to, the injured party, rather than a “criminal wrong,” punishable by paying a fine to the government or being imprisoned. Some torts may also serve as the basis for separate criminal prosecution by the state.

- The duty that is violated by the *tortfeasor* (*i.e.*, the “wrongdoer”) must exist *as a matter of law*, not as a consequence of any agreement between the tortfeasor and the injured party.

- **Business Tort:** Wrongful interference with another’s business rights.

- **Intentional Tort:** A wrongful act committed knowingly and with the intent to commit the act (not necessarily with the intent to do harm).

- **Unintentional Tort:** A wrongful act committed without knowledge of its wrongfulness or without the intent to commit the act.

INTENTIONAL TORTS: PHYSICAL ACTS

- **Assault:** An intentional, unexcused act creating in another person a reasonable apprehension or fear of immediate harmful or offensive contact (*e.g.*, pointing a gun at someone).
- **Battery:** Intentional, unexcused and harmful or offensive contact (*e.g.*, firing the gun).
- **False Imprisonment:** The intentional confinement of another person or restraint of another person's activities without justification. The confinement may occur through the use of physical barriers, physical restraint, or threats of physical force.
- **Infliction of Emotional Distress:** An intentional act that amounts to *extreme and outrageous conduct* resulting in severe emotional distress to another.

INTENTIONAL TORTS: DEFENSES

- **Consent:** When a plaintiff consents to the act that damages him or her, the alleged tortfeasor generally is not liable for any damage done.
- **Self-Defense:** An individual defending his or her life or physical well-being, either from *real* or *apparent* danger, may use *reasonably necessary* force, or resort to reasonably necessary action, to prevent harmful contact.
- **Defense or Assistance of Others:** An individual can act in a reasonable manner to protect or assist others who are in real or apparent danger.
- **Defense of Property:** An individual may use reasonable force to remove an intruder from the individual's home or to restrain the intruder for a reasonable time. Force that is likely to cause death or serious bodily injury (*i.e.*, *deadly force*) normally may not be used solely to protect property.
- **Necessity:** An otherwise tortious act may be excused if the tortfeasor acted in accordance with law or the public good.

DEFAMATION

- **Defamation:** Anything published or publicly spoken that injures another's character, reputation, or good name.
 - **Libel:** Defamation in written form.
 - **Slander:** Defamation in oral form.
 - **The Publication Requirement:** The speaker must have communicated the statement to persons other than the defamed party.

DEFAMATION *PER SE*

- **Defamation *Per Se*:** Common law recognizes four types of false utterances that constitute indefensible or unjustifiable defamation:
 - (1) that another has a **loathsome communicable disease** (*e.g.*, a sexually-transmitted disease);
 - (2) that another has committed **improprieties while engaging in a profession or trade**;
 - (3) that another has committed or has been imprisoned for a **serious crime**; and
 - (4) that an unmarried woman is **unchaste**.

DEFENSES TO DEFAMATION

- **Truth:** Truth is normally an *absolute defense*. In other words, if the allegedly defamatory words were objectively true, the defendant cannot be held liable for publishing them.
- **Privilege:** The ability to act contrary to another person's right without giving legal redress for such acts.
 - **Absolute Privilege:** Statements made or actions taken in judicial and certain legislative proceedings (*e.g.*, statements made by attorneys during trial, statements made by legislators during floor debate) are privileged against any claim of wrongful conduct.
 - **Qualified Privilege:** In other situations, statements or actions made in good faith and, in the case of statements, made only to those who have a legitimate interest in the statement, are privileged.
- **Absence of Malice:** Generally speaking, otherwise false and defamatory statements made about *public figures* are privileged unless they are made with *actual malice* – that is, with either knowledge of falsity or reckless disregard of the truth or falsity.

INVASION OF PRIVACY

- **Invasion of Privacy:** Common law recognizes four acts that qualify as improperly infringing on another's privacy:
 - (1) **Appropriation:** the use of a person's name, picture, or other likeness for commercial purposes without their permission;
 - (2) Intrusion in an individual's affairs or seclusion in an area in which the person has a **reasonable expectation of privacy**;
 - (3) Publication of information that places a person in **false light**; and
 - (4) Public disclosure of private facts about an individual that an ordinary person would find **objectionable**.

FRAUD

- **Fraud:** Intentional deceit, usually for personal gain. Actionable fraud consists of the following elements:
 - (1) A **misstatement or omission** of a material fact,
 - Mere *puffery*, or “seller’s talk,” will not give rise to a cause of action for fraud, because such claims involve opinions, not facts, and therefore cannot be justifiably relied upon by a reasonable person.
 - However, statements of **opinion** may give rise to a claim of fraud if the party expressing the opinion has a *superior knowledge of the subject matter*.
 - (2) made **knowingly** or with **reckless disregard** for the truth,
 - (3) and with the **intention of deceiving** another by inducing them to rely on the misrepresentation,
 - (4) on which a reasonable person would **justifiably rely to her detriment**, and
 - (5) on which the injured party **did, in fact, rely** to her detriment.

WRONGFUL INTERFERENCE

- **Interference with Contract:** The tort of interference with contract requires proof of the following:
 - (1) a **valid contract** exists between parties X and Y;
 - (2) a third party, Z, **knows** that said contract exists; and
 - (3) Z **intentionally** causes X or Y to breach the contract.

- **Interference with Business Relationship:** Interference with a prospective business relationship is also actionable, where:
 - (1) While no contract or other business relationship presently exists between X and Y, Z knows or has reason to believe that X and Y might enter into a business relationship, by contract or otherwise; and
 - (2) Z intentionally interferes with X's attempt to establish a business relationship with Y.

- In either case, Z's interference will be excused if Z can establish that it was **privileged** or **justified** to act as it did. Thus, for example, bona fide competitive behavior (*e.g.*, non-predatorily underselling a competitor) will not support a claim of tortious interference.

TRESPASS TO LAND

- **Trespass to Land:** Entry onto, above, or below the surface of land without the owner's permission or legal authorization.
- Any person who enters onto another's property to commit an **illegal act** is deemed to have trespassed as a matter of law. Otherwise, the owner or legal occupant of the real property must establish that
 - (1) the trespasser ignored a posted "no trespassing" sign (or comparable notice), or
 - (2) the trespasser ignored the owner's or legal occupant's request to leave the property.
- **"Attractive Nuisance":** A landowner may be liable for injuries to children enticed to enter the property by, *e.g.*, a swimming pool or an abandoned building.
- **Defense to Trespass:** Trespass may be justified or excused if the trespasser can prove
 - **Necessity:** she was trying to rescue another or save another's life or property, or
 - **License:** she was invited onto the owner's property.

TRESPASS TO PERSONAL PROPERTY AND CONVERSION

- **Trespass to Personal Property:** Taking or harming another's personal property, in such a way as to interfere with the other person's right to exclusive possession of his personal property, without the owner's permission or legal authorization.
 - The focus of trespass is injury to the owner's *enjoyment* of his personal property, not injury to the property itself.
- **Conversion:** Taking, using, selling, or retaining possession of personal property that belongs to another without the other's permission or legal authorization.
 - Conversion assumes that the purported owner has a **superior right** of possession.
 - Conversion may be excused by **necessity**.

DISPARAGEMENT OF PROPERTY

- **Disparagement of Quality:** The publication, whether written (*trade libel*) or oral (*slander of quality*), of false information about the quality of another's product or services.
- **Disparagement of Title:** The publication, whether written or oral, of a statement that denies or casts doubt upon another's legal ownership of any property, causing financial loss to the disparaged party.

NEGLIGENCE: BASIC PRINCIPLES

- **Negligence:** Failing to exercise the standard of care that a reasonable person would exercise in similar circumstances.

- In contrast to intentional torts, negligence requires no intent on the part of the tortfeasor, nor does it require that the tortfeasor know or believe the consequences that his act or omission may cause. Negligence merely requires that the tortfeasor's act or omission create a *risk* of the consequences complained of by the injured party.

- Actionable negligence requires that:
 - (1) the tortfeasor owe a **duty of care** to the plaintiff,
 - (2) which the tortfeasor **breaches**,
 - (3) **actually causing**
 - (4) a **legally recognizable injury** to the plaintiff.

NEGLIGENCE: DUTY OF CARE

- **Duty of Care:** The duty of all persons to exercise reasonable care in their dealings with others.
- **Reasonable Care:** The degree of care expected of a hypothetical “reasonable person”; not necessarily how a reasonable person *would* act, rather how a reasonable person *should* act.
- Tort law presumes that the **reasonable person** will be, at a minimum:
 - (1) attentive,
 - (2) aware of his or her environs,
 - (3) careful,
 - (4) conscientious,
 - (5) even tempered, and
 - (6) honest.

NEGLIGENCE: PREMISES & PROFESSIONALS

- **Duties of Landowners:** Landowners are expected to exercise reasonable care to protect from harm those persons coming onto their property – even trespassers.

- **Business Invitees:** Retailers and other business that explicitly or implicitly invite persons to come onto their premises are expected to exercise reasonable care toward these *business invitees*.

- **Duties of Professionals:** If an individual has knowledge, skill, or expertise superior to that of the ordinary person, the individual is held to that standard of care expected of a reasonable person with the same or similar knowledge, skill, or expertise. Failure to perform up to the standard of a “reasonable professional” can result in the professional being subject to liability for professional *malpractice*.

NEGLIGENCE: INJURY AND DAMAGES

- The purpose of tort law is to compensate those who suffer *legally recognizable injuries*. If no such injury occurs, no tort exists and there is nothing to compensate.
- Tort law recognizes two categories of damages:
 - **Compensatory Damages**, designed to reimburse the plaintiff for the actual value of the plaintiff's injury or loss, and
 - **Punitive Damages**, designed to punish the tortfeasor for particularly egregious conduct and to deter similar conduct in the future.

NEGLIGENCE: CAUSATION

- **Causation in Fact:** An act or omission without which the plaintiff's injury would not have occurred.
- **Proximate Cause:** Exists when the connection between an act and an injury is direct enough to impose liability.
 - A common and critical element of proximate cause is **foreseeability** – if the consequence of the act or omission or the victim who is harmed by the act or omission is unforeseeable, no proximate cause exists.
- **Superseding Cause** – The connection between the wrongful act or omission and the injury suffered may be broken by the occurrence of another act or omission, not caused by the alleged tortfeasor nor subject to the alleged tortfeasor's control, which supersedes the original wrongful act or omission as the cause of plaintiff's injury or loss.
- ***Res Ipsa Loquitur*:** A doctrine under which negligence may be inferred to have caused an injury or loss if the event resulting in the injury or loss would not occur in the absence of negligence.

NEGLIGENCE: ASSUMPTION OF RISK

- **Assumption of Risk:** A plaintiff who voluntarily enters a risky situation, knowing the risk involved, may not recover from the alleged tortfeasor. In order to establish assumption of risk, the defendant must prove that the plaintiff:
 - (1) had knowledge of the risk inherent in a situation, and
 - (2) voluntarily entered into the risky situation.
- Risk may be assumed by **express agreement** or be **implied** by the plaintiff's knowledge and conduct.
- Plaintiffs do not assume risks other than those **inherent** in the situation.
- Assumption of risk will not arise in **emergencies**.
- Assumption of risk will not arise when the plaintiff is a member of a **statutorily-protected** class of persons.

CONTRIBUTORY AND COMPARATIVE NEGLIGENCE

- **Contributory Negligence:** No matter how insignificant the plaintiff's own negligence is when compared to that of the defendant, in a minority of jurisdictions any negligence on the part of the plaintiff that contributed in any way to the injury of which plaintiff complains will bar the plaintiff from recovering damages from defendant.
- **Comparative Negligence:** More popular today than contributory negligence, a comparative negligence scheme permits plaintiff to recover only for the percentage of his or her injury or loss that was not caused by plaintiff's own negligence.
- **"50% Caps"** – Some jurisdictions further refuse to permit a negligent plaintiff from recovering any damages if the plaintiff is responsible for more than 50% of his or her own injury or loss.

NEGLIGENCE *PER SE*

- **Negligence *Per Se*:** An act or omission in violation of a statutory duty or obligation. Negligence *per se* often arises where the tortfeasor both violates a criminal statute or ordinance and causes injury to another party.

- The plaintiff must prove that:
 - (1) the statute or ordinance clearly sets out what standard of conduct is expected, when it is expected, and of whom it is expected,
 - (2) the plaintiff is in the class of persons intended to be protected by the statute or ordinance, and
 - (3) the statute or ordinance was intended to prevent the type of injury that the plaintiff suffered as a result of the defendant's wrongful act.

SPECIAL NEGLIGENCE RULES

- **The “Danger Invites Rescue” Doctrine:** In cases where an individual takes foreseeable action to avoid harm or to rescue another from harm, any injury her action causes will be attributable to the original wrongdoer whose fault or negligence caused her to take the defensive action.
- **“Good Samaritan” Statutes:** Many states have passed legislation preventing those who are aided voluntarily from then suing the person who rendered the assistance.
- **“Dram Shop” Liability:** Many jurisdictions hold that a business, and in some jurisdictions an individual, that served alcoholic beverages to a person after he or she arrived intoxicated or became intoxicated is liable for any injuries caused by the intoxicated patron or guest.

CYBER TORTS

- **Online Defamation:** An online message attacking another person or entity in harsh, often personal, and possibly defamatory, terms. Online defamation is difficult to combat because:
 - (1) the **Communications Decency Act of 1996** absolves *Internet service providers* (“ISPs”) from liability for disseminating defamatory material; and
 - (2) the Internet affords a high degree of **anonymity** to the person who posted the defamatory message.

- **Spam:** Bulk, unsolicited e-mail or newsgroup postings – usually an advertisement for the “spammer’s” product or service sent to all users on an e-mailing list or newsgroup.
 - Some states have begun to regulate or prohibit the use of spam, giving recipients of unwanted spam, and even ISPs, legal bases for blocking spam and for recovering against spammers.