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CHAPTER 1. WHAT IS A TORT?

A **tort** is a wrong committed by one person which causes injury to another person. When a tort occurs, the law enables the victim to recover for any resulting harm. There are many different types of torts recognized in the American legal system—some of the most common include battery, trespass, negligence, and defamation.

A. It is important to note that a tort is a **civil act**, which is different from a criminal act.

1. *Civil law* is meant to compensate a party who has been wronged, while *criminal law* is meant to punish a wrongdoer.

a. If someone commits a tort, the victim will be entitled to bring a civil lawsuit against the wrongdoer to recover money damages.

b. However, when someone commits a crime, the government or the state will bring the case against the accused.

2. Note that a tort may be both a civil wrong and a crime. In this situation, the wrongdoer may be subject to 2 lawsuits.

Example — If you punch someone, you have committed the tort of battery. You have also committed the crime of battery. In this circumstance, you may be prosecuted by the state in a criminal case, and you may also be sued by the victim in a separate civil case.

B. Another difference between civil cases and criminal cases is **burden of proof**.

1. The burden of proof is the level of proof the party bringing the case must attain in order to prevail.

a. In criminal cases, the prosecution must prove every element of the crime *beyond a reasonable doubt*.

b. However, in civil tort cases, the party bringing the action must generally prove the case by a *preponderance of the evidence*, which is a lower burden of proof than that required in criminal cases.

C. Note that when the victim of a tort files a civil lawsuit, the victim becomes the **plaintiff**, and the wrongdoer becomes the **defendant**.

1. The plaintiff will then have the burden of proof to show that he is entitled to recover. In order to meet this burden of proof, the plaintiff must present evidence and establish what is called a prima facie case.

D. In tort law, a **prima facie case** means that the plaintiff has proved each element of the tort. If the plaintiff cannot prove every element of the tort, the lawsuit will be dismissed.

1. *** Note that even if the plaintiff successfully establishes a prima facie case, this does not necessarily mean that the plaintiff automatically wins, because there are several *defenses* that may be asserted by the defendant.

E. The law of torts is derived from a combination of **common law** principles and legislative **statutes**.

1. This means that when courts are faced with a tort claim, they may look towards statutory law, as well as previous decisions of judges.

2. Today, most jurisdictions have enacted comprehensive tort statutes, utilizing the Restatement of Torts as a guide. The Restatement of Torts is a publication prepared by the American law institute which presents the general principles of tort law in the United States. Even still, note that tort law varies among jurisdictions.

F. As we have learned, tort law is applied by courts in civil proceedings to provide relief for those who have suffered harm from the wrongful acts of others.

1. As such, tort law covers a wide range of issues — it provides remedies for individuals who are harmed by others, it governs the operation of motor vehicles on public roads, it holds businesses liable for pollution, and it forces manufacturers to make products that are not defective.

► In this outline, we will be discussing all the different torts, their individual elements, and the defenses to torts. Specifically, we will examine intentional torts, negligence, strict liability, products liability, nuisance, defamation, privacy torts, and economic torts.

CHAPTER 2. INTENTIONAL TORTS

A. An **intentional tort** occurs when a party intentionally harms another person.

B. Intentional torts can be committed against **people**, as well as against **property**.

1. The intentional torts against **people** — include battery, assault, false imprisonment, and intentional infliction of emotional distress.

2. The intentional torts against **property** — include trespass to land and trespass to chattels.

C. In order to recover for an intentional tort, the plaintiff must show as part of its prima facie case that the defendant acted with **intent**.

1. A person acts with **intent** when they purposely act in a way to cause harm to another person, or when they know with substantial certainty that harm may occur.

Example — As a practical joke a high school student pulls a chair out from under his friend just as the friend is about to sit. The friend falls and unexpectedly breaks his hip.

→ In this case, even though the prankster did not intend to physically harm his friend, the element of intent is satisfied because the defendant knew with substantial certainty that injury may occur by causing someone to fall to the ground.

2. The intent element will also be established when someone who intended to harm someone in a particular way ends up harming another person in a different way. In tort law, this is known as **transferred intent**.

a. Under this doctrine, intent may be transferred from the *tort* that the defendant tried to commit to the *tort* that was actually committed. In addition, intent may be transferred from the *person* that the defendant tried to harm to the *person* that was actually harmed.

Example — Freddy intends to scare Liz by throwing a rock near her. Liz sees the rock coming toward her, and ducks out of the way. The rock flies past her and hits and injures a stranger. Liz sues Freddy for the intentional tort of assault, and the stranger sues Freddy for the intentional tort of battery.

→ In this case, Freddy will be liable to both Liz and the stranger. Freddy intended to assault Liz, which he succeeded in doing, but he also injured the stranger. Even though Freddy accidentally injured the stranger, he will be liable for the intentional tort of battery based on transferred intent because Freddy's intent to assault Liz will be transferred to the battery against the stranger.

b. The doctrine of transferred intent applies to all the intentional torts against people and property EXCEPT for the tort of intentional infliction of emotional distress.

1) So if a person intends to commit any intentional tort but ends up committing intentional infliction of emotional distress, the intent will not transfer and the person will not be liable for the intentional infliction of emotional distress.

► In this chapter, we began our discussion of **intentional torts**.

We learned that in order to be liable for an intentional tort, the defendant must act with *intent*. This means that the defendant must intend to cause harm or be substantially certain that particular harm may result.

We also discussed the doctrine of *transferred intent*, which allows the defendant to be held liable for an intentional tort he accidentally committed.

CHAPTER 3. BATTERY

A. **Battery** — an intentional harmful or offensive contact with another person.

1. **Harmful or offensive contact** is any contact that society considers offensive, or in other words, any contact that would be offensive to a reasonable person.

Example — Kissing a stranger without their permission is an offensive act and can constitute battery.
Example — If a surgeon operates on the wrong body part, that can be considered a battery.
Example — Tapping a stranger on the shoulder to get his attention would not be a battery because it is socially acceptable contact.

2. If someone is aware that an individual has a certain **sensitivity** to being touched, contact with that individual's sensitive area can be considered an offensive touching.

Example — Jill knows that Jack hates being touched on the shoulder, and she taps him on the shoulder.

→ In this case, even though tapping on the shoulder is socially acceptable contact, Jill may have committed a battery because she knew Jack had a supersensitivity.

3. Battery does not require the defendant to personally touch the victim's body — a battery will occur when there has been any physical contact, including **indirect** contact.

a. This can occur when the defendant *causes an object to hit the victim*, like throwing a rock through the air, or hitting someone with a car.

b. Battery can also occur when the defendant *makes contact with anything connected to the victim*, like knocking a hat off someone's head or snatching a book out of their hands.

4. In order for the tort of battery to occur, the wrongdoer must act **voluntarily**.

Example — If a person slaps a stranger while having a seizure, no battery has occurred because the person was unable to control their movements and did not act voluntarily.

5. Battery requires **intent**.

Example — A street performer is breakdancing on the sidewalk and a child runs up to the dancer. Before noticing the child, the dancer kicks the child while dancing.

→ In this case, although there was a harmful contact with the child, there is no battery because the performer did not intend to cause the harm.

► In this chapter, we discussed the intentional tort of **battery**, which is a harmful or offensive contact with another person.

CHAPTER 4. ASSAULT

A. **Assault** — a person becomes reasonably apprehensive of an immediate harmful or offensive contact.

1. Generally, an assault takes place when a person tries to *physically harm another but fails to make contact*.

Example — Nolan throws a rock at Sandy, but Sandy sees it and ducks out of the way.

→ In this case, Nolan has committed an assault. Note that if Sandy saw the rock coming toward her and was then hit by the rock, Nolan would be liable for assault as well as battery. The assault occurred when Sandy was in fear of being hit by the rock, and the battery occurred when the rock made contact with her.

2. For an assault to occur, the victim must be **aware** that it has taken place.

Example — Nolan throws a rock at Sandy's back and Sandy never sees it coming. The rock misses Sandy.

→ In this case, there is no assault because Sandy never apprehended the harm. And even if the rock happened to hit Sandy, there would still be no assault because Sandy still did not apprehend any harm.

a. Note that, unlike assault, battery can occur even when the *victim does not know about it*.

Example — Kissing someone while they are sleeping may constitute a battery since it is an offensive act. However, swinging a sword in front of someone's face while they are sleeping will not be an assault because the person was not aware it was happening.

3. When an assault is taking place, but the **victim knows that it would be impossible for any contact to occur**, there is no assault.

Example — Dirty Harry points a gun at you and threatens to shoot, however you know that the gun is unloaded.

→ In this case, even though you were aware of Dirty Harry's actions, no assault has taken place because you knew the gun was unloaded.

4. However, if a victim ever **reasonably believes there is a possibility of contact**, even if there is no real possibility, an assault has occurred.

Example — Dirty Harry points an unloaded gun at you, but you do not know the gun is unloaded.

→ In this case, even though it was impossible to be shot, an assault has been committed because you believed that you could have been shot.

5. A victim does not have to **fear** the contact for an assault to occur.

Example — A frail elderly lady in a wheelchair throws a punch at a 400-pound sumo wrestler and misses.

→ In this case, even though the sumo wrestler does not fear the old lady, an assault has occurred because he apprehended an immediate offensive contact.

6. For an assault to occur, the threat of any contact must be **immediate**.

a. Therefore, any threat of *future* contact will NOT amount to an assault.

Example — Dirty Harry pulls out a gun and says he will shoot you in thirty minutes.

→ In this case, there is no assault because Dirty Harry is threatening to shoot you in the future.

7. Note that any **verbal threat** by itself cannot be an assault. However, **words** that are coupled with an **act** can amount to an assault.

Example — Dirty Harry is standing next to you and says that he is going to shoot you, but he does not make any movement or do anything.

→ In this case, there is no assault because words alone cannot constitute an assault. However, if Dirty Harry says he is going to shoot you while reaching in his jacket, this could be an assault because it is words coupled with an act.

► In this chapter, we discussed the intentional tort of **assault**. We learned that assault is the reasonable apprehension of an immediate harmful or offensive contact.

CHAPTER 5. FALSE IMPRISONMENT

A. **False Imprisonment** — the intentional unlawful restraint of a person to a bounded area.

1. There must be an act that **restrains** the victim.

a. Any act that prevents another to move freely will constitute a restraint.

1) The restraint must be **unlawful** — this means that a lawful arrest by a police officer will not be false imprisonment.

b. A victim can be restrained in several ways — with physical barriers, with physical force, with threatening words, and also when the victim is not released.

Example — While you are in a closet, your friend closes the door and locks you inside. → In this case, you have been falsely imprisoned.

Example — You are in the closet, your friend does not close the closet door but he pulls out a gun and tells you that if you leave the closet, you will be shot. → In this case, there is a false imprisonment because your friend confined you to the closet with threats.

3) *** Note that *threats of future harm* CANNOT be the basis for false imprisonment.

c. In order for there to be sufficient restraint for a false imprisonment claim, the **victim must generally know** that he is being confined.

Example — Sleeping beauty is asleep in her room. Prince Philip comes along and locks the door, confining sleeping beauty to her room. Before she awakes, Prince Philip unlocks the door.

→ In this case, there is no false imprisonment because sleeping beauty was not aware that she was confined.

1) *** Note that in some jurisdictions, false imprisonment will occur when the victim is unaware of the restraint, but only if the victim was *injured* during the confinement.

2. There must be restraint to a **bounded area**.

a. For an area to be bounded, the victim's freedom of movement must be limited in every direction and there must be no means of escape.

b. If the victim is *aware of any reasonable means of escape*, he cannot be falsely imprisoned.

1) *** Note that a victim is not obligated to search for a means of escape.

Example — When your friend locks you in the closet, you are aware of a secret door through which you can leave.

→ In this case, there is no false imprisonment.

Example — However, let's assume that you did not know about the secret door.

→ In this case, your friend has committed a false imprisonment because you were unaware of the escape route and you had no obligation to search for one.

Example — Let's assume that instead of the secret door, the closet had a window six stories high.

→ In this case, even though you could escape by jumping out the window, there is false imprisonment because the means of escape is not reasonable.

3. When a victim has been falsely imprisoned, the victim can **recover** not only for being confined, but also for any *injuries* suffered during a reasonable attempt to escape.

Example — Assume that after you are confined to the closet, you jump out of the six story window to escape and you break your leg.

→ In this case, you can recover for being confined to the closet; however, you cannot recover for the broken leg because jumping out of a sixth story window is not a reasonable attempt to escape.

4. Note that when retail stores confine suspected shoplifters, they can avoid liability for false imprisonment in certain situations. This is known as the **shopkeeper's privilege**.

a. Under this rule, a merchant may reasonably confine a person for a brief period of time if they have a reasonable belief that a theft has occurred, and the merchant will not be liable for false imprisonment.

► In this chapter, we discussed **false imprisonment**, which is the unlawful restraint to a bounded area.

CHAPTER 6. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A. **Intentional Infliction of Emotional Distress** — a person acts outrageously to cause another person to suffer severe emotional distress.

1. The defendant must act in an **extreme and outrageous manner**.

a. Extreme and outrageous conduct is conduct that exceeds the bounds of decent behavior. Whether the defendant's behavior meets this standard is a subjective question that is determined on a case by case basis.

1) In general, mere *insults* do not rise to extreme and outrageous conduct; however, racial slurs and consistent verbal assaults may.

2) Other *examples* of extreme and outrageous conduct include falsely reporting that a family member has died, and disfiguring the corpse of a family member.

b. Certain behavior that regularly is not outrageous *may become* outrageous conduct.

1) For instance, when a defendant directs his behavior towards *victims with certain sensitivities*, *children*, the *elderly*, and *pregnant women*.

Example — Your prankster roommate knows that you have an abnormal fear of spiders. As a joke, he puts numerous fake rubber spiders in your bed. When you go to bed, you suffer a nervous breakdown.

→ In this case, you may have a cause of action because your roommate knew of your fear and acted in complete disregard of your sensitivities.

c. Although intentional infliction of emotional distress is an intentional tort and occurs when the defendant acts with intent, it also occurs when the defendant acts *recklessly*.

1) So if the defendant acts either with intent to inflict emotional distress or with reckless disregard that emotional distress may result, he may be liable.

2. The victim must have suffered **severe emotional distress**.

a. Severe emotional distress includes any highly unpleasant mental reaction—fright, nervousness, grief, anxiety, shock, humiliation—and can also include physical pain.

3. In order to recover for intentional infliction of emotional distress, the plaintiff must prove that he has suffered **actual damages**.

a. Actual damages can be shown in many ways: by a lack of productivity, a mental disorder documented by a mental health professional, or testimony of an acquaintance about a change in behavior. They can also be shown by physical bodily harm.

b. Note that this is the only intentional tort against persons that requires *damages*.

1) For the torts of battery, assault, and false imprisonment, the victim may recover even if the victim does not suffer harm.

c. Note also that the doctrine of *transferred intent* does NOT apply to intentional infliction of emotional distress.

B. **Negligent Infliction of Emotional Distress**

1. For negligent infliction of emotional distress to occur, the defendant's negligent conduct must cause the plaintiff to suffer a *physical injury*.

a. Mental reactions by the victim are not sufficient for a finding of negligent infliction of emotional distress.

2. Many jurisdictions allow recover for negligent infliction of emotional distress when the defendant negligently injures a *family member* of the victim.

Example — Mother and child are walking along the sidewalk. A car negligently veers off the road, it hits the child, and the mother has a heart attack witnessing the collision.

→ In this case, the mother may be able to recover for negligent infliction of emotional distress.

► In this chapter, we discussed **intentional infliction of emotional distress**, which is extreme and outrageous conduct that results in severe mental or physical damages.

CHAPTER 7. TRESPASS TO LAND

A. **Trespass to land** — the intentional, unlawful, physical invasion, of another's property.

1. There must be a **physical invasion**.

a. This means the defendant must intrude on another's land in a real or *tangible* way. Therefore, shining a light onto another's property would not be a trespass.

b. Also, the physical invasion does not have to be with one's body, it can occur with an *object* as well, like a baseball or a car. As long as the defendant intentionally causes himself or an object to enter another's property, that is a physical invasion.

Example — Chewbacca pushes Han Solo onto Darth Vader's property.

→ In this case, Chewbacca has committed a trespass. Note, however, that Han Solo has not trespassed because he did not intend to go onto Darth Vader's the property.

2. Note that a landowner owns not only the surface of his land, but also a **reasonable amount of space above and below the land**, which may be trespassed upon.

Example — You throw a Frisbee over 1 neighbor's property and it lands in another's.

→ In this case, even though you have not set foot on either property, you have committed 2 trespasses. Not only are you liable to the owner of the property where the Frisbee landed, you are also liable to the owner of the property that the Frisbee flew over because the Frisbee invaded the immediate airspace above the property.

1) Note that when airplanes fly high above property, that is not a trespass because a landowner has no rights to airspace at that height.

3. A trespass will occur even if the **defendant does not know that the land belongs to another person**.

Example — Taylor lives with her grandmother. While Taylor is out of town, grandma sells the house without telling Taylor. When Taylor gets back from her trip, she goes home to her grandmother's house.

→ In this case, even though Taylor did not know that grandma sold the house, Taylor has committed a trespass against the new owner because she intended to enter onto the property.

4. A trespass can occur when the defendant once had permission to be on private property but that permission **ended** & the defendant stayed on the property or left something behind.

Example — You invite Sherlock to a party at your house. During the party, Sherlock plants a recording device in your kitchen. The party ends and all the guests leave, including Sherlock.

→ In this case, Sherlock is liable for trespass because he intentionally left the recording device after he no longer had permission to be on the property.

► In this chapter, we discussed **trespass to land**, which is the unlawful physical invasion of another's real property.

CHAPTER 8. TRESPASS TO CHATTELS AND CONVERSION

A. **TRESPASS TO CHATTELS** — any intentional interference with a person's use or possession of a personal item.

1. A **chattel** is an item of personal property.

2. Generally, if property is *slightly damaged* or if the plaintiff is *deprived of its use for a short time*, the defendant committed **trespass to chattels** and the plaintiff will be able to recover the cost of repair or other damages for loss of use.

B. **THE TORT OF CONVERSION** — a severe version of trespass to chattels.

1. If property is *severely damaged or destroyed*, or if the plaintiff is *deprived of its use for an unreasonably long time*, the defendant will be liable for **conversion** and will have to compensate the plaintiff the fair market value of the item.

C. In order for there to be either trespass to chattels or conversion, there must be **interference with another's personal property**.

1. Interference includes taking a chattel, damaging it, impairing its value or condition in any way, destroying it, and preventing the owner from its use.

2. The most common form of trespass to chattels or conversion is the act of *stealing*.

3. Note that since *animals* are personal property, causing any harm to another's animal also could be actionable.

D. For there to be a trespass to chattels or a conversion, there must be **actual damages**.

1. Actual damages include not only physical damage to the property, but also damages resulting from *loss of use*.

Example — Lance takes your bike for a five-minute joy ride without your permission, and returns it unharmed. Before the bike was returned, you wanted to use it but were unable to do so.

→ In this case, even though there was no damage to the bike, Lance has committed a trespass to chattels because he has deprived you of your right to use the bike.

However, let's assume that you never knew the bike was gone and it was returned unharmed. In this case, there is no trespass to chattels because there are no actual damages.

E. Note that **mistake is not a defense** for trespass to chattels or conversion.

Example — While leaving a party, Elton grabs a jacket he thinks is his from the coatroom. The jacket looks exactly like the one Elton owns, however it belongs to someone else.

→ In this case, even though Elton was mistaken, he may be liable for trespass to chattels because he intended to take the jacket.

► In this chapter, we discussed trespass to chattels and conversion.

Trespass to chattels is a small intentional interference with a person's use or possession of a chattel.

The tort of **conversion** is severe interference with another's personal property.

CHAPTER 9. THE DEFENSE OF CONSENT

In certain situations, the defendant will not be liable for committing an intentional tort. When the defendant has a **valid defense**, the lawsuit will be dismissed. The defenses to intentional torts include: consent, self-defense, defense of others, defense of property, recapture of chattel, right of entry, and necessity.

A. **Consent** is a defense for *any* intentional tort. There are 2 types of consent that can be given:

1. **Express consent** — occurs when the plaintiff tells the defendant that he is willing to submit to the act.

Example — Brutus tells Popeye to punch him in the stomach because he wants to show off to Olive Oil. Popeye punches him in the stomach.

→ In this case, even though a battery was committed, Popeye will not be liable because Brutus expressly consented to the contact.

a. If express consent is given as a result of a *mistake* or *duress*, or is obtained through *fraud*, it is invalid.

Example — Julia Child severely cuts her finger while cooking. She goes to the hospital and asks for a doctor to stitch up her finger. The hospital sends in a man with a white coat who tends to her injury. Afterwards, Julia learns that it was an unlicensed medical student who stitched her up, not a doctor.

→ In this case, even though Julia consented to the touching, the consent was ineffective and Julia may recover for battery.

2. **Implied consent**

a. Consent that is inferred by the plaintiff's *conduct*.

Example — You meet with some friends to play tackle football. You are tackled and suffer an injury.

→ In this case, you cannot recover for battery because you implicitly consented to the contact by taking part in the game and contact is customary in tackle football.

b. Consent can also be implied by the **law**, particularly in emergency situations.

Example — George is unconscious and brought to the emergency room. A surgeon rushes in to perform surgery.

→ In this case, even though George did not expressly permit the surgeon to touch him, the consent is implied as a matter of law, and George cannot recover for a battery.

B. When consent is given, the defendant must stay within the **scope** of the consent.

Example — Let's assume that during your tackle football game, Mike punches you in the face.

→ In this case, Mike will be liable for battery because you only consented to contact resulting from the football game, and Mike exceeded the boundaries of the consent by punching you.

C. For the defense of consent to apply, the plaintiff must have the **capacity** to give consent.

a. Therefore, those who are children, those who are intoxicated, and those who are unconscious, do not have the capacity to give consent.

► In this chapter, we discussed the defense of **consent** for intentional torts.

CHAPTER 10. SELF-DEFENSE

A. Under the **SELF-DEFENSE** doctrine, a person may use reasonable force in response to a reasonable belief that a tort is being committed or is about to be committed.

1. In other words, if the defendant believes there is a threat of **imminent harm**, he is privileged to prevent the threatened harm. However, once the threat is terminated the defendant no longer has the right to use force in self-defense.

2. For self-defense to be valid, the force used must be **reasonable**. This means that force must be proportionate to the threatened harm.

Example — An old man with a cane comes up to you on the street and starts tapping your shin with his cane. In response, you pull out a gun and shoot the man in the leg.

→ In this case, the force used was unreasonable, and you will not be able to use self-defense as a valid defense.

3. In certain situations, a person may use **deadly force** as self-defense.

a. Under the general rule, deadly force may be used only when the defendant is threatened with death or serious bodily injury.

b. Deadly force may be used for self-defense and defense of others, but never for defense of property.

4. When a defendant is faced with a threat of imminent harm, the defendant does not have a **duty to retreat**.

a. This means that the defendant can use self-defense even if he is able to escape the threatened harm.

b. *** Some jurisdictions require a defendant to retreat before using deadly force in self-defense, but most agree there is no duty to retreat when *inside your own home*.

B. **DEFENSE OF OTHERS**

1. Like self-defense, the defendant can use reasonable force to protect another individual from the threat of immediate harm.

2. The defendant is only allowed to use the level of force that the third person himself would have been allowed to use.

C. **DEFENSE OF PROPERTY**

1. Under defense of property, the defendant may use **reasonable force to prevent a tort against his property** — both land and chattels.

2. The force used for defense of property must be reasonable and deadly force can never be used to defend property.

Example — Pyro Paul is standing next to your car with a lighter and gasoline and threatening to light it on fire. In response, you push him away from the car.

→ In this case, you have used reasonable force to defend your property.

Example — After repeated break-ins, Rambo installs a shotgun booby-trap inside his home while he goes on vacation. An intruder enters his home and is shot and injured.

→ In this case, Rambo will be liable because deadly force cannot be used to defend property.

*** However, note that if Rambo had instead set up the shotgun trap at his bedroom door while he was sleeping (because he was in reasonable fear of his life), Rambo may have a valid defense because there was a threat of deadly harm to Rambo himself.

2. Note that a person may use reasonable force not only to protect property, but also to **regain possession** of wrongfully taken property.

a. However, the defendant will have this privilege only *immediately* after the chattel was taken, while the defendant is in *hot pursuit* of the item.

b. Also note that force can only be used against the person who wrongfully took the property, not against any third party.

3. In certain circumstances, a person may be privileged to **enter another's land** to reclaim chattels that are on the property.

a. Although jurisdictions differ, they generally agree that the defendant may enter another's land to reclaim a chattel when they do so in a *reasonable manner.* This entails that the defendant asks the landowner for permission to enter.

4. Note that under the **shopkeeper's privilege**, merchants may be permitted to use force and temporarily detain a person for investigation when they reasonably believe that person is stealing merchandise.

► In this chapter, we discussed **self-defense**, **defense of others**, and **defense of property**.

CHAPTER 11. NECESSITY

The defense of **necessity** gives the defendant a privilege to take or use the property of another in an emergency. Necessity only applies to intentional torts against property.

A. There are 2 types of necessity: public necessity and private necessity.

1. **Public necessity** occurs when property of another is used to protect the community or a large group of people.

a. When the defense of public necessity applies, the defendant will *not be liable for the trespass or any damages caused as a result*.

Example — A fire is spreading throughout Lois' neighborhood. To prevent the fire from spreading to more homes, Superman lifts up Lois' home and hurls it into space.

→ In this case, Superman will have a defense for his trespass, and he will not be liable for Lois' destroyed home.

2. **Private necessity** occurs when another's property is used to protect the defendant.

a. When the defense of private necessity applies, the defendant will have a *defense for the trespass*; however, he will *be liable for any damages caused by the* trespass.

Example — A hurricane approaches an area where Dale is riding in his boat. To prevent damage to his boat, Dale secures it to a nearby dock without the dock owner's permission. As a result, the boat causes $500 in damage to the dock.

→ In this case, while Dale cannot be held liable for the trespass because the use of the dock was for a private necessity, Dale will however be liable for $500 in resulting damage to the dock.

► In this chapter, we discussed the defense of **necessity** for intentional torts against property.

We learned that in *emergency situations*, a defendant may be privileged to take or use another's property.

When the defendant commits a trespass for the good of the community, that is a *public necessity*, which serves as an absolute defense.

On the other hand, if the defendant commits a trespass to protect an interest of his own, that is a *private necessity*, and the defendant can be liable for any resulting damages.

CHAPTER 12. NEGLIGENCE

Negligence is the failure to act with the level of care that a reasonable person would have exercised under the same circumstances. The tort of negligence allows a victim to recover for harm that the defendant did not intend to cause, but was caused by accident.

A. There are 4 elements that make up the **prima facie case for negligence** — duty, breach, causation, and damages. Each element must be proved in order for the plaintiff to recover under negligence.

1. **Duty**

a. To recover under a theory of negligence, the plaintiff must show that the defendant owed a duty to the plaintiff.

b. In our society, everyone has a duty to conduct themselves as a *reasonable person* would under similar circumstances.

c. Note that in certain cases, the *level of care* that is owed will vary depending on the circumstances or the relationship between the plaintiff and defendant.

2. **Breach**

a. Once a duty of care has been established, the plaintiff must show that the defendant has breached the duty.

b. Note that a breach may consist of either an *act*, or an *omission* to act when there is a duty to do so.

3. **Causation**

a. In determining cause, the plaintiff must show that the defendant's act was the *actual* and *proximate* cause of the harm. (This means that the breach must have actually caused the plaintiff's injury and also that the harm was a foreseeable result of the breach).

4. **Damages**

a. Lastly, the plaintiff must show that he has been injured as a result of the defendant's breach. If the plaintiff does not suffer harm, he cannot recover for negligence.

B. *** Note that if a plaintiff successfully proves all 4 elements and makes a prima facie case for negligence, the lawsuit still may be dismissed because there are several **defenses** to negligence.

► In this chapter, we began our discussion on negligence, and we learned the 4 elements that make up a claim for negligence.

CHAPTER 13. DUTY

A. In our society, everyone has a duty to behave like a **reasonable person**. However, the reasonable person standard of care will vary from case to case.

Example — Jen is driving on a country dirt road in the middle of nowhere. She accidently runs a stop sign and hits Billy Bob.

→ In this case, Jen had a duty to drive as a reasonable person would drive, which entails paying attention and obeying traffic laws.

Example — Instead assume that Jen is driving through a school zone crowded with students, and accidently runs a stop sign and hits a schoolgirl.

→ In this case, Jen will be held to a higher standard because the level of care required to drive in a school zone is much higher than when driving on an empty country road.

B. In the majority of jurisdictions, a defendant owes a duty of care only to **foreseeable victims**.

1. This is Justice Cardozo's *zone of danger* rule from the landmark tort case ***Palsgraf versus Long Island Railroad Company*** (1928):

Facts — A train employee dropped a small package which happened to contain fireworks. There was an explosion, which caused heavy scales all the way at the other end of the platform to fall and injure the plaintiff.

Holding — Justice Cardozo (majority) held that a defendant owes a duty only to *foreseeable victims*. Since it was unlikely plaintiff would be harmed by the dropped package, she was *outside the foreseeable zone of danger* and could not recover.

*** Note that a minority of jurisdictions follow Justice Andrew's dissent from *Palsgraf*, which held that a duty of care is owed to everyone, even those who are not reasonably foreseeable victims.

C. A defendant owes a duty not only to foreseeable victims, but also to anyone who goes to the **rescue** of a victim.

1. Once a victim has been put in danger, it is foreseeable that someone would attempt to rescue the victim. Therefore, a defendant will be liable for any injuries caused by a rescue attempt, unless the rescue attempt was unreasonable.

2. However, a defendant is generally not liable when *professional rescuers* (like firemen) are injured coming to the aid of a victim in danger.

D. In general, **there is no affirmative duty to act**.

1. This means a reasonable person is not under a duty to go to the aid of others in danger.

Example — You are walking down the sidewalk at night and see a helpless man bleeding to death after being hit by a car. You walk by and do nothing to help him.

→ In this case, you cannot be held liable because there is no legal duty to rescue a stranger in an emergency.

2. However, there are 4 situations where an affirmative duty to act does exist:

(i) When there is a **special relationship** between the parties — like between parent and child, between employer and employee, and between host and guest.

(ii) If the defendant **voluntarily chooses to help a victim in danger**, the defendant will then owe the victim a duty of reasonable care and, in most jurisdictions, must finish the rescue efforts.

(iii) The defendant will have a duty of rescue when the defendant was **responsible for putting the plaintiff in danger** in the first place.

(iv) If the state has passed a **law** that requires people to assist others in certain emergency situations, then the defendant may have a statutory duty of rescue.

► In this chapter, we began our discussion of **duty**, the first element of negligence.

CHAPTER 14. STANDARDS OF CARE

Although everybody has a duty to act with reasonable care, the level of care will vary for each situation. The standard of care applicable in each case depends not only on the circumstances that existed at the time, but also requires looking at the defendant and his relationship with the plaintiff.

A. A person with a **DISABILITY**

1. ***Rule*** — Generally, a person with a disability has a duty to act as a reasonable person with the same disability would have acted.

Example — If a blind person crosses the road and causes an accident—while the blind person will not be held to the same standard of care as a person with eyesight—the blind person can be found negligent if a reasonable blind person would not have crossed the road under the circumstances.

B. There is a special standard of care for **CHILDREN**

1. ***Rule*** — In most jurisdictions, children (meaning minors or persons younger than 18 years of age) are required to act as a reasonable child of like age and maturity would act.

a. *** However, if a child engages in an *adult activity* or an *inherently dangerous activity*, then the child may be held to a reasonable adult person standard.

Example — Jimmy, a 15-year-old boy, steals a car and accidentally hits a pedestrian. The pedestrian sues Jimmy for negligence.

→ In this case, Jimmy will be held to the same standard of care as a reasonable adult because Jimmy was engaged in the adult activity of driving a car.

2. Note that in many jurisdictions, children under the age of 7 cannot be held liable for negligence. And for children between the ages of 7 and 14, there is a rebuttable presumption that they are incapable of negligence.

C. **PROFESSIONALS** are held to a higher standard of care than the reasonable person.

1. ***Rule*** — Professionals are required to act as a reasonable person with the same knowledge, skills and experience would act in the same situation.

a. This applies to doctors, lawyers, accountants, and engineers. When a professional acts negligently, that is known as *malpractice*.

2. *** Note that **doctors** also have a *duty to disclose* all relevant information (including benefits and risks involved) when recommending treatment to a patient.

a. If a patient chooses to undergo a certain courts of treatment based on *lack of informed consent* and suffers harm as a result, the doctor may be held liable.

D. **COMMON CARRIERS** and **INNKEEPERS** are held to the highest level of care expected.

1. **Common carriers** — businesses that transport people, like airlines, buses and cruise ships.

2. **Innkeepers** — businesses that provide accommodations for guests, like hotels and restaurants.

3. Both common carriers and innkeepers owe a **duty of utmost care** (rather than the duty of ordinary care) to protect their passengers and guests from injury.

5. **LANDOWNERS** or **LAND OCCUPIERS** owe certain duties to people who come on their property. This will be discussed in detail in the next chapter.

► In this chapter, we learned that everyone has a duty to conduct themselves in accordance with a certain standard of care. Other than the reasonable person standard which is applied to the average person, we learned that the disabled, children, professionals, common carriers and innkeepers, and land owners and occupiers, are all held to their own standard of care.

CHAPTER 15. LANDOWNERS AND OCCUPIERS

A. An **owner occupier** is someone who is in possession of land — whether they own the land or whether they are a tenant and occupy the land.

B. The **standard of care** that an owner occupier is held to depends on the type of person who comes onto the property.

1. **TRESPASSER** — a person who enters or occupies another's property without permission.

a. ***Rule*** — Generally, an owner occupier has no duty to exercise reasonable care for a trespasser. However, if the owner occupier has reason to know that the trespasser is on their land, they have a duty to protect the trespasser from artificial conditions that involve a risk of death or serious bodily harm.

1) This standard of care will be met if the owner occupier warns of, or makes safe, the artificial condition.

Example — McDonald owns some farmland and digs a hole to build a well. The hole is hidden from plain view because it in the middle of a heavily wooded area. A trespasser comes along and falls in the hole.

→ In this case, McDonald will not be liable because owner occupiers do not owe a duty to undiscovered trespassers.

Example — Lets instead assume that McDonald was told by neighbors that they saw a homeless man living in the woods. McDonald does nothing and the homeless man falls in the hole and is injured.

→ In this case, since McDonald knew there was a trespasser on his land, McDonald may be liable for negligence because owner occupiers owe a duty to discovered trespassers to protect them from dangerous artificial conditions.

b. Note that owner occupiers owe **child trespassers** a special duty of care based on the **attractive nuisance doctrine**.

1) ***Rule*** — Under this doctrine, an owner occupier who has reason to know that children are likely to trespass, may be held liable for injuries to child trespassers if caused by a dangerous artificial condition on the land that is likely to attract children who are unable to appreciate the risk involved.

a) *Examples* — The attractive nuisance doctrine has been applied to hold owner occupiers liable for injuries to children caused by abandoned cars, piles of lumber, trampolines, and swimming pools.

2. **LICENSEE** — a person who is permitted to enter another's property, but they do so for their own benefit, not for business purposes.

a. The most common licensees are *social guests*.

b. ***Rule*** — Owner occupiers owe licensees a duty to warn of, or make safe, all natural and artificial dangerous conditions that are known to the landowner and that are not obvious.

1) In other words, owner occupiers are required to protect licenses from dangerous conditions only if the owner occupier is aware of the dangerous condition.

2) And if the dangerous condition is one that is *obvious* to a reasonable person, the owner occupier is not under a duty to protect licensees from the condition.

Example — Max is having a party at his mansion. In the backyard, there is an empty swimming pool. Max does not display any warning sign or put a fence around the pool. Ralph, a guest at the party, walks up to the pool, jumps in and breaks his leg.

→ In this case, Max will not be liable to Ralph because owner occupiers owe licensees a duty to warn of or make safe all known dangerous conditions, but not dangers that are obvious to a reasonable person.

3. **INVITEE** — a person who comes onto another's property for business purposes.

a. For instance, customers at the bank or the grocery store are invitees.

b. ***Rule*** — Owner occupiers owe invitees a duty to inspect and discover any natural or artificial dangerous conditions and to either warn the invitee of the danger or make the condition safe.

Example — A grocery store is mopping the floor and displays warning signs that the floor is slippery. A customer sees the sign but slips and falls anyway.

→ In this case, the store would probably not be liable because it acted within the standard of care by warning customers of the slippery floor.

Example — Let's assume that a customer spills some soda on the floor of the grocery store. The store owner never becomes aware of the spill. The next day, another customer come in, slips and falls on the soda, and breaks her arm.

→ In this case, even though the grocery store was unaware of the spill, the store will be liable to the customer because business owners have a duty to make reasonable inspections of the property to discover any dangerous conditions, and the grocery store failed to do so.

► In this chapter, we learned that the standard of care of a land owner occupier varies and depends on whether the plaintiff is a trespasser, a licensee, or an invitee.

CHAPTER 16. BREACH — RES IPSA LOQUITOR

In a negligence lawsuit, once duty has been established, the plaintiff must then show that the defendant breached the duty. In order to prove breach, the plaintiff must offer evidence that the standard of care was not met. However, in certain cases, the plaintiff can recover for negligence WITHOUT having to prove breach.

A. Under the doctrine of **res ipsa loquitor**, there will be an *inference* of breach because the plaintiff's injury could only have resulted from defendant's negligence.

B. **Res ipsa loquitor** is generally applied when the plaintiff has been injured by an unusual or catastrophic accident, and there is no evidence of negligence or any such evidence has been destroyed.

1. Res ipsa loquitor is Latin for "the thing speaks for itself".

C. In order to invoke res ipsa loquitor, the plaintiff must establish 3 elements:

(i) That the accident does not normally occur and usually would not happen unless someone was negligent,
(ii) That the negligence is attributable to the defendant. (This is usually proven by showing that the cause of the harm was under the *exclusive control* of the defendant.)
(iii) That the plaintiff, or any third party, did not contribute to the accident.

Example — A passenger plane crashes in the ocean. Karl, who is a passenger on the plane, survives but is injured. The plane sinks to the bottom of the ocean and all evidence is lost.

→ In this case, if Karl sues the airline for negligence, he may invoke res ipsa loquitor.

(i) Planes usually do not crash without some negligence.
(ii) The negligence is attributable to the airline because the plane was owned and under the control of the airline.
(iii) Neither Karl, nor anyone else, contributed to the plane crash.

*** Since all 3 res ipsa loquitor elements can be established, Karl can recover from the airline for negligence without proving breach.

D. Once a plaintiff establishes res ipsa loquitor, that does not mean that the plaintiff is going to win the case.

1. Res ipsa loquitor just allows the plaintiff with no evidence to bring a negligence case to a jury, and the jury is permitted to assume that the defendant was negligent.

2. The jury may then find that the defendant was negligent or they may find that the defendant was not negligent.

► In this chapter, we discussed the breach element of negligence, and we examined the doctrine of **res ipsa loquitor**.

CHAPTER 17. BREACH — NEGLIGENCE PER SE

When a person *violates a statute*, and as a result another person is harmed, the victim may establish negligence by proving that the defendant violated the statute. This is **negligence per se**.

A. The doctrine of **negligence per se** allows a plaintiff to establish negligence without proving the defendant has breached a duty.

1. Essentially, all the plaintiff has to do is show the defendant violated a statute.

B. Although rules vary among jurisdictions, in the majority of jurisdictions 2 elements must be met to establish **negligence per se**:

(i) Plaintiff must be within the *class of people* intended to be protected by the statute, and
(ii) The statute must have been intended to prevent the *type of harm* suffered by the plaintiff.

Example — Emily is driving her car excessively over the speed limit. As a result, she can't slow down and she hits a pedestrian, who sues Emily for negligence.

→ In this case, the plaintiff was a member of the class of people that speed limit statutes intend to protect. And secondly, speeding statutes are intended to prevent injuries resulting from car accidents. Since both elements of negligence per se have been met, the pedestrian may recover without proving duty and breach, but just proving that Emily was speeding.

Example — The state passed a building safety code that requires contractors to install certain reinforcements in the beams of a house. When building a home, Larry the contractor violates the building safety code and fails to install the reinforcements. After homeowner moves in, the house collapses and injures homeowner.

→ In this case, since the state building safety code was intended to protect people from harm caused by the collapse of housing structures, Larry's violation of the code is negligence per se.

Example — Lets instead assume that after the homeowner moves into the house, he is injured from toxic contaminants emanating from the supporting beams of the house. The homeowner sues Larry for negligence.

→ In this case, although the statute was intended to protect people within the home, it was not intended to protect against toxic contamination. Therefore, Larry will not be liable under negligence per se, and the homeowner must prove each element of common law negligence to recover.

C. When a plaintiff establishes negligence per se, that does not mean the plaintiff will recover. It just means there is a *presumption* of duty and breach, which may be *rebutted* by the defendant.

► In this chapter, we discussed the doctrine of **negligence per se**, which is essentially negligence based on the violation of a statute. For negligence per se to apply, the plaintiff must be within the class of people protected by the statute, and the defendant's violation of the statute must have caused the type of harm that the statute intended to prevent.

CHAPTER 18. ACTUAL CAUSATION

A. In a negligence case, once duty and breach have been established, the plaintiff must then prove **causation**. Causation consists of 2 parts:

1. **Actual cause** — the defendant's act directly resulted in the plaintiff's harm.

2. **Proximate cause** — the harm was a foreseeable result of the defendant's act.

B. **Actual Cause** (also known as **cause-in-fact**) is usually determined by the "**BUT FOR" TEST**.

1. The but for test asks the question, "but for the defendant's actions, would the plaintiff have been injured?" In other words, if the plaintiff's injury would have occurred regardless of the defendant's actions, then there is no actual cause.

Example — Denny sets off a bottle rocket firework and the firework flies into his neighbor Mr. Smith's house. The house burns down and Mr. Smith sues for negligence. During litigation, it is discovered that the house was already burning down before Denny set off the firework.

→ In this case, since Mr. Smith's house would have burned down anyway, Denny's negligent conduct did not actually cause the house to burn down and he will not be liable.

C. The but for test easily applies to cases with 1 defendant. However, when there are **2 or more defendants**, actual causation can be determined by either the *substantial factor test* or the *alternative causes test*.

1. **"SUBSTANTIAL FACTOR" TEST** — used when there are multiple defendants who cause injury and *any 1 defendant by himself would have caused the injury*.

Rule — When two or more defendants negligently cause harm to a plaintiff, and the conduct of either defendant alone was a substantial factor in causing the harm, both defendants will be held liable.

Example — At the same time Denny sets off a firework, Sam also sets off a firework. Both fireworks enter Mr. Smith's home, the house burns down, and Mr. Smith sues both parties for negligence. Assume that either firework alone would have caused the fire.

→ In this case, Mr. Smith cannot recover under the but for test, however he may recover under the substantial factor test. Since the conduct of Denny alone would have caused the fire, and since also the conduct of Sam alone would have caused the fire, each defendant's act was a substantial factor in causing the harm. Therefore, both Denny and Sam actually caused the harm and both will be held liable.

2. **ALTERNATIVE CAUSES TEST** (also known as the alternative liability test) — applies when there are multiple defendants but *only 1 actually caused the harm*.

Rule — When there are multiple defendants but it is not clear who actually caused the harm, the burden of proof shifts to the defendants to show who caused the injury. And if the defendants cannot prove who caused the injury, then both will be liable.

Example — Denny and Sam simultaneously set off identical bottle rocket fireworks. Both fireworks enter Mr. Smith's house and the house burns down. Afterwards, it is discovered that only one firework caused the house fire, while the other flew through the house and out the other side. Mr. Smith sues both Denny and Sam.

→ In this case, since it cannot be shown which firework actually caused the fire, the court will shift the burden of proof to the defendants, Denny and Sam, to show who caused the fire. If nothing can be proven, both Denny and Sam will be liable.

D. **JOINT AND SEVERAL LIABILITY**

1. Joint and several liability rules are applied when there are *multiple defendants* in a negligence claim or any tort claim.

2. Under this doctrine, the plaintiff may recover all the damages from any single one of the defendants, regardless of their individual share of the liability.

3. Joint and several liability is used in the majority of jurisdictions.

a. In these jurisdictions, the plaintiff can choose to sue *just one* defendant for the full amount of damages caused by numerous defendants. Afterwards, it's the responsibility of the defendants to sort out their respective proportions of liability and payment.

► In this chapter, we discussed **actual causation**. We learned that the but for test will usually determine whether the defendant's actions actually caused the plaintiff's harm. However, when there are multiple defendants, other tests may be used to determine actual cause. We also learned about joint and several liability, which permits a plaintiff to hold any defendant fully liable for tortious harm that has been caused by several defendants.

CHAPTER 19. PROXIMATE CAUSATION

For the causation element of negligence to be met, there must actual causation as well as proximate causation. Actual cause establishes a defendant's liability, while proximate cause limits that liability. So proximate cause will not be considered until actual cause has been established.

A. **Proximate cause** — the plaintiff's harm was a *foreseeable* result of the defendant's negligence.

1. Therefore, if the plaintiff has suffered *unforeseeable* harm, generally there is no proximate cause and the plaintiff cannot recover.

2. Whether specific harm is **foreseeable** depends on the circumstances of each case, and the rules for determining proximate cause vary among jurisdictions.

B. **Foreseeability** generally becomes an issue in 3 situations:

(i) When harm comes about in an *extremely unusual manner*.
(ii) When the plaintiff has *supersensitivities*.
(iii) When there are *intervening forces* that contribute to the harm.

C. **Harm comes about in an extremely unusual manner**

1. ***Rule*** — Most jurisdictions agree that if the harm results in an **extremely unusual manner** or if the harm itself is unexpected, the defendant is not liable even though some harm was foreseeable.

Example — A driver approaches a crosswalk while Patricia is walking across it. The driver is negligent and has to swerve to miss Patricia. He hits a telephone pole. The telephone pole falls and breaks open a homeowner's fence. Almost immediately, a dog runs through the opening and bites Patricia. Patricia sues the driver for negligence.

→ In most jurisdictions, the driver will not be liable. Although it is foreseeable that a negligent driver may injure a pedestrian on a crosswalk, the harm was unexpected and it came about in an unforeseeable manner.

D. **Supersensitivity** (*thin skulled* or *eggshell plaintiff*)

1. ***Rule*** — If a plaintiff is injured because of a *supersensitivity*, the defendant will be liable for the injuries even though they are unforeseeable.

Example — Ricky negligently rear ends a parked car at a stoplight traveling at a slow pace of 10 miles per hour. The passenger in the car is an old lady with heart problems and as a result of the slight collision, the lady suffers a heart attack.

→ In this case, even though it is unforeseeable that a heart attack would result from a fender bender, Ricky will be liable for the full extent of the lady's injuries because defendants take plaintiffs as they find them.

E. **Intervening forces**

1. Intervening forces — events that occur after the defendant has acted negligently that contribute to the plaintiff's harm.

a. Note that the effects of intervening forces on proximate causation vary among jurisdictions.

2. ***Rule*** — In general, a defendant will be liable for the result of any intervening force that is a **foreseeable** consequence of the defendant's negligence.

a. For instance, when a defendant acts negligently, it is foreseeable that the endangered or injured plaintiff may try to **escape, may be rescued, or may receive medical treatment**.

1) If the plaintiff or any third party suffers harm as a result of an escape attempt, a rescue attempt, or careless medical treatment, the defendant WILL be liable because these intervening forces are considered to be foreseeable.

3. ***Rule*** — When an intervening force is **unforeseeable** (like an act of god), the defendant may still be liable; however, the defendant will only be liable if the resulting harm was foreseeable.

Example (of a situation where the intervening force is unforeseeable, but the harm is foreseeable) — Dory negligently leaves the stove on in her apartment and the apartment fills with gas. Lightning strikes the apartment and it blows up, along with other nearby apartments. The neighbors sue Dory for negligence.

→ In this case, even though the lightning, an unforeseeable intervening force, caused the apartments to blow up, Dory will still be held liable because it is foreseeable that an apartment filled with gas may blow up.

4. ***Rule*** — Note that if the intervening force is ever an **unforeseeable intentional tort or crime by a third party**, the defendant will not be liable.

Example — Let's assume Dory negligently fills her apartment with gas, leaves, and a burglar attempts to break into the apartment. While picking the lock on the apartment door, a spark ignites the gas-filled apartment and nearby apartments blow up. The neighbors sue Dory for negligence.

→ In this case, although a gas filled apartment exploding is foreseeable, Dory will not be liable because the intervening force was an unforeseeable crime.

5. Note that in basically every jurisdiction, when BOTH the intervening force and its results are unforeseeable, the defendant will not be liable.

► In this chapter, we discussed **proximate causation**. We learned that if the plaintiff has suffered unforeseeable harm, there is no proximate cause and the plaintiff cannot recover under a theory of negligence.

CHAPTER 20. DAMAGES

Once duty, breach, and causation have been established, the plaintiff must show that he has suffered damages.

A. **Damages** are generally measured by physical injuries, medical care, monetary losses, and damage or loss to property.

B. A plaintiff has a **duty to mitigate damages**

1. This means that once the plaintiff has been injured by the defendant's negligence, the plaintiff must do whatever is reasonable to limit the extent of the damages.

a. For instance, if the plaintiff has suffered physical injuries, he must seek proper medical treatment.

2. If the plaintiff does not mitigate damages, the defendant will not be liable for any damages that could have been avoided.

C. **Collateral source rule**

1. Under the collateral source rule, the defendant will be liable for the full extent of damages caused by his negligence, regardless of whether any of the damages have been paid for by another source, like an insurance company.

a. Therefore, jurisdictions that apply the collateral source rule do not admit any evidence that shows that the plaintiff has been or will be compensated by an insurance company.

► In this chapter, we discussed the damages element of negligence. Now that we have covered all the elements of negligence, let's discuss the defenses.

CHAPTER 21. CONTRIBUTORY AND COMPARATIVE NEGLIGENCE

Once the plaintiff has established a prima facie case for negligence, this does not mean the plaintiff wins. The defendant may then assert defenses which may reduce or eliminate liability.

The **defenses for negligence** include contributory negligence, comparative negligence, and assumption of risk. Note that the rules for these defenses vary among jurisdictions, and each jurisdiction uses its own form of contributory or comparative negligence.

A. **CONTRIBUTORY NEGLIGENCE** occurs when the plaintiff himself acts negligently to contribute to his injuries.

1. The basis for this defense is that everybody has a duty to protect their own safety, and a plaintiff who fails to do so may be barred from recovering.

2. Generally, when a plaintiff is contributorily negligent, that is a complete bar to recovery.

Example — Sarah gets a flat tire while driving on the highway. Instead of pulling over to the shoulder, she parks the car in the middle of the highway. Sure enough, another driver comes along and negligently runs into Sarah's car. Sarah sues.

→ In a contributory negligence jurisdiction, Sarah will not recover anything because she contributed to her injuries by negligently parking in the middle of the highway, and contributory negligence is a complete bar to recovery.

3. Note that very few jurisdictions follow this contributory negligence standard. Most have adopted the comparative negligence standard.

B. In a **COMPARATIVE NEGLIGENCE** jurisdiction, a negligent plaintiff may still recover, but will only recover based on how much they were at fault.

1. In such jurisdictions, the court or jury will assign a percentage of fault to each party, and will then reduce the plaintiff's recovery by the percentage of fault assigned to the plaintiff.

Example — Assume that in our previous example Sarah suffers $10,000 worth of damage to her car. At trial, the jury finds that the driver who ran into her car was 70% at fault, while Sarah was 30% at fault. → In a comparative negligence jurisdiction, Sarah will recover 70% of $10,000, or $7000.

2. There are 2 types of comparative negligence:

1. **Pure comparative negligence** jurisdictions allow the plaintiff to recover even if his negligence is greater than the defendant's. So if the plaintiff is mostly at fault for an accident, he can still recover under a pure comparative negligence theory.

2. **Partial comparative negligence** (which most jurisdiction apply) does not allow the plaintiff to recover if the plaintiff's negligence exceeds a certain threshold. In most jurisdictions, if the plaintiff is more than 50% at fault, he cannot recover.

► In this chapter, we began discussing defenses to negligence that apply when the plaintiff has contributed to his injuries. We learned about contributory negligence and comparative negligence.

CHAPTER 22. ASSUMPTION OF RISK

A. **Assumption of risk** — the plaintiff acts knowing there is risk of harm

B. To establish assumption of risk, the defendant must show that:

(i) The plaintiff *recognized and understood the particular risk* involved, and
(ii) *Voluntarily* took on that risk.

1. If it is proven that the plaintiff assumed of risk, the defendant will have a complete defense to negligence and the lawsuit will be dismissed.

a. *** Note that assumption of risk only applies as a defense for negligence, not for intentional torts.

C. Assumption of risk may be **express** or **implied**:

1. **Express** assumption of risk exists when the plaintiff expressly consents to the risk of harm. (This is common in a waiver form.)

Example — Matt goes skydiving for the first time with a skydiving company. Before he jumps out of the plane, he signs a waiver form that explicitly states that he understands the risks involved and assumes the risks. Matt then goes skydiving and as a result suffers injuries due to the negligence of the skydiving company.

→ In this case, Matt will be barred from recovery because he expressly assumed the risk.

2. Assumption of risk can also be **implied** from the plaintiff's conduct.

a. Typically, assumption of risk is implied in situations or *activities that carry inherent risks*. Note that implied assumption of risk rules vary among jurisdictions.

Example — Turning to our previous skydiving example, even if Matt had not signed the waiver form, he would still probably be unable to recover for any negligently caused injuries because it is safe to assume that he knew the risks involved in skydiving and voluntarily assumed them.

b. Implied assumption of risk may also apply to *spectators at sporting events*.

Example — When a spectator chooses to stand along the sidelines at a football game, it is implied that the spectator assumes the inherent risks of being hit by the football or by players running out of bounds.

D. Note that in **emergency situations**, when the plaintiff impliedly assumes a risk in a situation where he has no other choice, assumption of risk will not be a valid defense.

Example — Spiderman jumps in front of a negligently driven car to save Mary Jane. Spiderman gets injured and sues the driver.

→ In this case, the driver will be liable because even though spider man assumed the risk, it will not apply because Spiderman was faced with an emergency situation.

► In this chapter, we discussed **assumption of risk**. Under assumption of risk, plaintiff will be barred from recovering for negligence when plaintiff acted voluntarily and knew there was risk of harm.

CHAPTER 23. STRICT LIABILITY

Strict liability means liability without fault. When strict liability applies, the defendant will be liable for harm caused to the plaintiff even if the defendant was not negligent. This is because strict liability establishes an absolute duty to make conditions safe. So even when a defendant exercises the highest amount of care, he may still be liable under strict liability. The doctrine of strict liability applies in several contexts: *products liability*, when the plaintiff is injured by an *animal*, and when the plaintiff is injured by an *abnormally dangerous* activity.

A. **ANIMALS**

1. **Wild animals**

a. ***Rule*** — When a **wild animal** causes harm, the owner or keeper of the wild animal generally will be strictly liable.

Example — Dundee owns an alligator and it is kept in the most expensive up-to-date secure cage. The alligator somehow escapes and bites Sue.

→ In this case, even though Dundee has exercised the highest amount of care in keeping the alligator, Dundee will be strictly liable for Sue's injuries because owners of wild animals are strictly liable for any harm caused by the wild animal.

2. **Domestic animals** (include household pets and livestock)

a. ***Rule*** — The owner or keeper of a domestic animal will be strictly liable for harm caused by the animal if the owner has reason to know the animal has a specific propensity to cause harm, and if the harm caused by the animal was due to the dangerous propensity.

Example — Dorothy knows that her small dog, Toto, likes to bite people riding bikes. One day, Toto bites the wicked witch of the west, a cyclist. A few hours later, Toto runs into Aunt Em and knocks her over.

→ In most jurisdictions, Dorothy will be strictly liable to the witch, since biting was a known dangerous propensity. However, there will be no strict liability to Aunt Em because there was no known propensity for knocking people down.

b. *** Note that in regards to domestic animals (particularly livestock), many jurisdictions hold owners strictly liable for any damage caused by livestock when they *escape and trespass* on another's property.

B. **ABNORMALLY DANGEROUS ACTIVITIES**

1. Whether an activity is abnormally dangerous depends on certain factors; but generally, an abnormally dangerous activity can be defined as an *uncommon activity that involves a high degree of potential harm*.

a. Classic *examples* include dealing with explosives, dealing with toxic chemicals, and demolition of buildings.

2. ***Rule*** — When a plaintiff is injured from an abnormally dangerous activity, the owner or operator associated with the abnormally dangerous activity will be strictly liable.

C. Note that there is a **defense** for strict liability — **assumption of risk**:

1. If the plaintiff voluntarily partakes in an abnormally dangerous activity and knows the risks, the plaintiff may be barred from recovering under strict liability.

Example — Sue breaks into Dundee's alligator cage and is bitten.

→ In this case, Sue has assumed the risk and she could not recover under strict liability.

► In this chapter, we discussed **strict liability**. We learned that strict liability makes a person legally responsible for harm caused by his conduct, even if he was not at fault or negligent.

CHAPTER 24. PRODUCTS LIABILITY

A. **Products liability** refers to liability for any harm caused by defective consumer products.

1. When a person suffers damages resulting from an unsafe product, that person may have a *cause of action against any party who introduced the product into the stream of commerce* — which includes designers, manufacturers, distributors, and sellers.

2. Note that a **product** is generally thought of as *tangible personal property*; but it may be considered an intangible like gasoline, pets, and real estate.

B. When a plaintiff has been injured by a defective product, the plaintiff may bring a products liability claim under several different **theories**, depending on the jurisdiction:

1. The plaintiff may sue for strict liability, negligence, breach of warranty, or misrepresentation. And in rare situations, the plaintiff can sue for the intentional tort of battery.

2. In practice, products liability lawsuits usually include every theory possible in order to give the plaintiff the best chance of recovery.

C. Regardless of which theory is used, the plaintiff must generally prove 2 elements to recover for products liability:

(i) That there was a *defect* in the product that caused injury, and
(ii) That the defect *existed at the time the product left the defendant's control*.

1. Note that showing that the defect existed when it left the defendant's control will typically be inferred when the product has gone through the normal chains of distribution. Therefore, the second element is often easy to prove.

2. Establishing the first element is not as simple. In order to prove the product was defective, the plaintiff must show that there was some sort of imperfection that made the product unreasonably dangerous.

a. *Examples* — Common defects include faulty auto brakes, contaminated food, exploding bottles of soda, and lack of warning labels.

D. There are 3 general types of products liability claims.

1. **Manufacturing defects** — occur when a product has been improperly assembled.

a. A manufacturing defect can be proven by showing that there is a unique flaw in the product or that the product did not meet certain specifications.

Example — An automobile that is improperly welded together at the assembly plant would be classified as a product with a manufacturing defect.

2. **Design defects** — occur when a product has been designed in a way that poses a risk to the public.

a. Depending on the jurisdiction, a design defect can be proven by showing either that the product was more dangerous than expected, or that a reasonable alternative was available.

Example — The design of a vehicle with the fuel tank placed in such a position that it will explode on low-speed impact would be classified as a design defect.

3. **Marketing defects** deal with improper instructions and failures to warn consumers of unexpected dangers in the product.

a. A marketing defect can be proven simply by showing that there was no warning or the warning was inadequate.

1) Note that warnings are generally required only when a danger would not be expected; therefore, *obvious dangers do not require warnings*.

Example — The reasonable person does not need to be warned that knives cut, that dynamite explodes, or that electrical appliances should not be used in the shower.

► In this chapter, we began our discussion of **products liability**, which refers to the liability of a manufacturer or supplier for placing a defective product into the hands of a consumer. We learned that in order to recover for harm resulting from a product, the plaintiff must show that the product was defective, due to a manufacturing defect, a design defect, or a marketing defect.

CHAPTER 25. PRODUCTS LIABILITY THEORIES

A. STRICT LIABILITY

1. The majority of jurisdictions hold **manufacturers and suppliers strictly liable for any harm caused by their defective products**. This means that there will be liability even when the highest degree of care has been exercised in handling the product.

a. *** Note that strict liability does not mean the manufacturer or supplier will be liable whenever a product causes harm. The plaintiff still must prove:

(i) There was a *defect* in the product that caused the injury, and
(ii) The defect *existed at the time the product left the defendant's control*.

2. Almost **any person injured by a defective product can sue under strict liability —** including *purchasers* of the product, *users* of the product, as well as *bystanders*.

Example — Peter purchases fireworks that are defective. As Peter is walking home with the fireworks, they suddenly explode and injure a pedestrian on the other side of the street. The pedestrian sues the fireworks manufacturer under strict liability.

→ In this case, even though the pedestrian was a bystander, he will be able to recover for products liability.

3. Strict liability generally applies only to those **regularly engaged in the business** of manufacturing or supplying the defective product. This means that *individuals* or *occasional sellers* of products will not be held strictly liable.

4. Most jurisdictions do not apply strict liability to **sellers of used products** — because it is unreasonable to expect that a used product is completely free of defects.

5. A plaintiff cannot usually recover under strict liability when an injury has been caused by a **test model** that has not been sold —because a defective product must be introduced into the stream of commerce for strict liability to apply.

B. **NEGLIGENCE**

1. If the plaintiff brings a products liability claim under a theory of **negligence**, the plaintiff must prove that the defendant **failed to exercise ordinary care** in the manufacture, design, or marketing of a defective product.

a. In negligence products liability claims, the focus is on the defendant's *conduct*; while in a strict liability case, the defendant's conduct is irrelevant.

2. Everyone in the chain of distribution—from manufacturers to suppliers—has a **duty to supply a safe product**.

a. This means the product must be designed to be safe, it must be inspected and tested, it must be assembled carefully, and it must contain adequate warnings and directions for use.

b. Also, a seller cannot *misrepresent* the safety of the product and must *disclose* all defects.

3. Everyone in the chain of distribution—manufacturers, suppliers and everyone in between—owes a **duty of care** to anyone who is likely to be injured by a defective product.

a. So similar to strict liability, foreseeable victims include the *purchaser* of the product, any *users* of the product, and *bystanders*.

4. *** Note that in negligence cases (as well as strict liability cases) the plaintiff can recover for personal injuries and property damage caused by a defective product, but cannot recover for economic loss.

C. **BREACH OF WARRANTY**

1. **Breach of warranty** occurs when a seller fails to fulfill certain representations made about a product.

2. Note that breach of warranty is not a tort action, but a contract action.

a. *Example* —when a product does not conform with a warranty, there is a breach of warranty and the buyer can sue the seller.

D. **MISREPRESENTATION**

1. **Misrepresentation** refers to giving consumers false security about the safety of a particular product.

a. This can be done, not only by *making false statements about a product*, but also by *omitting important facts*. Therefore, under the theory of misrepresentation, a seller must *disclose* all known possible defects in a product.

2. If a buyer relies on any misrepresentation in purchasing a defective product, and as a result suffers damages, the victim may sue under misrepresentation to recover.

E. **INTENTIONAL TORT**

1. If a manufacturer or supplier sells a product that he knows is defective or dangerous, he may be liable for **battery** to any person injured by the product.

► In this chapter, we discussed the different theories that may be the basis for a products liability claim. We learned that while products liability is generally considered a strict liability offense, a person harmed by a defective product may also recover under negligence, breach of warranty, misrepresentation, and intentional tort.

CHAPTER 26. PRODUCTS LIABILITY — CONTINUED

A. Recall that almost any person—the buyer, a user, or a bystander—can recover when injured by a defective product. However, the **plaintiff's injury must result from normal or foreseeable** use of the product in order to hold the defendant liable.

Example — Johnny owns a riding lawnmower. Johnny needs a haircut, and decides to turn the lawnmower upside down and use the blades to cut his hair. As he does, the blades come off the lawnmower and injure Johnny.

→ In this case, even though the lawnmower was defective, Johnny will not recover because he misused the lawnmower in a manner that is completely unforeseeable.

B. **When a product is misused**, but its misuse is **reasonably foreseeable**, the defendant may be held liable for any resulting harm.

Example — Johnny uses his riding lawnmower to ride to his friend's house which is a mile away. It is winter and the roads are covered in snow and ice. While driving down the road, the brakes negligently fail, which causes Johnny to crash and sustain injuries. Johnny sues for products liability.

→ In this case, even though the lawnmower is not intended to be driven in the snow, Johnny may be able to recover because that is clearly a foreseeable use of the product.

C. **Manufacturers are required to warn of any possible dangers** that could be created by foreseeable misuse.

Example — In our example, the manufacturer of the lawnmower could have escaped liability if they had adequately warned consumers not to not drive in the snow.

D. According to the law in most jurisdictions, it is foreseeable that a buyer may try to modify a product. Once a **product has been modified**, the manufacturer or supplier may be liable for harm caused by the modified product, but only when the product is *prone to modification*.

Example — Johnny's riding lawnmower is built with a speed limiter that prevent the mower from driving too fast. Johnny removes it so he can race. As expected, Johnny crashes the lawnmower and sustains injuries.

→ In this case, the manufacturer will most likely be liable because the mower was easy to modify and it is foreseeable that a buyer would remove the speed cap to go faster.

E. **Defenses** to products liability claims

1. If a person **negligently contributes** to his injuries, liability may be eliminated or reduced, depending if the jurisdiction follows contributory or comparative negligence.

2. If the plaintiff **assumes any risk** associated with the product, and is thereby injured, the plaintiff will not be able to recover.

a. Common types of assumption of risk arise when a person chooses not to follow instructions or directions and when a person consciously disregards warnings.

3. If a person **misuses a product in an unforeseeable manner**, there will be no liability.

► In this chapter, we concluded our discussion on products liability. We learned that a manufacturer or supplier can be liable for damages resulting from any foreseeable use of a product, including foreseeable misuse. We also learned that products liability may exist after a product has been modified, but usually only when the product is prone to modification. And we discussed the several defenses to products liability.

CHAPTER 27. NUISANCE

A. The word "nuisance" essentially means "annoyance." The tort of **nuisance** is an interference that affects either an individual or the public as a whole.

1. Common *examples* of nuisances include pollution, harmful gases that destroy crops, loud noises, foul odors, excessive light, and vibrations from nearby explosions. Anyone who causes such an interference may be liable for nuisance.

2. *** Note that nuisance is sometimes confused with trespass, but the two are different.

a. Trespass is the physical invasion of another's property.

b. Nuisance is not a physical invasion, but an intangible intrusion that amounts to an interference.

B. In order to prove nuisance, the plaintiff must show that the defendant acted **intentionally** or **negligently**, or that **strict liability** applies.

1. *Example* — If Acme Motors produces cars and they know that pollution will emit from the factory as a result, Acme Motors has acted *intentionally* and may be liable for nuisance.

2. *Example* — If instead Acme Motors contains the pollution, but *negligently* allow it to escape, Acme Motors acted negligently and may be liable for nuisance.

3. *Example* — Lastly, if Acme Motors uses explosives to loosen the ground so they can build an assembly plant, and the noise is very loud and frequent, Acme Motors may be liable for nuisance under *strict liability*.

C. There are 2 types of nuisance:

1. **Private nuisance** — a substantial and unreasonable interference with a person's use or enjoyment of his land.

a. Private nuisance suits may be brought by a plaintiff if he owns the land or if he has the right to immediate possession of the land – (tenant may sue for a private nuisance)

Example — Acme Motors builds an automobile plant next to your neighborhood. The plant gives off pollution and foul odors that you breathe in and smell while on your property.

→ In this case, because the pollution and odors are interfering with your enjoyment of your property, you may have an action for nuisance against Acme Motors.

2. P**ublic nuisance** — the unreasonable interference with the health, safety, or property rights of a community.

a. It is common for the state where the public nuisance occurs to bring the nuisance lawsuit. However, an individual may bring a public nuisance suit when the individual suffers a particular type of injury that was not suffered by the public.

Example — An oil spill occurs just off the coast. As a result, several public beaches are closed to the public. Mr. Angler makes a living fishing on the beaches, and he has to shut down his business.

→ In this case, the state can sue for public nuisance for the closure of the beaches. In addition, Mr. Angler may have a cause of action against the oil company because he suffered a particular type of harm to his business.

D. Generally, plaintiffs who bring nuisance lawsuits will be awarded *money* to **compensate for the damages suffered as a result of the nuisance**.

1. However, when a nuisance occurs constantly (which is common), the plaintiff may be awarded an *injunction*. This means that the court will order the defendant to stop causing the nuisance.

E. **Defenses** to the tort of nuisance

1. The plaintiff cannot recover for a nuisance that is *permitted by statute*.

2. If the plaintiff *contributes* to a nuisance that is affecting his property, liability may be eliminated or reduced.

3. When the plaintiff *consents* to the defendant's actions, the plaintiff cannot recover.

4. If the plaintiff *assumes the risk* that he may be affected by a nuisance, he may not be able to recover.

Example — If the plaintiff knows that the nuisance exists and moves to the area where the nuisance is, there may be no recovery.

► In this chapter, we discussed the tort of **nuisance**. We learned that a *private nuisance* is an interference with a person's use or enjoyment of his land. And we learned that a *public nuisance* is interference with the public's use or enjoyment of public property.

CHAPTER 28. DEFAMATION

Not all torts result in bodily harm or property damage. Some cause harm to one's reputation instead. The laws of **defamation** protect a person from damage to his *reputation*.

A. To establish a prima facie case for the tort of defamation, the plaintiff must generally prove 3 elements:

(i) Defamatory statement has been made,
(ii) Publication to a third party, and
(iii) Damages.

1. **Defamatory statement has been made**

a. A defamatory statement is a false statement that tends to hurt a person's *reputation*.

1) For instance, falsely accusing an accountant of stealing money from clients would be a defamatory statement. However, mere name calling is not defamatory.

b. Defamatory statements can be *written* or *spoken*:

1) **Libel** is written defamation in any permanent form — like newspapers or books. Many jurisdictions also consider radio and television to be libel as well.

2) **Slander** is spoken defamation — such as statements made in a conversation or in an interview.

c. For a statement to be defamatory, it must allude to the plaintiff so that it is *reasonably understood to be about the plaintiff*.

1) A statement does not have to actually name the plaintiff to be defamatory.

Example — A famous actress falsely states in an interview that a certain unnamed co-star is a thief. The actress has only worked with one co-star in her short career.

→ In this case, the actress could be held liable because it can be reasonably assumed that the defamatory statement referred to her co-star.

d. A defamatory statement made about a *group of people* (for instance a sports team) does not enable any individual members of that group to recover, unless the group is so small that the defamation can be attributed to each member of the group.

2. **Publication to a third party**

a. Publication does not necessarily mean that the statement must be written down or printed in a newspaper — publication also includes *saying* the statement to another person.

b. Publication to a **third party** means that someone other than the plaintiff must read or hear the defamatory statement.

c. A person can be liable for *intentionally* publishing a defamatory statement as well as *negligently* publishing a defamatory statement.

1) **Intentional publication** — the defendant purposefully states something defamatory about the plaintiff to a third party.

2) **Negligent defamation** — the defendant is communicating directly with the plaintiff but fails to exercise due care and allows a third person to overhear conversation or view written communication.

Example — At a crowded party Chuck gets mad at his friend Maria and falsely states to her that she is having an extramarital affair. Chuck speaks loudly when he makes the defamatory statement and an eavesdropper overhears the statement.

→ In this case, Chuck has negligently published a defamatory statement.

d. For publication to be made to a third party, the *third party must be **capable** of understanding the defamatory nature of the statement*.

1) Therefore, if a defamatory statement is made to an infant or to someone who does not speak the language, there will be no publication.

3. **Damages**

a. In some cases, the plaintiff will have to prove that he suffered damages to recover; however, in other cases, damages will be presumed.

b. For **libel cases** (which involve written or permanent statements), damages will be presumed because of the permanent nature of the defamation.

Example — If there is a defamatory statement made in a newspaper article, it is presumed that the article caused damages to the plaintiff and the plaintiff does not need to suffer actual harm to recover for defamation.

c. For **ordinary slander cases**, the plaintiff must show that he actually suffered special damages. (Slander involves oral or spoken statements.)

Example — Dwight is applying for a new job and lists his previous boss Michael Scott as a reference. The employer calls Michael Scott and Michael Scott falsely says that Dwight is a racist. As a result, Dwight does not get the job.

→ In this case, Dwight has suffered special damages in the form of not getting the job and may sue for defamation.

Example — Instead assume that Dwight got the job after Michael Scott made the slanderous statement to the employer.

→ In this case, since Dwight did not suffer special damages from the slanderous statement, he will not be able to recover for defamation.

d. In defamation cases of **extreme slanderous statements**, damages will be presumed.

1) Slander that is extremely devastating to one's reputation is called *slander per se*, and there are 4 types of slander per se:

(i) The defendant has accused the plaintiff of committing a serious immoral crime,
(ii) Of having a loathsome disease,
(iii) Of being incompetent in their profession, and
(iv) Of committing adultery.

*** If the defendant slanders the plaintiff in any one of these 4 ways, it is slander per se and the plaintiff does not need to prove damages to recover for defamation.

► In this chapter, we discussed the tort of **defamation**, which is defined as a defamatory statement, either written libel or spoken slander, about another person, that has been published to a third party, and has caused damages.

CHAPTER 29. DEFENSES TO DEFAMATION AND THE FIRST AMENDMENT

A. There are several **defenses** that will relieve a defendant from liability for **defamation**:

1. **Truth** is a complete defense to defamation.

a. Remember that a defamatory statement must be *false*. Therefore, if the defendant can prove that the statement is true, there is no defamation and the case will be dismissed.

2. When the plaintiff **consents** to someone making a defamatory statement about himself, this would be a valid defense and the case would be dismissed.

3. When the defendant has an **absolute privilege**, there will generally be no cause of action for defamation.

a. Absolute privileges exist during *judicial or court proceedings*, during *legislative and executive proceedings*, and *between spouses*.

Example — If the defendant makes a defamatory statement about a third party to his wife, the third party may not sue for defamation because the defendant has an absolute privilege with his spouse.

B. Lastly in our discussion of defamation, we will discuss how the **First Amendment** of the United States Constitution affects the laws of defamation.

1. The First Amendment gives individuals the *right to free speech* — which includes giving ordinary citizens the right to speak freely about the government and members of the government. Because the freedom of speech is so significant, certain defamatory statements will be protected by the Constitution.

2. In general, the First Amendment applies when a defamatory statement is made about something that is of **public concern** and that involves a **public figure**.

a. A public figure is anyone who is in the public eye, whether it be a public official or any famous person.

3. ***Rule*** — When the plaintiff is a public figure, he must prove that the defamatory statement was made with actual malice (in order to recover for defamation).

a. *Actual malice* means the defendant made the statement knowing that it was false or with reckless disregard as to its truth.

► In this chapter, we learned that a defendant who makes a defamatory statement may *escape liability in 3 situations*: when he can prove that the statement was true, when he had consent from the plaintiff, and when he had a privilege.

We also learned that when a *public figure sues for defamation*, he must prove that there has been a defamatory statement, that it has been published to a third party, that it has caused damages, and that it was made with actual malice.

CHAPTER 30. THE INVASION OF PRIVACY TORTS

Invasion of privacy is an area of tort law that protects an individual when his expectation of privacy has been violated. When someone intrudes into the personal life of another, the victim can bring one of four types of lawsuits for invasion of privacy:

A. APPROPRIATION OF PERSON'S NAME/IMAGE FOR COMMERCIAL PURPOSES

1. Appropriation generally occurs when someone's name or image is used for commercial purposes without their permission.

    a. Usually this involves a business using a celebrity's name or likeness in an advertisement.

2. Note that appropriation does not apply to pictures or articles about celebrities or politicians—even if the picture is on a cover—as long as the picture or article is there for some *newsworthy purpose*.

    a. Note also that some jurisdictions protect other features associated with a plaintiff besides name and likeness — for instance, someone's voice or catch phrases.

Example — A cereal company uses a photograph of a popular athlete on their cereal boxes without the athlete's permission.

    → Because the cereal company used the player's picture for their own commercial benefit, and without permission, the player can sue the company for damages for appropriating his likeness.

B. INTRUSION INTO A PERSON'S PRIVACY OR SECLUSION

1. A defendant who intrudes upon another's privacy or seclusion is subject to liability if the intrusion would be considered *offensive* to a reasonable person.

    a. Intrusion is commonly associated with peeping Toms, illegally listening to another's private phone calls, and snooping through another's private records.

2. Note that *taking photographs* of someone in public would NOT count as intrusion because people are not considered to have a reasonable expectation of privacy in public, and being photographed in public is not highly offensive to a reasonable person.

    b. However, taking photographs of someone inside their home, or even using binoculars to watch someone undress, would qualify as intrusion.

C. **FALSE LIGHT**

1. False light is the publication of offensive or embarrassing facts about the plaintiff that gives people the wrong impression about the plaintiff.

2. In order to recover for false light, the plaintiff must prove that

(i) The publication was *distributed to a reasonably large number of people*, and
(ii) The false light that he was put under is *offensive* to a reasonable person.

3. *** Note that the tort of false light is similar to *defamation*. In fact, a number of states do not recognize the tort of false light because of its overlap with defamation. However, there are noteworthy differences between the two:

a. False light is intended to protect a plaintiff's mental or emotional well-being, while defamation is intended to protect a plaintiff's reputation.

b. Also, false light requires broad publication to many people, while a defamatory statement can be made to only one person.

4. Note that false light commonly occurs when a publication has acted *recklessly* — like using stock footage of a photo of a person to accompany a news story that the person is not connected to in any fashion.

Example — A newspaper prints an article about sex offenders that happens to be next to a picture of an individual who is not a sex offender.

→ In this case, the individual may have an action for false light because, by putting the article and his picture next to each other, the implication may be that the individual is a sex offender.

D. **PUBLIC DISCLOSURE OF PRIVATE FACTS**

1. Public disclosure of private facts occurs when the defendant *discloses private information about the plaintiff to the public*, and the disclosure is *highly offensive* to a reasonable person.

a. The laws regarding public disclosure of private facts essentially protect people from public embarrassment.

2. A **private fact** is an intimate detail of one's private life that is not generally known.

a. Common *examples* include information about medical conditions, sexual orientation and history, and financial status.

b. Any information that is discoverable through public records is not a private fact.

Example — A woman who is delivering a baby agrees to allow the operation to be filmed for educational purposes only; however, the video is shown to the public in a commercial theater.

→ In this case, the woman can sue for public disclosure of private facts because her pregnancy was shown to the public. In addition, the woman can sue for another invasion of privacy tort, appropriation, because the theater used her image for commercial purposes.

E. **Defenses** to invasion of privacy torts

1. ***Consent*** of the plaintiff, and any governmental or spousal ***privileges***, will serve as an absolute defense to relieve a defendant of any liability for any invasion of privacy tort.

► In this chapter we discussed the 4 invasion of privacy torts.

(i) **Appropriation of a person's name or image for commercial purposes** — usually involves a business using a celebrity's name or likeness in an advertisement.
(ii) **Intrusion into a person's privacy or seclusion** — usually occurs when one person is spying on another.
(iii) **False light** — a publication that gives people a false impression about the plaintiff.
(iv) **Public disclosure of private facts** — occurs when the defendant discloses highly offensive and private facts about the plaintiff.

CHAPTER 31. ECONOMIC TORTS

Economic torts (also known as business torts) are torts that arise out of business transactions, and they are likely to involve economic loss (meaning one party is harmed in a financial manner). The 2 economic torts we will examine are called **misrepresentation** and **interference with business relations**.

A. **MISREPRESENTATION** — a false statement of fact that induces someone to agree to a contract. Misrepresentation can be either intentional or negligent.

1. **Intentional misrepresentation** (fraudulent misrepresentation or fraud)

a. In most jurisdictions, to prove a prima facie case of intentional misrepresentation, the plaintiff must prove 5 elements:

(i) The defendant intentionally made a *material misrepresentation*,
(ii) The defendant made the misrepresentation *knowing that it was false*,
(iii) The defendant *intended for the plaintiff to rely* on the misrepresentation,
(iv) The plaintiff *justifiably relied* on the defendant's misrepresentation, and
(v) The plaintiff suffered *damages*.

Example — David is trying to sell his car. A buyer is interested and David tells the buyer that the car has never been involved in an accident so that the buyer will purchase the car. In fact, David crashed the car a few months earlier, which caused the axle of the car to crack, severely reducing the value and drivability of the car. Relying on David's lie, the buyer purchases the car. He later finds out about the damage to the car and sues David.

→ In this case, the buyer will be able to recover from David for fraudulent misrepresentation. David intentionally lied about the car's accident history, he knew that his statement was false, he intended for the buyer to rely on the false statement, the buyer did rely on the statement, he purchased the car and suffered damages. All the elements of fraud have been met.

2. **Negligent misrepresentation**

a. Negligent misrepresentation is similar to intentional misrepresentation except the defendant does not knowingly make a false statement, but instead, carelessly makes a statement without any grounds for knowing whether it is true.

Example — Carla, a real estate broker, tries to sell an apartment to a buyer, who has made it clear to Carla that he wants an apartment that is very quiet. Carla shows the buyer an apartment and promises that the apartment is very quiet, even though she has no idea. Unbeknownst to Carla, the apartment building and other nearby buildings are undergoing a very noisy reconstruction. The buyer purchases the apartment, finds out about the construction, and sues Carla.

→ In the case, even though Carla did not know about the noise, she will be liable because she made a negligent misrepresentation that the buyer relied upon and the buyer suffered damages.

B. **INTERFERENCE WITH BUSINESS RELATIONS** (also known as interference with contacts or tortious interference)

1. The tort of interference with business relations occurs when someone interferes with an existing or potential economic relationship.

2. In order to prove interference with business relations, the plaintiff must prove 4 elements:

(i) There was a relationship or a prospective relationship between the plaintiff and a third party,
(ii) The defendant knew about the relationship,
(iii) The defendant intentionally interfered with the relationship, and
(iv) The interference caused the plaintiff to suffer damages.

Example — A representative from Pepsi sneaks into Coca Cola's parking lot at night to slash the tires on the delivery trucks so that coca cola will be unable to make deliveries the next day.

→ In this case, Pepsi will be liable for interference with business relations because Coca Cola had a business relationship with the stores, Pepsi knew about the relationship, Pepsi intentionally interfered, and Coca Cola suffered damages because the delivery was not made on time. *** Note that, in this case, Pepsi will also be liable for the torts of trespass to land and trespass to chattels or conversion for damage the tires.

► In this chapter, we discussed the economic torts of misrepresentation and interference to business relations.

CHAPTER 32. VICARIOUS LIABILITY

Ordinarily, when an individual commits a tort, that individual will be held liable for his own actions. However, in certain situations, *third parties* can be held liable for torts committed by others. This is known as **vicarious liability**.

A. Under the doctrine of **vicarious liability**, a defendant may be held liable for the actions of another if there is a **special relationship** between the two.

1. Usually the relationship is one where the defendant has the right, the ability, or the duty to control the activities of the person who committed the tort.

2. This is common between employer-employee, between parent and child, between an owner of a vehicle and the driver, and between bar owners and patrons.

B. When an **EMPLOYEE** commits a tort within the scope of employment, the **EMPLOYER** may be vicariously liable.

1. This is known as the doctrine of **respondeat superior** (which is Latin for "let the master answer")

Rule — An employer is vicariously liable for an employee's tort committed within the scope of employment.

2. An employee acts within the **scope of employment** when he is acting with some intent to further the employer's business.

a. Obviously, any action done while carrying out job duties will usually be within the scope of employment. However, if an employee at any point during work hours goes well outside of the job duties to *pursue a private objective*, this will not be considered within the scope of employment and the employer will not be held liable for those actions.

Example — A driver for a delivery company is taking a package to the north side of town. The driver negligently gets into a car accident and injures a pedestrian.

→ In this case, the driver has acted within the scope of employment and the pedestrian will be able to sue the delivery company under respondeat superior.

Example — Assume instead that the driver decides to run a personal errand on the way to deliver the package. He goes off route and drives to the mall to return clothes. While leaving the mall parking lot, the driver negligently hits a pedestrian.

→ In this case, the driver is not acting within the scope of employment because he is doing something that has nothing to do with delivering the package. Therefore, the pedestrian may sue the driver for negligence, but respondeat superior will not apply and the delivery company will not be liable.

3. There is no vicarious liability for **independent contractors**, except in limited circumstances.

a. The reason for the distinction between employees and independent contractors is based on the fact that typically an employer has much more *control* over an employee than over an independent contractor.

b. *** However, when an independent contractor is hired for an **inherently dangerous activity** (like demolishing buildings or working with explosives or toxic chemicals), the employer will be liable for any negligent acts of the independent contractor.

c. Also, an employer will be liable for negligent acts of an independent contractor when the employer has a non-delegable duty.

1) *Examples* of non-delegable duties include keeping property safe for business visitors, providing employees with a safe place to work and the duty of a carrier to transport his passengers carefully.

4. When an employee commits an **intentional tort**, that will not usually be considered within the scope of employment, unless the job duties involve the use of physical force on others.

Example — While the driver for the delivery company is making a delivery, he sees his ex-girlfriend walking down the sidewalk and intentionally runs her over.

→ In this case, even though the driver was acting within the scope of employment, the delivery company will not be vicariously liable for the intentional tort.

Example — Let's say a bouncer or a bodyguard punches someone while working.

→ In this case, the employer of the bouncer or bodyguard will be vicariously liable for the intentional tort of battery committed by the employee because they acted within the scope of employment and it is part of their job to use physical force.

C. The next type of relationship that may be subject to vicarious liability is that of **PARENT** and **CHILD**.

1. In general, parents are not vicariously liable for the actions of their children.

a. However, some jurisdictions may hold parents or anyone who has custody liable for torts committed by the child in the guardian's presence.

b. Also, parents may be liable when they fail to exercise reasonable care to protect or warn third parties of a child's known dangerous tendencies.

D. Vicarious liability as it applies to the relationship between **AUTOMOBILE OWNERS** and **DRIVERS**.

1. In general, an automobile owner is not vicariously liable for torts committed by those who are permitted to drive the car.

a. However, in certain jurisdictions, an automobile owner may be liable for the negligence of any driver that has permission to drive the car (this is known as the *permissible use doctrine*).

b. Other jurisdictions may hold automobile owners liable for the negligence of a driver if the driver is a member of the owner's immediate family and has permission to drive the car (this is referred to as the *family car doctrine*).

E. Vicarious liability as it applies to the relationship between **BAR OWNERS** and **CUSTOMERS**.

1. Many jurisdictions have passed statutes called "DRAM shop acts", which allow third parties who are injured by drunk customers to sue bar owners.

a. Note that some of these jurisdictions will only impose vicarious liability to bar owners when the bar owner had *prior notice* of the customer's drunken tendencies.

b. Note also that most jurisdictions allow recovery only against *commercial* sellers of alcohol and not against private individuals who serve alcohol to guests.

► In this chapter we discussed **vicarious liability**. We discussed how it is common for employers to be liable for the actions of their employees that are within the scope of employment. We also discussed how some jurisdictions may apply vicarious liability to relationships between parent and child, vehicle owner and driver, and bar owner and customer.