

# Negligent In Your Legal Knowledge?

*A Primer on Tort Law & Basic Legal  
Analysis*

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## Introduction

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This primer is intended to supplement the pre-conference workshop hosted by the Student Committee at the 2016 AP-LS Annual Conference. For its first pre-conference workshop, the Student Committee has chosen to focus on Tort law. This topic was selected based on last year's Student Training Survey (<http://www.apls-students.org/training-survey.html>) In this report, the Student Committee found that only 18% of students interested in psychology and law received formal education in tort law. This percentage includes joint degree students, who are all required to complete this class. Based on this information in conjunction with the important role tort law plays in mental health law the Student Committee hopes to provide our student members with valuable information via a brief and interactive workshop experience. Both the workshop and this primer are meant to give an overview of tort law, some examples of common torts, how psychologists play a role in tort law, and an introduction to basic legal analysis.

The topics that follow were carefully selected to help psychologists in training understand the context in which they will be working, and to help them understand how their colleagues in the legal field frame analyses. Although many of these doctrines are commonly practiced, it is important to keep in mind that jurisdictions—and therefore legal doctrines—vary.

We hope that you will find this to be a valuable resource to which you can reference throughout your psychology-law training. If you have any questions, please feel free to contact the presenters, below:

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## What is a Tort?

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Tort law is a subfield of law that specializes in addressing legal wrongs that unfairly cause injury to another person. The person suffering the injury is referred to as the “victim” or the “injured party” (plaintiff), while the person who allegedly committed the tort is referred to as the “tortfeasor” (defendant). In order for the plaintiff to redress her injuries, she must file a lawsuit against the defendant in civil court, asserting that the defendant either did or failed to do something that violated a legal interest.

## Tort Philosophy & Goals

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### Make the Plaintiff Whole

As opposed to criminal law, which seeks to accomplish basic goals of the criminal justice system by representing the interests of the general public, tort law seeks to bring remedy to a specific injured party. When a tortious act is committed against a person, litigation is pursued to “make the plaintiff whole” again or to put the plaintiff back to the position they would have been had the tort not taken place. Generally, this is done via compensation (e.g. payment of damages) or injunctive relief (a court order commanding or preventing a particular action).

### Protecting Specific Rights

When considering tort law and the various acts covered, it is important to consider what interest that tort is protecting. Each claim arises out of a violation of these specific interests.

### Deterrence

Deterrence is a goal of both tort law and criminal law. The theory behind deterrence is that holding those who violate niche societal rights accountable sends a message to the rest of the society that this behavior is unacceptable in some way. If a system successfully accomplishes its goal of deterrence, it will contribute to an orderly society that clearly sets expectations for what is or is not acceptable behavior.

## Types of Torts

### Some Possible Torts Include:

#### Intentional Torts

- Battery
- Assault
- Intentional Infliction of Emotional Distress
- Trespass to Land/Chattel

#### Negligence

#### Other Considerations:

- Defenses
- Damages



## But What Does “Intent” Mean?

Intent is the first element in every intentional tort claim, and is the level to which an actor desires to produce a consequence (tort). There are three levels of intent for intentional torts: specific, general, or transferred intent (not covered).

- *Specific Intent*: An actor acts with specific intent if s/he acts with the purpose of producing the basis of the tort.
- *General Intent*: An actor acts with general intent if, although s/he may not desire to produce the specific basis of the tort, s/he acts knowing that it is substantially certain that the consequence will occur.

*Note*: A rational choice is not required. An actor is liable for a voluntary action. A voluntary act is not a reflex or convulsion.

## Intentional Torts

### Battery

**Interest Protected:** The inviolability of the body

**Elements:**

- Intent: Specific, General, or Transferred
- A harmful or offensive contact
  - Harmful contact: anything that makes you bleed, breaks a bone, sends you to the hospital, etc.
  - Offensive contact: offends a reasonable sense of dignity
- Contact with the person occurs

### Assault

**Interest Protected:** The right to be free from the fear of an immediate or imminent battery

**Elements:**

- Intent: Specific, General, or Transferred
- Apprehension of an imminent or immediate battery

### Intentional Infliction of Emotional Distress (IIED)

**Interest Protected:**

**Elements:**

- Intent: Specific, General, or Recklessness
- Outrageous Conduct
- Plaintiff suffers severe distress



### Trespass to Land/Chattel

**Interest Protected:** The right to exclusive ownership of land/property

**Elements:**

- Intent: Specific, General, or Transferred (land only)
- Enters land, remains on land, or fails to remove something from the land (land only)
- Substantial deprivation of use or dispossession (chattel only)

## Negligence

Whenever we act in the world, one of the byproducts of our action is that we could hurt someone else. Negligence stands for the principle that as members of society, we must work to lower the risk that we pose to someone else.

Negligence has four elements. Each element must be satisfied for a successful claim. In other words, all four elements must be satisfied in order to find an actor liable for a negligence tort. Examples of other negligence claims include malpractice claims or a professional's failure to satisfy informed consent requirements (if applicable).

### Elements:

- Duty
- Breach
- Causation
- Damages

*"Sometimes this person is called a reasonable man of ordinary prudence... the actor is required to do what this ideal individual would do in his place. The reasonable person is a fictitious person, who is never negligent, and whose conduct is always up to the standard."*

- Restatement 2<sup>nd</sup> of Torts § 283

## Element 1: Duty

**Duty** is a question of law for the court. Every person in society owes a duty to take care and minimize the harm they present to others. If there is no duty, however, then there is no negligence.

The default level of duty is measured by the objective reasonable person standard. This means that you must take the amount of precautions as would be taken by a hypothetical "Reasonably Prudent Person" acting under similar circumstances. This standard applies to protect a person's interest in walking around society without expecting harm. The standard gives everyone a general sense about what they can anticipate. Some argue that an objective standard accomplishes this goal.

The reasonable person standard increases when someone has special skills or knowledge. As a policy reason, this is done to encourage those with special skills or knowledge to use them when applicable.

## Element 1: Duty - Special Standards of Care

Although generally people must act under the reasonable person standard, certain circumstances require a heightened standard of care. The sections that follow outline of some of these circumstances.

### The Professional Standard of Care

A professional must provide the degree of care as is given by the average member of the same profession. But what qualifies an individual as a “professional”? Although it is not always clear as to whom the professional standard applies, factors to consider include:

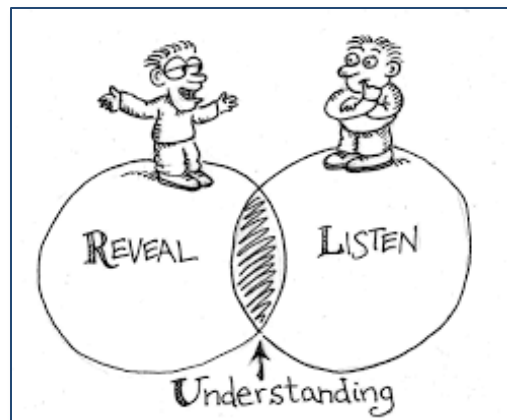
- Sharing sensitive, confidential information
- Whether the person has an obligation to maintain confidence
- Whether there is a fiduciary<sup>1</sup> relationship; whether the person has to act in the best interest of the client

For example, health care practitioners, accountants, and mental health practitioners may be considered professionals.

Once we determine that an individual is subject to the professional standard of care, how do we define to what degree of care the average member of the same profession would act? Jurisdictions vary on this topic. The majority of jurisdictions look to the actual customs and accepted practice within a profession, rather than what “should have” been done. This continues the objective standard that duty standards seek to apply.

### Informed Consent

All doctors must obtain informed consent from their patients before performing procedures on them. This is an objective test. As a policy rationale, this is to protect the self-determination of the patient.



<sup>1</sup> Fiduciary, n. - A person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor (Black's Law Dictionary).



### Duties to Act Affirmatively

Generally, there is no duty to act affirmatively. Absent a statute or contract, there is no duty to aid. However, when you volunteer to aid you take on the duty to act reasonably. There are two exceptions to the general lack of duty to aid:

- If there is a pre-existing relationship between the parties (such as a parent-child relationship)
- If the defendant caused the plaintiff's peril
- Duty imposed by statute or law (mandatory reporter laws, *Tarasoff* duties, etc.)

### Negligent Infliction of Emotional Distress

Whenever a defendant commits a negligent act that causes a physical injury, that physical injury is likely to have emotional consequences. NIED, however, is a stand-alone emotional distress claim. There are three different NIED scenarios:

- Near-Miss: A defendant commits a negligent act and although the plaintiff does not sustain the physical injury, s/he almost does and can recover for emotional distress if the distress results in observable physical symptoms.
- The Bystander: The plaintiff witnesses a severe negligent injury to a close family member and the result is a feeling of great emotional distress. Here, the emotion is grief, sadness, or melancholy in witnessing your loved one's injury.
- Relationship Distress: Parties are in a pre-existing relationship with each other and the distress is a highly foreseeable consequence of negligence. For example, if a doctor tells a patient that the patient is HIV positive but the lab has made a mistake.

## Element 2: Breach

The breach of the duty element involves the identification of a behavior that allegedly falls under the applicable standard of care. The plaintiff will claim, for example, that the defendant breached the professional standard of care by failing to utilize surgery procedures that the reasonable doctor in like circumstances would use.

## Element 3: Causation

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Once duty and breach have been proven, the plaintiff must prove that the defendant's breach of duty caused the plaintiff's injury. There are two types of causation, and both must be proven. First, the plaintiff must prove that the defendant's breach was the cause-in-fact, or "but for" cause of the harm. Then, the plaintiff must prove that the defendant's breach was the proximate cause of the harm.

### But-For Cause

The test for cause-in-fact is the But-For test, also known as Sine Qua Non. This translates to "without which not." This test asks the fact-finder to decide whether the plaintiff's harm would have happened if the defendant had acted reasonably or within the line of the relevant standard of care. But for the breach, would the plaintiff be injured today? If the answer is yes, then the defendant's duty breach was not the cause-in-fact of the plaintiff's harm. In instances of medical malpractice against therapists, this is often the element that prevents most claims from succeeding because it places a high threshold. There are instances in which the But-For test fails and the defendant can still be found to be the cause-in-fact. These instances are very specific and not covered in this material.

### Proximate Cause

To demonstrate that the defendant's duty breach was the proximate cause of the plaintiff's harm, the plaintiff must show that he (the plaintiff) was a foreseeable victim who sustained a foreseeable type of harm. The more foreseeable the harm is, the more likely we are to say it is close to time, space, and sequence. A number of special circumstances fall under proximate cause:

- **Directness:** Where the harm is caused instantaneously, the harm is almost always foreseeable.
- **Superseding Cause:** The breach and something else are operating on the plaintiff to cause the plaintiff harm. When this other "superseding" cause is so outrageous, this actor will be held liable instead of the one who breached the duty.
- **Intervening Medical Malpractice:** If a defendant commits a negligent act and causes injury to a plaintiff and the doctor makes things worse through medical malpractice, this was a foreseeable harm and the original tortfeasor will likely still be held liable for damages arising from the malpractice.

## Element 4: Damages

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Different torts allow the plaintiff to recover different damages, depending on what would be required to “make the plaintiff whole.” Certain torts preclude the recovery of certain damages.

- Nominal Damages: Small amount of damages that simply validate the plaintiff’s claim.
- Punitive Damages: Most often seen in cases that involve large companies, punitive damages are assigned to send the message that society will not tolerate egregious behavior.
- Special/Economic Damages: Damages the plaintiff paid money for, such as paying a bill, not getting a paycheck, out of pocket expenses, loss of earnings, wrongful death, etc. These are quantifiable damages.
- General/Non-Economic Damages: These are any other type of damages, such as pain and suffering, mental illness, disfigurement, or loss of consortium. These can be demonstrated using evidence from a doctor, medical prescription, a plaintiff’s own testimony, a therapist’s testimony, etc.
- Loss of Consortium: Damages recoverable for the loss of a relationship or companionship. Can be between spouses or between a parent and a child and applies when the victim is alive or dead.
- Survival Actions (statutory): Allow a victim’s estate to recover damages the victim would have been able to recover had s/he been alive.
- Wrongful Death (statutory): Creates a new cause of action in favor of the survivors of the victim for their losses occasioned by the death.

The damages element includes the “Eggshell Skull Principle.” This principle dictates that once a defendant has committed all the other elements of a tort, the defendant is responsible for *all* damages suffered by the plaintiff, even if they are surprisingly great in scope. This applies to every tort, including negligence. In other words, you “take your plaintiff as you find your plaintiff.”

## Defenses

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Just as the prosecution bears the burden to prove a defendant's guilt beyond a reasonable doubt, the plaintiff is required to prove his or her case. The defendant, however, has a number of defenses that s/he can claim.

A *defense* is when a defendant denies the allegations and leaves the plaintiff to the proof. An affirmative defense is when the plaintiff brings an element of proof, and the defendant agrees to that element but claims some sort of privilege. Under these circumstances, the burden of proof moves to the defendant. Some defenses include:

- Consent: Voluntary relinquishment of the right; voluntarily allowing the protected interest to be invaded
- Express Consent: An individual expressly communicates that s/he consents to the tortious action
- Implied Consent: An individual's conduct and the surrounding circumstances led another to believe that s/he has consented to the tortious action. This can be conveyed through: rules and custom, common practice, circumstances, the environment, gestures, etc.

Note: Consent is not a defense when it has been obtained via fraud, when the plaintiff was under duress, or when the tortious action is outside the scope. This means that when a person consents, they consent to the scope of the offer and some things lay outside of this. For public policy reasons, two individuals cannot claim consent as a defense to certain acts, such as a fight.

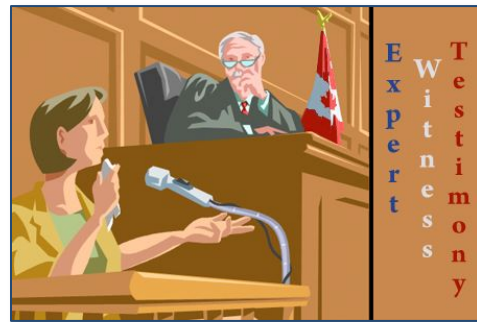
Under negligence cases, the following may be defenses:

- Contributory Fault: In some jurisdictions, where a plaintiff fails to exercise reasonable care and thereby contributes to his or her own injury, the plaintiff's negligence is a bar (partially or completely) to recovery.
- Last Clear Chance: Under this doctrine, a plaintiff may mitigate the legal consequences of his or her own negligence if the plaintiff can prove that the defendant had the last clear chance to avoid injuring the plaintiff, but failed to do so.
- Assumption of the Risk: A plaintiff may be barred from recovery when an injury results from a danger of which the plaintiff was voluntarily aware and voluntarily encountered. This can be express or implied. A plaintiff implies assumption of the risk if s/he subjectively knows of the specific risk posed by the defendant's conduct and voluntarily proceeds to encounter it.

## Psychologists and the Tort System

In the tort system, psychologists play the role of experts, or individuals who by virtue of their knowledge, skill, experience, training, or education are uniquely qualified to render opinions about certain subject matter. Psychologists can be called upon to render opinions in any torts case that involves some aspect of mental health. Typical contexts include the following:

- Intentional Infliction of Emotional Distress (IIED)
- Negligent Infliction of Emotional Distress (NIED)
- Personal Injury
- Workplace Discrimination & Harassment
- Workplace Disability
- Malpractice



## Proving or Negating Elements: Psychologist Opinion Evidence

To prove a tort claim, a plaintiff's lawyer must prove each element of that claim by a preponderance of the evidence. In contrast, the job of a defense attorney is to present evidence negating element of a claim, or to present evidence in support of an affirmative defense, or a defense that absolves or mitigates the legal consequences of a defendant's otherwise tortious conduct. Psychologists are often called upon to render opinions on causation and damages for claims generally, as well as regarding duty and breach in malpractice claims (continued):

## Proving or Negating Elements - Duty, Breach, Causation, & Damages

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### Duty

In ordinary negligence, an individual has a duty to act as a reasonable person in like circumstances would act. In malpractice, however, duties are established by professional standards in the field; a psychologist is to act as a reasonable objective psychologist would act in like circumstances. Psychologists can be called upon to render opinions about the standard of care in the field.

### Breach

In a malpractice claim, breach is demonstrated by presenting evidence that a psychologist failed to conform to the standard of care in the field. Alternatively, defendants can present evidence that they did act according to the standard of care in the field. Psychologists can be called upon to render opinions about whether a defendant psychologist's actions or omission conformed to the accepted standard of care in the field.

### Causation

In cases where psychological injury has been demonstrated, psychologists may be called upon to render an opinion as to whether a defendant's action or omission was the cause of the plaintiff's injury. For example, in a case where a plaintiff alleges that he has become depressed after experiencing discrimination in the workplace, a psychologist may be called upon to compare the plaintiff's mental health functioning before and after experiencing the discrimination.

### Damages

Psychologists may be called upon in cases where the plaintiff is alleged to have suffered some type of psychological injury. Due to their background in psychological assessment, psychologists are uniquely qualified to offer opinions as to whether a psychological injury has occurred.

## Introduction to Basic Legal Analysis

The job of psychologists in the tort system is to render opinions. In contrast, the job of lawyers is to advocate for their client. To this end, lawyers must present arguments as to whether each element of a tort is fulfilled. One such way that lawyers approach this task is to employ the simple and concise **IRAC** method of legal analysis:

- **I**ssue: Statement of what the legal issue being considered is
- **R**ule: Statement of what the relevant rule of law is
- **A**alysis: Application of the relevant rule of law to the facts of the case
- **C**onclusion: A summary conclusion of the case

"The protective  
privilege  
ends  
where the public peril  
begins."

- Justice Mathew O. Tobriner

## Sample IRAC (Legal Analysis)

An IRAC is completed for each separate element of a tort claim. Let's do a sample IRAC for a wrongful death claim. Assume the following facts:

- The plaintiff, a resident of California, alleges negligence against a psychologist who was treating her neighbor, Joe.
- The plaintiff claims that Joe revealed to the psychologist that he had been hearing voices commanding him to kill plaintiff's husband, John.
- At Joe's last therapy session before John's death, he revealed to the psychologist that he planned to shoot John when John returned home from work that night.
- The plaintiff claims that the psychologist had a duty to warn her husband of the danger Joe posed, and that her husband would still be alive if the psychologist had not breached that duty.

**Duty:**

- I: In order to establish a claim for wrongful death due to negligence, a plaintiff must establish that the defendant had a duty to protect her husband.
- R: In *Tarasoff v. Regents of the University of California*, the California Supreme Court held that psychologists have a duty to warn others of any imminent danger posed by the psychologist's clients.
- A: Here, Joe told the defendant psychologist that Joe planned to shoot John when John got home from work that night. Joe posed an imminent danger to John.
- C: Therefore, the psychologist had a duty to warn John of the danger that Joe posed.

**Breach:**

- I: To prove a claim of negligence leading to wrongful death, a plaintiff must establish that the defendant breached his duty to warn.
- R: A defendant psychologist breaches his duty to warn when he fails to warn another of an imminent danger posed by the psychologist's client.
- A: Here, the defendant psychologist failed to warn John that his client, Joe, was planning to shoot John when he returned home from work.
- C: Therefore, the defendant psychologist breached his duty to warn.

**Causation:**

- I: To prove a claim of negligence leading to wrongful death, a plaintiff must establish that the defendant psychologist's breach caused the decedent's death.
- R: A psychologist's breach of his duty to warn causes a decedent's death when: (1) but for that failure, the decedent would not have died, and (2) the failure to warn was the proximate cause to the decedent's death.
- A: Here, John would not have died had he known that John was planning to kill him when he returned home because he would have taken precautions to avoid being killed.
- C: Therefore, defendant psychologist's breach of his duty to warn caused John's death.

**Damages:**

Self-explanatory in this case: the fact that John died is unlikely to be at issue.