**Torts Outlines to Midterm**

**August 13, 2020**

**Tort**

**civil wrong**

 **not a breach of contract remedy provided by law**

**Crimes distinguished public v. private wrongs**

**Analyzing appellate court opinions opinion defined**

***not* a mere recommendation**

***the* law**

 **common law/made by courts**

 **statutory law/made by legislative bodies briefing a case**

**importance – provides structured outline component parts of opinion**

**citation (parties, reporter location, date, court) facts – the story (accuracy is key)**

 **procedural history**

 **issues (“whether”)**

**arguments of parties**

 **legal principles/analytical framework application of law to facts/explanation holding/court’s answer to the issue(s) disposition (affirm, reverse, modify, remand)**

**cautionary note**

**August 20, 2020**

**CHOICE OF LAW
Lex loci delicti
Most significant relationship test Lex fori**

**STATUTES OF LIMITATION
Defined
Slander/6 months
Property damage (real and personal)/3 years Libel, False Imprisonment, Malicious Prosecution,**

**Accountant and Lawyer Malpractice/1 year Personal injury/1 year**

**Products liability cases
personal injury/1 year
property damage/3 years
statute of repose/shorter of 6, 10, or 1 year**

**Medical malpractice/1 year
statute of repose/3years fraudulent concealment exception foreign object exception**

**no tolling for mental incompetency therapists/2-year sol and 3-year sor continuing medical treatment doctrine**

**Wrongful death/1 year Minors**

**statute of limitations tolled statute of repose not tolled**

**August 27, 2020**

**DAMAGES Objective**

**reasonably compensate the injured party**

**punish/deter Compensatory damages**

**purpose - make the plaintiff whole special/economic general/noneconomic
statutory caps**

**loss of consortium Damages for fatal injuries**

**common law rule survival statutes wrongful death statutes pecuniary loss**

**hedonic damages Property damage**

**destruction or dispossession – market value deprivation of use – value of the use physical harm**

**repairable – lesser of repair/decrease in market value**

**not repairable – decrease in market value Punitive damages**

**objective
conduct required
conduct defined
standard of proof - clear and convincing evidence bifurcated procedure
admissible evidence
constitutional limitations**

**Injunctive relief
Single action requirement Duty to mitigate damages Remittitur/additur Collateral source rule**

**TN’s exception for medical malpractice Attorney fees
“American Rule”**

**September 3, 2020**

**INTENTIONAL TORTS Intent**

**defined
consequences need not be intended distinguish from motive transferred intent doctrine involuntary acts
minors/mentally impaired
liability of parents/guardians**

**Assault defined**

**intent
reasonable apprehension**

**fear distinguished**

**objective test/hypersensitivity imminent threat
threat of harmful *or* offensive contact**

**awareness of the threat**

**nature of threatened harm
actual *or* apparent present ability
standard of proof/preponderance of the evidence**

**Battery defined**

**intent
harmful *or* offensive contact**

**objective test
actual contact required
source of contact
plaintiff’s awareness of the contact**

**contact with the plaintiff’s person**

**September 10, 2020**

**INTENTIONAL TORTS
Intentional infliction of emotional distress**

**interest protected – “peace of mind” rule
extreme and outrageous conduct negligence insufficient**

**intentional or reckless conduct
severe emotional distress
no physical consequences required plaintiff’s sensitivity/eggshell skull rule medical proof
conduct directed at third persons**

**False imprisonment defined**

**intent
unlawfulness
confinement, restraint, detention area of confinement
means of escape
physical barriers
physical force
threats of force
moral pressure
shoplifting detentions
awareness of the confinement time of the confinement**

**Trespass to land defined** - Trespass to land is the (1) intentional, (2) unlawful, (3) physical invasion of real property, (4) as to which the plaintiff is the rightful owner or is otherwise the person with rightful exclusive possession and control over the property (such as a lessee).

**Intent**

The "intent" element of trespass to land is a little different from what we've seen so far with respect to the other intentional torts. For the other intentional torts, the intent element has related primarily to the end result achieved by the defendant's actions. For example, for battery, one must intentionally do an act with the intent that it result in a harmful or offensive physical contact.

With trespass to land, though, the defendant can have the requisite intent even if the defendant has every reason to believe that his physical invasion of the plaintiff's property is perfectly legal. The intent that matters is not the intent to invade someone else's property unlawfully so much as to perform some act that happens to result in such invasion.

For example, let's say that the defendant gets lost in the woods all night and stays lost until the following morning. All night long, the defendant reasonably believed he was on public forestland, where he had a legal right to be. However, at some point during the night, the defendant unwittingly crossed over onto private property belonging to the plaintiff. At that precise moment, the defendant trespassed on the plaintiff's land, even thought he didn't know it. The defendant's action of wandering through the woods was intentional, and it resulted in an unlawful invasion of the plaintiff's land, in that the plaintiff had not given consent for the defendant to be there, and the defendant had no other privilege to be there. That is enough for trespass.

B. Unlawful Invasion

In order for the defendant’s physical invasion of the plaintiff’s land to be unlawful, it must be done either: (1) without the plaintiff’s effective consent or (2) without some other, overriding legal privilege to be there (these are discussed in other videos).

Bear in mind that the defendant’s presence on the plaintiff’s property might be lawful initially, but the defendant can morph into a trespasser if the defendant remains on the property after the plaintiff’s consent or his lawful privilege expires. The defendant might also be invited onto a certain part of the property, but then wander off into a different area of the property where the defendant has no privilege or permission to be, and thus become a trespasser.

 **physical entry boundaries aircraft exception damage**

**Trespass to chattels defined**

Having discussed trespass to land, let's delve into the two primary torts involving the defendant’s invasion of the plaintiff’s lawful possessory interest in personal, or movable, property: conversion of chattels and trespass to chattels.

Chattel is a legal term for personal property.

**intent interference**

3. Intent

Bear in mind that even though intent actually to interfere with the plaintiff’s rights is not strictly necessary for conversion, it is a factor in determining the seriousness of the defendant’s interference.

**intermeddling**

**dispossession**

**damage**

**Conversion defined**

A. Conversion of Chattels

Restatement (Second) of Torts, Section 222A, defines "conversion of chattels" as "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel."

This definition can be broken down into two basic, constituent parts: In order for there to be a conversion of chattels, there must be (1) an intentional exercise of near-total, owner-type dominion over personal property, coupled with (2) a resulting serious interference with the rights of the true owner or other rightful possessor, such as a lessee, or rightful bailee, or borrower.

**Intent**

Bear in mind that even though intent actually to interfere with the plaintiff’s rights is not strictly necessary for conversion, it is a factor in determining the seriousness of the defendant’s interference.

 **dominion and control**

1. Dominion

When we say there must be an intentional exercise of total dominion, what we mean is that the defendant intentionally must deal with the chattel as if it belongs to the defendant and not to the plaintiff.

Mistake is not a defense to conversion of chattel. The defendant can be liable for conversion of chattel even though the defendant thinks he or she has rightful possession of the chattel, if the defendant intentionally exercised control in a manner that actually violated the plaintiff’s rights in the chattel. Therefore, if the defendant accidentally walks off with the plaintiff’s cane, which looks identical to the defendant’s cane, and which was sitting right beside the defendant’s cane, there is conversion, even though this seems like an eminently reasonable mistake.

However, if the defendant has lawful possession of the chattel in the first place, the defendant will not be liable for conversion, unless the defendant takes some additional intentional step that violates the plaintiff’s rights, beyond the mere use of the chattel. Thus, if the plaintiff gives the defendant permission to borrow a car and the defendant negligently totals it, the defendant is not liable for conversion (but maybe negligence), since the defendant’s act of control did not violate the plaintiff’s rights because of the consent. However, if the defendant takes the car without consent and then totals it, even negligently, the defendant is liable for conversion, even though the defendant did not mean to total the car.

Similar reasoning applies if the defendant is, for example, driving his own car and negligently destroys the plaintiff’s car. In this case, there is no conversion, so that the defendant is liable, if at all, only under a negligence theory.

**substantial interference**

2. Serious Interference

Not only must the defendant exercise owner-type control over the property, but the defendant’s actions in this regard must amount to a serious interference with the plaintiff’s rights to control the chattel. The defendant’s interference with the plaintiff’s rights must be so severe that it would be equitable and fair to force the defendant to pay the plaintiff the full value of the chattel. Outright destruction or theft of the chattel is a prime example of such a result

The Restatement lists many other, perhaps less obvious ways to commit conversion: (1) taking possession of the chattel by fraud or duress, as opposed to outright theft; (2) barring the rightful possessor's access to the chattel; (3) destroying the chattel; (4) altering the chattel so that its identity or character is fundamentally changed; (5) using the chattel in some other way that is a serious violation of the plaintiff’s right to control it, even if the plaintiff ultimately gets the chattel back; (6) using the chattel in a manner that exceeds the scope of the plaintiff’s consent or other lawful privilege, or using it in a manner other than what was authorized; (7) a situation where the defendant is entrusted by the owner to deliver the chattel to person X, but mistakenly delivers it to person Y; (8) refusing to give property to the rightful owner on demand; (9) knowingly or unknowingly accepting control of stolen property from the person who stole it, or from someone who got it from someone who stole it (but not necessarily from someone who obtained it by trickery).

If this list is confusing, don't worry. Between the quizzes and the tests, we'll give you a chance to see some of them applied.

Ultimately, whether or not there has been a conversion of chattels must be analyzed under all the circumstances. The Restatement lists several factors that the cases have considered important in determining whether there has been a conversion of chattels, including: (a) the extent and duration of the defendant’s exercise of dominion or control; (b) the defendant’s intent to assert a right in fact inconsistent with the plaintiff’s right of control (such as intent to steal); (c) the  defendant’s good faith; (d) the extent and duration of the resulting interference with the  plaintiff’s right of control; (e) the harm done to the chattel; and (f) the inconvenience and expense caused to the plaintiff.

**subject matter damages**

**\*September 17, 2020**

**DEFENSES TO INTENTIONAL TORTS**

Even though the plaintiff has reasoning against the defendant; the tortfeasor has a time to establish a defense (sometimes called a privilege).

**Burden of proof -** A party’s obligation to persuasively provide evidence that supports its claim or defense as to an issue in dispute.

The plaintiff has the legal obligation to prove this. In defenses, the defendant has to prove the burden of proof on his side of the case. The burden of proof shifts but the standard of proof stays the same (a preponderance of evidence).

**Mistake** - A misunderstanding of the factual circumstances that gives rise to the underlying legal cause of action.

**Defense of Mistake**

 **Rule:** one who intentionally interferes with the personal or property of another

-A mistake is not a defense against intentional torts. If someone intentional commits a tort, that person accepts that idea that they could be wrong.

**exception for self-defense and defense of property :** a reasonable mistake is made in connection with self-defense or defense of property.

1. Limitations

A few limitations apply. First, the defendant cannot use deadly force. Second, the defendant cannot use any force if there is time to turn to lawful measures. Third, before using force the defendant must request the person posing the threat desist, unless doing so would be pointless. And finally, the property must be in the defendant's rightful possession. If the property isn't in the defendant's possession, then the defendant is allowed to recover it or to reenter it only if he or she seeks to do so immediately after the property is taken, and only if the person who has taken the property does not have a legitimate claim to it.

**Defense of Consent** - a tortfeasor is not liable if the plaintiff has given consent.

**Based on plaintiff’s words/conduct -** what the plaintiff does.

**express/actual -** the plaintiff has actually communicated his consent for something.

**implied/apparent -** words, behavior, or lack thereof that would lead a RPP to believe there was consent, even if there wasn’t.

**Implied by operation of law:**

**emergency privilege -** : health care provider has the implied consent to deliver medical services in an emergency.

 3 requirements:

 - Patient was unable to give effective consent

 - Time is of the essence

 - A reasonable person would have consented had that been possible

**Good Samaritan privilege -** Provides that any person, with or without medical training, has a privilege (defense) when they are acting a good Samaritan.

-Must have acted in good faith

- Did not charge (money) for their services

-It was an emergency

\*If these are present, the person is not liable. It, also, applies in a negligence case. If the defendant had a legal obligation to come to an aid or rescue of a person, this does not apply.

**When NOT a defense:**

**incapacity -** lacking legal capacity to give consent (intoxication, incapacity, minors)

**medical treatment - mature minor exception:** allows a minor to make decisions based on maturity (age)

**rule of sevens -** if a child is under the age of 7, they cannot give an affective consent. Over the age of 14, there is a rebuttable is capable of giving consent.

 **acts exceeding scope of the consent given -** : consent can have strings attached (limited to time or place for example). He has to exceed the scope.

**fraud/duress -** can be a defense if obtained by deceit, fraud, or duress.

**Self-defense** - Self-defense or defense of others (referred to collectively here as self-defense) operates as an affirmative defense against liability for intentional torts involving the defendant's use of physical force against the plaintiff. This obviously includes situations where the defendant commits a battery in self-defense, but it may also include cases where the defendant commits assault or false imprisonment in self-defense.

The basic rule is as follows: the defendant can use physical force against another only if the defendant reasonably believes the use of force is necessary to defend himself, herself, or someone else against unlawful physical force.

**Rule -** There is a defense (Privilege) that requires one to defend themselves

**when available – actual *or* apparent necessity:** privilege to act in self-defense when there reasonably appears or there actually is a necessity to trigger self-defense. The standard is that reasonable force can be used. The minimum amount of force that is or reasonably appears to be necessary to protect against the harm can be used.

**effect of a mistake**

 **degree of force – reasonable**

 **termination of the privilege -** once the threat is gone, there is not a need to use force. Revenge is not a defense.

**duty to retreat** - In some jurisdictions, there is a duty to retreat before employing deadly force. This means that, before employing deadly force in self-defense, the defendant must try to get away from the danger if the defendant knows, or perhaps should know, that he or she can avoid using force by retreating to a place other than his or her home, or by surrendering property to someone claiming a legal right to it (other than property constituting the defendant’s dwelling place), or by complying with the initial aggressor's demand that the defendant take some course of action, if the action is not illegal. Indeed, this is the position of the Restatement, if the defendant correctly or reasonably believes he or she can do so with complete safety. In other jurisdictions, the defendant does not need to do this, but can stand his or her ground.

**In TN:** : there is not a duty to retreat. Even if it is safe to do so, you do not legally have to withdraw from the situation. “Stand your ground laws”. You do not have to retreat from your home, even prior to using deadly force.

**extends to third parties -** : When a bystander gets injured. B attacks A. A defends himself. In the process, A injures C. A Is not liable to C for battery because self defense is broad enough to cover third parties, as long as those injuries are not intentional.

**Defense of others**

**Rule -** A attacks B and then C comes to B’s defense by attacking A. The defense of others says that any person has the right or legal ability to come to the defense of others using the same degree of force.

 **degree of force -** the same force of defense that is currently being using.

**mistake -** a mistake made in connect with defense of others be better right; otherwise, they are liable to for the torts they committed.

**\*September 24, 2020**

**DEFENSES TO INTENTIONAL TORTS**

**Defense of property** - Both the common law and the Model Penal Code allow a person to protect against threats to property under certain circumstances.

**Rule - :** a possessor of real or personal property is privileged to use reasonable force to protect said property.

 **real or personal property**

**reasonable force**

**Tenn. Code Ann.** § **29-34-201**

A person who is injured while attempting to commit a felony or commits a felony is barred from collecting damages. Does not extend to injuries of third parties.

(a) Any person who is injured while committing a felony or attempting to commit a felony on the real property of another is barred from recovery of actual or punitive damages resulting from injuries, either accidentally or intentionally inflicted by the owner, lawful occupier or tenant of such property, which the person receives while committing or attempting to commit a felony.

(b)(1) A person who accidentally or intentionally causes property damage to or inflicts injury or death upon the perpetrator of a criminal offense is absolutely immune from civil liability for or the payment of monetary damages from such person's actions if at the time such damage, injury or death occurred:

(A) The person was preventing or attempting to prevent the perpetrator from committing the offense or was apprehending the perpetrator of the offense; and

(B) The perpetrator was committing one (1) or more of the offenses specified in subdivisions (c)(1)-(9) or was attempting to commit one (1) or more of the offenses specified in subdivision (c)(10).

(2) The immunity conferred by this subsection (b) shall only apply to property damage caused to or injury or death inflicted upon a perpetrator of an enumerated offense and only under the conditions set out in this subsection (b). Such immunity shall not be construed to extend to property damage caused to or injury or death inflicted upon a bystander or other person who is not the perpetrator of an enumerated offense.

(c) The offenses for which such immunity applies are:

(1) Any criminal homicide;

(2) Aggravated rape;

(3) Kidnapping;

(4) Aggravated kidnapping;

(5) Especially aggravated kidnapping;

(6) Especially aggravated burglary;

(7) Aggravated robbery;

(8) Especially aggravated robbery;

(9) Carjacking; and

(10) Attempt to commit first or second degree murder.

**who may use this privilege to defend a property:**

**anyone in lawful possession or extends to anyone entitled to possess the property:** (i.e. renter). A allows B to use his torts book. C tries to take it from B. Can B use force to protect the book? Yes. He is lawfully in possession of the book to defend it.

**extends to businesses:** They have the right to protect their property. Only applies after the business has made a demand to stop the person before using any type of force. A 70-year-old man went into a market. He was on a date and told her to stay in the car. He is loud, yelling at customers. The manager of the store told him to leave. The man became more irate. The manager put his hands on the customer and escorted him outside and onto the sidewalk. The 70-year-old man punched the manager in the face. The manager punched the customer back once. The customer fell, hit his head on the concrete and he died. His estate sued. The jury found the story was liable for battery, but only awarded the customer $1 in damages.

**when available/actual or apparent necessity -** This ability to use force applies only when there is or appears to be danger to the property.

**effect of mistake**

**degree of force:**

**desist demand -** must demand they leave

They may use reasonable force to stop the interference of this property.

**deadly force prohibited:** force that can kill someone or seriously injure someone cannot be used to merely protect the property. The law places a higher tag on human life above property. This could easily evolve into self-defense rather than “deadly force”. You leave your torts book in your car. Someone wants it and they break your window to get your torts book. You confront them. They take up a threatening posture. This is no longer a “defense of property”; it is now a self-defense case.

**caution – facts may evolve**

**mechanical devices: *Katko v. Briney***

- *This had nothing to do with a person’s ability to protect their home*. Involves an old boarded up farmhouse. Mr. and Mrs. Briney lived several miles away. Nothing of any major value. Set up 7 “No Trespassing” signs, locked the doors, and boarded it up. People would break in and take things for over 10 years. They got fed up and set up a shot gun trap. They were aware of the power of the 20 gauge. Mr. Briney had is set up to hit the intruder in the stomach. Mrs. Briney suggested to lower it to the zone of the leg. Mr. Katko, looking for old jars, opens the door and gets shot. He is in the hospital for 45 days. He sues the Briney’s. Katko knew was what he did was illegal and plead guilty to Larceny. But, Katko sued and the court sided with him. The law is going to place a higher value on human lives rather than “things.” This was not self-defense, so it was not legal. Briney’s had the sell the farm to pay the judgements.

**Tenn. Code Ann.** § **39-11-616**

addresses Mechanical devices; it can be used to protect the property IF (1) the use of the device was reasonable under the circumstances and (2) the device must be one customarily used to protect property OR warnings were given to intruders and (3) must not be designed or known to cause death or serious injury.

(a) The justification afforded by [§§ 39-11-614](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-11-614&originatingDoc=N2FCF0DB0CCE411DB8F04FB3E68C8F4C5&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) and [39-11-615](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-11-615&originatingDoc=N2FCF0DB0CCE411DB8F04FB3E68C8F4C5&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) extends to the use of a device for the purpose of protecting property, only if:

(1) The device is not designed to cause or known to create a substantial risk of causing death or serious bodily harm;

(2) The use of the particular device to protect the property from entry or trespass is reasonable under the circumstances as the person believes them to be; and

(3) The device is one customarily used for such a purpose, or reasonable care is taken to make known to probable intruders the fact that it is used.

(b) Nothing in this section shall affect the law regarding the use of animals to protect property or persons.

**Forcible retaking of chattels**

**rule -** the owner/lawfully entitled person does a privileged to use force to recapture their chattel back. But there are limitations:

**when available**

Only when the “owner” is in “hot pursuit” of the person that took it.

 **“hot pursuit” requirement -** “hot pursuit” requirement: efforts to recapture happen immediately upon learning of the dispossession or the dispossession. If you wait, you will be sued for battery or assault by using force to take back the chattel. If the change in possession is rightful and lawful, no force can be used to take it back. (i.e. if you let me borrow your laptop, you cannot use force to get it back because we don’t want people getting hurt or killed over “things”). The efforts to recapture it must be made within an “undue lapse of time.” The court will decide this dependent of the circumstances.

**chattel rightfully acquired**

**degree of force -** reasonable force. (Same as above)

 **demand to precede use of force**

**deadly force prohibited**

Deadly Force

In contrast to the common law, the Model Penal Code does allow the use of deadly force to protect property if the following criteria are all met. First, the other person must be attempting to unlawfully dispossess the defendant of his or her dwelling or attempting to commit arson, burglary, robbery, or some other felonious theft or property destruction. Second, the other person must have used or threatened to use deadly force in the defendant's presence or the defendant must be unable to use non-deadly force without risking serious harm to himself, herself, or to another innocent party. And third, the deadly force must be immediately necessary to stop the person from committing the crime.

Limitations on Deadly Force

The Model Penal Code prohibits the defendant from using deadly force if he or she can safely retreat, surrender possession of the property to a person who claims to have rights to it, or else comply with a demand that the defendant refrain from taking action that he or she is not legally obligated to take.

**caution – facts may evolve**

**effect of mistake:** what if I think you have my torts book? I snatch your book from you. I realize your name is in it. My mistake is a reasonable mistake. You are liable for battery, assault, etc. A reasonable mistake can destroy your defense.

**Forcible retaking of land**

1. Recapture Property

A defendant may use non-deadly force to recapture property that he or she believes was unlawfully taken under two circumstances: first, if the defendant immediately seeks to recapture the property, and second, if the defendant reasonably believes that the intervening party has no legitimate claim to possession, in which case the recapture need not happen immediately.

The defendant may not, however, reenter land under any circumstances unless he or she believes it would be an exceptional hardship to wait for a court order.

**rule/no force -** no force can be used to retake real property. You may peaceable retake it (i.e. a landlord can go in when no one is home and change the locks; there was not force needed to recapture real property). If you use force, people will use deadly force and it could cause more problems than necessary.

**Defense of Necessity**

**rule -** there is a privilege to interfere with someone’s real property where there reasonable appears to be a means to avoid a greater harm.

**public -** any person has a privilege to commit what would otherwise be an intentional tort if it is or reasonably appears to be necessary to avoid a public disaster. A reasonable mistake will not destroy this tort. This is an absolute one because the defendant is not liable for any damages. (i.e. a fire jumping house to house. If the defendant destroys a house to stop the fire spreading, he/she will not be liable for the damages).

**private -** if the issue only threatens the defendant’s property, there is a privilege but the tortfeasor is liable to the damages. (i.e. he is hiking in a blizzard. He finds a cabin and breaks a window to get in to save himself, he will be liable for the window.

**Defense of Discipline -** the law allows for privilege that allows parents to use reasonable force and reasonable confinement on their child to help control the situation. This can be extended to people who stand in the shoes of the parent (babysitter, teacher, etc.)

 **Authority of law -** this can be a defense. If a person had the legal right to do what they did, this is not tortious. (The meter reader can be on your property).

**Statutes of limitations -** These can be used a defense in a Tort case.

**\*October 1, 2020**

**NEGLIGENCE -** Negligence is focused on conduct. It is an independent type of tort. It is focused on what the tortfeasor did or did not do; not about intent or mens rea.

**Distinct basis of liability**

**Defined -** Conduct that creates an unreasonable sense or risk of harm to people or property. The lack of due or ordinary care. Failed to do something that a RPP would have done under the same circumstances.

**Elements -** these are 5 elements that every negligence case has that the defendant must prove. Must prove all 5.

1. **The defendant (tortfeasor) has duty of care owed to the plaintiff:** legal obligation to conduct himself in a way to avoid unreasonable sense or risk of harm to people or property.
2. **Tortfeasor must have breached of that duty:** fall below the standard of care or negligent.
3. **The negligence must have been the factual cause (link) between the negligence and the plaintiff’s damages.** The negligence must have caused the harm.
4. **Must be the legal/proximate cause of the harm**
5. **Actual loss or damage**

**Standard of care**

**reasonable person test -** the defendants conduct will be evaluated against the RPP. It is not perfection.

**objective standard -** Doesn’t make a difference if he tried his best or was as careful because it’s not about what the defendant believed; it is being compared to an RPP. **Negligence is tested OBJECTIVELY, not subjectively.**

**Attributes of reasonable person**

**Physical -** identical physical characteristics of the tortfeasor (i.e. if the defendant is blind or deaf, the RPP will be blind or deaf).

 **mental capacity (voluntary intoxication) -** the tortfeasor is deemed to have the same mental capacity of a RPP, even if they don’t. (if the defendant is EMD, he will still be compared to an RPP). The use of drugs or alcohol is viewed as a mental limitation; not a physical one; therefore, it is not a defense in a Torts case.

**knowledge, observation, perception -** the tortfeasor is charged with the things he knew, observed or perceived AND will be compared with what a RPP would have known, observed, or perceived.

**knowledge common to the community -** tortfeasor is deemed to know what a RPP in the community would know. Such as characteristics of the people, animals, area, etc. Example: fire is hot, water can drowned you, etc. The reported lack of knowledge is not a defense.

**Minors -** The law recognizes that children do not have the same capacity as adults. Minors are charged with the care of a RPMinor (education, experience, etc).

**standard of conduct -** Can be held liable for negligent acts if it falls below the standard of conduct of someone like them (Reasonably Prudent Minor). Based on a Minor’s Standard of Care.

**adult activities -** if the minor is engaged in a dangerous activity undertaken by an adult (driving, shooting a gun, etc), no special allowance is given for that child’s lack of experience, training, education, etc. They will be held to the same standard of conduct as an adult.

Example*: Cook vs. Spinnaker’s*- a 17 year old gets drunk at a restaurant and chooses to drink. She is held to the standard of care that any adult would be held to.

**rule of sevens -** a child under 7 is deemed by law to be unable to commit a negligent conduct. Between 7-14, there is rebuttable assumption that they could or could not be incapable of negligent conduct. Above 7, they can be capable of negligent conduct.

**Activities requiring certain skill or knowledge -** if the tortfeasor is engaged in activity that required certain skill or knowledge, they will be held to the standard of care of someone with that trade or vocation.

**Professionals**

**standard of care (same or similar community) -** a professional is required to possess and exercise that skills and learning that a standard care for a RPP in the same or similar community or profession.

**specialists (national standard of care) -** a specialist will be held to the higher standard of their special (in the location of their practice). Medical specialists are held to the higher standard of their specialty nationwide.

**TN** does not have a national standard of care; they will be held to the standard of care of a RPP near where they practice.

There is a statewide standard of care for Lawyers in TN.

 **perfection not required! -** They are not held to a standard of perfection. Just because they are unsuccessful, does not mean they are negligent. They are not liable for a bad result; they are liable to for a bad result that leads to negligent. Anyone can make a mistake without being negligent. That mistake cannot fall below the standard of care from a RPP.

 **standard *and* breach established by expert testimony -** When a professional is the defendant, his standard of care and the breach must be proved by an expert testimony. The expert would testify about the standard of care and that the tortfeasor flunked their standard. The expert educates the jury and shows the standard and how the defendant deviated from that standard.

Example: Cardwell v. Bechtol

\*Expert testimony is not always required. It is so clear of the negligence. Ex. A doctor amputates the wrong leg.

**Medical malpractice**

 **TN (written notice 60 days out plus certificate of good faith) -** These are requirements (not a suggestion). Tn Statutes: written notice of a medical malpractice must be given to the health provider 60 days to filing suit. Acknowledge in your claim that you did that. Also, require plaintiff must file a “certificate” of good faith that one or more experts have been consulted and they expressed in writing that they are in good faith. This deters frivolously lawsuits against medical personnel.

 **duty to disclose risks/informed consent -** the medical personnel must give the patient enough information as the patient has enough information to undergo treatment. If the consent is obtained, but doesn’t give enough information to make an informed decision, the patient has a negligence case. They do not have to disclose risks that are material; however, doctors will usually disclose all the risks as to not get sued. If they patient is unable to give consent, doctors do not have to disclose any risks (bleeding out, heart attack, etc.)

*Shadrick v. Coker:* an exception of risk being disclosed are risks that are obvious/known or that are not material to the treatment/surgery.

 **medical battery v. informed consent malpractice -** no consent = battery. In battery, you don’t need expert testimony because the standard of care is irrelevant. The proof is not giving consent.

*Blanchard v. Kellum:* proved you do not need expert testimony because she did not give consent so this is considered battery, not malpractice/negligence.

*Ashe vs. Radiation Oncology*: risk of a spinal cord injury is less than 1%, so the doctor didn’t tell her because it was super low and if she doesn’t do radiation, she will certainly die. Her own expert said the risk is 2%, maybe 3%. She agrees to have the treatment. Her spinal cord is injured. She files for lack of informed consent. Is this battery or medical malpractice? Medical malpractice due to not disclosing the material information and the patient did not receive the informed consent necessary. The major problem is whether this decision was subjective or objective. The court decided it should be remanded for a new trial based on an objective opinion.

**vicarious liability of surgeons/hospitals -** Surgeons are captains of the ship but are not vicariously liability of the people in the room because the nurses are fellow servants.

*Parker v. Vanderbilt University*: a nurse anesthetist (in school) places a tube down the esophagus rather than his trachea. All vitals are crashing and no one could figure it out. They cut his chest open to massage his heart, etc. The actual nurse anesthetist steps in, fixes the tube, and the man was saved; however, the man was 12 minutes without oxygen was brain dead.

 **captain of the ship doctrine**

 **loaned servant doctrine**

 **respondeat superior -** look at the employer for the responsibility of the employee. “Not my Circus, not my monkeys”

**\*October 8, 20220**

**NEGLIGENCE: STANDARD OF CARE**

**Sudden emergency doctrine -** when someone is confronted with a sudden emergency that they did not create; they are not held to the same judgement they would be held to if they had time to respond to that emergency. Because it’s an emergency, they are not held to the same standard of care as if there was not an emergency.

**rule**

**choice of action available -** it only applies with the person has an emergent choice to make. It must be a choice that is made in an emergency. He cannot be held to the same accuracy as if he had 30 minutes or so to think.

Example: a child darts out in front of your car. You have 3 choices: slam on your breaks, swerve and hit a school bus, or swerve and hit a light pole.

One can still be held liable for the negligence created.

**Unavoidable accident doctrine -** if the harm at issue was unforeseeable and could not have been prevented through the exercise of reasonable care, there is no negligence involved.

**harm was unforeseeable**

**harm could not be prevented by due care**

Just because there is an accident or something, does not mean someone is liable. There is only liability for negligence IF there is actual negligence.

**Cases**: *McCall v. Wilder:* defendant suffered a seizure while driving and ended up in a head on collision with plaintiff. Once at the hospital, they discovered a brain tumor. Defendant experienced seizures prior to the day of the accident, but the loss of consciousness could have been activated by the brain tumor. But the defendant knew he had something that could forseeable result in an accident.

They ruled it was reasonably foreseeable that he could have had seizures while driving, so he was liable for negligence. It’s a jury question in TN.

Approach the idea of foreseeability in one of 3 ways: 1. If the defendant had any medical condition that caused harm, they were liable by law. 2. It’s a jury question. The jury will make a decision of whether it was foreseeable or now. 3. Defendant must have suffered symptoms on the day of the accident.

**Sudden incapacity doctrine**

**rule**

**incapacity unforeseeable**

**Case:** *Nichols vs. Atnip:* Robert Atnip was drunk and driving. He was an alcoholic and drug addict. His parents were enablers. Robert got into an accident and killed 2 young girls. The girl’s parents sued Robert’s parents for negligence. Robert’s issues effected school, jobs, and driving issues (9 tickets and 3 accidents before this). Did mom and dad know about Robert’s issues? Yes. He is convicted criminally, but the parents are sued. Trial Judge says it’s not mom and dad’s fault as a Matter of Law. So, can mom and dad be held liable?

TCA 37-10-103(a)- A parent or guardian shall be liable for the tortious activities of a minor child that causes injuries to persons or property. This is the statute that the girl’s parents claim. This does not apply because he was not a Minor. Plaintiffs say because of his alcohol and drug abuse, his mentality is 15 years old. The court says, Minor means Minor.

Plaintiffs argue that parents should be liable under negligent entrustment. There wasn’t proof that what the parents supplied caused the issue. The car was under Robert’s name. If the car had been in the parent’s name, they could have easily been liable for entrustment.

Plaintiffs argued that because of Robert’s behavior, the parents should have supervised him more closely. The courts said parents cannot be legally liable for their adult children.

In the end, Robert’s parents are not liable for his actions.

**Negligent entrustment**

**parental liability/Tenn. Code Ann. § 37-10-103 -** A parent or guardian shall be liable for the tortious activities of a minor child that causes injuries to persons or property.

**rule/elements -** someone (1) entrusts a chattel (2) to a person incompetent to use it (3) with knowledge that the person is incompetent AND (4) it is the proximate cause of injury or damage to another.

 **parental duty to supervise -** parents do not have a duty to supervise if their child is 18 years or older.

 **parents not generally vicariously liable -** parents are only liable if they are negligent in entrusting a chattel to their child. (i.e. if my competent 16 year old gets into a wreck, I am not negligent with my entrustment).

**Case:** *Stamp v. Honest Abe Log Homes*: The Stamps wanted a lock and key job (meaning blueprints, materials, and contracting). Smith said they didn’t build homes but had log home kits. Stamps said unless a Lock and Key situation could be arranged, they didn’t want it. Smith said he could provide a contractor with their purchase of a kit. Smith contacted Cochran (who is not a real contractor). Cochran starts but says it was underbid and left. Honest Abe says we didn’t misrepresent a fact. The Court says you mispresented that Cochran was a Contractor. They misrepresented Cochran’s true nature.

Honest Abe says well… we weren’t negligent. Court says yes you were because Smith knew Cochran wasn’t a contractor and was actually in the music business. Then, Honest Abe says if we were negligent and misrepresented information, the plaintiffs didn’t rely on this information. This is also false because the Stamps relied on him being a real contractor to finish their lock and key job. The plaintiffs told Smith they didn’t know anything about building a home and wouldn’t go through without a lock and key home. They went through the transaction because of this reliance.

Courts rule in favor of the Stamps.

**Negligent misrepresentation**

**rule -** When a defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief.

**requirements -**

**lack of privity -** (direct relationship) is not bar in this type of case; provided foreseeable reliance on the information.

**no bar provided**

**foreseeable reliance -** If A makes a negligent misrepresentation to B, but C ends up relying on that misrepresentation. Can C sue for negligent misrepresentation? Court says yes if it’s reasonably foreseeable if a third party would rely on that misrepresentation.

How far do we extend liability?

**Negligence Per Se**

**Rule -** Rule- the standard of care from a reasonable person can be set out in law, a statute. Under some circumstances, when a defendant has violated that statute, the defendant’s violation is conclusively to exist.

**Requirements:**

 **causal connection –** There must be a causal connection – a link between the harm and violation of the statute.

 **plaintiff is within class of persons protected -** the plaintiff had to be within the group that the statute was meant to protect.

**type of harm to be prevented -** statute must have been aimed at the harm that it was put in place to prevent.

There is a wreck. A can prove that B was speeding. Because B was speeding, he lost control and collided with A.

Was the violation a cause of what happened? Yes.

Is A within the class of people the laws that speed limits were meant to protect? Yes.

Are accidents the type of thing that traffics laws are meant to prevent? Yes.

Therefore, B was conclusively in violation so he is negligent per se.

There is a wreck. A can prove B didn’t have his license because his left his wallet at home. The statute says Thou shall have a driver license with you.

This is not negligent per se. The failure to not have his license was not the causal connection.

**Work-related injuries:**

**workers’ compensation law controls -** injuries that have a connection to work are not covered in tort law. They are covered by their own workers’ comp law. They do not have to prove negligence (or a standard of care). Only have to prove a work connection to recover damages.

**standard of care is immaterial -** standard of care is immaterial- the standard of care does not matter for injuries that are work related.

**recovery is limited by statute -** plaintiff cannot recover tort damages (pain and suffering, punitive, etc.); they can only recover what the workers’ compensation laws allow.

\*\*Anytime you see a fact pattern that deals with workers’ compensation, it will most likely not be a tort’s case; it’ll be a workers’ compensation case.

**October 15, 2020**

**NEGLIGENCE Burden of proof**

**plaintiff’s burden
preponderance of the evidence standard punitive damages/clear and convincing evidence burden of proof for defenses**

**Presumptions medical/repair bills rule of sevens rebuttable nature**

**Custom/industry-wide practices Res ipsa loquitur**

**defined
event does not occur absent negligence
condition or object under defendant’s control harm was not caused by plaintiff
legal effect
medical malpractice/Tenn. Code Ann. § 29-26-115**

**October 22, 2020**

**NEGLIGENCE
Duty defined
Balancing test
Owed to whom?
Probability v. possibility
Negligent infliction of emotional distress**

**zone of danger scenario physical impact rule physical manifestation rule zone of danger rule foreseeability rule**

**general negligence rule**

**severe emotional injury/expert proof required bystander scenario**

**sensory observation
serious or fatal injury to the third party plaintiff and third party have close relationship**

**exposure to harmful agent scenario actual exposure required**

**Duties to the unborn injuries prior to birth**

**viability standard born alive standard quick standard nonviable approach**

**wrongful pregnancy/conception *parent’s* claim
healthy child
recoverable damages ordinary costs of rearing**

**full recovery approach benefits rule
no recovery approach**

**wrongful birth
*parent’s* claim
physical and/or mental problems recoverable damages**

**wrongful life *child’s* claim**

**physical or mental problems
not recognized by most jurisdictions**

**October 29, 2020 and November 5, 2020**

**NEGLIGENCE: DUTY Duty to aid/rescue**

**general rule – no duty
special relationship between the parties Good Samaritan principle
defendant created the need for aid/rescue statutorily imposed duties
voluntary assumption of a duty**

**Duty to warn
physician’s duty to nonpatients
identifiable third persons
patient’s immediate family
foreseeable risks
existence/nonexistence of a duty is a question of law learned intermediary doctrine
duty to third parties in prescribing medication**

**Duty to control the conduct of others businesses/customers
prior incidents rule
totality of the circumstances rule balancing test**

**parents/children (generally not vicariously liable) Duty of sellers and furnishers of alcohol**

**common law rule dram shop statutes social hosts**

**November 12, 2020**

**NEGLIGENCE: CAUSE IN FACT
Rule
“But for” test
Multiple independent tortfeasors/concurrent causes**

**substantial factor test
indivisible injury/joint and several liability**

**divisible injury/several liability only
concert of action (joint venture, aiding and abetting) risk of further injury/original tortfeasor rule**

**Multiple independent tortfeasors but only one cause each tortfeasor was negligent
one cause only
*the* cause cannot be isolated/proven**

**joint and several liability results Loss of chance**

**defined
pure loss of chance
loss of a substantial chance
all or nothing approach
diminished opportunity v. unfavorable outcome Tenn. Code Ann. § 29-26-115**

**November 19, 2020**

**NEGLIGENCE: LEGAL/PROXIMATE CAUSE Defined**

**distinguished from cause in fact**

**serves as the boundary of liability Test**

**tortfeasor’s conduct was a substantial factor no rule or policy exists to negate liability
harm (not severity) was reasonably foreseeable unforeseeable consequences/eggshell skull rule**

**Rescue doctrine defined**

**extends to people and property**

**limited to *reasonable* actions by plaintiff Superseding intervening causes**

**defined
effect – negates liability criminal/tortious acts of third parties**

**December 3, 2020**

**PREMISES LIABILITY
Duty to those *off* defendant’s property**

**Rule
reasonable care
encompasses activities and conditions**

**Adjacent public ways
injury occurs on the public way
plaintiff deviates from the public way (foreseeability is key) natural condition exception
dead/decaying trees - negligence law controls**

**urban v. rural area**

**owner knew or should have known
living trees and plants - nuisance law controls**

**self-help approach
Massachusetts rule
Restatement rule
Virginia rule
Hawaii rule (Tennessee’s approach) Pennsylvania rule**

**Adjacent private property
Duty to those *on* defendant’s property**

**Trespassing adults
trespasser defined
undiscovered trespasser/no duty of reasonable care discovered trespasser/limited duty of reasonable care frequent trespasser/limited duty of reasonable care**

**Tenn. Code Ann. § 29-34-201 Trespassing children**

**attractive nuisance/playground doctrines limited to artificial conditions only
limited awareness/understanding of the danger defendant must be negligent**