Tuesday, June 12, 2018

Taft University, Santa Ana, CA

Baby Bar Mini Series Review

INSTRUCTOR: Good evening, we will be starting in approximately two minutes. If you make sure you have your three essay questions that you were e-mailed out to you that will be our primary focus for tonight's lecture. Again we will be start in approximately two minutes.

We will be starting in approximately one minute.

Good evening, welcome to tonight's baby bar mini series. Our primary focus will be on the three essay questions that were e-mailed out to you. I want to point out that the sessions are being recorded. You can go to Taft website and go to the student section sign in and go to the baby bar mini series and choose the lecture you want.

We are going to go over how to follow the call of question, how the issues arise based on the facts. I also want to point out if you have questions, post them in the question-answer box. That's where I will be monitoring.

As I stated previously, what do we do? We always read the call of the question first. You want to make a determination if it's a general call or specific, that will make a difference. And I'll explain why as we go through the call. An action brought -- we had the roofer -- for negligence. What the roofer might assert and what the outcome will be and explain fully.

We have a specific call because they gave you the theory of negligence. When you see a call that narrows you down to the specific theory, you should ask yourself what elements or defense are they testing here, and you will know based on the facts. If you read that essay all the way through, it's straightforward, there is duty, a breach, and causation, and damages. You know you made a mistake because your point value will be on the elements, and that means one of the elements have to be at issue based on the facts. If you go through a specific call and don't see something wrong, you have to go back. Something is up that I missed based on the facts. I want to go back and dissect it and break it apart. The other way when going through exams like this and to use your checklist, I know negligence is an at issue, so I will go through and see if there is a general duty or a breach. And I'm thinking of my inners, and I want to see if I can pick that up based on the facts. The call has "plaintiff" and "defendant", and it says "defenses", so we are looking for two or more. Defense can be true defenses as we know them, in this case, negligence, contributory negligence, comparative negligence, and assumption of risk. If you don't see true defenses, it's probably counterargument. You don't want to bring something up, especially when it has no merits; don't waste your time. Defenses can mean counterarguments. What will dictate for you are the facts.

(Reading) contractor contracted with Hal and the roofer, they have the relationship here, right. The usual practice among roofers is to place tarps to catch the nails and other materials. "Usual" means standard and normal in the industry that this is what you should do. On this occasion, he didn't have enough tarps and he failed to place them on the rear of the house. So he failed to use a tarp at the rear of the house, so the issue is, is that a breach? If nothing occurred, based on his lack of, it wouldn't be, but it something does, I will argue that is the actual breach. As a result many nails and old roofing materials fall in the grass of the backyard. At the end of the job, roofer did his best to clean up the yard but failed to pick up some nails in the grass. Six months later, as Hal was mowing his yard. And a nail flew into the next-door neighbor's yard. So they brought action against the roofer.

So the first thing you should ask yourself is how is the relationship between roofer and Ned. So first you want to determine negligence and the duty. If you go through the special duties -- remember the list. Don't see any of them triggered. It's a general duty. What is being tested here is a -- remember, a remote plaintiff. If you see a relationship between two people and there is a third party bringing a lawsuit, that triggers Cardozo. It's rather to be one sided. In regards to the duty here, roofer has an argument, he is saying I owe a duty to Hal, and he was asking me to replace the roof. I have no relationship with you, Ned. And that's what is going to trigger Cardozo which we know says we owe duty to those within the foreseeable zone of danger.

You will bring up facts that he didn't have enough tarps, and they allowed debris and nails to fall in the yard. However, there is a six-month gap in regards to time, and could I argue it's within the zone danger? It's a gray area. I'm working in the area of the home, I could argue that's in the foreseeable zone versus an actual neighbor. Either way, I don't care how you conclude, it's a gray area. Andrews say you owe a duty to all. Your duty, you want to spend time because it's arguable. Duty is the first one I see based on the facts I can argue.

If I want to do a good job here in developing my argument, you would argue both sides. Conclude as to Andrews or Cardozo, doesn't matter, but we will agree there is a duty owed to Ned. You will see you have to see a remote plaintiff.

It's a good exam for you to understand how it's triggered. We have seen this before. We are looking for remoteness. The roofer and Hal are the ones that have the relationship. I want you to understand when it's tested. A lot of times when you go to the baby bar website, they talk about the Cardozo and Andrews. It's triggered.

You can give up five and seven minutes easy, and I can't afford it on a nonissue. You have to see how did it get in the picture, it's between roofer and Hal, how did Ned come into the picture. That's a remote plaintiff that would trigger the Cardozo and Andrews. Non-issues they are not supposed to mark you off on, but they're killing your time.

Breach is, he didn't have the tarps and that eventually that caused nails to be in the grass. He did his best,he failed. Actual cause, use "your but, for" test. But for the nail not being stuck in the nail in the grass, and he Ned would not have been injured.

What about proximate cause? Is that straightforward? Is it foreseeable that nails would be in the grass? Sure, is it foreseeable that someone is going to run over it with the lawn mower? No. That's an argument that the roofer is going to bring up here, saying there is an intervening act. He is going to argue that his action was indirect and independent of Hal mowing and propelling into the neighbor's yard. However, what was Hal's conduct? Was it intentional or negligent? He didn't know the nails were in the grass. Even though roofer's act is indirect and independent, it's foreseeable, therefore, he is the proximate cause of Ned's injury. So I have a second issue here, the duty and now the proximate cause. I'm feeling good because, again, they gave me a specific call with the negligence and I know what the issues that are tested and I know that to do well. So he stepped on the nail and got pain and suffering, and anything that you can prove medical-bill wise. So they gave that to me.

Am I finished? No. The call said defenses. You use some of your creativity. Remember, with contributory negligence, you need to show you fell below the standard of care owed to yourself as a reasonable person. Based on these facts, what did Ned do? All Ned did was go barefoot in his backyard. The roofer is going to argue, you should not walk around outside barefoot. You can get an injury. So you fell below the standard of care to yourself. But I will come back with the argument that it's my own backyard. I should be aware of what is in my own backyard. If my backyard is grass, and I don't know of any construction going on now, it's six months, am I really falling below the standard of care by walking barefoot in my own backyard? No.

So contributory negligence, you can also argue what is called "the last clear chance" doctrine. The last clear chance doctrine is a plaintiff argument. So now the plaintiff is going to argue that doctrine and say, you could have avoided the accident by using tarps, and you could have made sure you got all the debris in the grass. So you have two arguments that you can argue that roofer had the last clear chance to prevent the injury to Ned. It only works for contributory negligence. It's a plaintiff argument to rebut that.

Of course, you don't know what jurisdiction you are in. So you will talk about comparative negligent. It's apportioned according to fault. So I will do a strong job on contributory negligence. And then you get to comparative negligence. Ned walked out barefoot. We will are apportion according to fault. So it's not a viable defense. You want to be consistent.

When you see the call of defenses, how I look at it, contributory negligence, comparative negligence and assumption of risk. How do I know? It's a difference of jurisdiction. So even though you talk about them separately, treat those at one. It doesn't answer the defenses in the call of the question. So I know assumption of the risk is there. With assumption of the risk, students do a poor job analyzing it. So break it apart. Roofer is going to argue, you go out in the backyard, knowledge that there is grass in the backyard and anything else. But did I understand and comprehend the danger? It's six months since the roof was replaced. So it didn't cross my mind that there could be debris from the neighbor's yard. Based on the facts, was there any knowledge that there was grass left behind? And I'll argue, no, he didn't appreciate the danger; he didn't fall below the standard of care that was owed to himself, so he didn't assume the risk.

These defenses are odd, aren't they, they are trying to make you look at them and make you make an argument. What did he really do? They are testing your logic. You want to break it apart and go through it, and let them know you understand the elements, and bring up your argument for Ned and give your overall conclusion. It's in the call and it's something we have to address. It's not obvious in the facts. Defenses can be counter arguments or true defenses. But when they use the term defenses I better go find them versus if they didn't use that in the call, defenses would be obvious in the facts. If they took it out of this call I wouldn't have brought up defenses. It's not obvious, but the a call told me otherwise.

So that's how you know, because of experience based on the examiner's test, I advocate the more issues you do in spotting issues, that's going to help you. You will understand, when the issue comes up, versus I'm barking up the wrong tree and wasting my time.

That's question Number 1. Any comments in regards to question Number 1? Did most of you see the Andrews Cardozo? It's an issue that doesn't come up on every baby bar, but it will help you not waste time on a nonissue.

If you have questions pop them up in the question and answer box.

Question 2 deals with contracts. (Reading question) the baby bar has a tendency to do "explain fully" versus "discuss". So you will see both types of questions, and I'm not sure why they changed. Maybe it's their way, I tell you breach of contract carry all the way through. Go through it, break it apart, show support for it, meaning address every element and address, et cetera. Maybe that's their way of indicating to you breach, you have to break it apart and start at the beginning and take your contract checklist in order. Don't take it out. You wouldn't start off with acceptance, or statute of frauds. You will see if the UCC applies, and then if it is an then you go to the offer, take it in the chronological order of your inner checklist. That's important. Can't stress that enough for contracts.

All right, so it says breach of contract. That tells me one thing that will run it all the way through my checklist until I get to the breach. Call 2 says, does Cotton Company have the right to reclaim the unused batting. It's a specific rule under UCC when you have a right to reclaim goods from the actual buyer of it. If you don't know, use your common sense. If I don't use the good, that do I have the right to reclaim it? Yes, you can reclaim the goods.

Let's go through the facts. Buyer manufactures mattresses -- it's a merchant -- so they use batting. The supply of batting unexpectedly ran out. It brought his entire production line to a halt. He was trying to fill a special order from a large customer. A special order. Supplier refused to supply any more batting because he was behind on his payments. Does that tell me he is insolvent? He is just behind in his payments. That's question mark. May 1 he told the Cotton Company he needed a large amount of batting. He will pay top dollar if they would deliver it. So you will think of statute of frauds. It looks like an offer because he says he will pay top dollar. He is looking for performance. On May 1st Cotton delivered the batting and told him he would send an invoice for $5,000 in a week. So by his performance he accepted.

Buyer was upset, price was about 30 percent higher than that charged by the regular supplier, but he had an urgent need. And he went ahead and used it. He could have rejected, but he didn't. On May 2nd, when he had about five percent of the batting used, Sleep Co. Call and cancelled the order. They told you that he had the special order from Sleep Company. It's an unforeseen event that would be frustration of purpose. The facts told you why he did order of batting although he didn't make it known to the cotton company.

When you see the doctrine of frustration or purpose, that's an excuse to a condition. Performance of a condition. When see that I should look for others that look like each other. What goes with that? Impossibility and impracticability. This is where your tools will help under the pressure of the exam because we have a tendency under stress to forget. So I can rely on that. Everything I can do to help myself I'm going to do.

So (continues reading question) put him out the business. He is going to argue impossibility, and frustration of purpose he can't perform in regards to pay because he lost the special order. On May 5th, Cotton Company learned that he had been insolvent for 30 days. So on the point when he telephoned them, they didn't have any knowledge that they were insolvent and they delivered the batting. So May 6, they demanded they either pay the invoice or return the unused portion of the bale of batting immediately. Buyer refused. Asserting that he had sold the batting to another manufacturer. Why are they telling me that? The first call they are looking at, breach of contract. You will take your checklist and start at the beginning. Does the UCC apply? Well, it applies to the transaction of goods. We are dealing with the Cotton batting. They gave it to you.

So I would conclude that they are both merchants. Next, we see in the beginning of your exam, you want to do a good job on the analysis to let the reader know how to play the game. You know how to break apart the facts and the relationship to the facts and apply them to the rule. So they told them they needed the batting, and were willing to pay top dollar -- we are dealing with the batting being the quantity and the time period, end of the day, and the price and the batting is the subject matter. So the details are stated and certain. So I have a valid offer. Break it apart and let them know. When I get to the end of the exam, because of time I might get more conclusory. This is where they make the determination about you. Don't give them any doubt.

So we have the consent to the offer and consideration. So I have benefit to both sides. So I will find there is a valid contract. One issue that student miss is the statute of frauds. It's -- we need it to be in writing. The other way I want you to make sure to be aware, is an incomplete writing. I want you to watch for that. If I fax a purchase order to you, and you fax your acknowledgement, that's an incomplete writing. It's a common way they test, and most students miss that. We are taught in law school, we shouldn't miss it's telephoned.

With the statute of frauds, show me how you get and in out. The agreement was made by telephone it was oral, it's contract is unenforceable and violates the statute the frauds.

Head note your exception. We can argue sufficient memo which we don't have any facts here. There is no facts to support that. Full or part performance? We have full performance here because the fax told you Cotton Company delivered the bale of batting. The performance will take that out of the statute of frauds. There is no fraud going on here. That will take it outside the statute of frauds.

Now running it through your checklist, what else do I go to? Conditions. This exam has conditions. Now you always want to foal follow your approach. Do I see express conditions? No, I don't. Remember last week we had an argument of an express condition and express promise. I see nothing here that I can grab onto here for the express condition.

Cotton Company can fully perform; didn't they know it shifted, which in this case buyer had the condition subsequent, their condition didn't arises now and they need to pay. You need to look to buyer and see if there is an excuse.

With impossibility, it has to be objectively impossible. It was objectively impossible for me to perform because I don't have the contract anymore.

How about frustration of purpose? You need an unforeseeable event and your purpose has to be contemplated between the parties. The buyer is going to argue I only needed the batting for a special order that was cancelled. What is the problem? Does the cancellation fully destroy the purpose? You didn't tell Cotton Company, so it doesn't destroy the purpose of the contract. You could argue impracticability. It's practically impossible that you paid too much.

So there are three good arguments there for your condition to try to excuse performance. But I'm going to find me one. They fail and therefore I go to my breach. Cotton Company delivered the batting, and so buyer is in breach.

In this case the contract is $5,000. The facts told you he returned the batting, what would be my damage? Depends on my facts. If I used a portion that was say $5,000, you would argue you might get an offset, so I could pay $1,000. And there is something else that comes to mind. This could trigger a loss volume seller. If I sell you some merchandise I have. And you get a portion back, and I sell it to somebody else, so I can still get my profit from you, I have multiple batting, it's not my only stock. It's not a unique item or discontinued. It's not all I've got. It's a concept that you get. I want your mind open to that. How that is triggered again is when partial goods is returned and they sell it to another buyer, and I have other things in my inventory that I could sell you.

They sell in essence, the pink car to somebody else, but what is the probability of somebody else wanting a pink car? So I could still sue you and get the profit. That see area to look at right now.

So does Cotton have the right to reclaim the batting? This is UCC 702. Told you I want you to look at the buyer's remedies before and after the acceptance and several remedies before and after the acceptance. It's black letter law. It's something I want you to know it comes up on the multiple choice. I want you to prepare for it.

When the seller discovers the buyer is insolvent -- go by common sense, I didn't know you were insolvent; I should be able to reclaim my goods in a reasonable amount of time. In this case they can reclaim the goods. The other thing that bothered me in this exam, if in fact, he did sell it to an actual buyer, I would bring up the bona fide purchaser. It's somebody who pays value without notice. If I bought the batting for $3,000, and I know he didn't pay for it, I didn't have actual notice, there is nothing filed. Like putting a lien on the actual business, so that VFP would cut off the right of the batting company. It's tricky for students.

Any questions on question Number 2? Again contracts obviously is going to be there, but I think UCC is going to be tested this time. I think you are going to have two contract exams and I see them getting a little more tricky in regards to what they want you to know. The remedies will be there on the multistates. So you need to know them.

All right. Let's go to the last question. Question Number 3. Let's look at the call first.

(Reading) what is the call telling me? "Criminal charges if any." What that means, it doesn't mean convicted. That means can he be charging with something? There could be a limit lacking but you will have to bring it up anyway. What convictions is a different story. A lot of times what students do is they won't bring it up, it wasn't nighttime; it wasn't burglary, you have to bring it up and show where it fails. And it also said, Art and Ben. I see two people, I know probably it's not going to be so red herring versus if they gave me a 3rd party. It helps you identify issues. If they give you three defendants. There has to be something different between them all. No way. What defenses do we have?

Remember the defenses they took out of the order meaning you have to all talk about them in Call 2. You might see an argument of defense and bring it up in call Number 2.

It says, after drinking heavily. What are you thinking? Intoxication. Remember I told you, when you see intoxication what other defense should you think of? Diminished capacity. They tend to go together. When you read these facts, you will look hard to find a second defense. So when I see intoxication, I always think of diminished capacity. (Reading) they decided -- what is that? Is that a conspiracy? I see intoxication and conspiracy. I also see they decided to rob an all-night convenience store. What do you think of? Burglary. (Reading) if I go into a store, and I say, this is a stick up, what is that? That's a robbery, right? They discovered the only person in the store was Mark who works at the store and Fran, a customer. (Continues) Art became enraged. What is he doing? He regarded Fran as a steady girlfriend and thought she was seeing Mark. (Reading) there is your kidnapping and also false imprisonment.

(Continues reading) you definitely know we have false imprisonment (continues reading) what did that just tell you? He ran in there, and robbery is taking and carrying with the specific intent to permanently deprive. They didn't take anything. Then when he locked them in the fridge, he came back and then took the $250. This is not force, fear, and intimidation, it's larceny. It's an attempt because he didn't take the money in the presence of Mark or Fran. Very clever.

(Reading) now you have what? Murder (continues reading) that's proximate cause problem, isn't it? Then it's plaintiff.

What criminal charges should be brought? You will take it in chronological order. First thing I see is conspiracy, and I feel they gave you the conspiracy. They decided to rob the all-night convenience store and they have an agreement between them and so conspiracy is there. So it's open to the public, you will go through robbery. It's nighttime, they didn't break in but they entered, but they need a breaking, so it will fail there. It's not a dwelling house of another.

Then you go to modern law, and even though the store is open to the public, the argument is if you enter with the intent to steal, it violates the consent of the owner. It's trespass. It shows larceny, so they had the specific intent to commit a felony, so there is a modern law burglary.

It wasn't taken in the presence of Fran or Mark. There is no force, fear, or intimidation. They are looked in the fridge. So you will show how the robbery fails, so you will fall back on attempt. With the attempt, remember, you need to focus on your elements of attempt. I have seen a lot of students go through the underlying crime -- you need to show specific intent, substantial step, preparation versus perpetration. They went in the store and they took a substantial step, and by the language, it shows specific intent, right. Did they have preparation, yes, they walked in there. They didn't perpetrate because they stopped and took Fran and Mark and locked them in the fridge. Therefore it's an attempt versus an actual robbery.

And they have done this a couple times in the baby bar where you have to bring up both. How do you know? When the act doesn't get completed. You know they want the issue of the underlying crime versus attempt. So you will see that the robbery falls short because of an interpretation. You will bring up the robbery and whatever the issue is and fall back on attempt.

So remember any movement is enough. If you moved them from one room to another is enough. Any reasonable asportation of movement. So the argument is by placing them in the fridge, is that intent to kill or cause bodily harm in I don't see that? But wanton and reckless you could argue.

 I could argue the felony murder rule. You could argue modern law burg. What else could I argue for the underlying felon?y there is where we get in trouble. The attempt. Any attempted inherently dangerous felony will work. So any attempted inherently dangerous felony will work for the felony murder rule. It doesn't have to be completed, it could be an attempt crime that matches your list. Burglary, arson, rape, robbery, I want you to remember that.

They brought up the issue of what? It's attempted murder in the first-degree, I would go to voluntary manslaughter. He was enraged and became jealous. Is that adequate provocation? I would argue there is no voluntary manslaughter. Another issue is the specific intent to harm Fran. Bring it up and make sure of your argument. One way with the fact pattern is, who did the conduct? They decided to rob, they have conspiracy. When they went in the store, they yelled, "this is a stick up", and saw Mark and Fran, and then what happened after that? Art became enraged and Ben stepped back. Art is doing what? Art is doing the murder, Art is doing the attempted murder, and the kidnapping and false imprisonment. What did is that trigger? You have the conspiracy. You will have to argue the Pinkerton's rule. You will need to break it apart. What did Ben foresee? I could foresee the burglary or robbery? Could I foresee the result of the kidnapping and false imprisonment? You need to break that apart. Absolutely I agree that would be foreseeable. It's foreseeable that the death will result from robbing a convenience store. Absolutely.

Don't lump them all together and say they are foreseeable. Let them know that it's each is foreseeable. Other issue is larceny because he took the money on the way out. He left, he had the intent evident by his conduct to deprive the owner of his money, so he will be guilty of larceny.

People understand the crimes we went through? If you add coconspirators, I'm not sure how you bring it up. When you talked about the conspiracy, the first issue I talked about in Call 1, you can bring up coconspirators. I would not head note a special issue. You could bring up coconspirators and Pinkerton's rule.

How would we do receipt of stolen goods? When Ben took the money and gave the money to Art, then I bring up receiving of stolen property. What I'll do with the conspiracy, can I break apart the Pinkerton's rule? I will say this it's foreseeable, that if we agree to rob a convenience store, we commit a burglary and a robbery. However based on the facts that Art kidnapped and falsely imprisoned Fran and Mark, it's not foreseeable that you would falsely imprison someone in the fridge. That's a gray area. And further, the murder and argue that's a natural result that if you are doing crime like robbery, not that someone will be locked in the fridge, but based on the fact that a murder may occur. So I break apart all those. I have to let them know I can see the distinctions here.

That's your argument. Remember in regards to your agreement, I agree to rob an all-night convenience store. Within that, what is contemplated? If I'm robbing somebody, it's foreseeable that you could kill somebody. It's a reasonable, standard type thing. Death could result. But usually how they show the death did occur, like pushing the guy off the cliff, we could not contemplate that. But that's not what we are looking at. But you are looking at it more broad, a death could occur.

What defenses if any? Everybody saw diminished capacity here. What is the trick here? It's only in specific intent crimes. Kidnapping, for example, is not a specific intent crime. If we show obviously the robberies, burglary, the larceny those are specific intent. With involuntary intoxication is, you need to show that you are not aware of what you are doing. You are able to show that you knew it was Fran and lured them in the truck and lock them in the fridge. And then he knew what was going on. They had the specific intent and I would argue that diminished capacity, they knew what was going on. It's very rare it's going to work as a defense. If they told you you were so drunk you went to the wrong home, now you have a chance.

General rule of thumb, they don't work. Anybody have any questions on question Number 3? Now overall where is my point value? On question Number 1, I told you Andrews and Cardozo and the proximate cause. Based on the defenses you need to argue the facts. In question Number 2, obviously the formation issues weren't a big issue, but you want to do a good job and let the reader know you can analyze. And your excuses, the impossibility frustration the purpose and impracticability. The more points.

Most people missed the burg, and the attempted robbery is worth points. And that works for criminal law as well. You want to be aware of that. These are good questions with little details or nuances of how the issues come up.

What should you be doing? Baby bar is two weeks away. I would work on multiple-states and get the score up to 70 or higher. I hope you have taken a simulated. You have to get your timing down. I hear all the time, "I ran out of time." If you don't practice, you have to get your timing down. The four hours to write the essays is the fastest four hours of your life. Take the simulated. I hear it all the time, "I ran out of time." "I didn't get to a question at all." They do give a zero because you didn't get to the question at all. 45 or 15 is at least some points. You have to get something in the book. If you get your timing down. Issue spot, make sure you understand how the issues come up.

You have to go in with the mindset, believe in yourself, and if you are doing well in practice, what would change. Keep the mindset up. It's a battlefield. You have to go with confidence with the tools and use your tools and make this happen.

Any other questions for me?

If anything comes up during your preparation, email me. I will help you in any way you can. You can do this. It's a lot of work and preparation. It's a battlefield, take at exam by control. You can do this.

Best of luck, and go and make this happen and make us proud. Have a good night.

(Session concluded 6:55 p.m.)