

## Chapter 12. Naawchigedaa Tort Claims

### 11.1101 SHORT TITLE

This Statute may be referred to as the “Torts Statute.”

(Source: WOS 2014-012, October 15, 2014, Section I)

### 11.1102 PURPOSE

To provide civil remedies to private persons within the jurisdiction of the Little Traverse Bay Bands of Odawa Indians who are injured by the wrongful acts of others.

(Source: WOS 2014-012, October 15, 2014, Section II)

### 11.1103 JURISDICTION

The Tribe’s jurisdiction extends to persons who are Indians, tribal citizens, or who live or work within the territorial jurisdiction of LTBB and who commit a tort or are injured by the tortious acts of another within the territorial jurisdiction of the Little Traverse Bay Bands of Odawa Indians, unless such claims fall within the Federal Tort Claims Act. The federal government currently provides for the resolution of tort, malpractice and injury claims against federally funded tribal activities under the Federal Tort Claims Act. Any such claim should be pursued and subject to the provisions and procedures of the Federal Tort Claims Act and are not within the jurisdiction of the Tribal Court.

(Source: WOS 2014-012, October 15, 2014, Section III)

### 11.1104 DEFINITIONS

**A. “Actual damages”** means the ascertainable loss of money or property sustained as the result of a tortious act.

**B. “Award”** means money damages that the Tribal Court determines are payable to compensate for an injury under this Statute.

C. **“Claim”** means a petition for an award under this Statute. A claim may be filed with respect to any injury under this Statute.

D. **“Dangerous condition”** means a physical aspect of a facility or the use thereof constituting an unreasonable risk to human health or safety that is known or should be known to exist upon the exercise of reasonable care.

1. For purposes of this subsection, a dangerous condition should be known to exist if it is established that the condition existed for a period of time and was of a nature that in the exercises of reasonable care, the condition and its dangerous character should have been discovered.

2. A dangerous condition does not exist solely because the design of a facility is inadequate or because of the mere existence of natural physical conditions such as wind, water, ice, or temperature.

E. **“Employee”** means any person employed by another when acting within the course and scope of their employment.

F. **“Indian”** means any person who is an enrolled member of a federally recognized Indian tribe.

G. **“Injury”** means death, physical or emotional harm to a person, or damage or destruction of property.

H. **“LTBB”** means the Little Traverse Bay Bands of Odawa Indians.

I. **“Malice”** means the intent to commit a wrongful act that will result in harm to another without just cause.

J. **“Offensive”** means an act by another that a person of ordinary sensitivity would find inappropriate.

K. **“Person”** means any individual, firm, partnership, corporation, or other legally recognized entity.

**L. “Reckless indifference”** means conscious or reckless disregard of the consequences of one’s acts or omissions.

**M. “Territorial jurisdiction of the Little Traverse Bay Bands of Odawa Indians”** means “areas referenced in Public Law 103-324, 25 USC Section 1300k-2(b)(2)(A) as the boundaries of *the reservations for the Little Traverse Bay Bands as set out in Article I, paragraphs ‘third and fourth’ of the Treaty of 1855, 11 Stat. 621.*” Little Traverse Bay Bands Constitution, Article V(A)(1)(a).

**N. “Tribal Court”** means the court of the Little Traverse Bay Bands of Odawa Indians.

**O. “Naawchigedaa”** means “to set things straight” in Anishinaabemowin.

(Source: WOS 2014-012, October 15, 2014, Section IV)

## **11.1105 STATUTE OF LIMITATIONS**

A plaintiff seeking relief under this Statute must file his or her claim with the Tribal Court within three years of the date that the injury occurred or becomes known.

(Source: WOS 2014-012, October 15, 2014, Section V)

## **11.1106 CAUSES OF ACTION**

In order to file a tort claim, the plaintiff must meet all requirements of one or more of the causes of action as set out below. Plaintiffs may file multiple claims and claims with alternative theories based on more than one cause of action.

### **A. Intentional Torts.**

**1. Assault.** An assault occurs when the defendant places the plaintiff in reasonable apprehension of an immediate battery.

**a.** Words alone or threats of physical harm are insufficient for an assault, unless those words or threats are accompanied by physical conduct or gestures.

**b.** In this subsection, apprehension refers to the plaintiff's knowledge of the defendant's apparent ability to commit an immediate battery. It does not mean fear.

**2. Battery.** A battery occurs when the defendant makes a harmful or offensive contact with the plaintiff's person.

**3. False Imprisonment.** False imprisonment occurs when the defendant commits an act of restraint that confines the plaintiff in a bounded area.

**a.** An act of restraint can be any action, verbal or physical, that causes the plaintiff to be confined.

**b.** A bounded area is one where the plaintiff has no reasonable means of escape.

**4. Intentional Infliction of Emotional Distress (IIED).** IIED occurs when the defendant engages in extreme and outrageous conduct that causes the plaintiff to suffer severe emotional distress.

**a.** IIED can be caused intentionally by the defendant or by the defendant's reckless conduct.

**b.** Outrageous conduct is conduct without just cause or excuse and exceeds all bounds of decency. Such conduct can be proven by a showing of continuous and repetitive conduct, conduct by a superior or someone in a supervisory position, conduct directed at young children, the elderly, or a person who has a medical condition that causes him or her to be particularly sensitive to such conduct, or any other conduct that a reasonable person would consider to be outrageous.

**5. Trespass to Land.** A trespass to land occurs when the defendant intentionally and physically invades the land of the plaintiff.

**6. Trespass to Chattels and Conversion.**

**a.** A trespass to chattels occurs when the defendant interferes with the personal property of the plaintiff.

**b.** A conversion occurs when there is a trespass to chattels that results in complete destruction or loss of the personal property.

**B. Defamation.** Defamation is an act of communication that causes someone to be shamed, ridiculed, held in contempt, lowered in the estimation of the community, or to lose employment status or earnings or otherwise suffer a damaged reputation. The Plaintiff must prove that there was (1) a defamatory statement of fact; (2) concerning the plaintiff; (3) which was false; (4) which was communicated to a person or persons other than the plaintiff; (5) with actual knowledge that the statement was false or with reckless disregard of the statement's truth or falsity or with negligence in failing to ascertain the truth or falsity; and (6) which caused damage.

**1. Libel.** Libel occurs where the defendant makes a defamatory statement identifying the plaintiff and that statement is published in *writing*, or otherwise recorded, that causes harm to the plaintiff's reputation. A plaintiff's damages are presumed in successful libel actions.

**2. Slander.** Slander occurs where the defendant makes a defamatory statement identifying the plaintiff, that statement is *orally* made to at least one other person than the plaintiff, and causes harm to the plaintiff's reputation.

**a.** Damages are presumed only when the plaintiff is successful in proving slander per se.

**b.** Slander per se occurs when the defendant makes a defamatory statement: regarding the plaintiff's business; that the plaintiff has committed a serious crime; that the plaintiff displays occupational or professional incapacity; that the plaintiff suffers from a loathsome disease; that has an immoral character.

**c.** In regular slander actions, the plaintiff must offer evidence of economic harm suffered or harm to the health. Social harm alone is insufficient evidence of damages.

**3. Public Officials and Matters of Public Concern.** If the plaintiff is a public official and the statement is one of public concern, he or she must prove that the defendant made

the statement knowing it to be false or with a reckless disregard for its accuracy in addition to the requirements under Section XI(B)(1) or (2), whichever is applicable.

### C. **Privacy Torts.**

1. **Appropriation.** An appropriation occurs when the defendant uses the plaintiff's name or image for a commercial purpose.

2. **Intrusion.** An intrusion occurs when the defendant invades the plaintiff's physical seclusion in a way that would be highly offensive to an average person and the plaintiff is in a place where the plaintiff reasonably expects to be a private place.

3. **False Light.** The tort of false light occurs when the defendant's conduct results in the widespread dissemination of a major falsehood about the plaintiff that would be offensive to an average person.

4. **Disclosure.** A disclosure occurs when the defendant's conduct results in the widespread dissemination of confidential information about the plaintiff that would be offensive to an average person.

### D. **Business Torts.**

1. **Fraud.** Fraud occurs when the defendant makes a misrepresentation of a material fact that the defendant knows or believes to be false with the intent to induce the plaintiff to act or refrain from acting in reliance on the misrepresentation, the plaintiff justifiably and actually relies on the misrepresentation, and the plaintiff suffers damages because of it.

2. **Negligent Misrepresentation.** Negligent misrepresentation occurs when the defendant makes a misrepresentation in a business or professional capacity that breaches a duty owed to a particular plaintiff that causes the plaintiff's justifiable reliance and results in damage to the plaintiff.

3. **Interference with a Business Relationship.** Interference with a business relationship occurs when the plaintiff has a valid contractual relationship with a third party that the defendant has knowledge of and the defendant intentionally interferes with that

relationship by inducing the third party to breach or terminate the relationship and such breach or termination causes harm to the plaintiff.

**E. Litigation Torts.**

**1. Malicious Prosecution.** Malicious Prosecution occurs when the defendant initiates criminal proceedings against the plaintiff that terminate in favor of the plaintiff and where the defendant had an improper purpose for initiating criminal proceedings and lacked any reasonable probable cause.

**2. Abuse of Process.** An abuse of process occurs when the defendant maliciously or deliberately misuses a regularly issued civil court process that is not justified by the underlying legal action or the abuser of process is interested only in accomplishing some improper purpose.

**F. Negligence.**

**1. In General.** In all negligence actions, the plaintiff must prove that the defendant owed the plaintiff a duty, the defendant breached that duty, and that the defendant's breach was the actual and proximate cause of the plaintiff's injury.

**2. Ordinary Negligence.** Negligence occurs when the defendant fails to exercise the type of care toward the plaintiff that a reasonably prudent person would exercise under similar circumstances.

**3. Malpractice.** Malpractice occurs when a defendant-professional acts or continues a course of conduct that does not meet the standard of professional competence in that particular profession and causes provable damages to the plaintiff.

**4. Premises Liability.** Owners and occupiers of land may be liable when his or her own negligence causes another person to be injured on the occupier's premises. An occupier's liability for another's injury depends on the type of person entering the land.

**a. Trespassers.** Owners and occupiers of land are only liable to known or anticipated trespassers that are injured because of a highly dangerous and artificial

condition that the owner or occupier knew existed.

**b. Licensees.** Owners and occupiers of land are liable to licensees that are injured because of a hidden condition on the land that the occupier knew existed.

**c. Invitees.** Owners and occupiers of land are liable to invitees that are injured because of a hidden condition on the land that the occupier either knew existed or could have discovered with reasonable inspection.

**d. Attractive Nuisance Doctrine.** Owners and occupiers of land are subject to liability for physical harm to children caused by an artificial condition on the land if the following are met:

**i.** the place where the condition exists is one that the owner or occupier knows or has reason to know that children are likely to trespass;

**ii.** the condition is one that the owner or occupier knows or has reason to know of and realizes or should realize will involve an unreasonable risk of death or serious bodily harm to children;

**iii.** the children, because of their youth, do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it;

**iv.** the owner's or occupier's utility of maintaining the condition and the burden of eliminating the danger are slight compared with the risk involved; and

**v.** the owner or occupier fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

## **G. Strict Liability Torts.**

**1. Abnormally Dangerous Activities.** A defendant is strictly liable when he or she is engaged in an abnormally dangerous activity that causes harm to another person. An activity is considered to be abnormally dangerous when it creates a foreseeable risk of



serious harm even where reasonable care is exercised and that activity is uncommon in the place where it is conducted.

**2. Wild Animals.** A defendant is strictly liable when he or she is the owner of a wild (undomesticated) animal and that animal causes harm to another person.

## **H. Products Liability.**

**1.** A defendant is liable for an injury caused to another person when:

- a.** the defendant is a merchant who regularly deals in products of the kind involved;
- b.** the product in question is defective;
- c.** the defect in the product existed when the product left the defendant's place of business; and
- d.** the plaintiff was using the product in a foreseeable manner.

**2.** A product is deemed defective when any one of the following defects exist:

- a.** Manufacturing defects exist when the product differs from all the others that were produced at the same time in a way that makes it more dangerous than consumers would expect.
- b.** Design defects exist when there is a safer, yet feasible, way that the product could have been built.
- c.** Information defects exist when the product has residual risks that cannot be designed out and consumers would not be aware of those risks without an adequate warning.

**3.** It is not a defense that the plaintiff misused the product. Such misuse by the plaintiff is irrelevant if it is foreseeable that consumers may use that product in that way.

**I. Nuisance.** A nuisance occurs when the plaintiff's ability to use and enjoy his or her real property has been disrupted to an unreasonable degree.

(Source: WOS 2014-012, October 15, 2014, Section VI)

## **11.1107 DEFENSES**

### **A. Affirmative Defenses to Intentional Torts.**

**1. Consent.** It is a complete defense to all intentional torts when the plaintiff consents expressly or impliedly.

**a.** Express consent occurs when the plaintiff makes a declaration of permission for the defendant to act. However, express consent is not a defense if the consent was obtained through fraud or duress.

**b.** Implied consent occurs based on custom or based on the defendant's reasonable interpretation of the plaintiff's objective conduct that the plaintiff consents to such action.

**c.** Any consent given by a plaintiff is limited to the scope of the consent given. Where a defendant exceeds the scope of the plaintiff's consent, consent is not a valid defense.

**2. Self-Defense.** This defense applies when the defendant is faced with an imminent threat of force or injury. The defendant may only use an amount of force that is necessary under the circumstances.

**3. Defense of Others.** This defense applies when the defendant witnesses another person faced with an imminent threat of force or injury. The defendant may only use an amount of force that is necessary under the circumstances.

**4. Defense of Property.** This defense applies when the defendant is faced with an imminent threat of damage to or loss of property. The defendant may only use an amount of force that is necessary under the circumstances.

5. **Necessity.** The defense of necessity only applies to torts involving property.

a. A defense based on public necessity applies when the defendant commits a property tort in an emergency to protect the community as a whole or to protect a significant group of people. This is an absolute defense to tort liability.

b. A defense based on private necessity applies when the defendant commits a property tort to protect his own interest. This is not an absolute defense, therefore, the defendant may be liable to the plaintiff for any actual damage done to plaintiff's property.

**B. Affirmative Defenses to Defamation.**

1. **Consent.** It is an affirmative defense to defamation if the plaintiff consents to the defendant's making and publishing the statement. See Section VII(A)(1).

2. **Truth.** A defendant is not liable for a defamatory statement if the statement made is true.

3. **Absolute Privileges.** A defendant is not liable for a defamatory statement if the defamatory statement is made to the defendant's spouse or made by an official in the course of official functions.

a. **Definition.** "Official" means any person who is elected or appointed that acts on behalf of the Tribe.

b. **Definition.** "Official functions" mean any acts taken by an official within the scope of that official's position.

4. **Qualified Privileges.** A defendant may not be liable for a defamatory statement if the defendant made the statement in good faith and the statement made was confined to relevant matters.

a. This privilege only applies in situations where there is a public interest in encouraging candor (e.g., employment references).

**b. Definition.** “Good faith” in this subsection means that the defendant had a reasonable belief that the statement made was accurate.

**C. Affirmative Defenses to Privacy Torts.**

**1. Consent.** It is an affirmative defense if the plaintiff consents to the invasion. See Section VII(A)(1).

**2. Defamation Privileges.** A defendant is not liable for the torts of false light or disclosure if either an absolute or qualified privilege applies. See Section VII(B)(3) and (4).

**D. Affirmative Defense to Negligence Torts – Comparative Negligence.** A defendant can lower his or her liability by proving that the plaintiff failed to exercise proper care for his or her own safety.

**1.** The judge or the jury must allocate a percentage of fault to each party. The plaintiff’s recovery must be reduced by his or her own percentage of fault.

**2.** When the percentage of fault allocated to the plaintiff is more than 50%, and that fault is due to the plaintiff’s intoxication, the plaintiff may not recover.

**E. Affirmative Defense to Products Liability.** A defendant can lower his or liability by proving that the plaintiff failed to take proper precautions. The rules of comparative negligence apply; see SECTION VII(D).

**F. Sovereign Immunity.**

**1. Tribal Immunity from Suit.** LTBB, including all subordinate entities, officials and employees are immune from suit except to the extent that the Tribal Council clearly and expressly waives its sovereign immunity, provided that the Tribe, subordinate entity, official or employee of the Tribe acting within the scope of their duties or authority. If the Tribe, including any subordinate entity, official or employee of the Tribe, who acts beyond the scope of their duties and authority in which the tortious actions include either acting with malice or with reckless indifference, or both, then the tortious action is not within the sovereign immunity of the Tribe.

(Source: WOS 2014-012, October 15, 2014, Section VII)

## **11.1108 REMEDIES**

**A. Damages.** Damages are available in any tort claim where the plaintiff can prove with reasonable certainty monetary loss or harm suffered because of the tortious acts of the defendant. Damages may include the following:

1. loss of wages;
2. loss of profits;
3. medical expenses;
4. pain and suffering;
5. loss of consortium;
6. loss of future earnings; and
7. market or rental value of destroyed property.

**B. Restitution.** Restitution is available where the plaintiff can be restored by putting the plaintiff in a similar position as he or she was prior to the tortious act. Restitution may include the following:

1. restitution damages calculated by the defendant's gain;
2. return of the plaintiff's property;
3. ejectment of a trespasser from the plaintiff's property; and
4. any other action or remedy as deemed appropriate to make the plaintiff whole.

**C. Injunctions.** Where monetary or restitutionary remedies will not make the plaintiff whole again, the judge may order an injunction to prevent the defendant from continuing or repeating the

tortious behavior in the future.

(Source: WOS 2014-012, October 15, 2014, Section VIII)

#### **11.1109 SAVINGS CLAUSE**

In the event that any phrase, provision, part, paragraph, subsection or section of this statute is found by a court of competent jurisdiction to violate the Constitution, laws or ordinances of the Little Traverse Bay Bands of Odawa Indians, such phrase, provision, part, paragraph, subsection or section shall be considered to stand alone and to be deleted from this statute, the entirety of the balance of the statute to remain in full and binding force and effect.

(Source: WOS 2014-012, October 15, 2014, Section IX)

#### **11.1110 EFFECTIVE DATE**

Effective upon signature of the Executive or shall be deemed enacted if not expressly vetoed by the Executive within thirty (30) days of submission. The Tribal Council may, by an affirmative vote of seven (7) members of the Tribal Council, override a veto by the Executive.

(Source: WOS 2014-012, October 15, 2014, Section X)