UNIT TWO

Torts and Crimes

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Part of doing business today—and, indeed, part of everyday life—is the risk of being involved in a lawsuit. The list of circumstances in which businesspersons can be sued is long and varied. A customer who is injured by a security guard at a business establishment, for example, may attempt to sue the business owner, claiming that the security guard’s conduct was wrongful. Any time that one party’s allegedly wrongful conduct causes injury to another, an action may arise under the law of torts (the word tort is French for “wrong”). Through tort law, society compensates those who have suffered injuries as a result of the wrongful conduct of others.

Many of the lawsuits brought by or against business firms are based on the tort theories discussed in this chapter, which covers intentional torts, and the next chapter, which discusses unintentional torts. Intentional torts arise from intentional acts, whereas unintentional torts often result from carelessness (as when an employee at a store knocks over a display case, injuring a customer). In addition, this chapter discusses how tort law applies to wrongful actions in the online environment. Tort theories also come into play in the context of product liability (liability for defective products), which will be discussed in detail in Chapter 23.

### The Basis of Tort Law

Two notions serve as the basis of all torts: wrongs and compensation. Tort law is designed to compensate those who have suffered a loss or injury due to another person’s wrongful act. In a tort action, one person or group brings a lawsuit against another person or group to obtain compensation (monetary damages) or other relief for the harm suffered.

### The Purpose of Tort Law

The basic purpose of tort law is to provide remedies for the invasion of various protected interests. Society recognizes an interest in personal physical safety, and tort law provides remedies for acts that cause physical injury or that interfere with physical security and freedom of movement. Society recognizes an interest in protecting property, and tort law provides remedies for acts that cause destruction or damage to property. Society also recognizes an interest in protecting certain intangible interests, such as personal privacy, family relations, reputation, and dignity, and tort law provides remedies for violation of these interests.

### Damages Available in Tort Actions

Because the purpose of tort law is to compensate the injured party for the damage suffered, you need to have an understanding of the types of damages that plaintiffs seek in tort actions. The high cost to society of sizable damages awards in tort cases has fueled the tort reform movement, which is discussed in this chapter’s Contemporary Legal Debates feature on pages 124 and 125.

**Compensatory Damages**

Compensatory damages are intended to compensate or reimburse a plaintiff for actual losses—to make the plaintiff whole and put her or him in the same position that she or he would have been had the tort not occurred. Compensatory damages awards are often broken down into special damages and general damages. Special damages compensate the plaintiff for quantifi-
able monetary losses, such as medical expenses, lost wages and benefits (now and in the future), extra costs, the loss of irreplaceable items, and the costs of repairing or replacing damaged property. *General damages* compensate individuals (not companies) for the nonmonetary aspects of the harm suffered, such as pain and suffering. A court might award general damages for physical or emotional pain and suffering, loss of companionship, loss of consortium (losing the emotional and physical benefits of a spousal relationship), disfigurement, loss of reputation, or loss or impairment of mental or physical capacity.

**Punitive Damages** Occasionally, the courts may also award *punitive damages* in tort cases to punish the wrongdoer and deter others from similar wrongdoing. Punitive damages are appropriate only when the defendant's conduct was particularly egregious or reprehensible. Usually, this means that punitive damages are available mainly in intentional tort actions and only rarely in negligence lawsuits (*negligence* actions will be discussed in Chapter 7). They may be awarded, however, in suits involving *gross negligence*, which can be defined as an intentional failure to perform a manifest duty in reckless disregard of the consequences of such a failure for the life or property of another.

Courts exercise great restraint in granting punitive damages to plaintiffs in tort actions because punitive damages are subject to the limitations imposed by the due process clause of the U.S. Constitution (discussed in Chapter 2). In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the United States Supreme Court held that to the extent an award of punitive damages is grossly excessive, it furthers no legitimate purpose and violates due process requirements. Although this case dealt with intentional torts (fraud and intentional infliction of emotional distress), the Court's holding applies equally to punitive damages awards in *gross negligence* cases (as well as to product liability cases, which will be discussed in Chapter 23).

**SECTION 6 Intentional Torts against Persons**

An *intentional tort*, as the term implies, requires intent. The *tortfeasor* (the one committing the tort) must intend to commit an act, the consequences of which interfere with the personal or business interests of another in a way not permitted by law. An evil or harmful motive is not required—in fact, the actor may even have a beneficial motive for committing what turns out to be a tortious act. In tort law, *intent* means only that the actor intended the consequences of his or her act or knew with substantial certainty that specific consequences would result from the act. The law generally assumes that individuals intend the normal consequences of their actions. Thus, forcefully pushing another—even if done in jest and without any evil motive—is an intentional tort (if injury results), because the object of a strong push can ordinarily be expected to be abruptly displaced.

Intentional torts against persons include assault and battery, false imprisonment, infliction of emotional distress, defamation, invasion of privacy, appropriation, fraudulent misrepresentation, and torts related to misuse of litigation. We discuss these torts in the following subsections.

**Assault and Battery**

Any intentional, unexcused act that creates in another person a reasonable apprehension of immediate harmful or offensive contact is an *assault*. Note that apprehension is not the same as fear. If a contact is such that a reasonable person would want to avoid it, and if there is a reasonable basis for believing that the contact will occur, then the plaintiff suffers apprehension whether or not she or he is afraid. The interest protected by tort law concerning assault is the freedom from having to expect harmful or offensive contact. The arousal of apprehension is enough to justify compensation.

The *completion* of the act that caused the apprehension, if it results in harm to the plaintiff, is a *battery*, which is defined as an unexcused and harmful or offensive physical contact *intentionally* performed. For example, Ivan threatens Jean with a gun, then shoots her. The pointing of the gun at Jean is an assault; the firing of the gun (if the bullet hits Jean) is a battery. The interest protected by tort law concerning assault is the freedom from having to expect harmful or offensive contact. The contact can be harmful, or it can be merely offensive (such as an unwelcome kiss). Physical injury need not occur. The contact can involve any part of the body or anything attached to it—for example, a hat or other item of clothing, a purse, or a chair or an automobile in which one is sitting. Whether the contact is offensive is
The question of whether our tort law system is in need of reform has aroused heated debate. While some argue that the current system imposes excessive costs on society, others contend that the system protects consumers from unsafe products and practices.

**“End the Tort Tax and Frivolous Lawsuits,” Say the Critics**

Critics of the current tort law system contend that it encourages too many frivolous lawsuits, which clog the courts, and is unnecessarily costly. In particular, they say, damages awards are often excessive and bear little relationship to the actual damage suffered. Such large awards encourage plaintiffs to bring frivolous suits, hoping that they will “hit the jackpot.” Trial lawyers, in turn, are eager to bring the suits because they are paid on a contingency-fee basis, meaning that they receive a percentage of the damages awarded.

The result, in the critics’ view, is a system that disproportionately rewards a few lucky plaintiffs while imposing enormous costs on business and society as a whole. They refer to the economic burden that the tort system imposes on society as the “tort tax.” According to one recent study, more than $300 billion per year is expended on tort litigation, including plaintiffs’ and defendants’ attorneys’ fees, damages awards, and other costs. Most of the costs are from class-action lawsuits involving product liability or medical malpractice.a (A *class action* is a lawsuit in which a single person or a small group of people represents the interests of a larger group.) Although even the critics would not contend that the tort tax encompasses the entire $300 billion, they believe that it includes a sizable portion of that amount. Furthermore, they say, the tax appears in other ways. Because physicians, hospitals, and pharmaceutical companies are worried about medical malpractice suits, they have changed their behavior. Physicians, for example, engage in defensive medicine by ordering more tests than necessary. PricewaterhouseCoopers has calculated that the practice of defensive medicine increases health-care costs by more than $100 billion per year.

To solve the problems they perceive, critics want to reduce both the number of tort cases brought each year and the amount of damages awards. They advocate the following tort reform measures: (1) limit the amount of punitive damages that can be awarded; (2) limit the amount of general noneconomic damages that can be awarded (for example, for pain and suffering); (3) limit the amount that attorneys can collect in contingency fees; and (4) to discourage the filing of meritless suits, require the losing party to pay both the plaintiff’s and the defendant’s expenses.

**“The Current System Promotes Fairness and Safety,” Say Their Opponents**

Others are not so sure that the current system needs such drastic reform. They say that the prospect of tort lawsuits encourages companies to produce safer products and deters them from putting dangerous products on the market. In the health-care industry, has a right to compensation. There is no need to establish that the defendant acted out of malice. The underlying motive does not matter; only the intent to bring about the harmful or offensive contact to the plaintiff. In fact, proving a motive is never necessary. A plaintiff may be compensated for the emotional harm or loss of reputation resulting from a battery, as well as for physical harm.

**Defenses to Assault and Battery** A defendant who is sued for assault, battery, or both can raise any of the following legally recognized defenses:

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2. The *reasonable person standard* is an “objective” test of how a reasonable person would have acted under the same circumstances. See the subsection entitled “The Duty of Care and Its Breach” in Chapter 7.
Consent. When a person consents to the act that is allegedly tortious, there may be a complete or partial defense to liability. Imposing limits on the amount of punitive and general noneconomic damages would be unfair, say the system’s defenders, and would reduce efficiency in our legal and economic system. After all, corporations conduct cost-benefit analyses when they decide how much safety to build into their products. Any limitation on potential damages would mean that corporations would have less incentive to build safer products. Indeed, Professor Stephen Teret of the Johns Hopkins University School of Public Health says that tort litigation is an important tool for preventing injuries because it forces manufacturers to opt for more safety in their products rather than less. Limiting contingency fees would also be unfair, say those in favor of the current system, because low-income consumers who have been injured could not afford to pay an attorney to take a case on an hourly fee basis—and an attorney would not expend the time needed to pursue a case without the prospect of a large reward in the form of a contingency fee.

Tort Reform in Reality
While the debate continues, the federal government and a number of states have begun to take some steps toward tort reform. At the federal level, the Class Action Fairness Act of 2005 (CAFA) shifted jurisdiction over large interstate tort and product liability class-action lawsuits from the state courts to the federal courts. The intent was to prevent plaintiffs’ attorneys from shopping around for a state court that might be predisposed to be sympathetic to their clients’ cause and to award large damages in class-action suits. At the state level, more than twenty states have placed caps ranging from $250,000 to $750,000 on noneconomic damages, especially in medical malpractice suits. More than thirty states have limited punitive damages, with some imposing outright bans.

WHERE DO YOU STAND?
Large damages awards in tort litigation have to be paid by someone. If the defendant is insured, then insurance companies foot the bill. Ultimately, though, high insurance rates are passed on to consumers of goods and services in the United States. Consequently, tort reform that reduces the size and number of damages awards ultimately will mean lower costs of goods and services to consumers. The downside of these lower costs, though, might be higher risks of medical malpractice and dangerous products. Do you believe that this trade-off is real? Why or why not?

1. Consent. When a person consents to the act that is allegedly tortious, there may be a complete or partial defense to liability.
2. Self-defense. An individual who is defending her or his life or physical well-being can claim self-defense. In a situation of either real or apparent danger, a person may normally use whatever force is reasonably necessary to prevent harmful contact (see Chapter 9 for a more detailed discussion of self-defense).
3. Defense of others. An individual can act in a reasonable manner to protect others who are in real or apparent danger.
4. Defense of property. Reasonable force may be used in attempting to remove intruders from one’s home, although force that is likely to cause death or great bodily injury normally cannot be used just to protect property.

False Imprisonment
False imprisonment is defined as the intentional confinement or restraint of another person’s activities without justification. It involves interference with the freedom to move without restriction. The confinement
can be accomplished through the use of physical barriers, physical restraint, or threats of physical force. Moral pressure does not constitute false imprisonment. Furthermore, it is essential that the person being restrained not agree to the restraint.

Businesspersons often face suits for false imprisonment after they have attempted to confine a suspected shoplifter for questioning. Under the laws of most states, merchants may detain persons suspected of shoplifting and hold them for the police. Although laws vary from state to state, normally only a merchant's security personnel—not salesclerks or other employees—have the right to detain suspects. Reasonable or probable cause must exist to believe that the person being detained has committed a theft. Additionally, most states require that any detention be conducted in a reasonable manner and for only a reasonable length of time. Tackling a customer suspected of theft in the parking lot would be considered unreasonable in many jurisdictions.

**Intentional Infliction of Emotional Distress**

The tort of intentional infliction of emotional distress can be defined as an intentional act that amounts to extreme and outrageous conduct resulting in severe emotional distress to another. To be actionable (capable of serving as the ground for a lawsuit), the act must be extreme and outrageous to the point that it exceeds the bounds of decency accepted by society. For example, a prankster telephones a pregnant woman and says that her husband and two sons have just been killed in a horrible accident (although they have not). As a result, the woman suffers intense mental pain and has a miscarriage. In that situation, the woman would be able to sue for intentional infliction of emotional distress.

Courts in most jurisdictions are wary of emotional distress claims and confine them to situations involving truly outrageous behavior. Acts that cause indignity or annoyance alone usually are not sufficient. Many times, however, repeated annoyances (such as those experienced by a person who is being stalked), coupled with threats, are enough.

Note that when the outrageous conduct consists of speech about a public figure, the First Amendment's guarantee of freedom of speech also limits emotional distress claims. For example, Hustler magazine once printed a fake advertisement that showed a picture of Reverend Jerry Falwell and described him as having lost his virginity to his mother in an outhouse while he was drunk. Falwell sued the magazine for intentional infliction of emotional distress and won, but the United States Supreme Court overturned the decision. The Court held that creators of parodies of public figures are protected under the First Amendment from intentional infliction of emotional distress claims. (The Court used the same standards that apply to public figures in defamation lawsuits, discussed next.)

**Defamation**

As discussed in Chapter 4, the freedom of speech guaranteed by the First Amendment is not absolute. In interpreting the First Amendment, the courts must balance the vital guarantee of free speech against other pervasive and strong social interests, including society's interest in preventing and redressing attacks on reputation.

**Defamation of character** involves wrongfully hurting a person's good reputation. The law imposes a general duty on all persons to refrain from making false, defamatory statements of fact about others. Breaching this duty in writing or other permanent form (such as an electronic recording) involves the tort of libel. Breaching this duty orally involves the tort of slander.

The tort of defamation also arises when a false statement of fact is made about a person's product, business, or legal ownership rights.

Note that generally only false statements that represent something as a fact (such as "Vladik cheats on his taxes") constitute defamation. Expressions of personal opinion (such as "Vladik is a jerk") are protected by the First Amendment and normally cannot lead to tort liability.

**The Publication Requirement** The basis of the tort of defamation is the publication of a statement or statements that hold an individual up to contempt, ridicule, or hatred. Publication here means that the defamatory statements are communicated (either intentionally or accidentally) to persons other than the defamed party. If Thompson writes Andrews a private letter falsely accusing him of embezzling funds, the action does not constitute libel. If Peters falsely
states that Gordon is dishonest and incompetent when no one else is around, the action does not constitute slander. In neither case was the message communicated to a third party.

The courts have generally held that even dictating a letter to a secretary constitutes publication, although the publication may be privileged (a concept that will be explained shortly). Moreover, if a third party overhears defamatory statements by chance, the courts usually hold that this also constitutes publication. Defamatory statements made via the Internet are actionable as well. Note also that any individual who repeats or republishes defamatory statements normally is liable even if that person reveals the source of the statements.

**Damages for Libel** Once a defendant’s liability for libel is established, general damages are presumed as a matter of law. General damages are designed to compensate the plaintiff for nonspecific harms such as disgrace or dishonor in the eyes of the community, humiliation, injured reputation, and emotional distress—harms that are difficult to measure. In other words, to recover damages in a libel case, the plaintiff need not prove that he or she was actually injured in any way as a result of the libelous statement.

**Damages for Slander** In contrast to cases alleging libel, in a case alleging slander, the plaintiff must prove special damages to establish the defendant’s liability. The plaintiff must show that the slanderous statement caused her or him to suffer actual economic or monetary losses. Unless this initial hurdle of proving special damages is overcome, a plaintiff alleging slander normally cannot go forward with the suit and recover any damages. This requirement is imposed in slander cases because oral statements have a temporary quality. In contrast, a libelous (written) statement has the quality of permanence, can be circulated widely, and usually results from some degree of deliberation on the part of the author.

Exceptions to the burden of proving special damages in cases alleging slander are made for certain types of slanderous statements. If a false statement constitutes “slander per se,” no proof of special damages is required for it to be actionable. In most states, the following four types of utterances are considered to be slander per se:

1. A statement that another has a loathsome disease (historically, leprosy and sexually transmitted diseases, but now also including allegations of mental illness).
2. A statement that another has committed improprieties while engaging in a profession or trade.
3. A statement that another has committed or has been imprisoned for a serious crime.
4. A statement that a person (usually only an unmarried person and sometimes only a woman) is unchaste or has engaged in serious sexual misconduct.

**Defenses to Defamation** Truth is normally an absolute defense against a defamation charge. In other words, if a defendant in a defamation case can prove that the allegedly defamatory statements of fact were true, normally no tort has been committed. Other defenses to defamation may exist if the speech is privileged or concerns a public figure. Note that the majority of defamation actions are filed in state courts, and state laws differ somewhat in the defenses they allow, such as privilege (discussed next).

**Privileged Speech.** In some circumstances, a person will not be liable for defamatory statements because he or she enjoys a privilege, or immunity. With respect to defamation, privileged communications are of two types: absolute and qualified. Only in judicial proceedings and certain government proceedings is an absolute privilege granted. For example, statements made by attorneys and judges in the courtroom during a trial are absolutely privileged. So are statements made by government officials during legislative debate, even if the legislators make such statements maliciously—that is, knowing them to be untrue. An absolute privilege is granted in these situations because judicial and government personnel deal with matters that are so much in the public interest that the parties involved should be able to speak out fully and freely and without restriction.

In other situations, a person will not be liable for defamatory statements because he or she has a qualified privilege. An employer’s statements in written evaluations of employees are an example of a qualified privilege. Generally, if the statements are made in good faith and the publication is limited to those who have a legitimate interest in the communication, the statements fall within the area of qualified privilege. The concept of conditional privilege rests

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4. Note that the term privileged communication in this context is not the same as privileged communication between a professional, such as an attorney, and his or her client. The latter type of privilege will be discussed in Chapter 51, in the context of the liability of professionals.
on the common law assumption that in some situations, the right to know or speak is equal in importance to the right not to be defamed. If a communication is conditionally privileged, to recover damages, the plaintiff must show that the privilege was abused.

**Public Figures.** Public officials who exercise substantial governmental power and any persons in the public limelight are considered public figures. In general, public figures are considered “fair game,” and false and defamatory statements about them that are published in the press will not constitute defamation unless the statements are made with actual malice. To be made with actual malice, a statement must be made with either knowledge of its falsity or a reckless disregard of the truth. Statements made about public figures, especially when they are communicated via a public medium, are usually related to matters of general public interest; they refer to people who substantially affect all of us. Furthermore, public figures generally have some access to a public medium for answering disparaging falsehoods about themselves; private individuals do not. For these reasons, public figures have a greater burden of proof in defamation cases (they must prove actual malice) than do private individuals.

**Invasion of Privacy**

A person has a right to solitude and freedom from prying public eyes—in other words, to privacy. As mentioned in Chapter 4, the courts have held that certain amendments to the U.S. Constitution imply a right to privacy. Some state constitutions explicitly provide for privacy rights, as do a number of federal and state statutes. Tort law also safeguards these rights through the tort of invasion of privacy. Four acts qualify as invasions of privacy:

1. **Appropriation of identity.** Under the common law, using a person’s name, picture, or other likeness for commercial purposes without permission is a tortious invasion of privacy. Most states today have also enacted statutes prohibiting appropriation (discussed further in the next subsection).

2. **Intrusion into an individual’s affairs or seclusion.** For example, invading someone’s home or searching someone’s personal computer without authorization is an invasion of privacy. This tort has been held to extend to eavesdropping by wiretap, unauthorized scanning of a bank account, compulsory blood testing, and window peeping.

3. **False light.** The publication of information that places a person in a false light is another category of invasion of privacy. This could be a story attributing to someone ideas not held or actions not taken by that person. (The publication of such a story could involve the tort of defamation as well.)

4. **Public disclosure of private facts.** This type of invasion of privacy occurs when a person publically discloses private facts about an individual that an ordinary person would find objectionable or embarrassing. A newspaper account of a private citizen’s sex life or financial affairs could be an actionable invasion of privacy, even if the information revealed is true, because it is not of public concern.

The following case included an allegation of an intrusion into an individual’s affairs or seclusion.

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**Background and Facts**

After Dick and Karyn Anderson’s marriage collapsed and they divorced, Karyn harassed Dick’s new wife, Maureen, until Maureen obtained a warrant for Karyn’s arrest. According to Maureen, Karyn’s new boyfriend, Paul Mergenhagen, then began following Maureen. On more than a dozen occasions between mid-2003 and mid-2005, Paul took photos of, and made obscene gestures to, Maureen as she was driving in her car or walking with her children. Frightened and upset, Maureen called the police several times. Paul admitted that he had followed Maureen at least four times and had taken at least forty photos of her car. The security guard at the entrance to the Andersons’ subdivision corroborated Maureen’s account that Paul often lay in wait for her and that she was “visibly shaken and upset, almost to the point of tears,” at least once. Maureen filed a suit in a Georgia state court against Paul, alleging, among other things, invasion of privacy. The court issued a summary judgment in Paul’s favor on this charge. Maureen appealed to a state intermediate appellate court.
The right of privacy, or the right of the individual to be let alone, is a personal right. It is the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone. The principle is fundamental, and essential in organized society, that every one, in exercising a personal right and in the use of his property, shall respect the rights and properties of others. The right of privacy is embraced within the absolute rights of personal security and personal liberty, “to be let alone,” to live a life of seclusion or to be free of unwarranted interference by the public about matters with which the public is not necessarily concerned, or to be protected from any wrongful intrusion into an individual's private life which would outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. [Emphasis added.]

With regard to the tort of intrusion upon seclusion or solitude, which is the claim made here, the “unreasonable intrusion” aspect involves a prying or intrusion, which would be offensive or objectionable to a reasonable person, into a person's private concerns. Traditionally, watching or observing a person in a public place is not an intrusion upon one's privacy. However, Georgia courts have held that surveillance of an individual on public thoroughfares, where such surveillance aims to frighten or torment a person, is an unreasonable intrusion upon a person's privacy.

In cases holding that public surveillance did not establish a privacy violation, we have found that the surveillance was reasonable in light of the situation. For example, reasonable surveillance of a residence from a public road to investigate a husband's disability claim constituted no intrusion upon his wife's seclusion or solitude, or into her private affairs. The surveillance of the husband at his house and on public roads also did not establish a privacy violation. Reasonable surveillance is recognized as a common method to obtain evidence to defend a lawsuit. It is only when such is conducted in a vicious or malicious manner not reasonably limited and designated to obtain information needed for the defense of a lawsuit or deliberately calculated to frighten or torment the plaintiff, that the courts will not countenance it.

In this case, [Maureen] Anderson alleges that her privacy was violated when [Paul] Mergenhagen followed her repeatedly in the car and took numerous photographs of her and her car. While a driver may have no cause of action for mere observation or even for having her photograph taken, a relatively harmless activity can become tortious with repetition. [R]epeatedly following a woman, who was pregnant for part of that time and was frequently alone or with her small children, photographing her at least 40 times, repeatedly causing her to become frightened and upset, to flee to her home, and to call the police seeking help, creates a jury question as to whether the defendant's actions amounted to a course of hounding the plaintiff that intruded upon her privacy.

- **Decision and Remedy** The state intermediate appellate court reversed the grant of summary judgment to Paul on Maureen's invasion of privacy claim. The court remanded the case for trial on the issue of whether the defendant followed and photographed the plaintiff so frequently as to amount to an intrusion into her privacy.

- **What If the Facts Were Different?** Suppose that Dick and Karyn had two children and Dick had been awarded custody of them. If Paul had been watching Maureen to determine her fitness to care for the children, would the result in this case have been different? Explain.

- **The Legal Environment Dimension** To succeed on a claim of intrusion into an individual's affairs or seclusion, should a plaintiff have to prove a physical intrusion? Why or why not?
Appropriation

The use of another person's name, likeness, or other identifying characteristic, without permission and for the benefit of the user, constitutes the tort of appropriation (sometimes referred to as the right of publicity). Under the law, normally an individual's right to privacy includes the right to the exclusive use of his or her identity. For example, in one early case, Vanna White, the hostess of the popular Wheel of Fortune game show, brought a case against Samsung Electronics America, Inc. Without permission, Samsung had included in an advertisement a robotic image dressed in a wig, gown, and jewelry, in a setting that resembled the Wheel of Fortune set, in a stance for which White is famous. The court ruled in White's favor, holding that the tort of appropriation does not require the use of a celebrity's name or actual likeness. The court stated that Samsung's robot ad left "little doubt" as to the identity of the celebrity that the ad was meant to depict.6

Degree of Likeness In recent cases, courts have reached different conclusions as to the degree of likeness that is required to impose liability for the tort of appropriation. In one case, a former professional hockey player, Anthony "Tony" Twist, who had a reputation for fighting, sued the publishers of the comic book Spawn, which included an evil character named Anthony Tony Twistell. The Missouri Supreme Court held that the use of Tony Twist's name alone was sufficient proof of likeness to support a misappropriation claim.7 Ultimately, the hockey player was awarded $15 million in damages.8

In California, in contrast, Keirin Kirby, the lead singer in a 1990s funk band called Deee-Lite, lost her appropriation claim against the makers of the video game Space Channel 5. Although the video game's character "Ulala" had some of Kirby's distinctive traits—hot pink hair, short skirt, platform shoes, and dance moves—there were not enough similarities, according to the state appellate court, to constitute misappropriation.9

Right of Publicity as a Property Right As mentioned, the common law tort of appropriation in many states has become known as the right of publicity.10 Rather than being aimed at protecting a person's right to be left alone (privacy), this right aims to protect an individual's pecuniary (financial) interest in the commercial exploitation of his or her identity. In other words, it gives public figures, celebrities, and entertainers a right to sue anyone who uses their images for commercial benefit without their permission. Cases involving the right of publicity generally turn on whether the use was commercial. For instance, if a television news program reports on a celebrity and shows an image of the person, the use likely would not be classified as commercial; in contrast, including the celebrity's image on a poster without his or her permission would be a commercial use.

Because the right of publicity is similar to a property right, most states have concluded that the right is inheritable and survives the death of the person who held the right. Normally, though, the person must provide for the passage of the right to another in her or his will. In 2007, for example, a court held that because Marilyn Monroe's will did not specifically state a desire to pass the right to publicity to her heirs, the beneficiaries under her will did not have a right to prevent a company from marketing T-shirts and other merchandise using Monroe's name, picture, and likeness.11

Fraudulent Misrepresentation

A misrepresentation leads another to believe in a condition that is different from the condition that actually exists. This is often accomplished through a false or an incorrect statement. Although persons sometimes make misrepresentations accidentally because they are unaware of the existing facts, the tort of fraudulent misrepresentation, or fraud, involves intentional deceit for personal gain. The tort includes several elements:

1. A misrepresentation of material facts or conditions with knowledge that they are false or with reckless disregard for the truth.
2. An intent to induce another party to rely on the misrepresentation.
3. A justifiable reliance on the misrepresentation by the deceived party.

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8. The amount of damages was appealed and subsequently affirmed. See Doe v. McFarlane, 207 S.W.3d 52 (Mo.App. 2006).
10. See, for example, California Civil Code Sections 3344 and 3344.1.
4. Damages suffered as a result of that reliance.
5. A causal connection between the misrepresentation and the injury suffered.

For fraud to occur, more than mere puffery, or seller’s talk, must be involved. Fraud exists only when a person represents as a fact something he or she knows is untrue. For example, it is fraud to claim that the roof of a building does not leak when one knows that it does. Facts are objectively ascertainable, whereas seller's talk—such as “I am the best accountant in town”—is not, because the speaker is representing a subjective view.

Normally, the tort of fraudulent misrepresentation occurs only when there is reliance on a statement of fact. Sometimes, however, reliance on a statement of opinion may involve the tort of fraudulent misrepresentation if the individual making the statement of opinion has superior knowledge of the subject matter. For example, when a lawyer makes a statement of opinion about the law in a state in which the lawyer is licensed to practice, a court would construe reliance on such a statement to be equivalent to reliance on a statement of fact.

Abusive or Frivolous Litigation

Persons or businesses generally have a right to sue when they have been injured. In recent years, however, an increasing number of meritless lawsuits have been filed—sometimes simply to harass the defendant. Defending oneself in any legal proceeding can be costly, time consuming, and emotionally draining. Tort law recognizes that people have a right not to be sued without a legally just and proper reason. It therefore protects individuals from the misuse of litigation. Torts related to abusive litigation include malicious prosecution and abuse of process.

If the party that initiated a lawsuit did so out of malice and without probable cause (a legitimate legal reason), and ended up losing that suit, the party can be sued for malicious prosecution. In some states, the plaintiff (who was the defendant in the first proceeding) must also prove injury other than the normal costs of litigation, such as lost profits. Abuse of process can apply to any person using a legal process against another in an improper manner or to accomplish a purpose for which the process was not designed. The key difference between the torts of abuse of process and malicious prosecution is the level of proof. Abuse of process does not require the plaintiff to prove malice or show that the defendant (who was previously the plaintiff) lost in a prior legal proceeding. Abuse of process is also not limited to prior litigation. It can be based on the wrongful use of subpoenas, court orders to attach or seize real property, or other types of formal legal process. Concept Summary 6.1 on the next page reviews intentional torts against persons.

Business Torts

Most torts can occur in any context, but a few torts, referred to as business torts, apply only to wrongful interferences with the business rights of others. Business torts generally fall into two categories—interference with a contractual relationship and interference with a business relationship.

Wrongful Interference with a Contractual Relationship

The body of tort law relating to wrongful interference with a contractual relationship has increased greatly in recent years. A landmark case in this area involved an opera singer, Joanna Wagner, who was under contract to sing for a man named Lumley for a specified period of years. A man named Gye, who knew of this contract, nonetheless “enticed” Wagner to refuse to carry out the agreement, and Wagner began to sing for Gye. Gye’s action constituted a tort because it interfered with the contractual relationship between Wagner and Lumley. (Of course, Wagner’s refusal to carry out the agreement also entitled Lumley to sue Wagner for breach of contract.)

Three elements are necessary for wrongful interference with a contractual relationship to occur:

1. A valid, enforceable contract must exist between two parties.
2. A third party must know that this contract exists.
3. This third party must intentionally induce a party to the contract to breach the contract.

In principle, any lawful contract can be the basis for an action of this type. The contract could be between a firm and its employees or a firm and its customers. Sometimes, a competitor of a firm draws away one of the firm’s key employees. Only if the original employer

can show that the competitor knew of the contract’s existence, and intentionally induced the breach, can damages be recovered from the competitor.

**Wrongful Interference with a Business Relationship**

Businesspersons devise countless schemes to attract customers, but they are prohibited from unreasonably interfering with another’s business in their attempts to gain a greater share of the market. There is a difference between competitive practices and predatory behavior—actions undertaken with the intention of unlawfully driving competitors completely out of the market.

Attempting to attract customers in general is a legitimate business practice, whereas specifically targeting the customers of a competitor is more likely to be predatory. For example, the mall contains two athletic shoe stores: Joe’s and Sprint. Joe’s cannot station an employee at the entrance of Sprint to divert customers to Joe’s and tell them that Joe’s will beat Sprint’s prices. Doing this would constitute the tort of wrongful interference with a business relationship because it would interfere with a prospective (economic) advantage; such behavior is commonly considered to be an unfair trade practice. If this type of activity were permitted, Joe’s would reap the benefits of Sprint’s advertising.

Although state laws vary on wrongful interference with a business relationship, generally a plaintiff must prove that the defendant used predatory methods to intentionally harm an established business relationship or prospective economic advantage. The plaintiff must also prove that the defendant’s interference caused the plaintiff to suffer economic harm.

**Defenses to Wrongful Interference**

A person will not be liable for the tort of wrongful interference with a contractual or business relationship if it can be shown that the interference was justified, or permissible. Bona fide competitive behavior is a permissible interference even if it results in the breaking of a contract.

For example, if Jerrod’s Meats advertises so effectively that it induces Sam’s Restaurant to break its con-
tract with Burke’s Meat Company, Burke’s Meat Company will be unable to recover against Jerrod’s Meats on a wrongful interference theory. After all, the public policy that favors free competition in advertising outweighs any possible instability that such competitive activity might cause in contractual relations. Although luring customers away from a competitor through aggressive marketing and advertising strategies obviously interferes with the competitor’s relationship with its customers, courts typically allow such activities in the spirit of competition.

Intentional Torts against Property

Intentional torts against property include trespass to land, trespass to personal property, conversion, and disparagement of property. These torts are wrongful actions that interfere with individuals’ legally recognized rights with regard to their land or personal property. The law distinguishes real property from personal property (see Chapter 47). Real property is land and things permanently attached to the land. Personal property consists of all other items, which are basically movable. Thus, a house and lot are real property, whereas the furniture inside a house is personal property. Cash and securities are also personal property.

Trespass to Land

The tort of trespass to land occurs any time a person, without permission, enters onto, above, or below the surface of land that is owned by another; causes anything to enter onto the land; or remains on the land or permits anything to remain on it. Actual harm to the land is not an essential element of this tort because the tort is designed to protect the right of an owner to exclusive possession. Common types of trespass to land include walking or driving on another’s land; shooting a gun over another’s land; throwing rocks at or spraying water on a building that belongs to someone else; building a dam across a river, thereby causing water to back up on someone else’s land; and constructing one’s building so that it extends onto an adjoining landowner’s property.

Trespass Criteria, Rights, and Duties

Before a person can be a trespasser, the real property owner (or other person in actual and exclusive possession of the property, such as a person who is leasing the property) must establish that person as a trespasser. For example, “posted” trespass signs expressly establish as a trespasser a person who ignores these signs and enters onto the property. Any person who enters onto another’s property to commit an illegal act (such as a thief entering a lumberyard at night to steal lumber) is established impliedly as a trespasser, without posted signs.

At common law, a trespasser is liable for damages caused to the property and generally cannot hold the owner liable for injuries that the trespasser sustains on the premises. This common law rule is being abandoned in many jurisdictions, however, in favor of a “reasonable duty” rule that varies depending on the status of the parties. For example, a landowner may have a duty to post a notice that the property is patrolled by guard dogs. Also, under the “attractive nuisance” doctrine, a landowner may be held liable for injuries sustained by young children on the landowner’s property if the children were attracted to the premises by some object, such as a swimming pool or an abandoned building. Finally, an owner can remove a trespasser from the premises—or detain a trespasser on the premises for a reasonable time—through the use of reasonable force without being liable for assault, battery, or false imprisonment.

Defenses against Trespass to Land

Trespass to land involves wrongful interference with another person’s real property rights. If it can be shown that the trespass was warranted, however, as when a trespasser enters to assist someone in danger, a defense exists. Another defense exists when the trespasser can show that he or she had a license to come onto the land. A licensee is one who is invited (or allowed to enter) onto the property of another for the licensee’s benefit. A person who enters another’s property to read an electric meter, for example, is a licensee. When you purchase a ticket to attend a movie or sporting event, you are licensed to go onto the property of another to view that movie or event. Note that licenses to enter onto another’s property are revocable by the property owner. If a property owner asks a meter reader to leave and the meter reader refuses to do so, the meter reader at that point becomes a trespasser.

Trespass to Personal Property

Whenever any individual, without consent, takes or harms the personal property of another or otherwise interferes with the lawful owner’s possession and
enjoyment of personal property, **trespass to personal property** occurs. This tort may also be called **trespass to chattels** or **trespass to personalty**. In this context, harm means not only destruction of the property, but also anything that diminishes its value, condition, or quality. Trespass to personal property involves intentional meddling with a possessory interest (an interest arising from possession), including barring an owner's access to personal property. If Kelly takes Ryan's business law book as a practical joke and hides it so that Ryan is unable to find it for several days prior to the final examination, Kelly has engaged in a trespass to personal property.

If it can be shown that trespass to personal property was warranted, then a complete defense exists. Most states, for example, allow automobile repair shops to hold a customer's car (under what is called an *artisan's lien*, discussed in Chapter 28) when the customer refuses to pay for repairs already completed. Trespass to personal property was one of the allegations in the following case.

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**Register.com, Inc. v. Verio, Inc.**

**LEVAL, Circuit Judge.**

* * * [Register.com, Inc.] is one of over fifty companies serving as registrars for the issuance of domain names on the World Wide Web. As a registrar, Register issues domain names to persons and entities preparing to establish Web sites on the Internet. Web sites are identified and accessed by reference to their domain names.

Register was appointed a registrar of domain names by the Internet Corporation for Assigned Names and Numbers, known by the acronym “ICANN.” ICANN * * * administer[s] the Internet domain name system. To become a registrar of domain names, Register was required to enter into a standard form agreement with ICANN * * * .

Applicants to register a domain name submit to the registrar contact information, including at a minimum, the applicant's name, postal address, telephone number, and electronic mail address. The ICANN Agreement, referring to this registrant contact information under the rubric “WHOIS information,” requires the registrar * * * to preserve it, update it daily, and provide for free public access to it through the Internet * * * .

* * * [T]he ICANN Agreement requires the registrar to permit use of its WHOIS data “for any lawful purposes except to * * * support the transmission of mass unsolicited, commercial advertising or solicitations via e-mail (spam) * * * .”

* * * An entity making a WHOIS query through Register’s Internet site * * * would receive a reply furnishing the requested WHOIS information, captioned by a legend devised by Register, which stated,

By submitting a WHOIS query, you agree that you will use this data only for lawful purposes and that under no circumstances will you use this data to * * * support the transmission of mass unsolicited, commercial advertising or solicitation via e-mail. * * *

* * *

The defendant [Verio, Inc.] * * * is engaged in the business of selling a variety of Web site design, development and operation services. * * * To facilitate its pursuit of customers, Verio undertook to obtain daily updates of the WHOIS information relating to newly registered domain names. To achieve this, Verio devised an automated software program, or robot, which each day would submit multiple successive WHOIS queries * * * . Upon acquiring the WHOIS information of new registrants, Verio would send them marketing solicitations by e-mail, telemarketing and direct mail. * * *

* * *

Register wrote to Verio demanding that it cease * * *. Verio * * * refused * * *. Register brought this suit [in a federal district court] on August 3, 2000 * * *. Register asserted, among other claims, that Verio was * * * trespassing on Register's chattels [personal
Conversion Whenever a person wrongfully possesses or uses the personal property of another as if the property belonged to her or him, the tort of conversion occurs. Any act that deprives an owner of personal property of the use of that property without that owner's permission and without just cause can be conversion. Often, when conversion occurs, a trespass to personal property also occurs because the original taking of the personal property from the owner was a trespass, and wrongfully retaining it is conversion. Conversion requires a more serious interference with the personal property than trespass, in terms of the duration and extensiveness of use.

Conversion is the civil side of crimes related to theft, but it is not limited to theft. Even when the rightful owner consented to the initial taking of the property so there was no theft or trespass, a failure to return the personal property may still be conversion. For example, Chen borrows Mark's iPod to use while traveling home from school for the holidays. When Chen returns to school, Mark asks for his iPod back, but Chen says that he gave it to his little brother for Christmas. In this situation, Mark can sue Chen for conversion, and Chen will have to either return the iPod or pay damages equal to its value.

Similarly, even if a person mistakenly believed that she or he was entitled to the goods, a tort of conversion...
may still have occurred. In other words, good intentions are not a defense against conversion; in fact, conversion can be an entirely innocent act. Someone who buys stolen goods, for example, has committed the tort of conversion even if he or she did not know the goods were stolen. Note that even the taking of electronic records and data may form the basis of a common law conversion claim. So can the wrongful taking of a domain name or the misappropriation of a net loss that harms a company. Thus, the personal property need not be tangible (physical) property.

**Disparagement of Property**

Disparagement of property occurs when economically injurious falsehoods are made about another's product or property rather than about another's reputation (as in the tort of defamation). Disparagement of property is a general term for torts that can be more specifically referred to as slander of quality or slander of title.

**Slander of Quality** Publishing false information about another's product, alleging it is not what its seller claims, constitutes the tort of slander of quality, or trade libel. The plaintiff must prove that actual damages proximately resulted from the slander of quality. In other words, the plaintiff must show not only that a third person refrained from dealing with the plaintiff because of the improper publication but also that the plaintiff suffered damages because the third person refrained from dealing with him or her. The economic calculation of such damages—they are, after all, conjectural—is often extremely difficult.

An improper publication may be both a slander of quality and a defamation of character. For example, a statement that disparages the quality of a product may also, by implication, disparage the character of a person who would sell such a product.

**Slander of Title** When a publication falsely denies or casts doubt on another's legal ownership of property, resulting in financial loss to the property's owner, the tort of slander of title occurs. Usually, this is an intentional tort in which someone knowingly publishes an untrue statement about another's ownership of certain property with the intent of discouraging a third person from dealing with the person slandered. For example, it would be difficult for a car dealer to attract customers after competitors published a notice that the dealer's stock consisted of stolen autos. See Concept Summary 6.2 for a review of intentional torts against property.

**Cyber Torts**

Torts can also be committed in the online environment. Torts committed via the Internet are often called cyber torts. Over the years, the courts have had to...
decide how to apply traditional tort law to torts committed in cyberspace. Consider, for example, issues of proof. How can it be proved that an online defamatory remark was “published” (which requires that a third party see or hear it)? How can the identity of the person who made the remark be discovered? Can an Internet service provider (ISP), such as America Online, Inc. (AOL), be forced to reveal the source of an anonymous comment? We explore some of these questions in this section, as well as some legal issues that have arisen with respect to bulk e-mail advertising.

Defamation Online

Recall from the discussion of defamation earlier in this chapter that one who repeats or otherwise republishes a defamatory statement is subject to liability as if he or she had originally published it. Thus, publishers generally can be held liable for defamatory contents in the books and periodicals that they publish. Now consider online message forums. These forums allow anyone—customers, employees, or crackpots—to complain about a business firm’s personnel, policies, practices, or products. Regardless of whether the complaint is justified and whether it is true, it might have an impact on the firm’s business. One of the early questions in the online legal arena was whether the providers of such forums could be held liable, as publishers, for defamatory statements made in those forums.

Immunity of Internet Service Providers

Newspapers, magazines, and television and radio stations may be held liable for defamatory remarks that they disseminate, even if those remarks are prepared or created by others. Prior to the passage of the Communications Decency Act (CDA) of 1996, the courts grappled on several occasions with the question of whether ISPs should be regarded as publishers and thus be held liable for defamatory messages made by users of their services. The CDA resolved the issue by stating that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” In other words, Internet publishers are treated differently from publishers in print, television, and radio, and are not liable for publishing defamatory statements, provided that the material came from a third party.

In a leading case on this issue, decided the year after the CDA was enacted, America Online, Inc. (AOL, now part of Time Warner, Inc.), was not held liable even though it failed to promptly remove defamatory messages of which it had been made aware. In upholding a district court’s ruling in AOL’s favor, a federal appellate court stated that the CDA “plainly immunizes computer service providers like AOL from liability for information that originates with third parties.” The court explained that the purpose of the statute is “to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.” The courts have reached similar conclusions in subsequent cases, extending the CDA’s immunity to Web message boards, online auction houses, Internet dating services, and any business that provides e-mail and Web browsing services.

In the following case, the court considered the scope of immunity that could be accorded to an online roommate-matching service under the CDA.

CASE 6.3 Fair Housing Council of San Fernando Valley v. Roommate.com, LLC


• Background and Facts Roommate.com, LLC, operates an online roommate-matching Web site at www.roommates.com. The site helps individuals find roommates based on their descriptions of themselves and their roommate preferences. Roommates.com has approximately 150,000 active listings and receives about a million user views per day. To become members of Roommate, users respond to a series of online questions, choosing from answers in drop-down and select-a-box menus. Users disclose information about themselves and their roommate preferences based on age, gender, and other

characteristics, as well as on whether children will live in the household. Members can create personal profiles, search lists of compatible roommates, and send “roommail” messages to other members. Roommate also e-mails newsletters to members seeking housing, listing compatible members who have places to rent. The Fair Housing Councils of San Fernando Valley and San Diego, California, filed a suit in a federal district court against Roommate, claiming that the defendant violated the Fair Housing Act (FHA) by asking for and distributing the information in its member profiles. The court held that the Communications Decency Act (CDA) barred this claim and dismissed it. The councils appealed to the U.S. Court of Appeals for the Ninth Circuit.

**CASE 6.3 CONTINUED**

**IN THE LANGUAGE OF THE COURT**

KOZINSKI, Circuit Judge.

* * * *

The touchstone of [the CDA] is that providers of interactive computer services are immune from liability for content created by third parties. The immunity applies to a defendant who is the “provider * * * of an interactive computer service” and is being sued “as the publisher or speaker of any information provided by” someone else. Reviewing courts have treated [this] immunity as quite robust. [Emphasis added.]

The Councils do not dispute that Roommate is a provider of an interactive computer service. As such, Roommate is immune so long as it merely publishes information provided by its members. However, Roommate is not immune for publishing materials as to which it is an “information content provider.” [Under the CDA, a] content provider is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet.” In other words, if Roommate passively publishes information provided by others, the CDA protects it from liability that would otherwise attach under state or federal law as a result of such publication. But if it is responsible, in whole or in part, for creating or developing the information, it becomes a content provider and is not entitled to CDA immunity.* * *

* * * Roommate is “responsible” for [the] questionnaires [that it requires users to fill out to register with the service] because it “creat[ed] or develop[ed]” the forms and answer choices. As a result, Roommate is a content provider of these questionnaires and does not qualify for CDA immunity for their publication.

* * *

We now turn to the more difficult question of whether the CDA exempts Roommate from liability for publishing and distributing its members’ profiles, which it generates from their answers to the form questionnaires.

* * * Roommate does more than merely publish information it solicits from its members. Roommate also channels the information based on members’ answers to various questions, as well as the answers of other members. Thus, Roommate allows members to search only the profiles of members with compatible preferences. For example, a female room-seeker who is living with a child can only search profiles of room-providers who have indicated they are willing to live with women and children. Roommate also sends room-seekers e-mail notifications that exclude listings incompatible with their profiles. Thus, Roommate will not notify our female about room-providers who say they will not live with women or children.

While Roommate provides a useful service, its search mechanism and e-mail notifications mean that it is neither a passive pass-through of information provided by others nor merely a facilitator of expression by individuals. By categorizing, channeling and limiting the distribution of users’ profiles, Roommate provides an additional layer of information that it is responsible at least in part for creating or developing.

• **Decision and Remedy** The U.S. Court of Appeals for the Ninth Circuit concluded that the CDA does not immunize Roommate for all of the content on its Web site and in its e-mail newsletters. The appellate court reversed the lower court’s summary judgment and remanded the case for “a determination of whether [Roommate’s] non-immune publication and distribution of information violates the FHA [Fair Housing Act].”
Piercing the Veil of Anonymity A threshold barrier to anyone who seeks to bring an action for online defamation is discovering the identity of the person who posted the defamatory message online. ISPs can disclose personal information about their customers only when ordered to do so by a court. Consequently, businesses and individuals often resort to filing lawsuits against “John Does” (John Doe is a fictitious name that is used when the name of the particular person is not known). Then, using the authority of the courts, they attempt to obtain from the ISPs the identities of the persons responsible for the messages. This strategy has worked in some cases, but not in others. Courts typically are reluctant to deter those who would potentially post messages on the Internet from exercising their First Amendment right to speak anonymously. After all, speaking anonymously is part of the nature of the Internet and helps to make it a useful forum for public discussion.

Spam

Bulk, unsolicited e-mail (“junk” e-mail) sent to all of the users on a particular e-mailing list or all of the members of a newsgroup is often called spam. Typically, spam consists of product ads. Spam can waste user time and network bandwidth (the amount of data that can be transmitted within a certain time). It also imposes a burden on an ISP’s equipment as well as on an e-mail recipient's computer system. Because of the problems associated with spam, the majority of states now have laws regulating its transmission. In 2003, the U.S. Congress also enacted a law to regulate the use of spam, although the volume of spam has actually increased since the law was enacted.

Statutory Regulation of Spam In an attempt to combat spam, thirty-six states have enacted laws that prohibit or regulate its use. Many state laws regulating spam require the senders of e-mail ads to instruct the recipients on how they can “opt out” of further e-mail ads from the same sources. For instance, in some states an unsolicited e-mail ad must include a toll-free phone number or return e-mail address through which the recipient can contact the sender to request that no more ads be e-mailed. The most stringent state law is California’s antispam law, which went into effect on January 1, 2004. That law follows the “opt-in” model favored by consumer groups and antispam advocates. In other words, the law prohibits any person or business from sending e-mail ads to or from any e-mail address in California unless the recipient has expressly agreed to receive e-mails from the sender. An exemption is made for e-mail sent to consumers with whom the advertiser has a “preexisting or current business relationship.”

The Federal CAN-SPAM Act In 2003, Congress enacted the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act, which took effect on January 1, 2004. The legislation applies to any “commercial electronic mail messages” that are sent to promote a commercial product or service. Significantly, the statute preempts state antispam laws except for those provisions in state laws that prohibit false and deceptive e-mailing practices.

Generally, the act permits the use of unsolicited commercial e-mail but prohibits certain types of spamming activities, including the use of a false return address and the use of false, misleading, or deceptive information when sending e-mail. The statute also prohibits the use of “dictionary attacks”—sending messages to randomly generated e-mail addresses—and the “harvesting” of e-mail addresses.

21. The term spam is said to come from a Monty Python song with the lyrics, “Spam spam spam spam, spam spam, spam spam, lovely spam, wonderful spam.” Like these lyrics, spam online is often considered to be a repetition of worthless text.
22. For an early case in which a court found that spam constituted a trespass to personal property because of the burden on the ISP’s equipment, see CompuServe, Inc. v. Cyber Promotions, Inc., 962 F.Supp. 1015 (S.D.Ohio 1997).
from Web sites through the use of specialized software. Notwithstanding the requirements of the federal act, the reality is that the problem of spam is
difficult to address because much of it is funneled through foreign servers.

### REVIEWING Intentional Torts

Two sisters, Darla and Irene, are partners in an import business located in a small town in Rhode Island. Irene is married to a well-known real estate developer and is campaigning to be the mayor of their town. Darla is in her mid-thirties and has never been married. Both sisters travel to other countries to purchase the goods they sell at their retail store. Irene buys Indonesian goods, and Darla buys goods from Africa. After a tsunami (tidal wave) destroys many of the cities in Indonesia to which Irene usually travels, she phones one of her contacts there and asks him to procure some items and ship them to her. He informs her that it will be impossible to buy these items now because the townspeople are being evacuated due to a water shortage. Irene is angry and tells the man that if he cannot purchase the goods, he should just take them without paying for them after the town has been evacuated. Darla overhears her sister’s instructions and is outraged. They have a falling-out, and Darla decides that she no longer wishes to be in business with her sister. Using the information presented in the chapter, answer the following questions.

1. Suppose that Darla tells several of her friends about Irene’s instructing the man to take goods without paying for them after the tsunami disaster. Under which intentional tort theory discussed in this chapter might Irene attempt to sue Darla? Would Irene’s suit be successful? Why or why not?

2. Now suppose that Irene wins the election and becomes the city’s mayor. Darla then writes a letter to the editor of the local newspaper disclosing Irene’s misconduct. What intentional tort might Irene accuse Darla of committing? What defenses could Darla assert?

3. If Irene accepts goods shipped from Indonesia that were wrongfully obtained, has she committed an intentional tort against property? Explain.

4. Suppose now that Irene, who is angry with her sister for disclosing her business improprieties, writes a letter to the editor falsely accusing Darla of having sexual relations with her neighbor’s thirteen-year-old son. For what intentional tort or torts could Darla sue Irene in this situation?

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6-1. Richard is an employee of the Dun Construction Corp. While delivering materials to a construction site, he carelessly backs Dun's truck into a passenger vehicle driven by Green. This is Richard's second accident in six months. When the company owner, Dun, learns of this latest accident, a heated discussion ensues, and Dun fires Richard. Dun is so angry that he immediately writes a letter to the union of which Richard is a member and to all other construction companies in the community, stating that Richard is the "worst driver in the city" and that "anyone who hires him is asking for legal liability." Richard files a suit against Dun, alleging libel on the basis of the statements made in the letters. Discuss the results.

6-2. QUESTION WITH SAMPLE ANSWER

Lothar owns a bakery. He has been trying to obtain a long-term contract with the owner of Martha's Tea Salons for some time. Lothar starts a local advertising campaign on radio and television and in the newspaper. This advertising campaign is so persuasive that Martha decides to break the contract she has had with Harley's Bakery so that she can patronize Lothar's bakery. Is Lothar liable to Harley's Bakery for the tort of wrongful interference with a contractual relationship? Is Martha liable for this tort?

• For a sample answer to Question 6–2, go to Appendix I at the end of this text.

6-3. Gerrit is a former employee of ABC Auto Repair Co. He enters ABC's repair shop, claiming that the company owes him $800 in back wages. Gerrit argues with ABC's general manager, Steward, and Steward orders him off the property. Gerrit refuses to leave, and Steward tells two mechanics to throw him off the property. Gerrit runs to his truck, but on the way, he grabs some tools valued at $800; then he drives away. Gerrit refuses to return the tools.

(a) Discuss whether Gerrit has committed any torts.

(b) If the mechanics had thrown Gerrit off the property, would ABC be guilty of assault and battery? Explain.

6-4. Bombardier Capital, Inc., provides financing to boat and recreational vehicle dealers. Bombardier's credit policy requires dealers to forward immediately to Bombardier the proceeds of boat sales. When Howard Mulcahey, Bombardier's vice president of sales and marketing, learned that dealers were not complying with this policy, he told Frank Chandler, Bombardier's credit director, of his concern. Before Chandler could obtain the proceeds, Mulcahey falsely told Jacques Gingras, Bombardier's president, that Chandler was, among other things, trying to hide the problem. On the basis of Mulcahey's statements, Gingras fired Chandler and put Mulcahey in charge of the credit department. Under what business tort theory discussed in this chapter might Chandler recover damages from Mulcahey? Explain.

6-5. Trespass to Property. America Online, Inc. (AOL), provides services to its customers or members, including the transmission of e-mail to and from other members and across the Internet. To become a member, a person must agree not to use AOL's computers to send bulk, unsolicited, commercial e-mail (spam). AOL uses filters to block spam, but bulk e-mailers sometimes use other software to thwart the filters. National Health Care Discount, Inc. (NHCD), sells discount optical and dental service plans. To generate leads for NHCD's products, sales representatives, who included AOL members, sent more than 300 million pieces of spam through AOL's computer system. Each item cost AOL an estimated $0.00078 in equipment expenses. Some of the spam used false headers and other methods to hide the source. After receiving more than 150,000 complaints from its members, AOL asked NHCD to stop. When the spam continued, AOL filed a suit in a federal district court against NHCD, alleging, in part, trespass to chattels—an unlawful interference with another's rights to possess personal property. AOL asked the court for a summary judgment on this claim. Did the spamming constitute trespass to chattels? Explain. [America Online, Inc. v. National Health Care Discount, Inc., 121 F. Supp. 2d 1255 (N.D. Iowa 2000)]

6-6. Intentional Torts against Property. In 1994, Gary Kremen registered the domain name "sex.com" with Network Solutions, Inc., to the name of Kremen's business, Online Classifieds. Later, Stephen Cohen sent Network Solutions a letter that he claimed to have received from Online Classifieds. It stated that "we have no objections to your use of the domain name sex.com and this letter shall serve as our authorization to the Internet registrar to transfer sex.com to your corporation." Without contacting Kremen, Network Solutions transferred the name to Cohen, who subsequently turned sex.com into a lucrative business. Kremen filed a suit in a federal district court against Cohen and others, seeking the name and Cohen's profits. The court ordered Cohen to return the name to Kremen and pay $65 million in damages. Cohen ignored the order and disappeared. Against what other parties might Kremen attempt to obtain relief? Under which theory of intentional torts against property might Kremen be able to file an action? What is the likely result, and why? [Kremen v. Cohen, 337 F.3d 1024 (9th Cir. 2003)]

6-7. Invasion of Privacy. During the spring and summer of 1999, Edward and Geneva Irvine received numerous "hang-up" phone calls, including three calls in the middle of the night. With the help of their local phone company, the Ivines learned that many of the calls were from the telemarketing department of the Akron Beacon Journal in Akron, Ohio. The Beacon's sales force was equipped
with an automatic dialing machine. During business hours, the dialer was used to maximize productivity by calling multiple phone numbers at once and connecting a call to a sales representative only after it was answered. After business hours, the Beacon programmed its dialer to dial a list of disconnected numbers to determine whether they had been reconnected. If the dialer detected a ring, it recorded the information and dropped the call. If the automated dialing system crashed, which it did frequently, it redialed the entire list. The Ivines filed a suit in an Ohio state court against the Beacon and others, alleging, among other things, an invasion of privacy. In whose favor should the court rule, and why? [Irvine v. Akron Beacon Journal, 147 Ohio App.3d 428, 770 N.E.2d 1105 (9 Dist. 2002)]

6-8. Defamation. Lydia Hagberg went to her bank, California Federal Bank, FSB, to cash a check made out to her by Smith Barney (SB), an investment services firm. Nolene Showalter, a bank employee, suspected that the check was counterfeit. Showalter called SB and was told that the check was not valid. As she phoned the police, Gary Wood, a bank security officer, contacted SB again and was informed that its earlier statement was “erroneous” and that the check was valid. Meanwhile, a police officer arrived, drew Hagberg away from the teller's window, spread her legs, patted her down, and handcuffed her. The officer searched her purse, asked her whether she had any weapons or stolen property and whether she was driving a stolen vehicle, and arrested her. Hagberg filed a suit in a California state court against the bank and others, alleging, among other things, slander. Should the absolute privilege for communications made in judicial or other official proceedings apply to statements made when a citizen contacts the police to report suspected criminal activity? Why or why not? [Hagberg v. California Federal Bank, FSB, 32 Cal.4th 350, 81 P.3d 244, 7 Cal.Rptr.3d 803 (2004)]

6-9. CASE PROBLEM WITH SAMPLE ANSWER
Between 1996 and 1998, Donna Swanson received several anonymous, handwritten letters that, among other things, accused her husband, Alan, of infidelity. In 1998, John Grisham, Jr., the author of The Firm and many other best-selling novels, received an anonymous letter that appeared to have been written by the same person. Grisham and the Swansons suspected Katherine Almy, who soon filed a suit in a Virginia state court against them, alleging, among other things, intentional infliction of emotional distress. According to Almy, Grisham intended to have her “really, really suffer” for writing the letters, and the three devised a scheme to falsely accuse her. They gave David Liebman, a handwriting analyst, samples of Almy’s handwriting. These included copies of confidential documents from her children’s files at St. Anne’s–Belfield School in Charlottesville, Virginia, where Alan taught and Grisham served on the board of directors. In Almy’s view, Grisham influenced Liebman to report that Almy might have written the letters and misrepresented this report as conclusive, which led the police to confront Almy. She claimed that she then suffered severe emotional distress and depression, causing “a complete disintegration of virtually every aspect of her life” and requiring her “to undergo extensive therapy.” In response, the defendants asked the court to dismiss the complaint for failure to state a claim. Should the court grant this request? Explain. [Almy v. Grisham, 273 Va. 68, 639 S.E.2d 182 (2007)]

- To view a sample answer for Problem 6-9, go to this book’s Web site at academic.cengage.com/blaw/clarkson, select “Chapter 6,” and click on “Case Problem with Sample Answer.”

6-10. A QUESTION OF ETHICS
White Plains Coat & Apron Co. is a New York–based linen rental business. Cintas Corp. is a nationwide business that rents similar products. White Plains had five-year exclusive contracts with some of its customers. As a result of Cintas’s soliciting of business, dozens of White Plains’ customers breached their contracts and entered into rental agreements with Cintas. White Plains demanded that Cintas stop its solicitation of White Plains customers. Cintas refused. White Plains filed a suit in a federal district court against Cintas, alleging wrongful interference with existing contracts. Cintas argued that it had no knowledge of any contracts with White Plains and had not induced any breach. The court dismissed the suit, ruling that Cintas had a legitimate interest as a competitor to solicit business and make a profit. White Plains appealed to the U.S. Court of Appeals for the Second Circuit. [White Plains Coat & Apron Co. v. Cintas Corp., 8 N.Y.3d 422, 867 N.E.2d 381 (2007)]

(a) What are the two important policy interests at odds in wrongful interference cases? When there is an existing contract, which of these interests should be accorded priority?
(b) The US Court of Appeals for the Second Circuit asked the New York Court of Appeals to answer a question: Is a general interest in soliciting business for profit a sufficient defense to a claim of wrongful interference with a contractual relationship? What do you think? Why?
For updated links to resources available on the Web, as well as a variety of other materials, visit this text's Web site at

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You can find cases and articles on torts, including business torts, in the tort law library at the Internet Law Library's Web site. Go to

www.lawguru.com/jlawlib

Legal Research Exercises on the Web

Go to academic.cengage.com/blaw/clarkson, the Web site that accompanies this text. Select “Chapter 6” and click on “Internet Exercises.” There you will find the following Internet research exercises that you can perform to learn more about the topics covered in this chapter.

Internet Exercise 6–1: Legal Perspective
   Online Defamation

Internet Exercise 6–2: Management Perspective
   Legal and Illegal Uses of Spam