

## Tort Law for Paralegals: Chapter 9

### Chapter Outline

**Tort Law for Paralegals: Chapter 9**

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Chapter Outline

Chapter 9

### Defenses to Intentional Torts

**Summary:** Chapter 9 introduces students to defenses to intentional torts: consent, self- defense, defense of persons or property, rightful repossession, mistake, privilege, necessity, public officer's immunity for legal process enforcement, warrantless arrest by law enforcement officials or citizens, statutes of limitations, and workers' compensation.

CHAPTER OUTLINE

I. CONSENT

A. Occurs when victim of intentional tort voluntarily

### Step Text

#### Chapter 9

### Defenses to Intentional Torts

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## CHAPTER OUTLINE

### I. CONSENT

A. Occurs when victim of intentional tort voluntarily agrees to tortfeasor's actions

B. The victim must have understood (or reasonably should have understood) the consequences of the tortfeasor's actions.

C. Elements

1. Victim's voluntary acceptance of intentionally tortious act,
2. With full knowledge or understanding of consequences.

D. Informed consent

1. The tort victim must willingly and knowingly agree to the tortfeasor's conduct.
2. The victim's ability to give consent (volition factor) depends upon the victim's mental capacity to agree (e.g., lack of consent with mentally retarded or incapacitated persons, or intoxicated individuals).

E. Expressed or implied consent

1. Consent may be expressed (e.g., victim openly agrees to tort) or implied (e.g., athletes playing contact sports).
2. A classic implied consent scenario is emergency medical treatment.

F. Consent is a defense to intentional torts. A defense can relieve a defendant of liability for the tort.

### II. INTRODUCTION TO DEFENSES

A. Defenses are legal justifications exonerating one party from liability to another party. Usually, defenses are used by defendants to counter plaintiffs' claims and avoid liability.

B. Defenses are responsive in nature.

1. Defenses are used only when the first party (usually the plaintiff) states a bona fide cause of action against the other litigant (usually the defendant).
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2. One litigant states a cause of action against another litigant.
3. The other litigant replies with a defense, absolving himself or herself from liability.

### III. SELF-DEFENSE

A. Definition: Defendant's exercise of reasonable force to repel attack upon his or her person or to avoid confinement

B. Routinely used against claims of assault, battery, or false imprisonment. Typical scenario: Plaintiff attacks defendant in some way; defendant responds with neutralizing force; plaintiff sues defendant for battery.

#### C. Elements

1. Defendant's use of reasonable force
2. To counter attacking or offensive force
3. Necessary to prevent bodily injury, offensive contact, or confinement.

#### D. Reasonable force

1. The neutralizing force that the defendant may use under this defense is limited to that degree of force reasonably necessary to dispel the attacking force.
  2. Once the attacking force has been neutralized, the defendant cannot turn aggressor and attack the attacker. This would constitute assault and battery and would cripple the defense.
  3. Reasonable force is defined by the reasonable person standard and depends on the specific factual circumstances of each case. Would a reasonable person have used the same force that the defendant used to counter the plaintiff's attack?
  4. When faced with deadly force, the defendant may respond with deadly force.
  5. When faced with an intruder inside the defendant's home, the defendant may use deadly force (castle rule).
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E. Countering attacking or offensive force: Defendant's actions must be in opposition to an attacking or offensive force.

F. Necessary force: That degree of force reasonably necessary for the defendant to neutralize an attacking or offensive force or avoid confinement.

#### IV. DEFENSE OF PERSONS OR PROPERTY

A. Defense commonly used in assault, battery, and false imprisonment cases

B. Elements of defense of persons

1. Defendant's use of reasonable force
2. To defend or protect third party from injury
3. When third party is threatened by attacking (or offensive) force.

C. Elements of defense of property

1. Defendant's use of reasonable force
2. To protect his or her (or another's) property from damage or dispossession
3. When another person (invader) attempts to injure or wrongfully take possession of property.

D. Reasonable force is defined in the same way as for self-defense. Most courts prohibit use of deadly force for protection of property.

E. Ejectment: Use of reasonable force to repel a trespasser. However, landowners cannot set dangerous traps to snare trespassers (e.g., spring-loaded guns). This is not a legally justifiable defense of property.

#### V. RIGHTFUL REPOSSESSION

A. Generally, the owners of personal property has a right to repossess chattel that has been wrongfully taken or withheld.

B. The owner may use reasonable force to repossess the property.

C. This defense is used most often in cases of trespass to land, trespass to chattel, conversion, assault, and battery.

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#### D. Elements

1. Defendant's (chattel owner's) use of reasonable force (defined as for self-defense)
2. To retake possession of his or her chattel
3. Of which owner has been wrongfully dispossessed (or of which owner is wrongfully denied possession).
4. Defendant's efforts to retake chattel must be made promptly after original dispossession or denial of possession occurs (sometimes called hot pursuit by courts, but this is usually a criminal law term).

#### E. Repossession

1. If someone has wrongfully dispossessed the owner of his or her chattel, then the owner has the right to enter upon the dispossessor's land to recover the chattel.
2. This provides a defense to trespass to land.

#### F. Prompt repossession

1. Older common law cases required the owner to try to repossess the chattel promptly after the initial dispossession.
2. What is "prompt" depends on the specific facts of the case. A reasonableness standard is applied.

G. Wrongful denial of possession: Occurs when someone possessing owner's personal property wrongfully fails to return it to owner upon request or at agreed time. Example: Bailments, when bailee refuses without justification to return chattel to bailor.

#### H. Wrongful dispossession or denial of possession

1. For this defense to apply, the chattel owner must have been wrongfully dispossessed, or possession must have been wrongfully denied.
2. This means that dispossessor or retainer must not have a legal right to possess or retain the owner's chattel.

#### VI. MISTAKE

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A. Good faith belief, based upon incorrect information, that defendant is justified in committing intentional tort under the circumstances

B. Elements

1. Good faith belief that defendant's actions were justified
2. With belief based upon incorrect information.
3. Defendant's conduct otherwise would be considered tortious, but for the erroneous belief.

C. Good faith belief

1. Defendant's reasonable belief that his or her intentional tort was justified
2. Reasonableness standard applied

D. Belief based upon incorrect information: For the mistake defense to apply, defendant's reasonable belief must be based on erroneous details that, if they had been true, would have justified defendant's tort.

E. Otherwise tortious behavior: Defendant must have committed tort (with mistaken belief) for defense to come into play.

## VII. PRIVILEGE

A. Definition: Legal justification to engage in otherwise tortious behavior to accomplish compelling social goal. Example: Defendant committing trespass to land to save drowning child.

B. Elements (balancing test)

1. Do actor's motives for engaging in intentional tort outweigh injury to victim or victim's property?
2. Was actor justified in committing intentional tort to accomplish his or her socially desirable purposes, or could a less damaging action have been taken instead?

C. Motive: Goal that defendant wishes to accomplish by committing particular tort. Motive = intent.

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D. Socially desirable goals: For privilege to apply, defendant's intentional tort must have been motivated by some socially desirable objective, such as protecting property from fire damage, saving lives, capturing a criminal suspect, and so on.

E. Less injurious alternatives: Could defendant have achieved socially desirable goal through actions less harmful than the intentional tort committed?

F. This defense is similar to the necessity defense.

## VIII. NECESSITY

A. Definition: Tortfeasor is justified in engaging in intentional tort to prevent more serious injury from external forces.

B. Type of privilege

C. Elements

1. Defendant commits intentional tort
2. To avert more serious harm
3. Caused by force other than defendant
4. And defendant's actions were reasonably necessary to avert greater threat.

D. Thwarting more substantial harm

1. Choice of lesser evils. Example: Defendant jettisons cargo to prevent damaged ship from sinking (and drowning passengers and crew). Assume that ship hit floating mine left over from Persian Gulf War, rather than being damaged by defendant's actions.

E. External force

1. A greater threat cannot have been created by the defendant. Example: Ship damaged by floating mine (preceding example). Defendant was not responsible for mine being there.

F. Reasonably necessary action

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1. The defendant's actions must have been reasonably necessary to avert greater harm from external force.
2. The reasonableness standard is applied.

## IX. PUBLIC OFFICERS' IMMUNITY FOR LEGAL PROCESS ENFORCEMENT

A. Process serving (service of process) = method by which defendant in lawsuit is notified that plaintiff has filed suit against defendant.

1. Personal service of process usually involves a law enforcement officer personally delivering summons to defendant.
2. Such officers are immune from intentional tort liability (such as trespass to land) while serving process.

B. Execution (sheriff's) sales

1. Law enforcement officers are immune from intentional tort liability (such as trespass to chattel or conversion) for seizing property for execution sales.
2. Execution sales = public sales of defendant's property to satisfy outstanding judgment.

C. Attachment or replevin

1. Attachment = court-ordered remedy in lawsuit, in which court orders law enforcement officers to attach, or seize, defendant's property to prevent its sudden disappearance as defendant attempts to avoid having assets to satisfy judgment for plaintiff.
2. Replevin = court-ordered remedy in lawsuit, in which court orders law enforcement officers to seize chattel that defendant wrongfully possesses, and return it to plaintiff, who is lawfully entitled to possession.
3. Law enforcement officials are immune from intentional tort liability (such as trespass to chattel, trespass to land, or conversion) for making such court-ordered seizures.

D. Arrest by warrant: Law enforcement officials are immune from intentional tort liability (such as false imprisonment, assault, battery, or infliction of emotional distress) for arresting criminal suspects pursuant to a lawfully issued arrest warrant.

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## X. WARRANTLESS ARREST BY LAW ENFORCEMENT OFFICIALS OR CITIZENS

A. Law enforcement officers are immune from intentional tort liability (such as assault, battery, false imprisonment, infliction of emotional distress, trespass to land) for making a lawful arrest without a warrant. Classic case: Police officer sees suspect commit misdemeanor or felony offense and takes suspect into custody.

### B. Citizen's arrest

1. At common law, private citizens could arrest suspects if citizens witnessed suspects commit felony or breach of peace.

2. Includes situations in which citizen reasonably believes that suspect has committed such crimes

3. Citizens making such arrests are immune from intentional tort liability (such as assault, battery, false imprisonment, infliction of emotional distress, or trespass to land).

4. Consider shoplifting or night watchman examples.

## XI. STATUTES OF LIMITATIONS

A. Definition: Statutes restricting time period within which plaintiff may file intentional tort action against defendant.

B. Common time periods: two- and three-year statutes.

## XII. WORKERS' COMPENSATION

A. A state's workers' compensation statute is a defense to an intentional tort action.

B. This is a form of strict liability, a no-fault system by state.

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## Lecture Hints

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#### Lecture Hints

1. Defenses seem to present some difficulties for paralegal students. It is easy to forget that defenses are used only when the opposing party has stated a bona fide cause of action. It may be helpful to begin your lectures with a clarification of this basic principle.
2. Hypotheticals are especially valuable in explaining defense concepts. You may wish to add illustrations to the black-letter explanations discussed in the text.
3. The defenses of privilege and necessity are particularly difficult for paralegals to master. Although they arise less commonly in litigation, it is important to differentiate between the two. You may wish to devote extra class discussion

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it is important to differentiate between the two. You may wish to devote extra class discussion time to these defenses.

4. You may wish to skip the public officers' immunities during lectures if time becomes short. Cases involving these defenses, such as governmental tort liability or even 42 U.S.C. § 1983 actions, are probably too complex to discuss with legal assistant students in a broad survey course.



## Answers to Case Questions

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#### Answers to Case Questions

**Kristina D. (Anonymous) v. NESQUAKE MIDDLE SCHOOL**

1. An example of an unassumed risk that a cheerleader might face is where electricians are in the crawl space of the gym ceiling working on the lighting system, and a live wire is accidentally dropped, falling through a light fixture, and severely burning a cheerleader.
2. If there was inadequate supervision of the cheerleaders, this most likely would have changed the result of the case. Although cheerleaders assume the risk of a dangerous activity, they don't assume the risk of anything that would unreasonably increase or conceal that risk.

**Burton v. Sanner**

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#### **Burton v. Sanner**

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1. Sometimes the drinking habits of the people are mentioned so you will not have sympathy for them. Other times this could be mentioned to explain why the people's actions don't seem to make sense.
2. Sanner's action should be compared to those of the reasonable person in the same situation, rather than to the reasonable police officer, which he wasn't.

### **Johnson v. Universal Acceptance Corp.**

1. The officer advised that he had no right to stop repossession on a public street. He could intervene if there was a breach of peace on private property.
2. Opinion: Breach of peace has a variety of different meanings. Different states have statutes defining this. Generally, resisting arrest and disturbing the peace are examples of breach of peace.

### **Johnson v. Universal Acceptance Corp. (Part II)**

1. There is state action if the officer affirmatively intervenes to aid the reposessor enough that the repossession would not have occurred without the officer's help. An example of this would be if the officer ordered the Johnsons to turn over their car to the repossessors.
2. Officers are entitled to qualified immunity if their actions did not violate "clearly established statutory or constitutional rights of which a reasonable officer would have known." When an officer is performing his or her job, the officer is generally entitled to qualified immunity, unless he or she is aware of breaking the law.
3. An officer would not be entitled to qualified immunity where the officer arrests someone for no apparent reason, merely because the officer is bored.

### **Rash v. Workers' Compensation Appeals Board**

1. Yes. The only reason Rash was injured was because he was on an errand for the benefit of his employer. He was getting shoes for his horse so he could work.
  2. Yes. The employee was on a special mission. Although he was not at work or performing his routine work duties, he was doing something not considered outside the scope of his employment.
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## Problems

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#### Problems

In the following hypotheticals, identify the intentional torts and available defenses involved, if any, and support your answers.

1. Kim drives a delivery truck for The Dough Boy, a local bakery. One day, while making a delivery, Kim saw an automobile parked along the side of the street begin to move. There was no one inside the car, and it appeared to have slipped out of gear. The car rolled with increasing speed down a hill toward a crowded sidewalk along which several businesses were having outdoor sales. None of the shoppers saw the runaway vehicle approaching. Kim rammed her truck into the rear right side of the car, causing it to spin sideways. This stopped it from rolling into the pedestrians. The auto owner sued Kim for damaging the car, and the owner of The Dough Boy also sued Kim for injuring the delivery truck.

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2. Todd, a student at the city college, visited the school bookstore to purchase some notebooks. Outside the bookstore was a series of locking boxes within which students placed their backpacks, briefcases, or other belongings that the bookstore forbade customers to bring into the store. Todd placed his backpack into one of the lockers and entered the bookstore. However, he forgot to take the key from the box. Luke, another student, opened the box and thought the backpack was his, as he owned a pack almost identical to Todd's. Luke had placed his own pack in one of the boxes but had also forgotten to take the key. Later, Todd discovered the pack missing, and a bookstore cashier described Luke as the culprit. Luke had not examined the pack closely but had thrown it into his car trunk and forgotten about it. Todd sued Luke.

3. Leroy frequented a pub called Bottom's Up! Late one Saturday night, an intoxicated man began shouting obscenities at a woman sitting at the table next to Leroy's. The woman ignored the man and continued to drink her beer. The man approached the lady, looking ominous. Leroy stood and asked the fellow over to the bar for a drink. The man grumbled that Leroy should mind his own business. The man reached out and grabbed the woman's wrist, and Leroy neatly twisted the man's other arm behind his back while restraining him with a neck hold. The man protested vehemently, but Leroy did not let go. Leroy placed the man firmly into a chair and told him not to move or else Leroy would have to punch him. The woman told Leroy that the man was her husband and asked him to leave them both alone. Leroy left the bar. The man sued Leroy.

4. Peter Delaney works as an assistant manager at a local clothing store. One evening, while emptying trash outside the back of the store, Peter saw someone toying with a lock on the back door of another store. He could not see who the person was. Peter telephoned the police from inside his store and returned to the alley. He yelled out to the mysterious person not to move, because he was armed, and the police were coming. In fact, Peter did not possess any weapons, but bluffed to scare the culprit. The suspicious character turned out to be a new employee at the neighboring store who was trying to determine which key opened the rear door lock. Peter did not know this individual. The person sued Peter.

5. Alyssa was purchasing some merchandise on layaway at a local department store. She had made her final payment and had requested that the items be delivered to her house. After a few days, she telephoned the store manager to complain that the goods had not been delivered. The manager explained that she would first have to pay the entire purchase price before delivery would be possible. Alyssa protested that she had, in fact, paid in full. She went to the store and showed the layaway clerk her

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payment receipts. The clerk refused to produce the merchandise. Alyssa walked behind the counter, went up the stairs to the layaway storage area, and retrieved her items. The clerk notified store security, who took Alyssa into custody and locked her in an empty storeroom next to the restrooms. The room was unlit and not heated. The police arrived after an hour to question Alyssa, and after a few minutes she was released. Alyssa sued the store and the store counterclaimed against Alyssa.

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## Problem Answers

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#### Problem Answers

1. Kim would have a successful necessity defense against both the automobile owner and her boss, the truck owner, for damaging the vehicles. Kim committed trespass to chattel by damaging the vehicles. However, she was legally justified, because her actions were reasonably necessary to avert the more serious harm of having the runaway car crash into the pedestrian crowd at the bottom of the hill. The car became runaway by external forces (slipping out gear, with no parking brake on), through no fault of Kim's. The threat to lives posed by the runaway car far exceeded the value of the damaged chattels, so Kim's actions were reasonable. You could also apply the privilege defense to these facts. Kim was justified in damaging the runaway vehicle to achieve the socially desirable goal of saving lives. Kim could not have taken any less damaging action to stop the runaway car, as she had little time to act before the car crashed into the crowd.
2. Todd sued Luke for trespass to chattel and

### Step Text

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2. Todd sued Luke for trespass to chattel and conversion, but Luke could use the mistake defense. Luke had a good faith belief that his taking Todd's backpack was justified, because Luke reasonably thought that the backpack belonged to him (incorrect information upon which belief was based). Did Luke act reasonably by not carefully examining the backpack's contents to determine his error? One might ask whether, under similar circumstances, the average person would check the contents of a backpack that he or she presumes to be his or hers. How easy it would be for someone to grab what appears to be the right backpack and, without another thought, toss it into the back seat of his or her car!

3. The man sued Leroy for battery and probably assault and, perhaps, even false imprisonment (because of the "don't get out of that chair, or else" threat). Leroy would apply the defenses of defense of persons and mistake. For defense of persons, Leroy used reasonable force to defend and protect the woman from injury when the man threatened her with physical injury by grabbing her wrist. Leroy reasonably believed that his actions (grabbing the man's arm, twisting it behind his back, using the neck hold, and forcing him to sit in a chair) were necessary to prevent the man from injuring the woman. A reasonable person would have acted similarly under these circumstances. Thus, Leroy used necessary force to counter the attacking force. For mistake, Leroy had a good faith belief that his actions were justified to prevent the man from injuring the woman. This belief turned out to be mistaken, as the man and woman were spouses and, apparently, the husband did not intend to hurt his wife. Still, Leroy could not have known this, especially because husbands have been known to strike wives (and vice versa) in bars. Thus, Leroy's belief was reasonable and his actions were legally justified. Accordingly, Leroy would not be liable to the man for any of the intentional torts mentioned, because of these two defenses.

4. The person sued Peter Delaney for false imprisonment and probably, if she had good counsel, intentional infliction of emotional distress. Both torts would be based upon Peter's bluff with the nonexistent weapon to intimidate the captive. Peter would attempt to use the defense of citizen's arrest. Peter reasonably believed that an unknown person, seen late at night toying with a store lock in an alley, might be a burglar. He could not see clearly what the person was doing with the lock, because it was dark. He could not have identified the person as a store employee, because he did not know the individual. Peter's actions were reasonably necessary to detain the suspected felon. The defense should protect Peter from liability. There is some question as to whether Peter's weapon threat was excessive and unreasonable. However, if Peter reasonably believed (as he did) that he was dealing with a felon, it seems reasonable for him to have used the weapon ruse to protect himself and immobilize the culprit. A reasonable person would have acted similarly. (Actually, a reasonable person probably would have watched the suspect until police arrived, rather than endangering himself or herself as Peter did.) 5. Alyssa sued the store for false imprisonment,

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assault, battery, infliction of emotional distress, and trespass to chattel (this last point because the store wrongfully denied her possession of her chattels). The store counterclaimed against Alyssa for trespass to land, trespass to chattel, and conversion, the latter two because she took what the store perceived to be its personal property.

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## Project

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1. Does the common law of your state recognize all the defenses discussed in this chapter? Is any of the terminology different? Are any defenses defined under statutes?
2. Read the case of *Jordan v. Town of Pratt* in Appendix C at the student companion website. What immunity defense was raised? Was it successful? Explain.

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#### Project Answers

1. This project is another state-specific problem. You might wish to supply statutory or digest citations to assist students in locating your state's tort defense statutes or common law.
2. In Jordan, the officer raised the defense of qualified immunity, which would protect him from liability if he relied on standard operating procedures. The court determined that there was probable cause to make the arrest based on the complaint information. The plaintiffs' claims were dismissed.

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