NAILING THE BAR

HOW TO WRITE ESSAYS FOR

TORTS

LAW SCHOOL AND BAR EXAMS

WHAT to Say and HOW to Say It!

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Attorney at Law

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What to Say and How to Say It

This book is a "How To" guide focused on the practical information you need to succeed in law school and Bar exams on **Torts**, including **Product Liability** law. It is based entirely on **common law and broadly adopted modern views** applicable to exams in every State.

This is a "cook book" approach focused on the mechanics and substance needed to write passing law school essays; **WHAT TO SAY and HOW TO SAY IT.**

EVERYTHING you NEED to SUCCEED is provided without unnecessary baggage.

The central focus of this book is "NAILING" the elements. "NAILING" means to cite the **ELEMENTS OF PROOF** the moving party (movant) must prove at each stage of a legal action. At each stage the "matter at issue" is either a CAUSE OF ACTION or an AFFIRMATIVE DEFENSE that has been raised by the movant. To "nail the elements" you must know what the REQUIRED ELEMENTS OF PROOF are, say what they are, and explain HOW the movant can prove them with the given facts, or else explain WHY they cannot be proven.

Brilliance is not needed nor even enough to succeed in law school, to pass the Bar Exam, or to be a lawyer. Many attorneys are not brilliant, but they succeeded in law school. And there is nothing as common as brilliant people that have failed law school. **The REASON** is **THEY LEARNED EVERYTHING EXCEPT** the one important thing -- **HOW TO PASS THE EXAMS.**

This book gives you **EVERY important issue, EVERY important rule** and **EVERY important definition** you need to know to write passing exams on **TORTS** along with practice questions and **sample answers.**

This book uses a methodical, practical, step-by-step approach to create issue analysis that works. It may seem mechanical, but it produces passing essay answers. This method is called **"NAILING THE ELEMENTS"** (Chapter 10). Whether you are completing the first year of law school or preparing for a Bar Exam this simple approach will help you succeed.

This book tells you **how to outline** your essay answer (Chapter 3), **how to spot issues** (Chapter 4), **how to avoid wasting time** (Chapter 5) and **budgeting time** on your essay (Chapter 7).

This book gives you **EVERY IMPORTANT DEFINITION** you need to know for law school exams on **TORTS** (Appendix A.) It shows you **EXAMPLES** of good and bad essay approaches, and it give you **PRACTICE QUESTIONS** complete with **SAMPLE ANSWERS** and **EXPLANATIONS**.

This book deliberately and necessarily omits discussion of many intricate details of the law that are explained in detail in Nailing the Bar's "Simple Outlines". But **EVERYTHING YOU REALLY NEED TO KNOW to prepare for your first year exams on Torts is in this ONE book.**

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Chapter 1: Why Essays are Critical

In law school the ability to write a proper essay answer is critical. On your first day of law school look at the person on your left, the person on your right and pick three people in front of you. At the end of the first year of law school two of those six people will be GONE. By the end of law school two more of those six people will be GONE. And in many States only one of those six people can pass the Bar examination on the first try. **Follow the instructions in this book and it will be you!**

The difference between the ONE student who succeeds and the FIVE students that fail is the ability to write a proper law school essay answer. It is both necessary to succeed in law school and essential to passing the Bar Exams.

Being smart is not enough. Everyone in law school is smart. Some of the students in your first-year law school class may seem stupid. Do not be deceived. They could not have all gotten into law school if they were as dumb as they look.

In fact, some of the attractive, sophisticated and eloquent students will be the first to fail. Your grade in law school, and on the Bar exams, depends on only ONE FACTOR. It is not what you look like, or what you talk like. It is what you PUT ON PAPER.

LEARN TO WRITE A PROPER ESSAY and your entire law school experience will be enjoyable, your class standing will improve at every turn and you will pass the Bar upon completion of law school.

FAIL TO ADOPT GOOD ESSAY FORM and your life will be Hell! You will fail law school, you will never become an attorney, and you will owe thousands of dollars in student loans that you cannot escape in bankruptcy. The sooner you learn what to do the better off you will be.

The Grading Key IS the Key. Law school exams and Bar exams are graded by means of a grading "key". The Grading Key is the guide the professor (or Bar reader) uses so that grades are as consistent as possible.

The Grading Key is a list of the ISSUES you are expected to recognize and address and the RULES of law you are expected to cite.

Certain FACTS are mentioned in the essay question, and the grading key reflects those facts that you should comment on in your ANALYSIS.

Finally, for each issue, you must state a CONCLUSION.

IRAC. This essay structure -- Issue, Rule, Analysis and Conclusion -- is referred to as the IRAC approach to essay writing.

State the Required Issues. The Grading Key has certain REQUIRED ISSUES. If your essay answer lists and analyzes all of the required issues, your essay is usually given a score of 70 points. For each required issue that you skip, your grade is reduced.

It is critical for you to recognize and state the proper area of law raised by the facts.

Generally the required issues are worth about 5 points each. Your essay grade will be reduced (from 70) by 5 points for each required issue that you fail to discuss. Some issues, such as negligence are worth 10 or more points, depending on the question.

How Graders Look at your Essays. In law school essays are generally graded by the professor, and she or he will read your essay more closely to see if you have developed an understanding of the fine points of the black letter law. Since the law school professor looks more carefully at your answer, you may be able to deviate farther from the IRAC approach without suffering a penalty. This is unfortunate because the Bar Exam essays are graded with close adherence to the IRAC approach.

When the grader first picks up your essay answer, she often starts by flipping through it to get a feel for the quality of you answer based on its appearance. If your writing is messy, your issues are not clear and you are disorganized, the grader will not be given a good first impression. Mentally, she will stop thinking "possible 70" and start thinking "probable 60". She will not waste a lot of time on your essay if it is an obvious loser.

The grader will next look at the last page of your answer to see if you ran out of time. If so, the grader may give you a grade of 45 or 50 without even bothering to read your essay at all.

So NEVER "LOOK" like you ran out of time!! ALWAYS have a "conclusion" at the end of your essay to make it appear you finished with adequate time. NEVER say "out of time!" at the end of your essay. NEVER put a big, garbled, frantic, scribbled mess at the end of the essay. NEVER write out an outline of the issues that you didn't have time to discuss. If you do these things you might as well write, "I AM STUPID; PLEASE SHOOT ME."

Aspire to be Adequate on Every Essay Question. If your essay appears to have been completed on time, the grader matches the issues you discuss to the issues on the Grading Key. For each required issue, your rule statement and analysis are assessed for adequacy. If you discussed the required issue, your rule statement and analysis are adequate, and you gave some statement of conclusion, then you get the COVETED "70".

If the grader cannot find where you discussed required issues or rules easily, she will not waste her time looking for them. CLEARLY IDENTIFY THE ISSUES and RULES OF LAW.

Your answer must explain how the stated rule applies to the stated facts of the question. If no facts from the question are mentioned in your answer, the analysis will be deemed conclusionary and inadequate.

Your answer must state and adequately analyze all issues raised by the question. **An excellent analysis of one issue will NOT recover all of the points lost by failing to discuss another required issue.**

Bonus Points. Some essay answers are given bonus points. BONUS POINTS may be given for answers that cite ADDITIONAL RELEVANT ISSUES. Also, bonus points may be given for answers that are exceptionally WELL ORGANIZED and CITE CASES.

Points lost by failing to discuss required issues will seldom be recovered through bonus points.

Chapter 2: Identify the Area of Law

In the first year of law school Torts classes may discuss the Restatement of Torts, but they generally only test on the **Common Law of Torts** and **broadly adopted modern rules**. That is all the California Bar tests.

In a law school examination it is not absolutely necessary to identify the area of law. But on Bar Examinations you must determine THE PROPER AREA OF LAW and TELL THE GRADER because your ability to properly determine the applicable law is an essential part of the examination. So state the applicable area of law as part of your essay answer.

Develop the practice of stating the applicable area of law as part of your essay answer NOW.

The basic rule for determining the applicable law in a law school exam is to REMEMBER WHICH CLASS YOU ARE IN! Every year there is some clown that shows up for a mid-term or final on the wrong day, at the wrong time, prepared for the wrong examination.

The single most important rule in all law school and Bar Exams is READ THE CALL OF THE QUESTION! Failure to read and respond to the CALL of the question is the one, single most common reason law students fail.

In the excitement of the moment, you might misread the call of the question. So it is critical to remember which class you are in and CAREFULLY READ THE CALL.

In the first year of law school you will never have a "cross-over" question that mixes two areas of law. For example, in law school a CONTRACTS exam will not test you on TORTS. But the Bar Exams do have cross-over questions. NEVER answer the question with the wrong law.

DON'T confuse Criminal law with Tort law. If the question asks for discussion of "crimes," "prosecution," or "charges," it is a criminal law question. If it asks for the actions a PARTY can bring, it is NOT A CRIMINAL law question because only States prosecute crimes.

PHRASE your answer properly. Remember defendants are only "GUILTY" of crimes. They are LIABLE for torts, not "guilty".

The party charged in a complaint is the DEFENDANT in all three areas of law -- contract, tort and criminal law. But only PLAINTIFFS bring actions based on tort or contract law. In criminal actions the complaint is brought by the PROSECUTION, not a victim or plaintiff.

On balance, it is a good, safe habit to start each essay with an affirmative statement of recognition concerning the area of law that applies to the question, and it never costs you.

Famous Last Words: *"This is the torts final, right?"*

Chapter 3: Outline Your Answer and COUNT THE ISSUES!

The second critical step in answering any essay question, after confirming the area of law, is to read the question and COUNT THE ISSUES to be discussed.

The issue outline is simply a list of the issues you will discuss, in the order you will discuss them. Make it "skeletal" in your own "personal shorthand." Don't waste time writing out detailed issue statements. Jot down **case names** and **special rules** like "Palsgraf". Jot down a few facts if you want, but DON'T WASTE TIME writing out every important fact. [1]

CONSIDER which issues you MUST discuss, which you MIGHT discuss and which are "unintended issues" that the grader does not want to hear about. Decide which issues are so minor, marginal, lacking in facts or attenuated that you should not discuss them. Look for specific wording in the question that indicates which issues are "required issues."

RE-READ THE FACTS to be sure you are not missing issues. Don't look so hard for hidden issues that you miss the issues that are obvious.[2]

Rewrite the outline as necessary, eliminating issues, or reordering issues. Usually you should list the issues in the same order they arise in the fact pattern, but there are exceptions.

SEPARATE THE ISSUES AND THE PARTIES discussing all rights, liabilities and remedies of each party in succession.

FOLLOW THE CALL. On a one-hour question outlining usually requires between 10 and 15 minutes. HOWEVER, if the call of the question actually lists the issues you are to discuss, then this outline process can (and must) be abbreviated. If the issues are listed for you, discuss all "sub-issues" that seem necessary and obvious but DO NOT DISCUSS ISSUES THAT ARE COMPLETELY IRRELEVANT TO THE CALL.

If the call of the question states the things to discuss, DISCUSS WHAT IT SAYS AND EVERYTHING DIRECTLY RELEVANT.[3]

> If the CALL says "what rights and remedies?" you MUST be sure to discuss the REMEDIES of the parties and not just the causes of action.
>
> If the CALL says, "what defenses might be raised?" you MUST discuss defenses as full issues.
>
> If the CALL describes A, B and C and then asks about the rights of B against C, DO NOT discuss A's rights because the CALL only asks about the rights of B.

---

[1] Some people advocate copying all of the important facts from the essay question to the answer outline. That may help some students but to me it just seems a waste of time.

[2] This is a common error. Don't look so hard for fleas you forget to talk about the elephant.

[3] Often you have to be sort of a "mind reader" to figure out what the professor wants to hear about.

READ SOME OF THE QUESTION, JUMP TO THE CALL, AND THEN READ AGAIN COMPLETELY. To properly outline an essay question,

FIRST read SOME of the facts, about ONE-THIRD of the fact pattern;
SECOND jump to the bottom of the question and determine the CALL;
THEN go back to the beginning and reread ALL of the facts.

As you read the question, draw lines to the margin and place symbols there designating the issues that might need to be discussed.

FOCUS ON THE AREA OF LAW. In law school you know what the area of law will be. But in a Bar Exam setting you have to figure out what area of law determines the outcome. Since the question is a torts question -- write a big "T" at the top of the page with a circle around it to reinforce in your mind that the area of law is common law TORTS.

After you have read the question completely LIST AND NUMBER THE ISSUES on the bottom of the question sheet or on a separate piece of paper. Generally you should **list the issues in the order they appear in the question**, because that is usually the order of the Grading Key.

COUNT the issues! You should have between 5 and 12 issues. A question with less than 5 issues is highly suspicious -- you probably missed something big. It is almost impossible for an exam to produce proper results if there are fewer than 5 main issues. Often the issues are the defenses rather than the offenses. Defenses may be issues by themselves that require thorough analysis. The essay usually takes ONE HOUR to complete, and if you don't see enough to keep you busy for the time allotted you are probably missing some issues.

A question with more than 8 major issues is a racehorse exam where you have little time to analyze the issues in depth in a one-hour period. If you have more than 8 major issues, carefully consider whether some of them are "non-issues." A non-issue is something that the grader does not want to hear about. Those are discussed in more detail later.

If there are 8 legitimate issues you should plan on spending FIVE MINUTES on each in a one-hour exam. However, some issues demand more time:

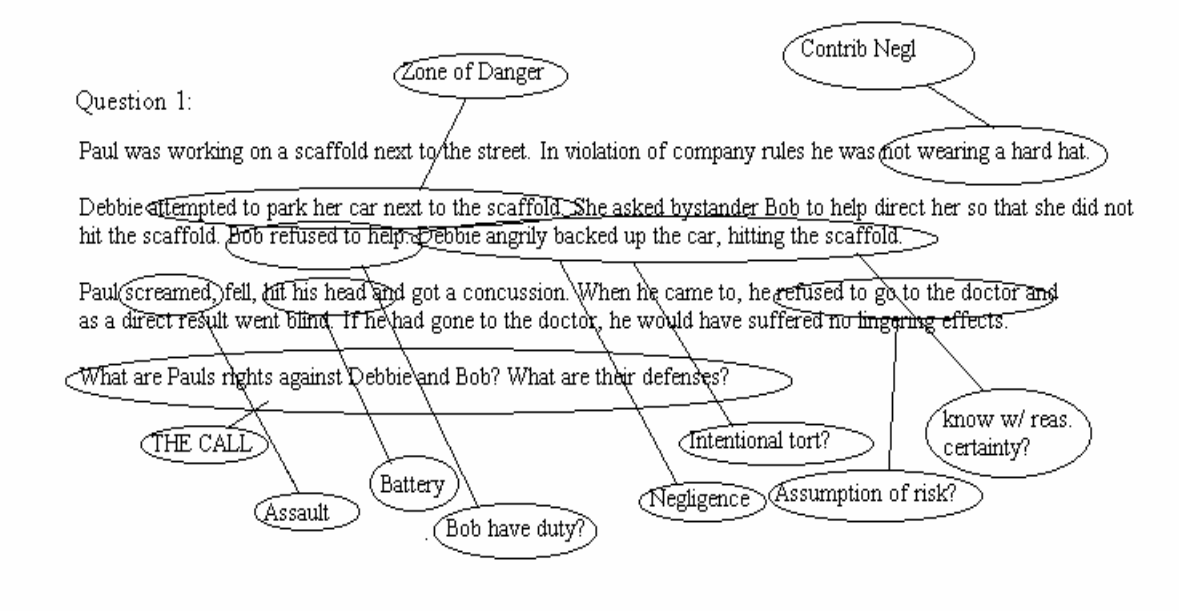
NEGLIGENCE and requires twice as much time as other torts, and can take an entire hour

Discussion of DEFAMATION or PRODUCT LIABILITY always takes an entire hour

If there are 12 issues to discuss you will only have 3 or 4 minutes to discuss each, and you will have to move very fast. Consider addressing some minor issues merely as “comments” in passing.

READ THE CALL AGAIN. Before you start writing, READ THE CALL OF THE QUESTION ONE MORE TIME and make sure your outline addresses the call.

Example: The example below shows a question (Question 1) about an accident and how you might mark up the question as you read it.



Following this mark-up on the question itself, you should create a skeletal outline as shown below:

EXAMPLE QUESTION OUTLINE

Paul v. Debbie

1. Assault -- "angry". "screamed". Know w/ reasonable certainty her act would cause apprehension?
2. Battery -- "angry". "hit head". Know she would probably touch scaffold?
3. Negligence? Duty - zone of danger. Palsgraf.
4. Contrib neg -- no helmet -- company rule sets standard of care
5. Assumption of risk -- didn't go to doctor -- aware of risk?

Paul v. Bob

6. Negligence -- No duty as "bystander"

Trespass to land? NON-ISSUE -- No mention of land owner
Intentional infliction? NON-ISSUE -- Not outrageous

Your outline should not be much more than shown here. But THINK IT THROUGH! Writing out an extensive outline with every fact, name, date, etc. is a big waste of time. Your outline should just list the ISSUES in the order you will discuss them, not all the facts. The facts are already listed in the question itself, so why repeat them? But THINK HARD about WHAT the facts suggest the issues the EXAMINER wants you to write about.

***Famous Last Words**: "I never outline. It takes too much time."*

Chapter 4: Spotting Tort Issues

Since you lose points for every required issue you fail to discuss, it is CRITICAL TO SPOT all of the issues. BUT DON'T waste time discussing issues that do not really exist. This is easier said than done and introduces a certain level of sadism peculiar to law school.

The grader wants you to discuss certain required issues. But graders fall into two basic schools. The first, rational school, simply states the issues to be discussed in the call of the question.

The second, less rational and often sadistic school of question writers uses only hints about the intended issues. Sometimes the "hints" are rather obvious. Other times they are so subtle the student has to be a psychic. At this extreme this approach is called HIDING THE BALL, and it is the stuff of law school horror stories.

The HIDE THE BALL question utilizes words and fact patterns that only vaguely suggest issues. This is like a code language known only to law school professors. The following is a list of "code" words and facts that are often used to indicate intended issues.

TORT Issue Spotting Hints

Issue Area and Coded Hint:	**Intended Issue:**
INTENT:	
1. Apprehensive/concern:	Assault?
2. Touching/contact/ate/drank:	Battery?
3. Intent to touch/scare another:	Transferred intent to plaintiff.
4. Pranks and jokes:	Intent to cause apprehension/touching?
5. Act by child:	Intent? Knowledge with reasonable certainty?
6. Mistaken entry to land:	No defense to Trespass to Land?
AWARENESS/INJURY BY PLAINTIFF:	
7. No apprehension:	No cause of action for Assault?
8. No awareness of confinement:	No cause of action for False Imprisonment?
9. Aware of confinement but stays:	False Imprisonment if wrongful taking of child?
10. No awareness of taking:	No cause of action for Conversion?
11. No humiliation/distress:	No cause of action for IIED?
12. No damage to land:	Cause of action for Trespass to Land?
NEGLIGENCE ISSUES:	
13. Remote plaintiff?	Palsgraf. Did defendant have Duty to plaintiff?
14. Injury despite reasonable actions?	Was there any Breach?
15. Defendant is professional?	What is the standard of care?
16. Defendant failed to act?	Did defendant have a Duty to act?
17. Chain of events lead to injury?	Actual cause without proximate cause?
18. Criminal causes the injury?	Intervening superseding event?
19. Negligent acts of two cause injury?	Both Substantial Factors?
DEFAMATION ISSUES:	
20. Former, retired official, celebrity:	Still Public Figure?
21. Well known/star/performer:	Public figure?

22. Crime victim or unwilling person:	Are they a Public Figure?
23. False statements:	Were statements really Defamatory?
24. Written, oral, videotaped:	Libel or slander?
25. Business dealings, Disease, Morals:	Libel per se?
26. Limited distribution of statements:	Publication?
27. News media:	Statements of public interest?
28. Failed to investigate:	Negligence?

INVASION OF PRIVACY

29. Commercial use of photo/picture:	Appropriation of likeness?
30. Said/told/revealed:	Defamation/Public disclosure/Interference?
31. False depiction:	False Light?

ABUSE OF PROCESS, MALICIOUS PROSECUTION, INTERFERENCE:

32. Arrested/sued:	Malicious prosecution/Abuse of process?

AFFIRMATIVE DEFENSES:

33. Detainment of customer in store:	Shopkeeper's Privilege - reasonable?
34. Pranks and jokes:	No defense to assault/battery?
35. Assumption of risk:	Defense to assault/battery?
36. Silence or acts by plaintiff:	Consent? Implied consent?
37. Negligence by plaintiff:	Contributory/comparative negligence?
38. Forced or protective act:	Necessity? Self defense? Defense of others?
39. Act taken without intention of harm:	Mistake of fact? Reasonable mistake?

AN ISSUE SPOTTING EXAMPLE:

Example: *"Sam Shooter went to a deserted rock quarry 100 feet deep to shoot his gun. He didn't know Wally Wino had fallen into the quarry in a drunken stupor. Wally knew he was in danger, but he went to sleep in an abandoned car at the bottom of the quarry anyway. Sam intentionally shot at a beer bottle in the quarry. The bullet hit the bottle just as he intended, but then it hit Wally. What actions can Wally bring against Sam? Defenses?"*

Issues: 1) BATTERY? The question says "intentionally shot" and "he intended" so even though Sam did not intend to hit Wally these words indicate the grader wants you to discuss and explain intent. So do it.

2) NEGLIGENCE? Sam had a duty to Wally because shooting creates reasonably foreseeable dangers. And Wally was in the "zone of danger".

3) CONTRIBUTORY NEGLIGENCE. Clearly Wally helped cause of his injury.

4) COMPARATIVE NEGLIGENCE -- same thing.

5) ASSUMPTION OF THE RISK -- Wally "knew he was in danger."

Famous Last Words: *"That was really easy. I got done early. "*

Chapter 5: Non-Issues, Red Herrings and Splits

It is almost as disastrous to waste time discussing a non-issue as it is to fail to discuss an intended issue. It wastes time and irritates the grader.

Remember, you usually get ZERO POINTS for discussing any issue that is not on the Grading Key. The grader often has little authority to give you points for your inventiveness.

Also remember that while you discuss the non-issue, everyone around you is discussing the intended issues. They are making points and you are being stupid.

How to Recognize Non-Issues.

A non-issue is an issue that is not on the Grading Key. For every issue the grader wants you to discuss there will be one or more specific facts as "signs", "hints" or indicators. The grader does not want to be accused of "hiding the ball", so If you see a "really subtle" issue or an issue that you think "most people" will not recognize, that it is probably because it is an UNINTENDED ISSUE.

Hints. If the grader does not want you to discuss an issue, they may add HINTING WORDS to show that issue is irrelevant.

> **Example:** If the intentional act that causes injury is a common act (driving auto, punch to nose) do not discuss IIED. If you are to discuss IIED there will be some outrageous act likely to embarrass or terrorize the plaintiff.
>
> **Example:** If the owner of land where injury occurs is not identified, or injury might be on public land (sidewalk, street, etc.) do not discuss trespass to land. If you are to discuss trespass (and transferred intent) the question will tell you whose land/building it is.
>
> **Example:** If the word "reasonable" appears it is a hint that you should not waste time analyzing whether or not the person was negligent. If they acted reasonably, they could not have been negligent.
>
> **Example:** Do not discuss assumption of the risk unless the plaintiff has knowingly engaged in some risky behavior.

Follow The Call.

Another way the grader will direct you is by the CALL OF THE QUESTION. If the CALL is "structured" with a list of questions, the professor (or Bar) is telling you the specific questions you are to address.

How Many Issues?

Another indicator is the NUMBER of clearly indicated issues. If you can count 6 to 8 clearly obvious issues to discuss, it is unlikely you are expected to discuss some other hidden and marginal issue.

Stay mainstream. Discuss only **mainstream law school issues**, not marginal or tangential issues of law. You may know something about the law from your own personal experience but leave that knowledge at home and only use knowledge you have been taught in law school.

Example of non-issues. Suppose the question states:

> *"Don was driving negligently when he hit little 5-year old Bobby who was playing in the busy street as usual. Fortunately, Bobby was not hurt. But when police found his mother, Slutzy, at the local tavern and told her of the accident, she was so upset she fell off her barstool in hysterics, bruising her knee. What are Slutzy's causes of action against Don and his possible defenses."*
>
> INTENTIONAL TORTS. These are non-issues. The facts say Don was "negligent". And Don did nothing to deliberately injure Slutzy.
>
> NEGLIGENCE. This is a non-issue because the facts say Don was "negligent". Take it as a given. Besides, the call is about Slutzy's causes of action, not Bobby's. But can Slutzy claim damages for her bruised knee? Proximate causation is an issue. Maybe she fell off the bar stool because she was drunk!
>
> NEGLIGENT INFLICTION. Here is the central issue -- is the bruise a physical manifestation of emotional distress? Was she close enough in time to claim negligent infliction. Can she claim negligent infliction because police tell her Bobby was not injured?
>
> CONTRIBUTORY/COMPARATIVE NEGLIGENCE. Isn't Slutzy negligent because Bobby was in the street "as usual"?
>
> ASSUMPTION OF RISK. Wasn't Slutzy aware of the risk of letting Bobby play in the street?

Red Herrings.

Although the grader will give you hints about the issues you are intended to discuss, she may also deliberately throw out a few RED HERRINGS to mislead the careless. A RED HERRING is a fact that hints at a totally different AREA OF LAW from the call of the question. The purpose of the Red Herring is to test your ability to focus on the CALL of the question without being distracted to irrelevant issues.

Example of a Red Herring. Suppose the question states:

> *"Tom sold a car to Dick in exchange for a $1,000 personal check that Dick knew was worthless.*
>
> *Dick used the car to rob a bank, and while fleeing from his crime, he negligently rammed the car into Paula. Paula was Tom's casual friend and she died and left Blackacre to Harry, Tom's brother, by an attested will that was only signed by one witness. When Harry received the inheritance he was married to Wanda but he lived in California, and*

> *she had temporarily moved to Nevada to file for a quickie divorce in District Court so she could marry her lover, Tom.*
>
> *What tort actions can Tom bring against Dick?*

Here the call of the question is to discuss Tom's possible tort remedies against Dick. The only possible remedy Tom could have is an action for deceit (fraud). Tom cannot "prosecute" Dick for his criminal acts. That might make Tom feel better, but it is not going to put money in his pocket. Therefore, his only injury is the result of Dick's presentation of a "worthless" check. None of the other facts give Tom any other causes of action in tort.

Avoid Detailed Split Discussions Unless Called For.

A split is a conflict of rules. Some law school professors obsess on them, and some law students get obsessed about learning all of their intricate little nuances. Get a life. This is a waste of time and very distracting. Splits should always be mentioned in your rule statement, but discussion should be limited unless an in-depth analysis is clearly called for.

For example, States or Courts may differ on the law applied to certain issues. In stating the rule of law, it is important to say, "States are split on this issue," but usually little more needs to be said. AVOID GETTING HUNG UP ON DISCUSSION OF SPLITS.

Where the grader INTENDS for you to analyze a split of law, the question will clearly INDICATE that intent. In that case you should define each of the positions that have been taken, and whether a particular approach is considered the majority or minority view. [4]

For example, one should state that,

> *"In Palsgraf Cardozo said that a person who creates a danger owes a duty only to those in the "zone of danger" and should only to be liable to those owed a duty of due care. But Andrews said that if the defendant breached his duty to anyone he should be liable to everyone actually and proximately caused injury."*

Having stated this, discuss whether a duty clearly existed. Then move on with the rest of the analysis. Do not get bogged down in a lengthy discussion about whether Andrews was right or whether Cardozo was right.

> ***Famous Last Words:*** *"I spent a lot of time trying to remember the majority view."*

[4] The concept of "majority" and "minority" is rather illogical. Law is not a matter of majority rule.

Chapter 6: A WARNING about Example Answers

You may see "exemplary" answers distributed by the California Bar. These answers can be very misleading and produce unfortunate results.

Some "example" answers are actually very bad answers because they are too long, too complex and took the student too much time to write.

Test this for yourself. Select one of the longer example answers and try to physically copy it in written form in the time allowed. Often this cannot be done. And if you cannot even copy the answer in the time allowed, you certainly could not read, outline, compose and write that same answer in the allotted time.

In fact, this is why many "brilliant" students fail in law school. They learn everything there is to know, attempt to say it all on the exam and run out of time before they can say it all.

Your goal should NOT be to tell everything there is to say about a subject. Your goal SHOULD BE to know everything necessary and to say everything that needs to be said and can be said in the time allotted.

Writing ONE excellent essay answer SHOULD NOT be your goal if it causes you to run out of time on the other questions. RATHER your goal should be to write ONE GOOD essay answer for each essay question asked within the given time limits.

The best answers are those that 1) state all required issues, 2) give correct rules of law for each, 3) give a straightforward analysis, 4) match the stated facts to the elements, and 5) state a simple conclusion, **all within the time allowed**.

The example answers given in this book are deliberately not perfect. They do not cite a lot of case law, and they do not go into a lot of detail. But they are feasible, adequate answers that can be outlined and written within a one-hour timeframe. [5]

Famous Last Words: *"I got a 90 on the first question, but…"*

[5] Since this book was first published many student's answers using the "nailing the elements" approach advocated here have actually been picked as "exemplary answers" on both the California FYLSX and also on the California General Bar Exam.

Chapter 7: Essay Time Budgeting Mechanics

Doing a proper essay is like doing comedy. Timing is as important as the material.

IT IS ABSOLUTELY ESSENTIAL to keep on schedule while writing essays. You must establish and stick to a time budget. Do not go overtime on one essay thinking you will catch up later on another -- you won't.

YOU MUST HAVE A WATCH OR CLOCK with you. Do not depend on the clock on the wall when taking an exam because it will not be set to the hour at the beginning of the test, it may not be easily visible, and it might stop working. One time I was taking an exam and the clock fell off the wall and smashed on the floor!

Set your watch or clock exactly to the hour (e.g. 9:00 a.m.) When the proctor says, "You may begin," start the clock!

The key to keeping your essay on schedule is to **NUMBER THE ISSUES** on your outline, **COUNT THE ISSUES** and **MARK YOUR OUTLINE** with the time each issue should be finished.

RESERVE 5 MINUTES at the end of each essay to underline issue statements and key words and to check for omissions. Therefore, if you spend 15 minutes outlining, and save 5 minutes at the end, you really have only 40 minutes to write.

> **Example.** Suppose it takes 15 minutes to read the question and create the Question Outline that was created above in Chapter 3. There are 45 minutes left and 7 issues to write about (the beginning "contract statement" is like an issue). If you reserve 5 minutes at the end to underline and check your work, you have to write the 7 issues in 40 minutes. This gives you between 5 and 6 minutes to write about each issue.

FOLLOW THE PLAN -- MARK THE START/FINISH TIMES for each issue on the outline by adding 5 and 6 minutes (alternating) to the outline. Suppose the question in Chapter 3 above was the first essay of the morning, at 9:00 a.m. Marking the times for each issue on the outline, alternating 5 and 6 minute schedules, produces the following schedule:

QUESTION OUTLINE WITH TIME BUDGET

Paul v. Debbie

[9:15] 1. Assault -- "angry". "screamed". Know w/ reasonable certainty her act would cause apprehension?

[:21] 2. Battery -- "angry". "hit head". Know she would probably touch scaffold?

[:28] 3. Negligence? Duty - zone of danger. Palsgraf.

[:34] 4. Contrib neg -- no helmet -- company rule sets standard of care

[:41] 5. Assumption of risk -- didn't go to doctor -- aware of risk?

Paul v. Bob

[:47] 6. Negligence -- No duty as "bystander"

STICK TO SCHEDULE. It does absolutely no good to develop a time schedule if it is not followed.

Check the schedule against the clock as you finish each issue of the essay. If you are behind schedule, shorten the analysis of the next issues to get back on schedule. If you are ahead of schedule, give more extensive rule statements, analysis and citation of facts in the remaining issues to use the extra time you have.

PRACTICE CHECKING THE CLOCK at the end of each issue in practice exams. This has to be practiced until it becomes a regular habit.

MODIFY to meet your personal needs AFTER you are proficient in this approach. You can relax your approach and may be able to eliminate the timing from the outline altogether eventually. But start out with a timed approach first to develop a "feel" for how much time to spend on each issue.

> ***Famous Last Words:*** *"I nailed the first one. It was exactly what I studied, and I did a whole blue book on it. But that last one was a real race horse. There just wasn't enough time."*

Chapter 8: Organizing the Answer

STATE THE PARTIES! First, present a heading stating the parties to the contract dispute, plaintiff first and defendant second as follows:

Plaintiff v. Defendant #1

If there are two or more plaintiffs, or two or more defendants, analyze the rights, liabilities and defenses of one pair first.[6] Then after you have concluded the issues for the first pair present a new caption for the second plaintiff-defendant pair and discuss the issues that pertain to them:

Plaintiff v. Defendant #2

Once you state the parties (e.g. Plaintiff v. Defendant) discuss all issues and defenses between those two parties and don't restate these same parties switching their names around backwards.

NEVER try analyzing two defendants at the same time like this: "White v. Red and Blue."

Usually it is best to discuss the various parties in the order in which they appear in the fact-pattern, but if they have alphabetical names (e.g. Adam, Bob and Charley) you might consider discussing them in that order.

ORGANIZATION BY CALL STRUCTURE. If the call of the question is STRUCTURED, it indicates the organization of the answer, and you must follow that organization EXACTLY because the Grading Key will be in that precise form.

For example, if the question asks,

> *"Discuss the following issues:*
> *a. What remedies does W have against Y?*
> *b. Can W bring an action against X?*
> *c. What defenses can X raise?"*

Then, discuss your issues within the order of this framework. For example, the structured call above may result in the following answer structure:

> *"a. What remedies does W have against Y?*
> *1. Conversion?*
> *2. Money damages?*
> *3. Restitution?*
> *4. Specific Performance?*
>
> *b. Can W bring an action against X?*
> *5. Negligent Infliction?*

[6] As is usually the case when the issue is products liability.

c. What defenses can X raise?"

6. *Assumption of the Risk?*
7. *Consent?*

GENERAL ORGANIZATION OF TORT ANSWERS. Generally, except as noted below, if the call of the question is general, such as "Discuss," the organization of issues in your answer should follow the following general pattern.

1) Discuss INTENTIONAL torts (mnemonic = ABC-FITT) before NEGLIGENCE.
2) Define INTENTIONAL in the first intentional tort issue.
3) Discuss PASSIVE DEFENSES (based on absence of an element of the tort) as part of your analysis of each tort issue itself.
4) Discuss AFFIRMATIVE DEFENSES (such as self-defense) as separate issues following the intentional tort discussion.
5) Discuss NEGLIGENCE in almost every essay unless intent is clearly shown.
6) Discuss the AFFIRMATIVE DEFENSES of CONTRIBUTORY NEGLIGENCE, COMPARATIVE NEGLIGENCE and ASSUMPTION OF RISK following almost every negligence analysis.
7) If DEFAMATION issues are raised you will have to define and discuss negligence briefly in order to apply *Sullivan v. New York Times*, etc.

For example, if "Ted dared Bob to throw at him. Bob threw at Ted, missed and hit Henry," the structure of the answer would be:

Ted v. Bob

1) Is Bob liable for TORTIOUS ASSAULT?

2) DEFENSE OF CONSENT?

Henry v. Bob

3) TORTIOUS BATTERY?

4) Bob liable for NEGLIGENCE?

INTRODUCTORY STATEMENT FOR NEGLIGENCE QUESTIONS. For questions that are negligence questions and do not suggest any intentional torts, an introductory statement can be beneficial because it allows you to define "negligence" at the very beginning of the essay and then treat each element of negligence as a separate issue.

" Negligence is a failure to act as a reasonable person would in the same circumstances. But whether the plaintiff can to prevail in a negligence action generally depends on whether she can prove DUTY, BREACH, ACTUAL CAUSE, PROXIMATE CAUSE and DAMAGES."

Chapter 9: Stating the Issue

An "issue" is a legal or equitable claim, charge, plea or defense (usually disputed or disputable) that can be settled by a single rule or definition of law that requires proof of a limited number of "legal elements".

Phrase the Issue for an EASY DETERMINATION. The best phrasing for the issue statement depends on the area of law: Set up your issue as a "straw man" so that you can easily "knock it down" by identifying the elements, showing the facts support the elements, and thereby go on to consider other issues. Avoid phrasing an issue in a way that forces a conclusion that necessarily precludes discussion of other necessary issues.

Issues should be narrow and not so overbroad they turn on more than one rule of law.

Good Issues:

- Tortious assault?
- Nuisance?
- Contributory negligence?
- Restitution in tort?

Overbroad Issues:

- Rights of Bob?
- Liability of Carl?
- Defenses of Dick?
- Equitable relief?

Issues Structured by Call. If the question has a structured call, reflect that call in your answer with the "issues" organized to support that overall organization.

For example, if the question asks,

> *"Discuss the following issues:*
> *a. What are the rights and remedies of B?*
> *b. What defenses can A raise? "*

Your answer should be structured with the issues like this:

B v. A

a. Rights and Remedies of B
1. (first issue)
2. (second issue)

b. Defenses of A
3. (third issue)
4. (fourth issue)

General Issue Structure. Number issues with ARABIC numbers. And UNDERLINE the entire issue statement. The issue can either be written out like "Is Bob liable for ASSAULT??" or they can be abbreviated to a single word like "ASSAULT?" Writing the main word in UPPER CASE brings it to the reader's attention.

Don't use Roman numerals or letters for issue statements because they waste time.

Use a question mark? The issue should be a disputed or disputable claim so mark it with a question mark (?).

Match Issue Numbers to Your Outline. The numbers on the issues should match the numbers on your outline. That helps prevent you from accidentally skipping an issue you intended to write about.

Examples:

1) ASSAULT?
2) BATTERY?
3) CONSENT?

Phrase Issues for EASY ANSWERS. Phrase issue statements so they are easy to answer! Make the issue a "straw man" with clear elements that you can easily "knock down" by proving the elements.

Always ask if the defendant "can be liable," NOT "guilty". Guilt is a criminal term, not a tort term so never use it. Call assault and battery "tortious assault" and "tortious battery" to make it clear this is not a criminal issue. Ask if the defendant can "raise issues."

Tort Issues. Generally discuss the torts suggested in the fact pattern CHRONOLOGICALLY, often citing the time or date of each tortious act to keep them straight.

Every intentional tort involves an INTENTIONAL ACT so DEFINE that term.

For CONSENT the issue is often whether it was an EFFECTIVE consent.

Tort Issue Examples:
1) Can A be liable for TORTIOUS BATTERY on B?
2) CONVERSION of the car?
3) TRESPASS to B's Land?
4) Defense of CONSENT?
5) NEGLIGENCE?
6) CONTRIBUTORY NEGLIGENCE?
7) DEFAMATION of B?

Famous Last Words: *"I had him guilty of conversion. What did you get him?"*

Chapter 10: Nailing the Elements – The HEART of the Essay

The heart of every law school or Bar essay is the ANALYSIS, and the key to analysis is **NAILING THE ELEMENTS.** This means to

1) State an ISSUE raised,
2) Cite LEGAL AUTHORITY for a rule,
3) State the LEGAL RULE with clear **ELEMENTS** to be proven, and then
4) PROVE that **HERE** EACH and EVERY ELEMENT of the rule can be proven **BECAUSE** a relevant **SUPPORTING FACT** exists in the fact pattern.

A heart of NAILING THE ELEMENTS consists of 2 parts:

1) State the ELEMENTS of the RULE, and
2) NAIL (prove) each ELEMENT of the rule with a QUOTED FACT.

NAILING THE ELEMENTS is the easiest thing to do, and it produces the greatest benefit. Yet some students simply refuse to do it. Those students are usually referred to by other students in the past tense.

Follow this order:

1) Cite the AUTHORITY. This is mandatory on a Bar Exam and it is a good habit to start in law school. Show the grader that you know the area of law that applies. This is a good approach to citing a CASE (Palsgraf, New York Times, etc.), a STATUTORY SCHEME, or a LEGAL CONCEPT (transferred intent, etc.). TELL THE GRADER THE LEGAL AUTHORITY your answer is based upon.

To do this, start your answer with the word "Under …" and cite the authority for your rule of law.

Examples:

1) *Under common law …*
2) *Under tort law …*
3) *Under Palsgraf …*
4) *Under New York Times v. Sullivan…*
5) *Under product liability law…*

2) State the LEGAL RULE. Generally you should state together all rules of law that apply to the issue FIRST in ONE SPOT. Do not "dribble" the rule out in bits and pieces here and there in the analysis.

The grader is looking for the RULE to follow the ISSUE. You must put the rule where the grader expects to find it. Follow the IRAC approach -- put the RULE right after the ISSUE.

Until you get familiar with this approach it is very beneficial to underline the rule elements that must be proven. You can stop doing this later after you have made "nailing the elements" a firm

habit. But when you are first learning HOW TO WRITE exams, underlining the ELEMENTS in the rule will help you focus on WHAT YOU NEED TO PROVE.

Examples of Legal Rules with Elements Underlined:

1) *Under tort law NEGLIGENCE is a failure to exercise that degree of care which a prudent person would use in similar circumstance.*
2) *Under NEW YORK TIMES V. SULLIVAN a public figure plaintiff must prove actual malice, that the defendant knew or recklessly disregarded the falsity of their statements in a defamation action.*
3) *Under tort law ASSAULT is an intentional act causing apprehension in the plaintiff. Intentional means for the purpose or with knowledge with reasonable certainty that the result will occur.*

3) NAIL EACH ELEMENT OF THE RULE WITH A FACT. This is the single MOST COMMON REASON PEOPLE FAIL THE BAR.

Remember, IF YOU DO NOT NAIL, YOU WILL FAIL!

You must show that each ELEMENT is PROVEN BECAUSE there is a FACT provided to prove it. "Nail" each element with a fact from the question by using the following form:

> *"Here* [the ELEMENT of law is PROVEN] *BECAUSE* "[some FACT is given]".[7]

Try to Use One "Because" for Each Element. Use the word "because" and give a "quoted fact" for each and every element in the rule. If the rule has four elements, there should be four "because"s and four "quoted facts".

You can combine two or more elements into a statement and otherwise modify this approach. But this general approach MUST be used.

If you follow this "Here … because … "quote"" approach, you will AUTOMATICALLY focus on each element of your rule and to the facts that prove that element.

4) Give a SIMPLE CONCLUSION. This is the least common problem area. All students are too quick to cite conclusions. The simplest approach is to state, "Therefore…"

About the only error one can make in citing a conclusion is to be WIMPY or WISHY-WASHY.

Do NOT give conclusions like this:

> ***WRONG: "****Bob might be liable for negligence bit it is not clear if Don was in the zone of danger."*

[7] Avoid saying, "Here…Here…Here…" Instead, say something like, "Here…And…Also…Further…"

Instead, just say,

> ***RIGHT:*** *"Therefore, Bob can be liable with negligence."*

Skeleton of NAILING Approach Structure.

Your essay should have this skeletal form:

Explanation :	Written Structure :
[Numbered, underlined issue statement]	*1.* [ISSUE as word, phrase or easy question]*?*
[Cite Authority]	*Under* [Authority],
[State Rule with each Element underlined.]	[The Rule is … with Element 1, Element 2, etc.]
[Address each Element by saying "Here…" The Element to be proven is underlined again. Then say **"because"** and quote a Fact to prove the element of the rule.]	*Here* [Element 1, underlined] *is proven/shown to be true* ***because*** ["Fact 1", Quoted].
[Repeat for each additional Element.]	*And* [Element 2, underlined] *is proven/shown to be true* ***because*** ["Fact 2", Quoted].
[Give a terse and definite Conclusion]	*Therefore,* [ISSUE is true/false/proven.].

Example of Proper Analysis: If the question asks, *"Don intentionally threw the ball as hard as he could to first base. But his throw was high, and it sailed into the bleachers hitting Mary in the face. Can Mary recover from Don for battery?"*

Analyze as follows:

"Mary v. Don

1. TORTIOUS BATTERY?
Under tort law a BATTERY is an intentional act causing a harmful or offensive touching of the plaintiff's person. An intentional is one done for the purpose or with knowledge with reasonable certainty that the result will occur.

Here Don did not intentionally act to hit Mary because his intent was to throw the ball to "first base."

Therefore, Don did not act with the intent of causing Mary to be hit, and would not be liable for battery.

An Example of Bad Form: Bad essay answers are usually bad for a number of small reasons. Each of the little problems adds up to a big problem. Compare the bad answer to the same question below to the correct answer given above.

BAD ANSWER:

"Mary v. Don

BATTERY.
Don has done battery unless he was justified in throwing the ball.

Don intentionally threw the ball as hard as he could to first base. But his throw was high, and it sailed into the bleachers hitting Mary in the face. This would be a harmful or offensive touching -- the basis for a BATTERY, an intentional harmful or offensive touching of the person, including their clothes or something the person might be holding.

Don would argue that he did not intend to hit Mary, but Mary would argue that he intentionally threw the ball as hard as he could. She would argue transferred intent since Don was trying to hit the first base.

This answer is bad for a lot of reasons. Put yourself in the grader's place. Pretend it is late at night and you have already gone through about 80 bad essays. You are tired of seeing bad essays. You are in no mood to cut any slack. Here is how you might feel about this essay:

"Hurumph. "Battery?" Tort or crimes?

Starts with a conclusion, rather than a rule. No rule given, just a restatement of all of the facts. Then a rule pops up followed by some paddling, and a mention of transferred intent without definition.

Never says "because". Forget about it girl. This is a 60."

Famous Last Words: *"They can't say I didn't use the facts this time. I rewrote the whole damned thing."*

Chapter 11: Don't Give "Conclusionary" Analysis

The "BAD ANSWER" in the previous chapter is conclusionary. Law students are often told their answer is "conclusionary" but that term is seldom explained. Sometimes the student is told to "use the facts." That also is seldom explained.

A "conclusionary" analysis is one that jumps to a conclusion regarding an issue without any analysis of the facts needed to prove the elements of the legal rule. The conclusion is unsupported by evidence.

The identifying characteristic of a conclusionary analysis is that the word "because" never appears BECAUSE no FACTS are referred to.

Example: Suppose the question says,

> ”Bob threw the firecracker into the crowd below causing panic."
>
> A **CONCLUSIONARY** answer is --
>
> *"1. Can Bob be charged with TORTIOUS ASSAULT?*
> *Under tort law an ASSAULT is an intentional act causing apprehension of a battery. A battery is an intentional act to cause a harmful or offensive touching of the person of the plaintiff, and an act is intentional if it is for the purpose or with knowledge with reasonable certainty that the result will occur.*
>
> *Here Bob acted intentionally and caused apprehension of a battery so he can be liable for assault.*

The conclusionary analysis jumps to a conclusion that the issue is proven by reference to the rule without reference to supporting facts.

Here you might argue there is some reference to the facts because the student writes that "Bob acted intentionally and caused apprehension ". But there is no reference to a fact that proves he "acted" or that "apprehension" was caused at all. The word "because" is missing. The explanation, that "Bob acted intentionally" because he "threw the firecracker" is absent from the answer. The explanation that "Bob caused apprehension" because the "crowd below panicked " is missing.

In an essay there should be one "because" and at least one reference to the facts for every element of every rule. This rule can be relaxed, but if there are few or no "because"s at all, and few references to the facts, the essay will become conclusionary and totally unacceptable.

Chapter 12: Don't "Restate Facts"

After law students are admonished to "use the facts" they are then chastised for "restating the facts". How can you "use the facts" without "restating the facts"? What does this mean?

The bad habit of "restating the facts " simply means that the student simply repeats the facts like a parrot without providing any analysis or explanation relating those facts to the elements of the rule that needs to be proven.

The identifying characteristic of an answer that simply restates facts is that the word "because" never appears BECAUSE no ELEMENTS are referred to.

An analysis which "simply restates facts" jumps to a conclusion that the issue is proven by reference to the facts without reference to the legal elements of the rule.

Example: Suppose the question says,

> ”Bob threw the firecracker into the crowd below causing panic."
>
> An answer with **UNNECESSARY RESTATING OF FACTS** would be --
>
> *"1. Can Bob be charged with TORTIOUS ASSAULT?*
> *Under tort law an ASSAULT is an intentional act causing apprehension of a battery. A battery is an intentional act to cause a harmful or offensive touching of the person of the plaintiff, and an act is intentional if it is for the purpose or with knowledge with reasonable certainty that the result will occur.*
>
> *Here Bob "threw the firecracker into the crowd below causing panic" so he can be liable for assault.*

The problem with this answer is that it jumps to a conclusion by simply repeating all the facts, but it does not relate any particular ELEMENT of law to any particular fact.

For example, it says "Bob threw the firecracker" but it does not explain that fact is important because it proves an intentional act. The explanation that Bob's act caused panic is important because it is evidence supporting the element of apprehension of battery is absent from the answer.

If an answer refers to a lot of "facts" but never uses the word "because" then it is unacceptable.

Follow The Yellow Brick Road. The simple, mechanical way to improve essay analysis is to remember what Dorothy said when she went down the Yellow Brick Road in the Wizard of Oz -- "BECAUSE, BECAUSE, BECAUSE, BECAUSE, BECAUSE."

If you put one "because" in your analysis for each element in your rule, it will simply force you to cite BOTH FACTS AND ELEMENTS. This approach automatically, methodically, mechanically and simply forces you to write a better essay.

Chapter 13: Avoid "Paddling"

Many law students use "analysis" composed of alternative arguments from each side of a dispute. This "sing-song" approach is referred to as "paddling" because it is like paddling a canoe, first arguing the position of one party, then switching to argue the position of the other side. This can be effective at times, but it is usually inferior to nailing the elements.

Example of a Paddling Answer: Suppose the question says,

> "Bob threw the firecracker into the crowd below causing panic."
>
> An answer with a "Paddling" approach would be --
>
> *"1. Can Bob be charged with TORTIOUS ASSAULT?*
> *Under tort law an ASSAULT is an intentional act causing apprehension of a battery. A battery is an intentional act to cause a harmful or offensive touching of the person of the plaintiff, and an act is intentional if it is for the purpose or with knowledge with reasonable certainty that the result will occur.*
>
> *The plaintiff would have to prove that Bob intentionally wanted to cause apprehension. Bob would argue that when he threw the firecracker he did not intend to cause a panic. The facts do not state what Bob's intent was. The plaintiffs would argue that Bob knew the firecracker would scare someone. They would say that a reasonable person would know that throwing a firecracker into a crowd would cause trouble.*
>
> *Bob would argue that panic is not the same as reasonable apprehension. The plaintiff would argue that panic is caused by apprehension.*
>
> *Therefore, Bob would be liable for assault.*

This "Paddling" approach is not totally worthless, because it does focus on the facts and the elements of the rule. In fact, it is a good approach to follow when there is an element that is not well supported by the facts. In that situation it provides a framework for explaining the strength and weakness of the supporting facts as viewed from each side. But it is simply overdone and often used where it is unnecessary.

Probably the worst thing about this approach is that it gets really irritating to the grader. It is like listening to two children bicker.

Chapter 14: Test Taking Mechanics

It is incredible the weird and stupid things law students do at examinations. The following comments cover the simple mechanics of preparing for and writing an exam. These points seem obvious but they are the reasons a lot of people fail law school and the Bar Exams.

If you work, take three days off for all first-year law school exams! For strange unknown reasons beginning law students are the most overconfident people in the world. Take three full days to study for each first-year law school exam. This is especially true of the first mid-terms. The first-year mid-term exams are the most important exams you will ever take. If you fail one of those first exams, you will be in a hole, on probation and at risk of expulsion for all the rest of your law school experience.

Write at least eight timed exams. That means you should spend at least 8 hours just writing essay answers. You can only physically write for about 4 hours a day, so this means you need to spend about TWO DAYS writing exams, getting your timing down and memorizing what to say.

Learn the mnemonics. If you don't know the mnemonics like ABC-FITT, DARN COPS, etc. you are the creek without a paddle.

Outline your answer and follow your outline! It does you no good to outline an essay answer if you are not going to use it.

Bring decent pens. Whether you handwrite the essay or type it, buy a small box of good, smooth writing black ink pens. DO NOT write an essay exam with colored pens or gummy old ink pens that give you writer's cramp and leak all over. I chided one student for using a crummy pen. He said he liked that pen. He just flunked the Bar for the fourth time.

Bring a Watch or Clock. Bring one or more watches or clocks that you can adjust to the hour so you can time your work. Start it when they say, "begin".

Use paragraphs, and lots of them. The "stream of consciousness" approach to writing does not thrill the grader. I don't think e e cummings was an attorney. Break your answer up into paragraphs of between one and four sentences.

Leave lots of blank space. Leave extra space between paragraphs, at the bottom of the page, and between issues. Leave space so that if you forget to mention an issue you will have room to go back and insert it.

Never switch defendants (plaintiffs) in mid page. Start a new page.

Never start a new issue at the bottom of a page. Go to the top of the next page to begin a new issue. Don't be afraid to ask for and use a lot of paper.

Typewriter ribbons. Bring plenty of typewriter ribbons if you type.

Do the essays in order. If you are given three essays, do them in the order given. DO NOT think that you will improve your score by doing them out of order. It will NOT improve your score and it can cause a major disaster. For example, there can be a problem with the third question. If

everyone but you is doing Question 1 the proctors might find an ambiguity on Question 3 and make a timely announcement. That would save the day for everyone -- but you!

Further, if you are working on the same question as everyone else, you can feel their anxiety and the pace of their work. You can feel when a question is easy or hard. You can feel yourself getting behind on the time.

Print out each page of the essay as it is completed! If you type on a word processor, DO NOT wait to the end of the essay to print it out. If you have a power failure, you will be screwed. Print each page as it is finished!

Do not underline with the typewriter. Most typewriters underline too slowly. Use ALL CAPS to identify words you feel are important and underline them manually with a pen after the page is finished. This gives you a timely chance to review your answer too.

Get some sleep. It is absolutely counter-productive to study all night before the exam.

Don't get wired. It is a bad strategy.

> ***Famous Last Words:*** *"I didn't write any practice essays but I looked at the old exams."*
>
> ***Famous Last Words:*** *" I crammed all night."*
>
> ***Famous Last Words:*** *"I did the third question first. It seemed easier."*

Chapter 15: Essay Answer Formats – WHAT to Say and HOW to Say It

Before you walk into a law school or Bar exam, you **MUST** be able to recite, verbatim, prepared responses to a wide variety of potential questions. If you don't have prepared responses memorized, you are dead. You will not have enough time to think up a good answer on the spot. You will get "brain lock", run out of time on your essay answers, panic and your goose will be cooked.

You MUST be able to recite, from memory, the definitions and rules of INTENTIONAL TORTS and PROXIMATE CAUSATION without hesitation or mental reservation, and be able to cite some important cases like *Palsgraf* and *New York Times*. You MUST be able to state by memory the defenses to intentional torts.

Am I kidding? NO.

What if the professor says it is not necessary? Don't believe him. When the other students know it and you don't is he going to forgive you? NO.

Will any of the other students learn all this? YES. Will they tell you? NO, they will act like they don't know any more than you do.

How? You must develop this ability by repetition and practice. You must memorize and be prepared to recite a significant portion of the material presented in the following **Issues and Answers** if you are to succeed in passing your exams.

The following chapter provides you with **EVERY ISSUE, AUTHORITY, DEFINITION and RULE** of law you need to be prepared for most questions. You can fake anything else.

Important Stuff. As you read through the following issue and answer formats, you may be overwhelmed with the feeling that, "There ain't no way in Hell I can memorize all of this." This is a natural reaction. But some of the following is more important than the rest, and the important portions will be identified and marked for you like this → **Important!** As for the rest, you should at least be able to fake it.

How to Memorize. The way to memorize the important portions of the following is like memorizing the Gettysburg Address -- read it, recite into a tape recorder, and play it back against the text. Do it naked if you have to. Sing it if you have to. Just do it.

The Text Format Used Here. In the following issue and answer formats, the text you should know and be prepared to produce is presented in *italics*. Additional information, comments and notes are presented in plain text.

Fake the Rest. You can't memorize everything. You can't know everything. You are human. So just listen in class, read a course outline and fake anything that is not in this book. But KNOW the definitions and rules that this book says are **Important!**

Four Ploys to Save You on an Exam.

When you are taking law exams you will invariably find yourself in perplexing and difficult situations. Here are four ideas you can use to get yourself out of a tight spot.

1. **"Actions Imply Intentions."** If no facts expressly state what the parties' intentions were at the time they acted, their actions (or lack thereof) imply their intentions.

   For Example: You are presented with facts that don't expressly say what a defendant's intentions were at some point in time. You can say, "The defendant impliedly did not intend to steal at the time of the breaking because she did not take the TV until the next morning."

2. **"The Courts Have Often Been Split."** If you are presented with an issue that you have either never seen before or else you recall reading something about it but can't remember which way the Courts decided the issue, you can always say, "The Courts have been split on this issue…" It sounds very "lawyer-like" and it is always true. Then you should probably discuss the "balance rule" and "reasonableness" standards presented below.

3. **"The Court Would Balance."** For almost every issue in every area of law there is some sort of "balance test". In these "balance tests" the Court considers the interests of the parties, the plaintiff and defendant, the interests of the Court itself, the interests of third parties, and the public interest. So if you don't know what the law is or what to say consider saying, "The Court would balance the interests of the parties in light of the public interest and the Court's own interest considering the impact on the efficient administration of justice." This sounds good, and you can make it up on the spur of the moment.

4. **"Reasonable expectations…reasonable behavior…reasonable person…"** For virtually every issue in every area of law the rule of law is based on what is "reasonable". Sometimes it is "reasonable expectations", sometimes "reasonable behavior", sometimes "reasonably foreseeable, and sometimes "reasonable person". But it is always "reasonable". So if you use the word "reasonable" liberally in describing the rule of law and the considerations of all concerned, you usually cannot go wrong.

   For Example: Putting this all together, suppose you are presented with some dispute that raises an issue that you have never seen before and don't know the law at all. You have to fake it. A good approach is to say, "The Courts have been split on this issue. The Court would balance the interests of the parties in light of the public interest and the Court's own interest considering the impact on the efficient administration of justice. The decision would depend on the reasonable expectations of each party in light of the reasonable needs of third parties and the impact on the Court. Here the reasonable expectation of …. And a reasonable person would believe… And it was reasonably foreseeable that… Therefore…"

Chapter 16: Answering Tort Questions

There are 5 basic types of tort essay questions; issues can be skipped if the question does not call for their discussion.

1. **INTENTIONAL TORTS AND NEGLIGENCE** – Intentional torts are deliberate ACTS causing CONFINEMENT, FEAR, OFFENSE or other harm and negligence is a NEGLIGENT act causing harm. If both intentional torts and negligence are suggested by the facts, address the INTENTIONAL TORTS first and the possible defenses. Then address NEGLIGENCE second with the possible defenses to that cause of action.
2. **PRODUCTS LIABILITY –** Anyone who releases an UNREASONABLY DANGEROUS product into the stream of commerce may be held liable for any personal injury, property damage or other economic losses caused, but the extent of liability depends on the legal theory proven by the plaintiff.
3. **DEFAMATION AND INVASION OF PRIVACY** –Defamation is a false assertion causing damage to REPUTATION. Invasion of Privacy can be any of four theories for unreasonable acts causing EMBARRASSMENT or INCONVENIENCE.
4. **NUISANCE** – Nuisance is an unreasonable interference with the plaintiff's ability to enjoy and use private LAND or else to enjoy the use of PUBLIC resources.
5. **MISCELLANEOUS MALICIOUS TORTS -- MALICIOUS PROSECUTION / ABUSE OF PROCESS, INTERFERENCE WITH CONTRACT / INJURIOUS FALSEHOOD, DECEIT, TRADE SLANDER** -- Watch out for these. They are often too simple for an entire essay answer so they may be mixed in with intentional torts, negligence or other issues.

Mnemonics for Tort Essays:

- **ABC-FITT** = The intentional torts – Assault, Battery, Conversion, False imprisonment, Intentional infliction of emotional distress, Trespass to land and Trespass to chattels.
- **DARN COPS** = The intentional tort DEFENSES. Discipline, Authority of law, Recapture, Necessity, Consent, Others (defense of), Property (defense of), Self (defense of).
- **SCRAP** = DUTY can be based on Statute, Contract, Relationship, Assumption, and Peril caused (both a TORT and a CRIMES factor).
- **CLUB** = Slander per se – Crime, Loathsome disease, Unchaste behavior, Business practices
- **LAID** = Invasion of Privacy – false Light, Appropriation of likeness, Intrusion into privacy, public Disclosure of private facts.

Recommended Tort Essay Answer Strategies:

1. Discuss INTENTIONAL TORTS first and NEGLIGENCE second.
2. Always DEFINE "INTENTIONAL" in the discussion of the first intentional tort.
3. Discuss both intentional torts and negligence UNLESS it is CLEAR there was **NO INTENTIONAL ACT** done to cause the tortious event that caused the injury.
4. For ASSAULT and BATTERY be clear you are talking TORT and not CRIMINAL law.
5. BATTERY suggests an issue of ASSAULT and possibly INTENTIONAL INFLICTION.
6. FALSE IMPRISONMENT suggests an issue of INTENTIONAL INFLICTION.
7. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS is only for BYSTANDERS.
8. CONVERSION suggests TRESPASS TO CHATTELS.

9. DEFAMATION suggests NEGLIGENCE; separate analysis is often needed.
10. DEFAMATION and PRIVACY INVASION may be in the same question, but often not.
11. MALICIOUS PROSECUTION may suggest FALSE IMPRISONMENT.
12. ABUSE OF PROCESS often suggests a DEFAMATION issue.
13. Discuss the AFFIRMATIVE DEFENSES as separate issues.
14. For NEGLIGENCE, always discuss CONTRIBUTORY and COMPARATIVE NEGLIGENCE. Also maybe ASSUMPTION OF THE RISK.

COMMON TORT ISSUES AND ANSWERS

FOLLOW THE CALL of the question. But if the call is general list the issues as follows:

1. *ASSAULT?* [8]

   Under tort law ASSAULT is an intentional act done to cause and that does cause reasonable apprehension of a battery, a harmful or offensive touching of the person. **Important!**

   [Every "intentional tort" has the element of INTENTIONAL ACT! Always DEFINE "intentional act" in the definition of the FIRST intentional tort issue as follows:]

   An INTENTIONAL ACT is one done for the purpose of causing or with knowledge with reasonable certainty that it will cause the result that produces injury. **Important!**

   [ALWAYS state this in your discussion of the first intentional tort. For TORTS an act is intentional if it is done for the PURPOSE of producing a RESULT, or if the actors knows that result will almost certainly occur! But the result does not necessarily have to be injury. All that matters is that the result CAUSES injury.]

   Here … because…

   Therefore, the defendant may be liable for tortious assault.

2. *BATTERY?*

   Under tort law BATTERY is an intentional act to cause and does cause a touching of the person of the plaintiff resulting in harm or offense to the plaintiff. [9] **Important!**

   Here … because…

   Therefore the defendant may be liable for battery.

[8] Note that for "assault" and "battery" you can either call them "tortious assault" or "tortious battery" in the issue statement or else you can say "Under tort law…" in the rule. But somewhere you MUST make it clear you are talking about a tort and not a crime.

[9] Note that the "intent" of the defendant must be to cause a touching, and the touching must cause harm or offense, but the intent of the defendant does not necessarily have to be to cause harm or offense.

3. *CONVERSION?*

   Under tort law CONVERSION is an intentional act to cause and that does cause interference with the chattel of the plaintiff resulting in substantial deprivation of possession. The proscribed legal remedy is forced purchase by the defendant, but the plaintiff may "waive the tort" and seek restitution instead. **Important!**

   Here … because… Therefore the defendant may be liable for conversion.

4. *FALSE IMPRISONMENT?*

   Under tort law FALSE IMPRISONMENT is an intentional act to cause and that does cause the plaintiff to be confined to a defined area without any reasonably apparent means of reasonable exit. [10] *Plaintiffs must actually know they are confined, but do not have to know the confinement is illegal.* [11] **Important!**

   Here … because… Therefore the defendant may be liable for false imprisonment.

5. *INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS?*

   Under tort law IIED is an intentional, outrageous act by the defendant which causes the plaintiff severe emotional distress. **Important!**

   [Note: Here "intent" may be shown by EITHER the intentional commission of an outrageous act, regardless of intent, or by almost any act for the purpose of causing emotional distress. Any act is "outrageous" per se if the actual intent is to cause severe emotional distress. And a lack of intent to cause emotional distress is not a defense if the act itself is outrageous. But in any case the plaintiff must almost always present evidence to show they suffered extreme emotional distress (The sort of distress that requires medical or psychiatric care. Not just embarrassment or anger).]

   Here … because… Therefore the defendant may be liable for intentional infliction.

6. *TRESPASS TO LAND?*

   Under tort law TRESPASS TO LAND is an intentional act by the defendant causing an unauthorized entry onto, over, or under the land of the plaintiff. The defendant is liable for nominal damages and all actual damages caused by the entry.

   Here … because…

   Therefore the defendant may be liable for trespass to land.

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[10] A "reasonable person test" determines whether the confinement is without a "reasonably apparent means of reasonable exit."

[11] For example it is false imprisonment to illegally conceal a child away from its lawful guardian even though the child agrees to be concealed. The child lacks legal capacity to "consent" to being taken. And it is false imprisonment to keep a prisoner in jail after the scheduled (legal) release date, even though the prisoner is unaware they have a right to leave the jail. But it is NOT false imprisonment to keep a plaintiff illegally confined if the plaintiff is asleep, comatose, etc. and unaware of their situation.

7. *TRESPASS TO CHATTELS?*

   Under tort law TRESPASS TO CHATTEL is an intentional act by the defendant causing unauthorized interference with or damage to the chattel of the plaintiff. The defendant is liable for actual damages measured as the lost rental value of the chattel, the rental costs for temporary replacement of the chattel, and the repair costs to repair the chattel, but usually not more than the actual cash value of the chattel.

   Here … because… Therefore the defendant may be liable for trespass to chattels.

8. *TRANSFERRED INTENT?*

   Under the tort doctrine of TRANSFERRED INTENT, a defendant who commits an intentional tort towards anybody generally becomes liable for every injury inflicted on everybody, even if the injury caused or the person caused injury is not the original intent. **Important!**

   An exception is that Courts generally will not find IIED based on transferred intent, and Courts may find only negligence and not an intentional tort by transferred intent if the original intent of the defendant was not malicious. [12]

   Here … because… Therefore the defendant may be liable for trespass to chattels.

9. *DAMAGES for TORTS?*

   Every defendant that commits any tort is liable for all actual damages actually and proximately caused. Damages consist of SPECIAL DAMAGES, compensation for monetary losses, and GENERAL DAMAGES, compensation for pain, suffering, anxiety, emotional distress, inconvenience, etc. Defendants who commit intentional torts, including gross negligence (deliberate breach of duty) and recklessness (deliberate creation of unreasonable risks) may also be liable for PUNITIVE DAMAGES if the Court finds they acted with FRAUD, OPPRESSION or MALICE, an evil or wrongful intent to cause harm. Defendants who commit accidentally negligent torts are not liable for punitive damages. Tort plaintiffs have a right to "waive the tort" and demand RESTITUTION instead of compensation for damages.

10. *DEFENSE of DISCIPLINE?*

    Under tort law a person with recognized authority (schoolteacher, bus driver, airplane pilot, policeman, parent, etc.) *is privileged to act reasonably given the circumstances in a manner that otherwise might constitute a battery or false imprisonment.* [13]

    Here…because…Therefore…

[12] For example, Bevis and Butthead deliberately trespass onto Boomer's land to go hunting. Then Bevis accidentally shoots Butthead. Most Courts would not allow Butthead to claim battery by transferred intent merely because the "intentional trespass" against Boomer caused an injury to Butthead. Butthead may be required to claim negligence.
[13] EVERY defense requires REASONABLE acts. Your defense argument should stress "reasonable" throughout.

11. DEFENSE of AUTHORITY OF LAW (PREVENTION OF CRIME)?

Under tort law a person is privileged to act reasonably to prevent or stop a FELONY or DISTURBANCE OF THE PEACE from being committed in their presence. Police may arrest for misdemeanors committed in their presence and for felonies otherwise if based upon reasonable suspicion. [14]

Here…because…Therefore…

12. DEFENSE of RECAPTURE?

Under tort law a person has a qualified privilege to use reasonable force to RECAPTURE their own chattel if 1) they have asked for and have been refused return of the chattel, and 2) they are in fresh pursuit of wrongfully taken chattel, or 3) they lost possession of the chattel through no fault of their own.

Here…because…Therefore….

13. DEFENSE of NECESSITY? [15]

Under tort law a person is privileged to act reasonably as NECESSARY to protect their own safety, the safety of others, and the safety of property. For defense of property to be "reasonable" the value of the property being protected must exceed the damages caused by the efforts to protect it. Reasonable acts done to protect the property of others is a PUBLIC NECESSITY and absolutely privileged. Reasonable acts done to protect the defendant's own property are a PRIVATE NECESSITY and only a qualified privilege. The defendant remains liable for actual damages to the plaintiff.

Here…because…Therefore…

14. DEFENSE of CONSENT?

Under tort law FULLY INFORMED CONSENT from a person with legal capacity is a defense to most intentional torts, but is not a defense to a battery that causes foreseeable great bodily injury.

Here…because…Therefore….

[14] It is sometimes said that people who are not "police" have no right to stop or prevent "disturbances of the peace". This odd argument is contrary to common sense and experience. While the law does not encourage private parties to act they are police officers, it also does not punish people who act as reasonably necessary to protect innocent victims, prevent trespassing, theft and vandalism, and quell violent disturbances, even if the crimes being prevented are not technically felonies. If nothing else, these acts are defense of others, public necessity, and defense of property anyway.
[15] The defense of necessity is simply a combination of self-defense, defense of others and defense of property, but it more often is used only when property is being protected.

15. DEFENSE of OTHERS?

Under tort law a person is privileged to act reasonably as necessary to defend others who are NOT AGGRESSORS from harm. Aggressors are people who have unreasonably created or increased dangers to others. Courts are split when a defendant unknowingly acts to defend an AGGRESSOR. Under one view the defendant STEPS INTO THE SHOES of the aggressor and has no privilege because the aggressor could not claim self-defense. In other Courts the defendant is privileged to defend the aggressor in a fracas if they act with a REASONABLE BELIEF they are acting to defend an innocent victim of aggression.

Here…because…Therefore….

16. DEFENSE of PROPERTY? [16]

Under tort law defendants are privileged to use reasonable force to protect their property or the property of others. The use of deadly force to protect property is never reasonable or legal.

State something like the following if there is a suspected theft of goods or services:

Under the SHOPKEEPER'S PRIVILEGE a defendant may use reasonable force to detain a plaintiff for a reasonable period of time to investigate a reasonable suspicion that the plaintiff has stolen goods or services from the defendant.

State something like the following if there was a tortious injury to the defendant:

To protect litigation rights defendants may use reasonable force to as necessary to detain plaintiffs for a reasonable period of time to investigate events that have caused them damages. [17]

Here…because…Therefore…

17. SELF-DEFENSE?

Under tort law a person who is NOT AN AGGRESSOR may act reasonably if NECESSARY to protect their own safety. Modernly the person can "hold her ground" and has is no duty to retreat in most jurisdictions. Aggressors are people who have unreasonably created or increased dangers to others.

Here…because…Therefore….

18. DEFENSE of INFANCY, INSANITY or INCOMPETENCE?

INFANCY, INSANITY and INCOMPETENCE are not defenses for intentional torts.

[Watch for intentional torts by children or insane people! It is a criminal defense but not a tort defense because tort law is to compensate plaintiffs, not punish defendants.]

[16] This is effectively the same issue as "Defense of Necessity". "Defense of Property" more often is the stated issue when "deadly force" is a factor. "Defense of Necessity" is more often used when "public necessity" is suggested. And every property owner has a legal right to PREVENT TRESPASS TO THEIR LAND OR CHATTEL!

[17] When this is tested 90% of law students fail to grasp the obvious. Litigation rights are personal property.

19. NEGLIGENCE?

Under tort law NEGLIGENCE is a failure to exercise that degree of care that a reasonably prudent person would use in the same situation. To prevail the plaintiff must usually prove DUTY, BREACH, ACTUAL and PROXIMATE CAUSATION and DAMAGES. **Important!**

[Note: If negligence is just one of several issues in the question, the analysis of negligence elements can be contained within the issue of negligence.

If a question involves nothing but the cause of action for negligence, CONSIDER MAKING THE ABOVE AN INTRODUCTORY STATEMENT and then treat each of the elements (Duty, Breach, etc.) as a separate "issue".]

20. STRICT LIABILITY in NEGLIGENCE?

Under tort law a defendant that engages in any of three activities is STRICTLY LIABLE to any person who is actually and proximately caused injury. These three activities are: 1) keeping a KNOWN, DANGEROUS ANIMAL, 2) keeping an EXOTIC ANIMAL of a type that is not commonly domesticated, or 3) engaging in ULTRA-HAZARDOUS ACTIVITIES that are unusual, pose extreme risks to others, and are usually subject to strict safety regulations. [18]

If a defendant engages in these activities duty is presumed, and if anyone is caused injured as a result breach is presumed as well. Here…because…Therefore…

[Note: Product liability also can pose strict liability, but that is better addressed as part of a product liability analysis, not a "strict liability in negligence" analysis.]

21. DUTY?

Under tort law the general rule is that a person has no duty to act to defend others from harm. [19] *A DUTY to act to protect others from harm ONLY arises under five scenarios:* **[SCRAP]** *STATUTE, CONTRACT, RELATIONSHIP, ASSUMPTION or where PERIL to the plaintiff is caused by the defendant.* [20] **Important! Important in criminal law as well.**

[Go from here to either discussing negligence per se, duty based on peril or perhaps duty based on relationship, premises liability, etc. as appropriate.]

[18] Ultra-hazardous activities are things that average people simply never do. It is often just a matter of scale.
[19] Any statement that there is a "general duty to act reasonably to protect others from harm" is poppy-cock. There is NO GENERAL DUTY to act to protect others from harm.
[20] NOTE: Courts tend to limit liability to only those defendants owed the duty. There are three exceptions - when duties are based on PERIL, when the RESCUER DOCTRINE applies, or in the case of NIED.

22. NEGLIGENCE PER SE? [21]

Under tort law a DUTY may be created by a STATUTE (or rule), and violation of the statute is a BREACH of duty making the defendant NEGLIGENT PER SE if the purpose of the statute was 1) to protect the CLASS OF PEOPLE to which the plaintiff belongs by 2) preventing the TYPE OF INJURY that the plaintiff suffered. [22]

Here…because…Therefore….

23. DUTY BASED ON PERIL? [23]

Under tort law defendants that create reasonably foreseeable dangers to others have a DUTY based on PERIL to act reasonably to protect others from those dangers.

In PALSGRAF, CARDOZO argued that defendants who fail to act reasonably to protect others from the perils they have created should only be liable to plaintiffs who were actually in the ZONE OF DANGER at the time of their breach. The Zone of Danger is the area where the acts of the defendant created reasonably foreseeable dangers to others.

ANDREWS argued that defendants who fail to act reasonably to protect others from the perils they have created had always been liable to RESCUERS under the RESCUER DOCTRINE, whether they were in the Zone of Danger or not, (because "peril invites rescue") and the same principal should be applied to all plaintiffs actually and proximately caused injury by the defendants' breach of duty. [24] **Important!**

Here the ZONE OF DANGER was…because… [25] **[Note: See footnote 57!]**

24. DUTY BASED ON PREMISES LIABILITY? [26]

Under tort law OCCUPIERS OF LAND have a duty to both those who come onto the land and to those off the land. This is a form of duty based on RELATIONSHIP.

Under the common law occupiers of land had no duty to UNKNOWN TRESPASSERS.

The occupiers had a duty to warn and protect KNOWN TRESPASSERS and LICENSEES from known, hidden dangers and artificial conditions. Licensees are people allowed onto the land but not for the occupiers' benefit.

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[21] If a "statute" is mentioned in the question discuss NEGLIGENCE PER SE first before discussing duty based on PERIL. Usually the facts will not support a negligence per se finding – because it makes the answer too simple for an entire hour of examination.

[22] You may see a "rule" that is not a "statute" as when an employee works for a firm with a "safety rule." The employee ASSUMES the duty of obeying the rule by working at the job. And once assumed, the effect of the rule is the same as a statutory requirement.

[23] Duty is probably the most difficult element of negligence to prove and understand.

[24] I have read and re-read what Cardozo and Andrews said and I believe this is an accurate interpretation.

[25] It simplifies your answer if you define the ZONE OF DANGER and analyze just where it was in the situation presented. Was anyone in it? If there is nobody in the zone of danger there is no duty.

[26] Duty based on premises liability, a form of RELATIONSHIP DUTY, is the THIRD MAJOR basis after discussing negligence per se (duty based on STATUTE) and duty based on PERIL.

The occupiers had a duty to reasonably inspect the land and warn and protect INVITEES from known, hidden dangers and artificial conditions. Invitees are people invited or allowed onto the land for the occupiers' benefit.

Finally the occupiers of land had a duty to conduct and control activities on the land with due care to prevent injury to PEOPLE OFF THE LAND.

Modernly these rigid rules by classification have often been modified by both statute and Court decision to create a balancing test under which occupiers of land have a duty of due care to ALL PEOPLE to act as reasonable people would in inspecting, maintaining and using their property so that it does not pose known dangers to others.

Here…because….Therefore.

25. *ATTRACTIVE NUISANCE DOCTRINE?*

Under the ATTRACTIVE NUISANCE DOCTRINE an OCCUPIER OF LAND who knows that children have or may in the future trespassed onto her land has a strict duty to inspect for and eliminate any condition posing dangers the children might not fully appreciate because of their young age.

This is a duty based on RELATIONSHIP which poses almost strict liability. The only defense the landowner may raise is assumption of the risk.

Here…because….Therefore.

26. *LIABILITY BASED ON RESCUER DOCTRINE / FIREMAN'S RULE?*

Under the RESCUER DOCTRINE defendants may be liable to rescuers who are injured attempting to rescue people injured or placed in peril because of a breach of duty, even if the duty was not originally owed to either the rescuers themselves or those being rescued. This is an exception to the general rule that defendants are liable to those owed a duty.

But under the FIREMAN'S RULE defendants are generally not liable to professional rescue workers because they have ASSUMED THE RISKS associated with their professions.

Here…because….Therefore.

27. *BREACH of duty?*

Under tort law BREACH means that the defendant did not exercise the DEGREE OF CARE a reasonable person would use in the same circumstances.

In assessing "reasonableness" the STANDARD OF CARE that would be applied to the defendant is…

[Note: Normally little if anything has to be said about the STANDARD OF CARE. But, if the defendant is a CHILD engaged in childlike activities, the standard is the level of care a child of that age and experience would normally use. A child engaged in adult activities

is held to an adult standard. And if the defendant is (or represents self to be) a highly trained PROFESSIONAL, a higher standard of care applies. Also, the standard of MEDICAL CARE is the standard in the community or the nation (split opinions). But if the defendant is MENTALLY RETARDED, insane or ignorant, the standard of care is NOT LOWERED below that set for the average member of the community.]

Here there was a BREACH because a reasonable person in the same circumstances would have … [27]

28. *BREACH based on RES IPSA LOQUITUR?*

Under the doctrine of RES IPSA LOQUITUR an INFERENCE OF BREACH exists if 1) negligence by someone is implied by the facts, 2) the defendant had control of the event or instrument that caused injury, and 3) the plaintiff had no control over the event or instrument causing injury. [28]

Here negligence by someone is implied because… and the defendant had control over the event (or cause of injury) because… and the plaintiff had no control over the event (or cause of injury) because…

Therefore, BREACH could be inferred based on RES IPSA LOQUITUR.

29. *BREACH BASED ON NEGLIGENT ENTRUSTMENT?*

Under tort law defendants who NEGLIGENTLY ENTRUST third parties with resources or authority are directly liable for injuries actually and proximately caused as a result. [29]

Here…because…Therefore.

30. *RESPONDEAT SUPERIOR?*

Under the doctrine of RESPONDEAT SUPERIOR an employer, master or principal is vicariously liable for all torts committed by an employee, servant or agent, respectively, if the tort is committed within the scope of the employment or agency relationship. [30] *Respondeat superior does not apply to independent contractors.*

Here…because…Therefore.

[27] Often the best explanation of "breach" is simply to describe what MORE a "reasonable person" would have done that the defendant did not do.
[28] Turn to res ipsa loquitur when the plaintiff is the helpless victim of injury by UNKNOWN CAUSES.
[29] Typically the tested issue is whether a reasonable person would have entrusted the party causing injury.
[30] Typically the tested issue is whether the tort was committed within the scope of the relationship.

31. VICARIOUS LIABILITY for JOINT ENTERPRISE?

Under tort law each member of a JOINT ENTERPRISE is vicariously liable for all torts committed by other members within the scope of the enterprise relationship. A joint enterprise is one in which two or more parties agree to work together for mutual benefit and each shares equal rights of control over assets and activities. [31]

Here…because…Therefore.

32. LIABILITY for acts of an INDEPENDENT CONTRACTOR?

Under tort law prople who hire INDEPENDENT CONTRACTORS to perform duties that are not "non-delegable" by law are NOT vicariously liable for torts committed by the contractors and can only be directly liable because of negligent selection or negligent entrustment of the contractors. An independent contractor is a person selected to provide labor services without close and regular supervision [e.g. gardeners, housekeepers, house painters and babysitters that are not employed on an exclusive and continuous basis.] [32]

Here…because…Therefore.

33. The ACTUAL CAUSE or a SUBSTANTIAL FACTOR causing injury?

Under tort law the defendant is the ACTUAL CAUSE of injury if the plaintiff would not have been injured BUT FOR the acts of the defendant. [33]

If two or more defendants acted negligently, the plaintiff would not have been injured if neither had acted, and the plaintiff cannot reasonably prove she would not have been injured but for the acts of each alone, then each defendant is a SUBSTANTIAL FACTOR causing injury. [34] ***Important!***

Here the defendant was the ACTUAL cause of injury (or else a SUBSTANTIAL FACTOR) because …but for…

34. PROXIMATE CAUSE? [35]

Under tort law PROXIMATE CAUSE means that the injury suffered by the plaintiff was so DIRECT, NATURAL and FORESEEABLE, so close in time and place, resulting from a CHAIN OF CAUSATION begun by the defendant's acts, unbroken by UNFORESEEABLE INTERVENING EVENTS that the law will impose liability for the result. ***Important!***

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[31] Typically the tested issue is whether the parties had equal rights of control over assets and activities.
[32] The tested issues are whether the person causing injury is an employee or independent contractor, whether they were selected negligently or negligently entrusted by the defendant, and whether the duties were "non-delegable".
[33] Actual cause is the easiest element of negligence to prove and understand.
[34] It is not necessary to define SUBSTANTIAL FACTOR unless you are presented with the odd fact pattern where it is necessary because the plaintiff cannot prove she would not have been injured but for the acts of each defendant alone.
[35] Proximate causation often mystifies law students, but using the rule presented here for "unforeseeable intervening events" makes it substantially easier.

Generally if two or more events are actual causes of the plaintiff's injury, the last event will be an UNFORESEEABLE INTERVENING EVENT cutting off the liability of all defendants who acted earlier. However, it is a matter of settled law that negligent acts by others are FORESEEABLE so they can never be intervening events. Acts of nature [e.g. tornados] *and criminal or intentionally tortious acts by third parties* [e.g. thefts, batteries] *are presumed to be UNFORESEEABLE and will terminate defendants' liability unless extrinsic evidence shows defendants were aware the subsequent events were likely to occur.* [36] ***Important!***

Here there was (no) PROXIMATE CAUSATION because…

35. *EGG SHELL PLAINTIFF?*

Under the EGG-SHELL PLAINTIFF concept, defendants are liable for all damages they actually cause plaintiffs, even if the plaintiffs , through no fault of their own, have pre-existing conditions that make them especially vulnerable to injury. The doctrine of the law is that "defendants must take plaintiffs as they find them." [37]

Here…because…Therefore…

36. *CONTRIBUTORY or COMPARATIVE NEGLIGENCE?*

Under tort law CONTRIBUTORY NEGLIGENCE completely bars plaintiffs from recovery in some States if any negligence by the plaintiffs helped cause their own injury.

This often produces harsh results and these jurisdictions may use the LAST CLEAR CHANCE DOCTRINE to allow negligent plaintiffs to recover anyway if the defendants had the last clear opportunity to avoid the accident. For the same reason these States may also use the AVOIDABLE INJURY DOCTRINE to allocate the injuries between the parties if negligence by plaintiffs contributed to their injuries even if it did not help cause the accident, itself.

Other States use the COMPARATIVE NEGLIGENCE approach which does not bar the negligent plaintiff from recovery but reduces the plaintiff's recovery to reflect the degree of fault shared by the plaintiff. However, some States do bar plaintiffs from recovery if they are over half to blame for causing an accident.

Here … because…

37. *ASSUMPTION OF THE RISK?*

Under tort law ASSUMPTION OF THE RISK is a complete bar to recovery for negligence if 1) plaintiffs deliberately put themselves at risk 2) with full awareness of the risks and 3) a conscious acceptance of the risks. Here … because…

[Note: This is the only possible affirmative defense to a proven claim of Strict Liability or Attractive Nuisance Doctrine.]

[36] This is one of the most powerful decision making tools for both tort and crime analysis. Learn this one!
[37] This only applies to "conditions" over which the plaintiff had no control and did not unreasonably create themselves. Plaintiffs that are vulnerable to injury because of their own negligence are not "egg-shell" plaintiffs.

38. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS (NIED)? [38]

Under tort law, a BYSTANDER to an event may bring an action for NEGLIGENT INFLICTION if they suffer severe emotional distress and there is a nexus between the negligent act and the injury based on a PROXIMITY IN TIME, PLACE and RELATIONSHIP. In some jurisdictions a physical manifestation of emotional distress must be shown. [39]

Here … because… Therefore…

39. PRODUCTS LIABILITY?

Under tort law anyone who RELEASES an UNREASONABLY DANGEROUS product into the STREAM OF COMMERCE is liable for PERSONAL INJURY or PROPERTY DAMAGE CAUSED. A product is UNREASONABLY DANGEROUS if the dangers it poses outweigh its utility given the commercial practicality for making it safer, without destroying its utility.

Liability may be established based on any of four theories: 1) BREACH OF EXPRESS WARRANTY, 2) BREACH OF IMPLIED WARRANTY, 3) NEGLIGENCE or 4) STRICT LIABILITY IN TORT. [40]

Under a BREACH OF EXPRESS WARRANTY theory the plaintiff must show the defendant sold goods with express representations (express warranty) which made them unreasonably dangerous, and that it was the actual and proximate cause of injury to the plaintiff.

Further, under a BREACH OF IMPLIED WARRANTY theory the plaintiff must show the defendant sold goods by representing they were safe for ordinary use or knowing the buyer's specific intended use (implied warranty), the goods were unreasonably dangerous for that use, and that it was the actual and proximate cause of injury to the plaintiff.

Under a NEGLIGENCE theory the defendant has a duty not to place unreasonably dangerous goods into the stream of commerce. The plaintiff must be a foreseeable plaintiff proximately caused injury by the negligent acts of the defendant.

And, under a STRICT LIABILITY theory the plaintiff must show the seller was a COMMERCIAL SUPPLIER, the product was unreasonably dangerous at the time it left the defendant's control, and the defendant is only liable for non-economic damages.

Here… because… Therefore …

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[38] Do not discuss NIED unless the plaintiff is a BYSTANDER who only witnesses or hears about some accident that injures another person. If the plaintiff is actually, physically involved in an event they have an action for NEGLIGENCE and can recover for their "emotional distress" as special damages.

[39] NOTE: This is an exceptional situation when Courts may extend liability to one who was not directly owed a duty.

[40] Because there are four theories of product liability, each with their own elements, essay questions often have two plaintiffs and two defendants. That produces four relationships and you are expected to compare and contrast how each product liability theory would benefit or fail to benefit each plaintiff or defendant.

40. DEFAMATION? [41]

Under tort law DEFAMATION is a FALSE statement of material fact PUBLISHED to others about the plaintiff CAUSING DAMAGE to REPUTATION. Defamation may be SLANDER, an oral statement, or LIBEL, a written statement. **Important!**

But many false statements are PRIVILEGED where the defendant speaks to defend a private interest, group interest or the public interest and does so without malice and in a reasonable manner calculated to defend that interest without unnecessarily harming the plaintiff. [42]

Injury to reputation will be presumed where there is LIBEL or SLANDER PER SE. SLANDER PER SE is found where the false statement alleges CRIMINAL behavior, LOATHSOME disease, UNCHASTE behavior or improper BUSINESS practices. **[CLUB] Important!**

Under NEW YORK TIMES and its progeny, a PUBLIC FIGURE PLAINTIFF must prove ACTUAL MALICE, that the false statement was made with knowledge or reckless disregard of its falseness, in order to recover in a defamation action. A PUBLIC FIGURE is a person who has acted to put themselves in the public spotlight. Further, where a matter of PUBLIC CONCERN is at issue, or where the plaintiff seeks punitive damages, the plaintiff must at least prove NEGLIGENCE. **Important!**

Here the statement was FALSE because … The defendant would dispute this because …

And the statement was NOT PRIVILEGED because (either no valid interest being protected, statement no made reasonably, or malicious intent)…Further, the statement was PUBLISHED because…Also the statement was ABOUT the plaintiff because … And the statement at issue was DAMAGING to reputation because… [43]

Therefore, the plaintiff would be able to establish a prima facie case of defamation.

[Now go through the CASE LAW AFFIRMATIVE DEFENSES as part of the defamation analysis.]

HOWEVER, the defendant would argue that the plaintiff is a PUBLIC FIGURE because… [44] *… Therefore, the plaintiff would have to show ACTUAL MALICE because …*

FURTHER, the defendant would argue that the subject was a PUBLIC MATTER because … Therefore, the plaintiff would have to prove NEGLIGENCE because …

Therefore…

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[41] Generally a defamation question takes an entire hour to answer so it seldom is combined with other issues except that it always involves the issue of "negligence" to some degree, and may suggest invasion of privacy. It is usually a mistake to discuss both defamation and false light concerning the same statement because if it is a statement that would damage one's reputation the issue is clearly defamation, not false light. If the statement does not damage the plaintiff's reputation but only causes embarrassment otherwise, it is not defamation and can only be false light.

[42] This is frequently tested and poorly taught. If a person has a good, valid reason to speak out, and is not motivated by malice, the statement is privileged even if the thing said turns out to be wrong later!

[43] Incorrect statements may not always damage reputations when compared to the actual truth.

[44] Any person who runs for political office, leads a cause, strives to become a celebrity, or places themselves in front of the television cameras and radio microphones becomes a PUBLIC FIGURE.

41. FALSE LIGHT?

Under tort law FALSE LIGHT is the tort of publishing a false portrayal of a person in a manner that would cause them embarrassment or inconvenience. [45]

Here…because…Therefore…

42. APPROPRIATION of likeness?

Under tort law APPROPRIATION is the tort of unauthorized use of the likeness of another person for personal gain in a manner that implies endorsement of a product or cause. [46]
Here…because…Therefore…

43. INTRUSION into the plaintiff's solitude?

Under tort law INTRUSION is the tort of unreasonable intrusion into the peace and solitude of another person. [47]

Here…because…Therefore…

44. PUBLIC DISCLOSURE OF PRIVATE FACTS?

Under tort law PUBLIC DISCLOSURE is the tort of unreasonably disclosing private facts that a reasonable person would find embarrassing. [48]

…Here…because…

HOWEVER, the defendant would DEFEND on the ground the facts revealed were PUBLIC FACTS. **[This is the main issue in these cases].**

45. PRIVATE NUISANCE?

Under tort law PRIVATE NUISANCE is an unreasonable interference with a person's use and enjoyment of their own land. In the MAJORITY view COMING TO THE NUISANCE is a consideration for the court and NOT A COMPLETE BAR to bringing a nuisance action.

Here B's use of her OWN LAND was INTERFERED WITH by A because…, and the interference was UNREASONABLE because…Therefore …

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[45] The best example of false light is false praise or false statements of fact that ridicule and embarrass but are not literally damaging to reputation -- like publishing articles saying Paris Hilton is a virgin.
[46] This is usually for business purposes, but it could also be for some other purpose like political advantage. Typically this gives rise to situations where the defendant has reaped a profit without really costing the plaintiff much. In that case the plaintiff "waives the tort" and seeks RESTITUTION, meaning that the plaintiff asks to be awarded the profits of the defendants instead of the injuries they have actually suffered.
[47] Here, as in so many legal issues, the key element AND YOUR WHOLE FOCUS OF ARGUMENT should be on the "unreasonableness" of the defendant's actions.
[48] Here, again, the key element is the "unreasonableness" of the defendant's actions. This sort of issue often involves private matters like past employment history and medical problems.

46. PUBLIC NUISANCE?

Under tort law PUBLIC NUISANCE is an unreasonable interference with a person's use and enjoyment of public resources. [49] *To have standing the plaintiff must show particular injury, greater than that suffered by the general public. …Here…because…*

HOWEVER, the defendant would DEFEND on the ground that the plaintiff has suffered no greater injury than the general public. **[This is the main defense issue in these cases]**

Therefore …

47. MALICIOUS PROSECUTION?

Under tort law a person is liable for MALICIOUS PROSECUTION if they have instituted or continued a criminal prosecution of another person out of malice and the action was terminated based on its merits because there was no probable cause.

Here there was no probable cause because… Therefore …

48. ABUSE OF PROCESS?

Under tort law a person is liable for ABUSE OF PROCESS if they have brought a civil or criminal action against another person without a legitimate basis out of malice or for an improper purpose. [50]

Here the defendant acted out of malice because… Therefore …

49. ILLEGAL INTERFERENCE? [Paraphrase as necessary] [51]

Under tort law a person is liable for unreasonably and illegally interfering with another person's known or apparent business relationships.

Here the defendant's acts caused unreasonable interference because… Therefore …

50. DECEIT (or FRAUD or MISREPRESENTATION)?

Under tort law a person is liable for 1) making a FALSE STATEMENT OF MATERIAL FACT 2) KNOWING it was false 3) with INTENT TO DECEIVE, 4) that was REASONABLY RELIED upon by the plaintiff, and thereby 5) CAUSING the plaintiff INJURY.

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[49] This concerns all public "resources" including use of public resources and basic rights such as being able to go in public without fear of harm. If a district attorney could bring an action, then a private party can bring an action, given that they meet the STANDING requirement of suffering a greater injury than the "average" member of the public.

[50] Malicious prosecution only concerns criminal actions that are prosecuted without probable cause. Abuse of process in contrast concerns both civil actions and criminal actions instituted for a wrongful purpose.

[51] This may be called "interference with contract", "trade slander", "interference with prospective economic advantage" or "injurious falsehood". Let's use football terminology and call it "illegal interference".

Here there was FALSE STATEMENT of MATERIAL FACT because… And the statement was made by the defendant with KNOWLEDGE it was false because…Further the defendant had an INTENT TO DECEIVE because… Also the plaintiff REASONABLY RELIED because… And the plaintiff was INJURED because… Therefore …

51. NONDISCLOSURE (CONCEALMENT)?

Under tort law a prima facie case of NONDISCLOSURE (or CONCEALMENT) requires showing 1) a DUTY to disclose material facts, 2) BREACH of that duty, 3) REASONABLE RELIANCE by the plaintiff on facts as they appeared to be, and 4) INJURY CAUSED by the nondisclosure.

Here the defendant had a DUTY to disclose because…And the defendant BREACHED that duty because they did not disclose…Further, this was a MATERIAL FACT because…And the plaintiff REASONABLY RELIED on appearances because…This nondisclosure INJURED the plaintiff because…Therefore…

52. TORT RESTITUTION ?

Under tort law plaintiffs have a legal right to "waive the tort" and instead of seeking an award of damages based on the injury they have actually suffered they may demand LEGAL RESTITUTION, an award of a money judgment measured by the amount the defendants have wrongfully benefited as a result of their tortious acts. The purpose of this is to PREVENT UNJUST ENRICHMENT by tortfeasors. [52]

Here…because…Therefore …

Note: The above issue statements provide virtually every important issue, definition, rule and term that you will ever see on a TORTS examination in law school or on a Bar Exam. If you know the above issues and responses you have everything you really need.

[52] This is one of the more poorly tested concepts of tort law and it would be wise to get Nailing the Bar's **Simple Remedies Outline** early in your legal studies instead of waiting until you are completely confused about this area of law.

Practice Question 16-1

Clark Kent, star reporter for the Daily Planet was approached by panhandler Bill Gates and asked for a quarter. As a prank, Kent (who was secretly Superman) lifted and very gently flew Gates hundreds of feet up to the top of the World Tribune building and left Gates there on a ledge.

Kent hovered over the World Tribune building and never touched the surface of the building.

During the flight Gates was apprehensive he might fall, but Kent had a strong grip.

Gates was embarrassed and the crowd below taunted him for hours as the fire department tried to devise a means of rescue. Gates was humiliated.

As he stood on the ledge Gates accidentally knocked a decorative panel loose. It fell to the ground and injured fireman Frank.

Suddenly Gates discovered that there was an unlocked window next to him all the time. He opened the window and escaped immediately.

Discuss Kent's liability to Gates, the World Tribune and fireman Frank.

Practice Question 16-2

Tom bought some firecrackers in Rural County, where they were legal. He took them into the National Forest where federal law prohibited the possession and use of fireworks. The federal law was enacted to reduce the threat of forest fires and injury on national lands.

In the National Forest Tom waded to a gravel bar in the middle of Big River, and there he carefully lit and threw the firecrackers into the air above the river. Occasionally one would fail to explode and it would fall harmlessly into the water. There was no one else around, and there was nothing on the gravel bar that could burn.

Little Dick was playing a half-mile upstream from Tom, throwing sticks into Big River. He was three years old. His mother warned him to stay back from the edge of the river because it was dangerous. Dick disobeyed his mother and recklessly pushed a rotted tree into the river and it swirled away in the water. No one was hurt.

Half a mile downstream from Tom, Paula was one of five people on the bridge above Big River fishing for trout. Paula was outside the National Forest boundaries. She had ignored a sign that said "No Fishing From Bridge." Fishing from the bridge was prohibited for traffic safety, but she was well off the roadway and there were very few cars this time of year. Paula was sitting carelessly on the edge of the bridge, but it was a nice day, the water was only six feet below her, and she knew how to swim.

Tom threw another firecracker into the air and it did not explode. Instead it fell onto the log that Dick had pushed into the river upstream.

The log swept down the river for half a mile before the firecracker exploded just as the log swept under the bridge.

Paula was startled and fell into the river.

Other people that had been fishing rushed off the bridge and down the river bank to rescue Paula as she laughingly climbed up the bank.

Harry had been fishing too, but instead of going to help Paula, he stayed on the bridge and took two dollars out of Paula's purse. No one saw Harry take the money and the crime was never solved. Paula was hurt and upset.

Under what theories can Paula seek to recover from Tom and Dick and what defenses would they raise?

Practice Question 16-3

The Macho-X99 chainsaw is a light-duty chainsaw designed for trees no bigger than 18". In the owner's manual said in big red letters, "WARNING -- NEVER TRY TO CUT DOWN A TREE BIGGER THAN 18" OR THIS SAW MIGHT CATCH FIRE." There were no warnings on the saw itself.

Tom went into Sam's Bargain Center. Sam told him, "This is the best chainsaw on the market. The Macho-X99 will cut trees up to 36" in diameter." Tom bought the Macho-X99 chainsaw.

Dick went into Sam's Bargain Center and said he didn't know much about chainsaws but needed one that could cut a tree about 24" in diameter. Sam told him, "I am an expert when it comes to chainsaws. I recommend this Macho-X99." Dick bought the Macho-X99 chainsaw.

Moe went into Sam's Bargain Center and bought the Macho-X99 chainsaw without any discussion.

Sam, Tom and Dick never read the owner's manual and were unaware of the potential fire danger. When Tom and Dick tried to cut down trees bigger than 18" the saws burst into flames and burned them.

Moe saw the warning in the owner's manual and tried to return the saw. Sam refused to give Moe his money back. Moe was disgusted and threw the saw in the garbage "Dumpster".

Harry saw Moe's old saw in the garbage and took it. There was no owner's manual, but the saw was just like brand new. When he first used the saw it burst into flames and burned him.

Discuss all the theories under which Tom, Dick and Harry would seek to recover from Sam. Under which theories can they NOT recover?

Practice Question 16-4

Barbara, the famous TV news lady, was assigned to do a story on former governor, Pat Wilson, to find out why Wilson had become almost a recluse in the years since he left office.

Barbara interviewed Wilson at his home. Wilson's speech was slurred, his eyes were bloodshot and he was unsteady. Barbara asked him about his health, and he declined to comment. Barbara knew Wilson had once been an alcoholic, and she suspected he had begun drinking heavily again. But she did not ask him about this because she knew he would deny it.

On TV Barbara accurately described Wilson's slurred speech, bloodshot eyes and unsteady gait. Then she stated, "It appears that someone we once knew and respected has gone back to his old ways." She did not state who the "someone" was, and she did not explain what she meant by "his old ways."

Because of the news broadcast, rumors rapidly spread that Wilson had again developed a drinking habit. Wilson's approval in polls fell dramatically, and he was passed over for the post of State Republican Chair, but he had little chance of being selected for that post.

Wilson demanded a retraction and apology, but Barbara refuses.

Discuss potential action by Wilson.

Practice Question 16-5

The National Inkwire focused on sensational articles about celebrities, complete with candid pictures taken during private moments. Actress Ellen D. Generate was pursued relentlessly.

One time The National Inkwire reported that Ellen was secretly a generous philanthropist. In fact, Ellen was a tightwad. As a result of the Inkwire article, Ellen was besieged by requests for donations, and it was professionally impossible for her to turn them all down.

Then the Inkwire photographer, Dick took pictures of Ellen sunbathing topless on her sailboat. At the time the photo was taken Ellen was anchored four miles from land in international waters, and she had her friend Anne posted as a lookout to warn of any approaching boats or airplanes. The way Dick got the photo was by using a remote controlled, miniature submarine with a powerful telephoto lens.

Ellen was so embarrassed by the nude photo that she remained secluded in her home for weeks.

Ellen decided to sue the Inkwire, so she went to the grocery store and bought a copy of the issue with her photo to show her lawyer. Unfortunately Dick was following her and he took a picture of Ellen buying the Inkwire. Then Inkwire put the picture of Ellen on billboards nationwide with a caption that said "Ellen D. Generate buys Inkwire!"

Before Ellen could file suit the Inkwire ran an interview with Ellen's old boyfriend from college. He said that even though Ellen was now a strong and vocal anti-abortion advocate, she had an abortion herself in college. This was a true fact that Ellen had told her ex-boyfriend in strictest confidence. This disclosure embarrassed Ellen and made her look like a hypocrite.

Discuss the possible actions Ellen might bring against the Inkwire and their defenses.

Practice Question 16-6

Ken was a politician from Los Angeles. He moved to Sacramento and purchased a spacious home on the Sacramento River. He felt he got a great deal because he only paid $400,000 and a similar home in Los Angeles would have cost him three times that amount.

Ken realized his home was directly in the flight path of the airplanes taking off and landing from the County airport, and the realtor had prominently disclosed this fact on the sales documents. But Ken didn't think the noise was so bad because from his backyard he just loved to hear little birds singing along the public river parkway.

Four years later Ken lost the election and he wanted to move back to Los Angeles. When he had the house appraised, it was worth $500,000. Ken was furious because his home value had only increased 25 percent in value while most real estate had gone up 50 percent.

Ken blamed the County. In the four years he owned the home the number of flights at the airport increased ten percent. This increased traffic was from increased military use in response to the crisis in Romaria. Ken could not enjoy his yard as much as before, and the little birds on the public river parkway didn't seem to sing as much as they used to.

What actions might Ken bring against the County, what defenses might be raised, and what remedies are appropriate?

Practice Question 16-7

Star approached Buck, the owner of JavaManiac, with a business proposal. Star knew where there was a retail space for lease that would be a great place for a JavaManiac franchise. Buck told Star that she would be granted a JavaManiac license if the location was acceptable. Based on this Star described the location in detail and gave Buck its address. Buck said he would have someone "check it out."

Buck had no intention of giving Star a franchise. He just wanted her to reveal the location. Based on Star's description it sounded perfect for a JavaManiac outlet, and Buck wanted to take the space himself.

Buck went to the location suggested by Star and saw that it was perfect for JavaManiac. He then contacted the owner, Jack. Jack said he already had tentatively promised the lease to someone named Star. Buck said, "I know Star," and held his hand in the air with his thumb out to indicate that Star had a drinking problem. Then Buck looked at Jack very sincerely and said, "I probably shouldn't say this, but I feel I have a duty to tell you that you don't want to lease to someone like Star."

Buck reported to Star that the location was unacceptable because it was too small to meet the secret JavaManiac minimum guidelines.

Star was very dejected and withdrew her offer to lease the space. Jack was relieved.

Three months later Star happened upon the grand opening of the next new JavaManiac franchise at the very location he had suggested. Standing in front were Buck and Jack shaking hands. Star was furious and accused Buck of cheating her. Buck rolled his eyes at Jack and said, "See what I mean?"

Then Buck sued Star for slander per se for accusing him of questionable business practices. Star won the suit when the jury found her statements had been true.

What are Star's possible actions against Buck? (Do not discuss intentional infliction, defamation or false light.)

Chapter 17: Conclusion

Brilliant law students often fail to grasp that the essay grader has to grade a lot of essays in a short time. The grader just wants you to spot and state the ISSUES.

Then, for each issue the grader wants you to correctly state the AREA of law and give a good statement of the RULE that would apply to settle that particular issue.

Then for each rule, the grader wants you to identify the ELEMENTS of the rule that are supported (or not supported) by the given FACTS.

By citing FACTS, you prove the ELEMENTS. By nailing the ELEMENTS you prove the RULE. And by proving the RULE you prove the ISSUE.

When the issue is proven, just state a CONCLUSION and move on.

You MUST be prepared to recite, verbatim, certain rules of law. You MUST cite certain cases like *Palsgraf* and *New York Times v. Sullivan.* You do not have to memorize everything in this book, but you must be prepared to recite concise definitions and rules for some tort law concepts without hesitation. During the exam is not the time or place to begin composing a statement explaining complex legal concepts.

You don't have to be brilliant to succeed in law school. The key to success is the use of the **"Here"/"because"** word combination along with some **memorization** and plenty of **timed practices**. PRACTICING essay writing is critical so you do not run out of time.

Appendix A gives an **ALPHABETICAL LISTING** and explanation of just about **EVERY definition and rule you need to know** for TORTS exams. In the rule definitions the required elements that should be the focus of your analysis are underlined for emphasis.

Appendix B gives **SAMPLE ANSWERS** to the practice questions presented above. The word "because" appears repeatedly in the sample answers. The word "Here" addresses each ELEMENT to be proven, and the word "because" nails that element with a given FACT. That is the approach you need to learn.

Nailing the elements is the key to success in law school, and YOU WILL SUCCEED if you follow the approach presented in this book.

Appendix A: Rules and Definitions for Torts

1. **ABUSE OF PROCESS (TORTS):** Abuse of process is the tort of bringing or instituting a civil or criminal action against the plaintiff without legitimate basis out of malice or for an improper purpose. (see MALICIOUS PROSECUTION.)

2. **ACTUAL CAUSE (TORTS/CRIMES):** An act is an actual cause of injury if injury would not have occurred but for that act. Actual causation is referred to as "sine qua non."

3. **ACTUAL MALICE (TORTS):** For DEFAMATION a false statement is made with actual malice if it is made with knowledge the statement is false or with reckless disregard for whether it is false or not. (see RECKLESS, DEFAMATION.)

4. **AFFIRMATIVE DEFENSES (TORTS/CRIMES):** Affirmative defenses are claims by criminal or tort defendants that even if the opposing parties (prosecutors or plaintiffs) can prove each required element of their causes of action (e.g. that the defendant committed battery) they were privileged by law to commit the acts complained of anyway (e.g. that they acted in self-defense). Affirmative defenses can only be raised by the defendant after the opposing parties have completed presentation of their case-in-chief. The burden is on the defendants to prove each required element of affirmative defenses. (see PASSIVE DEFENSES.)

5. **APPROPRIATION OF LIKENESS (TORTS):** Appropriation of likeness is the tort of unauthorized use of the name or likeness of a person in a manner that implies endorsement of a product or support of a cause. It does not include the publication of names and photographs in news articles and matters of legitimate public interest. Plaintiffs are often awarded LEGAL RESTITUTION to prevent unjust enrichment by the defendant rather than the plaintiff's DAMAGES. (see INVASION OF PRIVACY.)

6. **ASSAULT (TORTS):** Assault is the tort of intentionally acting to cause the plaintiff reasonable apprehension of a battery. The plaintiff must be apprehensive.

7. **ASSUMPTION OF THE RISK (TORTS):** Assumption of the risk is a defense to negligence that acts as a complete bar to recovery if plaintiffs 1) put themselves at risk, 2) with full awareness of the risks, and 3) consciously accepted the risks.

8. **AUTHORITY OF LAW (PREVENTION OF CRIME) (TORTS/CRIMES):** Authority of law is the defense that any person has a right to act reasonably, including to perform an arrest, to prevent a felony or disturbance of the peace being committed in their presence, and that police may arrest to prevent misdemeanors in their presence or based on reasonable suspicion of felonies. (Defense to charges of assault, battery and false imprisonment.).

9. **AVOIDABLE INJURY (TORTS):** Under the Avoidable Injury doctrine some Courts in jurisdictions that recognized CONTRIBUTORY NEGLIGENCE (which see) as a complete bar to recovery often held that if a plaintiff's negligence did not help cause an accident and only contributed to the degree of injury, the Court would consider the plaintiff's acts in allocating damages but would not consider it a total bar to recovery.

10. **BATTERY (TORTS):** Battery is the tort of intentionally acting to cause a harmful or offensive touching of the plaintiff or his person.

11. **BREACH (TORTS):** A breach in negligence is a failure by defendant with an existing duty to meet the applicable STANDARD OF CARE by acting as a reasonable person like the defendant would normally use in the same circumstance. (see STANDARD OF CARE, RES IPSA LOQUITUR.)

12. **BREACH OF EXPRESS WARRANTY (TORTS):** Breach of express warranty is a products liability theory when 1) a defendant releases unreasonably dangerous goods into the stream of commerce 2) while falsely stating the goods are suitable for a specific use and 3) the recipient of the goods reasonably relies on the statements, resulting in 4) injury to the plaintiff. The defendant is liable for all injury, property damage and other harm that is actually caused, subject to general considerations of foreseeability and proximate causation.

13. **BREACH OF IMPLIED WARRANTY (TORTS):** Breach of implied warranty is a products liability theory when 1) a defendant releases unreasonably dangerous goods into the stream of commerce 2) while impliedly representing the goods to be safe for ordinary use or else for the recipient's stated, intended use and 3) the recipient of the goods reasonably relies on the defendants statements because of the defendant's stated or implied expertise regarding the suitable use of the goods, resulting in 4) injury to the plaintiff. The defendant is liable for all injury, property damage and other harm that is actually caused, subject to general considerations of foreseeability and proximate causation.

14. **CASE-IN-CHIEF (CONTRACTS/TORTS/CRIMES):** The evidence and legal argument presented to the finder of fact (judge or jury) by moving parties (prosecutors and plaintiffs bringing actions in court) is called their "case-in-chief". The moving parties have the burden of presenting admissible evidence to prove each and every required legal element their stated causes of action (e.g. that the defendant committed battery). While the moving parties are presenting their case-in-chief the only defense arguments allowed are PASSIVE DEFENSES that the evidence presented by the moving parties is insufficient. After the moving parties have presented their case-in-chief they "rest" and the defendants are given an opportunity to present their "defense case-in-chief". That is the only time the defendant can claim and present evidence to support AFFIRMATIVE DEFENSES (e.g. that they acted in self-defense).

15. **CAUSATION, ACTUAL (TORTS/CRIMES):** See ACTUAL CAUSE.

16. **CAUSATION, PROXIMATE (TORTS/CRIMES):** see PROXIMATE CAUSE.

17. **CAUSE OF ACTION (CONTRACTS/TORTS/CRIMES):** A cause of action is a complaint cited by a moving party bringing an action in court against a defendant (e.g. allegations of breach of contract, murder, negligence, etc.).

18. **COMING TO THE NUISANCE (TORTS):** If plaintiffs in actions for nuisance have "come to the nuisance" by physically moving to the location where a condition already exists, a MINORITY of Courts find them totally barred from recovering damages. Under the MAJORITY view coming to the nuisance is only considered a factor in determining damages and is not a total bar to recovering damages. (see PRIVATE NUISANCE.)

19. **COMPARATIVE NEGLIGENCE (TORTS):** In the MAJORITY of States plaintiffs in negligence actions will have damage awards proportionately reduced by the amount of their own COMPARATIVE NEGLIGENCE. Some States completely bar plaintiffs from recovery if they cause over 50 percent of their own injury. Some States also bar plaintiffs from recovery against any defendant less at fault than the plaintiffs.

20. **CONCEALMENT (TORTS):** Concealment is the tort of 1) INTENTIONALLY CONCEALING FACTS with 2) an INTENT TO DECEIVE when there is 3) a DUTY to reveal the facts, and the 4) plaintiff REASONABLY RELIES on the facts as they appear and 5) is caused DAMAGES. The difference between CONCEALMENT and FRAUD is only that the latter requires an intentional misrepresentation while the former requires an intentional breach of the duty to disclose material facts. (see **FRAUD** as alternative theory.)

21. **CONSENT (TORTS):** Consent is a defense to most intentional torts if there is informed, voluntary consent by a person with legal capacity. Consent is not a valid defense to an act intended to cause serious bodily injury and often is not a defense to injury suffered from "mutual combat".

22. **CONTRIBUTORY NEGLIGENCE (TORTS):** In a MINORITY of States plaintiffs in negligence actions are completely barred from any recovery if their own CONTRIBUTORY NEGLIGENCE caused any part of their injury. But many States following this approach will not bar plaintiffs from recovery if the defendant had the LAST CLEAR CHANCE (which see) to avoid the accident. And under the AVOIDABLE INJURY DOCTRINE (which see) some Courts have allocated damages on comparative negligence principals when the plaintiffs' negligence did not cause the accident but only caused their injuries to be more severe.

23. **CONVERSION (TORTS):** Conversion is the tort of substantial interference with personal property (chattel) causing deprivation of possession. The remedy and measure of damages for conversion is the forced sale of the chattel to the defendant.

24. **DAMAGES (TORTS):** Under tort law "damages" means a monetary award to a plaintiff that is generally, but not always, measured by the injury suffered by the plaintiff. Damages may be special (measured by out of pocket expenses) or general (to compensate for pain, suffering.) Damages may also be claimed for interference with possessory rights in the case of trespass to land and conversion. If a prima facie case is proven, damages are presumed for the torts of ASSAULT, BATTERY, CONVERSION, FALSE IMPRISONMENT, TRESPASS TO LAND and LIBEL PER SE. Damages must be proven in some manner for the torts of INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, TRESPASS TO CHATTELS, NEGLIGENCE, NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, SLANDER, and LIBEL PER QUOD. (which see.) An award of PUNITIVE damages is intended to punish and deter further misconduct by the defendant is not strictly measured by the actual injury to the plaintiff. LEGAL RESTITUTION may be awarded to prevent unjust enrichment by the defendant rather than DAMAGES suffered by the plaintiff.

25. **DECEIT (TORTS):** Deceit is a tort also called FRAUD (which see.)

26. **DEFAMATION (TORTS):** A defamation is an unprivileged, false statement of material fact about the plaintiff published to another person causing damage to her reputation. Statements made in a reasonable manner, without malice to defend a legitimate personal, group, or public interest are PRIVILEGED. An oral defamation is SLANDER and a written defamation is LIBEL. If the defamatory statement involves INNUENDO, depends on interpretation (COLLOQUIUM) or requires the listener to know extrinsic facts (INDUCEMENT) it is defamation PER QUOD. If the false statement is clearly defamatory on its face as to the plaintiff and 1) about criminal acts, 2) about loathsome disease, 3) about unchaste behavior, 4) about business practices of the plaintiff (CLUB), or 5) LIBEL (written or otherwise permanently recorded), it is defamation PER SE (CLUB). General damages can be awarded without proving special damages only in the case of a defamation per se. Under *New York Times v. Sullivan* a public figure plaintiff must prove the defendant acted with actual malice because they acted with knowledge or with reckless disregard of the falsity of their statements. Further, negligence or actual malice must be proven if the false statements concern a matter of legitimate public interest. (see ACTUAL MALICE, LIBEL, PUBLIC FIGURE, RECKLESS, SLANDER.)

27. **DEFENSE of AUTHORITY OF LAW (TORTS/CRIMES):** See AUTHORITY OF LAW.

28. **DEFENSE of COMPARATIVE NEGLIGENCE (TORTS):** See COMPARATIVE NEGLIGENCE.

29. **DEFENSE of CONSENT (TORTS/CRIMES):** See CONSENT.

30. **DEFENSE of CONTRIBUTORY NEGLIGENCE (TORTS):** See CONTRIBUTORY NEGLIGENCE.

31. **DEFENSE of DISCIPLINE (TORTS):** See DISCIPLINE.

32. **DEFENSE of INFANCY, INSANITY AND INCOMPETENCE (TORTS):** See INFANCY, INSANITY AND INCOMPETENCE.

33. **DEFENSE of NECESSITY (TORTS):** See NECESSITY.

34. **DEFENSE of OTHERS (TORTS/CRIMES):** A person is privileged to act as reasonably necessary to protect the safety of others. Jurisdictions are split when a defendant mistakenly acts to protect an aggressor in a fight. Under the STEPS-INTO-THE-SHOES view the defendant steps into the shoes of the aggressor and is not privileged to act to defend the aggressor in a fracas. Under the REASONABLE APPEARANCES view the defendant is privileged to act based on reasonable appearances, even if he acts to protect the aggressor in a fracas mistakenly believing he is aiding the victim of aggression. (See AGGRESSOR.)

35. **DEFENSE of PREVENTION OF CRIME (TORTS/CRIMES):** See AUTHORITY OF LAW

36. **DEFENSE of PROPERTY (TORTS/CRIMES):** A person is privileged to act as reasonably necessary to protect his own property or the property of others. But deadly force can never be used to protect property because it is NOT reasonable. Defense of property is never a defense to murder, but a MISTAKE OF FACT may be a reasonable alternative. (see NECESSITY, MISTAKE OF FACT.)

37. **DEFENSE of RECAPTURE (TORTS):** See RECAPTURE OF CHATTELS.

38. **DEFENSE of SELF-DEFENSE (TORTS/CRIMES):** See SELF-DEFENSE.

39. **DISCIPLINE (TORTS):** A person of recognized authority (schoolteacher, bus driver, airplane pilot, policeman, parent, etc.) is privileged to act reasonably to control others (Defense to intentional torts of battery and false imprisonment.)

40. **DUTY (TORTS):** Generally a person has NO DUTY to act to protect others. But a DUTY may be established by STATUTE, CONTRACT, RELATIONSHIP, ASSUMPTION or creation of PERIL **[SCRAP]**. Violation of a duty created by STATUTE usually gives rise to a claim of NEGLIGENCE PER SE. The duties of occupiers of land are governed by the principles of PREMISES LIABILITY, a form of duty based on RELATIONSHIP. And any person who creates PERIL to others has a duty as discussed by Cardozo and Andrews in PALSGRAF. (See NEGLIGENCE PER SE, PREMISES LIABILITY, PALSGRAF.)

41. **EQUITABLE RESTITUTION (CONTRACTS/TORTS):** Equitable restitution is a money judgment or other remedy awarded by a Court of EQUITY when the parties have no adequate legal remedies. The purpose may be to compensate parties for injuries, restore the status quo, prevent frustration of reasonable expectations or prevent unjust enrichment

42. **FALSE IMPRISONMENT (TORTS):** False imprisonment is the tort of intentionally acting to cause the plaintiff to be confined to an enclosed area with no reasonably apparent means of reasonable escape. The plaintiff must be aware of the confinement.

43. **FALSE LIGHT (TORTS):** False light is the tort publishing a false portrayal of the plaintiff causing inconvenience or embarrassment. Damages are generally measured by the injury to the plaintiff. The distinction between False Light and Defamation is that in the former case the false portrayal may not

cause damage to reputation while in the later case false statements of fact cause injury to reputation and standing. (see INVASION OF PRIVACY.)

44. **FRAUD (TORTS):** Fraud is the tort of 1) FALSELY STATING or MISREPRESENTING material facts with 2) an INTENT TO DECEIVE, causing 3) REASONABLE RELIANCE by the plaintiff 4) resulting in INJURY to the plaintiff. (Also called DECEIT; See CONCEALMENT as alternative theory.)

45. **GROSS NEGLIGENCE: (TORTS,/CRIMES):** Gross negligence is the deliberate breach of a pre-existing duty. If it causes others to be exposed to extreme risks resulting in harm it may be called criminal negligence.

46. **INFANCY, INSANITY AND INCOMPETENCE (TORTS):** There is NO DEFENSE of infancy, insanity or incompetence in TORT!

47. **INTENTIONAL ACT (TORTS/CRIMES):** An intentional act is one done for the purpose or with knowledge with reasonable certainty that a result will occur. For a GENERAL INTENT crime the prosecution must prove the defendant intended to commit a criminal act but does not have to prove that a criminal result was intended. For a SPECIFIC INTENT crime the prosecution must prove the defendant acted intending to produce a criminal result. (see GENERAL INTENT, SPECIFIC INTENT.)

48. **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS (TORTS):** Intentional Infliction of Emotional Distress is an intentional, outrageous act which causes the plaintiff severe emotional distress beyond mere embarrassment and humiliation.

49. **INTERFERENCE (TORTS):** Interference is the tort of unreasonably interfering with the known business relationships of the plaintiff causing injury. This may be called interference with a "CONTRACT" where the defendant knows the plaintiff has an existing contract, or it may otherwise be called interference with "PROSPECTIVE ECONOMIC RELATIONSHIPS".

50. **INTRUSION (TORTS):** Intrusion is an action for INVASION OF PRIVACY caused by unreasonable intrusion into the peace and solitude of the plaintiff. Damages are measured by the injury to the plaintiff. (see INVASION OF PRIVACY.)

51. **INVASION OF PRIVACY (TORTS):** Invasion of privacy is a general term for four specific causes of action: FALSE LIGHT, APPROPRIATION OF LIKENESS, INTRUSION into solitude and DISCLOSURE of private facts (LAID). (see FALSE LIGHT, APPROPRIATION OF LIKENESS, INTRUSION of solitude and PUBLIC DISCLOSURE OF PRIVATE FACTS.)

52. **LAST CLEAR CHANCE (TORTS):** The SAVING DOCTRINE in jurisdictions that recognize CONTRIBUTORY NEGLIGENCE (which see) as a bar to recovery that even if a plaintiff was negligent, that is not a bar to recovery if the defendant had the LAST CLEAR CHANCE to avoid the accident.

53. **LEGAL RESTITUTION (CONTRACTS/TORTS):** Legal restitution is a money judgment awarded by a Court of LAW as a matter of right to a non-breaching party or tort plaintiff to prevent unjust enrichment by the wrongfully acting party instead of an award based on DAMAGES suffered.

54. **LIBEL (TORTS):** Libel is a written defamation or one recorded in some manner giving the false statement permanence. Libel is a DEFAMATION PER SE if it is clearly, on its face, defamatory and about the plaintiff. Otherwise it is a DEFAMATION PER QUOD. (see DEFAMATION.)

55. **MALICE (TORTS):** Malice in tort is the requisite mental state or wrongful intent required for a defendant to be liable for certain torts such as DEFAMATION, ABUSE OF PROCESS and MALICIOUS PROSECUTION (which see.)

56. **MALICIOUS PROSECUTION (TORTS):** Malicious prosecution is the tort of instituting and/or continuing a criminal prosecution of the plaintiff out of malice. The plaintiff must show the prosecution lacked probable cause and was terminated based on its merits. (see ABUSE OF PROCESS.)

57. **NECESSITY (TORTS):** A person is privileged to act as reasonably necessary to protect people and property from harm. If the act is to protect the safety of any person, it is a complete defense. If it is to protect the property of any person besides the defendant, it is a PUBLIC NECESSITY and a complete defense. If it is only to protect the property of the defendant it is a PRIVATE NECESSITY and the defendant remains liable for any damage actually caused.

58. **NEGLIGENCE (TORTS):** Negligence is the failure to exercise the degree of care that a reasonably prudent person would use in the same situation. But to prevail in an action for negligence the plaintiff must show the defendant had a DUTY, BREACHED the duty, and that the breach was the ACTUAL and PROXIMATE CAUSE of DAMAGES suffered by the plaintiff (which see).

59. **NEGLIGENCE PER SE (TORTS):** If a duty is created by a statute, a defendant who violates the statute is negligent per se and liable to all plaintiffs who are actually and proximately caused injury as a result if the plaintiffs are in the CLASS of people the statute was intended to protect and they are caused the TYPE of injury the statute was intended to prevent. (see DUTY.)

60. **NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS (TORTS):** A bystander, witness or other person who was not directly involved in an accident or other tortious event may bring an action for Negligent Infliction of Emotional Distress if they can prove they have suffered severe emotional distress because they were closely connected in time, place or relationship to the event. Some jurisdictions require that the plaintiff suffer some physical contact during the event and others require a physical manifestation of emotional distress as evidence of injury.

61. **NUISANCE, PRIVATE (TORTS):** See PRIVATE NUISANCE.

62. **NUISANCE, PUBLIC (TORTS):** See PUBLIC NUISANCE.

63. **PALSGRAF (TORTS):** Under *Palsgraf* a duty based on PERIL is created whenever the defendant acts in a manner that creates reasonably foreseeable harm to others. Cardozo argued that a duty was only owed to those in the ZONE OF DANGER where the acts of the defendant caused reasonably foreseeable harm, and that liability should be limited to only those to which the defendant owed a duty. Andrews argued that if a duty was owed to anyone, the defendant should be liable to all that were actually and proximately caused harm by a breach of that duty.

64. **PASSIVE DEFENSES (TORTS/CRIMES):** Passive defenses are arguments by criminal or tort defendants that the opposing parties (prosecutors or plaintiffs) have failed to meet their burden to prove each required legal element of their stated causes of action (e.g. that the defendant committed battery). (see AFFIRMATIVE DEFENSES.)

65. **PREMISES LIABILITY (TORT):** Premises liability is a form of duty based on RELATIONSHIP. Under the common law an occupier of land had no duty to unknown trespassers, a duty to protect people off the land from hazardous activities on the land, a duty to warn and protect both known trespassers and licensees from known, hidden hazards and activities on the land, and a duty to inspect, warn and protect invitees from hidden hazards and activities on the land. Modernly these categorical

distinctions have generally been replaced by a general duty to protect all parties from unreasonably hazardous conditions and activities on the land. (See DUTY.)

66. **PREVENTION OF CRIME (TORTS/CRIMES):** See AUTHORITY OF LAW.

67. **PRIVATE NECESSITY (TORTS):** See NECESSITY.

68. **PRIVATE NUISANCE (TORTS):** A private nuisance is an unreasonable interference with the plaintiff's use and enjoyment of her own land in a manner that does not constitute a TRESPASS TO LAND (which see.) Nuisance may involve smoke, fumes, odors, noise, light, obstruction or aircraft. In the MAJORITY view the plaintiffs COMING TO THE NUISANCE (which see) is NOT a complete bar to bringing a nuisance action. (see COMING TO THE NUISANCE, PUBLIC NUISANCE, TRESPASS TO LAND.)

69. **PRODUCTS LIABILITY (TORTS):** Every person who releases an unreasonably dangerous product into the stream of commerce may be liable for personal injury, property damage and other harm caused. Liability may be based on four theories: BREACH OF EXPRESS WARRANTY, BREACH OF IMPLIED WARRANTY, NEGLIGENCE or STRICT LIABILITY IN TORT (which see.)

70. **PROXIMATE CAUSE (TORTS/CRIMES):** Proximate cause means that a defendant's act actually caused injury that was so direct and natural, close in time and place, by a chain of causation unbroken by UNFORESEEABLE INTERVENING EVENTS that the law will impose liability. (see UNFORESEEABLE INTERVENING EVENTS.)

71. **PUBLIC DISCLOSURE OF PRIVATE FACTS (TORTS):** Public disclosure of private facts is the INVASION OF PRIVACY tort of unreasonably disclosing private facts, about the plaintiff that a reasonable person would find embarrassing. Damages are usually measured by the injury to the plaintiff. (see INVASION OF PRIVACY.)

72. **PUBLIC FIGURE (TORTS):** Under *New York Times v. Sullivan* a public figure for purposes of a defamation action is a person who injects themselves into the public arena. Once a person becomes a public figure they probably remain a public figure until they fade from memory. (see DEFAMATION.)

73. **PUBLIC NECESSITY (TORTS):** See NECESSITY.

74. **PUBLIC NUISANCE (TORTS):** A public nuisance is an unreasonable interference with the plaintiff's use of public resources. To bring an action plaintiffs must prove STANDING (which see) by showing they suffer a particular injury from the acts of the defendant that is different from or greater than the injury suffered by the general public. (see PRIVATE NUISANCE.)

75. **RECAPTURE OF CHATTELS (TORTS):** Property owners attempting to recover chattel while in fresh pursuit or seeking recovery of chattel lost through no fault of their own may enter land of others and use reasonable force if they first request and are refused return of their chattel by the parties in possession. (Defense to trespass to land and battery.)

76. **RECKLESSNESS (TORTS/CRIMES):** Recklessness is the deliberate creation of extreme risks to others. (See RECKLESS HOMICIDE, ACTUAL MALICE.)

77. **RES IPSA LOQUITUR (TORTS):** Under RES IPSA LOQUITUR a plaintiff may establish a presumption of breach if 1) negligence by someone is implied by the facts, 2) the defendant had substantial control over the situation that caused injury, and 3) the plaintiff had no control over the situation that caused them injury. By proving the elements of RIL the plaintiff may shift the burden of proof to the defendant to prove she did not breach her duty of due care.

78. **RESTITUTION (CONTRACTS/TORTS):** Restitution is a general term for any remedy awarded by the Court other than a money judgment by a Court of LAW for DAMAGES suffered. See LEGAL RESTITUTION and EQUITABLE RESTITUTION.

79. **SELF-DEFENSE (TORTS/CRIMES):** A person who is not the aggressor in a fracas is privileged to act as reasonably necessary to protect his or her own safety. This is NOT a defense if the party was the aggressor unless they are no longer the aggressor because they attempted withdrawal from the fracas or the other party escalated the level of violence. (see AGGRESSOR, NECESSITY.)

80. **SLANDER (TORTS):** Slander is an oral defamation or one made in some manner that it is transitory and not permanent. May be SLANDER PER SE or SLANDER PER QUOD. (see DEFAMATION.)

81. **STANDARD OF CARE (TORTS):** Normally the standard of due care is the level of care a reasonably prudent person would use. If the defendant is a CHILD engaged in childlike activities the standard is the level of care a reasonable child of the same age and experience would use. A child engaged in adult activities is held to an adult standard. For defendants that are HIGHLY TRAINED or PROFESSIONAL (or claim to be) the standard of care is higher. The standard of MEDICAL CARE is the standard in the community (or nation in some jurisdictions). There is not a lowered standard of care for INCOMPETENTS. (see BREACH (TORTS).)

82. **STANDING (CONTRACTS/TORTS):** Standing means that a plaintiff has a right to pursue a legal remedy because they have suffered actual damages.

83. **STRICT LIABILITY (TORTS):** Defendants are strictly liable for negligence if plaintiffs are caused injury by 1) the keeping of a known dangerous animal (other than normally domesticated farm animals), 2) the keeping of exotic animals (if the injury is of a reasonably foreseeable type), 3) excavating by the defendant that causes a subsidence of the plaintiff's land, or 4) ultra-hazardous activities, activities so dangerous they are subject to strict regulation and licensing requirements.

84. **STRICT PRODUCT LIABILITY (TORTS):** Strict product liability is a products liability theory when 1) a commercial supplier of goods 2) releases unreasonably dangerous goods into the stream of commerce, resulting in 3) personal injury or property damage (not economic losses) to the plaintiff.

85. **TRANSFERRED INTENT (TORTS):** Under the doctrine of transferred intent a defendant that intentionally acts to cause any tort injury to anyone is liable for every injury suffered by everyone, even if the resulting victim or injury is different from that intended.

86. **TRESPASS TO LAND (TORTS):** Trespass to land is an intentional act to cause unauthorized entry onto the land of the plaintiff. Trespass may be by physical entry of the defendant herself, or by the defendant causing other people, objects or any particulate matter to enter onto, under or pass over the land of the plaintiff at low altitude. A continuing trespass occurs if the defendant leaves objects on the plaintiff's land. No damage to the land is necessary, but the defendant is liable for any damage caused. It is not a trespass to land for the defendant to cause smoke, fumes, odors, sounds, light, obstruction or objects at high altitude to pass over the land of the plaintiff, but such acts may constitute a PRIVATE NUISANCE (which see.)

87. **TRESPASS TO CHATTELS (TORTS):** A trespass to chattels is an intentional unauthorized interference with the chattel of another causing damage.

88. **TRESPASSORY (TORTS/CRIMES):** "Trespassory" means an act done "without permission".

89. **UNFORESEEABLE INTERVENING EVENTS (TORTS/CRIMES):** If a subsequent act by a third party, or natural event ("act of God") is also an actual cause of the injury suffered by a plaintiff or

victim, if will generally be viewed as an "unforeseeable intervening event" that terminates proximate cause and ends the liability of defendants that acted earlier. But negligence by a third party is presumed to be foreseeable and will not terminate proximate causation or liability. Criminal acts and intentional torts by third parties are presumed to be unforeseeable and will terminate all liability of defendants that acted earlier UNLESS the defendant knew the subsequent criminal act or intentional tort by the third party was likely to occur. (see PROXIMATE CAUSE.)

90. **UNJUST ENRICHMENT (CONTRACTS/TORTS):** A Court may award damages in RESTITUTION to prevent an unjust enrichment. (see RESTITUTION).

91. **ZONE OF DANGER (TORTS):** The zone of danger is the area where the acts of a defendant cause reasonably foreseeable harm. (see PALSGRAF.)

Appendix B: Sample Answers

The sample answers are presented in *italics.* An answer explanation follows each.

Sample Answer 16-1: Intentional Torts

GATES V. KENT

1) TORTIOUS ASSAULT?
Under tort law an assault is an intentional act to cause, and which does cause, reasonable apprehension of an immediate battery, a harmful or offensive touching. An act is intentional if it is for the purpose or with knowledge with reasonable certainty a result will occur.

Here Kent acted intentionally because he intended to pull a "prank" on Gates. His intent because it was a "prank" was to cause Gates to be "apprehensive". Gates was "apprehensive" and that was reasonable because he was held "hundreds of feet in the air".

Therefore, Kent can be liable for assault.

2) TORTIOUS BATTERY on Gates?
Under tort law a battery is an intentional act done to cause a harmful or offensive touching.

Here Kent acted intentionally because he intended to pull a " prank", and he caused a touching because he "lifted and flew" Gates into the air. This would be an offensive touching to a reasonable person because it is socially offensive to be grabbed in this manner by a stranger.

Therefore, Kent can be liable for battery.

3) FALSE IMPRISONMENT?
Under tort law a false imprisonment is an intentional act causing the plaintiff to be confined to a defined space against their will with no reasonably apparent means of reasonable exit. The plaintiff must be aware of the confinement.

Here Kent intentionally acted because it was a "prank", and he confined Gates with no reasonably apparent means of reasonable exit because he put him on a "ledge". And Gates was aware of his confinement because he was "apprehensive" of falling and "taunted" by the crowd.

Kent may argue that Gates was not actually confined because all he had to do was go through the "window". But that means of exit was not reasonably apparent because even the "firemen" who tried to get Gates down for "hours" did not realize discover it.

Therefore, Kent can be liable for false imprisonment.

4) INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS?

Under tort law intentional infliction is an intentional, outrageous act causing the plaintiff severe emotional distress. Generally emotional distress will not be assumed, and the plaintiff must present evidence showing that they did, in fact, suffer severe emotional distress. Evidence of mere humiliation and embarrassment is generally not enough.

Here there was an intentional, outrageous act because Kent "flew" Gates to the top of a building and strand him there in front of a crowd where he was "taunted for hours".

However there is no evidence Gates suffered severe emotional distress because the facts only state that he was "humiliated" and "embarrassed".

Therefore, Kent can only be liable for IIED if Gates presents additional evidence of emotional distress.

WORLD TRIBUNE V. KENT

5) TRESPASS TO LAND?

Under tort law a trespass to land is an intentional act causing unauthorized entry onto, under or over the land of another. The entry may be by the defendant personally or by some person or object directed or placed on the land by the defendant. When an object is placed on the land it constitutes a "continuing trespass." No damage is necessary, but the defendant is liable for all damage actually caused. And if malice can be shown the defendant may be liable for punitive damages.

Here Kent was over the land of the World Tribune because he "hovered" over the "building." And he caused Gates to go onto the land because he put Gates on the "ledge." This caused actual damage because Gates accidentally caused a "panel to fall." Additional damages are implied by the fact "firemen" worked in the building "for hours" trying to rescue Gates. This disruption probably caused Tribune to suffer lost wages and lost profits.

Further, the possibility of malice is implied by the fact that Kent worked for one newspaper, the Daily Planet, and he disrupted business activities at what appears to be a competing newspaper, the World Tribune.

Therefore Kent would be liable for all damages he actually caused Tribune based on trespass to land, and may also be liable for punitive damages if implied malice could be proven.

FIREMAN FRANK V. KENT

6) BATTERY by TRANSFERRED INTENT?

Battery is defined above. Under tort law transferred intent means that a defendant that acts with intent to commit any tort injury on anyone will be liable for every injury inflicted on everyone, even if the person injured or the injury suffered is not what was originally intended. Some Courts limit the application of transferred intent, but it is more likely to be applied when the original tortious act was intended to inflict harm.

Here Kent intentionally acted to cause Gates to suffer assault, battery, false imprisonment and possibly intentional infliction of emotional distress, and he intended to cause a trespass to the land of the World Tribune. In turn, that caused Frank to suffer a "harmful touching".

Therefore, Kent would be liable to Frank for battery by transferred intent.

[**ANSWER EXPLANATION:** This question has all of the common law intentional torts except for conversion and trespass to chattels. Why did Kent act? Because he intended to pull a "prank." That fact expressly proves his acts were intentional. His physical acts imply intent, but the fact he wanted to pull a "prank" expressly proves intent. That saves you time.

Be prepared for batteries that cause "offense" but not harm. Being pushed around by a stranger is offensive to a reasonable person, and be prepared to state that.

The whole purpose of having fireman Frank hurt is to raise the issue of transferred intent. Did you spot the issue? Don't turn to "negligence" when the acts causing harm are intentional.

If Frank was injured as the result of negligence by Kent or Gates, he might have no case because of the "Fireman's Rule" that rescue personnel cannot sue for injuries suffered as a result of the negligence of others that creates the emergency situation to which they have responded. That is often codified in statute, and it expressly recognizes the issue that emergency personnel, by occupation, have assumed the risks of their employment.

But the Fireman's Rule does not generally extend to injury caused by intentional torts.

Some professors insist that students "always discuss defenses", and if your professor insists on that humor the prof and discuss defenses, even when there are no facts to suggest any. Often this sort of professor also wants the defenses discussed at the end of the essay in a "Defenses" section.

But generally the writers of law exam and bar exam questions will guide you by giving you facts to suggest the issues you are to discuss, and if you are not given any facts that suggest an issue it means they don't want you to discuss that issue.

And generally question writers want and expect you to discuss the issues in the order in which they arise in the fact pattern.

If no facts are presented to suggest any plausible defense the writer is effectively saying, "I don't want you to discuss defenses!" Here there are absolutely no facts to suggest that Kent has any plausible defense claims, so I didn't waste my time discussing it.]

Sample Answer 16-2: Negligence

PAULA V. TOM

NEGLIGENCE?

Paula's only cause of action here is for NEGLIGENCE. Under tort law NEGLIGENCE is the failure to exercise that degree of care that a reasonably prudent person would use in the same circumstances. To establish a prima facie case Paula must generally prove DUTY, BREACH, ACTUAL AND PROXIMATE CAUSATION and DAMAGES.

1) DUTY?

Generally a person owes no duty to others. But a duty may be based on a STATUTE, a CONTRACT, a RELATIONSHIP, the ASSUMPTION of a duty, or PERIL caused by the defendant.

NEGLIGENCE PER SE?

If a STATUTE creates a duty, violating the statute may constitute NEGLIGENCE PER SE if the purpose of the statute was to protect the CLASS OF PEOPLE to which the plaintiff belongs, and the violation of the statute caused the plaintiff to suffer the TYPE OF INJURY the statute was intended to prevent.

Here Tom violated the law that prohibited fireworks in the National Forest, and that caused Paula to suffer injury. But she was not in the CLASS OF PEOPLE the statute was intended to protect because it was to protect people "on national lands" and she was "outside the National Forest boundaries". Further, she did not suffer the TYPE OF INJURY the statute was intended to prevent because it was to "prevent forest fires and injury" while her injury was getting wet and having her money stolen.

Therefore, Paula would be unable to prove Tom was negligent per se.

DUTY BASED ON PERIL?

Under PALSGRAF, Cardozo said that a duty is only owed to those who are in the zone of danger caused by the defendant's acts. The Zone of Danger is the area where the defendant's acts create reasonably foreseeable peril to others.

Andrews held that if the defendant owes a duty to anyone and breaches it, he should be liable for all injury actually and proximately caused by that breach.

Here the Zone of Danger was the gravel bar and the water area immediately around it because it was not reasonably foreseeable the firecrackers could cause peril to anyone outside that area. And there was nobody placed in danger within the zone of danger because "no one else was around" and there was "nothing that could burn".

Paula appeared to be outside the zone of danger caused by Tom's activities because she was a "half mile downstream." Paula might argue that the zone of danger was larger than the small area of the "gravel bar" because Tom should have seen the possibility injury could occur farther away.

Therefore, it would be difficult for Paula to prove that Tom had any duty at all, and almost impossible for her to prove that she was placed in foreseeable peril by his actions.

2) BREACH?

Under tort law a BREACH is the failure to exercise DUE CARE. The standard of due care is that level of caution a reasonably prudent person would use in the same circumstance.

Here Tom went to great lengths to be sure his activities did not endanger anyone because he went to a "gravel bar" in the "middle of the river" with no one around so there would be no foreseeable danger to anyone. And once there he threw the firecrackers "carefully".

Paula could only argue that a reasonably observant person would have seen the "log" floating down the river, and would have been careful not to throw any burning firecrackers onto it.

Therefore, it would be difficult for Paula to show that a reasonable person would have been any more careful than Tom.

3) ACTUAL CAUSE of injury to Paula?

Under tort law an act ACTUALLY CAUSES injury if the plaintiff would not have been injured but for the act.

Here Paula would not have fallen in the river and had her money stolen if Tom had not thrown the firecracker.

Therefore, Tom was the actual cause of Paula's injury.

4) PROXIMATE CAUSE of injury to Paula?

Under tort law PROXIMATE CAUSE means that the injury to the plaintiff was foreseeable, close in time and place to the acts of the defendant and a direct result of a chain of causation unbroken by unforeseeable intervening events.

Generally when there are two or more actual causes of an injury, the last, unforeseeable, intentional act will be an UNFORESEEABLE INTERVENING EVENT that becomes the sole proximate cause, cutting off all liability arising from prior acts. Further, criminal acts and intentional torts by third parties are presumed to be unforeseeable absent additional specific facts.

Here Paula was rather far away from Tom in time and space, and it would not be foreseeable she could be injured by a firecracker at that distance. Further a reasonable person could not foresee that a firecracker would cause money to be stolen. Finally, even if Tom was the proximate cause of Paula falling in the river, he was not the proximate cause of her money being stolen because Harry's criminal act was an unforeseeable intervening event.

Therefore, Paula probably could not prove Tom was the proximate cause of her fall into the river, and she certainly could not prove he was the proximate cause of her money being taken.

5) DAMAGES?

Under tort law DAMAGES are SPECIAL (out of pocket expense) and GENERAL (pain and suffering).

Here Paula had SPECIAL damages because she lost "two dollars" and she had GENERAL damages because she was "hurt and upset." But she got out of the river "laughingly" and was not "hurt and upset" until after she discovered the purse was stolen.

Therefore Paula suffered actual damages, but Tom was not the cause of those damages.

6) CONTRIBUTORY or COMPARATIVE NEGLIGENCE?

Under tort law CONTRIBUTORY NEGLIGENCE is a complete bar to recovery if the plaintiff was responsible in any manner for their injury. It is a MINORITY VIEW rule, and the MAJORITY approach is COMPARATIVE NEGLIGENCE which just reduces the plaintiff's recovery based on the degree of fault of the plaintiff. In some states a plaintiff that is over 50% at fault for her own injuries is completely barred from recovery.

NEGLIGENCE PER SE is defined above. Tom might argue Paula was NEGLIGENT PER SE because she was fishing on the bridge where that is prohibited by statute. But Paula did not suffer the TYPE OF INJURY the statute was to prevent/ The purpose of the statute was "traffic safety" and she was not injured in a traffic accident.

Therefore any "negligence per se" argument by Tom would fail.

Tom's better argument is that Paula was contributorily (comparatively) negligent because she sat "carelessly" and that placed her in PERIL of falling.

Therefore, Tom could easily prove Paula was "careless" and partly responsible for her own injury.

7) ASSUMPTION OF THE RISK?

Under tort law ASSUMPTION OF THE RISK is a complete defense when plaintiffs 1) put themselves at risk, 2) with a full awareness of the risks, and 3) a conscious acceptance of the risks.

Here Paula put herself at risk because she "sat carelessly". She had a full awareness of the risks that she could fall. And she appears to have consciously accepted those risks because the river was only a few "feet" below her, "she could swim" and it was a "nice day".

Therefore Tom may be able to prove assumption of the risks.

PAULA V. DICK

Negligence is defined above.

8) DUTY?

Duty was defined above. Here Dick could only have a duty based on PERIL, and there is little evidence Dick's act created reasonably foreseeable peril to anyone. The only foreseeable danger he caused by pushing the log in the river is that it might hit someone swimming in the river downstream. Therefore the "zone of danger" created by his act is the surface of the river downstream. There is no evidence anyone was in the river, and Paula was certainly not because she was on the bridge..

Therefore, there is no evidence Dick created any foreseeable peril to anyone, and if that could not be proven he did not owe Paula or anyone else a duty.

9) BREACH AND STANDARD OF CARE?

Breach was defined above. The STANDARD OF CARE for a child is to act in the manner reasonable children of the same age and experience act.

Here Dick was only "three years old" and he would only be negligent if he acted in a manner that children of that age do not reasonably act.

Since Dick was so young it is unlikely Paula could prove that he breached his duty, if he had a duty.

10) PROXIMATE CAUSE?

Proximate cause is defined above.

Here Dick was even farther away from Paula than Tom, and it was even more unforeseeable that his act could harm her or anyone else.

Therefore, Paula would have even a more difficult time proving Dick was the cause of her injury.

[**ANSWER EXPLANATION:** This question focuses on the outer limits of DUTY to a remotely situated plaintiff (with firecracker yet, a la *Palsgraf*) and PROXIMATE CAUSATION of damage by some burning object floating down a river (a la *Wagon Mound I and II*). The question also focuses on the outer limits of BREACH because one cannot be breaching a duty by an act that poses no foreseeable risk to others.

Law schools tend to brainwash every student into thinking they can always sue, and win, for every injury. The truth is that Paula's case is frivolous.]

Sample Answer 16-3: Product Liability

TOM V. SAM

Under PRODUCT LIABILITY LAW a person who places an unreasonably dangerous product into the steam of commerce may be liable for the injury it causes. There are four basic theories on which a product liability action may be brought: Breach of Express Warranty, Breach of Implied Warranty, Negligence and Strict Liability.

1) UNREASONABLY DANGEROUS?

A product is unreasonably dangerous if it 1) poses serious and likely dangers, that 2) could be reduced or eliminated easily, 3) without damaging product utility, or else 4) the product utility does not justify the dangers posed.

Here the product presented serious and likely dangers because it could burst into flame under normal use, and those dangers could have been eliminated or reduced easily by putting a warning on the saw.

Therefore this was an unreasonably dangerous product at the time of sale.

2) BREACH OF EXPRESS WARRANTY?

Under tort law there is a BREACH OF EXPRESS WARRANTY if a product is sold with 1) express representations that the buyer 2) relies on and 3) the representations are incorrect and 4) it causes the purchaser injury. The seller is liable to foreseeable plaintiffs, those with privity of contract or their family.

Here Sam made express representations to Tom because he said the saw "would cut 36" trees" and Tom relied because he "bought" the saw. This was incorrect because the saw would only cut "18" trees", and this caused injury because Tom was "burned" when the saw caught on fire. And Tom had privity of contract because he was a "purchaser."

Therefore, Tom can recover under a breach of warranty theory

3) BREACH OF IMPLIED WARRANTY?

Under tort law there is a BREACH OF IMPLIED WARRANTY if a product is unsafe for ordinary use or for the buyer's known intended use, the buyer relies on the expertise of the seller, and the buyer is injured as a result. The seller is liable to foreseeable plaintiffs, those with privity of contract or their family.

Here Tom would argue he bought the saw for ordinary use, relied on Sam's expertise, and was injured as a result. Sam might argue that he did not know what Tom's intended use was, and there was no evidence Tom relied on his expertise.

Therefore Tom can pursue recovery on a breach of implied warranty theory.

4) NEGLIGENCE?

Negligence is a failure to use the care a reasonable person would in the same circumstance. To prevail the plaintiff must prove duty, breach, actual cause, proximate cause and damages.

DUTY? Under tort law a person has a duty to not put an unreasonably dangerous product into the stream of commerce. Further, a person who makes express representations about a product assumes a duty of due care to make sure they are accurate and will not create peril.

Here Sam owed Tom a DUTY because he was the seller of a product that posed foreseeable harm.

BREACH? Sam BREACHED his duty because he "never read the owner's manual" and misrepresented the saw.

CAUSATION? That was the ACTUAL CAUSE of his injury because he would not have been hurt if he did not buy the saw. This was also the PROXIMATE CAUSE of injury because it was the direct and foreseeable result.

DAMAGES? Tom had INJURY because he was "burned."

Therefore, Tom could recover on a negligence theory.

5) STRICT PRODUCT LIABILITY?

Under tort law a commercial seller of a product is strictly liable for personal injury or property damage if the product is unreasonably dangerous at the time it leaves the seller. The seller is liable to any person who is injured as a result.

Here Sam was a commercial seller because he had a store, the "Bargain Center", selling the product. And the product was unreasonably dangerous because it "burst into flames" in normal use and had "no warnings on the saw." This caused Tom injury because he was "burned."

Therefore, Tom can recover under strict product liability.

DICK V. SAM

6) BREACH OF EXPRESS WARRANTY?

Breach of express warranty is defined above.

Here Dick cannot recover under breach of express warranty because Sam only said he was an "expert" and "recommended" the saw. These are not express misrepresentations.

7) BREACH OF IMPLIED WARRANTY?

Breach of implied warranty is defined above.

Here Dick relied on Sam's expertise because Dick said he "didn't know" about saws and Sam said he was an "expert". And Sam knew Dick's intended use of the saw because he said he wanted to cut "24" trees". Further, the saw was not safe because it could only cut 18" logs, and this caused injury because the saw "caught fire" and Dick was "burned".

Therefore, Dick can recover under breach of implied warranty.

8) NEGLIGENCE or STRICT PRODUCT LIABILITY?

Dick's rights under negligence or strict product liability are the same as Tom's.

HARRY V. SAM

9) BREACH OF EXPRESS or IMPLIED WARRANTY?

Breach of warranty is explained above.

Here Harry did not buy the saw from Sam so there is no privity of contract between them and Harry was not a foreseeable plaintiff to Sam. Further, Sam made no express or implied representations to Harry.

Therefore, Harry cannot recover based on breach of warranty.

10) NEGLIGENCE?

Negligence is defined above.

It is not clear that Sam was the PROXIMATE CAUSE of the injury to Harry because Moe's act of throwing the saw in the garbage appears to be an interceding event that breaks the chain of causation.

Therefore, Harry's injury might be too remote in place and causation for recovery on a negligence theory.

11) STRICT PRODUCT LIABILITY?

Strict Product Liability is discussed above.

Here Sam would argue that even though he originally put the saw into the stream of commerce, it was TAKEN OUT OF THE STREAM OF COMMERCE because Moe threw it in the "garbage".

Further, he would argue that Harry ASSUMED THE RISKS the saw was defective when he took it out of the garbage.

Therefore, Harry might not be able to recover under strict product liability.

[**ANSWER EXPLANATION:** This question calls for a discussion of the four theories of product liability. The facts are intended to illustrate the differences between express and implied breach along with the fact that strict product liability theory extends to remote plaintiffs.

The preliminary discussion of whether this is an "unreasonably dangerous product" or not is very, very important. Stating the "balance" test given here is MANDATORY if you want to score maximum points.

Be wary of products that are not really "unreasonably dangerous" at all because they have been extensively tested, have great utility (often saves lives), pose trivial risks (turns hair green) to a very small number of users (less than 0.05%), and what little danger they pose is totally unknown to the manufacturer or simply cannot be easily eliminated. That is NOT an unreasonably dangerous product!

As for Harry, it is not clear if a person can prevail on a products liability claim if the product has been discarded, scrapped or abandoned. The purpose of product liability law is to protect consumers and regular users of products, not "Dumpster Divers". There is a strong argument that a product is no longer in the "stream of commerce" after it has been discarded or scrapped.

Here it seems that Harry put the product back in the stream of commerce by retrieving it from the Dumpster. Also he has assumed the risk by doing that since he knew or should have known something might be wrong with a product that has been discarded.]

Sample Answer 16-4: Defamation

WILSON v. BARBARA

1) DEFAMATION?

Under the law of torts DEFAMATION is a false statement of material fact of or about the plaintiff published to another party causing damage to the plaintiff's reputation. If the statement involves innuendo, interpretation, or knowledge of extrinsic facts it is DEFAMATION PER QUOD. Oral defamation is SLANDER and written or recorded defamation is LIBEL.

A false statement may be PRIVILEGED if the defendant speaks to defend a private interest, group interest or the public interest and does so without malice and in a reasonable manner calculated to defend that interest without unnecessarily harming the plaintiff.

Therefore, if Wilson can establish a prima facie case, and that Barbara was not privileged, Barbara can be liable for defamation.

2) Were there FALSE STATEMENTS OF FACT?

To establish a prima facie case, Wilson must show Barbara's objectionable comments were false. Her comments about his physical appearance, the slurred speech and bloodshot eyes, would be true and not defamatory because they do not, by themselves, cause loss of reputation.

Wilson's denial that he had been drinking might not be credible enough to prove the point. He may have difficulty proving factually that he had not been drinking.

Therefore, Wilson may not be able to prove the remarks were false.

3) Were the STATEMENTS ABOUT THE PLAINTIFF?

Here Barbara might say her remarks were not clearly about Wilson because she only said "someone" had done something. But the context within which the remarks were made, comments on an interview with Wilson and his physical appearance, made it clear Barbara's statements were about Wilson.

The statement involved innuendo and required extrinsic facts and interpretation because it referred to "his old ways." Therefore Barbara would argue this was a defamation PER QUOD, if at all. But Wilson would argue that since the remarks were made along with observations about "slurred speech" and "bloodshot eyes" viewers would interpret this as a reference to prior drinking problems even if they had no prior knowledge of extrinsic facts. Wilson would argue this was defamation PER SE.

Therefore, the remarks would reasonably be interpreted to be about Wilson.

4) Did Barbara PUBLISH her remarks?

Here Barbara clearly published her remarks because they were made "on TV."

5) Were the statements DAMAGING TO REPUTATION?

A statement that Wilson had become an alcoholic would be damaging to reputation because alcoholism is generally seen as a character flaw and undesirable in a person placed in a position of responsibility.

Therefore, the remarks were damaging to reputation.

6) Did Wilson SUFFER DAMAGE?

Under the law of torts DEFAMATION PER QUOD requires proof of SPECIAL DAMAGES before GENERAL DAMAGES will be presumed. Special damages will be presumed in a slander per se concerning criminal acts, a loathsome disease, unchaste behavior or improper business practices.

Here Wilson might argue that the claim he was alcoholic is equivalent to accusation of a loathsome disease. Barbara would dispute this, but alcoholism often is seen as a disease that might cause others to avoid the plaintiff.

Barbara would argue that her statements were not defamatory on their face (not per se) because they involved innuendo and required interpretation. Wilson would dispute this.

Wilson would argue he had suffered SPECIAL DAMAGES because his "popularity fell" and he did not get a position he wanted. Barbara would argue that this did not damage Wilson because he was a "former" politician and "almost a recluse." Further, she would argue that Wilson "had little chance" of getting the post, so her broadcast did not cause his loss.

Therefore, damages may be presumed, or Wilson may be able to prove damages.

7) Is Wilson a PUBLIC FIGURE PLAINTIFF?

Under New York Times v. Sullivan a plaintiff that is a public figure must prove actual malice, statements made with knowledge or reckless disregard for their falsity. A public figure is one who injects themselves into the public arena.

Here Wilson had been inactive in the public arena because he was "almost a recluse" and only a "former governor." Barbara would argue that Wilson agreed to be "interviewed at his home" for a "TV" show, and hoped to become the "State Republican Chair."

Therefore, Wilson had been in the public eye, was placing himself in the public arena by willingly being interviewed, and was a public figure.

8) Can Wilson prove ACTUAL MALICE?

Actual malice means statements made with knowledge of or reckless disregard for their falsity. Reckless disregard means intentionally acting without awareness and with negligent disregard for the clear and serious risk to others.

Here Barbara did not act with knowledge her statement was false because she "suspected" it was true. But there was a clear risk of injury to Wilson because she made comments "on TV" that would damage him.

Wilson would argue she acted with a reckless disregard of whether her comments were true or not because she had an opportunity to ask Wilson and "did not ask."

Barbara would argue it was not reckless disregard because Wilson would only have denied drinking. She would show that no further effort on her part would have clarified the matter any further.

Therefore, Barbara probably would be held to have not acted with actual malice.

[**ANSWER EXPLANATION:** This question requires discussion of defamation actions by public figures. It is an example of defamation using innuendo, interpretation (COLLOQUIUM) or knowledge of extrinsic facts (INDUCEMENT).

A definition and discussion of actual malice is necessary. Actual malice may be based on recklessness. When it comes to recklessness, this question is a wobbler because Barbara clearly could have asked and then reported "Wilson denies a drinking problem."

If Wilson was not a public figure, he would only have to prove the falsity of Barbara's statements and that they were of the sort that would damage his reputation. Barbara might then claim she was PRIVILEGED to make the statements, even if they were false. But she would have to prove she acted in a 'reasonable manner' without malice to protect the public interest. But she would not be able to prove that because it is not clear what "public interest" she is protecting, and it would not be reasonable to make damning statements of this type on TV about a private individual without at least questioning the person about it first directly.

PRIVILEGE is frequently tested and poorly taught so be sure to consider it in any defamation question. Did the defendant have a legitimate reason to speak out, and did they do it in a reasonable manner? The 1st Amendment does not protect defamatory statements, but it does protect the right to speak out to protect legitimate interests, as long as the defendant acts reasonably and without malice. Privilege defines the balance between these two conflicting rules of law.]

Sample Answer 16-5: Invasion of Privacy

ELLEN v. INKWIRE

1) FALSE LIGHT?

Under tort law FALSE LIGHT is the intentional act of publishing a false portrayal of the plaintiff in a manner causing ridicule or embarrassment.

Here Inkwire published a portrayal about Ellen because it "reported she was a secret philanthropist." This was a false portrayal because she was a "tightwad." And this caused her embarrassment because she was "besieged with requests" that were "professionally impossible" to reject. Ellen's damages would generally be measured by the amount of embarrassment she was caused.

Therefore, Inkwire may be liable for invasion of privacy under a false light theory.

2) INTRUSION?

Under tort law INTRUSION is an unreasonable intrusion into the peace and solitude of the plaintiff. Damages are measured by the value of lost solitude to the plaintiff.

Here there was an unreasonable intrusion because Dick sent a "submarine" to photograph Ellen through a "telephoto lens". It disturbed her peace and solitude because she had attempted to be alone in a secluded place "miles" from shore with a "posted lookout." Ellen suffered damages because it "embarrassed her" into "seclusion" in her home for "six weeks."

Dick would argue that Ellen had no reasonable expectation of privacy because she was "in international waters." Ellen would counter that she had a reasonable expectation of privacy because of the location and precautions she had taken.

Therefore, Inkwire may be liable for intrusion.

3) APPROPRIATION OF LIKENESS?

Under tort law APPROPRIATION is the unauthorized use of the name or likeness of a person in a manner that implies endorsement of a product or support of a cause, but not mere publication of names and photos as news articles. Damages are generally measured by the profit to the defendant.

Here there was a use of Ellen's photo and name because billboards with her "picture" said "Ellen D. Generate" buys their paper. And the use was not authorized because she did not give permission. The purpose of the billboards was to profit by implying she endorsed their paper.

Ellen's damages would generally be measured by the profits Inkwire made from using her likeness.

Therefore, Inkwire could be liable for appropriation.

4) PUBLIC DISCLOSURE OF PRIVATE FACTS?

Under tort law PUBLIC DISCLOSURE is the unreasonable public disclosure of private facts that a reasonable person would find embarrassing.

Here there was a public disclosure because Inkwire "ran the interview" in its publication. And the facts were private facts because they were told to the ex-boyfriend in "strictest confidence." These were embarrassing facts because they concerned an "abortion", a matter of personal intimacy, and of a nature likely to cause public disdain and ridicule. Ellen would argue Inkwire acted in an unreasonable manner.

Inkwire would argue that it acted reasonably because these facts were a matter of legitimate public concern since Ellen had injected herself into the public arena as a "strong and vocal anti-abortion advocate." Inkwire would argue the public had a right to know Ellen's true background since she sought to influence public opinion on this controversial topic.

Therefore, Ellen might fail to show Inkwire acted unreasonably.

[**ANSWER EXPLANATION:** This question calls for discussion of each of the four Invasion of Privacy torts -- False Light, Appropriation of Likeness, Intrusion and Disclosure of Private Facts (LAID).

The focus in intrusion and disclosure is on the unreasonableness of the acts of the defendant. It is not unreasonable to take a picture of a naked lady if she is lying on a public beach, but it is unreasonable to take the same picture by going to great lengths to avoid detection because it violates "reasonable expectations of privacy".

The term "money damages" generally means an award intended to compensate the plaintiff for losses suffered in terms of property damage, lost income, inconvenience, lost privacy, embarrassment, pain and suffering, etc. But the plaintiff can also request damages measured by the unjust enrichment the defendant would otherwise reap. In that case the plaintiff is said to have, "waived the tort and sued in restitution", and the damage award in that case is often referred to as "damages in restitution". In most cases of False Light, Intrusion and Disclosure of Private Facts the plaintiff is suing for compensatory damages, and in most cases of Appropriation of Likeness the plaintiff is suing for damages in restitution.

The term "damages" is broadly misused to mean "money judgment" and students are strongly advised to get (and read) Nailing the Bar's **Simple Remedies Outline** early in their law school career.]

Sample Answer 16-6: Nuisance

KEN v. COUNTY

1) PRIVATE NUISANCE?

Under tort law PRIVATE NUISANCE is an unreasonable interference with the plaintiffs' use and enjoyment of their land.

Here there was some interference because the County airport caused "noise" that prevented Ken from "enjoying his yard" and "hearing the birds." And this involved the use of Ken's land because it was his "house" and "yard."

The two elements that would be most difficult to prove are whether Ken suffered significant damages, and whether the County action was unreasonable. The County would argue that the noise was insufficient interference to prevent Ken from enjoying his land because Ken "didn't think the noise was so bad" when he bought the house. He in effect CAME TO THE NUISANCE, and that fact suggests the situation was not as bad as Ken claims.

But Ken would try to prove that the interference was unreasonable because the County let flights increase "ten percent" in only "four years."

The County would also argue it did not cause the nuisance, and had not acted irresponsibly. The County might argue it was not responsible because the increase in noise was caused by "military use" beyond their control. Alternatively, the County would argue that it acted reasonably because the flights were in response to the "Romaria crisis."

Ken would argue he suffered damages because the value of his home was less that it otherwise would be. But the County would argue there was no proof of financial loss because the home had gone up in value and the claim of loss was speculative. Further, the County would argue there was no proof the birds did not sing as much as before.

Therefore, the County might be liable for private nuisance depending on whether Ken could prove these legal elements.

2) PUBLIC NUISANCE?

Under tort law PUBLIC NUISANCE is an unreasonable interference with the plaintiff's use and enjoyment of public resources causing her particular injury that is different or greater than the general public.

Here the noise interferes with the enjoyment of public land because it prevents Ken from "hearing the birds sing" on the "public river parkway."

The County may argue that Ken lacks standing because he does not suffer any injury that is different from any other member of the public. But Ken suffers particular injury because his home is "on the river" and he could hear the birds sing "from his backyard."

Ken would have to prove the other elements of nuisance which are discussed above under private nuisance.

Therefore, the County may be liable for public nuisance, depending on whether Ken can prove the County's action is unreasonable and produces significant damages.

3) COMING TO THE NUISANCE?

Under tort law COMING TO THE NUISANCE is the defense that the plaintiff moved to the location where the condition complained of already existed. It is a complete bar in a MINORITY view, but in the MAJORITY view it is only a factor to be considered in determining damages.

Here Ken moved to the location because he "purchased the home." And the condition already existed because he "realized his home was in the flight path" and the "realtor disclosed the fact."

Ken would argue that even though problems existed when he bought the home, they worsened after that. Further, he would argue that in any event the County action is unreasonable per se.

Therefore, the court would consider Ken's coming to the nuisances only as a factor in determining damages in most States.

4) REMEDIES?

The REMEDIES for a nuisance action include both money damages and injunctive relief. If the nuisance is a temporary situation money damages measured by the loss of use for the period of the nuisance will be an adequate remedy. If the nuisance would continue but for injunctive relief, the Court would consider granting an injunction. Injunctive relief is an equitable remedy, and the court has discretion to deny it. The Court will balance the interests of the parties, the interests of third parties and the feasibility of judicial enforcement. If the Court denies injunctive relief, the appropriate remedy is an award of money damages measured by the loss of property value caused by the nuisance.

Here the nuisance is a permanent condition, so the Court would consider injunctive relief. But the interest of third parties, people who use the airport, the military, and the County residents would be so significant the Court is unlikely to issue an injunction stopping the airport from continuing operations.

Therefore the Court would most likely award Ken money damages to reflect the loss of market value of his property caused by the increase in airport traffic.

[**ANSWER EXPLANATION:** This question is roughly based on true events. The point to remember is that "coming to the nuisance" is not a complete bar to recovery. If a defendant unreasonably interferes with the use of land, a new purchaser might "buy into the right to sue" for a nuisance the previous owner did not litigate.

Just state the rule and prove (or disprove) the elements. Here Ken's case is rather weak, so you may have to give "conditional" conclusions.

Discussion of "defenses" and "remedies" is mandatory because the CALL specifically asks for it.]

Sample Answer 16-7: Miscellaneous Torts

STAR v. BUCK

1) FRAUD?

Under tort law FRAUD is based on false representations of fact by the defendant made knowingly with intent to deceive that are reasonably relied upon by the plaintiff causing damages.

Here Buck made a statement of fact when he said a franchise "would be granted" if the location was suitable, and that was false because he had "no intention" of granting Star a franchise. He intended to deceive because he wanted her to reveal the location, and Star reasonably relied on his representation because she did reveal the location. That caused her damages because Buck used the information to convince Jack not to lease the "perfect location" to Star.

Buck also made false statements when he told Star the location was "too small for a franchise." He intended to deceive her so she would not go through with her lease plans. And she reasonably relied on that statement because she "withdrew" her offer to Jack. That caused her damages because she otherwise would have secured the lease.

Therefore, Star can prove the elements of fraud and Buck may be liable for the damages she suffered.

2) TORTIOUS INTERFERENCE?

Under tort law INTERFERENCE is an unreasonable interference with the plaintiff's known business relationships causing damages.

Here Buck interfered with Star's business relationship with Jack by suggesting to him that "Star drank" and was a "bad tenant choice". Buck also interfered by telling Star the space was "too small for a coffee shop".

Buck did these acts knowing that he was interfering with the business relationship between Jack and Star because Jack had told him he, "promised the location to Star." The acts were unreasonable because they were intentional false statements intended to damage Star. And they caused Star damages because it prevented her from completing the lease agreement with Jack.

Therefore, Buck can be liable for tortious interference.

3) ABUSE OF PROCESS?

Under tort law ABUSE OF PROCESS is bringing a civil action against the plaintiff without legitimate basis out of malice and for an improper purpose.

Here Buck brought a civil action against Star because he "sued Star for slander." And he had no legitimate basis because all of Star's statements were true. Buck acted out of malice and for an improper purpose because he was trying to refute Star's statements and hide the truth.

Therefore, Buck could be liable for abuse of process.

[**ANSWER EXPLANATION:** This very short question is intended to focus on the elements that must be proven for fraud, interference, and abuse of process.

Intentional infliction, defamation and false light were excluded by the call because they are covered in other questions.

There is no evidence of IIED anyway because Star did not suffer "severe emotional distress."

You are unlikely to ever get such a short, simple question on a real exam.]

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