

TORTS AND FAMILY LAW

C O N T E N T S

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A. Chapter Competencies

After studying chapter 17 the student should be able to:

1. state how a court will treat tort damages in the property division component of a divorce.
2. identify why courts are reluctant to allow intrafamily torts and therefore impose an intrafamily tort immunity.
3. state when spouses can sue each other in tort.
4. state when emancipated and unemancipated children can sue their parents in tort.
5. state when other relatives can sue each other in tort.
6. state when there can be a suit by one spouse against another for intentional infliction of emotional distress.
7. state whether litigation can be brought for wrongful life, wrongful birth, and wrongful pregnancy.
8. state when an action for wrongful adoption can be brought.
9. state when suits can be brought (and by whom) for (a) loss of consortium, (b) loss of services, (c) alienation of affections, (d) criminal conversation, (e) enticement of spouse, (f) enticement or abduction of a child, and (g) seduction.
10. define vicarious liability.
11. state the general rule of whether vicarious liability can exist among family members.
12. distinguish vicarious liability and independent liability.
13. determine whether your state has a vicarious liability statute making parents liable for the torts of their children.
14. define the family purpose doctrine.

B. Assignment 17.3 (torts)

- a. The father has intentionally injured his son through the sexual abuse. The torts, if allowed, would be battery and intentional infliction of emotional distress. Showing the son pornography must be negligence. The problem, however, is that most states do not allow unemancipated children to sue parents for personal torts.
- b. If Dave either intentionally or negligently gave Alice herpes, the torts, if allowed, would be battery, negligence, and misrepresentation. On the battery claim the question would be whether Dave knew with substantial certainty that he would give Alice herpes. (There may also be some defense issues of consent or contributory/comparative negligence depending on what Alice knew or should have known about Dave's sexual health.) A court might not think his conduct was sufficiently outrageous to constitute intentional infliction of emotional distress.

The torts could clearly be brought if the parties were not married. Some states will not allow spouses to bring these personal torts against each other unless they have liability insurance or are divorced.

C. Assignment 17.4 (*Hakkila v. Hakkila*)

America is considered one of the most litigious societies in the world. The “I’ll-sue-you” mentality is deeply ingrained in our psyche. The natural instinct of many in the class is that *Hakkila v. Hakkila* was obviously decided incorrectly. If Mr. Hakkila had inflicted his indignities on a stranger, there is no question that our courts would be available to provide the stranger with a remedy. Should it be different in the family?

Should everyone in the family be able to sue every other family member? Just as individual family members often have their own doctor, should every member have his or her own attorney?

Was the husband a victim in *Hakkila*? Before anyone in the class screams the answer, “No!”, ask the class to state for you what the court’s argument is that the husband may have been a victim. (“[C]ourts must be sensitive to the privacy interests of the defending spouse.” “[H]usband was subjected to a six-day trial, to say nothing of discovery and other preparation, . . .” “He was privileged to refrain from intercourse.”) *Then* ask whether or not he was a victim.

D. Assignment 17.7(b) (heart balm actions)

b. Alienation of affections? We don’t know why Irene and George separated. If George left Irene and Irene still loves George, then Irene’s affections for George may never have been alienated.

Assuming that her affections for George *were* alienated, we have a causation problem. Who caused this alienation? We don’t know that Oliver caused it.

E. Assignment 17.9(b) (family purpose doctrine)

b. Here is an overview of the five elements:

- (1) Fred controlled the use of the car.
- (2) The car was for driving to work. Is this a “family use?” Did Fred drive the car while on business or did he simply use the car to drive to work? The latter may not be considered business use. Certainly there was no “general family use”—if this is a requirement in the state.
- (3) Was Fred’s mother a member of his “immediate household”? She was there only temporarily.
- (4) The mother was using the car for a family purpose at the time of the accident. The mother was not on her own personal business at the time.
- (5) Fred said the car was to be used to drive to work only. Wasn’t there, however, an implied exception to cover emergency situations such as the need to drive a child to the hospital? As a matter of common sense, didn’t the mother think that Fred would have approved of the use of the car for this purpose?

F. Ethics in Practice

Conflict of interest due to bias? It is difficult to see how an abortion rights advocate can give vigorous advocacy to a client who opposes his wife’s right to choose an abortion.