Law School Survival Guide

Torts

Outlines and Case Summaries

2010
Edition

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TORTS
Outlines and Case Summaries
Law School Survival Guide

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ABBREVIATIONS

A	Grantee (for present estate/ future interest hypotheticals)
AGI	Adjusted gross income
AP	Adverse possession
A/R	Assumption of the risk
B	Buyer
BFP	Bona fide purchaser or bona fide purchase
C	Constitution
CIF	Cause-in-fact
Cl.	Clause
CLEO	State Chief Law Enforcement Officer
Court (cap.)	United States Supreme Court
CP	Court of Pleas (UK)
CR	Contingent remainder
CSD	Common Scheme of Development
CSI	Compelling state interest
Ct.	Court
Ct. App.	Court of Appeals
Ct. Chan.	Court of Chancery (England)
ED	Emotional distress
EI	Executory interest
Eng.	England
ES	Equitable Servitude
FI	false imprisonment
FLSA	Fair Labor Standards Act
FMLA	Family and Medical Leave Act
FQJ	Federal question jurisdiction
FRAP	Federal Rules of Appellate Procedure
FRCP	Federal Rules of Civil Procedure
FRCrP	Federal Rules of Criminal Procedure
FRE	Federal Rules of Evidence
FS	Fee simple absolute (fee simple)
FSCS	Fee simple on condition subsequent
FSD	Fee simple determinable
FS EL	Fee simple on executory limitation
FT	Fee tail
H.L.	House of Lords (England)
IIED	Intentional infliction of emotional distress
IT	Intentional tort
JMOL	Judgment as a matter of law
JNOV	Judgment non obstante veredicto
J/SL	Joint and several liability, or jointly and severally liable
JT	Joint tenant/tenancy
K	Knowledge (criminal law) or Contract (all other law)
K.B.	King's Bench (UK)
KSC	Knowledge to a substantial certainty
L	Loss in value
L1	First landlord
Lat.	Latin
LE	Life estate
LED	Life estate determinable
LLC	Limited liability company
LLP	Limited liability partnership
LRM	Least restrictive means
MPC	Model Penal Code
MSAJ	Motion to set aside the judgment
N	Negligence
N.B.	Nota bene
NIED	Negligent infliction of emotional distress
O	Original owner, or grantor (in present estates and future interests)
OLQ	Owner of the *locus in quo*
OO	Original owner
P	Purpose or purchaser
PE	Privity of Estate
PJ	Personal jurisdiction
PJI	Pattern Criminal Jury Instruction
PK	Privity of Contract
Q.B.	Queen's Bench (UK)
R	Recklessness
RAP	Rule against perpetuities
RC	Real Covenant
Restatement	Restatement (of Contracts, Torts, Judgments, etc.)
RFRA	Religious Freedom Restoration Act of 1993
RIL	Res ipsa loquitur
RPP	Reasonable prudent person
Rule	Federal Rule of Evidence or Federal Rule of Civil Procedure
§	Section
S	Sublessee or seller
S.Ct.	Supreme Court or US Supreme Court Reporter
SF	Statute of Frauds
SJ	Summary judgment
SL	Strict liability, or statute of limitations

SMJ	Subject matter jurisdiction
SP	Specific performance
T1	First tenant
TE	Tenant/tenancy by the entireties
TO	True owner
UCC	Uniform Commercial Code
US	United States of America or United States Reports (compilation of US Supreme Court opinions)
USC	United States Code
VR	Vested remainder
VR SD	Vested remainder subject to divestment

I. INTRODUCTION TO TORT LAW

A. INTRODUCTION

1. Definition

   a. A tort a civil wrong, other than a breach of contract, for which the law provides a remedy.

2. General Overview

   a. Seventy to eighty percent of torts fall under the classification of "negligence torts," a group of torts in which the civil wrong was not intentional.[1]

   b. The other torts fall into a smaller group known as "intentional torts," where the requisite *mens rea* is intent.

3. Purpose of the Tort System

   a. While the criminal law seeks as its principle objective the punishment of the offender, in the civil law, of which the tort law is one branch, restitution to the victim is the primary objective.

      i. In the civil law, retribution also plays a limited role, since courts will at times award punitive damages, which are based on a theory of retribution.

      ii. The restitution in the tort law aims to return innocent parties back to their original position through compensation.

      iii. This is done through awarding them money damages, which the tortfeasor is required to pay.

      iv. In the criminal law, in contrast, the criminal pays his debt to society through paying fines to the government or through serving prison sentences.

   b. Among the other purposes of the tort system are as follow:

      i. To discourage negligence and civil wrongs;

      ii. To protect innocent victims; and

      iii. To avoid private revenge.

4. Sources

   a. The tort law is derived from the common law.

   b. However, in some states, the tort law is, to a certain extent, based on statute.

   c. In other states, such as California, it has been largely codified.

[1] The majority of these torts are automobile-related.

B. DEVELOPMENT OF LIABILITY BASED ON FAULT

1. Traditional approach: the "strict liability rule."
    a. There was a time when fault was not even considered for the purpose of ascertaining liability.
    b. Determining liability was *only about asking whether the defendant cause the injury*.
        i. If so, the defendant was liable.
        ii. If not, he was not liable.
    c. Intent, recklessness and negligence were not a part of the analysis.
2. Later developments
    a. Later, the idea of fault began to creep into the system.
    b. Under the earliest fault rule, the defendant was liable, *unless he was able to prove that he was* ***utterly without fault***.
        i. *See Weaver v. Ward* (K.B. 1616), where the plaintiff sued the defendant for an injury caused by the defendant when his musket accidentally discharged during a military exercise. The court held that the defendant was liable when he was unable to prove that he was utterly without fault. He would not have been liable if, for example, the plaintiff ran into the traveling bullet after the defendant pulled the trigger.
        ii. *N.B.*: this is perhaps the earliest case where fault was discussed.
    c. Eventually, the common law developed the notion that the burden was on the plaintiff to prove fault (intent for intentional torts, recklessness or intent for IIED, breach of duty for negligence), *not* on the defendant to prove that he acted with care. *See, e.g., Brown v. Kendall* (Mass. 1850).
    d. There is no fault when injury is caused by sudden, unforeseeable illness.
        i. *See Cohen v. Petty* (D.C. Ct. App. 1933), where the defendant caused a car crash when, while driving, he suddenly passed out. Since his passing out was unforeseeable and it was the first time it had happened, he was not held liable.
    e. Nevertheless, the traditional common law rule of strict liability still applies to some situations.
        i. *See Spano v. Perini* (N.Y. 1969), where the defendant's blasting caused damages on the plaintiff's land. Held: unless the plaintiff was trespassing or there was contributory negligence, the defendant is strictly liable. The plaintiff is therefore required to prove only causation, not fault (intent, recklessness, or negligence).

II. STRICT LIABILITY

A. INTRODUCTION AND BACKGROUND

1. Strict liability (SL) applies in cases involving: (i) ***animals;*** (ii) ***abnormally dangerous activities;*** and (iii) ***products liability***.
2. Unlike negligence, the plaintiff must not prove that the defendant violated a *duty to exercise reasonable care*.
3. Elements of a *prima facie* case:
    a. An absolute duty to protect the plaintiff from risks associated with the act;
    b. The breach of this duty;
    c. Causation in fact and proximate cause;
        i. Causation in fact is actual causation (*e.g.*, "but for X, Y would not have occurred").
        ii. Proximate cause is legal causation.
            1) This serves as a limitation on actual cause.
            2) All acts can be connected to a result; the law draws a limit with those acts which are closely enough connected to the consequence that the law will impose liability in a particular case.
            3) Proximate cause is the legal principle that courts apply in determining where to draw the line.
    d. Damage to the plaintiff's person or property.

B. ANIMALS

1. Wild Animals
    a. There is no-fault liability for injuries caused by wild animals with vicious temperaments.
    b. One keeps such animals "at his peril."
2. Domestic Animals
    a. Under the common law, a domestic animal is entitled to one bite free of liability.
    b. However, if the domestic animal has a dangerous propensity known by the owner, he would not be entitled to any bites free of liability.
    c. The statutory approach in most states imposes *strict liability* for dog bites.
    d. Exception: there is no liability when the plaintiff was trespassing or committing some tort.

e. Other states create other exceptions, such as when a sign is posted warning of a dangerous dog.

f. Many states have passed statutes requiring muzzles or leashes.

i. If a person is injured due to the violation of such a statute, he will be held guilty of negligence *per se* (negligence as a matter of law), such that breach of duty is not a jury question; the plaintiff only needs to prove that the violation of the statute caused damages.

ii. However, if the violation of the statute was not the cause of the injury (*e.g.*, in the case of a statute requiring the use of a muzzle, abiding by the statute would not have prevented the dog from knocking over a child), the burden is on the plaintiff to prove the violation of a duty owed by the defendant.

C. ABNORMALLY DANGEROUS ACTIVITIES

1. There is strict liability for damages arising out of abnormally dangerous activities. To prove SL, the plaintiff must prove both of the following elements:

a. The activity was abnormally dangerous.

i. A weighing test that balances the following factors is used to determine whether an activity is abnormally dangerous:

1) Whether the activity carries a high risk of serious injury;

2) Whether the activity is infrequently engaged in within the community and whether it is inappropriate there;

3) Whether it is impossible to perform the activity in a way that eliminates the risk, no matter how great the burden; and

4) Whether the activity's social utility outweigh the risks. § 520 Restatement.

ii. Activities that have been held to be abnormally dangerous include: blasting, the testing of rockets, the storage of water and of toxic chemicals, fireworks displays, and oil drilling.

iii. Among the activities that have been held *not* to be abnormally dangerous include: the use of firearms and the use of fire.

b. The abnormal activity was the actual and proximate cause of the plaintiff's damages.

2. The care exercised is immaterial in determining SL.

a. *See Rylands v. Fletcher* (H.L. 1868), where the defendant Rylands constructed a reservoir on his land, which burst and caused damage on the neighbor's land. The court held that when the defendant brings unnatural substances on land (here, the unnatural substance being the great amount of water), he does so at his own peril; regarding of the amount of care he exercises, he will be liable for damages caused by his act. Judgment for the plaintiff.

3. There is no strict liability for activities that are not abnormally dangerous. The duty to exercise reasonable care is applied.

    a. *See Miller v. Civil Constructors, Inc.* (Ill. App. Ct. 1995), where a court held that the discharge of firearms was not an abnormally dangerous activity, but rather, the duty was of reasonable care under the circumstances.

D. LIMITATIONS (DEFENSES)

1. Superseding Cause

    a. The defendant will not be held guilty if the damage arose not from that which made the activity abnormally dangerous, but rather, from a superseding cause.

    b. *See Foster v. Preston Mill Co.* (Wash. 1954), where the plaintiff sued the defendant for blasting that caused the plaintiff's mink to kill its young. Held: what makes blasting dangerous is the damage it may cause to persons or property. The plaintiff's damages arose not from this dangerous quality, but rather, from the minks' nervous disposition, a superseding intervening cause that caused the mink to kill their young. The defendant is not strictly liable.

2. Unforeseeable Intervening Cause

    a. An intervening cause is an act that intervenes in the series of events after an act, such that it alters the resulting consequence.

    b. When an intervening cause is strong enough to relieve a wrongdoer of liability, it becomes a superseding cause.

    c. However, the defendant will not be liable when the intervening cause is unforeseeable.

        i. *See Golden v. Amory* (Mass. 1952), where the plaintiff, relying on *Rylands v. Fletcher* (H.L. 1868) , sought compensation when water being stored in a dike on the defendant's property caused damage on the plaintiff's property as a result of an unforeseeable act of God—a hurricane. Held: the defendant is not liable, since the intervening cause was unforeseeable.

        ii. *N.B.*: the defendant would have been strictly liable if he had reason to believe that an act of God would come to bear.

3. Contributory Negligence

    a. Contributory negligence is generally not a defense when a defendant is strictly liable.

    b. However, knowing contributory negligence may be a defense.

4. Assumption of the Risk

    a. Assumption of the risk is an affirmative defense for strict liability.

b. *See Sandy v. Bushey* (Me. 1925), where the plaintiff was injured by the defendant's horse and sued. The defendant argued that the injury was caused by *contributory negligence*. Held: when the owner of an animal is aware of the animal's vicious propensity, the owner is strictly liable for injuries caused by the animal, regardless of whether there was contributory negligence. However, assumption of the risk *is* an affirmative defense. If the plaintiff unnecessarily puts himself in a situation where he knows of the probability of injury, the defendant is not liable. However, the facts in the present case do not support such a conclusion. Judgment for the plaintiff affirmed.

i. *N.B*: assumption of the risk *and* contributory negligence are defenses in ordinary negligence cases, but only assumption of the risk is a defense in SL cases.

III. INTENTIONAL TORTS

A. INTRODUCTION

1. Characteristics

a. Intentional torts (IT's) are those that involve the most fault.

b. They require actual intent, or, in the case of the intentional infliction of emotional distress (IIED), recklessness.

2. Elements of the Plaintiff's *Prima Facie* Case

a. A Volitional Act

i. A volitional act, or an external manifestation of the inner will, is always required.

ii. Volition is an act of the will that indicates that a tortfeasor's action resulted from a conscious choice.

iii. An action lacks volition if it was committed while the actor was sleepwalking or forced by some outside compelling force or circumstance (*i.e.*, *force majeure*).

iv. If the plaintiff wants something to come about, his omission to make it materialize cannot constitute an IT, since such an omission would not be a volitional act.

b. Intent

i. All of the IT's require intent.

ii. Intent is formed when the defendant possesses either:

1) Purpose (a wanting or desiring) that a certain result come about; or

2) Knowledge to a substantial certainty (KSC) of an extremely high risk that a particular consequence will materialize as a result of one's act (based on knowledge or belief).

a) *See Garratt v. Dailey* (Wash. 1955), where an infant was held liable for battery when, with knowledge to a substantial certainty that the plaintiff would try to sit in a chair, he moved it, causing the plaintiff to fall when she attempted to sit on it. Although the defendant did not have purpose, his KSC provided the requisite intent.[2]

c. The Resulting Tort

i. Finally, the plaintiff must prove that a resulting tort (assault, false imprisonment, etc.) came about.

B. THE SEVEN INTENTIONAL TORTS

1. Assault

a. The elements of assault are as follow:

i. A volitional act (an act of the will; see definition, *supra.*, for fuller treatment);

ii. With the intent (purpose or KSC) to cause an *offensive or harmful contact* or a *reasonable fear* of an immediate offensive or harmful contact; and

iii. A resulting immediate fear of imminent offensive or harmful contact.

b. Words alone, no matter how threatening, do not constitute assault.

c. If the defendant unsuccessfully attempts battery on the plaintiff, he may be liable for assault.

i. *See I de S et ux. v. W de S* (Assizes 1348), where the defendant came to the plaintiff's home to buy wine, but the door was shut. The defendant banged the door with a hatchet and when the plaintiff looked out the window to tell him to stop, the defendant threw the hatchet at her and missed. Held: the intent to offensively or harmfully contact the plaintiff is transferred to the intent to cause an immediate fear of an offensive or harmful contact. The defendant is liable for assault.

ii. *N.B.*: this may be the first case that has come to recognize assault as a tort.

d. Present ability to carry out offensive or harmful contact *not* necessary to establish assault, as long as there is an intent to cause an offensive or harmful contact and this causes the fear of such a contact.

i. *See Western Union Telegraph Co. v. Hill* (Ct. App. Ala. 1933), where the plaintiff sued the defendant for assault when he attempted to offensively contact her by reaching across a counter

[2] Infants are liable for their torts, just as adults (although in negligence cases, they are held to a different standard of care).

3) Example: A is wandering about a forest when a lion spies him. A may break into B's log cabin to take shelter until the threat retreats.

4) *N.B.*: the privilege of necessity does *not* permit one to trespass on another's land in order to recover a domestic animal that strayed off due to the owner's own negligence.

IV. NEGLIGENCE

A. INTRODUCTION

1. Negligence (N) arose as a tort of its own in the 1800s, as distinct from intentional torts (IT's), in that it does *not* require a volitional act; an ***omission*** would be sufficient in proving the plaintiff's *prima facie* case.[3]

2. The elements of the plaintiff's *prima facie* negligence case are as follow:

   a. The duty to protect persons and property from foreseeable, unreasonable risks;

   b. A breach of this duty;

   c. Actual and proximate cause; and

   d. Damages to a third party's person or property interests.

B. THE DUTY TO EXERCISE REASONABLE CARE

1. Introduction

   a. One has a duty to protect third parties from foreseeable, unreasonable risks.

   b. When an act is either unforeseeable or reasonable, the defendant does not have a duty to protect the plaintiff from the associated risks of the act.

2. Unforeseeability

   a. A defendant is liable for failing to protect others from *foreseeable risks*.

      i. *See Gulf Refining Co. v. Williams* (Miss. 1938), where the plaintiff Williams sued the defendant for giving him a gas drum whose bung cap was jagged, causing a spark when being opened that lead to a fire and injury to the plaintiff. The defendant's witnesses testified that the possibility of a fire was so unlikely that it was unforeseeable. The defendant therefore testified that he did not have a duty to prevent unforeseeable risks. The court, however, held that the defendant was liable because the condition of the bung attracted the attention of one of the defendant's employees and would have notified a reasonable prudent person of the foreseeable danger.

[3] However, as we will see, some N cases also involve a volitional act.

b. He is not liable for failing to prevent damages resulting from unforeseeable risks.

i. *See Lubitz v. Wells*, where the plaintiff sued the defendant for negligently leaving a golf club lying in his back yard, allowing the defendant's son to pick it up and hurt the plaintiff. Held: although there is a duty to exercise reasonable care and to prevent unreasonable risks, the risk of one's son's picking up a club lying in the yard and injuring a person is so slight that a reasonable person would not have taken actions to prevent it. The defendant is not liable.

ii. *See also Blyth v. Birmingham Waterworks Co.* (Exch. 1856), where a company took measures to prevent damages resulting from foreseeable storms. However, when one highly unusual frost came to past, a fire hydrant burst, causing damages. Since the frost was so extraordinary, it was not foreseeable and the defendant was held not to be liable.

3. Unreasonable Risks

a. Introduction to Risk-Utility Analysis

i. One has a duty to protect third parties not from *all* foreseeable risks, but from all *unreasonable* foreseeable risks.

ii. When a risk is reasonable, the defendant is not necessarily held liable for all resulting injuries.

iii. Determining whether a risk is reasonable requires applying risk-utility analysis.

iv. When the activity is of great public utility (*e.g.*, railroads, roads, shipping), society must be prepared to tolerate some degree of unreasonable risk in order to be productive.

v. In these cases, defendants are less likely to be held liable for the resulting risks.

b. When the burden of reducing unreasonable risks costs less than the damages that may otherwise result, there is a duty to protect others.

c. However, when the burden is cost-prohibitive, no such duty exists.

i. *See Davison v. Snohomish County* (Wash. 1928), where the court held that the defendant was not liable for not making stronger guard rails in order to prevent injuries on the roads, since making all roads safe would be cost-prohibitive.

d. When the burden to prevent damage to third persons is low, there is liability despite an activity's high utility

i. *See Chicago, B. and Q.R. Co v. Krayenbuhl* (Neb. 1902), where the plaintiff Krayenbuhl sued the defendant for negligence when his foot was severed while she was playing on a turntable. Held: society tolerates some of the unreasonable risks associated with trains because of the high utility of trains. However, *when the*

burden of prevention is much *slighter than the risk of damage*, there is liability. Here, the burden of putting a padlock on the turntable is much slighter than the risk of injury to children. The defendant is therefore liable.

e. The Learned Hand Formula

i. According to Judge Learned Hand, one is negligent when the probability of ***damage*** (P), multiplied by the ***magnitude of the potential damage*** (L) is greater than the ***burden*** (B) of preventing the risk.

ii. There is thus negligence when (P)(L) > B

iii. *See United States v. Carroll Towing Co.* (1st Cir. 1988), where the plaintiff sued the defendant for negligently allowing the plaintiff's barge to sink. Because the probability of harm multiplied by the magnitude of potential harm being was greater than the burden of prevention (having an attendee on board), the defendant was held to be liable.

f. Traditional Common Law View

i. Judge Learned Hand's formula ignores an important factor that most courts include in their analysis: the degree to which an activity is useful to society (utility).

ii. Under the traditional common law view, there is thus negligence when the ***risk*** (R) is greater than the ***utility*** (U) plus the ***burden*** (B).

iii. There is thus negligence when R > U + B.

iv. When the risk is great and unreasonable, there is negligence, unless the utility and the burden are very high and outweigh the risk (*e.g.*, *Davison v. Snohomish County*).

v. When there is great risk, but greater utility, there will generally not be negligence, unless the burden is slight.

g. The View of the Restatement of the Law (Second) of Torts

i. The Restatement view summarizes the common law view and add precisions to the definitions of risk and utility.

ii. Factors determining risk include the probability of the harm, the magnitude of the harm, and the number of people who would be harmed.

iii. Factors determining utility include the social value of the activity and the extent to which this value can be met with other, less dangerous activities.

iv. Under the Restatement, there is unreasonableness from which the defendant has a duty to protect third parties when:

1) The ***risk*** (the probability of damage times the magnitude of the potential damage times the number of people (N)

who would be harmed) is greater than the ***social utility*** plus the ***burden***.

2) There is thus negligence when R (P x L x N) > U + B.

C. THE STANDARD OF CARE

1. The Standard Objective Test

   a. In negligence cases, tortfeasors are generally held to an objective, reasonable prudent person standard.[4]

   b. It is an objective standard that does not take into consideration a party's lack of skill, thoughtfulness, or intelligence.

      i. *See Vaughan v. Menlove* (Ct. Common Pleas 1837), where the court applied an objective standard when it held the defendant liable for stacking hay in a way that caught fire, even though he sincerely believed that there was no such risk. The defendant's intelligence was not taken into account.

2. An Amalgum Subjective/Objective Test

   a. Under certain circumstances, a person will be held to an amalgam subjective/objective test that looks to a reasonable prudent person *in that person's position*.

   b. For example, in emergency situations, an actor is held to the standard of a reasonable prudent person *in an emergency situation;* the actor must exercise reasonable care *under the circumstances*.

      i. *See Cordas v. Peerless Transportation Co.* (N.Y. City Ct. 1941), where the defendant jumped out of his cab while it was still running, injuring a woman and her children, after a robber came into the car and, with a gun pointed at his head, commanded him to drive. Held: the defendant is not negligent, since a reasonable prudent person would have acted similarly in like circumstances and quick decision-making was necessary.

   c. The disabled are held to a "reasonable prudent person of like disability" standard. *Roberts v. State of La.* (La. Ct. App. 1981) (applying the standard of a "reasonable prudent blind person").

   d. Those with a diagnosable impairment (*e.g.*, retardation) are generally held to a subjective standard.

   e. Similarly, those who are subjected to a sudden and unforeseeable mental illness will be held to a subjective standard, as long as he has no prior history of the potential impairment that would make injury to third persons a foreseeable risk.

[4] Although custom may provide evidence as to what the reasonable prudent person standard is, custom is *not* dispositive, since an entire society can breach its duty of care.

b) Example: running into a burning building to save a child.

c) In these cases, the A/R is no defense.

2) Qualified Assumption of the Risk

a) Qualified A/R applies when the plaintiff goes into a situation knowing, appreciating, and voluntarily assuming a risk in a way that is *unreasonable*.

b) Ex.: running into a burning building to save a book or some other object.

c) In these cases, A/R *is* a defense.

X. PARTIES THAT MAY BE HELD LIABLE

A. JOINT TORTFEASORS: LIABILITY AND JOINDER OF DEFENDANTS

1. When Joint and Several Liability Applies

a. Introduction

i. We previously saw that joint and several liability (J/SL) applied when *res ipsa loquitur* was invoked, but the plaintiff could not prove which of multiple defendants caused the harm. *Ybarra v. Spangard*.

ii. In this section, we will explore four other situations under which J/SL may apply.

b. Determining Which Party Caused the Harm

i. When it is clear that one of a group of the defendants caused harm, but it is not clear which one, all may be ***jointly and severally liable*** (J/SL).

1) *See Summers v. Tice* (Cal. 1948), where the defendants (Tice) argued that, because the plaintiff could not prove which defendant's shot caused the plaintiff's eye injury, neither was liable because the plaintiff did not prove but-for cause. Held: since it is clear that one of the defendants was the cause of the injury, one or both are liable; the burden is on each the defendant to show that he was not the cause; otherwise, they are J/SL. The burden shifts to the defendants, who may untangle the facts.

ii. Carried to its logical conclusion, *Summers* allows an entire industry to be held liable to the plaintiff, when it is clear that some member of that industry caused the plaintiff's injury, but when it is not clear as to which one.

1) *See Sindell v. Abbott Laboratories* (Cal. 1980), where each company marketing the drug that caused the plaintiff's health problems was liable for its market share of the drug, even though only 90% of the companies that could have sold the drug to the plaintiff's mother were in

the suit, and it was thus possible that none of them caused the plaintiff's injury.

c. Common Acts of Negligence

i. J/SL also applies when several actors are engaged in a *common act of negligence*.

ii. *See Bierczynski v. Rogers* (Del. 1968), where the defendant argued that he should not be liable for the plaintiff Rogers's injuries, since it was Race, not the defendant, who had collided with and injured the plaintiff. Held: because both the defendant and Race were engaged in a common act of negligence (racing on a public way), both are jointly and severally liable to the plaintiff. But for the defendant's negligence, the plaintiff would not have been injured.

d. In addition, J/SL may be used in cases involving employer/employee and master/servant relationships.

2. Joint and Several Liability in Comparative Negligence States

a. Some states that have adopted comparative negligence still apply J/SL.

i. *See Coney v. J.L.G. Industries, Inc.* (Ill. 1983), where the defendant was held J/SL for injuries caused to the plaintiff Coney when the plaintiff fell from the defendant's platform: comparative negligence is used to determine the plaintiff's comparative fault, not each the defendant's comparative fault.

ii. *N.B.*: however, the first defendant may recover against the codefendant in a ***contribution and indemnity suit*** (*see infra.*), unless the codefendant is insolvent.

b. In other states, the adoption of comparative negligence eliminates J/SL.

i. Rationale: since these states have already become accustomed to apportioning the plaintiff's fault, they apply the same calculus to each of the defendants.

ii. *See Barlett v. New Mexico Welding Supply, Inc.* (N.M. Ct. App. 1982), where the plaintiff Barlett was unable to collect the entire judgment against the defendant, who was only 30 % at fault, because NM abolished J/SL upon adopting comparative negligence. Since the codefendant, who was principally responsible for the accident, was "nowhere to be found," the plaintiff was able to recover only 30 %.

B. VICARIOUS LIABILITY

1. Introduction

a. Vicarious liability is the liability of a supervisory party for the acts of a subordinate. Employers, for example, are said to be vicariously liable for the acts of their employees.

b. The doctrine of *respondeat superior* (*Lat.*, "let the superior answer") points to vicarious liability, and holds that a master or principal is *vicariously liable* for the negligence of his employees or agents, even when he was not himself negligent.

c. *Respondeat superior* is thus in many ways like SL: an employer is held liable, *regardless of his faultlessness*.

d. There are two elements to *respondeat superior* vicarious liability:

i. The damage was *actually and proximately caused* by an employee's negligence; and

ii. The employee was working *within the scope of his employment or agency*, which includes both:

1) *Work done for the employer* by the employee; and

2) *Personal work* interconnected with the work done for the employer.

2. The Going and Coming Rule

a. The "going and coming rule" is an exception to the scope of employment rule.

b. When an employee is going and coming to work, he is not considered to be *within the scope of employment* (and the employer thus cannot be held liable for damages caused), *unless:*

i. The negligence is triggered by a work incident and it is foreseeable that the employee will cause damage while coming or going to work.

1) *See Bussard v. Minimed, Inc.* (Cal. Ct. App. 2003), where the defendant Minimed, Inc.'s employee, having left work while dizzy from insecticide sprayed at the work place, later collided with the plaintiff's car. Because the damage was foreseeable, the defendant employer was liable to the plaintiff for the injuries caused.

ii. The employee is going or coming to work while on a company errand for the employer, even if the employee is on a *detour*.

1) There is, however, a limit as to certain detours that take an employee *out of the scope of employment*. *O'Shea v. Welch* (10th Cir. 2003).

2) Such detours are known as ***frolics***.

3) The factors considered in determining whether a detour is a frolic include: (i) how long the diversion took; and (ii) whether it was related to work or was of purely personal interest.

3. Independent Contractors

a. Unlike employees, independent contractors are not given specific directions on how to do their work.

b. Rather, they are asked to achieve a certain result, *regardless of how they go about doing it*.

c. Employers of independent contractors are not liable for the negligence of those contractors.

i. *See Murrell v. Goertz* (Okla. Ct. App. 1979), where the employer of a newspaper carrier was not liable for the negligence of the carrier towards a plaintiff that was struck by the carrier, because the carrier operated under broad guidelines outside of the control of the employer.

d. The justification of this rule: to hold an employer liable for the acts or omissions of one over whom he had no control would be a *miscarriage of justice*.

e. However, employers of independent contractors *can be held liable for their* ***direct negligence*** over acts and omissions that they control.

i. Example: hiring a contractor that the employer should have reasonably known to be negligent.

f. In addition, employers could be held vicariously liable for ***non-delegable duties***, such as assuring safety in one's car.

i. *See Maloney v. Rath* (Cal. 1968), where an employer is held vicariously liable for the negligence of her independent mechanic contractor. The general rule that employers are *not vicariously liable* for the negligence of their contractors does not apply when the question involves a non-delegable duty, such as the duty to maintain safe brakes.

C. CONTRIBUTION AND INDEMNITY

1. Contribution

a. Under the old common law, a defendant was not entitled to contribution from a codefendant, even if the codefendant was simultaneously responsible for the plaintiff's injury.

b. Under the intermediate common law, a defendant could recover 50 % of damages from his codefendant.

c. Under the modern law, especially in states that have grown comfortable in allocating percentages of fault through comparative negligence, a defendant may recover whatever a codefendant's proportional share in damages was.

i. However, in states that have not adopted comparative negligence, the *per capita* ("by the head") system is used.

d. Contribution is allowed in forty nine states, and is generally allowed only in negligence cases (intentional torts are barred).

REVIEW CHARTS

INTENTIONAL TORTS SUMMARY

Introduction and Background	ITs are unique in that they always require a volitional act as well as intent that a particular result come about.	
	Elements: volition, intent, a resulting tortious act.	
The Seven Intentional Torts: elements	***Assault***	Volition, intent to cause fear of harmful contact, resulting fear.
	Battery	Volition, intent to cause harmful contact, resulting contact.
	False imprisonment	Volition, intent to confine, resulting confinement
	IIED	Outrageous act, intent or recklessness, proximate cause, severe ED
	Trespass to land	Volition, intent to enter land, resulting trespass
	Trespass to chattels	Volition, intent to interfere with chattel, resulting interference
	Conversion	Volition, intent to exercise dominion, resulting serious interference
Privileges	***Consensual privilege***	Actual or implied consent (implied-in-law, implied-in-fact).
	Non-consensual privilege	Self-defense
		Defense of others
		Defense of property
		Recovery of property

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GLOSSARY

***Ad coelum* doctrine** Under this doctrine, for the purpose of immovable minerals, "to whomever the soil belongs, he also owns to the sky and to the depths." It refers to the right of the owner of property to the space that extends vertically upward and downward from his property.

Arson The malicious, willful, and unlawful burning of a structure which, at common law, had to be the dwelling place of another.

Assignment A transfer of property that grants the possession of land for the *entire period of a lease*. By default, an assignment grants *all of the property* for the lease period. A *partial assignment* may however, be granted for only *part of the property* during the lease period. Compare SUBLEASE.

Bailment A legally recognized property relationship between a bailor, who gives personalty to another to be held for a particular purpose, and a bailee, party that receives the property.

Bill of attainder An uconstitutional legislative action that singles out an individual or group for punishment without the benefit of a trial.

Burglary At common law, the specific intent crime that consisted of the breaking and entering of the dwelling of another at night with the intent to commit a felony therein.

Causation in fact Actual causation that links an act with a result through implementing the "but-for" test (*i.e.*, "but for A, B would not have occurred"). Compare PROXIMATE CAUSE.

Circumstantial evidence Secondary facts and other evidence that lead to primary fact inferences.

Chattel An item of personal, as opposed to real property; any moveable object.

Claim preclusion *See RES JUDICATA*.

Closing (real property) The final meeting between the seller and the purchaser in a land sale contract, whereby the executory period is concluded and the payment and property are exchanged.

Closing of escrow *See* CLOSING.

Collateral estoppel Under the doctrine of collateral estoppel, a factual issue *may not be litigated* in any lawsuit if it was litigated and decided in a previous proceeding. Also referred to as ISSUE PRECLUSION.

Constructive notice Legal notice derived from the circumstances.

Construction The act of interpreting the sense or intention of a constitution, statute, contract, or some other text; the process of construing the meaning of a writing.

Constructive possession doctrine Doctrine by which control or dominion of property is granted to the owner of the *locus in quo*, in situations in which it would otherwise go to the finder (*e.g.*, in cases of treasure trove and findings generally). The doctrine is applied, for example, when an object is found in a private place of a store. The owner of the *locus in quo*, rather than the finder, obtains possession.

Conversion A tortious act of willful interference with the property of another without lawful justification, in a way that *deprives the owner of the use of his property*. Examples of conversion include illegal takings, the assumption of ownership, and the destruction of the property of another.

Counterclaim An independent cause of action made by the defendant against the plaintiff in order to defeat the plaintiff's claim.

Criminal negligence Extremely negligent conduct that creates a risk of death or serious bodily injury beyond that of mere civil negligence.

Cross-claim A claim under FRCP 13(g) by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.

Dead Man's Act A statute that disqualifies a party from testifying *against the estate* of the deceased because of the party's incentive to lie based on: (i) his interest in the case; and (ii) the unavailability of the deceased to contradict him.

Detinue An action at common law to recover PERSONALTY or its value when it is unlawfully held by another.

Devise To make a gift of real property by will. Property that can be given in such a gift is referred to as "devisable."

Duress A defense that applies when the defendant acts illegally and against his own will as a result of another's *unlawful threat* of bodily harm. Duress excuses an actor from the legal effects of his actions (*e.g.*, a defendant is not guilty for a theft committed under duress).

Easement The right to use part of land owned by another for a special purpose. *See* EASEMENT APPURTENANT and EASEMENT IN GROSS.

Easement appurtenant An easement that benefits the grantee's (dominant tenant) land. When there is an easement appurtenant, there are *both dominant* and *servient tenements*. Compare EASEMENT IN GROSS.

Easement in gross An easement that does not benefit the grantee's land. Although there is a servient estate, but there is no *dominant estate*. Compare EASEMENT APPURTENANT.

Equitable servitude Covenants restricting the use of land that run with the land at equity and thus offer remedies at equity (*e.g.*, injunctions). Compare REAL COVENANTS.

Executory period In a land sale contract, the period between the formation of the sale contract and the closing.

***Ex post facto* law** (Lat., a law "after the fact"). A law that does any of the following retroactively: (i) makes conduct criminal; (ii) establishes a stricter punishment for a crime; or (iii) alters the procedural or evidentiary rules in favor of the prosecution.

False pretenses A specific intent crime consisting of the acquiring of title to the property of another through making false statements or misrepresentations with the intent of defrauding the owner.

First degree murder Under the modern statutory approach to murder, first degree murder is generally defined as all forms of murder having malic aforethought *and* premediation and deliberation. Compare SECOND DEGREE MURDER.

Freehold estate An estate where the possessor is the owner of the property (at least for a temporary period of time).

Grand theft The commission of LARCENY when the value of the property unlawfully taken exceeds some predetermined amount.

Habeas corpus Legal proceeding where a writ is brought to determine whether a person is being lawfully detained.

Holdover tenant A tenant who keeps possession of the property beyond the expiration of the lease.

Implied easement by prior use An easement that comes into being when an owner of two parcels of land uses one of them, the servient estate, to benefit the other in such a way that when he sells one of them, the purchaser can *reasonably expect* that the servient estate will continue to be used in a way that is consistent with its prior use.

In-court identification Modality of identification where an attorney asks a witness

if she recognizes the perpetrator of a crime in court.

Indictment Since a defendant may not cross-examine witnesses presented against him in a grand jury indictment, the Confrontation Clause does no apply. Compare PRELIMINARY HEARING.

Infant A person who has not yet reached the legal age of majority (generally, eighteen years of age); a minor.

Intent (torts) The *mens rea* element for intentional torts, which is formed when the defendant possesses either: (i) purpose (a wanting or desiring) that a certain result come about; or (ii) knowledge to a substantial certainty that a result is substantially certain to come about as a result of his act (based on belief or knowledge).

Intervening cause An act that intervenes in the series of events after an act, such that it alters the resulting consequence. When intervening causes are strong enough to relieve wrongdoer of liability, they become SUPERSEDING CAUSES.

Involuntary manslaughter An *unintentional* killing lacking malice aforethought committed either with criminal negligence or during the commission of an unlawful act.

Issue preclusion *See* COLLATERAL ESTOPPEL.

Joinder The uniting of distinct claims or parties in an action.

Knowledge to a substantial certainty (torts) Knowledge of an extremely high risk that a particular consequence will materialize as a result of one's act. It may be based on knowledge or belief and, like purpose, satisfies the *mens rea* required in intentional torts.

Larceny A specific intent crime consisting of the unlawful taking and carrying away of the property of another with the intent to permanently deprive him thereof.

Leasehold estate An estate where the possessor is not the owner of the property (*e.g.*, in the case of a rental property). Possession will spring back to the owner after the current possessor's lease or rental comes to a close.

License (property law) A right to use another's property that is terminable at the will of the possessor of the land.

Malum in se (Lat., "a wrong in itself"). An inherently evil or immoral act, regardless of whether it is prohibited.

Malum prohibitum (Lat., "a prohibited wrong"). An act or offense which is prohibited but is not inherently wrong (*e.g.*, failing to stop at a stop sign).

Merchantable title Title not subject to such reasonable doubt that it would create a just apprehension of its validity in the mind of a reasonable prudent person. Merchantable title is not necessarily good title; it may have *slight defects*.

Mortgage Security for a debt given by a mortgagor (a debtor) to a mortgagee (a creditor) to secure a loan given to the mortgagor, usually for the purpose of purchasing land or some other real estate.

Mortgagee In a mortgage, the creditor, loan company, or bank that lends to the debtor, or mortgagor.

Mortgagor In a mortgage, the party that borrows from a creditor, loan company, or bank; a debtor.

Negligence *per se* Negligence established as a matter of law such that the plaintiff need not establish duty and breach. The violation of civil and criminal statutes gives rise to negligence *per se* in most states, such that the jury is instructed that the violation of a statute constitutes the breach of duty for the purposes of negligence.

Nonjusticiable political question A question that involves the exercise of *discretionary*