

# MBE Subject Matter Outline: Torts

- NOTE: Examinees are to assume that survival actions and claims for wrongful death are available. Joint and several liability, with pure comparative negligence, is the relevant rule unless otherwise indicated.
- Approximately half of the Torts questions on the MBE will be based on category II, and approximately half will be based on the remaining categories—I, III, and IV.

# MBE Subject Matter Outline: Torts

## I. Intentional torts

### A. Harms to the person, such as:

- Assault
  - Battery
  - False imprisonment, and
  - Infliction of mental distress
- Harms to property interests, such as:
- Trespass to land and chattels, and
  - Conversion



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## B. Defenses to claims for physical harms

### 1. Consent

### 2. Privileges and immunities:

- Protection of self and others;
- Protection of property interests;
- Parental discipline;
- Protection of public interests;
- Necessity; and
- Incomplete privilege



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## II. Negligence

- A. The duty question, including failure to act, unforeseeable plaintiffs, and obligations to control the conduct of third parties
- B. The standard of care
  1. The reasonably prudent person: including children, physically and mentally impaired individuals, professional people, and other special classes
  2. Rules of conduct derived from statutes and custom

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C. Problems relating to proof of fault, including res ipsa loquitur

D. Problems relating to causation

1. But for and substantial causes
2. Harms traceable to multiple causes
3. Questions of apportionment of responsibility among multiple tortfeasors, including joint and several liability



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## E. Limitations on liability and special rules of liability

1. Problems relating to “remote” or “unforeseeable” causes, “legal” or “proximate” cause, and “superseding” causes
2. Claims against owners and occupiers of land
3. Claims for mental distress not arising from physical harm; other intangible injuries
4. Claims for pure economic loss

## F. Liability for acts of others

1. Employees and other agents
2. Independent contractors and nondelegable duties

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## G. Defenses

1. Contributory fault, including common law contributory negligence and last clear chance, and the various forms of comparative negligence
2. Assumption of risk



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## III. Strict liability and products liability, including

- Common law strict liability, including claims arising from abnormally dangerous activities and defenses to such claims;
- Claims against manufacturers and other defendants arising out of the manufacture and distribution of products, and defenses to such claims

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## IV. Other torts

- I. Claims based on nuisance, and defenses
- II. Claims based on defamation and invasion of privacy, defenses, and constitutional limitations
- III. Claims based on misrepresentations, and defenses
- IV. Claims based on intentional interference with business relations, and defenses



# MBE Sample Question: Torts

- A homeowner was using a six-foot stepladder to clean the furnace in his home. The homeowner broke his arm when he slipped and fell from the ladder. The furnace had no warnings or instructions on how it was to be cleaned.
- In a suit by the homeowner against the manufacturer of the furnace to recover for his injury, is the homeowner likely to prevail?

# MBE Sample Question: Torts

- A. **No**, because the danger of falling from a ladder is obvious.
- B. **No**, because the homeowner should have hired a professional to clean the furnace
- C. **Yes**, because the furnace did not have a ladder attached to it for cleaning purposes
- D. **Yes**, because the lack of warnings or instructions for how to clean the furnace made the furnace defective.

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- **A** is the best answer. A manufacturer has no obligation to warn against obvious dangers. While a manufacturer's failure to warn of a danger can itself make the product defective and trigger strict liability, the seller or manufacturer of a product is generally not liable for failing to warn against a danger that should be obvious to foreseeable users of the product. Here, the ordinary dangers of working on a ladder are obvious. There does not seem to be anything about using a ladder to clean *this* furnace that increases the danger of ladder use, so the lack of a warning about the general danger of using a ladder does not make the furnace defective.

# MBE Sample Question: Torts

- A customer fell and injured himself when he slipped on a banana peel while at a grocery store. The banana peel was fresh and clean except for a mark made by the customer's shoe. In an action brought against the grocer by the customer, these are the only facts in evidence.
- Should the trial judge permit the case to go to the jury?

# MBE Sample Question: Torts

- A. **No**, because the customer had an obligation to watch where he stepped.
- B. **No**, because there is not a reasonable basis for inferring that the grocer knew or should have known of the banana peel.
- C. **Yes**, because it is more likely than not that the peel came from a banana offered for sale by the grocer.
- D. **Yes**, because the grocer could foresee that a customer might slip on a banana peel.

# MBE Strategy: Torts

- Don't try to come up with a perfect answer. Eliminate the wrong answers and choose the best answer that's left.
- Eliminate the major sources of liability and eliminate answer options that relate to irrelevant ones.
- In tort, major sources of liability are: intentional tort; negligence; strict liability.
- Ask what is the most likely source of liability here? Does that help eliminate any options?
- Shortcut: liability under negligence requires unreasonable behavior. Was defendant's conduct reasonable? If so, liability is unlikely.

# MBE Sample Question: Torts

- Correct answer: B.
- The question is really about *res ipsa loquitur*. But you can reach the right answer by elimination. There is no evidence to support intentional tort or strict liability, so only possible source of liability could be negligence. There is no evidence of negligence, as the banana peel was said to be “fresh and clean”, so no showing that anyone had an opportunity to clean it up. Only choices left are the ones where the customer loses, A or B.
- A is not right because a claim of the customer’s contributory fault would not prevent the case from going to the jury, which is what the **call of the question** asked. The answer left is B.