

gilbert

LAW SUMMARIES

TORTS

Marc A. Franklin

law \ 'lo' \ *n*, often attrib [ME, fr. OE *lagu*, of Scand origin; akin to ON *lög* law; akin to OE *liegan* to lie — more at LIE] **1 a** (1) : a binding custom or practice of a community : a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority (2) : the whole body of such customs, practices, or rules : **COMMON LAW** **b** (1) : the control or enforcement of such law (2) : the action of enforcing such law *also* : LITIGATION (3) : the state of being under the law or order that it is advisable to conform to : **UNDER THE LAW** **c** : a statement of the law or order that it is advisable to conform to : **UNDER THE LAW** **cap** : the revelation of the law : **REVELATION** **3** : a rule of law relating to one subject **5** : a statement of the law or order that it is advisable to conform to : **UNDER THE LAW** **a** : a statement of an order or law that is invariable under the given conditions **b** : a relation or connection between mathematical or scientific quantities **c** : the relation or connection between mathematical or scientific quantities **ORDINANCE**, **CANON** mean a law or rule that is binding on the part of all subject to it *attrib* [ME, fr. OE *lagu*, of



WRITTEN BY THE NATION'S
MOST ACCLAIMED
LAW PROFESSORS

**Adaptable to All Major
Casebooks**

THE
barbri
GROUP

BOARD OF EDITORS

RICHARD J. CONVISER

Professor of Law, IIT/Kent

MICHAEL R. ASIMOW

Professor of Law, U.C.L.A.

JOHN A. BAUMAN

Professor of Law, U.C.L.A.

PAUL D. CARRINGTON

Dean and Professor of Law, Duke University

JESSE H. CHOPER

Professor of Law, U.C. Berkeley

GEORGE E. DIX

Professor of Law, University of Texas

JESSE DUKEMINIER

Professor of Law, U.C.L.A.

MELVIN A. EISENBERG

Professor of Law, U.C. Berkeley

WILLIAM A. FLETCHER

Professor of Law, U.C. Berkeley

MARC A. FRANKLIN

Professor of Law, Stanford University

EDWARD C. HALBACH, JR.

Professor of Law, U.C. Berkeley

GEOFFREY C. HAZARD, JR.

Professor of Law, University of Pennsylvania

STANLEY M. JOHANSON

Professor of Law, University of Texas

THOMAS M. JORDE

Professor of Law, U.C. Berkeley

HERMA HILL KAY

Dean and Professor of Law, U.C. Berkeley

JOHN H. McCORD

Professor of Law, University of Illinois

PAUL MARCUS

Professor of Law, College of William and Mary

RICHARD L. MARCUS

Professor of Law, U.C. Hastings

ROBERT H. MNOOKIN

Professor of Law, Harvard University

THOMAS D. MORGAN

Professor of Law, George Washington University

JARRET C. OELTJEN

Professor of Law, Florida State University

JAMES C. OLDHAM

Professor of Law, Georgetown University

WILLIAM A. REPPY, JR.

Professor of Law, Duke University

THOMAS D. ROWE, JR.

Professor of Law, Duke University

JON R. WALTZ

Professor of Law, Northwestern University

DOUGLAS J. WHALEY

Professor of Law, Ohio State University

CHARLES H. WHITEBREAD

Professor of Law, U.S.C.

KENNETH H. YORK

Professor of Law, Pepperdine University

gilbert

LAW SUMMARIES

TORTS

Twenty-first Edition

Marc A. Franklin

Professor of Law
Stanford University

**THE
barbri
GROUP**

A COMPLETE PUBLICATIONS CATALOG IS
FEATURED AT THE BACK OF THIS BOOK.

HARCOURT BRACE LEGAL AND PROFESSIONAL PUBLICATIONS, INC.

EDITORIAL OFFICES: 176 W. Adams, Suite 2100, Chicago, IL 60603

gilbert
LAW SUMMARIES

REGIONAL OFFICES: New York, Chicago, Los Angeles, Washington, D.C.

Distributed by: **Harcourt Brace & Company** 6277 Sea Harbor Drive, Orlando, FL 32887 (800)787-8717

PROJECT EDITOR

**Steven J. Levin, B.A., J.D.
Attorney At Law**

SERIES EDITOR

**Elizabeth L. Snyder, B.A., J.D.
Attorney At Law**

QUALITY CONTROL EDITOR

Blythe C. Smith, B.A.

Copyright © 1997 by Harcourt Brace Legal and Professional Publications, Inc. All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or any information storage and retrieval system, without permission in writing from the publisher. Printed in the United States of America.

gilbert

LAW SUMMARIES

Titles Available

Administrative Law	Family Law
Agency & Partnership	Federal Courts
Antitrust	First Year Questions & Answers
Bankruptcy	Future Interests
Basic Accounting for Lawyers	Income Tax I (Individual)
Business Law	Income Tax II (Corporate)
California Bar Performance Test Skills	Labor Law
Civil Procedure	Legal Ethics (Prof. Responsibility)
Commercial Paper & Payment Law	Legal Research, Writing, & Analysis
Community Property	Multistate Bar Exam
Conflict of Laws	Personal Property
Constitutional Law	Property
Contracts	Remedies
Corporations	Sales & Lease of Goods
Criminal Law	Securities Regulation
Criminal Procedure	Secured Transactions
Dictionary of Legal Terms	Torts
Estate & Gift Tax	Trusts
Evidence	Wills

Also Available:

First Year Program
Pocket Size Law Dictionary
The Eight Secrets Of Top Exam Performance In Law School

***All Titles Available at Your Law School Bookstore,
or Call to Order: 1-800-787-8717***

Harcourt Brace Legal and Professional Publications, Inc.
176 West Adams, Suite 2100
Chicago, IL 60603

First We Get You Through Law School...

gilbert
LAW SUMMARIES

Gilbert Law Summaries —
*America's Best Selling Legal
Outlines*

Legalines

Legalines Case Briefs —
*Detailed Briefs of Every
Major Case*

Law School Legends
Audio Tape Series

Law School Legends
*America's Greatest Law
Professors On Audio
Cassette*

Over 4 Million Copies Sold

Call or write for free product catalog:

Gilbert Law Summaries

176 West Adams • Suite 2100 • Chicago, IL 60603 • 1-800-787-8717

...Then We Get You Through The Bar Exam!

barbri

BAR/BRI Bar Review—

The Country's Leading Bar Review Provider

***Over 500,000 Students Have Used BAR/BRI
To Prepare For The Bar Exam During The Past 25+ Years***

Call or write for free product catalog:

BAR/BRI Bar Review

176 West Adams • Suite 2100 • Chicago, IL 60603 • 1-800-621-0498

**THE
barbri
GROUP**

Our Only Mission Is Test Preparation

Refer to the catalog in the back of this book for a complete title list.

TEXT CORRELATION CHART

Gilbert Law Summary Torts	Christie, Meeks Cases and Materials on the Law of Torts 1990 (2nd ed.)	Dobbs Torts and Compensation 1993 (2nd ed.)	Epstein Cases and Materials on Torts 1995 (6th ed.)	Franklin, Rabin Tort Law and Alternatives Cases and Materials 1996 (6th ed.)	Henderson, Pearson, Siliciano The Torts Process 1994 (4th ed.)	Keeton, Keeton, Sargentich, Steiner Tort and Accident Law Cases and Materials 1989 (2nd ed.)	Wade, Schwartz, Kelly, Partlett Prosser, Wade, and Schwartz's Torts Cases and Materials 1994 (9th ed.)
I. INTENTIONAL TORTS							
A. Torts to the Person	35-51, 935-965, 1149-1158	21-61	3-31, 64-91	801-835	9-34, 817-873	3-7, 25-47, 81-99, 123-129	17-62
B. Defenses and Privileged Invasions of Personal Interests	58-88, 1149-1158	73-91	4-53	818-820, 835-846	34-109	47-80, 99	91-117, 124-129
C. Torts to Property	20-32, 51-57	62-67	9-12, 120-123, 642-651	588-594, 1077-1078	497-499, 506-513	100-106, 120-123, 138-142	62-89, 840-841
D. Defenses and Privileged Invasions of Land and Chattels	80-96	78-82, 91-101	50-66	838, 846-852	93-99, 499	112-119	118-124, 486-489, 633
II. NEGLIGENCE							
A. Introduction	97-98	104-107	93-163, 165-167	22-30	185-201	7-10	130-131
B. Negligence (Based on the "Duty of Due Care")	98-146, 167-322, 464-472, 686-697, 701-736	107-126, 146-254, 779-816	167-250, 275-319, 467-542, 863-897, 907-914	31-62, 75-115, 269-381, 613-672, 680-693	111-164, 201-227, 241-288, 340-463, 675-755	144-201, 219-238, 331-356, 371-408, 423-440	132-198, 200-205, 227-343, 403-407, 416-421, 436-460, 507-545
C. Special Duty Questions	47-48, 121-122, 146-167, 319-320, 322, 384-388, 438-524	127-145, 315-398, 438-448, 473-537, 540-571	250-275, 450-466, 542-640	17-21, 62-75, 116-257	165-184, 227-241, 288-340, 393-463	10-15, 201-218, 239-264, 415-422, 504-523	198-199, 205-227, 386-403, 407-416, 436-448, 461-506, 638-659
D. Defenses to Negligence	323-382	255-314	319-398	382-430	463-486	280-330, 523-527	566-604, 661-663
E. Effect of Liability Insurance	801-842	714-718, 942-954	979-1012	672-717	757-775	459-503	292
III. STRICT LIABILITY							
A. In General	525-528	572-580	93-163, 641	454-460	535	134-135, 528-533, 570	664
B. Animals		580-581, 594	651-659		535-538		664-669, 690-692
C. Abnormally Dangerous Activities	528-572	588-603	659-681	431-453	538-560	15-20, 132-138, 537-571	669-685
D. Extent of Liability	549-551, 555-561, 565-572	601-603	97-98, 730-749	460-472	549-560		686-690
E. Defenses	561-563, 565	603-608	319, 324-325, 394, 669	452		530-532, 564-568	692-693, 776, 780
IV. PRODUCTS LIABILITY							
A. In General	573-585	609-612	727-730	473-479	561		694-700
B. Liability Based on Intentional Acts			732-733				725
C. Liability Based on Negligence	573-585	609-615, 618, 634-651, 680-683, 693-698, 703-708	474-475, 730-741, 752-769, 820-837, 851-862	473-492, 550-559	562-565, 595-603, 611-626	635-642, 659-662	535-536, 695-700, 720, 724-725, 767-769, 801-807
D. Strict Liability in Tort	596-684	612-712	741-749, 755-768, 771-862	454-472, 485-550, 555-578	575-668	662-755	535-536, 713-719, 720-807
E. Liability Based on Breach of Warranty	585-596, 673-684	611-624	741-755, 761-771	478-479, 515-516, 578-587	565-575, 632-640	642-659, 663	701-713, 769-775, 792-801

TEXT CORRELATION CHART—continued

Gilbert Law Summary Torts	Christie, Meeks Cases and Materials on the Law of Torts 1990 (2nd ed.)	Dobbs Torts and Compensation 1993 (2nd ed.)	Epstein Cases and Materials on Torts 1995 (6th ed.)	Franklin, Rabin Tort Law and Alternatives Cases and Materials 1996 (6th ed.)	Henderson, Pearson, Siliciano The Torts Process 1994 (4th ed.)	Keeton, Keeton, Sargentich, Steiner Tort and Accident Law Cases and Materials 1989 (2nd ed.)	Wade, Schwartz, Kelly, Partlett Prosser, Wade, and Schwartz's Torts Cases and Materials 1994 (9th ed.)
V. NUISANCE							
A. In General							810-811
B. Private Nuisance vs. Public Nuisance	871-874, 882-893	581-588 581-587	122, 128, 682-687, 717-725	594 594-597	499-505	596-597, 603-608	
C. Plaintiff's Interest	874-875, 880-882	583-584	682-687, 689	596	501-502	107, 109, 608-623	813-814
D. Defendant's Conduct	875	585-586	686	596-598	502-503	106-111, 572-576,	819-820
E. Substantial and Unreasonable Harm to Plaintiff	876, 880-882		686-700	597-605	503-533	584-597, 618-625	820-827
F. Causation				610-611			
G. Remedies	877-893	586-587	706-717	598-612	520-533	109-111, 576, 584-603, 608-617, 626-634	839-840
H. Defenses		586	585, 700-706	607	520-523, 533	629-634	827-838
VI. MISCELLANEOUS FACTORS AFFECTING RIGHT TO SUE							
A. Survival of Tort Actions	737-747	460-473	919-920	16	742-743	443-450	550, 556, 558-565
B. Wrongful Death	737-751	460-473	914-920	16, 640-645	427-433, 742-743	429, 438-440, 443-451	546-565
C. Injuries to Members of the Family	751-800	433-438, 448-460, 989-900		16, 247-251, 257-268, 397-398	417-447	440-443, 451-458, 822-823, 1288-1291, 1305-1306	421-436, 1123-1126
D. Tort Immunity	1202-1243	67-72, 398-431, 481-492, 552-553	939-977	188-225, 852-875	104-105, 486-495	265-279	368-369, 604-637
E. Release and Contribution Among Joint Tortfeasors	426-437	200-203, 730-740	400-427, 435-450	322-341, 391, 399, 717	476-482	352-358, 361-364, 369-370, 819	353-369
F. Indemnity	380, 428-429	200-203, 733-740	427-434	17-18, 399-400, 692-693, 717		362-368, 819-822	368-373
VII. STATUTORY CHANGES IN PERSONAL INJURY LAW							
A. Changes Targeting Specific Kinds of Tort Claims	186-187, 319-320, 685, 697-698, 700-701, 708-709, 718-719, 731, 843-870	387-398, 695-712, 868-926, 943-954	229-233, 254-255, 265, 270-275, 571, 892-894, 1014-1079	726-795	311-312, 668-673, 777-816	754, 806-895	198-199, 226, 326-328, 405, 411, 517-525, 535-536, 541-543, 711-712, 1191-1214
B. Changes Affecting Tort Claims Generally	687-698, 700-701, 728-730	535, 730, 736-738, 760-767, 792-810, 813-814, 825-866	489-490, 870-874, 880-886, 889-894, 897-905, 907-914	718-725, 795-800	143-145, 678-683, 719, 744-755	369-370, 481-497, 781-805, 895-909	196-198, 351-353, 514-525, 542-543, 1127-1174
VIII. DEFAMATION							
A. In General	966-976	961-964	1083-1085, 1093-1097		875-880	1159-1162	842-844
B. Publication to a Third Party	989-995	961	1085-1092	880-881, 927-928, 999-1001, 1010-1017	889-891	1159-1163, 1180-1186	844-847, 869, 872-877, 901-903

TEXT CORRELATION CHART—continued

Gilbert Law Summary Torts	Christie, Meeks Cases and Materials on the Law of Torts 1990 (2nd ed.)	Dobbs Torts and Compensation 1993 (2nd ed.)	Epstein Cases and Materials on Torts 1995 (6th ed.)	Franklin, Rabin Tort Law and Alternatives Cases and Materials 1996 (6th ed.)	Henderson, Pearson, Siliciano The Torts Process 1994 (4th ed.)	Keeton, Keeton, Sargentich, Steiner Tort and Accident Law Cases and Materials 1989 (2nd ed.)	Wade, Schwartz, Kelly, Partlett Prosser, Wade, and Schwartz's Torts Cases and Materials 1994 (9th ed.)
C. Harm to Reputation	966-1007, 1052-1053, 1063-1065	961-963	1093-1101, 1125-1127, 1181-1182	876-895, 927, 999-1001	876-882, 891-892	1163-1185	844-851, 855-864, 889-901
D. False Facts	976, 1007-1011, 1063-1065, 1086	963-964, 968, 975	1101-1121	969-971, 994-999	898-899	1095-1119, 1187-1200, 1222-1223	851-856, 889-900, 919-933
E. Causation				967-969		1177-1179	908-912
F. Damages and Other Remedies	966-970, 1000-1007, 1031-1032, 1056-1057, 1070, 1073, 1086-1087	962-964, 974-975	1121-1143	895-902, 923-927	882-889	1120-1158, 1170-1186	856, 864-871, 901-903, 907-911, 913, 933-942, 942-946
G. Defenses	999-1032	963-964, 968	1144-1169	902-928, 972-976	892-902	1187-1246	901-903, 933-942
H. Constitutional Privileges	1032-1087	964-976	1169-1214	928-1010, 1017-1027	903-923	1053-1158	872-932
I. Related Torts						1089-1095, 1179	947-948, 973-978, 980-995
IX. WRONGFUL INVASION OF PRIVACY							
A. Intrusions into Plaintiff's Private Life or Affairs	1090, 1097-1111	984	1268-1284	1069-1092	930, 933-940	1134-1135, 1276-1278, 1291-1297	954-968
B. Public Disclosure of Private Facts	1111-1133	984-988	1241-1260	1028-1059	930-931, 940-960	1280-1286	958-968
C. Appropriation of Plaintiff's Name or Likeness	8-16, 1088-1090, 1111, 1133-1148	985, 1000-1002, 1006	1223-1241	1092-1117	932-933, 967-973	1278-1280	948-958
D. Publicity Placing Plaintiff in a "False Light"	1090-1096	985-988	1260-1268	1059-1069	931-932, 961-966	1065-1069	968-973
E. Claims Involving Privacy of Third Persons	1147-1148		1237-1241				952
F. Important—Related Torts						1085-1095	973-979
X. OTHER TORTS							
A. Misrepresentation	894-934	1018-1037	1285-1330	1118-1140	975-1018	1023-1084, 1210	1013-1072
B. Injurious Falsehood		991-994	1101-1102, 1380-1381	1156-1157, 1159		1085-1100, 1145-1158	1073-1085
C. Interference with Economic Relations		1007-1017	1330-1387	1140-1165	1018-1036	1101-1153	1085-1122
D. Unjustifiable Litigation	1159-1175	976-984				1002-1022	996-1012

approach to exams

A course in Torts deals with a number of distinct and separate legal problems that are to a large extent governed by dissimilar principles and doctrines. For example, the rules governing liability in a battery case are entirely different from those governing liability in a case involving the sale of contaminated foodstuffs; yet both are “torts” problems. In the battery case, the applicable rules reflect a policy judgment to deter the defendant’s wrongful conduct, even though the plaintiff may not have been physically injured. In the foodstuffs case, the principles governing liability seem to reflect a policy judgment to provide compensation to an injured consumer, with less attention to whether the defendant was at fault.

This interplay between the policies of *providing adequate compensation* to an injured plaintiff, and of *detering wrongdoers* underlies much of the law of Torts. In effect, when the reasons for taking money from the defendant and giving it to the plaintiff coincide, tort liability will follow. When either reason is missing, the question of liability is likely to be difficult. In determining the relative strength and applicability of these policies, you need to consider certain factors.

Use the following analytical approach to focus on these factors and determine the key issues for you to analyze in answering your exam question. (Also review the chapter approach sections found at the beginning of each chapter.)

1. **Identify the Tort:** The nature and scope of liability that may be imposed, as well as the matters that may be considered by way of defense, vary significantly depending upon which particular tort is involved. Consequently, the first thing you need to do is to determine from the facts which particular tort (or torts) may be a possible basis for liability.

Keep in mind that there is no fixed, rigid classification of recognized torts. While there are a number of “classic” tort situations (e.g., battery, false imprisonment, defamation, etc.), there are also many cases that do not fit into the “classic torts” but may still be actionable (*see infra*, §§1386 *et seq.*). In such cases, and indeed with all tort problems, the nature and scope of liability that may be imposed rest upon a determination of two factors:

- a. **The nature of plaintiff’s interest that has been injured:** There are many different types of protectable interests—one’s person, property, reputation, emotional well-being, advantageous business relationships, etc. You must determine exactly which interests have been injured, because the scope of liability may vary radically (e.g., the scope of liability that will be imposed upon a defendant for a negligent injury to plaintiff’s body is greater than that imposed for negligent injury to plaintiff’s economic well-being).
- b. **The nature of defendant’s conduct:** The second crucial factor in identifying the tort is the concept of fault: Did the defendant act intentionally to cause the result that occurred? Or was the conduct negligent? Or was the defendant’s conduct blameless under the circumstances? As you might expect, the greater defendant’s “fault” in causing the plaintiff’s injuries, the greater the extent to which liability will usually be imposed on the defendant for his acts and the fewer the matters that may be permitted by way of defense. For example, if defendant *intentionally* injures the plaintiff’s person, the defendant will almost certainly be held liable for all harm ensuing, whether or not foreseeable; whereas if the defendant’s conduct was merely *negligent*, liability may be limited to foreseeable injuries (*infra*, §§348 *et seq.*).

2. **Apply the Prima Facie Case:** By identifying each interest of the plaintiff that has been invaded, and evaluating the defendant's conduct with regard to that interest, you can establish the particular area of tort liability—*e.g.*, an intentional invasion of the plaintiff's real property ("trespass to land"), negligent injury to plaintiff's person ("negligence"), etc. It is neither necessary nor advisable to go into any more elaborate "definition" of the particular tort involved. Rather, focus your attention on the prima facie case of that tort—*i.e.*, the *essential elements* that the plaintiff must establish as a basis for liability. These essential elements "define" the tort.

In answering your question, analyze the facts given to make sure that *each element* of the prima facie case is present. Remember, in some situations, a single wrongful act by defendant (*e.g.*, false publication regarding plaintiff's private life) may conceivably be the basis for *several entirely different tort theories* (*e.g.*, defamation, invasion of privacy, infliction of emotional distress). Hence, consider the *prima facie case of each tort* that could conceivably be in issue. In close cases, weigh the policy factors of compensating the plaintiff and deterring the defendant in the particular tort involved.

3. **Consider Defenses or Limitations on Liability:** After you have found the elements of the prima facie case, look for any defenses that might be available to the defendant. Remember that the matters that may be asserted by way of defense, or to mitigate or limit liability, will vary with the two factors that "identify" the tort—the *nature of plaintiff's interest* and the *nature of the defendant's conduct*. For example, where the defendant negligently causes physical injury to the plaintiff's person, the defendant may prove by way of complete or partial defense that the plaintiff was also negligent; whereas, if the defendant had intentionally caused the same injuries, this would not be a permissible defense.
4. **Note—Evaluate the Facts:** Often, the rules of law in Torts are easier to state than they are to apply. This is because Torts problems invariably involve difficult *factual* issues that must be resolved before the applicable rules of law can be determined. For example, the prima facie case of certain torts requires a finding of "unreasonable" conduct by defendant; the rules of causation may be based on determinations of "foreseeability" of harm; various privileges and defenses are lost by "excessive" or "unreasonable" acts; etc. However, these are all ultimate *conclusions* that can be reached only after careful evaluation of facts given in the particular problem. For a good answer, avoid discussing these matters in the abstract, or making snap judgments as to the outcome. Rather, consider all operative facts in the problem, together with the logical inferences to be drawn therefrom, and remember, a conclusion concerning "reasonableness," "foreseeability," etc., will be only as good as the factual analysis upon which it is based.

5. Other Considerations

- a. **Parties:** Be sure of the parties. Be certain you know who is the plaintiff and who is the defendant. In fact situations involving multiple parties, consider the rights and liabilities of *each* party. As to each party-plaintiff, consider and analyze separately each *interest* that has been invaded; and, as to each party-defendant, analyze separately the *nature of that person's conduct* and responsibility for the plaintiff's injuries.
- b. **Relationship:** Check the relationship, if any, between the parties. This may be important for these reasons:
 - (1) There may be a basis for *imputing liability* from one to another (*e.g.*, master-servant cases, *see infra*, §494);

- (2) If there is a marital or family relationship between the plaintiff and the defendant, there may be possible *immunity* from suit (*see infra*, §§1011 *et seq.*);
 - (3) The relationship may *increase the amount of care* owed by one party to the other (*e.g.*, a common carrier's higher standard of care owed to a passenger; *see infra*, §478); or
 - (4) The relationship may *decrease the standard of care* owed (*e.g.*, a landowner's limited duty to social guests; *see infra*, §§531 *et seq.*).
- c. **Effect of death of party:** Whenever any party—plaintiff or defendant—has died subsequent to commission of the tort, consider problems of *survival* of causes of action and the applicability of *wrongful death* (*see infra*, §§959 *et seq.*).
- d. **Statutes:** Although the law of Torts is primarily judge-made, in certain areas (*e.g.*, “guest” statutes, wrongful death statutes, survival statutes, comparative negligence statutes), legislative enactments are found so frequently that any analysis of a problem in such areas must include a discussion of the effect of the relevant statutes.
6. **Caution—One Fact May Raise (and Influence) Several Issues:** Perhaps the greatest danger in Torts problems lies in treating the various issues and elements as separate, when they are usually interrelated. For example, if P decides to cross a street in the face of oncoming traffic, this single fact bears significantly on a number of legal doctrines that may be applicable—*e.g.*, D's duty under the circumstances, P's own negligence, P's assumption of the risk. A correct analysis will emphasize that these various issues are related and dependent on each other: Whether P assumed the risk or was negligent is related to and dependent on what duty, if any, D is held to owe to P under the circumstances. Keep in mind, then, that a single fact may influence more than one issue in the case, and that each issue should be treated as interrelated with others in the problem.

SUMMARY OF CONTENTS

	Page
TORTS CAPSULE SUMMARY	I
TEXT CORRELATION CHART	i
APPROACH TO EXAMS	(i)
INTRODUCTION	1
I. INTENTIONAL TORTS	1
Chapter Approach	1
A. Torts to the Person	2
1. Battery	2
2. Assault	6
3. False Imprisonment	9
4. Intentional Infliction of Emotional Distress	12
B. Defenses and Privileged Invasions of Personal Interests	16
C. Torts to Property	27
1. Trespass to Land	27
2. Trespass to Chattels	30
3. Conversion of Chattels	31
D. Defenses and Privileged Invasions of Land and Chattels	33
II. NEGLIGENCE	39
Chapter Approach	39
A. Introduction	39
B. Negligence (Based on the “Duty of Due Care”)	39
C. Special Duty Questions	80
D. Defenses to Negligence	117
E. Effect on Liability Insurance	129
III. STRICT LIABILITY	132
Chapter Approach	132
A. In General	132
B. Animals	132
C. Abnormally Dangerous Activities	134
D. Extent of Liability	137
E. Defenses	138
IV. PRODUCTS LIABILITY	139
Chapter Approach	139
A. In General	139
B. Liability Based on Intentional Acts	140
C. Liability Based on Negligence	140
D. Strict Liability in Tort	143
E. Liability Based on Breach of Warranty	163
V. NUISANCE	169
Chapter Approach	169

A.	In General	169
B.	Private Nuisance vs. Public Nuisance	169
C.	Plaintiff's Interest	170
D.	Defendant's Conduct	170
E.	Substantial and Unreasonable Harm to Plaintiff	171
F.	Causation	173
G.	Remedies	173
H.	Defenses	173
VI.	MISCELLANEOUS FACTORS AFFECTING RIGHT TO SUE	176
Chapter Approach		176
A.	Survival of Tort Actions	176
B.	Wrongful Death	177
C.	Injuries to Members of the Family	179
D.	Tort Immunity	184
E.	Release and Contribution Among Joint Tortfeasors	190
F.	Indemnity	192
VII.	STATUTORY CHANGES IN PERSONAL INJURY LAW	193
Chapter Approach		193
A.	Changes Targeting Specific Kinds of Tort Claims	193
B.	Changes Affecting Tort Claims Generally	199
VIII.	DEFAMATION	203
Chapter Approach		203
A.	In General	203
B.	Publication to a Third Party	204
C.	Harm to Reputation	207
D.	False Facts	212
E.	Causation	214
F.	Damages and Other Remedies	214
G.	Defenses	217
H.	Constitutional Privileges	224
I.	Related Torts	232
IX.	WRONGFUL INVASION OF PRIVACY	233
Chapter Approach		233
A.	Intrusions into Plaintiff's Private Life or Affairs	233
B.	Public Disclosure of Private Facts	235
C.	Appropriation of Plaintiff's Name or Likeness	241
D.	Publicity Placing Plaintiff in a "False Light"	243
E.	Claims Involving Privacy of Third Persons	244
F.	Important—Related Torts	245
X.	OTHER TORTS	246
Chapter Approach		246
A.	Misrepresentation	246
B.	Injurious Falsehood	255
C.	Interference with Economic Relations	259
D.	Unjustifiable Litigation	266

REVIEW QUESTIONS AND ANSWERS	273
SAMPLE EXAM QUESTIONS AND ANSWERS	341
TABLE OF CITATIONS TO RESTATEMENT (SECOND) OF TORTS	367
TABLE OF CASES	369
INDEX	385

gilbert

capsule summary

torts

Text
Section

INTRODUCTION

Tortious harms are generally divided into personal injury, property damage, and invasion of interests such as reputation. There are three main bases of liability—**intent**, **negligence**, and **strict liability**.

I. INTENTIONAL TORTS

A. TORTS TO THE PERSON

1. **Battery:** A *prima facie* case involves an act by D, with intent to inflict harmful or offensive touching, a harmful or offensive touching, and causation [1]
 - a. **Act by D:** Refers to **volitional** movement of D's body [2]
 - (1) **Unconscious acts:** Unconscious acts are not "volitional" (e.g., epileptic seizures, persons asleep) [3]
 - (2) **Reflex action:** Muscular reaction by a person in command of his senses is "volitional" unless it is a purely reflex action [4]
 - (3) **Acts by incompetents:** Persons not legally competent are capable of volitional acts [5]
 - b. **Intent:** D must act with the intent to inflict a harmful or offensive touching . [6]
 - (1) **Test:** Intent is determined by whether D acted with the **desire** to cause the result or with the **belief** that the result was **substantially certain** to occur. This is a subjective test [7]
 - (2) **Motives:** Motives are immaterial, but if malice is present, D may be liable for punitive damages [9]
 - (3) **Transferred intent:** Under transferred intent doctrine, if D acts intending to cause battery, assault, false imprisonment, trespass to land, or trespass to chattels, he will be liable even if the particular harm or plaintiff is unexpected [10]
 - c. **Harmful or offensive touching:** This must involve contact with P's person or something closely associated with P (e.g., knocking P's hat off her head) [11]
 - (1) **"Harmful" or "offensive":** Touching is "harmful" if it inflicts pain, injury, or impairment of the body; it is "offensive" if it would offend a reasonable person's sense of dignity [12]
 - (2) **Note:** P need **not** have knowledge of the touching at the time thereof . [16]
 - d. **Causation:** D's conduct must **directly or indirectly** bring about the injury. Setting in motion the force that actually causes the touching suffices . [17]
 - e. **Damages:** Actual damages are not required. Compensatory (e.g., pain and suffering, medical bills, etc.) and punitive damages (if D acted maliciously) are recoverable. However, some states do not award punitive damages [19]
2. **Assault:** A *prima facie* case involves an act by D, with intent to cause apprehension of immediate harmful or offensive touching, apprehension, and causation [24]
 - a. **Act by D:** Requires a volitional movement of the body. **Words alone** are ordinarily **insufficient** except where surrounding circumstances force P to rely on mere words (e.g., threat to a blind person) [25]

- b. **Intent:** Same as battery—*i.e.*, intent to inflict a harmful or offensive touching or cause apprehension of the same. Transferred intent doctrine is applicable. [29]
- c. **Apprehension:** P must be placed in reasonable apprehension of **immediate** battery and must be subjectively **aware** of the threat at the time thereof [30]
 - (1) **Nature of harm threatened:** P must be apprehensive of a touching **to her own person**, not to a third party or to property [32]
 - (2) **Source of threatened harm:** D is liable if he arouses apprehension of harm from any source (*e.g.*, act of God or other person) [33]
 - (3) **Imminence of threatened harm:** Threat of **imminent** harmful or offensive touching is required. Thus, words may negate threat. A **conditional** threat may be assault where D is not privileged to make the threat [34]
 - (4) **Nature of apprehension:** Fear is **not** required; **apparent** ability to inflict harm suffices [37]
- d. **Causation:** P's apprehension must be legally caused by D's act or something D set in motion [39]
- e. **Damages:** Actual damages are not required (same as battery) [40]
- 3. **False Imprisonment:** A **prima facie case** includes an act by D, with intent to confine P to a specific area, a confinement, and causation. [41]
 - a. **Act by D:** D's act must be volitional, but words alone **may** suffice [42]
 - b. **Intent:** This is measured by the **desire or belief in substantial certainty** test—intent to confine is required [44]
 - c. **Confinement:** P must be restricted to a limited area without knowledge of reasonable means of escape and must be **aware** of the confinement at the time thereof or else be harmed thereby [45]
 - (1) **Cause of confinement:** This may be by: [49]
 - (a) **Physical force** exercised against P or a member of P's family;
 - (b) **Threats of immediate harm** to P or P's family;
 - (c) **Actual or apparent physical barriers** to escape (includes **refusing to release** P when under a duty to do so); or
 - (d) **Assertion of legal authority** and P's submission thereto.
 - d. **Causation:** Confinement must be legally caused by D's intentional act or a force set in motion thereby (same as battery) [59]
 - e. **Damages:** Actual damages are not required. P may recover for injuries suffered in a reasonable attempt to escape [60]
- 4. **Intentional Infliction of Emotional Distress:** A **prima facie case** involves an extreme and outrageous act by D, with intent to cause severe emotional distress, causation, and severe emotional distress [62]
 - a. **Act by D:** D's act must be **extreme and outrageous**. Words alone may suffice, but simple insults are not actionable [63]
 - (1) **Exceptions:** Common carriers and public utilities are held to a stricter standard; they may be liable for insults not ordinarily actionable. Also, cases based on racial or gender attacks or insults may be actionable even if not amounting to traditional tort [65]
 - b. **Intent:** D must intend severe emotional distress. However, reckless conduct also suffices [67]
 - (1) **Inference:** Intent is inferred where D **knows** P is particularly sensitive [68]
 - (2) **There is no transferred intent** [69]
 - c. **Causation:** Under the early view, demonstrable physical injuries were required, but under the modern approach, **distress alone** suffices—outrageousness of the conduct insures reliability of the claim [71]
 - (1) **Liability to third persons:** D's liability also includes emotional distress of members of the **intended victim's family** if their presence was known to D [73]

d.	Severe emotional distress: The distress must be more than a reasonable person could be expected to endure	[74]
e.	Defenses: Common law defenses to other intentional torts are <i>irrelevant</i> here. However, the First Amendment protections of free speech and free exercise of religion have been permitted as defenses	[75]
f.	Damages: Compensatory and punitive damages are recoverable. (Some states bar punitive damages generally; others do so where speech is involved)	[79]
B. DEFENSES AND PRIVILEGED INVASIONS OF PERSONAL INTERESTS		
1.	Consent: Most authorities deem lack of consent a part of the prima facie tort . .	[80]
a.	Types: The basic types of consent are:	[81]
	(1) Actual (express) consent	
	(2) Apparent consent: This is what the reasonable person would infer from custom or <i>P's</i> conduct.	
	(3) Consent implied by law:	
	(a) <i>P is absent or unable</i> to consider the matter;	
	(b) <i>An immediate decision</i> is necessary;	
	(c) <i>There is no reason to believe P would withhold consent</i> if able; and	
	(d) <i>A reasonable person in P's position would consent.</i>	
b.	Consent is not a defense when:	
	(1) Acts are in excess of consent given	[85]
	(2) Procured by fraud (unless the fraud relates to a collateral matter) .	[86]
	(3) Given under duress (physical force or threats)	[88]
	(4) Given by reason of mistake caused by or known to D: Mistake may be one of two types:	[89]
	(a) Mistake of law caused by D	[90]
	(b) Mistake of fact: P fails to understand the <i>nature or consequences</i> of the invasion of her person or property	[91]
	1) Medical treatment: Where patient did not give consent to medical treatment, the doctor may be liable for battery . . .	[92]
	2) Lack of informed consent: Where P alleges that she was not adequately informed of the risks and benefits prior to surgery, the claim is usually treated as <i>negligence</i> , not an intentional tort	[93]
	(5) Given by person incapable of consenting—e.g., infant, mental incompetent	[94]
	(6) Criminal acts: The majority holds consent ineffective if the act involves a breach of the peace. The minority holds consent effective except where P is a member of a protected class by statute	[95]
2.	Self-Defense	
a.	Nondeadly force: Nondeadly force may be used if D <i>reasonably believed</i> P was about to inflict <i>immediate bodily harm</i> , and the force used was <i>reasonably necessary</i> to prevent harm	[99]
	(1) No duty to retreat: D is under no duty to retreat <i>unless</i> D recognizes that P acted unintentionally or had mistaken D's identity	[102]
b.	Deadly force: Deadly force may be used if D <i>reasonably believed</i> P was about to inflict <i>death or serious bodily harm</i>	[103]
	(1) Duty to retreat: Under the majority view, there is <i>no</i> duty to retreat unless P's conduct is recognized as unintentional. The minority is contra if retreat is safe, unless: D is in her <i>own home</i> , retreating would endanger D or a third party, or D is attempting a valid arrest . .	[105]
c.	Threats of force: D is privileged to threaten greater force than she could actually use if threats would do no more than cause apprehension	[109]
d.	Limitations on right of self-defense: The right to self-defense is limited where:	[110]