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Business Law: Negligence and Torts

Scope:

This set of eight lectures discusses a basic aspect of business law: torts and negligence. Torts, the body of law designed to redress harms done to persons through civil litigation, are divided into several categories, one of which is negligence. Negligence is a familiar concept in everyday life, but it has very specific legal definitions and implications. As with all bodies of law, in order to analyze the legal implications of a potentially tortious action, it is necessary to blend common sense and pragmatic thinking with an understanding of legal definitions as they have evolved over time. This lecture series not only explains the basics of this substantive body of law, but it also gives insight through examples of how the law is based on a logical idea of a just outcome.

Lecture One lays out the basic foundations of torts law, the three categories of which it is composed, and the legal factors necessary to find a person liable for a tort. Negligence is discussed in terms of specific legal duties under the common law, and the standard of what a “reasonable person” would think or do, which is relied upon so heavily in this body of law. Lecture Two continues the discussion of negligence, especially of property owners, and the defenses that can be offered against allegations of negligence. Lecture Three discusses the flip side of property owner’s negligence – the definitions of intentional interference with property. The nature of intent is discussed in terms of each of several kinds of offenses.

Lectures Four and Five deal with the high-profile, occasionally controversial topics of defamation, privacy, and emotional distress. In Lecture Four, the several requirements of defamation are discussed, as well as the privilege to defame which can attend commentary on public figures. Lecture Five discusses the expanding tort of infliction of emotional distress, which can be either negligent or intentional, but which must pass several specific tests before it can be definitely labeled tortious. Invasion of privacy and the various forms it can take under common law are reviewed in detail.

Lectures Six, Seven, and Eight return to a more traditional conception of business law in their discussion of product liability, business torts, and trademarks. The extent to which a manufacturer is liable for damages caused to persons or property is explained in Lecture Six, including the several defenses, such as assumption of risk, which can be raised. Lecture Seven discusses third-party intervention in contracts and prospective business, as well as the legal implications of misappropriation of information. Lecture Eight closes the series with an interesting discussion of trademark law, and the considerations such as competition or likelihood of consumer confusion which courts must weigh before handing down decisions on such infringements.
Lecture One
Foundations of Torts and Negligence

Introduction

Scope: Tort law, an extremely high-profile area of the law, is a body of common law designed to compensate persons injured in civil, as opposed to criminal, wrongs. The duties and behaviors of the hypothetical “reasonable person,” as interpreted during centuries of litigation, have come to form this practical and highly developed body of law. Although they often accompany criminal litigation, torts can be pleaded alone. They can be broken down into the broad categories of intentional harms, negligence, and certain cases in which strict liability for actions applies.

Outline

I. The Nature of Tort Law. Tort is a common law remedy to compensate those injured by civil wrongs.

A. Evolution. Torts require the following two factors:

1. Breach of Duty. A person is only liable for breach of some duty, though not necessarily a violation of criminal law. Under tort law, one must behave reasonably but need not, for example, come to the rescue of others.

2. Legally Protected Interest. A plaintiff can sue over injuries only to certain interests that the law protects; thus, you have no case for wrongful heartbreak.

B. Categories of Torts. Torts are generally divided into three types:

1. Intentional. These are harmful actions taken on purpose. However, there need not be an intent to produce the actual eventual harm, so long as that consequence was foreseeable to the actor.

2. Negligent. It is a tort to injure someone because of your carelessness or foolishness or other negligent behavior. Negligence is the most common tort action.

3. Strict Liability. In some limited circumstances, a person is liable for harm even if they took all appropriate care. These circumstances include ultrahazardous activities and the sale of products, discussed later.

II. Negligence: Breach of Duty

A. General Duties —The Reasonable Person. Everyone has the legal duty to act around others as would a reasonable person. Automobile accident liability generally arises from a party's failure to drive as safely as a reasonable person.

B. Specific Duties. Specific circumstances give rise to various definitions of legal duty.

1. Special Relationships. People in special relationships, such as a doctor, have higher duties, including a duty to take action to prevent harm.

2. Legal Responsibilities. Violation of a statutory law or ordinance is considered automatically to be negligent, with limited exceptions.

3. Custom. Customary practice may create duties to behave in a certain way, especially in business.

4. Duty To Act. Ordinarily you do not have a duty to act or rescue another, unless you put the person into the situation requiring rescue.

5. Mental Suffering. The law has a limited duty not to cause mental suffering. There is a duty not to intentionally cause extreme mental suffering. Negligent infliction of mental distress is generally not actionable except in special cases defined differently by the various states.

6. Presence of Contract. If the individuals in question are parties to a contract, that contract may define their duties, rather than general tort law.

C. Res Ipsa Loquitur. (the thing speaks for itself). This is a doctrine enabling a plaintiff to recover in negligence even if the plaintiff cannot prove exactly what negligence caused her injuries. It is available when an accident generally does not occur without negligence and when the situation and facts are in the defendant's possession.
Review Questions

1. Can an action be an intentional tort even when the actor did not intend to harm the victim?

   Yes, when the actor should have known of the consequences with reasonable certainty or when the actor intended similar consequences for a different person.

2. Atomco is transporting highly radioactive waste through a small town. Despite all possible precautions, there is a release of this waste and a local is injured. Will Atomco be liable for these damages?

   Yes, there is strict liability for such ultrahazardous activities.

3. A hardware store sells glue to a minor, in violation of local law. The minor sniffs the glue, passes out, and drowns. Should the hardware store be liable?

   Yes, they are per se negligent for violating a law, the purpose of which is to protect minors from themselves, so there is no comparative negligence defense.

4. Two cars collide at an intersection and injure a pedestrian. Unaware of the cause of the accident, the plaintiff tries to recover from the drivers through res ipsa loquitur. Is the doctrine applicable here?

   No, the plaintiff might succeed with a single driver accident but cannot create an inference that both drivers, or either particular driver, must have been negligent in this accident.

5. A person watching a show in a theater was hit by a falling piece of glass from a chandelier. The theater owner showed that the chandelier was frequently inspected and that no similar accidents had occurred. Should the person be able to proceed with a lawsuit for damages?

   Yes, a court found that the mere presence of the accident could reasonably create an inference of negligence by a reasonable jury.

6. Ruby became angry when another driver cut her off and seized the only mall parking space. She rammed her car into that driver's fender, which pushed his car into a third car. Is Ruby liable to the owner of the third car?

   Yes, she committed an intentional tort and the third car's damages were a natural consequence.

7. Driving carelessly, Jody ran over Sam's pet puppy. Sam was greatly traumatized and sued Jody for his emotional distress. Can Sam recover?

   Not for emotional distress, because Jody was only negligent, and negligent infliction of emotional distress is not actionable on these facts.

8. Joe ran a shop that rented canoes and sold cheap beer to those who rented. After a couple rented the canoe and bought lots of beer became drunk and overturned the canoe, they shouted for help. Should Joe be liable for ignoring their cries?

   A court would probably hold Joe liable to take some action (even if only phoning for help), because his actions contributed to the danger.

9. Ernesto Parra was eating at a restaurant when he began choking on a piece of food. Although workers at the restaurant were aware of his problem, none of them offered him any assistance. Unaided, Parra eventually died. His estate sued the restaurant for negligence, claiming that the restaurant should have done something in response to the choking. Is the restaurant liable?

   In this case, Parra v. Tarasco, Inc., 595 N.E.2d 1186 (1992), the court held that the restaurant was not liable. Ordinarily, there is no duty to rescue a person from a dangerous condition. There may be such a duty to rescue.
however, by a defendant that has itself created the condition of danger. The court held that the choking itself was not caused by any negligence by the restaurant but was personal to Parra. Consequently, the restaurant had no duty to rescue him from the choking.

10. Ricky Osmer was a heavy equipment operator for Cherokee Cable Company. A large truck was stuck in the mud near his job site and requested his assistance. Osmer loaded a bulldozer onto a flatbed trailer, drove to the spot, and pushed the truck free. Then, Osmer sought to reload the bulldozer back on the trailer by driving it on at several miles per hour. Because the trailer slowly slid into the mud, the bulldozer slipped off the trailer and fell on Osmer, killing him. His widow sued the manufacturer of the trailer and others. A key defense was that Ricky had caused his own risk by behaving negligently in loading and using the trailer. Should his widow be able to recover?

In this case, Osmer v. Belshe Industries, Inc., 585 So.2d 791 (1991), the court ruled that Osmer was not negligent as a matter of law, so that the case should go before a jury. While he may have been negligent in driving the bulldozer back on to the trailer he did not so clearly violate the reasonable person standard for a court to dismiss the case.
Further Readings

Basic Readings


*Torts in a Nutshell*, Edward J. Kionka (2d ed. 1992), Chapter 1 — This chapter of the simplified legal guide discusses the functions and objectives of tort law.

Intermediate Readings

*The Law of Torts*, Fowler L. Harper, Fleming James, Jr., and Oscar S. Gray (2d ed., 1986), Chapter 16 — This chapter of the multivolume treatise discusses the nature of negligence liability.

*Prosser and Keeton on Torts*, W. Page Keeton, Dan B. Dobbs, Robert B. Keeton, and David G. Owens (5th ed., 1984), Chapter 1 — This chapter of the hornbook addresses the history and policy of tort law.

Advanced Readings

*Restatement of the Law (Second) of Torts*, American Law Institute (1979), sections 281-327 — These sections of the official review of American tort law address general principles of negligence and standard of care.

Thomas A. Eaton, "Res Ipsa Loquitur and Medical Malpractice in Georgia: A Reassessment," 17 *Georgia Law Review* 33 (1982) — This article reviews the application of the traditional doctrine of res ipsa loquitur to controversial malpractice actions.

Jay Silver, "The Duty to Rescue: A Reexamination and Proposal," 26 *William and Mary Law Review* 423 (1985) — This article reconsiders the traditional lack of any duty to rescue and argues for statutory expansion of this duty.
Lecture Two
Negligence (continued)

Scope: This lecture picks up the previous lecture’s discussion of negligence with the duties of landowners—a subject of much speculation and of very practical interest to many Americans. The degrees of liability are various, and defenses to these and other torts abound, from defenses which admit the actions alleged but give an excuse (affirmative defenses) to issues of “proximate cause” which offer common-sense checks to the damages sought in many cases.

Outline

I. Breach of Duty (continued)
   A. Duties of Landowners
      1. Trespassers. Contrary to popular folklore, a landowner has very little duty not to harm trespassers. The landowner generally cannot cause intentional serious harm to trespassers (e.g., boobytraps). A landowner may also be liable to known repeated trespassers or when the land creates an attractive nuisance that presents a hazard to children.
      2. Licensees. These are social guests, and landowners generally have a duty to warn them of known dangerous conditions at the site.
      3. Invitees. Landowners owe the highest duty to these business guests. The owner has a duty to inspect the land for hazards, to warn of those hazards, and, often, to fix the hazards if a warning might prove insufficient to protect the invitee.
      4. Lessees. A specific circumstance that often arises is the duty of the landlord to the lessee. Landlords are liable for common areas, such that they may have to repair hazardous conditions or provide sufficient security against crime.
   B. Proximate Cause. A party is liable in tort only for those harms that were the "proximate cause" of the party's wrongful actions. Proximate cause is a legal concept that limits liability even for some harms that a party caused in fact.
      1. Causation in Fact. A party is liable only for harms that she actually produced.
      2. Foreseeability. Proximate cause limits liability to those consequences that are generally foreseeable. However, a person "takes the defendant as he finds him," so that you may be liable for a greater than expected degree of harm to a fragile person. In addition, the precise chain of events need not be foreseen so long as the general type of harm could be contemplated.
      3. Intervening Cause. A party will not be liable for an unforeseeable intervening cause between the negligence and the harm. Criminal acts are generally considered such intervening causes that may break the chain of proximate cause.
   C. Defenses. In addition to disputing the facts of the tort as alleged by the plaintiff, a defendant may raise additional affirmative defenses to avoid liability.
      1. Comparative Negligence. A plaintiff's recovery will be limited by the percentage that the plaintiff was himself negligent and shares blame for his injuries.
      2. Assumption of Risk. Plaintiffs cannot recover for risks they assumed, implicitly or explicitly. The legal definition of assumption of risk is narrower, though, than general popular attitudes.
         a. express assumption. This exists when a person expressly assumes the risk of an activity, as in a contract.
         b. implied assumption. This exists when the plaintiff undertook an activity, freely and with knowledge of the nature of the risk that she was running.
Review Questions

1. Corwin was riding his bicycle to school on a busy street. While riding, he was frequently checking his hair and failed to see an oncoming car that hit him. If Corwin sues the driver for negligence, what defenses are available?

   Comparative negligence and assumption of risk are both possibly effective defenses.

2. Scott was poor and drove his car on badly worn tires because he could not afford new ones. One of the tires blows out and Scott hits Felix. Can Felix recover from Scott for negligence?

   Yes, Scott was negligent in driving on unsafe tires, regardless of the explanation.

3. A criminal entered a cab, which started up. The criminal then put a gun to the driver's head and ordered the driver to go or he would be shot. The cab driver slammed on the brakes and jumped out of the car, which kept rolling and injured a bystander. Is the cab driver liable in negligence?

   No, the cab driver was acting in emergency circumstances and did not act negligently.

4. Poddar is being counseled by licensed psychotherapists and tells them that he intends to kill a woman. The counselors do not inform the woman or her parents, and Poddar kills her. Should the psychotherapists be liable to the woman's survivors?

   Yes, they negligently failed to inform her of the risk.

5. A train was traveling faster than the railroad's speed limit and struck a car crossing the tracks. Visibility at the crossing was blocked by a large nearby warehouse, which precluded the train from stopping in time. Is the railroad liable to the injured driver?

   No, the speeding was not a cause of the accident, because the court found that the train could not have stopped in time even if it had not exceeded its speed limit.

6. A ship negligently spilled oil into a bay, and some of the oil drifted to a nearby wharf. Some workmen dropped molten metal on the wharf, which set the adhering oil afire and burned the wharf. Is the ship liable for the damages to the wharf?

   In this classic Australian case, the court held that the ship was not the proximate cause of the fire damages.
7. A negligently moored ship drifted down a river and struck a drawbridge, which could not be raised because no employees were on duty. The collapsed bridge and ship create a dam on the river that produces substantial flooding. Are the ship- and bridge-owners liable to those damaged by flooding?

Yes, the general type of damages should have been a foreseeable consequence to these defendants.

8. A worker has been drinking heavily on the job, and the employer sends him home mid-day. On the way home, he drives unsafely and gets in an accident. Can the victim of the accident successfully sue the employer as well as the worker?

Yes, the employer cannot rely on the drunken driving as an intervening cause, because the company was aware of the worker’s drunken condition and caused him to drive home at the time.

9. George Ward entered a K-Mart Department store through a service entrance near the department where he sought to shop. Ward purchased a large mirror and left through the same entrance. The mirror was so large that he could not see where he was going. As he left the store, he collided with a concrete pillar that shattered the mirror, such that broken glass cut his cheek and eye, costing him some vision. Ward sued K-Mart for negligence. Should the store be liable to him?

In this case, Ward v. K-Mart Corp., 554 N.E.2d 223 (1990), the court held in favor of Ward. As a business invitee, he was owed the highest level of care from the store. The court held that it was reasonably foreseeable to the store that a customer might leave while carrying packages so large as to block his or her view. Because the pillar was immediately outside the entrance, it was also foreseeable that a customer would collide with the pillar. K-Mart was negligent for failing to take precautions against this eventuality.

10. Charlie Brown was a sixteen-year-old who saw a cat stranded at the top of a thirty-five-foot utility pole on a neighbor's property. He was able easily to climb the pole because of a metal pipe running alongside it. While climbing, he suffered an electrical shock and fell, suffering injuries. He sued the owner of the utility pole. Should he be able to recover even though the risky pole was not the cause of his entering the property?

In this case, Brown v. Arizona Public Service Co., 790 P.2d 290 (1990), the court held that Brown might be able to recover. Although he was a trespasser, the court deemed that he was drawn to the property by an attractive nuisance. Although he was attracted to the property by the cat, not the instrumentality that injured him, this was immaterial. Other issues, including whether the condition was a breach of duty, still had to be tried.
Further Readings

Basic Readings


*Torts in a Nutshell*, Edward J. Kionka (2d ed. 1992), Chapters 4 and 5 — These chapters of the simplified legal guide cover the standards of liability for negligence and defenses

Intermediate Readings

*The Law of Torts*, Fowler L. Harper, Fleming James, Jr., and Oscar S. Gray (2d ed. 1986), Chapters 17-22 — These chapters of the multivolume treatise discuss negligence duties, causation, and defenses.

*Prosser and Keeton on Torts*, W. Page Keeton, Dan B. Dobbs, Robert B. Keeton, and David G. Owens (5th ed. 1984), Chapters 5-7 — These chapters of the hornbook address standards of negligence and causation.

Advanced Readings

*Restatement of the Law (Second) of Torts*, American Law Institute (1979), sections 328-503 — These sections of the official review of American tort law address the full range of negligence issues, including breaches of care, causation, defenses, and other issues.

Laura Kulwicki, "A Landowner's Duty To Guard Against Criminal Attack: Foreseeability and the Prior Similar Incidents Rule," 48 Ohio State Law Journal 247 (1987) — This article considers when a landowner may be liable for a third party's criminal attack on the premises.

Lecture Three
Intentional Interferences with Property

Scope: Intent, as an essential component of many types of torts, has been legally refined to differentiate between the kind of action taken and the necessary components of intent in that circumstance. The torts of trespass, conversion, and nuisance involve very different actions, and the intent to do those actions has also been construed differently. The subtleties are such that one does not need to intend actual harm in order to be liable for the harm caused.

Outline

I. The Meaning of Intent. The nature of intent, discussed in the first lecture, is particularly relevant to certain intentional interferences with property rights. One need not intend particular harm, so long as the action was purposeful and the consequences foreseeable.

II. Trespass.
   A. Invasion of Property. The well known concept of trespass arises when a person invades the property of another without permission. The invasion may be in person or through objects.
   B. Nature of Intent Required. Trespass requires an intent to enter land but not necessarily an intent to trespass or cause harm. Trespass may also involve failure to leave after requested.
   C. Indirect Invasions. The invasion of another's land with material objects, from air pollution to baseballs, is also trespass.

III. Conversion.
   A. Taking of Property. Conversion is the taking of others' property, such as the crime of theft. It extends to all exercises of dominion over property and includes the destruction of that property. A lesser invasion, short of taking the property, may be the tort known as trespass to chattels.
   B. Nature of Intent. For conversion, intent is somewhat narrower. If you accidentally take the property of another and return it promptly, there is no conversion. However, even an innocent purchaser of stolen goods is liable for conversion.

IV. Nuisance
   A. Interference with Property. There is a general principle that a property owner may make any use of his land that doesn't injure the property of others. Such an interference with other's property is a private nuisance; interference with a common right is a public nuisance. Nuisance generally requires actual damages and involves consideration of both the magnitude of harm and the reason for the activity.
   B. Nature of Intent. Nuisance requires an intent to act but not necessarily to cause harm.
   C. Remedies. The injured party may obtain damages or an injunction against the objectionable activity, though the injunction may be denied due to the benefits of the activity, even if it constitutes a nuisance.

V. Defenses.
   A. Consent. Consent is a defense to interference with property rights. Again such consent may be express or implied from the circumstances. Consent is limited in that it must be voluntary and can be limited in scope.
   B. Necessity. Invasions of property are justified by public necessity, if required to protect a substantial number of people. Property interference in response to private necessities still require payment of damage.

VI. Defense of Property. Rather than suing, a party may personally try to defend his or her property. Force may be used in this defense but the force is limited to that required and deadly force is generally proscribed.
Review Questions

1. Walking along a sidewalk, Robert is hit by a skateboarder and knocked through a store window. Has he committed trespass?
   
   No, his invasion of the store's property was not intentional.

2. Shortly before leaving on vacation, the Dunns' cat has kittens. Neighbor Gretchen agrees to take care of the kittens during vacation. The Dunns phone from Florida to say they are not returning home and don't want the kittens. Can Gretchen successfully sue?
   
   Yes, the Dunns have committed a trespass by refusing to take back the kittens.

3. Kareem places certain bonds in the First Federal Bank to serve as collateral for a large loan from the bank. Kareem pays off the loan and demands the bonds, but the bank has negligently misplaced them. Can Kareem recover for conversion?
   
   No, so long as the bank's failure to return the bonds is due to their negligence and not intentional action.

4. A fire is raging in a residential neighborhood and approaching Maxwell's house. The local fire warden makes the determination that to stop the fire Maxwell's house must be blown up, and the warden does so. Can Maxwell recover?
   
   In a nineteenth-century case tracing these facts, the court held that the homeowner could not recover, due to the defense of necessity.

5. Aaron operates a restaurant on a site, and Jimco operates a refinery on an adjacent site. Increased refinery use caused greater emissions of nauseating gases, discouraging Aaron's clientele. When Aaron sued for nuisance, Jimco stressed that it was obeying all laws and operating the refinery properly. Can Aaron recover?
   
   Yes, this would represent a nuisance, notwithstanding the lawful operation of the refinery, though the court might order only damages and not an injunction.

6. Clyde left his fur coat for storage with Jerry. Jerry then altered the coat, lengthening it such that Clyde could no longer wear it. Is this act a conversion?
   
   Yes, this would be an exercise of dominion that would qualify as a conversion.

7. Javier gives a valuable painting to an auctioneer to sell for him. The auctioneer innocently sells the painting to Norman. In fact, the painting was owned by Zach, who sues the auctioneer for conversion; can Zach win?
   
   Yes, even one who takes stolen goods innocently is liable for conversion.

8. Ann hunted ducks from Vin's land. She fired a shot over the nearby residential property of John. She missed the duck and the bullet was never found, but the noise distressed John's livestock. Can John successfully sue Ann for trespass?
   
   Yes, the firing of the bullet into the low air space of John's land qualifies as a trespass.

9. A nine year old boy was a member of a swim club. While swimming in the club pool, the boy raised a metal cover over a drain, put a tennis ball in the drain pipe and replaced the metal cover. He was unaware of a suction effect and when he returned for the ball, it was gone. The ball had been sucked into a critical area of the pipe, which ruined the pool's drainage. The club had to close the pool for several days and make costly repairs. The club sues the boy for damages in trespass. Should the boy be liable?
   
   In this case, Cleveland Park Club v. Perry, 165 A.2d 485 (1960), the court found the boy could be liable. The defense was a lack of intent in the simple act of placing a tennis ball in the drain. However, the action of placing the ball in the pipe clearly was intentional, and intent does not require knowledge of the subsequent injurious consequences. However, the boy was permitted to raise a defense that the club was aware of such actions and had consented to them.

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10. The Central Hide and Rendering Company had operated its animal rendering plant near Tyler, Texas for decades. The plant was in an area that was historically industrial but nevertheless adversely effected residential communities. Obnoxious odors and flies affected nearby homeowners intermittently. The homeowners sued for nuisance and sought an injunction requiring that the plant be moved. Should such an injunction issue?

In this case, Storey v. Central Hide and Rendering, 226 S.W.2d 615 (1950), the court held that no injunction should be issued. The plant was a lawful business and in a traditional industrial area. The plant was the only rendering plant in the area and served the needs of citizens as well as providing employment opportunities. Balancing precluded the injunction, though citizens could recover their money damages.
Further Readings

Basic Readings


*Torts in a Nutshell*, Edward J. Kionka (2d ed. 1992), Chapter 7 and Section 6-6 — These sections of the simplified legal guide discuss trespass and defenses to intentional torts.

Intermediate Readings

*The Law of Torts*, Fowler L. Harper, Fleming James, Jr., and Oscar S. Gray (2d ed., 1986), Chapter 1 — This chapter of the multivolume treatise addresses interference with the possession and use of land.

*Prosser and Keeton on Torts*, W. Page Keeton, Dan B. Dobbs, Robert B. Keeton, and David G. Owens (5th ed., 1984), Chapters 3 and 15 — These chapters of the hornbook address intentional interferences with property and nuisance law.

Advanced Readings

*Restatement of the Law (Second) of Torts*, American Law Institute (1979), sections 157-215 — These sections of the official review of American tort law address trespass on land and defenses; and sections 821-840 — these sections discuss the law of nuisance.


*And Forgive Them Their Trespasses: Applying the Defense of Necessity to the Criminal Conduct of the Newsgatherer*, 103 Harvard Law Review 890 (1990) — This article considers whether the First Amendment gives the press the right to trespass on private property.
Lecture Four
Defamation

Scope: Defamation, a body of law that frequently produces high-profile litigation, is divided into the torts of libel and slander. Both have developed highly nuanced definitions, as the difference between a defamatory statement and an unflattering opinion can be difficult to discern. Public figures, for example, have different standards applied to them than ordinary private citizens in matters of defamation, and the elements of defamation, including publication and business interest, require much care to prove.

Outline

I. Defamatory Communication. Defamation consists of libel (written) and slander (spoken). It begins with a defamatory communication.
   A. Fact. To be defamatory a statement must be one of fact, not opinion, though the line between these can be a close one.
   B. Injury to Reputation. The key to defamation is that the communication injures the reputation of the person in reference. The comment must be something considered bad by the mores of the time, which may change
   C. Reference to Person. To constitute defamation, the statement must involve a reference to a specific person. However, a general reference to a small group of people may constitute defamation to each member.
   D. Believed. In order to constitute defamation, the statement must be believed, otherwise there would be no harm to reputation. Insulting a person to his face is not defamation unless others overhear.

II. Falsity. Defamation is limited to false communications of fact. Originally, the defendant had to prove the statement true but now it is incumbent upon the plaintiff to prove it false. If a statement is substantially true, there may not be liability for a minor, technical false fact.

III. Publication.
   A. Defined. Publication simply means communication of the defamatory fact to a third party and may be oral.
   B. Repeating Defamation. Repeating the defamation (as by a newspaper) uttered first by another is also tortious, even if the repeater expresses doubt about the facts. There is no liability for passive distribution, such as that by a library.
   C. Compelled Self Publication. Ordinarily, persons would not defame themselves. If a person is compelled by circumstances to repeat a third party’s defamatory comment, the third party may be liable. This eventuality has arisen in job interviews.

IV. Privileges. Under some circumstances, a party is privileged to make defamatory comments without fear of liability.
   A. Absolute Privilege. Absolute privileges to defame are narrow, such as representatives making official remarks or judges speaking in court.
   B. Qualified Public Figure Privilege. The law provides a more limited privilege to comment on public figures.
      1. Identity of Public Figure. For the law’s purposes, a public figure is a person who has somehow thrust himself or herself into the public eye. Entertainers and public officials are the most obvious examples.
      2. Malice. Even a false comment about a public figure is not actionable unless it was made with "malice." In this context, malice means that the commenter knew the statement was false or made it with a reckless disregard for whether it was true.
C. **Qualified Business Interest Privilege.** Another limited privilege exists for comments made for a legitimate business interest, such as a recommendation regarding a former employee. An analogous privilege applies for a general public interest.

1. **Good Faith.** While false comments are not actionable under the business interest privilege, the comment must have been made with a good faith belief in its truth to be protected by the privilege.

2. **No Excessive Publication.** The qualified privilege extends only to necessary communications and not to excessive publication of the potentially defamatory comments.
Review Questions

1. A newspaper article stated that prominent trial attorney Melvin Belli "took" the Florida bar association by charging certain expenses to them. After he sued for defamation, the newspaper contended that its comment was merely a tribute to his cleverness. Is this a good defense?

   *No, the court found that statement could carry an implication of dishonesty to support a defamation claim.*

2. An employer published statements that certain union leaders were placing their own personal ambitions ahead of the interests of their members. Is this defamation?

   *No, this statement is one of opinion, not fact, and cannot be defamation.*

3. Murphy fired her secretary for sloppiness on the job. She informed everyone in the building of the secretary's shortcomings, so the secretary sued her for defamation. Can the secretary recover?

   *Probably not. Murphy cannot use the business privilege due to excessive publication, but she has potentially good defenses of truth and opinion, depending on additional facts.*

4. Jim was the vice president of an academic society. The society newsletter accused him of expense account fraud, and he sued for defamation. Can the publisher claim a privilege?

   *Yes, Jim was a public figure in the context of the society, so the qualified privilege applies.*

5. Suppose that a society member had made the allegations of expense account fraud in the *New York Times*. How would this change the legal situation?

   *The author would probably lose the public figure privilege. The vice president of an academic society is probably not a public figure for the general public.*

6. Can a person successfully sue for defamation even if his or her name never appears in the defamatory communication?

   *Yes, if the communication refers to a small enough group of people that the public might attribute it to the person.*

7. Can a statement be defamatory if it is subject to two possible interpretations, only one of which is negative?

   *Yes, if a reasonable listener might adopt the negative interpretation, and the plaintiff's reputation suffers as a consequence.*

8. A motel manager traced the identity of an individual who may have stolen motel property. He sent a certified letter to the person's home accusing him of theft, and his wife opened the letter. If the accusation is false, can the person recover for defamation?

   *No, the court held that the manager had no way of knowing that a third person would see the letter.*

9. Amanda drives deliveries for Melrose Pizza Company. In the course of her job, she has had several accidents of varying severity within a single year. Frustrated with this, her boss fires her. He also fires off a letter to the owners of all other delivery companies in the city stating that she is the "worst driver in the entire city" and an "accident waiting to happen." After being unable to get a new job, Amanda discovers the letter and sues the boss for defamation. Should she prevail?

   *Yes, Amanda has been defamed. The boss's letter meets all the basic requirements of defamation. He will doubtless raise the affirmative defense of the business privilege for his communication. This defense should prove insufficient. First, the letter's statements are excessive. The boss may have had a right to caution about the safety of her driving, but there is no evidence that she is the worse driver in the entire city. Second, the letter probably was excessively publicized. The boss had a right to warn those considering hiring Amanda but not every business in the region.*
10. Luigi owns and operates a successful Italian restaurant. His chef, named Toni, also has a job writing about restaurants in the area, but Toni cannot discuss Luigi's so long as he is employed there. Luigi and Toni have a falling out. In a fight before the restaurant patrons, Toni quits and states that Luigi has watered the house wine and not made his own pasta. Luigi has occasionally bought pasta but never watered the wine. Toni then writes a review of Luigi's that rates the restaurant poorly and declares that the wine and pasta are inferior to that in other restaurants. May Luigi recover in defamation for these statements?

Luigi should be able to recover something. The statements about the wine and pasta are false statements of fact publicized in front of Luigi's customers. If any of the customers believed the statements to be true, which seems likely, Luigi would have suffered damages in defamation. The case is much weaker with respect to the restaurant review. Depending upon the precise statements, such a review is probably a statement of opinion that is not actionable under defamation law.
Further Readings

Basic Readings


Torts in a Nutshell, Edward J. Kionka (2d ed., 1992), Chapter 13 — This chapter of the simplified guide addresses defamation and defenses.

Intermediate Readings

Advanced Torts: Cases and Materials, Peter B. Kutner and Osborne M. Reynolds, Jr. (1989), Chapter 6 — This chapter of the law school textbook covers the tort of defamation and associated privileges and defenses.

The Law of Torts, Fowler L. Harper, Fleming James, Jr., and Oscar S. Gray (2d ed., 1986), Chapter 5 — This chapter of the multivolume treatise discusses the tort of defamation and privileges.

Prosser and Keeton on Torts, W. Page Keeton, Dan B. Dobbs, Robert B. Keeton, and David G. Owens (5th ed., 1984), Chapter 19 — This chapter of the hornbook addresses the law of defamation.

Advanced Readings

Restatement of the Law (Second) of Torts, American Law Institute (1979), sections 558-623 — These sections of the official review of American tort law address the law of defamation and defenses.

Jeffrey Kirchmeier, "The Illusion of the Fact-Opinion Distinction in Defamation Law," 39 Case Western Reserve Law Review 867 (1989) — This article addresses the difficulty of distinguishing between actionable statements of fact and those of opinion.

John C. Martin, "The Role of Retraction in Defamation Suits," 1993 University of Chicago Legal Forum 293 (1993) — This article considers the effect a retraction might have upon a defamation action.
Lecture Five
Privacy and Emotional Distress

Scope: Emotional distress, either negligently or intentionally inflicted, is a tort that has both very real penalties, and yet it uses potentially subjective tests. The use of a “reasonable person’s” perspective is the classic attempt at standardizing under law the effects of outrageous and negligent behavior on the emotions. Invasion of privacy is a tort that carries implications for the media, law enforcement, and workplace policies.

Outline

I. Intentional Infliction of Emotional Distress. This tort prohibits intentionally causing serious emotional distress to another, including some practical jokes. Unlike assault, the distress need not be actual fear.
   A. Extreme and Outrageous Action. The law does not protect against all emotional distress, and insulting words are not tortious. Rather, this tort requires some truly extreme action.
   B. Intent. The action must be intentional, but recklessness may suffice when the eventual distress was readily foreseeable.
   C. Productive of Actual Severe Distress. The law requires a demonstration that serious distress was suffered. As often, a reasonable person test is applied to determine the probable seriousness of the distress. Plaintiffs may allege the need to seek medical aid or sleep difficulties to demonstrate the measure of their emotional distress.
   D. Proximate Cause. As discussed above in negligence, the outrageous act must be the cause of the emotional distress, to permit recovery in this tort.

II. Negligent Infliction of Emotional Distress. States have historically limited the ability to recover for distress caused by negligent acts. Such recovery has been permitted when the event in question also caused physical impact or injury or involved harm to a close relative, witnessed by the plaintiff. The ability to recover under this theory has been slowly expanding in recent years.

III. Invasion of Privacy. Invasion of privacy is a tort that comes in several distinct forms.
   A. Intrusion. This is a class form of privacy invasion, when a party intrudes into an area where another has a reasonable expectation of privacy. This would extend to "peeping Toms," telephone wiretaps, improper searches, and other such actions.
   B. Publicity of Private Life. The tort applies when a party publicizes the private activities of another, independent of actual intrusion. This may also be defamation, but invasion of privacy may involve publicizing true facts. There is a defense of newsworthiness, which is particularly applicable to public figures and news organizations.
   C. Misappropriation of Likeness. The use of another's name or likeness without their consent, particularly in advertising, may be invasion of privacy. This generally does not extend to pictures of their property, though. A defense is available for photos already in the public domain and for newsworthy events.
   D. Employee Testing. A recent privacy controversy involves compulsory employer drug testing. In private workplaces, such testing is generally permitted at common law, because the employee consents to the testing as a condition of holding the job. Some states have acted to restrict the scope of such testing by statute.
Review Questions

1. After discovering unsavory facts about the home life of a rival for promotion, Benjamin informs his boss of these facts. If sued for these statements, can Benjamin rely on truth as an absolute defense?

   *No, if the rival brings an invasion of privacy case, truth is not a defense.*

2. Peter's father died and was taken to a funeral home. The home buried the father before Peter could arrive and explained that the body was in such a gruesome condition that Peter would not have wanted to see his father. This is shown untrue, and Peter sues. Should he recover?

   *Yes, in a case much like this a court held that the funeral home action was outrageous and likely to cause serious distress.*

3. Maria was shopping in a supermarket and asked a clerk for the price on an item. The clerk refused to answer and shouted that Maria stunk to him. Can Maria recover for intentional infliction of emotional distress?

   *No, the action was not so outrageous as to seriously distress a person of ordinary sensibilities.*

4. A manufacturer of jacuzzis uses a photo of President Clinton and Speaker Gingrich in their advertisement, claiming that their product would promote relaxation in Washington. Is this use of the photo unlawful misappropriation?

   *No, the photo would be considered in the public domain and news-related, so the manufacturer can use it.*

5. The paperboy carelessly threw the Sunday edition onto Michael's porch, crushing his cat before his very eyes. Michael loved the cat very much and sued for emotional distress damages. Can he recover?

   *No, these facts do not permit recovery for negligent infliction of emotional distress.*

6. After a terrible murder of a wife by her husband, an author turned the facts into a novel, but the surviving children complained that the book invaded their privacy. Can they stop publication?

   *No, not only are the facts newsworthy, but such preliminary injunctions against speech are highly disfavored in the law.*

7. After hearing rumors of an employee's drug and gun violations, a retail store investigated by opening the worker's locker at the jobsite. Is this an unlawful invasion of privacy?

   *No, not only did the store possess reason to investigate, the inspection was on the store's own property, where the worker lacked a reasonable expectation of privacy.*

8. A large company deposited its hazardous wastes where they would leach onto nearby property that was privately owned. The property owner sued the company for intentional infliction of emotional distress, among other claims. Who should win this case?

   *The company probably should win the case. The wastes leached and were not intentionally disposed on the property, nor is action probably outrageous (though this might depend on the degree of hazard).*

9. In the 1960s, Ralph Nader was researching and publicizing information that indicated that certain cars were unsafe. General Motors asked Nader's acquaintances about personal issues, placed him under surveillance, had him accosted by women seeking illicit relationships, made harassing telephone calls, wiretapped his telephone, and conducted other harassing actions. Nader filed suit alleging a breach of his privacy, among other claims. Which if any of the above actions would warrant a ruling for Nader?

   *In this case, Nader v. General Motors Corp., 255 N.E.2d 765 (1970), the court affirmed much of a jury verdict for Nader. The appellate court stressed that some of GM's actions were not an unlawful invasion of privacy. Inquiring of Nader's acquaintances, even about personal matters, was not an invasion of privacy. Neither were the acts of sending women to proposition him or making harassing telephone calls unlawful privacy invasions. However, the wiretapping and certain methods of surveillance involving electronic eavesdropping did qualify as improper invasions of Nader's privacy.*
10. Jim Meads had a Visa account with Citibank and fell behind on his payments. Citibank therefore cancelled his account and notified him that the matter was transferred to Collection Group of Citicorp Credit Services, Inc. (CCSI) for collection. Meads wrote CCSI to inform them that because of his significant medical problems and expenses he could not make required payments but would make partial payments. His attorney wrote CCSI to request that all communications regarding the account be sent to the attorney. CCSI nevertheless continued to contact Meads regularly by telephone and through the mail. Meads stated that some calls were abusive and reduced his wife to tears. Should CCSI be liable for intentional infliction of emotional distress?

In this case, Meads v. Citicorp Credit Services, Inc., 686 F. Supp. 330 (S.D. Ga. 1988), the court found that Meads could have a claim as a matter of law. While not holding that CCSI's actions were necessarily outrageous enough to support a claim, the court found it close enough to leave to a jury to decide. The court observed that the purpose of CCSI's actions appeared to be to induce distress in Meads and his family.
Further Readings

Basic Readings


*Torts in a Nutshell*, Edward J. Kionka (2d ed., 1992), Chapter 14 and section 6-5 — These sections of the simplified legal guide address recovery for invasion of privacy and infliction of emotional distress.

Intermediate Readings


*Prosser and Keeton on Torts*, W. Page Keeton, Dan B. Dobbs, Robert B. Keeton, and David G. Owens (5th ed. 1984), Chapter 20 — This chapter of the hornbook addresses interference with privacy rights.

Advanced Readings

Barbara Moretti, "Outing: Justifiable or Unwarranted Invasion of Privacy? The Private Facts Tort as a Remedy for Disclosures of Sexual Orientation," 11 *Cardozo Arts and Entertainment Law Journal* 857 (1993) — This article addresses whether a well-known person can sue for disclosure of their sexual preference.

Dennis P. Duffy, "Intentional Infliction of Emotional Distress and Employment at Will: The Case Against 'Tortification' of Labor and Employment Law." 74 *Boston University Law Review* 387 (1994) — This article questions the extent to which employees should be able to bring claims for intentional infliction of emotional distress due to the manner of their termination.
Lecture Six
Product Liability

Scope: The power of a consumer to sue a manufacturer for injury by a product is bounded by several tests. Unavoidably unsafe products, or those which are reasonably safe in regard to their function, are protected from liability. Defects in design or manufacture are carefully weighed by courts before awarding damages, and there are also several defenses, such as assumption of risk, or product misuse, to a manufacturer’s strict liability for injury to person or property.

Outline

I. Strict Product Liability. Traditionally, when a person was injured by a product, she had to recover for breach of warranty. Under this theory, only the actual purchaser of the product could recover however (called privity). Now, sales of products by merchants are subject to strict liability. Under this doctrine, the injured party can recover without privity and without having to prove intent or negligence by the manufacturer or retailer.

A. Protected Interests. Not all harms from products are governed by strict liability.
   1. Personal Injury. Physical harms to a person’s health are covered by strict liability.
   2. Property Damage. Economic losses from a defective product are not subject to product liability but direct property damage is covered.

B. Defective Product. While a plaintiff need not prove negligence, he must show that the product was defective to invoke strict liability. This is somewhat easier, as it focuses upon the product itself and not the actions of the defendant. Moreover, even a very careful manufacturer may produce occasional defective products.
   1. Manufacturing Defect. This is a circumstance when a mistake in manufacturing the product yielded an unsafe product, such as an automobile brake flaw.
   2. Design Defect. This is a circumstance when the design of the product made it unsafe, such as misplacement of a fuel tank.
   3. Failure to Warn. Even if manufacturing and design were perfect, the product may still be unsafe and create a duty to warn of the remaining hazards. There is not a duty to warn of every conceivable risk. Courts consider both the probability and severity of the risk. If a warning is required, it must be sufficiently conspicuous for consumers.

C. Unreasonably Dangerous. A product defect invokes strict liability only if that defect makes the product unreasonably dangerous.
   1. Balancing Test. To determine whether unreasonable danger is present, courts consider the risk from and the benefit of the product, as well as alternative designs that might be safer.
   2. Unavoidably Unsafe Products. There is no strict liability for unavoidably risky products, such as a very sharp kitchen knife.
   3. Known Unsafe Products. Nor is there strict liability when the risks are known to consumers.

D. Liable Parties. Under strict product liability, both the product manufacturer and retailer are liable.

E. Defenses. Several defenses are available even if strict liability applies.
   1. Alteration. The defendants are not strictly liable if the product has been altered materially after its sale.
   2. Assumption of Risk. As discussed above in negligence.
   3. Product Misuse. Strict liability will not apply if the harm was the result of product misuse, though defendants may still be liable for foreseeable types of misuse.
   4. Learned Intermediary Doctrine. Manufacturers and sellers are not strictly liable if the product was prescribed for use for a learned intermediary, such as a physician.
Review Questions

1. Many have sued asbestos manufacturers over lung damage from exposure to asbestos. The manufacturers argued that they should not be liable for any exposures prior to 1964, because that was when they first learned of the risk from asbestos. Should this be a good defense to product liability actions?

   No, according to a leading case that held that the asbestos-containing products were unsafe and defective when sold, regardless of whether the manufacturer knew or could have known of the hazard.

2. Gerald receives a blood transfusion and contracts serum hepatitis. At the time, the blood bank was unable to test for this type of hepatitis but warned doctors of the risk, though the doctors did not inform Gerald. Can Gerald recover in product liability from the blood bank?

   No, the existence of a risk was unavoidable, and the blood bank provided a warning. The learned intermediary doctrine means that the bank is not liable for informing doctors but not patients.

3. Sharon inadvertently tried to start her car with the transmission in the drive position. The car started, lurched forward, and injured members of her family. Can she recover from the auto manufacturer?

   Yes, a jury could reasonably find that a car that started in the drive position was defective.

4. Nat's car overturned after an accident, and the roof buckled and injured him. He claimed that the car was defectively designed, due to the lack of a roll bar, but the car company noted that it had not caused the accident. Should Nat be able to recover for damages from the collapsed roof?

   Yes, even though the defect did not cause the accident, it aggravated the injuries from the accident. Auto accidents are certainly foreseeable.

5. Juanita took Chloromycetin for her tonsillitis and develops a serious type of anemia. The drug containers warned that blood disorders could result from the drug, but the manufacturer's representatives had told doctors that there was no real risk. Can Juanita recover for her disease?

   Yes, even though the drug contained a warning, a court held that the comments of the manufacturer's representatives in effect cancelled out the warning.

6. JoAnn purchased a cash register for use in her small business. After several months, the register broke and JoAnn had to close her store, losing substantial profits. Can she recover these damages in strict product liability?

   No, strict liability does not extend to this type of economic damages and she would have to rely on a breach of warranty claim that she might have.

7. After purchasing a new car and getting into an accident, Joyce read about a new radar technology that could be used on cars to help avoid collisions. She sues the manufacturer for product liability; should she win?

   No, the absence of a new and presumably expensive technology does not render the car defective.

8. Raquel bought a new lawn mower for a discount by agreeing that the retailer made no promises of safety. While mowing a defective part comes lose and injures her friend William. Can William recover from the retailer?

   Yes, Raquel gave up all warranties but strict liability remains to protect bystanders.

9. David Jordon, a ten-year-old boy, lost control of his new sled and hit a tree. He was seriously injured. The sled was a plastic toboggan-like sled purchased from K-Mart. David's parents sued K-Mart for strict product liability. They complained that the sled had no separate braking or steering mechanism, and that K-Mart had failed to warn about the possible consequences of sledding. Should the Jordon's action be permitted to proceed?

   In this case, Jordon v. K-Mart Corp., 611 A.2d 1328 (1992), the court dismissed the Jordon's case. The court held that sledding involves a certain degree of risk that cannot be prevented even with braking or steering.
systems. There was no duty to warn, because the risk of such an accident could be considered common knowledge, and that the sledder should avoid areas with trees, rocks, or other dangerous obstacles.

10. Olen Kelly was injured when shot by a handgun in the course of a grocery robbery. He successfully traced the handgun to its West German manufacturer. They sued the manufacturer for strict product liability, alleging that the gun was abnormally dangerous and that the gun was unreasonably dangerous. The defendant contended that the gun was not defective because it had performed just as designed. Should the manufacturer be liable?

In this case, Kelley v. R.G. Industries, Inc., 497 A.2d 1143 (1985), the court held for the defendant. The gun was not defective because it satisfied the consumer expectation test. It functioned just as designed. The risk/utility test, balancing the costs and benefits of the product was inapplicable because it is limited to defects. Making manufacturers liable for handgun injuries was deemed a matter for the legislature, not the court.
Further Readings

Basic Readings


*Torts in a Nutshell*, Edward J. Kionka (2d ed., 1992), Section 8-9 — This section of the simplified legal guide provides an overview of product liability law.

Intermediate Readings

*The Law of Torts*, Fowler L. Harper, Fleming James, Jr. and Oscar S. Gray (2d ed., 1986), Chapter 28 — This chapter of the multivolume treatise discusses liability for sale of products, both strict and in negligence.

*Prosser and Keeton on Torts*, W. Page Keeton, Dan B. Dobbs, Robert B. Keeton, and David G. Owens (5th ed. 1984), Chapter 17 — This chapter of the hornbook addresses product liability.

Advanced Readings

*Reforming Products Liability*, W. Kip Viscusi (1991) — This book suggests a variety of reforms in product liability law and reviews its application from an empirical perspective.


Lecture Seven
Business Torts

Scope: Although the majority of tort actions are initiated by individuals against other individuals, organizations, or corporations, suits for business torts can be brought by corporations against individuals. These include the complex issues of wrongful interference with contract or prospective business, and misappropriation. This area of the law litigates, among other things, the intricacies of trade secrets and breaches of contract induced by third parties.

Outline

I. Wrongful Interference with Contract. A person may be liable in tort for improperly interfering with a contract among two other parties. This might arise when a person tries to steal business from a competitor.

A. Contract Existed. Wrongful interference with contract requires that an actual contract be in existence.

1. Enforceable Contract. There is no liability for interference with a void contract, because that is no contract. There is liability for interference with a voidable contract, though, because it is effective until voided.

2. At Will Contract. Some contracts are terminable at the choice of either party. Most states provide potential liability for interference with such an at will contract.

B. Defendant Aware of Contract. As an intentional tort, wrongful interference applies only if the defendant was aware or should have been aware that the contract existed between the two other parties.

C. Defendant Induced Breach. Liability exists only when the third party defendant initiated or induced the breach of the contract.

D. Improperly. Not all inducements to breach a contract are deemed legally improper.

1. Nature of Conduct. The tortious nature of an interference depends upon the type of conduct. Simply advertising a low price may induce a breach but is not wrongful. Individualized focus and high pressure sales are factors in finding improper interference.

2. Malice. Actual malicious intent is not required, but courts consider the reason for the interference in evaluating its propriety.

3. Interests of Society. Some interferences further the public interest in free competition or other interests (such as workers' rights) and these are not improper.

E. Privilege Defense. Some interferences are privileged. A lawyer or manager of a business may have a responsibility to advise that a contract be breached in the interest of the client, and this is not improper. The privilege can be lost if the party acts for personal interest and not for the client.

II. Wrongful Interference with Prospective Business. This tort is similar to wrongful interference with contract but applies when the other two parties had no actual contract but merely an expectation of prospective business.

A. Reasonable Certainty. The prospective business must be reasonably certain before it can support an action. A speculative possibility of business is insufficient.

B. Greater Scope for Competition. Because the parties do not yet have a contract, courts tend to give the third party greater scope in competing for the business. Motive is more relevant here.

III. Misappropriation. Another business tort is the misappropriation of valuable information from another company.

A. Investment in Creation. To be protected, the plaintiff must have invested something in the creation of the information. If the information is a trade secret, the plaintiff must have taken reasonable steps to protect the secrecy.
B. **Used Without Permission.** In the case of a trade secret this might involve espionage but also includes more mundane actions, such as hiring away the plaintiff's employees in order to get the secret. If the information can be gleaned from reverse engineering of a product, that acquisition is legal.

C. **Injury.** The plaintiff must demonstrate an injury from the misappropriation. If an injury is demonstrated, the plaintiff may get an injunction as well as damages.
Review Questions

1. Mario had an ear piercing stand in the mall. His enemy, Cliff, set up his own stand and followed Mario throughout the mall, setting up wherever Mario did and offering lower prices. Does Mario have a good claim for wrongful interference?

Yes, while there is nothing wrong with offering lower prices, following Mario throughout the mall would qualify as wrongful interference with prospective business.

2. To maintain an action for wrongful interference with prospective business relationships, must the plaintiff show that the defendant was aware of an actual contract between the parties?

No, this is an element of wrongful interference with contract, not interference with prospective business, which does not even require the presence of a contract.

3. Carl hires Hilda to sing at his bar. Aware of this plan, Nan pays Hilda even more money to sing at his bar on the same night, and Hilda accepts. Can Carl sue Hilda for wrongful interference with contract?

No, a party to the contract may not be liable for wrongful interference, though Carl would have a good case against Nan.

4. Epstein, a member of a law firm, leaves the firm to start his own practice and solicits the firm's existing clients with a letter that included a form they could use to discharge the firm as their counsel and substitute Epstein. The firm sued for interference with contract; should the firm prevail?

Yes, the active solicitation of parties in contract is wrongful; a letter merely informing the clients of his new position might have been lawful, but the accompanying form was wrongful.

5. Jacques developed a drink with therapeutic qualities that he sold successfully. Karen bought a bottle, had a chemist identify its constituents, and began producing the same drink under a different name. Has she infringed upon Jacques' trade secret?

No, what she did is called reverse engineering, and it is perfectly legal.

6. A food supply company had contracts to supply professional baseball teams. The games were cancelled after the players went on strike. The food supply company sued the players for wrongful interference with contract. Should the company win?

No, there is a federally recognized right to strike, and the public interest decrees that this cannot be wrongful interference.

7. Matt was driving carelessly and crashed into a van that was delivering medical supplies. After the accident, the supply contract was cancelled for late delivery. Can the supply company recover from Matt for wrongful interference?

No, Matt's action was merely negligent and wrongful interference requires intentional action.

8. Action Plumbing used new phone technology to "remote forward" its competitors calls — when a customer phoned a competitor for plumbing work, the call went straight to Action, which got the business. What case do the competitors have against Action?

This would be wrongful interference with prospective business.

9. A nonprofit corporation that was involved in work with neglected and abandoned children used a girl's photograph and name in its annual financial report. The report also contained a discussion of the nonprofit corporation's good works. The girl then sued for misappropriation of her likeness. Should she succeed?

In this case, Smith v. Long Island Youth Guidance, Inc., 581 N.Y.S.2d 401 (1992), the court held that the girl had not established her right to recover. In so doing, the court held that the financial report was not an advertisement or for purposes of trade but was simply an annual financial statement.

10. After a person was injured, he entered into a contingent fee contract with an attorney to recover his damages. The attorney contacted the insurance company about his representation and sought to initiate negotiations. Instead, the insurer contacted the injured person directly and told him that he did not need a lawyer. The
company solicited the person to come to its offices and settle his claims directly. He did so. The attorney then sued the insurance company; should the attorney prevail?

*In this case, Cross v. American Country Insurance Company, 875 F.2d 625 (7th Cir. 1989), the court affirmed a jury verdict in favor of the attorney. The insurance company was aware of the contract with the victim and induced him to deal directly with the company. The action was found intentional and malicious.*
Further Readings

Basic Readings

*West's Business Law, Sixth Edition*, Clarkson, Miller, Jentz and Cross (1994), Chapter 7 — This chapter of the university business law text addresses issues of torts related to business.


Intermediate Readings


*The Law of Torts*, Fowler L. Harper, Fleming James, Jr. and Oscar S. Gray (2d ed. 1986), Chapter 6 — This chapter of the multivolume treatise discusses business torts and privileges.

*Prosser and Keeton on Torts*, W. Page Keeton, Dan B. Dobbs, Robert B. Keeton, and David G. Owens (5th ed., 1984), Chapter 24 — This chapter of the hornbook addresses interference with economic relations.

Advanced Readings

*Restatement of the Law (Second) of Torts*, American Law Institute (1979), sections 762-44 — These sections of the official review of American tort law address on interference with contractual relations.


Lecture Eight
Trademark

Scope: Companies develop trademarks in order to develop and hold consumer goodwill. The law protects these trademarks from being used by others in order to seize that goodwill. Originally a common law issue, trademark law is now statutory. Different types of trademarks are treated with varying degrees of protection under law, but the main goal of statutes is to protect consumers from confusing products as a result of similar trademarks.

Outline

I. Protectible Trademark. Not all possible trademarks are protected by the law.
   A. Categories. In determining the extent that a trademark can be protected, courts first break down the mark into one of several categories.
      1. Generic. A generic trademark receives no legal protection. This is a trademark that simply identifies the product being sold, such as aspirin.
      2. Descriptive. A trademark that simply describes the attributes of the product is descriptive. Such trademarks may not be protected unless they have acquired a secondary meaning, such that the mark is associated with a particular manufacturer.
      3. Suggestive or Fanciful. If a trademark only suggests, or hints at, the product’s attributes, it is protected. The strongest trademarks are fanciful ones, which have no logical relationship to the product other than to identify the producer.
   B. Not Illegal or Immoral. To be protected, trademarks cannot themselves violate laws or be distinctly immoral.
   C. Need for Registration? The statute now provides for registration of a trademark with the government but such registration is not required for protection. Registration provides some important benefits, such as giving nationwide scope to trademark protection and creating a presumption that the trademark is legally protectable.
   D. Trade Dress. The appearance of a product or its packaging may also be protected in trademark law, if the appearance is sufficiently distinctive and not generic or descriptive.

II. Likelihood of Confusion. Trademark law only prohibits others from using marks in a way that creates a likelihood of consumer confusion. Several factors are considered and weighted in the likelihood of confusion analysis.
   A. Competing Goods. If the trademarked product and the copycat's ("junior user") product are in direct competition, there is an obvious risk of confusion. Conversely, if the products are not competing or interchangeable there is not likely to be a risk of confusion.
   B. Similarity. Seldom are trademarks copied exactly, and the degree of similarity between the original user and the junior user's mark is considered in evaluating the likelihood of confusion.
   C. Intent of Junior User. Bad faith by the secondary user makes a finding of infringement more likely.
   D. Bridging the Gap. If the products are not in direct competition, but the senior user might be expected to seek expansion into the junior user's product category, a finding of infringement is more likely.
   E. Parody Defense. Trademark copying is allowed if the purpose is parody, such that there is little likelihood of confusion.

III. Anti-Dilution Laws. States have passed laws that protect trademarks in some circumstances even when there is no likelihood of confusion.
   A. Tarnishment. When a trademark is used for a non-competing product in a manner that would tarnish and harm the reputation of the mark for the senior user, anti-dilution laws may provide an injunction. Parody is still protected by the First Amendment right of free speech, however.
   B. Loss of Uniqueness. If a trademark, usually a fanciful one, is truly unique and used by no others, anti-dilution laws may prevent a new company from using that unique trademark for its new products.
Review Questions

1. Barra begins producing "Hop" cola and selling it in New York. After a few months, Zygmunt starts selling "Hop" cola in Los Angeles. Is this a trademark violation?

   *It depends upon whether Barra registered the mark with the federal government. If so, he has national protection; otherwise his trademark is protected only where he sells the product.*

2. An Illinois company names itself Polaroid and sells heating and refrigeration systems. Polaroid cameras sues the new company. Who should win?

   *A court held for the camera company under the state anti-dilution statute, because Polaroid was unique. There would be no good trademark claim because of no likelihood of confusion.*

3. Cyclone is an established manufacturer of wire fencing. A new company produces wire fencing under the name Tornado, and Cyclone sues. Is this a trademark violation?

   *Yes, even though the names do not sound alike they are roughly synonymous and thereby produce a likelihood of confusion.*

4. A company began producing an imitation leather product called "Soft Hide." Is this trademark protectible?

   *No, it was deemed to be deceptive in implying that the product was itself leather.*

5. Taylor wines are well known and successful in the market. A person named Taylor wishes to produce his own wines and also call them Taylor. Is this legal or a trademark violation?

   *A court held that the individual could only sell Taylor wines if his label contained a disclaimer stating that he was in no way affiliated with the established brand.*

6. Which trademark would tend to get more legal protection, "Chap Stik" or "Coppertone"?

   *Coppertone, because it is deemed to be suggestive, while Chap Stik is considered a descriptive trademark that required a secondary meaning (which it doubtless has acquired).*

7. *Hardware* magazine came out in an unusual square (9" x 9") shape. *Hardware* claims a trademark on this shape and seeks to prevent other magazines from using it. Will *Hardware* succeed?

   *No, though the shape is uncommon it is still functional and the company probably has not acquired a secondary meaning in the shape.*

8. What are the reasons for registering a trademark with the federal government?

   *Although not required, registration gives a trademark nationwide protection and a presumption of validity if challenged.*

9. Sterling Drug Inc. holds the U.S. trademark to the word "Bayer" in connection with its aspirin sales. Bayer AG is a major German corporation that produces chemicals but also has a subsidiary pharmaceutical company. The parties reached a voluntary agreement on the use of "Bayer," but the American company believed that the German company had breached this agreement through excessive use of the term in consumer media and in connection with the pharmaceutical subsidiary. Sterling sought an injunction that would prevent the German company from using the word "Bayer" in any advertising that could reach the United States market. Should the court grant the injunction?

   *In this case, Sterling Drug, Incorporate v. Bayer AG, 14 F.3d 733 (2d Cir. 1994), the court agreed that Bayer AG had breached the contract between the parties and had violated trademark law. A survey of consumers had shown actual confusion in response to the German company's advertising. However, the injunction sought by Sterling (and granted by a lower court) was too broad because it could prohibit even honest foreign uses of the trademark.*

10. Gruner and Jahr publishes the successful Parents magazine and has had the title as a registered trademark for many years. Meredith Corporation publishes Ladies' Home Journal and starts a new magazine entitled the Ladies' Home Journal Parents Digest. This was a quarterly compilation of previously-published articles. Both
In this case, Gruner and Jahr USA Publishing v. Meredith Corporation, 991 F.2d 1072 (2d Cir. 1993), the court found that the title Parents was descriptive in nature but that the trademark had become incontestable due to registration for more than five years. The word parents was so common, though, that the mark was not a strong one. The trademarks at issue here were not that similar, considering the length of title and also the appearance on the magazine. Nor was there evidence of actual confusion, so the court found no trademark infringement.
Further Readings

Basic Readings

*West's Business Law, Sixth Edition,* Clarkson, Miller, Jentz, and Cross (1994), pages 144-150— These pages of the university business law text address issues of trademark protection.

*How To Register Your Trademark; Protect Yourself Before You Lose Your Priceless Trademark,* Walter E. Hurst and Fred Woessner (1983) — This book provides a guide to registering a trademark, including sample forms.

Intermediate Readings

*Trademarks and Unfair Competition,* J. Thomas McCarthy (2d ed., 1984) — This two-volume treatise provides great detail on contested issues of trademark law.


Advanced Readings

Jacqueline Stern, "Genericide: Cancellation of a Registered Trademark," 51 *Fordham Law Review* 666 (1983) — This article reviews how a trademark may be lost by becoming generic.

David S. Welkowitz, "Reexamining Trademark Dilution," 44 *Vanderbilt Law Review* 531 (1991) — This article reviews applications of antidilution laws and suggests limiting their scope.