



## **LEGAL ENGLISH**

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## BIBLIOGRAPHY

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## C) TORTS

### Bases of Liability

- *Intent* - The (1) desire or (2) substantial certainty that (3) offensive contact with the plaintiff will occur or that (4) the plaintiff will become apprehensive of such contact.
- *Negligence* - Requires (1) a duty of care, which arises from creating a risk or from a special relationship (e.g. parents in relation to their children). The duty of care is breached if it was (2) foreseeable that the act or omission would cause harm. Something is foreseeable if a reasonable person had anticipated that someone in the victim's position would have been at risk.
- *Aggravated Negligence* - Recklessness
- *Strict Liability* - Ultrahazardous activities (liability without fault)

### Cause

- *Damage* - Harm or injury to a person or property
- *Proximate Cause* - This term refers to an act or omission that is considered to be legally sufficient to result in liability. While the "but-for" cause relates to a cause without which the event could not have occurred (but for the action, the result would not have happened), proximate cause tests whether an intervening cause is strong enough to relieve the initial wrongdoer of any liability and hence become a superseding cause.

### Affirmative Defenses

A defendant's assertion of facts and arguments that will serve as a justification and defeat the plaintiff's claim

- *Defense of self, others, or property*
- *Recapture of chattel*
- *Public or private necessity*

### Remedies

- Damages
- Restitution
- Injunction

## CHAPTER 1 - OBJECTIVES

### WARM-UP ACTIVITY

→ A tort is a civil wrong other than breach of contract for which a remedy may be obtained. Why do we need tort law? Consider the case and come up with arguments. Work in small groups.

*Liebeck v. McDonald's, 1994*: Stella Liebeck, a 79-year-old woman from Albuquerque, New Mexico, ordered a 49¢ cup of coffee from the drive-through window of a local McDonald's restaurant. Liebeck was in the passenger's seat and her grandson Chris parked the car so that Liebeck could add cream and sugar to her coffee. She placed the coffee cup between her knees and pulled the far side of the lid toward her to remove it. In the process, she spilled the entire cup of coffee on her lap. Liebeck was wearing cotton sweatpants; they absorbed the coffee and held it against her skin as she sat in the puddle of hot liquid for over 90 seconds, scalding her thighs, buttocks, and **groin** [i.e. *the junction of the inner part of each thigh with the trunk, often including the external genitals*]. The coffee had a temperature of 190°F (88°C). She was taken to the hospital, where it was determined that she had suffered third-degree burns on six percent of her skin. She remained in the hospital for eight days.

Applying the principles of comparative negligence, the jury found that McDonald's was 80% responsible for the incident and Liebeck was 20% at fault. They awarded her \$160,000 in actual damages and \$2.7 million in punitive damages (= two days of McDonald's U.S. coffee sales). The judge reduced punitive damages to \$480,000. The decision was appealed, but the parties settled out of court for an undisclosed amount.

## CHAPTER 2 - INTENTIONAL TORTS

### LISTENING FOR GIST

*Torts by Prof. S. Finz, Western State University College of Law, Fullerton, California © 2005 Thomson West Group - [edited: 2.18 min.]*

- Defendant shoots a gun aiming at plaintiff but misses.
  - battery
  - assault
- Defendant fires a gun in the air to shock plaintiff. The bullet ricochets and hits plaintiff.
  - battery
  - assault
- Defendant locks up an unconscious plaintiff.
  - false imprisonment
  - no false imprisonment

### BATTERY, ASSAULT, FALSE IMPRISONMENT

battery = intent + offensive contact (touching of the body)  
 assault = intent + no offensive contact (touching of the mind)

Intent is (1) the desire or (2) substantial certainty that (3) offensive contact with the plaintiff will occur or that (4) the plaintiff will become **apprehensive** [i.e. *anxious, afraid*] of such contact.

false imprisonment = intent + confinement
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**Confine** means to (unlawfully) overcome the plaintiff's will to leave.

## TRESPASS AND CONVERSION

trespass to land = intent + unauthorized entry trespass to chattels = intent + interference + damage conversion = intent + serious interference + serious damage
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Trespass to land does not require any damage. This tort consists of doing any of the following without justification: (1) entering upon land in the possession of another, (2) remaining on the land, or (3) placing or projecting any object upon it. Trespass to chattels refers to an act of direct physical interference with a **chattel** [i.e. *movable property*] possessed by another. Conversion relates to a serious interference with a chattel that causes a major damage.

## CHAPTER 3 - NEGLIGENCE

<p><b>Negligence</b> is the breach of the duty of reasonable care and thus the failure to exercise the standard of care that a prudent person would have exercised in a similar situation. <b>Recklessness</b> is conduct whereby the actor does not desire harmful consequence but foresees the possibility and consciously takes the risk. Hence, it is less than intent but more than ordinary negligence.</p>
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The definition **comprises** [i.e. *embraces*] a two-prong test:

- There must be a **duty of care**, which arises from (1) creating a risk or from (2) a special relationship (e.g. parents in relation to their children).
- The duty of care is breached if it was **foreseeable** that the act or omission would cause harm. Something is foreseeable if a reasonable person had anticipated that someone in the plaintiff's position would have been at risk.


→ Apply this test to the famous Palsgraf case. Discuss in pairs or small groups.

*Palsgraf v. Long Island Railroad Co., New York Court of Appeals, 1928*: A man carrying a package containing fireworks jumped aboard a car of a moving train and, seeming unsteady as if about to fall, a guard on the car reached forward to help him in and another guard on the platform pushed him from behind, during which the package was dislodged and falling upon the rails exploded. The shock of the explosion threw down some scales at the other end of the platform, many feet away. The scales struck the plaintiff, causing injuries for which she sued the railroad company. There was nothing in the appearance of the package to give notice that it contained fireworks.

## LANGUAGE FOCUS - comprise v. compose

The traditional rule states that **the whole comprises the parts and the parts compose the whole**: *The United States comprises 50 states. Fifty states compose the United States.* According to this rule, comprise is similar to include, encompass, embrace, comprehend, and involve. Synonyms of compose are constitute and make up. Even though careful writers maintain this distinction, comprise is increasingly used in place of compose, especially in the passive, as in *The United States is comprised of 50 states.*

## CHAPTER 4 - STRICT LIABILITY

 Law 101 - The American Legal System by Prof. J. M. Feinman, Rutgers School of Law, Camden © 2000 J. M. Feinman

### READING

One of the earliest strict liability cases was *Rylands v. Fletcher*, decided \_\_\_\_\_ the House of Lords in 1868. The defendants, mill owners, had built a reservoir on their property. Unbeknownst \_\_\_\_\_ them, the reservoir was built on top of an abandoned coal mine. The water in the reservoir broke through the abandoned mine and flooded the connecting mine of an adjoining landowner. Because the defendants did not know or have reason to know of the abandoned mine, they were not negligent \_\_\_\_\_ locating the reservoir where they did.

But, the court said, some activities, like building a reservoir to hold a large quantity of water, are abnormally dangerous even if they are performed \_\_\_\_\_ due care. The activity is not so dangerous that it is illegal, but is sufficiently dangerous that we make the actor liable without fault \_\_\_\_\_ all damages that flow from it. This encourages a heightened degree of care and it imposes \_\_\_\_\_ the actor the duty to pay all of the costs associated with the activity. Accordingly, the defendants were liable even though they acted with reasonable care.

## CHAPTER 5 - PROXIMATE CAUSE

Proximate cause refers to an act or omission that is considered to be legally sufficient to result in liability.

The “**but-for cause**” relates to a cause without which the event could not have occurred (but for the action, the result would not have happened). Proximate cause tests whether an **intervening cause** is strong enough to relieve the initial tortfeasor of any liability and hence become a **superseding cause**. Supersede means to replace, as in *supersede another as chairman of the board*.

→ Discuss the following example in pairs or small groups.

A driver hits a pedestrian negligently. The ambulance driver wrecks the car on the way to the hospital because of reckless driving. The victim dies in this second accident. It turns out that the internal injuries she incurred in the first accident would have been fatal as well.

→ The following situation was given to law students at Oxford University. The aim was to show that legal liability differs from moral value judgments. The suggestion was also that the moral responsibility imputed would reveal the value system of the students. Here is the story:

*A woman lived with her husband in a town beside a river. One day her husband went away for three months. While her husband was away, the woman took a lover, who lived across the bridge on the other side of the river.*

*One day, while she was with her lover, the woman heard that her husband was coming home. She left her lover and tried to cross the bridge. But now there was a soldier on the bridge. The soldier said, “Stop! I have orders that no one must cross the bridge. If you try to cross the bridge, I will shoot you.”*

*Near the bridge was a boat. The woman told the boatman she needed to cross the river. The boatman said he would take her across the river if she paid him \$100. The woman didn't have \$100, so she asked her lover to give her the money, but he refused.*

*The woman tried to cross the bridge. The soldier shot her dead.*

→ Please don't look ahead but work through your assignment in the order given. Work in small groups.

① Who is legally liable? Who is not liable and why?

② Who is morally liable? Grade the characters with the numbers ① (most to blame) up to ⑤ (least to blame).

a) Create your own list.

b) Create a group list (consensus must be reached).

	Personal List	Group List
Woman		
Husband		
Lover		
Soldier		
Boatman		

③ The suggestion is that the person you blame least represents the attribute you value most. Do you agree? Does your personal result reflect your value system? Discuss. Interpretation: Woman = choice; husband = marriage; lover = freedom; soldier = law; boatman = money.

④ **WRITING**

→ Proximate cause links conduct with result. The American Law Institute proposed that the label "proximate cause" be replaced with "scope of liability." Why?

Reasoning:

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## LISTENING FOR DETAIL - reasoning

*Torts by Prof. S. Finz, Western State University College of Law, Fullerton, California © 2005 Thomson West Group - [edited: 2.31 min.]*

→ Fill out the blanks and answer the questions.

Maybe you read about the case of *Hergenrather v. East* in which a defendant parked his truck negligently and a thief was able to steal it and run the plaintiff over. When the plaintiff sued the owner of the truck, the defendant (the truck owner) argued that the theft of the truck was a \_\_\_\_\_ cause. But after the mayor of the city where it happened testified that the street where the truck had been parked were skid row, populated mostly by junkies, drunks, bad actors, \_\_\_\_\_ of all kinds, the court found the theft was not extraordinary. So you'd better consider all circumstances before you \_\_\_\_\_ your argument on a general statement.

→ What is the piece of advice the Russian writer Anthon Pavlovic Chekhov (1860 - 1904) gave to other writers?

- Have a shotgun ready on the wall to commit suicide.
- Don't overuse red herrings.
- Strike everything that does not drive the story forward.

→ What is a red herring?

- A smoked fish with a reddish color once used in hunting
- A notice for bar exam takers written in red
- Something that draws attention away from the real issue

## CHAPTER 6 - AFFIRMATIVE DEFENSES

Affirmative defenses are a defendant's **assertion** [i.e. *stated positively*] of facts and arguments that will serve as a justification and defeat the plaintiff's claim.

- **defense of self, others, or property** - These defenses allow using reasonable force to prevent a tort or apparent tort against the defendant. The applied force was reasonable if the advantages of the act outweigh its disadvantages.
- **recapture of chattel** - If a chattel of someone has been wrongfully taken, they may subsequently recapture it, as long as they act promptly and use reasonable force.
- **public or private necessity** - These defenses refer to an emergency that threatens either the general public (public necessity) or the defendant (private necessity). A necessity that involves only personal interests provides only a limited privilege and the defendant has to compensate the plaintiff for any damage caused. By contrast, public necessity excuses liability completely.



## LANGUAGE FOCUS

**assertion** - Synonyms: affirmation, asseveration, averment  
 Antonyms: denial, disavowal, disclaimer

These words refer to a solemn declaration of truth. In a legal context, **affirmation** is a declaration made under penalty of perjury, but without an oath. While an oath is sworn to, an affirmation is simply affirmed. **Asseveration** is an earnest declaration, as in *She asseverated her innocence*. **Averment** is an assertion in a pleading, as in *the averment that the defendant ran a red light*.

→ One word can be used in all sentences. Answer: \_\_\_\_\_

Since his illness, he has had to \_\_\_ off smoking.

She had only just begun practice, but her clients \_\_\_ by her.

His friends will \_\_\_ for his integrity.

→ One word can be used in all sentences. Answer: \_\_\_\_\_

Even under torture, he refused to \_\_\_ his faith.

Many parents \_\_\_ themselves so that their children can have the best.

He will neither confirm nor \_\_\_ the allegations.

## CHAPTER 7 - TORT DAMAGES

Tort damages are intended to put plaintiffs back in the position they were in before the tort happened.

**Actual damages** compensate for a proven injury or loss, so far as it is possible to do so by awarding money to make up for the loss or injury. Consider the unfortunate fate of Yetta Seffert (*Seffert v. Los Angeles Transit Lines, 1961*), who was boarding a Los Angeles city bus when the doors suddenly closed, catching her left foot. The bus dragged her some distance, and then threw her to the pavement, causing major injuries to her left foot. As a result of the accident, Seffert had to undergo several operations, and her ankle joint contracted, causing her heel to be raised two inches above floor level. The condition was **irremediable** [e.g. *incurable, irreparable*], and Seffert would suffer pain and limited movement for the rest of her life.

**Nominal damages** are a **trifling** sum [i.e. *a tiny amount*] awarded when a legal injury is suffered but when there is no substantial loss to be compensated, for example trespass to land.

**Punitive damages** are awarded in addition to actual (or nominal) damages when the defendant acted with **malice** [i.e. *wickedness of heart, intent*] or recklessness. Punitive damages are intended to punish and thereby deter blame-worthy conduct. **Deter** means to prevent from acting, particularly by means of fear. At common law, punitive damages are proportional to both actual damages and, in some degree, to wealth. If you are going to punish a rich person, you need to take away more money.

## CHAPTER 8 - RESTITUTION & INJUNCTION

### LISTENING FOR GIST

*Remedies by Professor W. A. Fletcher - Berkeley School of Law, University of California, Berkeley. © 2005 BarBri - [edited: 2.17 min.]*

→ Match key word and example.

① replevin

② constructive trust

③ equitable lien

\_\_\_\_\_: Someone steals \$1,000 from you. He buys stock worth \$1,000 with that money and the stock goes down in value to \$800.

\_\_\_\_\_: Someone steals a Picasso painting from you. You want the masterpiece back.

\_\_\_\_\_: Someone steals \$1,000 from you. She buys stock worth \$1,000 with that money and the stock goes up in value to \$1,500. You want the stock be conveyed to you.

**LEGAL RESTITUTION - Replevin** is an action for the repossession of personal property either wrongfully taken or rightfully taken but wrongfully **detained** [i.e. *withheld*] by the defendant. Plaintiffs get the property conveyed to them, but have to give security until the court decides who owns it. By contrast, **ejectment** is an action for the repossession of real property. If someone has been **ousted** [i.e. *forced out*] from real property, they can get a **writ** of ejectment [i.e. *written order issued by a court*] and the sheriff will **evict** [i.e. *throw out*] the occupier.

→ One word can be used in all sentences. Answer: \_\_\_\_\_

The disruptive students were \_\_\_ after school.

The police \_\_\_ several suspects for questioning.

The injured were \_\_\_ overnight in the hospital.

→ One word can be used in all sentences. Answer: \_\_\_\_\_

Tenants who fall behind in their rent risk being \_\_\_.

He was \_\_\_ from the pub for drunken and violent behaviour.

Thousands of farmers were \_\_\_ to make way for large sheep farms.

**EQUITABLE RESTITUTION** - The difference between replevin and **constructive trust** is that replevin allows the plaintiff to get a particular piece of property conveyed to him, while constructive trust allows the plaintiff to get a substitute. An **equitable lien** does not result in property being conveyed to the plaintiff. Rather, it results in a security interest against the property.

**INJUNCTION** - On a par with the remedy of specific performance in contract law, an injunction is a court order commanding or preventing an action, for example in a civil stalking case. A party is required to do (mandatory injunction) or refrain from doing (prohibitory injunction) a particular thing.

## CHAPTER 9 - REVIEW

→ Draft a summary “remedies” (cf. page 14 - contract remedies).

**LEGAL REMEDIES**

**Damages**

Focus on the loss incurred by the aggrieved party

Contracts	Torts
▪	▪
▪	▪
▪	▪

**Restitution**

Focus on the benefit obtained by the breaching party/tortfeasor

Contracts and Torts
▪
▪
▪

**EQUITABLE REMEDIES**

**Restitution**

Contracts and Torts
▪
▪

**Equity**

Contracts	Torts
▪	▪
▪	
▪	

**LAWYER JOKE** - Two lawyers are in a bank, when armed robbers burst in. They line the bank's customers including the lawyers against a wall, and proceed to take their wallets, watches, etc. While this is going on one of the lawyers jams something in the hand of the other. "What is this?" whispers the lawyer, to which the other one replies, "It's that \$100 I owe you."

## ANSWER KEY

*Objectives* ▪ If a tortfeasor is criminally prosecuted, the victim still bears the loss; if the victim is compensated by insurance, the wrongdoer still takes no responsibility. Tort law thus serves three purposes: fairness, compensation, and deterrence of careless conduct.

*Intentional Torts* ▪ assault - defendant acted with intent to hit plaintiff but missed (no offensive contact) ▪ battery - defendant acted with intent since he had the desire that the plaintiff becomes apprehensive of offensive contact; there was offensive contact because the bullet hit plaintiff ▪ no false imprisonment - defendant acted with intent to lock up plaintiff, but did not overcome his will to leave because an unconscious person has no will at all.

*Negligence* ▪ *Palsgraf Case - Opinion by Chief Judge Benjamin Cardozo*: "The risk reasonably to be perceived defines the duty to be obeyed. If no hazard was apparent to the eye of ordinary **vigilance** [i.e. *alert watchfulness*], an act innocent and harmless does not take to itself the quality of a tort because it happened to be a wrong."

*Strict Liability*: by - to - in - with - for - on

*Proximate Cause* ▪ If the new event, whether through human agency or natural causes, does not break the chain, the original actor is liable for all the consequences flowing naturally from the initial circumstances. But if the new act breaks the chain, the liability of the initial actor stops at that point, and the new actor, if human, will be liable for all that flows from his or her contribution. If someone acts willfully (e.g. intent, recklessness) and thus takes over control of an event, the chain is usually considered broken. In this case, another deciding factor is that the victim died earlier, a result that does not naturally flow from the initial risk created.

*Writing* - Proximate cause is not so much a matter of causality but rather a question of public policy: "We pick out the cause which in our judgment ought to be treated as the dominant one with reference to the jural consequences." (B. Cardozo)

*Chekov* - superseding, nogoodniks, base ▪ Strike everything that does not drive the story forward. ▪ A smoked fish / Something that draws attention away from the real issue.

*Language Focus* ▪ swear - deny

*Restitution* ▪ 3 - 1 - 2 ▪ detained - evicted