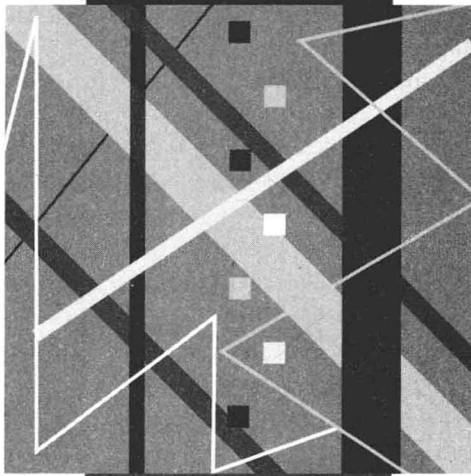


MULTISTATE



West
Bar Review™



MULTISTATE

West
Bar Review™
♦♦♦♦♦

Series Interior Design: adapted from a design by Roslyn M. Stendahl,
Dapper Design
Composition by Carlisle Communications

WEST'S COMMITMENT TO THE ENVIRONMENT

In 1905, West Publishing Company began recycling materials left over from the production of books. This began a tradition of efficient and responsible use of resources. Today, up to 95% of our legal books and 70% of our college texts and school texts are printed on recycled, acid-free stock. West also recycles nearly 22 million pounds of scrap paper annually—the equivalent of 181,717 trees. Since the 1960s, West has devised ways to capture and recycle waste inks, solvents, oils, and vapors created in the printing process. We also recycle plastics of all kinds, wood, glass, corrugated cardboard, and batteries, and have eliminated the use of Styrofoam book packaging. We at West are proud of the longevity and the scope of our commitment to the environment.

Production, Prepress, Printing and Binding by West Publishing Company.



TEXT IS PRINTED ON 10% POST
CONSUMER RECYCLED PAPER

Printed with **Printwise**
Environmentally Advanced Water Washable Ink



COPYRIGHT © 1995 by WEST BAR REVIEW
901 Fifteenth Street NW
Washington, D.C. 20005
1-800-693-7822

ISBN 0-314-07620-4



Brief Contents

- SECTION **1** **Torts & Tort Remedies**
- SECTION **2** **Contracts & Contract Remedies**
- SECTION **3** **Real Property & Real Property Remedies**
- SECTION **4** **Constitutional Law**
- SECTION **5** **Criminal Law**
- SECTION **6** **Criminal Procedure**
- SECTION **7** **Evidence**

SECTION 1

Torts & Tort Remedies

Part One: Intentional Torts 15

I. Injury to Plaintiff's Person 15

A. INJURY TO PLAINTIFF'S BODY 15

1. Assault 15

OVERVIEW 15

a. *Act and Causation* 15

- 1) Volitional Act 15
- 2) Causation 15

b. *Intent* 16

- 1) Third Person Injured—Transferred Intent 16

NOTE—*Changing Rule* 16

- 2) Substantially Certain 16

c. *Result* 16

- 1) Reasonable Apprehension 17
 - a) REASONABLENESS 17
 - b) APPREHENSION 17
 - (1) Plaintiff's Awareness 17
 - (2) Apparent Ability 17
 - (3) Immediacy 18
 - (4) Qualified Threat 18

- (5) Words 18

2) Harmful or Offensive Contact 19

- a) HARMFUL OR OFFENSIVE 19
- b) CONTACT 19

2. Battery 19

OVERVIEW 19

a. *Act and Causation* 19

b. *Intent* 19

c. *Result* 20

- 1) Harmful or Offensive 20
- 2) Contact 20
- 3) Plaintiff's Awareness 20

3. False Imprisonment 20

OVERVIEW 20

a. *Act and Causation* 20

b. *Intent* 20

c. *Result* 20

- 1) Manner of Confinement or Restraint 20
 - a) PHYSICAL BARRIERS 20
 - (1) Failure to Release 21

- b) PHYSICAL FORCE 21
- c) THREATENED APPLICATION OF FORCE 21
 - (1) Threat 21
 - (2) Immediate 21
 - (3) Moral Pressure 21
- d) INVALID ASSERTION OF LEGAL AUTHORITY 22
- 2) Duration of Confinement or Restraint 22
- 3) Resistance or Escape 22
 - a) NO DUTY TO RESIST 22
 - b) DUTY TO MAKE REASONABLE ESCAPE 22
 - (1) Conditional Release 22
- 4) Plaintiff's Awareness 22
- 5) Bounded Area 23

B. INJURY TO PLAINTIFF'S MIND OR EMOTIONS (MENTAL DISTRESS) 23

OVERVIEW 23

1. Intentional Infliction of Mental Distress 23

OVERVIEW 23

a. Act and Causation 23

- 1) Necessity for Physical Harm 23

b. Intent 23

- 1) No Transferred Intent 24
- 2) Family Members 24

c. Result 24

- 1) Extreme and Outrageous Conduct 24
 - a) SPECIAL RELATIONSHIP 24
 - b) KNOWN SENSITIVITY 25
- 2) Severe Mental Distress 25
- 3) Damages 25

2. Negligent Infliction of Mental Distress 25

C. INJURY TO PLAINTIFF'S REPUTATION OR PRIVACY 25

1. Defamation 25

2. Invasion of Privacy 25

II. Injury to Plaintiff's Property 25

A. INJURY TO PLAINTIFF'S INTEREST IN REAL PROPERTY 25

OVERVIEW 25

1. Trespass 26

OVERVIEW 26

a. Act and Causation 26

- 1) Volitional Act 26
- 2) Causation 26

b. Intent 26

c. Result 26

- 1) Physical Invasion 26
 - a) REMAINING ON LAND 26
- 2) Land 26
 - a) AIRCRAFT 26

- 3) Possession 27
 - a) TENANT IN POSSESSION 27

2. Nuisance 27

OVERVIEW 27

OVERVIEW 27

- a) PUBLIC NUISANCE—WHO MAY SUE 27

a. Act and Causation 27

b. Intent 28

c. Result 28

- 1) Substantial 28
- 2) Unreasonable 28

NOTE—Remedies 28

B. INJURY TO PLAINTIFF'S INTEREST IN PERSONAL PROPERTY 29

OVERVIEW 29

1. Trespass to Chattel 29

OVERVIEW 29

a. Act and Causation 29

b. Intent 29

c. Result 29

- 1) Interference 29
 - a) DISPOSSESSION 29
 - b) INTERMEDDLING 30
- 2) Chattel 30
- 3) Possession 30
 - a) BAILMENT 30
- 4) Damages 30

2. Conversion 30

OVERVIEW 30

a. Act and Causation 30

b. Intent 30

c. Result 30

NOTE—Comparison of Trespass to Chattel and Conversion 31

- 1) Special Rules Applicable to Bailees 31
 - a) MISDELIVERY 31
 - b) LOSS OR DESTRUCTION 31
- 2) Remedies 31
 - a) DAMAGES 31
 - (1) Offer to Return 31
 - b) REPLEVIN, DETINUE OR CLAIM AND DELIVERY 31

III. Privileges and Defenses 32

A. CONSENT 32

OVERVIEW 32

a. Express Consent 32

b. Implied Consent 32

- 1) Consent Implied in Fact 32
- 2) Consent as a Matter of Law 32

1. Effectiveness of Consent 32
 - a. Exceeding Scope of Consent 32
 - b. Mistake, Fraud or Duress 33
 - 1) Mistake 33
 - a) INFORMED CONSENT 33
 - 2) Fraud 33
 - 3) Duress 34
 - c. Violation of Criminal Statute 34
 - 1) No Breach of Peace 34
 - 2) Class Protected 34
 - d. Capacity to Consent 34

B. DEFENSES 34

1. Self Defense 34

OVERVIEW 34

- a. Imminent and Unprivileged Attack 34
 - 1) Imminent 34
 - 2) Unprivileged 35
- b. Reasonable Apprehension and Use of Force 35
 - 1) Reasonable Apprehension 35
 - 2) Reasonable Force 35
- c. Duty to Retreat 35
 - 1) Exception to Minority View 36

NOTE—Injuries to Third Parties 36

2. Defense of Others 36

OVERVIEW 36

- a. Another Person 36
- b. Same Manner and Conditions 36
 - 1) Minority Rule—Reasonable Mistake Permitted 36

3. Defense of Property 36

- a. General Rule—Harm to Property 36

OVERVIEW 36

- 1) Reasonable Force 36
 - a) INDIRECT APPLICATION OF FORCE 37
- 2) Prevent 37

NOTE—Compare Defense of Property and Defense of Persons 37

- b. Recovery of Personal Property 37

OVERVIEW 37

- 1) Tortious Dispossession 37
 - a) EFFECT OF MISTAKE 37
- 2) Demand for Return 37
- 3) Reasonable Force 38
- 4) Prompt 38
- 5) Wrongdoer or Guilty Third Party (GTP) 38

NOTE—Entry onto Land 38

- a) WRONGDOER OR GUILTY THIRD PARTY (GTP) 38
- b) INNOCENT PARTY 38
 - (1) Exception 38

- c. Recovery of Wrongfully Dispossessed Land 38
 - 1) No Use of Force 38
 - 2) Minority Rule 38

C. NECESSITY 38

OVERVIEW 38

1. Private Necessity 39

- a. Reasonably Necessary 39
 - 1) Effect of Mistake 39
- b. Substantially Greater Harm—Private Interest 39
- c. Scope of Privilege 39

2. Public Necessity 39

- a. Reasonably Necessary 39
 - 1) Private Individuals 39
- b. Substantially Greater Harm—Public Interest 39
- c. Scope of Privilege 39

D. AUTHORITY 40

1. Arrest 40

- a. With Warrant 40
- b. Without Warrant 40
 - 1) Felonies 40
 - a) BEFORE OR DURING COMMISSION 40
 - b) AFTER COMMISSION 40
 - (1) Reasonable Mistake of Fact 40
 - 2) Breaches of the Peace 40
 - 3) Misdemeanors Which Are Not Breaches of the Peace 40

- c. Entry on Land 41

2. Shopkeeper's Privilege 41

- a. Effect of Mistake 41

3. Discipline 41

OVERVIEW 41

- a. Reasonable Force 41

Part Two: Negligence 41

OVERVIEW 41

A. APPROACH 41

What Did the Defendant Do? 42

I. Actual Cause 42

OVERVIEW 42

NOTE—Act or Failure to Act 42

A. "BUT-FOR" TEST 42

1. Concurrent Liability (Multiple Causes, Multiple Identifiable Defendants) 42
2. Successive Liability (Multiple Injuries, Multiple Causes, Multiple Identifiable Defendants) 43

- B. "SUBSTANTIAL FACTOR" TEST 43
- C. *SUMMERS v TICE* (SINGLE CAUSE, SEVERAL IDENTIFIABLE DEFENDANTS) 43
- D. MARKET SHARE LIABILITY (SINGLE CAUSE, SEVERAL UNIDENTIFIABLE TORTFEASORS) 44
 - 1. Joinder of Defendants 44

II. Breach of Duty 44

OVERVIEW 44

- A. GENERAL DUTY OF CARE 45
 - 1. Reasonable Person 45
 - 2. Learned Hand Calculus 45
 - a. *Social Utility of Defendant's Activity* 46
 - 3. Application—Characteristics of Reasonable Person 46
 - a. *Knowledge* 46
 - b. *Custom* 46
 - c. *Emergency* 46
 - 1) Exception 47
 - d. *Special Attributes* 47
 - 1) Children 47
 - a) ADULT ACTIVITIES 47
 - 2) Handicapped Defendants 47
 - a) EXCEPTION—INTOXICATION 47
 - b) MENTAL ATTRIBUTES 47
- B. SPECIAL FACTORS AND SPECIAL DUTY RULES 47
 - 1. Violation of Statute 48
 - a. *General Rule* 48

NOTE—Statutes Providing for Civil Liability 48
 - b. *Criminal Statutes* 48
 - a) EXCUSE 48
 - c. *Effect of Violating Criminal Statute* 49
 - 1) Minority Rule 49
 - d. *Effect of Compliance with Statute* 49
 - 2. Malpractice (Increased Knowledge or Skills) 49
 - a. *Customary Level of Knowledge and Skill* 49
 - 1) Average Competence 49
 - 2) Different Standards within Profession 50
 - 3) Same or Similar Community 50
 - b. *Informed Consent (Medical Malpractice)* 50
 - 1) Modern Rule 50
 - a) PATIENT'S VIEWPOINT 50
 - 3. "Increased" Standard of Care 50
 - a. *Common Carriers* 50
 - b. *Innkeepers* 50
 - c. *Public Utilities* 51

4. Guest Statutes 51

a. *Constitutionality* 51

5. Owners/Occupiers of Land 51

a. *Types of Risks Involved* 51

b. *Categories of Persons Involved* 51

NOTE—Landowner/Occupier 52

c. *Persons outside Defendant's Land* 52

1) Natural Conditions 52

a) URBAN AREA EXCEPTION 52

b) MINORITY VIEW—REASONABLE CARE 52

2) Artificial Conditions 52

3) Activities 53

d. *Persons on Defendant's Land* 53

1) Trespassers 53

2) Unknown Trespasser 53

3) Known Trespasser 53

a) NATURAL CONDITIONS 53

b) ARTIFICIAL CONDITIONS 53

c) ACTIVITIES 53

4) Frequent Trespasser 53

5) Trespassing Children 54

a) REQUISITES 54

(1) Foreseeable Risk 54

(a) *Unreasonable Danger* 54

(2) Foreseeable Trespass 54

(3) Ignorance of Child 54

(4) Balance Risk vs. Utility 54

b) ATTRACTIVE NUISANCE 54

6) Licensees 55

a) NATURAL CONDITIONS 55

b) ARTIFICIAL CONDITIONS 55

c) ACTIVITIES 55

7) Invitees 55

OVERVIEW 55

a) NATURAL CONDITIONS 56

b) ARTIFICIAL CONDITIONS 56

c) ACTIVITIES 56

d) EXCEEDING SCOPE OF INVITATION 56

8) Privileged Entrants 56

a) PUBLIC ENTRANTS 56

(1) Fire Fighters and Police 57

b) PRIVATE ENTRANTS 57

9) Abandonment of Special Landowner/Occupier Rules 57

e. *Landlords* 57

1) Special Liability for Common Areas of Multiple Housing Units 57

2) Known Defects—Duty to Persons outside the Land 57

- a) NATURAL CONDITIONS 58
 - b) LIMITED DURATION 58
- 3) Tenants 58
 - a) EXISTING "PATENT" DANGERS 58
 - b) EXISTING "LATENT" DANGERS 58
 - c) DANGERS ARISING AFTER TRANSFER OF POSSESSION 58
 - (1) Landlord Undertakes Repairs 58
 - (2) Landlord Covenants to Repair 58
 - 4) Third Persons on Leased Premises 59
 - a) EXCEPTION TO TRADITIONAL VIEW 59
- f. *Sellers of Land* 59
 - 1) Latent Dangerous Conditions 59
 - a) ACTIVE CONCEALMENT 59
 - 2) Builder/Seller of Residence 59
- 6. **Mental Distress Not Resulting from Physical Injury** 59
 - a. *Mental Distress with No Physical Symptoms* 60
 - 1) Exception—Nature of Injury Guarantees Sincerity 60
 - b. *Mental Distress Manifested by Physical Symptoms* 60
 - 1) Minority Rule—Physical Impact 60
 - 2) Physical Symptom 60
 - c. *Bystander Mental Distress* 60
 - 1) Zone of Danger Requirement 60
 - 2) Minority Rule—Balancing Test 61
- 7. **Omission to Act** 61

OVERVIEW 61

NOTE—General Rule 61

 - a. *Defendant Causes Peril* 61
 - 1) Negligence 61
 - a) MODERN TREND 61
 - b. *Defendant Acts or Promises to Act* 62
 - 1) Defendant Acts—The Good Samaritan Rule 62
 - a) DISCONTINUING AID 62
 - b) GOOD SAMARITAN STATUTES 62
 - 2) Defendant Promises to Act 62
 - a) MAJORITY RULE—NONFEASANCE 62
 - (1) Malfeasance 62
 - (2) Minority Rule 63
 - c. *Special Relationship* 63
 - 1) Duty to Care 63
 - 2) Duty to Control 63
 - a) RECURRING ISSUES 63
 - (1) Negligent Entrustment 63
 - (2) Negligent Hiring 64
 - 3) Duty to Warn 64

- d. *Direction of Change* 64
- C. **PROVING BREACH OF DUTY—RES IPSA LOQUITUR** 64

OVERVIEW 64

 - 1. **Elements** 65
 - a. *Inference of Negligence* 65
 - 1) Expert Testimony 65
 - b. *Attribution to Defendant* 65
 - 1) Multiple Defendants 66
 - a) MINORITY VIEW 66
 - (1) Other Applications 66
 - c. *Plaintiff Not Responsible* 66
 - 2. **Procedural Effect of Res Ipsa Loquitur** 67
 - a. *Majority View* 67
 - b. *Minority View—Burden of Producing Evidence* 67
 - c. *Minority View—Burden of Persuasion* 67
- What Were the Consequences of Defendant's Act?** 67
- III. **Proximate Cause** 67

OVERVIEW 67

 - A. **THE UNFORESEEABLE PLAINTIFF—DUTY** 67
 - 1. **The "Cardozo View" and the "Zone of Danger"** 68
 - 2. **The "Andrews View"** 68

NOTE—Nomenclature 68
 - B. **DIRECT CAUSE** 69
 - 1. **Foreseeable Injury** 69
 - 2. **Unforeseeable Injury** 69
 - a. *Unforeseeable Extent of Injury* 69
 - b. *Unforeseeable Type of Injury* 69
 - 1) *Polemis* Jurisdictions 70
 - 2) *"Wagon Mound I"* Jurisdictions 70
 - 3. **Foreseeable Injury Caused in Unforeseeable Manner** 70
 - a. *Highly Extraordinary Manner* 70
 - b. *Direct Cause* 70
 - C. **INDIRECT CAUSATION** 70

NOTE 71

 - 1. **Intervening Force** 71
 - a. *Existing Condition* 71
 - b. *Third Party Source* 71
 - 2. **Dependent Intervening Force** 71
 - a. *Normal/Foreseeable* 71
 - 1) Rescue/Protection 72
 - 2) Medical Treatment 72
 - a) GREATER WRONG 72
 - 3) Suicide 72
 - b. *Abnormal/Unforeseeable* 72

- 1) Exception—Unforeseen Reaction Causes Foreseeable Injury 72

3. Independent Intervening Force 73

a. Foreseeable Force 73

- 1) Negligence of Third Party 73
- 2) Illness 74
- 3) Accident 74

b. Foreseeable Force Causing Unforeseeable Injury 74

- 1) Unforeseeable Extent of Injury 74
- 2) Unforeseeable Type of Injury 75
 - a) KINSMAN II 75

c. Unforeseeable Force 75

- 1) Foreseeable Injury 75
 - a) GENERAL RULE 75
 - b) EXCEPTION—UNFORESEEABLE CRIMINAL OR TORTIOUS ACTS 76
 - c) COMPARE AND CONTRAST—FORESEEABLE CRIMINAL OR TORTIOUS ACTS 76
- 2) Unforeseeable Injury 76

IV. Damages 77

A. ELEMENT OF PRIMA FACIE CASE 77

What Did the Plaintiff Do? 77

V. Defenses 77

A. CONTRIBUTORY NEGLIGENCE 77

1. General Rule 77

a. Application 77

- 1) Emergencies 77
- 2) Children 77
- 3) Violation of Statute 77
 - a) PLAINTIFF MEMBER OF PROTECTED CLASS 78

2. Proximate Cause 78

3. Imputed Contributory Negligence 78

a. Minority Rule—Loss of Consortium 78

4. Effect of Contributory Negligence—Complete Bar 78

- a. Other Torts 78
- b. Compare—Mitigation of Damages 79

5. Last Clear Chance 79

a. Standard of Care—"Helpless" Peril versus "Inattentive" Peril 79

- 1) Helpless Peril 79
- 2) Inattentive Peril 79
 - a) DUTY TO DISCOVER 79
- 3) Minority Rule 80

B. COMPARATIVE NEGLIGENCE 80

1. Types of Comparative Negligence Systems 80

- a. Pure Comparative Negligence 80
- b. Partial Comparative Negligence 80

- 1) Several Defendants 80

a) AGGREGATE 80

b) INDIVIDUAL EQUALITY 81

C. ASSUMPTION OF RISK 81

1. Elements 81

a. Knowledge and Appreciation 81

- 1) Known Risks 81
- 2) Specific Danger 81

b. Voluntary Assumption 81

- 1) Express Consent 81
- 2) Plaintiff's Conduct 81

c. Plaintiff Protected by Statute 82

Part Three: Strict Liability 82

OVERVIEW 82

What Did Defendant Do? 82

I. Actual Cause 82

II. Strict Liability Activity 82

OVERVIEW 82

A. POSSESSION OF ANIMALS 83

1. Trespass 83

2. Personal Injury 83

- a. Known Dangerous Propensities 83
- b. Exception—Zookeepers 83
- c. Special Liability Rule—Landowner 83
 - 1) Exception 83

B. ABNORMALLY DANGEROUS ACTIVITIES 84

What Were the Consequences of Defendant's Act? 84

III. Proximate Cause 84

OVERVIEW 84

A. NATURAL PROPENSITY FOR DANGER 84

B. FORESEEABLE PLAINTIFF 84

IV. Damages 84

What Did the Plaintiff Do? 85

V. Defenses 85

A. CONTRIBUTORY NEGLIGENCE 85

B. COMPARATIVE NEGLIGENCE 85

C. ASSUMPTION OF THE RISK 85

Part Four: Products Liability 85

OVERVIEW 85

I. Strict Liability in Tort 86

A. PARTIES 86

1. Plaintiff 86

- a. Bystanders 86
- b. Rescuers 87

2. Defendants 87**a. Manufacturer 87**

- 1) Assembler 87
- 2) Component Manufacturer 87

b. Distributors 87**c. Suppliers 87**

- 1) Goods 88
 - a) USED GOODS 88
- 2) Real Property 88
 - a) SELLERS 88
 - b) LANDLORDS 88
- 3) Services 88
 - a) RESTAURANTS 88
 - b) HAIRDRESSERS 88
 - c) BLOOD TRANSFUSIONS 89
 - d) DOCTORS 89

d. Franchisors and Endorsers 89**B. DEFECTIVE PRODUCT 89****OVERVIEW 89****1. Manufacturing Flaws 89****2. Design Defects 90****a. Consumer Expectation Test 90**

- 1) Application 90
- 2) Problems 90
- 3) "Obvious" Dangers 90
- 4) "Consumer" 90

b. Danger-Utility Test 90

- 1) Application 91
- 2) "State of the Art" 91
- 3) Time of Design 91

NOTE—Combined Approach Test 91

- 1) Application 91

c. Hindsight-Negligence 91

- 1) Application 91

3. Absence of Warning 92**a. Application 92****b. Obvious and Unavoidable Dangers 92****c. Allergic or Other Adverse Reactions 92**

- 1) Substantial Number 92

NOTE—Difference between Strict Liability and Negligence 92**C. PROOF OF DEFECT AND CAUSATION 92****1. Actual Cause 92****a. Attributable to Defendant 93**

- 1) Liberality of Courts 93

b. Injury Caused by Defect 93**2. Proximate Cause 93****a. Intervening Acts of Third Persons 93**

- 1) Criminal or Intentionally Tortious Conduct 93

- 2) Negligent Conduct 93

- 3) Shifting Responsibility 94

D. DAMAGES 94**1. Personal Injuries 94****2. Property Damage 94****a. General Rule 94****b. Injury to Product 94****3. Economic Losses 94****a. Minority Rule 94****b. Emerging Rule—Nature of Harm Threatened 95****E. DEFENSES 95****1. Product Alteration 95****2. Plaintiff's Fault 95****a. Contributory Negligence 95**

- 1) Failure to Discover Defect 95
- 2) Misuse or Abnormal Use of Product 95
- 3) "Independent" Negligence 96

b. Comparative Fault 96**c. Assumption of the Risk 96**

- 1) Voluntarily 96
- 2) Unreasonably 96

II. Negligence 97**A. PARTIES 97****1. Expansion of Potential Defendants 97****a. Used Goods 97****b. Real Property 97****c. Services 97****d. Franchisors and Endorsers 97****B. BREACH OF DUTY 97****NOTE 98****NOTE—RE: Intermediate Handlers 98****1. Failure to Inspect 98****a. Packaged Goods 98****b. Goods Requiring Inspection 98****c. Customer Complaints 98****2. Failure to Discover 98****3. Failure to Remedy or Warn 98****C. CAUSATION 99****1. Actual Cause 99****2. Proximate Cause 99****D. DAMAGES 99****E. DEFENSES 99****III. Intentional Tort 99****A. PARTIES 99**

- B. INTENT 99
- C. CAUSATION 99
 - 1. Actual Cause 99
 - 2. Proximate Cause 100
- D. DAMAGES 100
- E. DEFENSES 100
- IV. Warranty 100
 - A. PARTIES 100
 - 1. Modern Rule 100
 - 2. UCC Provisions 100
 - NOTE 101
 - B. BREACH OF WARRANTY 101
 - 1. Express Warranty 101
 - a. UCC Provisions 101
 - 2. Implied Warranty 101
 - a. Sale of Goods 101
 - 1) Implied Warranty of Merchantability 101
 - NOTE—Exam Writing 102
 - 2) Implied Warranty of Fitness for a Particular Purpose 102
 - b. Lease of Goods 102
 - c. Real Property 102
 - d. Services 102
 - C. PROOF OF BREACH (DEFECT) AND CAUSATION 102
 - D. DAMAGES 103
 - 1. Pure Economic Losses 103
 - E. DEFENSES 103
 - 1. Contributory/Comparative Negligence 103
 - 2. Assumption of the Risk 103
 - 3. Disclaimer 103
 - a. Limitation for Personal Injuries 103
 - b. Sale "As Is" 103
 - c. Federal Statute 103
 - 4. Failure to Notify Seller 104

Part Five: Defamation 104

OVERVIEW 104

- I. Defamatory Message Concerning Plaintiff 104
 - A. DEFAMATORY 104
 - 1. General Rule 104
 - a. Injury to Reputation 104
 - 1) Comprehension of Defamatory Message 104
 - b. Community or Third Persons 105
 - 2. Defamation Per Se 105
 - 3. Fact or Opinion 105
 - a. Context 105
 - b. Nature of Utterance 106

- B. MESSAGE 106
- C. CONCERNING PLAINTIFF 106
 - 1. Persons Who May Be Defamed 106
 - a. Defamation of Third Person 106
 - b. Group Defamation 106
 - 1) All Members of Large Group 106
 - 2) All Members of Small Group 107
 - 3) Some Members of a Small Group 107
 - c. Colloquium—Message Doesn't Defame Plaintiff on Its Face 107

II. Published 108

- A. COMMUNICATED TO THIRD PERSON 108
- B. INTENT OR NEGLIGENCE 108
 - 1. Effect of No Intent to Defame 108
- C. PUBLICATION AND REPUBLICATION—WHO MAY BE LIABLE 108
 - 1. Primary Publisher 108
 - a. Republishers 108
 - 2. Secondary Publisher (Disseminators) 109
 - 3. Equipment Suppliers 109

III. Damages 109

- A. TYPES OF DAMAGES 109
 - 1. Pecuniary Damages 109
 - 2. General Damages (May Be Presumed) 109
 - 3. Punitive Damages 109
- B. PECUNIARY DAMAGES AS ELEMENT OF CAUSE OF ACTION 109
 - 1. Pecuniary Damages Must Be Proved 109
 - 2. Pecuniary Damages Need Not Be Proved 110
- C. DIFFERENCE BETWEEN LIBEL AND SLANDER 110
 - 1. Slander 110
 - a. Slander per Se 110
 - 1) Business, Trade, Profession, or Office 110
 - 2) Notorious Crime 110
 - 3) Loathsome Disease 110
 - 4) Unchastity to a Woman 110

2. Libel 110

- a. Libel per Quod 111
- 3. Hybrids—Where Classification Is Difficult 111
 - a. Republication 111

IV. Constitutional Principles 111

OVERVIEW 111

- A. PUBLIC OFFICIAL/FIGURE PLAINTIFF VERSUS MEDIA DEFENDANT 111
 - 1. Public Official 112
 - 2. Public Figure 112
 - a. Voluntary Injection into Public Controversy 112

- 3. **Malice 112**
 - a. *General Rule—Knowledge of Falsity or Reckless Disregard 112*
 - 1) Standard of Proof 112
 - b. *Application 112*
 - 1) Speech Protected Even When Characterized as Another Tort 112
 - 2) Fabricated Quotations 113
- 4. **Effect of Constitutional Privilege—Damages 113**
- B. **PUBLIC OFFICIAL/FIGURE PLAINTIFF VERSUS PRIVATE DEFENDANT 113**
- C. **PRIVATE PLAINTIFF VERSUS MEDIA DEFENDANT 113**
 - 1. **Media Defendant 113**
 - 2. **Degree of Fault 114**
 - 3. **Effect of Constitutional Privilege—Damages 114**
 - a. *Actual Damages 114*
 - 4. **Matters of Public Concern 114**
 - a. *Analysis 114*
- D. **PRIVATE PLAINTIFF VERSUS PRIVATE DEFENDANT 114**
- V. **Common Law Privileges and Defenses 115**
 - A. **TRUTH 115**
 - 1. **Minority View 115**
 - 2. **Constitutional Protection 115**
 - B. **CONSENT 115**
 - C. **ABSOLUTE PRIVILEGE 115**
 - 1. **Legislative Proceedings 115**
 - 2. **Judicial Proceedings 116**
 - a. *Participant 116*
 - b. *During Course of Judicial Proceedings 116*
 - 3. **Executive Communications 116**
 - 4. **Compelled Broadcast 116**
 - 5. **Spousal Communications 116**
 - 6. **Burden of Proof 116**
 - D. **QUALIFIED PRIVILEGE 116**
 - 1. **Reports of Public Proceedings 116**
 - 2. **Public Interest 117**
 - 3. **Fair Comment 117**
 - 4. **Private Interest 117**
 - a. *Publisher's Interest 117*
 - b. *Recipient's Interest 117*
 - c. *Common Interest 117*
 - 5. **Burden of Proof 117**
 - E. **LOSS OF QUALIFIED PRIVILEGE 117**
 - 1. **Malice 117**
 - 2. **Exceeding Scope of Privilege 117**
 - 3. **Lack of Belief in Truth 118**
 - 4. **Burden of Proof 118**
- Part Six: **Invasion of Privacy 118**
- OVERVIEW 118
- I. **Intrusion 118**
 - OVERVIEW 118
 - A. **INTRUSION 118**
 - B. **UNREASONABLE 118**
 - C. **SECLUSION 119**
 - 1. **Not All Privacy Lost in Public 119**
 - D. **DAMAGES 119**
- II. **Appropriation 119**
 - OVERVIEW 119
 - A. **UNAUTHORIZED USE 119**
 - B. **IDENTITY 119**
 - C. **COMMERCIAL ADVANTAGE 119**
 - D. **DAMAGES 120**
- III. **Public Disclosure 120**
 - OVERVIEW 120
 - A. **PUBLIC DISCLOSURE 120**
 - B. **UNREASONABLE 120**
 - C. **PRIVATE FACTS 120**
 - D. **DAMAGES 120**
- IV. **False Light 120**
 - OVERVIEW 120
 - A. **PUBLISH 120**
 - B. **FALSE LIGHT 120**
 - C. **DAMAGES 120**
- V. **Constitutional Principles 121**
 - A. **FALSE LIGHT 121**
 - 1. **Other Defamation Principles 121**
 - 2. **Damages 121**
 - B. **DISCLOSURE—COX TO FLORIDA STAR 121**
 - 1. *Cox Broadcasting Corp. v Cohn 121*
 - 2. *Florida Star v B.J.F. 122*
 - C. **APPROPRIATION AND INTRUSION 122**
- VI. **Common Law Defenses and Privileges 122**
 - A. **TRUTH 122**
 - 1. **Disclosure 122**
 - 2. **False Light 122**
 - 3. **Appropriation, Intrusion 122**
 - B. **CONSENT 122**
 - 1. **Disclosure, Intrusion, False Light 122**
 - 2. **Appropriation 123**
 - C. **PRIVILEGE 123**

Part Seven: Economic Torts and Other Miscellaneous Torts 123

I. Misrepresentation and Nondisclosure 123

OVERVIEW 123

A. DECEIT 123

OVERVIEW 123

1. Misrepresentation 123

a. General Rule 123

1) Types of Actionable Misrepresentations 124

b. Liability 124

1) False Affirmative Assertions 124

2) Active Concealment 124

a) MINORITY VIEW 124

3) Failure to Disclose 124

NOTE—Modern Trend 125

c. Compare—Breach of Contract versus Deceit (Fraud) 125

2. Intent and Scienter 125

a. Intent 125

1) Transferred Intent 125

2) Exception 125

3) Modern Trend 125

b. Scienter 126

1) Recklessness 126

3. Materiality, Justifiable Reliance and Causation 126

a. Material 126

b. Justifiable Reliance 126

1) Misrepresentation of Fact 126

2) Misrepresentation of Opinion 127

a) SUPERIOR KNOWLEDGE 127

b) FIDUCIARY DUTY 127

c) CONFIDENTIAL RELATIONSHIP 127

d) UNDISCLOSED INTEREST 127

3) Misrepresentations of Law 127

c. Causation 127

4. Damages 128

a. Benefit of Bargain 128

b. Out of Pocket 128

B. NEGLIGENCE MISREPRESENTATION 128

1. Traditional Rule 128

a. Application 128

2. Minority Rule 128

3. Modern Trend—Special Relationship 128

a. Business of Supplying Information 128

a) COMPARE—SCOPE OF LIABILITY IN DECEIT VERSUS NEGLIGENCE 129

NOTE 129

C. STRICT LIABILITY FOR MISREPRESENTATION 130

1. Warranty 130

II. Interference with Contract or Prospective Advantage 130

A. INDUCING BREACH OF CONTRACT 130

OVERVIEW 130

1. Act and Causation 130

a. Active Role 130

2. Intent 130

a. Negligent Inducing of Breach 130

1) Modern Minority Rule 131

3. Result 131

a. Nature of Contract 131

b. Enforceability of Contract 131

4. Defenses 131

a. Privilege 131

1) Justifiable Purpose 131

2) Justifiable Methods 132

B. INTERFERENCE WITH CONTRACTUAL RELATIONS 132

C. INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE 132

OVERVIEW 132

1. Privilege 132

III. Injurious Falsehood 132

OVERVIEW 132

OVERVIEW 133

A. FALSE STATEMENT 133

1. Subject Matter of Statement 133

B. MADE TO ANOTHER 133

C. INTENT 133

D. CAUSATION 133

E. DAMAGES 133

F. DEFENSES 133

1. Consent 133

2. Privilege 134

3. Constitutional Principles 134

IV. Wrongful Institution of Legal Proceedings 134

A. MALICIOUS PROSECUTION 134

OVERVIEW 134

1. Act and Causation 134

a. Institution of Criminal Proceedings 134

b. Causation 134

2. Intent—Improper Purpose 134

3. Result 134

a. Absence of Probable Cause 134

1) Official Action 135

2) Advice of Counsel 135

b. Terminate Favorably 135

4. Defenses 135

a. Privilege 135

b. Plaintiff's Guilt 135

B. WRONGFUL INSTITUTION OF CIVIL PROCEEDINGS 135

C. ABUSE OF PROCESS 135

Part Eight: General Considerations Concerning Liability-Widening and Liability-Narrowing Devices 136

OVERVIEW 136

I. Liability-Widening Devices 136

A. PLAINTIFF'S DEVICES 136

1. Vicarious Liability 136

a. Situations Where Vicarious Liability Is Clearly Applicable 136

1) Employer-Employee 136

a) GENERAL RULE FOR NEGLIGENCE AND STRICT LIABILITY ACTIVITIES 136

(1) Scope of Employment 137

b) LIMITATION FOR INTENTIONAL TORTS 137

(1) Exception—Force Furthers Employer's Objectives 137

2) Joint Enterprise 137

a) PARTNERS AND JOINT VENTURERS 137

(1) Joint Venture 137

(a) *Shared Expense Auto Trips 137*

3) Auto Owner 137

a) NEGLIGENCE ENTRUSTMENT 137

b. Independent Contractors 138

1) General Rule 138

2) Exceptions 138

c. Situations Where Vicarious Liability Is Clearly NOT Applicable 138

1) Parent-Child 138

2) Bailor-Bailee 138

3) Tavernkeeper 138

2. Duty to Control 139

3. Joint and Several Liability 139

a. Comparative Negligence 140

B. DEFENDANT'S DEVICES 140

1. Contribution 140

a. Traditional Rule 140

b. Modern Rule 140

1) Minority Rule 140

2) Variations 140

a) EQUAL SHARES 140

b) PERCENTAGE OF RESPONSIBILITY 140

c) JUDGMENT 140

2. Indemnity 141

a. Vicarious Liability 141

b. Different Degree of Fault 141

c. Subsequent Aggravating Conduct 141

II. Liability-Narrowing Devices 141

A. IMMUNITIES 141

1. Family Immunities 141

a. Spousal Immunity 141

b. Parent-Child Immunity 141

c. Modern Limitations 142

1) Spousal Immunity 142

2) Parent-Child Immunity 142

a) EXCEPTION—PARENTAL DISCRETION 142

2. Governmental Immunity 142

a. Federal 142

b. States 142

c. Municipal 142

3. Charitable Immunity 142

B. DEATH OF VICTIM OR TORTFEASOR 142

1. Wrongful Death 143

2. Survival Statutes 143

a. Type of Injury 143

1) Personal Injuries versus Property Damages 143

2) Intangible Interests 143

b. Damages Recoverable 143

1) Pain and Suffering 143

2) Punitive Damages 143

C. SATISFACTION AND RELEASE 143

1. Satisfaction 143

2. Release 143

Part Nine: Tort Remedies 144

I. Damages 144

GENERAL PRINCIPLES 144

1. Compensatory Damages 144

a. General Damages 144

b. Special Damages 144

c. General Limitations 144

1) Foreseeability 144

2) Certainty 145

a) EXISTENCE VERSUS AMOUNT 145

3) Avoidability (Mitigation) 145

2. Punitive Damages 145

a. Willful, Wanton or Malicious 145

b. Parasitic 146

c. Constitutional Limitations 146

1) Due Process 146

- a) ABROGATION OF JUDICIAL REVIEW
UNCONSTITUTIONAL 146

2) Eighth Amendment 146

3. Nominal Damages 146
APPLICATION 147

A. PERSONAL INJURY 147

1. Body and Mind 147

a. Noneconomic Damages 147

- 1) Jury Discretion 147

b. Economic Losses 147

c. Lump Sum 147

- 1) Prior to Trial 148
 - a) DEATH OF PLAINTIFF 148
- 2) Future 148
 - a) NO EARNINGS HISTORY 148
 - b) PRESENT VALUE 148
 - (1) Inflation 148

2. Reputation and Privacy 148

B. INJURY TO PROPERTY 149

OVERVIEW 149

1. Destruction 149

a. Real Property 149

- 1) General Rule 149
- 2) Destruction of Improvements 149
- 3) Destruction of Crops or Trees 149
- 4) Destruction of Easement 149

b. Personal Property 149

- 1) General Rule 149
 - a) VALUE 149
 - b) LOSS OF USE 149

2. Damage (Partial Injury) 150

a. Real Property 150

- 1) General Rule 150
 - a) TRESPASS WITH NO OUSTER 150
 - b) TRESPASS CAUSING OTHER INJURY 150
- 2) Damage to Improvements 150
- 3) Damage to Crops or Trees 150
- 4) Interference with Easement 150
- 5) Waste 150
 - a) VOLUNTARY WASTE 150
 - b) PERMISSIVE WASTE 151

NOTE—RE: Modern Rule 151

- c) AMELIORATIVE WASTE 151
- 6) Nuisance 151
 - a) PERMANENT NUISANCE 151

b. Personal Property 151

- 1) General Rule 151
- 2) Cost of Repair 151
- 3) Loss of Use 151

3. Taking 152

a. Real Property 152

- 1) Trespass with Ouster 152
 - a) SET OFF 152
- 2) Encroachment 152

b. Personal Property 152

- 1) Conversion 152
 - a) PROPERTY NOT RETURNED 152
 - (1) Unable to Obtain Return 152
 - (2) Fluctuating Value 152
 - (3) Increased Value 153
 - b) PROPERTY RETURNED 153
 - (1) No Duty to Accept Return 153

C. MISCELLANEOUS 153

1. Deceit (Fraud) 153

- a. Benefit of Bargain 153*
- b. Out-of-Pocket 153*
- c. Non-Standard Measure 153*
- d. Rescission 154*

2. Inducing Breach of Contract 154

- a. Tort Damages 154*
- b. Contract Damages 154*

3. Interference with Prospective Economic Advantage 154

II. Restitution 154

OVERVIEW 154

A. LEGAL REMEDIES 155

1. Ejectment 155

2. Replevin 155

- a. Plaintiff's Bond 155*
 - 1) Due Process 155
- b. Defendant's Bond 155*
- c. Execution of Writ 155*

B. EQUITABLE REMEDIES—QUASI-CONTRACT ("WAIVE THE TORT AND SUE IN ASSUMPSIT") 155

1. Constructive Trust 156

- a. Inadequacy of Legal Remedy 156*
- b. Effect of Constructive Trust 156*
 - 1) Tracing 156
 - a) CONVEYANCE TO BFP 156
 - 2) Priority 156

2. Equitable Lien 156

a. Effect of Equitable Lien 157

- 1) Conveyance to BFP 157
- 2) Priority 157

b. Difference between Constructive Trust and Equitable Lien 157

- 1) Legal Title Properly Held by Defendant 157

- 2) Substitutionary 157
- 3. **Effect of Commingled Funds** 157
 - OVERVIEW** 157
 - a. *Traditional View* 158
 - b. *Modern Approach* 158
 - 1) General Rule—Equitable Lien 158
 - 2) Knowing Wrong 158
- III. **Injunctive Relief** 158
 - OVERVIEW** 158
 - NOTE—RE: Timing of Injunctive Relief** 159
 - 1. **Commencement (Temporary Restraining Order)** 159
 - 2. **Pending Final Judgment (Preliminary Injunction)** 159
 - 3. **Final Judgment (Permanent Injunction)** 159
 - A. **PROOF OF UNDERLYING TORT** 159
 - B. **INADEQUACY OF LEGAL REMEDY** 159
 - 1. **Application** 159
 - a. *Damages Inadequate* 159
 - 1) Irreparable Injury 160
 - b. *Multiplicity of Lawsuits* 160
 - c. *Threatened Injury* 160
 - 2. **Recurring Problems** 160
 - a. *Trespass* 160
 - 1) Legal Remedy Inadequate 161
 - a) SIMPLE TRESPASS 161
 - b) ENCROACHMENT 161
 - c) TRESPASS WITH SEVERANCE 161
 - d) TRESPASS WITH OTHER INJURY 161
 - 2) Legal Remedy Adequate 161
 - a) TRESPASS WITH OUSTER 161
 - b) PERMISSIVE WASTE 161
 - b. *Nuisance* 161
 - c. *Conversion* 161
 - d. *Privacy* 162
 - C. **FEASIBILITY OF DECREE** 162
 - 1. **Types of Injunctions** 162
 - a. *Prohibitory* 162
 - b. *Mandatory* 162
 - 1) Framing Decree as Prohibitory 162
 - 2. **Jurisdiction** 162
 - D. **BALANCING OF HARDSHIPS** 162
 - 1. **Majority Rule** 162
 - 2. **Minority Rule** 162
 - a. *Exception—Preliminary Injunction* 163
 - 3. **Application** 163
 - a. *Encroachments* 163
 - b. *Nuisance* 163
 - E. **PROPERTY RIGHT** 163
 - F. **DEFENSES** 163
 - 1. **Laches** 164
 - a. *Statute of Limitations* 164
 - b. *Reasonableness of Delay* 164
 - 2. **Unclean Hands** 164
 - 3. **Defamation** 164
 - a. *Exception—Trade Libel* 164
 - 4. **Crimes** 164
 - a. *Exception—Public Nuisance* 164
 - b. *Exception—Tortious Conduct* 165