

TORTS
20 January 1998

I: INTENTIONAL TORTS

§ 1: Intentional Torts Against the Person

A. Overview

- Hyper-sensitive plaintiffs are irrelevant in determining a particular element of a claim
 - Assume that the Plaintiff is of Reasonable & Normal Sensitivity
- Every Defendant on exam is Capable of committing an Intentional Tort
 - There is no such thing as Incapacity Defenses to Intentional Torts
 - Remember Garret v Daly where a 5 year old kid pulls a chair out from underneath an old lady. He is still liable for the intentional tort (infancy is no incapacity for INTENTIONAL torts)
- INTENT may be either Specific (the goal is the consequence) or General (actor knows with substantial certainty that his conduct will bring about the consequence)
- TRANSFERRED INTENT: where a tort-feasor intends to commit an intentional tort against one, but fails, and instead commits a tort against another (like an innocent bystander). Transferred Intent only applies to the Intentional Torts that follow:
 - Assault, Battery, False Imprisonment, Trespass to Land, Trespass to Chattel

B. Battery

- Elements:
 1. **HARMFUL OR OFFENSIVE CONTACT**
 2. **CONTACT WITH THE PLAINTIFF'S PERSON**
- 1. Harmful Contact: Rarely Tested on the Exam since self-explanatory
- 2. Offensive Contact: Non-permitted by a person of Ordinary sensitivity
 - For Example; Tapping someone on shoulder for the time is Not offensive, since it is tolerated by a person of ordinary sensitivity
 - For Example: Woman sitting in library, a man goes up and gropes her. That is Offensive to the person of ordinary sensitivity
- 3. Contact with the Plaintiff's Person
 - This is an MBE trick: the Plaintiff's person is deemed to include anything CONNECTED to the plaintiff (i.e., anything the plaintiff is holding or touching)
 - Fisher v Carolse; Fisher, math teacher at conference, holding plate of food at lunch buffet. Whitey knocks it out of his hand. Fisher sues for battery. Plate deemed part of the person for purposes of battery.
 - Anything Plaintiff TOUCHES or HOLDS is considered part of the Plaintiff's person for purposes of determining battery.
- RULE: think of it as 3rd grade Cooties, anything that gets touched gets the cooties
 - For example: woman on horse and somebody slaps the horse, that is a battery.

C. Assault

- Elements: 1. **DEFENDANT PLACES PLAINTIFF IN APPREHENSION**
2. **OF AN IMMEDIATE BATTERY**

1. Apprehension

- Apprehension must be REASONABLE
 - For example: Guy is standing next to another. Guy reaches for his Hanky in back pocket. Person next to him says, "Oh my God, he's reaching for a gun". Sues for assault. He will lose because his apprehension was NOT reasonable
- *Apprehension ≠ Fear*
 - On MBE, A Davy will Threaten a Goliath. For an Assault, one need not be AFRAID of an Offensive Touching, but only APPREHENSIVE about it
- *Unloaded Gun Problem*
 - For Example: Defendant is about to try an offensive touching, but is really NOT CAPABLE of bringing the battery to fruition. Is it an Assault?
 - Must analyze from the position of the Plaintiff. If the Plaintiff doesn't know that the gun is empty, an ordinary and reasonable Plaintiff would be apprehensive of an offensive touching coming from the gun
 - In law school, this is known as *The Problem of APPARENT CAPABILITY*

2. Immediacy

- WORDS ALONE NEVER possess the requisite Immediacy
 - Law finds talk to be cheap, there is no immediacy to a mere verbal threat, ergo, there must be some accompanying physical conduct to constitute an immediate threat and assault
- Whether the Physical conduct places Plaintiff in apprehension depends on the Context, it is a fact based analysis
- Even if there is the Requisite Physical Conduct, WORDS may NEGATE the implication of the Conduct and DESTROY IMMEDIACY
 - *Conditional Words:* If physically waive your fist and say, "If I weren't your best friend, I'd beat the crap out of you: is NOT actionable. The accompanying words to the threatening conduct NEGATE the conduct and destroy immediacy
 - *Future Words:* "At 3 PM, I'll beat you up" is NOT immediate enough. Depends on the degree of mental disturbance, a Later Harm is < Immediate Harm

D. False Imprisonment

- Elements: 1. *Act of RESTRAINT (+ Aware or Harm)*
2. *CONFINEMENT in a BOUNDED AREA*

1. Restraint

- THREATS are Sufficient for Acts of Restraint
- OMISSIONS can be Acts of Restraint
 - *For example:* if there was some PRIOR OBLIGATION to permit somebody to go, like a Jailer & Jailee (Jailer refuses to release jailee after he had fully served his sentence, that would be false imprisonment by omission)
- There is NO MINIMUM TIME requirement for false imprisonment. Could be either 5 Minutes or 5 Weeks. However, Time will IMPACT the MAGNITUDE of the DAMAGES

- To recover for False Imprisonment, the Plaintiff must be AWARE of his Confinement OR SUFFER HARM.
 - *For example*; if lock someone in room while he's asleep, that's not false imprisonment because he's not Aware of his confinement. Yet, even if he's asleep, but suffers injuries, that will be false imprisonment
- 2. Bounded Area
 - For Plaintiff to be confined in a bounded area, his Movement must be Constrained in ALL DIRECTIONS (360°). If there is 1 point of egress behind him, that is not False Imprisonment
 - False Imprisonment is NOT EXCLUDING plaintiff from a certain place (for example, protesters keeping women away from an abortion clinic is not false imprisonment)
 - Even if Plaintiff is Confined in All Directions (i.e., within a Bounded Area), there will NOT be false imprisonment if there is a REASONABLE MEANS OF ESCAPE which is REASONABLY DISCOVERABLE
 - *For Example*: Man goes into the basement and gets locked in. Sees a tunnel out, but it is covered with Rats. That is not a reasonable means of escape, so there is still false imprisonment

E. Intentional Infliction of Emotional Distress

- Elements:
 1. **OUTRAGEOUS CONDUCT**
 2. *Evidence that Plaintiff suffered SEVERE EMOTIONAL DISTRESS*
- 1. Outrageous Conduct
 - Defendant's conduct is Outrageous if it EXCEEDS ALL BOUNDS of DECENCY TOLERATED in a CIVIL SOCIETY
 - Mere *Name Calling* is NEVER outrageous (law assumes people have a thick skin)
 - ALWAYS Outrageous include things containing *Hallmarks of Egregiousness*
 - 1.) Conduct is PUBLIC, not private
 - 2.) Conduct is CONTINUOUS, Repetitive, and On-going
 - 3.) Defendant is a COMMON CARRIER or INNKEEPER
 - 4.) Plaintiff is a Member of a FRAGILE CLASS (Children, Elderly, Pregnant Women)
 - If Defendant has KNOWLEDGE of Plaintiff's HYPER-SENSITIVITY and Exploits it, that is OUTRAGEOUS (only time plaintiff's hypersensitivity is a factor)
 - *For Example*: 2 Law Colleagues, 1 is a practical joker. He gets a life like Rubber Rattle Snake and puts it on the other's chair (while hiding behind the door to see the other's reaction). The other is hyper-sensitive and has an incredible fear of Rattle Snakes and the joker knows about that. When the other walks in and sees the snake, has a heart attack and dies while the joker laughs his ass off about it, that is Outrageous.
 - Recklessness Is Sufficient for Intent
- 2. Severe Emotional Distress
 - Self-Explanatory. Mere fright is not sufficient. Need not also have PHYSICAL injuries accompanying the emotional trauma.

- NOTE: prima facie case requires Proof of DAMAGES (only intentional tort to do so)
- *By-stander trauma*: either prove prima facie evidence of IIED or show that she was PRESENT when the injury occurred, that she is a CLOSE RELATIVE of the injured, and Defendant knew that she was Present and a Close Relative when he committed the Act

§ 2: Intentional Torts Against Property

A. *Trespass to Land*

- Key to these torts is that the Defendant got to the place by a VOLITIONAL Act (intent). However, there is No Requirement that the Defendant KNOWS of his trespass, only that he made an affirmative act to get to the place of the trespass. If wind up on land with no intent, by sleepwalking, epileptic seizure, or your horse goes crazy, there is no intent and no trespass.
 - Elements:
 1. Act of *PHYSICAL INVASION*
 2. to the *LAND*
 - 1. Act of Physical Invasion
 - Defendant enters the land on FOOT or by CONVEYANCE, or the Defendant PROPELLS TANGIBLE OBJECTS onto the Land
 - *MBE*: Non-physical invasion is not an Actionable Trespass
 - *For example*: shine a bright light on the window of another. That is not trespass, though it may be nuisance
 - *Light, Sound, Odor, Smoke* are NOT PHYSICAL INVASIONS
 - 2. Land
 - Plaintiff's property interest includes not just the SURFACE, but also the AIR ABOVE and the SOIL BELOW out to a REASONABLE DISTANCE
 - *For example*: Jets flying at 35,000 feet above the surface of a property owner are NOT trespassing, because that height is unreasonable above the land. However, a guy shooting bullets across your yard is guilty of trespass because the air above your land to a reasonable distance includes the trajectory of that bullet.

B. *Trespass to Chattel & Conversion*

- Both deal with Invasions to Plaintiff's interest in PERSONAL property
- 2 Ways to invade the Interest of Another's Personal Property
 1. *Physically DAMAGE the item (Trespass to Chattel)*
 2. *Deprive permanently of Possession (Conversion)*
- These are Civil Remedies for THEFT or VANDALISM
- Difference between them is the MAGNITUDE of the Interference
 - If the Magnitude is Minor, will be Trespass to Chattels, if Major, Conversion
 - Difference is the Remedy: CONVERSION; Plaintiff Property Owner, rather than pay damages or return the item, Defendant has to Pay Replacement Cost of Item (treat the act of conversion as a Forced Sale)
 - Harm Doer Keeps the Property, but Must pay the Plaintiff enough to Replace it

§ 3: Affirmative Defenses to Intentional Torts

A. Consent

- To have VALID CONSENT, Plaintiff must have Legal CAPACITY
 - Those without Legal Capacity cannot give legal consent
 - If Plaintiff has Capacity, look for EITHER
 1. Express Consent
 - An EXPLICIT grant of Permission given by Plaintiff to Defendant to Act in a Certain Way
 - Exception: Express Consent is INVALID if given under Circumstances of FRAUD or DURESS (i.e., when give consent to sex not knowing the other has an STD, that is not a Valid Express Consent because it is fraudulent)
 2. Implied Consent
 - a.) *Custom & Usage*: go to place were certain invasions are considered customary, like getting battery on the subway due to a quick stop, you impliedly consented to that battery
 - b.) *Defendant's REASONABLE interpretation of Plaintiff's OBJECTIVE Conduct*:
 - Reasonableness will be determined by the jury
 - Objective Conduct is the Key to the Inquiry. It must be the objective conduct that is analyzed, not the subjective intent of the plaintiff
- Note: All consent is given within a SCOPE. If Defendant exceeds the SCOPE of the Consent, Defendant Reverts to the Role of the Tortfeasor

B. Self-Defense, Defense of Others, Defense of Property

- In order to determine if 1 of these defenses is Available, must analyze two things: TIMING & ACCURACY
 1. Timing
 - May only use these defenses if the Event to which one is responding is IN THE PROCESS of being committed or is IMMINENT
 - Not available if the action has already been committed (i.e., in the past)
 - Not Proper to use these defenses for Revenge purposes
 - Either Act in the Moment or Don't act at all
 2. Accuracy
 - Self-Defense: Sufficient to use force in a self-defense if one has a REASONABLE BELIEF of imminent danger (even if get the facts of the situation wrong)
 - Defense of Others: Must Be CORRECT about jeopardy of danger to a 3rd person. If misconstrue, the purported defender can be liable. This is a BUTT-IN at your OWN RISK defense
 - MA : Grants Defense of Others (3rd Person) Privilege Based on REASONABLE BELIEF
 - Defense of Property: Sufficient to have REASONABLE BELIEF

Note: Proper Force Limitation

- Limit the use of force to whatever is NECESSARY under the Circumstances. Must be PROPORTIONAL
- *Self-defense or Defense of the 3rd Person*: If DEADLY threat involved, may use Deadly force in Response
 - MA: require RETREAT before Resorting to Deadly Force (UNLESS in OWN HOME)
- *Defense of Property*: may NEVER use Deadly force in defense of property (No Deadly traps may be used to protect property (such as the Spring Gun Trap)

C. Necessity

- Necessity is a Defense Available only to PROPERTY TORTS
- There are 2 Forms of Necessity
 1. Public Necessity
 - When a Defendant interferes with a Plaintiff Property Interest in an EMERGENCY situation to protect the Community as a WHOLE or Some SIGNIFICANT group of People, then that Defendant will have an *Absolute Defense of Public Necessity*
 2. Private Necessity
 - When destroy Property of Another to Save OWN property, When a defendant invades the Property interest of a plaintiff to defend an interest of his own
 - Three Consequences of a defendant invading the property interest of another to defend a property interest of his own:
 1. *Defendant must pay for any Harm Actually Inflicted on the Plaintiff's Property (ergo, this is a Limited Defense)*
 2. *If no harm done, however, there is no liability (not even the nominal \$1 liability available to most trespass plaintiffs)*
 3. *So long as the Emergency Persists, Plaintiff's Privilege of Defense of Property is SUSPENDED*

§ 4: Other Torts

A. Defamation

- Elements:
 1. Defamatory STATEMENT
 2. Publication
 3. Damages (maybe)
1. Defamatory Statement
 - Defendant must make a defamatory statement ABOUT the Plaintiff
 - DEFAMATORY means that it TENDS to ADVERSELY affect one's REPUTATION
 - Things that are NEVER Defamatory include statements that amount to mere name-calling
 - There must be a SPECIFIC STATEMENT of FACT

2. Publication
 - Defendant must REVEAL the Defamatory Statement to AT LEAST ONE OTHER person (other than the Plaintiff)
 - The Publication need not be Deliberate; it is possible to have Inadvertent Publication

3. Damages (maybe)
 - Some Defamation Plaintiff's need not PROVE damages whereas others do
 - LIBEL v SLANDER

Libel:

- Any Defamation Embodied in a Permanent Form (Written, Recorded, Filmed), permanently memorialized
- Libeled Plaintiff NEED NOT PROVE DAMAGES, only need to prove defamatory statement + publication

Slander:

- Oral Defamation (Spoken)
- PER SE – treated like Libel, need not prove damages
- PER QUOD – not per se, NEED TO PROVE DAMAGES

Per Se Slanderous Statements:

1. *Regarding Business or Profession of a Person (competence, qualification, practice)*
2. *Regarding a Crime of MORAL Turpitude*
3. *Imputing UNCHASTITY to a WOMAN (not man)*
MA: Does NOT recognize statements imputing the Unchastity of a woman to be slander per se
4. *Implying that the Plaintiff suffers from a LOATHESOME disease (usually Leprosy or Venereal Disease, though AIDS is up in the air)*

Per Quod Slanderous Statements (not per se slander) MUST prove Damages (like Lost Job, lost contract, decreased revenue). Some direct out of pocket harm

Note: Affirmative Defenses to Defamation

1. *Consent*
2. *TRUTH (Balance of Proof rests on the Defendant)*
3. *Privilege*

Absolute Privilege

- Applies to ONLY 2 narrow Categories of Defendants depending on their STATUS
 1. *SPOUSES Communicating with one Another (Intra-Marriage Conversations)*
 2. *Statements made by members of the 3 branches of government made in the conduct of their official duties*

Qualified Privilege

- Depends not on the Status of the Speaker, but on the CIRCUMSTANCES of the speech
 1. *Circumstances are Socially Approved or Useful Context*
 2. *Challenged Part of Speech is Relevant to a Socially Useful & Approved Context*
 3. *Defendant speaks in Good Faith (with honest belief in the accuracy of the information). Really, applicable only if the defendant was wrong, else absolute defense of truth*
- For example: Letters of Recommendation, Credit Reports, Statements made to Police, Society has deemed these activities useful and wants to encourage candor, ergo extend a Limited Privilege

NOTE: 1st Amendment Concerns

- When the Defamation involves a matter of PUBLIC CONCERN, plaintiff must prove, in addition to the common law elements the FALSITY of the STATEMENT and FAULT on the part of the Defendant
 1. *Falsity*: Burden of Proof on Plaintiff to prove that the statement is false
 2. *Fault*: Type of Fault required to be proven depends on STATUS of plaintiff
 - Public Official: Prove MALICE on the part of Defendant
 - Malice** = Knowledge of falsity OR Reckless Disregard of falsity
 - Private Person: only prove NEGLIGENCE in the publication of the falsity

B. Privacy

There are 4 Privacy Torts: **appropriation, intrusion, false light, disclosure**

1. Appropriation

- When the Defendant uses the Plaintiff's NAME or IMAGE for COMMERCIAL purposes Without Permission
- Exception: Newsworthiness. If the name or image is newsworthy, it is not appropriation to use them in a publication
- Really, the only time this comes up is when the Defendant uses the Plaintiff's name or image in an advertisement or trademark

2. Intrusion

- Invasion, by the Defendant, of Plaintiff's SECLUSION in a way that would be OBJECTIONABLE to the REASONABLE person in the community
- Remedy against Peeping Toms and Eavesdroppers
- No Physical entry on to Plaintiff's property Required
- Plaintiff must be in a place where there is a REASONABLE EXPECTATION of PRIVACY (i.e., this tort cannot occur when the plaintiff is out in public, thus limited to the home and maybe the car)

3. False Light

- MA: DOES NOT RECOGNIZE the tort of False Light
- Defined: Widespread Dissemination of a non-defamatory falsehood that would be Objectionable to the Average, Reasonable Person
- Sort of a Near Miss of Defamation, INTENT, though, is not a requirement
- Widespread Dissemination ≠ publication for defamation (which requires only disclosure to one other person)
- Widespread dissemination means that many people are aware of it

4. Disclosure

- When Defendant makes a widespread dissemination of CONFIDENTIAL information about the Plaintiff
- Exception: Newsworthiness
- There is no Disclosure c.o.a. if all the defendant does is repeat in a single forum information which is otherwise publicly available (for example: if a man is having an affair & eats with his mistress at a public restaurant, & someone tells the wife, that is not disclosure because he is repeating publicly available information)

Note: Affirmative Defenses

1. *Consent*
2. *Absolute & Qualified Privileges of Defamation are also available to False Light & Disclosure (though not Appropriation or Intrusion)*

II: NEGLIGENCE

§ 1: Elements

- Everybody knows that the Essential Elements of a Negligence Tort are Duty, Breach, Cause, Injury/Damages

1. DUTY

a.) To Whom is the Duty Owed?

- Essentially, duty is Owed to FORESEEABLE VICTIMS
- Owe a Duty to all people except unforeseeable victims
- UNFORESEEABLE VICTIM = Palsgraff type, those OUTSIDE THE ZONE of DANGER
- Exception: The 1 Unforeseeable Victim to whom a duty of care is always Owed is the RESCUER (for public policy reasons)

b.) How Much Care is Owed (what is the Standard of Care)?

- The Care owed is the REASONABLE PRUDENT PERSON under the Circumstances
- RPP = Reasonably Prudent Person, a general pain in the ass
- Compare the actions of the Reasonably Prudent Behavior to those of the Defendant
- Standard of the Reasonably Prudent Person is Objective and Never Changes (Hold the Defendant up to the standard no matter the idiosyncracities of the defendant)
- Exception: Will Attribute SUPERIOR KNOWLEDGE/ABILITY to the Reasonably Prudent Person, and will also Attribute PHYSICAL ATTRIBUTES (such as if the Defendant is blind, standard is the reasonably prudent blind person)

c.) Not All Persons Subject to Reasonably Prudent Person Standard

1. Children

- Very Young Children are incapable of Negligence (< 4 years)
- Child Standard of Care (5-18): Children of LIKE AGE, EXPERIENCE, & INTELLIGENCE (a subjective standard)
 - Exception: Children engaged in ADULT ACTIVITIES are held to a Reasonably Prudent Person Standard (such as Operation of a MOTORIZED CONVEYANCE)

2. Professional

- Custom of Industry sets the Standard of Care (medical, legal)
- Require an EXPERT witness to establish the Professional Standard of Care
 - MBE: held to a LOCAL standard
 - MA: abolish the locality rule, instead sort of a Generic National Standard

3. Land Holders

- Owners & Occupiers of Land owe their duties depending on STATUS of Entrant to the Land & Cause of the Accident
- a.) Cause of Accident (either Affirmative Activity on Land or Encounter with a Static Condition)
- b.) Legal Status of Entrant (Undisclosed Trespasser, Disclosed trespasser, Licensee or Invitee)

1. **Undisclosed Trespasser**

- Undisclosed trespassers have NO Legal Right to be on land and Owner/Occupier has No Knowledge of their existence
- Duty:
 - a.) AFFIRMATIVE ACTIVITY: No duty
 - b.) CONDITION: No duty
- Undiscovered trespasser ALWAYS loses in a negligence claim because he is owed NO duty (Similar to Mrs. Palsgraff, an Unforeseeable Victim)

2. **Discovered Trespasser** (An Anticipated Trespasser)

- The Discovered Trespasser has No legal right to be on the land, but the Owner/Occupier KNOWS or HAS REASON to know or ANTICIPATES their presence
- Duty:
 - a.) AFFIRMATIVE ACTIVITY: **Reasonable Prudence under the Circumstances**
 - b.) CONDITION: 4 Part Test. The Owner/Occupier of land must protect the Known or Anticipated Trespasser from:
 - 1. ARTIFICIAL CONDITIONS ONLY (man made, there is no duty for naturally occurring harmful conditions)
 - 2. HIGHLY DANGEROUS CONDITIONS (severe bodily injury potential)
 - 3. CONCEALED CONDITIONS
 - 4. KNOWN (to land owner/occupier) CONDITIONS (ACTUAL knowledge)
 - **Land Owners/Occupiers should protect the Known or Anticipated trespasser from Known, Man-made, Concealed, Dangerous Conditions**

3. **Licensee** (the Social Guest)

- Duty:
 - a.) AFFIRMATIVE ACTIVITY: **Reasonable Prudence under the Circumstances**
 - b.) CONDITION: the Owner/Occupier must Protect any LICENSEE from any CONDITION that is
 - 1. CONCEALED CONDITION
 - 2. KNOWN (to Land owner/occupier) Condition (actual knowledge)
 - **Land Owners/Occupiers should protect the Licensee from Known, Concealed Conditions**

4. *Invitee* (those who enter premises held open to the public; business, hospital, airport, etc.)
- Duty:
 - a.) AFFIRMATIVE ACTIVITY: **Reasonable Prudence under the Circumstances**
 - b.) CONDITIONS: Landowner must protect the INVITEE from:
 1. CONCEALED CONDITIONS
 2. ACTUAL KNOWLEDGE or SHOULD HAVE KNOWN (Imposes a Duty to **inspect**)
 - **Land Owners/Occupiers should Protect the Invitee from all Reasonably Knowable Concealed conditions.**

Summary Chart of Duties owed to Entrants by Land Owners/Occupiers

	<u>Affirmative Activity</u>	<u>Conditions</u>
Undiscovered Trespasser	No Duty Owed	No Duty Owed
Discovered Trespasser	Reasonable Prudence under the Circumstances	1. Artificial 2. Highly Dangerous 3. Concealed 4. Known (actual)
Licensee	Reasonable Prudence under the Circumstances	1. Concealed 2. Known (actual)
Invitee	Reasonable Prudence under the Circumstances	1. Concealed 2. Known (Actual or Constructive)

MA Standards for Owners/Occupiers of Land: There are only **2** categories of ENTRANTS

1. *Lawful*
 2. *Unlawful*
- All Lawful Entrants get Invitee Treatment
 - Unlawful Entrants are owed NO Duty, regardless of discovered or undiscovered

Footnotes on Duties:

- If an Entrant is Injured by Conditions, there are 2 Theoretical ways for Owner to Discharge (Satisfy) the duty.
 1. *Repair*
 2. *Warn*
 - On MBE: if “WARNING” is written, could be a signal that the owner/occupier discharged his duty
- If Plaintiff/Entrant is injured by an OPEN & OBVIOUS condition (that is potentially dangerous), that Plaintiff may NOT recover, regardless of status, because he Assumed the Risk himself

- If Owner/occupier problem involves a CHILD TRESPASSER, just do a Reasonably Prudent analysis. However, there is the **Attractive Nuisance Doctrine**. In Trying to determine what the duty of the owner/occupier is who possesses a potentially attractive nuisance, look to:
 1. *Likelihood of Child Trespasser*
 2. *Potential Magnitude of Harm to the child*
 3. *Cost of a reasonable Safety Measure*
- **OTHER DUTY ISSUES**
 - A. *Statutory Standard of Care Problem*
 - Trying to Impose a CRIMINAL statute standard onto a Negligence Case
 - If violate the criminal or other statute, it is NEGLIGENCE PER SE
 - When may a negligence plaintiff borrow an unrelated statutory standard of care to replace the Reasonably Prudent Person Standard of Care? Satisfy 2 part test.
 1. **Plaintiff is in the CLASS OF PERSONS that the statute was designed to protect**
 2. **The Accident giving rise to the negligence claim is the TYPE of RISK that the statute was designed to protect**
 - So, for Negligence Per Se, determining factor for borrowing is Class of Person, Class of Risk
 - Exceptions; (where class of person, class of risk does not apply)
 1. *Where Compliance is more DANGEROUS than Violation of Statute*
 2. *Where Compliance is IMPOSSIBLE under the circumstances*
 - MA: Even if Satisfy Class of PERSON, Class of RISK, the violation of the Statute is ONLY EVIDENCE of NEGLIGENCE, NOT Negligence Per Se
 - B. *Affirmative Duties to Act (Duty to Rescue)*
 - Rule: There is NO DUTY to Rescue (duties generally arise only if one chooses to act)
 - Must be Hard Hearted here on the MBE exam: don't get lulled by sympathy
 - Exceptions to the NO DUTY rule:
 1. *if Defendant placed the Plaintiff in PERIL in the 1st place, then the defendant has a duty to rescue.*
 2. *PRE-EXISTING Relation which triggers a duty to Rescue*
 - Kinship (family)
 - Common Carriers & Innkeepers
 - Land Owners to Invitees

The duty is to AID REASONABLY (need not be a perfect rescue; given facts, phoning the police may be sufficient; it is Reasonableness under the Circumstance)

MA: **good Samaritan statute**: Protects Rescuers from Liability if they choose to rescue (it is NARROW, it applies only to *Drs. Cops, Firemen, & people with CPR certification*)

C. *Negligent Infliction of Emotional Distress*

- What type of duty is owed to modify behavior to avoid disturbing people?
- Original Common Law: No Duty
- But over time, modify the rule; Now, a Defendant owes a duty to AVOID getting in a situation where he exposes the plaintiff to a RISK of PHYSICAL peril. Plaintiff may recover for any mental distress they suffered, even if NO physical injuries
- NEAR MISS principal, Requires a Close Call fact pattern
- To prevent Fraudulent Claims, most jurisdictions also require physical manifestations of injury which were caused by the near miss physical peril
- MA: More liberal view; Allow Recovery under ANY circumstances where the distress would be Foreseeable

2. **BREACH**

- Plaintiff MUST show what the Defendant did wrong with SPECIFICITY
- Res Ipsa Loquitor
 - Doctrine designed to Assist a Desperate Plaintiff who cannot prove exactly what the Defendant did wrong
 - Instead for Res Ipsa Loquitor to apply, Plaintiff MUST show:
 1. *Event which occurred does not NORMALLY Occur in the Absence of Negligence*
 - May use Probability to show this (usually, if a barrel falls out of a window, it is due to negligence)
 2. *The Injury Causing Instrumentality was in EXCLUSIVE CONTROL of the Defendant*
 - Res Ipsa Loquitor is no guarantee of victory; it is a shield rather than a sword

3. **CAUSATION**

- There are TWO facets of Causation: 1) Factual & 2) Legal (proximate) Causation
 1. Factual Causation
 - Plaintiff must show some cause & effect relation between the Defendant's Misconduct and the injuries of the Plaintiff
 - **BUT FOR** Test: But for the Defendant's Bad Act (negligence), the injury would not have occurred (If true, Plaintiff establishes the Factual Causation)
 - Defendant's EVEN IF Test: Even if the Defendant had acted reasonable, Plaintiff would still have been harmed.
 - Situations where the BUT FOR Test does not Work;
 - a.) Multiple Defendants & Co-Mingled Cause
 - For Example: Al & Bill are unrelated. By co-incidence, both go camping at the same National Park, 25 miles apart. Sunday, after eating, both Al & Bill independently fail to properly douse their camp fires. Then, 2 separate and independent Forest Fires erupt. Eventually, the fires merge and burn the Plaintiff's house. Here, the BUT FOR test does not work. Each Defendant could argue that but-for the negligence of the other (and not me) Plaintiff's house would have burned. This would Leave the Plaintiff without

Remedy. Not surprisingly, the Common Law Courts came up with the SUBSTANTIAL FACTOR TEST

- **Substantial Factor Test:** If an act is a SUBSTANTIAL FACTOR contributing to the event causing injury, then that act is the Factual Cause of the negligence. Therefore, each contributing actor will be held Jointly & Severally Liable.

b.) *Multiple Defendants & Unascertainable Cause*

- For Example: Somers v Tyson: 3 people go hunting together, Moe, Larry & Curly. Larry & Curly spot a quail while Moe is elsewhere. Larry & Curly both shoot at the quail, but miss and hit Moe in the eye. Can't tell which gun the injuring bullet came from. BUT FOR does not work. Instead, SHIFT THE BURDEN of PROOF to each Defendant to Exonerate himself. If the individual defendant can't exonerate his actions, he will be deemed to be one of the factual causes, and each will be held jointly & severally liable.

2. Legal (Proximate) Causation

- Every human act has ripple effects that alter the course of human history through the end of time
- Try to limit the causation to fairness; Plaintiff must show that liability would be fair under the circumstances
- Try to keep it within Foreseeability (IF the consequence was foreseeable, then it is fair to hold the defendant liable, and the act will be the Proximate, Legal cause.
- MBE: 2 types of Legal Proximate Cause Questions
 - a.) DIRECT CAUSE fact pattern:
 - Defendant acts, Plaintiff suffers, and there is NO intervening event
 - On Direct Cause case, almost always fair to hold the defendant liable (unless the results are positively freakish)
 - Therefore, the acts of the defendant will be the PROXIMATE cause of the plaintiff's injury, and liability will attach
 - b.) INDIRECT CAUSE fact pattern:
 - Defendant Acts, there is some INTERVENING event, and then the plaintiff suffers an injury. Will liability be fair? It depends on whether it was foreseeable
 - Did the intervening event cut off the defendant's liability? Did the intervening event make the outcome unforeseeable/?
 - For MBE there will be 4 INTERVENING EVENT fact patterns which IMPOSE LIABILITY on the Defendant (these are Foreseeable Intervening Causes/Events)
 1. *Intervening Medical Malpractice*
 2. *Intervening Negligent Rescue*
 3. *Intervening Protection or Reaction Forces*
 4. *Subsequent Accident or Disease*

- MBE Analysis for Intervening Causes/Events:
 - Look at the Defendant's Negligent behavior and ask what is it about the behavior that makes it negligent? What are you worried about?
 - Is the final outcome (the final event) similar to the harm ordinarily attributed to the type of negligence committed by the Defendant? If so, then hold the defendant liable. If not, the Intervening Cause excuses the defendant and there is no legal proximate cause to hold the defendant liable

4. DAMAGES

- Egg Shell Skull Doctrine: If a Defendant has otherwise committed a tort, that Defendant is Liable for ALL damages suffered by the Plaintiff, even if those damages are surprisingly great in scope
 - You take your Plaintiff as you find him
 - Egg shell Skull Doctrine applies to **ALL TORTS** (Negligence, Intentional Torts, Strict Liability Torts)
 - Egg Shell Skull Doctrine ≠ Hypersensitivity

Affirmative Defenses to Negligence

1. *Contributory Negligence (rare, only in a minority of States)*
 - Abolished in 46 Jurisdictions
 - When to use on Exam? Only if the Question explicitly states that the jurisdiction follows TRADITIONAL DEFENSES
 - Plaintiff's behavior that triggers the doctrine is FAILURE of the Plaintiff to use the Relevant Degree of Care for His/Her Own Safety
 - The Relevant Degree of Care for Safety Varies (usually Reasonableness, but may be Statutory, Professional, Child, etc.)
 - Legal Consequence: Absolute BAR to any recovery
2. *Implied Assumption of Risk*
 - Also a TRADITIONAL DEFENSE, abolished in a majority of the states
 - Look for 2 Things in Regard to the Conduct of the Plaintiff (which evidences a MANIFESTATION of)
 - a.) **knowledge of risk**
 - b.) **willingness to Voluntarily Encounter the Risk**
 - Legal Consequence: Absolute BAR to any recovery
3. *Comparative Negligence*
 - Triggered by the Same Behavior of the Plaintiff which triggers Contributory negligence, Namely, the Plaintiff fails to Exercise the REASONABLE degree of care for His Own Safety
 - Legal Consequence: Jury assigns a Percentage of FAULT to each party. The Percentage of Fault which is attributed to the Plaintiff reduces his recovery by that proportion of his fault
 - There are 2 types of Comparative Negligence: PURE & PARTIAL

- Pure Comparative Negligence: Go strictly by the Percentage no matter the degree of fault attributed to the Plaintiff's Conduct (if Plaintiff is 99% at fault, he still recovers 1%)
- Partial Comparative Negligence: Plaintiff's damages are reduce up to the point of **50%** fault. If the Plaintiff is more than 50% at fault, the Plaintiff is Barred from recovery
- MA is a PARTIAL COMPARATIVE NEGLIGENCE jurisdiction

III: STRICT LIABILITY TORTS (4)

1. Strict Liability for Injuries Caused by Animals

- Domesticated (Dog Bite Cases)
 - *In General*: There is NO Strict Liability for Domesticated Animals **unless** the Plaintiff can show that the Defendant had ACTUAL knowledge of the Domesticated Animal's **vicious propensities**
 - If the Defendant has Knowledge of the vicious propensities of the Domesticated Animal, then there will be Strict Liability
 - Usually, the animal gets one free bite (to Establish Knowledge)
 - The Knowledge of the Vicious Propensity arises from the previous acts of the domesticated animal
 - MA: Strict Liability for injuries caused by a Domesticated Animal **unless** the Plaintiff was **teasing** or **tormenting** the domesticated animal
- Wild Animals
 - Strict liability ALWAYS. The Defendant will be LIABLE no matter what precaution is taken, & despite the fact that the wild animal is purportedly tamed

2. Ultra-hazardous Activities

- An Ultra-hazardous Activity is Recognized by **3** criteria
 1. *The Activity cannot be made REASONABLY SAFE through the Exercise of Reasonable Precautions*
 2. *The Amount of Risk the Activity imposes is SEVERE*
 3. *The Activity is UNCOMMON in the area where it is Conducted*
- Ultra-hazardous Activity is context specific
- MBE: will have obvious Ultra-hazardous Activities: **explosives or blasting, toxic chemicals, radiation, nuclear energy**
- If engaged in an Ultra-hazardous Activity, Defendant will be STRICTLY LIABLE (don't get tricked by the MBE putting up all types of safety measures; the defendant will still be liable no matter how many precautions are taken)
- MA: Strict Liability, in addition, for LEAD paint in any Residential Premises where there resides any child UNDER 6 years of age

3. *Strict Liabilities for Injuries Caused by Products*

- Narrower than the Broad Product liability (which can have negligence, warranty, etc.)
- This is just STRICT Liability for Products (must read the question carefully)
- Product Negligence against a RETAILER or WHOLESALER will generally fail. WHY? Negligence involves conduct and a retailer rarely acts badly enough to cause injury
- Now, Strict Liability for Products has **4 elements**

1. Defendant is a Merchant

- Where the Defendant is a CASUAL Seller, He will NOT be a merchant, and will not be held to be strictly liable
- Where the Defendant is a COMMERCIAL ESTABLISHMENT, but not a purveyor of the GOODS in QUESTION, he will NOT be subject to Strict Liability
- A COMMERCIAL LESSOR is considered to be a Merchant for this purpose (like Hertz, a Construction Equipment Company, etc.)

2. Product is Defective

- The MBE may stipulate this up front, but IF NOT, There are **2 Standards** of DEFECT

a.) **Manufacturing Defect**

- When the Product that Harmed the Plaintiff DIFFERS from other identical products that came off the assembly line, in a way that Makes it more dangerous than a Consumer would Reasonably Expect
- This is like an IRREGULAR product that can harm the consumer
- This type of Manufacturing Defect will cause Strict Liability to Attach REGARDLESS of the Degree of Care Exercised by the Defendant
- For Example: the 1 in a million toaster that explodes, that will be a Manufacturing Defect and Strict Liability May attach, if prove the other Elements

b.) **Design Defect**

- A Product has a DESIGN Defect if there is an ALTERNATIVE WAY to physically build the product that satisfies a **3 pronged Analysis**. The Alternative must be:
 1. Safer
 2. Cost Effective (Alternative is not much more expensive than the current Design)
 3. Practical (Alternative does not impair the utility of the product)
- Design Defects may also include things such as WARNINGS (as an alternative) & INSTRUCTIONS (as alternative design)
- MBE: An absence of a warning may indicate a design defect

3. Defect in Question Existed at Time the Product Left the **Control** of the Defendant
 - There is a PRESUMPTION that the defect existed at the time the product left the control of the defendant, if the product traveled through the ORDINARY CHANNELS of TRADE
 - With the presumption, this element becomes almost automatic
4. Plaintiff must be a Reasonably **Foreseeable User** making a **Reasonably Foreseeable Use** of the Product
 - **Foreseeable Use** is NOT limited to the INTENDED use of the product (foreseeable can also include several unintended, yet reasonably foreseeable uses)
 - For Example; A chair is intended to be sat on, but it is foreseeable that someone will use it to climb up and reach the top of their closets

NOTE: MA: Strict Liability is TECHNICALLY NOT RECOGNIZED. But, the same outcome is pretty much assured via the LAW OF WARRANTY

IV: NUISANCE

- MBE: The Fact Pattern will be 2 Landowners (neighbors) getting on each others nerves
- Plaintiff decides to open a Sanitarium for persons suffering from nervous disorders. Defendant decides to open up a music studio for Heavy Metal Bands. That type of thing
- RULE (in general): One will be Guilty of Nuisance if he **UNREASONABLY INTERFERES** with his **NEIGHBOR'S USE** or **ENJOYMENT** of the **Land**
- MBE: Degree and Reasonableness will be the issues. Try to **BALANCE** the Interests of each neighbor.
- MBE: can't ask for a conclusion (which is too subjective). Therefore, it will only ask for the rule of the law.

V: MISCELLANEOUS ISSUES IN TORTS

A. Vicarious Liability

- Find Liability in a completely passive party due to that party's relationship to the active tort-feasor. There are **3** principal relationships which involve Vicarious Liability:
 1. Employer-Employee
 - *Rule*: Employer will be VICARIOUSLY Liable for the Non-intentional Torts of his Employee committed within that Employee's **scope of employment**
 - **Intentional Torts** of the Employee will not create Liability in the Employer (because intentional torts are outside of the scope of employment). However, there are **3** Exceptions, in which Employers can be held liable for the intentional torts of their employees.)
 - a.) *FORCE is within the Scope of Employment*
 - b.) *Job Generates FRICTION*
 - c.) *The Intentional Tort DIRECTLY serves the Master's Purpose*
 2. Owner-Driver of Automobile
 - *Rule*: No vicarious liability imposed on the owner of a car for the torts committed by the driver of the car
 - *Trick*: If the owner directs the driver to do something which benefits that owner, then it becomes an AGENCY relationship, and the Principal is Always Liable for the Acts of his AGENT
 3. Parent-Child
 - *Rule*: Parents are NOT vicariously liable for the Torts of their Children.
 - Why would anyone sue the kids? Covered by insurance
 - **MA**: Limited Exception: MA parents are vicariously liable for UPTO \$5,000 of damages of WILFUL torts committed by their children
 4. Alcohol Servers
 - May be liable for Torts committed by Alcohol consuming drivers who leave their premises (It is a NEGLIGENCE and not a STRICT LIABILITY standard)
 - **TRICK**: Vicarious Liability Analysis should NEVER be used BEFORE a Direct negligence analysis. If the Defendant is DIRECTLY liable, no vicarious negligence liability analysis is required.

B. Reconciliation of Rights Between Multiple Defendants

- For Example: Plaintiff sues MULTIPLE defendants, Plaintiff wins, and Plaintiff collects the Joint & Several Liability from one, and only one, of the multiple defendants. What rights does that defendant, who paid, have against the other defendants, who have not yet paid?
- Common Law: **2** Mutually Exclusive Remedies:
 1. *CONTRIBUTION*
 - If all co-defendants are ACTIVE tortfeasors of roughly EQUAL Culpability, the out of pocket Defendant can go after the other Defendants for equal Fractional Shares
 2. *INDEMNIFICATION*
 - If there is a DISPARITY in the culpability or if 1 Tort-feasor is Passive and the others are Active; when the LESS CULPABLE party pays, he has a RIGHT of INDEMNIFICATION from the others (100% pay-back)

C. Tort Immunity

- There are only **3** types of Tort Immunity
 1. *Governmental Immunity*
 - Can an agency of the Government be immune from TORT?
 - It depends on whether that agency was ENGAGED in a PROPRIETARY FUNCTION or a TRADITIONAL FUNCTION
 - If it was a **proprietary function**, there is **no immunity**
 - Proprietary Functions are the Conduct of an Activity Equivalent to a PRIVATE BUSINESS (parking lot, swimming pool, dormitories, etc.)
 - If it was a **traditional function**, there is **immunity**
 - Traditional Functions include Police, Fire, National Guard, Militia, etc.
 2. *Family Immunity*
 - Historically, members of the same family could not sue one another for torts (inter-spousal or parent-child)
 - Most states, though, have abolished this type of immunity
 - MBE: if it alludes to family immunity, it is likely a wrong choice
 - MA; has abolished Family Immunity
 3. *Charitable Immunity*
 - Historically, this immunity was common as nobody wanted to bankrupt a charity with a tort action
 - Now, though, with the Availability of **insurance**, there is very LIMITED charitable immunity
 - MA: Charities have a **maximum liability** of **\$20,000** in a tort claim **unless** the charity is **also engaged in a commercial activity**

VI: EQUITY

A: Overview of Equity

- **Equity means injunctions**
 - Plaintiff, if establish a prima facie case on merits, may get injunctive relief instead of damages.
 - **First**, the Plaintiff must show that a **tort** has been committed before he may get injunctive relief
 - What Torts are capable of being compensated for by Injunctive Relief?
 - Torts involving a **property** or **commercial** interest (such as nuisance),
 - In Family cases, or Defamation cases, courts are less likely to grant injunctive relief
 - **Second**, the Plaintiff must satisfy the following elements to get injunctive relief
 1. ***Absence of Adequate Remedies at Law***
 - Money Won't work: Applicable where:
 - a.) *Behavior is REPETITIVE, ON-GOING, INCESSANT*
 - b.) *Defendant is INSOLVENT*
 - c.) *Threatens something of INCALCULABLE VALUE*
 2. ***Property Interest is at Stake***
 - Has become a mooted element over time. Courts NOW cast as a property right any protectable right
 3. ***Injunction could be Feasibly Enforced***
 - Enforcement is more important in cases of AFFIRMATIVE MANDATORY injunctions than NEGATIVE injunctions (Affirmatives are harder to monitor). How to Weigh?
 - a.) *The more COMPLEX the affirmative act, the more difficult the enforcement*
 - b.) *The LONGER the act takes, or the more supervision it requires, the more difficult it is to enforce*
 - c.) *If the Act is OUT OF STATE, it is more difficult to enforce*
 4. ***Balancing of Hardship***
 - Court must weigh the Hardship imposed on Plaintiff if not granted against the Hardship imposed upon the Defendant if it is imposed
 - **MA: Trespass & Balance of hardship**: If the Defendant builds a structure which encroaches on the land of the Plaintiff, the Plaintiff can get Relief without a BALANCE of the HARDSHIP Analysis

B: Defenses to Injunction

1. Unclean Hands

- Plaintiff who is Guilty of Misconduct Cannot Get Injunctive Relief

2. Laches

- When the Plaintiff has UNREASONABLY DELAYED in bringing an action AND the Delay is PREJUDICIAL to the Defendant
- Laches ≠ Statute of Limitations. SoL considers the PASSAGE of time, whereas Laches considers the EFFECT of time

3. 1st Amendment

- Torts involving SPEECH and Speech related Activity: Very difficult to get any type of an injunction. They will usually be denied due to the 1st Amendment.

C: Preliminary Injunctions

- This is done to freeze the situation at a Status Quo pending a FULL TRIAL.
- To get a Preliminary Injunction (or a TRO), the Plaintiff Must Show:
 - 1. Plaintiff will Suffer IRREPARABLE injury, absent the TRO***
 - 2. Plaintiff is LIKELY to SUCCEED on the Merits*****Plus the Remaining Elements of any Injunction**
 - 3. Absence of an Adequate Remedy at Law***
 - 4. Property Interest at Stake***
 - 5. Injunction is Feasibly Enforceable***
 - 6. Balancing of the Hardships***

NOTE; there are separate requirement for a TRO, which is usually done Ex Parte
Refer to Outline in Book and pray it is not on the exam