

2: What is Law

By John W. Tulac

Law is the framework for any civilized society (any uncivilized society too, but we don't want to go there).

Law covers just about everything that we do. We are presumed to know the law. Go to the library. You'll find several rows of law books. You are presumed to know everything contained in those books and they are only a very small part of the total body of law. Remember ...

IGNORANCE OF THE LAW IS NO EXCUSE!

Law is not for the lawyers. Law is for everyone. Anyone can learn the basics of law relevant to everyday business and everyday life.

Jurisprudence is concerned with the philosophy of law. There are several schools of thought and the study of jurisprudence is endlessly fascinating. It is also unnecessary to our needs. For our purposes, law defines what is right or wrong to do in our business and everyday lives. Law sets a minimum threshold of conduct. To fall below the threshold is to engage in unlawful conduct. Such unlawful conduct may be a civil wrong (a tort or a breach of contract) or it may be a criminal wrong (an act that is also deemed to harm not only the victim but against society as well).

In the United States, there are four sources of law. The primary source is the United States Constitution. In a jurisprudential sense "We the People" are the ultimate source of law as embodied in the Constitution. The other sources of law are statutory law, case law and common law, and administrative or regulatory

law. All four sources of law impact what we do as businesspeople and citizens.

Exercise: When you think of law, what words come to mind? List as many of them as you can. Give yourself fifteen minutes. List them here:

Most people will associate law with justice. However, not all laws are just. People also disagree about what might be just under a given set of circumstances.

People also associate law with fairness. Law and fairness often overlap but they are not the same things. In contract law, the fairness of a contract is generally irrelevant. This isn't as difficult to accept as it might first seem. A toddler soon learns to add "that's not fair" to his list of most used and useful vocabulary. However, what one comes to consider fair changes as one grows up (of course, some people never grow up and may need to be handled like toddlers).

Through the use of law, we hope to achieve objectively fair and just results. And hell is paved with good intentions. Many bad laws have been passed in the name of worthy causes. Many had unexpected bad consequences. Visit dumblaws.com for a hilarious collection of mostly well-intended but nevertheless bad or just plain stupid laws. Here are a few examples:

- No vehicle without a driver may exceed 60 miles per hour.
- It is illegal to wear a fake moustache that causes laughter in church.

- If two trains meet on the same track, neither shall proceed until the other has passed.
- It is mandatory for a motorist with criminal intentions to stop at the city limits and telephone the chief of police as he is entering the town.

This course is not an academic exercise in the law. It is designed to give you minimum competence in recognizing legal issues. The focus in presenting the law is on what is practical. You cannot learn everything you need to know in ten short weeks. You can learn enough to recognize legal issues and to develop an approach to prevent legal issues from becoming legal problems. You will also learn a methodology to help you think clearly and logically about legal issues.

Law, then, is for everybody. It is in your own best interests to know the law that is relevant to what you do.

2.1. Law and the Design Professional

What does it mean to be a professional? As a licensed engineer or architect you have some things in common with all professionals including attorneys.

The law holds professionals to a higher duty or legal responsibility than ordinary citizens for anything that is specific or specialized to the professional's expertise or practice. You will learn more about the professional standard of care, which defines or measures this professional duty.

The law also considers a professional to be a fiduciary. A fiduciary is subject to the highest standard of care that the law requires of anyone. A design professional owes an obligation not only to the client but also to the public at large. The design professional must not only provide the client with what it wants, but must also advise the client what it needs as well. A professional provides services not only under contract to the client, but with a broader responsibility to the public as well. For a design professional, that broader responsibility includes a commitment to public safety.

A professional is licensed. This means that the state reserves the right to set the standards for admission to the profession and confer the right of the individual to be known as a professional. A professional is subject to a code of ethics. Everyone has an obligation to be ethical. A professional, however, is subject to specific rules

of conduct that are codified and must be followed for the professional to remain in good standing.

2.2. Structure of Law and Legal Analysis

Law covers virtually every subject matter. Law is organized into many categories. In this class we deal primarily with the categories of tort and contract law.

Human beings are held accountable for their actions and sometimes their failures to act. Conduct is examined under the law pursuant to objective standards. The law does not require perfection, merely what is reasonable under the circumstances. The law requires us to act in certain ways when we do act and sometimes requires us to act even though we may not want to act. How do we know when and how to act? We must learn the applicable *standard of care* required under any given circumstances. We will spend a lot of time on this concept.

Unfortunately, people do things that injure one another or which damage or destroy property. Even an uncivilized society has rules to deal with such things. In our society we recognize that a wrong can be civil, criminal or both.

A civil wrong is called a *tort*. It is a wrong that harms an individual or property. A *crime* is a wrong against society as a whole. Not all crimes are torts and not all torts are crimes. Examples: Defamation, which is a false statement about another that puts that person in a bad light, is a tort, but not a crime. Prostitution, an exchange of a sexual act for cash or other consideration, is a crime, but not a tort. A battery, which is a harmful or offensive touching of another without consent, is both a tort and a crime.

A *claim* is an allegation of wrongdoing that has caused a harm or loss. A *cause of action* is a claim recognized under the law for which a remedy is available. A cause of action consists of *elements*, each of which must be proven or the cause of action fails. You must learn how to recognize causes of action and their elements and how to prove or disprove each element using the facts known or inferred.

2.3. IRAC Methodology

An essay question allows you to communicate your knowledge of the subject matter and your ability to

apply it to a specific question or situation. Your essay should be well developed and organized, and clearly focused on the question presented. You should reach the right conclusion for the right reasons. Proper grammar, punctuation, spelling, and style are all important to an effective essay. If your writing skills are deficient, then you will have a difficult time with essay questions and you owe it to yourself to get help. An inability to express yourself effectively in writing is a serious impediment to advancement in the business world.

IRAC stands for **I**ssue **R**ule **A**alysis **C**onclusion. IRAC methodology is a powerful way to organize and write essays requiring legal reasoning and/or critical thinking. In fact, it is adaptable to any subject matter. In law, IRAC is applied to a set of facts to determine what the proper legal outcome should be.

ISSUE: The issue is the legal question presented. What legal question is raised by the facts? There can be more than one. Frequently, you will be given the issue. If you are given the issue, write about it. Don't change the issue and write about something else. If the question simply says "Discuss," then you must determine and properly state the issue.

RULES: Once you know the legal issue, then you can determine the relevant law necessary to answer the legal question presented. In this section you should accurately and fully state the law that you have determined to be relevant. Relevant rules are those that relate to the development of a party's position or another party's defense or alternative position. Select the rules that support the outcome or conclusion you reach. In an open book or a take-home exam there is no excuse for incorrectly stating the law. If you identify a rule as relevant, I expect you to apply it in the analysis.

ANALYSIS: The analysis is the most important part of your essay. It demonstrates your ability to apply the law to the facts to answer the legal issue presented and to support the conclusion you reach. Analysis is interpretation of facts and law together to determine the objective truth justifying the conclusion. Proper analysis is well organized to logically develop the arguments for and against the issue, and explains why one position is ultimately stronger than another is. Competent analysis accounts for all the given facts, and leaves nothing out in the support of

the conclusion in the same manner that a proof in geometry must include all the steps to be valid. Analysis sets out your reasoning and explains using facts and law together why your conclusion is correct. You will use connecting words like "since" and "because" in your analysis. Omissions in the development of the argument or assumptions in place of facts are usually fatal to your proof. Thus, analysis is your proof that you are right, based on using the proper law and applying it fully and correctly to the evidence (facts and your interpretation of them).

CONCLUSION: The final part of your answer is the conclusion. The conclusion answers the legal question presented in the issue and is your expression of the right or just result or outcome. It should rarely be more than a sentence or two.

Here is a different approach to understanding the IRAC methodology:

When you are reading a case or analyzing a case problem, ask these questions:

1. Who is the Plaintiff/ Defendant(s)?
2. What is/are the claim(s), cause(s) of action, issue(s)?
3. What are the elements of each claim or cause of action?
4. What are the defenses to each claim or cause of action?
5. Is each element proved? Use the facts/evidence to support or negate and explain why.
6. Is each defense proved? Use the facts/evidence to support or negate and explain why.
7. What is the result/conclusion?

If you think about it, question 2 sets the issue, questions 3 and 4 set the rules, questions 5 and 6 set the analysis, and question 6 provides the conclusion. Poof! Instant organization of your answer.

Unfortunately, many people suffer from a lack of writing skills. You cannot become a good writer unless you practice. Here is an easy and fun practice exercise:

Here is a short question followed by a model answer written by a student to demonstrate the IRAC methodology. Following the Model Answer is a Writing Diagnostic for an IRAC answer.

QUESTION

FACTS: Seller owns a forty-acre tract of land. Buyer, after passing the land one says, sends a letter to Seller which states: "I like your property very much. Would you like to accept \$60,000 for it?" Seller immediately writes back: "Yes, I would. I accept your offer of \$60,000 for my forty acres." Has a contract been formed?

MODEL ANSWER

ISSUE: Did Buyer make an offer to Seller that Seller accepted to create a contract?

RULES OF LAW: An offer is a promise or commitment to do or refrain from doing some specified thing in the future. An offer must be reasonably definite or certain so that the parties can ascertain the terms and must communicate a serious intent by the offer or to be bound by its terms. Statements of interest or inquiry are not offers but are invitations to negotiate. If there isn't an offer, there can be no acceptance.

ANALYSIS: Buyer has not made an offer to purchase Seller's 40 acres for \$60,000 because he has not expressed a serious intent to be bound by its terms, even though the terms are reasonably certain. The terms are reasonably certain because a definite price is stated and, although the property could be described more specifically, such as location, the parties can probably determine that they are referring to the same parcel of land.

By stating that he liked the property very much, Buyer has merely expressed his interest in the land. Buyer then inquires whether Seller would take \$60,000 for the land. This question is in the nature of a probe or trial balloon and may provide a basis for further negotiations, but it is not an offer.

Neither statement by Buyer in his letter indicates a serious intent to be bound. The first statement is irrelevant to intent. A person can like many things without intending or desiring to acquire them. The second statement is tentative, rather than definite. It invites further discussion rather than express an absolute intent to be bound.

Since no offer has been made by Buyer, Seller cannot "accept" and create a binding agreement. All Seller has done is communicate his willingness to sell and reveal to the Buyer that a contract might very well

be concluded at a \$60,000 purchase price. Seller's letter provides a basis for further discussion to form a binding contract.

CONCLUSION: Since there has been neither an offer nor an acceptance, no contract has been formed between Buyer and Seller for the purchase of 40 acres of land.

2.4. *Communication*

Good communication is essential to good business. A professional must write and speak well.

A design professional must speak and write with precision, but must also learn how to recognize and respond to ambiguity. Ambiguity is also sometimes a useful tool in negotiation and even occasionally in contracts.

The primary business tool of any business is the contract. A significant portion of the course is about contract law and contract provisions relevant to the business of the design professional. The design professional must know and understand the language commonly used (and often abused) in contracts.

A design professional must be a skilled negotiator and mediator.

A design professional must be an expert listener.

Few people are born with the proverbial silver spoon in mouth. Public speaking is an acquired skill. It requires practice.

People must learn how to write well. Writing requires practice.

Are you willing to do what it takes to become a good communicator? Never stop working on your communication skills. Always PRACTICE.

2.5. *Constructing a Paragraph*

Unfortunately, many people suffer from a lack of writing skills. You cannot become a good writer unless you practice.

Are you a good writer? Show me! Here is an easy and fun practice exercise:

ASSIGNMENT

Write a six or seven sentence paragraph recommending a favorite CD. You must follow these directions:

1. The first sentence introduces the name of the album and the artist.
2. The second sentence describes the kind or type of music on the album and can include something about the artist. However, you may need a separate sentence to describe both the music and the artist.
3. The next three sentences set forth the reasons why you like the album and are recommending it. Be strong and specific in your descriptions so that the reader can gain some understanding of what you are hearing and why the album is so good. For example, you could describe different tracks on the album.
4. The last sentence brings your recommendation to a conclusion. It should provide some final insight in support of your recommendation rather than something lame like “So in conclusion you should buy this CD.”

Not a music fan? No excuse. Adapt the assignment to recommend a favorite movie, book, or video game instead. If you can't think of something fun to write about and recommend with enthusiasm to someone else, you desperately need a hobby.

Use the writing diagnostic attached at the end of this article to evaluate your paragraph. You may wish to ask a friend to do this for you. The only way to improve your writing is through practice. You must write, have your writing critiqued, correct your writing and have it critiqued again.

If you cannot easily do this assignment, you need to get help to improve your writing to do well in this course.

2.6. Paraphrasing

Paraphrasing is an effective way to determine whether you have understood someone or that someone has understood you. Paraphrasing is explaining what you have just read or heard in other words.

Example: “Ignorance of the law is no excuse.”

Paraphrase: One is required to know the law and follow it.

Example: “The pen is mightier than the sword.”

Possible Paraphrase: Ideas are stronger than force.

How would you paraphrase it? Put your understanding here:

Example: “Give me liberty or give me death.”

Possible Paraphrase: Freedom is worth dying for. Put your paraphrase here:

Later in this course, you will be asked to paraphrase detailed contract clauses as part of your learning experience.

2.7. Critical Thinking¹

What does it mean to be a professional? What does it mean to you to be a professional? That's not the same question, is it?

What does it mean to think critically? Do you think you know how to do it? Do you actually do it? That's not the same question, is it?

Engineers concerned with good thinking must be as rigorous in their approach as lawyers are in their approach. A critical thinker in any discipline must possess certain intellectual traits and regularly and routinely apply intellectual standards to elements of thought.

The standards are clarity, accuracy, precision, relevance, depth, breadth, logic, significance, fairness, and ethics. What do each of these terms mean?

The elements are purposes, questions, points of view, information, inferences, concepts, implications, and assumptions. What do each of these terms mean?

The required traits are intellectual humility, intellectual autonomy, intellectual integrity, intellectual courage, intellectual perseverance, intellectual empathy, confidence in reason, and fair-mindedness.

Egocentric thinking and action are to be avoided by the true professional.

You will be asked to make use of the above standards, elements and traits in this course and throughout your professional and personal life.

¹ Adapted from *The Thinker's Guide to Engineering Reasoning*, Richard Paul, Robert Niewoehner, and Linda Elder, Foundation for Critical Thinking, 2006

WRITING DIAGNOSTIC

TEST NUMBER _____

GRADE _____

FACTORS: Yes/No

Ratings: Superior, Excellent, Average, Fair, Poor

- Y/N Followed directions for the question
- Y/N Followed IRAC Format
- Y/N Stated the Issue if not given in question
- Y/N The Issue is well and correctly stated
- Y/N Relevant rules are correctly stated
- Y/N Relevant rules are fully stated
- Y/N Facts are fully considered in analysis
- Y/N Facts are correctly stated in analysis
- Y/N Facts and law are used together to support conclusion
- Y/N Rules are applied properly to facts
- Y/N All elements of relevant cause of action are discussed
- Y/N All possible defenses are discussed
- Y/N The analysis is logically organized and presented
- Y/N The analysis is well-reasoned
- Y/N Required or permissible inferences are made
- Y/N The conclusion is correctly stated
- Y/N Structure of the paper is clear
- Y/N Each paragraph is coherent
- Y/N Transitions from one idea/element to next are logical
- Y/N Sentence structure is correct
- Y/N Sentences are well written and varied (not awkward)
- Y/N Word choices are correct
- Y/N Punctuation errors are few
- Y/N Spelling errors are few
- Y/N Grammar errors are few

Result: The conclusion is correct/incorrect and/but

- All relevant material is covered fully and correctly
- Substantially all relevant material is covered correctly
- Some relevant material is omitted and/or there are weaknesses or errors in the analysis
- Significant relevant material is omitted and/or there are major weaknesses or errors in the analysis
- The analysis is general and conclusionary
- The analysis is superficial
- Is unsupported by the analysis
- The analysis is so wrong, incomplete or disorganized as to be nonexistent

Comments:

3: Tort Law

By John W. Tulac

3.1. Introduction

A tort is a civil wrong for which the law provides a remedy.

Everyone is free to do as one wants, provided one does not interfere with the equal freedom of others. Tort law protects people and property by imposing reasonable limitations on the otherwise unbridled freedom to act.

We may have the power to do something, but not the right to do it under a given set of circumstances. For example, I can possess a gun and have the power to use it, but I do not have the right to point it at you and demand your laptop computer.

This article is at most an outline of the most important aspects of tort law. You are required to use the Internet to learn more about torts at web sites such as findlaw.com, wikipedia.com and nolo.com. These are examples. Run a search for different terms. There is a wealth of free information available.

3.2. Classification of Torts

Torts are classified as intentional, negligent, and strict. Torts can be further classified as acts harmful to persons, acts harmful to property, or acts harmful to both.

3.2.1. Intentional Torts

An intentional tort is one that is purposely done. The actor's intent does not actually have to be to cause actual harm. It is sufficient that the person doing the

act knew or *should have known* that the act was likely to cause harm.

Examples of intentional torts:

- Assault
- Battery
- Conversion
- Defamation
- Fraud
- Intentional Infliction of Emotional Distress
- Invasion of Privacy
- Nuisance
- Sexual Harassment
- Trespass to Property

“Intentional torts” require that the plaintiff prove the element of intent.

There are two types of rules to define intent:

1. Doing an act for the purpose of causing the consequences
2. Doing an act that creates a substantial probability (or substantial certainty) of causing the damages.
 - a) Presumption: a person is presumed to have intended the natural and probable consequences of his or her conduct
 - b) Transferred intent
 - c) Distinguish proof of motive from proof of intent

3.2.2. Negligence

A negligent act is one that is done carelessly, recklessly, thoughtlessly, or foolishly and results in harm. The actor did not intend to cause harm, but should have known better than to act that way.

We do a lot of stupid things, but most of the time we don't cause any harm to others or to property. You've heard the phrase "No harm; no foul." Negligence is like that.

3.2.3. Strict Liability

Under certain circumstances, liability can be absolute if a harm or loss results, regardless of intent or the amount of caution or control we used. Certain activities are ultra-hazardous, but nevertheless have beneficial effects. We permit such activities but hold the operator strictly liable for any resulting harm or loss. This is known as strict liability. Product liability is an example of strict liability.

3.3. Legal Duty and the Standard of Care

Tort law is based on the concept of legal duty. Everyone must follow the legal duty to act around others in a reasonable way as a reasonable person would under the circumstances. Legal duty is all about knowing how to act (or sometimes to refrain from acting) under the circumstances.

The standard of care, which defines a specific legal duty for specific circumstances, is based on reasonableness, not perfection. Ask: What would an ordinary person of ordinary means and ability do under the same or similar circumstances? The standard of care is the objective description of the legal duty. It tells us what to do. It sometimes tells us how to do it.

Legal duty as measured by the standard of care moves from the general to the specific.

Example: A driver of a motor vehicle must always operate and maintain the vehicle in such a way as to avoid harming others or property. This is the general duty of care for drivers of motor vehicles.

A reasonable person would never drive faster than it is safe to drive for the circumstances and within any speed limit designated for the area. This is a specific standard of care for how to drive a motor vehicle.

A reasonable person will not exceed 25 miles per hour in a residential area and will slow to 15 miles per hour in a school zone when children are present. This is an even more specific standard of care for more specific circumstances.

3.4. The Professional Standard of Care

A professional is held to a higher standard of care for activities directly connected to the professional's specialized expertise. The higher standard applies only to what the professional does as a professional in the capacity as a professional. The higher standard of care does not apply to ordinary activities of the professional. For example, the professional is held to the ordinary standard of care for operating a vehicle even if it is being used "on the job."

Ask: What would a professional of ordinary means and ability within the area of professional expertise do under the same or similar circumstances in the same or substantially same geographic area?

The conduct of a surgeon in a rural area with a properly equipped hospital cannot be directly compared with the conduct of a surgeon at UCLA practicing surgery with state of the art equipment and facilities. This would not be fair. Like must be compared to like.

However, if a professional claims to be more than he or she is, that professional can be held to the standard of the higher level of expertise that was claimed. If a professional licensed in one state acts in another state (or, more likely, under the licensed authority of a professional in another state), that out-of-state professional can be held to a higher standard of care than if the same work was done in the home state.

3.4.1. California Jury Instructions

The follow jury instruction (BAJI 6.37, 6.37.1 & 6.37.2) is that given in California Superior Courts to describe the professional standard of care.

BAJI 6.37

In performing professional services for a client a [specific professional] has the duty to have that degree of learning and skill ordinarily possessed by reputable [specific

design professional] practicing in the same or a similar locality and under similar circumstances.

It is a further duty to use the care and skill ordinarily used in like cases by reputable members of the same profession practicing in the same or a similar locality under similar circumstances, and to use reasonable diligence and best judgment in the exercise of professional skill and in the application of learning, in an effort to accomplish the purpose for which the professional was employed.

A failure to fulfill any such duty is negligence.

This jury instruction has been problematic for a couple of reasons. First, the jury must be given evidence of what is a “reputable” member of the specific profession.

Second, the expression “best judgment” implies the highest possible competence or decision-making when, in fact, the law does not require perfection. The exercise of best judgment of a junior engineer may be perfectly competent and within the standard of care, even though a more experienced engineer or one of the objectively best engineers in the country might exercise best judgment in a different way. Therefore, expert testimony is always required to determine whether a design professional has breached a duty of care.

The final sentence of the jury instruction is technically incorrect. The failure to fulfill a duty of care is a breach of the duty of care, but is not per se negligence. Negligence requires proof of causation as well.

BAJI 6.37.1

It is the duty of a [specific professional] who holds himself or herself out as a specialist in a particular field of [specify], to have the knowledge and skill ordinarily possessed, and to use the care and skill ordinarily used by reputable specialists practicing in the same field and in the same or a similar locality and under similar circumstances.

This instruction is often given when the case involved a specific specialty or subfield within which a professional is practicing.

BAJI 6.37.2

A [specific professional] is not necessarily negligent because he or she errs in judgment or because his or her efforts prove unsuccessful. However, a [specific professional] is negligent if the error in judgment or lack of success is due to a failure to perform any of the duties as defined in these instructions.

A professional is not a guarantor of results and a professional’s work is not judged by a standard of perfection.

The most difficult task sometimes is to go from a general description of the standard of care to a specific description of the standard of care for specific circumstances. For example, our general legal duty when we drive a motor vehicle is to always drive it in a manner that is safe under the circumstances and to never go beyond any stated maximum like a posted speed limit. For the specific circumstances, such as a school zone or a blizzard, we further describe the specific legal duty. The DMV conveniently gathers such rules for us in a nice little pamphlet. Thus, when we park a car on the hill we know that we have the specific legal duty to put the car in park, set the emergency brake and turn the wheels in the appropriate direction.

3.4.2. Review Exercise for the Professional Standard of Carey Smith

So now, let’s see how well you can determine the professional standard of care. Assume you are a licensed civil engineer based in Los Angeles, California:

1. Define the general professional legal duty of care you must follow.
2. You are asked to provide design services for a new bridge over the Los Angeles River using new lightweight composite materials that have not previously been used in bridge construction. Define the specific standard of care you must follow.

3. You are asked to design a conventional arch-type bridge over the River Kwai in Thailand. Assuming Thailand has laws similar to the United States, define the specific standard of care you must follow.
4. You park on the street to visit a client that has an office near the top of a steep hill. Define the specific standard of care you must follow.
5. You contract with the owner of the property to provide consulting services reviewing the plans and specifications of a licensed architect and a licensed civil engineer for a building to be constructed in Corona, California. Define the specific standard of care you must follow.

You should need no more than one sentence to answer each of these subparts.

3.5. General Structure and Analysis of Tort Liability¹

3.5.1. Elements of the Plaintiff's Cause of Action

Each tort can be broken down into basically four “sub-parts” or “sections”:

1. Act or conduct requirements:
 - a) These elements (there may be more than one “act” or “conduct” element) define what the plaintiff must show the defendant to have done, not done or what the defendant must have known at the time.
 - b) They define the nature and quality of the defendant’s conduct.

Example

Assault: A physical act that creates in another person a reasonable apprehension or fear of an immediate harmful or offensive touching.

Note: This definition of the “act” or “conduct” requirements can actually be viewed as a series of required elements:

- i) A physical act
- ii) Creating reasonable apprehension or fear in another person

- iii) Of an immediate harmful or offensive touching

Note: When analyzing the conduct of an individual, be sure that their conduct conforms to all of the conduct requirements, including “sub-elements.”

2. Tort categorization

- a) Is it a tort that requires the plaintiff to prove intent?
- b) OR is it a tort that could be committed without fault, negligently or intentionally?
- c) All torts other than the tort of negligence would fall into one of the two categories above

Examples:

Assault:	Intent required
Trespass:	Intentional
	Negligent
	Without fault

3. Causation:

- a) All torts require the plaintiff to prove that the defendant’s conduct was the actual and proximate cause of the plaintiff’s injury.
- b) Both parts of causation must be established or proof of causation fails

4. Injury and plaintiff’s remedy:

- a) Damages
- b) Injunctive relief
- c) There must always be an injury, and the usual remedy is damages.

3.5.2. Affirmative Defenses

Next, you should consider all possible affirmative defenses that relate to the tort.

For example, the doctrine of consent and the doctrine of self-defense are affirmative defenses to all intentional torts.

To some degree, the affirmative defenses vary depending on the tort the defendant is alleged to have committed.

3.6. The Remedy of Damages

Remember “no harm; no foul” as a general proposition.

Critical Rules

1. Actual or compensatory damages:
 - a) Compensation for injury that would naturally flow from the defendant’s conduct
 - b) Personal injury to the plaintiff, the plaintiff’s property, reputation, privacy, business interest, pain and suffering, emotional distress, etc.
2. Punitive damages:
 - a) Generally requires proof of a form of intent—more than ordinary negligence
 - b) Purpose of punitive damages
 - c) Economic significance: insurance and bankruptcy
3. Injunctive Relief
 - a) Injunctions are an “Equitable” Remedy
 - b) Prerequisites of Equitable Remedies
 - c) Negative vs. Affirmative Injunctions
 - d) Types of Injunctions

3.7. The Element of Causation

Critical Rules

1. Actual cause
 - a) Was the defendant the actual cause in fact of the plaintiff’s damages?
 - b) Two tests:
 - i) *But For Rule*: But for the defendant’s conduct, would the plaintiff’s injuries have occurred?
 - ii) *The Substantial Factor Test*: Was the defendant’s conduct a substantial factor in bringing about the plaintiff’s injury
 - I *Only Factor*: Actual cause need not be the “sole contributing factor”
 - II *Most Substantial Factor*: Actual cause need not be the “most” substantial factor
 - III *Comparative Liability*: Can result where damage results from more than one substantial factor

2. Proximate cause of “legal cause”:

- a) To what extent should the defendant be liable for the damages for which he was the actual cause? This is a “social policy issue.”
- b) Foreseeability of the injury: Was injury to the plaintiff “foreseeable” at the time of the defendant’s conduct?
- c) Intervening forces: Sometimes intervening forces (forces that occur after the defendant’s original conduct) increase damages. Will the defendant be liable for these increased damages? Yes, unless the intervening forces are “supervening forces.”
- d) Supervening forces: What intervening forces are supervening forces?

Example: There is no liability for a third party’s intervening intentional tort that was not foreseeable. This “supervening force” is said to “break the chain of causation.”

3.8. Negligence

1. Act:

An action or failure to act (when under a duty to act) that raises a risk of harm to another.

2. Duty:

- a) To foreseeable individuals
- b) To unforeseeable individuals where
 - No one was foreseeable
 - Someone was foreseeable, but not the plaintiff

3. Breach of standard of care:

- a) The general duty rule:
 - One has a duty to act as a reasonable, prudent person would act under the same or similar circumstances.
- b) Special duty rules for special circumstances
 - i) Negligence Per Se:
 - Breach of a statute or ordinance intended to protect a class of individuals that would include the plaintiff.
 - ii) Res Ipsa Loquitur:
Facts speak for themselves. Applies when:

- The event creating the damage is one that ordinarily does not occur in the absence of negligence; AND
- All the instrumentalities of causation include the defendants.

iii) Other Special Duty Rules Exist

Examples: Duty of owners and occupiers of land to trespassers, licensees and invitees.

4. Causation:

- See prior discussion of actual and proximate cause. Causation is an element of every tort.

5. Injury—Damages:

(See prior discussion of “actual or consequential damages.” A plaintiff **cannot** obtain punitive damages for negligence.)

NOTE: If the Plaintiff has established each element of the cause of action for negligence, the burden of proof has been met and a prima facie case for the defendant’s negligence has been made. The burden of proof then shifts to the defendant to show why liability should not be imposed.

Defendant can raise one or more affirmative defenses to show either that Plaintiff is in whole or part responsible for her own harm or loss or that someone other than Defendant is responsible in whole or part for the plaintiff’s harm or loss or both Plaintiff and one or more other parties are in whole or part responsible.

Affirmative Defenses:

6. Assumption of the Risk:

- a) Knowledge of the risk
- b) Voluntary assumption of the risk

7. Comparative Fault (Contributory Negligence):

- a) Failure to exercise the degree of care and caution that a reasonable, prudent person would exercise on behalf of himself or herself
- b) The doctrine of comparative negligence: By showing the comparative fault of another (often the plaintiff), the defendant can effectively lower his or her liability.

3.9. Professional Negligence

Professional negligence is established in the same way as ordinary negligence, but under the measure of the professional standard of care.

3.10. Fraudulent Misrepresentation

1. Act: Misrepresentation of facts or conditions
 - a) With knowledge that they are false; OR
 - b) With reckless disregard for the truth; OR
 - c) Failure to disclose when under a duty to disclose.
2. Intent: *Scienter* is intent to induce another to rely on the misrepresentation.
3. Justifiable reliance by the deceived party:
4. Causation: same as above
5. Injury—Damages: Actual and punitive damages
6. Affirmative defenses:
 - a) Consent
 - b) Puffing

3.11. Innocent Misrepresentation or Negligent Misrepresentation

1. Act: Misrepresentation of facts or conditions
2. Intent: This tort can be committed without fault or negligently. If committed intentionally with justifiable reliance, it becomes a tort of fraud for which punitive damages can be awarded.
3. Actual reliance by the plaintiff
4. Causation
5. Injury—Damages: Actual or consequential damages only.
6. Affirmative defenses:
 - a) Consent
 - b) Puffing

3.12. Strict Statutory Product Liability

1. Act: The product must be in a defective condition at the time of sale.
2. The defendant normally engaged in business of selling such products.
3. The product must be unreasonably dangerous* to the user and consumer because of its defective condition.

4. *This element is not required in California and some other states.
5. The plaintiff must incur physical harm to self or property from the use or consumption of the product.
6. No substantial change of the goods from the time the product was sold to the time of injury.
7. Causation: same analysis as above
8. Injury—Damages:
 - a) Actual or compensatory damages only (in the absence of an intentional tort theory).
 - b) Affirmative defenses and limitations on recovery:
 - i) *Assumption of Risk*: (See previous discussion)
 - ii) *Misuse of the Product*: Similar to assumption of the risk—limited by courts if misuse is reasonably foreseeable
 - iii) *Comparative Fault*: E.g., plaintiff who fails to take precautions against a known defect may have recovery reduced
 - iv) *Statutes of Repose*: The limited time within which a plaintiff can file a product liability suit begins to run on an earlier date than the statute of limitations
 - v) *Bystander Liability*: May require “reasonable foreseeability”

3.13. Tort Reform

1. Limits on non-economic damages—such as pain and suffering
2. Limitations on attorney contingency fees
3. Cap on punitive damages

Are such limitations just?

NOTES

¹ Sections 3.5 through 3.13 based on *Class Notes for FRL 201: Legal Environment of Business Transactions*, Richard Bergstrom (2002)