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Sample

The Best
California Bar Exam
Essay Book

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Thank you for downloading this free sample of the BarMD Best Bar Essay Template Book: CA Edition. This book was years in the making and is designed to help any bar applicant understand HOW to organize just about any issue the bar examiners might throw your way and HOW to analyze that issue. I wrote this book because I have seen numerous Bar Applicants who have memorized a rule but don't understand how to analyze that rule so we wrote the analysis for you and you just need to fill in the blanks.

This is the Torts chapter in its entirety as of September 2023. The book includes a chapter for each subject tested on the California Bar Exam. There are also introductory chapters explaining the approach to writing essays, timing, formulas for writing your analysis and counterarguments, study schedules for full time students and working students, and much more.

A few things to note. First, within each analysis paragraph template, you will see things like [can / cannot], [is / is not], and [Defendant] or [Plaintiff]. If you have alternatives, such as [can / cannot] or [is / is not], you are to pick between one of the alternatives as appropriate for the analysis you are writing. If you have one word, such as [Defendant] or [Plaintiff], you are to insert the actual name of the plaintiff or defendant in that instance.

Second, within the chapter below, you will notice some text is in gray, rather than black. The reason for this is to help you SAVE TIME. For many people, the biggest challenge of the bar exam is timing. The text that is in gray means that you can omit that rule entirely if you tend to run out of time or include it only if that particular rule is triggered by the facts.

Third, you might notice that there are some issues that are repeated in the book – this is intentional and is done to show you an in-depth method for breaking down an issue and a more succinct way to efficiently get through an issue. For example, with the intentional torts, we show you how to break each intentional tort up into numerous sub-IRACs (one for each element) and how to do it with just a single IRAC to save time because usually a torts essay is a racehorse essay on the bar exam and you would not have time to break it up into sub-IRACs.

Finally – one of the major benefits of the book is the information contained in the footnotes so do not skip those. That is where I include lots of tips, notes, and strategies particular to the various issues tested on the bar exam.

The full book is available here: <https://bar-md.com/product/the-best-ca-bar-essays-book/> and you can find our other proven study resources in our Shop at bar-md.com/shop.

Please reach out with any questions at hello@bar-md.com.

Best,
Maureen D. MacManus, Esq.
President | CEO | Founder
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TORTS

Torts tends to be one of the subjects bar applicants find a bit easier because the concepts are not as difficult as some other subjects. Generally, the challenge on torts essays is that they tend to be racehorse essays with lots of issues. Additionally, bar applicants need to be comfortable drawing inferences and matching facts to the law.

Torts essays tend to focus in a few areas: negligence, intentional torts, strict liability for abnormally dangerous activities and animals, defamation with privacy torts, and products liability. There are, of course, some lesser tested issues that may be dotted in with the issues above.

Below, there are templates for each tort and many also demonstrate how to break the tort down into sub-IRACs and into a truncated single-IRAC when timing is an issue.

Frequently Tested Issues in Torts:

- Negligence
 - Negligence Per Se
 - Landowner Duties
 - Vicarious Liability
- Intentional Torts
- Products Liability
- Strict Liability
- Defamation
- Privacy Torts
- Nuisance

Intentional Torts

Intentional torts are frequently tested on the bar exam. Often, they appear in combination with negligence (e.g., July 2010) or there can be an entire essay on intentional torts (e.g., February 2016). Often, there are so many intentional torts that you do not have time to break each intentional tort down into sub-IRACs. Therefore, we have presented the intentional torts two ways here: broken down with rules for each element in detail and as a collapsed IRAC with fewer rules but the same level of depth for the analysis.

Very rarely is a single intentional tort tested in isolation, so if you spot one intentional tort, think carefully about whether the same action on the defendant's part might meet the requirements for a different intentional tort. If you are pressed for time and decide that the defendant would not be liable for an intentional tort because one of the required elements is not met, go straight to that element and explain why that is the case (e.g., "Here, plaintiff will not succeed in suing defendant for assault because plaintiff did not experience reasonable apprehension of imminent harmful or offensive contact because the defendant said he would kill the plaintiff 'next week'.")

Assault¹

A defendant is liable for assault when he intentionally causes the plaintiff to suffer apprehension of immediate harmful or offensive contact to the plaintiff's person.

Intent²

Intent may be either specific or general. A defendant specifically intends an assault when he purposefully causes the plaintiff to suffer an apprehension of immediate harmful or offensive contact. A defendant generally intends an assault when they know to a substantial certainty that the plaintiff will suffer apprehension of an immediate harmful or offensive contact.³

Here, defendant [did / did not] [purposefully cause / know to a substantial certainty that he would cause] the plaintiff to suffer apprehension because [facts].

Thus, there [is / is not] intent.

Causation

The defendant's actions must be a substantial factor in causing the reasonable apprehension of imminent harmful or offensive contact.

Here, the defendant's conduct [was / was not] a substantial factor in causing the plaintiff's apprehension because [facts].

Thus, there [is / is not] causation.

Apprehension of Harmful or Offensive Contact

The plaintiff must suffer apprehension, the apprehension must be reasonable according to the reasonable person test, the plaintiff must have actually been aware of the defendant's conduct, the defendant must have had the apparent ability to carry out the act, and the apprehension must be of an immediate battery. Words alone are insufficient. Future threats and conditional threats are not sufficient for an assault.

Here, the plaintiff [did / did not] suffer apprehension because [facts]. A reasonable person would [not] have suffered apprehension because [facts]. The plaintiff [was / was not] aware of the defendant's conduct because [facts]. The defendant [had / did not have] the apparent ability to carry out the act because [facts]. The apprehension [was / was not] of an immediate battery because [facts].

Thus, there [was / was not] apprehension.

Accordingly, the defendant [is / is not] liable for assault.

¹ Here, you have assault broken down into each element with the detailed rules for each element.

² Transferred intent can replace regular intent here.

³ You need only include the rule here that you will apply – either specific or general intent.

Assault⁴

A defendant is liable for assault when he intentionally causes the plaintiff to suffer apprehension of immediate harmful or offensive contact to the plaintiff's person.

Here, defendant [did / did not] [purposefully cause / know to a substantial certainty that he would cause] the plaintiff to suffer apprehension because [facts].

The defendant's conduct [was / was not] a substantial factor in causing the plaintiff's apprehension because [facts].

The plaintiff [did / did not] suffer apprehension because [facts]. A reasonable person would [not] have suffered apprehension because [facts]. The plaintiff [was / was not] aware of the defendant's conduct because [facts]. The defendant [had / did not have] the apparent ability to carry out the act because [facts]. The apprehension [was / was not] of an immediate battery because [facts].

Thus, defendant [is / is not] liable for assault.

Defenses to Assault

Consent

If a plaintiff consents to remain to assault, the defendant is not liable for assault.

Here, plaintiff [did / did not] consent because [facts].

Thus, there [is / is not] consent.

⁴ Here is assault as a single IRAC. The analysis is just as developed as above but this is much faster and more manageable for you to discuss within the time frame.

Battery⁵

A defendant is liable for battery when they intentionally cause a harmful or offensive contact to the plaintiff's person.

Intent⁶

Intent may be either specific or general. A defendant specifically intends a battery when he purposefully causes the plaintiff to suffer harmful or offensive contact. A defendant generally intends a battery when they know to a substantial certainty that the plaintiff will suffer a harmful or offensive contact.

Here, defendant [did / did not] [purposefully / know to a substantial certainty they would] cause the plaintiff to suffer harmful or offensive contact because [facts].

Thus, there [is / is not] intent.

Causation

The defendant will be deemed to be the cause of the harmful or offensive contact if the defendant's conduct is a substantial factor in bringing about the harmful or offensive contact.

Here, the defendant [was / was not] a substantial factor because [facts].

Thus, there [is / is not] causation.

Harmful or Offensive Contact

Contact is harmful when it causes physical injury. Contact is offensive when it would offend a reasonable person. The contact must be to the plaintiff's person or something intimately associated with the plaintiff's person.

Here, the contact [was / was not] harmful because [facts]. The contact [was / was not] offensive because [facts].

Thus, there [was / was not] a [harmful / offensive] contact.

[Include applicable defenses here, if applicable].

Accordingly, defendant [is / is not] liable for battery.

Battery⁷

A defendant is liable for battery when they intentionally cause a harmful or offensive contact to the plaintiff's person.

Here, defendant [did / did not] [purposefully / know to a substantial certainty he would] cause the plaintiff to suffer harmful or offensive contact because [facts].

Here, the defendant [was / was not] a substantial factor because [facts].

Here, the contact [was / was not] harmful because [facts]. The contact [was / was not] offensive because [facts].

Defenses to Battery

Defense -- Recapture of Chattel⁸

An individual may use reasonable, but not deadly, force to regain possession of personal property. The individual may only use force when they are in hot pursuit of another who has wrongfully obtained possession of the personal property.

⁵ Battery is broken up by each element here. Like the other intentional torts, this may be unrealistic for you to complete within the time constraints and we have included a faster / condensed version of how you might complete a battery analysis below.

⁶ Transferred intent can replace regular intent here.

⁷ Here is battery as a single IRAC. This analysis is the same level of depth as above but more manageable for you during the exam.

⁸ Only include this defense if applicable to the facts.

Here, defendant [was / was not] in hot pursuit of another who wrongfully obtained possession of plaintiff's personal property because [facts].

Thus, defendant [can / cannot] rely on the defense of recapture of chattel.

Accordingly, defendant [is / is not] liable for battery.

Self-Defense

An individual can use reasonable force to prevent an imminent attack. The individual must actually and reasonably believe that the use of force is necessary. An individual can only use deadly force if the individual is facing the threat of death or serious bodily harm.⁹

Here, defendant [did / did not] reasonably believe the use of force was necessary because [facts].

Thus, defendant [can / cannot] rely on the self-defense defense.

Defense of Others

When an individual has reasonable grounds to believe that a third-person is being, or is about to be attacked, the individual may use such force as is reasonably necessary to protect the third-party.

Here, defendant [did / did not] have reasonable grounds to believe a third-person was being attacked because [facts].

Thus, defendant [can / cannot] rely on the defense of others defense.

Defense of Property

An individual may use a reasonable amount of force to protect their real or personal property. A verbal warning is required before an individual may use force unless issuing the warning would be futile or dangerous. An individual is only permitted to use deadly force if the individual believes that there is a risk of death or serious bodily harm.¹⁰

Here, defendant's use of force [was / was not] reasonable because [facts]. Defendant [[did / did not] give a verbal warning.

Thus, defendant [can / cannot] rely on the defense of property defense.

Consent

If a plaintiff consents to the touching, the defendant is not liable for battery. A plaintiff may impliedly consent.

Here, plaintiff [did / did not] consent because [facts].

Thus, there [is / is not] consent.

⁹ Only include this if deadly force was used.

¹⁰ Only include this if triggered by the fact pattern.

False Imprisonment

A defendant commits false imprisonment when the defendant intentionally confines or detains plaintiff to a bounded area and the plaintiff is either aware of the confinement or actually harmed by it.

Intentionally¹¹

The defendant must intend to confine or retain plaintiff within a bounded area (i.e., negligence is insufficient to meet this element).

Here, the defendant [did / did not] intend to confine plaintiff because [facts].

Thus, there [was / was not] intent.

Confines or Detains Plaintiff to a Bounded Area

The defendant must confine¹² or detain plaintiff to a bounded area via physical restraint or physical force.¹³

Here, the defendant [did / did not] use [physical restraint / force] because [facts].

Thus, the plaintiff [was / was not] confined to a bounded area.

Plaintiff Aware of Confinement or Harmed by It

The plaintiff must have been aware of the confinement or harmed by it.

Here, plaintiff [was / was not] aware of the confinement because [facts]. Plaintiff [was / was not] harmed by the confinement because [facts].¹⁴

Thus, the plaintiff [was / was not] [aware of the confinement / harmed by the confinement].

False Imprisonment¹⁵

A defendant commits false imprisonment when the defendant intentionally confines or detains plaintiff to a bounded area and the plaintiff is either aware of the confinement or actually harmed by it.

Here, the defendant [did / did not] intend to confine plaintiff because [facts]. The defendant [did / did not] use [physical restraint / force] because [facts]. Plaintiff [was / was not] aware of the confinement because [facts]. Plaintiff [was / was not] harmed by the confinement because [facts].

Thus, defendant [is / is not] liable for false imprisonment.

Defenses to False Imprisonment¹⁶

Consent

If a plaintiff consents to remain to the bounded area, the defendant is not liable for false imprisonment.

Here, plaintiff [did / did not] consent because [facts].

Thus, there [is / is not] consent.

Legal Justification

¹¹ Transferred intent, *supra*, can replace regular intent here.

¹² There is confinement when there are no reasonable means of escape; however, the area can be bounded even if it lacks specific boundaries (e.g., a defendant pointing a gun at a plaintiff and telling her not to move can be a confinement even though there are no physical boundaries).

¹³ Threats are sufficient. An omission can be an act of restraint if there is a preexisting duty to act.

¹⁴ You only need to include one of these sentences, not both.

¹⁵ Again, this is False Imprisonment in a single-IRAC instead of sub-IRACs.

¹⁶ Only include the defenses that apply to your fact pattern.

If the defendant is authorized by law to detain or confine the plaintiff, the defendant is not liable for false imprisonment.

Here, the defendant [was / was not] legally justified because [facts].

Thus, defendant [can / cannot] successfully assert the defense of legal justification.

Shopkeeper's Privilege

Generally, a store owner may detain someone for a reasonable period of time, based upon a reasonable suspicion that the person stole the store's property.

Here, a store owner [had / did not have] a reasonable suspicion that the plaintiff stole the store's property because [facts].

Thus, defendant [can / cannot] successfully assert the defense of shopkeeper's privilege.

Trespass to Land

The defendant commits trespass to land when the defendant intentionally invades the plaintiff's exclusive possessory interest in real property, including air above and soil below.

Intent

The defendant need only intend to enter the property. (i.e., it is irrelevant whether the defendant knew the land belonged to the plaintiff.)

Here, defendant [did / did not] intend to enter the property because [facts].

Thus, there [is / is not] intent.

Causation

The defendant must have caused the invasion to land.

The defendant [did / did not] cause the invasion to land because [facts].

Thus, there [is / is not] causation.

Damages

The plaintiff need not demonstrate actual damages.

Here, plaintiff [suffered / did not suffer] damages because defendant [did / did not] enter plaintiff's land.

Thus, there are damages.

Accordingly, defendant [committed / did not commit] trespass to land.

Defenses to Trespass to Land¹⁷

Public Necessity

An individual can interfere with another's real or personal property when it appears reasonably necessary to prevent a threatened harm to the community. If the property is damaged as a result, no compensation is owed.

Here, there [was / was not] a threat to the community because [facts]. It [was / was not] reasonably necessary to enter plaintiff's property to prevent the threatened harm because [facts].

Thus, there [was / was not] a public necessity.

Private Necessity

An individual can interfere with another's real or personal property when it appears reasonably necessary to prevent a threatened harm to the individual, the individual's property, a third-person, or a third-person's property. If the other person's property is damaged as a result, the individual must pay damages.

Here, there [was / was not] a harm threatened because [facts]. It [was / was not] reasonably necessary to enter plaintiff's land to avoid the threat because [facts].

Thus, plaintiff [can / cannot] successfully assert private necessity as a defense.

¹⁷ Only include the necessary defenses. If none apply, you can say something akin to, "Here, there was no public or private necessity because [facts]."

Trespass to Chattel

The defendant commits trespass to chattels when the defendant intentionally commits an act that interferes with the plaintiff's right of possession.

Interference

The defendant must interfere with the plaintiff's right to possess personal property, which can be damaging the property.

Here, defendant [did / did not] interfere with the plaintiff's right to possess personal property because [facts].

Thus, there [was / was not] an interference.

Intent

The defendant intended to perform the act that interferes with the plaintiff's right of possession.

Here, defendant [did / did not] intend to [facts].

Thus, there [is / is not] intent.

Causation

The defendant must have legally caused the interference with the plaintiff's interest in the chattel.

Here, defendant [did / did not] cause the interference with plaintiff's interest because [facts].

Thus, there [is / is not] causation.

Damages

The plaintiff must suffer actual damages.

Here, plaintiff [did / did not] suffer actual damages because [facts].

Thus, there are damages.

Conversion

A defendant commits conversion when the defendant intentionally acts to interfere with the plaintiff's right of possession that is serious enough in nature or consequence to warrant that the defendant pays the full value of the chattel.

Intent

The defendant need only intend the act that causes the interference.

Here, defendant [did / did not] intend the act that caused the interference because [facts].

Thus, there [is / is not] intent.

Causation

The defendant must have legally caused the interference with the plaintiff's interest in the chattel.

Here, defendant [did / did not] cause the interference with plaintiff's interest because [facts].

Thus, there [is / is not] causation.

Substantial Interference

The defendant seriously invades the plaintiff's interest in the personal property, which may take the form of seriously damaging or destroying the property.

Here, the defendant [did / did not] seriously invade the plaintiff's interest in the personal property because [facts + reasoning].

Thus, there [was / was not] a substantial interference.

Damages

The plaintiff can recover the fair market value of the personal property at the time of the conversion.

Here, the fair market value at the time of the conversion is [facts].¹⁸

Thus, plaintiff [suffered / did not suffer] damages and can recover the fair market value.

Accordingly, defendant [is / is not] liable for conversion.

Conversion¹⁹

A defendant commits conversion when the defendant intentionally acts to interfere with the plaintiff's right of possession that is serious enough in nature or consequence to warrant that the defendant pay the full value of the chattel.

Here, defendant [did / did not] intend the act that caused the interference because [facts]. Defendant [did / did not] cause the interference with plaintiff's interest because [facts].

The defendant [did / did not] seriously invade the plaintiff's interest in the personal property because [facts].

Thus, defendant [is / is not] liable for conversion.

¹⁸ Often, you won't know the fair market value, so the analysis is just that the plaintiff suffered a complete destruction and can recover the fair market value.

¹⁹ Here is the truncated version of conversion if you do not have time to break it down into its sub-IRACs.

Intentional Infliction of Emotional Distress

A defendant commits intentional infliction of emotional distress when they intentionally or recklessly engage in extreme and outrageous conduct that causes plaintiff to suffer severe emotional distress.

Extreme and Outrageous Conduct

The defendant must have acted in a manner that transcends all bounds of human decency.

Here, defendant [did / did not] act in a manner that transcends all bounds of human decency because [facts + reasoning].

Thus, there [is / is not] extreme and outrageous conduct.

Intent

The defendant consciously desires or acts recklessly causing the plaintiff to suffer severe emotional distress.

The defendant [consciously desired / acted recklessly in causing] the plaintiff to suffer severe emotional distress because [facts + reasoning].

Thus, there [is / is not] intent.

Causation

The defendant's conduct must have been a substantial factor in causing the plaintiff's severe emotional distress.

Here, the defendant's conduct [was / was not] a substantial factor in causing the plaintiff's severe emotional distress because [facts].

Thus, there [is / is not] causation.

Damages

The defendant must have caused the plaintiff to suffer severe emotional distress.

Here, plaintiff [did / did not] suffer severe emotional distress because [facts + reasoning].

Thus, plaintiff [did / did not] suffer damages.

Intentional Infliction of Emotional Distress²⁰

A defendant commits intentional infliction of emotional distress when they intentionally or recklessly engage in extreme and outrageous conduct that causes plaintiff to suffer severe emotional distress.

Here, defendant [did / did not] act in a manner that transcends all bounds of human decency because [facts]. The defendant [consciously desired / acted recklessly in causing] the plaintiff to suffer severe emotional distress because [facts]. The defendant's conduct [was / was not] a substantial factor in causing the plaintiff's severe emotional distress because [facts]. Plaintiff [did / did not] suffer severe emotional distress because [facts].

Thus, defendant [is / is not] liable for intentional infliction of emotional distress.

²⁰ Here is the truncated version of IIED if you do not have time to break it down into its sub-IRACs.

Transferred Intent²¹

Transferred intent would replace your intent section where applicable. It applies to the following intentional torts: assault, battery, false imprisonment, and IIED.

Transferred Intent

Intent may be transferred from one victim to another or from one tort to another tort.

Here, defendant intended to [commit [other tort] / harm [other victim]] and, as such, the intent is transferred.

Thus, there is intent.

²¹ You would insert transferred intent into your intent section for any of the intentional torts.

Negligence

Negligence is the most commonly tested issue in torts on the California Bar Exam. A typical torts fact pattern will include negligence plus another issue, such as intentional torts, (e.g., July 2010) or multiple negligence analyses in it (e.g., July 2014). Below, we include a straightforward negligence template, followed by the special issues that appear in a negligence essay.

If negligence is tested more than once in the same essay, look for something unique about each call. For example, maybe one of the claims requires a discussion of negligence per se, once triggers discussion of a special duty, and one triggers the eggshell skull rule.

Do not be afraid to use “See above” or “supra” to reference a rule you have already stated. You do not need to retype a rule or even copy/paste a rule – it is a waste of your time.

Templates

Negligence

To show negligence, a plaintiff must show duty, breach, causation, and damages.

Duty

Defendants owe a duty of care to foreseeable plaintiffs. Courts adopt either the *Andrews* or *Cardozo* view when determining whether the defendant owed the plaintiff a duty of care.

Cardozo (Majority Approach)

Under the *Cardozo* view, a defendant owes a duty of care to a foreseeable plaintiff within the zone of danger created by the defendant’s conduct.

Here, the zone of danger is [facts establishing where the zone of danger is]. Defendant created the zone of danger by [facts – focus on the negligent thing defendant did that created a zone of danger]. Plaintiff [was / was not] within the zone of danger because [facts].

Thus, defendant [owed / did not owe] a duty of care under *Cardozo*.

*Andrews (Minority Approach)*²²

Under the *Andrews* approach, a defendant owes a duty of care to all persons injured by the defendant’s conduct.

Here, plaintiff is a person injured by defendant’s conduct because [facts].

Thus, defendant [owed / did not owe] a duty of care under *Andrews*.

Standard of Care – Reasonably Prudent Person²³

A defendant owes a duty to act as a reasonably prudent person.^{24 25} A court compares a business to an entity of similar, size, experience, and location.²⁶

Here, defendant owed a duty to [establish what a reasonably prudent person / business would have done].

²² If you run out of time, you can omit reference to *Andrews*. High scoring answers will include *Andrews*.

²³ Ideally, you will always do an RPP analysis; however, if a special standard applies, you might omit the RPP standard and focus solely on special duty.

²⁴ A reasonable person is considered to have the same physical characteristics as the defendant. Thus, if a fact pattern provides detail about the physical characteristics of someone, you need to consider those characteristics in evaluating whether the defendant acted reasonably.

²⁵ Special Skills: If the defendant has special skills (e.g., the defendant is a race car driver), the RPP is considered to have those same skills.

²⁶ Only include this rule if the defendant is a business.

Breach²⁷

A breach occurs when the defendant fails to adhere to the applicable standard of care.

Reasonably Prudent Person/Business

A person/business breaches when they fail to act as a reasonably prudent person/business. The reasonably prudent person/business test is objective. A court will compare the defendant to an entity of similar size, experience, and location.

Here, defendant [failed / did not fail] to act as a reasonably prudent person because [establish whether defendant failed to do what a reasonably prudent person/business would do as established in your standard of care section] and defendant did [facts].

Thus, defendant [breached / did not breach].

Res Ipsa Loquitur

The Doctrine of Res Ipsa Loquitur may be used to establish a breach in situations where the events lead to an inference that the defendant was likely negligent. A party can rely on the Doctrine of Res Ipsa Loquitur where: (1) the event is the type that does not ordinarily occur in the absence of negligence, (2) the instrumentality was in the defendant's exclusive control, and (3) the plaintiff could not have caused the accident.

Here, this [is / is not] the type of event that does not ordinarily occur in the absence of negligence because [facts + reasoning]. The instrumentality [was / was not] in the defendant's exclusive control because [facts]. The plaintiff [could / could not] have caused the accident because [facts + reasoning].

Thus, *res ipsa* [may / may not] be used to draw an inference of breach.

Causation

The defendant must have actually and proximately caused the plaintiff's injuries.

Actual Cause

The defendant actually causes the plaintiff's injuries when but for the defendant's conduct, the injury would not have occurred.

Here, but for [defendant's conduct] plaintiff would not have suffered [injury].

Thus, defendant [is / is not] the actual cause.

Proximate Cause

Generally, a defendant is liable for foreseeable results. Results are foreseeable when they are the normal incidents of and within the increased risk caused by defendant's acts.

Here, [plaintiff's injury] [is / is not] the normal incident of [defendant's conduct] because [facts + reasoning²⁸]. [Plaintiff's injury] [is / is not] within the increased risk of [defendant's conduct] because [facts + reasoning²⁹].

Thus, [defendant] [is / is not] a proximate cause.

Damages

A plaintiff must suffer injury – either physical or to personal property.

²⁷ The breach analysis is generally very short. Essentially, you should refer to your section on standard of care and show how defendant failed to do what a reasonable person (or whatever the applicable standard of care is) would have done.

²⁸ Here, you need to establish whether the plaintiff's injury is the type of thing that might normally happen when someone does the type of negligent thing defendant did.

²⁹ Here, you need to explain why or how defendant's conduct increases the risk that the plaintiff would suffer the type of injury they suffered.

Here, plaintiff suffered injury to [facts].

Thus, plaintiff [did / did not] suffer injury.

Defenses to Negligence³⁰

Comparative Fault³¹

In a comparative fault jurisdiction, plaintiff's recovery is reduced by their percentage of negligence. In a comparative fault jurisdiction, the plaintiff's negligence is not a complete bar to recovery; the plaintiff's damages are reduced by their percentage of fault. In a pure comparative fault jurisdiction, plaintiff can recover no matter how much they contributed to their injuries. In a partial comparative fault jurisdiction, plaintiff can recover from each defendant where the defendant's negligence was greater than the plaintiff's.

Here, plaintiff [did / did not] contribute to her injuries because [facts].

Thus, plaintiff's damages [may / may not] be reduced by her percentage of fault or might be completely barred, depending on the jurisdiction.³²

Contributory Negligence (Minority Approach)

In a contributory negligence jurisdiction, if a plaintiff negligently contributes to their injuries, plaintiff cannot recover at all.

Here, plaintiff [did / did not] contribute to their injuries because [facts].

Thus, defendant [can / cannot] successfully assert contributory negligence if in a jurisdiction that adopts this approach.

Assumption of Risk^{33 34}

A court may deny plaintiff recovery if they assumed the risk of any damages caused by defendant's act. The plaintiff must have (1) known of the specific risk, and (2) voluntarily proceeded despite the risk.³⁵

Here, plaintiff [knew / did not know] of the specific risk of [risk] because [facts]. Plaintiff [did / did not] voluntarily proceed despite the risk because [facts].

Thus, plaintiff [did / did not] assume the risk.

Defenses to Negligence – Comparative/Contributory Negligence / Assumption of Risk

In a contributory negligence jurisdiction, if a plaintiff negligently contributes to their injuries, plaintiff cannot recover at all. In a comparative fault jurisdiction, plaintiff's recovery is reduced by their percentage of negligence. A plaintiff may not recover if they assumed the risk of injury.

Here, plaintiff [contributed / did not contribute] to their injuries because [facts]. Plaintiff did not assume the risk of the injury because [facts]. Plaintiff did not voluntarily proceed despite the risk because [facts].

Thus, defendant cannot rely on any defenses.³⁶

³⁰ You should always include defenses to negligence. If there are no viable defenses, you can just combine the potential defenses, as demonstrated below.

³¹ You can generally combine comparative fault and contributory negligence together because the analysis is the same. You would just reference each defense in your conclusion (e.g., Thus, plaintiff cannot recover at all in a contributory negligence jurisdiction but might recover in a comparative fault jurisdiction, depending on whether it's a pure or partial comparative fault jurisdiction).

³² Generally, the jurisdictional splits aren't really tested on the essays, so they are not necessary to include but a better answer will include them.

³³ Assumption of risk does not apply to common carriers, innkeepers, or public utilities.

³⁴ Assumption of risk does not apply to members of a class of persons intended to be protected by statute.

³⁵ Assumption of risk may be either implied or express. Generally, on bar essays, the examiners test on implied assumption of risk. A plaintiff impliedly assumes a risk when a reasonably prudent person would have appreciated the risk.

³⁶ Make sure to include an overall conclusion as to negligence and answer the call of the question.

Standard of Care

For the various standards discussed below, you would insert these either in place of or in addition to your reasonably prudent person standard of care discussion. You can pass an essay just addressing a special standard of care and it is often advisable to just address the special standard of care that is triggered by the particular fact pattern. A better answer will include both reasonably prudent person/business and any relevant special standard of care.

For landowner duties, the most commonly tested issues are duties owed to licensees and invitees and attractive nuisance doctrine. You should be familiar with the rest but they are much less frequently tested.

Special Duty – Child

Children are held to the subjective standard of care of a reasonable child of the same age, intelligence, and experience unless the child is engaging in an adult activity.

Here, a child of the same age, intelligence, and experience would do [facts]. [Child] [was / was not] engaging in an adult activity because [facts].

Thus, [defendant] will be held to the standard of care of a [child / adult].

Special Duty – Professional³⁷

A professional must exercise the level of skill a minimally qualified member of that same profession performing similar services viewed on a national scale.

Here, a [member of profession] would do [facts]. Defendant is a [facts].

Thus, defendant owed a special professional duty.

Firefighter's Rule

Firefighters, police officers, and other emergency personnel injured in the line of duty cannot sue for negligence if the resulting injury stemmed from the risks inherent in their work.

Here, [plaintiff] is a [firefighter / police officer / other emergency personnel] and the injury [did / did not] stem from risks inherent in their work because [facts + reasoning].

Thus, [plaintiff] [is / is not] barred from recovery under the firefighter's rule.

Special Duty – Common Carrier / Innkeeper

Common carriers³⁸ and innkeepers³⁹ owe the utmost standard of care to their guests. Common carriers are things like trains, and buses. Innkeepers are hotel / motel owners.

Here, defendant is a [establish defendant is a common carrier or innkeeper].

Thus, defendant owed a special duty as a [common carrier / innkeeper].

Special Duty – Landowners⁴⁰

The duty owed by a landowner to a potential plaintiff depends on the status of the individual on the land.

Undiscovered Trespassers

³⁷ The professional standard generally applies to “white-collar” careers, such as doctors. Generally, a reasonably prudent doctor would not err in conducting a medical procedure, misdiagnose a medical issue, or create an inappropriate treatment plan.

³⁸ Common carriers are things like trains, and buses.

³⁹ Innkeepers are hotel/motel owners.

⁴⁰ There is a lot to know for landowner duties. You do not need to raise and dismiss various potential landowner duties. Just raise the issues triggered by the fact pattern.

If the plaintiff was an undiscovered trespasser, the landowner owes no duty of care.

Here, plaintiff was an undiscovered trespasser because [facts].

Thus, defendant owed no duty of care to plaintiff.

Known or Anticipated Trespassers

For anticipated trespassers, a landowner has a duty to warn or make safe concealed artificial conditions known to the landowner that pose a threat of death or serious bodily harm.

Here, there [was / was not] a concealed condition because [facts]. The condition was artificial because [facts]. The condition [was / was not] known to the landowner because [facts]. The condition [did / did not] pose a threat of death or serious bodily harm because [facts].

Thus, defendant owed a duty to plaintiff as a known or anticipated trespasser.

Licensee

A licensee (i.e., a social guest) is one who enters the land with the landowner's permission for the licensee's own purpose or business, rather than the landowner's benefit. For licensees, the landowner has a duty to warn or make safe dangerous artificial or natural conditions known to the owner that create an unreasonable risk of harm to the licensee and that the licensee is unlikely to discover.

Here, plaintiff is a licensee because [facts]. A [dangerous / artificial] condition existed on the land because [facts]. Defendant knew of the condition because [facts]. The condition created an unreasonable risk of harm to the licensee because [facts]. The licensee is unlikely to discover the condition because [facts].

Thus, defendant owed a duty to plaintiff as a licensee because [facts].

Invitee

An invitee is someone who enters the landowner's land in response to an invitation by the landowner (i.e., they enter for a purpose connected with the business of the landowner or enter as members of the public for a purpose for which the land is held open to the public). For invitees, a landowner owes a duty to make reasonable inspections to discover non-obvious conditions and, thereafter, make them safe. A warning is sufficient to make a condition safe. An invitee may lose their status as invitee if they exceed the scope of their invitation.

User of Recreational Land

A landowner who permits the general public to use their land for recreational purposes without charging a fee is not liable to individuals who suffer an injury unless the landowner willfully and maliciously failed to guard against or warn of known dangers.

Here, defendant permits the general public to use their land without charging a fee. Landowner [did / did not] willfully and maliciously fail to guard against or warn against known dangers because [facts].

Thus, defendant owed a duty to the users of his land.

Lessor / Lessee

A lessee has general duty to maintain the premises; however, the lessor must warn of existing defects of which they are aware or has reason to know, and which they know the lessee is not likely to discover on a reasonable inspection.

Here, there is a lessor / lessee relationship because [facts]. Lessor was [aware / had reason to know of] the defects because [facts]. The lessee is not likely to discover on a reasonable inspection because [facts].

Thus, defendant owed a duty as lessor.

Negligence Per Se

For a negligence per se analysis, we generally would address it after the regular duty and breach analysis. However, on the bar exam in a racehorse essay you will often not have time for both the regular duty and breach analysis and negligence per se. Therefore, if negligence per se applies, you may choose to do negligence per se in lieu of regular duty and breach. On the July 2010 bar exam, for example, one of the selected answers only slightly referenced regular duty and breach and focused on negligence per se in the first negligence analysis. Many passing answers omitted regular duty and breach from the first negligence analysis on the July 2010 exam.⁴¹

After writing negligence per se, you need to address causation, damages, and defenses, as outlined in the Negligence section.

Negligence Per Se

Negligence per se establishes that a duty was owed and defendant breached that duty. A defendant is liable under negligence per se when the defendant violated a statute, the plaintiff belongs to the class of persons the statute aims to protect, and the plaintiff suffered the type of harm the statute intended to prevent.

Here, defendant violated the statute because [facts]. The plaintiff [belongs / does not belong] to the class of persons the statute aims to protect because [facts + inference establishing who the statute is trying to protect and whether plaintiff is part of that group]. The plaintiff [suffered / did not suffer] the type of harm the statute intended to prevent because [facts + inference establishing the type of harm the statute intended to prevent and whether plaintiff suffered that type of harm].

Thus, negligence per se [establishes / does not establish]⁴² duty and breach.

⁴¹ While this is true, you needed to address the remaining issues on the exam thoroughly to get a passing answer.

⁴² If you conclude the plaintiff cannot prove negligence per se, you should probably have a regular duty and breach analysis.

Negligent Infliction of Emotional Distress

A defendant is liable for negligent infliction of emotional distress when defendant creates a risk of physical injury to plaintiff. The defendant must threaten (1) physical impact to a plaintiff within the zone of danger which (2) results in emotional distress that manifests in physical symptoms.

Plaintiff Within Zone of Danger

A plaintiff is within the zone of danger when there is a threat of physical impact to their person.

Here, there [was / was not] a threat of physical impact to plaintiff because [facts].

Thus, plaintiff [was / was not] within the zone of danger.

*Bystander Exception*⁴³

A plaintiff need not be in the zone of danger and may still recover for their own distress when (1) plaintiff and the person injured by the defendant are closely related, (2) plaintiff was present at the scene of the injury, and (3) plaintiff personally observed or perceived the event. Most states also require a physical manifestation of symptoms from the emotional distress.

Here, [plaintiff] and [person injured] [are / are not] closely related because [facts]. [Plaintiff] [was / was not] present at the scene of the injury because [facts]. [Plaintiff] [did / did not] personally [perceive / observe] the event because [facts]. [Plaintiff] [did / did not] suffer physical manifestations from the emotional distress because [facts].

Thus, defendant [is / is not] liable for negligent infliction of emotional distress.

⁴³ Often there isn't enough time to go through all the elements here and it usually is not a major issue. So, if timing is an issue, you can just address the element not met and move on.

Defamation + Privacy Torts

Defamation and privacy torts tend to be tested together. Privacy torts can usually be addressed in a single IRAC, and if you address one, consider addressing all four. When it comes to defamation, it is extremely unlikely that you will be faced with a common law case, so you should be prepared to move on to address the elements of Falsity and Fault.

Templates

Defamation⁴⁴

A defendant is liable for defamation when they (1) make a defamatory statement (2) of or concerning the plaintiff that is (3) published to a third party and (4) causes plaintiff damages.

Defamatory Language

Language is defamatory when it diminishes the respect, esteem, or goodwill of the plaintiff, or deters others from association with the plaintiff. Innuendo language may qualify as defamatory.⁴⁵ Defamation may be either spoken (slander) or written (libel). Opinion is actionable when the defendant implies a factual basis for that opinion.⁴⁶

Here, the statement [does / does not] diminish the [respect / esteem / goodwill] of the plaintiff because [facts].

Thus, the statement [does / does not] include defamatory language.

Of or Concerning the Plaintiff

The statement must be about the plaintiff, directly or indirectly and the statement must be about a living person. The plaintiff may offer extrinsic evidence to show the statement refers to the plaintiff. If the statement refers to a group, whether someone can recover depends on the size of the group. If the group is small, each member may establish that the statement is about or concerning the plaintiff by alleging they are a member of that group; however, if the group is large, no member can prove the statement is about him.⁴⁷

Here, the statement [is / is not] about [plaintiff] because [facts] and plaintiff [is / is not] a living person.

Thus, the statement [is / is not] of or concerning the plaintiff.

Publication

The publication must be to a third party; however, publication need not be intentional.

Here, the publication [was / was not] to a third party because [facts].

Thus, there [was / was not] publication.

Damages – Private Person on Matter of Private Concern

For libel, damages are presumed and the plaintiff need not prove special damages. For slander, the plaintiff must prove special damages unless the statement is one that (a) adversely reflects on one's conduct in a business or profession, (b) states plaintiff has a loathsome disease (e.g., leprosy or a sexually transmitted disease/infection), (c) states one is or was guilty of a crime involving moral turpitude, or (d) states a woman is unchaste.

Here, the statement was libel and damages are presumed.

OR

⁴⁴ Generally, you can do a single IRAC for defamation. Elements are broken down above for explanatory purposes.

⁴⁵ Only include this rule if it is triggered by the facts in the fact pattern.

⁴⁶ Only include this rule if it is triggered by the facts in the fact pattern.

⁴⁷ Only include these rules regarding the group if triggered by the fact pattern.

Here, the statement was slander but [adversely reflects on plaintiff's conduct in business / states plaintiff has a loathsome disease / states plaintiff is guilty in a crime of moral turpitude / states a woman is unchaste] because [facts].

OR

Here, the statement was slander and damages are not presumed. Plaintiff [has / has not] suffered damages because [facts].

Thus, [plaintiff] has suffered damages.

Accordingly, [plaintiff] [can / cannot] recover.

Damages – Private Person on Matter of Public Concern

If the plaintiff is a private figure related to a matter of public concern, the plaintiff must prove the defendant acted negligently regarding the falsity of the statement.

Here, [plaintiff] is a private figure because [facts]. The matter is one of public concern because [facts]. Defendant [did / did not] act negligently regarding the falsity of the statement because [facts].

Accordingly, [defendant] [is / is not] liable for defamation.

Damages – Public Figure

If the plaintiff is a public figure, the plaintiff must prove the defendant acted with actual malice. A public figure is a person who has achieved pervasive fame or notoriety or voluntarily assumes a central role in a particular public controversy. A defendant acts with actual malice when the defendant knew the statement was false or acted with reckless disregard as to the statement's falsity.

Here, plaintiff [has / has not] achieved pervasive [fame / notoriety] such that they are a public figure because [facts]. [Defendant] [knew the statement was false / acted with reckless disregard as to the statement's falsity] because [facts].

Thus, [plaintiff] [can / cannot] prove actual malice.

Accordingly, [defendant] [is / is not] liable for defamation.

Damages – Private Person on Matter of Public Concern

If the plaintiff is a private figure related to a matter of public concern, the plaintiff must prove the defendant acted negligently regarding the falsity of the statement.

Here, [plaintiff] is a private figure because [facts]. The matter is one of public concern because [facts]. Defendant [did / did not] act negligently regarding the falsity of the statement because [facts].

Accordingly, [defendant] [is / is not] liable for defamation.

Defenses to Defamation

Truth

Truth is a complete defense to defamation.⁴⁸

Here, the statements [are / are not] true because [facts].

Thus, [defendant] [may / may not] rely on truth as a defense.

Consent

⁴⁸ Truth is a defense in defamation actions involving a public figure. Where the plaintiff is a private figure, falsity is presumed.

Consent to publication is a complete defense.

Here, [plaintiff] [did / did not] consent to publication because [facts].

Thus, [defendant] [may / may not] rely on consent as a defense.

Absolute Privilege

Certain statements are absolutely privileged and are immune from defamation claims, which include (1) spousal privilege, (2) marital communication privilege, (3) doctor-patient privilege, (4) statements in a judicial proceeding, and (5) required publications by radio, television, or newspaper.⁴⁹ Absolute privileges cannot be lost.

Here, the statement is immune from defamation because [of spousal privilege / of marital communication privilege / doctor-patient privilege / it was made in a judicial proceeding / it was a required media publication].

Thus, [defendant] [may / may not] rely on privilege as a defense.

Qualified Privilege

Statements in the following scenarios are subject to qualified privilege: (1) affecting an important public interest, (2) in the interest of the publisher, and (3) in the interest of a third party or the recipient. A defendant may lose the qualified privilege if the defendant abuses it by either making statements outside the scope of the privilege or acting with malice.

Here, the statement [affects a public interest / affects the interest of the publisher / is in the interest of the third party or recipient] because [facts]. The statement [was / was not] [outside the scope of the privilege / made with actual malice] because [facts].

Thus, [defendant] [may / may not] rely on privilege as a defense.

False Light

A defendant commits false light when the defendant attributes viewpoints to plaintiff which the plaintiff does not hold and such attribution is objectionable to a reasonable person.

Here, [defendant] attributed a viewpoint to plaintiff because [facts]. [Plaintiff] does not hold such views because [facts]. Such attribution [is / is not] objectionable to a reasonable person because [facts].

Thus, [defendant] [is / is not] liable for false light.

Intrusion Upon Seclusion

A defendant commits intrusion upon seclusion when the defendant intrudes on plaintiff's private affairs, plaintiff has a reasonable expectation of privacy in such affairs, and the intrusion is highly objectionable to a reasonable person.

Here, [defendant] intruded on [plaintiff's] private affairs because [facts].⁵⁰ [Plaintiff] [does / does not] have a reasonable expectation of privacy in such affairs because [facts].⁵¹ The intrusion [is / is not] highly objectionable because [facts].

Thus, [defendant] [is / is not] liable for intrusion upon seclusion.

Misappropriation

A defendant commits misappropriation when the defendant uses the plaintiff's likeness or name without authorization for the defendant's commercial gain.

⁴⁹ You do not need to include each alternative here; rather, you can include just what is triggered by the fact pattern.

⁵⁰ Here, the key is to show that the information released is information that one expects to keep private, such as medical information, nude photos, etc.

⁵¹ Here, you need to explain why the release of such information would be offensive to a reasonable person.

Here, the defendant used plaintiff's [likeness / name] because [facts]. The use [was / was not] without authorization because [facts]. The use [was / was not] for defendant's commercial gain because [facts].

Thus, [defendant] [is / is not] liable for misappropriation.

Public Disclosure of Private Fact

A defendant commits public disclosure of private fact when the defendant reveals private facts that are not a matter of legitimate public concern, the release is objectionable to a reasonable person, and the disclosure is to the public at large.

Here, the facts revealed [are / are not] a matter of legitimate public concern because [facts]. The release [is / is not] objectionable to a reasonable person because [facts]. The disclosure [is / is not] to the public at large because [facts].

Thus, [defendant] [is / is not] liable for public disclosure of private fact.

Strict Liability

Here, we are just referring to strict liability for abnormally dangerous activities and animals, not products liability.

For abnormally dangerous activities, the way the bar examiners have tested the issue is by blasting, dynamite, fumigation services, and providing high voltage electricity.

Abnormally dangerous animals are more commonly tested on the MBE; however, they have been tested on the essays as well. There are really two categories of abnormally dangerous animals – non-domesticated animals and domesticated animals that have a dangerous propensity.

Strict Liability for Abnormally Dangerous Activities and Animals tend to be smaller issues. As such, we have included a truncated version of how to organize and write each of these issues.

Templates

Abnormally Dangerous Activity

To establish a prima facie case of strict liability, the plaintiff must show the defendant engaged in an abnormally dangerous activity the dangerous aspect of which actually and proximately caused the plaintiff to suffer damages.

Abnormally Dangerous Activity

An activity is abnormally dangerous if it involves a substantial risk of significant harm to person or property despite the exercise of reasonable care and is not a matter of common usage in the community.

Substantial Risk of Significant Harm Despite the Exercise of Reasonable Care

An activity is abnormally dangerous when it poses a substantial risk of significant harm despite the exercise of reasonable care.

Here, the defendant's activity poses a substantial risk of significant harm despite the exercise of reasonable care because [facts].

Thus, this element [is / is not] satisfied.⁵²

Matter of Common Usage

A matter is not of common usage when it is something out of place in the area where the defendant chooses to conduct it.

Here, the defendant's activity [is / is not] out of place because [facts].

Thus, the defendant's activity [is / is not] a matter of common usage.

Harm Results from Normally Dangerous Propensity

The harm the plaintiff suffers must result from the type of danger to be expected from the abnormally dangerous activity.

Here, the plaintiff's injury [did / did not] result from the dangerous aspect because [facts].

Thus, this element [is / is not] satisfied.

Causation

The dangerous aspect of the activity must actually and proximately cause the harm.

Actual Cause

⁵² The element here is so long that I just do a fast conclusion here. You can do this for just about all of the other issues as well.

The dangerous aspect of the activity actually causes a plaintiff's damages when the damages would not have occurred but for the dangerous aspect of the activity.

Here, but for [dangerous aspect], plaintiff's injury would not have occurred.

Thus, there [is / is not] actual cause.

Proximate Cause

The dangerous aspect of the activity proximately causes the plaintiff's damages if the damages are foreseeable, meaning they are a normal incident of and within the increased risk of the dangerous aspect of the activity.

Here, [plaintiff's injury] [is / is not] the normal incident of [defendant's conduct] because [facts + reasoning].⁵³ [Plaintiff's injury] [is / is not] within the increased risk of [defendant's conduct] because [facts + reasoning].⁵⁴

Thus, there [is / is not] proximate cause.

Damages

The plaintiff must prove they suffered actual, cognizable damages to their person or property.

Here, plaintiff suffered harm because [facts].

Thus, there [are / are not] damages.

Accordingly, defendant [is / is not] liable under a strict liability theory.

Abnormally Dangerous Activity

To establish a prima facie case of strict liability, the plaintiff must show the defendant engaged in an abnormally dangerous activity the dangerous aspect of which actually and proximately caused the plaintiff to suffer damages.

Here, the defendant's activity poses a substantial risk of significant harm despite the exercise of reasonable care because [facts.] Defendant's activity [is / is not] a matter of common usage because [facts]. Plaintiff's injury [did / did not] result from the dangerous aspect because [facts]. [Plaintiff's injury] [is / is not] the normal incident of [defendant's conduct] because [facts + reasoning⁵⁵]. [Plaintiff's injury] [is / is not] within the increased risk of [defendant's conduct] because [facts + reasoning⁵⁶]. Here, plaintiff suffered harm because [facts].

Accordingly, defendant [is / is not] liable under a strict liability theory.

⁵³ Here, you need to establish whether the plaintiff's injury is the type of thing that might normally happen when someone does the type of negligent thing defendant did.

⁵⁴ Here, you need to explain whether defendant's conduct increases the risk that the plaintiff would suffer the type of injury they suffered.

⁵⁵ Here, you need to establish whether the plaintiff's injury is the type of thing that might normally happen when someone does the type of negligent thing defendant did.

⁵⁶ Here, you need to explain whether defendant's conduct increases the risk that the plaintiff would suffer the type of injury they suffered.

Abnormally Dangerous Animal⁵⁷

An owner of an abnormally dangerous animal is liable for injuries caused by that animal's abnormally dangerous propensity.

Harm Results from Dangerous Propensity

The harm the plaintiff suffers must result from the type of danger to be expected from the abnormally dangerous animal.

Here, the harm [did / did not] result from the type of danger to be expected from the animal because [facts].

Thus, the harm [did / did not] result from the dangerous propensity.

Causation

The dangerous aspect of the activity must actually and proximately cause the harm.

Actual Cause

The dangerous aspect of the activity actually causes a plaintiff's damages when the damages would not have occurred but for the dangerous aspect of the animal.

Here, the damages would not have occurred but for the dangerous aspect of the animal because [facts].

Thus, there [is / is not] actual cause.

Proximate Cause

The dangerous aspect of the activity proximately causes the plaintiff's damages if the damages foreseeable, meaning they are a normal incident of and within the increased risk of the dangerous aspect of the activity.

The damages [are / are not] a normal incident of the dangerous aspect because [facts]. The damages [are / are not] within the increased risk of the dangerous aspect of the activity because [facts].

Thus, there [is / is not] proximate cause.

Damages

The plaintiff must prove they suffered actual, cognizable damages to their person or property.

Here, [plaintiff] [did / did not] suffer actual, cognizable damages because [facts].

Thus, plaintiff suffered damages.

Accordingly, plaintiff [can / cannot] prove defendant strictly liable.

Abnormally Dangerous Animal

An owner of an abnormally dangerous animal is liable for injuries caused by that animal's abnormally dangerous propensity.

Here, the harm [did / did not] result from the type of danger to be expected from the animal because [facts]. Here, the damages would not have occurred but for the dangerous aspect of the animal because [facts]. The damages [are / are not] a normal incident of the dangerous aspect because [facts]. The damages [are / are not] within the increased risk of the dangerous aspect of the activity because [facts]. Here, [plaintiff] [did / did not] suffer actual, cognizable damages because [facts].

Accordingly, plaintiff [can / cannot] prove defendant strictly liable.

⁵⁷ An animal is abnormally dangerous for two reasons: (1) it is a wild animal, or (2) it's a domesticated animal with dangerous propensities.

Products Liability

If products liability is being tested, it is often the entire focus of the essay. I encounter a lot of bar applicants who struggle a bit with products liability because it is so cumbersome; however, if you organize it into the five theories and know that (a) negligent products liability is really just a regular negligence analysis, (b) the warranties are mostly similar, and (c) all the theories have causation and damages, a products liability essay becomes a bit more manageable.

In a products liability essay, I like to always identify the theories I will discuss at the outset and then proceed in the following order: strict products liability, negligent products liability, implied warranties, and then express warranties if triggered by the facts, and intentional products liability, if triggered by the facts. One thing to keep in mind, you will always address strict products liability, negligent products liability, and breach of implied warranties, but you will only address breach of express warranty and intentional products liability if those theories are triggered by the facts.

Products Liability

Defendant may be liable for products liability under the following theories: strict products liability, negligent products liability, breach of implied warranties of merchantability and fitness for a particular purpose, [breach of express warranty], and [intentional products liability].

Strict Products Liability

To be liable under a strict products liability theory, the plaintiff must prove the defendant is a commercial supplier, that manufactured or sold a defective product, the defective product caused plaintiff's injury, and the plaintiff suffered damages.

Commercial Supplier

A defendant is a commercial supplier when the defendant is a manufacturer, retailer, assembler, or wholesaler of a product.

Here, defendant is a [manufacturer / retailer / assembler / wholesaler] of the [product].

Thus, [defendant] is a commercial supplier.

Defective Product⁵⁸

A product may be defective when it has a design defect, manufacturing defect, or warning defect.

Here, [product] has potential [design / warning / manufacturing]⁵⁹ defects.

Design Defect

A design defect exists when the product is made according to the manufacturer's specifications but is inherently dangerous as designed. Courts use two tests to determine whether a design defect exists: the cost-utility test and the reasonable consumer test. A design defect exists when the defendant could have made the product safer without seriously impacting the product's cost or utility. A design defect exists when the product fails to perform as safely as the ordinary consumer would expect.⁶⁰

Here, there [was / was not] a reasonable alternative design because [facts + reasoning].⁶¹ The product [does / does not] fail to perform as safely as the ordinary consumer would expect because [facts].

Thus, there [is / is not] a design defect.

⁵⁸ Most fact patterns focus on both design and warning defects. Manufacturing defects are tested less regularly.

⁵⁹ Choose all that apply.

⁶⁰ You need to apply both of these tests. Often, these tests will require you to come up with what a reasonable consumer would do, which will require some inferential reasoning on your part.

⁶¹ Here, you need to show how the product could have been made safer (i.e., you need to come up with a safer design that would not seriously impact the cost or utility). This is sometimes alluded to in the facts but not always.

Warning Defect

A warning defect exists if the product fails to provide adequate warnings about risks posed by the product and the danger is not apparent to users.

Here, the product [does / does not] fail to provide adequate warnings to users because [facts + reasoning]. The danger [is / is not] apparent to users because [facts].

Thus, there [is / is not] a warning defect.

Manufacturing Defect

A product has a manufacturing defect when the product emerges from the manufacturing process different from and more dangerous than products that were made properly.⁶²

Here, the product emerged from manufacturing process different from and more dangers than products that were made properly because [facts]. The product fails to perform as safely as the ordinary consumer would expect because [facts].

Thus, there [is / is not] a manufacturing defect.

Causation

The defendant must actually and proximately cause the plaintiff's injuries.

Actual Cause

To establish actual cause, the plaintiff must prove that the defect in the product existed when the product left the defendant's control.

Here, the defect [did / did not] exist when it left [defendant's] control because [facts].

Thus, there [is / is not] actual cause.

Proximate Cause

The defect is a proximate cause of the plaintiff's damages if the plaintiff's damages are a normal incident of and within the increased risk caused by the defect. The failure of an intermediary to discover the defect is not a superseding cause and will not cut off the defendant's liability.⁶³ Foreseeable misuse of the product will not cut off the defendant's liability.

Here, plaintiff's injuries [are / are not] a normal incident of the defect because [facts]. Plaintiff's injuries [are / are not] within the increased risk caused by the defect because [facts].

Thus, there [is / is not] proximate cause.

Accordingly, there [is / is not] causation.

Damages

The plaintiff can recover for personal injury and/or property damage; however, a plaintiff cannot recover for pure economic loss.

Here, [plaintiff] suffered [personal injury / property damage] because [facts].

Thus, [plaintiff] suffered damages.

Accordingly, [plaintiff] [may / may not] recover for products liability under a strict liability theory.

⁶² Complying with legal standards is insufficient to prove there is not a defect.

⁶³ Only include this if triggered by the facts.

Defense – Assumption of Risk

A court may deny plaintiff recovery if she assumed the risk of any damages caused by defendant's act. The plaintiff must have (1) known of the specific risk, and (2) voluntarily proceeded despite the risk.⁶⁴

Here, plaintiff [knew / did not know] of the specific risk of [risk] because [facts]. Plaintiff [did / did not] voluntarily proceed despite the risk because [facts].

Thus, plaintiff [did / did not] assume the risk.

Defense – Misuse

if a plaintiff negligently contributes to her injuries by misusing the product in an unforeseeable way, plaintiff cannot recover at all.

Here, plaintiff [did / did not] misuse the product in an unforeseeable way because [facts].

Thus, defendant [can / cannot] successfully assert contributory negligence if in a jurisdiction that adopts this approach.

Negligent Products Liability

The defendant is liable under a negligent products liability theory when there is a duty, breach, causation, and damages.

Duty

Defendants owe a duty of care to foreseeable plaintiffs. Courts adopt either the *Andrews* or *Cardozo* view when determining whether the defendant owed the plaintiff a duty of care.

Cardozo (Majority Approach)

Under the *Cardozo* view, a defendant owes a duty of care to a foreseeable plaintiff within the zone of danger created by the defendant's conduct.

Here, the zone of danger is anywhere plaintiff could bring [product]. Defendant created the zone of danger by [facts – focus on defect in product]. Plaintiff [was / was not] within the zone of danger because [facts].

Thus, defendant [owed / did not owe] a duty of care under *Cardozo*.
*Andrews (Minority Approach)*⁶⁵

Under the *Andrews* approach, a defendant owes a duty of care to all persons injured by the defendant's conduct.

Here, plaintiff is a person injured by defendant's conduct because [facts].

Thus, defendant [owed / did not owe] a duty of care under *Andrews*.

Standard of Care – Reasonably Prudent Person

A defendant owes a duty to act as a reasonably prudent [person / business].^{66 67 68} A court compares a business to an entity of similar, size, experience, and location.⁶⁹

⁶⁴ Assumption of risk may be either implied or express. Generally, on bar essays, the examiners test on implied assumption of risk. A plaintiff impliedly assumes a risk when a reasonably prudent person would have appreciated the risk.

⁶⁵ If you run out of time, you can omit reference to *Andrews*. High scoring answers will include *Andrews*.

⁶⁶ A reasonable person is considered to have the same physical characteristics as the defendant. Thus, if a fact pattern provides detail about the physical characteristics of someone, you need to consider those characteristics in evaluating whether the defendant acted reasonably.

⁶⁷ Special Skills: If the defendant has special skills (e.g., the defendant is a race car driver), the RPP is considered to have those same skills.

⁶⁸ Most products liability questions are companies rather than individuals.

⁶⁹ Only include this rule if the defendant is a business.

Here, defendant owed a duty to [establish what a reasonably prudent person/business would have done].

Breach⁷⁰

A breach occurs when the defendant fails to adhere to the applicable standard of care.

Reasonably Prudent Person/Business⁷¹

A person/business breaches when they fail to act as a reasonably prudent person/business. The reasonably prudent person/business test is objective. A court will compare the defendant to an entity of similar size, experience, and location.

Here, defendant [failed / did not fail] to act as a reasonably prudent person because [establish whether defendant failed to do what a reasonably prudent person/business would do as established in your standard of care section] and defendant did [facts].

Thus, defendant [breached / did not breach].

Causation & Damages

See rules above.

Here, the same analysis applies as in strict products liability because the rules and facts are the same.

Thus, there [is / is not] causation and damages.

Accordingly, [plaintiff] [may / may not] recover for products liability under a negligence theory.

Defenses

See *Negligence, supra*.

Implied Warranty of Merchantability

When a merchant who deals in a type of good sells such goods, there is an implied warranty that the goods are “merchantable,” or of a quality generally acceptable among those who deal in the type of good and generally fit for the ordinary purposes for which the good is used. If the good does not live up to this standard, then the warranty is breached, and the defendant is liable, even if the defendant is not at fault. The plaintiff generally must be the buyer, a member of the buyer’s family or household, or the buyer’s guest.⁷²

Here, the good is not generally [acceptable / fit] for the ordinary purpose for which it is to be used because [facts]. [Plaintiff] is a proper plaintiff because they are the [buyer / member of buyer’s family / household / guest]. The same analysis for causation and damages applies as in strict products liability because the rules and facts are the same.

Thus, [defendant] [did / did not] breach the implied warranty of merchantability.

Implied Warranty of Fitness for a Particular Purpose

An implied warranty of fitness for a particular purpose is created when the seller either knows or has reason to know the particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to

⁷⁰ The breach analysis is generally very short. Essentially, you should refer to your section on standard of care and show how defendant failed to do what a reasonable person (or whatever the applicable standard of care is) would have done.

⁷¹ For products liability, the standard of care will most likely be the reasonably prudent business.

⁷² Vertical privity between the buyer and manufacturer is not required. There are three alternatives when it comes to horizontal privity: (1) the implied warranty applies to the buyer’s family, household, and guests who suffer personal injury; (2) the implied warranty applies to any person who suffers personal injury; and (3) the implied warranty applies to any person who suffers any injury. Most jurisdictions have adopted alternative (1).

select or supply the goods. If the goods do not live up to this standard, then the warranty is breached, and the defendant is liable, even if the defendant is not at fault.

Here, [defendant] [knew / had reason to know] the particular purpose for which [plaintiff] bought [product] because [facts]. [Product] was not fit for that purpose because [facts] [Plaintiff] is a proper plaintiff because they are the [buyer / member of buyer's family / household / guest]. The same analysis for causation and damages applies as in strict products liability because the rules and facts are the same.

Thus, [defendant] [did / did not] breach the implied warranty of fitness for a particular purpose.

Express Warranty

An express warranty is created when a seller or supplier makes a factual affirmation or promise concerning the goods to buyer, and the factual affirmation or promise becomes part of the basis of the bargain. A plaintiff can recover for any breach of the express warranty, even if the breach was not the defendant's fault. In most jurisdictions, privity is not required.

Here, [defendant] made an express warranty because [facts]. That promise was part of the basis of the bargain because [facts]. [Product] failed to live up to that promise because [facts]. The same analysis for causation and damages applies as in strict products liability because the rules and facts are the same.

Thus, [defendant] [did / did not] breach the express warranty.

Defenses to Breach of Warranty

*Disclaimer*⁷³

A disclaimer of implied warranties may be effective as a defense.

Here, there [was / was not] a disclaimer of the implied warrant of [merchantability / fitness for a particular purpose] because [facts].⁷⁴

Thus, [plaintiff] [can / cannot] recover.

Assumption of Risk

See Strict Products Liability, supra.

Notice

A plaintiff must notify the defendant within a reasonable time of the defect to recover.

Here, [plaintiff] [did / did not] notify the defendant within a reasonable time because [facts].

Thus, [defendant] [can / cannot] assert lack of notice as a defense.

Comparative / Contributory Negligence

See Negligence, supra.

Intentional Products Liability

If the defendant intended that someone be injured by a defective product or knew to a substantial certainty that someone would be injured by a defective product, the defendant may be liable for intentional products liability.

Here, there is a defective product because [facts]. Defendant [intended / knew to a substantial certainty] that someone would be injured by [product] because [facts].

⁷³ This does not apply to express warranties – they are not disclaimable.

⁷⁴ It may be a disclaimer as to both.

Defenses to Intentional Products Liability

See Intentional Torts Defenses, supra

Nuisance

Private Nuisance

A defendant is liable for private nuisance when they create a (1) substantial and (2) unreasonable interference with plaintiff's use or enjoyment of property that he (3) actually possesses or to which plaintiff has a right of immediate possession.

Substantial Interference

Interference is substantial when it is offensive, inconvenient, or annoying to the average person in the community (i.e., it is not substantial if it is merely the result of plaintiff's hypersensitivity or specialized use of his own property).

Here, the interference [is / is not] [offensive / inconvenient / annoying] to the average person in the community because [facts + reasoning].

Thus, there [is / is not] substantial interference.

Unreasonable Interference

Interference is unreasonable when the severity of the inflicted injury outweighs the utility of defendant's conduct. In balancing these interests, the court will consider plaintiff's entitlement to use his land in a reasonable way considering the neighborhood, land values, and existence of any alternative courses of conduct open to defendant.

Here, the severity of the injury [does / does not] outweigh the utility of [defendant's] conduct because [facts + reasoning].

Thus, there [is / is not] unreasonable interference.

Plaintiff Possesses or Has Right of Immediate Possession

Plaintiff possesses or has right of immediate possession of land when they own, lease, occupy, or control the property.

Here, plaintiff [owns / leases / occupies / controls] the property because [facts].

Accordingly, [defendant] [is / is not] liable for private nuisance.

Public Nuisance

A public nuisance occurs when the defendant unreasonably interferes with the health, safety, or property rights of the community. Recovery is available only if a private party suffers some unique damage not suffered by the general public.

Here, [defendant] [did / did not] unreasonably interfere with the [health / safety / property rights] of the community because [facts]. [Plaintiff] [did / did not] suffer unique damages because [facts].

Thus, [plaintiff] [can / cannot] recover for public nuisance.

Nuisance Remedies

Damages

The general measure of recovery when someone has suffered a private or public nuisance is damages.

Here, plaintiff has suffered [facts].

Thus, plaintiff has suffered damages and may recover for such damages.

Injunction⁷⁵

Where damages are unavailable or inadequate, a court may grant an injunction. A court will find damages inadequate when the nuisance is continuing or it will cause irreparable injury. In this instance, a court will balance the hardships associated with granting an injunction.

Here, damages [are / are not] [unavailable / inadequate] because [facts]. The nuisance [is / is not] [continuing / causing irreparable injury] because [facts].

Thus, a court [will / will not] grant an injunction.

⁷⁵ This is not the same as if you were analyzing injunction as a full-on remedy. This is specific to nuisance.

Vicarious Liability

Vicarious Liability

A party's own negligence aside, a defendant may also bear liability for the negligence of one of their agents. Courts apply different tests for liability depending on whether the agent is an employee or an independent contractor.

Employee vs. Independent Contractor

Courts assess in the totality whether someone is an independent contractor or an employee. They look to factors including: the parties' intent; the form of payment; whether the agent uses its own tools or facilities; whether the agent has discretion in the method used to complete the task; and whether the agent must work on the assigned project at a certain time. Generally, a principal is not vicariously liable for tortious acts of their agent if the agent is an independent contractor; however, the principal is liable when the independent contractor is engaged in an inherently dangerous activity or non-delegable duty, or if an important public policy is involved. Generally, an employer is liable for tortious acts committed by their employees if the tortious act occurs within the scope of employment.

Here, the parties' intent was for [individual at issue] to be an [employee / independent contractor] because [facts + reasoning]. The form of payment weighs in favor of a finding that [individual at issue] is an [employee / independent contractor] because [facts + reasoning]. [Individual] [does / does not] use their own tools, which weighs in favor of being an [employee / independent contractor] because [facts + reasoning]. Agent [does / does not] have discretion in the method used to complete the task, which weighs in favor of a finding that they are an [employee / independent contractor] because [facts + reasoning]. [Individual at issue] [is / is not] required to work on the project at a certain time, which weighs in favor of being an [employee / independent contractor] because [facts + reasoning].

Thus, a court is likely to find [individual at issue] was an [employee / independent contractor] because [reasoning] and [may / may not] hold [principal] liable.

Within the Scope of Employment

An employee driving for an employer may commit a tort while on a business trip for their employer. If the employee committed the tort while deviating from the business purpose, whether the employer is vicariously liable depends on whether it is a detour or a frolic. A detour occurs when the deviation was minor in time and in geographic area. A frolic occurs when the deviation is more than minor in time and geographic area.

Here, employee was on a [frolic / detour] because [facts + reasoning].

Thus, employee [was / was not] acting within the scope of employment.

Miscellaneous Extra Torts

Below, are some torts that do not come up as often but have been tested and it is worth you being familiar with them.

Misrepresentation often arises within a remedies fact pattern and, generally, you will have to address both intentional and negligent misrepresentation. Intentional interference with business relations, abuse of process, and malicious prosecution are all rarely tested and, while it is good for you to know them because it is good for you to know all areas of law, these are less important and, even if you can't remember all of the elements, you can likely get at least half of the elements and come to the right conclusion just by knowing the names of the torts and general tort principles of fairness and equity.

Intentional Misrepresentation

A defendant commits intentional misrepresentation when they (1) misrepresent a material fact⁷⁶⁷⁷ (2) which they knew or believed was false or the statement lacked a basis in truth, (3) the defendant intended to induce plaintiff to act or refrain from acting in reliance⁷⁸⁷⁹ on the misrepresentation, (4) the plaintiff actually and (5) justifiably relies on the statement which results in (6) damages.

Here, [defendant] misrepresented a material fact because [facts]. [Defendant] [knew / believed statement was false / lacked basis in truth] because [facts]. [Defendant] intended to induce plaintiff to act in reliance on the misrepresentation because [facts]. [Plaintiff] actually relied on the statement because [facts]. [Plaintiff] justifiably relied because [facts]. [Plaintiff] suffered damages because [facts].

Thus, [defendant] [is / is not] liable for intentional misrepresentation.

Negligent Misrepresentation

A defendant commits negligent misrepresentation when they misrepresent a fact in a business or professional capacity, owe a duty toward a particular plaintiff, causation, justifiable reliance, and damages.

Here, [defendant] [did / did not] misrepresent a fact in a [business / professional] capacity because [facts]. [Defendant] owed a duty to [plaintiff] because [facts]. The misrepresentation actually and proximately caused [plaintiff] to rely on the statement because [facts]. The reliance [was / was not] justifiable because [facts]. [Plaintiff] suffered damages because [facts].

Thus, [defendant] [is / is not] liable for negligent misrepresentation.

Interference with Business Relations

A defendant interferes with business relations when (1) a valid contract relationship exists between plaintiff and a third party or plaintiff has a valid business expectancy, (2) defendant knows of the relationship or expectancy, (3) defendant intentionally interferes by inducing a breach or termination of the relationship or expectancy which (4) causes plaintiff damages.

Here, a valid contract relationship existed between [plaintiff] and [other individual] because [facts]. [Defendant] [knew / did not know] of the [relationship / expectancy] because [facts]. [Defendant] [did / did not] intentionally interfere with the [relationship / expectancy] because [facts].

Thus, [defendant] [is / is not] liable for interference with business relations.

Malicious Prosecution

A defendant commits malicious prosecution when they (1) institute judicial proceedings against the plaintiff, (2) which terminate in the plaintiff's favor, (3) defendant lacks probable cause, (4) defendant instituted the proceedings for an improper purpose, and (5) cause plaintiff damages.

⁷⁶ Generally, there is no duty to disclose; however, concealment of a fact may constitute a misrepresentation.

⁷⁷ A fact is material when it would influence a reasonable person in making a decision.

⁷⁸ If a third party relies on the misrepresentation made by the defendant, the defendant may still be liable.

⁷⁹ If a plaintiff relies on opinion, the reliance is justifiable only if the defendant offering the opinion possesses superior knowledge on the subject matter.

Here, [defendant] instituted judicial proceedings against [plaintiff] because [facts]. The proceedings terminated in plaintiff's favor because [facts]. The defendant lacked probable cause because [facts]. The defendant instituted the proceedings for an improper purpose because [facts]. Plaintiff suffered damages because [facts].

Thus, [defendant] [is / is not] liable for malicious prosecution.

Abuse of Process

A defendant commits abuse of process when the defendant wrongfully uses process for an ulterior purpose, and a definite actor poses a threat against plaintiff to accomplish that purpose.

Here, the defendant used legal process for an ulterior purpose because [facts]. A definite actor [does / does not] pose a threat against a plaintiff to accomplish that purpose because [facts].

Thus, [defendant] [is / is not] liable for abuse of process.