TORTS

RULE-STATEMENT CHECKLIST

II. NEGLIGENCE

~50% tested

A. PRIMA FACIE CASE AND DUTY

GENERAL RULE A prima facie case of negligence requires duty, breach, actual and proximate causation, and damages; the plaintiff bears the burden of proving each element by a preponderance of the evidence.

- ☐ **General duty.** A defendant owes a duty of reasonable care to all foreseeable plaintiffs, that is, persons within the foreseeable zone of danger created by the defendant's conduct. A defendant generally owes no duty to unforeseeable plaintiffs outside that zone.
- ☐ **Reasonable person standard.** The default standard of care is that of a reasonably prudent person acting under the same or similar circumstances; the standard is objective and does not account for the defendant's own mental shortcomings, though a physical disability is considered by measuring conduct against a reasonable person with that disability.
- ☐ **No general duty to act.** There is generally no duty to affirmatively act or to rescue another; a duty to aid arises where the defendant created the peril, has a special relationship with the plaintiff, voluntarily undertakes a rescue, or is bound by contract or statute.
- ☐ **Duty to third parties.** One who voluntarily undertakes to act must do so with reasonable care and is liable if the undertaking increases the risk of harm or the plaintiff relies on it; a defendant may also owe a duty to control third persons where a special relationship gives the ability and authority to control the actor.

B. SPECIAL STANDARDS AND DUTIES OF CARE

- ☐ **Children.** A child is held to the standard of a reasonable child of like age, intelligence, and experience, except that a child engaged in an inherently dangerous or adult activity is held to the adult reasonable person standard.
- ☐ **Professionals.** A professional must exercise the knowledge and skill of an ordinary member of that profession in good standing, judged by a national standard; a physician must also obtain informed consent by disclosing risks a reasonable patient would find material.
- ☐ **Common carriers and innkeepers.** Under the traditional rule, common carriers and innkeepers owe their passengers and guests a high degree of care and are liable for even slight negligence.
- ☐ **Landowners, invitees.** A land possessor owes an invitee, one who enters for a purpose connected to the possessor's business or a purpose for which the land is held open to the public, a duty of reasonable care, including to inspect for and warn of or make safe known and reasonably discoverable dangerous conditions.
- ☐ **Landowners, licensees.** A land possessor owes a licensee, a social guest or other privileged entrant, a duty to warn of or make safe concealed dangers known to the possessor, but no duty to inspect for unknown dangers.
- ☐ **Landowners, trespassers.** A land possessor owes an undiscovered trespasser no duty; to known or anticipated trespassers, the possessor must warn of or make safe concealed, artificial conditions known to the possessor that involve a risk of death or serious bodily harm.
- ☐ **Attractive nuisance.** A land possessor is liable for injury to a child trespasser caused by an artificial condition where the possessor knows children are likely to trespass, knows the condition poses an unreasonable risk of serious harm, the child cannot appreciate the danger, and the burden of eliminating the danger is slight compared to the risk.
- ☐ **Negligent infliction of emotional distress.** A defendant is liable for negligent infliction of emotional distress where the plaintiff was within the zone of danger and suffered physical symptoms, or, as a bystander, was closely related to the victim, present at the scene, and personally observed the injury-causing event.

C. BREACH OF DUTY

- ☐ **Breach standard.** Breach occurs when the defendant's conduct falls below the applicable standard of care; under the risk-utility test, conduct is unreasonable where the burden of taking precautions is less than the probability of harm multiplied by the gravity of the resulting harm.
- ☐ **Negligence per se.** Violation of a statute establishes a conclusive presumption of duty and breach where the plaintiff is within the class of persons the statute was designed to protect and the harm is of the type the statute was designed to prevent; the plaintiff must still prove causation and damages.
- ☐ **Excused violation.** A statutory violation may be excused where compliance would be more dangerous than violation, or where compliance was impossible under the circumstances.
- ☐ **Res ipsa loquitur.** Res ipsa loquitur permits an inference of breach where the injury is of a type that does not ordinarily occur absent negligence and the instrumentality causing harm was in the exclusive control of the defendant; it does not shift the burden of proof but allows the case to reach the jury.
- ☐ **Custom.** Evidence of industry custom is relevant to establish the standard of care but is not conclusive, because an entire industry may be negligent in failing to adopt available precautions.

D. CAUSATION

- ☐ **Actual cause.** The defendant's conduct is an actual cause of harm if the injury would not have occurred but for the defendant's conduct; where multiple sufficient causes concur, actual cause exists if the defendant's conduct was a substantial factor in bringing about the harm.
- ☐ **Multiple defendants.** Where two or more defendants are negligent but only one caused the harm and it is unclear which, the burden shifts to each defendant to prove it did not cause the injury, failing which both are jointly liable.

- ☐ **Proximate cause.** Proximate cause limits liability to harms that are a foreseeable result of the defendant's conduct; a defendant is liable for foreseeable harmful results caused directly or through foreseeable intervening forces.
- ☐ **Intervening and superseding causes.** A foreseeable intervening cause does not cut off liability, but an unforeseeable, superseding cause breaks the chain of causation and relieves the defendant; intentional torts and crimes of third parties are often superseding, while ordinary negligence, rescue, and medical malpractice are typically foreseeable.
- ☐ **Eggshell plaintiff.** The defendant takes the plaintiff as found and is liable for the full extent of injuries even if their severity was unforeseeable due to the plaintiff's preexisting condition.

E. DAMAGES

- ☐ **Actual damages required.** Actual injury, whether to person or property, is an essential element of negligence; nominal damages are not available and the plaintiff cannot recover for the mere threat of future harm.
- ☐ **Compensatory damages.** A prevailing plaintiff recovers compensatory damages for past and future medical expenses, lost earnings and earning capacity, and pain and suffering; pure economic loss unaccompanied by physical injury or property damage is generally not recoverable.
- ☐ **Avoidable consequences.** A plaintiff must take reasonable steps to mitigate damages and cannot recover for harm that reasonable mitigation would have avoided.
- ☐ **Collateral source rule.** Under the traditional collateral source rule, benefits the plaintiff receives from independent sources such as insurance are not credited against the defendant's liability.

F. DEFENSES

- ☐ **Comparative negligence.** Under pure comparative negligence, the plaintiff's recovery is reduced by the plaintiff's own percentage of fault but is never barred; under modified comparative negligence, recovery is barred once the plaintiff's fault exceeds fifty percent.
- ☐ **Contributory negligence.** In the minority of jurisdictions following contributory negligence, any negligence by the plaintiff that contributes to the injury completely bars recovery, subject to the last clear chance doctrine allowing recovery where the defendant had the final opportunity to avoid the harm.
- ☐ **Express assumption of risk.** A plaintiff who expressly agrees, typically by contract, to relieve the defendant of a duty is barred from recovery, unless the agreement is unconscionable or violates public policy.
- ☐ **Implied assumption of risk.** A plaintiff who knowingly and voluntarily encounters a known risk assumes that risk; many comparative fault jurisdictions have merged implied assumption of risk into the comparative fault analysis rather than treating it as a complete bar.

I. INTENTIONAL TORTS

~15% tested

A. HARMS TO THE PERSON

> **GENERAL RULE** Intentional torts require an act, intent (the purpose to cause the result or knowledge that the result is substantially certain to follow), and causation; intent transfers between certain torts and between intended and actual victims.

- ☐ **Battery.** Battery is an intentional act that causes a harmful or offensive contact with the plaintiff's person; contact is offensive if it would offend a reasonable person's sense of dignity, and it includes contact with anything closely connected to the plaintiff.
- ☐ **Assault.** Assault is an intentional act that causes the plaintiff to reasonably apprehend an imminent harmful or offensive contact; words alone are generally insufficient, and the plaintiff must be aware of the threatened contact.
- ☐ **False imprisonment.** False imprisonment is an intentional act that confines the plaintiff to a bounded area against the plaintiff's will, where the plaintiff is aware of the confinement or harmed by it; there must be no reasonable means of safe escape known to the plaintiff.
- ☐ **Intentional infliction of emotional distress.** Intentional infliction of emotional distress is extreme and outrageous conduct undertaken intentionally or recklessly that causes the plaintiff severe emotional distress; unlike other intentional torts, it requires proof of actual severe distress and permits recovery only on this showing.

B. HARMS TO PROPERTY

- ☐ **Trespass to land.** Trespass to land is an intentional physical entry onto the land of another, or causing a physical object or third person to enter; the defendant need only intend the entry, not to trespass, and no actual damages are required.
- ☐ **Trespass to chattels.** Trespass to chattels is an intentional interference with the plaintiff's right of possession by dispossessing or intermeddling with a chattel, causing actual damage, deprivation of use, or dispossession.
- ☐ **Conversion.** Conversion is an intentional exercise of dominion over the plaintiff's chattel so serious that it warrants requiring the defendant to pay its full value; the plaintiff recovers the fair market value at the time of conversion or may seek return of the chattel.

C. DEFENSES TO INTENTIONAL TORTS

- ☐ **Consent.** Valid consent, express or implied by custom or the plaintiff's conduct, is a defense; consent is invalid if given by one without capacity, obtained by fraud or duress, or exceeded in scope by the defendant.
- ☐ **Self-defense and defense of others.** A person may use reasonable force to defend against a reasonably perceived imminent threat of harm, and may likewise defend others; deadly force is permitted only against a threat of death or serious bodily harm.
- ☐ **Defense of property.** A possessor may use reasonable, non-deadly force to prevent a tort against property after requesting the intruder desist, unless the request would be futile or dangerous; force intended to cause death or serious bodily harm may never be used solely to protect property.

- ☐ **Necessity.** Public necessity is a complete defense to property torts where the defendant acts to protect the community from a greater harm; private necessity is a qualified defense allowing the defendant to interfere with property to protect a limited number of persons, but the defendant must pay for any actual damage caused.
- ☐ **Shopkeeper's privilege.** A merchant who reasonably believes a person has shoplifted may detain that person in a reasonable manner and for a reasonable time to investigate.

III. STRICT LIABILITY AND PRODUCTS LIABILITY ~20% tested

A. COMMON LAW STRICT LIABILITY

GENERAL RULE Strict liability imposes liability without regard to fault where the defendant engages in certain especially hazardous conduct; the plaintiff must still prove actual and proximate causation and that the harm resulted from the risk that made the activity dangerous.

- ☐ **Wild animals.** An owner of a wild animal is strictly liable for harm caused by the animal's dangerous propensities, even if the owner took precautions; injury must flow from a characteristic dangerous propensity of that kind of animal.
- ☐ **Domestic animals.** An owner of a domestic animal is liable for harm only if the owner knew or had reason to know of the animal's dangerous propensities abnormal to its class, though many jurisdictions impose strict liability by statute for dog bites.
- ☐ **Abnormally dangerous activities.** One who carries on an abnormally dangerous activity is strictly liable for resulting harm; an activity is abnormally dangerous if it creates a foreseeable and highly significant risk of serious harm that cannot be eliminated by reasonable care and is not a matter of common usage.
- ☐ **Scope and defenses.** Strict liability extends only to foreseeable plaintiffs and to the kind of harm making the activity dangerous; in comparative fault jurisdictions, the plaintiff's fault reduces recovery, and assumption of a known risk remains a defense.

B. PRODUCTS LIABILITY THEORIES

GENERAL RULE A products liability plaintiff must show the defendant is a commercial supplier, the product was defective when it left the defendant's control, and the defect actually and proximately caused the plaintiff's injury.

- ☐ **Strict products liability.** A commercial seller is strictly liable for personal injury or property damage caused by a product that was defective when it left the seller's control; every commercial supplier in the distribution chain may be held liable, and privity is not required.
- ☐ **Manufacturing defect.** A product has a manufacturing defect when it departs from its intended design and is more dangerous than a properly made unit of the same product would be.
- ☐ **Design defect.** A product has a design defect where a reasonable alternative design was available that would have reduced the foreseeable risks of harm at a reasonable cost and its omission rendered the product not reasonably safe; some jurisdictions apply a consumer expectations test instead.
- ☐ **Warning defect.** A product is defective for inadequate warnings where foreseeable risks of harm could have been reduced by reasonable instructions or warnings whose omission renders the product not reasonably safe.
- ☐ **Negligence and warranty theories.** A products claim may also be brought in negligence, requiring proof of breach of the standard of care, or in implied warranty of merchantability and fitness, and in express warranty or misrepresentation where the product fails to conform to representations of fact made about it.
- ☐ **Defenses.** Comparative fault, product misuse that is not reasonably foreseeable, and assumption of a known risk may reduce or bar recovery; a substantial and unforeseeable alteration of the product after it leaves the seller's control can defeat liability.

IV. OTHER TORTS ~15% tested

A. DEFAMATION

GENERAL RULE Defamation requires a defamatory statement of or concerning the plaintiff, publication to a third party, fault, and damage to the plaintiff's reputation; constitutional limits add requirements where the matter is of public concern.

- ☐ **Elements.** A defamatory statement is a false assertion of fact that tends to harm the plaintiff's reputation; it must be of and concerning the plaintiff and published, meaning communicated intentionally or negligently to at least one person other than the plaintiff who understands it.
- ☐ **Libel and slander.** Libel is defamation in written or permanent form and general damages are presumed; slander is spoken and requires proof of special pecuniary damages unless it is slander per se, that is, a statement about the plaintiff's business or profession, a loathsome disease, serious criminal conduct, or sexual misconduct.
- ☐ **Constitutional fault.** Where the plaintiff is a public official or public figure, the plaintiff must prove the statement was false and made with actual malice, meaning knowledge of falsity or reckless disregard for the truth; a private plaintiff on a matter of public concern must prove at least negligence as to falsity and actual malice to recover presumed or punitive damages.
- ☐ **Defenses and privileges.** Truth is a complete defense; absolute privilege attaches to statements in judicial, legislative, and certain official proceedings and between spouses, while a qualified privilege protects statements made in the interest of the publisher, recipient, or a common interest, and is lost by abuse or actual malice.

B. INVASION OF PRIVACY

- ☐ **Appropriation.** Appropriation is the unauthorized use of the plaintiff's name or likeness for the defendant's commercial advantage; use for newsworthy purposes is not actionable.
- ☐ **Intrusion.** Intrusion upon seclusion is an intentional interference with the plaintiff's private affairs or seclusion that would be highly offensive to a reasonable person, where the plaintiff had a reasonable expectation of privacy.

- ☐ **False light.** False light is the widespread publication of facts placing the plaintiff in a false light that would be highly offensive to a reasonable person; where the matter is of public concern, the plaintiff must also prove actual malice.
- ☐ **Public disclosure of private facts.** Public disclosure of private facts is the widespread publication of private information about the plaintiff that would be highly offensive to a reasonable person and is not of legitimate public concern; truth is not a defense to this tort.

C. MISREPRESENTATION

- ☐ **Intentional misrepresentation.** Fraudulent misrepresentation requires a false representation of a material fact, scienter meaning knowledge of falsity or reckless disregard for truth, intent to induce reliance, justifiable reliance by the plaintiff, and resulting pecuniary damages.
- ☐ **Negligent misrepresentation.** Negligent misrepresentation requires a false statement made without reasonable care in a commercial or professional relationship, justifiable reliance, and resulting damages; liability generally extends only to persons the defendant intended or knew would rely on the information.

D. NUISANCE AND ECONOMIC TORTS

- ☐ **Private nuisance.** Private nuisance is a substantial and unreasonable interference with another's use and enjoyment of land; interference is unreasonable where the gravity of the harm outweighs the utility of the defendant's conduct, judged from the perspective of an ordinary person in the community.
- ☐ **Public nuisance.** Public nuisance is an unreasonable interference with a right common to the general public; a private plaintiff may recover only by showing harm different in kind from that suffered by the public at large.
- ☐ **Tortious interference.** Intentional interference with contract or with a prospective economic advantage requires a valid contract or business expectancy, the defendant's knowledge of it, intentional and improper inducement of a breach or disruption, and resulting damages.

E. VICARIOUS LIABILITY

- ☐ **Respondeat superior.** An employer is vicariously liable for the tortious acts of an employee committed within the scope of employment; intentional torts fall outside the scope unless force is inherent in the work or the conduct is motivated to serve the employer.
- ☐ **Independent contractors.** A principal is generally not liable for the torts of an independent contractor, except where the activity is inherently dangerous or the duty is non-delegable.
- ☐ **Other relationships.** A car owner is not liable merely for lending a vehicle absent a family purpose or negligent entrustment; joint enterprise participants and, under some statutes, parents for a child's willful acts, may face vicarious or independent liability.