

Slides with Podcast
Recorded May 2017



Torts Lightning Review

Eric E. Johnson
ericejohnson.com



Konomark
Most rights sharable

- This assumes you've already taken Torts - it's a review.
- You can listen to the audio without looking at the slides. You can look at the slides later as notes.

- I'm going to try to refresh your recollection about as much torts doctrine as I can in a very short amount of time.
- I'm particularly hopeful this will be useful to 2Ls and 3Ls to help them "interrupt the forgetting process," so to speak, and retain more of that 1L torts knowledge.
- Obviously, this is not a substitute for a bar preparation course!



Negligence

Negligence

- **Duty of care owed to plaintiff**
- **Breach of duty**
- **Actual causation**
- **Proximate causation**
- **Injury (Damages)**

Negligence

- Duty of care owed to plaintiff
- Breach of duty
- Actual causation
- Proximate causation
- Injury (Damages)

Duty of Care

- **In general, owed to all foreseeable plaintiffs**
- **No affirmative duty to act**
 - Exceptions
- **Specific situations**
 - Rescuers

Affirmative Duty

- **No affirmative duty to act (general rule)**
- **Exceptions**
 - **Assumption of duty by acting**
 - **Peril caused by D's negligence**
 - **Special relationships**
 - **E.g., parent to child**
 - **Common carriers, innkeepers, shopkeepers**
 - **Control of third persons where D has the ability and authority to do so and knows the third person is likely to do harm**
 - **Note: Generally, there is no obligation to control third persons**

Specific situation: Rescuers

- "Danger invites rescue"
- If you put someone else in harm's way, and a rescuer gets injured trying to help them, you are on the hook.
 - That is, you owed them a duty and you can't get out of it by claiming their rescue action was unforeseeable

Negligence

- Duty of care owed to plaintiff
- Breach of duty
- Actual causation
- Proximate causation
- Injury (Damages)

Breach of Duty

Two questions:

- What is the standard of care?
- Can it be proven, by a preponderance of the evidence, that it was breached?

Standard of care

- **General standard: Reasonable person**
- **Specific standards for:**
 - **Children**
 - **Professionals**
 - **Bailment**
 - **Owners/occupiers of land**
 - **Negligence per se**

Reasonable Person Standard

- This is the general standard.
- It's easy.
- You ask: Would the reasonable person have done what the defendant did? Or would they have undertaken some additional precaution or care?

Reasonable Person Standard

Some elaborations (*think of this as the reasonable person "FAQ"*)

- It's an objective standard
- Mental limitations/deficiencies are not taken into account.
- Inexperience is not taken into account.
- Physical disabilities/limitations are taken into account.
- Custom is not dispositive.

Specific Standard: Children

- Children are held to the standard of a child of like age, experience, and intelligence
 - ... unless engaged in an adult activity
 - in which case, it's the reasonable person standard.
- Children 4 and under generally cannot be held liable in negligence.

Specific Standard: Professionals

- Professionals, in the case of professional malpractice, are held to the standard of a minimally qualified individual in that profession.
 - Generalist medical practitioners are held traditionally to the standard in a similar community.
 - Specialists are held to a higher, national standard for their specialty.
- Note: Custom is dispositive here!

Specific Standard: Bailment

- **Bailee's standard of care:**
 - if for sole benefit of bailor, low standard
 - if for mutual benefit, ordinary standard
 - if for sole benefit of bailee, high standard
- **Bailor's standard of care:**
 - if gratuitous bailment, must inform of known, dangerous defects in chattel
 - if bailment for hire, must inform of known and reasonably discoverable defects in chattel
 - i.o.w., there's a duty to inspect

Specific Standard: Land owners/occupiers

- **For activities:**
 - reasonable person standard of care
- **For conditions of the land:**
 - Depends on status of plaintiff, whether
 - unknown trespasser
 - anticipated/discovered trespasser
 - infant trespasser
 - licensee
 - invitee

Specific Standard: Land owners/occupiers for conditions upon the land

- **unknown trespasser**
 - no duty
- **anticipated/discovered trespasser**
 - warn of or make safe concealed artificial hazards that are known and that are capable of causing death or serious bodily injury

Specific Standard: Land owner for conditions upon

- unknown trespasser
 - no duty
- anticipated/discovered trespasser
 - warn or or make safe concealed artificial hazards that are known and that are capable of causing death or serious bodily injury

LACK:
Lethal
Artificial
Concealed
Known

Specific Standard: Land owners/occupiers for conditions upon the land

- **infant trespasser**
 - **duty to avoid foreseeable risk to children caused by an artificial condition if the owner knows or should know that children frequent the area and that the condition is hazardous to children, and the cost of remedying condition is slight compared to risk of injury (cost-benefit analysis)**
 - **Note: this is a situation where a warning won't necessarily work**
 - **This is called "attractive nuisance doctrine," but that's a confusing name for it.**

Specific Standard: Land owners/occupiers for conditions upon the land

- licensee
 - regular non-trespassers
 - warn of or make safe concealed known hazards (whether artificial or natural)
- invitee
 - customers, patrons, members of public invited to a place like a shop, mall, park
 - warn of or make safe concealed known and reasonably knowable hazards (whether artificial or natural)
 - i.o.w., we add a duty to inspect

Specific Standard: Land owners/occupiers

REMEMBER:

Activities on land
use the regular
standard (that's
reasonable person,
usually)

and

Specific Standard: Negligence Per Se

- This is an alternative that the plaintiff can use to make the case easier to prove.
- You use the standard from a relevant statute or regulation.
- The plaintiff must get by the class of persons / class of risks test for negligence per se.
 - Was the plaintiff within the class of persons the statute or reg was designed to protect?
 - Was the harm to the plaintiff within the class of risks the statute or reg was meant to address?

Proving breach

- **Generally an issue for the jury or trier of fact.**
 - Did the D's care fall below the applicable standard?
- **Res ipsa loquitor**
 - If we don't know about the D's care, but we can say:
 - this is something that ordinarily doesn't happen absent negligence (i.e., a breach of the duty of care), and
 - the instrumentalities of the accident were in the defendant's sole control,
 - then there is a rebuttable presumption of breach

Negligence

- Duty of care owed to plaintiff
- Breach of duty
- Actual causation
- Proximate causation
- Injury (Damages)

Actual Causation

- The plaintiff only needs to prove but-for causation.
- If the plaintiff can't prove but-for causation, there are some alternatives available for the plaintiff:
 - Multiple sufficient causes (a.k.a. "twin fires doctrine")
 - Summers v. Tice doctrine
 - Market-share liability

but for

the but for

~~time~~ but for

the  a but for

**You don't have
to pick one
defendant.**

**You can sue
everybody who's
a but-for cause.**

Multiple necessary causes

Multiple sufficient causes

Normal

Multiple necessary causes

Multiple sufficient causes

Normal

Multiple necessary causes

Multiple sufficient causes

Infrequent

Multiple necessary causes

When each of multiple careless acts is a necessary condition for an injury, each is deemed an actual cause of that injury.

Multiple necessary causes

When each of multiple careless acts is a necessary condition for an injury, each is deemed an actual cause of that injury.

Normal

Multiple necessary causes

Hypo: Someone heaves a bowling ball off a building. Someone else lobs a knife up into the air over the sidewalk. Both the ball and knife would have landed harmlessly on the sidewalk. But the bowling ball deflects the knife, which hits a pedestrian, badly injuring him.

Knife lobber
and bowling
ball heaver

Who's liable?

1. Lobber only
2. Heaver only
3. Lobber and heaver
4. Neither

**Knife lobber
and bowling
ball heaver**

Multiple necessary causes

Hypo: Someone heaves a bowling ball off a building. Someone else lobs a knife up into the air over the sidewalk. Both the ball and knife would have landed harmlessly on the sidewalk. But the bowling ball deflects the knife, which hits a pedestrian, badly injuring him.

Analysis: Ask the “*but for*” question.

Multiple necessary causes

Hypo: Someone heaves a bowling ball off a building. Someone else lobs a knife up into the air over the sidewalk. Both the ball and knife would have landed harmlessly on the sidewalk. But the bowling ball deflects the knife, which hits a pedestrian, badly injuring him.

Analysis: Ask the “*but for*” question.

Is it correct to say that the plaintiff would not have been injured but for the actions of the heaver?

Is it correct to say that the plaintiff would not have been injured but for the actions of the lobber?

Multiple necessary causes

Hypo: Someone heaves a bowling ball off a building. Someone else lobs a knife up into the air over the sidewalk. Both the ball and knife would have landed harmlessly on the sidewalk. But the bowling ball deflects the knife, which hits a pedestrian, badly injuring him.

Analysis: Ask the “*but for*” question.

Is it correct to say that the plaintiff would not have been injured but for the actions of the heaver? YES

Is it correct to say that the plaintiff would not have been injured but for the actions of the lobber? YES

Multiple necessary causes

Hypo: Someone heaves a bowling ball off a building. Someone else lobs a knife up into the air over the sidewalk. Both the ball and knife would have landed harmlessly on the sidewalk. But the bowling ball deflects the knife, which hits a pedestrian, badly injuring him.

Result: *The heaver and the lobber are both liable. The actions of both are but-for causes. Pointing to the other as an additional but-for cause does not release either from liability.*

Multiple necessary causes

Hypo: Someone heaves a bowling ball off a building. Someone else lobs a knife up into the air over the sidewalk. Both the ball and knife would have landed harmlessly on the sidewalk. But the bowling ball deflects the knife, which hits a pedestrian, badly injuring him.

Normal

Result: *The heaver and the lobber are both liable. The actions of both are but-for causes. Pointing to the other as an additional but-for cause does not release either from liability.*

**Let's go
beyond
but-for...**

Alternatives to but-for

- These only help, never hurt, the plaintiff! They allow proof of actual causation even without but-for causation.
 - Multiple sufficient causes (twin fires cases)
 - Summers v. Tice doctrine
 - Market-share liability

Alternatives to but-for

- These only help, never hurt, the plaintiff! They allow proof of actual causation even without but-for causation.
 - Multiple sufficient causes (twin fires cases)
 - Summers v. Tice doctrine
 - Market-share liability

Multiple sufficient causes

When each of multiple discrete careless acts committed by different multiple actors would, by itself, have caused the injury that resulted from the confluence of those acts, each act is deemed an actual cause, even though neither satisfies the but-for test.

Multiple sufficient causes

When each of multiple discrete careless acts committed by different multiple actors would, by itself, have caused the injury that resulted from the confluence of those acts, each act is deemed an actual cause, even though neither satisfies the but-for test.

Infrequent

Multiple sufficient causes

When each of multiple discrete careless acts committed by different multiple actors would, by itself, have caused the injury that resulted from the confluence of those acts, each act is deemed an actual cause, even though neither satisfies the but-for test. → Sometimes courts talk about "substantial factor" as a way of weeding out seemingly trivial/silly causes.

Infrequent

Alternatives to but-for

- These only help, never hurt, the plaintiff! They allow proof of actual causation even without but-for causation.
 - Multiple sufficient causes (twin fires cases)
 - Summers v. Tice doctrine
 - Market-share liability

Alternatives to but-for

- These only help, never hurt, the plaintiff! They allow proof of actual causation even without but-for causation.
 - Multiple sufficient causes (twin fires cases)
 - Summers v. Tice doctrine
 - Market-share liability

~~time~~ but for

the  a but for

Negligence

- Duty of care owed to plaintiff
- Breach of duty
- Actual causation
- Proximate causation
- Injury (Damages)

Proximate Causation

- Essentially, a way of preventing plaintiffs from being able to recover from a greater scope of defendants than the legal system is comfortable with.
- A defendant's breach can be an actual cause without being a proximate cause.
- A good test courts use is the "harm within the risk test."

Negligence

- Duty of care owed to plaintiff
- Breach of duty
- Actual causation
- Proximate causation
- Injury (Damages)

Injury (Damages)

- **General rule: Plaintiff must suffer a personal injury or property damage (real property or chattel; "a dent or a bruise")**
- **Exceptions:**
 - **Pure economic harm in very particular situations (but usually not)**
 - **Negligent Infliction of Emotional Distress (perhaps better thought of as its own cause of action)**

Negligence Defenses

- **Pure comparative negligence**
 - UBE instructions are to assume this!
- **Assumption of risk**
 - Implied
 - Express

Negligence Defenses

- **Pure comparative negligence**
 - UBE instructions are to assume this!
 - If instructed otherwise for a specific question, there's also
 - modified comparative negligence
 - contributory negligence

Negligence Defenses

- **Assumption of risk**
 - Two forms: express and implied
 - Requires:
 - Knowing and appreciating the risk
 - Encountering it voluntarily
 - Not valid for common carriers, hospitals, other public necessity providers
 - Not valid for gross negligence



**Strict
Liability**

Negligence

- **Duty of care owed to plaintiff**
- **Breach of duty**
- **Actual causation**
- **Proximate causation**
- **Injury (Damages)**

STRICT LIABILITY

• Duty of care
Absolute duty of safety (tiff
case of duty

- Actual causation
- Proximate causation
- Injury (Damages)

STRICT LIABILITY

Absolute duty of safety

- Keeping of wild animals
- Trespassing livestock
- Domesticated animals with known, dangerous propensities
- Abnormally dangerous (a/k/a "ultrahazardous") activities
- Defective products

Important note:

Products Liability

There are three paths to products liability (*a plaintiff can use any or all*).

- Strict products liability
- Negligence
- Breach of warranty (UCC Article 2)

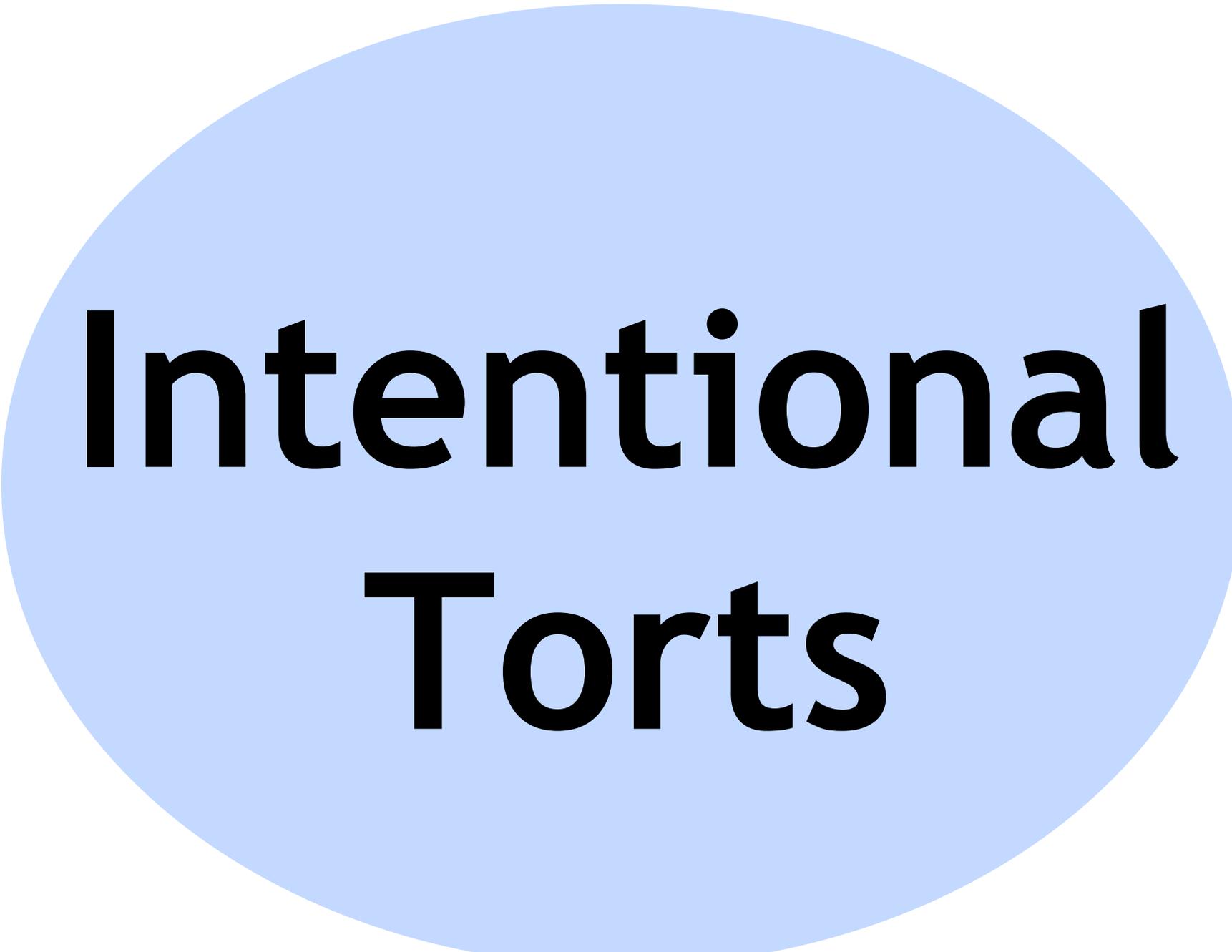
Strict products liability

- (1) Defendant was engaged in the business of selling or supplying the product at issue, whether as a manufacturer, distributor, or retailer.
- (2) The product was defective when sold or supplied.
- (3) The product reached the plaintiff in essentially unchanged condition, and
- The defect was (4) an actual cause and (5) a proximate cause of (6) an injury to the plaintiff's person or physical property.

Strict products liability: Proving a defect

(2) The product was defective when sold or supplied.

- **Kinds of defects:**
 - manufacturing
 - design
 - warning
- **Tests:**
 - consumer-expectations test (esp. for manufacturing or design defects)
 - risk-utility test (esp. for design defects)
 - reasonable under circumstances to avoid danger (esp. for warning defects)



Intentional Torts

Intentional Torts

Against the Person

- Battery
- Assault
- False Imprisonment
- Intentional Infliction of Emotional Distress

Intentional Torts

Against the Person

- Trespass to Land
- Trespass to Chattels
- Conversion

Battery

- (1) The defendant undertook an act,**
- (2) with intent, effecting a**
- (3) harmful or offensive**
- (4) touching of the plaintiff.**

Assault

- (1) The defendant undertook an act,**
- (2) with intent, effecting**
- (3) the immediate apprehension of**
- (4) a harmful or offensive**
- (5) touching of the plaintiff.**

False Imprisonment

**The defendant (1) intentionally
(2) confined the plaintiff, and that
the plaintiff
(3) was aware of (or harmed by) the
confinement.**

False Imprisonment (more)

Sufficient confinements:

- **physical barriers**
- **force**
- **imminent threat of force**
- **improper assertion of legal authority**

IIED or Outrage

The defendant

(1) intentionally or recklessly,

**(2) by extreme and outrageous
conduct**

**(3) inflicted severe emotional
distress on the plaintiff.**

Trespass to Land

The defendant

(1) intentionally

(2) caused an intrusion, either by entry onto or failure to leave or remove from,

(3) plaintiff's real property.

Trespass to Chattels

The defendant

(1) intentionally

(2) interfered with the

(3) plaintiff's right of possession in a chattel.

Trespass to Chattels (more)

Interference can be established by any of the following:

- (1) actual damage to the chattel,**
- (2) actual dispossession of the chattel,**
- (3) loss of use of the chattel for some appreciable amount of time, or**
- (4) harm to the plaintiff, or to something or someone in whom the plaintiff had a legal interest, on account of the defendant's action**

Conversion

The defendant

(1) intentionally

(2) interfered with

**(3) the plaintiff's right of possession
in a chattel**

**(4) in so substantial a manner as to
warrant the remedy of a forced sale.**

Defenses to Intentional Torts

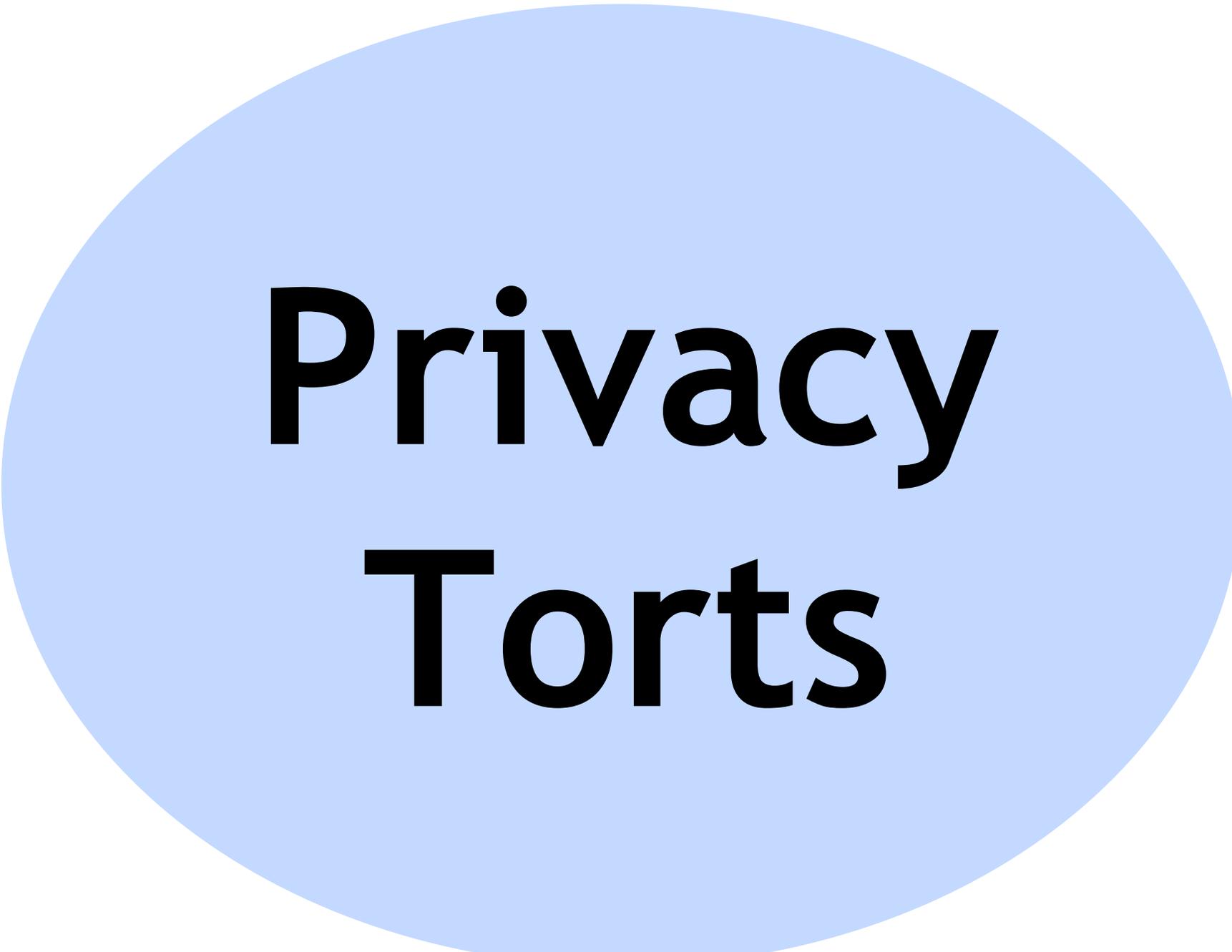
- Consent
- Privilege of self-defense
- Privilege of defense of others
- Private necessity
- Public necessity

Defenses to Intentional Torts (more)

- **Consent**
 - Implied
 - Express
- **Privilege of self-defense**
 - (entitled to make a reasonable mistake)
- **Privilege of defense of others**
 - (not entitled to make a reasonable mistake)

Defenses to Intentional Torts (more)

- **Private necessity**
 - (incomplete defense, still owe compensatory damages)
- **Public necessity**
 - (complete defense, don't owe compensatories)



**Privacy
Torts**

Privacy Torts

- **Intrusion**
- **Public Disclosure**
- **False Light**
- **Appropriation / Right of Publicity**

Intrusion

The Elements:

1. Physical or other intrusion
2. Into a zone in which the plaintiff has a reasonable expectation of privacy
3. Which is highly offensive to the reasonable person

Disclosure

The Elements:

1. A public disclosure
2. Of private facts
3. That is highly offensive to the reasonable person

False Light

The Elements:

1. A public statement
2. Made with actual malice
3. Placing the plaintiff in
4. A false light
5. That is highly offensive to the reasonable person

Right of Publicity

(a/k/a "Appropriation" or "Commercial Misappropriation")

The Elements:

1. The commercial use
2. Of a person's name, voice, likeness, image, or other indicia of identity

Right of Publicity

(a/k/a "Appropriation" or "Commercial Misappropriation")

The Elements:

1. The commercial use
2. Of a person's name, voice, likeness, image, or other indicia of identity

NOTE: This blackletter formulation is overbroad. The scope of the doctrine is greatly limited by:

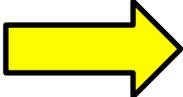
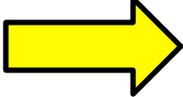
- First Amendment freedom of expression
- Copyright preemption
- Ad-hoc "spin"

Three circumstances where rights of publicity actions are commonly recognized:

- **Endorsement/advertising**
- **Merchandising**
- **"Virtual impressment"**

Think about these together:

(they often travel in the same fact patterns):

- Intrusion
- Public Disclosure
- False Light
- Appropriation / Right of Publicity
-  • IIED (Outrage)
-  • Defamation



**Fraud /
Misrepresentation**

Fraud

The Elements:

1. Material misrepresentation by defendant
2. Scierter
 - (at least recklessness; it's a lie)
3. Intent to induce reliance
4. Causation (actual reliance)
 - (victim must be deceived and actually relied)
5. Justifiable reliance
6. Damages
 - (economic injury; suffered a detriment)



**Intentional
Economic
Interference**

Intentional Economic Interference

The Elements:

1. Valid contract or economic expectancy between plaintiff and third party (not defendant!)
2. Defendant's knowledge of contract or expectancy
3. Intent to interfere
4. Actually caused interference
5. Damages (to plaintiff, not third party)

NOTE: Wide ranging, nebulously defined "justifications" are the key defense.

What's the name of this tort?

The tort is often commonly called Intentional Interference with Contract if there's a contract.

And it's called Intentional Interference with Prospective Economic Advantage if there's not a contract but there is a non-speculative economic expectancy.

Either way, the elements are the same.



**Good
luck!**

Eric E. Johnson
ericejohnson.com

© 2017 Eric E. Johnson



Konomark. Most rights sharable. If you would like to re-use or modify these slides, please ask. I am usually willing to provide permission without charge.