Essentials for Success In Law School Torts

A black-letter law approach to the essential rules of law for succeeding in first-year law school Torts
INTRODUCTION

Success in law school is hard-work and results from a combination of factors:

- Memorization of rules of law
- Application of FIRAC
- Analytical reasoning
- Diligence, perseverance and commitment

In this book we will orient you to the fundamental and foundational Black Letter rules of torts, the FIRAC technique, and the keys to sound analytical reasoning techniques.

The diligence, perseverance and commitment are your choice.
The Case-Book

In your first year of law school your main “textbook” is a casebook and your primary assignments are to read cases. These cases are based on real litigation in which two or more parties with a dispute went to court to seek a resolution. The dispute is usually resolved by a judge (or panel of judges) or a jury with an opinion issued by the court.

The Socratic Method

You have probably heard the term Socratic Method applied to law school teaching. In law school, the professor will ask you questions to extract and test your understanding of the facts, issues, rules of Law, analysis and judicial holding (conclusion) of the case. The Socratic Method is an approach to teaching based upon asking for information, rather than giving information. This places the burden on the learner - you - to learn from your own reading.

Hint:
Under the case-book method of legal study, you read cases and then apply FIRAC so that you can identify the elements necessary to succeed when applying the Socratic Method.
TORTS

Since the Socratic Method is based on learning by identification and application of the FIRAC elements, case-briefing becomes a very important tool for success in your first year of law school.

Case Briefing

Case-briefing is not required by your professors in law school. It is a method that is used predominantly by first year law students to help them organize the cases they are reading in preparation for answering questions in class.

When reading a case, you are reading the judicial opinion of a judge or court. The case incorporates the:

- Material facts of the case (Facts)
- Issue or issues before the Court for decision (Issues)
- The rules of law that the judge is relying upon in issuing his or her decision (Rules)
- The Judge’s analysis and reasoning upon which he or she is issuing the decision (Analysis)
- The Judge’s decision (Conclusion)
Since most cases are not written with the FIRAC method in mind, it is often a difficult and daunting task to extract the material facts, the issues, the primary rules of law and then focus on understanding the analysis and conclusion. This is essential, however, so that you can present these aspects of the case in an organized and coherent manner when called upon by your professor in class. Remember, the Socratic Method emphasizes your professor asking you questions - so your job in class is to answer questions.

What then is the most effective way to organize the FIRAC points?

A case brief allows you to prepare, for yourself, notes from the case that highlight the FIRAC elements. For example, when reading a case, you want to look for the material facts and the primary rules of law. Often law students will use different color highlighters to mark these different FIRAC elements as they are reading through the case. In addition, since the Socratic Method places you in the “hot seat,” you do not want to be flipping through the case book trying to find all of the pink highlighting which represents the facts (since these are often scattered throughout the case). You want an
organized piece of paper - a brief - that allows you to quickly and easily find the information.

The case brief, as it is called, is really an outline that allows you to summarize the:

- Material Facts
- Rules of Law
- Issues
- Court’s Analysis
- Conclusion

The case brief should be short - preferably one page.

The case brief should be written in paragraph form with simple, easy-to-read statements.

The case brief should have headers and should be organized according to the FIRAC system: facts, issues, rules, analysis, and conclusion. The case brief is only useful if it is accessible, since when you are called on in class, the pressure is on and you want to have quick access to your answers.
As you will learn from your first semester in law school, you may also want to make sure to note - in this case “brief” - the date of the case, the court, any dissenting opinions, and other relevant and useful information to gain a better understanding of the court’s decision.

You will need to determine your professor’s style and approach and his or her expectation when you are called upon in class. The whole goal of briefing cases is to prepare you for answering questions in class and succeed in conquering the Socratic Method.
In law school torts, your primary focus is on the substantive principles of common law and the Restatement of torts. It is important to remember that in law school torts the goal is not to teach you the practical principles of tort law, but to teach you to think about identifying issues and memorizing rules of law so that you can excel on law school exams, and ultimately the Bar exam.

It is, therefore, the focus of this book to provide you with the more important principles – the “Essentials” - of black letter law so that you can identify issues, memorize rules of law and elements of causes of action, and develop a FIRAC approach for law school exams.
INTRODUCTION TO TORTS

In law school the study of torts encompasses civil actions for damages or injuries to a person or his or her property. There are three primary categories of torts that you will be exposed to in your first year of law school.

The categories of torts are:

- Intentional torts
- Negligence
- Strict liability

You will find primarily in your second semester (although it varies with the law school and law professor) that law school torts will also provide you with exposure to product liability, defamation, libel, and other types of business torts.

The main focus of this book is to familiarize you with the black letter principles of intentional torts, negligence and strict liability. Product liability is often a separate course that is offered in law school as an elective, even though many second semester law school torts classes cover certain aspects of product liability.
In considering the historical development of tort theory, it is important to note that tort theory is founded upon the basic premise that:

1. Individuals should not be intentionally injured by another person, or his or her property
2. Nor should a person be exposed to unnecessary or unreasonable harm

Part 1 in the above definition focuses on the area of intentional torts. Part 2 provides more of a foundation for the concept of negligence. In discussing strict liability, there neither needs to be intent on the part of the harming person, nor does there need to be unreasonable exposure to harm. Rather, in strict liability, the action in and of itself creates a liability. In the discussion of strict liability we will become familiar with those areas of exposure that result in strict liability acts - apart from intent as an element of the cause of action.
INTENTIONAL TORTS

An intentional tort is defined by Black’s Law Dictionary, as “a tort that is committed by a person who intends to commit a wrong or harm against another person, or a person who fails to exercise a particular degree of care towards another person.”

You will notice from this definition that the word “intent” is paramount in finding an intentional tort. You will also note that there must be some type of intentional interference with an individual or his or her property.

In order to establish a cause of action for an intentional tort it is necessary that a Plaintiff establish that the Defendant actually intended to commit an act and that the act caused harm to the Plaintiff.

For law school purposes, terminology is very important and you will discover that the terms Plaintiff and Defendant are used in the litigation environment. Since torts is driven by a civil wrong committed by one person against another person, a cause of action for a tortious act normally finds itself in the civil litigation environment.
The Plaintiff, therefore, is the person against whom the wrong was committed, and the Defendant is the person who is accused of committing the wrongful act.

In determining whether or not the Defendant committed a wrongful act, there must be a voluntary, intentional decision on the part of the Defendant to commit (or in certain instances, refrain from committing) an act. This requires that the Defendant voluntarily engage in the wrongful act or conduct. In summary, there needs to be some type of voluntary action on the part of the Defendant.

In determining intent, it is important to consider the Defendant’s state of mind. Intent requires a cognizant act on the part of the Defendant to produce a certain consequence from his or her actions. Intent therefore, requires that the Defendant desired a certain result, or reasonably knew that a certain result would occur as a consequence of his or her action.
In analyzing intent for the purposes of determining whether or not the elements necessary to establish a cause of action for an intentional tort are present requires a discussion of two types of intent: **specific intent** and **general intent**.

In defining specific intent, the Defendant not only must intend the consequences of his or her conduct in committing the act, but the purpose of the act must be to bring about the particular harmful consequences.

In defining general intent, the Defendant still needs to intend the particular consequences of his or her conduct. The difference is, instead of the “consequence of the act” being the primary purpose of his or her act (as it is in specific intent), in general intent, the Defendant knows, with substantial certainty, that his or her actions will produce certain consequences. It is important to note the distinction between the two types of intent, in that in defining general intent, the Defendant need not necessarily intend a specific injury to a person, but rather intend a particular consequence to occur as a result of his or her actions.
For example, a Defendant bumps into a Plaintiff intending to push the Plaintiff out of the way and the Plaintiff falls down and breaks a leg. Even though the Defendant did not intend for the Plaintiff to break a leg, the Defendant knew, with substantial certainty, that bumping into the Plaintiff could result in the Plaintiff falling down. Therefore, the Defendant would be Liable for the broken leg even though that was not an intended injury or intended result of the Defendant’s actions.

It is important to note as well in the discussion of intent, the doctrine of transferred intent. Transferred intent occurs when the Defendant intends a particular action or consequence towards the Plaintiff, but instead, a third party suffers the results of the Defendant’s intended action. For example, a Defendant aims a sling shot at the Plaintiff intending to launch a rock and hit the Plaintiff. Instead, because of the Defendant’s bad aim, he or she hits a person standing near the Plaintiff. The Defendant will still be liable for the consequences to the third party (who is now the injured party) under the doctrine of transferred intent, even though the Defendant did not intend to injure the person standing near the Plaintiff.
INTENTIONAL TORTS AGAINST A PERSON

There are four primary intentional torts that can be committed against a person. These are:

1. Assault
2. Battery
3. False Imprisonment
4. Intentional Infliction of Emotional Distress

Battery is an intentional tort that requires that the Plaintiff prove the following elements:

1. The Defendant committed an act
2. The Defendant intended to commit an act
3. The intended act brought about harmful or offensive contact with the Plaintiff or with something closely associated with the Plaintiff
4. The intended act was the cause of the harmful or offensive contact
As with any rule of law, it is always important on a law school exam to identify the appropriate elements of the rules of law, and then apply the elements to the facts to develop reasoning and analysis.

Let us consider two examples.

In the first example, Mary and Peter are standing in a crowded New York subway. The train comes to an abrupt stop and Peter bumps into Mary. Mary is disturbed and offended by Peter’s bump and brings an action for battery against Peter. Will Mary be successful?

In analyzing the above fact pattern it is important to start with the applicable rules of law. The call of the question asks for a determination of whether or not Peter will be liable for battery. This requires a discussion of the elements necessary to establish a cause of action for battery and an integration of those elements of the rule of law with the facts to develop an analysis. As we discussed previously, the main elements in the rules of law for battery require an act, intent, harmful or offensive contact, and causation.
In this example there clearly is an act on the part of Peter; he bumped into Mary. According to the facts, it was offensive to Mary and the bumping caused the offensive contact. However, there is no intent by Peter to cause the harmful or offensive contact, in that he bumped into Mary when the train came to an abrupt stop.

Now let us consider another example. Peter is walking down the street in a very bad mood. He is looking for a way to vent and chooses to bump into Mary (who is properly walking down the street), and then Peter will curse at her for failing to move out of his way. In this fact pattern, if the question was raised, can Mary bring an action for battery? What would be the answer?

The analysis would require the same approach as in the previous example. You would need to begin with a statement regarding the rules of law for battery and identify each element. You would then identify that the Defendant committed an act; he did bump into Mary. The act was harmful or offensive to Mary and was caused by his act of bumping into her. The difference between this example and the previous example, is that in this example, Peter intentionally sought her out to
vent. Peter intentionally bumped into Mary, and then used additional offensive words towards her. Therefore, in this example, the element of intent is present and Mary would be able to sustain a cause of action against Peter for battery.

It is important to remember in a discussion of the elements of the rules of law for the cause of action of battery that the harmful or offensive contact is with the person or property closely associated with the person. You will read cases in law school that will involve the purse that the Plaintiff is holding, or the scarf that the Plaintiff is wearing. The courts have determined that if the property is either attached to the person or so closely associated with the person (so as to be considered a part of the person), then the Defendant will be liable under a cause of action for battery for the contact with the item associated with the person.

It is also important to note, in the discussion of causation (as an element for a cause of action in battery), that the causation may be either direct or indirect. That is, if the Defendant initiates the act that results in the harmful or offensive contact, he or she will still be liable, whether the act is a direct cause or an indirect cause of the harmful or offensive contact.
Assault is another intentional tort. In order to establish a cause of action for the intentional tort of assault, it is once again necessary to establish the elements for assault. These elements are very similar to the elements for battery except that the main difference is that there does not necessarily need to be harmful or offensive contact, but rather the Plaintiff must have a reasonable apprehension of harmful or offensive contact, and it must be imminent.

Therefore the elements that must be established for a cause of action in assault are:

1. An act by the Defendant
2. Intent by the Defendant to bring about the act
3. Reasonable apprehension by the Plaintiff that there will be harmful or offensive contact and that such harmful or offensive contact is imminent
4. The Defendant intended by his or her act to cause the reasonable apprehension of the imminent harmful or offensive contact
As is evident from the elements for a cause of action for assault, there does not necessarily need to be physical contact. Rather it is the mental state of the Plaintiff in believing that there is reasonable belief that harmful or offensive contact is imminent. That is the key focus. Note that the key word is “reasonable.” If the Plaintiff is especially sensitive, paranoid, or has some other exaggerated belief that leads him or her to think there is imminent apprehension - when in fact a reasonable person would not determine an imminent apprehension - then the courts are reluctant to find this element satisfied and will not hold a Defendant liable for an act of assault.

Another distinguishing factor between assault and battery is that, as we have seen with battery, the Plaintiff does not necessarily need to be aware that there will be harmful or offensive contact, but rather, must suffer the harmful or offensive contact. In the cause of action for assault the Plaintiff needs to have knowledge, or a reasonable apprehension of the harmful or offensive contact. It is also important to remember that even if the Plaintiff believes he or she can defend against the apprehension of imminent harmful or offensive contact, the mere fact that there is a reasonable belief of
apprehension is sufficient to establish the element for purposes of finding a cause of action for assault.

The “imminent apprehension of harm” element is critical in the discussion of a cause of action for assault. For example, if a Defendant says to a Plaintiff “I am going to shoot you in 3 days unless you deliver $1,000.00 to me,” the Plaintiff cannot bring a cause of action for assault because the apprehension of harm is not imminent. It is also important to remember that the doctrine of transferred intent also applies to a cause of action based on the principles of assault. It is not necessary to establish damages in proving a cause of action for assault.
Another intentional tort is the tort of false imprisonment. This is an intentional tort that is committed directly against the person and requires an intentional confinement of a person without that person’s consent for an unreasonable period of time.

Once again, as with all intentional torts, in order to establish a cause of action, it is necessary to establish the elements for the cause of action. To establish a cause of action for false imprisonment the Plaintiff must establish that the Defendant committed an act to confine or restrain a Plaintiff within a designated, bounded area. The Plaintiff must also establish that the Defendant intended to confine or restrain the Plaintiff within that specific area. Finally, the Plaintiff must establish that the act of the Defendant was the actual confinement or restraint within that specified area.

It is very important in a discussion of false imprisonment to consider the definition of confinement.
What is Confinement?

There are two primary types of confinement. One type of confinement is that which is imposed by an actual physical barrier or by physical force. Another type of confinement results from threats of force, or psychological confinement.

Let us consider a few examples. Mary says to Joe, “I think we should take a cruise around the harbor.” Joe consents to go on the cruise. During the cruise, Joe decides that he does not feel well and wants to return to shore. Mary says “We cannot go back to shore. We are going to stay out here until I feel like going back and that might be a couple of days.” Can Joe bring a cause of action for false imprisonment against Mary?

In answering any “call of the question” it is important to remember that you want to begin with the elements of the rules of law and then discuss the elements that are applicable to the rules of law. The call of the question in this example is, “Can Joe bring a cause of action for false imprisonment against Mary?” In order to answer this question we need to establish that Mary actions satisfy the elements for the cause of action. Did Mary intentionally commit an act to confine or restrain Joe
within a specified area? Under these facts it is difficult to determine intent; although Mary did say they will stay there until she feels like returning. It is also difficult to find a specified area, in that Joe was free to move aboard the entire cruise ship, he just could not return to shore. The analysis, therefore, requires that you identify the elements for the rules of law and then develop reasoning that demonstrates your ability to apply the elements to the specific facts and develop analysis towards a conclusion.

In this example it is not apparent that Joe has been restrained in a confined area and therefore, it would be difficult to establish a cause of action for false imprisonment. In addition, in this example, if there is a reasonable means of escape, courts will find that there is not confinement to a specified area and therefore, there is no cause of action for false imprisonment. The question that then arises is, “Is there a reasonable means of escape?”
Is there a reasonable means of escape?

In order to determine if there is a reasonable means of escape, all of the facts and circumstances must be taken into account. In the above example Joe is on a cruise ship. We are not given facts as to the location of the cruise ship. If the cruise ship is still in the harbor, relatively close to shore, and the water is not unreasonably cold, and there are not sharks swimming in the water - then it may be that Joe has a reasonable means of escape and can jump off the boat and swim to shore.

These are the types of facts, albeit exaggerated, that you would want to seek out in forming your analysis and determining whether there is a reasonable means of escape so as to determine whether or not there is a cause of action for false imprisonment.

Shoplifting fact patterns or arrest situations often involve a discussion of the cause of action of false imprisonment. Many courts have held that a shopkeeper has a right to detain a person suspected of shoplifting for a reasonable period of time for the purpose of questioning without the confinement (even in a restricted area) being considered false imprisonment.
Legal authorities have also found the right to exist to hold a person for questioning within a confined area for a reasonable period of time if there is a reasonable ground or belief that the person has committed a felony.

In these situations, once again, the courts will not find a cause of action for false imprisonment.

Finally, in discussing a cause of action for false imprisonment it is important to note that the period of time of the confinement is not important. The fact that the Plaintiff does not resist any force against confinement is also not a necessary element for establishing the cause of action for false imprisonment. It is, however, necessary to establish that the Plaintiff was aware of his or her imprisonment and that the Plaintiff was, in fact, in a specifically designated, confined area, with no reasonable means of escape.
Another intentional tort against a person is the tort of intentional infliction of emotional distress. As with any intentional tort, the primary element is that of intent. In order for the Plaintiff to establish a cause of action for the tort of intentional infliction of emotional distress, the plaintiff must establish that:

1. The Defendant intended to act in a manner that would cause the Plaintiff to be exposed to extreme and outrageous conduct.
2. The Defendant intended that the Plaintiff suffer emotional distress as the result of his or her extreme and outrageous conduct.
3. The Defendant intended, as a result of the Defendant’s recklessness, that the Plaintiff would suffer extreme emotional distress.
4. The Defendant’s act caused (Causation) the result.
5. The Plaintiff suffered harm (Damages).
In discussing the tort of intentional infliction of emotional distress it is important to remember that often the Plaintiff does not suffer a physical injury. Therefore, some courts have been reluctant to award damages for the tort of intentional infliction of emotional distress.

The necessary elements for the tort of intentional infliction of emotional distress require extreme and outrageous conduct. It is obvious that the judicial interpretation will vary as to what constitutes extreme and outrageous conduct. Courts will often look for conduct that transcends all reasonable boundaries of decency within community standards. It is important to note that the test for extreme and outrageous conduct can vary from community to community and therefore all facts and circumstances must be considered.

On a law school or bar exam, the fact pattern will provide sufficient exaggerated facts so as to allow you to discuss the element of extreme and outrageous conduct in your analysis. It is important once again not to discuss emotional thoughts or feelings, but rather, use the facts and circumstances to support a well reasoned analysis that the Defendant’s conduct has gone beyond any reasonable norms of decency.
An important area in analyzing extreme and outrageous conduct is to note that often offensive or insulting language is not considered extreme or outrageous conduct. If a Defendant curses in an outrageously vulgar manner in front of a Plaintiff, courts have held that such insulting or offensive language does not constitute extreme or outrageous conduct. The primary exception in this area exists in situations in which the Defendant and Plaintiff have a special relationship. These relationships, such as a business or commercial relationship, will often be used to satisfy the exception to find a tort for intentional infliction of emotional distress based on the offensive and insulting language.

For example, if the desk clerk at a hotel barrages someone with offensive and insulting language, then the courts may deem that to be extreme and outrageous conduct because of the special nature of the relationship between the parties – a commercial or business relationship.
The courts will also find that if a Defendant has knowledge that a Plaintiff has a particular sensitivity, and then uses that knowledge to engage in intentional conduct toward the Plaintiff, such conduct may be deemed extreme and outrageous because of the Defendant’s special knowledge of the Plaintiff’s sensitivity.

For example, if the Defendant and Plaintiff are good friends and the Defendant knows that the Plaintiff has an abhorrence and intolerance to insulting, cursing language and the Defendant intentionally engages in such language in front of the Plaintiff, then because the Defendant knows of this sensitivity, the Defendant may be held liable for intentional infliction of emotional distress - if the other elements are satisfied as well.

It is important to note that since intentional infliction of emotional distress is an intentional tort, the obvious first element that must be established from the fact pattern is - intent. It is also important to note that the Defendant may be held liable for reckless conduct if he or she is acting in such a manner that demonstrates a disregard for any possible tortuous outcome or consequence.
Causation is another element that must be established in a claim for intentional infliction of emotional distress. It is, therefore, important to search the fact pattern to establish that the Defendant’s conduct resulted in emotional distress to the Plaintiff. It is also possible to establish that the Defendant’s conduct resulted in physical or emotional distress to a close relative of the Plaintiff, rather than the Plaintiff, and still hold the Defendant liable for the tort of intentional infliction of emotional distress. Finally, the Plaintiff must establish harm or damage.

For example, if the Defendant engages in outrageous and reckless conduct towards the Plaintiff and the Plaintiff’s 16 year old daughter is standing next to her and the daughter suffers physical injury or emotional injury as a result of the Defendant’s extreme and outrageous conduct, the Defendant will be liable not only to the Plaintiff, but to the Plaintiff’s daughter, as well.
INTEGRATIONAL TORTS TO PROPERTY

In addition to the intentional torts to person, which we have discussed in the previous chapters, there are also intentional torts to property. One of the more popular intentional torts to property that you will discuss in law school is the intentional tort of trespass to land.

The tort of trespass to land requires that the following elements be established:

1. A physical touching or invasion of the Plaintiff’s property.
2. Intent to touch or invade the Plaintiff’s property.
3. Causation.

Let us consider an example. If Johnny is playing ball on his lawn and the ball accidentally lands on the lawn of his neighbor, can Johnny be held liable for trespass to property?
Can Johnny be held liable for trespass to property?

In analyzing the above facts you need to start with the call of the question. The call of the question is, “Can Johnny be held liable for the tort of trespass to property?” In order to answer this question, you need to establish the elements for trespass to property. Since this is an intentional tort, the first element is intent. Notice from the fact pattern that the ball accidentally went from Johnny’s lawn to the neighbor’s property. As a result, it is obvious from the facts, that Johnny did not intend to physically touch or invade the land of another. Therefore, the element of intent is not present, so there is no further need for analysis and you can conclude that Johnny would not be liable for the intentional tort of trespass to property.

In another example, if Johnny is standing on his lawn and he is intentionally throwing rocks onto his neighbor’s lawn, you can see immediately that the fact pattern has changed and the key element of intent is present. You would therefore enter into the same analysis by beginning with the elements of the rules of law and establishing the necessary elements for the intentional tort of trespass to property. You would then apply each
element to the facts to develop an analysis and reach a conclusion.

It is obvious in the second example that Johnny’s intent is established because the rocks physically invaded the land of another and Johnny’s throwing the rocks was the cause of the invasion. You can see that all three elements are apparent from the facts, and therefore, you can conclude that, in this instance, Johnny would be liable for the intentional tort of trespass to property.
TRESPASS TO CHATTELS

Another intentional tort to property is intentional tort of trespass to chattels. The elements necessary to establish a tort for trespass to chattels are:

1. The Defendant acts in such a manner as to interfere with the Plaintiff’s right to possession of a thing - “chattel.”
2. The Defendant intends to interfere with the Plaintiff’s right of possession of the chattel.
3. Causation.
4. Damages.

The word “chattel” (for tort purposes), merely means a “thing.” A thing is usually regarded as personal property. Therefore, in discussing a trespass to chattel tort, it is important to establish from the facts that the Defendant actually interfered with the Plaintiff’s right to possess some aspect of his or her personal property - the “chattel.”
Since the tort of trespass to chattel involves the interference with the right of possession, the courts have concluded that any interference with the right to possession will constitute a trespass to chattel. The Defendant does not need to dispose the owner entirely of his or her chattel in order to be held liable for a trespass to chattel. Rather the Defendant must merely interfere with the Plaintiff’s right to possess his or her property.

Mistake as to ownership of the chattel is not a defense for liability for trespass to chattel. For example, a famous case you will read in law school involves two individuals that are in a pub. It is a rainy night and the individuals have entered the pub, placed their umbrellas and jackets in the entry way of the pub, and have taken their respective tables. The Defendant, in this case, leaves the pub and takes what he believes to be his umbrella and jacket. He walks a few blocks and realizes that in fact he has taken the wrong umbrella and jacket. In this instance, if the Plaintiff was to bring a cause of action for the tort of trespass to chattel you would need to establish the elements for the applicable rules of law, apply them to the fact pattern, develop an analysis, and reach a conclusion.
Since the tort of trespass to chattel only requires that the Defendant interfere with the Plaintiff’s right to possession of his personal property, the fact that the Defendant was mistaken is not relevant. Rather, it is the fact that he left the pub with the Plaintiff’s personal property, and therefore, interfered with the Plaintiff’s right to possess his personal property, that is important. These are the types of facts that you would need to use to integrate with the elements of the rule of law; to establish a logical analysis and reach a conclusion that the Defendant might be held liable for the tort of trespass to chattel.

You may be thinking from the above example, “Wait a minute. It says that the Defendant took what he believed to be his umbrella and jacket and left the pub.” The question is “Did the Defendant intend to interfere with the Plaintiff’s right of possession?” I hope you caught this in the above fact pattern because, in fact, trespass to chattel is, remember, an intentional tort and therefore what is a critical element?
This is where it is important to closely consider the elements of the applicable rules of law. If you review the elements, you will note that the Defendant’s intent must bring about the interference. Under these facts, you would need to determine whether or not the Defendant intended to interfere with the Plaintiff’s right of possession.

As you can see, it is easy to become involved with the facts and to apply the rules of law without specifically focusing on the exact terminology, and therefore, possibly reach an incorrect conclusion as the result of an incorrectly developed analysis.

Since the interference by the Defendant (with the Plaintiff’s right to possess his or her chattel) must be caused by the Defendant, and the Defendant must have intended to cause the act, you would need to consider the facts and recognize that since the Defendant had a mistaken belief that the chattel or property (i.e., the umbrella and jacket) were his, and since mistake is not a defense, that, in fact, the Defendant could be held liable for the cause of action of trespass to chattel.
Another intentional tort to property is the tort of conversion. Conversion is similar to trespass to chattel except with the primary difference being that in a cause of action for conversion, the interference with the right to possession is normally not sufficient to establish the cause of action. Rather, the interference must be serious enough, so that in essence, the interference with the chattel is complete control of the chattel or its destruction.

Before we consider an example, we need to consider the elements that are necessary to establish a cause of action for conversion.

The elements necessary to establish a cause of action for conversion are:

1. An intentional act by the Defendant.
2. The intentional act by the Defendant interferes with the Plaintiff’s right of possession in the chattel.
3. The interference is of a serious and substantial nature so as to render the chattel useless or valueless.
4. The Defendant needs to compensate the Plaintiff for the full value of the chattel because the chattel is totally destroyed or rendered useless.

5. Causation.

Let us continue with a discussion of the above example from trespass to chattels where the Defendant leaves the pub with the Plaintiff’s jacket and umbrella and begins walking down the street. Now, however, the Defendant realizes, in a fit of fury, that it is not his umbrella and jacket and tears the jacket off him and takes the umbrella and tosses both of them into the rain-soaked street. A truck coming down the street runs over the jacket and umbrella and destroys them. You can immediately see the change in facts moving the cause of action from trespass to chattels in the previous chapter, to conversion of chattel.

If the facts in this illustration seem ridiculous to you, that is a good sign, because in many of the cases the fact patterns (particularly on law school and bar exams), will be ridiculous and outrageous. This is for the purpose of drawing you into either an emotional or policy-driven argument, rather than, a legal argument.
Never allow the facts to draw you away from the specific elements of the rules of law and the application of those elements to the facts to develop a well-reasoned analysis.

In the above fact pattern, the primary difference between the facts in the example for trespass to chattels and these facts, is that the jacket and umbrella are basically now rendered useless. As a result, it is apparent that the Defendant’s intent to interfere with the Plaintiff’s right to possession of his umbrella and jacket “which would be sufficient to establish a cause of action for trespass to chattel” has now risen to the level of the tort of conversion. This is because the interference is now serious enough to destroy or render the chattel useless, and therefore, result in compensation for the Plaintiff for the value of the destroyed chattel.

In law school and on the Bar exam, you will be given fact patterns that will require you to distinguish between the torts of trespass to chattel and conversion. Since the torts are similar - the key distinguishing fact in most fact patterns is - for a tort of conversion, the chattel will have been destroyed or rendered useless. Therefore,
remember to carefully consider the facts and view them in the context of the elements of the rules of law so that you can, in your analysis, develop a thorough discussion which demonstrates to your professor or Bar examiner that you understand the difference between the elements for the rules of law for a trespass to chattel and conversion. It is also helpful to be able to demonstrate in your analysis, that it is the destruction of the chattel that renders the tort of conversion applicable under the facts; whereas in the example, where the Defendant realizes he has taken the wrong umbrella and jacket and returns to the pub to return them, is merely a tort for trespass to chattel.
DEFENSES TO INTENTIONAL TORTS

There are many defenses that are applicable for a Defendant when he or she is charged with an intentional tort by a Plaintiff. The most common of these defenses are:

1. Consent
2. Self-defense
3. Defense of others
4. Defense of property
5. Necessity

Consent

The defense of consent may be used by a Defendant to establish that the Plaintiff, in fact, consented to the intentional tort. For example, in a tort for battery, if a Defendant can establish that the Plaintiff consented to the Defendant’s contact or touching of the Plaintiff, then the tort of battery can be defended by the Defendant with the defense of consent.
Self-Defense

Self-defense may be asserted by a Defendant to establish (for example, in a battery), the Defendant needed to defend him or herself and that it was the defensive act that resulted in the unwanted touching or contact. The entire discussion surrounding self-defense is premised primarily upon a right to use only the force necessary to protect “self.” Self-defense is usually not permitted to be used as a defense when there is a reasonable means of escape or averting the harmful contact that could result from the self-defense.

Defense of Others

Defense of others is another difficult defense to establish, but nevertheless, may be used by a Defendant to negate a cause of action for an intentional tort. For a Defendant to assert the defense of others, he or she must have a reasonable belief that the other person (third-party) would have had the right to use self-defense in the same situation.
Defense of Property

Defense of property is also a defense to an intentional tort. As with all of the previous discussions regarding defense in general, it is important to establish that there is a reasonable need that reasonable force may be used as a defense. A Defendant may use the defense of defense of property if he or she reasonably believes that reasonable force is necessary to prevent a tort against his or her property. The defense of property is only permitted when the Defendant believes that it is necessary to use reasonable force to prevent the actual tort being committed against his or her property.

Therefore, defense of property is not permitted once the interference with the Plaintiff’s right to his or her property has already been committed by a Defendant.
Necessity

Another defense that is available in the area of intentional torts is that of necessity. There are two primary types of necessity:

1. Public necessity
2. Private necessity

Public necessity exists for the public good. Private necessity exists for the protection of a private individual’s person or his or her property. For example, if a driver is driving down the street and to avoid hitting a child running into the street, he enters the property of a third-party; although, the third-party can argue that there was an interference with his or her property rights - which was intentional on the part of the driver when he intentionally drove onto the property - it is clear that the driver acted in such a manner, out of necessity, so as to avoid hitting the child. Therefore, necessity could be used as a defense, although if the defense is private necessity, the driver may still be liable for damages.
NEGLIGENCE

Negligence is probably one of the most important areas in first year torts. You will spend a substantial amount of time reading cases pertaining to negligence, with a particular emphasis on the element of causation. It is very important in any analysis of a cause of action to establish the elements of the rules of law for the cause of action. However, with negligence, it is particularly important to pay attention to the element of causation. You will see from reading your cases in law school that there are many different views and interpretations regarding the element of causation; there are also many different types of causation.

In order to establish a cause of action for the tort of negligence, you must establish the following elements:

1. Duty
2. Breach
3. Causation
4. Damages
Duty

The discussion of the element of duty requires that you start from the foundational premise that everyone owes a duty to another to exercise reasonable due care. This is the foundation for the discussion of the element of duty in negligence. There are, however, duties that arise because of the relationship between the Defendant and the Plaintiff, or between certain classifications of parties.

One of the important aspects of developing an analysis for a cause of action for negligence, begins with identifying if there is any special relationship that exists between the parties, and then, using that relationship to determine the standard of care for purposes of discussing the element of duty. Remember, the initial standard of care is a reasonable duty of due care, and that duty can be extended and increased depending upon the relationship between, and classification of, the parties.

There are three primary types of classifications that you will be exposed to in law school torts. These classifications are important for determining the standard of care and analyzing the element of duty.
The three primary classifications are:

1. The duty owed to a trespasser.
2. The duty owed to a licensee.
3. The duty owed to an invitee.

A Trespasser

A trespasser, as we know from the tort of trespass, is one who intentionally enters or touches the land of another without permission or consent. Therefore, the duty of care that is owed to a trespasser is usually only the foundational duty of the standard of due care. Therefore, if a landowner has particularly dangerous conditions on his or her property, the landowner is not under a heightened duty to disclose those risks to a potential trespasser.

It becomes trickier, however, when the landowner knows of a particular danger or risk and knows, in fact, that there are trespassers entering his or her property. In that instance, the landowner, upon discovery of the trespassing, has a heightened duty to warn the respective trespassers of the dangerous conditions. This might, for example, require that the landowner place a
sign on the property stating, “beware of giant, gaping hole ahead,” so as to warn the known trespassers - even if the landowner does not know the trespasser’s identity.

In any fact pattern where there is a child trespasser, it is important to see if the attractive nuisance doctrine is applicable to raise the standard of care. The attractive nuisance doctrine is popular on law school and bar exams. You will usually have facts where children are trespassing on empty property or property under construction because there are “dangers” on the property that entice the children, such as large mounds of rock or dirt, on which the children may be enticed to play.

In analyzing the applicability of the attractive nuisance doctrine, it is important to look for what is known as an attractive nuisance on a landowner’s property. This “attraction” would typically be something that would entice a child to think it would be fun to enter onto the land to play, but in fact, the risk to the child is a result of the state of the landowner’s property, and therefore, the landowner can be held liable for the damages that result to a child trespasser who is attracted to the landowner’s
property because of the “attractive nuisance” on the landowner’s land.

Licensee

Another classification that raises the foundational duty of due care is that of licensee. A licensee is one who has the right to enter onto the land of another, but it is normally for the licensee’s own purpose or a social purpose. Therefore, the primary distinguishing factor (for law school purposes), is that a licensee is someone who has a social or personal relationship with the landowner and an invitee, as we will see later in this book, is one who has a commercial or business relationship with the landowner.

If the classification is one of licensee, and is for a social or personal purpose, then the standard of care - or the duty - that the landowner owes to the licensee is to warn the licensee of any known dangerous conditions.

For example, if Susan has a loose floor board in her apartment and she knows that the loose board has caused people to trip and fall in the past, when her friend Ralph comes to visit, she has a duty to disclose to Ralph (who is a licensee), the condition of the floor. If
she fails to disclose the condition of the floor, she can be found to have breached her duty of care and if the other elements necessary to establish a cause of action for negligence are present then she will be liable for damages caused by her failure to warn of a known danger.

Invitee

Another classification that raises the foundational duty from due care to a higher standard pertains to an invitee. As we have discussed earlier, an invitee is one who normally enters the property of another for commercial or business purposes. The duty of care towards an invitee is increased in that an invitee is entitled to an expectation that the landowner will make a reasonable inspection of the property so as to become aware of any known or non-obvious dangers, and to make any necessary disclosures to the business invitee.

The landowner, therefore, owes a heightened duty of care to an invitee to use reasonable and ordinary care to keep the property safe, and to inspect the property for any possible dangers. If there is an obvious danger, then the landowner does not need to warn the invitee of the
danger because it will be deemed obvious by all of the surrounding facts and circumstances.

You will see as you read cases in law school that there are many sub-categories of trespasser, invitee, and licensee. It will become particularly important to become familiar with the sub-classifications and the special rules that apply between different types of commercial and personal relationships as they relate to the invitee and licensee.

One of the sub-classifications that require a heightened level of duty arises in the landlord – tenant arena. It will become important for you to note that the basic duty of a landlord to a tenant “or a lessor to a lessee” is for the lessor to warn the lessee of any existing defects or known hazards on the property. The landlord also has a duty to repair any reasonably known dangerous conditions that exist on the property.

This is just one example of a sub-classification. It is important when reading the cases to always identify the parties in the context of their business or personal situation and/or relationship so that you may classify them properly and then apply the proper standard of care.
Since the first element that must be established in a cause of action for negligence is duty, it is important to establish that the Defendant owed a duty to the Plaintiff and understand how a duty is developed. A duty, as we have seen from our previous discussion, is developed not only from a special relationship or classification between the parties, but it can also arise because of a custom or community standard.

For example, a duty can arise from a rescue situation in which a rescuer may have a particular duty of care because he or she enters into the rescue situation. Please note that a professional rescuer, such as a lifeguard or a fireman, is already operating under a heightened standard of care because of his or her professional duties. When discussing the standard of care for a rescuer, you will want to ascertain from the facts whether or not the rescuer is a passer-by (a good Samaritan) or a professional rescuer, since the standard of care is different for each.
Another way in which a special duty and standard of care arises, is by statute. There are statutes that will impose particular duties upon certain classifications or groups of persons. For example, the professional rescuer, or those in a commercial context operating hazardous machinery or equipment, will have a higher standard of care.

In addition, a failure to act may also give rise to a duty. There are special relationships in situations where there is an affirmative duty to protect or act on the behalf of another party, and the failure to act, will give rise to a failure to perform a particular duty. For example, if one person has placed another person in danger, he or she may have an affirmative duty to act to prevent any resulting harm, and any failure to act, may give rise to a failure to perform a specific duty.
Breach of Duty

Once a duty has been established, the failure to perform that duty according to the requisite standard of care will result in a breach of duty. Therefore, in analyzing any fact pattern, once you have identified the relationship between the parties and classified the relationship such as to identify the duty, you then need to analyze the facts to see if the Defendant performed his or her duty according to the appropriate standard of care.

If the Defendant did not perform his or her duty according to the appropriate standard of care, then you may conclude that there is a breach of duty and move onto the next element necessary to establish a cause of action for negligence - causation.
Causation

As we just mentioned earlier, causation is probably one of the most complex and most important elements for establishing the cause of action of negligence. You will read many cases in your law school casebook pertaining to the variances and nuances in the element of causation. Causation basically requires that the Plaintiff establish that the Defendant’s act (or failure to act) was the actual and proximate cause of the Plaintiff’s injury.

You will immediately note the terms, “actual and proximate cause.” Whenever you see specific terminology, it is critical to define that terminology in the context of judicial interpretations gleaned from reading the cases in your casebook. It is wise for law school and bar exam purposes to never impose a definition on a word, but rather, to use the definition that has been derived from the judicial interpretations of the cases you are reading for a particular area.

Actual cause is generally defined as a Defendant having acted, in his or her conduct, in such a negligent manner that his or her actions were a contributing factor to the Plaintiff’s injury. Since the general definition of causation requires actual and proximate cause, the fact that the...
Plaintiff can prove that the Defendant’s actions were the cause of the Plaintiff’s injury is not an end in itself. The Plaintiff must also establish that the Defendant’s actions were the proximate cause of the Plaintiff’s injury.

Before we move onto a discussion of proximate causation, it is important to note that there are two basic tests in determining whether the Defendant’s actions - his or her negligence - were the actual cause of the Plaintiff’s injury. The first test is known as the “but for” test. The second test is known as the “substantial factor” test.
What is the “but for” test?

The “but for” test basically requires that the Defendant’s act - or in certain instances the defendant’s failure to act - has resulted in the injury, and that the injury would not have occurred “but for” the Defendant’s act, or failure to act.

The “substantial factor” test usually requires that the Defendant’s action contributed substantially to the Plaintiff’s injury. This raises the issue of what happens when one or more individuals or actions contribute to a particular injury.

This is where causation can become very complicated. In a discussion of causation there are **concurrent causes**, **intervening causes**, and **superseding causes**. You will often see on law school and bar exams very convoluted fact patterns where there is a chain of events that results from a Defendant’s particular action. For example, let us consider the following example:

John is seated 2 rows in front of Mary in a classroom. Mary is drinking a very hot cup of coffee, which is permitted during class. John is day-dreaming and the classroom is rather full of students surrounding
both John and Mary. John, in his day-dream, becomes frightened and jumps up, falling backward into Mary, causing Mary to spill her very hot coffee all over herself. As a result, Mary leaps up yelling and screaming as a result of her burns and heads towards the door to leave the classroom. On her way out the door, a fellow classmate, whose leg is extended in the aisle, causes Mary to fall, knocking her head and resulting in a concussion. Mary, who is lying unconscious, is rendered aide by another student in the class while another one dials 911. The student rendering aide picks Mary up and in doing so, dislocates her knee. When the paramedics arrive, they are unable to revive Mary. They place her in the ambulance and on the way to the hospital, the ambulance is struck by a drunk driver, killing all inside the ambulance.

If you are laughing at the facts, note once again that fact patterns on law school and bar exams are normally exaggerated so as to provide you with sufficient information to engage in a detailed discussion – in this case – a discussion of causation. In order to even approach this fact pattern you need to clearly identify the many events that have now contributed to Mary’s death.
The initial causation question is, “Who is liable for Mary’s death?” Is it the student who was day-dreaming? The student whose leg was in the aisle? The drunk driver who crashed into the ambulance? All of the above parties? Some of the above? None of the above?

This is where the analysis of causation and the identification of proximate cause, contributing cause, intervening cause, superseding cause, concurrent cause and the like need to be addressed and discussed in detail.

The following rules will give you a foundational introduction into the various types of causation and how you would need to apply the rules of law in order to discuss this type of complex and convoluted fact pattern.
Proximate Causation

Once the element of actual cause has been established the Defendant must also establish proximate causation. Proximate causation is also known as “legal causation.” In any discussion of proximate causation, it is important to consider foreseeable events and intervening acts such as we have seen in the previous examples.

As we have seen, actual causation has two tests: the “but for” test and the “substantial factor” test. In the discussion of actual causation, the Plaintiff must establish that the “but for” in the Defendant’s action was a substantial factor that contributed to the Plaintiff’s injury. Proximate causation or legal causation can therefore be thought of as a limitation to the Defendants liability in that it will cut off the Defendants liability for certain foreseeable or certain intervening consequences, or causes that contributed to the Plaintiff’s injuries or damages.

The famous case you will read in law school focusing on proximate causation is known as Palsgraf. The majority opinion in Palsgraf was written by a New York Court of
Appeals Justice, Justice Cardozo. The case was written in the early 1900’s. The fact pattern of the case is interesting and basically involves a passenger who was carrying an unidentified package and was attempting to board a train. The train was already in motion and the train conductor went to assist a passenger, who was running towards the already moving train, to board the train. Now, remember this is the early 1900’s and the train is moving very slowly at this point. The train employee, in assisting the passenger to board the train, dislodged the package that the passenger was carrying. The package turned out to be explosives and when it hit the ground, the explosives created an explosion which jarred a heavy scale that was on the train platform, resulting in the scale falling and injuring another passenger that was standing on the train platform.

You can obviously see, since this is a real case, that the exaggerated and often bazaar fact patterns on law school and bar exams do actually arise from real cases. In this case, the issue was whether the injured passenger standing on the train platform could bring a cause of action against the railroad for the sustained injuries. In considering these facts, it is apparent that there are certain events pertaining to the element of causation.
The first event is that the passenger who dropped the package was carrying explosives. The second is that the train employee assisted the passenger and in rendering the assistance, caused the dislodging of the package, which caused the package to drop and the explosives in the package to explode. The explosion resulted in a large scale on the platform falling, resulting in the Plaintiff’s injuries.

We will not analyze this case since you will spend significant time doing that in law school, but it is important to note several questions. Is it reasonable for the railroad to have known that a passenger would be carrying a package of explosives when trying to board a train? Is it reasonable to expect that the railroad would know that the passenger would drop the package of explosives, and that in dropping the package of explosives, it would cause the large scale to fall and cause injuries to a passenger on the platform?

As you can see, there are many unanticipated and unexpected causes, as well as, intervening causes that may have “caused” the injuries to the Plaintiff. Therefore, in order to properly analyze this fact pattern you need to consider all of the causes, expected and
unexpected. In the majority opinion issued by Justice Cardozo, the issue of anticipated and reasonably foreseeable consequences was a primary item of discussion. In the *Palsgraf* case, there is an extensive dissenting opinion which raises important issues pertaining to the element of causation. In law school it is very important to read not only the majority opinion, but dissenting opinions as well.

The general rule of liability pertaining to proximate causation or legal causation is that a Defendant will be liable for any harmful consequences resulting to a Plaintiff if the consequences are foreseeable. The primary test in a discussion of proximate or legal cause is grounded in the **issue of foreseeability**.

In order to discuss foreseeability it is necessary to categorize causes into either **direct causes** or **indirect causes**.

In the discussion of a **direct cause**, there is normally an uninterrupted chain of events that will become apparent in a fact pattern with no external intervening cause of any kind.
In a discussion of **indirect cause**, there are normally intervening causes that are present and enter the fact pattern after the Defendant’s negligent action, so that when combined with the Defendant’s negligent action, there is a resultant injury to the Plaintiff.

In the discussion of **direct causation**, the Defendant will be liable for any foreseeable results and will normally not be liable for any unforeseeable results.

In a discussion of **indirect causation**, the Defendant will normally be liable for any foreseeable results that are caused by foreseeable intervening causes, but will not be liable for any unforeseeable results that are caused even by foreseeable intervening causes.

Once again, these rules become very complicated and it is very important to carefully consider and classify the acts in the facts as a direct cause or an indirect cause. It is necessary to make the following determinations:

- Is the act an intervening cause?
- Is the intervening cause foreseeable or unforeseeable?
- Is the intervening cause a dependent intervening cause or an independent intervening cause?
A **dependent intervening cause** is usually an anticipated response or reaction to a situation caused by the Defendant’s negligence. For example, in the previous illustration where the paramedics were rendering aide and placing Mary in the ambulance - that would be considered a dependent intervening cause. An independent intervening cause is one which can also be created by the Defendant’s negligence, but is primarily one that is not necessarily anticipated, nor reasonably foreseeable in contributing to the Defendant’s negligence and in increasing the risk of harm. For example, if the student with his leg in the aisle had intentionally placed his leg there to trip Mary, that could be considered and independent intervening cause.

In summary, these general rules will have many exceptions, so be careful to learn and focus on the exceptions as you read the cases in law school. These general rules apply:

1. If there is a direct foreseeable cause, then the defendant may be liable.
2. If there is a direct unforeseeable cause, then the defendant may not be liable.
3. If there is a direct unforeseeable cause in which there are foreseeable intervening causes, then the defendant may be liable.

Once again, in this discussion, you need to look at the intervening causes and classify them to see whether they are dependent or independent.

1. If there are foreseeable causes that result from an unforeseeable intervening action, then the defendant may be liable.
2. If there are unforeseeable causes that result from foreseeable intervening forces, then the defendant may not be liable.
3. If there are unforeseeable causes that have unforeseeable intervening actions as well, then the defendant may not be liable.

There are two additional rules that you will become familiar with in reading law school cases. The first is known as the Polemis rule. The Polemis rule, which is derived from case law, basically states that a Defendant will be held liable for all unforeseen consequences. This rule is not the current majority opinion, but nevertheless, on any law school examination it is always important to demonstrate your knowledge of the different rules and
to discuss - particularly when discussing causation - the historical development of the rules pertaining to causation.

The other rule you will need to become familiar with is the *Wagon Mound* rule. The *Wagon Mound* rule basically states that a Defendant will not be liable for any consequences resulting from his or her negligent action if the Defendant could not reasonably anticipate that such consequences would occur from his or her actions. The *Wagon Mound* rule historically contributed to the development of the concept of direct and indirect causation. Once again, it is important to note in any law school exam analysis the historical development of these rules and be able to define these rules by name.
Damages

In order to establish a cause of action for negligence - once you have identified a duty, a breach of duty, and causation – it is necessary to identify the damages or injury to the Plaintiff. In any discussion of damages in the tort of negligence, it is important to have actual harm or injury. There must be personal injury, injury to property, or a combination of both in order to establish the element of damages, and therefore, have all four elements to prove a cause of action for negligence.

In a cause of action for negligence, if the Plaintiff can establish duty, breach, causation and damages, then the Defendant will be liable to the Plaintiff for all the damages that resulted from the Defendant’s negligent actions. In a discussion of property damage, the damages are normally calculated based on the fair market value or cost of repair to the property.
DEFENSES TO A CAUSE OF ACTION FOR NEGLIGENCE

Once a plaintiff has established all four elements for a cause of action in negligence, a Defendant or Defendants may assert defenses. Depending upon the jurisdiction there are four primary defenses which may be asserted by a Defendant or Defendants in a cause of action for negligence. These are:

1. Contributory Negligence
2. Comparative Negligence
3. Assumption of the Risk
4. Last Clear Chance

Contributory Negligence

A Defendant may argue that the Plaintiff contributed to his or her own injuries and therefore the Defendant’s damages should be mitigated because of contributory negligence.
Contributory negligence, in some jurisdictions, has been replaced by **Comparative negligence**. In a Contributory negligence jurisdiction, if the Plaintiff has contributed to his or her injuries by his or her own negligence - even if it is only to the extent of 1% - then in a contributory negligence jurisdiction, the Defendant will not be held liable for the Plaintiff’s injuries based on the Defendant’s assertion of the defense of contributory negligence.

**Comparative Negligence**

If a jurisdiction uses the standard of comparative negligence, then the jurisdiction will consider to what extent the Plaintiff contributed to his or her own injury and to what extent the Defendant contributed to the Plaintiff’s injuries.

A comparative negligence jurisdiction will then assign, in considering damages, the percentages of “fault” (contribution to the injury) to the calculation of damages so that the Defendant is only liable for his or her percentage of contribution to the Plaintiff’s injuries.
For example, if a comparative negligence jurisdiction determines that a Defendant is 55% liable for a Plaintiff’s injuries, and the damages are $100.00, then the Defendant will only be liable for $55.00 to the plaintiff. This is because the Plaintiff has 45% of the liability and the Defendant’s assertion of comparative negligence serves as a defense to reduce the amount of the damages that he or she may owe the Plaintiff as a result of his or her negligent actions.

In thinking about comparative negligence it is important to remember that the amount of damages that the Defendant is liable for is diminished proportionately to the Plaintiff’s share of responsibility for those damages. There are some jurisdictions that use a modified comparative negligence theory which basically states that the Plaintiff will be limited in his or her recovery to situations where the “the Plaintiff’s” negligence is not as great as the Defendant’s negligence.
Assumption of the Risk

Another available defense to the cause of action for negligence is known as assumption of the risk. In discussing assumption of the risk, it is important to establish that the Plaintiff has voluntarily exposed him or herself to the known risks or consequences of particular actions and has specifically assumed those risks.

If the Defendant can establish that the Plaintiff has assumed a particular risk, then the Defendant’s duty to the particular Plaintiff is either negated or limited. For example, if a Defendant has warned a Plaintiff about a particular danger and the Plaintiff has ignored the Defendant’s warning, or stated by his or her actions or words that the Plaintiff is disregarding the Defendant’s warning, then it can be asserted that the Plaintiff has assumed the risk. If the Plaintiff has consequentially injured him or herself, the Plaintiff cannot assert a cause of action for negligence against the Defendant because the Defendant may be able to use the defense of assumption of the risk.
Doctrine of Last Clear Chance

Another defense which is applicable against a cause of action for negligence is known as the doctrine of last clear chance. The doctrine of last clear chance basically states that a Plaintiff has an affirmative duty to avoid any risk or injuries by placing her or himself in a position of peril in connection with a Defendant’s action.

For example, if a Plaintiff has an opportunity to escape harm, he or she must exercise that duty to escape and take the “last clear chance” to escape the harm, so as to avoid the negligent actions or conduct. If the Defendant can establish that the Plaintiff had such an opportunity and failed to take it, then the Defendant may successfully argue that the doctrine of last clear chance should negate the Defendant’s liability for negligence.
Another subject in torts that you will review in your first semester of law school is the area of strict liability. The primary difference between an intentional tort and strict liability is that there is no need to establish the element of intent. A Defendant will be held liable merely for performing the act, rather than for having intended the particular consequence of the act.

In order to show a cause of action for strict liability, there are four primary elements:

1. There must be an absolute duty that attaches to the Defendant.
2. The Defendant must breach that duty.
3. The breach of the duty must be the actual and proximate cause of the Plaintiff’s injury.
4. There must be damage to the Plaintiff’s person or property.
In a discussion of strict liability, there are three primary causes of action you will review in law school torts. These are:

1. The keeping and maintaining of dangerous animals
2. Abnormally dangerous activities
3. Defective or hazardous products

In establishing a cause of action for strict liability a Defendant will be found liable if the Defendant has a duty, breaches that duty, the breach of the duty is the actual and proximate cause of the injuries, and the Defendant did nothing intentionally wrong but rather entered into one of the activities that is deemed to be a strict liability tort.
The Keeping of Dangerous Animals

Strict liability attaches to a Defendant if he or she owns or maintains - what are considered dangerous animals - on his or her property or premises. Dangerous animals are classified into two primary categories: wild animals and domestic animals with known propensities towards dangerous activities.

If a person owns or keeps a wild animal, the owner or keeper will be strictly liable for the actions of the wild animal that result in injuries or damages to a Plaintiff. There are no additional burdens of proof pertaining to intent or knowledge if the animal falls within a wild animal classification.

A domestic animal with a known propensity towards danger is a household pet where the owner knows that the pet has a propensity towards a dangerous activity. There are certain animals that are considered to be domestic animals with known propensities for dangerous activity even if the owner is not aware of these propensities. These are for example, bulls, bees,
and other animals that are known to harm people or property.

If the owner of a domesticated animal knows that the animal has a propensity towards a dangerous activity for harming people, then the owner has a duty to maintain that animal in such a manner so as to mitigate or minimize the animal’s potential for harm. This would apply for example, if an owner has a dog and knows that the dog bites people. The owner then has a duty to keep that dog in a confined area or a protected area where it cannot bite or harm people.

As with a cause of action for negligence, you will see that strict liability requires a duty, breach of duty, causation and damages. Therefore, while an owner would be strictly liable in terms of the obligation of the duty - because of the classification of the type of animal - the Plaintiff would still be required to demonstrate a breach of that duty, as well as, causation, and damages.
Abnormally Dangerous Activities

The courts have determined that there are particular types of activities that constitute abnormally dangerous activities, and therefore, give rise to strict liability. These activities would include using explosives on a person’s property, or engaging in activities using ultra-hazardous materials, as well as, other types of dangerous activities.

Under a tort of strict liability for an abnormally dangerous activity, the Defendant must engage in a specialized and highly dangerous activity, and the Plaintiff must establish that the Defendant’s engaging in the specialized and highly dangerous activity gave rise to and caused the Plaintiff’s injuries.

For purposes of classifying specialized and highly dangerous activities, the courts will determine whether or not the activity involved a serious risk of harm to a person or property and whether or not the activity is one that normally cannot be performed without potential for risk or serious harm; i.e., using explosives.
As in any discussion pertaining to strict liability, establishing the element of causation can once again be difficult. Historically, you will read a law school case named “Ryland v. Fletcher.” In that case it was established that a Defendant who conducts a dangerous activity involving a non-natural use of his or her property may be strictly liable for any foreseeable consequences.

Once again, Ryland v. Fletcher is a case focusing on establishing the element of causation. The first Restatement of Torts, which is basically a collection of judicial interpretations that have been codified to present a theory of law, will limit liability for abnormally dangerous activities and require a finding of ultra-hazardous activity. The Restatement defines ultra-hazardous activities as those activities that “involve a serious risk of harm which normally cannot be eliminated by the exercise of due care and arise in a context that does not involve common usage.”

The Restatement 2nd is a codification that modifies the First Restatement of the Law of Torts, and changes the Restatement to an updated and modified version. The Restatement 2nd sets forth six primary factors that determine if an activity is abnormally dangerous. You will
want to consult the Restatement 2nd of Torts to become familiar with the elements or factors that are identified as constituting an abnormally dangerous activity.

It is important to note that product liability is an entirely separate area from strict liability, and while there are certain Statutes that will impose strict liability in a product liability scenario, product liability is a subject that will not be covered in this book. Product liability is usually offered as either a separate elective in law school or as part of a second semester torts class.

Remember that law schools and law professors will cover different subject matter in the first and second semesters and there are no specific, general rules. Therefore, there may be some professors and law schools that will address product liability in a first semester law school torts class.

In establishing a cause of action for strict liability for an abnormally dangerous activity, it is important to note that liability will be imposed for any injuries to the person or property resulting from the abnormally dangerous activity even if the plaintiff attempted to make the activity safe.
MISCELLANEOUS TORTS

There are many additional torts that you will cover in your first semester law school torts class and these are grouped according to different classifications. For example, there are torts that interfere with personal interests, such as defamation or invasion to the right of privacy. There is the tort of nuisance and other miscellaneous torts.

This chapter introduces you to the primary elements of the causes of action for some of these miscellaneous torts.

Misrepresentation

The tort of misrepresentation is a tort that is committed by one person against another - usually in the context of disregarding actual, material facts. There are two general categories of misrepresentation: intentional misrepresentation (which also is known as deceit) and negligent misrepresentation.
In order to establish intentional misrepresentation, or deceit, the Plaintiff needs to establish five elements:

1. The Defendant made an untrue statement as to a material fact.
2. The Defendant made the untrue statement with intent and knowledge of the statements untruth.
3. The Defendant had the intent to deceive the Plaintiff when making the statement.
4. The Defendant detrimentally relied upon the false statement.
5. The Plaintiff suffered damages.

In establishing a cause of action for intentional misrepresentation it is important that all elements are established. This requires that the Plaintiff establish that the Defendant not only intended to deceive in making the false statement, but knew that the statement was false. The Plaintiff must also establish that: the Defendant knew that the statement pertained to a material fact; the Plaintiff relied upon the statement to his or her detriment; the Plaintiff suffered injury or damage as a result of the reliance on the misrepresentation.
Negligent Misrepresentation

Negligent misrepresentation is similar to intentional or deceitful misrepresentation with the primary difference resting on the fact that the Defendant does not need to intentionally misrepresent a material fact, but rather can negligently misrepresent a material fact in a context in which the Defendant had a duty of reasonable care to transmit the information accurately. In a situation involving negligent misrepresentation, a Plaintiff needs to establish that the Defendant had a duty of care to acquire and transmit information accurately and failed to exercise his or her duty according to the standard of care.

Negligent misrepresentation is similar to a cause of action for negligence with the additional element of misrepresentation as to a material fact.

Defamation

Another area in torts which is deemed interference of a personal interest is the tort of defamation. The tort of defamation is defined as a statement communicated to another person that harms the reputation of that person.
A defamatory statement therefore can be classified as either libel or slander.

**Libel**

Libel is commonly considered as written defamation. Libel arises most commonly in a context when a person, in writing, harms the reputation of another by a statement or words in the writing.

**Slander**

Slander is spoken defamation. In order to establish a cause of action for slander, a Plaintiff must prove that the Defendant’s words were untrue and meant to harm his or her reputation. A Plaintiff cannot normally bring a cause of action for slander unless the Plaintiff can establish special damages rather than general damages.

Another important element in both slander and libel is the requirement that the statement must be made or published to a third person. The communication of the information must then, as a result, harm the Plaintiff.
A primary defense to a cause of action for defamation (either libel or slander) is the defense of truth. Truth is a complete defense. If the words spoken or written by the Defendant were - and it is not important whether the Defendant acted maliciously or not – true, then there is a defense to the cause of action.

There are also many other defenses to a cause of action for defamation and these defenses are known either as absolute privileges or qualified privileges. An absolute privilege normally arises in the context of a duty owed by the government. A qualified privilege normally arises in connection with defamation by a private individual, but a private individual who can assert a privilege for protection of his own interest, the protection of a third person, or the protection of a common interest.

The media can often assert the defense of privilege - under the First Amendment - for fair commenting and reporting of public proceedings. There are certain exceptions that apply to public officials or public figures. You will read many cases in law school pertaining to these privileges. For example, in the famous case of *New York Times v. Sullivan*. It was held that a public official
cannot recover damages for defamation unless a public official can establish malice.

In the case of celebrities and public figures, judicial interpretation has resulted in decisions that allow a Defendant to assert a privilege for defamation if the public figure or celebrity has placed her or himself in the public light, and therefore, sacrificed certain elements of protection that would be afforded an ordinary individual.

In a United States Supreme Court case named *Gertz v. Welch*, the court held that the *New York Times v. Sullivan* rule, which required a demonstration of malice on the part of the Defendant, be limited only to situations where the Plaintiff is a public official or public figure. This is another example of the importance of tracing the historical development of case law for law school and Bar exams, so that you can accurately discuss the appropriate cases and be familiar with how they have been modified and changed by subsequent cases.
Invasion to the Right of Privacy

Another type of tort that involves a personal interest is the invasion of the right of privacy. There are four basic types of invasion of right to privacy causes of action. These are:

1. Intrusion upon the Plaintiff’s physical seclusion.
2. Misappropriation of Plaintiff’s name or likeness.
3. Unwarranted disclosure of the Plaintiff’s private life.
4. Publications which place the Plaintiff in a false light in public opinion.

Intrusions upon the Plaintiff’s Physical Seclusion

Intrusions upon the Plaintiff’s physical seclusion normally include such activities as eavesdropping, spying, shadowing, persistent telephone calls, and other types of behavior that would not rise to the level of trespass by invading the plaintiff’s physical seclusion.
For example, this tort often arises when a fan interferes with a celebrity’s seclusion by spying on him or her on their property, following them around, etc.

**Misappropriation of the Plaintiff’s Name or Likeness**

In the invasion to right to privacy causes of action under the subcategory of misappropriation of the Plaintiff’s name or likeness, the Courts will often look to see if the Plaintiff’s name or likeness has been used in a commercial context by the Defendant, without the Plaintiff’s consent. For example, if a photograph is published in a commercial publication without the Plaintiff’s consent, this can constitute the tort of misappropriation of the Plaintiff’s likeness.

**The Unwarranted Public Disclosure of the Plaintiff’s Private Life**

The unwarranted public disclosure of the Plaintiff’s private life is similar to intrusion upon the Plaintiff’s physical seclusion, if, in fact, the information is not already in the public record and is disclosed without the consent of the Plaintiff.
The Tort of False Light

The tort of false light, which is also a type of invasion of privacy, is when the Plaintiff is placed in a false light in the public arena by the Defendant. This tort is similar to the tort of defamation. In order for a cause of action for placing the Plaintiff in a false light in the public arena, the Plaintiff must establish that the Defendant contributed to the Plaintiff certain conduct or other characteristics that place the Plaintiff unjustly and falsely in an objectionable light in the public arena.

Nuisance

There are certain types of actions that cause harm and are considered invasions of property. There are also certain invasions of rights that are classified as nuisances.

Nuisance is not necessarily a separate tort, but is grouped into categories, where the Plaintiff can demonstrate that the Defendant intentionally interfered with the Defendant in a manner that interfered with the Plaintiff’s right to use or enjoy his property.
In a private nuisance context, the Plaintiff must establish that there was a substantial and unreasonable interference with the Plaintiff’s right to use or enjoy his or her property. Note that the level of interference is substantial. Therefore, it is important to conduct a facts and circumstances analysis of what constitutes a substantial interference.

Public nuisance is similar to private nuisance, in the sense that there must still be a substantial interference with the right to use or enjoy property, but the focus is on the health, safety or property rights of the public at large, rather than a private individual.

Nuisance actions are often seen in the context of airplanes flying over homes or construction activity taking places in neighborhoods where there is excessive noise or activity and it rises to the level of a substantial or unreasonable interference to the use or enjoyment of property such that the Plaintiff cannot take advantage of his or her normal property ownership rights.
Vicarious Liability

In the discussion of all tort situations you want to be familiar with the term **vicarious liability**. Vicarious liability simply means that one person who commits a tort against another person can also be liable to a third party. One type of vicarious liability that may or may not be familiar to you is the doctrine of **respondeat superior**.

The doctrine of respondeat superior normally arises in employer, employee relationships. This doctrine states that an employer may be liable for the acts of his or her employee if the act is committed within the employee’s scope of duty. This is an important concept and you will study it further if you pursue electives, such as, employment law.

Another area in which there may or may not be vicarious liability is in situations involving a parent or child. In certain jurisdictions, a parent may be held liable for the willful and intentional acts of their minor children (up to a certain dollar amount). In these instances it is important to determine that the child is a minor. It is also important to become familiar with the specific law of the jurisdiction.
Another area where there may be vicarious liability is between husbands and wives. The question is whether or not one member of the family, such as the husband or wife, can be responsible for, or to another member of, the family. This area is known as intra-family tort immunities and is discussed in a limited context in first semester law school torts. This is an area that you will be exposed to in more detail if you take electives such as, family law.
CONCLUSION

The purpose of this book is to introduce you to the general rules of tort law and the essential black letter principles you will need to be successful primarily in your first semester of torts.

Every law school and every law professor is different. They choose different subject matter and different textbooks. Although there are many common themes found in the first semester of law school among professors and law schools, this book does not necessarily cover every major rule of law or area that your professor or you law school will cover in the first semester.

This book provides a source of information regarding the more important rules of law and topics in a manner that will help you put a context around those rules of law. It will help you begin to see a pattern for torts so that when you analyze a lengthy law school exam or Bar exam fact pattern, you will be able to develop a well-reasoned analysis that progresses in a logical and chronological order following FIRAC. This analysis will successfully produce an answer that is grounded in the elements of the rules of law and integrated with the material facts.
It is always useful to demonstrate on your law school exam or Bar exam your familiarity with the general rules of law as well as the modifications to those rules of law.

It is also important to point out an area, although it may not be important to the overall development of the analysis, so you can demonstrate your knowledge of a rule of law. However, it is not valuable to discuss rules of law that are clearly not applicable under the facts only for purposes of demonstrating your knowledge of those rules of law.

Remember the call of the question, which is the actual question that the fact pattern is asking you to answer, is where you must focus your attention and is what you want to ultimately answer when you are reaching your conclusion.

The most important element for your success in law school, for preparing for law school, or even preparing for the Bar exam, is to memorize the rules of law. There are no shortcuts. If the rules of law are not memorized then it is increasingly difficult to spot issues. If you cannot spot issues, you cannot identify applicable rules
of law and you cannot develop a well reasoned analysis. It is a circle driven by a memorization of the rules of law.

The more familiar you are with the rules of law, the easier it is to spot the issues, the easier it is to identify the material facts, and the better opportunity you will have to develop a well-reasoned, logical analysis.

SUCCESS TO YOU