

Bar Bri - Torts Review

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I. Essay Exam Techniques

step 1 - identify torts committed

step 2 - identify PL/Def (will differ between each action)

step 3 - for each tort

- a. set out prima facie case requirements
- b. has PL met requirements (if no → no case; if yes → goto c)
- c. identify affirmative defenses (if no affirmative defenses → PL wins)

step 4 - consider presence of general consideration items requiring discussion- may arise in any tort action

- vicarious liability - liable for other tortfeasor
- joint tortfeasor - two Def

II(a). Intentional Torts (non-property)

Keep in mind

- always deal w/ PL were an average person (ignore hypersensitivities)
 - exception - unless Def knows of hypersensitivities
- everyone capable of intentional tort
- Intent rarely tested
- causation - usually not an issue

Battery

- **intentional** = acts which desires harm to occur OR acts where Def substantially certain harm will occur
 - transferred intent - intent element present even though injure another party
- **harmful or offensive (unpermitted) contact**
 - must consider average person in PL circumstances at time of contact (ignore hypersensitivity unless Def knows)
 - no actual harm required
 - supervening goal = right to physical self determination (Mohr v. Williams - ear operation)
- **w/ PL person** (or anything connected w/ PL person) - PL need not be specifically targeted
 - liberally construed to include anything attached (e.g., automobile)
- **liability** = all harms (even if unforeseen) arising from tort

Assault

- **intentionally** = acts or threats + circumstances - desires harm to occur OR substantially certain will occur
- **causing reasonable apprehension**
 - must be reasonable (ignore hypersensitivity unless Def knows)
 - fear/intimidation not required

- apparentability may create reasonable apprehension (e.g., unloaded gun) - focus on PL's interpretation of situation
- **of any imminent harmful or offensive contact**
 - no actual harm required - no battery necessary
 - imminent = no significant delay
 - **need words + conduct/circumstances** → words alone - not enough to meet immediacy conduct
 - consider if words/conduct = contradictory → no assault
- **liability** = all harms (even if unforeseen) arising from tort

False Imprisonment

- **sufficient act of restraint**
 - could be anything - force not required (threats are enough)
 - inaction is enough as long as PL has/had understanding that Def would act (e.g., not providing a boat to put person ashore)
 - time of restraint = irrelevant
- **bounded area**
 - freedom of movement = limited
 - inconvenience does not qualify (unless inconvenience = substantial)
 - **area not bounded if reasonable means of escape exists which PL knows of**

Intentional Infliction of Emotional Distress (Failsafe Tort)

- **outrageous conduct**
 - has to be truly outrageous
 - consider if normally acceptable behavior has been exaggerated to make outrageous
 - continuous activity (e.g., insulting all day long)
 - certain kind of PL (e.g., young/old/pregnant/hypersensitivity where Def knows)
 - certain kind of Def (e.g., **common carrier/innkeeper rule** - held to higher standard)
 - **limitation** - only applicable to relevant type of PL - passenger/guest
- **damages required**
 - clear showing of substantial emotional distress (more than a few sleepless nights)
 - more outrageous the conduct → less level of damages required
 - developed as a fallback to **privacy** and **defamation**

II(b). Intentional Property Torts

Trespass to Land

- **Def physically invade PL land**
 - Def need not personally go onto land
 - is required that some **physical object** must go onto land
 - **land** - includes space going up and down for reasonable distance

Trespass to Chattels

- **simply some damage to PL property or some interference w/ property rights**

Conversion

- **involves a lot of damage or lot of interference w/ property rights**

III. Defenses

• consent

- **step one** - determine that PL had capacity (e.g., statutory limits, emergency, children, incompetents)
- **step two** - what type of consent
 - express = words (consider if any mistake, fraud, coercion - see outline materials)
 - implied = no words (apparent implied consent)
 - **PL own conduct** - O'Brien v. Cunard - PL subjected self to shipboard vaccination
 - **custom in usage**
 - **medical emergency/during medical procedure** -
 - allowed if substituted consent OR no relative, issue = unforeseen / no opportunity for consent, and reasonable person w/h consented
 - central concern - autonomous right to self determination
- **step three** - did Def stay within boundaries of consent granted
 - **Def misrepresentation invalidates consent** - e.g., consent to sex w/o disclosing disease

• privileges (defense of self, others, property)

- **self defense** - privilege to forestall an impending battery
- **defense of others** -
- **defense of property** -
- **step one** - is timing requirement met (is PL act happening immediately)
 - past tense not allowed - retaliation not allowed
 - hot pursuit doctrine - if hot pursuit of someone who has wrongfully taken chattel → tort deemed to still be occurring
- **step two** - has met belief elements of specific defenses
 - **self defense** - reasonable belief that tort will be committed on you (even if wrong) -
 - majority courts - no duty to retreat (can stand ground and defend self)
 - Restatement - must retreat if possible (unless if in own home)
 - **defense of others** -
 - 1/2 states = must correctly believe that tort will occur (cannot be wrong) → step into shoes of apparent victim ; but
 - 1/2 states = reasonable belief is enough
 - **defense of property** - reasonable belief is enough
- **step three** - did Def stay within boundaries of consent granted (by not using excessive force)
 - **self defense/defense of others** - can use reasonable force, including deadly force
 - **defense of property** - can use reasonable force (never including seriously bodily injury force)
 - in your own home cases = self defense/defense of others (e.g., family)
 - **injury to others** - no liability to others to extent not liable to target for defensive action
 - transferred intent = inapplicable b/c no tortious conduct intended in self defense

• necessity

- applies only to property torts (usually trespass to land)
- **public necessity** - benefit lots of people = absolute privilege
- **private necessity** - benefits limited group of people = limited privilege
 - no tort for invasion of land
 - liable for damage caused
 - consider defense of property v. necessity - **necessity trumps defense of property**

IV. Negligence

• duty

- **foreseeable PL**
 - duty owed only to clearly foreseeable PL
 - unforeseeable PL fact pattern - (e.g., Palsgraff) negligence directed at foreseeable PL
 - **Cardozo** (slight majority opinion in U.S.) - was PL w/i **foreseeable zone of danger** from Def conduct
 - **Andrews** - if negligence towards one individual injures a second individual → second individual = foreseeable
 - ❖ foreseeability limitations - minimally present in opinion but very rare (e.g., would require desert island fact pattern)

- **standard of care** - judge determines which duty Def owes to PL (at issue in every single negligence problem)
 - reasonable person - objective test standard
 - invent hypothetical average person and assign average traits/characteristics
 - measure Def actions against those of expected from hypothetical person
 - **ignore specific traits of Def**
 - **exception** - physical characteristics (e.g., disabilities) taken into account (e.g., blind) - standard = objective reasonable person w/ same disability **if Def aware of disability**
 - common carrier/inn keepers -
 - much higher standard of care
 - liable for even slight negligence
 - requires right type of PL (passenger/guest)
 - professionals - standard = reasonable professional in same/similar communities
 - exception - expertise taken into account (e.g., specialist = higher standard)
 - children - subjective standard = that of child of like age and intelligence
 - children under 4 = incapable of negligent act
 - consider if intentional tort applicable
 - owners/occupiers of land -
 - **Step One** - make sure that right type of Def → Def = owner/occupier of land or in privity w/ owner/occupier (e.g., including family/employees)
 - **Step Two** - did injury occur on or off land?
 - ❖ on land -
 - is PL = **undiscovered trespasser** → no liability (no duty to undiscovered trespassers → no standard of care)
 - if PL <> undiscovered trespasser → was injury caused by activity (anything do on property) / dangerous condition (characteristic of land) on land?
 - ❖ **activity** caused injury = ordinary negligence case (type of PL = irrelevant)
 - ❖ **dangerous condition** caused injury → consider type of PL
 - **discovered trespasser** - Def responsible for artificial condition involving risk of serious injury which owner/occupier knows of
 - **licensees** - PL comes onto property for own purpose (d2d salesmen, social guests) - Def responsible for all dangerous conditions which owner/occupier knows of
 - **invitees** - PL on land for purpose of Def - (if unsure safer to guess licensee over invitee) - Def responsible for all dangerous conditions which owner/occupier should know of (**talk re: duty to inspect to find conditions**)
 - discharging duty -
 - make condition safe
 - warn of dangerous conditions
 - ❖ off land - outline addresses if
- statutory standard of care - prevails over reasonable person standard
 - Step one - PL must fall w/i protected class
 - Step two - statute must be designed to prevent this kind of harm
 - ❖ more interesting for tests
 - ❖ make sure that standard applies to harm arising
 - ❖ consider - **what other standard of care applies** - usually = ordinary person
 - ❖ negligence per se - **relevant only for breach of duty**
 - **theories**
 - Negligence per se w/ excuse - Def may offer excuse/justification for violating statute - excuses include -
 - incapacity
 - lack of knowledge of relevant fact

- inability to comply (e.g., weather)
 - emergency
 - compliance poses greater risk than violation
 - Presumption of negligence - if statute violated = conclusive presumption of negligent conduct
 - Evidence of negligence - jury not compelled to find negligence where statute violated even if Def = no rebuttal
 - still must prove conduct caused damages
 - **exceptions** -
 - where compliance = more dangerous (non-compliance excused)
 - where compliance = impossible (blind person crossing street)
 - Step three - Burden of proof - remains on PL unless Def fails to meet burden of production
- **Negligent infliction of emotional distress**
 - must show physical injury
 - intentional infliction of emotional distress - does not require physical injury (b/c conduct must have been outrageous)
 - target zone problem
 - majority rule - must be in target zone of Def negligent conduct
 - modern trend - target zone rejected - recovery allowed where close relative present at injury
- **Affirmative Duty to Act**
 - general rule - no affirmative duty to act
 - exceptions -
 - relationship exception - affirmative duty to act due to relationship (kin, employer/employee, owner occupier with business invitees, common carriers/innkeepers)
 - duty to control conduct of 3rd persons
 - ❖ right and ability to control 3rd persons
 - ❖ Def knew/should have known of facts which would have caused Def to act
 - note that once start to act → obligated to not finish acting where

- **breach**

- negligent conduct = breach = violation of applicable standard of care
- **res ipsa loquitur** - allows case to reach jury w/ inference of negligence
 - required elements -
 - probability test - injury not have happened unless someone was negligent (injury causing event more probably than not attributed to Def)
 - injury attributable to Def (other responsible causes eliminated)
 - PL must be free from contributory negligence
 - defenses
 - prove actual cause of harm OR
 - attack individual elements OR
 - show Def exercised due care (may backfire/show that c/n/h happened w/o negligence)
 - on facts given = unclear if negligence occurred
 - last chance if negligence does not otherwise lie (default action)
 - allows case to goto jury w/ inference of negligence (will survive motion for directed verdict) - jury may find no negligence even if Def offers no negligence

- **causation**

- **causation in fact**
 - must be addressed first - if does not exist → PL loses
 - but for causation - true causation → did Def actual conduct cause injury?
 - if no actual causation → generally dismiss
 - **exceptions** (if but for test = no) - requires negligence of all named Def (some breach must exist)
 - **substantial factor alternative** -
 - ❖ if conduct of each Def = substantial factor → causation in fact allowed
 - ❖ negligence of both Def causes injury

◦ **alternative causes test -**

- ❖ Summers v. Tice - e.g., multiple Def - inability to determine which Def caused injury
- ❖ negligence of only one Def caused injury (but unsure which)
- ❖ **burden of proof shifted to Def**

- **proximate causation -**

- only arises if cause in fact exists
- already established that
 - negligent conduct occurred
 - negligent conduct caused the injury
- Def tries to show that, despite negligence, the resulting injury was so unforeseeable that Def should not be held liable
- **way for jury to let negligent Def who actually caused injury off based on lack of foreseeability**
- direct cause case - where uninterrupted chain of events b/w negligent act and injury
- indirect cause case - chain of events (after negligent act/before injury) interrupted by an affirmative intervening act by 3rd person or act of God
- foreseeability - only have to foresee an injury - not extent of injury
- **Basic Rules**
 - if result = unforeseeable → Def = no liability (no exceptions)
 - if result = foreseeable → Def = liable
 - ❖ exception - indirect cause case - if intervening act = **unforeseeable** intervening intentional tort/crime → Def = no liability even though result foreseeable (e.g., if negligence increases risk of intentional tort/crime → liability arises)
- **Notes**
 - in direct cause cases → result = almost always foreseeable = proximate causation lies
 - **egg-shell skull rule** - Def takes PL as finds them
 - ❖ not an unforeseeable result case
 - ❖ **foreseeability - only have to foresee an injury - not extent of injury**

• **damages**

- takes PL property as find it

VII. Negligence Defenses

Contributory Negligence

- previously represented majority rule
- today 40is/50 states = comparative negligence
- **knowing contributory negligence -**
 - PL sees risk and unreasonably voluntarily takes on risk
 - **see - implied assumption of risk defense = equally available**
 - reference to strict liability
- **unknowing contributory negligence**
 - PL carelessness contributes to injury (not paying attention) (PL does not see risk)
 - **not** a defense to strict liability

Comparative Negligence

- differing results from contributory negligence
 - any contributory negligence completely bars recovery
 - amount of recovery offset against own liability in comparative negligence state (insurance??)
 - 50% rule - no award if PL more negligent than Def (in most states)
 - pure comparative negligence rule - even more negligent party can recover

- implied assumption of risk not available in most comparative negligence states (still applies in contributory negligence states)
- **last clear chance doctrine** - applies in contributory negligence states; not applicable in comparative negligence states
 - applies where PL contributorily negligent but Def failed to take last clear opportunity to avoid injury
 - PL contributory negligence = ignored
 - adopted by courts as relief to harshness of contributory negligence statutes
 - in comparative negligence states - Def last clear chance may increase amount of fault allocated to Def
- reckless tortious conduct
 - contributory negligence - not good defense to reckless tortious conduct in a contributory negligence state (minimizes harshness of all or nothing in contributory negligence state)
 - contributory negligence added to reckless tortious conduct offset in comparative negligence states
-
-

Implied Assumption of Risk

- PL sees risk and unreasonably voluntarily takes on risk (**same as knowing contributory negligence**)
-

VIII. Strict Liability

- liability w/o Def fault
- historically
 - negligent tortious conduct
 - intentional tortious conduct
 - reckless tortious conduct
- **prima facie elements**
 - same as negligence but standard of care (duty, breach, damages)
 - standard of care = absolute duty to make safe
- **defenses to strict liability**
 - **majority view** - (some states using comparative negligence have not extended to strict liability)
 - knowing contributory negligence = complete defense
 - unknowing contributory negligence = no defense at all
 - **minority view** (due to change to comparative negligence)
 - comparative negligence principles apply
 - **domestic pets** - standard = one free bite rule?
 - **exotic or dangerous pets** = strict liability from start
 - **ultra-hazardous activity** - **see outline**
 - conduct/safety measures undertaken = irrelevant
 - conduct = fault related issues/ strict liability = policy driven
 - in strict liability b/c couldn't establish Def did anything wrong
 - if both fault and strict liability → use fault b/c larger damages
 - common fact pattern - blasting but Def = ultra-safe

IX. Products Liability

- products liability is not a tort
- products liability is a tort designation
- only fact pattern - individual sues commercial supplier for defect
- available theories
 - **negligence** - a favorite - treat like any other negligence case
 - types of negligent cases -
 - **negligent design** - all products have problem (mfr only)
 - **negligent manufacture** - only one product has problem (mfr only)

- **negligent warnings** - lacking or inadequate (mfr only)
- **negligent inspection** - (mfr, maybe retailers/wholesalers)
- who can serve as PL - anyone w/i foreseeable zone of risk (including bystanders)
- who can be successfully sued as Def -
 - mfrs = almost always
 - retailers, wholesalers = almost never (e.g., unless somehow aware of defect)

- **strict liability** - a favorite - treat like any other negligence case
 - conduct = irrelevant b/c liability w/o fault
 - **required element** - unreasonably dangerous condition which caused injury
 - who can serve as PL - anyone w/i foreseeable zone of risk (including bystanders)
 - who can be successfully sued as Def - everybody (mfr, retailer, wholesalers)
 - policy based → don't need to show retailers/wholesalers did anything wrong
 - indemnification principles apply (see below)

- **warranty liability** - less favored

- determining which theory - look to interrogatory re: question

- **Note**

- **adequate warnings** generally insulate Def from liability
- **feasible alternatives** - if could have cured defect from minor amount of \$\$ relative to risk involved → should have cured defect (**warning will not save Def**)
- **product use incidental to service** - strict product liability theories <> applicable
- fault based tort recovery = still available (e.g., negligence)

Nuisance

- **general rules**

- any nuisance suit → court will balance competing interests
- PL can come to nuisance and sue (e.g., Def carried on activity before PL arrived)

- **Private Nuisance** - interference w/ use and enjoyment of land

- objective test standard applies
- ignore subjective sensitivities

- **Public Nuisance**

General Considerations

Vicarious Liability - liability for someone else's tort

- **respondeat superior**

- employers liable for torts of employees committed w/i scope of employment

- **automobile owners/ drivers**

- automobile owners <> liable for torts of their drivers
- exceptions (not majority rule)
 - **family car doctrine** - owner liable for drivers w/i immediate family
 - **permissive use doctrine** - Def liable for anyone who drives car w/ permission

- **parents/children** -

- parents <>. liable for torts of children
- exception - parents liable for intentional torts of children (up to statutorily imposed ceiling)

- **note**

- consider whether Def liable through negligence or vicarious liability

Joint Tortfeasor Problems (Unsure)

- will always involve multiple Def
- **release rule**
 - previously - if PL released one joint tortfeasor → all tortfeasors released
 - today - release of one joint tortfeasor does not release all tortfeasors unless expressly indicates
- **joint/several liability** - each individual Def liable for entire judgement amount
- **contribution** - Def1 recovers total amount from equally responsible Def2
 - *likely fact pattern* - two Def equally responsible; one Def pays entire amount
- **comparative contribution** - Def recovers portion from other Def's portion of liability
 -
- **indemnification** -
 - strict liability case - e.g., retailer recovers from tortfeasor mfr
 - vicarious liability - e.g., employer recovers from tortfeasor employee
 - *likely fact pattern* - two Def unequally responsible; Def1 recovers entire amount from Def2