This outline was created for the February 2008 California bar exam. The law changes over time, so use with caution. If you would like an **updated** and editable version of this topic outline, go to http://www.barexammind.com/california-bar-exam-outlines/.

Torts Outline

I. Intentional Torts to the Person
   a. General observations
      i. Ignore hypersensitivity of P
      ii. No incapacity defenses to intentional torts
      iii. ALL OF THESE require *intent* [ie, INTENT is an element for all]
         1. specific: the desire of D to produce the forbidden result; or
         2. general: act with virtually certain knowledge that the result will come to pass
   b. Battery
      i. Elements:
         1. D commits **harmful or offensive contact**; and
            a. Offensive battery typically tested: "unpermitted": ie, not permitted by typical, normal, average person
         2. Contact must be **with P's person**
            a. Anything holding/touching = P's person
      ii. Types
         1. sexual harassment; groping, no informed consent medical procedure
   c. Assault
      i. Elements
         1. D **places P in reasonable apprehension;** and
            a. Not fear, but "knowledge of"
            b. Look out for "David and Goliath" problem, since it is not FEAR
            c. Unloaded gun problem: use perspective of P
         2. **of an immediate battery** (ie, harmful or offensive contact)
            a. "words alone" lack immediacy; must be coupled with overt physical conduct
            b. BUT, words can "negate" immediacy [conditional words; future threats]
   d. False Imprisonment
      i. Elements
         1. D committed **act/omission** that;
            a. Threats are sufficient if would confine a reasonable person
            b. Omission: D has duty to facilitate movement, but intentionally refuses to aid = confinement
         2. **confines/restrains** P to;
            a. keeping someone OUT or denying admission is not false imprisonment
         3. a **bounded area**; and

            a. must be no reasonable means of escape known/can be reasonably discovered by P
        4. P must **know of the confinement** or **suffer a harm**
    e. <u>Intentional Infliction of Emotional Distress</u>
        i. Elements
            1. D engages in **extreme and outrageous conduct**; and
                a. Conduct exceeds all bounds of decency tolerated in civilized society
                b. Mere insults generally not enough
                c. Plus factors:
                    i. Continuous, repetitive bad behavior
                    ii. D is common carrier or innkeeper
                    iii. P is a fragile class of person [children, elderly, pregnant, adults with sensitivities known to D]
            2. P **suffers severe distress**
            3. [NB: can be intentional or reckless act]

II. Intentional Torts to Property
    a. <u>Trespass to Land</u>
        i. Elements
            1. D enters the land **intent**ionally (no awareness of crossing boundary line or defying property rights)
                a. Epilepsy or accidental entry (eg, car accident) is not intentional entry
            2. **physical invasion** of
                a. D enters land; D propels a tangible object onto land
                b. Non-physical penetrations are not trespass, but are nuisance
            3. P's **real property**
                a. Includes air above and soil below for a *reasonable distance*
    b. <u>Trespass to Chattels</u>
        i. Elements
            1. D **intentionally interferes** with
                a. Interference: damaging or theft
                b. Relatively small interference is trespass
            2. P's **right of possession**
            3. in **personal property**
        ii. Mistake of ownership
            1. no defense to trespass or conversion
        iii. Recovery
            1. actual damage to chattel or possessory right
    c. <u>Conversion</u>
        i. Elements
            1. D **intentionally interferes** with
                a. Significant harm is conversion
            2. P's **right of possession**
            3. in **personal property**
            4. interference is so **severe** that it warrants requiring D to pay chattel's full value
        ii. Special Remedy available

1. can treat tort as a "sale" and recover item's full value, and not merely the cost of repair

III. Defenses to Intentional Torts

a. <u>Consent</u>

i. Defense to ALL intentional torts

ii. Issues:

1. was consent valid?

a. Must have legal capacity to consent

2. did D stay within the bounds/scope of the consent?

a. If exceeded scope, then tort liability

iii. Types of consent:

1. Express

a. Exceptions: fraud or duress to obtain the consent invalidates the consent; mistake of P known and taken advantage of also invalidates

2. Implied

a. based on custom and usage (eg, body contact consented to in contact sports)

b. D's reasonable interp of P's objective conduct

b. <u>Self-defense, defense of 3rd persons, defense of property</u>

i. To establish this defense, D must show

1. acted with *proper timing*; and

a. ie, threat was in progress or imminent

2. reasonable belief that threat is genuine

a. Defense of Property: shopkeeper's privilege is exception to this, assuming action is reasonable [stopping all blacks, teens is not reasonable]

ii. Limitations on these protective privileges:

1. strength of response must be appropriate to threat

2. deadly force never permitted to defense property

c. <u>Necessity</u>

i. Only a defense to PROPERTY torts

ii. Public Necessity:

1. D invades P's personal/real property in an *emergency* to protect the community *as a whole* or a *significant group of people*

iii. Private Necessity

1. D interferes with P's property in an *emergency* to protect an *interest of his own*

2. Consequences:

a. D must pay for actual harm inflicted;

b. D is not liable for nominal or punitive damages;

c. As long as emergency persists, the P can not expel D from his land [ie, sanctuary]

IV. Dignitary and Economic Torts

a. <u>Defamation</u>

i. Elements

1. D makes a **defamatory statement** that is **of or concerning P**;

a. Defamatory: tends to adversely affect reputation--

            i. Mere insults not defamatory
            ii. Allegations of "fact" are paradigm of defamation
                1. *opinion*: if listener would assume it is based on fact, then defamatory
        b. P must be alive
    2. that is **published** to a 3rd party
        a. can be *negligent* publication
    3. **damages** (maybe) to P's reputation
        a. Libel cases (written or permanently memorialized):
            i. P's don't have to prove damages to get to jury
        b. Slander (spoken defamation)
            i. Slander per se: same damage approach as liabel
                1. statement concerning business or profession
                2. statement that P committed crime of moral turpitude
                3. statement imputing unchastity to a woman
                4. statement that P suffers from a loathsome disease (leprosy, venereal disease)
            ii. All other slanders:
                1. must prove damage
        c. Damages mean
            i. Economic harm

ii. Defenses:
    1. Consent (see above)
    2. Truth
    3. Privilege
        a. Absolute: associated with status of D
            i. communication between spouses
            ii. officers of 3 branches of govt engaged in official duties
                1. eg, anything said in courtroom (including by lawyers)
        b. Qualified: when/why statement is made
            i. socially valuable statements: letters of rec; statements to police. D must show:
                1. any error was made in good faith
                2. material must be relevant to socially valuable purpose of speech

iii. First Amendment Issues
    1. if the defamation involves a matter of public concern, then P must prove 2 additional elements: [see CMR p. 16]
        a. **falsity** of the defamatory language; and
        b. **fault** on the part of D
    2. Level of Fault depends on status of P
        a. *Public official* must prove <u>actual malice</u>, meaning
            i. Knowledge that statement is false; or
            ii. Reckless disregard as to whether it was false
        b. *Private person* can show
            i. actual malice; or

            ii. negligence: and evidence of actual injury
        c. Damages presumed (see above) where actual malice shown

b. <u>Invasion of Right to Privacy</u>
    i. Appropriation
        1. Elements:
            a. D's **unauthorized use of P's name or picture**
            b. for **a commercial purpose**
        2. Exception:
            a. newsworthiness
    ii. Intrusion upon private affairs
        1. Elements:
            a. **Invasion** by the D **of**
            b. P's **solitude**
            c. In a way that would be **objectionable to an average person**
        2. Cautions
            a. P can only recover if he has a REP
            b. Does NOT require a trespass
    iii. False Light
        1. Elements:
            a. D makes a **widespread dissemination**;
                i. This element distinguishes it from defamation
            b. Of a **major falsehood** about P;
                i. Need not be defamatory
            c. That would be **objectionable to an average person**
        2. Damages
            a. Unlike defamation, permits recovery for emotional damages
        3. NB: this is not an intentional tort
            a. Negligence and inadvertence are actionable
    iv. Public disclosure of private facts
        1. Elements:
            a. A **widespread dissemination** of;
            b. **Confidential information** of P;
                i. Financial, academic, medical
            c. That would be **objectionable to an average person**
        2. Cautions
            a. There is a newsworthiness exception here
            b. Facts in question must be genuinely confidential
    v. Defenses to Privacy Torts
        1. consent is a defense to all
        2. privilege (absolute and qualified) are defenses to false light and disclosure only

c. Fraud

d. Inducing a Breach of Contract/Intl Interference with Business Relations
    i. Existence of a **valid contract**
    ii. D's **knowledge of that contract**
    iii. D's **intentional interference** w/K inducing breach or termination
    iv. **damages**

e. Malicious Prosecution

f. Abuse of Process
g. Intentional Misrepresentation/Fraud
    i. **Misrepresentation** of a material fact
    ii. **D's knowledge or belief** the fact was false
    iii. **Intent to induce** P to act/refrain from acting in reliance on the misrep
    iv. **Actual reliance** (ie, causation)
    v. **P's justifiable reliance** on the statement
    vi. **damage**

V. Negligence
a. Elements:
    i. Duty
    ii. Breach
    iii. Causation
    iv. Damages
b. **Duty**
    i. An obligation to take risk-reducing precautions; to whom is it owed?
    ii. Owed to **foreseeable victims**
        1. therefore, no duty owed to *un*foreseeable victims and always lose on the bar exam
    iii. Who is foreseeable?
        1. person within the *zone of danger* (ie, if you are very far away, you can't recover)
            a. minority view: everyone is foreseeable
        2. the *size* of the zone depends on the activity in which D is engaged
        3. EXCEPTION:
            a. Rescuer is a foreseeable victim where D negligently put himself or a 3rd person in peril
    iv. What is the *Standard of Care*?
        1. give the amount of care that a **reasonably prudent person** would **acting under similar circumstances**
            a. don't forget "similar circumstances" part
            b. standard is **objective**: thus inflexible, can be harsh
                i. applies to the retarded; the mentally ill
        2. EXCEPTIONS:
            a. If D has superior knowledge, that will be incorporated into the standard of care
                i. Skills: Thus, held to higher standard of care (eg, reasonably prudent NASCAR driver)
                ii. Fact Nugget: driver knows that certain area has bad visibility, so held to have this *extra* knowledge
            b. Includes physical characteristics of D, if relevant
    v. <u>Special Standards of Care</u>
        1. Children as D
            a. Under 4, no duty; incapable of negligence
            b. 4 and over: owe care of hypothetical child of similar age, education, experience, and intelligence acting under similar circumstances (a **subjective!!** std – very generous, pro D)
            c. EXCEPTION: Adult Activity

        i. Held to normal reasonable person std (generally operating something with a *motor*)

2. Professionals
    a. Def: provide services to public, have special skill/training, and licensed by state [archi, enginer, health care]
    b. Std: provide care of average (not "reasonable") member of their profession practicing in a similar community
        i. Average: compare to *real world colleagues*, not a hypothetical professional (ie, **empirical** std); ie, *custom of the profession sets the std of care*
            1. thus, P will need to put on EXPERT testimony
        ii. Specialists: expected to use even higher care
    c. Informed consent
        i. If undisclosed risk was serious enough that a reasonable person in patient's position would have withheld consent, doctor has breached duty

3. Owner/Occupier of Land
    a. Determining Std:
        i. How did entrant on land get hurt?
            1. <u>activities being conducted</u> by land occupier or his agents; OR
            2. accidents caused by <u>hazardous conditions</u> on the land
        ii. *Categorize the **entrant***:
            1. <u>Undiscovered trespasser</u>: no permission to enter AND occupier has no awareness of entrant
                a. *Duty owed:* NONE
            2. <u>Discovered trespasser</u>: status at time of accident; includes "anticipated" trespassers
                a. *Activity duty*: reasonable care
                b. *Condition duty*: protect only from conditions meeting a 4-part test:
                i. Artificial condition
                ii. Highly dangerous
                iii. Concealed from naked eye
                iv. Occupier has advance knowledge
            3. <u>Licensee</u>: enter with permission onto land not generally open to everyone (eg, social guest)
                a. *Activity duty*: reasonable care
                b. *Condition duty*: warn & protect from condition meeting 2-part test:
                i. Concealed/hidden
                ii. Occupier has advance knowledge
            4. <u>Invitee</u>: enter land open to large portion or all of the public

a. *Activity duty*: reasonable person
b. *Condition duty*: duty if meet 2-part test:
    i. Concealed/hidden
    ii. Occupier either has advance knowledge OR could have discovered it through a *reasonable inspection*
c. NB: if person wanders into an off limits area, then duty only to limit willful or wanton misconduct[1]

b. Test information
    i. Firefighters & Cops: considered licensees, but **never recover** for injuries that are inherent risk of their job
    ii. Child Trespassers: entitled to reasonable care, regardless of facts
        1. the more likely it is that kids will trespass, the higher a degree of care (eg, attractive nuisance[2])
    iii. If duty owed for a condition to anyone, occupier can satisfy duty in 2 ways:
        1. eliminate the condition; or
        2. give a warning

vi. Statutory Standards of Care
1. typically, a criminal, quasi-criminal, or regulatory statute not providing for express tort liability
    a. **negligence per se**: *breach of statute creates conclusive presumption of duty and breach of duty*
2. So, when do we borrow a statutory std? Two-part "class of person, class of risk" test:
    a. P is a *member of class of persons* that the statute seeks to protect; AND
    b. Harm that occurred is *what statute sought to prevent*
3. If cannot borrow the statute, then go ahead under reasonable person standard
4. EXCEPTIONS to class of person, class of risk test:
    a. If compliance would be more dangerous than violation, we don't use as std of care, *even if* 2 part test satisfied.
    b. If compliance was impossible under circumstances, don't borrow the statute.

vii. Affirmative Duty to Act
1. General Rule: No duty to act affirmatively.
    a. EXCEPTIONS:

[1] Ie, invitee has "exceeded the scope" of his license to enter the land
[2] P must show: 1) owner knew or should have known of the dangerous **artificial** condition, 2) owner knows of should know children frequent the area; 3) condition is likely to cause injury b/c kids inability to appreciate the risk; and 4) *the expense of remedying the situation is slight compared with the magnitude of the risk.*

i. Pre-existing relationship (eg, familial, common carrier/ innkeeper, business invitees)
ii. D caused peril
iii. NB: duty to rescue is only what would be reasonable under the circumstances
iv. If error during rescue, then liability for negligence

viii. Negligent Infliction of Emotional Distress
1. Elements:
a. No direct physical trauma
b. **Negligence** occurs under one of the other standards above
c. And
i. P was in "**zone of physical danger**" (ie, near miss or close call fact pattern); and
1. Also, recovery in *Bystander* situation
a. Witness to injury of a close family member (50% of states)
ii. **Subsequent physical manifestations** of the distress (ie, an *injury* requirement)
2. Also, recovery in *Bystander* situation
a. Witness to injury of a close family member (50% of states)

c. **Breach**
i. *Identify* the specific wrongful conduct of P and *explain* why it is wrongful
ii. If duty standard is specific (eg, custom, usage, statute), breach is easy to explain. If duty standard is general, then more difficult (ie, under RPP)
1. eg: D was unreasonable when he <facts>. This is unreasonable because reasonable drivers in these circumstances <standard>.
iii. Res Ipsa Loquitur: when lack of info about what D did wrong
1. P must show:
a. Accident which occurred would not *normally* occur in the absence of negligence; and
b. This type of accident normally occurs because of negligence of someone in *D's position*
2. Thus, can get to jury without direct evidence of breach
a. No *directed verdict* available to D (see CMR p. 28)

d. **Causation**
i. Actual Cause / Factual Causation
1. D's breach <state facts> was a cause in fact of P's injuries because "**but for**" that action, P would not have been hurt. This is b/c . . .
a. D's defense: *even if* I had been prudent, you would have still been hurt. Therefore, but for test fails.
2. Multiple Defendants Problem
a. *Mingled Causation*: we use the **substantial factor test**:
i. Did each D contribute to injury in a significant or substantial way?
b. *Unascertainable Cause*: normally burden on P to show each factor of case, but **burden shifts to Ds** to show they were not the cause of the injury [*Summers v. Tice*]
ii. Proximate Cause / Legal Cause

1. This is a "fairness" doctrine
2. Two ways to test:
    a. *Direct cause questions*: D breaches and P is injured immediately
        i. If resulting harm unforeseeable, no liability
    b. *Indirect cause questions:* D breaches, and no/minor injury occurs, and intervening forces happen leading to greater injury
        i. <u>Liability is fair where intervening act is foreseeable</u>: The well-settled rules:
            1. intervening medical negligence
            2. intervening negligent rescue
            3. intervening protection/reaction forces
            4. subsequent disease or accident
        ii. if not in 4 above, ask "what is it about this conduct that makes me call it a breach?"
            1. then, ignore everything else, and look at P at end of story.
            2. if it seems fair to punish D, then impose liability

e. **Damages**
    i. Eggshell Skull: if all other elements satisfied, D must pay for **all** damages suffered, even if *surprisingly great* in scope.
    ii. "Take P as you find him." ← applies to EVERY TORT (personal or property damage), not just negligence

f. **Defenses to Negligence**
    i. <u>Traditional contributory negligence</u> (rare)
        1. any negligence on P's part completely barred recovery
            a. unless "last clear chance" applicable
    ii. <u>Implied assumption of the risk</u>
        1. P must have **known of the risk**
        2. P **voluntarily went ahead** in face of the risk
        3. UNLESS,
            a. Common carrier or public utility involved
            b. Statute enacted to protect P's class
            c. Fraud, force, emergency
        4. NOT a defense to *intentional torts*
    iii. <u>Comparative Fault</u> (modern doctrine)
        1. D must show **P is guilty of fault**
            a. ie, P failed to use relevant degree of care for *his own* safety (usually RPP, but may be statute (eg, jay-walking))
        2. Then, jury instructed to **compare fault of the parties**
        3. Then, P's recovery is reduced based on percentages
        4. Types of Comparative Fault:
            a. *Pure comparative fault:* go strictly by jury numbers, and P will always recover something [unless no D has greater negligence % than P]

b. *Partial/modified comparative fault:* P's fault of less than 50% results in reduction of recovery; P's fault over 50% bars recovery

VI. Stict Liability: CANNOT BE AVOIDED BY HIGH LEVEL OF CARE

a. Injuries caused by animals

i. Domesticated animals

1. General Rule: no strict liability for injuries caused by animals
2. EXCEPTION:
   a. Strictly liable if knowledge that pet has "vicious propensities" (usually a previous bite)

ii. Trespassing Livestock

1. strict liability

iii. Wild Animals

1. strict liability

b. Ultrahazardous Activities

i. Test:

1. activity *cannot be made safe*
2. poses a *risk of severe harm*
3. *activity is uncommon* in the area where it is being conducted

ii. Eg, blasting/explosives, chemical/biological agents, nuclear materials

c. Products Liability

i. Injury by product, leads to many causes of action: negligence, warranty in contract[3], battery?, fraud?, etc

ii. Elements of product strict liability:

1. D was a **merchant** (deals in goods of the kind);
   a. Casual sellers NOT merchants
   b. Service providers NOT merchants of goods *incidental* to services
   c. Commercial lessors (eg, rental car companies) ARE considered merchants
   d. All merchants in chain of distribution subject to strict liability
2. P shows that the **product is defective**;
   a. *Manufacturing* defect; or
      i. Product in question <u>differs from all others</u> that came off assembly line that makes it <u>more dangerous than consumer would **expect**</u>
   b. *Design* defect
      i. There is hypo <u>alternative design</u> that meets the following tests:
         1. <u>safer</u> than current version;
         2. <u>economical</u>; and
         3. <u>practical</u> (product utility not impaired)
      ii. If test met, current version is defective and vendor must pay damages
      iii. *Product info* is considered part of design:

[3] Such as: implied warranties of merchantability and fitness; express warranty, misrepresentation of fact. See CMR pp. 38-39 and contracts/sales outline.

1. warnings: failure to warn = liability
    a. prominent, calculated to come to attention of user
    b. easy to understand
2. instructions
3. THEREFORE, if product can't be physically made safer, we can give better warnings or instructions that will make it safer

3. P demonstrates that **defect existed when it left D's hands**
    a. Never an issue with design defects
    b. Manufacturing defects: could defect have been due to rough treatment by someone other than the person being sued?
        i. RULE: P gets presumption that defect existed in D's hands, *if product traveled in ordinary channels of distribution* (ie, BOP on P)
            1. eg, buy second hand product at garage sale does NOT permit the presumption
4. P must be **foreseeable user** of product **making a foreseeable use**
    a. Not limited to *intended uses* of the product

d. **Defenses**
    i. comparative fault
    ii. assumption of risk
    iii. contributory negligence, IF P knew of risk and didn't guard against it

VII. Nuisance
a. Private nuisance
    i. Elements
        1. **Interference** with P's ability
        2. To **use and enjoy his land**
        3. To an **unreasonable degree**
    ii. Incompatible land use or spiteful neighbors
    iii. RULE: D is liable if unreasonable degree of interference
        1. Balancing test:
            a. D's right to use land
            b. P's right to be free from annoyance

b. Public nuisance
    i. Elements
        1. act that **unreasonably interferes** with
        2. the **health, safety, or property rights** of
        3. the **community**
    ii. private party can only recover if directly affected by the nuisance. Normally resolved by nuisance/abatement action brought by govt

VIII. Miscellaneous
a. Vicarious Liability
    i. Predicated on *relationship* between active tortfeasor and passive party
        1. employer-employee
            a. course & scope issue: generally, intentional torts are outside scope of employment

i. BUT, if *job description involves use of force*, probably within the scope
ii. OR act by employee *designed to serve employer's interests*

b. *Minor* frolic and detour does not eliminate VL

2. independent K-hiring party
   a. no vicarious liability
      i. EXCEPT: land occupier liable if IK hurts invitees on the land
      ii. IK engaged in inherently dangerous activities; or
      iii. Duty of care is nondelegable due to public policy reasons
3. auto owner – auto driver
   a. No vicarious liability
      i. EXCEPT: if doing errand for owner, then driver is agent for owner
4. parent-child
   a. No vicarious liability

ii. Nelgigent entrustment
1. This is *always* a 2nd choice theory. Party must be completely passive before this can be applied.
   a. eg, lending car to obviously drunk person; leaving loaded gun out in house with little kid

b. Reconciling rights of co-defendants
i. Comparative **contribution**
1. each co-D is assigned a % by jury and out-of-pocket D recovers based on these percentages

ii. Indemnification
1. vicariously liable party can get all $ back from active tortfeasor
2. non-manufacturer held strictly liable can get all $ back from the manufacturer
3. where joint tortfeasors, if one negligent and one intentional, the negligent torfeasor can get all $ back from intentional tortfeasor

c. Loss of consortium
i. Victim of ANY tort must be **married**
ii. **Uninjured spouse** has a separate cause of action for loss of consortium
iii. Allows recovery for three types of damages:
1. loss of services (fix things, doing dishes)
2. loss of society (companionship, friendship)
3. loss of sexual activity

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