

TORTS Bar Exam Outline

INTENTIONAL TORTS

- General Principles

- In deciding whether π has satisfied an element, π 's hypersensitivity is ignored
- No incapacity defenses
 - Every Δ should be held liable (if otherwise appropriate) regardless of incapacity

- Battery

- Elements
 - **(1) Harmful or offensive contact by Δ**
 - *Would not be permitted by a person of normal sensitivity*
 - *Social conventions*
 - **(2) Upon π 's person**
 - *Anything attached to the π*
 - *Clothes, purse, etc.*
 - *Can even include a steed (slapping horse with rider on it → battery to rider)*
- May be indirect
 - *E.g., poisoning someone's sandwich*

- Assault

- Elements
 - **(1) Δ places π in apprehension**
 - *not fear*
 - *apparent ability creates reasonable apprehension*
 - *threatening with unloaded gun = assault*
 - **(2) Of an immediately imminent battery**
 - *immediacy: mere words insufficiently immediate*
 - *need **overt conduct***
 - *even with overt conduct, words can negate immediacy*
 - *conditional words (e.g., "If you weren't my friend...")*
 - *future threats (e.g., "Two hours from now I will...")*

- False Imprisonment

- Elements
 - **(1) Δ engages in an act of restraint**
 - *requires **intent**, not just negligence*
 - *threats can be sufficient*
 - *if would be meaningful to a person of ordinary sensibility*
 - *omission may be an act of restraint*
 - *need some prior commitment to help someone move around*

- **(2) that results in confinement of π to a bounded area**
 - *plaintiff must know of confinement*
 - *and be harmed by it*
 - *bounded: movement must be constrained (in whatever way) in all directions*
 - *not bounded if there is a reasonable means of escape that π can reasonably discover*

- **Intentional Infliction of Emotional Distress**

- Elements
 - **(1) Extreme or outrageous conduct**
 - *may be reckless; doesn't require actual intent*
 - **(2) π suffers resultant severe emotional distress**
 - *severe is a subjective term*
- **Outrageousness**
 - Conduct that exceeds **all bounds of decency** tolerated in a civilized society
 - *Mere insults \neq outrageous*
 - **“Plus factors”**—“hallmarks of outrageousness”
 - *conduct is continuous or repetitive*
 - *if Δ is common carrier/innkeeper—high standard of courtesy*
 - *anything designed to be offensive = outrageous*
 - *plaintiff is member of a “fragile class”*
 - *young children; elderly; pregnant women*
 - *racial/religious/ethnic groups & sexual minorities with specific epithets*
 - *targeting someone's known psychological sensitivity*

- **Trespass to Land**

- Elements
 - **(1) π commits act of physical invasion**
 - *in person or using a tangible object*
 - *walking on land or throwing a baseball on land*
 - *must be intentional entry*
 - *intentional invasion of that particular area, not intentional trespass*
 - **(2) to land**
 - *includes air above and soil below to a reasonable distance*

- Trespass to chattels; conversion

- Element
 - **(1) Intentional interference with chattels**
 - *anything tangible & not real estate*
 - *includes money*
- **Interference**
 - damage or dispossession
 - degree of interference determines whether conversion or trespass applies
 - big harm → conversion
 - small harm → trespass to chattels

- Affirmative defenses to intentional torts

- **Consent**
 - valid defense to all seven above intentional torts
 - only a person with **legal capacity** can consent
 - **Express**
 - but void if given as a result of fraud or duress
 - **Implied**
 - consent by custom and usage
 - routine, customary invasions (e.g., sports; tapping on shoulder)
 - defendant's reasonable interpretation of π 's objective conduct
 - **Scope**
 - can't exceed scope of consent
- **Self-defense, defense of others, defense of property**
 - The "protective privileges"
 - Considerations
 - **(1) Timing**
 - Defense only applies if action is in response to imminent or ongoing conduct
 - **(2) Allowance for mistake**
 - Need **reasonable belief** that conduct is threatening or harmful; **reasonable mistake** is okay
 - but not for defense of property (except shopkeepers)
 - **(3) Amount of force**
 - **Proportional:** what is reasonably necessary
 - deadly force if rsbl belief that a life is in danger
 - never for harms only to property
 - modern trend toward duty to retreat unless at home

- **Necessity**
 - Applies only to property torts
 - **Public necessity** (*complete defense*)
 - Defendant interferes with π 's property in an emergency situation to protect community as a whole or a significant group of people
 - **Private necessity** (*qualified defense*)
 - Defendant invades π 's property in an emergency to protect an interest of his own
 - Private-necessity Δ :
 - must pay for actual harm done
 - is not liable for punitive/nominal damages
 - is privileged to remain on π 's land in a position of safety as long as the emergency continues

DEFAMATION

- Elements

- **(1) Δ must make defamatory statement that specifically ID'd π**
 - *defamatory = tends to harm reputation*
 - *more than just insults*
 - *allegations of fact that reflect negatively on a trait of character*
 - *honesty, peacefulness, sexual modesty*
 - *plaintiff **must be alive** at time of statement*
- **(2) Δ must publish**
 - *sharing with a 3P other than π*
 - *may be negligent and still liable*
 - *more publication \rightarrow more damages*
- **(3) Damages, maybe**
 - **libel:** defamation in permanent/written format
 - no *need* to prove damages
 - **slander:** spoken
 - public/private; formal/informal
 - **Slander per se**
 - no need to prove damages if slander is **particularly harmful**
 - statements relating to business/profession, crime of moral turpitude, imputing unchastity to a woman, loathsome diseases (leprosy, venereal)
 - **Other slander**
 - must prove **economic damages**
 - loss of job, etc.

- **Affirmative defenses to defamation**
 - o **Consent; truth**
 - o **Privilege**
 - Status or identity of Δ
 - absolute privilege for married couples
 - governmental privilege
 - o includes court papers; sr. members of exec/leg branch
 - Circumstance or occasion of speech
 - “Socially useful speech”
 - o public interest in encouraging candor
 - LoRs, statements to investigating police
 - Two requirements
 - o (1) Δ must be speaking in good faith (rsbl basis for stmts)
 - o (2) Δ must confine himself to matters relevant to the purpose at hand
- **Defamation and the First Amendment**
 - o **If a matter of public concern:**
 - Defendant must prove as part of prima facie case:
 - **falsity**
 - o *eliminates truth as A.D.; BoP* $\rightarrow \pi$
 - **fault**
 - o *that Δ had no good-faith belief in truth*
 - o **public figure:** fault = intent/reckless disregard for truth
 - o **private figure:** fault = negligence (no rsbl attempt to verify)

PRIVACY TORTS

- **Appropriation**
 - o Defendant uses π 's **name or likeness** for a **commercial purpose**
 - newsworthiness exception
- **Intrusion**
 - o Invasion by Δ of π 's **seclusion** in a way that would be **objectionable** to the average person
 - plaintiff must be in a place where there is a rsbl expectation of privacy
 - no requirement of a physical trespass
- **False light**
 - o **Widespread dissemination** by Δ of a **material falsehood** about the π that would be **objectionable** to the average person
 - may be defamatory or nondefamatory
 - o allows recovery for social/emotional harm
 - cf. defamation (economic harm)

- good-faith belief is no defense
- **Disclosure**
 - **Widespread dissemination of confidential information** that is **objectionable** to the average person
 - medical records, academic records . . .
 - newsworthiness exception
- **Affirmative defenses to privacy torts**
 - **Consent**
 - **Privileges of defamation**
 - apply to **false light** and **disclosure** only

NEGLIGENCE

- **Duty, breach, causation, damage**

DUTY

- **Foreseeable victims**
 - “zone of danger”
 - exception: rescuers
 - not barred from recovery if they were outside the zone of danger at the beginning of the fact pattern
- Default standard = **reasonably prudent person** (objective standard)
- **Special standards**
 - **superior knowledge**
 - std = rsbly prudent person with that superior knowledge
 - *skills, individual articles of knowledge*
 - **physical characteristics**
 - std = rsbly prudent person with Δ 's same phys chars
 - **children**
 - **under 4**
 - legally incapable of rsbl prudence → they owe no duty
 - **age 4–18**
 - owes duty of care of rsbl child of similar age, experience, and intelligence acting under similar circumstances
 - **subjective standard**; flexible; customized; pro- Δ
 - exception
 - child is engaged in adult activity (driving motorized vehicle) → rsbly prudent person std
 - **professionals**
 - std = in performing prof'l services, owes duty of care of avg practitioner who practices in a similar community
 - nonhypothetical std (empirical comparison to colleagues)
 - custom & conformity

- usually need expert witness to establish std
- **land possessors to persons entering**
 - any kind of land (public, private, (un)developed...)
 - someone who enters land gets hurt → can they recover?
- Pertinent info/Qs:
 - (1) **How did entrant get hurt?**
 - (a) via **activity of possessor/agent** *or*
 - (b) by encountering a **dangerous condition**
 - (2) **What kind of entrant?**
 - (i) **undiscovered trespassers**
 - owed **no duty of care** under (a) or (b)
 - will never win negligence claim because is an unforeseeable victim
 - (ii) **known & anticipated trespassers**
 - *pattern of previous trespassers*
 - (a) **activities**
 - normal std: rsbly prudent person
 - (b) **dangerous conditions**
 - duty to protect only when:
 - (1) condition is **artificial**
 - (2) **highly dangerous**
 - (3) condition is **concealed**
 - (4) possessor had **advance knowledge**
 - **“all known man-made death traps”**
 - (iii) **licensees**
 - *persons who enter land w/ permission, but not to confer any economic benefit to possessor (e.g., social guests)*
 - (a) **activities**
 - normal std
 - (b) **dangerous conditions**
 - duty to protect only when:
 - (1) condition is **concealed**
 - (2) possessor had **advance knowledge**
 - **“all known traps”**
 - (iv) **invitees**
 - *persons who enter land either to confer an economic benefit or land is open to public (e.g., businesses, hospitals)*
 - (a) **activities**
 - normal std
 - (b) **dangerous conditions**
 - duty to protect only when:
 - (1) condition is **concealed**
 - (2) possessor **knew or should have known**

- **“all reasonably knowable traps”**
 - **Overview**
 - undiscovered trespasser always loses
 - others protected from activities by normal standard
 - dangerous conditions:
 - known trespassers → all known man-made death traps
 - licensees → all known traps
 - invitees → all reasonably knowable traps
 - **Exceptions**
 - **firefighter’s rule**
 - POs and firefighters cannot recover for usual hazards of the job (assumption of the risk)
 - **child trespassers**
 - always given rsbly-prudent-person std of care if injured by artificial conditions
 - Qs:
 - frequency of child trespassers. any attractions to children? (previously *attractive nuisance doctrine*)
 - age, maturity, judgment of child trespassers
 - **Satisfying duty to protect from dangerous conditions**
 - **(1) fix problem**
 - **(2) give adequate warning**
- **Statutory standards of care**
 - Criminal statutes not textually relevant to civil torts claims may sometimes be borrowed
 - If borrowed, violating statute = negligence per se
 - **Borrow statute if:**
 - **(1) Class of person**
 - *Plaintiff demonstrates that he is in the class of persons that the statute seeks to protect*
 - **(2) Class of risk**
 - *Plaintiff shows that the accident/injury was in the class of risks that the statute seeks to prevent*
 - **Exceptions (apply normal negligence std instead)**
 - **If compliance would be more dangerous than violation**
 - **Compliance is circumstantially impossible**
 - *E.g., driver has heart attack and runs red light. Can’t stop because unconscious. But ask: did Δ forget to take meds? feel prior chest pain? ...*

- Duties to act affirmatively
 - There are none
 - *E.g., no duty to rescue*
 - *Basic idea of negligence law: if you do something, do it carefully*
 - Exceptions
 - (1) special relationship
 - *some pre-existing relationship—business, familial, social ...*
 - (2) Δ put π in peril
 - (3) rescue attempted → can't abandon
 - *But no duty to put your own life in danger to rescue*
 - *Many states have altered via Good Samaritan statutes, but ignore for MBE*

- Negligent Infliction of Emotional Distress
 - Elements
 - (1) no physical trauma
 - (2) π was in zone of danger (“near miss”)
 - (3) subsequent physical manifestations
 - *reqmt prevents fraud and perjury*
 - *or*
 - Bystander cases
 - Defendant negligently injures A ; B is emotionally damaged.
 B recovers if B can show **proximity of three sorts**:
 - (1) **time** (watched it happen)
 - (2) **space** (nearby)
 - (3) **relationship** (close family member)

BREACH

- Test-taking observations
 - Breach is where π identifies specific wrongful behavior and makes argument for its wrongfulness
 - **Nontrivial. Include on essay.**
 - “Plaintiff will argue that defendant was unreasonable here because he This is unreasonable because”
 - Inverse proportionality between specificity of duty analysis and specificity of breach analysis

- **Res Ipsa Loquitur**
 - Elements
 - **(1) Injury/accident usually associated with negligence**
 - *Usually established through argument/rhetoric, but expert testimony may be useful*
 - **(2) Accidents of this type usually due to the negligence of someone in Δ 's position**
 - *Must show that π has sued the right Δ*
 - *e.g., show that Δ had control of the object*
 - Case goes to jury
 - Jury can reject res ipsa inference

CAUSATION

- **Factual causation**
 - Plaintiff establishes a connection between Δ 's breach and π 's injury
 - "But for the breach, π would have escaped harm"
 - But this is speculative; Δ may counterargue
 - "Even if" = rebuttal to "but for"
 - "But for" argument doesn't work with multiple Δ s
 - "Substantial factor" test
 - If a given Δ 's breach is capable of causing harm → causation
 - Multiple breaches capable → joint & several liability
 - Unascertainable causation (*Summers v. Tice*)
 - if Δ s' negligence makes determining causation impossible, Δ s carry BoP to show that their breach \neq cause
 - if Δ s can't discharge this burden → joint & several liability
- **Proximate (legal) causation**
 - "Shadow name" = fairness
 - Liability for foreseeable consequences of breach
- **Direct-cause cases**
 - Breach → injury
 - Liability unless outcome freakish and bizarre (unforeseeable)
- **Indirect-cause cases**
 - Breach → stuff → injury

- The “well-settled quartet” under which liability for all injury is fair
 - (1) **intervening medical negligence**
 - aggravated injury → fair to hold liable
 - (2) **intervening negligent rescue**
 - (3) **intervening protection/reaction forces**
 - Defendant liable for damage caused when Δ creates situation forcing people to flee
 - *Defendant drives through crowd. People run. Pete falls; Mary’s spiked heel crushes Pete’s hand. Δ liable for Pete’s injuries.*
 - (4) **Subsequent disease or accident**
 - *Defendant hits π with car. π breaks leg, gets cast. Next week, π loses balance and falls down stairs, breaking arm. Δ liable.*
- Other indirect-cause cases
 - If essence of breach created a reasonable worry about an outcome that was realized → foreseeability & liability

DAMAGES

- Eggshell-skull rule
 - Once π shows every other element of the case, π gets all damages suffered, even if surprisingly extensive in scope
 - take the π as you find him

AFFIRMATIVE DEFENSES TO NEGLIGENCE

- Traditional contributory negligence
 - If π is at fault in any way, no recovery
 - Last-clear-chance rule
- Traditional assumption of the risk
 - If π *knew of risk* and *voluntarily proceeded* in the face of the risk, no recovery
- Modern comparative negligence
 - Fault of π does not bar recovery
 - Jury allocates percentages; π ’s recovery reduced proportionately
 - Pure comparative (*rescuers immune from comparative fault*)
 - π always recovers something
 - Modified (partial) comparative
 - π recovers only if < 50% at fault

STRICT LIABILITY

- Injuries caused by animals

- **(1) Domesticated animals**
 - No strict liability *unless* owner knew of animal's vicious propensities
 - "one free bite"
- **(2) Trespassing cattle** → strict liability
- **(3) Wild animals** → strict liability

- Abnormally dangerous activities

- Injury relates to abnormally dangerous aspect of the activity → strict liability
- **Abnormally dangerous:**
 - **(1)** poses risk of serious harm even when rsbl care is being exercised
 - **(2)** activity is not a matter of common usage in society
- *Questions on the MBE will attempt to distract w/ lots of detail about (irrelevant) safety precautions. Right answer will be something like "Pete can recover"*

- Products liability

- *One injured by a product probably has multiple claims*
- **Strict liability if:**
 - **(1) Δ was a merchant**
 - *Someone who routinely deals in products of this type*
 - *Casual sellers = no; service providers = no; comm'l lessors = yes*
 - *Every merchant in the chain of distrib = subject to strict liability*
 - **(2) π must show defect**
 - **Manufacturing defect**
 - *anomaly/irregularity & more dangerous*
 - *departs from intended design in a way that makes it more dangerous than consumers would expect*
 - **Design defect**
 - *there is an alternative design that is (1) safer, (2) ~same cost, (3) practical; mere warning does not fix*
 - **Information defect**
 - *really a kind of design defect (defectively designed info)*
 - *residual risks that consumers would not be aware of & there is no warning about these risks*
 - *warnings must be designed to be discovered*
 - **(3) Product not altered since left Δ's hands**
 - *Presumption of nonalteration if travelled through normal channels of goods (doesn't apply to secondhand goods)*
 - **(4) π made foreseeable use of product**

- *Not necessarily intended use—not a question of misuse, just foreseeability*

- **Affirmative defenses to strict-liability claims**

- **Comparative fault**

NUISANCE

- *Really a type of harm*
- **Defendant unreasonably interferes with π 's ability to use and enjoy π 's property**
 - *May be intentional or negligent*
- **Balancing the equities**
 - *Look for an answer that mentions “balancing the equities” or “unreasonable interference with enjoyment and use”*

GRAB-BAG TOPICS

- **Vicarious liability**

- Active party is always liable for his own torts
- **Employer/employee**
 - **Scope of employment** → **vicariously liable**
 - Bar exam favorite: intentional torts (outside scope)
 - **Exceptions**
 - (1) employment involves use of force (bouncers)
 - (2) job generates animosity (tax collectors)
 - (3) when tort committed in misguided attempt to further employer's interests
- **Hirer/independent contractor**
 - **Hirer not vicariously liable**
 - **exception:** if independent contractor hurts an invitee of the hirer
 - *nondelegable landowner* → *invitee duty*
- **Car owner/car driver**
 - **Owner not vicariously liable**
 - **exception:** driver is running errand for owner (= acting as agent)
- **Parents/kids**
 - **Parents not vicariously liable**
 - *but still issues of negligent supervision, etc.*
- **Always look for direct liability first**
 - Negligent hiring, negligent supervision, negligent entrustment ...

- **Joint tortfeasors**

- What compensation can out-of-pocket Δs get against co-Δs?
 - **Majority rule: jury allocates percentage fault under comparative fault**
 - **Exceptions**
 - **Indemnification** (*100% recovery by out-of-pocket Δ*)
 - **(1) Δ** held vicariously liable
→ full indemnification from active tortfeasor
 - **(2) Nonmfr** held strictly liable on products-liability claim
→ full indemnification from mfr

- **Loss of consortium**

- **Married couple: uninjured spouse gets CoA**
 - **(1) loss of (household) services**
 - **(2) loss of society (companionship)**
 - **(3) loss of sex**