

MBE Torts (Texas) Lecture Handout

Professor Arnold Rochvarg

Torts in Texas is tested only on MBE. Answers should be based on general principles of law, not Texas law. These general principles require you to also know some minority approaches and some modern trends. Assume comparative negligence, joint and several liability, and survival and wrongful death statutes unless otherwise stated. Assume no other statute unless stated in the fact pattern.

INTENTIONAL TORTS

For all intentional torts:

1. D must have made a voluntary act. Involuntary acts such as sliding on ice are not sufficient.

*Example: While socializing at the Cattleman's Club, J.R. slapped Punk Anderson so hard on the back that Punk spilled his bourbon on Jock. Was J.R.'s act voluntary?
Yes Was Punk's act voluntary? No*

2. D must have intended the consequences of D's act. This means D acted with actual desire or substantial certainty. Negligent behavior is not sufficient.
3. Intent can be proven by transferred intent – either tort to tort or person to person.
 - a. Person to person: if intent is proven as to one plaintiff, intent is proven as to all plaintiffs.

Example: J.R. slapped Punk with the intent to have Punk spill his bourbon on Cliff. IN fact, the back slap caused Punk to spill his drink on Clayton. Is the intent element proven in Clayton's lawsuit against J.R.? Yes, based on transferred intent.

- b. Tort to tort: if intent is proven for one intentional tort, eg assault, intent may be proven for another intentional tort, eg battery.
4. Motive is not relevant. Watch for good intentions with intent.

*Example: Because J.R. wanted to buy Sue Ellen a totally new wardrobe for her birthday, he burned all her dresses. Did J.R. have the intent for the intentional tort of conversion?
Yes, despite his good motive.*

5. Mentally incompetent adults and children can be held liable for intentional torts.
6. Causation: D's act must have caused or been a substantial factor in causing the result.
7. Actual damages are not needed. Nominal damages (\$1) can be awarded.

8. Punitive damages are to punish and deter if D's behavior was willful, wanton and malicious. Amount of punitive damages is based on D's wealth. Modern trend is to limit punitives to more egregious conduct by D.

9. Unlike in negligence, a Defendant in an intentional tort case is liable for all harm caused even if unforeseeable.

ASSAULT

Reasonable apprehension of imminent harmful or offensive contact, plus intent and causation.

1. Apprehension means "expectation of."

2. Harmful contact includes being punched or shot. Offensive contact includes spitting.

3. D must do a voluntary act which creates a reasonable apprehension in P of imminent or immediate harmful or offensive contact. D must intend to cause such apprehension.

4. No actual contact is needed.

5. Words alone are not sufficient to prove assault. There must be some physical act. Three exceptions: (1) dark room; (2) blind plaintiff; (3) shouted practical joke.

6. Words can negate assault: "I'd love to hit you, but I won't."

7. A conditional threat is not a defense; "Your money or your life" satisfies assault.

8. P's apprehension must be for herself, not someone else, even if that someone else is a family member.

9. P's apprehension must be of immediate contact, not future: "I'll spit on you next week," does not prove assault.

10. P must be aware of D's act. Sleeping or unconscious persons cannot win assault cases.

11. D must have the actual or apparent ability. Apparent ability is sufficient. The unloaded gun that P does not know is unloaded satisfies assault.

12. P's apprehension must be reasonable. Extra sensitivity of P is only considered if D is aware of P's extra sensitivity.

13. Transferred intent applies to assault.

14. No actual damages are needed for assault.

Review problem: At the Oil Baron's Ball, Bobby tried to punch J.R. The punch missed J.R., but landed on Punk Anderson. Punk, however, was so drunk that he did not feel it. A gun which J.R. was negligently carrying fired a bullet in the direction of Cliff. The bullet missed Cliff. J.R. yelled at Cliff, "At next year's Oil Baron's Ball, I will shoot you."

Is Bobby liable for assault against J.R.? - Yes - Voluntary, intent, transferred intent

Is Bobby liable for assault against Punk? - No - No awareness

Is J.R. liable for assault against Cliff? - No - Future threat, not immediate, words alone not sufficient

Key issues: no contact needed; transferred intent; awareness; intentional act (negligent act is insufficient); immediate harm, not future; words alone are insufficient.

BATTERY

D's harmful or offensive contact with P plus intent and causation.

1. D must intend to cause harmful or offensive contact.
2. The intent to commit assault (apprehension) will satisfy intent for battery under transferred intent when the contact is made accidentally.
3. Contact can be with P's body or something connected to P's body, eg, a hat. Battery also established by D setting in motion something that causes contact, eg, pulling away a chair or putting poison in food.
4. Harmfulness or offensiveness of contact is based on a reasonable person standard. We only consider special sensitivity of P if D knew of it.
5. P's awareness of the contact is not needed for battery.

Review Problem: At the Oil Baron's Ball, Bobby, jokingly threw a punch at J.R., but purposely missed him. The punch accidentally landed on Punk Anderson. Punk, however was so drunk that he did not feel the punch. Has Bobby committed a battery against J.R.? - No. Has Bobby committed a battery against Punk? - Yes.

Key issues: actual contact needed; transferred intent; awareness not needed.

FALSE IMPRISONMENT

P is confined or restrained to a bounded area by D's voluntary and intentional act.

1. D's act must confine or restrain P to a bounded area. D's act must be voluntary and with the intent to confine or restrain.

2. Confinement or restraint includes physical barriers (locking a door), physical force, and threats of immediate physical force.
3. A bounded area means there is no reasonable exit.
4. Being excluded from an area is not false imprisonment. P being locked out of P's house is not false imprisonment.
5. Moral or social pressure is not sufficient. If P remains in place to clear P's name or avoid attracting attention, this is not false imprisonment.
6. P need not resist or test the threat of force.
7. Length of confinement is not relevant to prove a false imprisonment case (although relevant to damages).
8. P must be aware of confinement. Exception: if P is mentally incapable of awareness, but is actually harmed.
9. Transferred intent applies to false imprisonment.
10. Motive is not relevant.
11. Actual damages are not needed.

Review Problem: Cliff Barnes was attending the Mavericks-Rockets basketball game when he went to the men's room. When he tried to leave, Cliff was unable to push open the stall door. The door had been locked from the outside. When Cliff tried to crawl underneath the door, Cliff was told that if he tried to leave the stall, he would be shot. Cliff saw a window about six feet above the toilet. He stood on the toilet and looked out the window. It was over fifty feet off the ground. Two minutes later, the door stall opened, and Cliff saw Ray Krebs. Ray apologized to Cliff. Ray said he thought J.R. was in the stall, and he had intended to play a practical joke on J.R. Will Cliff be successful in a false imprisonment case against Ray? Yes

Key issues: confinement to a bounded area; threat of immediate physical harm; no reasonable exit; awareness; no need to test the threat of force; transferred intent; motive is irrelevant; short length of time not fatal; no actual damages needed.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

D'S intentional or reckless extremely outrageous behavior which causes P severe emotional distress.

1. D's act must be extreme and outrageous. Rudeness is not sufficient. But mere words or a threat of future outrageous behavior may suffice.

2. P's special sensitivity will be considered only if D knows of P's special sensitivity.

Example: Jenna's daughter died from food poisoning at McDonald's. At the funeral, J.R. asked Jenna if she wanted to get a Big Mac.

3. D's identity is relevant. Eg, conduct by common carrier's and innkeepers are more likely to be viewed as outrageous.
4. P's identity is also relevant. A plaintiff who is pregnant, elderly or very young is more likely to win these cases.
5. Severe emotional distress is required, eg, a complete nervous breakdown. Nominal damages are not enough.
6. Intent is proven not only by actual desire and substantial certainty, but also reckless behavior. "Deliberate disregard of a high probability".
7. As a general rule, transferred intent does not apply (especially tort to tort), but cases exist that permit onlookers to collect, especially if family member is target of the outrageous conduct.

Review Problem: Jock Ewing was reported missing in the jungles of Bolivia. J.R. and Bobby flew down to Bolivia to investigate. While in Bolivia, J.R. explained to Maria Gomez, the president of a local airline company, that he was very close to his father, Jock, and that he was very upset. ON a flight from La Paz to a jungle airstrip, Maria told J.R. she had a special meal for him. She then uncovered a plate that had Jock's decapitated head on it. J.R. suffered a nervous breakdown, as did another passenger who saw the head. If Maria liable to J.R. for intentional infliction of emotional distress? - Yes. Is Maria liable to the other passenger? - Maybe? No.

Key issues: extreme and outrageous behavior; D's knowledge of special sensitivity; common carrier defendant; severe emotional distress; intent.

TRESPASS TO LAND

1. Trespass to land involves D's voluntary and intentional physical invasion of P's land.
2. P's land includes airspace to a reasonable height.
3. Physical invasion includes D's personal entrance, throwing tangible objects on P's land, D's remaining on P's land after being told to leave, or D's leaving objects on P's land after being told to remove them.
4. P can be owner or tenant (superior possessory interest to D).
5. D must have intent to physically invade, but no need to prove intent to trespass or do any wrong.

6. D's good faith, honest, reasonable belief that the land belongs to D is not a defense.
7. Harm to land is not needed.

Review problem: Ray Krebs rents a small house on three acres from Jock Ewing. Carter McKay, reasonably and in good faith believing that the land and house was his, slept in the house one night when Ray was gone. When Ray returned the next day, Carter left when Ray told him the house was Ray's. That night, Ray invited Carter to dinner beginning at 6 p.m. At 10 p.m., Ray told Carter to leave. Carter refused. Has Carter committed any trespass to land? Yes (2)

Key issues: tenant as P; reasonable belief of ownership is not a defense; refusing to leave is trespass; no actual damages needed.

CONVERSION AND TRESPASS TO CHATTEL

1. Conversion is the intentional destruction or wrongful possession for a significant period of time of another's personal property.
2. Trespass to chattel involves less harm or short wrongful possession of another's personal property.
3. Remedies for conversion include damages (fair market value) or replevin (return).
4. Trespass to chattel damages require actual damages, usually reduction in value or value of loss of use.
5. D's good faith reasonable belief that property belongs to D is not a defense.

Review Problem: Lucy Ewing mistakenly took Pam's coat from the cloak room at a restaurant. Lucy reasonably believed the coat was hers. When Lucy saw a homeless person on the street, Lucy gave the coat to the homeless person. When Pam went for her coat, she mistakenly took Sly's coat. When Pam put it on, she realized it was Sly's, and Pam put it back in the coat room. Is Lucy liable for conversion? Yes. Is Pam liable for trespass to chattel? No, no actual damages - if torn, then damages, yes.

DEFENSES

CONSENT

1. Consent is a defense to all torts.
2. D's acts beyond scope of the consent defeat the defense.
3. Consent based on duress is invalid.
4. Consent based on P's mistake is invalid only if D was aware of P's mistake.

Example: In a dark room, J.R. asked April to consent to a kiss. April who mistakenly believed J.R. was Bobby, said yes. If J.R. knew of April's mistake, then there is no consent, and thus a battery. If J.R. was unaware of the mistake, there is valid consent, and no battery.

5. If express consent was based on a misrepresentation going to the essence of the touching, consent is not valid. If express consent was based on a misrepresentation as to a collateral matter, consent is valid.

Example: J.R. said to Afton, "I was born on April 1, can I kiss you?" Afton said yes, but in fact J.R. was born on April 8. There would be no battery, because the misrepresentation was to a collateral matter (J.R.'s birth date), and thus there is valid consent. ON the other hand, if J.R. asked Afton whether he could touch her with a harmless stick, and Afton said yes, but the stick was electrified and gave her a terrible shock, there is battery, because the misrepresentation went to the essence of the touching, and thus the consent was not valid.

6. Implied consent is also a defense. Implied consent results from participating in activities known to include physical contact, eg, riding a bus. There is also implied consent in an emergency situation.

7. If D is reasonable in believing P has consented, consent is valid, even if D was mistaken that P consented.

8. Consent to criminal act: Majority view is that P cannot validly consent to a criminal act, and therefore the loser in a fight can sue for battery. Modern trend says no battery case because of consent.

9. Capacity to consent: P must have the capacity to understand the consequence of consent for there to be valid consent. Children, mentally incompetent individuals, and drunken persons lack capacity to consent.

Example: Jordan Lee asked Christopher, age four, whether he could touch him with an electric cattle prod. If Christopher does not understand what a cattle prod does, and Christopher says, "Yes, please touch me with the prod", there is not valid consent.

Review problem: Casey Denault walked into the Cattleman's Club for a drink. As he walked through the crowded bar, he bumped against Punk Anderson. Casey then walked over to Gil Thurmond who was sitting on a bar stool. He told Gil that if Gil shook his oily dirty hand, he would buy him dinner. Gil shook his hand, but Casey refused to buy him dinner. Casey then went to Afton, and asked her if he could fondle her for one minute. Afton nodded yes, but in fact was so stoned, she had no idea of what was happening. Casey fondled Afton for thirty minutes. Is Casey liable for battery against Punk? - No, implied consent (crowded bar).

Is Casey liable for battery against Gil? - No, misrepresentation of collateral matter (buying dinner) = valid consent.

Is Casey liable for battery against Afton? - Yes, stoned, one minute vs. 30 minutes

Key issues: implied consent; misrepresentation as to a collateral matter; capacity to consent; acts beyond consent.

SELF DEFENSE

1. D is entitled to use reasonable force to prevent an intentional tort that D reasonably believes is about to be committed against D.
2. Reasonable belief of D is valid defense even if D was mistaken for need to use self-defense.
3. The amount of self defense must be reasonable. If too much force is used, the defense is invalid or lost.
4. General rule: there is no duty to retreat. Modern trend requires retreat if self defense force causes death or serious bodily harm, unless D is in own home.
5. Self defense does not include retaliation.
6. Injured bystanders: If a bystander is injured during valid, reasonable self defense, self defense privilege transferred to bystander's case, and D is not liable.

Review Problem: Ray Krebs went into Braddock to shoot pool at the pool hall with Wes Parmalee. After losing to Ray, Wes pulled a gun from inside his shirt. Ray kicked Wes in the stomach, causing Wes to let go of the gun which then hit Gil Thurmond on the head. Wes and Gil sue Ray for battery. Wes testified he had no plans to use the gun; he was merely moving it away from his wallet so that he could buy a drink for Ray. Is Ray liable for battery to Wes? - No. Is Ray liable for battery to Gil? - No.

Key issues: reasonable belief; reasonable amount; injured bystander.

DEFENSE OF OTHER PERSONS

1. Reasonable force may be used to protect a third person, even a stranger.
2. Split of authority regarding mistake: Majority position is that if defender is mistaken as to right of self defense of third person, defense is invalid (liable). Modern trend provides for valid defense if D was reasonable in belief of third persons right to self defense.

DEFENSE OF LAND OR CHATTELS

1. Reasonable, non deadly force, may be used to protect land or chattels after a request is made not to commit the tort.
2. Request is excused if D has reasonable belief that request is useless or dangerous.

3. Retaliation is not allowed.
4. Reasonable, non deadly force to regain possession of chattel is allowed if (1) original taking was illegal, (2) in fresh pursuit, and (3) request for return is useless or dangerous.
5. When chattel is located on land of wrongdoer, owner of chattel is privileged to enter wrongdoer's land and reclaim chattel. Reasonable entry on wrongdoer's land is total defense.

Review Problem: A burglar entered April's apartment and grabbed some jewelry on the cocktail table in the living room. When the burglar left the apartment, he slammed the door thus waking April. April ran to the front door and (1) shot the fleeing burglar; or (2) ran after him and tackled him to recover the jewelry. Is April liable for battery? in (1) Yes; in (2) No.

Key issues: no deadly force to protect property; repossession of chattel.

NECESSITY

1. A defense to trespass to land, trespass to chattel and conversion.
2. Public necessity defense: if D's acts, although a tort, avoided greater injury to the public. This is a total defense.
3. Private necessity defense: if D's acts, although a tort, avoided greater injury to a small number of persons. D, however, is still liable for any actual damage.

Review Problem: Digger Barnes' shack caught on fire. Ray Krebs dynamited Digger's shack to stop the fire from spreading. (1) If the fire would have spread and destroyed the entire town of Braddock, would Ray be liable for conversion or for any damage to the contents of Digger's house? Answer: No, because of public necessity. (2) If the fire would have spread to destroy only the house of Donna Krebs, would Ray be liable for conversion or for any damage to the contents of Digger's house? Answer: No liability for conversion, but Ray would be liable for damage to the contents.

DISCIPLINE

1. D is permitted to use reasonable force to control a child.

Review Problem: John Ross, Jr. was put into "Time Out" by his kindergarten teacher. Is the teacher liable for false imprisonment? Answer - No. What if the teacher locked John Ross in a foot locker for a week? Answer - Yes.

DEFAMATION

1. Slander is purely spoken. Libel is written or permanent form. Statements on TV, oral repetitions of a libel, and written repetition of a spoken statement are all viewed as libel.
2. Statement must be defamatory. Defamatory means it lowers P's reputation in the community (respectable society) or deters others from associating with P.

3. Whether a statement is defamatory is based on whether a reasonable person would find the statement defamatory.

4. Facially Defamatory, Inducement, and Innuendo: J.R. tells Bobby that Afton is a crack cocaine addict who steals to support her addiction. This is defamatory on its face. Compare: J.R. tells Bobby that Afton married Cliff, and had a wonderful honeymoon in Waco. Extrinsic facts are needed to make this defamatory (eg, that Afton is already married to someone else, and thus is a bigamist and adulterer). In this latter case, we need: Inducement: the pleading of additional facts to prove defamatory nature; and Innuendo; plea of defamatory meaning of the statement.

5. Defamation involves statements of fact, not opinion. A statement is not an opinion just because it begins with "My opinion is." Compare "My opinion is that Digger Barnes embezzled money from the bank" with "J.R. is the slickest oilman in Texas."

6. Concerning plaintiff: A reasonable reader or listener must understand the statement to refer to P. If P's identity is not obvious, P must plead extrinsic facts. This is called Colloquium. *Example: A novel, Primary Colors, is published about the presidential campaign and sexual shenanigans. In a libel action, Bill Clinton, in his complaint through his Colloquium, alleges that people who read the novel reasonably understood it to concern him, even though the character in the book has a different name and the book claims to be fictional.*

7. Group defamation: If a group is defamed, an individual member of the group can only bring an individual defamation action if the group is small. No bright line exists as to what size group is too large.

8. No dead defamation plaintiffs.

9. Publication: A defamation action requires publication which means communicated to a third party who understood it. D merely telling P is not sufficient.

10. D's publication must be voluntary, and made either intentionally or negligently.

Example: J.R., intending only to tell Afton that she was a crack cocaine addict (and thus there would be no publication), spoke unreasonably loudly, and Cliff heard the statement. There is publication. If J.R. was not speaking unreasonably loudly, but Cliff had wiretapped Afton, there would have been no publication.

11. Republication: A person who repeats a defamatory statement is also liable for defamation. Moreover, the republisher can increase the liability of the original defamer if republication was intended or reasonably foreseeable.

12. Presumed Damages: At common law, if statement was defamatory, damages were presumed without need to prove actual damages.

13. Special damages mean economic damages such as loss of a job. Special damages are needed for slander, except if the statement involves a crime of moral turpitude, business misconduct, sexual misconduct, or loathsome disease.
14. Libel per quod (minority view): a writing not defamatory on its face requires special damages.
15. Truth: Under common law defamation, truth is a defense for defendant to prove. P is not required to prove falsity.
16. Constitutional Limits: involved when (1) plaintiff is a public official or public figure, or (2) when the matter involves an issue of public concern.
17. Public official/public figure plaintiffs must prove by clear and convincing evidence that the statement was false, and that D acted with malice, meaning D knew the statement was false or acted with reckless disregard of its truth or falsity.
18. There are all purpose public figures (government officials, sports and entertainment figures), and limited purpose public figures – those who have voluntarily assumed a role in a particular public controversy.
19. “Private person/public concern” plaintiffs are not required to prove malice, but such P’s must prove D made a false statement and that D acted at least negligently. However, a “private person/public concern” plaintiff must prove malice to collect presumed and punitive damages.
20. A private person plaintiff suing for defamation in a matter not of public concern need not prove any fault of D under common law; need not prove falsity, and can collect presumed and punitive damages even absent malice.
21. Absolute privilege: There is no defamation liability for statements made by one spouse to another; statements made in judicial proceedings; statements made by executive branch officials; and statements made by legislators in hearings or floor debates.
22. Qualified privilege: There are various situations where a speaker is entitled to a qualified privilege. Look for employers and professors giving recommendations; persons reporting crimes; and credit bureau reports. If D has a qualified privilege, D is only liable if (1) D acted with malice; or (2) engaged in excessive publication; or (3) if the statement is unrelated to the policy of the qualified privilege.

Example: Professor writes a clerkship recommendation letter commenting on a student’s legal research and writing skills, and adds a PS that student has loathsome disease. Qualified privilege is lost because it is beyond the policy.

23. Consent is a defense to defamation.

Review Problem: Sue Ellen owned a clothing boutique where Mandy worked as a model. Sue Ellen hated Mandy. Sue Ellen told Mandy she saw her steal a dress from the store.

Sue Ellen told Miss Ellie that Mandy was having an affair with Dave Culver, the Senator from Texas. Sue Ellen told Pan that Mandy had ugly hair. When Mandy heard about these statements, she quit working for Sue Ellen, and applied for a job on Wheel of Fortune. When Pat Sajak called Sue Ellen, Sue Ellen told Pat that she felt sorry for Mandy because Mandy was an abused child, and that like all persons born under the zodiac sign of Aries was a kleptomaniac.

Key issues: publication; public official plaintiff and malice; private person plaintiff and matter of public concern – negligence; special damages; opinion vs. fact; qualified privilege; colloquium; group defamation.

INVASION OF PRIVACY

There are four branches to invasion of privacy:

1. Misappropriation of P's picture or name for commercial advantage.
2. Unreasonable intrusion into P's affairs or seclusion: Examples include wiretapping, reading P's mail, repeated telephone calls. The intrusion must be into something private, and must be objectionable to a reasonable person. No communication to a third person is needed.
3. Public disclosure of private facts about P. The private facts are such that a reasonable person would not want these facts to be made public. D's disclosure must be made in a public way. The facts are true; not generally known about P; not part of the public record; and not of legitimate public interest.
4. False Light: false attribution of a belief or action which a reasonable person would find objectionable that is publicized in a public way. Malice needs to be proven.
5. Consent defense: only actual consent is a valid defense, not reasonable belief of consent.

Review problem: Cliff Barnes started an oil exploration company to compete with Ewing Oil. To attract business, Cliff mailed a brochure to over 1000 oil companies in Texas. The front of the brochure had a picture of Tiger Woods with the quote "Tiger loves Barnes Oil." Inside the brochure, Cliff wrote that J.R. supported government subsidies for solar and wind power (which were not true), and that J.R. had a picture of Barry Manilow on his nightstand in his bedroom (which was true). Cliff knew about the nightstand picture because he had secretly installed a camera in J.R.'s bedroom

All four branches of invasion of privacy are illustrated.

1. Camera - intrusion into seclusion
2. Manilow - public disclosure of private fact that reasonable person doesn't want people to know of
3. Solar support -
4. Tiger Woods - misappropriation of likeness

DECEIT - FRAUDULENT MISREPRESENTATION

1. A misrepresentation of material fact.
2. As a general rule, opinions and silence cannot be the basis of deceit.
3. Deceit can be based, however, on an opinion by an expert; and on silence if there is a fiduciary relationship, or a duty to correct earlier misinformation.
4. D must have scienter – intent to deceive or reckless disregard of the truth.
5. In general, transferred intent does not apply. Only proper P's are those D intends to deceive or could reasonably foresee would rely on the statement.
6. P must prove reasonable reliance and actual damages.

Review problem: J.R. called Cliff Barnes, and asked Cliff to meet him at the Cattleman's Club. J.R. offered to sell Cliff a property which J.R. told Cliff had 1 million barrels of oil beneath the surface. In fact, J.R. had a report that estimated only 1000 barrels. Cliff agreed to buy the property, and J.R. laughed his way to the bank. Is J.R. liable for deceit? Yes

NEGLIGENT MISREPRESENTATION

1. A misrepresentation of fact as a result of D's negligence. This tort is narrow; it only covers misrepresentations made by D as part of D's business or profession, eg, accountants and surveyors.
2. Only persons that D knew would rely on D's statement are proper P's.
3. P must prove reasonable reliance and actual damages.

Review Problem: J.R. and Bobby decided to sell Ewing Oil to Jeremy Wendell. J.R. hired Mark Grayson, a certified public accountant, to value the business and to send the figures to Wendell. In valuing the business, Mark negligently calculated the company to be worth \$35 million. This was \$5 million more than its true value. Jeremy Wendell, relying on Mark's figures, paid the \$35 million. Is Grayson liable to Wendell for negligent misrepresentation? - Yes, although reasonable reliance may be an issue.

TORTIOUS INTERFERENCE WITH CONTRACT

1. P must prove P had a valid contract with T that D knew about; that D intentionally interfered with the contract; and that plaintiff suffered actual damages.
2. Interference with a contract at will or a prospective contract is only actionable if D used wrongful tactics, eg, violence.

Problem: Gil Thurmond agreed to sell his oil refinery to Cliff Barnes. A written contract was signed. J.R. then called Gil, and convinced Gil to sell the refinery to him. Is J.R. liable in tort for interference with a contract? - Yes

NEGLIGENCE

Six issues: duty, breach, actual cause, proximate cause, damages, and defenses.

WAS A DUTY OWED

1. Rule #1 - Everyone has a duty not to affirmatively act in a manner to create unreasonable risk of harm to others.

Example: Ray put Charlie on a wild unbroken horse. When the horse threw Charlie, Charlie broke her leg. Did Ray have a duty to Charlie? Yes, because his act created an unreasonable risk of harm.

2. Rule #2 - There is no duty to take precautions against events that are not reasonably foreseeable.

Example: Ray put Charlie on a pony. Unknown to anyone, the pony had a rare disease that caused the pony to collapse causing Charlie to break her leg. Did Ray have a duty to Charlie? No liability, because there is no duty to protect against an unforeseeable event.

3. Rule #3 - A duty is only owed to foreseeable plaintiffs.

Example: Ray put Charlie on a wild horse. The horse kicked Jenna who was helping Charlie get on the horse. Did Ray owe a duty to Charlie and Jenna? Yes, because Jenna and Charlie are foreseeable plaintiffs.

Example: Ray put Charlie on a wild horse. The horse raced off of Southfork, and ran ten miles to Braddock where the horse ran over Cliff breaking Cliff's leg. Did Ray owe a duty to Cliff? Under the majority (Cardoza) approach, no, because Cliff was not within the foreseeable zone of danger. Under the minority approach (Andrews), yes, because Ray's duty to Charlie translates to a duty to Cliff.

4. Rule #4 - Rescuers are foreseeable as long as the rescue is reasonable.

5. There is no duty to aid someone in need of help. Exceptions: special relationship (parent-child; hotel-guest; employer-employee; common carrier-passenger; business person-customer; social host-guest); someone who causes another's injury or places another in peril (even absent fault); Good Samaritan: a person who begins to help must complete the help with reasonable care. Some states have statutes limiting liability of Good Samaritans to gross negligence. Note that doctors are not treated differently. Doctors have no duty to come to help injured persons.

Review Problem: Cliff Barnes was a guest at the Hilton Hotel. Cliff tripped over a liquor bottle which Punk Anderson had left on the floor, and was pleading for help. J.R. walked by Cliff, and laughed. Hotel employees ignored Cliff. Bobby came over to Cliff, moved

Cliff a few feet, but then decided to go to his room and watch TV. Who had a duty to come to Cliff's aid?

Key issues: no general duty to help; exceptions: special relationships; cause of injury, and Good Samaritans.

6. Rule #6 - There is no duty to control a third person and prevent that third person from committing a tort.

Example: J.R. tells Bobby he plans to drive to the airport at 110 mph. If J.R. crashes into Cliff, Cliff could not sue Bobby because Bobby had no duty to control J.R.

Exceptions: parent has duty to control children; employer has duty to control employees; and statute may impose duty to control third person, (eg, tavern owner).

STANDARD OF CARE

1. General rule: we use an objective standard of reasonable care – the ordinary, prudent person, not whether D did his best.

2. Less bright, less experienced adults are not held to a lower standard. Insanity is not a defense.

3. But greater knowledge and greater experience of an adult defendant will be considered in deciding reasonableness.

4. Physical liability are considered in deciding reasonableness, eg, we use a reasonable blind person standard for blind persons.

5. Child Standard: what is reasonable for someone of like age, knowledge, education, intelligence and experience. If child is engaged in adult activity, eg, driving, use adult standard.

6. Professionals' Standard: What is reasonable for average member of the profession in good standing in the same or similar community.

7. Standard for Specialist: Extra knowledge leads to higher standard. Also, we use a national standard in evaluating specialist.

8. Guest statutes: Driver owes non paying rider less than reasonable care.

DUTY OWED BY OWNERS AND OCCUPIERS OF LAND

1. Initial Two Step Approach

- a. Was plaintiff injured while on defendant's land or off defendant's land?
- b. Was plaintiff injured by an artificial condition, a natural condition, or an activity?

2. If Plaintiff was injured off the land:
 - a. by a natural condition: no duty owed to P except if P was injured by decaying tree next to sidewalk in a city.
 - b. by an artificial condition: no duty owed to P except if P injured by dangerous condition on edge of property, eg, explosives or uncovered excavated hole.
 - c. by an activity: duty of reasonable care owed to P.
3. If Plaintiff injured on D's land:
 - a. First, label P as trespasser, licensee or invitee.
 - b. Trespasser is person on D's land without D's permission.
 - c. There are different types of trespassers:
 - I. Undiscovered: If P is undiscovered, no duty owed if P was injured by artificial condition, natural condition or activity.
 - ii. Discovered trespasser: If P is discovered, no duty owed if P was injured by natural condition or non dangerous artificial condition. Duty to warn or make safe if injured by hidden, highly dangerous artificial condition. Duty of reasonable care owed if injured by activity.
 - iii. Anticipated trespasser: same rules as discovered trespasser.
 - iv. Child trespasser: no duty owed if child trespasser injured by activity or natural condition. But duty of reasonable care owed if child trespasser injured by dangerous artificial condition if attractive nuisance doctrine applies. For attractive nuisance doctrine to apply, we need (1) dangerous, artificial condition, eg, swimming pool; (2) D knew or should have known that children are likely to come by the artificial condition; (3) P was incapable of appreciating the danger; (4) the expense of making the condition safe is slight compared to the danger. The artificial condition need not be the motive for the child's trespass.
 - d. Licensee is a social guest, or a person on D's property for her own economic benefit, eg door to door salespersons. Police and firefighters on D's land are also treated as licensees.
 - e. If licensee is injured by an activity, D owes P duty of reasonable care. If licensee is injured by a condition (either artificial or natural), D owes P duty to warn or make safe non obvious dangerous conditions that D knows of. No duty to inspect.
 - f. Invitees – two types: the business invitee and the public invitee. Business invitee is on D's property for economic benefit to D. These include customers, persons

accompanying customers, and repair persons in D's home. Public invitees are persons on D's property for a public purpose, eg, airport passengers, museum tourists, church attendees.

- g. If invitee is injured by activity, D owes P duty of reasonable care. If invitee injured by condition (either natural or artificial), D owes P same duty as licensee plus duty to make reasonable inspection, and duty to warn or make safe non obvious dangerous conditions.

4. Modern trend does away with fine distinctions, and focuses on defendant's reasonableness based upon all relevant factors.

BREACH OF DUTY

1. Burden on P. P might have direct evidence of unreasonable conduct, i.e., eyewitnesses.
2. Or P can rely on circumstantial evidence, eg, res ipsa loquitur.
3. If RIL is established, jury is allowed to infer breach. RIL means P will avoid directed verdict. RIL does not create presumption of negligence and does not shift burden to D. To establish RIL, it must be shown that what happened ordinarily occurs only if someone was negligent, and that more probably than not, it was D who committed the negligent act because of D's exclusive control of injury producing instrumentality.

Review Problem: Clayton Farlow bought a box of chocolate candy which was sealed in a cellophane wrap. He opened the box, and ate one candy. It tasted a bit funny. Upon closer inspection, the candy contained a rat's head. Clayton suffered a nervous breakdown and was institutionalized. How can Clayton prove breach of duty?

Key issues: direct evidence and RIL.

CUSTOM OF THE TRADE AND USE OF AN EXPERT WITNESS

1. Evidence of custom is admissible, but not binding. Jury could find that the custom itself is unreasonable, and thus D was acting unreasonably even if in compliance with the custom.
2. Expert testimony: An expert will testify on (1) what is the custom; and (2) whether in expert's opinion defendant violated the custom. Expert opinion is admissible but not conclusive. Expert testimony not needed if matter does not involve special knowledge or expertise (eg, legal malpractice action based on embezzlement).

Review Problem: Have Smithfield is an attorney in private practice. He was sued for legal malpractice resulting from his joint representation of Bobby, J.R., and Jock in a buy-sell agreement involving stock in Ewing Oil. The major allegation is conflict of interest. A law professor was called by plaintiff as an expert witness to testify about the rules involving conflict of interest. She also testified that in her opinion Harve violated the standard required of attorneys. An expert witness for the defense, a Dallas attorney,

testified that in Dallas, the custom is that lawyers do not follow the rules involving conflict of interest because it hurts business to do so.

Key issues: expert's testimony needed; entire custom can be held unreasonable.

VIOLATION OF A STATUTE

1. P may rely on D's violation of a statute to prove negligence.
2. Majority - negligence per se. Minority - evidence of negligence.
3. Three things must be true: (1) violation was unexcused (balance harm of complying vs. harm if violated); (2) type of harm must be same type of harm statute was aimed at preventing; (3) plaintiff must be member of class of persons the statute was intended to protect.
4. D's compliance with statute is relevant, but not conclusive. Reasonable person may have to go beyond statute's requirements.

Review Problem: A supertanker owned by Ewing Oil was sailing in the coastal waters of Texas when a violent storm erupted. In order to avoid sinking, the captain of the tanker ordered that 1000 gallons of crude oil be dumped into the water. This saved the ship. Some of the oil washed ashore. The next day, Cliff, while walking along the shore, slipped on some oil and broke his leg. A statute prohibits the dumping of oil in coastal waters. Will violation of the statute establish negligence per se? No.

Key issues: Excuse; right type of harm; class of person to be protected.

ACTUAL CAUSATION

1. Use the "But for" test when there is one tortfeasor.
Example: J.R. negligently drove his car into Cliff, and Cliff's leg was broken. "But for" J.R.'s negligence, Cliff would not have a broken leg.
2. Use the substantial factor test, (not "but for") if more than one negligent actor.
3. If two D's are acting jointly, all D's are actual cause of entire injury.
4. If two D's are not acting jointly, if negligence of either one would have caused entire injury, each is actual cause of entire injury.

Example: Pam and Cliff acting independently, negligently set fires at either side of Southfork. Both fires go out of control. Each fire spreads from opposite directions towards Southfork. Southfork is destroyed. Either fire by itself would have destroyed Southfork. Both Pam and cliff are the actual cause of the destruction of Southfork.

5. If two D's are not acting jointly, and the negligence of both combine to cause greater injury than what would have resulted from the separate negligence of each, each D is actual cause

of entire injury.

6. If two D's are not acting jointly, and P is injured by negligence of one, not both, and it is impossible to determine which one, all D's are viewed as the actual cause, unless one D can prove that the other was the actual cause (burden is on D).

Review Problem: J.R. was jogging when two shots were fired. One shot came from the Texas School Book Depository Building. This shot was negligently fired by Kristen. Another shot was fired from the grassy knoll. This shot was negligently fired by Jenna. Both shots hit J.R. Who was the actual cause of J.R.'s injury?

Key issue: where they acting jointly?

Question: What if J.R. was hit by only one bullet?

Answer: If we can determine from whose gun the bullet came that hit J.R., then only that D is the actual cause. If we cannot determine from whose gun, then both are deemed the actual cause, unless D meets burden.

PROXIMATE CAUSE

1. The harm suffered by P must have been reasonably foreseeable to D at time of D's negligent act.

Example: Ray put Charlie on a wild horse. Charlie was thrown off the horse and broke her leg. Was this harm foreseeable? Yes

2. The type of harm must be foreseeable, but not the extent of harm. "Take your victim as you find him." Remember the plaintiff with hemophilia or an egg shell head.

3. Proximate cause does not extend to economic harm suffered by third persons.

Example: Cliff negligently burned down the offices of Ewing Oil. Sly, a secretary in the office who lost wages because she was out of work, could not sue Cliff.

4. Intervening causes: An intervening cause is third person conduct or an event which occurs subsequent to D's tort, and which causes additional harm to P. If the intervening cause is foreseeable, D is liable for additional harm. An unforeseeable intervening cause is superceding, and D is not liable for added harm.

5. Foreseeable intervening events: (1) Medical malpractice. *Example: J.R. negligently crashed his car into Kristen. Kristen went to the hospital where Dr. Cooper negligently set her leg, resulting in a permanent limp. If Dr. Cooper had not been negligent, no limp would have resulted. Is J.R. liable for permanent limp? Yes, because medical malpractice is foreseeable.;* (2) Rescuers who create additional injury or who are themselves injured; (3) Negligent acts of third persons. *Example: Cliff negligently drove through a red light and ran over April who was lying on the street as a result of J.R.'s earlier negligent driving. Is J.R. liable for the additional harm created by Cliff? Yes.* (4) Non extraordinary weather changes. *Example: a car accident*

victim who suffers additional harm from a rainstorm.

6. Generally unforeseeable intervening events: crimes and intentional torts.

Example: J.R. negligently crashed his car into April. While April was waiting for an ambulance, Mickey walked by and stabbed April. Will J.R. be liable for the additional injury resulting from the stabbing? No, unforeseeable.

7. But a crime may be foreseeable, eg, a stolen car with keys left inside.

DAMAGES

1. Actual damages are required for negligence.
2. Types of damages: (1) pain and suffering (past and future); (2) diminished earning capacity; (3) medical expenses (past and future)(P's medical insurance is not deducted – collateral source rule); (4) loss of consortium (married persons). For future medical and future pain and suffering damages, expert testimony is needed.
3. Emotional distress: Majority view requires some physical injury. Also, P must have been impacted or within zone of danger. Modern approach covers P who was present at the scene who views close family member being impacted (mother sees child get run over).

Review Problem: Pam and Bobby were walking to the swimming pool when Kathryn Wentworth, negligently driving her car, crashed into Bobby. Bobby suffered a broken leg and a nervous breakdown. Pam has recurring nightmares. Miss Ellie, Bobby's mother, who witnessed the crash from her bedroom window, developed a nervous twitch. The caviar delivery person who was with Miss Ellie suffered a complete nervous breakdown and is paralyzed. Who can collect damages for emotional distress?

*Bobby – impacted plus physical injury, yes maj
Pam – zone of danger, but no physical injury, no maj
Ellie – modern approach, possible injury
CDP - no recovery*

DEFENSES

1. Assumption of risk is a complete defense - P collects nothing. P must subjectively actually know and understand risk, and voluntarily accept it. Not applicable to rescuers and to members of a class protected by statute, eg, child labor laws.
2. Contributory negligence: When P's unreasonable conduct is actual proximate cause of P's injury. Even if P is only slightly contributorily negligent, P collects nothing.
3. Last clear chance doctrine mitigates harshness of contributory negligence. Although P was contributorily negligent, if D had not acted subsequent to P's contributory negligence, P would not have been injured, and therefore P can collect because of the last clear chance

doctrine. Look for a helpless contributorily negligent plaintiff.

4. Comparative negligence is the majority view today. P's recovery is reduced by percentage of fault attributable to P.

Example: If P suffered \$100,000 in damages, but P's negligence was 20% responsible for her injury, P would recover \$80,000. If P's negligence was 70% responsible for P's injuries, P would receive \$30,000 in damages. This is pure comparative negligence.

5. Partial or modified comparative negligence; If P is more than 50% responsible for injury, P gets nothing.

6. On MBE, use pure comparative negligence unless question says otherwise.

7. Last clear chance doctrine is irrelevant in a comparative negligence state.

8. In most comparative negligence states, assumption of risk is viewed in terms of comparative fault which reduces, but does not bar, recovery.

Review Problem: Lucy Ewing and Mickey Trotter went to the state fair. A new roller coaster, Wildthing, was featured. A sign was posted at its entrance. It read: "Warning: This ride can cause nausea, vomiting and incontinence. Inexperienced operator. Remain seated at all times." Mickey read the sign and said to Lucy, "I always get sick on rides. let's do it, anyway." The operator of Wildthing negligently let it run too long. Mickey vomited on Lucy near the end of the ride. When Mickey vomited, Lucy stood up. The operator continued the ride, and Lucy was thrown out of the car.

Key issues: contributory negligence, last clear chance doctrine, assumption of the risk, comparative negligence.

STRICT LIABILITY

1. No fault liability.

2. There is strict liability for harm caused by an abnormally dangerous activity, defined as an activity that involves high risk of harm which cannot be eliminated no matter how much care is taken, and the activity is not usual for the area. Examples: blasting and storage of explosives.

3. There is strict liability for injuries by wild animals.

4. Strict liability for domestic animals requires knowledge of animal's dangerous propensity.

5. Defenses: Assumption of risk - yes. Contributory negligence - no.

Problem: Ray Krebs kept an atomic bomb in his basement protected by man-eating alligators. Through no fault of Ray, the alligators ate Wes Parmalee, and the bomb

exploded causing Braddock to disappear. Is Ray strictly liable? Yes

PRODUCTS LIABILITY AND NEGLIGENCE

1. Same law as negligence but concerning a product. Unreasonable conduct regarding manufacture or sale of product which is actual and proximate cause of P's injury. P must be reasonably foreseeable victim. Privity not needed. Typical D is manufacturer, but also includes seller and component part maker.
2. Negligent failure to discover a defect is not a superseding cause. If the seller is negligent in failing to correct a manufacturer's defect, the manufacturer remains liable.
3. Same negligence defenses as discussed above.

PRODUCTS LIABILITY AND STRICT LIABILITY

1. No fault liability for injury caused by a product which is defective and unreasonably dangerous.
2. Defect: in design, manufacture, warning or instruction. Defect need not be the result of any negligence.
3. Unreasonably dangerous: dangerous beyond what an ordinary consumer would contemplate; or whether a less dangerous alternative is economically feasible.
4. Foreseeable unintended use is not a defense. Example: A car whose roof collapses when the car flips upside down. Rule: design must account for unintended foreseeable uses. Also, there is a duty to warn about unintended but foreseeable uses. Example: "Don't drink the furniture polish."
5. Causation: defect must have caused the injury. Look for a substantial change since the time the product left D.
6. Proper D's: D must be a commercial supplier of the product. This includes sellers and lessors in regular business of selling or leasing; the manufacturer; and a component part maker. It does not include garage sales, or loans from neighbors.
7. Proper P's: no privity needed. All foreseeable victims are proper P's which includes purchasers and bystanders.
8. Damages: there must be physical damage to a person or property (other than the product). If there is only economic loss, no strict liability recovery.
9. Defenses: Assumption of risk: yes. Contributory negligence: no. Comparative negligence: split. Foreseeable unintended use: no.
10. Strict liability does not apply to services. Look out for tainted blood transfusion.

11. No strict liability for unavoidably unsafe products, eg, knives and chemotherapy drugs.

Review Problem: Kathryn Wentworth, while very drunk and driving 85 mph, had the front tires on her car explode. Kathryn suffered a broken arm when the car crashed into a ditch. Punk Anderson, also very drunk, came by the ditch and ate a piece of the tire. He suffered severe stomach pain. Kathryn win. Punk lose.

Key issues: Were the tires defective and unreasonably dangerous? Foreseeable unintended use and contributory negligence are not defenses. Unforeseeable unintended use is a defense.

NUISANCE

1. D's substantial and unreasonable interference with P's use and enjoyment of property. Examples: vibration, order, noise, light.
2. The interference must be unreasonable. Balance harm against social utility. Consider character of area, frequency, and time of day. Zoning laws are relevant but not conclusive.
3. The interference must be substantial to the average person. P's special sensitivity is not considered.
4. D's act could be intentional, negligent or abnormally dangerous.
5. No need to prove intent to be a nuisance.
6. Actual harm needed.
7. Remedies: equitable - close down or limit hours. Damages - reduction in property value.
8. "Coming to" a nuisance: P can still bring a nuisance action even if P bought property in the area after nuisance activity was there. Proving actual damages, however, may be problem.
9. Public nuisance: when health, safety or property rights of general public are effected. Private P must prove unique injury apart from that of the public.

Review Problem: Michelle and her sister, April, decided to open the definitive nightclub for the beautiful people of Dallas. They purchased the penthouse of a high rise apartment building and transformed it into a club for dancing. The club is very popular even though the music is so loud no one can hear anyone talk. The club is not popular, however, with Harve Smithfield who lives below the club. Will Harve win a nuisance action? Yes

Key issues: unreasonable interference; substantial to the average person; actual harm needed.

VICARIOUS LIABILITY

1. Liability based on status, not fault.

2. Employer/employee

1. Servant (right to control); IC (no right to control). Servants are paid salaries, are not highly skilled, do not have own business, use boss' tools at boss' place of business, are long term workers. IC's have their own business, have more skill, get paid by the job, have own tools, are short term workers.

2. No vicarious liability for IC unless inherently dangerous activity or non delegable duty (landlord's duty to repair). Liability for negligent hiring or supervision of IC is not vicarious liability.

3. Vicarious liability for servant if servant's tort within scope of employment. What, when, where, why.

4. Commuting from house to work is not within scope.

5. Vicarious liability applies to all torts. Consider bouncer in bar who commits battery to maintain order.

6. Even if employer is vicariously liable, employee is also liable for own tort.

Review Problem: Carter McKay built a dam to divert water which flowed between his ranch and Southfork. J.R. hired Jordan Lee of Lee Explosives to blow up the dam. J.R. also told Pete, a Southfork ranch hand, to help Lee on the project. While blowing up the dam, Lee and Pete were negligent in measuring the fuse, thus injuring McKay. Is J.R. vicariously liable?

Lee is IC, but exception for inherently dangerous activity. Pete is servant within scope.

OTHER VICARIOUS LIABILITY SITUATIONS

1. Automobile owner: general rule is no vicarious liability. Exception: Family car doctrine imposes liability when members of owner's immediate family or household drive car with owner's permission. Statutes often impose liability on car owners.

2. Parent-child: general rule is no vicarious liability.

MULTIPLE TORTFEASORS

1. General rule is joint and several liability. *Example: Defendants A and B are jointly and severally liable to P for \$100,000. P can collect \$100,000 from either A or B; or P can collect \$70,00 from A and \$30,000 from B, or any combination you can think of. P is only entitled to receive \$100,000 total.*

2. Contribution: If D1 paid more than her pro rata share to P, D1 entitled to contribution from D2 to equalize payment based on number of tortfeasors. *Example: A and B are jointly and*

severally liable for \$100,000 to P. If A paid \$70,000 to P, and B paid \$30,000, A has right of contribution from B for \$20,000. Percentages in a comparative negligence state may be based on fault.

3. Indemnification: When D seeks full reimbursement from another. Examples: (1) seller liable under strict liability seeks indemnification from manufacturer; (2) employer held vicariously liable seeks indemnification from employee.

DECEASED TORT VICTIM

1. Wrongful death statute: Damages for loss of support, services, companionship and consortium. Damages are paid to surviving family members of deceased victim.

2. Survival statute: Damages suffered between time of tort and time of death, eg, medical expenses. Damages paid to estate of deceased victim.

3. Beneficiaries have no greater rights than victim would have had if victim had lived.

IMMUNITIES

1. Spousal: majority today rejects spousal immunity, so spouses can sue one another.

2. Parent-child majority today rejects parent-child immunity, so minor child can sue parents.

3. Charitable: majority today rejects charitable immunity, so charity can be sued.

4. Federal government: sovereign immunity protects against tort suit, but FTCA waives immunity for negligence. NO punitive damages or strict liability claims.

5. State government - sovereign immunity, but most have limited waiver.

6. Municipal government - immune while engaged in governmental functions, but not proprietary ones, for example, trash collection, and parking lots.

Review Problem: J.R. was driving with his wife Sue Ellen and son John Ross. A car driven by an employee of the Daughters of the Alamo, a local charity, crashed into their car. After viewing the damage, J.R. continued to drive, but negligently crashed into a pole injuring Sue Ellen and John Ross. J.R. blamed the crash on the failure of the Braddock police department to properly direct traffic.

Key issues: charitable immunity, spousal immunity, parent-child immunity, governmental function of a municipal government.