**Torts**

**Intent**

Intent may be either: 1) specific (the goal in acting is to bring about specific circumstances); or 2) general (the actor knows with a substantial certainty that these consequences will result).

**Battery**

A battery requires: 1) a voluntary intentional act by the defendant; 2) which causes a harmful or offensive contact to the plaintiff’s person. The defendant need not intend injury. All that is necessary is that the defendant intends to bring about a harmful or offensive contact. The defendant is liable not only when he directly causes harmful or offensive contact, but also when he sets in motion a force that brings about such contact. Harmfulness and offensiveness are judged by a reasonable person standard.

**Assault**

An assault is 1) a voluntary intentional act by the defendant; 2) which places the plaintiff in apprehension of an imminent harmful or offensive contact to his person. The plaintiff need not be placed in fear of the contact. An apprehension of a contact that is offensive is sufficient. The apparent ability to inflict contact is all that is that is needed. The fact that it couldn’t be carried out is irrelevant. The act requirement generally is not satisfied by words alone, however, there usually has to be some volitional movement of the body for there to be a reasonable apprehension of imminent contact. Words, however, can negate reasonable apprehension. Under the doctrine of transferred intent, the intent to inflict battery satisfies the intent requirement of assault.

**False imprisonment**

False imprisonment requires: 1) a voluntary intentional act or omission by the defendant; 2) that confines or restrains the plaintiff to a bounded area; and 3) causation. Sufficient acts of restraint include: 1) physical barriers; 2) physical force; 3) threats of force; 4) failure to release; and 5) invalid use of legal authority. Insufficient threats of restraint include: 1) moral pressure; and 2) future threats. It is irrelevant how short the period of the confinement is. The plaintiff must either know of the confinement or be harmed by it. For an area to bounded, freedom of movement must be limited in all directions. There must be no reasonable means of escape.

*Shopkeeper’s privilege*

In Florida, shop keeper’s privilege also applies to farmers and mass transit.

**Intentional infliction of emotional distress**

To establish a prima facie case for intentional infliction of emotional distress in Florida, the following elements must be proved: 1) an act by the defendant amounting to extreme and outrageous conduct; 2) intent on the part of the defendant to cause plaintiff to suffer severe emotional distress or recklessness as to the effect of defendant’s conduct; 3) causation; and 4) damages (i.e., severe emotional distress). Extreme and outrageous conduct is conduct that transcends all bounds of decency. Conduct that is not normally outrageous may become so if: 1) it is continuous in nature; 2) it is directed toward a certain type of plaintiff (children, elderly, pregnant); or 3) it is committed by a certain type of defendant. Physical impact or physical manifestation of psychological trauma is not required to state a claim.

If a defendant is sued for defamation and successfully invokes a qualified or absolute privilege in defense, a plaintiff may not bring a cause of action for intentional infliction of emotional distress based solely on the defamatory publication.

**Trespass to land (2)**

To establish a trespass to land, a person in actual or constructive possession on the land must show: 1) A voluntary intentional act by the defendant; 2) which physically invades the property. Damages need not be shown. The defendant need intend only to enter the land; he need not know that the land belonged to another.

**Trespass to chattels**

To establish a prima facie case for trespass to chattels, the following elements must be proven: 1) a voluntary intentional act by the defendant; 2) that interferes with the plaintiff’s right of possession in the chattel (not serious enough to warrant the defendant to pay full value); and 3) causation; and 4) damages. The interfere may be either directly damaging the chattel or depriving the plaintiff of the right of possession of it.

**Conversion (1)**

To establish a prima facie case for conversion, the following elements must be proved: 1) an voluntary intentional act by the defendant; 2) that interferes with the plaintiff’s right to possession in the chattel that is serious enough in nature or consequence to warrant the defendant to pay the full value of the chattel; and 3) causation. If successful, the plaintiff may recover possession or the fair market value of the chattel at the time of conversion.

**Consent (1)**

A defendant is not liable for an otherwise tortuous act if the plaintiff consented to the defendant’s act. In addition to express consent, consent may be inferred as a matter of custom and usage (e.g., minor bumping in a crowd) or implied by law (e.g., in an emergency situation).

**Self defense (1)**

In Florida, a person is justified in the use of force against another when and to the extent that he reasonably believes it necessary to defend himself or a third party against the other’s imminent use of unlawful force. A person who is not engaged in an unlawful activity and who is attacked in any place where she has a right to be has no duty to retreat and has the right to use force, including deadly force if she reasonably believes it is necessary to prevent death or great bodily harm to herself or another or to prevent the commission of a forcible felony (i.e., treason, murder, manslaughter, burglary, robbery rape, aggravated assault, and aggravated battery).

A person is presumed to have a reasonable fear of death or great bodily harm to herself or another if: 1) the person against whom defensive force was used had unlawfully and forcefully entered a dwelling, residence, or occupied vehicle, or was in the process of doing so, or was attempting to remove another against that person’s will for a dwelling, residence, or occupied vehicle; and 2) the person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or act had occurred or was occurring.

**Defamation (3)**

*Notice requirement*

At least 5 days before initiating an action for defamation against a media defendant, a plaintiff must serve the media defendant with written notice describing the alleged defamatory statement. If media defendant retracts the defamatory statement within 10 days of the receipt of such notice, and if the original publication was made in good faith, then only actual damages may be recovered.

*Elements*

In Florida, the elements of a prima facie case for defamation are: 1) a statement of fact (as opposed to opinion); 2) defamatory effect from the statement; 3) identification of the plaintiff as the subject; 4) publication to at least one third party other than the plaintiff; 5) compensable damages to the plaintiff; 6) falsity of the statement; and 7) requisite fault by the defendant. Florida courts have not yet decided whether the elements of falsity and fault apply to all defamation cases or only to those against media defendants or involving matter of public concern. To the extent that falsity isn’t part of the prima facie case, truth is a defense.

*Distinguishing fact and opinion*

Florida courts distinguish fact and opinion by: 1) examining the statement in totality and in context; 2) weighing cautionary terms used by the publisher; and 3) considering all of the surrounding circumstances. The statement is then classified as: 1) pure opinion, which is not actionable; 2) mixed opinion and fact, which is actionable because there is an undisclosed set of defamatory facts underlying the opinion; or 3) a statement of fact, which is actionable, if false and defamatory.

*Degree of fault*

The degree of fault that the plaintiff must prove depends on the plaintiff’s status and the nature of the concern. If the plaintiff is a private and the nature of the concern is public, then the plaintiff must prove negligence on the part of the defendant in discovering the falsity of the statement. In contrast, if the plaintiff is public figure or a public official, the plaintiff must prove by a preponderance of the evidence that the defendant acted with express malice, that is, that the statement’s primary motive and intent was to injure the plaintiff’s reputation. Thus, if defamer is motivated by a desire to protect a property interest, he does not lose the privilege merely because he also feels hostility towards the plaintiff.

*Public figure*

A public figure is one who voluntarily injects himself into the public eye or who has achieved such pervasive fame and notoriety that he is known to the general public.

*Damages rules for libel*

Florida does not distinguish between libel per se and libel per quod. Presumed damages are permitted, at least where a media defendant is involved. Some evidence of actual injury must be established, i.e., loss of reputation, humiliation, mental anguish and suffering, as well as out of pocket loss.

*Qualified privilege*

Qualified privilege exists where the communication is: 1) made in good faith; 2) made by someone with an interest or duty regarding the subject matter; 3) limited to such interest or duty in its scope; 4) given appropriately; and 5) made in a proper manner.

**Invasion of privacy**

The tort of invasion of privacy includes: 1) appropriation of the plaintiff’s name or likeness commercial or trade purposes; 2) intrusion upon the plaintiff’s affairs or seclusion; and 3) public disclosure of private facts about the plaintiff.

*Commercial appropriation*

To prevail under Florida unauthorized appropriation statute, the plaintiff must establish: 1) the D’s public use of the person’s name, portrait, photograph, or likeness for advertising or trade purposes; 2) lack of express consent, written or oral; 3) lack of newsworthiness; and 4) injury.

*Intrusion upon seclusion*

To establish a prima facie case for intrusion upon seclusion, the plaintiff must prove the following elements: 1) an unauthorized physical, electronic, or mechanical intrusion by the defendant; 2) into P’s private space; and 3) the intrusion would be highly offensive or objectionable to a reasonable person of ordinary sensibilities.

*Public disclosure*

In order to establish a prima facie case for public disclosure of private facts the plaintiff must prove: 1) public disclosure; 2) of a private fact; 3) which would be highly offensive to a reasonable person; and 4) that the disclosure is not newsworthy, i.e., of a legitimate public concern. There is no requirement that the private facts be false. The disclosure, however, must be public, meaning that the facts were made available to the general public, or at least large group of people, as opposed to a single person. If the disclosure is newsworthy, the plaintiff must establish he disclosure was made with malice.

*False light*

Florida does not recognize the tort of publication of facts placing the plaintiff in a false light because it is largely duplicative of defamation, which allows recovery for literally true statements that create a false impression.

**Misrepresentation**

*Intentional*

To establish a prima facie case for intentional misrepresentation, the plaintiff must prove: 1) misrepresentation of material fact (no duty to disclose and opinion is not actionable unless rendered by someone with superior skill); 2) scienter, i.e., when the defendant made the statement he knew or believed it was false or that there was no basis for the statement; 3) intent to induce the plaintiff to act or refrain from acting in reliance upon the misrepresentation; 4) causation; 5) justifiable reliance; and 6) damages (plaintiff must suffer actual pecuniary loss).

*Negligent*

To establish a prima facie case for negligent misrepresentation, the plaintiff must prove: 1) misrepresentation by a defendant in a business or professional capacity; 2) breach of duty toward a particular plaintiff; 3) causation; 4) justifiable reliance; and 5) damages.

**Negligent infliction of emotional distress**

The duty to avoid causing emotional distress to another is breached when the defendant creates a foreseeable risk of physical injury to the plaintiff, either by: 1) causing a threat of physical impact that leads to emotional distress; or 2) directly causing severe emotional distress that by itself is likely to result in physical symptoms. Physical impact is required. Physical impact occurs when an outside force, no matter how small and no matter whether invisible to the eye, touches or enters the plaintiff’s body and causes harmful effects, even if the effects are not immediately discernible.

*Bystander recovery in absence of physical impact*

No impact is required if there are physical injuries caused by anxiety about the safety of another if such injury is reasonably foreseeable and proximately caused by the defendant. In addition to foreseeability, however, the following elements must be proved: 1) the defendant negligently injured a party with whom the plaintiff has an especially close emotional attachment; 2) the negligent injury occurs within the sensory perception of the plaintiff (e.g., plaintiff is directly involved in the event causing the injury, see or hears the event, or arrives upon the scene while the injured party is still there); and 3) the plaintiff suffer a causally connected, clearly discernible physical impairment following the psychic trauma.

**Tortious interference with business relations (2)**

In Florida, an intentional inference with a business relationship requires 1) an existing business relationship 2) evidenced by an actual identifiable agreement 3) that in all probability would have been completed had the defendant not interfered. No cause of action

There must be: 1) a valid contractual relationship or business expectancy between the plaintiff and a third party; 2) the defendant must have had knowledge of the business relationship or expectancy; 3) the defendant’s intentional interference must have induced a breach or termination of the relationship or expectancy; and 4) the breach or termination resulted in loss to the plaintiff. No cause of action exists for totrious interference with a business relationship to the community at large. Damages cannot be recovered where the relationship is based on speculation regarding sales to past customers.

**Malicious prosecution**

Ti establish a prima facie case for malicious prosecution, the following elements must be proven: 1) the institution of criminal proceeding against the plaintiff; 2) termination in the plaintiff’s favor; 3) absence of probable cause for prior proceedings; 4) improper purpose; and 5) damages. Prosecutors are immune from liability.

**Negligence**

To establish a prima facie case for negligence, a plaintiff must prove: 1) the existence of a duty on the part of the defendant to conform to a specific standard of conduct for protection of the plaintiff against an unreasonable risk of injury; 2) a breach of that duty by the defendant; 3) the breach is the actual and proximate cause of the plaintiff’s injury; and 3) damage to the plaintiff’s person or property.

*Duty*

A duty of care is owed to all foreseeable plaintiffs that fall within the zone of danger created by the defendant’s conduct. The extent of the duty owed is determined by the applicable standard of care. Generally, a defendant owes foreseeable plaintiffs the duty to conform his conduct to that of a reasonable, ordinary, prudent person under similar or like circumstances. This is an objective standard.

*Breach*

Where the defendant’s conduct falls below the applicable standard of care, he has breached that duty.

*Negligence per se*

To establish negligence per se the plaintiff must prove: 1) the plaintiff is a member of the class of persons the statute is seeking to protect; and 2) the accident that occurred is in the class of risks that the statute is trying to prevent. If this is established, there is a conclusive presumption of duty and breach of duty.

When a statute is designed to protect a particular class from their inability to protect themselves, the statute imposes strict liability standard for which the plaintiff’s contributory negligence is no defense.

In Florida, a traffic violation is not considered negligence per se. It is only evidence of negligence.

*Res ipsa loquitor*

The plaintiff may invoke the doctrine of res ipsa loquitur and where: 1) the accident causing the plaintiff’s injury is a type that would not normally occur unless someone was negligent; and 2) the instrumentalities causing the accident were in the defendant’s exclusive control; and 3) the injury was not the plaintiff’s fault. Where res ipsa is established, there is an inference of duty and breach of duty. The plaintiff has made a prima facie case and directed verdict may be given for the defendant.

*Causation*

Once negligent conduct is shown that plaintiff must establish that such conduct was both the cause in fact and the proximate cause of his injury. A breach is the cause in fact of an injury where the injury would not have occurred “but for” the breach.

Where joint causes bring about an injury, and any one alone would have been sufficient to cause the injury, the plaintiff may establish actual cause by showing that the defendant conduct was a “substantial factor” in causing the injury.

A defendant is generally liable for all harmful results that are the normal incidents and within the increased risk caused by his acts. The breach will be considered the proximate cause of the plaintiff’s injury if such injury was foreseeable consequence of the breach.

*Damages*

Damages are an essential element of negligence, and thus will never be presumed.

**Premises liability**

*Business invitee*

In Florida, the owner of a business premises owes a duty of reasonable care to maintain the premises in a reasonably safe condition for business invitees. This includes reasonable efforts to keep the premises free from transitory foreign objects or substances that might be foreseeably give rise to injury. To prevail, a slip and fall plaintiff must prove that the defendant had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it. Constrictive knowledge may be proven by circumstantial evidence showing that: 1) a dangerous condition existed for such a length that, in the exercise of ordinary care, the business establishment should have known of the condition; or 2) the condition occurred with regularity and was therefore foreseeable.

*Professionals*

For doctors and healthcare professionals, Florida law imposes a standard of care based on what is recognized as acceptable and appropriate by reasonably prudent similar health care providers in light of all relevant circumstances.

*Undiscovered trespasser*

An undiscovered trespasser is a person who enters property without an express or implied invitation, and whose physical presence was not detected within 24 hours preceding the accident. To avoid liability, a landowner must refrain from intentional misconduct that proximately causes injury, but has no duty to warn of dangerous conditions.

*Discovered trespassers*

A discovered trespasser is someone who enters property without express or implied invitation, and whose presence detected within 24 hours preceding the accident. To avoid liability, a landowner must refrain from gross negligence or intentional misconduct that proximately causes injury, and must warn of dangerous conditions that are known, but are not readily observable.

*Uninvited licensees*

Uninvited licensees are people who choose to come onto the premises solely for their own convenience without invitation. There are owed the same duty as discovered trespassers. In effect they have eliminated the licensee category. There is no liability for a person who is attempting to commit a felony on the property.

*Licensees by invitation*

Licensees by invitation are social guests and other persons who are on the property through the express or implied invitation of the owner. Licensees by invitation are treated like invitees, and thus are owed a duty of reasonable care under the circumstances.

*Fighter fighters and police officers*

Florida has abolished the Firefighter’s rule, which characterized a firefighters and law enforcement officers as licensees. In Florida, a firefighter or properly identified law enforcement officer who lawfully enters the premises of another within the scope of their employment is treated like a invitee, and thus is owed a duty of reasonable care under the circumstances.

*Attractive nuisance*

To establish apply the doctrine of attractive nuisance, the plaintiff must prove : 1) a dangerous condition on the land that the owner is or should be aware of; 2) the owner knows or should know children frequent the vicinity of the condition; 3) the condition is likely to cause injury, i.e., dangerous because of child’s inability to appreciate the risk; 4) the expense of remedying the situation is slight compared with the magnitude of the risk; and 5) the plaintiff was lured onto the premises by the dangerous condition.

**Defenses**

*Assumption of risk*

In Florida, a plaintiff may be denied recovery is she expressly assumed the risk of any damage caused by the defendant’s act. To establish assumption of the risk, it must be proven that: 1) the plaintiff knew of the risk; and 2) voluntarily proceeded in face of the risk. Florida has abolished implied assumption of the risk.

*Pure comparative negligence*

Florida has adopted the doctrine of pure comparative negligence. Under this approach, any party may have a claim for damages unless he was 100% at fault. The percentage of fault of the plaintiff and the defendant is calculated based on the comparative fault of all parties to the injury causing the vent, regardless of whether they are joined in the suit or whether they could be joined. Florida has abolished joint and several liability. The court must enter judgment against each defendant on the basis of each party’s percentage of fault as determined by the jury.

In Florida, a plaintiff may not recover any damages if the trier of fact finds that, at the time the plaintiff was injured 1) the plaintiff was legally drunk (i.e., a blood alcohol level of .08% or higher); and 2) as a result of such impairment, the plaintiff was more than 50% at fault for his own harm.

The fact that a person is injured when failing to wear an automobile seat belt, when required by law to do so, may be considered as evidence of comparative negligence in any civil action.

**Inherently dangerous activities**

There are three requirements for the application of strict liability for an inherently dangerous activity: 1) the activity must involve a risk of serious harm to persons or property; 2) the activity must be one that cannot be performed without risk of serious harm no matter how much care is taken; and 3) the activity is not commonly engaged in in the particular community.

**Liability for animals**

In Florida, an owner is strictly liable for injuries caused by his dog, regardless of the former viciousness of the dog or the owner’s prior knowledge of such viciousness. But, in absence of negligence, the owner is not liable, except as to a person under the age of six, if at the time of any such injury: 1) the person is not lawfully on the premises; or 2) the owner has displayed in a prominent place on his premises an easily readable sign including the words “Bad Dog.” Any negligence on the part of the person bitten that proximately contributes to the biting incident reduces liability of the owner of the dog by a percentage that the bitten person’s negligence contributed to the accident.

**Products Liability**

To find liability under any product liability theory, the plaintiff must establish that the product was defective when the product left the defendant’s control.

***Negligence***

*Duty*

A duty of care is owed to all foreseeable plaintiffs

*Breach*

To establish breach the plaintiff must prove: 1) negligent conduct on behalf of the defendant; 2) which lead to the supply of the defective product. The conduct must fall below that of a reasonable, ordinary, prudent person taking into consideration the superior skill and training the manufacture expects to have.

Manufacturing defect

A product is defectively manufactured where it emerges from the manufacturing process not only different from the other products, but also more dangerous than if it had been made the way it should have been. To prove the defect, the plaintiff must show that the product failed to perform as safely as an ordinary consumer would expect.

Design defects

A product is defectively designed when all of the products of a line are made identically according to the manufacturing specifications, but have dangerous propensities because of their mechanical failures or packaging. To prove the defect, the plaintiff must show a reasonable alternative design that at the time of manufacture was both economically and pragmatically feasible. To establish that the defendant’s negligent resulted in a design defect, the plaintiff must show that those designing the product knew or should have known of enough facts to put a reasonable manufacturer on notice about the dangers of marketing the product as designed. Negligence is not shown if the danger of the product becomes apparent to a reasonable manufacturer only after the product has reached the public.

Inadequate warnings

A product may be defective as a result of the defendant’s failure to give adequate warnings as to the risks involved in using the product. For liability to attach the danger must not be open and obvious. A manufacture has the duty to warn of all foreseeable misuses. Plaintiffs are entitled to the presumption that an adequate warning would have been read and heeded.

Government safety standards

In Florida, there is a rebuttable presumption that the product is not defective or unreasonably dangerous if, at the time the specific product was sold or delivered to the initial purchaser or user, the aspect that allegedly caused the harm: 1) complied with federal and state codes, statutes, rules, regulations, or standards relevant to the event causing death or injury; 2) the codes or standards were designed to prevent the type of harm the allegedly occurred; and 3) compliance with the codes or standards is required as a condition for selling ir distributing the product. Conversely, there is a presumption that the product is defective or unreasonably dangerous if the manufacturer or seller did not comply with the relevant codes or standards.

These presumptions do not apply to an action brought for harm allegedly caused by a drug that is ordered off the market or seized by the FDA.

A dealer who markets goods from a reputable manufacturer, with no reason to anticipate that the product is dangerous need only make a cursory inspection of the goods to avoid liability.

***Strict Products Liability***

To establish a prima facie case in products liability based on strict products liability, the plaintiff must establish: 1) a strict duty owed by a commercial supplier; 2) breach of that duty; 3) actual and proximate cause; and 5) damages.

*Duty*

A strict duty is imposed on all commercial suppliers selling a product engaged in the business of selling such products. In Florida, to be considered a product, the defective product must be offered into the stream of commerce and sold to the consuming public at a profit. Commercial suppliers include any supplier in the chain of distribution (manufacturers, wholesalers, distributors, and retailers). To hold a defendant liable for strict product liability the product must be expected to and must in fact reach the user or consumer without substantial change in the condition in which it is supplied. Privity is not required. A duty is owed to all foreseeable plaintiffs that fall within the zone of danger of the product.

*Breach*

In contrast to a negligence action, the plaintiff need not prove that the seller was at fault in selling a defective product to establish breach. Strict liability will apply even if the seller has exercised all reasonable care in the preparation and the sale of the product. The plaintiff only needs to prove that the defendant sold a product that was so defective as to render it unreasonably dangerous.

*Causation*

To prove actual causation, the plaintiff must trace the harm suffered to a defect in the product that existed when the product left the defendant’s control. If the defect is difficult to trace, the plaintiff may rely on the doctrine of res ipsa loquitor by asserting that the type of product failure ordinarily would occur only as a result of a product defect. Proximate cause is the same as in negligence cases.

**Warranties**

Vertical privity is no longer required between the buyer and the manufacturer. Under the UCC Alternative A, horizontal privity is extended to the buyer family, household, and guests who suffer personal injury.

**Sovereign immunity**

Florida has waived its immunity for torts for ministerial acts (those performed at the operational level), but not for discretionary activities (those performed at the planning or decision making level). The government will therefore be liable for the torts of its employees to the same extent as a private employer under the doctrine respondeat superior. The traditional test to determine whether the governmental entity’s alleged negligence is actionable is the planning vs. operational test. While the government entity is immune from suit for its planning decisions, it is subject to suit for its negligent operational decisions. The state has waived liability for only $100,000 for each person injured, and $200,000 for all claims arising from one accident. If the state has insurance coverage greater than these amounts, it is liable to the extent of the coverage. There is no liability for punitive damages or prejudgment interest. No tort action may be brought against a government entity unless the plaintiff has first presented a written claim to the appropriate agency and, except in cases against a municipality, to the department of insurance. The claim must be submitted within three years after the cause of action accrues. A written denial of the claim by the agency or department of insurance is a prerequisite to filing suit. The claim is deemed denied if it is not disposed of within 6 months after filing.

By statute, officers and employees of the state and its subdivisions are not liable for damages caused by their torts committed within the scope of their employment except when: 1) they have acted in bad faith; 2) with a malicious purpose; or 3) with willful disregard of human rights, safety, or property.

In Florida, the agency employing a law enforcement officer is not liable for injury or property damage caused by a person fleeing from the officer in a motor vehicle if: 1) the pursuit is conducted in a manner that does not involve conduct by the officer so reckless as to constitute disregard of human life, safety, or the property of another; 2) at the time the officer initiates pursuit, the officer reasonably believes the person is fleeing has committed a forcible felony; and 3) the pursuit is conducted by an officer pursuant to a written policy governing high speed pursuit adopted by the agency.

**Parent child immunity**

Florida has abolished parent-child immunity in the following cases: 1) when an unemancipated minor sues his parent for negligence, but only to the extent of available insurance coverage; and 2) in the case of intentional sexual abuse perpetrated by a parent against the minor child.

**Respondeat Superior**

An employer is vicarious liable for the torts of its employee’s committed within the scope of their employment.

*Frolic and detour*

An employee making a minor deviation from his employer’s business for his own purposes is still acting within the scope of his employment. If the deviation in time or geographic area is substantial, the employer is not liable.

**Negligent hiring**

To establish liability based on negligent hiring, supervision, or retention of an employee, a plaintiff must establish the elements of a negligence cause of action.

An employer is presumed not be negligent in hiring an employee if the employer conducted a background investigation before hiring that did not reveal any information reasonably demonstrating the employee’s unsuitability for the particular work or the employment in general. On the other hand, a decision by an employer not to conduct the investigation doesn’t raise in presumption that the employer failed to use reasonable care in hiring an employee.

**Permissive use rule**

Florida has adopted the permissive use rule, which provides that the owner of an auto who consents to the use of his auto by another is vicariously liable for the damage resulting from the driver’s negligence. Moreover, under Florida’s dangerous instrumentality doctrine, it doesn’t matter whether the driver exceeds the scope of consent the auto owner permitted. The owner is still liable.

**Good Samaritan statute**

Florida’s Good Samaritan Act, is applicable to all persons (including those who practice medicine who gratuitously render aid at the scene of an emergency). But, the rescuer remains liable for ordinary negligence.

In emergency rooms, health care providers who are obligated to provide emergency treatment are not liable for negligence unless they acted with reckless disregard for the consequences to the life or health of another.

Health care providers in a hospital/emergency room who voluntarily render emergency treatment to persons other than their patients are not liable unless they acted willfully or wantonly.

Persons using a defibrillator on a victim in an emergency are not liable unless they acted with recklessness or gross negligence. But this immunity does not apply to health care professionals using the defibrillator within the scope of their employment or entities providing health care.

**Liability based on alcohol**

In Florida, one who provides alcohol to a person of lawful age generally will not liable for damages caused by the intoxication of that person. Liability, however, may be imposed on: 1) one who willfully and unlawfully sells or furnishes alcohol to a minor; 2) one who knowingly serves a person habitually addicted to the use of alcohol; and 3) a proprietor, if he knows or should have known the likelihood of injuries to patrons caused by disorderly conduct to third parties is general and fails to do anything about it.

**Procedure in medical mal practice claims**

*Standard of care*

In Florida, health care providers are held to a standard of care based on what is recognized as acceptable and appropriate by reasonably prudent similar health care providers in light of all relevant circumstances.

Florida has adopted a procedural framework for bringing medical mal practice claims against health care providers: 1) the claimant must first investigate the grounds for the claim and obtain a written opinion by a medical expert verifying that reasonable grounds for a claim exist; 2) the claimant must notify each prospective claimant at least 90 days before filing suit; 4) during this 90 day period, the claimant may file suit, and the statute of limitations period is tolled; 5) by the end of the 90 days, the defendant’s insurer must deliver to the claimant either: a) a rejection of the claim; b) an offer to settle; or c) an offer to admit liability and seek arbitration of damages; 6) the claimant must accept or reject the offer to admit liability within 50 days; and 7) after completion of thee presuit investigations, the parties may elect to have damages determined by a voluntary binding arbitration. A claimant refusing arbitration may recover net economic damages and limited noneconomic damages.

**Wrongful death**

A cause of action for wrongful death is separate and independent of the action that might have been brought by an injured person, had she lived. A cause of action for a personal injury survives death of the person injured, except where the injury results in that person’s death. When a personal injury to the decedent results in her death, no action for the personal injury survives. Instead, the action merges with the wrongful death action. All damages caused by the injury resulting in death must be sought in an action for wrongful death brought by the personal representative of the decedent. The Florida Wrongful Death Act consolidates survival and wrongful death actions by providing for one lawsuit.

*Survival action*

In a survival action, the damages recoverable are the traditional damages available in a tort action. This would include traditional tort damages, such as lost wages, property damages, medical expenses, recovery for pain and suffering, and loss of consortium.

*Wrongful death action*

Under Florida’s wrongful death act, the surviving spouse and minor children (or all of the children of there is no surviving spouse) may recover for loss of the decedent’s companionship and protection and for mental pain and suffering from the date of the injury. Funeral and medical expenses are recoverable by the survivor if he paid such expenses. Likewise, funeral and medical expenses are recoverable from the estate if it paid such expenses. The decedent’s estate may also recover loss of earnings of the deceased from the date of injury to the date of death, less support of survivors. The loss of prospective net accumulations of the estate is reduced to present value if there is a surviving spouse or lineal descendent.

**No-fault automobile insurance**

Under Florida’s no fault insurance law, the plaintiff’s own auto insurer will pay the first $10,000 of his out of pocket expenses regardless of fault. The remainder can be recovered from the defendants in a negligence action. These benefits, called personal injury protection (PIP) benefits, are paid to a maximum of $10,000 for: 1) medical expenses, 2) lost income and earning capacity; and 3) funeral, burial, or cremation benefits.

No tort liability exists to the extent that PIP benefits are payable for the injury. Hence, PIP benefits that are currently payable owed by the insurance carrier for expenses that already have been incurred will reduce an award of future medical expenses in a tort verdict.

**Punitive Damages**

In Florida, a defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds the defendant personally guilty of intentional misconduct or gross negligence.

In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of the employee or agent only if that conduct constituted intentional misconduct or gross negligence and the employer or principal: 1) actively and knowingly participated in such conduct; 2) knowingly condoned, ratified, or consented to such conduct,; or 3) engaged in conduct that constituted gross negligence and contributed to the damages suffered by the plaintiff.

Florida has restricted the recovery of punitive damages in negligence actions.

A claimant may not plead punitive damages unless evidence in the record demonstrates a reasonable basis for recovery. When punitive damages are claimed, the trial court should bifurcate the punitive damages determination from other matters to be tried. By statute, punitive damages generally may not exceed the greater of: 1) three times the amount of compensatory damages awarded to each claimant; or 2) the sum of $500,000. But, this cap will does not apply where: 1) the defendant had the specific intent to harm the plaintiff and in fact did harm the plaintiff; or 2) at the time of the act of omission for which punitive damages are sought, the defendant was under the influence of alcohol or a drug that impaired his normal faculties.

**Collateral source rule**

By statute, a trial court must reduce any damages awarded to a claimant by any amounts paid for or available to the claimant from collateral sources (not including Medicare, Medicaid, or worker’s compensation benefits). This reduction is offset by any amount paid by the claimant for the benefit. But, where the right of subrogation exists for a collateral source, the claimant’s damages will not be reduced.

**Prenatal injuries**

Both a parent and the child have an action for prenatal injuries provided the child is born alive. If the fetus dies from the injuries, the parents may not bring a wrongful death action, but may bring a negligent still birth action for mental pain and anguish damages and medical expenses incident to the pregnancy.

**Wrongful birth**

Florida recognizes the cause of action for wrongful birth of a deformed child. The parents may recover special upbringing expenses associated with a deformed child as well as damages for mental anguish.

**Nuisance**

*Private*

Private nuisance is a substantial, unreasonable interference with a private individual’s use or enjoyment of property that he actually possesses or to which he has a right of immediate possession. To be characterized as unreasonable, the severity of the inflicted injury must outweigh the utility of the defendant’s conduct. In balancing these prospective interests, courts take into account every person is entitled to use his own land in a reasonable way, considering the neighborhood, and land values. The usual remedy is damages. If the legal remedy is inadequate, injunctive relief may be granted. In deciding whether to issue an injunction the court will balance the relative hardships.

**Future economic damages**

In Florida, the standard for whether to award future economic damages is whether the economic damages are reasonably certain to occur.