

TOPIC 9: TORT LAW

Overview

Tort law generally encompasses situations where an individual's conduct causes harm to another. Torts are specific causes of action against individuals when a recognized statutory or common law right is violated. It is distinct from civil actions involving contract or family law. This chapter explores tort law and specific causes of action in tort. Specifically, it explains the three categories of tort — intentional torts, negligence, and strict liability torts — and the elements necessary for establishing liability under each. Lastly, it explains the types of damages available to plaintiff's injured by a defendant's tortious conduct and the defenses available to a defendant.

VIDEO LESSON - INTRODUCTION



VOCABULARY & CONCEPTS

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TOPIC 9: TORT LAW - QUESTIONS & ANSWERS

1. What is a “Tort”?

A tort, in the legal context, means a “wrong”. More specifically, it is a civil wrong, as apposed to a breach of contract or other civil action.

- *Note:* Individuals may be liable in tort for their own conduct and for the conduct of others.

- *Resource Video:* <http://thebusinessprofessor.com/torts-defined/>

2. What types of torts exist?

There are three broad categories of tort, as follows:

- *Intentional Torts* - Intentional torts, as the name implies, are characterized by the mental intent of the tortfeasor. The tortfeasor undertakes an activity with either the desire to bring about an intended result or with the knowledge that the result is “substantially certain”. When the action results in an identifiable harm or loss to a third party, it constitutes an intentional tort.
 - *Example:* If one person physically batters another person by punching him in the face. This is an intentional tort because the individual intended her actions and the probable result.
 - *Negligence* - Negligence is conduct by an individual that drops below a reasonable standard of care and causes harm to another person. Succinctly, an individual has a duty to act reasonably when interacting with others. When that individual fails to act reasonably and thereby causes harm to others, that individual is negligent.
 - *Example:* A person who is driving too quickly, following too closely, or not paying close attention may be negligent if her careless behavior results in an automobile accident.
 - *Strict Liability* - Strict liability subjects an individual to liability for activity that causes harm to another without regard for her intent or the standard of care she shows in carrying out that activity. That is, simply undertaking the activity that results in harm is sufficient to make the actor liable. The injured party is not required to demonstrate the actor’s intent or the level of care they exercised in undertaking the activity.
 - *Example:* A person who deals in very hazardous material, has a vicious or wild animal, or takes part in the production or sale of an unreasonably dangerous product may be liable if her activity causes injury to someone. It does not matter that the person did not intend to harm anyone or that the person took extra precautions to not harm anyone. These activities alone are enough to subject the person to liability.
- *Discussion:* Why do you think that torts are generally categorized based upon the mental state of the tortfeasor? Should the mental state of the tortfeasor affect the severity of the potential liability for the tort? Why or why not?

How should the intent of the tortfeasor be compared against the result of the tort when determining the liability of the tortfeasor?

- **Practice Question:** Doug is speaking with his friend Annie about an unfortunate accident involving her pet dog. Her pit bull bit the mailman, apparently mistaking him for an intruder. The mailman is now suing Annie. Annie says that she is going to trial to contest her liability because her dog broke out of its cage and it wasn't her fault. Animal bites are strict liability torts in Annie's state. What does Annie need to know before going to trial?
- **Resource Video:** <http://thebusinessprofessor.com/what-are-the-types-of-torts/>

INTENTIONAL TORTS

There are many intentional statutory and common law torts. Some of the more common intentional torts are discussed below.

- **Resource Video:** <http://thebusinessprofessor.com/intentional-torts/>

3. What is “assault and battery”?

Two commonly recognized intentional torts are “assault” and “battery”.

- **Assault** - Acting to place another person in immediate apprehension of a harmful or offensive physical contact. There are several elements to this tort. First, the individual must intentionally act and the action cannot be unconscious or inadvertent. Second, the individual witnessing the act must sense or apprehend immediate contact. Apprehension is more than fear. While the individual may also be scared, fear or intimidation is not required; rather, she only need be aware that a touching is likely to ensue. The apprehension of the touching is judged by a reasonable person standard. That is, would a reasonable person believe that physical contact is imminent. Lastly, the contact must be harmful or offensive. Offensiveness is judged based upon a reasonable person in the individual's situation.
 - **Example:** A person picks up a baseball bat and begins walking toward another person in a menacing manner. If the second individual reasonably believes that the first individual is going to hit him with the baseball bat, this is an assault. The second individual is in immediate apprehension of a harmful touching. The same situation could apply if the second individual believed that she would be touched inappropriately (such as groping or fondling), which would be considered offensive touching.
- **Battery** - A battery is an illegal touching of another. The touching is harmful or offensive and done without justification and without the consent of the person touched. A battery often accompanies an assault.
 - **Example:** In the above example, actually hitting the individual with the bat or touching the individual in an unwanted sexual manner would be a battery.
- **Note:** An individual can be assaulted but not battered (and vice versa). A battery without an assault occurs when

the individual was not aware in advance or did not see the battery coming.

- **Discussion:** Why do you think assault and battery are separated into different causes of action? Should one cause of action be more severe in liability than the other?
- **Practice Question:** Erin is very angry at Marshall. She walks up behind him and acts as if she is going to hit him with a baseball bat. Fortunately for Marshall, she decides against her plan before Marshall becomes aware. Still annoyed, however, she walks up to Marshall and slaps him in the face. Marshall did not expect to be slapped and was taken totally by surprise. If Marshall sues Erin, what causes of action will likely prevail?
- **Resource Video:** <http://thebusinessprofessor.com/assault-and-battery/>

4. What is the “intentional infliction of mental distress”?

The intentional infliction of mental distress upon another is a form of battery to the emotions. Like a battery, it is caused by intentional conduct that carries a strong probability of causing mental distress to the person at whom it is directed. Generally, the conduct must be very extreme or outrageous in nature to result in emotional distress. To recover for this tort, the plaintiff must demonstrate that the intentional conduct actually caused her mental distress that manifests itself physically.

- **Example:** Intentionally exposing a person to extreme ridicule in front of a large crowd may constitute such a tort.
- **Discussion:** What type of conduct would you consider sufficiently extreme or outrageous to qualify as a battery on the emotions? Do you agree with the requirement that mental distress must also manifest itself through physical symptoms?
- **Practice Question:** Helen is shopping in the mall with her daughter, Penny. They are on the second floor of the mall looking over the railing at the large, central fountain when a stranger approaches Penny. The stranger picks up Penny and begins screaming at her. He then holds her over the railing and threatens to drop her into the fountain a floor below. Helen screams hysterically for help and begs the stranger to put her down safely on the ground. Some bystanders grab Penny and tackle the stranger to the ground. Helen is so emotionally distraught by the incident that she develops nightmares, insomnia, and begins seeing a therapist. Can Helen sue the stranger and, if so, for what? Explain.
- **Resource Video:** <http://thebusinessprofessor.com/intentional-infliction-of-emotional-distress/>

5. What is the tort - “invasion of privacy”?

Invasion of privacy is comprised of three principle types of invasion of personal interest:

- **Use of Name or Likeness** - Individuals have a property interest in their name and physical image. As such, appropriating an individual’s name or likeness for business use without her consent violates her property rights.

- *Note:* Before using anyone's picture or name, a business must obtain a proper release from that person to avoid possible liability.
- *Example:* Using a candid picture of Ann smiling in an advertisement for a local business without her consent violates her personal rights.

- ***Discussion:*** Do you agree with the idea that an individual has an ownership interest in her name or physical likeness? Does it matter to you the nature of the likeness? Should a drawing or painting of an individual receive the same protections as a photograph or video? Why or why not?
- ***Practice Question:*** Judy owns a supermarket. She is advertising the sale of basketballs. She puts a small caption in her weekly newspaper flyer that uses an image of Steve Curly, a professional basketball player. Is there a legal issue?

- *Invalidate Physical Solitude* - Individuals have an expectation of privacy in their home and within other personal spaces. Viewing or monitoring such places is an invasion on the individual's physical solitude.
 - *Example:* Entering a person's home, spying through windows, illegal wiretapping, and persistent unwanted telephoning all may constitute an invasion of privacy.

- ***Discussion:*** Do you think that an individual should have a right to prevent individuals from spying or eaves dropping on them in private places? What amount of effort should be required to constitute an invasion and how would you measure it? Should an individual have to show damages to bring an action for invasion of physical solitude?
- ***Practice Question:*** Scott is walking by Karla's house and sees her through the window. She forgot to close the blinds and is walking around her bedroom in a state of undress. Scott is very curious and makes an effort to get a better view. He even climbs the tree growing beside the street on public property to get a better view. Has Scott committed a tort against Karla?

- *Disclosure of Private Information* - Disclosure of highly-objectionable, private information about someone may be an invasion of that person's privacy. Generally, the information must be obtained by an individual who owes a duty of confidentiality to the individual whose rights are violated. In some cases, the information must be obtained without the person's consent.
 - *Note:* A personal or professional relationship could give rise to a confidential relationship.
 - *Example:* A nurse disclosing someone's private medical information could constitute an invasion of privacy. The tort generally requires that the private information result in disclosure to the public at large.

- ***Discussion:*** What type of information should be considered private for purposes of an invasion of

privacy? Why? Should it matter whether there is a relationship between the individual whose information is disclosed and the discloser?

- **Practice Question:** Deshaun works in a pharmacy as a technician. One day, Dolly comes to the window and requests to fill a prescription. The prescription is for a medicine commonly used to treat a common venereal disease. Deshaun does not like Dolly, so he immediately gossips to friends about Dolly's medication. The friends post the information on a popular social media site and the news quickly travels back to Dolly. Has Deshaun committed a tort?

- **Resource Video:** <http://thebusinessprofessor.com/invasion-of-privacy/>

6. What is “false imprisonment”?

False imprisonment is the wrongful detention of a person without that person's consent. The detention does not have to involve physical force. It can involve a threat of physical force or the apprehension of harm for failure to remain in a specific location. The key aspect is that the detained individual must reasonably believe that she cannot leave the detention without unjust repercussions.

- **Note:** The detention area must be relatively defined.
- **Example:** This situation often arises when an agent of a retail establishment detains a suspected shoplifter. If the individual is not actually a shoplifter, the detention is wrongful and can constitute false imprisonment.
- **Discussion:** What type of action do you believe would reasonably make a person believe that she is detained without the ability to leave? Why?
- **Practice Question:** Everett is a security guard at a local clothing store. He believes that a customer is shoplifting. He asks the customer to step into the back room of the store to interrogate her. Upon arriving in the back room, the customer says that she feels uncomfortable and wishes to leave the store. Everett tells her that the police are coming and that she cannot leave until they arrive. Under what conditions has Everett committed a tort?
- **Resource Video:** <http://thebusinessprofessor.com/false-imprisonment/>

7. What is “malicious prosecution”?

Malicious prosecution is wrongfully subjecting someone to the prosecutorial process. This tort often arises from causing someone to be arrested or formally charged through intentional false swearing or malevolent pretenses.

- **Example:** I cause the police to arrest Tom simply to harass him. I do so by stating to the police that he stole my computer, when this is not true.

- **Discussion:** How would you propose balancing the objective of protecting the wrongfully accused against dissuading someone from pressing charges against someone who committed a crime against them?
- **Practice Question:** Autumn cheats on her boyfriend with Isaac. She is very embarrassed when everyone, including her boyfriend, learns of her actions. To cover up her infidelity, she accuses Isaac of improperly taking advantage of her while she was intoxicated. She informs the police who proceed with pressing charges against Isaac. When pressed to take a lie detector test, Autumn comes clean and admits her false accusation. What are Isaac's options for suing Autumn?
- **Resource Video:** <http://thebusinessprofessor.com/malicious-prosecution/>

8. What is "trespass"?

The tort of trespass is similar to the crime of trespass. It involves physically entering onto someone else's land without consent or remaining there after being asked to leave (consent is revoked). The difference between the civil action and the criminal charge is that a tort requires the existence of damages to be actionable.

- **Note:** In addition to personally entering someone's land, trespass can occur by projecting something (such as pollution or garbage) onto another's land without consent.

- **Discussion:** How does the civil tort of trespass relate to constitutional protections? How do you feel about trespass and the requirement for damages to bring a civil action? Can you think of scenarios where trespass could take place with no damages, but a civil action is preferable to pursuing criminal charges?
- **Practice Question:** Jason is in a local bar and music venue listening to a popular musical group. He drinks too much and becomes intoxicated. The bar bouncers kindly asks Jason to leave, but he refuses on the grounds that he rightfully paid the cost of entrance. If Jason refuses to leave, has he committed a tort?
- **Resource Video:** <http://thebusinessprofessor.com/trespass/>

9. What is "conversion"?

Conversion is a civil cause of action for taking another person's property without her consent. It entails the wrongful exercise of dominion (power) and control over the personal (non-land) resources of someone else. In doing so, a person violates the owner's lawful right to exclude others from her resources. The deprivation may be temporary or permanent, but it must constitute a serious invasion of the owner's legal rights.

- **Example:** Stealing something from an employer is conversion – as is purchasing something that has been stolen. Failing to return something at a designated time, delivering something to the wrong party, and destruction or alteration of someone else's property also constitutes conversion.

- **Discussion:** What level of interference with another person's use and enjoyment should be considered

conversion? How does the nature of the deprivation affect your opinion? Does the length of deprivation affect your opinion? Should the interference be intention? How would you balance the rights of an innocent transferee of the property against the rights of the original owner?

- **Practice Question:** Ervin purchases a luxury watch from Carl. Carl claims to have received the watch as a gift. In reality, Carl stole the watch from Todd. Todd learns that Ervin has possession of his watch, what are his options for securing its return?
- **Resource Video:** <http://thebusinessprofessor.com/conversion/>

10. What is “defamation”?

Defamation is the publication of an untrue statement about another that subjects that individual’s character or reputation to contempt or ridicule. “Publication” simply means that the untruthful statement was told or made known to at least one other person.

- **Note:** Individuals and businesses can sue for defamation. In business, false accusations of dishonesty or inability to pay one’s debts frequently lead to defamation suits. Approximately one-third (1/3) of all defamation claims are brought by employees against present and former employers.

Types of Defamation

There are three general types of defamation:

- **Slander** - Slander is spoken or oral defamation.
- **Libel** - Libel is recorded defamation (i.e., written) or defamation over the television or radio.
- **Disparagement** - Disparagement is defamation of another person’s trade or business prowess, product, or service.

- **Discussion:** Why do you think the government recognizes a legal cause of action for defamation? Should a business’s reputation be treated differently than an individual’s reputation? Why or why not? Should verbal defamation be treated differently than recorded defamation? Why or why not? Should defamatory statements be treated differently depending upon how they are communicated (written, spoken, text, song, video, etc.)? Why or why not? Why do you think actions for defamation are common in the employment context? Should employment related defamation be afforded greater or lesser protection than personal character defamation? Why or why not?

- **Practice Question:** Marvin gets into an argument with his supervisor and quits his job. He lists his employer on his résumé. When a potential employer calls his former employer to verify his employment, his former supervisor says all sorts of harsh and arguably untrue things about Marvin. Marvin does not get the job. Does Marvin have a legal action against his former employer?

- **Resource Video:** <http://thebusinessprofessor.com/defamation/>

Defenses to Defamation

There are several recognized defenses to a defamation claim. First, if the allegedly defamatory statement is true, it is an absolute defense. Second, a communication may be privileged under the law and specifically exempted from defamation actions.

- *Example:* In most circumstances, statements made by legislators, judges, attorneys, and those involved in lawsuits (in court or in session) are privileged.
- **Discussion:** Do you think defamation should extend to truthful statements in some situations? Should truthful communications that are presented in a way to create a false impression about someone be defamatory? Why or why not? How do you feel about certain forums being privileged or exempt from defamation actions? What are the arguments for and against such privilege?
- **Practice Question:** Dora learns from Elvis that Sandra has a venereal disease. While this is true, Dora and Elvis are incorrect about the specific disease. When Dora incorrectly tells another person that Dora has a specific venereal disease, has she committed a tort?
- **Resource Video:** <http://thebusinessprofessor.com/defenses-to-defamation-actions/>

1st Amendment Considerations

Special rules apply to defamation of celebrities and public figures and defamation by the news media. The media is not liable for the defamatory untruths they print unless the plaintiff can prove the untruths were published with “malice” (evil intent that is the deliberate intent to injure) or with “reckless disregard for the truth.” Likewise, for a celebrity or public figure to recover for defamation, she must demonstrate that the defendant defamed her with malice or with reckless disregard for the truth.

- **Discussion:** Do you believe that defamation laws violate the 1st Amendment? Why or why not? How should the rights of individuals against defamation be balanced against individual freedom of speech? Do the higher standards for defamation against celebrities, public figures, and the media effectively balance those rights? Why or why not?
- **Practice Question:** Donald is running for political office. He routinely says things about his opponents that are not true. Many of the statements are very offensive and attack the opponent’s personal character. Under what conditions could Donald be liable for his statements?
- **Resource Video:** <http://thebusinessprofessor.com/defamation-and-1st-amendment-considerations/>

11. What is “fraud”?

Fraud is the intentional misrepresentation of a material fact that is justifiably relied upon by someone to his or her injury. The false statement inducing the other party's misunderstanding must regard a material fact about the prospective transaction. Fraud often involves intentional misrepresentations regarding ownership of property or one's financial status.

- *Note:* Fraud may be an intentional failure to disclose a material fact that induces another into action which results in her harm. This may be the case when a legal duty to disclose the material fact exists.
- *Example:* Lying about assets or liabilities in order to get credit or a loan is a common form of fraud.
- **Discussion:** How do you feel about the requirement that fraud be intentional? Should a misrepresentation that is reckless and unverified be considered fraudulent, even if it is not intentional? Why or why not?
- **Practice Question:** Daryl is selling a poster bearing the signature of a known celebrity athlete. Daryl advertises that the poster is 15-years old and was signed when the athlete was a rookie. In reality, the poster was signed recently, following the athlete's retirement. If someone buys the poster based upon Daryl's representations, is there a tortious act? Why or why not?
- **Resource Video:** <http://thebusinessprofessor.com/fraud/>

12. What is the "intentional interference with economic relations"?

This is a tort based in common law rather than statute. There are several categories of conduct that may violate common law rights of individuals:

- *Disparagement* - This is an untrue statement about someone's business acumen, product, or service. This tort may be addressed as defamation; however, some states lack a statute or common law protecting commercial rights against defamatory statements.
- *Interference with Contractual Relations* - This tort occurs when a non-party to a contract knowingly induces a party to the contract to fail to honor or breach the agreement.
 - *Example:* This situation often arises when one company raids another for employees. The raiding company knowingly induces employees to breach their employment contracts with their current employer.
- *Interference with Perspective Advantage* - This cause of action entails a situation in which there is a business relationship between the plaintiff and a third party. The defendant then acts in a way intended to disrupt the relationship. This conduct is done not for personal advantage but with the purpose of harming the plaintiff. The plaintiff may bring an action to recover the losses or damages sustained.
 - *Example:* A third party intentionally creating distrust between a supplier and vendor to harm the vendor may constitute an illegal interference.
- *Wrongful Appropriation of Business Interests* - This tort arises when a fiduciary breaches the duty of loyalty and appropriates someone else's intellectual property rights, such as patent, trademark, copyright, trade secret, or good will.
 - *Note:* This type of conduct is often addressed in non-compete and non-disclosure agreements. These

agreements establish a contractual right. This is in addition to any common law rights to seek redress in tort for such conduct.

- *Example:* An employee downloading an employer's client list (that is a trade secret) with the purpose of opening her own business would constitute wrongful appropriation.

- **Discussion:** How do you feel about the tort of intentional interference with contractual relations? Does the tort conflict with valid business practice? Why or why not? Who do you think this cause of action is meant to protect?
- **Practice Question:** ABC, Inc., is a competitor of 123, Inc.? ABC knows that 123's contract with Supplier Corp is instrumental to its business operations. ABC offers Supplier Corp a substantial sum of money to breach its contract with 123, Inc. ABC does not plan on doing business with Supplier Corp. What are 123's legal options and why?
- **Resource Video:** <http://thebusinessprofessor.com/intentional-interference-with-economic-relations/>

NEGLIGENCE TORTS

13. What is "negligence"?

Negligence is unreasonable behavior that causes injury to another person or business.

Elements of Negligence

Five elements make up a claim for negligence:

- existence of a duty of care owed by the defendant to the plaintiff;
- unreasonable behavior by the defendant that breaches the duty of care;
- causation in fact;
- proximate causation; and
- an actual injury.

- **Discussion:** What are the core differences between intentional torts to negligence actions? How does the existence of a duty to act reasonably compare to intentional activity with a specific *mens rea* attributable to the activity?
- **Practice Question:** Luther is driving through a parking lot and listening to music through his headphones. He inadvertently runs into Sandra, who is walking through the parking lot. What type of legal action potentially exists in this scenario?
- **Resource Video:** <http://thebusinessprofessor.com/negligence-actions/>

14. What is a “legal duty”?

The first element of a negligence tort is establishing the nature and extent of the defendant’s duty to the plaintiff. A duty generally arises pursuant one’s conduct or activity, such as assuming a position of authority, control, or other special relationship with someone. Any form of activity in the presence of or otherwise affecting a third party gives rise to a duty of care. A special relationship between individuals may include: parent-child, doctor-patient, attorney-client, etc. The extent of a person’s duty to others is based upon the nature (or genesis) of that duty. Once the nature of the duty is determined, the individual owing the duty must use reasonable care and skill in her actions. That is, an individual must act reasonably in a given situation (based upon the nature of the duty owed) to avoid causing harm to those to whom she owes a duty. The greater the risk or potential harm to others, the greater the level of care required to meet the duty owed.

- *Example:* An individual who decides to drive an automobile owes a duty of care to other motorists and pedestrians. An individual walking on the sidewalk with others owes a duty not to walk carelessly and bump into others.
- *Discussion:* How do you feel about the duty to act reasonably? What level of interaction between individuals gives rise to a duty? What types of factors should contribute to the establishment and strength of the duty between individuals?
- *Practice Question:* Eric is a lifeguard by profession. He is taking a leisurely stroll along the lake when he notices a person in distress. Does Eric have a duty to attempt to rescue the individual drowning individual?
- *Resource Video:* <http://thebusinessprofessor.com/duty-of-care-negligence/>

15. What is “unreasonable behavior” that constitutes a breach of duty?

Negligence entails unreasonable behavior that breaches the duty of care that the defendant owes to the Plaintiff. This standard is known as the “reasonable person” standard. Whether conduct is unreasonable is a mixed question of law and fact. The duty of care exists under the law, but the determination of what is reasonable may be unreasonable in another situation. In determining whether conduct is unreasonable, a court will consider “the likelihood that the defendant’s conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk.” Notably, the reasonable person standard of care is an objective standard based upon the nature of the relationship and the subjective characteristics of the plaintiff.

- *Note:* A professional, such as a doctor, will be held to the standard of a reasonable professional in a given situation. A failure of a professional to act reasonably within the scope of her duties is known as “malpractice”. Further, a large person interacting with a small child may owe a higher standard of care to avoid harmful physical contact than a small person interacting with a large person.

Inaction as Unreasonable Behavior

In some situations, inaction may constitute unreasonable behavior. This is true when a special relationship exists or one individual causes the risk of harm to the other person. In such a situation, an individual incurs an affirmative duty to act.

Failing to act drops below a reasonable standard of care.

- *Example:* A mother fails to help her child cross the street. If the child strays into traffic and is injured, the mother's inaction is negligent in causing harm to the child. A mother is assumed to act in the best interest of her child, such that others will not act assuming the mother will act. I push a non-swimmer into deep water, I now have a duty to act reasonably in preventing that person from drowning. My inaction to rescue her will result in liability.

Gross Negligence, Reckless & Wanton Behavior

Negligence generally entails a simple failure to meet the standard of care owed to others. "Gross negligence", in contrast, is a severe departure from the standard owed.

- *Example:* I am rock climbing with a friend. I do not hook our climbing rope in carabiners every 5 feet, as recommended. I think we will make better time if I hook the rope every 15 feet. When my friend slips, he falls 15 feet, rather than 5 feet, before the rope catches him. This causes him to slam very hard into the rock face. This may be an example of gross negligence. I may not have intended the result or appreciated the risk, by my actions fall way below an acceptable standard of care.

"Reckless" behavior demonstrates a complete disregard for the potentially harmful consequences of one's conduct. It generally requires a defendant to appreciate the nature and severity of the potential harm that may arise from the conduct. Though it does not entail intent to cause the harm, it shows an extreme lack of due care. Such conduct falls below the standard of care owed to other individuals and constitutes negligence. In some jurisdictions reckless conduct is known as "aggravated negligence". The law frequently allows a plaintiff to recover punitive damages as well as actual damages in such situations.

- *Example:* Shooting an arrow up into the air without knowing whether anyone will be harmed by the arrow could be reckless conduct.

Res Ipsa Loquitur & Negligence Per Se

Two situations exist where a defendant may either be held liable without a showing of unreasonable conduct or the unreasonableness of conduct is inferred from the facts of the situation.

- "*Res Ipsa Loquitur*" posits that in some situations the very nature of the accident or situation indicates that conduct of the defendant was negligent. That is, this type of harm would not have occurred in the absence of negligence by someone in the defendant's position. As such, it is not necessary to demonstrate how a reasonable person would or should have acted in the situation.
 - *Example:* Tom is walking by a building when a potted plant falls on his head. It is apparent that the potted plant fell from the room of the building where there is a community garden. Ginny keeps a garden and is present in the garden when the plant falls. There is no evidence that Ginny intentionally dropped the plant or that she was negligent in allowing the plant to fall, but this could result in her liability for negligence pursuant to *res ipsa loquitur*. It is abnormal that a plant would fall from the top of the building unless someone was negligent in her actions causing the resultant harm.
- Negligence *per se* posits that a failure to meet a standard or guideline, often established by a statute or regulation,

means an individual is negligent without examining whether the individual's conduct in the situation was reasonable.

- *Example:* A professional practice group may establish standards of conduct for its employees. If an employee does not comply with that standard, it could be negligence *per se*. Violating the standards is assumed negligent without a demonstration of how a reasonable person would act. Further, if an individual is involved in a car crash while speeding, the violation of the speed limit may demonstrate negligence *per se* without a need to show that a reasonable person would not have been driving at that rate of speed.

- **Discussion:** How do you feel about using the fictional, reasonable person standard to determine whether an individual has acted reasonably? Do you think that the reasonable person standard varies depending upon the fact-finder? Why or why not? Does it surprise you that inaction can constitute unreasonable behavior in some circumstances and not in others? Why or why not? Should reckless and wanton behavior be considered an intentional tort or unreasonable behavior for purposes of liability? Why?
- **Practice Question:** Eric is a lifeguard by profession. He is taking a leisurely stroll along the lake when he notices a person in distress. He begins to swim after the drowning individual. A few feet into the water, he realizes the water is cold. He does not want to get sick, so he quickly gets out of the water and goes on his way. Has Eric committed a tort?
- **Resource Video:** <http://thebusinessprofessor.com/breach-of-duty-of-care/>

16. What is “Causation in Fact”?

In a negligence action, the defendant's conduct must have caused the injury to the plaintiff. Causation in fact presents the question, “but for” the act of the defendant, would the injury have occurred? This is the broadest aspect of causation, as any number of causes together could have contributed to the injury. The jury must determine whether the defendant's conduct is a “substantial, material factor in bringing about the injury”. If there are multiple defendants, each individual defendant can be held jointly and severally liable for the collective actions of the group.

- **Discussion:** Can you think of a situation where an individual is a contributor to an outcome, but the outcome would have occurred regardless of the individual's involvement? Should a person be held liable if a particular damage would have occurred regardless of her involvement in a tortious activity? Why or why not?
- **Practice Question:** Jessica and 5 friends are jumping up and down on a trampoline. Terry falls while bouncing, but the other friends continue to bounce. Terry is thrown from the trampoline by the force generated by the other bouncers. Is Jessica's conduct the cause in fact of Terry's injury?
- **Resource Video:** <http://thebusinessprofessor.com/cause-in-fact-element-of-tort-liability/>

17. What is “Proximate Causation”?

Proximate causation means that the harm suffered by the defendant was reasonably foreseeable as a result of the plaintiff's conduct. More specifically, for the type of injury to be foreseeable, the plaintiff must be one whom the defendant could reasonably expect to be injured by a negligence act. Further, the injury must be caused directly by the defendant's negligence. The relationship between the defendant's actions and the harm caused cannot be too far removed or tenuous. This may be the case when an unexpected intervening actor or occurrence is involved in bringing about the harm. It would breach the "chain of causation" necessary for finding a defendant negligent. This determination is left for the jury to decide.

- **Discussion:** How do you feel about the "reasonably foreseeable" standard? What factors should influence what one determines to be reasonably foreseeable? Can you think of scenarios where the outcome would not occur without a person's involvement, but the outcome is not reasonably foreseeable from her conduct? Should conduct that is reasonably foreseeable to result in a particular outcome give rise to liability, even if the outcome would have occurred without the individual's involvement? Why or why not?
- **Practice Question:** Jessica brings a box of fireworks on a train. While she is boarding, she trips and the box of fireworks explodes. The explosion shakes the loading platform violently. At the opposite end of the loading platform, a large vending machine falls over and injures a passenger. Is Jessica the proximate of the passenger's injury? That is, does bringing fireworks on a train lead to a foreseeable risk that a distant, heavy object will fall over and hurt someone? Or, is the tall, heavy, inherently unstable design of the vending machine an intervening cause that negates proximate causation?
- **Resource Video:** <http://thebusinessprofessor.com/causation/>

18. What are the common defenses to negligence actions?

Jurisdictions commonly recognize three principle defenses to negligence actions.

- **Contributory Negligence** - This doctrine bars a plaintiff's recover in a negligence action if her own fault contributed to the injury "in any degree, however slight."
 - *Note:* Contributory negligence is only applied in a few jurisdictions and in limited circumstances.
- **Comparative Negligence** - Comparative negligence compares the degree of fault assessable against the defendant with that assessable against the plaintiff. The jury is left to access the percentage of negligence between the parties.
 - **Pure Comparative Negligence** - In a pure comparative negligence jurisdiction, the plaintiff can only recover the percentage of damages not attributable to her own fault.
 - *Example:* If the plaintiff is 90% negligent for her loss of \$100k, she can only recover \$10K from the defendant.
 - **Modified Comparative Negligence** - In a modified comparative negligence state, the plaintiff cannot

recover if her negligence is greater than (or “as great as” in some jurisdictions) the negligence of the defendant.

- *Example:* If the plaintiff’s negligence is less than 50% compared with that of the defendant(s), she can recover damages. Her recover is reduced, however, by her percentage of negligence.
- *Assumption of the Risk* - Assumption of the risk arises when the plaintiff knowingly and willfully undertakes an activity made dangerous by the negligence of another. That is, the plaintiff identifies a potentially harmful situation brought about by the defendant’s conduct, understands the risk associated with the situation, and proceeds to voluntarily expose herself to this risk of harm. This is a defense against any harm suffered by the plaintiff as a result of this exposure. In some situations, the parties can contractually acknowledge certain risks in a given activity. This may have the effect of assuming the risk of any harm suffered as a result of those risks.
 - *Example:* Skydiving is an inherently risky activity. Bob hires Plane Jumpers, LLC to instruct him in this activity. Before his first solo jump, Bob signs an acknowledgement of the potential dangers inherent in this activity. Bob is injured when heavy winds cause him to crash while landing. His acknowledgement is likely an assumption of this risk — which may bar his recover from PlaneJumpers for allegedly negligent instruction for not preparing him for landing in heavy wind.

- **Discussion:** Which, if any, of the defenses to negligence do you find most compelling? Why?
- **Practice Question:** Beverly owns a small store. She recently mopped the floor and placed “wet floor” signs all around the area. William is wearing sneakers with small wheels on the sole. These wheels allow him to skate around on smooth surfaces. He approaches the wet floor area and takes notice of the sign. He proceeds to skate across the wet floor, but falls and breaks his ankle. If William sues Beverly, what defenses might she put forward?
- **Resource Video:** <http://thebusinessprofessor.com/defenses-to-negligence/>

STRICT LIABILITY TORTS

19. What is “strict liability”?

Strict liability concerns an individual’s legal liability for injury-causing behavior that is neither intentional nor negligent. Basically, an individual will be liable for any harm resulting to a third party from a course of conduct to which strict liability applies. Injuries caused while working with explosives, dangerous animals, product design or manufacturing, and serving alcohol to the public are strict liability torts in most states.

- *Example:* Beth has a business conducting fireworks shows. She is hired to conduct the fireworks display during a 4th of July celebration. During the event, a large firecracker veers into the crowd and explodes. Two people are injured by the explosion and sue Beth. She will be held strictly liable regardless of the amount of care she exerted in orchestrating the show.

- **Resource Video:** <http://thebusinessprofessor.com/strict-liability/>

20. What is “strict products liability”?

Strict products liability involves the commercial sale of defective products. In most states, any retail, wholesale, or manufacturer who sells an unreasonably dangerous, defective product that causes injury to a user of the product is strictly liable. This applies to commercial sellers who normally sell products like the one causing injury or who place them in the stream of commerce, such as suppliers of defective parts and companies that assemble a defective product.

There are two kinds of defects for purposes of strict product liability:

- *Production Defects* - A production defect occurs when products are not manufactured to a manufacturer’s own standards. Consumers of the defective product are later injured as a result of this variation from the manufacturer’s standards.
- *Design Defects* - A design defect occurs when a product is manufactured according to the manufacturer’s standards but is an unsafe design. The product injures a user due to its unsafe design.

If either of these defects makes the product unreasonably dangerous if used as intended, any seller of the product (from manufacturer to retailer) may be liable for an injury caused by the defective product. Strict products liability is useful in protecting individual consumers who suffer personal injury or property damage.

- **Discussion:** How do you feel about the fact that anyone in the chain of distribution can be liable for design or manufacture defects? Why do you think the law allows for such wide liability?
- **Practice Question:** Fancy Motors is a car manufacturing company. They develop a new, compact car for the US market. The car has troubles from the minute it comes off of the assembly line. The gas tank is located behind the fender-well of the vehicle. This leads to an increased risk of fire in the event of a rear-end collision. Also, Fancy Motors installed a seatbelt system that is designed to have three points of contact with the car frame. Due to space concerns and a lack of understanding of the seatbelt system, Fancy only attached the seatbelt to the frame in two locations. Can you identify any points of potential liability for Fancy Motors in this scenario?
- **Resource Video:** <http://thebusinessprofessor.com/strict-product-liability/>

21. What other common strict liability causes of action exist?

Most states recognize similar types of conduct as subject to strict liability:

- *Ultrahazardous Activity* - Courts may impose strict liability in tort for types of activities they call ultrahazardous. This may include activities such as working with explosives, wild animals, or extreme sports.
- *Dram Shop Acts* - These laws make sellers of alcoholic beverages directly to customers on the seller’s premises liable for harm caused as a result of the consumer becoming intoxicated.
- *Common Carriers* - Carriers of cargo on behalf of others may be strictly liable to the owner for any harm suffered

by the cargo. Risk of loss, however, may be shifted back on the owner *via* contract.

- **Discussion:** How do you feel about the idea that an individual can be held liable for actions without having any intent to achieve a result or knowledge that the action is wrong? What if an individual is intentionally deceived into undertaking activity that entails strict liability?
- **Practice Question:** Garth has a Rottweiler named Alf. Alf is generally very amiable. She has an buried electric fence that keeps Alf in her yard. One day, Alf sees a bicyclist riding by her house. She runs through the electric fence and bites the bicyclist. What is the likelihood that Garth will be held liable in this situation?
- **Resources Video:** <http://thebusinessprofessor.com/examples-of-strict-liability-actions/>

22. What defenses exist to strict product liability actions?

The following defenses affect liability in a strict product liability case.

- **Contributory and Comparative Negligence** - These are generally not defenses to strict products liability actions; though, the negligence of the plaintiff may be used to reduce damage awards.
- **Assumption of the Risk** - If a plaintiff knowingly undertakes a dangerous activity to which strict liability applies, she may be barred from recovering from the defendant for harms suffered. Individuals may contractually acknowledge their assumption of any risks in a given activity. In most jurisdictions, however, assumption of the risk may constitute a defense.
- **Misuse of a Product** - Strict product liability depends upon an individual use the product as intended by the manufacturer or in an otherwise reasonable manner. This means that the defendant may avoid liability if the injury to the plaintiff was the result of using the product in a manner that is not intended or is cautioned against.
 - **Note:** Compliance with federal or state standards regarding the manufacture and design of a product is evidence that the product is not defective, but it is not a complete defense. Many states are beginning to adopt a reasonableness standard for design defects, failure to warn, and testing inadequacies. These standards replace the traditional strict liability standard.
 - **Examples:** Handling fireworks while smoking could be an assumption of the risk if the explosive nature of the product is known or expressed to the user. Removing safety guards from equipment is a common misuse that could constitute a defense to strict product liability.

- **Discussion:** How do you feel about the available defenses to strict product liability actions? Should comparative negligence apply to such actions? Why or why not? Why do you think assumption of the risk is a commonly accepted defense? Should any defense apply differently depending upon who is being sued (manufacturer, distributor, retailer, etc.)? Why or why not?
- **Practice Question:** Mycroft purchases a new Sherlock model of riding lawnmower from Watson's hardware. After

using the mower once, he decides to remove the cover guard from the top of the mower deck. This makes it easier for him to clean excess trimming from the deck after use. One day, he accidentally sticks his foot in the pulleys and severely injures his foot. If he sues Watson's and Sherlock, Inc., under strict product liability, what potential defenses apply?

- **Resource Video:** <http://thebusinessprofessor.com/defenses-in-a-strict-liability-action/>

TORT DAMAGES

23. What are “compensatory damages”?

Tort plaintiffs may generally recover compensatory damages for injuries or losses suffered as a result of the tortious conduct. As the name implies, these damages are used to compensate the plaintiff for an injury suffered and to make the plaintiff whole again. Compensatory damages may include financial loss, pain and suffering, decreased life expectancy, loss of enjoyment, and loss of life or limb. Calculation of damage awards are made by the jury.

- **Note:** Juries may employ life expectancy tables and present value discounts in arriving at a damages award.
- **Discussion:** Do you have any opinions on how compensatory damages should be calculated? Should any factors other than the harm suffered by the plaintiff be considered? Do you think the award of compensatory damages is always fair? Why or why not? Should there be cap on damages? Why or why not?
- **Practice Question:** Arthur gets into an automobile accident. He suffers some bruising and a broken ankle. He also has to take leave from work for several months until his ankle fully heals. The doctors are concerned that Arthur could suffer long-term pain and arthritis in the ankle. He sues the other driver for negligence and wins. What do you think the jury will consider in awarding compensatory damages to Arthur?
- **Resources Video:** <http://thebusinessprofessor.com/compensatory-damages/>

24. What are “punitive damages”?

Punitive damages are used to punish defendants for committing intentional torts and for negligent behavior considered “gross” or “willful and wanton.” The key consideration in the award of punitive damages is the defendant’s motive. Usually, a defendant’s motive must be malicious, fraudulent, or evil. Punitive damages are also awarded for dangerously negligent or reckless conduct that shows a conscious disregard for the interests of others.

- **Discussion:** How do you feel about the award of punitive damages? If punitive damages are awarded by the jury, is it fair that they go to the defendant? Why or why not?
- **Practice Question:** Happy Motor Co. manufactures cars. The company learns that the braking system in the vehicle is subject to fail in certain weather and road conditions. The company calculates the likelihood of losses from lawsuits from the failed braking system and realizes that it would be far cheaper to pay out awards in those lawsuits than to recall all of the vehicles and replace the braking system. When a plaintiff is severely injured

because of the malfunction and sues Happy Motor Co., what type of damages do you think the jury will award and why?

- **Resources Video:** <http://thebusinessprofessor.com/tort-damages/>