**TORT**

**Negligence**

To establish prima facie case of negligence, plaintiff must show

(1) duty (2) breach of duty (3) causation (4) damage.

**(1) Duty**

a) **To whom does D owe a duty?**

Under the Cardozo view, D owes a duty to any **foreseeable** persons who may be injured

(= a person in the zone of foreseeable danger)

when D is engaged in affirmative, risk-creating conduct causing personal injury or property damage

　※ 少数説はかかる要件不要。essayでは同要件で切るべき場合はまずない。

・for **rescuers:** it’s foreseeable that a rescuer would come.

=1) injuries for rescuers, 2) injuries the rescuer causes during rescueにつきliable

SPLでも同様：defective designによる怪我人を助けようとして轢かれる人にliable

Firefighter’s rule = 消防士は火事を起こした人に請求不可能 ∵assumption of risk

The rule precludes a professional rescuer from recovering for his/her own injuries

occurring on duty even if those injuries are caused by another's negligence.

In Ca, the rule extends to police officers as well. The determinative factor in applying the firefighter's rule is whether the injury sustained is related to the particular dangers which police officers and firefighters are expected to assume as part of their duties. The fireman's rule has been heavily criticized for preventing police officers from suing criminals who intentionally lead them on high-speed car chases (CAは立法で解決)

・**Intended beneficiaries** of economic transaction may be foreseeable.

・Medical professionals owe duty of care to **viable fetuses**

(通常は生存可能状況が要件, 出生が要件の州もある)

Affirmative Duty to Act = Nonfeasance

No affirmative duty to act (No duty to rescue等)

　　　　　Hurley v. Eddingfield (1901)

かかりつけ医が重い病状を聞いても理由なく診察拒否→患者が死亡しても過失なし

Except:

1) the person who **created** the plaintiff’s **peril**

Tubbs v. Argus (1967)

Following an accident of a car driven by Argus, she abandoned the car without

assisting Tubbs, her guest passenger.

　　　　　　　　　→One whose innocent or tortious conduct has caused another bodily harm, leaving

the victim helpless and in further danger, has a duty to use reasonable care to

prevent foreseeable additional injuries to the victim.

2) **Assumption of duty**: Rescuer who undertakes to aid someone

車を止めて道に倒れている人の様子を見て放置ならOK

　　　　　　　　Good Samaritan Act only liable if the defendant is reckless or intentional.

(周囲が安心して引受者に任せた等他者の地位を悪化させた場合のみ

liableとする州が多い。全州でreasonable careより責任軽減）

3) **Special relationship of dependence** between parties creates a duty + foreseeability

family/ common-carrier to passenger/ innkeeper to guest/ land-occupier to invitee

/ captain to passenger or seaman/ shopkeeper to customer

例: 足の不自由な乗客の降車を鉄道が放置

具合の悪くなった被用者を使用者が放置

※「加害者との」特別な関係で警告義務認める裁判例もある

a) special relationships and

b) the third party’s conduct is foreseeable

例: 子供が飲酒運転するのを分かっていて放置

Tarasoff v. Regents of University of CA (Cal 1976)　批判多し

An actor only has a duty to warn others of third party’s foreseeable dangerous conduct if a special relationship exists between P and D, OR between D and the dangerous person.

Facts 　: Doctors knew that a mental patient they were releasing intended to kill D.

Hold : Because of the psychologist’s special relationship with a patient, the psychologist

has a duty to warn even if he has no special relationship with the victim.

b) **If so, what is the applicable standard of care?**

The basic standard of care is

that of a **reasonably prudent person acting under** similar circumstances.

※ Emergency : care of reasonable person under the same emergency conditions

１　Exception

In general, no exception for personal attributes, (stupidity, insanity, etc)

but, there are two exceptions: (emergency**は例外か微妙**)

① Superior knowledge ：if the person has **superior knowledge or skills**

→the standard is that of the reasonably prudent person with such superior knowledge or skills

② **Physical** characteristics　: if person is blind, confined in a wheel chair, etc.

→the standard is that of the person with such physical characteristics.

※ Lack of experience, Slow reflexes, insanity, Low IQなどの事情は考慮されない

問 精神病院で看護師が患者に怪我をさせられ訴えた

⇒ Traditionally mental disability is not defense → assumption of risk is better assertion.

2 Special Standards of Care:

① Children : the standard of **a child of the same age, intelligence and experience**

acting under similar circumstances.

・Children under 4 (less than 5) can’t be liable for negligence.

(六歳までは不法行為責任なしとする州もあるが少数派)

Exception

: if a child is **engaged in an adult dangerous activity**, no special standard.

② Professionals (with special skills) must give the patient or client

**the care of an average member** of that profession practicing **in a similar community** (big city v. small city).

**(**Specialists=national standard, General practitioners=same locality standard)

(×hypothetical comparison. comparison to real people. Requires testimony of expert witness)

③ Common carriers and innkeepers

held to a very high standard to passengers/guests

　 例: 飛行機で客の一人が飲みすぎ暴力的になっていたがスチュワーデスが無視，同客が暴行

→liable, the airline has a duty to take reasonable steps to make conditions in the aircraft

reasonably safe. (MBE)

④ Occupiers / Owners of land　後述

⑤ Statutory Standards of Care

when a statute set out the specific duty, the specific duty set out by a statute may

replace the duty of reasonable person standard. (要件はbreach of dutyで後述)

**(2) Breach of duty**

A breach of duty occurs when D fall below the specified standard.

Where the duty standard is reasonableness, prove breach by one of the following methods.

**General rule** Identifying conduct, and explaining why it is unreasonable.

**Custom or usage** Custom or usage can be evidence (but not conclusive)

**Negligence per se** = Violation of applicable statute essay tip: general ruleの適用も検討する

　 An **unexcused statutory violation** conclusively establishes duty and breach of

duty. (In some jurisdictions, a rebuttable presumption)

To establish D’s negligence per se, P must show **(class of person / class of risk test)**

1) P falls within **the class of persons** the statute **seeks to protect**

2) the accident is **the type of risk** the statute was **seeks to prevent**

Exceptions: “excused” for 1)necessity 2)incapacity 3)emergency

(1) if statutory compliance would be **more dangerous** than statutory violation

→ don’t use the statute. apply **reasonably prudent person standard**.

(2) if statutory compliance is **impossible (e.g. child)**

→ apply reasonably prudent person standard

※ compliance will not necessarily establish due care∵prescribe minimum standard

Martin v. Herzog (1917)

Facts: P was killed when his buggy was struck by D’s car. D alleged that P was

contributorily negligent by driving without lights, contrary to a safety statute.

→violation of a safety statute is negligence per se. However, it must be shown that

such omission contributed to the damages in order to be contributory negligence.

Tedla v. Ellman (N.Y. 1939)

Facts: Ps were walking eastward along Highway. There weren’t any sidewalks and

they were transporting junk with baby carriages, and so could not walk on

the grass center strip.

Rules: Statute that claimed pedestrians should keep to the left of other center line

so that all vehicles passing in either direction would pass on their right.

When a statute does not prescribe additional safeguards, then not following

a statute for good reason does not mean automatic negligence.

　　　　Brown v. Shyne (N.Y. 1926) あくまでbreach of dutyまで認定。causationの検討は必要

P was paralyzed by D’s chiropractic treatment. D practiced medicine without a

license, in violation of a state statute.→法令違反からnegligenceを認定OKと

原審がinstruction. →logical connection between the proven neglect of

statutory duty and the alleged negligence.が必要としてreverse

※ 法令のsecondary purposeまで解釈を広げて狭く適用されている

例：カギをつけての駐車禁止という法令を無視した車が盗まれて事故

　　　 ⇒Purpose is not only to protect the owner, but also protect those who might

be injured by the negligent driving by theftとして責任肯定

**Res ipsa loquitur**

P cannot prove precisely D’s breach, P can avoid dismissal if P can show

＝**It may be inferred that harm suffered by P is caused by negligence of D when res 2nd 328**

(1) the event is the type that won’t usually occur without negligence,

(2) the cause of harm was under exclusive control of D (同要件緩和する法域も多い)

(3) P was not at fault = P did not in any way, voluntarily bring about the harm (同上)

例・店でfresh & cleanなバナナの皮で転ぶ

→ fresh & clean banana peel is not the event that is ordinarily caused by negligence.

**Slip & Fall** ①店が危険作出, ②他が作出でも知っていた又は知るべき, ③床にこぼれ

やすい商売方法 で責任を肯定するのが通常

例・店の自動ドアが突然締まり大けが（他に証拠なし）

　　→MBEではres ipsaの可能性有るとして, summary judgementは不可。

※　　　　医療過誤には通常res ipsaの適用がない ∵医療事故は過失がなくても起こり得る

　　　　　　　　　→ 適用は①手術器具の置き忘れ②手術部位の誤り等に限定されている。

Shutt v. Kaufman’s (1968 Colorado)

Facts: A metal shoe stand toppled from a table and hit Shutt on the head when her chair bumped the table. (非常に重くて通常では倒れない状況だった)

Rule: Res ipsa doesn’t apply if P has the means to establish the negligence of P.

Valley Properties LP v. Steadman’s Harware Inc (1992)

被告だけが利用していた倉庫から出火→ 適用なし∵火災は過失がなくとも生じるし，

電機システム不具合など被告の過失以外の原因も考えられる.

Escola v. Coca Cola (1944)　要件緩和例・ＰＬ法へ展開

Facts: A waitress, Escola, was injured when a Coca Cola bottle broke in her hand.

She sued Coca Cola alleging negligence in the preparation of the bottle for sale.

Rule : Res ipsa may apply where an accident occurs sometime after the D relinquished

control over the injury-causing instrumentality if the P shows that the condition of

the instrumentality didn’t change after it left D hands and P handled it with due care.

**(3) Causation**

P must show that D’s conduct was both the actual cause and proximate cause of her injury

**Actual cause (cause in fact)** – several tests:

1 Actual cause is generally determined “But for” Test.

: injury would not have occurred but for D’s act or omission.

Ponder v. Angel Animal Hospital(1988)

　　　 　誤ってペットが去勢→ 去勢でペットの市場価値が下がった立証がないとして棄却

　　　 　(精神的損害は現実の損害がある場合に付随して認められるに過ぎない)

2 Multiple Ds with joint causes (concurrent causes)

Substantial Factor Test (多数説)

Where several causes bring about an injury, and any one alone would have been sufficient

→If D’s conduct is a **substantial factor** in causing the injury.

(D will be jointly and severally liable.)

Sanders v. American Body Armor & Equipment(1995)

A police officer was fatally shot when two bullets struck his abdomen and chest split

seconds apart. Either bullet would have been sufficient to kill Officer Sanders.

Sanders would have died anyway from the bullet to his abdomen

→“each cause has in fact played so important a part in producing the result that

responsibility should be imposed upon”

　　　　　　 　　例：A社・B社が毒を川に流出し家畜死亡。どちらの毒も致死量以下

→substantial factorであればactual causeあり(but for testはクリアー，それだけでは×)

Res 2nd §27 : substantial factor test

if two forces are actively operating, one because of the actor’s negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor’s negligence may be found to be a substantial factor in bringing it about.

Res 3rd : factual causeとproximate cause (scope of liability)を分離

§27; If multiple acts occur, each of which alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm

§36: When an actor’s negligent conduct constitutes only a trivial contribution to a causal set

that is a factual cause of harm under the harm is not within the scope of the actor’s liability

Jointed and several liability **連帯責任**

One Rule:

When there are multiple person’s negligence, D is jointly and severally liable if:

1) his negligence is substantial factor and 2) Plaintiff’s injury is indivisible.

Some states requires 3) concerted action. Res requires “when they act in concert”.

※ 各州バラバラ, the damage is indivisibleのときにconcerted actionとして連帯責

任認める州も多いが(concurrent causes doctrine), 過失相殺の考え方からして寄

与に応じた賠償しか認めない州もある。

但しagreementに基づく同一行動では連帯責任を負うことは争い無し。

※ 伝統的には複数の被告の間に求償無し → 現在はほとんどの州で求償認める

※ 一部の被告への免責は他の被告にも効果が及ぶのが原則

→ そのため covenant not to sueで和解するのが大切

Concurrent causes doctrine (少数説)

– when 2 parties are negligent and their actions combine to cause an **indivisible**

harm, they are both jointly and severally liable for the entire harm.(substantialでな

くても全責任)

Kingston v. Chicago & NW Ry. (Wis. 1927).

Facts: 2 fires destroyed Kingston’s property.

D was the cause of one fire, but the origin of the second fire was unknown.

Rule: If the concurrent acts of 2 or more joint tortfeasors cause a wrong, each is

individually responsible for the entire damage.

Unascertainable Causes Approach **=** Alternative liability　因果関係の立証責任転換

1) P bring all possible Ds into court

2) P show the all Ds breached a duty of reasonable care.

(but it is unascertainable which are the cause)

→The burden then shifts to the defendants。

[Summers v. Tice](https://en.wikipedia.org/wiki/Summers_v._Tice) (1948) the two Ds negligently shot in the direction of the plaintiff

×A, B, Cのいずれかが椅子をアパートの2階から歩行者に投げた。3人をまとめて

訴える ∵それぞれのbreach of dutyの証明がない。下記はあり得る。

※ [Ybarra v. Spangard](https://en.wikipedia.org/wiki/Ybarra_v._Spangard). (Cal.1944): the smoke-out function of [res ipsa loquitur](https://en.wikipedia.org/wiki/Res_ipsa_loquitur)

→Where an unexplained injury occurs during a medical procedure to a part of the body

not under treatment, res ipsa applies against all of the doctors and medical employees

who take part in caring for the patient.　※批判強い，適用は同種医療事故に限定

・the burden is shifted on the defendants to show **negligence,** whereas in alternative

liability the plaintiff shifts the burden to show **causation**.

特則 (but for testの例外, substantial factor test, alternative liability以外)

：Market share liability = 直接の原因不明でも市場占有率に応じ賠償請求可とする考え

Loss of chance =　　　　certainでない損害でも可能性応じ賠償請求可とする考え

例：the loss of X％ chance of survival

**Proximate cause (legal cause)**: is it fair to impose liability? testは諸説あり(百花繚乱)

　　　 (多数説) Proximate cause is determined “foreseeability” test.

If the injury is foreseeable, there is a proximate cause.

※ **type** of harm, **manner** of harmが問題。

**extent** of harmは予見不能でもliable ∵egg-skull rule

（少数説)　1) direct consequence doctrine:古い, 直接原因(superseding cause無し)なら責任有り. barbri

2) Res.3rd=within the scope of the risk= “[a]n actor’s liability is limited to those physical harms

that result from the risks that made the actor’s conduct tortious.

1) Direct cause case (他人の行為の介在なし) : simple foreseeable test

Res 2nd§460: If D is liable for an injury which impairs the physical condition, D is also liable for harm sustained in a subsequent accident which would not have occurred had the other’s condition not been impaired, and which is a NORMAL consequence of such impairment.

（direct consequence testに近い表現）

S. S. KRESGE CO. v. KENNEY. (1936)

事故で骨折し,その影響で10か月後にベッドから落下

　→第2事故はher contributory negligenceとして責任否定∵能力不足と知っている行動に出た

Hartnett v. Tripp (1918)

　松葉杖の操作ミスで二度目の怪我→ 松葉杖の利用は通常であり医師も勧める方法→ 責任肯定

(direct consequence testの方が説明しやすいが予見可能といえばそれまで)

Res.3rd例1：子供にショットガンを預けたら落として足に宛てて骨折

→ガン固有のriskの実現でない。NO legal cause

2：10マイルスピード違反し35マイルで走行。がけ崩れで同乗者死亡

　 →スピード違反しなければがけ崩れに会わなかったのでbut for testはクリアー

しかしスピード違反固有のriskの実現でない。

　 　　　　　　　　　　 ※：コンビニの駐車場に照明無し。転んで骨折→Legal cause有り

　　　　　 　 　 強盗に会う→(多数説) 犯罪からの防御義務なし(prior criminal actionが必要)

2) Indirect cause case: when a force of independent act is also a factual cause

→If intervening cause is highly **unforeseeable and culpable**, the cause is

superseding and breaks the chain of causation. (Res.では介在事項のculpableをも重視)

**Negligent conduct** generally will not cut off the liability, however it will cut

off the extended consequence if it is **freakish and bizarre**.

Foreseeable intervening force doesn’t break the proximate causation.

※: MBEで因果関係切断される例はrare. really bizarreのときだけ

Intervening force is foreseeable as a matter of law,

when it is intervening

1) medical malpractice

2) negligent rescue　例:事故の怪我人を助けようとして轢かれる 諺:Danger invites rescue

3) protection or reaction forces

4) subsequent disease or accident

Intentional tort

・Criminal conduct is generally unforeseeable.

unless 1) D’s original conduct **increases the risk o**f criminal force or

2) the tortfeasor should have realized the likelihood of the crime.

Brower v. NY Central RR(1918)

D’s train hit P’s wagon. P was still confused from the accident, while third parties stole

his goods. →Possibility of theft was foreseeable, clear that if train crashes, goods will

scatter, and if they are not protected they will be stolen.

・An actor generally is entitled to assume that others will not act negligently,

recklessly or criminally. but sometimes foreseeable.

Tarasoff v. Regents

psychologist has duty to warn intended victim of patient

Kline v. 1500 Mass Ave (1970)

Security guards are being let go from the apartment, and doors aren't covered. Assault and robbery inside the building, rather predictably.

→ A duty should be placed on a landlord to take steps to protect tenants from **foreseeable criminal acts** committed by third parties.

Hines v. Garrett (2004)

After missing stop, conductor drops off young passenger one mile from station in dangerous area telling her to walk back to station, passenger is raped. → liable

**(4) Damages**

General: only actual damages (must be proven), **NO** nominal damages.

Punitive damages = if D’s conduct is **willful, wanton, and reckless. ※明快な定義なし**

(1) intentionally disregard an high risk 2) of causing substantial harm

**Egg-Shell Skull doctrine (apply to every tort)**

When the defendant commits a tort, he is liable for any injury that is mangnified

by the plaintiff’s peculiar characteristics.

(foreseeability is irrelevant about the extent of harm.)

**Avoidable consequence rule**

P has a duty to take reasonable steps to mitigate damages.

**Collateral source rule**

Damages are not reduced because P received benefits from other sources.

**Affirmative Defenses to Negligence**

**1 Comparative negligence**

Defined 　P’s own negligence contributes to her injury

Effect P’s claim completely barred

Exceptions 　 D had last clear chance / D was wanton or reckless.

**Pure Comparative Negligence**

Defined P’s own negligence contributes to her injury

Effect 　 P’s recovery will be reduced by the percentage of his fault

**Partial Comparative Negligence**

Defined P’s own negligence contributes to her injury

Effect 　 P’s recovery will be reduced if her fault is less serious than D

otherwise Ps claim is barred

　　　　※ 被害者側の過失考慮不可 → 子供を連れていた親の過失は相殺の対象にならない

**2 Assumption of Risk**（implyもexpressもある。通説は区別不要）

Defined 1) P **knew the particular risk** of injury

and 2) **voluntarily exposed himself** to it.

Effect P’s claim completely barred.

　問：競馬における急速な進路変更により傷害を受けBatteryに基づき提訴。Assumption of risk?

　答：NO ∵assumption of risk is a defense to negligence, not to intentional tort.

　※ informed consent　→ 適用範囲は狭い

: ① 現実の損害と説明義務違反との因果関係

② 主観的因果関係（説明があれば手術を受けなかったこと）

の立証を判例は必要とする。

Material informationは全て説明が必要という説もあるが，通常は医師基準説（同様の状況に

ある医師が説明するか＝risks that are customarily divulged）

**Owners and occupiers of land**

**検討順1) D is an owner or occupier？**

**2) the injury occur on the land？**

**3) P is undiscovered trespasser? → no duty (dangerous conductで怪我させてOK)**

**4) the injury caused by an activity？ → standard of care is that of reasonable person**

**by dangerous condition? 　　　　　　　　→ type of P controls the standard of care**

① trespasser = someone with no legal right on the land

to undiscovered trespasser →no duty (cannot intentionally hurt, 過失につき何の義務がないだけ)

※ undiscovered = whose presence the owner doesn’t know

to discovered trespasser 　 　→duty to protect from **man-made known death traps**

※ discovered = whose presence the owner knows or should reasonably anticipate

※ man-made known death traps　隠れたる重大瑕疵を知っているときだけ責任

1) artificially made 2) actually known by the owner 3) highly dangerous 4) concealed

② licensees = a person who enters onto D’s lands with owner’s permission 例. friend, social guest

duty to protect from **known hidden (traps)** 隠れたる瑕疵を知っているときだけ責任

= 2) actually known by the owner, 4) concealed from the licensee.

③ invitee =1) anyone who could potentially confer an **economic** benefit on the land possessor

= a person who enter the land for business purposes

2) any person in a public space (places held open to the public)

e.g. business entrants, customers.

duty to protect from **knowable hidden (traps)** 隠れたる瑕疵を知り得べきときも責任

= 2)’ actually known **or should be known** by the owner, 4) concealed from the licensee

※ exceeds the scope of invitation → become licensee or trespasser

**Gladon v. Greater Cleveland Regional Transit Auth (ohio,1996)**

　　 ホームで殴られ線路に落ちて，そこで轢かれる→ became trespasserとして責任軽減

Attractive Nuisance Doctrine (①の特則 for children)

dangerous condition

1) artificially made

2)’ actually known **or should be known** by the owner

4)’ (concealed or) be unable for the children to appreciate the risk

＆5) knew or should have known that children frequent the area

6) expense of remedying is slight as compared with the risk

**Now-Physical Injury**

**原則：Impact rule = physical impactに派生した精神的損害だけ賠償可能**

**・火事でレストラン燃やされてもemotional distressは請求不可**

**physical injury又は以下に限定 (IIEDでも請求可)**

**Negligent Infliction of Emotional Distress** (Distressed but not physical injured)　州でバラバラ

1 . Preexisting Relationship – (古典的例外)

1) When P and D were in a **Preexisting relationship** (病院や葬儀場など), and

2) It is foreseeable that careless conduct by D might cause emotional distress.

・Erroneous report of a relative’s death or false report of cancer or HIV OR

mishandling of a relative’s corpse.

※ Physical symptoms are NOT required.

※ 子供を性的虐待した医者に対して親の請求は無理，子供が請求できるだけ。

しかし, 下記の通りbystanderの要件を満たせば, それで請求可能。

2 . Near Miss (最初に認められるようになったケース: majority, must be in the zone of danger)

1) D negligently place P in **danger of immediate harm**

2) The **serious** mental harm results from the danger

(:3) Subsequent **Physical manifestation** of the distress) ※ Res.では不要, minorityな要件

・子供と歩いていて自分も危なかった母は賠償受けられるが，窓から見ていた父は無理でいいのか？

3 . Bystander cases (次に認められるようになったケースminority, only needs to be near the accident)

– must show:

1) **Close familial relationship** of injured party (Spouse or child)

2) P must has perceived the injury contemporaneously

( 3) Subsequent **Physical manifestation** of the distress) 　※Res.では不要, minorityな要件

　　 ※ intentional tortでも同様

　　 　 He is 1) a close relative 2) present at the scene, and 3) D knows the close relative is presentが要件

Loss of consortium

When a spouse is killed the surviving spouse may bring a claim for loss of consortium for

the loss of the 1) Relationship and 2) Sex.

**Economic Loss Rule**

**Prohibition of recovery in negligence for pure economic loss**

　　 例：過失で橋を壊して大事な商品供給を失わせても責任を負わない

　　 　：石油流出事故で魚を得られなくなった漁師の損害賠償請求を否定するのが通説

：A社の瑕疵ある製品で従業員が大けが。それにより受けた会社の損害も追及不可能

：騒音でホテルの客が減ってもnegligenceで請求は無理。ただしnuisanceで追及可能

※ it does not apply when the only kind of harm a defendant can inflict upon the plaintiff is economic harm.

Legal Malpractice Claim (may recover pure economic loss)

Unlike ordinary negligence, P must show

1) the lawyer’s misconduct, and

2) that, had the lawyer met standard of care, P would have won her claim.

(= often called “trial within trial”)

**Intentional Torts**

**要件: (1) intent (2) act｛(3) causation (4) damage｝**

**(1) Intent**

・All intentional torts require intent.

intentional= 1) desire the result or 2) know that the result is **substantial certain** to happen.

**・**NO **incapacity** defenses (Mentally ill, intoxicated, minor, disabled)

but very young or extremely mentally impaired person cannot have intent (desire or know)

　 　※　　５歳の子が椅子を引いて尻もちさせて怪我させても責任ありGarratt v. Diley (1955)

Essay tip: tortの問題でinsanityは論じない。incapacityはdefenseにならないとだけ記載。

**(2) Act**

Voluntary act = conscious or willed (not purely reflexive)が必要

**Specific Intentional Tort**

**※④⑥⑦ & Defamation, Economic tortsはactual damageが必要。**

**①②③(暴行系)⑤**(trespass to land)**は不要**

① Battery **1)** **Harmful or offensive contact**

**2) to the other person or, something closely connected with the person**

**3) intending to cause the contact =** 接触を生じさせる故意をもって

1) harmful – causing actual injury or pain.

offensive –“A bodily contact is offensive if it offends a reasonable sense of personal dignity”: Res.

＝ Conduct by implied consent is not offensive 例：転倒を助けるため腰に手を回す

Fisher v. Carrousel Motor Hotel, Inc.(Tex 1967)

Facts: Fisher, an employee of NASA, is a black attendant at a conference held at Hotel.

His plate is snatched away from him by an employee. He was not actually touched.

Holding: Touching anything connected with his person in an offensive manner, is an

offense to his dignity and constitutes battery.

Leichtman v. Jacor Communications, Inc (Ohio.1994).

Facts: Leichtman, an antismoking advocate, appeared on the radio show. Another radio

host let a cigar while in the studio and repeatedly blew smoke in Leichtman’s face.

Holding: Intentionally directing smoke at another constitutes battery. Tobacco smoke has

the physical properties capable of making physical contact. No matter how trivial

the incident, a battery is actionable. ※光の反射ではcontactになり得ない

　　　　　　Mohr v. Williams (1905) 右耳手術に同意, 左耳を手術して成功 → battery

※ 輸血拒否を無視して輸血すればbattery

2)・人の乗っている車に石をぶつけるのはbatteryでない。∵ not closely connected

clothing, something they eat or are holdingはclosely connected

・Rule: Contact may be either direct or indirect. (setting a trap, pulling someone’s chair)

つまり，時間的差異はあってもよい

例：落とし穴を掘って三日後に狙った人物が落ちて怪我

食材に毒を入れて，後で飲んで病気にさせる (食材を通じてcontact)

　　 　　　　　　 Aに向かって自転車で爆走。Aが逃げようとして木にぶつかり怪我をしてもcontactあり

車のブレーキを切断し, 事故を起こさせ, 怪我させる

3)・接触が発生する相当程度確実な認識も故意

Vosburg v. Putney (Wisc. 1891) – intent to harm not necessary

Facts: one student lightly kicked the leg of another student during class intending

no harm. The leg was sensitive from a previous injury and was severely

damaged by the kick.

Holding: intent to harm isn’t an element of battery. Only proof of unlawful intent or

of fault is necessary. as long as intent is present, the consequences need not

be foreseeable.

・assaultの故意でbattery発生→ transfer of intent

例: うるさいネット裏の観客に向けて剛速球で球を投げる。想定外にネットが破れて観客が大けが

例: おびえさせるため投げた石があったる

※ assault, battery, false imprisonment, trespass to land & chattelsはtransferred intent適用

② Assault : **Intentional causing of**

(a) a **reasonable apprehension** in P

(b) of **immediate battery (offensive or harmful contact)**

Beach v. Hancock (N.H. 1853) D pointed an unloaded gun at Plaintiff in a threatening manner→assault

※ fear is not necessary

※ a reasonable person in the same circumstance would have apprehensionで判断。

但しD knows of the P’s particular susceptibilityの場合は例外: 日本でいう修正客観説

※ 定義よりして被害者の認識が必要（batteryでは不要）

※ batteryに吸収されない ∵tortsにmergeなし!!

×　　　家に帰ったら州外へ出ていけ！出ていかないと殺す！∵not immediate

③ False Imprisonment

(a) **confinement in the bounded area** (b) P knew the confinement or was harmed by it

※ bounded area can be a large area, even an entire city.

※ there is no duration requirement.

※ barrier must surround the victim in all directions so that no reasonable means of escape exists.

※ reasonable means of escapeをＶが知っていれば不成立

If there is any risk of harm to the plaintiff, including the risk of embarrassment ⇒ not reasonable means

実行行為 1) use of physical barrier 2) force and threat 3) invalid assertion of legal authority等

Personal propertyに対する脅迫= OK. Threats of reputational harm=×

Shopkeepers Privilege – If a shopkeeper has **reasonable suspicion**,

he can use **reasonable force** to **detain** P for a **reasonable time**.

　 Hardy v. LaVell’s distributing (1983)

　 　従業員にうそを言って部屋に連れていき，警察立会で30分ほどうそ発見器にかけた

　　　　　　　　→①本人は部屋から出たいと言っていない②真実を言っても部屋に入ったと思われる

　　　　　　　　⇒NO False imprisonment ∵not against will

Enright v. Groves (1977)

万引を疑い，少女に今警察が来ると嘘を言って家族が来るまで部屋に25分入れる

⇒False imprisonment

∵物理的拘束が無くても警察が来るという嘘で押しとどめるのはダメ

　　　　　Unlawful Arrest

false assertion of legal authorityに基づくfalse imprisonment

例：ペットをひもに繋がない条例違反の女性に「運転免許を見せるか拘置所に行くかど

ちらかだ」と告げ拒否したら警察署に連行

⇒ False imprisonment

∵運転に疑いなければ免許提示義務はないので逮捕要件欠く. よってfalse assertion.

④ Intentional Infliction of Emotional Distress(★常に、最後に付け足す!!) 2nd§218

1) Intentional **or reckless** infliction

2) **by extreme and outrageous conduct**

3) causing **severe emotional distress** (damages = severe emotional distressが要件)

= substantial and lasting that reasonable person would not endure.

・Outrageous conduct = exceeds all bounds (of decency) tolerated in a civilized society.

原則insulting languageは2)の要件を満たさない

　例外1) Innkeepers, common carriers, and other public utilities

2) D knows of P’s particular susceptibility

3) the superior-subordinate relationship (and use racial ethnic insults)

MBE Tip：接触があればbattery, なくてもassaultを優先して選ぶ

⑤ Trespass to land 不動産に対するintentional tortはtrespass to landとnuisanceのみ

(a) Physical invasion

(b) of P’s real property ※損害不要

**2nd§158** :if he intentionally

1) enters land in the possession of the other

2) causes a thing or a third person to do so,

3) remains on the land

4) fails to remove from the land a thing which he is under a duty to remove.

※ possessory interestに対するtort ⇔ physicalといえない光，悪臭等はnuisance

・intent to commit the act constituting the trespassが必要。mistakeはdefenseにならないが，無

過失であればnot liable 例:ロケットが爆発して破片が農場に侵入⇒爆発に無過失なら責任無し

⑥ Trespass to chattels

（moderate） (a) **interference** with a person’s use or possession (b)of chattels (c)damage

　※ 通常はUse or Borrow property without authorization.

　※ interference＝bringing about physical contact: 例beat a dog, throw a stone at another’s car

intentionally perform the physical actは必要。intend to trespassはなくても成立

Remedy 1) Damages= cost of repair or fair market rental value 2) restitutionary: replevin

⑦ Conversion

（**substantial**）(a) interference with a person’s use or possession (b) of chattels (c) damage

Res 2nd :Conversion is an **intentional exercise of dominion or control** over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.

※ Full value = FMV (not 新品価格)

→愛着ある猫が殺されても時価相当額まで, IIEDを検討すべき。

These factors are considered in determining seriousness:

(1) duration and extent of interference,

(2) defendant’s intent to assert an inconsistent right,

(3) defendant’s good faith,

(4) expense or inconvenience to plaintiff,

(5) extent of harm to chattel.

Conversion例: 数時間かかる予定で一晩借りた，チェーンソーを無断で持ち出し使ったら壊した，

　　　　　　 (修理費用でなく時価評価額の賠償責任)

・minor damageならtrespass to chattels

・attempt to stealは即時にconversion（bad faithを重視する）

・盗品購入は売主も買主もconversion

例　借金を返したのに銀行が担保物件返却を拒否。２か月拒否すれば十分substantial

　　 →“Recovery of Full value at the time of torts” is OK＝forced sale

例　5万＄で買った絵画に瑕疵があったので契約キャンセル。引取に来るのを待っている間に新

たな買主が現れたので6万＄で売却→conversion. 元売主は6万＄の請求可能

Essay Tip: ⑥⑦は同時に論じてOK Trespass to Chattel and Conversion

論証例: Trespass to chattel and conversion

Trespass to chattel and conversion are property torts that occur when the defendant

intentionally **interferes** with a person’s use or possession of chattels, resulting in damage

The difference is in degree of the interference. Conversion requires that the substantial

interference, whereas a more minor interference constitutes trespass to chattel. Here ~

D could be liable for conversion, which means he would owe P the market value of ～ at

the time the conversion occurred.

**Defense** ①Consent ②Defense (self-defense, defense of others) ③Necessity (public, private)

×contributory negligence 故意と過失は相殺できない。

**CONSENT**

– P’s **consent** to D’s **conduct** is a defense, but one **cannot** consent to a **criminal act**.

Express Consent – **Mistake**は原則同意を無効にしない

例：ヘルペスと言わないでSEXしてうつす→原則batteryではない。

　　　　　　　　　　　　　例外1) D **knew** and took advantage of the mistake ヘルペスと知りつつ非開示

2) Consent induced by **fraud** or **duress** is void

※もっともcollateral elementに関わるmistakeなら例外不適用

Implied Consent – Consent may be implied by 1) the **usage or custom** or (2) P’s **conduct**.

Test – judged on an objective standard, namely,

if a “reasonable person” could conclude that consent was given.

　　　Apparent Consent : “If words or conduct are reasonably understood by another to be intended as

consent, they constitute apparent consent and are effective as consent in fact.”

Consent Implied by Law

– arises when action is needed to **save a person’s life** or some

other **important interest** in person or property.

例：車に引かれそうな人を突き飛ばす

**※** intent not to harmはdefenseにならない。

**※** necessityは通常trespass=財産権侵害の問題。そもそもpay for actual damages

※ Capacity required – Individuals without capacity are deemed **incapable of consent.**

✕ Exceeding the **scope** of Consent

**SELF DEFENSE** (Defense of others / defense of property)

**刑事と共通要件とするのが多数の法域（**違いはthe burden of proof）

the use of force is justifiable ※reasonable mistakeはOK

1) when the actor reasonably believes

2) that such force is **immediately** necessary

3) for the purpose of protecting himself

4) against the use of **unlawful** force upon herself

※ applies even if you hurt a bystander, so long as acting reasonably.

e.g. B shoots at an attacker, misses and hits bystander. → B is not liable

　　　 なおthe bystander would have a negligence claim against the attacker.

**Mistaken Defense** (tortsではマイナー論点)

In tort law, all reasonable mistakes are treated differently.

The Mistake Doctrine

If a D intends to do acts (which would constitute a tort), it is no defense that the D mistakes, even reasonably, the identity or person he acts on or believes incorrectly there is a privilege.

・同doctrineがtrespass to land, trespass to chattels, conversionに適用は争い無し

Reasonable mistakes as to ownership of real property result in strict liability for trespass to land

Ranson v. Kitner (1889): He killed the plaintiff’s dog which he reasonably mistook for a wolf.

→ the defendant was held liable for conversion.

　　　・しかし, self-defenseには適用なしが通説。

“The defendant is privileged to use reasonable force to defend another even when he

is mistaken in his belief that the intervention is necessary, so long as **his mistake was**

**reasonable.**”Res.2nd

(defense of othersには適用を認める＝合理的でも誤想防衛は認めないとする州もある)

**Entry on Land to Remove Chattel** – The owner is privileged to enter another’s land to reclaim his chattel at a **reasonable time** and in a **reasonable manner**, after first making a **demand** for their return UNLESS the chattel is on the land through the **owner’s fault.**

※ Must pay for actual damages when entering innocent party’s land.

**Recapture of Chattel**

One may use reasonable force to get back one’s property,

provided that 1) D is in a hot pursuit 2) D asks to get it back.

**Privilege of Arrest 州により相当違う**

**For Felony**

A police officer is allowed to make an arrest for a felony without a warrant if he reasonably suspects that a felony was committed.

→必要時はdeadly force OKがコモンロー, “危険な”felonyに限定する州も多い, 最高裁は, probable cause to believe that the suspect poses significant threat of death or serious physical injury to the officer or othersに限定　Tennessee v. Garner, (1985)

A private citizen is privileged to make an arrest for a felony without a warrant only if the felony has actually been committed.　(felonyと合理的に間違えて射殺すれば有罪)

**For Misdemeanor**

As far as arresting for misdemeanors, the general rule is that both police officers and private citizens can make arrests without warrants **so long as if breach of peace occurred in front of arresting party present.** 原則deadly force不可

・The privilege of arrest carries with it the privilege to enter another’s land for the purpose

of effectuating the arrest.

・Subsequent Misconduct – The actor may still be liable for subsequent misconduct after the arrest.

※ Citizens may make a reasonable mistake regarding the identity of the felon, but not regarding

whether the felony occurred (Split).

→Force – Reasonable force. No deadly force in misdemeanor arrests.

Katko v. Brinery (1971)

頻繁な空き巣に辟易しドア開閉でショットガンが当たる装置設置。泥棒大けが

　　　　　　　　　 → Battery ∵defense of propertyにdeadly forceは不可 (negligenceだと過失相殺可)

**NECESSITY defense for property torts.**

**Private necessity privilege** The Restatement 2nd of Torts § 197

One is privileged to interfere with personal or real property of another (usually; enter

or remain on land)

if **it reasonably appears to be necessary to prevent serious harm** to

(a) the actor, or his land or chattels,

or (b) a third person, or the land and chattels of either,

unless the actor knows or has reason to know that the third person do not want

※ ①Trespass to land、②Trespass to chattel、③Conversion等のみヘの抗弁。

①②③に対すると同時に,自らの身体も防衛する場合はNecessityを主張OK。

※ 不可避でもD must still pay for actual damages (刑事と異なる)

“he is subject to liability for any harm done in the exercise of the privilege

except where the threat of harm to avert which the entry is made is caused by the tortious conduct or contributory negligence of the possessor”

⇔ 正当防衛では第三者に対するActual Damagesの責任も負わない。

・刑事と異なり法益の権衝(reasonable belief the harm caused< the harm avoidedはrestatement上は不要とも読めるが多くの文献は必要と解している。

　　　　 Effect: The possessor of land has duty to permit him to remain

Necessityな人を脅して退去させると、逆に、その者に対する損害賠償義務が発生する。

→正当避難者のボートをUnlockし、ボート沈没させればLoss of the boatを請求される。

Rossi v.Del Duca (1962)

犬から逃げる子供が被告の土地に入ると，被告の土地の犬が同子供にかみつき怪我をさせた

The court hold that P had a privilege to enter the land because it reasonably appeared to be necessary to prevent serious harm. “This privilege not only relieves the intruder from liability for technical trespass but it also destroys the possessor’s immunity from liability in resisting the intrusion.”

Depue v. Flateu (1907) team=二頭以上の馬

P was invited into the defendant’s house, and while there, he was taken suddenly ill and fell to the floor. He requested permission to remain overnight, but defendants refused. D assisted him from their house to the cutter. P could not hold the reins to guide his team. P, who nearly frozen to death sued for damages

→ A is privileged without liability to remain in B’s house.

**Public necessity privilege**　Restatement §197

One is privileged to interfere with personal or real property of another (usually; enter land

in the possession of another)

1) if the actor reasonably believes

2) it is necessary to avert an imminent public **disaster.**

→ absolute privilege＝NO LIABILITY

Surroco v. Geary (1853)

大火で火よけ地確保のために家を壊してもOK

Wegner v. Milwaukee (1991)

凶悪犯人が立てこもった家に集中砲火. 家屋に大ダメージ.

→ public necessityによりtortにはならない. taking clauseで被害者救済

**DEFAMATION**

Publication１of (false2) statements3 concerning P4 that causes damage to his reputation5

1. = revealed or communicated to a third person ※日本と異なり一人に言うだけで十分

含む: intentionally or **negligently** permitted a third party to hear

not strict liable しかし, 原則 not at faultがdefense

2. Falsity→**if relates to something that is of public concern→立証責任転換(後述)**

3. = allegation of the fact

※ Pure opinion = statement that cannot be proved to be true or falseは含まれない

Hyperbole = no reasonable person would believe the statementも含まれない

4. that specifically identifies P (of or concerning P)

5. presumed in libel and slander per se

→ General damage OK, emotional loss without proving that damages OK.

If not, special damages must be proven (e.g., lost of job, lost of gift)

Libel 　　　　　　　– **Written or printed** defamatory language (statement embodied in a relatively permanent form)

Slander – **Spoken** defamation

**Slander per se: about a plaintiff’s**

a) Performance in a **business** b) Having a **loathsome disease** (leprosy:癩病and venereal disease)

c) Commission of a **crime involving moral turpitude** d) **Unchastity** of a woman (sex before marriage)

**Fault** public figure or public official → malice (knowledge, reckless)

private figure 　　　　　　 → negligent

※ reasonably believed the statement is trueならnot liable∵strict liabilityではない

negligently publicized to the 3rd partyならliable.

Gertz v. Robert Welch, Inc. (1974)

Fact: Gertz was an attorney hired by a family to sue a police officer who had killed the family's son. In a magazine, the John Birch Society accused Gertz of being a "Communist-frontier"

Hold: Gertz was neither a public official nor a public figure.→malice is not required

Second, even for private individuals, states may not impose strict liability. P

must show negligence.

**Defense**

① **Consent**

② **Truth**「A看護師が派遣されると頻繁に麻酔薬がよくなくなる」ことは真実でもＡが盗んで

いなければdefenseにならない。

**→** the truth must refer to the defamatory “sting” (qualified privileg**eを検討すべき)**

③ **Absolute Privilege 嘘と知った上での悪意の発言でも免責**

1) communication between spouses

2) communication a) made during judicial proceedings

b) made on the floor of a legislature

c) made among high-ranking government officials

④ **Qualified privilege**:

　　 The communication is made

1) in good faith (真実と思って)

2) about subject in which he has **an interest or duty to be upheld**

3) within a scope limited to the interest

4) in a proper manner and to proper parties

**INVASION OF RIGHT TO PRIVACY**

**Commercial Appropriation** of Plaintiff’s Name or Likeness

1) Unauthorized use of

2) D’s name, identity or likeness (CAの定義)

3) for the D’s commercial purpose (defense: Newsworthy purpose)

※ Does not have to be a celebrity. Any person can bring suit.

※ 球場でのチアリーディングの様子を撮影 ⇒ 通常はassumption of risk適用

**Intrusion**, **False Light ＆ Disclosureまとめ**

1) Invasion of P’s solitude or seclusion 　 (**Intrusion**)

1)’ Publication of facts

a) concerning P that places the other in a false light (**False Light**)

b) concerning **the private life of** P 　 (**Disclosure**)

2) if it would be highly offensive to a reasonable person. (**共通**)

**Intrusion** **upon Seclusion Res 2nd /652B**

1) Intrusion on P’s solitude or seclusion of his private affairs

2) that is highly offensive to a reasonable person.

1)→ The plaintiff must have a reasonable expectation of privacy.

例: 寝室・手術室，携帯電話の会話

盗聴器をしかければ,通常intrusionとtrespass to chattels

**Portrayal in a False Light Res 2nd /652A E.**

1) Giving publicity to a matter concerning P (defamationと異なり1 person is not enough)

2) that places the other in a false light (misleadingも含む）

3) and the false light is highly offensive to a reasonable person.

　 　※ matter is in the public interest → malice must be proved.

※ reasonable belief / honest mistake is NOT a defense.

False light = offensive but not reputation harming (かえって名誉を高める場合もある)

裁判例：「９６歳女性が妊娠！」という嘘記事，「たくさんの勲章をもらった」というガセ

Defamation = reputation harming

**Public Disclosure of private facts　　Res 2nd /652D**

1) Giving publicity a matter concerning **the private life of** P

2) if the matter publicized (a) would be **highly offensive** to a reasonable person, AND

(b) is not of legitimate concern to the public.(**not newsworthy**)

Newsworthy exception

– The news can publish any newsworthy facts so long as they are true. (defamation

と異なりtruth defenseは本来は不可)

例:「あの人は今」で元天才の堕落した姿を報道→ OK Sidis v. F-R Publishing Corp(1940)

※ appropriationにも適用，false light, intrusionには適用無し

※ Information is true but must be confidential / private.

例：不動産購入・ゲイパレード参加はconfidentialでないから保護されない

※ A matter of public record cannot be the basis of a cause of action.(前科OKか調べたが不明)

※ Widespread dissemination of the information is required.

※ Proof of Special Damages is unnecessary.

・Plaintiff need not plead or prove special damages.

・Emotional distress are sufficient.

**Defenses**

Consent to all & Privilege for false light & disclosure

Truth, inadvertence, good faith, or lack of malice are NOT good defenses.

**Right to Privacy**の特徴– The right to privacy is a personal right and

1) not extend to members of a **family**, 2) not survive the **death** of the plaintiff,

3) not apply to **corporations** and 4) **not assignable**.

**その他のIntentional Tort**

**Economic Tort　　いずれも**pecuniary damages**が要件**

**前提：Negligent interference with contract right is not actionable.**

**To be tortious, the interference must be for an improper purpose**

例：子供のおかしな婚約を解消してもＯＫ．

“fair” economic competition for “proper” purposeは許される。

→下記prima facie caseは広いが, privileged when it is proper attempt

**①Inducing a Breach of Contract**:

1) **Existence of Valid contract** between P and 3rd party (which must NOT be terminable at will)

2) D’s **knowledge** of that contract.

3) D’s **Intentional acts** designed to **induce a breach** of the contract

4) Actual breach of the contract by the 3rd party = Damages

**②Interference with Contractual Relations　①とほぼ同じ, 太文字相違点**

1) Existence of a valid **contractual relationship** between P and 3rd party

(or valid business expectancy of plaintiffでＯＫの州も)

2) D’s knowledge of **the relationship** (or expectancy)

3) D’s Intentional acts designed to induce a breach or **disruption of the relationship**

4) Actual **disruption of the relationship** (or expectancy) = Damages

**③Misrepresentation**

Intentional or negligent Misrepresentation (Fraud / Deceit)

1) **Misrepresentation of a material fact** (Silence is generally not enough)

2) Scienter – knowingly or recklessly (know the statement is false or is reckless as to truth)

3) Intent – Intent to induce plaintiff to act or refrain from acting

4) Causation 　　= actual & justifiable reliance

it must be justifiable to rely on the misrepresentation and the party must in

fact rely on it

5) Damages – Actual pecuniary harm.

Negligent misrepresentation

In general no duty to avoid, only where there is special relationship (fiduciary relationship)

**司法手続の不当利用 ※essay頻出**

**Malicious Prosecution**  ※ Prosecutors are immune from liability

1) Institution of criminal proceedings against P by D (i.e. filing complaint with police)

2) **Termination in Plaintiff’s Favor**

3) Absence of **Probable Cause** – i.e. insufficient facts for a reasonable person to believe that

the plaintiff was guilty OR the D did not believe the P was guilty.

4) **Improper Purpose** – i.e. other than bringing the person to justice

5) Damages

※ 近年malicious prosecution of **civil claims**もWillers v. Joyce (NY.2016)など多数の州が認め

る (barexamでは認められること前提で出題あり)

probable cause→ reasonable and proper cause

※ 通常abuse of processとセットIIED, defamationなどもセットになる。

**Abuse of Process** (Civil or Criminal)

1) Intentional misuse of legal processes (e.g. depositions, subpoenas)

2) **primarily** to accomplish an **ulterior purpose** (目的が隠された = ulterior)

※ No need to await outcome of the underlying proceedings.

※ Doesn’t matter who ultimately wins in the underlying proceedings.

※ motion in proper form and with probable causeでも違法になる.

2nd§ 682 One who uses a legal process, whether criminal or civil, against another primarily to

accomplish a purpose for which it is not designed, is subject to liability to the other for

harm caused by the abuse of process.

**Strict Liability**

**１. Strict liability for animals**

1) wild animal / domesticated animal with **vicious propensity** (unless D knows)

2) injury **from the dangerous propensity**

※ domestic animalはthe owner knew or had reason to know of its dangerous propensityが要件

should knowを含むので知らなくても責任を負う

※ trespasserを怪我させても原則責任なし

例1 隣人の飼う蛇にかまれそうになり逃げたら骨折

⇒ strict liabilityだからcontributory negligence is not issue. foreseeableなのでliable

例2　　　　joggerのtrespassに腹を立ててスカンクを飼っておなら攻撃させる

⇒ wild animalだからstrict liability (undiscovered trespassかはduty of careの問題)

**２. Abnormally Dangerous Activities**

An actor who carries on **Abnormally Dangerous Activities** is subject to strict liability

①high risk of physical harm ② inability to eliminate risk ③ not common

③: using explosives, storing dangerous chemicals, fumigating, crop dusting, blasting with

dynamite, transporting toxic waste等

driving car, transmission or distribution of high-voltage electricityは多くの裁判で非該当

※ injured by a risk that makes the activity abnormally dangerousが要件

⇒ダイナマイト運送中、不可抗力で落下1)爆発でPが怪我→Strict liability, 2)当たってPが怪我→Negligence

※ foreseeability and within zone in dangerも要件

※ assumption of riskはdefense 「進入禁止」という看板を無視して危険がある土地に侵入して怪我

**３. Strict Products Liability (SPL)**

<注>必ずnegligence, breach of warranty (expressであればmisrepresentation)も忘れない

∵判例の流れ①契約責任→②過失責任→③無過失責任，危険ならabnormal dangerous activityも

To establish prima facie case of a strict liability claims of products liability,

plaintiff must show

1) D is a **commercial supplier** (**Commercial Seller or Distributor**)

2) Product has a **Defect when it leaves defendant’s control**

3) the defect is a) **actual and** b) **proximate** cause and

※ a)≒Alteration: the products was not altered since leaving the D’s control) and

b)≒Misuse : the P was making foreseeable use of the products

4) P suffers **damages. ※** damagesがあるよ！ということも必ず論述が必要

**0) Proper Plaintiff**

Bystander is a proper plaintiff because privity between a commercial supplier and a

plaintiff is not required – users, buyers, and bystanders can sue.

**1) Proper Defendants**

**D : Commercial Seller or Distributor** (× non merchant, × service provider)

Manufacturer and all sellers in the distribution chain who **routinely** deals in the goods at issue.

※ 鉄道会社は車輪の，食堂は椅子の，重機メンテナンス会社は重機のdefectsにSPL責任なし

　　　　　　　※ サービスが中心の契約には適用無し（product dominate the transactionを要する）

→ doctor providing a defective medicineにSPLの適用はない。

※ 売る予定のない商品が盗まれたのであればcommercial seller of the product in questionでない

**2) Defect**

Manufacturing Defect

1)　Product does **not conform to design**

2) The product failed to perform as safely as an **ordinary consumer would expect**

because of the non-conformity.

Design defect

　短く論じる時

**A design defect exists when “the risk could have been reduced by the adoption of a reasonable (cost effective) alternative design”** (Res 3rd§2(b))

長く論じる時：②が現代の通説，CAは①②両方併用

① Consumer expectation test (Res.2nd) simple design向き

A product is defective in design

if it fails to perform as safely as **an ordinary consumer would expect**.

② Risk-Utility Test 　 complicated design向き

(Manufacturing defectには適用ない, 考慮すべき事項に通説無し)

A product is defective in design

if the risk of the design outweighs the utility of the design,

　RISK　1) **likelihood** of injury

2) **Gravity** of injury

Utility　1) **Availability of a safe alternative** design

2) **Effects** of the alternative design

3) **Cost** of the design 　(以上はRes.のコメントの評価事項の一部)

※ Patent Danger Rule: Unavoidably unsafe products (e.g. vaccines)はdesign defect適用無し(risk < utilityでも, adequate warningは必要)

MBE：多少高額の安全製品と危険製品の販売。いかに危険であることを警告していてもDesign defect

の責任は逃れられない⇒ 例外は危険を実質的に避けられない製品のみ

　　　Failure to warn※ 通説的規範無し，以下裁判例から自作

The product is defective when the failure to give **adequate warning** as to **non-obvious** danger renders the product not **reasonably** safe.

= Product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

**Adequate warning** is determined by the standard “of reasonableness in the circumstances.”

Among the factors to be considered are Res.3d, §2, comment. i

1) the gravity of the risks …,

2) the likelihood that the intermediary will convey the information to the ultimate user, and

3) the feasibility and effectiveness of giving a warning directly to the user.”

Causation: P would not have used the product or would not have used it in the way he did.

but for the adequate warning の証明はもちろん必要

**3)** **Causation**

**a) Product has NOT been ALTERED** (Actual cause)

Product are presumed not altered if it moved through normal channels of distribution.

The plaintiff cannot recover if 3rd party or plaintiff unforeseeably changes the products

AND change makes it dangerous.

**b) P must be making FORESEEABLE USE of product when injured** (Proximate cause)

= Plaintiff used the product in an intended or reasonably foreseeable manner

※ multiple causeが存在しsubstantial factor testが問題となる例が多い

※ an unforeseeable force that is so culpable will be seen as superseding

⇒ 欠陥を知りつつセラーが販売継続しても製造業者は責任を負わない

Learned intermediary doctrine

A manufacturer has fulfilled his duty of care, if he provides a warning to a reseller (= a "learned intermediary") who then interacts with the consumer of a product.

⇒ Resellerが適切に警告しないことはsuperseding causeになる。 ※ intermediary=仲介人

**4)** **Damages**

**Personal injury** and **Property Damage** are recoverable > than damage to the product itself

※ NO recovery for **economic loss** standing alone.

※ damage to the product itselfしかなければnegligenceも不可。warranty違反しかいえない。

**DEFENSE**

1) **Assumption of the risk**

a) P knows the defect, b) comprehends the consequences and

c) voluntarily elects to expose himself to that danger

2) **Comparative Fault** (認めない州も多い)　＝Knowledge of the Danger

(contributory negligenceは適用されない，他のstrict liabilityでも同様)

3) **Misuse of product　＆　Alteration**上記の通りcausationの問題だが抗弁でも論じる

**Implied Warranties**

※ 契約関係必要要件は近年緩和. しかし, 免責有効が問題. 経済的損失にも及ぶ点が有意義

**Implied warranties of merchantability and fitness** （過失不要）

A warranty of merchantability is implied if the seller is merchant.

Goods to be merchantable must be of **fair average quality** and fit for the **ordinary purposes**.

**Implied warranties of fitness for a particular purpose**

A warranty of fitness for a particular purpose is implied if the seller knows or has reason to know the particular purpose. (for which the goods are required and that the buyer is relying on the seller’s skill and judgment in selecting the goods.)

Who can sue? – Buyer, family, household and guests can sue for personal injuries

Damages – Property, personal injury, AND **purely economic** **loss** are recoverable.

Disclaimers – are valid.

**Express Warranty**

Any **affirmation of fact** or **promise** concerning goods that becomes part of the **“basis of**

**the bargain”** creates an express warranty.

Who can sue? – Any consumer, user or bystander may sue

but must show that someone relied on the representation.

Disclaimers – Disclaimers are ineffective.

**Misrepresentation of Fact**

A seller is liable for misrepresentations when:

1) statement was of a **material fact**

2) concerning the **quality or uses** of goods (mere puffery is insufficient), AND

3) The seller **intended to induce reliance** by the buyer in a particular transaction.

4) **Justifiable Reliance** – The representation was a substantial factor in inducing the purchase.

Damages – Must show property or personal injury damages.

Purely economic loss is not recoverable.

**Negligence**

・Res ipsa loquitur takes the place of manufacturing defect

・Any foreseeable plaintiff is entitled to bring an action

・Negligence defense apply

**VICARIOUS LIABILITY**

**※** 必ずemployer固有のnegligence = direct liabilityから検討する。

　 vicarious liabilityは法定の無過失責任。

　 例: 精神病院で看護師が患者に強制わいせつ

→後述の通り故意の不法行為のためvicarious liabilityは厳しい可能性ある(法域による)

しかし,現実にはdirect liabilityで広く救済されている。

　① Employer-Employee Relationship (**Respondent Superior**)

※ applies to partnership and joint JV

Employer is generally liable for torts of the employee, if he was acting **within the scope of the employment**.

**Within the scope**

**a) assigned by the employer or**

**b) engaging in a course of conduct subject to the employee’s control Res. Agency**

exception (NOT within the scope of the employment 上記基準で解決可)

(1) Frolic or Detour: not liable for the employee’s actions **during the frolic** ※detourは負う

(2) **Intentional tort** unless it is

a)Specifically **authorized** by the principal, (bouncer)

b) **Natural from the nature** of employment (Repo Man)

c) Motivated by a **desire to serve the principal**

※ negligent hiring or supervisingがあればdirectly liable

② Hiring party-Independent contractor

General rule: Hiring party is **not liable**.

Exceptions: (1) Engaged in **inherently dangerous** activity.

(2) The principal has the duty that is **nondelegable** on public policy grounds**.**

Ex. **Land occupier's duty** of care to keep her land safe for business **invitees.**

**ホテルは工事業者の工事ミスによる危険にも責任がある。**

**∵** a possessor of land open to the public owe the duty to keep

the premises reasonable safe. Such a duty cannot be delegated.

**※** The more the employer controls 1) means 2) method 3) manner of work，

→ the more they are employees

③ Automobile Owner-Automobile Driver

The automobile owner is NOT liable for the **tortious conduct of another** person

driving his automobile.

Exceptions

Family Car – In many states the owner is liable for the conduct of immediate family or

household members who are driving with the owner’s permission.

Negligent Entrustment – An owner may be liable for her OWN negligence in entrusting

the car to a driver (Drunk person) ※ Not vicarious liability

1) D gives something dangerous

2) to someone D knows or should know

3) is incapable of handling the dangerous object

④ Tavern keepers – At common law, NO liability for injuries resulting from the customer’s

intoxication. Modernly, Dram shop Acts OR negligence suits are used.

⑤ Parents 　　　　– No vicarious liability.

1) negligent supervision 2) negligent entrustmentで固有の責任

**NUISANCE** (Type of harm, Not a separate tort in itself) (can be done intentionally, negligently or without fault)

Private Nuisance

1) **A substantial and unreasonable interference**

2) with P's private **use and enjoyment** of his land.

・Substantial interference – interference that is **offensive** or annoying to the **average**

**person** in the community. (Objective test)

**※** 主観的には迷惑うけてなくても請求可能 ∵客観基準

・Unreasonable Interference – The severity of the inflicted injury **must outweigh the**

**utility** of the defendant’s conduct.

嫌がらせ目的だけで夜にライト点灯**＝** NO utility→unreasonable

※1) the value of the D’s activity, 2) alternatives to both to minimize the harm,

3) the nature of locality, 4) extent of the injury, 5) who was there firstなどから判断

・P must actually possess the land or have a right to immediate possession.

　所有者でなく借主がstandingを有する

・D must be notified, and the D’s continued action establishes intent.

Public Nuisance 　Res 2nd§825

1) **An unreasonable interference**

2) with a **public right** (the health, safety, or property rights)

Standing

In public nuisance cases, only a **public authority** or a private party who has suffered some

**unique damage**s can seek an injunction or abatement.

**Defenses**

Legislative Authority 　– Zoning ordinance for nuisance activity is persuasive.

Contributory Negligence – Is NOT a defense.

Coming to the Nuisance 　　　　– NOT a defense. He may still file a lawsuit for nuisance unless you

came to the nuisance for the purpose of **bringing a harassing lawsuit.**

※ nuisanceが出題されるessayでは常に論じるべき

**当事者の死亡**

伝統的には被害者加害者のいずれかが死亡したら訴訟は終わり

1. **Survival act** (訴権存続法) 死亡までの訴権の存続，即死であれば適用なし。

　論証例: The widow may sue under a survival act as a representative if the decedent survived for a

even brief period of time or under wrongful death statute as a widow.

2. **Wrongful death statute** (生存近親者訴権付与法) 金銭的損失のみ。慰謝料など請求不可。

→重症の場合配偶者がloss of consortium (relationship and sex)が認められているのと不均衡

(なお，死亡の場合も配偶者にloss of consortiumは認められる)

　※ Widows’ claim 1) lost earnings 2) loss of consortium 3) negligent infliction of emotional distress