Themis
Bar Review
A UWorld Company

LAW SCHOOL ESSENTIALS:

TORTS

Table of Contents

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I. INTENTIONAL TORTS INVOLVING PERSONAL INJURY

There are four established intentional torts involving personal injury—battery, assault, intentional infliction of emotional harm, and false imprisonment.

A. GENERALLY

A prima facie case for any intentional tort, including those not involving personal injury, must include proof of **the tortious conduct, the requisite mental state, and causation**.

1. Tortious Conduct

For battery and assault, the defendant's tortious conduct must be an act. The act must be voluntary, meaning that the defendant must have directed the physical muscular movement. For false imprisonment and the intentional infliction of emotional distress, the focus is on the defendant's conduct. Regarding the latter two torts, a defendant who fails to act when having a duty to do so may be liable as well as a defendant who affirmatively acts. Restatement (Third) of Torts: Inten. Torts to Persons §§ 1, 5, 7 (Am. L. Inst., Tentative Draft No. 4, 2019); Restatement (Third) of Torts: Inten. Torts to Persons § 106 (Am. L. Inst., Tentative Draft No. 1, 2015).

2. Requisite Mental State

As the name implies, the requisite mental state for an intentional tort is established if the defendant acts intentionally. A defendant acts **intentionally** if the defendant acts:

i) With the **purpose** of causing the consequences of his act; or

ii) Knowing that the consequence is **substantially certain** to result.

The substantial-certainty test (item (ii), above) is limited to situations in which the defendant has knowledge to a substantial certainty that the conduct will bring about harm to a particular victim, or to someone within a small class of potential victims within a localized area. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 1 cmt. e (Am. L. Inst. 2010).

a. Children and the mentally incompetent

In most jurisdictions, neither a **minor child** nor a **mentally impaired individual** is excluded as such from liability for an intentional tort. Either may be liable if they act with the requisite mental state.

b. Transferred intent

Transferred intent exists when a defendant intends to commit a battery, assault, or false imprisonment against one person but instead commits the intended tort against a different person. Transferred intent does not apply to transfer intent from an intentional tort based on personal injury (e.g., battery, assault) to an intentional tort based on harm to property (e.g., trespass to land). It also generally does not apply to intentional infliction of emotional distress, but may under limited circumstances (*see* I.D.1. Intent, *infra*).

Example 1: An individual throws a punch intending to hit a friend. The punch misses the friend and instead lands on a bystander. The individual's intent to

commit an intentional tort (i.e., battery) against the friend satisfies the intent requirement for the same intentional tort against the bystander.

Transferred intent also exists when a defendant intends to commit a battery (i.e., intends to cause a contact with the person of another) and instead commits an assault (i.e., causes the other to anticipate an imminent, and harmful or offensive, contact with his or her person).

Example 2: An individual throws a ball at a friend with the intent to hit the friend. The friend anticipates that the ball will hit her, but it sails wide of its mark. The individual's intent to commit one intentional tort (i.e., battery) satisfies the intent requirement for another intentional tort (i.e., assault).

Similarly, transferred intent exists when a defendant intends to commit an assault and instead commits a battery.

Example 3: An individual throws a ball in the direction of a friend, intending only to scare the friend. The ball hits the friend. The individual may be liable to the friend for battery. The individual's intent to commit one intentional tort (i.e., assault) satisfies the intent requirement for another intentional tort (i.e., battery).

Restatement (Third) of Torts: Inten. Torts to Persons § 110 (Am. L. Inst., Tentative Draft No. 1, 2015).

c. Intentional infliction of emotional distress—recklessness

For the tort of intentional infliction of emotional distress, the requisite mental state can also be established if the defendant acts recklessly. A defendant acts recklessly if:

i) The defendant knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation; and

ii) The precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the defendant's failure to adopt the precaution a demonstration of the defendant's indifference to the risk.

Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 2 (Am. L. Inst. 2010).

3. Causation

Causation exists when the resulting harm was legally caused by the defendant's conduct. For the defendant conduct to be the legal cause of the harm, the defendant's conduct must be both the factual cause and the proximate cause of the harm.

a. Factual cause

Generally, a defendant's conduct is a factual cause of harm when the harm would not have occurred absent the conduct (i.e., the "but for" cause). When there are multiple acts, each of which by itself would have been a factual cause of the harm at the same time in the absence of the other acts, each act is a factual cause of the harm. Restatement (Third) of Torts: Liability for Physical and Emotional Harm §§ 26, 27 (Am. L. Inst. 2010).

b. Proximate cause

Proximate cause limits a defendant's liability. A defendant who intentionally or recklessly causes harm is not subject to liability for harm the risk of which was not increased by the defendant's intentional or reckless conduct. However, a

defendant is not relieved from liability merely because the harm was unlikely to occur. In addition, a defendant who intentionally or recklessly causes harm is liable for a broader range of harms than the defendant would be if only acting negligently. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 33 (Am. L. Inst. 2010).

4. Participation in an Intentional Tort

A defendant who knowingly and substantially instigates, encourages, or assists another person's commission of an intentional tort involving personal injury is subject to liability for that tort, even if the actor's conduct does not independently satisfy all elements of the underlying tort. Restatement (Third) of Torts: Inten. Torts to Persons § 10 (Am. L. Inst., Tentative Draft No. 3, 2018).

B. BATTERY

A defendant is subject to liability to the plaintiff for **battery** if:

i) He intends to cause a contact with the plaintiff's person;

ii) His affirmative conduct causes such a contact; and

iii) The contact causes bodily harm or is offensive to the plaintiff.

The intent element (item (i), above) may also be satisfied through the application of the transferred intent doctrine (*see* I.A.2.b. Transferred intent, *supra*). Restatement (Third) of Torts: Inten. Torts to Persons § 1 (Am. L. Inst., Tentative Draft No. 4, 2019).

1. Lack of Consent

Most jurisdictions have not decided which party bears the burden of proof with respect to the issue of consent, and the Restatement (Third) of Torts has not taken a position. Of the jurisdictions that have addressed the issue, most jurisdictions have placed the burden of proof on the plaintiff to prove her lack of actual consent. Restatement (Third) of Torts: Inten. Torts to Persons § 12 cmt. e (Am. L. Inst., Tentative Draft No. 4, 2019). For battery, a plaintiff is generally precluded from recovery if the plaintiff consents either to the contact that is harmful or offensive or to the conduct by which the actor intends to cause such a contact. *See* II.A. Consent, *infra*.

2. Harmful or Offensive Contact

a. Harmful contact

Contact is harmful when it causes physical injury, illness, disease, impairment of bodily function, or death. Restatement (Third) of Torts: Inten. Torts to Persons § 101 cmt. b (Am. L. Inst., Tentative Draft No. 1, 2015); Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 4 (Am. L. Inst. 2010).

b. Offensive contact

Contact is **offensive when a person of ordinary sensibilities** (i.e., a reasonable person) would find the contact offensive (objective test). In addition, contact is offensive when the defendant knows that the contact is highly offensive to the plaintiff's sense of personal dignity, and the defendant contacts the plaintiff with the primary purpose that the contact will be highly offensive, unless the court determines that imposing liability would violate public policy. Restatement (Third) of Torts: Inten. Torts to Persons § 3 (Am. L. Inst., Tentative Draft No. 4, 2019).

c. Plaintiff's lack of awareness

The plaintiff need not be aware of the contact when it occurs to recover. Restatement (Third) of Torts: Inten. Torts to Persons § 101 cmt. e (Am. L. Inst., Tentative Draft No. 1, 2015).

Example: An operating room attendant inappropriately touches the patient while she is under the effect of anesthesia. The attendant is subject to liability for battery, even though the patient was not aware of the touching.

d. Indirect contact

The harmful or offensive contact need not be with the defendant himself (e.g., the defendant throws a rock that strikes the plaintiff, the defendant pushes another individual into the plaintiff). Restatement (Third) of Torts: Inten. Torts to Persons § 101 cmt. e (Am. L. Inst., Tentative Draft No. 1, 2015).

e. Lack of contact—purposeful infliction of bodily harm

When there is no contact (either directly or indirectly) with the plaintiff's person, the defendant is not liable for battery. However, in rare cases, when the defendant's conduct is particularly culpable, the Restatement Third of Torts: Intentional Torts to Persons would impose liability on the defendant for the purposeful infliction of bodily harm. Under the Restatement's position, the defendant's conduct could be either an affirmative act or a failure to act when the defendant has a duty to act. Restatement (Third) of Torts: Inten. Torts to Persons § 4 (Am. L. Inst., Tentative Draft No. 4, 2019).

Example: The neighbor of an elderly individual knows that the individual has left the neighbor a small inheritance in his will. When the neighbor is present in the individual's home, the individual has a heart attack. The neighbor attempts to reach for a phone to call 911. The neighbor, motived by the inheritance, seizes the phone before the individual can reach it and watches the individual die. The neighbor is not liable for battery because the neighbor has not made contact with the individual but is liable for the purposeful infliction of bodily harm.

3. Contact with Plaintiff's Person

Contact with anything **connected to** the plaintiff's person qualifies as contact with the plaintiff's person for the purposes of battery (e.g., a person's clothing, a pet held on a leash, a bicycle ridden by the plaintiff). Restatement (Third) of Torts: Inten. Torts to Persons § 101 cmt. e (Am. L. Inst., Tentative Draft No. 1, 2015).

For the contact to constitute a battery, contact with an object under the plaintiff's physical control must be done with the necessary intent. Hitting a pet being walked by the plaintiff because the pet, on its own initiative, nipped the defendant would not constitute a battery.

4. Causation

The defendant's act, which must be both voluntary and affirmative, must in fact result in contact of a harmful or offensive nature. A defendant who sets in motion a chain of events that causes contact with the plaintiff, whether the contact is direct or indirect, is subject to liability (e.g., a tripwire set by the defendant with the intent to cause the plaintiff to fall that causes the plaintiff to fall). Restatement (Third) of Torts: Inten. Torts to Persons § 101 cmt. e (Am. L. Inst., Tentative Draft No. 1, 2015).

5. Intent

Subject to the transferred intent doctrine (*see* I.A.2.b. Transferred intent, *supra*), the defendant must intend to cause a contact with the plaintiff. To act intentionally, a defendant must act with either (i) the purpose of bringing about the consequences of that act or (ii) the knowledge that the consequences are substantially certain to occur.

Regarding the intended consequences, the majority rule merely requires a defendant to intend to cause a contact. While the contact must be harmful or offensive, the defendant need not intend that result (i.e., the single-intent rule). The minority rule requires a defendant not only to intend to bring about a contact, but also to intend that the contact be harmful or offensive (i.e., the dual-intent rule). Restatement (Third) of Torts: Inten. Torts to Persons § 102 (Am. L. Inst., Tentative Draft No. 1, 2015).

6. Damages

A plaintiff may recover damages for physical injury (e.g., bodily harm) as well as damages for emotional distress (e.g., pain, suffering).

a. No proof of actual harm

A plaintiff may recover nominal damages to vindicate her right to physical autonomy, even though the defendant did not suffer actual harm.

b. Punitive damages

Many jurisdictions allow recovery of punitive damages if the defendant acted outrageously or with malice (i.e., a wrongful motive, or a conscious or deliberate disregard of a high probability of harm). *See* IV.F.7. Punitive Damages, *infra*.

c. Defendant liable for unforeseen consequences

Under the **thin-skull rule** (also known as the "eggshell-plaintiff" rule), the defendant is not required to foresee the extent of damages to be subject to liability for all damages. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 31 (Am. L. Inst. 2010).

Example: A man inappropriately pinches a woman, who is a hemophiliac, on a bus. She bleeds to death as a consequence. The man is subject to liability for her death.

C. ASSAULT

A defendant is subject to liability to the plaintiff for assault if:

i) The defendant **intends** to cause the plaintiff **to anticipate an imminent, and harmful or offensive, contact** with the plaintiff's person; and

ii) The defendant's **affirmative conduct causes the plaintiff to anticipate such contact** with the plaintiff's person.

The intent element (item (i), above) may also be satisfied through the application of the transferred intent doctrine (*see* I.A.2.b. Transferred intent, *supra*). Restatement (Third) of Torts: Inten. Torts to Persons § 5 (Am. L. Inst., Tentative Draft No. 4, 2019).

1. Lack of Consent

As is the case with battery, most jurisdictions have not decided which party bears the burden of proof with respect to the issue of consent, and the Restatement (Third) of Torts has not taken a position. Of the jurisdictions that have addressed the issue, most have placed the burden of proof on the plaintiff to prove her lack of actual

consent. Restatement (Third) of Torts: Inten. Torts to Persons § 12 cmt. e (Am. L. Inst., Tentative Draft No. 4, 2019).

For assault, a plaintiff is generally precluded from recovery if the plaintiff consents to (i) the anticipation (including fear) of an imminent harmful or offensive contact, (ii) the contact itself, or (iii) the conduct by which the defendant intends to cause such an anticipation or contact. *See* II.A. Consent, *infra*.

2. Anticipated Contact

a. No actual contact

Unlike battery, contact with the plaintiff's person is not required.

Example: A man throws a punch at another and misses. The man may be subject to liability for assault, even though he failed to land the punch.

b. Anticipation of contact

A plaintiff must be aware of or have knowledge of the defendant's act. Restatement (Third) of Torts: Inten. Torts to Persons § 105 cmt. c (Am. L. Inst., Tentative Draft No. 1, 2015). A battery, by contrast, may be committed even though the plaintiff is unaware of the contact.

Example: An individual kisses a sleeping stranger. The individual is not liable for assault, even though the individual may be liable for battery.

The anticipated contact must be harmful or offensive (*see* I.B.2. Harmful or Offensive Contact, *supra*). *Id*.

1) Objective v. subjective standard

Under the majority rule, the standard for anticipation is an objective one—the plaintiff's anticipation must be **reasonable**, that is, a reasonable person (i.e., a person of ordinary ability or courage) must have anticipated a harmful or offensive contact. Under the minority rule, which is supported by the Restatements, the standard for anticipation is a subjective one—the plaintiff must actually have anticipated a harmful or offensive contact. The minority rule does recognize that a plaintiff's subjective anticipation of an imminent offensive contact cannot override the legal definition of an offensive contact. Restatement (Third) of Torts: Inten. Torts to Persons § 105 cmt. d (Am. L. Inst., Tentative Draft No. 1, 2015).

2) No need for fear

Although the traditional definition of assault uses the term "apprehension" rather than "anticipation," the plaintiff need not be fearful of the harmful or offensive contact. Restatement (Third) of Torts: Inten. Torts to Persons § 105 cmt. c (Am. L. Inst., Tentative Draft No. 1, 2015).

Example: A six-year-old child attempts to kick an adult wearing body armor. The child may be subject to liability for assault, even though the adult does not fear being harmed by the kick.

3) Prevention of contact

The plaintiff's ability to prevent the threatened contact does not preclude the plaintiff from anticipating that the defendant's conduct would be harmful or offensive if the plaintiff failed to act. While a plaintiff may take preventive

action, the plaintiff is not required to do so. Even though the plaintiff fails to take such action, the defendant is subject to liability for assault. *Id*.

Example 1: An elderly individual points a loaded gun at a teenager who is within arm's length. The teenager can seize the gun before the individual can fire it. The individual may be liable for assault, even though the teenager can prevent the individual from firing the gun.

Similarly, the plaintiff's knowledge that a third party likely may or will prevent the threatened harm does not preclude the defendant's conduct from being an assault. *Id*.

Example 2: An elementary school student cocks his arm to throw a rock at another student. The intended victim sees a teacher standing behind the student ready and able to prevent the student from throwing the rock. The student may be liable for assault, even though the intended victim is certain that the teacher will intervene and prevent the student from throwing the stone.

4) Apparent ability

The defendant's apparent ability to cause harm can be sufficient to place the plaintiff in anticipation of harm. Restatement (Third) of Torts: Inten. Torts to Persons § 105 cmt. d (Am. L. Inst., Tentative Draft No. 1, 2015).

Example: A woman threatens to shoot a man with a toy gun that appears to be a real gun. The woman may be liable for assault, even though the gun is incapable of harming the man.

5) Threat of contact with another

A threat of contact with another individual does not constitute an assault of the plaintiff. Restatement (Third) of Torts: Inten. Torts to Persons § 105 cmt. i (Am. L. Inst., Tentative Draft No. 1, 2015).

Example: An individual, leaning over a baby in a crib, tells the baby's mother, who is across the room, "I'm going to take your baby." The individual is not liable for assault of the mother because the individual has not threatened contact with the mother.

3. Imminence

The threatened bodily harm or offensive contact must be **imminent**, i.e., without significant delay. While threats of future harm are usually insufficient, as are threats made by a defendant who cannot inflict imminent harm due to the physical distance between the defendant and the plaintiff, a threat of future contact *can* satisfy the imminence requirement. Whether such a threat will satisfy the imminence requirement depends on the circumstances of the particular case and is ordinarily a question for the finder of fact. Restatement (Third) of Torts: Inten. Torts to Persons § 105 cmt. e (Am. L. Inst., Tentative Draft No. 1, 2015).

Example 1: A man calls another, who is located 20 miles away, and tells him, "I'll beat you up." The caller is likely not liable for assault because there will be a significant delay between the threat and the contact.

Example 2: A man visits his ex-wife's house and screams at her for several minutes. He then threatens to shoot his ex-wife and walks out of the house toward his car. The ex-wife knows that the man always used to keep a gun in his car. Whether the ex-

wife anticipated an imminent harmful or offensive contact would depend on the circumstances of the case and would be a question for the finder of fact.

4. Intent

Subject to the transferred intent doctrine (*see* I.A.2.b. Transferred intent, *supra*), the defendant must intend to cause the plaintiff's anticipation of an imminent harmful or offensive contact, or substantially or virtually know that the plaintiff will suffer such anticipation. Restatement (Third) of Torts: Inten. Torts to Persons § 105 cmt. f (Am. L. Inst., Tentative Draft No. 1, 2015).

a. Mere words

It is sometimes said that "**mere words alone do not constitute an assault**." However, words coupled with other acts or circumstances may be sufficient if the plaintiff reasonably anticipates that a harmful or offensive contact is imminent. Restatement (Third) of Torts: Inten. Torts to Persons § 105 cmt. g (Am. L. Inst., Tentative Draft No. 1, 2015).

Example 1: An individual sneaks up behind another in a dark alley and utters in a menacing voice, "Your money or your life." The individual may be liable for assault, even though the individual has taken no other action with respect to the other person.

The defendant's own words, however, can negate the intent. *Id*.

Example 2: An individual raises his fists as if to hit a friend while saying, "If you were not such a good friend, I would punch you." The individual's words indicate a lack of intent to cause the friend to anticipate an imminent harmful or offensive contact.

5. Damages

As with battery, a plaintiff may recover damages for physical injury (e.g., a heart attack) as well as damages for emotional distress (e.g., pain, suffering) when the defendant is liable for assault. No proof of actual damages is required. The victim can recover **nominal damages** and, in appropriate cases, **punitive damages**.

D. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A defendant is subject to liability to the plaintiff for the intentional infliction of emotional distress if the defendant by **extreme and outrageous conduct** intentionally or recklessly causes severe emotional distress to the plaintiff. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 46 (Am. L. Inst. 2012).

1. Intent

The defendant must intend to cause severe emotional distress or must act with recklessness as to the risk of causing such distress. The traditional doctrine of transferred intent does not apply to intentional infliction of emotional distress when the defendant intended to commit a **different** intentional tort (such as a battery) against a different victim. Instead, this situation is governed by the "bystander" rule for third-party victims (*see* 4. Emotional Harm Caused by Harm to Third Party, *infra*). However, transferred intent **may** apply to intentional infliction of emotional distress if, instead of harming the intended person, the defendant's extreme and outrageous conduct harms another. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 46 cmt. h (Am. L. Inst. 2012).

Example: A man, with the intent to cause his ex-wife severe emotional distress, calls her cell phone and falsely tells the individual who answers that the couple's only child was murdered, describing the murder in graphic detail. The individual who answered the phone was not the man's ex-wife but instead the best friend of the couple's only child. The man's intent to cause severe emotional distress to his ex-wife satisfies the intent requirement with respect to his liability for the intentional infliction of emotional distress regarding the best friend.

2. Extreme and Outrageous Conduct

Conduct is extreme and outrageous if it **exceeds the possible limits of human decency**, so as to be entirely intolerable in a civilized society. The character of the conduct must be outrageous, and the conduct must be sufficiently unusual to be extreme.

Example: As a practical joke, the defendant tells an individual that his spouse was badly injured in an accident and is in the hospital. The acquaintance's conduct satisfies the extreme and outrageous standard.

While liability generally does not extend to mere insults, threats, or indignities, a defendant's abusive language and conduct may be sufficiently "extreme and outrageous" if either:

i) The defendant is in a position of **authority or influence** over the plaintiff, such as a police officer, employer, or school official, or traditionally an innkeeper or an employee of a common carrier; or

ii) The plaintiff is a member of a group with a **known heightened sensitivity** (e.g., young children, pregnant women, or elderly persons).

Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 46 cmt. d (Am. L. Inst. 2012).

3. Public Figures

Public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publication without showing in addition that the publication contains a false statement of fact that was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to its truth. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988).

In addition, the U.S. Supreme Court has suggested that private plaintiffs cannot recover for IIED if the conduct at issue was speech on a matter of public concern because that conduct may be protected by the First Amendment. *Snyder v. Phelps*, 562 U.S. 443 (2011).

4. Emotional Harm Caused by Harm to Third Party

A defendant who causes harm to an individual may be liable when his intentional or reckless conduct also causes severe emotional distress to a **close family member** of the individual who **contemporaneously perceives** the defendant's extreme and outrageous conduct. This "bystander" rule does not require the close family member to suffer bodily harm.

Example 1: An individual draws a pistol and threatens to shoot a woman in her husband's presence, and the husband suffers severe emotional distress. The individual is subject to liability to the husband for intentional infliction of emotional distress.

If the defendant's **purpose** in harming an individual is to cause severe emotional distress to a third party, the third party need not have contemporaneously perceived the conduct nor be a close family member of the harmed individual. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 46 cmt. m (Am. L. Inst. 2012).

Example 2: A man kills a woman when the two are alone for the purpose of causing severe emotional distress to the woman's unrelated friend. When the friend learns of the killing the following day, the friend suffers severe emotional distress. The man is subject to liability to the friend for intentional infliction of emotional distress, even though the friend was not a close family member of the woman and was not present at her killing.

5. Causation

The plaintiff must establish that the defendant's actions were a **factual cause** of the plaintiff's distress. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 46 cmt. k (Am. L. Inst. 2012).

6. Damages

The plaintiff must prove severe emotional distress beyond what a reasonable person could endure. If the defendant's conduct also causes bodily harm to the plaintiff, the defendant may be liable for that harm as well.

In many cases, the very extreme and outrageous character of the defendant's conduct itself provides evidence that the plaintiff experienced severe mental distress. In other words, the more extreme the defendant's conduct, the less evidence is required of the severity of the plaintiff's emotional distress.

If the plaintiff is **hypersensitive**, however, and experiences severe emotional distress unreasonably, then there is no liability **unless the defendant knew** of the plaintiff's heightened sensitivity.

E. FALSE IMPRISONMENT

A defendant is subject to liability to a plaintiff for false imprisonment if:

i) The defendant **intends to confine** the plaintiff within a limited area;

ii) The defendant's **conduct causes** the plaintiff's **confinement** or the defendant **fails to release the plaintiff** from a confinement despite **owing a duty to do so**; and

iii) The plaintiff is **conscious of the confinement**.

In a minority of jurisdictions and under the Restatement Third, a plaintiff who was not conscious of the confinement (item (iii), above) may still recover if the plaintiff was **harmed by the confinement**. In all jurisdictions, the intent element (item (i), above) may also be satisfied through the application of the transferred intent doctrine (*see* I.A.2.b. Transferred intent, *supra*). Restatement (Third) of Torts: Inten. Torts to Persons § 7 (Am. L. Inst., Tentative Draft No. 3, 2018).

1. Lack of Consent

As is the case with battery and assault, most jurisdictions have not decided which party bears the burden of proof with respect to the issue of consent, and the Restatement (Third) of Torts has not taken a position. Of the jurisdictions that have addressed the issue, a majority place the burden of proof on the plaintiff to prove her lack of actual consent. *See* II.A. Consent, *infra*. Restatement (Third) of Torts: Inten. Torts to

Persons § 7 cmt. k (Am. L. Inst., Tentative Draft No. 4, 2019); Restatement (Third) of Torts: Inten. Torts to Persons § 12 cmt. e (Am. L. Inst., Tentative Draft No. 4, 2019).

2. Confinement

a. Within limited area

Generally, the plaintiff must be confined within a limited area in which the plaintiff's freedom of movement in all directions is constrained. A plaintiff who is prevented from entering a building (e.g., store, home) is not confined, nor is a plaintiff who is prevented from traveling a particular route to reach a destination unless that route is the only means of reaching the destination. The area may be large (e.g., an area as large as a state, in some cases) and need not be stationary (e.g., a plaintiff trapped in a moving car). Restatement (Third) of Torts: Inten. Torts to Persons § 8 cmts. b and c (Am. L. Inst., Tentative Draft No. 3, 2018).

A plaintiff may also be confined when compelled to move in a highly restricted way, such as accompanying the defendant to the back of a store or to a police station. *Id.*

b. Methods of confinement

The defendant may confine the plaintiff by the use of physical barriers, physical force or restraint or the threat of physical force or restraint, duress other than by threat of physical force or restraint, or by the assertion of legal authority.

1) Physical barriers

A defendant can confine a plaintiff by creating a physical barrier that precludes the plaintiff from exiting a limited area. The boundaries that confine the plaintiff need not be created by the defendant and often are not (e.g., a defendant locks the plaintiff in a room in the plaintiff's house). Restatement (Third) of Torts: Inten. Torts to Persons § 8 cmt. e (Am. L. Inst., Tentative Draft No. 3, 2018).

Example: An individual, aware that another person is sitting in a windowless room, intentionally locks the only door to that room. The individual has confined the other person.

a) Plaintiff's knowledge of an exit

A plaintiff who knows of a readily available, feasible, and safe way to exit the limited area is not confined by the physical barrier. A plaintiff, however, is not required to use an exit that would expose the plaintiff to any risk of physical harm.

Example 1: An individual, aware that another person is sitting in a room on the ground floor of a building, intentionally locks the only door to that room. The room has a window through which the other person can safely exit the room without any risk of physical harm. The individual has not confined the other person.

Example 2: An individual, aware that another person is sitting in a room on the second floor of a building, intentionally locks the only door to that room. The room has a window through which the other person can exit the room, but in doing so the other person would risk a sprained ankle. The individual has confined the other person.

Although a defendant's lack of knowledge of such an exit may indicate that the defendant had the intent to confine the plaintiff, the defendant's

conduct does not result in the plaintiff's confinement if the plaintiff has such knowledge.

Example 3: An individual, aware that another person is sitting in a windowless room, intentionally locks what the individual believes is the only door to that room. The other person is aware that a panel of the wall can be opened to provide the other person with a safe exit from the room. The individual has not confined the other person.

2) Physical force or restraint or threat of physical force or restraint

A defendant who employs physical force or restraint against a plaintiff to prevent the plaintiff from leaving a limited area has confined the plaintiff. If physical force or restraint employed wrongfully places the plaintiff at risk of being subjected to additional force, restraint, indignity, or physical injury, the plaintiff who submits to the force or restraint has been confined, even though the plaintiff is physically capable of escaping. Restatement (Third) of Torts: Inten. Torts to Persons § 8 cmt. f (Am. L. Inst., Tentative Draft No. 3, 2018).

Example: A ten-year-old, 70-pound fan grabs the shirt of a professional football player as the player is walking across a stadium parking lot after a game. The fan intends to retain his hold until the player signs the fan's football. Although the player could easily break free of the fan's grasp, the player does not. The fan has confined the football player.

A defendant who threatens to employ immediate physical force or restraint if the plaintiff attempts to leave the limited area has confined the plaintiff. The threat may be expressed or implied and may be made by words, conduct, or both. Restatement (Third) of Torts: Inten. Torts to Persons § 8 cmt. g (Am. L. Inst., Tentative Draft No. 3, 2018).

3) Duress

A plaintiff who agrees to remain in a limited area because of the defendant's duress has been confined. The duress may arise from the defendant's threat to harm a member of the plaintiff's family or retain the plaintiff's property, but not all threats or forms of pressure (e.g., moral pressure) constitute duress. Restatement (Third) of Torts: Inten. Torts to Persons § 8 cmt. h (Am. L. Inst., Tentative Draft No. 3, 2018).

4) Assertion of legal authority

A defendant confines a plaintiff if:

i) The defendant asserts the legal authority to take the plaintiff into custody or to otherwise confine the plaintiff; and

ii) The plaintiff submits to such confinement because the plaintiff believes either that she:

a) Has a duty to comply with the assertion of authority; or

b) Might face adverse legal or physical consequences for failure to comply.

Restatement (Third) of Torts: Inten. Torts to Persons § 9 (Am. L. Inst., Tentative Draft No. 3, 2018). Although the defendant may have committed false imprisonment by such confinement, the defendant's conduct may be privileged (*see* II.H. Privilege of Arrest and Other Crime-related Conduct, *infra*).

5) Refusal to release defendant

A defendant has confined the plaintiff when he has refused to perform a duty to release the plaintiff from an existing confinement or provide a means of escape. Restatement (Third) of Torts: Inten. Torts to Persons § 7 cmt. f (Am. L. Inst., Tentative Draft No. 3, 2018).

Example: An individual accidentally locks herself in a restroom in a restaurant. The restaurant may be liable if it intentionally fails to assist her in unlocking the door.

c. Length of confinement

The length of time of the confinement or restraint is immaterial, except as to the determination of the extent of damages. Restatement (Third) of Torts: Inten. Torts to Persons § 8 cmt. c (Am. L. Inst., Tentative Draft No. 3, 2018).

d. Knowledge of confinement

In most jurisdictions, the plaintiff must be aware of her confinement at the time it occurs. In a minority of jurisdictions and under the Restatement Third, the plaintiff must either be aware of her confinement at the time it occurs or must suffer actual harm from the confinement. Restatement (Third) of Torts: Inten. Torts to Persons § 7 cmt. g (Am. L. Inst., Tentative Draft No. 3, 2018).

3. Intent

The defendant must act with the purpose of confining the plaintiff or act knowing that the plaintiff's confinement is substantially certain to result. The defendant may possess the necessary intent even though the defendant is acting in what she believes is the best interest of the plaintiff or that the plaintiff will welcome the confinement. However, in such a case, the defendant may not be liable to the plaintiff due to a defense (e.g., consent). Restatement (Third) of Torts: Inten. Torts to Persons § 7 cmt. c (Am. L. Inst., Tentative Draft No. 3, 2018).

Contrast with negligence and accident: If the confinement is due to the defendant's negligence rather than his intentional acts, then the defendant may be liable for negligence but not false imprisonment. If the imprisonment occurs by pure accident and involves neither the defendant's intent nor his negligence, then there is no recovery.

4. Damages

It is not necessary to prove actual damages, unless, in a minority of jurisdictions, the plaintiff is unaware of the confinement, in which case the plaintiff must suffer harm. The victim can recover **nominal damages** and, in appropriate cases, **punitive damages**. The "thin skull" rule applies; a defendant may be liable for harm to the plaintiff that the defendant did not anticipate.

II. CONSENT AND DEFENSES TO INTENTIONAL TORTS INVOLVING PERSONAL INJURY

A. CONSENT

A defendant is not liable for the defendant's otherwise intentional tortious conduct if the plaintiff gave legally effective consent to the conduct. Consent is legally effective if it satisfies the requirements for:

i) **Actual** consent;

ii) **Apparent** consent; or

iii) **Presumed** consent; or

iv) The **emergency doctrine**.

Restatement (Third) of Torts: Inten. Torts to Persons § 12 (Am. L. Inst., Tentative Draft No. 4, 2019).

For the intentional torts of battery, assault, and false imprisonment, most jurisdictions have not decided which party bears the burden of proof with respect to the issue of consent, and the Restatement Third has not taken a position. Most jurisdictions that have addressed the issue have placed the burden of proof on the plaintiff to prove her lack of actual consent. Restatement (Third) of Torts: Inten. Torts to Persons § 12 cmt. e (Am. L. Inst., Tentative Draft No. 4, 2019).

1. Actual Consent

The plaintiff expressly consents to the defendant's otherwise tortious intentional conduct if the plaintiff is willing for that conduct to occur. Such willingness may be express or inferred from the facts. Restatement (Third) of Torts: Inten. Torts to Persons § 13 (Am. L. Inst., Tentative Draft No. 4, 2019).

a. Scope conditions

A plaintiff's actual consent extends to conduct by the defendant that is not substantially different in nature from the conduct that the plaintiff is willing to permit. When a plaintiff places a condition on her actual consent that limits the consent with respect to time, place, or otherwise, the consent is legally effective only within the limits of that condition. Restatement (Third) of Torts: Inten. Torts to Persons § 14 (Am. L. Inst., Tentative Draft No. 4, 2019).

1) Revocation of consent

When a plaintiff clearly communicates a revocation of his actual consent to the defendant, the consent is generally no longer legally effective. An exception exists when it would be unreasonably burdensome for the defendant to immediately comply with the revocation of consent.

2) Consent to a crime

The jurisdictions are split as to whether a plaintiff may consent to a crime, with the modern trend and the Third Restatement of Torts recognizing that a plaintiff may do so. However, even in jurisdictions that recognize that a plaintiff may consent to a crime, the consent is not legally effective if the plaintiff is a member of a class that the crime is intended to protect without regard to her consent (e.g., the consent of victim of statutory rape is not legally effective).

3) Past conduct

A plaintiff's actual consent does not extend to past conduct.

b. Mistake

Actual consent given by a plaintiff due to a substantial mistake regarding the nature of the invasion of the plaintiff's interests, the extent of the expected harm, or the defendant's purpose in engaging in the conduct is nevertheless valid consent unless the defendant **caused** the mistake by affirmative misrepresentation or fraud or **knew** of the mistake. Restatement (Third) of Torts: Inten. Torts to Persons § 15 (Am. L. Inst., Tentative Draft No. 4, 2019).

c. Duress

Actual consent given while under duress (e.g., physical force or threats) is not valid. The threat, however, must be of **present action**, not of future action. In general, threats of economic duress do not render a plaintiff's consent invalid nor does consent given under moral pressure. Restatement (Third) of Torts: Inten. Torts to Persons § 15 (Am. L. Inst., Tentative Draft No. 4, 2019).

d. Capacity

A plaintiff's lack of capacity due to youth, intoxication, or intellectual incompetence may negate the validity of her consent. However, an individual who appreciates the nature, extent, and potential consequences of the conduct has the capacity to consent to it. Generally, an adult is rebuttably presumed to have the capacity to consent. Restatement (Third) of Torts: Inten. Torts to Persons § 15 (Am. L. Inst., Tentative Draft No. 4, 2019).

2. Apparent Consent

A defendant is not liable for otherwise tortious intentional conduct if the defendant reasonably believes that the plaintiff actually consents to the conduct, even if the plaintiff does not. Restatement (Third) of Torts: Inten. Torts to Persons § 16 (Am. L. Inst., Tentative Draft No. 4, 2019).

3. Presumed Consent

A defendant is not liable for otherwise tortious intentional conduct if:

i) Under prevailing social norms, the defendant is justified in engaging in the conduct in the absence of the plaintiff's actual or apparent consent; and

ii) The defendant has no reason to believe that the plaintiff would not have actually consented to the conduct if the defendant had requested the plaintiff's consent.

This category of consent is also known as "implied consent." Restatement (Third) of Torts: Inten. Torts to Persons § 16 (Am. L. Inst., Tentative Draft No. 4, 2019).

4. Emergency Doctrine

The emergency doctrine, which typically is applicable in a medical setting (e.g., an operating room), is a special application of presumed consent. Under the doctrine, a defendant is not liable for tortious intentional conduct with respect to the plaintiff if:

i) The **purpose** of the conduct is **to prevent or reduce a risk to the life or health** of the plaintiff;

ii) The **defendant reasonably believes** that:

   a) Her conduct is necessary to prevent or reduce a risk to the life or health of the plaintiff that **substantially outweighs** the **plaintiff's interest** in avoiding the conduct;

   b) **Immediate action is necessary** to prevent or reduce the risk before it is practicable for the defendant to obtain actual consent from the plaintiff or a person empowered to grant consent for the plaintiff; and

iii) The defendant has **no reason to believe** that the **plaintiff would not have actually consented** to the conduct if there had been the opportunity to do so.

Restatement (Third) of Torts: Inten. Torts to Persons § 17 (Am. L. Inst., Tentative Draft No. 6, 2021).

5. Participant in Athletic and Recreational Activities

Determination of whether a participant in an athletic or recreational activity can rely on apparent or presumed consent typically involves consideration of a variety of factors, such as whether the conduct is a violation of a safety rule of the sport, whether the conduct typically occurs during the activity, and whether the conduct involves significant risks of very serious injury or death. Some jurisdictions prohibit recovery unless the defendant was reckless with respect to the risk of physical harm or acted with the purpose to injure. Other jurisdictions preclude liability for harm that results from the inherent risks of the game or activity. Restatement (Third) of Torts: Inten. Torts to Persons § 16 cmt. f (Am. L. Inst., Tentative Draft No. 4, 2019).

6. Consent to Sexual Conduct

The general consent rules apply to sexual conduct. In addition, when a defendant causes a nonconsensual sexual contact with a plaintiff, the contact constitutes an offensive contact for purposes of battery. Also, when a plaintiff expresses through words or conduct an unwillingness to engage in a sexual act, and the defendant nevertheless causes the person to submit to or perform the act, the plaintiff has not consented to the act, and the defendant is liable for the applicable intentional tort. Restatement (Third) of Torts: Inten. Torts to Persons § 18 (Am. L. Inst., Tentative Draft No. 6, 2021).

7. Medical Treatment without Legally Effective Consent as Battery

Most jurisdictions treat a physician's failure to adequately disclose the risks and benefits of a medical procedure as giving rise to a negligence claim (often labeled a "lack of informed consent"). Most jurisdictions treat a physician's failure to secure a patient's consent to the nature, type, or extent of physical contact that the physician intentionally causes as a battery (e.g., a patient consents to operation on his left foot, but the physician operates on the right foot). Restatement (Third) of Torts: Inten. Torts to Persons § 19 (Am. L. Inst., Tentative Draft No. 6, 2021).

B. PRIVILEGES—IN GENERAL

The following privileges are defenses to the intentional torts of battery, assault, and false imprisonment. Although most often the privileges arise as a defense to battery that is attributable to the defendant's use of force, the defendant's tortious conduct may result from the defendant's threat of force (i.e., assault) or confinement of another (i.e., false imprisonment). The use of the term "force" in reference to the defendant's conduct and the applicability of a privilege encompasses the threat of force as well as confinement.

C. SELF-DEFENSE

A defendant has a privilege to use force against the plaintiff for the purpose of defending himself against the plaintiff's unprivileged use of force if the defendant reasonably believes that the force is both necessary and proportionate to the force that the plaintiff is intentionally inflicting or about to inflict. Restatement (Third) of Torts: Inten. Torts to Persons § 21 (Am. L. Inst., Tentative Draft No. 6, 2021).

1. Defensive Purpose

The defendant's use of force must be for a **defensive purpose**. When a defendant's sole purpose is to retaliate for past conduct or to deter future conduct, the defendant's use of force is not privileged. However, a defensive purpose need not be the defendant's sole motive for using force. The defendant's use of force may be privileged even though the defendant is also using force because of a personal dislike or hostility towards the plaintiff. *Id.*

2. Use of Nondeadly Force

A defendant may use nondeadly force for the purpose of defending himself against another only if the defendant reasonably believes that:

i) The other is intentionally inflicting or about to intentionally inflict unprivileged force on the defendant;

ii) The force that the defendant is using is proportionate to the other's use of force or threat of force; and

iii) The defendant can prevent the other's force or threat of force only by the immediate use of the force the defendant is employing.

Restatement (Third) of Torts: Inten. Torts to Persons § 22 (Am. L. Inst., Tentative Draft No. 6, 2021).

a. Nondeadly force

Nondeadly force is force neither intended nor likely to cause death or serious bodily harm. Serious bodily harm is serious, permanent disfigurement or permanent or protracted loss or impairment of the function of any important bodily member or organ.

b. No duty to retreat

When a defendant uses nondeadly force, the defendant has no duty to retreat even if he can do so safely. Similarly, the defendant is not required to give up a right (e.g., to use a public space) or privilege (e.g., to defend himself or a third person).

c. Plaintiff's unprivileged use of force

When the defendant has consented to the plaintiff's use of force, the defendant does not have the privilege of self-defense unless the plaintiff exceeds the scope of the defendant's consent. Similarly, if the plaintiff is privileged to use force against the defendant (e.g., self-defense), then the defendant does not have a privilege to respond with force.

d. Immediacy

For the defendant's use of force to be privileged, the plaintiff must either be using force against the defendant or threatening to immediately use force against the defendant. In addition, the defendant's own use of force must be an immediate response to the plaintiff's use of force or threat of force. However, the defendant need not wait until the last second to respond to a threatened use of force in the near future if there will not be a later opportunity to prevent the attack.

1) Spoken words, verbal gestures

Spoken words or verbal gestures (e.g., provocative language, insults) do not by themselves justify the use of force. Neither does a verbal threat of immediate physical harm unless there is additional conduct either at that time (e.g., taking a step towards the defendant) or in the past (e.g., inflicting physical harm after making such a threat) that demonstrates that the plaintiff's intent is to immediately act on the threat. Alternatively, as with battery, words may negate a threat ("If we were in the Middle Ages, I'd stab you with this sword.")

e. Proportional force

Regarding the use of nondeadly force, the force used by the defendant should not be significantly greater than the force used by the plaintiff. The defendant is not privileged to use force that is greater in degree or kind than the force the defendant knows or should know will prevent the threatened harm. In addition, if the defendant knows that the plaintiff's threatened use of force is based on a mistake, the defendant is not privileged to use force if the defendant has time to correct the mistake and prevent the attack.

f. Reasonable belief

A defendant who is mistaken as to the need to immediately use force is nevertheless privileged to use force if the defendant reasonably believes, in light of the exigent circumstances, that relevant facts exist that would justify the defendant's use of force.

3. Use of Deadly Force

A defendant may use deadly force for the purpose of defending himself against the plaintiff only if the defendant reasonably believes that:

i) The plaintiff is intentionally inflicting or about to intentionally inflict unprivileged force upon the defendant;

ii) The defendant is thereby put in peril of either death, serious bodily harm, or rape by the use or threat of physical force or restraint; and

iii) The defendant can safely prevent the peril only by the immediate use of deadly force.

Restatement (Third) of Torts: Inten. Torts to Persons § 23 (Am. L. Inst., Tentative Draft No. 6, 2021).

a. No duty to retreat

In most jurisdictions, when a defendant uses deadly force, the defendant has no duty to retreat even if he can do so safely (e.g., "stand your ground" laws). A minority of jurisdictions and the Restatement Third impose a duty to retreat on the defendant if the defendant knows or reasonably should know that he can avoid the need to use deadly force by retreating in complete safety. However, even those jurisdictions, recognizing the "castle" doctrine, do not impose this duty on a defendant who is attacked at home, unless the plaintiff also lives there.

b. Burglary exception

The Restatement Second recognizes an exception that permits a defendant to use deadly force to prevent a burglary of the defendant's home, even if the defendant was not threatened with bodily harm. The Restatement Third limits this exception to a burglary that puts the defendant in peril of bodily harm that does not constitute serious bodily harm, death, or rape.

4. Excessive Force

A defendant who is privileged to use force but uses excessive force is generally liable only for the harm caused that is attributable to the excessive force. However, if the harm caused by the use of privileged force and excessive force is indivisible, the defendant is subject to liability for all of the harm caused. The defendant's use of excessive force does not excuse the plaintiff's prior unprivileged use of force but may give the plaintiff a privilege to respond to the defendant's use of excessive force (e.g., the defendant responds to the plaintiff's use of nondeadly force with deadly force).

Restatement (Third) of Torts: Inten. Torts to Persons § 25 (Am. L. Inst., Tentative Draft No. 6, 2021).

5. Withdrawal

When a plaintiff withdraws from a confrontation after using unprivileged force and the defendant recognizes or should recognize that the plaintiff has withdrawn, the defendant no longer has a privilege to use force in self-defense. If the defendant subsequently uses force against the plaintiff, the plaintiff may be entitled to use force in self-defense. Restatement (Third) of Torts: Inten. Torts to Persons § 25 (Am. L. Inst., Tentative Draft No. 6, 2021).

6. Harm to Bystander

If a defendant, when acting in self-defense, intentionally uses force against a bystander (i.e., a person who is not using or threatening to use force against the defendant or a third person), the defendant may use **nondeadly force** against the bystander if the defendant reasonably believes that:

i) The force that the plaintiff is using against the defendant is substantially greater than the force that the defendant uses against the bystander; and

ii) The defendant's use of force against the bystander is immediately necessary to avoid the plaintiff's threat or use of force.

Example: On a crowded city sidewalk, a woman is running away from a man who is chasing her with a knife, intent on stabbing her. The woman pushed a pedestrian aside to make room for the woman to get by. The pedestrian falls onto the sidewalk and suffers serious injuries. The woman's use of force is privileged, and she is not liable to the pedestrian for the harm that resulted from the battery.

While a defendant enjoys a privilege with respect to her intentional tort liability, the defendant may nevertheless be liable for negligence. Restatement (Third) of Torts: Inten. Torts to Persons § 26 (Am. L. Inst., Tentative Draft No. 6, 2021).

7. Burden of Proof

A defendant bears both the burden of production and the burden of persuasion regarding the privilege of self-defense. Restatement (Third) of Torts: Inten. Torts to Persons § 21 cmt. i (Am. L. Inst., Tentative Draft No. 6, 2021).

D. DEFENSE OF THIRD PERSONS

The requirements are generally the same for the privilege of defense of third persons as they are for the privilege of self-defense, except that the defendant's use of force is for the purpose of defending a third person from the plaintiff's use of force. The defendant must reasonably believe that the circumstances are such that the third person has a privilege of self-defense against the plaintiff and the defendant's intervention is immediately necessary for the protection of the third person. The third person need not be related to the defendant but may instead be a stranger. Restatement (Third) of Torts: Inten. Torts to Persons § 24 (Am. L. Inst., Tentative Draft No. 6, 2021).

E. DEFENSE OF PROPERTY

1. Defense of Land and Personal Property from Intrusion

A defendant is privileged to engage in conduct that would otherwise constitute a battery, assault, or false imprisonment to prevent a plaintiff's imminent intrusion or to terminate a plaintiff's intrusion on the defendant's land or personal property if:

i) The intrusion is not privileged;

ii) The defendant reasonably believes that:

a) The plaintiff is intruding or imminently will intrude on the defendant's property; and

b) The intrusion can be prevented or terminated only by the means used;

iii) The defendant first asks the plaintiff to desist, and the plaintiff disregards the request or the defendant reasonably believes that a request will be useless or dangerous or that substantial harm will be done before the request can be made;

iv) The means used are reasonably proportionate to the value of the interest the defendant is protecting; and

v) The means used are not intended or likely to cause death or serious bodily injury.

Restatement (Third) of Torts: Inten. Torts to Persons § 30 (Am. L. Inst., Tentative Draft No. 6, 2021).

a. Use of a mechanical device

A defendant is privileged to use a mechanical device for the purpose of preventing or terminating a plaintiff's intrusion on the defendant's land or personal property only if:

i) The type of device employed is reasonably necessary to protect the property from intrusion;

ii) The use of the particular device is reasonably proportionate to the value of the interest the defendant is protecting;

iii) The device is one customarily used for such purpose, or reasonable care is taken to make its use known to probable intruders; and

iv) The use of the device is not intended or likely to cause death or serious bodily injury.

Restatement (Third) of Torts: Inten. Torts to Persons § 31 (Am. L. Inst., Tentative Draft No. 6, 2021).

2. Regaining Possession of Property

a. Regaining possession of land

A defendant is **not privileged** to commit battery, assault, or false imprisonment to regain the possession of land. The defendant must instead pursue legal action (e.g., ejectment, eviction). Restatement (Third) of Torts: Inten. Torts to Persons § 32(a) (Am. L. Inst., Tentative Draft No. 6, 2021).

b. Regaining possession of personal property

Similarly, a defendant is generally not privileged to commit battery, assault, or false imprisonment to regain the possession of personal property. Restatement (Third) of Torts: Inten. Torts to Persons § 32(b) (Am. L. Inst., Tentative Draft No. 6, 2021)

1) "Fresh pursuit" exception

When a plaintiff wrongfully takes personal property from a defendant's possession, the defendant may use reasonable, nondeadly force to regain possession of the property if the defendant acts promptly. Under the majority rule, a defendant is not privileged to use force when the plaintiff received custody of the property from the defendant, even when the plaintiff gained

possession of the property through fraud and the defendant later discovers the fraud. The Restatement Third expands the privilege to encompass the use of reasonable force to regain property that is in the defendant's presence even when the plaintiff has received custody of the property from the defendant if the plaintiff refuses to return it to the defendant after the defendant has made a request for its return. A request is not necessary if the defendant reasonably believes that a request will be useless or that the property will be damaged or secreted before the request can be made.

2) Defendant's mistake

Under the majority rule, the defendant's mistake, even a reasonable mistake, regarding her right to possess the property precludes the privilege. The Restatement Third recognizes a privilege to use force if the mistake was knowingly induced by the plaintiff.

3. Defense of Third Person's Land and Personal Property

A defendant is privileged to engage in conduct that would otherwise constitute a battery, assault, or false imprisonment to prevent or terminate an intrusion on a third person's land or personal property or to regain possession of a third person's personal property only if:

i) The third person is a member of the defendant's immediately family or household;

ii) The defendant reasonably believes that he is under a legal duty to protect the third person's property; or

iii) The third person requested that the defendant protect the person's property or employed the defendant for that purpose.

Restatement (Third) of Torts: Inten. Torts to Persons § 34 (Am. L. Inst., Tentative Draft No. 6, 2021).

4. Liability to Bystander for Unintentional Harm

If a defendant engages in otherwise tortious conduct that is a privileged exercise of a defense of property and thereby unintentionally causes harm to a bystander, the defendant is not subject to intentional tort liability to the bystander. However, the defendant may subject to liability to the bystander in negligence. Restatement (Third) of Torts: Inten. Torts to Persons § 33 (Am. L. Inst., Tentative Draft No. 6, 2021).

F. PRIVILEGE TO DISCIPLINE OR CONTROL A MINOR CHILD

1. Parental Discipline or Control of a Minor Child

A parent is privileged to use reasonable force, threat of force, or confinement against the parent's minor child for the purpose of disciplining, educating, controlling, or otherwise promoting the welfare of the child. Restatement (Third) of Torts: Inten. Torts to Persons § 45 (Am. L. Inst., Tentative Draft No. 6, 2021).

a. Reasonable force

The reasonableness of the force is determined by the totality of the circumstances. Significant weight is given to the degree of force used considering the risk of physical harm to the child.

b. Unreasonable force

A privilege does **not** exist if:

i) Deadly force is used;

ii) The force is grossly degrading or likely to cause severe emotional harm; or

iii) A purpose of the parent in using force is sexual.

c. *In loco parentis*

In addition to a child's legal parent or guardian, a person who is acting as a parent *in loco parentis* (e.g., a babysitter, camp counselor) may also be entitled to this privilege. The privilege to use reasonable force by a person who is entrusted by a parent or by law with a parental function is subject to any limitations placed on the use of force by the parent or by law.

2. Teacher's Discipline or Control of a Child

A teacher or other authority in a public or private school with responsibility for the care and education of students is privileged to use reasonable force if the school authority reasonably believes that the force is necessary to maintain order and safety in the school. Unless authorized by law, the use of force to punish through the infliction of pain is not necessary to maintain order or safety. A majority of jurisdictions prohibit corporal punishment in public schools, while a substantial minority permit it. A few jurisdictions have also extended this prohibition to private schools. Restatement (Third) of Torts: Inten. Torts to Persons § 46 (Am. L. Inst., Tentative Draft No. 6, 2021).

G. PRIVILEGE TO PROTECT MENTALLY IMPAIRED PERSON FROM SELF-HARM

A defendant, whether a private actor or a law enforcement officer, is privileged to use force against another individual for the purpose of protecting that individual from self-harm if:

i) The individual is unable to understand the nature and consequences of her actions; and

ii) The defendant reasonably believes that the individual is about to commit an act likely to cause death or serious bodily harm to herself.

"Serious bodily harm" means an injury that causes serious, permanent disfigurement or the permanent or protracted loss or impairment of the function of any important bodily member or organ. Restatement (Third) of Torts: Inten. Torts to Persons § 36A (Am. L. Inst., Tentative Draft No. 6, 2021).

H. PRIVILEGE OF ARREST AND OTHER CRIME RELATED CONDUCT

1. Private Actor

a. Felony arrest

In most jurisdictions, a private actor (i.e., an individual who is not an on-duty law enforcement officer) is privileged to use force (e.g., commit a battery or false imprisonment) to make an arrest in the case of a felony if the felony has in fact been committed and the arresting party has reasonable grounds to suspect that the person being arrested committed it.

This privilege extends to the prevention or termination of another's criminal conduct as well as to completed criminal conduct.

1) Reasonable mistake

The privilege, which is often referred to as "citizen's arrest," is recognized when the private actor makes a reasonable mistake as to the **identity of the felon** but not as to the **commission of the felony.**

2) Restatement Third

The Restatement Third does not recognize this privilege if the private actor makes a reasonable mistake as to either the identity of the felon or the commission of the felony. In addition, the Restatement Third, concerned with vigilantism, also requires that the private actor reasonably believe that law enforcement will likely be unable to apprehend the other unless the actor immediately uses such force. Restatement (Third) of Torts: Inten. Torts to Persons § 35 (Am. L. Inst., Tentative Draft No. 6, 2021).

b. Misdemeanor arrest

In most jurisdictions, a private actor may make an arrest when the misdemeanor is being committed or reasonably appears about to be committed **in the presence** of the actor, and the misdemeanor is a breach of the peace. The Restatement Third recognizes this privilege if the misdemeanor creates a substantial risk of bodily harm and the private actor reasonably believes that law enforcement will likely be unable to prevent or terminate the crime unless the actor immediately uses such force. Restatement (Third) of Torts: Inten. Torts to Persons § 36 (Am. L. Inst., Tentative Draft No. 6, 2021).

c. Assisting a law enforcement officer

A private actor is privileged to use force to assist a law enforcement officer if (i) the private actor reasonably believes that the officer needs aid and (ii) the officer's conduct is privileged or the actor believes or is unsure about whether the officer's conduct is privileged. Restatement (Third) of Torts: Inten. Torts to Persons § 40 (Am. L. Inst., Tentative Draft No. 6, 2021).

d. Intervenor aiding arrestee

A private actor is privileged to use force against an intervenor who is intentionally impeding the actor's privileged conduct or is intentionally aiding the person that the actor is arresting to resist or escape arrest. Restatement (Third) of Torts: Inten. Torts to Persons § 41 (Am. L. Inst., Tentative Draft No. 6, 2021).

2. Law Enforcement Officials

A law enforcement official acting within the scope of employment is privileged to use force, threat of force, or confinement against another individual for the purpose of (i) arresting someone, (ii) investigating, terminating, or preventing a crime, or (iii) otherwise enforcing the law. Courts have defined this privilege in accord with federal and state constitutional and criminal law standards. Restatement (Third) of Torts: Inten. Torts to Persons § 39 (Am. L. Inst., Tentative Draft No. 6, 2021).

Subject to state law to the contrary, an off-duty law enforcement official is treated as a private citizen.

a. Common law privileges

Under the common law, a police officer had a privilege to arrest an individual if the officer reasonably believed that a felony had been committed and that the individual arrested committed it. An officer's mistake as to either did not vitiate the privilege. In the case of a misdemeanor, a police officer had a privilege to arrest if the misdemeanor was being committed or reasonably appeared about to be committed in the presence of the officer.

3. Use of Force

A private actor or a law enforcement official may use force, threat of force, or confinement only if the following conditions are satisfied:

i) The actor's use of force is for a legitimate purpose (e.g., arrest, prevention of crime);

ii) In the context of arrest, the actor, prior to using force, communicates or manifests to the other an intention to arrest, unless the actor reasonably believes that such a communication would be:

a) Dangerous to the actor or to a third person;

b) Likely to frustrate the arrest; or

c) Useless or unnecessary;

iii) The actor reasonably believes that the force that the actor is employing is necessary to accomplish the legitimate purpose;

iv) The actor reasonably believes that the degree of force used is proportionate; and

v) The actor is not using or threatening the use of deadly force, unless:

a) If the actor is a private person, the use or threat of deadly force satisfies the requirements of self-defense or the defense of third persons; or

b) If the actor is a law enforcement officer, the use or threat of deadly force satisfies the requirements of constitutional and criminal law.

Restatement (Third) of Torts: Inten. Torts to Persons § 42 (Am. L. Inst., Tentative Draft No. 6, 2021).

I. MERCHANT'S PRIVILEGE

A merchant, which for purposes of the Restatement Third means a seller of goods or services, is privileged to use force against another for the purpose of:

i) **Investigating a potential theft** or knowing nonpayment for goods or services;

ii) **Recapturing personal property**; or

iii) **Facilitating the arrest** of a person suspected of theft or knowing nonpayment.

For this purpose, a merchant encompasses a merchant's agent or employee.

To be entitled to this privilege, the merchant must reasonably believe that the other has **wrongfully**:

i) **Taken**, or is attempting to take, **merchandise** from the merchant's premises; or

ii) **Failed to pay for personal property** purchased on those premises or for services rendered there.

In addition, the merchant's use of force against the other must be:

i) On, or in the immediate vicinity of, the merchant’s premises;

ii) In a reasonable manner; and

iii) Only for the time reasonably necessary for investigating the matter, for recapturing the property, or for facilitating the other's arrest.

The force used by the merchant cannot be deadly force. Restatement (Third) of Torts: Inten. Torts to Persons § 37 (Am. L. Inst., Tentative Draft No. 6, 2021).

III. HARMS TO PERSONAL PROPERTY AND LAND AND DEFENSES

A. TRESPASS TO CHATTELS

1. Definition

A defendant commits a trespass to chattels (i.e., tangible personal property) if she **intentionally interferes with the plaintiff's right of possession** by:

i) **Dispossessing** the plaintiff of the chattel; or

ii) **Using or intermeddling with** the plaintiff's chattel.

a. Dispossession of chattel

Dispossession requires the defendant to act with respect to the chattel as an owner would. It can occur even though it is of brief duration and does not deprive the owner of the chattel for a substantial length of time.

Example: An individual, leaving a restaurant, picks up another's coat from a coat rack and walks out the door with the coat. The individual has committed a trespass to chattel by dispossessing the owner of the coat of her coat.

b. Use of chattel

Use of the plaintiff's chattel occurs when the defendant does not assume ownership of the chattel, but instead only uses the chattel.

Example: At a public library, an individual sits down at a table and uses a computer that a stranger has temporarily left there. The individual has committed a trespass to chattel by using the stranger's computer.

c. Intermeddling with chattel

Intermeddling with a plaintiff's chattel requires the defendant to make physical contact, whether direct or indirect, with the chattel.

Example: At a friend's house, an individual is annoyed by the friend's dog. The individual kicks the dog. The individual has committed a trespass to chattel by intermeddling with the friend's dog.

2. Intent

Only the intent to do the interfering act is necessary; the defendant need not have intended to interfere with another's possession of tangible property.

The doctrine of transferred intent applies to trespass to chattels.

3. Appropriate Plaintiffs

An action for trespass to chattels may be brought by **anyone with possession or the immediate right to possession** of the chattel.

4. Mistake

Mistake of law or fact by the defendant regarding his actions is **not** a defense.

5. Damages

Although a defendant may commit a trespass to chattel, whether the defendant is liable for damages depends on the defendant's conduct. In a case of **dispossession**, a plaintiff may recover for:

i) The **actual damages caused** by the interference;

ii) The **loss of use**; and

iii) **Nominal damages** for the loss of possession, even when no actual harm is established.

In cases of **use for a substantial time or intermeddling**, the plaintiff may recover only when there are **actual damages**. Restatement (Second) of Torts §§ 217-219 (Am. L. Inst. 1965).

Intermeddling with chattel is not a dispossession unless the intermeddler intends to exercise dominion and control over the chattel that is inconsistent with anyone else's possession. Therefore, a trivial removal of a chattel from one place to another with no intention to exercise further control over it or to deprive the possessor of its use is only intermeddling, not a dispossession. Restatement (Second) of Torts § 221 (Am. L. Inst. 1965).

In determining the amount of damages, a plaintiff may be entitled to compensation for the **diminution in value** or the **cost of repair.**

B. CONVERSION

1. Definition

A defendant is liable for conversion if he **intentionally** commits an act **depriving the plaintiff of possession** of her chattel or **interfering** with the plaintiff's chattel in a manner **so serious as to deprive the plaintiff of the use of the chattel.**

Only personal property and intangibles that have been reduced to physical form (e.g., a promissory note) can be converted.

2. Intent

The defendant must only intend to commit the act that interferes; intent to cause damage is not necessary. Mistake of law or fact is no defense (e.g., a purchaser of stolen goods is liable to the rightful owner). Transferred intent does not apply to conversion. The defendant must have intended to exercise control over the particular chattel.

Accidentally damaging the plaintiff's chattel is not conversion if the defendant had permission to use the property.

3. Interference

The defendant interferes with the plaintiff's chattel by exercising **dominion or control** over it. Examples of acts of conversion include wrongful acquisition, transfer, or detention; substantially changing; severely damaging or destroying; or misusing the chattel.

If the original acquisition of the chattel was not wrongful, then the defendant's failure to return it does not constitute conversion unless the plaintiff is entitled to immediate possession of the chattel and demands the return of the chattel. The defendant's failure to return chattel that has been lost or destroyed does not itself constitute conversion, but the defendant may be liable for conversion if the defendant

intentionally destroyed or disposed of the chattel and liable for negligence if the defendant's negligence caused its loss or destruction.

4. Distinguishing Conversion from Trespass to Chattels

There is no specific rule as to what behavior constitutes conversion, as opposed to trespass to chattels; it is a matter of degree of seriousness. The following factors are considered:

i) The **duration and extent** of the interference;

ii) The defendant's **intent to assert a right inconsistent** with the rightful possessor;

iii) The defendant's **good faith**;

iv) The **expense or inconvenience** to the plaintiff; and

v) The **extent of the harm** to the chattel.

Generally, the greater the degree of these factors, the greater the likelihood that a conversion has occurred. Conversion is an exercise of dominion or control over the plaintiff's personal property such that the court is justified in requiring the defendant to pay the plaintiff the full value of the property.

Example: If an embittered defendant steals his ex-girlfriend's car and drives it into a lake, that is conversion. If he merely hits the hood of her car once with a hammer, that is trespass to chattels.

5. Damages

The plaintiff may recover **damages in the amount of the full value of the converted property** at the time of the conversion. Alternatively, the plaintiff may bring an action for replevin to recover the chattel.

C. TRESPASS TO LAND

Trespass to land occurs when the defendant's **intentional** act causes a **physical invasion** of the land of another.

1. Intent

The defendant need only have the **intent to enter the land** (or to cause a physical invasion), not the intent to commit a wrongful trespass. In other words, the defendant **need not know that the land belongs to another.** Mistake of fact is not a defense.

Example: An erroneous survey of the defendant's property leads the defendant to believe that an annoying cherry tree is on her property when in fact it is on her neighbor's property. She intentionally enters her neighbor's land and cuts down the tree. Even though she reasonably believed that the tree was on her property, she is liable for trespass to land.

The doctrine of transferred intent applies to trespass to land.

If the defendant's action in trespassing on another's land does not satisfy the intent requirement, the defendant could be liable in negligence for harm caused by his trespass.

2. Physical Invasion

The defendant need not personally enter onto the plaintiff's land; intentionally flooding the plaintiff's land, throwing an object (e.g., a rock) onto it, or intentionally emitting particulates into the air over the land will each suffice.

Additionally, the defendant's failure to leave the plaintiff's property after his lawful right of entry has expired constitutes a physical invasion.

A trespass may be committed on, above, or below the surface of the plaintiff's land.

3. Appropriate Plaintiffs

Because it is the right to possession that is being protected, **anyone in actual or constructive possession of land may bring an action for trespass** (e.g., owner, lessee, or even an adverse possessor).

4. Distinguished From Nuisance

Trespass always requires an invasion of or an intrusion onto land; nuisance may or may not involve intrusion.

An action for trespass protects the possessor's interests in the land; an action for nuisance protects the use and enjoyment of land. *See also* § III.D. Nuisance, *infra*.

If no physical object enters onto the plaintiff's land (e.g., the defendant's floodlights project onto the plaintiff's land or damage results from the defendant's blasting), then the case is generally treated as a nuisance or strict liability action (discussed in §§ III.D. Nuisance and V. Strict Liability, *infra*).

5. Damages

No proof of actual damages is required; nominal damages may be awarded. The defendant is liable for harm not only to the land itself and structures on it but also for bodily harm to the possessor of the land and members of his family attributable to the trespass, even if the defendant had no reason to foresee such harm or otherwise would not be liable (e.g., accidental (non-negligent) harm).

6. Necessity as a Defense to Trespass

The privilege of necessity is available to a person who enters or remains on the land of another (or interferes with another's personal property) to prevent serious harm, which typically is substantially more serious than the invasion or interference itself. The privilege of necessity applies only to intentional torts to property, including trespass to land, trespass to chattels, and conversion.

a. Private necessity

Private necessity is a **qualified** privilege to protect an interest of the defendant or a limited number of other persons from serious harm when the interference is **reasonably necessary** to prevent such harm. A defendant is not entitled to the protection of this privilege on behalf of another if the defendant knows or has reason to know that the other person is unwilling for the defendant to take such action. Despite this privilege, the property owner is entitled to recover **actual damages**, but cannot recover nominal or punitive damages nor use force to eject the defendant as long as the necessity exists.

Example: During a severe storm, the owner of a boat secures the boat to a dock to prevent the destruction of the boat. The storm winds knock the boat against the dock, causing damage to the dock. The defendant is not liable as a trespasser for nominal damages, but is liable for the actual damages to the dock.

b. Public necessity

Under the doctrine of public necessity, private property may be intruded upon or destroyed when necessary to protect a large number of people from public calamities, such as the spreading of a fire or disease or the advance of a hostile military force.

The privilege is absolute. As long as the defendant acts reasonably, he is not liable for any damage to the property. He is not liable even if the original entry was not necessary, as long as he **reasonably believed** that the necessity existed. The privilege lasts only as long as the emergency continues.

The privilege is available to private citizens as well as public officials.

c. Application to torts affecting damages to chattels

Necessity and public necessity also are privileges to the torts alleging damage to personal property, i.e., trespass to chattels and conversion. *See* §§ III.A-B, *supra*.

D. NUISANCE

1. Private Nuisance

a. Definition

A private nuisance is a thing or activity that **substantially and unreasonably interferes** with another individual's **use and enjoyment** of his land.

b. Nature of the defendant's conduct

The interference must be intentional, negligent, reckless, or the result of abnormally dangerous conduct to constitute nuisance. Intentional conduct encompasses not only acts for the purpose of causing the interference but also knowledge that the interference is resulting or is substantially certain to result from the conduct.

c. Appropriate plaintiffs

Anyone with **possessory** rights in real property may bring a nuisance claim.

d. Substantial interference

A substantial interference is one that would be **offensive, inconvenient, or annoying to a normal, reasonable person in the community**. A person with special sensitivities can recover only if the average person would be offended, inconvenienced, or annoyed. Conversely, a "thick-skinned" plaintiff who is not offended, inconvenienced, or annoyed is nevertheless entitled to recover if an average reasonable person would be, although the amount of damages may be affected.

e. Unreasonable interference

The interference is unreasonable if the injury caused by the defendant **outweighs the usefulness** of his actions.

f. Distinguished from trespass

1) Physical invasion

Trespass requires a **physical invasion** of the plaintiff's property. Nuisance does not require physical invasion, but **physical invasion may constitute a nuisance.**

Example: If the defendant's factory emits particulates that settle on the plaintiff's property, then the defendant may be liable for **both** trespass and private nuisance.

2) Substantial interference

Private nuisance requires **substantial interference** with the plaintiff's use and enjoyment of her property. Trespass, however, does not require a substantial intrusion.

Example: A defendant's merely walking onto the plaintiff's land, if unprivileged and not consented to, is a trespass.

3) Duration

Generally, a nuisance is continuous. A trespass may be a one-time event, episodic, or continuous.

g. Access to light

Historically, courts have refused to find the obstruction of sunlight as creating a private nuisance.

h. Defenses to private nuisance

Apart from challenging the elements of nuisance, the defenses available to a defendant turn on whether the defendant's conduct is intentional, reckless, negligent, or abnormally dangerous. For example, the plaintiff's negligence or assumption of the risk may be a defense to a nuisance (or reduce recovery in a comparative-fault jurisdiction).

1) Regulatory compliance

The fact that a defendant complies with a statute, local ordinance, or administrative regulation is not a complete defense to a nuisance action. However, such statutory or regulatory compliance may be admitted as evidence as to whether the interference with the plaintiff's use and enjoyment of her land is unreasonable. For example, zoning regulations are typically regarded as admissible evidence in actions for nuisance, but they are not determinative.

2) Coming to the nuisance

It is generally **not a defense** that the plaintiff "came to the nuisance" by purchasing property in the vicinity of the defendant's premises with knowledge of the nuisance operated by the defendant. However, the fact that the plaintiff moved to the nuisance is not irrelevant; it may be considered by the jury in determining whether the plaintiff can recover for the nuisance.

In other words, the plaintiff's coming to the nuisance **does not entitle the defendant to judgment** as a matter of law, but it is **evidence that the jury may consider.**

Conversely, ownership of land prior to the defendant's entry into the neighborhood will not, by itself, make the defendant's action a nuisance. The test is whether the defendant's action is unreasonable.

2. Public Nuisance

a. Definition

A public nuisance is an unreasonable interference with a right common to the general public. (Note: Public nuisance does not necessarily involve land, but it is included in this part of the outline because of its common historical roots with private nuisance.) Typical examples of public nuisance include air pollution, pollution of navigable waterways, interference with the use of public highways, and interference with the public's use of parks or other public property.

A private citizen has a claim for public nuisance only if she suffers harm that is different in kind from that suffered by members of the general public (e.g., physical injury).

Example 1: If the defendant pollutes a river, a plaintiff who fishes in the river cannot bring a claim for public nuisance. However, a plaintiff who operates a fishing camp on the banks of the river and suffers a substantial economic loss may do so.

Example 2: A dynamiting operation causes rocks to block a public highway. All members of the community are harmed by the nuisance. Consequently, a driver who suffers economic harm, such as a loss of business, due to the blockage, cannot recover.

Example 3: Same facts as in Example 2, but in this case, a rock strikes the driver's car, cracking the windshield. The driver has suffered harm different from the general community and may bring an action in public nuisance.

In most instances, state statutes or local ordinances specifically declare something to be a public nuisance, such as running a house of ill repute or a disorderly tavern, gambling on Sundays, or growing certain types of thorny bushes.

Public authorities can either (i) seek injunctive relief to abate (prevent the continuation of) the public nuisance, or (ii) criminally prosecute the defendant.

b. Applying principles derived from the law of private nuisance

The law of public nuisance is extremely vague and varies greatly from one jurisdiction to another. However, the **modern trend** is to transpose much of the law governing private nuisance onto the law of public nuisance. For example, most courts hold that a defendant's conduct must be (i) intentional and unreasonable, (ii) negligent or reckless, or (iii) actionable under the principles governing abnormally dangerous activities. Furthermore, the defenses available to defendants in private nuisance actions typically apply in public nuisance actions.

3. Remedies for Nuisance

a. Damages

The usual remedy for nuisance is damages. All resulting harm is recoverable, including damages for reduction in the value of real property, personal injury, and harm to personal property.

1) Utility of the defendant's conduct

Even if the utility of the defendant's conduct outweighs the gravity of the harm, damages (but not injunctive relief) may be available if the harm is serious and the financial burden of compensating for the harm would not make the defendant's continuing conduct unfeasible. In other words, while it may be

reasonable for the defendant to engage in the conduct, it is unreasonable for the defendant to do so without paying for the harm done.

2) Continuing nuisance

If the nuisance is a continuing one and the court deems it "permanent," then it will award the plaintiff all past and future damages, which prevents plaintiffs from returning to the court to collect damages in the future.

Occasionally, courts award **temporary damages** measured by the damages that have occurred prior to trial and within the statute of limitations. In these instances, plaintiffs may return to the court in the future to collect additional temporary damages if the nuisance continues.

b. Injunctive relief

If monetary damages are inadequate and the nuisance would otherwise continue, then courts may grant injunctive relief. In determining whether an injunction is appropriate, the courts will **"balance the equities,"** that is, weigh the social utility of the defendant's conduct against the harm caused to the plaintiff and others. However, the court need not consider the relative hardships if the defendant's sole purpose was to cause harm to the plaintiff or to violate the common standards of decency (sometimes called a "spite nuisance").

4. Abatement

a. Private nuisance

A person may enter another's land in order to abate a private nuisance after giving the defendant notice of the nuisance, after which the defendant refuses to act. The amount of force used may be only that which is reasonable to abate the nuisance; the plaintiff is liable for any additional damage.

b. Public nuisance

One who is entitled to recover for a public nuisance has the right to abate that nuisance by self-help, as one would with a private nuisance. However, in the absence of unique injury, a public nuisance may be abated only by a public authority.

IV. NEGLIGENCE

EXAM NOTE: Negligence is a very commonly tested subject on law school exams. In addition to memorizing the elements, be sure to know that the defendant must:

i) Fail to exercise the care that a reasonable person in his position would exercise; and

ii) Act in a way that breaches the duty to prevent the foreseeable risk of harm to anyone in the plaintiff's position, and the breach must be the cause of the plaintiff's injuries.

A. DEFINITION

Negligence is **conduct** (the commission of an act or the failure to act), without wrongful intent, that falls below the minimum degree of ordinary care imposed by law to protect others against unreasonable risk of harm.

1. Standard of Care

There are two (sometimes competing) approaches for defining the basic standard of care in negligence.

a. Traditional approach

Most courts define the standard of care as what a **reasonably prudent person** under the circumstances would or would not do.

b. Restatement (Third) approach

The modern trend is to define negligence **as the failure to exercise reasonable care under all the circumstances,** and then use an economic or cost-benefit analysis to determine whether reasonable care has been exercised. For example, the Third Restatement calls for courts, when determining whether a person has acted without reasonable care, to weigh the following factors:

i) The **foreseeable likelihood** that the person's conduct will result in **harm**;

ii) The **foreseeable severity of** any **harm** that may result; and

iii) The **burden of precautions to eliminate or reduce the risk of harm**.

Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 3 (Am. L. Inst. 2010).

2. Elements of Negligence

A prima facie case for negligence consists of four elements:

i) **Duty**, the obligation to protect another against unreasonable risk of injury;

ii) **Breach**, the failure to meet that obligation;

iii) **Causation**, a close causal connection between the action and the injury; and

iv) **Damages**, the loss suffered.

B. DUTY

In general, a duty of care is owed to all foreseeable persons who may be injured by the defendant's failure to follow a reasonable standard of care. An actor has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm. Restatement (Third) of Torts: Liability for Physical or Emotional Harm § 7 (Am. L. Inst. 2010).

1. Failure to Act

Generally, there is no duty to act affirmatively, even if the failure to act appears to be unreasonable. For more on this principle, and the exceptions to it, *see* § IV.B.5. Affirmative Duty to Act, *below*.

2. Foreseeability of Harm

Most courts today hold that if the defendant is acting affirmatively, then **the foreseeability of harm to another resulting from the defendant's failure to use reasonable care is sufficient to create a general duty to act with reasonable care.** This is a change from 19th-century negligence law under which the plaintiff was required to show an independent or autonomous source of duty, such as a contract, a statute, or a regulation.

3. Foreseeability of Harm to the Plaintiff

a. Cardozo (majority) view

The majority rule is that a duty of care is owed to the plaintiff only if she is a member of the class of persons who might be foreseeably harmed (sometimes called "foreseeable plaintiffs") as a result of the defendant's negligent conduct. According to Judge Cardozo's majority opinion in *Palsgraf v. Long Island R. R. Co.*,

162 N.E. 99 (N.Y. 1928), the defendant is liable only to plaintiffs who are **within the zone of foreseeable harm.**

b. Andrews (minority) view

The minority view, articulated in Judge Andrews's minority opinion in *Palsgraf*, states that if the defendant can foresee harm to **anyone** as a result of his negligence, a duty is owed to **everyone (foreseeable or not) harmed** as a result of his breach. However, the plaintiff still may not be able to recover, because a particular plaintiff's injury may not be closely enough connected to the defendant's negligence for the court to conclude that it was proximately caused by the defendant's negligence. In other words, the issue is one of duty for Judge Cardozo, but one of proximate cause for Judge Andrews. *See* § IV.E.3., *infra*. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29 cmt. n (Am. L. Inst. 2010).

4. Specific Classes of Foreseeable Plaintiffs

a. Rescuers

A person who comes to the aid of another is a foreseeable plaintiff. If the defendant negligently puts either the rescued party or the rescuer in danger, then he is liable for the rescuer's injuries. To the extent that a rescuer's efforts are unreasonable, comparative responsibility should be available to reduce, rather than to bar, recovery by a rescuer. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 32 (Am. L. Inst. 2010).

An emergency professional, such as a police officer or firefighter, is barred from recovering damages from the party whose negligence caused the professional's injury if the injury resulted from a risk inherent in the job ("firefighter's rule").

b. Intended beneficiaries

A defendant is liable to a third-party beneficiary if the legal or business transaction that the beneficiary is a part of is prepared negligently by the defendant, and the defendant could foresee the harm of completing the transaction.

c. Fetuses

Fetuses are owed a duty of care if they are viable at the time that the injury occurred. *See* § IV.G.4. "Wrongful Life" and "Wrongful Birth" Claims, *infra*.

5. Affirmative Duty to Act

In general, there is no affirmative duty to act. However, there are some notable exceptions to that rule.

a. Assumption of duty

A person who voluntarily aids or rescues another is liable for injury caused by a failure to act with reasonable ordinary care in the performance of that aid or rescue.

Note that some states have enacted **"Good Samaritan" statutes** to protect doctors and other medical personnel when they voluntarily render emergency care. These statutes exempt medical professionals from liability for ordinary negligence; however, they do not exempt them from liability for gross negligence.

b. Placing another in peril

A person who places another in peril is under a duty to exercise reasonable care to prevent further harm by rendering care or aid.

c. By contract

There is a duty to perform contractual obligations with due care.

d. By authority

One with actual ability and authority to control another, such as parent over child and employer over employee, has an affirmative duty to exercise reasonable control. Generally, this duty is imposed upon the defendant when the defendant knows or should know that the third person is apt to commit the injuring act.

Example: A parent may be liable for failing to control the conduct of a child who uses a dangerous instrumentality to injure a plaintiff.

e. By relationship

A defendant with a unique relationship to a plaintiff, such as business proprietor-patron, common carrier-passenger, employer-employee, or parent-child, may have a duty to aid or assist the plaintiff and to prevent reasonably foreseeable injury to her from third parties.

C. THE STANDARD OF CARE

1. Reasonably Prudent Person

In most cases, the standard of care imposed is that of a **reasonably prudent person under the circumstances**. This standard is an **objective** one, measured by what a reasonably prudent person would do, rather than whether a particular defendant is acting in good faith or using her best efforts. A defendant is required to exercise the care that a reasonable person under the same circumstances (i.e., in her position, with her information and competence) would recognize as necessary to avoid or prevent an unreasonable risk of harm to another person. In determining whether particular precautions were warranted, a jury should weigh the probability and gravity of the injury against the burden of taking such precautions.

a. Mental and emotional characteristics

Under this standard, the defendant is presumed to have average mental abilities and the same knowledge as an average member of the community. The defendant's own mental or emotional incompetence is not considered in determining whether his conduct is negligent, unless the defendant is a child. In other words, **a mentally incompetent person is held to the standard of someone of ordinary intelligence and knowledge**.

Most courts hold that if a defendant possesses special skills or knowledge, she is held to a higher standard, i.e., she must exercise her superior competence with reasonable attention and care.

b. Physical characteristics

The defendant's particular physical characteristics (e.g., blindness) are taken into account in determining the reasonableness of the defendant's behavior. The reasonableness of the conduct of a defendant with a physical disability will be determined based upon a reasonably careful person with the same disability. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 11 (Am. L. Inst. 2010). For example, a blind pedestrian must act as any other reasonable blind person would act under the circumstances.

c. Intoxication

Intoxicated individuals are held to the same standards as sober individuals unless their intoxication was involuntary.

d. Children

The standard of care imposed upon a child is that of a **reasonable child of similar age, intelligence, and experience.** Unlike the objective standard applied to adult defendants in negligence actions, the standard applicable to minors is more subjective in nature because children are unable to appreciate the same risks as an adult.

However, a child engaged in an adult activity, such as driving a car, is held to the same standard as an adult. Courts regard children of a particularly young age as incapable of negligent conduct. Under the Third Restatement, children under the age of five are generally incapable of negligent conduct. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 10 (Am. L. Inst. 2010).

2. Cost-Benefit Analysis

In many cases, courts describe the primary factors to consider in determining whether the defendant has acted negligently to be:

i) The foreseeable likelihood that the defendant's conduct would cause harm;

ii) The foreseeable severity of any resulting harm; and

iii) The defendant's burdens (costs or other disadvantages) in avoiding the harm.

In fact, the Third Restatement defines negligence using these terms rather than the reasonable person standard.

3. Custom

a. Within a community or industry

Evidence of a custom in a community or industry is admissible as evidence to establish the proper standard of care, but such evidence is not conclusive. The entire community or industry may be negligent.

b. Safety codes

Safety codes promulgated by industries, associations, and governmental bodies for the guidance of operations within their respective fields of interest are admissible to prove custom.

c. Professionals

A professional person (e.g., doctor, lawyer, or electrician) is expected to exhibit the **same skill, knowledge, and care as an ordinary practitioner in the same community.** A specialist may be held to a higher standard than a general practitioner because of his superior knowledge.

Establishing negligence by a professional person generally requires expert testimony to establish both the applicable standard of care and the defendant's deviation from that standard. However, when the defendant's negligence is so apparent that a layperson can identify it, expert testimony will not be required. *See, e.g.*, *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984) (Because the standard of care was regarded as within the common knowledge of a layman when the surgeon amputated the wrong leg, no expert testimony was required to establish the standard of care.).

d. Physicians

1) Local vs. national standard

Traditionally, physicians were held to the "same or similar locale" rule of custom: did the physician's actions comport with those customarily employed by doctors in the same locale or in similar localities? While some jurisdictions have retained the traditional rule, the majority of jurisdictions now apply a national standard to physicians, including physicians who are specialists.

2) Informed consent

Physicians are under a specific obligation to explain the risks of a medical procedure to a patient in advance of a patient's decision to consent to treatment. Failure to comply with this "informed consent" doctrine constitutes a breach of the physician's duty owed to the patient and is actionable as medical malpractice (medical negligence). Doctors are **not** under an obligation to disclose when the:

i) Risk is a **commonly known** risk;

ii) Patient is **unconscious**;

iii) Patient **waives or refuses** the information;

iv) Patient is **incompetent** (although the physician must make a reasonable attempt to secure informed consent from a guardian); or

v) Disclosure would be **too harmful** to the patient (e.g., would upset the patient enough to cause extreme illness, such as a heart attack).

A **majority** of jurisdictions hold that the required level of disclosure of risks is governed by custom among medical practitioners. However, a significant **minority** holds that the physician must disclose any "material risk," that is, any risk that might make a difference to a reasonable person in deciding whether to proceed with the surgery or other medical treatment.

4. Negligence *Per Se*

The standard of care can sometimes be determined by statute. In most jurisdictions, the violation of such a statute establishes negligence as a matter of law (a conclusive presumption as to duty and breach). A minority of jurisdictions hold that violation of the statute is merely evidence of negligence (a rebuttable presumption as to duty and breach).

a. Basic rule

i) A criminal or regulatory statute (or an administrative regulation or municipal ordinance) imposes a penalty for violation of a specific duty;

ii) The defendant violates the statute by failing to perform that duty;

iii) The plaintiff is in the class of people **intended to be protected** by the statute; and

iv) The harm is of the type the statute was **intended to protect against**.

Once negligence per se is established, in order for the defendant to be liable, the plaintiff must prove that his injuries were proximately caused by the defendant's violation of the statute.

b. Proof of a defendant's compliance is not dispositive

Generally speaking, compliance with a statute, regulation, or ordinance does not prove the absence of negligence. However, sometimes, if the defendant's conduct complies with certain types of federal regulatory statutes, such as those establishing comprehensive regulatory schemes, compliance with the federal requirements may preempt common-law tort actions.

c. Defenses

1) Compliance is impossible

Even in those jurisdictions in which negligence *per se* results in negligence as a matter of law, the defendant can avoid liability by proving either that compliance was **impossible** under the circumstances or that an **emergency** justified violation of the statute.

2) Violation was reasonable under the circumstances

The defendant's violation of a statute is excused and is not negligence if the violation is reasonable in light of the defendant's **physical disability** or incapacitation, if the defendant is a **child**, or if the defendant exercises **reasonable care** in attempting to comply with the statute. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 15 (Am. L. Inst. 2010).

In addition, if the statute imposes an obligation only under certain factual circumstances that are not usually present, and the defendant is **not aware** that these circumstances are present and further proves that his ignorance was reasonable, then the defendant's violation of the statute is excused for the purposes of negligence *per se*.

Finally, if the requirements of the statute at issue were presented to the public in a **confusing** manner (e.g., extremely vague or ambiguous), then the defendant's violation is excused. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 15 (Am. L. Inst. 2010).

d. Violation by a plaintiff

The violation of a statute, regulation, or ordinance by a plaintiff may constitute contributory negligence per se. The same requirements apply.

5. Standards of Care for Specific Classes of Defendants

a. Common carriers and innkeepers

Under the common law, a majority of jurisdictions held common carriers (e.g., operators of planes, trains, buses) and innkeepers to the highest duty of care consistent with the practical operation of the business. Under this approach, common carriers and innkeepers could be held liable for "slight negligence."

A majority of courts continue to hold **common carriers** to this higher standard. However, most courts today hold that an **innkeeper** (hotel operator) is liable only for **ordinary negligence**.

Note, however, that the Third Restatement approach is slightly different: common carriers and innkeepers must exercise reasonable care toward their passengers and guests. Although generally there is no affirmative duty to act, common carriers and innkeepers have a duty to act based on a special relationship. They must use reasonable care under the circumstances with regard to risks that arise

out of the relationship with their passengers and guests. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 40 (Am. L. Inst. 2012).

> **EXAM NOTE:** Be certain to apply the carriers and innkeepers standards only to passengers or guests.

b. Automobile drivers

In most jurisdictions, automobile drivers owe ordinary care to their guests as well as their passengers (those who confer an economic benefit for the ride). However, a minority of jurisdictions distinguish between the two with "guest statutes," which impose only a duty to refrain from gross or wanton and willful misconduct with a guest in the car. Proof of simple negligence by the driver will not result in recovery by the plaintiff-guest.

c. Bailors and bailees

A bailment occurs when a person (the bailee) temporarily takes possession of another's (the bailor's) personal property, such as when a driver leaves his car with a valet. The duty of care that must be exercised by a bailor or bailee varies depending on the type of bailment.

1) Bailor's duty

A gratuitous bailor (e.g., the owner of a power saw who lends it without charge to a friend) has a duty to inform the bailee only of **known** dangerous defects in personal property, but a compensated bailor (e.g., a commercial entity that leases a power saw to a customer) must inform a bailee of defects that are known or **should have been known** by the bailor had he used reasonable diligence.

2) Bailee's duty

When a bailor receives the sole benefit from the bailment, the bailee has a lesser duty to care for the property and is liable only if he has been grossly negligent. In contrast, when a bailee receives the sole benefit from the bailment, he must exercise extraordinary care for the bailor's property. Slight negligence on the bailee's part will result in liability for any injuries to the property from failure to properly care for or use it. In a bailment for mutual benefit, the bailee must take reasonable care of the bailed property.

d. Modern trend

The modern trend has been to get away from distinctions in the level of care and to regard the relationship between the parties as simply one of the circumstances in the light of which conduct is to be measured by the standard of reasonable care.

e. Emergency situations

The applicable standard of care in an emergency is that of a reasonable person in the same situation. In other words, less may be expected of the reasonably prudent person who is forced to act in an emergency, but only if the defendant's conduct did not cause the emergency.

6. Possessors of Land

The term "possessors of land" as used here includes owners, tenants, those in adverse possession, and others in possession of land. The fact that a plaintiff is injured while on someone else's land does not affect the liability of a defendant other than the land possessor. Only land possessors are protected by the rules limiting liability to

trespassers or licensees. Everyone else—for example, easement holders (e.g., a utility company with power lines on the land) or those licensed to use the land (e.g., hunters)—must exercise reasonable care to protect the trespasser or the licensee.

In general, possessors of land owe a duty only to those within the boundaries of their land. The duty to entrants on the land includes:

i) **Conduct** by the land possessor that creates risks;

ii) **Artificial conditions** on the land;

iii) **Natural conditions** on the land; and

iv) Risks created when any of the **affirmative duties** discussed in § IV.B.5. Affirmative Duty to Act, *supra*, are applicable.

a. Two approaches

Approximately one-half of all jurisdictions continue to follow traditional rules that provide that the standard of care owed to land entrants depends upon whether the land entrant is an invitee, a licensee, or a trespasser.

Courts in the other half of jurisdictions (as well as the Third Restatement) require that a standard of reasonable care applies to all land entrants except trespassers, abolishing the distinction between invitees and licensees. (In the case of the Third Restatement, the rule applies to all land entrants except for "flagrant" trespassers (*see* b.2) Modern and Third Restatement approach, *below*.)

a) Known or obvious dangers

A land possessor must take reasonable precautions for known or obvious dangers when the possessor should anticipate the harm despite such knowledge or obviousness. However, when the danger is open and obvious to the entrant, a warning will ordinarily not provide additional protection against harm. Consequently, if the only purpose of a warning would be to provide notice of a danger that is open and obvious, there is no liability for failing to provide such a warning. In addition, even when a warning is required, an entrant who encounters an obviously dangerous condition and fails to exercise reasonable self-protective care is contributorily negligent.

b. Trespassers

A trespasser is someone who enters or remains upon the land of another **without consent or privilege** to do so.

1) Traditional approach

A landowner is obligated **to refrain from willful, wanton, reckless, or intentional misconduct** toward trespassers.

a) Spring-guns and other traps

The use of a "spring-gun" or other trap set to expose a trespasser to a force likely to inflict death or grievous bodily injury will lead to liability for the land possessor. The land possessor cannot do indirectly what he would be forbidden to do directly (e.g., shoot the trespasser).

b) Discovered trespassers

Land possessors owe a duty toward **discovered or anticipated trespassers** to warn or protect them from **concealed, dangerous,**

artificial conditions. There is no duty to warn of natural conditions or artificial conditions that do not involve risk of death or serious bodily harm. Land possessors also have a duty to use reasonable care while conducting activities on their land, as well as to control the activities of third parties on their property.

When a land possessor **should reasonably know** that trespassers are consistently entering his land (e.g., frequent trespassers using a footpath to cut across the corner of the property), the possessor owes a duty to the **anticipated trespasser**, regardless of the land possessor's actual knowledge of the trespasser's presence.

c) Undiscovered trespassers

Land possessors generally owe no duty to undiscovered trespassers, nor do they have a duty to inspect their property for evidence of trespassers.

d) Attractive nuisance

Under the "attractive nuisance" doctrine, a land possessor may be liable for **injuries to children** trespassing on the land if:

i) An artificial condition exists in a place where the land possessor knows or has reason to know that **children are likely to trespass**;

ii) The land possessor knows or has reason to know that the condition poses an **unreasonable risk** of death or serious bodily injury to children;

iii) The children, because of their youth, do not discover or **cannot appreciate the danger** presented by the condition;

iv) The utility to the land possessor of maintaining the condition and the burden of eliminating the danger are **slight compared to the risk of harm** presented to children; and

v) The land possessor fails to exercise **reasonable care** to protect children from the harm.

Restatement (Second) of Torts § 339 (Am. L. Inst. 1965).

2) Modern and Third Restatement approach

A few states now take the approach that land possessors owe trespassers, like all other land entrants, a reasonable standard of care under all the circumstances. Of course, the fact that the land entrant is trespassing, particularly if he is undiscovered, is one fact that the jury may consider in deciding whether the land possessor has exercised reasonable care.

The Third Restatement § 52 provides that although a duty of reasonable care is owed to trespassers, only the duty not to act in an intentional, willful, or wanton manner to cause physical harm is owed to **flagrant trespassers** who are not imperiled and unable to protect themselves. A burglar in a home would be a flagrant trespasser but someone injured while walking in a public park at midnight, despite the presence of a posted notice that the park was closed after dusk, would not be. This distinction has not been widely adopted by the courts.

c. Invitees: traditional approach

An invitee is either:

i) A **public invitee—**Someone invited to enter or remain on the land for the purposes for which the land is held open to the public; or

ii) A **business visitor**—Someone invited to enter or remain on the land for a purpose connected to business dealings with the land possessor.

A land possessor owes an invitee the duty of reasonable care, including the duty to use reasonable care to **inspect** the property, **discover** unreasonably dangerous conditions, and **protect** the invitee from them.

However, the duty of reasonable care owed to an invitee does not extend beyond the scope of the invitation, and the invitee is **treated as a trespasser** in areas beyond that scope.

1) Non-delegable duty

The land possessor's duty to invitees is a non-delegable duty. For example, even if a store owner hires an independent contractor to maintain the escalator in her store, she will remain liable if the contractor negligently fails to properly maintain the escalator. This same principle of non-delegable duty applies under the modern approach (discussed below) under which the land possessor owes most land visitors a duty of reasonable care.

2) Recreational land use

In some jurisdictions, a land possessor who opens his land to the public for recreational purposes is not liable for injuries sustained by recreational land users so long as he does not charge a fee for the use of his land, unless the landowner acts willfully and maliciously or, in some jurisdictions, with gross negligence.

d. Licensees: traditional approach

A licensee is someone who enters the land of another with the express or implied permission of the land possessor or with a privilege. Examples of licensees include:

i) **Social guests**—Note, they may be "invited," but they are still licensees, not invitees;

ii) Those whose presence is **tolerated** by the land possessor such as children who routinely cut across the land on their way home from school; and

iii) **Emergency personnel** such as police, firefighters, and emergency medical technicians.

The land possessor has a duty to either **correct or warn** a licensee of **concealed dangers** that are either **known** to the land possessor or which **should be obvious** to her. The land possessor **does not have a duty to inspect** for dangers. In addition, the land possessor must exercise **reasonable care** in conducting activities on the land.

e. Invitees and licensees: modern and Restatement approach

Approximately one-half of all jurisdictions and the Third Restatement now require the land possessor to exercise **reasonable care under all circumstances to all land entrants except trespassers** (or in the case of the Third Restatement, all land entrants except for "flagrant trespassers." *See* § IV.C.6.b. Trespassers, *supra*). The land possessor must use **reasonable care to prevent harm posed by artificial conditions** or conduct on the land.

If the land possessor is commercial, then he also must use reasonable care to prevent harm to the visitor posed by natural conditions. A non-commercial land possessor must use reasonable care to prevent harm posed by natural conditions only if the possessor is aware of the risk, or the risk is obvious.

f. Liability of landlords and tenants

Because the obligations associated with property are owed by the possessor of the land, a lessee (tenant) assumes any duty owed by the lessor (the landlord) once the lessee takes possession.

1) Landlord's liability

The landlord, though, remains liable for injuries to the tenant and others occurring:

i) In **common areas** such as parking lots, stairwells, lobbies, and hallways;

ii) As a result of **hidden dangers** about which the landlord **fails to warn** the tenant;

iii) On premises **leased for public use**;

iv) As a result of a hazard caused by the landlord's **negligent repair**; or

v) Involving a hazard that the landlord has **agreed to repair**.

2) Tenant's liability

As an occupier of land, the tenant continues to be liable for injuries to third parties arising from dangerous conditions within the tenant's control, regardless of whether the landlord has liability.

g. Off-premises victims

A landowner generally does not owe a duty to a person not on the premises (e.g., passerby, owner of adjacent land) who is harmed by a **natural condition** on the landowner's premises. An exception exists, however, with respect to trees in urban areas.

With respect to an **artificial condition,** the landowner generally owes a duty to prevent an unreasonable risk of harm to persons who are not on the premises. Similarly, with respect to an activity conducted on the premises by the owner or by someone subject to the owner's control, the landowner generally owes a duty of reasonable care to persons who are not on the premises.

h. Sellers of real property

Sellers of real property owe a **duty to disclose** to buyers those concealed and unreasonably dangerous conditions known to the seller. These are conditions that the buyer is unlikely to discover upon reasonable inspection. The seller's liability to third parties continues until the buyer has a reasonable opportunity, through maintenance and inspection, to discover and remedy the defect.

D. BREACH OR VIOLATION OF DUTY OF CARE

1. Burden of Proof

The plaintiff must establish all four elements of negligence (duty, breach, causation, damage) by a **preponderance of the evidence**. A breach of duty occurs when the defendant departs from the conduct expected of a reasonably prudent person acting under similar circumstances. The evidence must show a greater probability than not

that (i) the defendant failed to meet the required standard of care, (ii) the failure was the proximate cause of the injury, and (iii) the plaintiff suffered damages. The plaintiff can demonstrate such failure by introducing evidence of the required standard of care through custom and usage, violation of a statute, or *res ipsa loquitur*.

2. *Res Ipsa Loquitur*

Under the doctrine of *res ipsa loquitur*, the trier of fact may infer the existence of the defendant's negligent conduct in the absence of direct evidence of such negligence. *Res ipsa loquitur* is **circumstantial evidence** of negligence that does not change the standard of care.

EXAM NOTE: *Res ipsa loquitur* does not apply if there is direct evidence of the cause of the injury.

a. Traditional requirements

Under the traditional standard for *res ipsa loquitur,* still used in many jurisdictions, the plaintiff must prove that:

i) The accident was of a kind that **ordinarily does not occur** in the absence of negligence;

ii) It was caused by an agent or instrumentality within the **exclusive control** of the defendant; and

iii) It was not due to any action **on the part of the plaintiff**.

In establishing that the accident was of a kind that ordinarily does not occur in the absence of negligence, the plaintiff need not conclusively exclude all other possible explanations. It is enough that the facts proved reasonably permit the conclusion that negligence is the more probable explanation. Restatement (Second) of Torts § 328D (Am. L. Inst. 1965).

b. Modern trends

Even under the traditional requirements, courts often generously interpret the "exclusive control" requirement.

Example: The defendant hires an independent contractor to clean and maintain his store premises. The plaintiff is injured when she slips on a floor negligently left wet by an independent contractor. Courts will find that the duty to maintain the premises open to the public is a non-delegable duty, such that the defendant continued to be in "exclusive control." Therefore, *res ipsa loquitur* can be used to find that the defendant breached a duty of reasonable care.

1) Medical malpractice

In medical malpractice cases in which several physicians, nurses, and other medical personnel have access to the plaintiff during surgery, a small number of jurisdictions apply *res ipsa loquitur,* finding that each defendant has breached a duty of care unless he can exonerate himself. In the absence of such exonerating evidence, the courts hold all defendants jointly and severally liable. *See*, *e.g.*, *Ybarra v. Spangard*, 25 Cal. 2d 486 (1944).

2) Product liability

In negligence cases involving products, even if the product passes through many hands—those of the manufacturer, the distributor, the retail store, and the consumer/user—if the manufacturer wrapped the package or it is clear

that any negligence took place during the production process, **many courts ignore the exclusivity requirement**.

3) Comparative fault jurisdictions

Courts in the vast majority of jurisdictions that have adopted comparative fault also are inclined to loosely apply the third requirement—that the harm must not be due to any action on the part of the plaintiff (whether such action constitutes contributory negligence or not)—because such a requirement would otherwise be in tension with the law holding that the plaintiff's contributory negligence is no longer a total bar to recovery.

c. Third Restatement

In light of the fact that the majority of jurisdictions generously apply the traditional requirements for *res ipsa loquitur,* the Third Restatement of Torts has re-articulated the requirements of the doctrine in the following manner:

The fact finder may infer that the defendant has been negligent when:

i) The accident that caused the plaintiff's harm is a type of accident that ordinarily happens as a result of negligence of a class of actors; and

ii) The defendant is a relevant member of that class of actors.

Note that a group approach to res ipsa loquitur is generally supportable only if the parties in the group have an ongoing relationship pursuant to which they share responsibility for a dangerous activity. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 17 (Am. L. Inst. 2010).

However, because the Third Restatement was only recently adopted*,* few courts have adopted this precise articulation of the doctrine.

d. Procedural effect of *res ipsa loquitur*

If the plaintiff establishes a prima facie case of *res ipsa loquitur*, then the trial court should deny the defendant's motion for a directed verdict and the issue of negligence must be decided by the trier of fact. In most jurisdictions, *res ipsa loquitur* does not require that the trier of fact find negligence on the defendant's part. It simply establishes an **inference** of negligence sufficient to avoid dismissal of the plaintiff's action.

E. CAUSATION

The plaintiff must prove that the defendant's actions were both the actual cause (also known as the factual cause or "cause-in-fact") and the proximate cause (i.e., within the scope of liability) of the plaintiff's injury.

1. Cause In Fact

a. "But-for" test

If the plaintiff's injury would not have occurred **but for** the defendant's tortious act or omission, then the defendant's conduct is a factual cause of the harm. If the injury would have occurred despite the defendant's conduct, then there is no factual cause.

b. Multiple and/or indeterminate tortfeasors

The "but-for" test of causation often will not work if:

i) There are multiple tortfeasors and it cannot be said that the defendant's tortious conduct necessarily was required to produce the harm;

ii) There are multiple possible causes of the plaintiff's harm but the plaintiff cannot prove which defendant caused the harm; or

iii) The defendant's negligent medical misdiagnosis increased the probability of the plaintiff's death, but the plaintiff probably would have died even with a proper diagnosis.

1) Substantial factor

When but-for causation does not work, most courts substitute a substantial-factor test. In cases in which the conduct of two or more defendants may have contributed to a plaintiff's indivisible injury, each of which alone would have been a factual cause of that injury, the test is whether the defendant's tortious conduct was a **substantial factor** in causing the plaintiff's harm.

The *Restatement (Second) of Torts* promoted the substantial-factor test, but the Third Restatement is highly critical of it and drops it. Under the Third Restatement, in cases in which several causes or acts may have contributed to the plaintiff's injury, each of which alone would have been a factual cause of the plaintiff's injury, each cause or act is regarded as a factual cause of the harm. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 27 (Am. L. Inst. 2010).

Note: The substantial-factor test is still used in most jurisdictions, at least in some context.

2) Concurrent tortfeasors contributing to an individual injury

When the tortious acts of two or more defendants are each a factual cause of an indivisible injury to the plaintiff, the defendants are jointly and severally liable.

3) Alternative causation

If the plaintiff's harm was caused by (i) one of a small number of defendants—usually two and almost never more than four or five, (ii) each of whose conduct was tortious, and (iii) all of whom are present before the court, then the court may shift the burden of proof to each individual defendant to prove that his conduct was not the cause in fact of the plaintiff's harm.

4) Concert of action

If two or more tortfeasors were **acting pursuant to a common plan or design** and the acts of one or more of them tortiously caused the plaintiff's harm, then all defendants are jointly and severally liable.

Example: Two defendants agree to a drag race and one of them injures another driver or a passenger during the race. Both are jointly and severally liable to the plaintiff.

c. Loss of chance of recovery

When a physician negligently misdiagnoses a potentially fatal disease and thereby reduces the patient's chance of survival, but the patient's chance of recovery was less than 50% even prior to the negligent misdiagnosis, the plaintiff ordinarily cannot prove that but for the physician's negligence the plaintiff's death would not have occurred. A majority or substantial minority of courts now hold that the plaintiff can recover reduced damages based on the loss-of-chance doctrine.

Under this doctrine, the plaintiff can recover an amount equal to the total damages recoverable as a result of the decedent's death multiplied by the difference in the percentage chance of recovery before the negligent misdiagnosis and after the misdiagnosis.

Example: The plaintiff's total damages are $1,000,000, and his chances of survival were 40% without the negligent misdiagnosis and 25% after the misdiagnosis. The plaintiff will recover $150,000 ($1,000,000 × (40% – 25%)).

2. Causal Linkage

Most often, when the plaintiff proves that the defendant's tortious conduct was a **but-for cause** of his injury, he also implicitly proves that the defendant's conduct increased the probability that the plaintiff would be harmed.

However, in a few cases, it is purely coincidental that the defendant's tortious conduct was the but-for cause of the plaintiff's injury.

Example: A passenger in a car is injured because the wind blows down a tree and the car is positioned under the tree at the moment it falls only because the driver has been traveling at an unreasonably unsafe speed. While the passenger would not have been injured but for the driver's negligent speeding, most courts would find that the driver should not be found to be a cause of the accident under the doctrine of causal linkage, i.e., the driver's conduct did not increase the probability that the plaintiff would be harmed.

3. Proximate Cause (Scope of Liability)

In addition to proving actual causation, the plaintiff must prove that the defendant's tortious conduct was a proximate cause of her harm. Some courts and the Third Restatement replace the proximate causation terminology with the issue of whether the plaintiff's harm was within the **"scope of liability"** of the defendant's conduct. A defendant's liability is limited to those harms that result from the risks that made the defendant's conduct tortious. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29 (Am. L. Inst. 2010).

a. Limitation on liability

The basic idea of proximate causation (or, scope of liability) is that there must be limits on liability for the tortious acts of the defendant. There are two sub-issues in proximate causation:

1) Which plaintiffs can recover?

a) Majority rule

Recall that a majority of jurisdictions hold that the defendant does not owe a duty of care to the plaintiff unless the plaintiff is among the class of victims who might **foreseeably be injured** as a result of the defendant's tortious conduct. This is the Cardozo approach in *Palsgraf v. Long Island R. R. Co.*, 162 N.E. 99 (N.Y. 1928). *See* § IV.B.3. Foreseeability of Harm to the Plaintiff, *supra*.

b) Minority/Restatement rule

In the minority of jurisdictions—and in the Third Restatement—which plaintiffs can recover is determined by whether harms to them were proximately caused by the defendant's tortious conduct or were within the scope of liability of the defendant's conduct. This is the Andrews approach in *Palsgraf*.

Under the Andrews approach, whether the plaintiff's harms are proximately caused by the defendant's conduct requires consideration of the following factors:

i) Is there a **natural and continuous sequence** between cause and effect?

ii) Was the one a **substantial factor** in producing the other?

iii) Was there a **direct connection** without the intervention of too many intervening causes?

iv) Was the cause **likely to produce** the effect?

v) Could the defendant have **foreseen** the harm to the plaintiff?

vi) Is the cause **too remote** in time and space from the effect?

2) Types of risk

The second proximate cause (scope of liability) issue is whether the plaintiff can recover for the specific type of risk that harmed her. For example, even if the court decides that a duty of care is owed to a specific plaintiff, a ship owner, because there is a foreseeable risk that a defendant stevedore's dropping of a plank into the hold of a ship might dent the ship, is the defendant still liable when the dropped plank unforeseeably causes vapors in the hull of the ship to ignite, totally destroying the ship? Again, there are two approaches.

a) Direct cause

A majority of U.S. courts hold that the plaintiff can recover when the defendant's tortious acts are the **direct cause** of the plaintiff's harm—a cause **without the intervention of independent contributing acts**. In deciding whether the plaintiff can recover for a particular type of harm, these courts look at many of the same factors that Judge Andrews considered in *Palsgraf.* These jurisdictions hold that the foreseeability of the type of harm does not necessarily preclude liability.

b) Unforeseeable type of risk

A strong minority of U.S. jurisdictions hold that whether a plaintiff can recover for a particular type of risk is determined by whether or not that particular risk is **foreseeable as a result of the defendant's tortious conduct**. If it is not, then there is no proximate cause and the plaintiff cannot recover.

b. Extent of damages

Even though a strong minority of jurisdictions hold that the type of risk that produces the plaintiff's harm must be foreseeable, under the "thin skull" or "eggshell skull" rule, the **extent of the damages need never be foreseeable**. Thus, the defendant is liable for the full extent of the plaintiff's injuries due to the plaintiff's pre-existing medical condition or vulnerability, even if the extent is unusual or unforeseeable.

c. Intervening and superseding causes

Many proximate cause questions involve intervening and superseding causes.

1) Intervening cause

An intervening cause is a factual cause of the plaintiff's harm that contributes to her harm after the defendant's tortious act has been completed.

2) Superseding cause

A superseding cause is any intervening cause that **breaks the chain of proximate causation between the defendant's tortious act and the plaintiff's harm**, thereby preventing the original defendant from being liable to the plaintiff.

a) Foreseeability

Most courts hold that an **unforeseeable** intervening cause is a superseding cause that therefore breaks the chain of causation between the defendant and the plaintiff. Examples of foreseeable intervening forces include subsequent medical malpractice, disease, or accident; negligence of rescuers; normal forces of nature; or efforts to protect a person or property. Examples of unforeseeable superseding causes include extraordinary acts of nature ("Acts of God") and criminal acts and/or intentional torts of third parties.

b) Negligent intervening causes

Generally, **negligent intervening acts are usually regarded as foreseeable** and do not prevent the original defendant from being held liable to the plaintiff.

Example: The defendant negligently injures the plaintiff in an auto accident. The plaintiff seeks treatment for the resulting broken leg, and the treating physician commits malpractice that results in the amputation of the leg. Because the original driver-defendant's negligence was a but-for cause of the amputated leg and because medical malpractice is foreseeable, the driver's negligence is also a proximate cause of the amputated leg, and he may be held liable for damages caused by the entire injury including the consequences of the amputation.

c) Criminal intervening causes

Criminal acts of third parties are generally regarded as **unforeseeable superseding causes,** and therefore break the chain of causation between the original defendant's negligence and the plaintiff's harm.

However, if the duty breached by the defendant is one of **failing to use reasonable care to protect the plaintiff** and the plaintiff is harmed by a **criminal act**, then the original defendant remains liable.

Example: A middle-school student is assaulted during a field trip. Her teacher failed to use reasonable care to protect her. The fact that the intervening cause of her harm, the assault, was criminal will not preclude the student and her parents from holding the school liable.

d) Effect of non-superseding intervening causes

If the intervening negligent act is not a superseding cause, then the original defendant and the actor responsible for the intervening negligent act can be held jointly and severally liable to the plaintiff.

EXAM NOTE: Remember that the original tortfeasors remain liable unless the results of an intervening negligent act are **unforeseeable**. In particular, keep in mind that medical malpractice is foreseeable, and therefore it is not a superseding cause that breaks the chain of causation and insulates the defendant from liability.

F. DAMAGES

1. Actual Damages

The plaintiff must prove actual harm, i.e., personal injury or property damages, in order to complete the requirements of liability for negligence. Unlike actions for intentional torts, nominal damages are not recoverable in negligence actions. In addition, a plaintiff who suffers only economic loss without any related personal injury or property damage cannot recover such loss through a negligence action. However, once a plaintiff has proven non-economic injury, he is entitled to recover both economic and non-economic damages. Attorney's fees and interest from the date of damage are not recoverable in a negligence action.

2. Compensatory Damages

The general measure of compensatory damages is compensation that would make the victim whole, as if he had never suffered the injury.

3. Mitigation of Damages, Avoidable Consequences

The plaintiff must take reasonable steps to mitigate damages. Although sometimes phrased as a "duty to mitigate," this "duty" is not an obligation that the plaintiff owes to the defendant but instead is a limitation on the plaintiff's recovery due to the failure to avoid harm that could have been avoided by the use of reasonable effort after the tort was committed. For example, if the victim fails to use reasonable care to treat a wound, resulting in infection and the loss of a limb, she ordinarily will not be able to recover for the infection or lost limb. In a contributory-negligence jurisdiction, the failure to mitigate precludes the plaintiff from recovering for any additional harm caused by aggravation of the injury. In a comparative-negligence jurisdiction, the failure to mitigate is taken into account, but it does not categorically prevent recovery.

4. Personal Injury: Categories of Damages

The typical categories of damages recoverable in a personal injury action include:

i) Medical and rehabilitative expenses, both past and future;

ii) Past and future pain and suffering (e.g., emotional distress); and

iii) Lost income and any reduction in future earnings capacity.

Under the **"eggshell-skull rule,"** the defendant is liable for the full extent of the plaintiff's injuries that may be increased because of the plaintiff's preexisting medical condition or vulnerability, even if the extent is unusual or unforeseeable.

5. Property Damage

a. General rule

When the plaintiff's real or personal property is injured or destroyed by the defendant's tortious conduct, the general rule is that the plaintiff may recover the difference between the fair market value of the property immediately before the injury and immediately after the injury.

b. Cost of repairs

In the case of tortious harm to personal property, most courts also allow the cost of repairs as an alternative measure of damages, provided that the cost of repairs does not exceed the value of the property.

c. Household items

In the case of household items, such as clothing and appliances, courts often hold that replacement value is the measure of damages.

6. Collateral-Source Rule

a. Traditional rule

Under the traditional rule, benefits or payments provided to the plaintiff from outside sources (such as medical insurance) are not credited against the liability of any tortfeasor, nor is evidence of such payments admissible at trial. Even under the traditional rule, payments made to the plaintiff by the defendant's insurer are not considered payments from a collateral source, and such payments are credited against the defendant's liability.

b. Modern trend

A majority of states have passed statutes that either eliminate the collateral source rule entirely or modify its application (e.g., not applicable in medical malpractice cases).

7. Punitive Damages

The plaintiff may be entitled to punitive damages if he can establish by clear and convincing evidence that the defendant acted willfully and wantonly, recklessly, or with malice. Torts that inherently involve a malicious state of mind or outrageous conduct (such as intentional infliction of emotional distress) may often result in punitive damages for the plaintiff. Note that in many states that availability of punitive damages as a remedy is determined by statute. There are also constitutional limitations on the amount of a punitive damages award. The Supreme Court has declined to impose a bright-line ratio which a punitive damages award cannot exceed, but has observed that very few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. *State Farm v. Campbell*, 538 U.S. 408 (2003).

G. SPECIAL RULES OF LIABILITY

1. Negligent Infliction of Emotional Distress

There are three types of cases in which a defendant may breach the duty to avoid negligently inflicting emotional distress upon a plaintiff. Whether a duty exists may depend upon whether the harm and the plaintiff are reasonably foreseeable. Some states deny recovery because one or the other is too speculative and thus not foreseeable.

a. Zone of danger

A plaintiff can recover for negligent infliction of emotional distress from a defendant whose tortious conduct placed the plaintiff in harm's way if the plaintiff demonstrates that:

i) He was within the "**zone of danger**" of the threatened physical impact—that he feared for his own safety because of the defendant's negligence; and

ii) The threat of physical impact caused emotional distress.

1) Proof of emotional distress

The majority rule is that the emotional distress must be manifested by **physical symptoms** (e.g., nightmares, shock, ulcers). The severity of symptoms required varies by jurisdiction. A few states as well as the Restatement allow recovery for serious emotional disturbance without a physical manifestation of harm. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 4 cmt. d (Am. L. Inst. 2010).

Compare to intentional infliction of emotional distress, under which the plaintiff must prove more than negligence (intentional or reckless extreme or outrageous conduct) but need not prove any physical injury.

b. Bystander recovery

Most states allow a bystander plaintiff outside the zone of danger to recover for emotional distress if that plaintiff:

i) Is closely related to the person injured by the defendant;

ii) Was present at the scene of the injury; and

iii) Personally observed (or otherwise perceived) the injury.

A majority of jurisdictions have not expanded liability to an unmarried cohabitant. However, some jurisdictions do allow engaged cohabitants to recover.

1) Proof of emotional distress

As with a plaintiff who is in the zone of danger, for a plaintiff who is a bystander, the majority rule is that the emotional distress must be manifested by **physical symptoms** (e.g., nightmares, shock, ulcers).

c. Special relationship

The duty to avoid negligent infliction of emotional distress exists without any threat of physical impact or physical symptoms in cases in which there is a special relationship between the plaintiff and the defendant. The most common examples are a mortician mishandling a corpse or a common carrier mistakenly reporting the death of a relative.

Example: A physician negligently misdiagnoses a patient with a terminal illness that the patient does not have, and the patient goes into shock as a result.

2. Wrongful Death and Survival Actions

a. Wrongful-death actions

A decedent's spouse, next of kin, or personal representative may bring suit to recover **losses suffered as a result of a decedent's death** under wrongful death actions created by state statutes. Under typical statutes, the recoverable damages include the **loss of support** (income) as a result of the decedent's death, as well as the **loss of companionship, society, and affection** experienced by the surviving family members, **but not pain and suffering**. Recovery, however, is limited to what the deceased would have recovered had he lived. Additionally, the decedent's creditors have no right to institute a claim against the amount awarded.

b. Survival actions

Survival statutes typically enable the personal representative of a decedent's estate to pursue **any claims the decedent herself would have had at the time of her death**, including claims for damages resulting from both personal injury and property damage. Such claims often involve damages resulting from the tort that injured the decedent and later resulted in her death.

Example: If the decedent was negligently injured by the driver of another automobile and lingered—out of work, in the hospital, and in extreme pain—for one year before passing away, his estate would be able to recover for his **medical expenses** from the time he was injured until his death, for his **loss of income** during this time, and for the **pain and suffering** he experienced.

Most states do not allow survival of tort actions involving intangible personal interests (such as defamation, malicious prosecution, or invasion of privacy) because they are considered too personal to survive the decedent's death.

Note: If a jurisdiction recognizes both wrongful death and survival actions, there is no double recovery.

3. Recovery for Loss Arising from Injury to Family Members

a. Spouses

One spouse may recover for loss of consortium and services as a result of injuries to the other spouse resulting from the defendant's tortious conduct.

b. Parent-child

A parent may recover damages for loss of services if a child is injured due to the defendant's tortious conduct. Many jurisdictions allow a parent to recover for loss of the child's companionship in a wrongful-death action if the child is killed, but only a few jurisdictions allow a parent to recover for such damages if the child is injured but lives.

Similarly, many jurisdictions allow a child to recover for loss of the parent's companionship in a wrongful-death action, but most do not allow the child to recover such damages if the parent is injured but lives. In a wrongful-death action, the child's claim for loss of support resulting from the decedent's death will be brought by the statutorily designated adult family member as part of the wrongful-death action.

c. Limitations

The amount of damages recoverable in a derivative action (an action arising solely because of tortious harm to another) for interference with family relationships is reduced in a comparative-fault jurisdiction (and eliminated in a contributory-negligence jurisdiction) by the injured family member's contributory negligence. Thus, if the damages recovered in the injured family member's own action are reduced by the plaintiff's comparative fault, then the damages recoverable by his family members in their derivative action will also be reduced.

4. "Wrongful Life" and "Wrongful Birth" Claims

a. Wrongful life

Most states do not permit actions by a child for "wrongful life" based on the failure to properly perform a contraceptive procedure or failure to diagnose a congenital defect, even if the child is born with a disability. A few states permit this action,

but they limit the child's recovery to the special damages attributable to the disability.

b. Wrongful birth

Conversely, many states do permit parents to recover for "wrongful birth" (failure to diagnose a defect) or "wrongful pregnancy" (failure to perform a contraceptive procedure). Generally, the mother can recover damages for the medical expenses of labor as well as for pain and suffering. In the case of a child with a disability, the parents may be able to recover damages for the additional medical expenses of caring for that child, and, in some states, may recover for emotional distress as well.

H. VICARIOUS LIABILITY

Vicarious liability is a form of strict liability in which one person is liable for the tortious actions of another. It arises when one person has the right, ability, or duty to control the activities of another, even though the first person was not directly liable for the injury. It is, of course, a defense to vicarious liability that the conduct of the person subject to the plaintiff's conduct was not tortious.

1. Liability of an Employer for an Employee's Torts

a. Employer's right of control

As a rule, a person is an employer if the person has the right to control the means and methods by which another performs a task or achieves a result. The person subject to this right is an employee. Absent a right to control, the person is likely an independent contractor.

b. Scope of employment

An employer is liable for the tortious conduct of an employee that is within the **scope of employment**. Conduct within the scope of employment includes acts that the employee is employed to perform or that are intended to profit or benefit the employer.

Note: Careful instructions directed to the employee do not insulate the employer from liability—even when the employee acts counter to the instructions—if the employee is acting within the scope of employment.

1) Intentional torts

An employer may be liable for the intentional tort of an employee. For example, when **force is inherent** in the employee's work (e.g., a bouncer at a bar), the employer may be responsible for injuries the employee inflicts in the course of his work. However, if an employee, acting on a long-standing personal grudge, punches a customer of the employer's store, the employer probably will not be held liable. In addition, if the **employer authorizes the employee** to act on his behalf, and the employee's position provides the opportunity to commit an intentional tort, the employer may be liable (e.g., when an employee with the power to sign contracts enters into a fraudulent contract with a third party, the employer may be liable). As with negligence, the test is whether the employee was acting within the scope of employment. Restatement (Third) of Agency § 7.07 (Am. L. Inst. 2006).

2) Detour and frolic

An employer may be liable for a tort committed by the employee during an employee's detour (a minor and permissible deviation from the scope of

employment) but not for an employee's frolic (an unauthorized and substantial deviation).

> **EXAM NOTE:** The employer and employee will be jointly and severally liable (*see* § IV.J.1. Joint and Several Liability, *infra*) for torts committed by the employee within the scope of employment.

c. Direct liability

In addition to vicarious liability for torts committed by an employee within the scope of employment, an employer is liable for its own negligence in the hiring, training, supervising, or entrustment of an employee. Generally, the employer's liability extends only to actions taken by the employee within the scope of the employment.

2. Torts Committed By Independent Contractors

a. Generally no vicarious liability

Those who engage an independent contractor are generally not vicariously liable for the torts of the independent contractor.

b. Distinguished from employee

An independent contractor is one engaged to accomplish a task or achieve a result but who is not subject to another's right to control the method and means by which the task is performed or the result reached.

i) Independent contractors tend to have specialized skills or knowledge, e.g., physicians and plumbers; and

ii) Independent contractors tend to work for many employers, while employees more often work for a single employer.

c. Non-delegable duties

A person who hires an independent contractor is vicariously liable for certain conduct, including:

i) **Inherently dangerous activities**;

ii) **Non-delegable duties** arising out of a relationship with a specific plaintiff or the public (i.e., activities that are inherently risky or that affect the public at large, such as construction work adjacent to a public highway);

iii) The duty of a storekeeper or other operator of premises open to the public to keep such premises in a reasonably safe condition; and

iv) In a minority of jurisdictions, the duty to comply with state safety statutes.

d. Apparent agency

Under the rule of apparent agency, a person who hires an independent contractor to perform services is subject to vicarious liability for physical harm if (i) the services are accepted in the reasonable belief that the person or the person's employees are rendering the services, and (ii) the independent contractor's negligence is a factual cause of harm to one who receives the services, and such harm is within the scope of liability. The reasonable belief must be traced to manifestations of the person, but the injured person need not be the person who accepts the services based on that belief.

Example: On a hot summer day, a brother and sister are walking on a city sidewalk in the neighborhood in which they live. The sister passes out. The brother hails a taxi. Painted on the taxi is the name of a taxi company that owns the taxi. The driver of the taxi is an independent contractor. The brother places his sister into the taxi, enters himself, and directs the taxi to drive them home. On the way there, the taxi, as a result of the driver's carelessness, hits a car. Both the brother and sister are injured. The taxi company is vicariously liable to the sister, as well as the brother, for the negligence of the taxi driver, even though only the brother relied on the identification of the taxi company as the provider of the taxi services.

e. Negligence in selection or supervision

A party who selects or supervises an independent contractor may be liable for his own negligence in selecting or supervising the independent contractor.

3. Business Partners and Joint Enterprise Participants

Partners in a partnership are jointly and severally liable for torts committed within the scope of the partnership. Participants in a joint enterprise, in which each has a common purpose with the other participants and there is a mutual right of control, may be liable for the tortious acts of each other that are committed within the scope of the business purposes.

By contrast, a member of a limited liability company (LLC) is generally not personally liable for torts committed by another member of the LLC.

4. Automobile Owners

a. Negligent entrustment

The owner of a vehicle (or any other object that carries the potential for harm, such as a gun or lawn mower) may be liable for the negligent acts of a driver or user to whom the car or other property was entrusted if the owner knew or should have known of the user's negligent propensities.

b. Family-purpose doctrine

Many jurisdictions, through either legislative enactments or judicial decisions, have adopted the family-purpose doctrine, providing that the owner of an automobile may be liable for the tortious acts of **any family member** driving the car with permission.

c. Owner liability statutes

Many jurisdictions have enacted statutes that provide that the owner of an automobile may be liable for the tortious acts of **anyone** driving the car with permission.

5. Parents and Their Children

a. No vicarious liability

The general rule is that parents are not vicariously liable for their minor child's torts. **Exceptions** to this general rule include situations in which:

i) The child commits a tort while acting as **the parent's agent**;

ii) State statutes provide for the liability of parents when children commit specified acts such as **vandalism or school violence**; or

iii) State statutes require that a parent, when he signs for the child's driver's license application, assumes liability for any damages caused by negligent acts that the child commits while driving a car.

b. Negligence of parents

Parents, however, are liable for their ***own*** negligence with respect to their minor child's conduct. A parent is under a duty to exercise reasonable care to prevent a minor child from intentionally or negligently harming a third party, provided the parent:

i) Has the ability to control the child; and

ii) Knows or should know of the necessity and opportunity for exercising such control.

In such circumstances, a parent who fails to exercise control may be liable for harm caused by the child, even though the child, because of his age, is not liable. Restatement (Second) of Torts § 316 (Am. L. Inst. 1965).

Example: A father gives a gun to his six-year-old son. Although the son lacks the necessary maturity and judgment to operate the gun independently in a safe manner, the father allows the son to use the gun when the father is not present. The son, while aiming the gun at a toy in his yard, misses and accidentally shoots a neighbor. The father, because of his failure to properly supervise his son, can be liable for the injury suffered by the neighbor that is directly attributable to the son's conduct, even though the son himself will not be liable because of his age.

6. "Dram Shop" Liability

Many states recognize, either by statute (a "dram shop act") or by judicial decision, a cause of action against the seller of intoxicating beverages when a third party is subsequently injured due to the buyer's intoxication. Most states limit liability to situations in which the buyer was a minor or was intoxicated at the time of the sale. Some states extend liability to a social host who serves intoxicating beverages to a minor. The states are divided as to whether the cause of action is grounded in negligence or strict liability.

7. Bailment Liability

A bailor may be liable for his own negligent actions but generally is not vicariously liable for the tortious acts of his bailee, except for those limited situations described above, such as bailments involving automobiles or parents and children.

I. LIMITATION OF LIABILITY RESULTING FROM DEFENDANT'S IDENTITY OR RELATIONSHIPS ("IMMUNITIES")

Traditionally, governmental entities, charities, and family members were immune from liability. Today, these immunities have been largely eliminated, but the rules governing the liability of these defendants continue to differ from those governing other tortfeasors.

1. Liability of the Government and Its Officers

a. Federal government

Under the Federal Tort Claims Act ("FTCA"), the U.S. government waives immunity in tort actions, with the following exceptions:

i) Certain enumerated torts (assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel and slander, misrepresentation and deceit, and interference with contract rights);

ii) Discretionary functions (i.e., planning or decision making, as opposed to operational acts);

iii) Assertion of the government's immunity by a government contractor in a products liability case if the contractor conformed to government specifications and warned the government of any known dangers in the product; and

iv) Certain traditional governmental activities (i.e., postal, tax collection or property seizure, admiralty, quarantine, money supply, and military activity).

When the U.S. government waives its sovereign immunity under the FTCA, it is liable in the same manner and to the same extent that a private person under the same circumstances would be liable, but it is not liable for punitive damages.

b. State governments

Most states have waived sovereign immunity, at least partially, through legislation. Simultaneously, however, they have imposed limits on the amount of recovery and the circumstances under which the state can be held liable. They also have created procedural barriers to recover that do not exist in claims against private defendants. **State tort claims acts vary greatly** and therefore each act must be read carefully.

Unless otherwise provided in the legislation, the same terms and conditions apply to the liability of state agencies—including prisons, hospitals, and educational institutions—as to the state itself.

c. Municipalities

1) Usually governed by state tort claims act

Today, the liability of municipalities, other local governments, and their agencies usually is governed by the provisions of state tort claims acts.

2) Governmental vs. proprietary functions

Traditionally, immunity attached to the performance of traditional government functions (such as police and court systems) but did not attach when a municipality was performing a "proprietary" function that often is performed by a private company (such as utilities and parking lots).

3) Public-duty rule

The public-duty rule provides that there is no liability to any one citizen for the municipality's failure to fulfill a duty that is owed to the public at large, unless that citizen has a special relationship with the municipality that creates a special duty. A special relationship can be shown by:

i) Promises or actions on the part of the municipality demonstrating an affirmative duty to act on behalf of the injured party;

ii) Knowledge by the municipality's agents that failure to act could lead to harm;

iii) Direct contact between the municipality's agents and the injured party; and

iv) The injured party's justifiable reliance on the municipality's affirmative duty.

d. Government officials

1) Discretionary functions

When a government official is personally sued, immunity applies if she is performing **discretionary functions** entrusted to her by law so long as the acts are done without malice or improper purpose.

2) Ministerial functions

There is no tort immunity for carrying out ministerial acts, such as driving while on government business.

3) Highly ranked officials

Many highly ranked government officials, such as legislators performing their legislative functions, judges performing their judicial functions, prosecutors, and some upper-echelon officials of the executive branches, are usually absolutely immune from personal liability.

4) Federal immunity

Under the so-called "Westfall Act," 28 U.S.C. § 2679(b)(1), the remedy against the United States under the FTCA for torts committed by federal employees precludes any personal liability on the part of a federal employee under state tort law.

2. Intra-Family Immunity

Intra-family immunity applies only to personal injuries, not to property damage.

a. Interspousal immunity

Traditionally, interspousal immunity prevented one spouse from suing the other in a personal-injury action. In most jurisdictions today, however, interspousal immunity has been extinguished, and either spouse can now institute a cause of action for personal injury against the other spouse.

b. Parent-child immunity

Traditionally, parents were immune from tort claims brought by their children. In recent decades, however, there has been a clear trend toward abolishing or greatly restricting parental immunity, but abrogation has proceeded more slowly than in the case of interspousal immunity.

Courts generally allow parents to be held liable in areas other than **core parenting activities.** For example, most states allow children to sue parents:

i) For injuries arising from **automobile accidents**;

ii) In extreme cases, such as those involving **sexual abuse and intentional tortious conduct;** and

iii) When the parent is acting in a **dual capacity,** such as when the parent is a physician treating the child for an injury (medical malpractice claim allowed).

3. Charitable Immunity

Most states have either totally or partially eliminated the common-law rule of charitable immunity. Some states cap the amount of damages recoverable from a charitable institution.

J. SHARING LIABILITY AMONG MULTIPLE DEFENDANTS

1. Joint and Several Liability

a. Definition

Under the doctrine of joint and several liability, each of two or more defendants who is found liable for a single and indivisible harm to the plaintiff is subject to liability to the plaintiff **for the entire harm**. The nondivisibility of the injury may be due to an inability to divide the injury itself or because the injured plaintiff cannot divide the injury among the wrongdoers.

The plaintiff has the choice of collecting the entire judgment from one defendant, the entire judgment from another defendant, or portions of the judgment from various defendants, as long as the plaintiff's entire recovery does not exceed the amount of the judgment.

b. Application

Examples of when joint and several liability applies include, among other instances, when:

i) The tortious acts of two or more tortfeasors combine to produce an indivisible harm (*see* § IV.E.1.b.2. Concurrent tortfeasors contributing to an individual injury, *supra*);

ii) The harm results from the acts of one or more tortfeasors acting in concert (*see* § IV.E.1.b.4. Concert of action, *supra*);

iii) Alternative liability applies (*see* § IV.E.1.b.3. Alternative causation, *supra*);

iv) Res ipsa loquitur is used against multiple defendants (such as in a surgical setting), and the plaintiff is unable to identify the tortfeasor whose acts were negligent (*see* § IV.D.2. Res Ipsa Loquitur, *supra*); and

v) The employer and the employee are both held liable (*see* § IV.H.1. Liability of an Employer for an Employee's Torts, *supra*).

2. Contribution

If two or more tortfeasors are subject to liability to the same plaintiff, and one of the tortfeasors has paid the plaintiff more than his fair share of the common liability, then he may sue any of the other joint tortfeasors for contribution, and recover anything paid in excess of his fair share. Additionally, a person seeking contribution must prove that the person against whom contribution is sought would have been liable to the plaintiff in an amount and share equal to or greater than the amount sought as contribution. *See* Restatement (Third) of Torts: Apportionment of Liability § 23 (Am. L. Inst. 2000).

a. Determining fair shares

In most jurisdictions, each party's fair share is determined by comparing how far each tortfeasor departed from the standard of reasonable care.

b. Intentional tortfeasor

Generally, a party who has committed an intentional tort may not seek contribution from another tortfeasor.

3. Several (Proportionate) Liability

A majority of states now restrict or reject joint and several liability. Many instead recognize **pure several liability**, under which **each tortfeasor is liable only for**

his proportionate share of the plaintiff's damages. In most of these jurisdictions, each defendant's share of liability is determined in accordance with how far each deviated from the standard of reasonable care. In other words, the more culpable defendant pays the higher proportion of the damages.

4. Satisfaction and Release

Once a plaintiff has recovered fully from one or a combination of defendants, she is barred from pursuing further action against other tortfeasors. The plaintiff generally may not receive double recovery.

If the plaintiff has not been wholly compensated, it is now the usual rule that a release of one tortfeasor does not release the others but instead diminishes the claim against the others, ordinarily by the amount of compensation received from the released tortfeasor. However, a release may bar claims against other tortfeasors if either (i) the release agreement so provides or (ii) the plaintiff has been entirely compensated for his losses.

5. Indemnification

Indemnification is the shifting of the entire loss from person to another.

a. Vicarious liability

Indemnification generally applies when a person is vicariously liable for the other's wrongdoing. The person who has discharged the liability is entitled to indemnity from the actual wrongdoer who was primarily responsible for the harm (e.g., an employer who pays a judgment for the tort of an employee because of the employer's vicarious liability).

b. Complete reimbursement

A tortfeasor can seek complete reimbursement (indemnity) from another tortfeasor when:

i) There is a **prior indemnification agreement** between the parties (e.g., in the construction industry, a contractor may agree to indemnify a subcontractor for the latter's negligence that may occur in the future);

ii) There is a significant difference between the blameworthiness of two defendants such that **equity requires a shifting of the loss** to the more blameworthy defendant;

iii) Significant **additional harm is subsequently caused by another tortfeasor** (i.e., one defendant pays the full judgment, including for additional harm caused by the malpractice of the treating physician); or

iv) Under **strict products liability**, each supplier has a right of indemnification against all previous suppliers in a distribution chain.

Note: Indemnity in degree of blameworthiness is rejected in jurisdictions with comparative negligence systems. These states apportion damages based on relative fault, although indemnification is allowed in other instances when it is not based on degree of fault.

K. DEFENSES TO NEGLIGENCE

1. Contributory Negligence

Contributory negligence occurs when a plaintiff **fails to exercise reasonable care** for her own safety and thereby **contributes to her own injury**. Note that when a plaintiff is suing a defendant for the negligent rendering of services, such as medical

services, the plaintiff's negligent conduct in creating the condition that the defendant has been employed to remedy is not taken into account.

a. Contributory negligence: traditional rule

At common law, and in a handful of states, the plaintiff's contributory negligence (i.e., failure to exercise reasonable care for her own safety) is a **complete bar to recovery**, regardless of the percentage that the plaintiff's own negligence contributed to the harm.

Examples of contributory negligence include:

i) A plaintiff's violation of a statute that is designed to protect against the type of injury suffered by the plaintiff; the plaintiff's violation of a statute cannot be used as a defense, however, when a safety statute is interpreted to place the entire responsibility for the harm suffered by the plaintiff on the defendant (e.g., workplace safety statutes when an injury occurs to someone not covered by workers' compensation);

ii) A plaintiff-pedestrian's crossing the street against the light; and

iii) A plaintiff driving at an unreasonable speed that deprived him of the opportunity to avoid a traffic accident.

A rescuer who takes significant risks when attempting a rescue may also be permitted to recover, despite the rescuer's negligence.

Note: Contributory negligence is **not** a defense to an intentional tort, gross negligence, or recklessness.

Traditional reasons for the rule denying recovery have included punishing a plaintiff who has herself been negligent and deterrence, in that people are more likely to be careful about their own safety if they know they cannot recover for their injuries if they are not themselves careful.

b. Last clear chance

In contributory-negligence jurisdictions, the plaintiff may mitigate the legal consequences of her own contributory negligence if she proves that the defendant had the last clear chance to avoid injuring the plaintiff but failed to do so. This doctrine has been abolished in most comparative-fault jurisdictions.

1) Helpless plaintiff

A plaintiff who, due to his own contributory negligence, is in peril from which he cannot escape is in helpless peril. In such cases, the defendant is liable if she **knew or should have known** of the plaintiff's perilous situation and could have avoided harming the plaintiff but for her (the defendant's) own negligence.

2) Inattentive plaintiff

A plaintiff who, due to his own contributory negligence, is in peril from which he could escape if he were paying attention is an inattentive or oblivious plaintiff. The defendant is liable only if she has **actual knowledge** of the plaintiff's inattention.

c. Comparative fault

Rejecting the "all-or-nothing" approach of contributory negligence, almost all jurisdictions have adopted some form of comparative fault (comparative

negligence), which attempts to apportion damages between a defendant and a plaintiff based on their relative degrees of fault. There are two basic forms of comparative fault.

1) Pure comparative negligence

In jurisdictions that have adopted the doctrine of pure comparative negligence, a plaintiff's contributory negligence is not a complete bar to recovery. Instead, the plaintiff's full damages are calculated by the trier of fact and then reduced by the proportion that the plaintiff's fault bears to the total harm (e.g., if the plaintiff's full damages are $100,000, the plaintiff is 80% at fault, and the defendant is 20% at fault, then the plaintiff will recover $20,000). Only a minority of jurisdictions have adopted the pure comparative negligence approach.

2) Modified or partial comparative fault

A majority of comparative-fault jurisdictions apply modified comparative fault. In these jurisdictions:

i) If the plaintiff is **less at fault than the defendant**, then the plaintiff's recovery is **reduced by his percentage of fault**, just as in a pure comparative-fault jurisdiction;

ii) If the plaintiff is **more at fault than the defendant**, then the plaintiff's **recovery is barred**, just as in a contributory-negligence jurisdiction;

iii) In the vast majority of modified comparative-fault jurisdictions, if the plaintiff and the defendant are found to **be equally at fault**, then the **plaintiff recovers 50% of his total damages**. In a few modified comparative-fault jurisdictions, the plaintiff recovers nothing when the jury finds that the plaintiff and the defendant are equally at fault.

3) Multiple defendants

In either a pure comparative-fault or a modified comparative-fault jurisdiction, the plaintiff's degree of negligence is compared to the total negligence of all defendants combined.

4) Relationships to other defenses

i) Last clear chance no longer applies as a separate doctrine in comparative-fault jurisdictions.

ii) Comparative fault will reduce the plaintiff's recovery even if the defendant's conduct is willful, wanton, or reckless, but it will not reduce the plaintiff's recovery for intentional torts.

iii) The impact of comparative fault on assumption of risk is considered in § IV.K.2.c. Unreasonably proceeding in face of known, specific risk, *below*.

5) Illustrations

i) Single defendant, pure comparative—The defendant is 55% negligent and the plaintiff is 45% negligent in causing the accident. They each have $100,000 in damages. The plaintiff will recover $55,000 from the defendant ($100,000 minus $45,000, which represents the plaintiff's proportionate fault of 45%), and the defendant will recover $45,000 from the plaintiff. The plaintiff will have a net recovery of $10,000

because the defendant's damages will be offset against the plaintiff's damages.

ii) Single defendant, modified or partial comparative—Same facts as above, except that the defendant will not recover anything because he was more than 50% at fault.

iii) Multiple defendants, modified or partial comparative—Two defendants are negligent: Defendant 1 is 20% negligent; Defendant 2 is 45% negligent. Combined, their negligence is 65%. The plaintiff is 35% negligent. The plaintiff can recover $65,000 from either Defendant 1 or Defendant 2 under the theory of joint and several liability. The paying defendant can then seek contribution from the nonpaying defendant. If either defendant suffered damages, he also has a right of recovery against either of the other two negligent parties because each one's negligence is less than the total negligence of the other two.

d. Imputed contributory negligence

Imputed contributory negligence occurs when another person's fault is "imputed" to the plaintiff to prevent or limit his recovery due to the other person's fault. For example, an employee's negligent driving may prevent or reduce an employer's recovery from a third party if the employer's car is damaged by the third party's negligence. The fault of one business partner can be imputed to another business partner as contributory negligence when the second party is suing a third party.

Imputed contributory negligence is disfavored. Imputed contributory negligence does not apply to:

i) A married plaintiff whose spouse was contributorily negligent in causing the harm, in a suit against a third party;

ii) A child plaintiff whose parent's negligence was a contributing cause of her harm, in a suit against a third party;

iii) An automobile passenger suing a third-party driver if the negligence of the driver of the car in which the passenger was riding also contributed to the accident; or

iv) An automobile owner in an action against a defendant driver for negligence when the driver of the owner's car also was negligent.

EXAM NOTE: Common fact patterns of imputed fault to look for on examinations are ones involving the employers and their employees and business partners.

e. Distinguishing comparative fault, contribution, and several liability

Comparative fault, contribution, and several liability all involve comparing the level of egregiousness of fault of parties in tort litigation. However, each of these concepts operates in a different context:

i) Comparative fault always involves comparing the fault of a plaintiff with the fault of one or more defendants;

ii) Contribution involves comparing the degrees of fault of co-defendants in an action or as the result of a motion by one co-defendant against another co-defendant; it does not affect the liability of any of the defendants to the plaintiff;

iii) Several liability, in the minority of jurisdictions where it operates, involves comparing the levels of fault of the co-defendants; however, unlike with contribution, the issue is how much the plaintiff will receive from each defendant.

2. Assumption of the Risk

a. Exculpatory clauses in contracts

In general, parties can contract to disclaim liability for negligence. But, courts **will not** enforce exculpatory provisions:

i) Disclaiming liability for reckless or wanton misconduct or gross negligence;

ii) When there is a gross disparity of bargaining power between the parties;

iii) When the party seeking to apply the exculpatory provision offers services of great importance to the public that are a practical necessity for some members of the public such as medical services;

iv) If the exculpatory clause is subject to typical contractual defenses such as fraud or duress; or

v) When it is against public policy to enforce agreements that insulate people from the consequences of their own negligence.

Some jurisdictions require that the contract explicitly state that claims "based on negligence" are disclaimed.

Generally, **common carriers, innkeepers, and employers cannot disclaim liability for negligence**. State statutes often provide that certain additional businesses cannot disclaim liability for negligence.

Many courts now hold that **disclaimer of liability by contract negates** the fact that the defendant owes a **duty of care** to the plaintiff in the first place. This causes the plaintiff's prima facie case for negligence to fail, rather than acting as an affirmative defense of assumption of the risk.

b. Participants and spectators in athletic events

In a negligence claim brought by a spectator of or a participant in an athletic event or similar activity, the spectator or participant necessarily subjects himself to certain risks that are usually incident to and inherent in the game or activity. Some courts hold that the other players or facility owners therefore do not owe the spectators a duty of care; others allow the defendant to defend against the claim using the affirmative defense of assumption of the risk.

c. Unreasonably proceeding in the face of known, specific risk

Traditionally, and in many jurisdictions today, a plaintiff's **voluntarily encountering a known, specific risk** is an affirmative defense to negligence that affects recovery. Most courts hold that the voluntary encountering must also be **unreasonable**.

In **contributory-negligence** jurisdictions and in a minority of comparative-fault jurisdictions, this form of assumption of the risk remains a **total bar** to recovery.

In most **comparative-fault** jurisdictions, this form of assumption of the risk has been merged into the comparative-fault analysis and merely **reduces recovery**. The plaintiff's awareness of the risk is taken into account in determining the degree to which the plaintiff is at fault, but it also can be considered in determining the reasonableness of the plaintiff's or the defendant's actions.

Consent distinguished: Consent is a defense to intentional torts, whereas assumption of the risk applies to negligence actions and actions alleging strict liability.

V. STRICT LIABILITY

A. ELEMENTS

A prima facie case for strict liability requires (i) an absolute duty to make the plaintiff's person or property safe, (ii) breach, (iii) actual and proximate causation, and (iv) damages.

The three general situations in which strict liability is imposed are:

i) **D**angerous activities;

ii) **A**nimals; and

iii) **D**efective or dangerous products (*see* VI.B. Strict Products Liability, *infra*).

MNEMONIC: DAD

EXAM NOTE: The "DAD" situations are the **only** situations in which a defendant can be directly liable without fault. There are situations in which a defendant may be vicariously liable for another's conduct without fault. For example, an employer may be vicariously liable for an employee's conduct without proof that the employer is at fault; instead, the employee's fault is imputed to the employer. *See* IV.H. Vicarious Liability, *supra*.

Strict liability for dangerous activities and animals is not recognized when the person harmed has come into contact with or proximity with the defendant's animal or dangerous activity for the purpose of securing a benefit from the contact or proximity.

B. ABNORMALLY DANGEROUS ACTIVITIES

1. Basic Rule

A defendant engaged in an abnormally dangerous activity is subject to strict liability—without any proof of negligence—for physical harm (e.g., bodily injury, property damage) caused by the activity, regardless of precautions taken to prevent the harm. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 20 (Am. L. Inst. 2010).

2. Definition of "Abnormally Dangerous"

An abnormally dangerous activity is an activity that:

i) Creates a **foreseeable and highly significant risk** of physical harm even when reasonable care is exercised; and

ii) Is **not commonly engaged in**.

In addition to these requirements, in evaluating whether an activity is abnormally dangerous, courts often consider the **gravity of the harm** resulting from the activity, the **inappropriateness of the place** where the activity is being conducted, and the **limited value** of the activity to the community.

EXAM NOTE: The focus is on the inherent nature of the activity, not on how careful the defendant may or may not have been in conducting the activity.

Common abnormally dangerous activities include mining, blasting, using explosives, fumigating, crop dusting, excavating, disposing of hazardous waste, storing gasoline in residential areas, storing toxic chemicals and gases, and storing large quantities of water and other liquids.

Jurisdictions are split as to whether fireworks displays constitute an abnormally dangerous activity. Some compare the activity to blasting, finding that fireworks displays are not commonly engaged in and present substantial risks that cannot be eliminated with the exercise of reasonable care. Other jurisdictions, relying on the Second Restatement of Torts, have found that their value to the community outweighs the risks, and do not find the activity abnormally dangerous.

Damage or injury caused by flying aircraft is no longer subject to strict liability, though a few states still apply the doctrine to ground damage from an airplane crash.

3. Scope of Risk

Strict liability for an abnormally dangerous activity exists **only if harm that occurs results from the risk that made the activity abnormally dangerous in the first place**.

Example: A defendant drops a heavy package of explosives on the plaintiff's foot, severely injuring it. The injury did not result from the risk of an explosion, which is the risk that makes the use of explosives an abnormally dangerous activity.

As in the case with superseding causes in negligence (*see* § IV.E.3.c. Intervening and superseding causes, *supra*), the defendant's liability can be cut off by unforeseeable intervening causes.

C. THE RULE OF *RYLANDS V. FLETCHER*

A defendant is strictly liable for the consequences that occur when he "…for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." *Rylands v. Fletcher*, LR 3 HL 330 (1868) (involving the release of water from the defendant's reservoir onto the plaintiff's property). The narrow holding of *Rylands*—that an owner of property with a dam on it is strictly liable for the harm caused by the release of water due to the bursting of the dam—is still followed. However, the broader principle of strict liability for harm caused by any dangerous object brought onto property by the landowner is no longer always followed. Instead, courts usually hold that only abnormally dangerous activities are subject to strict liability.

D. ANIMALS

1. Wild Animals

The Second Restatement of Torts defined wild animals as animals in a category that is "not by custom devoted to the service of mankind at the time and in the place in which it is kept." Restatement (Second) of Torts § 506(1) (Am. L. Inst. 1977). The Third Restatement narrows this definition by excluding animals that pose no obvious risk of causing substantial personal injury. Under the Third Restatement, a wild animal is an animal that belongs to a category of animals (e.g., species) that:

i) Have not been generally domesticated in the United States; and

ii) Are likely, unless restrained, to cause personal injury.

Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 22 (Am. L. Inst. 2010).

Example 1: An elephant in the United States that has been tamed and exhibited as part of a circus strikes a circus acrobat with its trunk. The elephant is categorized as a wild animal even though, in other countries, it has been domesticated. Because an unrestrained elephant is likely to cause personal injury due to its strength and

temperament, an elephant would be a wild animal under both the Second and Third Restatements.

Example 2: A pet snake escapes its enclosure and bites its owner's roommate. Snakes are not generally domesticated in the United States, and would be considered wild animals under the Second Restatement. However, under the Third Restatement, whether the snake is considered "wild" depends on the particular species of snake; a garter snake would not be considered "wild" because its species is not likely to cause personal injury, but a rattlesnake, even if defanged, would be considered "wild" because it belongs to a species of animals that are likely to cause personal injury.

Under both rules, a wild animal remains a wild animal despite being tamed for a number of years and even though its departure from that tameness is sudden and unexpected.

Example 3: A veterinarian raised a young chimpanzee as a pet. She kept the chimpanzee in her home and diligently trained and socialized it for many years. The chimpanzee has always adapted easily to meeting new people and has never injured anyone. One day, without warning, the chimpanzee bites a visitor to the veterinarian's house. Because the chimpanzee is a wild animal, strict liability will apply.

a. Dangerous propensity

Generally, the owner or possessor of a wild animal is strictly liable for harm caused by the animal, despite any precautions the possessor has taken to confine the animal or prevent the harm, if the harm arises from a **dangerous propensity** that is **characteristic of such a wild animal** or of which the owner **has reason to know**.

b. Plaintiff's fearful reaction

Strict liability applies to an injury caused by a **plaintiff's fearful reaction to the sight of an unrestrained wild animal**, in addition to injuries caused directly by the wild animal's dangerous propensity.

c. Kept animals

Strict liability applies to wild animals that are kept. The owner of land on which a wild animal is naturally found is not strictly liable for harm caused by that animal unless the landowner exercises control over the animal.

2. Abnormally Dangerous Animals

a. Known to be abnormally dangerous

The owner or possessor of an animal is strictly liable for injuries caused by that animal if he **knows or has reason to know** that the animal has **dangerous propensities abnormal for the animal's category or species**, and the harm results from those dangerous propensities. Otherwise, at common law, the owner of a domestic animal is generally liable only for negligence. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 23 (Am. L. Inst. 2010).

Example: A defendant suffered injuries when he was thrown from his neighbor's young horse. Even if the neighbor knew that the young horse was "high strung" and "skittish," these traits are unlikely to establish that the neighbor knew or had reason to know that the horse had **abnormal dangerous propensities** because of how common it is for horses to have these traits. However, if the neighbor knew that the horse had an unusual habit of throwing all of its riders, strict liability may apply.

b. "Dog-bite" statutes

Many states have enacted "dog-bite" statutes that hold owners of dogs or other domestic animals designated in the statute strictly liable for damages resulting from personal injuries.

3. Trespassing Animals

The owner or possessor of any animal, wild or domestic (other than household pets), is strictly liable for any reasonably foreseeable damage caused by the animal while trespassing on the land of another. The exception for household pets (the Third Restatement specifically mentions dogs and cats) does not apply if the owner knows or has reason to know that the dog or cat is intruding on another's property in a way that has a tendency to cause substantial harm. The general negligence standard applies if an animal strays onto a public road and contributes to an accident there. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 21 (Am. L. Inst. 2010).

4. Landlord's Liability

In most jurisdictions, the landlord is not liable for harms caused by animals owned by his tenants because the landlord lacks the required element of control over the animal. Some jurisdictions impose liability on the landlord based on negligence if the landlord is aware of the dangerous propensities of the dog or other animal and has control under the terms of the lease of the tenant's possession of animals.

E. DEFENSES TO STRICT LIABILITY

1. Contributory Negligence

In contributory-negligence jurisdictions, the plaintiff's contributory negligence is not a defense to strict liability, i.e., it does not bar recovery.

2. Comparative Fault

Courts are divided, and in some comparative-fault jurisdictions, the plaintiff's negligence does not reduce the plaintiff's recovery under a strict-liability claim. Other jurisdictions would allow recovery to be reduced by the comparative fault of the plaintiff. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 25 (Am. L. Inst. 2010).

3. Assumption of the Risk

The plaintiff's assumption of the risk bars his recovery in a strict-liability action. This defense is also referred to as "knowing contributory negligence." With animals, if the plaintiff is aware of the dangerous propensity of an animal and taunts the animal, he may be prohibited from recovering under the doctrine of assumption of the risk.

4. Statutory Privilege

Performance of an essential public service (e.g., construction of utility or sewer lines) exempts one from strict liability; however, liability may still exist under a negligence theory.

5. Trespasser

In states that continue to classify property entrants (i.e., invitee, licensee, trespasser), a property possessor is **not** strictly liable for injuries inflicted by his animals against a **trespasser**, except, in some jurisdictions, for injuries inflicted by a **vicious watchdog**. Restatement (Second) of Torts § 511 (Am. L. Inst. 1977).

Remember, however, that a landowner may be liable on a negligence theory. Restatement (Second) of Torts § 512 (Am. L. Inst. 1977).

VI. PRODUCTS LIABILITY

A product may be defective because of a defect in its **design** or **manufacture** or because of a **failure to adequately warn** the consumer of a hazard related to the foreseeable use of the product.

When a plaintiff files a products liability case, he generally has at least three possible claims on which to base an action: **negligence, strict products liability**, and **breach of warranty**. Each type of claim requires different elements. (The Third Restatement provides for only a single cause of action in the absence of additional facts, and some courts have begun to adopt this approach.)

If, however, the defendant intended or knew with substantial certainty the consequences of the defect, then the cause of action could be based on an intentional tort. As with any intentional tort claim, punitive as well as compensatory damages are recoverable. The same defenses germane to each type of tort are applicable.

A. NEGLIGENCE

As with any negligence action, the plaintiff must prove duty, breach, causation, and damages to prevail.

1. Duty

The commercial manufacturer, distributor, retailer, or seller of a product owes a duty of reasonable care to **any foreseeable plaintiff** (i.e., a purchaser, user, or bystander).

2. Breach

Failure to exercise **reasonable care** in the inspection or sale of a product constitutes breach of that duty. The plaintiff must establish not only that the defect exists, but that the defendant's negligent conduct (lack of reasonable care) led to the plaintiff's harm. In other words, had the defendant exercised reasonable care in the inspection or sale of the product, the defect **would have been discovered,** and the plaintiff would not have been harmed. The plaintiff also has the option of invoking *res ipsa loquitur* if the defect could not have occurred without the manufacturer's negligence.

Note: The individual defendant must have breached his duty to reasonably inspect or sell. Unlike in strict products liability, the negligence of others in the supply chain cannot be imputed. Rather, the plaintiff has the burden of proving fault on the part of any particular defendant.

3. Causation

The plaintiff must prove factual and proximate causation.

Note: When a retailer sells a product with a known defect and without giving adequate warnings about the defect, the failure to warn may be a superseding cause, breaking the chain of causation between the manufacturer and the injury.

4. Damages

The plaintiff is entitled to recover damages resulting from any personal injury or property damage. A claim for purely economic loss is generally not allowed under either a negligence theory or a strict-liability theory, but it must be brought as a breach-of-warranty action.

5. Defenses

The standard negligence defenses of contributory/comparative negligence and assumption of the risk apply.

B. STRICT PRODUCTS LIABILITY

Under strict liability, the manufacturer, retailer, or other distributor of a defective product may be liable for any harm to persons or property caused by such product.

EXAM NOTE: Strict products liability is only one way that a manufacturer or supplier of a product can be held liable for a plaintiff's injuries. Remember also to consider breach of warranty and negligence.

1. Elements of Claim

In order to recover, the plaintiff must plead and prove that:

i) The product was **defective** (in manufacture, design, or failure to warn);

ii) The defect existed at the time the product left the defendant's control; and

iii) The defect **caused the plaintiff's injuries** when the product was used in an **intended or reasonably foreseeable way**.

2. Defective Product

A product is defective when, at the time of the sale or distribution, it contains a manufacturing defect, a design defect, or inadequate instructions or warnings (i.e., failure to warn).

a. Manufacturing defect

A manufacturing defect is a **deviation from what the manufacturer intended** the product to be that causes harm to the plaintiff. The test for the existence of such a defect is whether the product **conforms to the defendant's own specifications**.

b. Design defect

Depending on the jurisdiction, courts apply either the **consumer-expectation test** or the **risk-utility test** to determine whether a design defect exists. Many jurisdictions use various hybrids of the two tests, and some states allow the plaintiff to prove a design defect under either test.

i) *Consumer expectation test:* Does the product include a condition not contemplated by the ordinary consumer that is **unreasonably dangerous** to him?

ii) *Risk-utility test:* Do the risks posed by the product **outweigh its benefits**?

Under the risk-utility test, in a majority of jurisdictions and under the Third Restatement, the plaintiff must prove that a **reasonable alternative design** was available to the defendant and the failure to use that design has rendered the product not reasonably safe. The alternative design must be economically feasible.

Note: Merely providing a warning does not necessarily prevent a product from being unreasonably dangerous.

c. Failure to warn

An action brought under a failure-to-warn theory is essentially the same as a design defect claim, but the defect in question is the manufacturer's failure to provide an adequate warning related to the risks of using the product. A failure to warn defect exists if there were **foreseeable risks of harm, not obvious to an ordinary user** of the product, which risks could have been reduced or avoided by providing reasonable instructions or warnings. The failure to include the instructions or warnings renders the product not reasonably safe.

1) Prescription drugs and medical devices

Under the "learned-intermediary" rule, the manufacturer of a prescription drug or medical device typically satisfies its duty to warn the consumer by informing the prescribing physician, rather than the patient, of problems with the drug or device. Restatement (Third) of Torts: Products Liability § 6 (1998). There are several exceptions, including, most importantly:

i) If the manufacturer is aware that the drug or device will be dispensed or administered without the personal intervention or evaluation of a healthcare provider, such as when a vaccine is administered through a mass inoculation; and

ii) As a result of a federal statute, in the case of birth control pills.

d. Inference of defect

A plaintiff is entitled to a res ipsa loquitur–like inference that a product defect existed if the harm suffered by the plaintiff:

i) Was of a kind that ordinarily occurs as a result of a product defect; and

ii) Was not solely the result of causes other than a product defect existing at the time of sale or distribution.

Restatement (Third) of Torts: Products Liability § 3 (Am. L. Inst. 1998).

This inference is frequently applied in cases involving a manufacturing defect when the product is lost or destroyed as a consequence of the incident that caused the plaintiff's harm.

3. Plaintiffs

To bring a strict-liability action, a plaintiff is **not** required to be in privity of contract with the defendant. **Anyone foreseeably injured** by a defective product or whose property is harmed by the product may bring a strict-liability action. Appropriate plaintiffs include **not only purchasers**, but also **other users** of the product and even **bystanders** who suffer personal injury or property damage.

4. Defendants

a. Business of seller

To be subject to strict liability for a defective product, the defendant must be in the **business of selling** or otherwise distributing products of the type that harmed the plaintiff.

b. Chain of distribution

Included as a seller are the **manufacturer** of the product, its **distributor**, and its **retail seller**.

c. Even if not responsible for the defect

If the seller is a commercial supplier of the product, the seller is subject to strict liability for a defective product, even if the revenue from sales of the product is not a significant portion of its business. The seller is generally strictly liable even if the seller was not responsible for the defect in any way and even when the product is not purchased directly from the seller. However, a retail seller or other distributor of a prescription drug or medical device is subject to liability for harm caused by the drug or device only if:

i) At the time of sale or other distribution the drug or medical device contains a manufacturing defect; or

ii) At or before the time of sale or other distribution of the drug or medical device the retail seller or other distributor fails to exercise reasonable care and such failure causes harm to persons.

d. Seller of a component part

The commercial supplier of a component, such as sand used in manufacturing cement or a switch used in an electrical device, is subject to liability if the component itself is defective, but not when the component is incorporated into a product that is defective for another reason. However, the commercial supplier of a component may be liable if that supplier substantially participates in the process of integrating the component into the design of the assembled product and that product is defective due to the integration.

e. Indemnification

Ordinarily, if the plaintiff recovers from the retailer solely for a product defect that existed at the time the product left the manufacturer's control, the retailer can recover from the manufacturer in an indemnification action.

f. Lessor

Generally, a lessor of a commercial product (e.g., car, boat, tools) is subject to strict liability for a defective product.

g. Products and services

A product is tangible personal property distributed commercially for use or consumption. A service is not a product. A seller that provides both products and services generally is **liable if the defective product is consumed**, such as food at a restaurant, but not if the product is only used, such as the vendor of a balloon ride when the balloon itself is defective. Hospitals and doctors generally are treated as providing a service, rather than a product, in cases in which the defective product is used as a tool, loaned to the patient, or even implanted in the patient.

h. Exclusions

1) Casual seller

Because the seller must be in the business of selling similar products, a casual seller, such as an individual car owner who sells a car to his neighbor or an accountant who sells her office furniture to another businessperson, is **not subject to strict liability**.

2) Auctioneer

Similarly, an auctioneer of a product generally is not subject to strict liability with respect to the products auctioned.

5. Damages

As with negligence claims, the plaintiff is entitled to recover damages for any personal injury or property damage. A claim for **purely economic loss generally is not allowed under a strict-liability theory** but must be brought as a breach-of-warranty action, as must a claim for harm to the product itself and any consequential damages arising therefrom.

6. Defenses

a. Comparative fault

In a comparative-fault jurisdiction, the plaintiff's own negligence reduces his recovery in a strict-products-liability action in the same manner as it is in a negligence action. For example, in a pure comparative-fault jurisdiction, the plaintiff's recovery is reduced by the percentage that the plaintiff's fault contributed to causing her injury.

b. Contributory negligence

In a contributory-negligence jurisdiction, the plaintiff's negligence generally is not a defense to a strict-products-liability action when the plaintiff negligently failed to discover the defect or misused the product in a reasonably foreseeable way, but it generally is when the plaintiff's fault consisted of unreasonably proceeding in the face of a known product defect.

Note: Suppliers are required to anticipate reasonably foreseeable misuses of their products.

c. Assumption of risk

Voluntary and knowing assumption of the risk is a complete bar to recovery in contributory-negligence jurisdictions and in a small number of the comparative-fault jurisdictions. In most comparative-fault jurisdictions, a plaintiff's assumption of a risk will reduce his recovery in proportion to degree of fault, but it will not be a complete bar to recovery. Assumption of the risk is a subjective standard. The plaintiff must be aware of the danger and knowingly expose himself to it.

d. Product misuse, modification, or alteration by the user

The misuse, alteration, or modification of a product by the user in a manner that is neither intended by nor reasonably foreseeable to the manufacturer typically negates liability. On the other hand, foreseeable misuse, alteration, or modification usually does not preclude recovery.

A majority of comparative-fault jurisdictions treat product misuse as a form of fault that reduces, but does not eliminate, the plaintiff's recovery. A significant minority of comparative-fault jurisdictions, and most contributory-negligence jurisdictions, hold that product misuse totally bars recovery.

e. Substantial change in product

If the product substantially changes between the time it is distributed by the manufacturer and the time it reaches the consumer (e.g., a part is reconditioned), then this change may constitute a superseding cause that cuts off the liability of the original manufacturer.

f. Compliance with governmental standards

Most often, compliance with governmental safety standards is not conclusive evidence that the product is not defective. On the other hand, the jury can consider evidence introduced by the defendant that the product complied with governmental standards and also evidence offered by the plaintiff on the product's failure to comply with these standards in deciding whether the product is defective.

However, if a product complies with federal safety statutes or regulations, a state tort claim act may be "pre-empted" if (i) Congress has explicitly so indicated, (ii) Congress has comprehensively regulated the field (i.e., "field preemption"), or (iii) it would be impossible for the manufacturer to comply with both the federal regulation and the requirements of state tort law.

g. "State of the art"

In failure-to-warn and design-defect cases, the manufacturer may introduce as evidence the level of relevant scientific, technological, and safety knowledge existing and reasonably feasible at the time of the product's distribution. In most jurisdictions, compliance with this "state of the art" standard does not bar recovery against the manufacturer as a matter of law. However, many states have enacted statutes providing that compliance with the state-of-the-art standard is a total bar to recovery.

h. Statute of limitations issues

The statute of limitations begins to run against the plaintiff with a personal injury whenever he discovers, or in the exercise of reasonable care should discover, his injury and its connection to the product. As a result, the statute of limitations may not preclude an action against a manufacturer or other seller until many decades after the manufacture and distribution of the product. For example, asbestos-related diseases may not manifest themselves until decades after the distribution of the asbestos insulation and the plaintiff's exposure to it.

i. Contract disclaimers, limitations, and waivers

A **disclaimer** or limitation of remedies or other contractual exculpation (i.e., waiver) by a product seller or other distributor **does not generally bar** or reduce an otherwise valid products-liability claim for personal injury.

EXAM NOTE: The immunity created by workers' compensation statutes protects only the plaintiff's employer from most tort claims brought by the victim. It does not provide any immunity for other defendants. Frequently, the plaintiff-employee is injured while working with a defective machine tool or with a toxic substance, such as asbestos insulation. Workers' compensation does not bar his claim against the manufacturer of these products.

C. WARRANTIES

Products-liability actions brought under warranty theories generally may be brought not only against a retailer of a product, but also against a manufacturer or distributor of goods, at least when damages are sought for personal injury or property damage.

1. Implied Warranties

a. Two types

1) Merchantability

The implied warranty of merchantability warrants that the product being sold is **generally acceptable and reasonably fit for the ordinary purposes for which it is being sold**. The seller must be a merchant with respect to the kind of goods at issue.

2) Fitness for a particular purpose

The implied warranty of fitness warrants that a product is fit for a particular purpose, but only if the **seller knows the particular purpose** for which the product is being purchased and the buyer **relies on the seller's skill or judgment in supplying the product**.

b. Claims

Any product that fails to live up to either of the above warranties constitutes a breach of the defendant's warranty; the **plaintiff need not prove any fault** on the defendant's part.

The plaintiff may recover damages for personal injury and property damage, as well as for **purely economic loss**.

Alternative versions of the Uniform Commercial Code (UCC) provisions governing warranties provide differing versions of who can recover. For example, the most restrictive UCC provisions allow only the purchaser or a member of her family or household to recover, while a more inclusive variation essentially allows any foreseeable victim to recover.

2. Express Warranties

An express warranty is a guarantee—an **affirmation of fact or a promise**—made by the seller regarding the product that is part of the **basis of a bargain**. A seller is liable for any breach of that warranty, regardless of fault. Damages for personal injury or property damage are recoverable.

3. Defenses to Warranty Claims

a. Disclaimers

Although the seller generally can disclaim warranties, in the case of **consumer goods, any limitation of consequential damages for personal injury is prima facie unconscionable**.

In the case of express warranties, a disclaimer is valid only if it is consistent with the warranty, which it usually is not.

b. Tort defenses

1) Assumption of the risk

Most jurisdictions hold that the plaintiff's unreasonable, voluntary encountering of a known product risk bars recovery.

2) Comparative fault

Most comparative-fault jurisdictions reduce recovery based on warranty claims in the same way they would strict-products-liability claims.

3) Contributory negligence

In contributory-negligence jurisdictions, most courts hold that contributory negligence does not bar a plaintiff's warranty claim, except when the contributory negligence consists of the unreasonable encountering of a known risk (i.e., the overlap between contributory negligence and assumption of the risk).

4) Product misuse in implied warranty claims

With or without using the language of "product misuse," most courts find that product misuse prevents recovery under the implied warranty of merchantability when the product is warranted to be fit for "ordinary purposes."

5) Failure to provide notice of breach

A warranty claim generally fails if the plaintiff fails to provide the seller with notice of the breach of warranty within the statutorily required time period (when applicable) or a reasonable period of time.

VII. DEFAMATION, INVASION OF PRIVACY, AND BUSINESS TORTS

A. DEFAMATION

A plaintiff may bring an action for defamation:

i) If the defendant's **defamatory language**;

ii) Is **of or concerning** the plaintiff;

iii) Is **published** to a third party who **understands** its defamatory nature; and

iv) **Damages** the plaintiff's reputation.

For **matters of public concern**, the plaintiff is constitutionally required to prove fault on the part of the defendant. If the plaintiff is either **a public official or a public figure,** then the plaintiff must prove actual malice**.**

1. Defamatory Language

Language that diminishes respect, esteem, or goodwill toward the plaintiff, or that deters others from associating with the plaintiff, is defamatory. The plaintiff may introduce extrinsic facts to establish defamation by innuendo.

An opinion is actionable if the defendant implies that there is a factual basis for that opinion. *See Milkovich v. Lorian Journal Co.*, 497 U.S. 1 (1990); *Gertz v. Welch, Inc.*, 418 U.S. 323 (1974).

2. "Of or Concerning" the Plaintiff

A reasonable person must believe that the defamatory communication refers to this particular plaintiff and holds him up to scorn or ridicule in the eyes of a substantial number of respectable members of the community.

If the defamatory language applies to a group, then a member of the group can maintain a defamation action only if the group is so small that the matter can reasonably be understood to refer to that member, unless there is other evidence that the language refers to that particular member.

Note: A deceased individual cannot be defamed. A corporation, partnership, or unincorporated association may be defamed if the language prejudices it in conducting its activities or deters others from dealing with it.

3. Publication

a. To a third party

Publication of defamatory matter is its intentional or negligent communication to a third party, i.e., to someone other than the person being defamed.

Example: If an employer confronts her employee in a face-to-face conversation during which no one else is present and no one can overhear the conversation and tells him that he is being fired because he embezzled company funds, then there is no publication and no defamation.

EXAM NOTE: Questions on defamation often center on the publication requirement. Remember that the statement must be **intentionally or negligently made to a third party**. Beware of fact patterns in which the publication requirement is not met, such as those involving a third party learning about the statement through no fault of the defendant's, or when no third party hears the statement at all.

b. Republication

A person who **repeats** a defamatory statement may be liable for defamation even though that person identifies the originator of the statement and expresses a lack of knowledge as to the truthfulness of the statement.

c. Internet service providers

A federal statute provides that internet service providers are not publishers for the purpose of defamation law.

4. Constitutional Requirements

Since the Supreme Court's opinion in *New York Times v. Sullivan,* 376 U.S. 254 (1964), which held that the First Amendment affects the plaintiff's right to recover under the common-law tort of defamation, constitutional requirements now underlie many aspects of defamation law. These constitutional requirements affect fundamental aspects of defamation law in various ways depending on (i) the category into which the plaintiff fits and (ii) the nature of the defamatory communication.

a. Public official

A public official is someone in the hierarchy of government employees who has, or appears to have, **substantial responsibility for or control over the conduct of government affairs**. **Candidates for public office** are also treated as public officials.

b. Public figure

The constitutional requirements are the same when the plaintiff is a public figure as when she is a public official. There are two ways in which a plaintiff may be categorized as a public figure:

i) *General purpose public figures*—Plaintiffs who occupy positions of such **persuasive power and influence in society** that they are deemed public figures for all purposes; and

ii) *Limited purpose or special purpose public figures*—Plaintiffs **who thrust themselves to the forefront of particular public controversies** in order to influence the resolution of the issues involved. These plaintiffs are treated as public figures **if the defamatory statement relates to their**

participation in the controversy, but they are treated as private figures if the defamation relates to any other matter.

c. Private individual

1) Matter of public concern

If the plaintiff is a **private individual** (neither a public figure nor a public official) and the statement involves a matter of **public concern**, then the defendant is entitled to **limited constitutional protections**, though not as significant as those available when the person being defamed is either a public official or a public figure.

2) Not a matter of public concern

If the plaintiff is a **private individual** and the statement is **not a matter of public concern**, then there are **no constitutional restrictions** on the law of defamation. However, many states now apply the same principles of defamation law to all cases involving private individuals as plaintiffs.

5. Falsity

a. Matters of public concern

If either (i) the defamatory statement relates to a matter of public concern or (ii) the plaintiff is a public official or a public figure, then the plaintiff must prove that the **defamatory statement is false** as part of her prima facie case.

b. Private individual plaintiff/not a matter of public concern

At common law and in some states today, a private individual plaintiff suing for defamation regarding a statement that does not involve a matter of public concern is **not required to prove falsity** as part of her prima facie case. However, the defendant may prove the truth of the statement as an affirmative defense.

6. Fault

a. Public official or public figure

If the plaintiff in a defamation action is either a public official or a public figure, then the plaintiff is required to prove that the defendant acted with **actual malice;** that is, he either had **knowledge that the statement was false or acted with reckless disregard as to the truth or falsity of the statement.** To establish a reckless disregard for the truthfulness of a statement, the plaintiff must prove that the defendant entertained **serious doubts** about its truthfulness; mere failure to check facts is not sufficient. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *St. Amant v. Thompson*, 390 U.S. 727 (1968).

b. Private individual/matter of public concern

If the plaintiff in a defamation action is a private individual and the defendant's statement involves a matter of public concern, then the plaintiff is constitutionally required to prove that the **defendant acted with fault—either negligence or actual malice**. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The level of fault will determine what damages may be recovered.

c. Private individual/not a matter of public concern

If the plaintiff in a defamation action is a private individual and the defendant's statement does not involve a matter of public concern, then the constitutional requirements do not apply. At common law, the defendant was strictly liable.

Most states today require **at least negligence** by the defendant for all defamation actions, and some now require actual malice in all defamation actions.

7. Libel and Slander Distinguished

a. Libel

Defamation by words **written, printed, or otherwise recorded** in permanent form is libel.

1) Television and radio

Today it is generally—though not universally—accepted that defamatory **radio and television broadcasts are libel,** regardless of whether they are spoken from a script.

2) Email and other electronic communication

Most courts addressing the issue have held that e-mail messages can be categorized as **libel**. It is not yet clear whether courts will hold that tweets and text messages are libel or slander.

3) General and presumed damages

Subject to the constitutionally imposed limits on damages recoverable in a defamation action, the libel plaintiff need only prove **general damages** in order to complete the prima facie tort of libel. General damages are any damages that **compensate the plaintiff for harm to her reputation**. Under the common law, the plaintiff was entitled to recover "presumed damages" as part of general damages. The plaintiff did not need to prove that she actually incurred any damages; her lawyer only needed to invite the jury to award the damages that they believed flowed from the defendant's defamatory communication.

4) Libel *per quod*

In some jurisdictions, under the doctrine of libel *per quod*, if the nature of the defamatory statement requires proof of extrinsic facts to show that the statement is defamatory, then the plaintiff must prove either special damages or that the statement fits into one of the four categories of statements that satisfy the requirements of slander per se.

b. Slander

Defamation by **spoken word, gesture, or any form other than libel** is slander. To recover for slander, the plaintiff must plead and prove one of the following.

1) Special damages

Special damages require the plaintiff to prove that a third party **heard** the defendant's defamatory comments and **acted adversely** to her. Most often, special damages involve an economic loss to the plaintiff, e.g., loss of employment or loss of business, but they also would include such things as the plaintiff's fiancé breaking off the engagement or a friend refusing to host the plaintiff in her home after hearing the defamatory comments.

2) Slander per se

Under the doctrine of slander per se, a plaintiff alleging slander need not plead and prove special damages if the statement defaming her fits into one of four categories.

To qualify as slander per se, the defamatory statement must accuse the plaintiff of one of the following.

i) *Committing a crime.* In many jurisdictions, the crime must be one involving moral turpitude or one that subjects the criminal to imprisonment.

ii) *Conduct reflecting poorly on the plaintiff's trade or profession.* Traditionally, accusing a navigator, teacher, or holy person of being a drunk satisfied this requirement, but the same accusation against a salesperson did not.

iii) *Having a loathsome disease.* Traditionally, loathsome diseases included illnesses such as leprosy or a sexually transmitted disease.

iv) *Sexual misconduct.* In modern times, examples of cases falling within this sub-category, as well as the previous one, are very rare. A few courts have held that trading sex for drugs constitutes sexual misconduct. Traditionally, this category applied when a person imputed unchaste behavior to a woman. This typically meant adultery. Under the equal protection requirements of the Fourteenth Amendment, a state would likely be required to give such protection to men, as well.

3) Parasitic damages

Once the plaintiff satisfies the requirements of the slander per se prima facie tort by proving either special damages or slander per se, at common law she could recover general damages as parasitic damages.

4) Constitutional constraints

Damages recoverable in a slander action, as well as damages recoverable in a libel action, are subject to the constitutional limitations discussed below.

8. Constitutional Limitations on Damages

If the plaintiff is a private figure and the matter is one of public concern, presumed and punitive damages may not be awarded if the plaintiff establishes the defendant's fault without proving actual malice. *Gertz v. Robert Welch Inc., supra*. However, if the plaintiff is a private figure and the matter is not one of public concern, presumed and punitive damages may be awarded even if the plaintiff establishes the defendant's fault without proving actual malice. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, Inc., 472 U.S. 749 (1985).

9. Defenses

a. Truth

Truth is an absolute defense to a claim of defamation.

Falsity as an element of a cause of action: For a defamation action brought by a public official or figure, by a limited public figure, or by a private figure regarding a statement about a matter of public concern, the falsity of the statement is an element that the plaintiff must prove.

Common-law distinction: The plaintiff need not prove fault or falsity for common-law defamation. Defamatory statements are presumed to be false, and the defendant must assert truth as a defense.

A truthful statement is not defamatory. A statement that contains slight inaccuracies may nevertheless be considered to be true and therefore not

defamatory. A statement that a person has engaged in conduct that is substantially different from the conduct in which the person did in fact engage is not considered to be true, even if the person's actual conduct was equally or more morally reprehensible.

EXAM NOTE: If a statement is true but seems like defamation, consider whether it constitutes intentional infliction of emotional distress or invasion of privacy.

b. Consent

Consent by the plaintiff is a defense, but as with other torts, a defendant cannot exceed the scope of the plaintiff's consent.

c. Absolute privileges

Statements made under the following circumstances are shielded by absolute privilege:

i) In the course of **judicial proceedings** by the participants to the proceeding (e.g., witnesses, parties, lawyers, judges);

ii) In the course of **legislative proceedings**;

iii) Between **spouses** concerning a third person; and

iv) **Required publications** by radio, television, or newspaper (e.g., statements by a political candidate that a station must carry and may not censor).

Statements made by participants in the course of judicial proceedings must be related to the proceedings in order to be privileged. A similar limitation applies to statements made by witnesses in a legislative proceeding. However, no such limitation exists for statements made by a legislator in a legislative proceeding.

d. Qualified (conditional) privilege

Statements made under the following circumstances are subject to a conditional privilege:

i) In the **interest of the publisher** (defendant), such as defending his reputation;

ii) In the **interest of the recipient of the statement** or a third party; or

iii) Affecting an important **public interest**.

Qualified privileges most often occur in the contexts of employment references, credit reports, and charges and accusations within professional societies and among members of religious and charitable organizations.

1) Abuse of privilege

A qualified privilege may be lost if it is abused. Generally, a privilege is abused by making statements outside the scope of the privilege or by acting **with malice**. Traditionally, the malice required was **express** malice—hatred, ill will, or spite. Today, most jurisdictions hold that **actual malice**, i.e., knowledge that a statement is false or acting with a reckless disregard as to the truth or falsity of the statement, will defeat a qualified privilege.

2) Burden of proof

The burden is on the defendant to prove that a privilege, whether absolute or qualified, exists. It is, therefore, an **affirmative defense**. The burden is

then on the plaintiff to prove that the privilege has been abused and therefore lost.

B. INVASION OF PRIVACY

The right of privacy **does not extend to corporations**, only to individuals. Additionally, because the right of privacy is a personal right, in most instances, this right terminates upon the death of the plaintiff and does not extend to family members.

Invasion of privacy is not a single tort but includes four separate causes of action.

MNEMONIC: I FLAP (Intrusion, **F**alse **L**ight, **A**ppropriation, **P**rivate facts)

1. Misappropriation of the Right to Publicity

A majority of states recognize an action for the misappropriation of the right to publicity, which is based on the right of an individual to control the commercial use of his identity. The plaintiff must prove:

i) The defendant's **unauthorized appropriation of the plaintiff's name, likeness, or identity** (Most often commercial appropriation cases involve the use of the plaintiff's name or picture, but this is not required. A television or radio production might mimic the plaintiff's distinctive vocal patterns. Also, an action may be maintained when the defendant uses other items closely associated with the plaintiff, such as a specially designed car with unique markings associated with a racecar driver.);

ii) For the **defendant's advantage**, commercial or otherwise;

iii) **Lack of consent**; and

iv) Resulting **injury**.

The states are split as to whether this right survives the death of the individual, with some states treating it as a property right that can be devised and inherited.

2. Intrusion Upon Seclusion

Many states recognize an action for unreasonable intrusion upon the plaintiff's private affairs (also referred to as intrusion upon seclusion). The defendant's act of **intruding,** physically or otherwise, into the plaintiff's private affairs, solitude, or seclusion, if the intrusion is **highly offensive to a reasonable person** establishes liability. Eavesdropping on private conversations by electronic devices is considered an unreasonable intrusion. Photographing a person in a public place generally is not, unless the photograph is taken in a manner that reveals information about the person that the person expects to keep private even in a public place.

Note: Unlike the other forms of invasion of privacy, no publication is required to establish liability.

3. Placing the Plaintiff in a False Light

A minority of jurisdictions recognize a separate tort of false light. The plaintiff must prove that the defendant (i) **made public** facts about the plaintiff that (ii) placed the plaintiff in a **false light,** (iii) which false light would be **highly offensive to a reasonable person**.

Attributing to the plaintiff **views** that he does not hold or **actions** that he did not take may constitute placing him in a false light. Similarly, falsely asserting that the plaintiff was a victim of a crime or once lived in poverty may be sufficient for the false light tort.

Most jurisdictions require that the plaintiff prove **actual malice** by the defendant. As considered in the discussion of defamation, this may be constitutionally required in many instances.

4. Public Disclosure of Private Facts About a Plaintiff

a. Elements

In order to recover, the plaintiff must show that:

i) The defendant **gave publicity to a matter concerning the private life** of another; and

ii) The matter publicized is of a kind that:

a) Would be **highly offensive** to a reasonable person; and

b) Is not of **legitimate concern** to the public.

b. Publicity

The requirement of publicity in the public disclosure tort requires far broader dissemination of the information than is required under the "publication" requirement of defamation. The information must be communicated at large or to so many people that it is substantially certain to become one of public knowledge.

c. Disfavored tort

Because the public disclosure tort involves the dissemination of true facts, it clearly is in tension with the First Amendment's freedoms of speech and press. Accordingly, the tort is disfavored in the modern era.

d. Disclosure of dated material

Today, most courts hold that the public disclosure of even dated material—for example, a criminal conviction from decades ago—is a matter of public interest and therefore does not create liability.

5. Damages

The plaintiff need not prove special damages for any of the invasion of privacy torts. Emotional distress and mental distress are sufficient.

6. Defenses

a. Defamation defenses

The defenses of absolute and qualified privileges applicable in defamation actions also apply to privacy actions brought on "false light" or "public disclosure of private facts" grounds. These defenses are not applicable if the defendant was intrusive.

b. Consent

Consent is a defense to invasion of privacy actions. A defendant's mistake as to consent negates this defense, no matter how reasonable the mistake.

EXAM NOTE: Remember that truth is not a defense to invasion of privacy, whereas it is a complete defense to defamation.

C. INTENTIONAL MISREPRESENTATION

A prima facie case of intentional misrepresentation is established by proof of the following six elements.

1. Defendant's False Representation

The misrepresentation must be of **a material fact**. Usually the defendant actively misrepresents the facts, such as through deceptive or misleading statements or pictures. Sometimes the misrepresentation occurs through the active concealment of a material fact, such as when the seller of a house places paneling over the basement walls in order to conceal that the foundation is in terrible condition.

There generally is no duty to disclose a material fact or opinion to the other party. However, there may be an affirmative duty to disclose a fact when the other party is:

i) In a fiduciary relationship with the defendant;

ii) Likely to be misled by statements previously made by the defendant ("partial disclosure"); or

iii) (In a minority of jurisdictions) About to enter into a transaction under a mistake as to what the basic facts of the transaction are, the defendant is aware of this, and the customs of the trade or other objective circumstances suggest that the other party would expect the defendant to disclose these facts.

2. Scienter

The defendant must have **known** the representation to be false or must have acted with reckless disregard as to its truthfulness.

3. Intent

The defendant must have intended to induce the plaintiff to act (or refrain from acting) in reliance on the misrepresentation.

4. Causation

The misrepresentation must have caused the plaintiff to act or to refrain from acting. That is, the plaintiff must have actually relied on the misrepresentation.

5. Justifiable Reliance

The **plaintiff's reliance must have been justifiable**. Reliance is not justifiable if the facts are obviously false or if the defendant is stating a lay opinion. However, the plaintiff is under no duty to investigate the truth or falsity of the statement.

6. Damages

The plaintiff **must prove actual damages** to recover; nominal damages are not awarded. Consequential damages may also be awarded.

a. Measure of damages

In most jurisdictions, recovery in misrepresentation cases is based on the "benefit of the bargain" measure (i.e., the difference between the actual value received in the transaction and the value that would have been received if the misrepresentation were true). In some jurisdictions, instead of basing the "loss of bargain" measure on the value of what was received, an amount equal to the cost of conforming the property to what was promised can be used. In some other jurisdictions, recovery is based on the "out of pocket" measure (i.e., the difference

between the amount paid and the market value of what was received). In a few jurisdictions, the defrauded person can elect which measure to use.

b. No emotional distress damages

Damages for emotional distress generally are not permitted.

c. Punitive damages

Punitive damages may be awarded.

D. NEGLIGENT MISREPRESENTATION

1. Elements and Scope

Under the law of a majority of jurisdictions, as well as that outlined in the Second Restatement:

i) The defendant, usually an accounting firm or another supplier of commercial information, who

ii) Provides false information (the "misrepresentation") to the plaintiff as a result of the defendant's negligence in preparation of the information,

iii) Is liable to the plaintiff for pecuniary damages caused by the plaintiff's justifiable reliance on the information, provided that

iv) The plaintiff is either in a contractual relationship with the defendant or is a third party known by the defendant to be a member of the limited group for whose benefit the information is supplied, and

v) The information must be relied upon in a transaction that the supplier of the information intends to influence or knows that the recipient of the information intends to influence.

Under this rule, the accountant who regularly conducts audits and furnishes financial statements and opinions routinely required by lenders, investors, purchasers, or others is not liable unless she is informed that an identified third party or third parties will be using the statement for a particular purpose.

Note: This tort generally is confined to commercial transactions; the defendant is not liable to the public in general, but only to the particular plaintiffs to whom the representation was made or to those the defendant knew would rely on it. In addition, the defendant is liable only if the plaintiff uses the information for its intended purpose or a substantially similar one.

2. Defenses

Unlike in intentional misrepresentation, in negligent misrepresentation, negligence defenses (e.g., contributory negligence or comparative fault) can be raised.

3. Damages

The plaintiff can recover reliance (i.e., out-of-pocket) damages, as well as consequential damages, if negligent misrepresentation is proven with sufficient certainty.

4. Distinguished From Ordinary Negligence

The ordinary rules of negligence apply when physical harm is a foreseeable result of a negligent misrepresentation.

Example: A defendant air traffic controller is liable for ordinary negligence when he negligently gives the pilot of an airplane incorrect information about the plane's location and speed and, as a result, the passenger-parachutist jumps to his death in Lake Erie instead of at the target airfield.

E. INTENTIONAL INTERFERENCE WITH BUSINESS RELATIONS

1. Intentional Interference With a Contract

a. Elements

To establish a prima facie case for intentional interference with a contract, the plaintiff must prove that the defendant:

i) **Knew** of a **contractual relationship** between the plaintiff and a third party;

ii) **Intentionally interfered** with the contract, **resulting in a breach**; and

iii) The breach caused **damages** to the plaintiff.

b. Nature of contractual relationship

In the majority of states, the contract in question **must be valid and not terminable at will**. However, a minority of states will allow the cause of action to be brought for interference with a contract that is terminable at will.

A contract that is voidable by one of the parties to the contract, such as due to a violation of the Statute of Frauds, may be the subject of tortious interference unless the party elects to void the contract.

c. Interference with performance other than inducing breach

The defendant may be liable whenever he prevents a party from fulfilling its contractual obligations or adds to the burden of a party's performance, even if the defendant does not induce the party to breach its contractual obligation. To be considered tortious, a defendant's actions must **substantially exceed** fair competition and free expression, such as persuading a bank not to lend money to a competitor.

d. Justification

A defendant's interference usually will be found to be justified if it is not motivated by an improper purpose. Some courts require the plaintiff to prove that the breach was induced by an improper purpose. Considerations of health, safety, morals, or ending poor labor conditions are proper purposes. For example, a defendant who tries to convince a U.S. clothing store to stop buying fabrics from a foreign textile manufacturer known for its inhumane labor conditions will not be liable for interference with a contract.

A defendant might claim that the interference is within the privilege of fair competition. If the contract is terminable at will, the defendant's attempt to induce a third party to breach its contract with the plaintiff can be justified if the defendant is a business competitor of the plaintiff who is in an existing contractual relationship with the third party.

2. Interference With Prospective Economic Advantage

A defendant may be liable for interfering with a plaintiff's expectation of economic benefit from third parties even in the absence of an existing contract.

When there is no valid contract in place between the plaintiff and the third party, courts require more egregious conduct on the part of the defendant in order to hold him liable. A defendant who is the business competitor of the plaintiff will not be held liable for encouraging the third party to switch his business to the defendant.

Some jurisdictions require that the defendant's conduct, in order to be actionable, must be either "independently tortious" (e.g., consist of fraud or assault) or violate provisions of federal or state law. Other jurisdictions and the Second Restatement engage in a more open-ended balancing process to decide whether the defendant's conduct is improper.

3. Theft of Trade Secrets

The plaintiff must own a valid trade secret (i.e., information that provides a business advantage) that is not generally known. The owner of the secret must take reasonable precautions to protect the secret, and the defendant must have taken the secret by improper means.

F. INJURIOUS FALSEHOODS

1. Trade Libel

Trade libel imposes tort liability for **statements injurious to a plaintiff's business or products**. Unlike defamation, it is not intended to compensate for harm to the personal reputation of the owner/manager of the business. Proof of special damages is required. Damages for mental suffering are not available. The plaintiff must prove:

i) Publication;

ii) Of a derogatory statement;

iii) Relating to the plaintiff's title to his business property, the quality of his business, or the quality of its products; and

iv) Interference or damage to business relationships.

2. Slander of Title

Similar to trade libel, slander of title protects against false statements that harm or call into question the plaintiff's ownership of real property. The plaintiff must prove:

i) Publication;

ii) Of a false statement;

iii) Derogatory to the plaintiff's title;

iv) With malice;

v) Causing special damages;

vi) As a result of diminished value in the eyes of third parties.

G. WRONGFUL USE OF THE LEGAL SYSTEM

1. Malicious Prosecution

A person is liable for malicious prosecution when:

i) She **intentionally and maliciously** institutes or pursues, or causes to be instituted or pursued;

ii) For an **improper purpose**;

iii) A legal action that is brought **without probable cause**; and

iv) That **action is dismissed** in favor of the person against whom it was brought.

Most jurisdictions have extended malicious prosecution to include civil cases as well as criminal actions. The civil action is sometimes known as wrongful institution of civil proceedings.

The plaintiff may recover for any damage proximately caused by the malicious prosecution, including legal expenses, lost work time, loss of reputation, and emotional distress.

Note that judges and prosecutors enjoy **absolute immunity** from liability for malicious prosecution.

2. Abuse of Process

Abuse of process is the misuse of the power of the court. To recover for abuse of process, the plaintiff must prove:

i) A legal procedure set in motion in proper form;

ii) That is "perverted" to accomplish an ulterior motive;

iii) A willful act perpetrated in the use of process that is not proper in the regular conduct of the proceeding;

iv) Causing the plaintiff to sustain damages.

For abuse of process, unlike malicious prosecution, the existence of probable cause—and even whether the defendant ultimately prevails on the merits—is **not** determinative in precluding liability. Rather, **the essence of the tort is using the legal process for an ulterior motive, such as extorting payment or recovering property**.

Example: A local school board of education sued a teacher's union and subpoenaed 87 teachers for a hearing in order to prevent the teachers from walking a picket line during a labor dispute between the union and the board of education.

Note that abuse of process, like malicious prosecution, does not require ill will or spite, but it does require proof of damages.