

TORTS

I. INTENTIONAL TORTS

a. General principles for ALL intentional torts

- i. Extreme sensitivity of a P is ignored when deciding if P has a cause of action.
 - 1. Always assume you are dealing with a typical, ordinary person, a person of normal sensitivity.
- ii. There are no incapacity defenses in the world of intentional torts.

b. For a prima facie case of intentional tort, P must prove:

- i. Act by D (volitional movement)
- ii. Intent
 - 1. Knowledge
 - 2. Substantial certainty
 - 3. Transferred intent
 - a. Can be invoked only if both the act intended and the actual results are one of the following:
 - i. Assault
 - ii. Battery
 - iii. False imprisonment
 - iv. Trespass on land
 - v. Trespass to chattels
- iii. Causation

c. Individual Torts

i. Battery

- 1. 2 principal testable elements:
 - D must commit a harmful or offensive contact***
 - i. Contact is offensive if it is something that would be unpermitted by a person of normal or average sensitivity.
 - b. The contact must be with the P's person.***
 - i. P's person includes anything the P is holding or touching; anything the P is connected to.
 - 1. Slapping the horse on the ass was battery against the rider on a question on a bar about 4 years ago.
 - 2. A battery does not have to happen instantaneously so long as the D set it in motion.
 - a. Putting poison in someone's sandwich. When the person eats the sandwich and becomes ill 3 hours later, that's battery.

ii. Assault

- 1. 2 elements:
 - D must place the P in apprehension.***
 - i. Apprehension:

1. Synonym for knowledge here: I apprehend that the capital of CA is Sacramento.
 - a. David and Goliath question (trick question warning): soon to be P is big and strong. Little D is going to pick up a stick and waive at the big guy. One of the choices will say big guy cannot recover because he has not been put in apprehension.
 - i. Apprehension does not mean fear. He has been placed in apprehension because he has knowledge that he may be struck with a stick and that's all the law requires.
2. Unloaded gun problem
 - a. D threatens P with a touching, but he is bluffing; he cannot consummate the attack. Put yourself in P's place in that situation. If P is aware that D lacks the ability to complete a battery, then the P knows he cannot be touched and therefore, no assault.
 - b. On the other hand, if P lacks info one way or the other, that is good enough to give him knowledge that he could be subject to battery and he will win.
 - i. Doctrine of apparent ability: If it looks like you could complete the battery and P thinks you might be able to, that's enough.
 - b. ***Apprehension must be of an immediate battery.***
 - i. Immediacy
 1. Words alone lack immediacy.
 - a. A verbal threat by itself is not enough to constitute assault on the bar exam.
 - b. You need accompanying physical conduct.
 2. Even when you have threatening conduct, words may negate or destroy the immediacy.
 - a. Conditional word or phrase may destroy immediacy: if you weren't my best friend, I'd beat the crap out of you.
 - i. P knows here that he won't be touched.
 - b. Words that promise action in the future: just you wait until 3 pm and I will haunt you down like the dog that you are (saying this at 9 am).
 - i. This is not a threat of an immediate battery.

iii. False imprisonment

1. Elements:

D must commit an act of restraint

- i. Threats are sufficient.
 1. If you leave this room in the next 30 minutes, I will kill your child.
- ii. An omission can be an act of restraint.
 1. This will happen when there is a pre-existing duty on the part of D to help the P move about.

2. Not summoning a wheelchair on a plane for someone who needs it.
 - iii. In order for an act of restraint to count, P must either be aware of it or be harmed by it.
- b. The result must be confinement of the P to a bounded area (plus intent and causation)**
- i. The movement of the P must be constrained in 360 degrees.
 1. It can be constrained by the scope of a threat.
 2. The real bar exam trick here is the barricade question: if the D eliminates one route of travel, that is not false imprisonment because the P, although limited in his ability to go in that direction, is free to go in other directions.
 - ii. If there is a reasonable means of escape that P can reasonably discover, then the area is not a bounded area.
 1. If the only way out is disgusting, unpleasant, or impossible to discover, that P is stuck in a bounded area.
 - iii. P must know of the confinement or be harmed by it.
 - iv. It is irrelevant how short the period of confinement is.

iv. Intentional infliction of emotional distress

1. 2 elements:

a. D must engage in outrageous conduct

- i. Only tort to upset someone if you do it through outrageous conduct. It's apparently ok to upset someone as long as you don't do it through outrageous conduct.
- ii. Conduct is outrageous if it exceeds all bounds of decency tolerated in a civilized society.
- iii. NOT outrageous: mere insults.
- iv. Hallmarks of outrageousness (not a complete list):
 1. The conduct is continuous or repetitive.
 2. When D is a common carrier or an inn keeper.
 - a. Common carrier = transportation company.
 - b. Inn keeper = hotel.
 - c. If behave in a way that is marginally outrageous, much more likely to be able to push it over the line.
 3. If P is a member of a fragile class of persons.
 - a. 3 fragile classes:
 - i. Young children
 - ii. Elderly people
 - iii. Pregnant women (D must know woman is pregnant)
- v. If you know about someone's phobia and go ahead with a tasteless joke anyway, that is outrageous. It is outrageous to go for someone's emotional weak spot.

b. P must suffer severe distress

- i. The severe distress doesn't have to take any particular form. No requirement that P suffer observable physical symptoms, see a doctor, miss a prescribed number of days of work, etc.
- c. Recklessness will satisfy the intent requirement here.
- d. IIED is the only intentional tort to the person that requires damages.

e. Causation in bystander cases

- i. When D intentionally causes physical harm to a 3rd person and P suffers severe emotional distress because of it, P may recover by showing either the prima facie elements of emotional distress or that:
 1. She was present when injury occurred.
 2. She is a close relative of the injured person, and
 3. D knew facts 1 and 2.

v. Trespass to land

1. 2 elements:

a. Physical invasion by D

- i. D enters the property.
- ii. D alternatively can throw or project physical objects onto the land.
 1. It can be motivated by benign motivations, like watering neighbor's flowers. It is still trespass.
 2. Sight/sound, smell -- not physical invasions. Maybe a claim for nuisance, but not a trespass claim.

b. Land (plus intent and causation)

- i. The land in P's control includes the air above and the soil below out to a reasonable or usable distance.
- ii. A kid throwing a ball over your backyard, even if not falling on your land or touching anything, constitutes a trespass.

vi. Trespass to chattels and conversion

1. Both deal with an intentional interference with personal property.
2. *An act by D that interferes with P's right of possession in a chattel (plus intent, causation, damages).*
3. Interference can happen in 2 ways:
 - a. D can damage item in question.
 - b. D can take it away from you.
4. The difference between the 2 of them is the degree of interference.
5. If interference is modest or slight, appropriate cause of action is trespass to chattels.
6. If large interference, appropriate c/a is conversion.
7. Damages

a. Conversion

1. The P is entitled to recover not merely the cost of damage, but rather the full value of the item in question because the interference with the chattel is serious.

b. Trespass to chattels

- i. Cost of repair.

d. Affirmative defenses to intentional torts

i. Consent

1. P must have legal capacity because only a person with legal capacity can give consent.
 - a. A drunk cannot consent to being hit.
 - b. Children can consent to age appropriate stuff, but they cannot consent to things that normally would require adult judgment.

2. Methods of consenting
 - a. Express consent
 - i. Words spoken or written that give D permission to behave in what would otherwise be a tortious manner.
 - ii. Exceptions:
 1. Express consent is disregarded if there was fraud or duress involved (unless duress is only threats of future action or future economic deprivation).
 - a. Ex: one night stand where one person has an STD and does not tell the other person about it. Person who gets infected can not sue for battery because withdrawing that info denies consent.
 2. Mistake will undo express consent if D knew or took advantage of the mistake.
 - b. Implied consent
 - i. Two ways:
 1. Custom and usage
 - a. Ex: playing sports.
 - b. In a sports case, the implied consent goes to everything that is customary or routine to the game whether it conforms to the rules of the game or violates them. We are just interested in what customarily happens.
 2. Based on D's reasonable interpretation of P's objective conduct.
 - a. P's subjective thoughts are not part of the legal analysis.
 3. Consent implied by law arises when action is necessary to save a person's life or some other important interest in person or property.
 - ii. Scope
 - a. If D exceeds scope of consent, D goes right back to being liable for a tort.
 - b. Ex: medical procedures.
 - iii. Protective Privileges: Self-defense, defense of others, and defense of property
 1. D must demonstrate 2 things:
 - a. *Proper timing*
 - i. When the invasion in question is imminent or in progress. Already committed torts do not qualify.
 - b. *Reasonable belief that the invasion was genuine*
 - i. A reasonable mistake will not negate the protective privileges.
 - ii. Ex: shopkeeper's privilege.
 2. You are obligated to use only the amount of force necessary to protect the privileges. The amount of force must be responsive and symmetrical to the attack.
 3. You may NEVER use deadly force to protect property, no matter how valuable the property may be.
 - a. No deadly traps to protect your property.
 4. Self-defense

- a. When a person reasonably believes that she is being or is about to be attacked, she may use such force as is reasonably necessary protect against injury.
 - b. A reasonable mistake as to the existence of the danger is allowed.
5. Defense of others
 - a. One may use force to defend another when the actor reasonably believes that the other person could have used force to defend himself.
 - b. Reasonable mistake permitted.
 6. Defense of property
 - a. A request to desist or leave must first be made unless it would be futile or dangerous.
 - b. Reasonable mistake allowed as to whether an intrusion occurred or whether a request to desist is required, but not as to whether the entrant has a privilege (e.g., necessity) that supersedes the defense of property right.
- iii. Privilege of arrest
 1. Depending on the facts, the actor may have a privilege to enter another's land for the purpose of effecting the arrest.
 2. It carries with it the privilege to enter another's land for the purpose of effecting the arrest.
 3. The actor may still be liable for subsequent misconduct.
 4. If arrest for misdemeanor, privileged only if for a breach of peace and action takes place in front of D.
 5. For felony arrests, a police officer may make a reasonable mistake. Citizens may make a reasonable mistake regarding the identity of the felon, but not regarding whether the felony occurred.
 - iv. Necessity
 1. Only going to arise in the 3 property torts: trespass to land, chattels, conversion.
 2. A person may interfere with the real or personal property of another when it is reasonably and apparently necessary to avoid threatened injury from a natural or other force and when the threatened injury is substantially more serious than the invasion that is undertaken to avert it.
 3. Two types:
 - a. Public necessity
 - i. Arises when D invades P's property in an emergency to protect the community as a whole or a significant group of people.
 - ii. P recovers nothing. It's an absolute defense.
 - b. Private necessity
 - i. When D invades P's property in an emergency to protect an interest of his own.
 - ii. Limited defense. 3 legal consequences to private necessity:
 1. D must pay for actual harm done.
 2. D never liable for nominal or punitive damages.
 3. As long as the emergency continues, D may remain on P's property in a position of safety. He cannot be expelled or ejected so long as the emergency persists: right of sanctuary.

II. DEFAMATION

a. 3 elements:

i. ***D must make a defamatory statement specifically identifying the P;***

1. A statement is defamatory if it tends to adversely affect your reputation.
2. The cts are consistent in holding that mere name calling is NOT defamatory.
3. Look for an *allegation of fact* that reflects negatively on a trait of character.
 - a. Honesty
 - b. Loyalty
 - c. Courage
 - d. Competence
 - e. Sexual morality
4. P must be alive at the time the statement was made.
5. If the statement does not refer to P on its face, extrinsic evidence may be offered to establish that the statement refers to P. This is known as *proving colloquium*.

ii. ***D must publish the statement;***

1. The defamatory statement must be shared with at least 1 person other than the P himself.
2. Negligent publication will suffice.
3. It is the intent to publish, not the intent to defame, that is the requisite intent.
4. Each repetition is a separate publication.
 - a. But for magazines, newspapers, etc., most states have adopted a *single publication* rule under which all copies are treated as one publication.

iii. ***Damages, maybe.***

1. Libel cases – defamation written down or embodied in a permanent format.
 - a. A libel P need not prove damages to get to the jury.
 2. Slander per se – slander that falls within 4 specific, itemized areas that the law has considered to be devastating to reputation. It gets the same rule as libel with respect to damages. In slander per se, damages are also presumed.
 - a. Statement about a P's business or profession.
 - b. Statement that P committed a crime or moral turpitude.
 - c. Statement imputing unchastity to a woman.
 - d. Statement that P suffers from a loathsome disease:
 - i. Leprosy
 - ii. Venereal diseases
 3. Slander – spoken defamation.
 - a. P must prove damages (economic harm).
- b. Slander vs. libel
- i. Where the original defamation is libel, any repetition (even if oral) is also libel.
 - ii. On the other hand, the written repetition of a slander will be characterized as libel.
 - iii. Radio and TV programs will be treated as libels if sufficiently permanent, premeditated, and broadly enough disseminated.

c. **Defenses**

- i. Consent (see above) – complete defense
- ii. Truth – complete defense
- iii. Privileges
 1. ***Absolute privileges – can never be lost***
 - a. Based on the status of the speaker
 - i. Spouses

1. If married person says something defamatory about a third person to his spouse, he has an absolute privilege and cannot be held liable for defamation.
- ii. *Officers of the 3 branches of the gov't in the course of their official duties*

1. Judicial branch → privilege extends to lawyers and witnesses as well as the judge himself

2. **Qualified privileges – can be lost through abuse**

- a. Based on the occasion or purpose of the speech
 - i. *Arises where there is a public interest in promoting candor*
 1. Ex: letters of recommendation, credit reporting, statements made to investigating police officers
- b. Two conditions:
 - i. *Speaker must have a reasonable belief that the info disclosed is true.*
 - ii. *Speaker must limit himself to matter at hand (cannot inject extraneous information)*

c. **If the subject matter of the claim is a matter of public concern, then the P is obligated to prove two additional elements:**

- i. **P must show the falsity of the statement as part of his case in chief.**
- ii. **P must also show fault on the part of the D, not only did D speak falsely, but he did not have a good faith or reasonable basis for the statement.**

1. If P is a:

- i. **Public figure:** P has to show D knew it was false or spoke with reckless disregard of the truth.
 1. This is a subjective test.
- ii. **Private figure:** enough to demonstrate that D was merely negligent.
 1. Where D is negligent, only actual injury damages are recoverable. However, where malice is found, damages may be presumed, and punitive damages allowed.

III. **INVASION OF RIGHT TO PRIVACY**

a. **Appropriation of P's picture or name**

- i. *P must show unauthorized use of P's picture or name for D's commercial advantage.*
- ii. **Bar exam caution:** newsworthiness exception.
 1. Sports Illustrated putting a picture of Tiger Woods on the cover.

b. **Invasion**

- i. *An invasion of P's seclusion in a way that would be objectionable to a reasonable person.*
 1. Ex: wire tapping
- ii. Must be in a place where there is a reasonable expectation of privacy.
- iii. Intrusion does not require trespass to land.
- iv. Photographs taken in public places are not actionable.

c. **False light**

- i. *The widespread dissemination of a major falsehood about the P that would be objectionable to a reasonable person (such as views P doesn't hold or actions he didn't take).*
- ii. For liability to attach, there must be publicity.
- iii. **Bar exam trick:** D need not know information is incorrect; D liable for running his mouth regardless.
- iv. If matter is in public interest, malice on D's part must be proved

d. **Disclosure**

- i. *Widespread dissemination of confidential information objectionable to a reasonable person.*
- ii. **Bar exam trick:** newsworthiness limit; liability may attach even if actual statement is true.
- iii. **Bar exam trick:** dual life fact patterns
 - 1. P operates in 2 different spheres of activity. P will then be doing something in one sphere that he doesn't want people in the other sphere to know about. Some blabber mouth will carry the info from one sphere to the other. P will lose because the info is not truly confidential.

e. **Damages**

- i. P need not plead and prove special damages. Emotional distress and mental anguish are sufficient damages.

f. **Defenses**

- i. Consent is a defense to all 4 privacy torts.
- ii. Absolute and qualified privileges apply to disclosure and false light.

IV. **MISREPRESENTATION**

a. **Intentional misrepresentation (fraud, deceit)**

- i. Prima facie case:
 - 1. *Misrepresentation* of a material fact
 - 2. *Scienter* (when D made statement, she *knew or believed* it was false or that there was no basis for the statement)
 - 3. *Intent* to induce P to act or refrain from acting in reliance upon the misrepresentation
 - 4. *Causation* (actual reliance)
 - 5. *Justifiable reliance*
 - 6. *Damages* (actual pecuniary loss)

b. **Negligent misrepresentation**

- i. Prima facie case:
 - 1. *Misrepresentation* by D in a *business or professional capacity*
 - 2. *Breach of duty* toward a particular P
 - 3. *Causation*
 - 4. *Justifiable reliance*
 - 5. *Damages*

V. **WRONGFUL INSTITUTION OF LEGAL PROCEEDINGS**

a. **Malicious prosecution**

- i. Prima facie case:
 - 1. *Institution of criminal proceedings* against P
 - 2. *Termination in P's favor*

3. **Absence of probable cause** for proceedings (insufficient facts for a reasonable person to believe that P was guilty or D in fact did not actually believe P to be guilty)
4. **Improper purpose** (something other than bringing person to justice)
5. **Damages**

b. Abuse of process

- i. **Wrongful use** of process for an ulterior purpose; and
- ii. Definite **act or threat** against P in order to accomplish an ulterior purpose.

VI. INTERFERENCE WITH BUSINESS RELATIONS

a. Prima facie case:

- i. Existence of a **valid contractual relationship** between P and a third party or **valid business expectancy** of P
- ii. D's **knowledge of the relationship or expectancy**
- iii. **Intentional interference** by D inducing a breach or termination of the relationship or expectancy
- iv. **Damages.**

VII. NEGLIGENCE

a. Elements:

- i. Duty
- ii. Breach
- iii. Causation
- iv. Damages

b. DUTY OF CARE

i. To whom do we owe a duty of care?

1. **We owe a duty of care to foreseeable victims.**

a. **When D breaches a duty to P1 and also causes injury to P2:**

- i. **Cardozo view (majority):** P2 here must prove that a reasonable person would have foreseen that she was located in the foreseeable zone of danger.
- ii. **Andrews view (minority):** everyone is foreseeable; P2 must only prove that D breached a duty owed to P1.

2. Unforeseeable victims always lose negligence claims on the bar exams.

- a. **Exception:** rescuers are owed a duty as a matter of law despite the fact that they may be unforeseeable.

3. A duty of care is owed to a viable fetus.

ii. How much care are you supposed to exercise?

1. **The amount of care that would be exercised by a hypothetical reasonably prudent person acting under similar circumstances.**

- a. This is an objective test. D's personal weaknesses and shortcomings are ignored. However, the reasonable person is considered to have the same physical characteristics as D.

- i. But remember, one is expected to know one's physical handicaps and to exercise the care of a person with such knowledge – e.g., a blind person should not fly a plane.

2. **Exceptions:**

- a. If D has superior knowledge about the events in question, the standard becomes *a reasonably prudent person with that superior skill or knowledge*.
 - i. It can be superior knowledge or just an isolated nugget of a fact that you just happen to be aware of.
- b. Blind, handicapped, unusually large, etc.

iii. **6 special duty rules:**

1. **Children as Ds**

- a. **Rule 1:** Children under the age of 4 are incapable of negligence as a matter of law. They owe the rest of us zero duty; they can never be held liable.
- b. **Rule 2:** From age 4 to 18 owe the rest of us the care of a child of similar age, intelligence, and experience acting under similar circumstances. It's an extremely subjective standard.
 - i. **Exception:** If D child is engaged in an adult activity (anything with an engine), use the reasonable prudent person standard.

2. **Cases where D is a professional**

- a. **Rule:** D owes clients and patients the care of an average member of that profession practicing in a similar community.
 - i. This standard is based on what happens in the real world; it's an empirical standard. The custom of the profession sets the standard of care.
 - ii. In the world of primary care (generalists), the community is geographical: big city doctors are compared to big city doctors while small town doctors are compared to small town doctors.
 - iii. With respect to specialists, the similar community is a community of other specialists of the same type: brain surgeon compared to other brain surgeons nationwide, regardless of where he is located.

3. **Possessors of land**

- a. How did the entrant get hurt?
 - i. Some entrants will get hurt by **activities that are being conducted on the land** by the possessor or the possessor's agents.
 - ii. Alternatively, other entrants will get hurt when they encounter a **dangerous condition** on the property.
- b. What legal category does the entrant fall in?
 - i. Undiscovered trespassers
 - 1. Owed a zero duty of care by the possessor of land regardless of how he gets hurt.
 - ii. Discovered/anticipated trespassers
 - 1. Anticipated trespassers: when there has been a routine of trespass in the past.
 - 2. **With regard to activities, the standard is reasonable prudent person acting under similar circumstances.**
 - 3. **With regard to dangerous conditions, possessors must protect only against conditions that meet a 4-part test:**

- a. Condition must be ARTIFICIAL in nature (therefore, no duty to protect a discovered trespassers from NATURALLY OCCURING conditions on the land).
- b. Condition must also be HIGHLY DANGEROUS; capable of killing or maiming that trespasser.
- c. Condition must be CONCEALED from the trespasser.
- d. Condition must be one that the possessor KNEW about IN ADVANCE of the accident. (no duty to inspect the property for dangerous conditions). Possessor must protect from known man-made deathtraps on the land (Schechter's short version of these conditions).

iii. Licensees

- 1. They do not come to confer a commercial benefit, but they come with permission. On the bar exam, they will be social guests.
 - 2. Standard of care for activities: reasonable prudent person acting under similar circumstances.
 - 3. Standard of care for conditions: possessor must protect from conditions that meet a 2-part test:
 - a. Condition must be CONCEALED from the licensee.
 - b. Condition must be one that the possessor KNEW about IN ADVANCE.
- Short version: Licensees are to be protected from ALL known traps on the land (not just man-made ones).

iv. Invitees

- 1. Those who either come on land to confer a commercial benefit on the land possessor or they are entering land that is open to the public generally.
- 2. Standard of care for activities: reasonable prudent person under the circumstances.
- 3. Standard of care for conditions: 2-part test:
 - a. Condition must be CONCEALED from the invitee.
 - b. Condition must be one that the possessor either KNEW about in advance or COULD HAVE DISCOVERED through a reasonable inspection.
 - c. Short version: Duty to protect from reasonably knowable traps on the land.

c. **Duty owed to users of recreational land**

- i. A landowner who permits the general public to use his land for recreational purposes without charging a fee is not liable for injuries suffered by a recreational user, unless the landowner willfully and maliciously failed to guard against or warn of a dangerous condition or activity.

d. Duties of lessor and lessee

- i. Lessee has a general duty to maintain the premises.
- ii. Lessor must warn of existing defects of which he is aware or has reason to know, and which he knows the lessee is not likely to discover on a reasonable inspection.
- iii. If lessor covenants to repair, he is liable for unreasonable dangerous conditions.
- iv. If lessor volunteers to repair and does so negligently, he is liable.

e. Duties of vendor of realty

- i. Must disclose to vendee concealed, unreasonably dangerous conditions of which the vendor knows or has reason to know, and which he knows the vendee is not likely to discover on reasonable inspection.

f. 3 footnotes:

i. Firefighters and police officers

1. Generally treated as licensees.
2. Never recover for injuries related to the inherent risk of their job.

ii. Child trespassers

1. If a child trespasses on real estate and is injured by an artificial condition, that child is entitled to the care of a reasonably prudent person under the circumstances. This rule TRUMPS the other rules for trespassers.
2. **Attractive nuisance doctrine** - reasonably prudent person landowners do consider whether there is something on their land that is attractive on their property. This is a dangerous condition on the land that the owner is or should be aware of. To establish the doctrine's applicability, P must show:
 - a. A dangerous condition on the land that the owner is or should be aware of;
 - b. The owner knows or should know children frequent the vicinity of the condition;
 - c. The condition is likely to cause injury;
 - d. The expense of remedying the situation is slight compared with the magnitude of the risk.
3. Also process if the children can take care of themselves: for example, high school students vs. 2-year old toddlers as far as having or not having to fence your pool.

iii. In any case where there is a duty owed by the possessor regarding a dangerous condition, possessor can satisfy the duty in 2 ways:

1. **Fix the problem; or**
2. **Give a warning (they convert concealed dangers into open and obvious dangers).**

4. Common carriers and innkeepers

- a. Held to a very high degree of care; liable for slight negligence.

iv. Statutory standards of care

1. A statute's specific duty may replace the more general common law duty of due care if:
 - a. The statute provides for a *criminal penalty*;
 - b. The statute clearly defines the *standard of conduct*;
 - c. P is within the *protected class*; and
 - d. The statute was designed to prevent *the type of harm* suffered by P.
2. **Exceptions:**
 - a. Cases where statutory compliance would be more dangerous than statutory violation.
 - b. Cases where compliance impossible under the circumstances.

v. Duties to act affirmatively

1. There are no duties to act affirmatively in negligence law.
2. **Exceptions:**
 - a. If D put the P in the *position of peril* in the first place, then P has a duty to rescue.
 - b. If there is a *pre-existing relationship* between P and D, there will be a duty to rescue reasonably under the circumstances (no duty to put your life in jeopardy).
 - i. Family members
 - ii. Common carriers and innkeepers
 - iii. Land possessor has a duty to rescue invitee
3. If one of the factors in the question *undertakes a duty to rescue* even though under no legal obligation to rescue, that person must now rescue reasonably. If they abandon it, they will be liable for it.

vi. Negligent infliction of emotional distress

1. In order to recover for NIED (emotional distress NOT directly associated with trauma to your body), must show 3 things:
 - a. P must show *D was negligent* (must find a breach of one of the other duties we already talked about);
 - b. P must have been in a *zone of physical danger* as a result of D's negligence (even though no actual physical trauma required; look for a close-call/near miss fact pattern);
 - c. There must be a *subsequent physical manifestation* of that distress (it can be nearly instantaneous or even a few days later).
 2. **Bystander cases**
 - a. Person B must establish:
 - i. A *close relationship* to person A;
 - ii. The sad person must also be *physically present* when the other person got hurt.
 1. Near in time, space, and relationship to a physical victim of negligence.
- vii. Note: if physical injury has been caused by the commission of another tort, P can tack on damages for emotional distress as a parasitic element of his physical injury damages, without the need to consider the elements of the emotional distress torts.

c. **BREACH OF DUTY**

i. P must identify wrongful behavior and explain why it falls beneath the standard of care. Always have a sentence in the essay that says, "This is unreasonable because..."

ii. **Res Ipsa Loquitur**

1. Accident which occurred is normally associated with negligence.
2. Any negligence that would have occurred would normally be due to the fault of this D (exclusive control).
 - a. Where res ipsa loquitur is established, P has made a prima facie case and no directed verdict may be given for D. However, P can still lose if the inference of negligence is rejected by the trier of fact.

d. **CAUSATION**

i. **Factual causation**

1. P must establish a connection between the breach and the injury that P suffered.
2. Determined by application of the **but-for test**: but for the breach, would P be injured today?
 - a. This test applies where several acts (each insufficient to cause the injury alone) combine to cause the injury.
3. Multiple D scenarios
 - a. Merged/mixed causes (ex: fire)
 - i. Test: whether each D was a substantial factor in producing the injury.
 1. A party is a substantial factor if his breach was capable on its own of causing the injury.
 - b. Unascertainable cause (ex: guy gets shot in the eye by one pellet, but 2 Ds shot their gun)
 - i. Burden of proof was shifted to D to explain their way out of the liability. Ds are both free to show how their breach did not cause the injury. If they cannot do so, then they will be held jointly liable because it was their simultaneous acts of carelessness that put us in the info fog in the first place.

ii. **Proximate causation (legal causation)**

1. Use proximate cause label when writing, but think of it in terms of fairness.
 - a. Is liability fair under the circumstances?
 - b. We think it's fair for people to pay for the foreseeable consequences of their actions.
2. Direct cause fact patterns: D commits breach and P suffers injury right away with nothing happening in the middle. D is liable for all foreseeable harmful results, regardless of unusual manner or timing.
 - a. Unforeseeable: freakish and bizarre outcomes.
3. Indirect cause fact patterns: D commits breach, something else happens, after which P suffers the full extent of the harm. 4 particular situations (well-settled quartet):
 - a. Intervening medical negligence
 - i. Cts reason that when you negligently hurt someone, they have to seek medical treatment and doctors will make things worse rather

than better in a certain number of cases. Since it is foreseeable that this could happen, it's only fair that you pay for it when does.

ii. The doctor that puts on the too tight cast will also be liable.

b. Intervening negligent rescue

i. Same as above.

ii. The clumsy rescuer liable for his botched rescue.

c. Intervening protection or reaction forces

i. When you engage in careless conduct, people in the immediate vicinity will react to protect themselves and, in doing so, may make things worse to an original victim. It's only fair that you pay for it.

d. Subsequent disease or accident

i. If your negligence leaves someone in a weakened/disabled state, they can get worse and it's only fair that you pay for it.

4. For all other cases, focus on breach and ask what it is about the conduct that causes you to label it a breach in the first place. Then ignore everything that happened in the middle of the story and look at what happened to the poor P. If what happened to P is what you worried about when you looked at the breach, then liability would be fair and you can call it proximate cause and hold him liable.

5. **Independent intervening forces**

a. Independent intervening forces that are not a natural response or reaction to the situation created by D's conduct may be foreseeable if D's negligence increased the risk of harm from these forces.

Independent intervening forces include:

- i. Negligent acts of third persons;
- ii. Crimes and intentional torts of third persons; and
- iii. Acts of God.

6. **Foreseeable results caused by unforeseeable intervening forces**

a. D liable where his negligence increased the risk of a foreseeable harmful result and that result is ultimately produced by an unforeseeable intervening force.

b. This rule does not apply where the unforeseeable intervening force was a crime or intentional tort of a 3rd person.

7. **Unforeseeable results caused by foreseeable intervening forces**

a. D not liable in the rare case where a totally unforeseeable result was caused by a foreseeable intervening force.

8. **Unforeseeable results caused by unforeseeable intervening forces**

a. Superseding forces break the causal connection between D's initial negligent act and P's ultimate injury. D not liable.

e. DAMAGES

i. Eggshell skull doctrine

1. Once a D has committed all the other elements of negligence, that D is liable for all damages suffered by the P even if the damages are surprisingly great in scope.
2. You take your P as you find your P. This is the rule for any tort on the bar exam.

f. Defenses to negligence

i. Contributory negligence

1. No defense to intentional torts.
2. Last clear chance – exception to contributory negligence
 - a. Permits P to recover despite her contributory negligence. Under this rule, the person with the last clear chance to avoid an accident who fails to do so is liable for negligence.

ii. Imputed contributory negligence

1. As a general rule, the contributory negligence of a third party will be imputed to a P and bar her claim only when the relationship between the third party and the P is such that a court could find the P vicariously liable for the 3rd party's negligence.
2. Negligence is imputed in master-servant, partner, and joint venture relationships.
3. Negligence is NOT imputed between husband and wife, parent and child, and automobile owner and driver.

iii. Assumption of risk

1. P may be denied recovery if she assumed the risk of any damage caused by D's act.
2. P must have:
 - a. Known of the risk; and
 - b. Voluntarily proceeded in the face of the risk.
3. Implied assumption of risk
 - a. Knowledge may be implied where the risk is one that an average person would clearly appreciate.
P may not be said to have assumed the risk where there is no available alternative to proceeding in the face of the risk or in situations involving fraud, force, or an emergency.

iv. Comparative negligence

1. D must offer evidence that P failed to take proper degree of care for his own safety.
2. Comparative fault results in a damage reduction to the P.
3. Two types:
 - a. *Pure comparative negligence*
 - i. The P always recovers something even though the P is found to be the predominantly faulty party.
 - b. *Partial/modified comparative negligence*
 - i. P fault under 50% reduces recovery.
 - ii. P fault over 50% bars recovery.

VIII. STRICT LIABILITY TORTS

a. Prima facie case

- i. For strict liability, the following elements must be shown:
 1. Existence of an **absolute duty** on the part of the D **to make safe**;
 2. **Breach** of that duty;
 3. The breach of that duty was the **actual and proximate cause** of P's injury; and
 4. **Damages** to the P's person or property.

b. Injuries caused by animals

- i. *Injuries caused by domesticated animals*

1. Not strictly liable for your domesticated animals. If someone gets bit by your dog, they must show you were negligent.
2. **Exception:** if you keep a domesticated animal and you have knowledge of its vicious propensities, then you will be strictly liable if it bites/hurts someone.
 - a. Bite 1: negligence
 - b. Bite 2 – infinity: strict liability
- ii. *Injuries caused by trespassing cattle*
 1. If you keep cattle and they get off your property and do damage to your neighbor's property, you are strictly liable for that.
- iii. *Injuries caused by wild animals*
 1. Strictly liable

c. Ultrahazardous activities

- i. An activity is ultra-hazardous if it meets a 3-part test:
 1. The activity **cannot be made safe** given existing technology.
 2. The activity imposes a **severe risk of harm**.
 3. The activity is **uncommon in the area** where it is being conducted.
- ii. If you meet this test, strictly liable.
- iii. Examples:
 1. Blasting or explosives
 2. Hazardous chemical or biological agents
 3. Nuclear energy or radioactive material
- iv. In contributory negligence states, contributory negligence is no defense if P has failed to realize the danger or guard against it.
 1. It is a defense if P knew of the danger and his unreasonable conduct was the very cause of the Ultrahazardous activity miscarrying.
- v. Assumption of the risk is a good defense to strict liability.
- vi. Most comparative negligence states apply their comparative negligence rules to strict liability cases.

d. Products Liability

- i. Refers to the liability of a supplier of a defective product to someone injured by the product.
- ii. Five theories of liability that P may use:
 1. Intent
 2. Negligence
 3. Strict liability
 4. Implied warranties of merchantability and fitness for a particular purpose; and
 5. Representation theories (express warranty and misrepresentation).
- iii. To find liability under any of these theories, P must show:
 1. A defect, and
 2. Existence of the defect when the product left D's control.
- iv. *Liability based on intent*
 1. D will be liable to anyone injured by an unsafe product if D intended the consequences or knew that they were substantially certain to occur.
 2. Any injured P can sue.
 3. The defenses are those available in other intentional torts cases.
- v. *Liability based on negligence*

1. P must show duty, breach, causation, and damages.
2. Duty of care is owed to any foreseeable P.
3. Users, consumers, and bystanders can all sue.
4. Commercial suppliers such as manufacturers, wholesalers, and retailers can be held liable.
 - a. Very difficult to hold retailers and wholesalers liable for negligence since they can usually satisfy their duty through a cursory inspection.
5. Breach of duty is shown by:
 - a. **Negligent conduct** of D leading to
 - b. The supplying of a **defective product**.
6. Causation
 - a. An intermediary's negligent failure to discover a defect doesn't supersede the original manufacturer's negligence unless the intermediary's conduct exceeds ordinary foreseeable negligence.
7. Damages
 - a. Physical injury or property damage must be shown.
 - b. Recovery will be denied if sole claim is for economic loss.
8. Defenses
 - a. Same as in a general negligence action.

vi. **Liability based on strict liability**

1. Prima facie case
 - a. Strict duty owed by a commercial supplier of a product
 - b. Breach of that duty
 - c. Actual and proximate cause
 - d. Damages
2. Duty
 - a. D has a duty to supply safe products.
 - b. Users, consumers, and bystanders can sue.
 - c. Any commercial supplier can be held liable.
3. Breach of duty
 - a. P must show the product is defective
 - b. Defect must make product unreasonably dangerous.
 - c. Retailers may be liable even if they have no opportunity to inspect the product.
4. Causation
 - a. Actual cause: P must show that the defect existed when the product left D's control.
 - b. Proximate cause: same as in negligence cases.
5. Damages
 - a. Physical injury or property damage must be shown.
 - b. Recovery will be denied if the sole claim is for economic loss.
6. Defenses

- a. In contributory negligence states, ordinary contributory negligence is no defense where P merely failed to discover the defect or guard against its existence, or where P's misuse was reasonably foreseeable.
 - b. Assumption of risk is a defense
 - c. In comparative negligence states, courts apply their comparative negligence rules.
 - d. Disclaimers are irrelevant in negligence or strict liability cases if personal injury or property damages occur.
7. D must be a merchant
- a. Merchant is someone who routinely deals in goods of this type.
 - b. Casual sellers are NOT merchants and cannot be strictly liable.
 - c. Service providers not merchants for the products offered incidentally to the service provided.
 - d. Commercial lessors are merchants even though they don't part with title and, therefore, they can be strictly liable: car rental companies.
 - e. Every merchant in the distribution chain is subject to strict liability (no requirement of privity of K).
8. Product must be defective
- a. Product can be defective in 1 of 2 ways:
 - i. Because of a manufacturing defect
 - 1. Product has a manufacturing defect if it differs from all the others that came off the same assembly line in a way that makes it more dangerous than consumers would expect.
 - ii. Because of a design defect
 - 1. Product has a design defect if there is another way to build it (hypothetical alternative design). The alternative design meets 3 tests:
 - a. It must be SAFER than the version actually marketed;
 - b. It must be ECONOMICAL (cost the same to manufacture or maybe a little more than the version placed on the market);
 - c. It must be PRACTICAL (it doesn't impair the product's utility).
 - 2. Warnings and instructions
 - a. If a product has residual risk that cannot be eliminated by a physical re-design and consumers would be unaware of that risk, the product is defectively designed unless it carries a warning.
 - b. Not all warnings are created equal.
9. P must show product has not been altered since time it left D's hands
- a. There is a presumption that this element was satisfied.
10. P must be making a foreseeable use of the product at the time he got hurt.
11. Majority of states have now gone to comparative fault in the world of strict liability as well.

vii. ***Implied warranties of merchantability and fitness***

- 1. There are 2 warranties implied in every sale of goods that can serve as the basis for a suit by buyer against a seller:

- a. **Merchantability**
 - i. Refers to whether the goods are of average acceptable quality and are generally fit for the ordinary purpose for which the goods are used; and
- b. **Fitness for a particular purpose**
 - i. Arises when the seller knows or has reason to know the particular purpose for which the goods are required and that the buyer is relying on the seller's skill and judgment in selecting the goods.
- 2. Buyer, family, household, and guests can sue for personal injuries.
- 3. If the product fails to live up to either of the above standards, the warranty is breached and D will be liable.
- 4. Causation handled as in ordinary negligence case.
- 5. Personal injury and property damages, and purely economic loss are recoverable.
- 6. Defenses include assumption of risk and contributory negligence to some extent as in strict liability cases.
- 7. Disclaimers are generally rejected in personal injury cases but upheld for economic loss.

viii. **Representation theories**

- 1. **Express warranty**
 - a. Any affirmation of fact or promise concerning goods that becomes part of the basis of the bargain creates an express warranty.
 - b. Any consumer, user, or bystander can sue.
 - c. Causation, damages, and defenses → same as under implied warranties.
- 2. **Misrepresentation of fact**
 - a. A seller will be liable for misrepresentation of facts concerning a product where:
 - i. The statement was of a material fact concerning quality or uses of goods (mere puffery insufficient); and
 - ii. The seller intended to induce reliance by the buyer in a particular transaction.
 - b. Reasonable reliance is required (need not be the victim's)
 - c. Actual cause is shown by reliance. Proximate cause and damages are the same as for strict liability.
 - d. Assumption of risk is not a defense if P is entitled to rely in the representation.
 - e. Contributory negligence is the same as in strict liability unless D committed intentional misrepresentation.

IX. **NUISANCE**

- a. Describes a category of case based on the harm suffered by the P.
- b. The harm suffered is an interference with P's ability to use and enjoy his own land.
- c. Conduct of D can be intentional, negligent, or free of fault.
- d. P can make out a nuisance claim if degree of interference is one of unreasonable extent or scope.
 - i. Cts balance the P's interest in being free from misery with D's right to use his land as he sees fit.
- e. **Private nuisance**
 - i. Private nuisance is a *substantial, unreasonable interference* with another private individual's use or enjoyment of property that he actually possesses or to which he has a right of immediate possession.

- ii. Substantial interference → interference that is offensive, inconvenient, or annoying to the average person in the community.
- iii. Unreasonable interference → severity of the inflicted injury must outweigh the utility of D's conduct.

f. Public nuisance

- i. Public nuisance is an act that unreasonably interferes with *the health, safety, or property rights of the community*.

X. OTHER STUFF

a. Vicarious Liability

- i. Always flows from a relationship:

1. *Employer-employee*

- a. Employer liable for employee's acts provided acts were committed in the scope of employment.
- b. They like to test on intentional torts. If the job entails the use of force, if the employer authorized the employee to get physical, then intentional torts can be in the scope of employment: night club bouncers, repo men.
- c. Frolic and detour
 - i. An employee making a minor deviation from his employer's business for his own purposes is still acting within the scope of his employment.
 - ii. If the deviation in time or geographic area is substantial, the employer is not liable.

2. *Hiring party-independent contractor*

- a. Generally not liable for their actions.

Exceptions:

- i. A land possessor is vicariously liable if an independent contractor hires an invitee (duty is nondelegable).
- ii. The independent contractor is engaged in inherently dangerous activities.

3. *Owner of car-driver of car*

- a. Majority rule: owner not liable for accident committed by driver of car.
- b. If I lend you the car to run an errand for me, now I am liable because now we have a principal-agent relationship.

4. *Parent-child*

- a. Parents are not vicariously liable for the torts of their children.
- b. Bar exam trick: parents remain liable for their own negligence and their negligence can involve how they interact with their children: negligent entrustment/supervision of their kids.

5. *Partners and joint venturers*

- a. Each member of a partnership or joint venture is vicariously liable for the tortious conduct of another member committed in the scope and course of the affairs of the partnership or joint venture.

6. *Bailor-bailee*

- a. Under the general rule, the bailor is not vicariously liable for the tortious conduct of his bailee.

b. Co-Defendants

- i. Where two or more negligent acts combine to proximately cause an indivisible injury, each negligent actor will be jointly and severally liable.

- ii. The rule of contribution allows a D who pays more than his share of damages under joint and several liability to have a claim against other jointly liable parties for the excess.
- iii. Indemnity involves shifting the entire loss between or among tortfeasors.

c. Loss of Consortium

- i. In any case where victim of tort is married, the uninjured spouse gets a separate cause of action against the same D.
- ii. Can recover:
 - 1. Loss of services
 - 2. Loss of society
 - 3. Loss of sexual intimacy

REMEDIES

REMEDIES

I. HOW TO SPOT A REMEDIES QUESTION

- a. The call of the question will do 1 of 3 things:
 - i. One: use the word “remedies”
 - ii. Two: use the word “relief”
 - iii. State a specific remedy, e.g. specific performance
- b. The remedies issues will be incorporated into a substantive law fact pattern. The most relevant areas for bar exam purposes are torts and contracts (and the related property areas).
- c. The question may be a pure remedies question or a crossover. The tip-off will be found in how the call-of-the-question lines are worded.

II. HOW TO APPROACH A REMEDIES QUESTION

- a. Step one
 - i. Determine what substantive area of law is involved. Could be more than 1.
 - ii. What specific type problem is at issue within that substantive area.
 - iii. **TIP:** the fact pattern may be susceptible to more than one substantive law interpretation, e.g., torts and contracts.
- b. Step two
 - i. Make sure that P has a case, e.g. a tort committed, a K breached.
- c. Step three
 - i. Determine what remedies require discussion.
 - ii. This must be done in the right chronological order as follows:
 - 1. FIRST: LEGAL REMEDIES
 - 2. SECOND: RESTITUTIONARY REMEDIES
 - 3. THIRD: EQUITABLE REMEDIES
 - a. Only write about these after you determine remedies at law won't take care of the problem.
 - iii. **TIP:** There are 2 types of restitutionary remedies, legal and equitable. The legal remedies must be considered first.

III. THE TORT REMEDIES

a. The legal remedies

i. Damages

- 1. D is ordered to pay money to P.

ii. FIRST TYPE OF DAMAGES: COMPENSATORY

1. They are based on the injury to the P. They put the injured party in the position he would have been in had the injury not occurred.

2. The four requirements checklist:

a. *First requirement: causation*

i. This refers to actual causation (but for test)

b. *Second requirement: foreseeability*

i. Proximate causation: the injury must have been foreseeable at the time of the tortious act.

c. *Third requirement: certainty*

i. This means the damages cannot be too speculative.

ii. **TIPS:**

1. Past losses have to be established with more certainty than future losses.

2. If there is a historical record that helps to provide certainty, e.g., old vs. new business, use it to establish what losses will be.

3. For future damages, P must show that they are more likely to happen than not. This is the ALL OR NOTHING rule.

Are odds better than 50-50 that she would have gone to law school / passed her class / pass the bar, etc.? Hypo: injured P is an outstanding undergrad student who has been accepted to law school. Basis of future loss: income calculation?

d. *Fourth requirement: mitigation*

i. P must take reasonable steps to mitigate damages.

3. Compensatory damages: particular problem area – personal injury torts

a. The certainty rules

i. *Economic losses (special damages)*, e.g., medical expenses, lost earnings

1. The basic certainty rules apply here, i.e., calculation must be with sufficient certainty.

ii. *Non-economic losses (general damages)*, e.g., pain and suffering, permanent disfigurement

1. The basic certainty rules do NOT apply here. The jury may award any amount it wishes subject to proper instructions.

b. Form of judgment payment

i. The award must be a single lump sum payment. Installment payments are NOT allowed.

ii. Two calculation items

1. The award must be discounted to present value.

2. Inflation is NOT taken into account. Under the modern view it is.

iii. SECOND TYPE OF DAMAGES: NOMINAL

1. These are awarded where P has no actual injury.

2. They serve to establish or to vindicate the P's rights.

iv. THIRD TYPE OF DAMAGES: PUNITIVE

1. These are awarded to punish the D.

2. The three rules

- a. **First rule: in order to get punitive damages, P must have first been awarded compensatory or nominal damages.**
 - i. Note: punitive damages can also be attached to restitutionary damages.
- b. **Second rule: in order to get punitive damages, D's type of fault must be greater than negligence.**
- c. **Third rule: generally, punitive damages are awarded in an amount relatively proportionate to actual damages.**
 - i. As actual damages go up, punitive damages go up.
 - ii. S Ct would limit punitive damages to a single digit multiple of actual damages unless conduct facts are extreme.

b. The restitutionary remedies

i. These remedies are based on the theory that E should not be *unjustly enriched*.

ii. LEGAL RESTITUTIONARY REMEDY

- 1. These are based on the benefit to the D.
- 2. And the amount is calculated based on the value of the benefit.
- 3. Contrast with compensatory damages, which focus on the injury to P.

iii. COMPENSATORY VS. RESTITUTIONARY DAMAGES, THE 3 BAR EXAM FACT PATTERN POSSIBILITIES

- 1. **Only compensatory damages are available**
 - a. D destroys P's car. No benefit to D, so no restitutionary damages.
- 2. **Only restitutionary damages are available**
 - a. P is a manufacturing company and drives trucks across road on P's vacant property to get to railroad reducing trip from ten miles to one mile. P wasn't injured at all here but nominal damages might be available here.
- 3. **Both compensatory and restitutionary damages are available**
 - a. D steals your machine to use in his business. Remedy?
 - i. Compensatory for P's loss of use.
 - ii. Restitutionary because D benefited and he would be unjustly enriched.

iv. REPLEVIN, LEGAL RESTITUTIONARY REMEDY

- 1. P recovers possession of specific personal property.
- 2. **Two part test:**
 - a. **Establish that P has a right to possession; and**
 - b. **That there is wrongful withholding by D.**
- 3. **Most likely bar exam issue**
 - a. P can recover the chattel BEFORE the trial.
 - b. **TIP:** if this is in issue, mention in your answer that:
 - i. P will have to post a bond.
 - ii. D can defeat an immediate recovery by posting a redelivery bond. D can then keep the chattel until after the trial.
 - 1. Note: the sheriff repossesses the property for P.
 - c. **TIP:** replevin is ALMOST ALWAYS coupled with damages (compensatory or restitutionary) for lost use or benefit to D during the time of detention.

v. EJECTMENT, LEGAL RESTITUTIONARY REMEDY

- 1. P recovers possession of specific real property.
- 2. **Two part test:**
 - a. **Establish that P has a right to possession and**

b. That there is a wrongful withholding by D.

3. Most likely bar exam issue

- a. Status of D: ejectment only available against D who has possession of property.
- b. Note: sheriff ejects D from property.
- c. **TIP**: ejectment is ALMOST ALWAYS coupled with damages (compensatory or restitutionary) for lost use or benefit to P during time of wrongful withholding.

vi. **CONSTRUCTIVE TRUSTS AND EQUITABLE LIENS, EQUITABLE RESTITUTIONARY REMEDIES**

1. **Constructive trust**: imposed on improperly acquired property to which D has title. D serves as “trustee” and must return property to P.
2. **Equitable lien**: imposed on improperly acquired property to which D has title. Property will be subject to an immediate court-directed sale. The monies received go to the P. If the proceeds of the sale are less than the FMV of the property when it was taken, a deficiency judgment will issue for the difference and can be used against D’s other assets.
3. **TIP**: constructive trusts and equitable liens can be used only when the fact pattern indicates that D has title to the property.

4. **The rules**

a. *Inadequate legal remedy alternative*

- i. Basic alternative: money damages

1. The 2 reasons:

- a. D is insolvent; or

- b. For constructive trust: the property is unique.

Tracing is allowed

c. *BF’s prevail over P*

d. *P will prevail over unsecured creditors*

- i. Note: to extent you have a deficiency judgment in connection with an equitable lien, you stand on equal footing with other unsecured creditors.

5. Choice of remedy: constructive trust or equitable lien?

- a. If the property value subsequent to taking goes up, go with a constructive trust.
- b. If the property value subsequent to taking goes down, go with an equitable lien.
- c. When D’s property cannot be traced solely to P’s property, only an equitable lien is available.

c. The equitable remedies

i. **INJUNCTIVE RELIEF, EQUITABLE REMEDY**

1. P is ordered (enjoined) to do or refrain from doing something.
2. Threshold inquiry
 - a. Determine if you’re required to discuss permanent or temporary injunctive relief.
 - b. Permanent injunction: issued AFTER trial on the merits.
 - c. Temporary (preliminary, interlocutory) injunction: issued pending trial on the merits.
 - d. **TIP**: if in doubt, go with a permanent injunction.

ii. **TEMPORARY INJUNCTIVE RELIEF**

1. Two part test:
 - a. **Establish that there is irreparable injury.**
 - i. Facts must be discussed in a time frame context. One must show that he will incur irreparable injury while waiting for a full trial on the merits – and that’s why he or she needs relief now.
 - ii. Balancing of hardships: irreparable injury is weighed against any hardship D will suffer if a temporary injunction is granted.
 - b. **Establish P’s likelihood of success.**
 - i. **TIP:** bond requirement → if a temporary injunction is sought on the exam, mention that the ct should impose a bond requirement on P to reimburse D if the injunction injures him and the P does not succeed.

iii. CONTRAST: TEMPORARY RESTRAINING ORDER WITH TYPICAL TEMPORARY INJUNCTION

1. TRO: issued pending a hearing to determine whether temporary injunction should issue.
2. **Test for obtaining a TRO: identical to that for temporary injunction.**
3. TRO proceeding can be ex parte. Thus
 - a. Notice not required
 - b. Adversarial proceeding not required
4. Even though a TRO can be issued ex parte, if there is an opportunity to give D notice and a chance to appear to contest the injunction, a good faith effort must be made to do so.
5. TROs are limited to 10 days. Must have regular temporary injunction hearing by then.
6. It is very difficult to get any type of temporary injunctive relief that is mandatory in form. This is particularly true for a TRO.

iv. PERMANENT INJUNCTIVE RELIEF

1. The permanent injunction 3-part checklist:
 - a. **Inadequate legal remedy alternative**
 - i. The 3 legal remedy alternatives: replevin, ejectment, money damages
 - ii. **Replevin**
 1. It would be inadequate because:
 - a. The sheriff may not be able to recover it.
 - b. D can file a redelivery bond (and then run off with or destroy chattel in interim).
 - iii. **Ejectment**
 1. It would be inadequate because:
 - a. The sheriff may refuse to act.
 - iv. **Money damages**
 1. They would be inadequate because:
 - a. They’re too speculative
 - b. D is insolvent
 - c. Irreparable injury
 - d. Avoiding a multiplicity of actions
 - b. **Property right/protectable interest requirement**
 - i. **Traditional rule:** equity will grant relief only where a protectable property right is involved.
 1. Any legitimate property interest will suffice.

ii. **Modern trend:** a protectable interest will suffice.

c. **Feasibility of enforcement**

i. Negative injunction: no enforcement problem

ii. Mandatory injunction: there may be an enforcement problem based on the difficulty of supervision, or concern with effectively ensuring compliance.

iii. The 3 exam favorite mandatory injunction fact patterns

1. **Act involves application of great taste, skill, or judgment.**

a. Bar exam answer: injunction denied.

2. **A series of acts over a period of time.**

a. Bar exam answer: injunction denied unless P's case is otherwise great.

3. **An out-of-state act is required.**

a. Bar exam answer:

i. Resident D: injunction granted.

ii. Non-resident D: injunction denied.

4. **TIP:** if a decree can be couched as a negative injunction, you should note that in your answer and eliminate the enforcement problem.

d. **Balancing of hardships**

i. P's benefit against D's hardship if relief granted

ii. 4 balancing of hardship rules:

1. There must be a gross disparity between detriment and benefit.

2. Even then, there will be no balancing if D's conduct was willful.

3. If you decide to balance hardships, in whole or in part, consider money damages.

4. Hardship to the public is also taken into account.

iii. **TIP:** balancing of hardships defense is almost always a primary discussion item when the tort is nuisance or trespass to land.

e. **Defenses**

i. Unclean hands

1. Available only if P's alleged improper conduct is related to the lawsuit.

ii. Laches

1. It's a running of a period of time defense. Unlike SoL, which involves the mere passage of time, laches is concerned with the effect of the passage of time.

2. Laches time period will never be greater than the SoL.

3. **Three laches rules:**

a. Clock starts to run when P knows of the injury

b. Delay cuts off the right to relief when it has been both unreasonable and prejudicial to the D.

c. If laches applies, consider giving the P some money.

iii. Impossibility

1. Impossible for D to carry out terms of injunction.

iv. Free speech

1. If the tort is defamation or a privacy publication branch, your best exam answer is: injunction denied based on free speech grounds.

2. Miscellaneous injunctive relief problems

- a. Crimes
 - i. Equity will not enjoin them.
- b. Who will be bound by injunction
 - i. Parties
 - ii. Employees and agents WITH NOTICE
 - iii. Third parties acting WITH NOTICE
- c. Erroneous injunction
 - i. If there is an erroneous injunction, you still have to obey it.
 - ii. So what one must do is have it modified or dissolved.
- d. Contempt
 - i. *Civil contempt (to coerce)*
 1. Money (fine)
 2. Imprisonment: D holds the keys to the jailhouse
 - ii. *Criminal contempt (to punish)*
 1. Money (fine)
 2. Imprisonment: cannot get out of prison. Remain for set amount of time.
 3. Note: constitutional safeguards apply to criminal contempt cases.
 4. **TIP:** there is no civil, civil or criminal, contempt for non-compliance with a money judgment (exceptions: alimony, child support).
 5. **TIP:** injunctive relief is almost always coupled with damages for injuries incurred in the time period prior to obtaining the injunction.

3. PERMANENT INJUNCTION MEMORIZER

- a. Input five backs down
 - i. Inadequate legal remedy
 - ii. Property right/protectable interest requirement
 - iii. Feasibility of enforcement
 - iv. Balancing of hardships
 - v. Defenses (ALWAYS discuss them → unclean hands and laches are the big ones)

d. SPECIFIC TORT FACT PATTERN POSSIBILITIES → EXAMSMANSHIP: GENERAL THOUGHTS

- i. *Two sets of basic bar exam questions*
 1. First set
 - a. Has/is P been/being injured?
 - b. Has D derived a benefit?
 - c. Does P want the property returned?
 - d. Does P need an injunction?
 2. Second set
 - a. Do the wrongs relate to the past only? (only damages available)
 - b. Do the wrongs relate to the future only? (no damages available)
 - c. Do the wrongs relate to both the past and the future? (all remedies in play)

- ii. *How to handle compensatory damages measures*
 - 1. Bar exam compensatory damages language
 - a. **P is entitled to compensatory damages to put him in the position he would have been in had this wrong and resulting injury not occurred. On these facts...**

IV. THE CONTRACT REMEDIES

a. The legal remedies

i. Damages

- 1. Legal remedy

ii. **FIRST TYPE OF DAMAGES: COMPENSATORY**

- 1. Based on injury to P
- 2. 4 requirements:
 - a. *Causation*
 - b. *Foreseeability (tested at time of formation)*
 - c. *Certainty*
 - d. *Unavoidability (mitigation)*
- 3. Consequential damages
 - a. Available for related damages foreseeable at the time of formation.
- 4. **TIP:** bar exam favorite fact pattern: the reputation fact pattern.

iii. **SECOND TYPE OF DAMAGES: NOMINAL**

- 1. Allowed

iv. **THIRD TYPE OF DAMAGES: PUNITIVE**

- 1. Not allowed
- 2. **TIP:** if D's conduct is willful, you should always try to see if you can characterize this as a tort case.
- 3. The liquidated damages fact pattern
 - a. 2 part test for validity
 - i. *Damages are very difficult to ascertain at time of K formation.*
 - ii. *This was a reasonable forecast of what they would be.*
 - b. Results:
 - i. If valid: only liquidated amount available
 - ii. If invalid: only actual damages available
 - c. **TIP:**
 - i. Trick fact pattern: clause provides that one can get either actual damages or liquidated damages → invalid provision.

b. The restitutionary remedies: to prevent unjust enrichment

i. **LEGAL RESTITUTIONARY REMEDIES**

- 1. Restitutionary damages
- 2. Replevin
- 3. Ejectment

ii. **EQUITABLE RESTITUTIONARY REMEDIES**

- 1. Constructive trusts
- 2. Equitable liens

iii. **THE BASIC BAR EXAM RESTITUTIONARY CONTRACT FACT PATTERN**

- 1. **Contract "fails" after P has rendered performance (partial or complete)**
- 2. Two ways this occurs on bar exam:
 - a. The K is unenforceable
 - b. The K is breached

3. Unenforceable Ks

a. The K is unenforceable due to, e.g., mistake, lack of capacity, SoF, illegality.

b. **The 2 questions:**

i. *Can P get restitutionary damages for property/money given to, or services rendered for, D?*

1. Yes, for the value of the benefit.

a. D need not use the benefit; he just needs to be given the benefit.

b. If value of the services is greater than the K rate, P can recover if pay for value of benefit rendered, whether used or not.

ii. *Can P get the property back?*

1. Yes, if it is unique or D is insolvent.

4. Breached Ks

a. **Bar exam threshold inquiry: who is the P? Is he the non-breaching or breaching party?**

b. *P as non-breaching party*

i. **The 2 questions:**

1. *Can P get restitutionary damages for property/money given to, or services rendered for, D?*

a. Yes, for the value of the benefit.

b. Again, value may be greater than the K rate.

2. *Can P get the property back?*

1. Yes, if it is unique or D is insolvent.

c. *P as breaching party*

i. Typo contract for land, price = 100k. P, after paying 30% of installment land sales K, defaults. Land is now only worth 80k.

ii. Can P get any restitutionary damages?

1. Traditional view: no recovery b/c P defaulted

2. Modern view: recovery allowed, but cannot be greater than the K rate and is reduced by any damages suffered by D as a result of the breach.

iv. **SPECIFIC PERFORMANCE, EQUITABLE REMEDY**

1. D is required to perform the K.

2. **6-part checklist:**

a. *K is valid*

i. Note: in order to obtain specific performance, P must be able to show the K terms with more certainty and definiteness than would be the case in an action for money damages at law. Otherwise it will be too difficult to enforce according to the K's terms.

b. *K conditions of P must be satisfied*

i. P must be able to show his K conditions have been fulfilled (already performed, ready and able to perform, or excused from performing).

ii. The 2 favorite bar exam conditions fact patterns (both involve land sale Ks)

1. Deficiencies fact pattern (seller cannot deliver the agreed upon consideration)

a. Seller as P

- i. Can enforce the K if the defect is minor
- ii. Cannot enforce K if the defect is major unless the seller can cure the defect before or at closing (won't happen at the bar)

b. Buyer as P

- i. Can enforce the K even if defect is major
- ii. Cannot enforce the K if defect is VERY major. The ct will simply not act in this case.

c. **Bar exam imperative:** if you decide that specific performance should be granted under the rules above, even though a defect still remains, you MUST include a sentence noting that the ct will lower the purchase price to take into account this defect in consideration.

d. **Bar exam buzz word:** *abatement* in the purchase price.

2. Time of the essence clause fact pattern (buyer does not meet the K condition of timely performance)

a. There will be a land sale K with an express time of the essence clause.

b. This clause will contain a forfeiture provision (forfeiture of all performance rendered to date if performance is not timely).

c. There will have been partial performance which is now potentially subject to forfeiture.

d. Buyer will have made a late payment.

- i. This triggers the time of the essence clause and its forfeiture provision. Seller wants to keep both the land and any performance rendered to date.

e. Buyer will bring a lawsuit for specific performance.

f. **Note: equitable maxim → EQUITY ABHORS FORFEITURES.**

g. Factors cts can look at to avoid the harsh result of a forfeiture:

- i. Loss to seller is small
- ii. Tardiness is de minimis
- iii. Waiver (seller has accepted late payment in past)
- iv. Buyer would suffer undue hardship

h. The above fact pattern relates to partially performed Ks. If the K is wholly executory (buyer has done nothing yet), the time of essence clause will be strictly enforced.

c. Inadequate legal remedy alternative

- i. Money damages could be inadequate because:

1. Damages are speculative
 2. D is insolvent
 3. Multiple suits are necessary
 4. The thing bargained for is unique
- ii. The uniqueness problem
1. If property is unique, then even if P received money damages, he could not simply go out and buy it.
 2. Determine whether K was for real or personal property
 - a. *Real property*
 - i. Land is unique.
 - ii. **TIP:** bar examiners try to trick you by making every parcel of land look identical.
 - iii. The special seller's rule: sellers can get specific performance even though all they have coming in is money.
 - b. *Personal property*
 - i. Personal property is not unique, but see exceptions.
 - ii. One of a kind or very rare
 - iii. Personal significance to buyer
 - iv. Circumstances make chattel unique
- iii. Bar exam favorite issue: liquidated damages clauses
1. **GR:** a liquidated damages clause does NOT make money damages adequate. Specific performance is still available.
 2. **Exception:** where the clause provides that this is to be the only remedy.
- d. Mutuality of remedy (only going to be an issue when dealing with party that lacks contractual capacity)
- i. First, determine and discuss that you have a mutuality fact pattern → P should not be able to enforce this K against me because I could not enforce it against him.
 - ii. Second, set out the rule → ct will reject the mutuality argument if it feels sure that the P will perform.
 - iii. Third, grant specific performance → in your answer, have the decree provide for simultaneous performance.
- e. Feasibility of enforcement
- i. Personal services K enforceability
 1. **Rule:** they are NOT specifically enforceable.
 2. **Reasons**
 - a. Enforcement problem
 - b. Involuntary servitude
- f. Defenses
- i. **Equitable defenses**
 1. Unclean hands
 2. Laches
 3. Unconscionability
 - a. More than simply a bad deal. There must also be some small factor facts that brought it about.
 - b. Tested at the time of K formation.
 - ii. **Contract defenses**

1. Mistake
2. Misrepresentation
3. SoF

iii. Bar exam favorite: SoF/part performance doctrine problem

1. How do you spot the problem?
 - a. The contract must involve land. It could be either a land sale K or one to make a testamentary disposition of land.
 - b. This contract will have been an oral K.
2. Once you have spotted and set out the problem, discuss the rule:
 - a. *If one has rendered (i) invaluable part performance (ii) in reliance on the K, this will take the case out of the SoF and specific performance will be granted.*
 - b. What is valuable part performance? Any 2 of the top 3 taken together:
 - i. Payment in whole or part
 - ii. Possession
 - iii. Valuable improvements
 - iv. Valuable services (modern trend)

3. Specific performance: 2 particular problem areas

a. Equitable conversion

i. *Where a valid land sale K is entered into, an equitable conversion occurs upon execution.*

ii. Result: the property interests of the buyer and seller are regarded as switched. Thus:

1. The buyer will now be regarded as having the real property interest (the specifically enforceable right to the land); and
2. The seller will now be regarded as having the personal property interest (specifically enforceable right to the money).

iii. **IP**: timing of bar exam issues → they occur between K execution and the closing.

iv. The 2 basic bar exam fact patterns:

1. *Death (who gets what, assuming equitable conversion)*
 - a. Doofus enters into a specifically enforceable K to sell Blackacre. Before the closing, he dies. His will gives his real property to Bowater, his personal property to Lulu. Who gets what?
 - i. Bowater: real property.
 - ii. Lulu: personal property (purchase price).
2. *Damage/destruction → risk of loss, assuming equitable conversion*
 - a. Majority rule: the risk is on the buyer.
 - b. Modern trend: the risk is on the seller.

b. Covenants not to compete enforceability

- i. The covenant must protect a legitimate interest of the person in whose favor it runs. For this to be the case, the services must be unique.

- ii. The covenant must be reasonable in both its geographical and durational scope.

4. SPECIFIC PERFORMANCE MEMORIZER

- a. **Cha Cha is my favorite dance.**
 - i. Contract validity
 - ii. Conditions of P satisfied
 - iii. Inadequate legal remedies
 - iv. Mutuality of remedy
 - v. Feasibility of enforcement
 - vi. Defenses

v. RESCISSION, EQUITABLE REMEDY

- 1. The original K is considered voidable and rescinded.
- 2. **Rescission requires a two-step analysis:**
 - a. **Determine if there are grounds for rescission.**
 - i. General grounds (all relate to formation):
 - 1. **Mistake**
 - a. *Mutual mistake*
 - i. Material fact: rescission granted
 - ii. Collateral fact (going to quality, desirability, or fitness of property for a particular purpose) rescission denied.
 - b. *Unilateral mistake*
 - i. Rescission denied
 - ii. Exceptions: the non-mistaken party knows or should know of the mistake; the mistaken party would suffer undue hardship if there is no rescission (modern trend exception).
 - 2. **Misrepresentation**
 - a. Rescission: granted
 - b. In order to get rescission based on misrepresentation grounds, P must show that they have *actually relied* upon the misrepresentation.
 - 3. **Coercion**
 - 4. **Undue influence**
 - 5. **Lack of capacity**
 - 6. **Failure of consideration**
 - 7. **Illegality**
 - b. **Determine if there are valid defenses.**
 - i. **Clean hands**
 - ii. **Laches**
 - iii. Negligence of P is NOT a good defense.
 - 3. Two specific items
 - a. *Election of remedies*
 - i. P sues for damages first: rescission is NOT allowed.
 - 1. This is regarded as an *affirmance* of the K.
 - ii. P sues for rescission first: damages ARE allowed.
 - 1. P can even sue for both at the same time, but must elect the preferred remedy BEFORE judgment.
 - b. *Availability of restitution*

- i. If a P who is entitled to rescission has previously rendered performance on the K, he can get compensated for it or get the property back via restitution.

4. RESCISSION MEMORIZER

a. **Good dog.**

- i. Grounds
- ii. Defenses

vi. REFORMATION, EQUITABLE REMEDY

1. Changes written agreement to conform with the parties' original understanding.
2. **3-step analysis:**

a. *Determine if there is a valid K.*

b. *Determine if there are grounds for reformation.*

- i. Mutual mistake → reformation granted.
- ii. Unilateral mistake → reformation denied.
 1. *Exception:* when the non-mistaken party knows of the mistake (contrast with “knows or should know” for rescission).
- iii. Misrepresentation → reformation granted.
 1. This is available for both innocent and intentional misrepresentations. Rewriting reflects expressed intent of the parties.

c. *Determine if there are valid defenses.*

- i. Unclean hands
- ii. Laches
- iii. Negligence of P, SoF, and Parol Evidence Rule are NOT valid defenses.
- iv. **Bar exam note:** reformation is NOT allowed where it would adversely affect the rights of a subsequent BFP.

3. REFORMATION MEMORIZER

a. **Very good dog.**

- i. Valid K
- ii. Grounds
- iii. Defenses

SPECIFIC CONTRACT FACT PATTERN POSSIBILITIES

- i. Has P been injured?
- ii. Has D derived a benefit?
- iii. Does P want the property returned?
- iv. Does P want the K performed?
- v. Does P want the K nipped up (rescission)?
- vi. Does P want the K rewritten (reformation)?

d. HOW TO HANDLE COMPENSATORY DAMAGES MEASURES

- i. Bar exam compensatory damages language:

1. P is entitled to compensatory damages to put him in the position he would have been in had this wrong and resulting injury not occurred. On these facts...

- ii. Threshold inquiry fact analysis for compensatory damages:

1. Which party to the K committed the breach and how did they do it?

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