

The Bar Essay Lecture

The subject matter that may appear on the essay portion of the California Bar Examination is listed below:

I have placed the subjects in categories that have a tendency to cross over with each other:

Torts	Criminal Law
Contracts/UCC	Criminal Procedure
Property	Constitutional Law
Remedies	Evidence
Community Property	Business Associations
Trust	Professional Responsibility
Wills	Civil Procedure

The only way to succeed on the essay portion of the California Bar Exam is to review and write many practice examinations:

Most bar candidates make the mistake of believing if they know the law they will do well on the essay portion of the bar examination. While some recognize the need to practice exams, most feel they still need to learn and memorize all their law first before starting to work with practice examinations. This is a mistake as time passes quickly, usually leaving little or no time to practice exams

The bar examiners assume you know the law going into the examination. However, they will only reward those students who recognize the tested issues by applying the law to the examination, writing an organized and responsive answer with solid analysis and finishing within the allotted time. Although memorizing law and reading outlines is informative, it does not prepare you to write an essay examination answer.

Once you have reviewed a major subject area, you should begin to issue spot and write several examinations in that subject matter. This will reinforce what you have learned while teaching you how the issue/issues arise on the exam. When you complete the next major area of the subject, again issue spot and write several examinations. Continue this process until all subjects that are on the bar have been studied.

In addition you can review examinations previously reviewed to learn from your mistakes. This process will enable the student to learn the law through application, while giving the student confidence, as he or she will be developing approaches on how to write on issues that will be tested on the exam.

In addition practice examinations will enable you to start applying the legal theories you have been studying. The fear of not knowing enough law should not prevent you from taking practice examinations.

Working with practice exams exposes you to the law and allows you to learn how the issues are tested on an exam.

If an issue is missed in a practice examination, you need to review the facts of the essay. Review the model answer and determine why the issue was missed. Chances are if you understand why you missed an issue in practice, you will not miss the issue if it is on the bar examination.

Most bar candidates are fearful about missing issues. If you do not raise an issue or you do not identify all key issues, you will not receive a passing score. The bar graders do not award points for what issues were identified but rather penalizes you for those issues that were not identified.

Practice examinations can be found on Taft's web site under prior bar essays questions. Further, you can get practice essay with model answers from Taft's e-class lectures (link-taftu.edu). In addition, you can also get more practice essays on the California bar website (link-calbar.ca.gov).

The only way to prepare for the essay portion of the examination is to *PRACTICE, PRACTICE PRACTICE* with as many actual essay examinations as possible.

Again, the benefits of practicing essay examinations are numerous. You will become better issue spotters, which will always earn you a higher grade. Becoming familiar with many fact patterns allows you to see how certain issues are tested and give, and build, your confidence.

The key to good issue spotting is to practice with as many essay questions as possible and to understand how issues are tested. The more practice in writing essay examinations the better your understanding of the issues, and how those issues arise based on the facts. The act of practicing and writing essay examinations is the only way to be successful on this examination.

How do you take an essay examination?

Reading the call of the question

The first step in doing well on an essay portion of the exam is to read the call of the question first. The call will dictate the direction you need to take in order to answer the question. It is important to understand the call of the question because it may help you determine what subject matter is being tested.

If the call of the question is not understood, the call must be read and reread. If it is still not understood, proceed to read the facts of the examination and then revisit the call.

Once the call of the question is read, there needs to be a determination as to whether the call is a general call or a specific call. This is a very important step. This type of call will clue you into where the point allocation is and direct you on how to spend your time in setting up and writing the exam answer.

If there is a general call, the point value is on issue spotting and your analysis of the issues. An example of a general call is as follows:

On what theory or theories might Peter recover damages from Daniel and what defenses may reasonably be raised? Discuss.

From this call one cannot determine what issues are being tested. Therefore, students have to review the facts in order to recognize the tested issues.

If there is a specific call, the point value given is not for issue spotting but awarded for the depth of your analysis and for identifying what elements of the issue are being tested. An example of a specific call is as follows:

Carol's statements about Senator Brown were defamatory; that, in any event, both Carol's statements and Reporter's publication of the statements were privileged; and that, as a matter of law, Senator did not suffer any damages? Discuss.

From this call, it is easy to identify the tested issues from the call of the question. A specific call will usually narrow down the issues that are being tested. Therefore, no point value will be given for identifying the above issues of defamation, privileges and damages. The point value will be awarded for the analysis of defamation, privileges and damages and for identifying what elements of defamation, privileges and damages have been put at issue.

Therefore, the call of the question is very important. Students who do not follow the call of the question in the examination will not do well on their exam. A main reason students do not do well on their essay exams is because they either do not answer the call of the question that is being asked or they answer the question in an order different than what was being asked.

Most students do not know how to break down the call of the question or even understand what is being asked. By working with practice exams, you will be able to develop this necessary skill.

Writing down your checklists

After reading the call of the question, the next step is to identify the subject(s) being tested and to write down your pre-developed checklist(s) either on the scratch paper next to the examination for easy reference or on the bottom of the actual examination. Remember the bar examinations may test more than one subject on an exam. Thus, you may have to write down more than one checklist.

Once the checklist is written, you are ready to read the essay once through. Next you can start to issue spot and outline the exam. Make sure you run the examination facts through your checklist. This will help you possibly identify another issue or two that may not have been seen in the fact pattern. Since good issue spotting is essential, the use of a checklist is a must.

With all the black letter law knowledge required for the bar examination, you must develop individual subject matter checklists for each tested subject prior to taking any practice examinations.

An example of a checklist for Torts includes:

- 1. Intentional Torts**
- 2. Negligence**
- 3. Vicarious Liability**
- 4. Wrongful Death/Survival Statute**
- 5. Strict Liability**
- 6. Products Liability**
- 7. Defamation**
- 8. Privacy**
- 9. Misrepresentation**
- 10. Improper Litigation**
- 11. Remedies**

In applying the issue spotting checklist(s) you must first completely issue spot the examination and develop your own IRAC outline. Then, run the examination facts through your issue spotting checklist(s).

Ask yourself the following questions when working with your Tort checklist: Could there be any Intentional Torts, could there be any Negligence issues, could there be any Vicarious Liability issue, and so forth. This process will help you identify issues that were initially missed during your issue spotting phase of taking the examination under the pressures of the examination.

You must practice writing your checklists over and over until they become rote. In time you will be able to develop a predetermined form of shorthand when writing out each checklist in order to conserve time. You could write down “I” on the scratch paper and instinctively know that the “I” stands for Intentional Torts and Defenses.

Additionally, students are also required to learn and create inner checklists that support each major subject heading of the subject in order to identify the inner issues and approaches.

An example of the inner issue spotting checklist for Negligence is as follows:

Negligence

Duty

Breach

Causation

Damages

Defenses

The inner issue spotting checklist will not only help you to see more issues on your examination, but it may also serve to act as an approach on how to write that particular issue. So, when you think of Negligence, you will have memorized all of the inner issues that arise under the Negligence heading as well as the Defenses.

The importance of timing

The next step after identifying the call of the question and the subject(s) being tested is to properly manage your time while answering the question.

In an one hour examination, time has to be divided into two areas. Time must be allocated to preparing an outline that must contain the spotted issues and supporting facts while reserving time for writing or lap topping the examination answer.

In determining the time split, students must read the call of the question of the examination and make an educated guess as to what type of question is being tested. And, of course, there are two types of calls, a “thinkum” question and a “racehorse” question.

The first type of question, similar to the specific call, is known as a thinkum question. With a thinkum question, the issues are few and easily identifiable as they will either appear in the call of the question or be laid out in the examination for everyone to see. Point value is awarded to those who write a good analysis using the facts from the examination.

Students must determine how to best analyze the issues with the facts. With this type of examination, twenty (20) minutes should be allotted for the outlining process and forty (40) minutes allowed for the writing portion. Property, Constitutional Law, and Civil Procedure questions often appear as thinkum questions.

The second type of question similar to the general call is known as a racehorse question. Issues are usually numerous and not easily identifiable from the call of the question. With so many testable issues, the required analysis is not expected to be lengthy and most points will be allocated for good issue spotting.

Because of the number of tested issues and to ensure that you finish writing your answer to the question, fifteen (15) minutes should be allotted for the outlining process and forty five (45) minutes allowed for the writing portion. Criminal Law, Torts and Evidence questions often appear as racehorse questions.

Upon determining what type of question is being presented, the time allocation should be written on the scratch paper and placed next to the examination for easy reference. Students should consistently monitor their time to be sure they are staying within the allotted times as time does fly during the examination.

Read the examination fact pattern for content before the issue spotting process

Read the examination fact pattern several times for content before beginning your issue spotting process. This will allow you to get an understanding of the facts and enable you to think about the facts in the examination. Once you have read the facts, re-read the facts again. However, this time you are breaking apart the facts sentence by sentence and marking up the fact pattern.

The facts will dictate what is at issue. Students must be able to comprehend the facts and understand their meaning. The facts are what raise the issues and without facts there are no issues. If there are facts that raise an issue, but based on those same set of facts the issue fails, the issue still needs to be discussed with supportive legal analysis as to why the issue has no merit.

Pay close attention to verbs, adjectives, adverbs, dates, commas, descriptive words and quotation marks. Break apart each sentence word by word and look for the key language in order to find the hidden issues. If students fail to understand the facts, they most likely will miss issues. Therefore, issue spotting during the outlining phase is the most important skill students should practice in order to do well in taking any essay examination.

Once you have marked up the fact pattern, set up an IRAC outline that can be followed when writing your answer. Carry over the noted issues written on the question onto your outline and support all elements of the issues with facts in the examination.

How to outline your examination answer

Once a student marks up the examination with issue spotted notations, those notations must then be carried over to scratch paper and written into an outline. In developing an outline, students must analyze each element of each rule and extract the supporting facts from the examination. This process allows students to decipher whether or not the raised issue is correct based upon the facts from the examination.

In reducing the outline into a written answer, the IRACing method and the weave method are predominantly used by students. The difference between the two methods is that with the weaving method the rule itself is eliminated and not written into the answer.

Although no point value is given for stating a rule, it is beneficial when writing the examination to serve as a reminder that all elements must be properly supported with facts from the examination.

The IRAC method allows students to first state the issue in either a headnote or an issue statement. Students then can define the rule of law for that particular issue that is being discussed. Next, students can apply the facts to each element of the issue for solid analysis. Finally, the overall conclusion can be stated.

Set up your outline paper vertically into four columns. The IRAC method should be used for organization purposes. IRAC stands for Issue, Rule, Analysis and Conclusion. Following the IRAC method, the first column should be marked “I” for issue. The second column should be marked “R” for rule. The third column should be marked “A” for Analysis and the last column should be marked “C” for conclusion.

In carrying over an issue into the essay outline, it should be placed in the Issue column. The next step is to “break apart” the elements of the rule and place them in the Rule column next to the issue. Like building blocks, in essay outlining each element should be stacked one on top of the other and not written out in a sentence form. Next, place facts in the Analysis column to support each element of the rule in the “R” column. Lastly, based on the number of supporting facts, a conclusion must be written in the “C” column.

In some instances, a student’s answer may differ from the model answer. Since graders are more interested in how one arrives at a conclusion, point value will not be lost if the differing conclusion is well supported with facts from the examination. Remember to abbreviate wherever possible in order to conserve time.

The following is an example of how to outline from fact excerpts of an examination:

Joe telephones Mary and asks if she wants to buy his car for \$5,000 before March 1.

The issue that is being tested is offer. The outline to support these facts is as follows:

ISSUE	RULE	ANALYSIS	CONCLUSION
Offer	Present contractual Intent	Joe’s telephone call to Mary asking if she wants to buy his car	Yes
	Definite & Certain Terms	Quantity- 1 car Time- before March 1 Identity of Parties-Joe & Mary Price-\$5000 Subject matter- car	

	Communicated to Offeree	Mary receiving Joe's telephone call	
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One issue at a time should be placed into the outline and broken down with elements of the rules, facts for the analysis and a drawn conclusion.

Don't make the mistake of actually writing the "IRAC" words into the answer. By merely using an underlined and bolded headnote or issue statement, the grader will know an issue is being raised without the need of having an "I" next to the issue. By defining a rule, the grader will understand without having an "R" for the rule. This also applies to the writing of the analysis and conclusion.

A well developed essay outline is critical in passing an essay examination

Remember, a well developed essay outline is a guaranteed roadmap to your success. It will, in turn, become a well written answer. The need to outline the examination prior to writing the answer cannot be stressed enough. The process will allow for discovering the tested issues, eliminating the non-issues and will help you to organize the written answer.

Students who are quick to rush into writing the answer often tend to miss issues and missing issues is what costs students the examination.

Before committing to writing your exams look to see if you have used all of the facts used. Read the call of the question again. Run the facts through your checklist(s). Seeing even one additional issue can make a huge difference in your grade. Once that is done, you are ready to write.

Writing your answer

After completing your outline, the final step is to write the examination in the allocated time. Issues should be easily identifiable and legible and the entire answer should be well structured and easy to follow. Underlining and bolding issue headnotes when writing the answer are helpful to the grader, who will quickly see if the answer contains the tested issues. If the issues are easily identified, it may not be necessary for the grader to read the entire answer and he or she will give a favorable grade. If the issues are not present, or the student does not use headnotes, writes long paragraphs, or is sloppy, a thorough reading of the examination may raise other problems that result in a low grade. Complex writings by students are unnecessary and not warranted. Keep the answer simple by following the IRAC method.

Here is an example of proper writing.

Joe telephones Mary and asks if she wants to buy his car for \$5,000 before March 1.

The call of the question is:

Was there a valid offer? Discuss.

Issue: Offer

Rule: An offer is an outward manifestation of present contractual intent to be bound by an agreement with definite and certain terms communicated to the offeree.

Analysis: Joe's telephone call to Mary where he asked her if she wanted to buy his car demonstrated an outward manifestation of present contractual intent to be bound by an agreement.

By Joe offering to sell his car (quantity), on March 1 (time period), between himself and Mary (identity of the parties), for \$5,000 (certain price) to sell the car (subject matter), the terms are definite and certain.

Because Joe telephoned Mary and communicated his intent to sell his car to her, it showed his intent was communicated to Mary, the offeree.

Conclusion: Therefore, a valid offer exists.

From this example the issue was stated in a bolded headnote fashion, allowing the grader to easily see the issue in the answer. Each element of the issue was supported with facts from the examination. It must be demonstrated to the grader that one understands how to apply the facts to the rule of law.

If a student merely repeats facts, then little or no credit will be given for the issue. Notice that a line is skipped between each part of the IRAC, which makes it easier for the grader to grade. Although subjective, a proper presentation tends to increase a student's grade.

Using the same facts, an example of an **incorrect** analysis is as follows:

Joe telephones Mary and asks if she wants to buy his car for \$5,000 before March 1.

Was there a valid offer? Discuss.

Offer

An offer is an outward manifestation of present contractual intent to be bound by an agreement with definite and certain terms communicated to the offeree.

Joe's telephones Mary and asks if she wants to buy his car for \$5000 before March 1. Thus, Joe's telephone call demonstrated an outward manifestation of present contractual intent to be bound by an agreement with definite and certain terms communicated to the offeree.

Therefore, a valid offer exists.

Remember, little point value is awarded for conclusionary answers.

You now have the knowledge on how to take and attack the essay portion of the bar exam. Work on what we have reviewed and you will be able to write a strong and passing essay answer.

Nutshell on how you are going to take the essay examination

1. Read the call of the question first.
2. Read the facts once for content only.
3. Take each sentence and look at the wording. Pay attention to ands, ors and the punctuation being used.
4. Take each paragraph and cross check it against your checklist.
5. Outline the exam.
6. Conclude to each issue.
7. Re-read the exam one more time to make sure you did not miss any issues.
8. Write your answer.

TORTS

Transco, a common carrier, hauls chemicals by train through an area where Paul operates a commercial greenhouse. Concerned about the risks if there were spillage from one of the boxcars containing the chemicals, Transco hired Diana, a consultant, to assess that risk. Diana concluded there was little or no risk to nearby property owners if any spillage occurred, and she so advised Transco.

Thereafter, one of Transco's trains containing a known toxic chemical derailed because the train engineer suffered a heart attack while operating the engine. The engineer was obese and, five years earlier, had taken a leave of absence because of a mild heart attack he had suffered. The derailment caused chemical spillage near Paul's property, and Paul closed his greenhouse business out of fear that the spillage would damage his greenhouse plants and cause him to get cancer. In fact, no lasting damage resulted from the spill.

Six months after the accident, Paul moved back into his previously vacated premises and began operating the greenhouse again. Paul's fear for his health from possible exposure to the chemical continued, however, and subsequently he suffered severe anxiety and depression because of this fear.

On what theory or theories, if any, can Paul recover damages from, and what defenses may reasonably be raised by:

1. Transco? Discuss.
2. Diana? Discuss.

TORTS MODEL ANSWER

1. On what theory or theories, if any, can Paul recover damages from, and what defenses may reasonably be raised by Transco?

Vicarious Liability

An employer is vicariously liable for any tortious acts committed by his employees within the scope of the employment. It does not apply to torts committed by the employees outside of the scope of employment (frolic and detour).

Transco, a common carrier, employed engineer to operate its trains. Thus, an employer-employee relationship exists. Transco hauls chemicals by train and the train derailed because of the engineer's heart attack. Since the engineer was operating Transco's train at the time of the incident, the engineer was in the course and scope of his employment when the derailment occurred.

Therefore, if the engineer is found to have committed a tort to result in the accident, Transco is vicariously liable for the train engineer's actions.

Strict Liability

One who engages in an abnormally dangerous activity will be strictly liable for damages resulting from such activity. A balancing test that weighs the utility of the activity against the risk of harm can be used to evaluate whether Defendant will be held liable for its actions.

Transco hauls toxic chemicals by train and is under a duty to properly haul the chemicals and to do so safely so as not to expose others to an unreasonable risk of harm. Since toxic waste is highly contaminated it is impossible to eliminate the risk of the chemicals escaping and causing harm to adjoining land, it is an abnormally dangerous activity.

However, Transco will argue that hauling toxic waste by train is a common method of disposal. Since the risk of spillage was determined to be low, the utility of toxic waste disposal far outweighed the risk of harm. Further, the transportation of toxic waste out of the community is appropriate in the area and was necessary to prevent contamination within the community. Additionally, Transco will assert that the transportation of toxic waste did not involve a high risk of harm to persons or property.

However, since a reasonable transporter would have foreseen a potential danger to the possessors of land near where it transported toxic waste, Transco owed a duty to Paul not to create a high risk of harm to him.

Therefore, Transco should be held strictly liable for its conduct.

Actual Cause

If Plaintiff would not have been injured “but for” Defendant’s tortious act, Defendant’s conduct is the actual cause of Plaintiff’s injuries and damages.

But for the spillage of the toxic waste, Paul would not have feared for his life.

Therefore, Transco is the actual cause of Paul’s fear and emotional distress.

Proximate Cause

A Defendant’s tortious act is the proximate cause of Plaintiffs’ injuries and damages if the manner and result of Defendant’s acts are foreseeable.

It is foreseeable that the spillage of toxic chemicals could cause damage to persons or property that came in contact with it. Thus, to the extent that persons or property came into contact with the toxic chemicals, injury to persons and damage to property is foreseeable.

Therefore, any such injury or damage would be proximately caused by the spillage.

General Damages

General damages are damages that reasonably or naturally flow from the tort and they do not need to be specifically pleaded. General damages allow recovery for injuries that include past, present, and future pain and suffering. General damages could also include damage to or destruction of personal property.

Since the train derailment and its subsequent chemical spill did not come into contact with Paul or his property, Paul suffered no damages to his person or property as a result.

Therefore, there were no general damages sustained by Paul.

Special Damages

Special damages are those damages unique to Plaintiff and they must be specifically pleaded and proved. Further, special damages must be foreseeable, reasonable in amount and not too remote. Special damages may include economic losses and lost business profit resulting from the injury.

Paul will argue that the damages he sustained by closing his greenhouse business were the result of his fear of sustaining damage to his plants and of contracting cancer. Both fears are unique to him and, thus, might be recoverable as special damages.

However, because the chemicals never actually came into contact with any of his plants but only spilled “near” his greenhouse, it was not foreseeable that Paul would close his business out of such fear.

Further, it was not foreseeable that Paul would close his business out of fear of getting cancer where there were no chemicals that directly contacted Paul to potentially cause cancer. Moreover, it was not foreseeable that Paul would suffer anxiety and depression when he had no contact with the toxic chemicals. Thus, the damages claimed by Paul were not foreseeable. Further, since Paul did not sustain general damages, special damages will not be awarded.

Therefore, Paul cannot recover any special damages from Transco's conduct.

Defenses

Comparative Negligence

The doctrine of comparative negligence apportions the relative negligence or fault, i.e., blameworthiness, of the Plaintiff and Defendant, and reduces Plaintiff's recovery of damages accordingly.

Paul voluntarily closed the greenhouse out of fear that the spillage would damage his greenhouse plants and cause him to get cancer. However, since the chemicals only spilled near his greenhouse and there was no basis for his belief that the chemicals would either damage his plants or result in cancer, Paul acted unreasonably. Moreover, six months after the accident, Paul moved back into his previously vacated premises and began operating the greenhouse again without any apparent change in circumstances. In light of the facts, Paul is solely to blame for his lost income. As such, the court will apportion damages accordingly.

Therefore, comparative negligence will likely be a complete defense.

Assumption of the Risk

A person who expressly or impliedly agrees to confront the risk posed by Defendant's act and knowingly assumes the risk of his conduct is barred from recovery. Defendant must show that Plaintiff recognized and understood the particular risk, and voluntarily elected to encounter it.

Since Paul returned and reopened his greenhouse business six months after closing it, with knowledge of the spillage of toxic waste, he did so with full knowledge that the spill had occurred. Thus, impliedly he appreciated the danger, in part because he closed the business due to his belief a danger existed. The fact that he knew of and appreciated the potential danger showed that Paul voluntarily choose to encounter the risk of injury.

Therefore, assumption of the risk is a valid defense.

Negligence

Negligence requires a showing that a duty was owed from Defendant to Plaintiff, that the duty was breached by Defendant and that the breach was the actual and proximate cause of Plaintiff's damages.

Duty

A Defendant owes a duty to others to act as a reasonable prudent person would under the same or similar circumstances. A common carrier, i.e., bus lines, airlines and trains, owes a higher duty to its passengers.

As a hauler of toxic waste, Transco had a duty to take all reasonable precautions so as not to expose Paul to an unreasonable risk of harm. Since Paul was not a passenger on the train, Transco, as a common carrier, does not owe a higher duty to Paul.

Therefore, Transco owed a duty to Paul to act reasonably in order to prevent a risk of harm to Paul.

Breach

A breach is a failure to act as a reasonable, prudent person under the same or similar circumstances. A Defendant breaches a duty through an act or omission that exposes others to an unreasonable risk of harm.

Even though Transco's consultant assessed little or no risk to nearby property owners if a toxic spill occurred, the foreseeability of a risk of spillage would outweigh the preventable risk of danger to property owners like Paul. Transco's train did derail causing a spillage. Thus, its conduct fell below the reasonable prudent person's standard of care.

Therefore, Transco breached its' duty of due care to Paul.

Actual Cause

Defined supra.

"But for" Transco hiring an engineer with known, pre-existing heart problems, the train would have not derailed.

Therefore, Transco's conduct is the actual cause of any recoverable damages sustained by Paul.

Proximate Cause

Defined supra.

It is foreseeable that an engineer who is obese and has had a prior mild heart attack could have another while driving the train. Transco will argue that the engineer's heart attack is an unforeseeable, intervening act, and thus cutting off the chain of causation. However, the court will probably find that it is foreseeable that someone in the engineer's poor physical condition and medical history could suffer a heart attack.

Therefore, Transco is the proximate cause of Paul's damages.

General Damages

Defined and discussed supra.

Special Damages

Defined and discussed supra.

Defenses

Contributory Negligence

At common law, the Plaintiff's contributory negligence, however slight, was a complete bar to his recovery against a negligent Defendant. If a Plaintiff's conduct falls below the reasonable person's standard of care and contributes to his own injury or damages, he is barred from recovering against Defendant.

Transco will contend that Paul was aware of the spillage near his property, closed up his greenhouse, and moved away. Six months after the accident, Paul acted unreasonably when he moved back into his previously vacated premises and began operating the greenhouse again. Further, by moving back onto his property, Paul contributed to his own anxiety and depression.

Therefore, contributory negligence is a valid defense.

Comparative Negligence

Defined and discussed supra.

Assumption of the Risk

Defined and discussed supra.

Private Nuisance

Private nuisance is a non-trespassory invasion of Plaintiff's interest in the use or enjoyment of his property. The non-trespassory invasion must result in a substantial and unreasonable harm to Plaintiff's land.

Paul will assert that by Transco spilling toxic waste near his property, Paul had to close his greenhouse. In addition, Paul sustained injuries of anxiety and depression out of fear of contracting cancer as a result of the toxic waste spill. Thus, Transco interfered with the use and enjoyment of Paul's property.

Since Paul's land was affected because of the spill it involved the property of another. However, the chemicals only spilled near Paul's property, and there was no evidence of a non-trespassory invasion of Paul's property by the chemicals.

Therefore, a private nuisance will probably not be found against Transco.

Negligent Infliction of Emotional Distress

A party owes a duty to others not to subject them to a foreseeable risk of physical injury (impact/threat) that might foreseeably result in emotional distress.

Transco, a common carrier, transported chemicals by train. The train derailed and caused a spillage near Paul's property. Transco owed a duty not to subject Paul to harm. However, because the spillage only came "near" Paul's property it did not result in a foreseeable physical injury to Paul.

Therefore, there was no negligent infliction of emotional distress.

2. On what theory or theories, if any, can Paul recover damages from, and what defenses may reasonably be raised by Diana?

Negligence

Defined supra.

Duty

Defined supra.

As a toxic waste consultant, Diana had a duty to take all precautions so as not to expose Paul to an unreasonable risk of harm and to assess the risk involved.

Therefore, a duty of care is owed to Paul.

Breach

Defined supra.

Diana assessed the risk and properly concluded there was little or no risk to nearby property owners if any spillage occurred due to the train derailment. Further, the spillage did not go onto Paul's property.

Therefore, Diana did not breach any duty of care owed to Paul.