Taft Law School

Electronic Classroom – Baby Bar Mini Series

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>> INSTRUCTOR: Good evening, everybody welcome to tonight's baby bar mini series. We'll be starting in approximately three minutes. Thank you.

>> INSTRUCTOR: Good evening, everybody. Welcome to tonight's baby bar mini series. We'll be starting in approximately one minute. Thank you.

Good evening, everybody. Tonight we'll be going over the subject matter of torts and what I mean by that is I'll give you an idea in regards to how it's tested on the baby bar and how they test issues or certain elements. You've had your torts class, so we're not gonna just sit here and rehash what you've already learned. It's kind of gonna be an overview and give you an idea how the concept's tested.

I want to point out these sessions are recorded, so if you ever want to go back and listen to a session or if you miss one, you can go to Taft's Web site, sign on, go to the student section, and the baby bar mini series. Everything's there posted for you.

If you have any questions, please feel free to ask. Just post them there in the chat and I'll help you in any way I can.

Now we're going to focus on torts for your baby bar that's coming up. In order to do well on the examination, I highly recommend that you have a checklist. If you haven't created one, I recommend that you do create one. Taft does give you one in all your classes. You can use that one. Obviously you can add to it and do whatever you feel needs to be placed there. The purpose of the actual checklist, it's going to help you organize and also make sure you don't miss issues.

It's funny how we act under the pressure of the exam, because we have a tendency to leave things out or we think we address something and guess what? We didn't. The checklist helps you. You want to make sure, again, you have one developed and make sure you use it that way you don't leave out any issues.

Now, when you, read an essay or multiple choice question, I want you to remember you should always start with the call of the question. We learned that last week. Remember the stem? Always read the call of the question. Why? A lot of times the call's gonna give you direction. Whether it's on an essay or the MBE, it's going to give you a point of reference or it might say in the call, what intentional tort has Johnny committed? Then you know it's an intentional tort exam. Again, the call is your direction you want to make sure you do follow it. Make sure you what? Answer the call of the question. That's very important.

Sounds silly when you hear it but a lot of times students don't do well because they don't answer the call. They never follow the call of the question. That can be quite frustrating, especially if that's something you're knowledgeable in. By not following the call and not answering it, you didn't do well.

The first area is intentional torts we're going to focus on is intentional torts. Does the baby bar test intentional torts? Yes. Absolutely. It pops up here and there on essays. The problem with intentional torts we know the concepts and they're straightforward, but for some reason for intentional tort exams we don't do well. I think the point being we don't break it apart enough and see what the examiners are really testing, so we miss what we call the sub issues within the issue itself and that's where your points are. You want to make sure you break it apart.

Obviously with an intentional torts the maybe main thing you look at is intent. What does intent mean? You have the actual intent, or the desired result, or acting with a substantial certainty. A student asked today about well, I'm driving my car and I hit somebody. Is that a battery? Her comment was well, I did have the intent to drive the car. What you're looking at is your intent to do the connect, meaning I know I'm gonna hit that car and I did it any way. Or substantially certain to occur based on the actual facts. You'll know truly when it's a battery versus a prima fascia case or negligence.

Again, with intent, you're looking at substantial certainty and again that's with the substantial certainty that it's most likely to what? Occur. If I shoot a gun in a crowd, right, and the bullet hits somebody, they could come after me for battery because I'm substantially certain someone's going to get hit. You do have the desired result and desiring that result, and that's the actual conduct you're doing. I'm desiring that result. Or remember, you also have the transfer and intent. Everybody hear me right now? Everybody should be able to hear me at this point. We have started. Hopefully Elizabeth can hear me. In regards to your intent, that's the main element.

The other thing I want you to focus on before we start going through the actual torts itself is intent. How do the examiners test? If you're not sure if it's assault, battery, what have you, look to see if there's facts that support the argument for intent. If there's facts that support the argument for intent, then you know they want it. Does that make sense? Again, look to that.

You could see obviously intentional torts with products liability. A lot of times, with products liability, battery doesn't come up a lot. A lot of times [inaudible] seen on the baby bar, obviously you'll have a products liability exam or you'll have what we call an intentional tort exam. There's one out there with Dolly in regards to throwing a book at her boyfriend. There's quite a few. One with the coffee cup and putting sleeping pills in it. I would highly recommend you to review it so you have a good understanding when it is tested versus when it's not.

Now, assault is the intentional creation of an eminent apprehension of the harmful offense of touching. The one thing I want you to be aware of: the eminency. They like to test that. So in essence, are words alone actionable? No. Look for the eminency. You need something there to show they eminent. I'm gonna hit you tomorrow. That's not an assault; there's no eminency there so you do want to be aware of it.

Battery. Again, you still need the intent, and it's harmful or offensive conduct of another. So it's harmful or offensive. An example how that could come up you're walking your dog down the street and I kick your dog. That could be battery against you. When you see assault and battery, a lot of students are taught that these go together. I guess you could bring them up on an essay if you had to. What I teach is look to the facts. If I can see it's coming towards my face versus the back of my head, I know they want assault and battery if it's towards my face. Versus if it's in the back of my head, how could there be an issue of assault? So you're wasting time. I want you to be aware of it in regards to when I need to address the everybody ewe or not.

If you can see it coming towards you, assault and battery. Also, look to the call. A lot of times with intentional torts it's gonna say more than one; right? Break it apart and see how many you can grab onto and make sure to run it through your checklist or your inner checklist. A lot of times we'll leave one or two out and those start to add up. Important to look at that.

False imprisonment's very testable especially on the multistates. Remember, with false imprisonment, you still need the intent, and it's a physical or psychological confinement of another. Okay. Now, what does that mean? Does it mean obviously that I feel I can't leave? Is it subjective or is it objective? You need to know that. Versus if there's a reasonable means of escape, do I need to take it? These are nuances they like to test. The other thing they like to test, were you aware of the confinement? The answer is no, there's no recovery unless you were damaged by the confinement. You either have to be aware of the confinement or damaged by it. So that is something they like to test so you want to break that apart.

Can threats or words confine you? Absolutely. Again, as long as I have what? The psychological ‑‑ because it's based on your words ‑‑ confinement, that would be equivalent to false imprisonment as long as I was aware, and of course, damaged by the actual confinement itself.

You have trespass to land. That one's a sleeper because a lot of people don't see it. I walk into your home and punch you in the nose. Everybody sees the assault and battery; don't think about the trespass. It's very subtle. Remember, do I need to know the land belongs to another? No. Right? If I'm basically ‑‑ my car breaks down and I don't wanna walk along the highway and I see there's this piece of property, I go walking along that property to stay out of the roadway, I had what? Desire result to walk on that grass where I'm walking on that property. That still could be equivalent to trespass to land.

You also have trespass to chattels. Remember, with trespass to chattels, again, you need the intent. It's the interference with the chattel of another. You need some type of interference.

The first five I gave you ‑‑ assault, battery, false imprisonment, trespass to land, trespass to chattels ‑‑ these are known as the five writs to trespass. What does that mean? The transfer and intent doctrine works for those five. It does not and will not and cannot be used for conversion or intentional infliction of emotional distress. You want to be aware of that. So the transfer and intent doctrine works for assault, battery, false imprisonment, trespass to land, and trial court. Conversion, obviously, is a modern law court. You need to see an intentional wrongful exercise of the dominion control of another. With that tort, you need to understand, you either have complete destruction of the object, or a substantial interference. A lot of times people can't tell should I talk about trespass to chattels or conversion? On an essay, you don't know; you can obviously do both. Problem A and B, I have to pick the right answer choice. So you want to look to was the property completely destroyed, or was there a substantial interference? If you look at this a lot of times what you see in the multistates is, you go to a bowling alley and bowl. You pick up somebody else's ball and go home. Was that be conversion? Obviously you've been staying home, week goes by, I would argue substantial interference, so you actually just converted a bowling ball.

Remember, mistake is not a defense. In that case, you'd have the desired result of picking up the ball, putting it in your bag, and going home. Even though you thought it was yours, doesn't matter. You had the desired result of taking the ball. It is different than what? Crimes. You don't need to be aware. Mistake is not a defense to negate that intent. A lot of times on an essay you'll see a defense of mistake. Use your checklist. No such defense exists. Okay.

So if A beats B up and throws B onto C's land but doesn't trespass himself does transfer and intent doctrine still work? Again, who's suing who? So if you basically have the landowner suing, is he going after A? So did he intentionally interfere or enter the land of another? Or you're saying he caused the instrumentality. Remember, with transfer and intent I can transfer from the intended tort to the actual tort, or from the intended victim to the actual victim. I don't see the transfer and intent would work in that case unless I was trying to do something against C. The transfer and intent can go from the intended victim to the actual victim, or from the intended to actual tort. That's how transfer and intent works. In that case I would say no, it wouldn't work.

The other one's intentional infliction of emotional distress. That's a good tort. You need intent; right? It is extreme and outrageous conduct. What you'll see on the multistates is do I know if it's intentional infliction or negligent infliction of emotional distress? And it's your job to make the distinction. It's very important for you to understand.

So like an example and you will see this on the multistates that why you went to school in your elementary school and your friend went to sit down in a chair and you pulled the chair out from underneath him and he fell on the floor and the class laughed. Would that be a battery? Or would that be intentional infliction on emotional distress? Based upon the facts I gave you, that would be a battery. But I can take those same facts and tell you that it's on television during a premier and you did that to somebody famous and pulled out the chair. The tort would change, and that would be intentional infliction of emotional distress. So you need to understand which way to go. On an MBE, you only get one answer choice. You want to look to the humility. Could that be humiliating? Of course, that boy in second grade might think so, but look to the surrounding facts and circumstances, and that will tell you which way to go as to the battery or intentional infliction of emotional distress. You will see those on the multistates and practice. You want to do some of those so you get a good understanding at how it's tested.

When you see intentional torts being tested, make sure you identify all the ones that apply. If I tell you Tommy was angry with Peter ‑‑ that kind of shows intent, right ‑‑ and while driving to the store to get some milk, he saw Peter walking along the road, jumped out of the car, pushed him down, stood over him in an alley. Most of us see he jumped out of the car and pushed so there's your battery. What do you do with the fact that he stood over him in the alley? That could an argument as was that false imprisonment? So you want to think about the facts and break it apart.

Remember when you do see intentional torts at issue actual cause, proximate cause, damages, defenses. Do I always talk about everything? No, the facts will dictate. A lot of times I skip causation if it's really not at issue because of time. I should talk about damages, and if there's defenses I should bring them up. But every tort has causation, so you want to make sure you look for that. That is tested also on the multistate. We have a tendency to overlook that, not think about it, and we'll pick the wrong answer choice. So you obviously need to be the actual cause and as well as the proximate cause. Then of course you need to look at damages and then your defenses.

With intentional torts, do you need physical damage? No, you don't. Just that you did the actual conduct.

Again, once you find intentional torts, asterisk and always look for defenses. Use your checklist. People make up weird defenses. Mistake, foreseeability. It's not a defense. If it's not on your checklist, most likely you're seeing something else. Go back and see where it comes into play.

Now, again, on an essay, the problem with an intentional torts exam ‑‑ I think that's why it pops up here and there ‑‑ people don't see all the intentional torts being tested and that's why they don't do well. Again, run it through the checklist, look to the facts, break it apart, and grab on as many as you can that are being supported by the facts.

Negligence. very testable. Huge. You should know it. All over the multistates, it comes up on the actual essay. With negligence, I always want you to ask yourself and start at this point. Obviously duty but special duty. So is there a special duty? I use the mnemonic SOLD. What does that mean? You got violence of statute so the S is for statute. Omission the act is the O. Landowner occupier that's the L. Duties owed to lessor of land, D. I look to see if I can find SOLD first. If I can't, I'm going to break it apart and start there. Why? Because if it fails somewhere, then I can rely upon your general duty versus if I start my general duty, most likely it's gonna work and it's going to be awkward to go back to a special duty. So you always want to start off with the special duty first.

The first one we're gonna look at is by statute, which is also known as negligence per se. When you see this on the exam, don't take it for granted; look at it based upon the facts. Guess what? A lot of times it doesn't work. You can't find that oh, gee, what was the intended legislature? You remember the class. Did you suffer the type of injury? Prime example they test on the multistates is a guy goes to pick up his lunch and there's no parking, so he parks in front of a fire hydrant, runs in to get his sandwich, and here comes a car and hits him. If he wasn't there, obviously the car wouldn't have hit him. He parked in front of a fire hydrant. What's the intent of the legislature? Basically saying don't park in front of a fire hydrant. To prevent fires. Obviously if there is a fire, that fireman can come and hook up to get the actual water.

Is he a member of the class of statutes designed the protect? I would say yes. What type of injury are they trying prevent? A car from being hit? No. If you actually go through the statute yourself you'll see no, that's not the purpose behind not parking by fire hydrants. Don't take it for granted. Make sure you break apart those elements. In the example I just gave you, it would fail for violation of statute and then I would go to my general duty. Violation of statute, go through the actual elements: Intent, classify, injury. Those are the main ones you're gonna want to look at.

Omission to act, remember general duty you don't owe a duty at all, but look to see if there's some type of relationship. They've kind of expanded a little bit more on this. If you're the one that a created the position of peril, you have a duty. Can't just leave. Now it's even extended. If you're in the car with somebody else who created that position of peril, you can't just leave. If someone needs aid, they don't want you just running off. But again, look to that. Do you have a duty in general? No. See based on the facts if we can impose one on you based upon the actual relationship. A student asked today about what about an aunt and her niece? Well, at first glance I would probably say no. But look to the facts. So if you live with your aunt and she takes you to school every day, i think there's that special relationship. Versus if you only see your aunt once a year for Christmas and she gives you money for Christmas, that relationship's different isn't it? Again, the facts are going to dictate and you're gonna know.

You also have in regards to land and occupier. The trick there is look for the status changing. We have an invitee, licensee, trespasser, known trespasser. In regards to your person coming on the land, if a Girl Scout's coming to sell you cookies, what is she? She's truly an invitee. She's not and invitee. The invitee's someone going onto land open to the public where they're obviously trying to make money. Disneyland, a hotel, a resort, that you would argue an invitee, and the duty is different so you want to break that apart.

Now, the one thing you do need to be aware of for the baby bar, California does not classify. So you would start off with I go to Disneyland. I'm an invitee. I walk behind this door that says employees only. Now I'm a trespasser. I was an invitee, I went where I wasn't supposed to, now I'm a trespasser and got injured. Then you would fall back on California who doesn't classify, and California follows the general duty. I have a reason to act as a reasonable and prudent person under the circumstances. So either way, you're going to get there.

The other doctrine you need to be aware of is the attractive nuisance doctrine. That's dealing with children; right? Of course there's attractive nuisance, and of course because of the youth they don't understand the danger. Landowner knew or should have known that children were likely to trespass, and see if it's supported based on the facts. The key thing there with your landowner occupier is to look for changing of the status. You could be classified as one thing and then its changes, so you want to be aware. That's worth points, and it will change the outcome in regards to your answer.

Then we have duties owed to lessor of land. That doesn't come up too much, but it did on the baby bar. I was surprised to see it. In regards to landlord tenant situation where they contracted to rent in this building and of course the landowner left old newspapers and of course guess what? A fire broke out. That would be duties owed to the lessors of land. Very odd. It doesn't come up too much, but there it was and of course what would be the actual duty? And of course there also was a statute in that exam so we started negligence per se showed it failed and then argued the duties of lessor of land which failed and then go to your general duty. You'll know based upon the facts.

For the California rule, it's just the general duty. It's Rowland v. Christian's the case. You can look it up. California does not classify licensee invitee trespasser. We don't follow that. We follow the general duty. A reasonable prudent person standard under the same or similar circumstances. Does that make sense?

I'm not sure. You may want to check your volume if you can't hear all the time. If you're having trouble, let me know. Okay.

Now we just went through special duties go to general duties. Again, reasonable prudent person is one. You've got your Andrews and Cardozo, you've got your child based on age, unless it was an adult activity, or your common carrier which is a higher duty but you have to be an occupant in the train, plane, boat or whatever it is.

In regards to reasonable prudent person standard it's based upon objective standard. Would that reasonable person have done thing under the same and similar circumstances? That's pretty straightforward.

Andrews and Cardozo. That's talked about all the time, and it's usually not there. It does come up once in a while, but how do I know when it's triggered and I need to talk about it? If you see it, you must talk about Andrews and Cardozo. You can't just pick one or the other. In regards to Cardozo, you owe duty to those within the foreseeable zone of danger. Then argue if you're within the foreseeable zone of danger, versus Andrews you owe duty at all. How do I know when this is triggered? It's triggered when we have what we call a remote plaintiff. If I'm driving home tonight and I'm in a car accident and I hit defendant ‑‑ or plaintiff I should say ‑‑ that is not a remote plaintiff but a witness that was standing off to the side of the road is is suing me, now that's a remote plaintiff. There's no direct contact. How'd you get in my picture? That would trigger Andrews and Cardozo. There's no direct contact between plaintiff and defendant.

So a lot of times you'll see if you look at student answers from the bar Web site they talk about it all the time. It's like they're taught to always bring it up and most of the time it's not there because I did the contact. Directly hit you, whatever it is in regards to the negligent action. It's remoteness. Take me out of the actual picture.

Those are your duties.

Next is in regards to your breach. Breach, you have your general breach failed to act as whatever you told me the duty was, or you have res ipsa. Res ipsa comes up every once in a while. They changed how they test. They used to always say there's no evidence of how the door fell or no evidence how whatever got on the floor. They don't do that anymore. They're getting more clever because they knew that was a way for us to flag it. When you're gonna se res ipsa, you don't know how the breach occurred. I can't point my finger at anybody. Can't say the handyman unbolted the door. The doctor left the sponge in. I don't know did it. That's how res ipsa's going to pop up. Can you point your finger to somebody? Most likely not because we had too many people in the operating room. the nurse, the doctor, the surgeon, the anesthesiologist. You can't. That would be a res ipsa problem. What it is, it's out of fairness basically, it shows circumstantially a breach which shifts [inaudible]. So I can overcome that burden. The burden kind of shifts on to them to show otherwise. You will know when it's at issue.

Your actual cause you got your general but for. Make sure you use your language in your essay. But for hitting me, I wouldn't have been injured. You want to be aware of successive tortfeasors and concurrent. Those come up. Successive is one of their favorites. I don't know. Students maybe don't understand how to see it. Very straightforward if you remember the rule. Successive tortfeasors are two independent acts. I got you doing a wrong act, I'm doing a wrong act, come together to cause a wrong act. Two independent negligent acts come together and cause a result.

So but for their successive negligent conduct.

How could you see that come up? Car accident, and a doctor committing malpractice. You're suing the plaintiff for not only the injuries of the accident but what the doctor did. That would be successive tort feasor. Versus concurrent is two independent acts not negligent on their own, but they came together and were negligent. I'm washing my driveway with gasoline, the neighbor's out there smoking a cigarette and throws it right on my driveway. My conduct wasn't negligent on its own. I'm cleaning my driveway. Not smart with what I'm using. He's smoking not doing anything until he did what he ‑‑ obviously threw it over to the driveway and caused that result, that would be what we call concurrent tortfeasors. Two independent acts but once they come together causes the negligent act.

Proximate cause is big. Proximate cause students don't like but I promise you this: If you break it apart, it's rather simple. Break it apart for you in steps.

Step one. You ask yourself: Is this a direct act or indirect? If it's a direct act, cakewalk. It's foreseeable or unforeseeable and I'm done. The examiners aren't testing it. So they basically ‑‑ it's foreseeable if you hit your car into somebody else that they're gonna be injured. Pretty straightforward.

If it's indirect, that's where the game begins. Now you need to break it apart. If it's indirect you need to ask yourself is it dependent or independent? Car accident on the freeway. You hit driver Joe. Your conduct hitting driver Joe is what? Direct. Now the paramedics are called to the scene and here they come. A car runs a red light and hits into the paramedic truck. Well, I didn't do it. So my act of hitting that car's direct, but the fact the paramedic truck got hit it's indirect; right? But was that paramedic truck dependent on my actions or independent? It was dependent I put the chain in motion because what I did they had to be called. Then is it foreseeable versus unforeseeable? In regards to what's foreseeable is normal acts of God, acts of animals, and the negligence of a third party. If a car ran into a paramedic truck, most likely it's foreseeable so I would still be accountable.

If you find that it's in this case same example with the paramedic truck it's indirect but if you can show it's independent, meaning I didn't put that chain in motion, again same thing is it foreseeable or unforeseeable? If you get to know that, language is good, good buzz words, [inaudible] understand proximate cause know what you're talking about. What are the steps again? Is it direct or indirect? If it's direct pretty simplistic. Is it foreseeable or unforeseeable? That most likely tells you they're not testing proximate cause too hard.

If it's indirect, you want to ask yourself is it dependent on what you did? You put the chain in motion. Or is it independent? So dependent versus independent, and then the next step is it foreseeable or unforeseeable? Everybody have a handle on that? Practice that. Actually something I would recommend for the multistates because it would help you get the direct answer choice. A lot of times we think things are dependent. If you put the chain in motion such as a rescue force, sorry, you're going to be accountable even though somebody else caused the accident to that person called on the scene.

Your concurrent liability. All it is, is you have two people independent of each other doing an act that's not negligence on its own by itself, but when it comes together it's negligent. Another example you should have had in your case book with oil spill in the ocean and a guy was soldering on the dock, and the sparks hit the water and explosion. They weren't negligent independently on their own because they didn't cause any damage, but when they came together they did. That would be another example of concurrent tortfeasors.

Okay? Everybody with me?

We hit actual cause and hit proximate cause, and then of course the last thing you need to address is damages. Remember, for negligence you need damages. You need general damages. If you don't have general damages, no recovery. Can't get pure special damages; right? General damages would be your pain and suffering or your property loss; right? Like damage to your car. Special damages is that which is reasonably foreseeable, such as medical expenses, lost income, stuff like that. Remember, special damages need to be what? Pled and proven. I want to make sure obviously you're not just giving you a free ticket. I want you to show me your actual losses. Then after you prove your prima facie case, it's just to the other side to make sure you look for defenses. Prima facie. You're looking for actual defenses.

Now, in regards to your multistate question with concurrent scene, I'm not sure you mean. The victim can want sue any of them. If I can show negligence, I'm basically showing that you were one of the tortfeasors that's joint tortfeasor concept. I can sue either one of them and then the other one can seek indemnity or contribution. The plaintiff, remember, has the option when we're dealing with joint tortfeasor to serve any party. It's up to them. They have the choice. The reason being they want to go after the one they most likely have jurisdiction over. Plus, insurance, deep pockets stuff like that.

That is your negligence in a nutshell. Remember with your actual defenses with contributory negligence you could argue the last clear chance doctrine. That only works for contributory negligence. Doesn't stand on its own. And what it does is, if you showed the plaintiff was contributary negligent, the plaintiff was bringing this up, wait a minute, defendant. You had the last clear chance to prevent the injury to save themselves, so they're not completely barred from recovery. That's how the last clear chance doctrine works. It's really a plaintiff argument to kind of knock back out the contributor negligence if that helps you see it.

Strict liability does come up a lot more than you think on the multistates dealing with the animals. It was on the baby bar with little rabbits. That was the last baby bar. Make your arguments. With strict liability, remember, you still have causation and damages so still need to go through it. With your strict liability with animals, you look to the propensity. Will be on the multistates. Dogs bite, snakes squeeze. They're gonna give you something we're familiar with not something like a llama. I would say a llama bites, but I don't know. Or a camel. They'll make it more realistic. It has to be its propensity. Cows trespass.

Versus your abnormally dangerous activities. That could be with explosive, toxic chemical, crop dusting. They had one on the baby bar dealing with extermination. That would be abnormally dangerous. Someone comes and tents your house or they fumigate or they put bait traps all over. That's a form of abnormally dangerous activity in and of itself. Don't forget, you still need causation. Actual cause, and proximate cause, and then your damages. Of course, once you find a prima facie case look for your defenses which you can only use comparative negligence and assumption of the risk. With strict liability, it's liability regardless of fault. You're not really looking at fault. If you see a difference on a multistate, I can support faced on the fact strict liability. But the same facts I can support negligence, what's your answer choice? It's strict liability because it's liability regardless of fault. So I just basically show it's an abnormally dangerous activity ‑ causation and damages, versus the duty and the breach et cetera. Okay.

Remember, strict liability on the land you can have a crossover. What's that mean? I can see another tort like private nuisance. You want to start playing when you look at exams and doing them in practice. If I see this, I look for this. If I see this, I look for this. So force yourself to look and not miss the issue. So strict liability on the land, you generally want to look for private nuisance.

Products liability, that's something I would like you to go over. Products liability I think is right for testing for this up and coming baby bar. With products liability you have battery. There's no way I can hide that from you. You had an idea this was a defective product. They had one out there ‑‑ I don't like it ‑‑ dealing with medication, and the doctor as well as the manufacturer knew it could lose potential eyesight, and they didn't disclose that and gave the woman the medication. Since they knew, that's a battery. They didn't disclose it. That would be equivalent to battery. When you see products liability, you're going to talk about at least three theories. Always negligence, always implied warranty and merchantability, and always strict liability and tort. Then the facts will dictate for the others. You know that going in so you know you have three theories already without even reading the fact pattern.

The duty's different same elements duty, breach, causation, and damages. But you have a duty to inspect, discover, correct, or warn in the danger in the product. Right? The breach, the failure of the product remember you're going to type it as a manufacturing design or warning defect. Guess what? It could be multiple types of defect. A warning as well as a defect. If you can grab on two, you wanna do that. Then your proximate cause damages and your defenses. It pretty much mirrors negligence of what you've already learned. The language is a little bit different in regards to your duty and your breach. Everything else is pretty much the same.

You have warranties express warranties and implied warranties. Express warranty, wording can hurt you there because you are responsible for ‑‑ even though we're talking about torts, does come up in UCC as well ‑‑ warranties for products. In regards to express warranty, look to is it expressly stated? Is it mere puffery? Ooh, this is the best product for your hair. If it's not the best product for my hair, I can't sue them for express warranty or violation of the express warranty. Doesn't work that way.

With your warranties, you still need causation and damages. Then of course always look for defenses such as misuse or disclaimer. You bought it as is or maybe you assumed the risk.

Implied warranty and merchantability. That deals with the product being fair and average in use. In regards to a hair drier, what's fair and average in its use? Blow drying your hair, not burning your scalp. If you're using it as a drier to dry your clothes, that's not fair and average in regards to its use not the purpose of what? A hair drier.

Your implied warranty of fitness. When you see express warranty, usually you'll see implied warranty of fitness. That's where the seller makes a representation as to the product of what you intend to use it for. Are these boots good for mountain climbing? The snow? They make a representation. A lot of time when you see this, you don't see oral communication. It's usually by advertisement; right? Or on the label. They want you to miss it. General rule when you see express warranty, you want to always discuss what? Implied warranty of fitness for a particular purpose.

If you have a general call, what theory or theories and you know it's products you know you're gonna talk about negligence, strict liability and tort, implied warranty and merchantability. I already know I've got those three, so make sure we do that. There's an exam they did very clever and it's a baby bar exam with a child eating a banana and throwing the banana peel on the ground because it was sprayed with a chemical obviously when the child bit the banana, peel and all, the taste of chemical, spit it out, threw it on the ground. Obviously they're suing for products. Based upon the defective banana. In that particular exam, though, the call said strict liability. So you were stuck with only strict liability.

There's another exam out there with the cold drink blender. They took your product approach and threw it all over the place. The first call dealt with what type of defect, the second call dealt with defense, the third call dealt with in regards to causation issue then they got to the negligence. They really tore it apart for students to see if they really understood what was being tested. The more you can play with them and shoot me an email ‑‑ I'll send you some products or intentional tort exams, or whatever you want ‑‑ to look at the difference. If you look at the five different ways that they've tested or they've tested intentional torts or products liability, there's nothing they can give you you can't handle. That's the game. You want to understand how the concept's tested. That's important. If I don't understand I'm gonna miss it. If I see it for the first time I'm like what? It takes so much time to figure it out time's done and I didn't finish. Spent too long on this exam and didn't get to question four. That's why the more I can get you through repetition to understand how concepts are tested and how they come up, that'll speed up your time. Time's against us on the exam isn't it? I want to finish. I've heard but sad stories of I didn't write question four. You didn't touch question four, you're already at 0. You have to recover 100 points somewhere. That's hard to do. At least if you wrote a sentence they might give you forty. Sixty points is a lot easier versus a full hundred. That's big. And I don't want to be there.

Also in products you have your strict liability and tort. Basically, that's where you have a defective product placed in the stream of commerce. Again, it's liability regardless. Then you show your causation and your damages.

The other thing they might try couple things to trick you like an endorser. Can you sue an endorser for products? No, you may not. You can sue them for negligence or misrepresentation. You go to the doctor and he sells you the medicine. Can you sue him for products? No, you can't. He's not really the manufacturer (speaking too quickly) consider him within the chain for products liability so you want to pay attention to that in and of itself.

Remember, it has to be what? A product. So sometimes people under the pressure of the exam will come up with weird things like a service. It's not a product. Or obviously you're renting a hotel room. That's not a product. What are you doing? You let the exam take control. You take control of the exam. And again, the more I understand how the test the concepts I'm not gonna let the exam throw me off. I'm gonna stand firm because I know obviously based on my practice and my review, my studying, that this is the direction to go. Right?

Vicarious liability comes up more than you think. With vicarious liability, how do I even know what's at issue? I always look at the call of the question. Is Conco liable? That's a business. I already know vicarious liability because an entity can't do anything. Is it straight vicarious liability, employer/employee, or are they gonna play with me in the facts? Will dictate itself. Versus you hire an independent contractor. You go home tonight and realize your brakes are defective so you go to Midas and get them fixed. You think they're fixed, you get on the road, get in an accident. Can I argue wait a minute I hired Midas, independent contractor. No. Because it's a non‑delegable duty. So the maintenance of a car sorry. If I hire somebody to cut down trees I'm still on the hook. Doesn't mean I can't go after them with due indemnity or something but again I'm gonna be the one accountable to the plaintiff. So there's certain non‑delegable duties. Even something open to the public ‑‑ maintenance, like the elevator ‑‑ they're not gonna let them delegate that away. You can go after the resort or wherever you are injured and they can go after the maintenance people themselves. But they're not gonna let them delegate their responsibility.

Nuisance is something that comes up. You have your private versus public nuisance. They tested this a few years back, it was a very weird baby bar exam. That's all it was, public versus private nuisance. Okay. How much can I talk about it? And it dealt with the sound of a horn. This lady goes up to the mountains to do bird watching, and when that horn went off to kind of warn people if there's danger emergency alert thing ‑‑ there goes the birds. Was it a public versus a private nuisance? If you see something like that, you'll know. Massage those facts. Argue those facts. Look to both sides. It can't be that straightforward.

Defamation's big. With defamation, that's the one tort that students don't do well on, and I think it's because they just lump it together. You've got to break apart your actual elements of the rule of law. What do I mean? Defamation, remember, it's a false, defamatory statement, has to be to be published intentionally or negligently, has to be to a third party who knew and understood it's meaning, then of course is it libel versus slander in order to determine damages, and then your defenses.

With your false defamatory statement, one thing to look at is it a statement of fact versus opinion? Sometimes they will give you a full statement where you need to bifurcate. There's one out there with judge Bright. It says Judge Bright's not very fair, he doesn't know the law, and he's often drunk on the bench. That's three different things I need to bifurcate there. He's unfair. Sounds like a statement of opinion. He doesn't know the law. Is that a statement of fact or opinion? Arguable. And then he's drunk on the bench. Definitely an argument of fact especially if it wasn't true that would be defamatory. So you want to look to the statement to see if you can break it apart.

Remember, in regards to the publication, who does it have to be published with? A third party. If you and I are talking and I defame you, that's okay. No cause of action. A third party has to hear it. So they test that on the multistate so it has to be a third party. Also, did you understand it? So in essence, is it really clear on its face it's defamatory or do I need to introduce intrinsic facts? That's when your innuendo, your inducement, and your colloquium come in. Student sent me an answer today and I noticed with colloquium, they dealt with a reporter went and took a photograph of something posted in law school about a teacher giving A's in exchange for sex. They're arguing with colloquium. Colloquium deals with a group. You don't know what group that group is, colloquium's gonna be triggered.

Obviously in regards to innuendo and inducement, innuendo is the defamatory meaning, inducement is that extrinsic fact to make it come to life. So innuendo and inducement go together with an individual to understand the defamatory meaning, versus colloquially kind of stands on its own, but it's dealing with a group. All lawyers are shysters. Okay. You're dealing with me, you're talking about me. I'm going to try to bring colloquium. Needless to say, if it's not a small enough group, it's not gonna work in that case. You're gonna have to see a group.

Now, determining if it's libelous or slanderous, very big, very important. Why? Well, anything in permanency ‑‑ so written, broadcasted on the radio ‑‑ they're gonna consider that libel because people remember. It's more permanent of a record. If I can show it's libel, general damages will be presumed. Versus slander, if we're basically talking in a party what have you, people forget. They're gonna make you show general damages, unless it dealt with I use the mnemonic CLUB: Crime, Loathsome disease, Unchastity of a female, or dealt with your Business.

So in regards to if a person passes away and yet there is a viable cause of action for defamation, can your state sue? Sure. That would be under the survival action. If I can show the prima facie case, I would be able to. You'd have to prove the survival statute first, which at common law remember, the cause of action died with you so you want to be careful about that on the MBEs versus moderately survives and then the state could bring it with you.

Also, too, which wouldn't work for defamation, you have your wrongful death. In essence, if someone's in an accident and the person dies other members of the family have a claim for wrongful death as well because that person was taken out of their lives. Besides the estate being able to sue under survival for the wrongdoing.

Now, with defamation, again, you want to make a determination if it's libel or slander because that's gonna determine in regards to your general damages as to whether or not they're presumed or not. That's important. If you want special damages you have to prove them up but you don't have to the you don't want 'em or you can't prove 'em. When you see defamation, I want you looking for defenses so you have qualified privileges, constitutional privileges, absolute privileges. Husband and wife in regards to have privilege or court proceedings, when we're arguing in court like a divorce there's a privilege; right? So look to the actual facts. But if that proceeding's over, which the with Judge Bright you said after the hearing, not privileged anymore. You can't claim it.

The constitutional privilege comes up more. Remember when you see constitutional privilege that means you had a media defendant. Newspaper, the news, reporter, something to that effect.

When you see defamation and it's a general call, guess what other tort you have? False sight in the public eye. They go together. So if it's [inaudible] theories and you see defamation, most likely you're gonna false sight in the public eye. Also look to defamation because if you see it's done intentionally, argue intentional infliction of emotional distress. There's three right there. Based on the same facts, if I teach myself if you see this, look for this. If you see it's done intentionally, I also have this. That'll help you because it'll fore you to look and see if that issue's there. Doesn't, under the pressures of the exam, always pop into my mind. If you start training yourself and understanding, hey, look, I see defamation, I know I look for false sight. Oh, if defamation's done intentionally, I look for intentional infliction of emotional distress. Didn't know that. Now I got it. Okay.

With your invasion of privacies, false sight's the mainly one tested on the essay. You have intrusion upon conclusion. That's more MBE oriented. Public disclosure of private acts, MBE oriented. Appropriation of name or likeness, that's MBE oriented.

With the appropriation of name or likeness, they like to trick you. If I'm a photographer and I take a picture of Lori Loughlin and now I'm selling it on Ebay for five hundred bucks. Is that appropriation of name or likeness? A lot of people say yes, it is. No, it's not. I have to be using either her picture her name or her picture like her likeness for my commercial gain. If I post her photo, look who comes to my establishment, now it's appropriation of name or likeness. If you think about it, we wouldn't have the Star Magazine, or People, or any of these magazines. They could all sue, saying appropriation of name or likeness. That's not how it works. You're taking their likeness or image and you're making money through your own business by your representation. Look who comes to my dry cleaners to get his clothes washed. Look who comes to my restaurant and eats here. I'm using that image to beef up my business. That's where you're crossing the line and that's appropriation of name or likeness. You want to watch that.

A lot of times when you see it on multistate, it's not appropriation in name or likeness. Make sure as to what they're doing.

You have business torts they don't come up too much for the baby bar. Intentional interference with a contract ‑‑ has to be an existing contract ‑‑ or a perspective advantage, don't see that too much. You do have misrepresentation that's like what? Negligent misrepresentation or fraud. That's something you want to look for. Again, negligent misrepresentation or fraud. You want to look for either one of those. Those do come up once in a while. When you do see an issue of fraud, it has to be based on intent.

Your defense of mistake of fact. Where's mistake of fact in your checklist? With improper litigation torts and malicious prosecution. I've seen those on the bar. I've seen those on the bar. A lot of times I've seen how they test currently, they give it to you. They'll put it in the call of the question but I've never seen it on the baby bar. Kind of have a general understanding about it. If you see abuse of process, most likely you have unsolicited prosecution, because they work civilly and criminally amongst each other. That's where you're using the legal system to gain advantage, and obviously you file a false claim because you're mad at your neighbor, whatever it is, that's a no‑no. It's not a hard tort, but I've never seen it tested on the baby bar so I wouldn't worry about it. Be surprised if it came up now.

Now, in regards to areas they like to test your intentional torts, negligence, products liability. Defamation hasn't been tested in a while. I would know it. Look at some exams. Go to Taft's Web site and prior bar questions click on that. There are baby bar questions on there with Taft model answers. You can go to the bar Web site and get their previous baby bars for the last eight or nine years. Remember, those are student answers so they don't have everything in there. They could be missing issues, it's not the strongest rule. Again, it's under the heat of battle. That's a difference in and of itself.

Now, you asked in regards to mistake of fact. Mistake of fact, mistake of law reminds me of crim law. I don't know of any defense that's mistake of fact that can argue for tort. That's another thing to make sure I'm paying attention to the call of the question because on the multistates, they will mess with you. A lot of times you'll answer it thinking I got it correct and guess what? It was a crim law call. They set you up. You've got to be careful. That's why you'll see battery tested, or assault. We have them in torts and crim law. There is a big difference between them so make sure you pay attention to that.

So in regards to misappropriation, what are you doing? You're taking someone's identity whenever it's their voice they did that with Bette Midler in a commercial. We didn't know it was her, but the voice sounded like her so that would be misappropriation. Or something that they're noted for, that we identify that person of doing that activity, whatever it is. That would be misappropriation. So if the public can relate to that person based on what you're doing, yes, you've crossed the line. That's a no‑no.

Again because they've worked so hard to create their identity. They don't want someone coming and making money.

As you can see in regards to torts, I like torts not that hard of a subject matter. There's nuances that you need to go through. So you want to make sure you understand certain key things like again your causation. That's gonna be there so I should have it mastered. It's definitely on the multistates and most likely on the essay question itself so I should do well.

The other thing is, run through your checklist and make sure you have an example. How do I see in regards to assault? How do I see battery? How do they test? What do I look for? That's just gonna make you stronger. Again, the more you understand how the concepts are tested you're not gonna falter on me. You'll see even in reading ‑‑ I tell people, when you start getting overwhelmed, go to the bar Web site and read the student answers. You'll look at it and say, I can do this. This is terrible. Remember, when we study we feel oh, we have to have perfection. We're all that way. But you don't. It's mediocre. You have to get your C. Not too hard to do. It's just breaking it apart. It doesn't have to be perfect so you have to keep that in your mindset. I'm the same way. It has to be perfect but it doesn't. When you start feeling overwhelmed, go look at the student answer and then that's doable I can do it.

The other thing we tend to do under exams is we second guess ourself. That's a problem. If you second guess yourself you're gonna falter. That's why the more you understand how the concept's tested, you're gonna stand by your convictions.

With defamation the First Amendment privilege, that's the Constitutional privilege. When that's gonna work is when you have a media defendant, they're saying we have a right for free speech in regards to publishing. You know how they publish in regards to movie stars and stuff and they don't like what they say a lot of times, so they want to sue for defamation. Remember, if you're in the limelight you need to show what? Like Trump. He's in the limelight. What's he need to show? If he's trying to sue for defamation, he has to show malice. The standard changed, versus [inaudible] as to mere negligence like you or I. I'm not in the limelight. Mere negligence will suffice. There's a difference. When you see a media defendant which you'll know, you'll know constitutional privilege because it changes a standard as to mere negligence versus a malice standard, so that's big. You'll know a lot of times based on the call. They're suing Gill, the reporter who published the story, as well as The Times Magazine. Kind of gave it. away.

The more you look at it and understand how they test, you'll be fine.

There is a couple out there they have tested that are a little tricky on the baby bar one where they said Darby's ‑‑ it's a political rally ‑‑ Darby's a snob, comma, and she's cutthroat because she got her friend not to be accepted from whatever organization. Those two statements. That's what you got to watch out for. She's a snob I would say is argued as opinion; right? Then of course as to what she did to her friend okay maybe argue that is that's defamatory and go through it. You have to look to the verbiage and the punctuation. That's the problem with what? Defamation because if there's multiple statements, you miss 'em, you just got hurt. Can't do that.

Any other questions? So again, I can't stress it enough. Go through and understand how they test the concepts. Start plugging it in back to your checklist. How do they test battery? I remember that false imprisonment. There was no intent. We did that last week in regards to Raj's and the billboard. He wanted her out, not in, even though she was psychologically afraid to leave. That's what they got you to focus on. He wanted her back to the commune, right? There was no intent. So therefore there's no false imprisonment. So I've got to make sure I break apart those elements and they're supported with the facts. The other thing I want to make sure is make sure you understand how the concept comes down. Again, the you understand the five ways of how it's tested, I can't shake ya. And that's what they're gonna do. They're gonna create doubt in your mind and I've got you. We can't do that. Sometimes the questions aren't so straightforward, which you'll see on the last baby bar. A couple were a little difficult. If you stood by your convictions, you wouldn't have faltered.

If you do have questions, feel free to shoot me an email. If you want me to send you some intentional torts exams, or some products, shoot me an email at jolly@taftu.edu. Be more than happy to send those to you. Most of them have model answers. If they don't, I'll tell you they just have an issue sheet.

I start putting exams together so you can start comparing and contrasting. That's important. That's what you do when you prepare for an exam. You want to make sure you understand how are the five different ways products can be tested? Intentional torts, how can they all come up? How do I know ‑‑ an example, I put a sleeping pill in a coffee cup. What's the issue? What's the intentional tort? Huh? Right? So people don't see it. So you want to break it apart. If you want that, shoot me an email so I have it and can send it right off to you.

Flemings is a good workshop if you're doing that for the baby bar. That's a highly good course for the baby bar. Taft does work with you for that. It's something I would do if you can. He does assign I believe it's still six essays. You do wanna write those to get some feedback. That'll help [inaudible] the direction of where your weaknesses are. Definitely.

Okay. So shoot it off to ‑‑ because this screen goes off where I can't see everybody's information. So jolly@taftu.edu. Email it to me and I'll shoot it right off to you. I don't get this transcript for a week, and I can't go back through it obviously and see who wants what. That's what I would recommend. What happens at this point you'll be sent an essay question in torts. It is something I would recommend for you to look at outline and write it. Why? Because the more exposure you get the better you're going to be. Send that in. You'll see by the email you can send it off to me, I take a look at it and get an idea of our strengths and weaknesses are. Gives me an idea what needs to be worked on and where are faulters are, if you didn't follow the call of the question, or you're leaving out multiple facts, or you didn't break it apart enough. That helps you and trains you in regards to how the dissect and take apart the essay so you get everything in there.

Look for that. That should most likely go out tomorrow being Wednesday and have it to me by Monday morning so I can be prepared by Tuesday next week. If anything does come up, shoot me an email at jolly@taftu.edu. Be more than happy to help you in any way I can whether if it's in regards to the lecture or multistate or you've seen that you have questions about, like the one that asked about the concurrent. I'd go back over that one because, again, as plaintiff you can sue either party. That's not correct.

All right. I look forward to seeing you guys next week, then. Have a good night.

[END TIME: 7:00 PM]