Taft Law School

Electronic Classroom – Baby Bar Mini-series

08/20/19 6:00 – 7:00 PM

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

Good evening, everybody, and welcome to tonight's baby bar mini series. We'll be starting in approximately one minute. Thank you.

Good evening, everybody, and welcome to tonight's baby bar mini series. Our primary focus will be on the subject matter of torts. I'm going to give you an idea as far as the concepts and how they're testing on the exam so you can learn how to see the issue and do better on the up and coming baby bar. I want to make sure you have a checklist. They were sent out to you. It has a main checklist, an inner checklist, and a dissection. Inner checklist, you should memorize it and write down the first abbreviation of the word so you can use that tool to help you identify issues. You should the pressure of the exam we have a tendency to leave things out.

You have the inner checklist that kind of shows you where everything fits. That's your chronological order of negligence you do duty, then breach, then actual cause. Then you have your [inaudible] which is black letter law. If you have your own checklist, don't re‑memorize this one. It's harder to undo and redo. If yours is lacking, plug into it but you know the law so keep your definitions. Nothing wrong with them. I wouldn't relearn something because you don't have that kind of time.

These sessions are recorded so for your convenience if you ever want to go back and listen to it prior to your baby bar mini series they're up on Taft's Web site go to the baby bar mini series click on it and the lectures are there for you. There's prior lectures as well, so if it's not timely you can always go back and listen to the lecture for multi states in the previous baby bar mini series we had. Pretty similar to each other.

Okay. We have a PowerPoint presentation that you can look at not just having to write down every word I say. You have a visual here to help you. That's important, again, to give you an idea.

Now, when you read an essay or the multi states, I always wanna make sure you remember you read with the call of the question. Start there. The stem on the MBEs. This is gonna give you point of direction. So I think our biggest fear is when we get on the exam I don't know if it's torts, contracts, or crim law. The more exposure you get, you'll know. What theory or theories of liability? Most likely a tort call. If you have plaintiff defendant you know it's a tort call. State v defendant that's a ‑‑ with contracts. You just have a contract. In regards to what liabilities or was there any breach, something to that effect. So you'll have a good idea. But start there. A couple reasons. The anxiety's there. And if I okay it's contracts and I know the subject matter I start to calm down. Then if I go to my scratch paper and start writing out cursory my main checklist my brain starts to focus on that subject matter I just identified like in this particular subject we're going over torts. So that will help you immensely. Always read the call first. Once you identify what are you gonna do in regards to the actual issue? Write down your inner checklist on your scratch paper and from there, you're gonna go ahead and start reading the fact pattern itself. This is important anxiety, getting your mind set in the subject matter being tested. That's something I want you to look at and obviously review because that's important.

First area we're going to start off with is intentional torts. In intentional torts, they can come up on the essay, and on the multi states. So you want to be aware of it. What people aren't aware of is how they're tested. They're relatively simple rules. What happens is students don't work on the application and by not working on the application they're not understanding I'm missing the issue of battery, I'm not understanding as to why I missed it. Didn't break apart the elements. Very important.

The first thing I want you to look at how do I know when an intentional tort is really at issue? I want you to focus on the intent. A lot of times I was driving my car home and I ran into the car in front of me and hit his car. Battery. No. No facts to supported intent. If there's facts that support intent you're going to bring it and you happen break it apart. If I was driving home and I say my neighbor who I was angry at and hit him, I think there's enough facts there to support maybe I had intent. Then you'll know when it's at issue. Very important on an essay question.

Remember with intent you have substantial certainty, a desired result or transfer and intent. These are areas they test because we forget about transfer and intent or did I really act with substantial certainty? What that means basically is you intended to do the act. Maybe not the result, but the act. We forget that. Of course I didn't want to hurt you. I was swinging my arms trying to stretch and punched you in the nose. Well, did I act with essential certainty to do the conduct knowing I was in a crowded area? I got a problem there. That does form the actual intent. So, again, something I want you to be aware of.

First issue is assault. Key things they test are words alone enough to find an assault? No. I basically say you know if you don't behave I'm going to hit you tomorrow. Are words alone enough? No. What they test is the eminency. I said tomorrow. Not very eminent. Not an eminent threat. That's the area they test with assault. Battery, an intentional harmful touching of another. If I have my dog on the leash and I kick the dog or knock the plate out of my hand, equivalent to a battery.

Another thing I see with students that tells me you're not practicing enough on the multi states is does it have to be a physical touching? No. People will miss a question. If you go outside for a walk and your neighbor comes up to you and blows smoke in your face, that's equivalent to a battery. It's offensive that someone blows smoke in your face. Again, you don't have to have a physical touching.

False imprisonment. Again, with false imprisonment, what do you look for? You need the intent. Could words alone be sufficient to cause the confinement? Right? The answer is yes. Words alone can be. But what are they really testing here? With false imprisonment there's two areas I want you to be aware of. And you either have to be aware that you're being imprisoned or you're damaged by it. That's what they're going to test. Sometimes you'll see in a fact pattern that a guy was in a coma in the hospital and the nurse locked the door in order to go on her break and he wouldn't get out if he got up. Well, she comes back, and unlocks the door. Can his family bring cause of action? He's in a coma so he's not aware. Is there any facts to show he's damaged by it in no. Since he wasn't damaged or aware of it, no false imprisonment.

The other area's confinement. If I'm afraid of heights and you lock me upstairs in a tower and the only way I can get out is climbing down a fire escape or a ladder or something, do I have to take that means to try to escape? No. Basically I am confined so I don't have to take the means of egress especially if I have that fear.

Trespass to land. Main thing they test here is you accidentally ‑‑ meaning you're walking deliberately on that path and you don't know it's owned by someone else. Desired result of walking across this sandy S on a piece of land ‑‑ section ‑‑ that can be equivalent to trespass. It's owned by another. Now, with trespass, I want you to be leery. What they do test, they use the term trespass. You can have an intentional trespass or you can have a negligent trespass. Hmm. Department know that. So you'll see on the multi states they'll say can Joe be liable for trespass? Great. Yes or no? What you're going to do is look to the actual facts and determine, okay, do I have actual intent? Right? You're gonna know that based on the facts versus it was a mere inadvertence that would be a negligent trespass. What's the difference? Actual intent to desired result. For a negligent trespass is inadvertent but you must have damages for a negligent trespass. Prime example we use on the multi states is an airplane's flying over a farmer's land and an engine goes out, and it plans for an emergency landing and lands right in your crop. Is that an intentional trespass or negligent trespass? Intentional. You're gonna be responsible but you don't have to have damages. In this case you probably do. But you can get your punitives. Versus if the facts tell you that the plane inadvertently just fell out of the sky, don't know why. That's a negligent trespass so you'd have to show damage to the property in order to recover. That is something they do test that you need to be aware of.

And the other one is trespass to chattels. Again, you have the intentional interference of the chattel of another. What gets confusing between this and conversion for students? Conversion you need the intent but you need the wrongful exercise of dominion and control of property of another. What you're going to look at to determine ‑‑ on a multistate you only have one answer choice ‑‑ should I pick percent or conversion? How do I know? This simple rule: If you have a complete destruction of a chattel it's conversion. Or if you have a substantial interference it's conversion. So you can look to the facts and dictate.

The last intentional torts is negligent infliction of emotional distress. How the examiners test this? They're going to use the term emotional distress. It's your job, again, to determine is it intentional or is it negligent? Remember the negligent infliction, yes? Right? So it's your job to determine. I just gave you seven torts. Five of these are what we call five roots of trespass. What that means is the transfer and intent doctrine works. So the transfer and intent doctrine will work for assault, battery, false imprisonment, trespass to land, and trespass to chattels. It does not work for conversion and it does not work for intentional infliction of emotional distress. You want to have an idea when you can apply the transfer and intent. You don't wanna apply it and you're wrong. You'll find the wrong answer choice especially on the multi states. Those are your primary focus intentional torts. When you see an intentional tort exam, you want to make sure you identify as many intentional torts as you can. So if you see an essay which they have tested on the baby bar and you see it's intentional torts run it through that checklist. If you're just seeing one or two, probably made a mistake. That's not gonna take me an hour to write. To give you an example, right, Tommy was angry at Peter. (reading from handout). What do we automatically see? That push. Since they told you angry, we know we have a battery. What do we do with the facts and stood over him? Why are they telling me that? That could be an argument doesn't mean he's going to succeed for false imprisonment. He's in an alley. Is there means to get out because you're standing over me? You would address in this case both the battery as well as the false imprisonment. That's important.

Now, the other thing you want to remember when you're looking at an intentional torts causation, damages, defenses. That's your setup. Right? But a lot of us on an essay question don't talk about causation. Too time consuming. If it's at issue I'd better. Also on the multi states make sure you have the intentional tort causation and damages. They like to test the causation and the intentional torts on the multi states. People don't realize. If it's you intentionally confine me and I cannot leave in time to pick up my daughter and she's kidnapped, should I argue false imprisonment? Sure. You're the actual cause of the kidnapping itself? Not gonna work.

Once you find intentional tort, remember, look for defenses. Easy basically to go through what? I found intentional torts but can I argue self‑defense? Crime prevention. Go through and break it apart. Is mistake a defense for intentional tort? No, they're trying to trick you. Mistake is not a defense. Look to your elements. Was there intent or not? I mistakenly took the bowling ball. Thought it was mine; looked like mine. Or the umbrella. Doesn't matter. That would be a conversion because you intentionally had the desired result to pick it up and leave, and that's the substantial interference of the property of another. I would find in regards to that being a conversion. But it was a mistake. Thought it was mine. Doesn't matter. That is not a defense so don't fall for it. That will hurt you especially on the multi states so I do want you to be aware of it.

Any questions? The key thing there I can't ‑‑

(Phone ringing.)

Ugh ‑‑ harp on, shall I say, is break apart the actual elements and dissect it in order to support as to what's being tested there and if all the elements are satisfied that's important. The next theory is nets highly testable. Comes down. What I want you to realize and learn is start off with the especially duty if it's triggered. And I use the mnemonic SOLD. Do we have a special duty with violation of a statute in regards to omission to act? Landowner occupier rules? Or ‑‑

(Phone ringing.)

Those are your four special duties. See if that applies. If it does, grab onto one that applies itself.

Now, the first one is your violation of statute. The key thing I want you to remember, you have to see a statute on the exam. They're gonna have to tell you. What I want to do and I want to break apart my elements of the intent, the class, the type of injury trying prevent. The longer the statute is, the more likely it doesn't work. Go through the facts and see if it applies.

(Phone ringing.)

Statute that you're not supposed to park your car near a fire hydrant. Not supposed to do it. The guy's going to pick up his lunch. Okay. So then what does he do? Parks his car next to the fire hydrant. You come along and swerve and hit the car. Negligence per se. What's the intent of the legislature for that statute you can't park next to the fire hydrant? To prevent what? There's a fire, there's a place for the firemen to park their vehicles. What's the mesh ‑‑

(Phone ringing.)

Class people using the roadways. The type of injury they're trying to prevent is obviously fires. Getting out of control, not being able to put 'em out. The fact that you hit the car, negligence per se won't work. I'll fall back on a general duty. Make sense? It violates the statutes.

Land and occupier you want to be aware that the duty can change on you. So you have an invitee, a licensee, trespasser, known trespasser, child trespasser. So I can start off to be an invitee. Let's say I go to Disneyland. I'm an invitee. They have a duty to inspect, discover, warn, correct of any known problems; right? Then I see this area I want to go and it says employees only. I go anyway. My status did change 'cause I'm not supposed to be there. It said employees only. I became a trespasser. Or maybe multiple people always do this at Disneyland so I might be a known trespasser. Obviously you're going to address both, aren't you? And then if it fails, see if you can fall back on something else.

Now, in California, we don't have classifications. We don't have invitees, licensees, trespassers. You have to rely on the general duty. That's your role in the Christian case. If you find it's at issue in your exam, fall back on California law for the essay and point out that you looked to reasonable prudent person standard and argue to the facts. We laugh in California. Someone's burglarizing your home falls through a hole in your floor can sue you for the negligence. You're in my home, but you didn't warn and take precautions as a reasonable person would to make sure somebody didn't fall in that hole, and that would be falling back on a general duty. Okay?

You also have in regards to your omission to act. So generally you don't have a duty to act unless you undertake or you have a special relationship. Duties owed to lessors of land. Landlord tenant in regards to your duty that you owe. I've seen that once probably in the last two and a half years on the baby bar. One that students didn't know too well and it dealt with landlord tenant. The landlord had old newspapers and stuff left up in the storage, but that wasn't the cause of why he couldn't get out in time and based on the fire ‑‑ obviously he was down on the regular floor versus where the newspapers were stored is no relevance there. Those are your special duties. You're gonna start off with the special duty then if it fails, you're gonna fall back on your general duty. Right? So special duty first, fails, go to general.

In regards to your general duty you have the reasonable prudent person, you have Andrews and Cardozo, you have children. Remember, general rule is what? General rule for majority that you look to children based on their age, intelligence. And of course what? Age, intelligence in regards to same similar circumstances. Then you have minority's based upon age ‑‑ 0 to 7, 7 to 14, 14 plus, unless it's an adult activity. They test this once in a while. There's one with an RTV and the kids riding in it, also one in a golf cart that a kid's riding in. So you know they want you to focus on, wait, this is adult activity. I would do my majority rule and fall back on my minority to get the point value on the essay. On the multiple choice questions common law first and then fall back on the minority in this case.

Common carrier have a higher duty. Remember, who is that higher duty owed to? The occupants. Don't forget it. Once you show a duty, then go to a breach. With your breach, you have your general breach in regards to fell below the standard of care and whatever you just told me the duty was. Then you have res ipsa. It comes up once in a while. Make sure you understand how it's tested. With res ipsa, I have no idea how this occurred. So if I leave and the door falls on me, that's a res ipsa problem. I don't know who made the door hinges fall off and fall onto me. We don't know so you don't know what happened. You had surgery and there's so many doctors in there and they ended up leaving a sponge. Who did it? I don't know. It's a way to show circumstantially a breach and then they can sift to the other defendants and determine they didn't do it. It's out of fairness to plaintiff to show a breach did occur because you have no way of pinpointing who did it. That's the problem. With res ipsa you don't know what occurred. A lot of times people bring it up and we know what happened. Your brakes failed and you ran me over. You just had them fixed still we know what happened therefore there's a breach.

Next you got your causation. Remember, you have your actual cause that breaks apart, your but‑for test, your successive tortfeasors, your concurrent tortfeasors, and your substantial factor. Start there first and break that apart. That's important. One they like, but‑for as well as your successive tortfeasors. With successive tortfeasors, you have two independent negligent acts that come together that cause the result. Car accident you're taken to the hospital. The doctor gives you the wrong medication. That's successive tortfeasor issue. You've got the negligence of the driver as well as the negligence of the doctor in regards to the medicine he gave you. That would be successive.

Proximate cause. Big. You need to know it. Proximate cause I tell people use steps break it apart. The first step you'll ask yourself is it a direct act or indirect? My car hit yours. That's a direct act. Indirect would be the paramedics are called on the scene. My contact with your car is direct the paramedics coming on to the scene is an indirect act. From there, I need to go to is it dependent or independent? A dependent act is gonna be based on whatever chain I put in motion. The paramedic being called into play that would be dependent. Versus independent would be something that my chain of events didn't place in motion. Example, again, a car accident and they break apart in regards to calling the paramedics so that would be an issue in regards to the paramedics pick you up on the way to the hospital, car runs a red light and hits the paramedic truck and obviously cause you more injuries. So if we're suing, obviously, based on that second accident, the issue is proximate cause. Is it foreseeable that car would run that red light and cause more severe damage? My running into the first car that put you into that position in the first place is a direct act. But the paramedics being called to the scene is indirect. Is it dependent on my actions? It was because I put the chain in motion for them to call for aid.

Now, the event of the car running the red light that hit the paramedic truck was that foreseeable? The negligence of a third party's always foreseeable so I would be accountable for that even though I'm not that car that hit the paramedic truck I would be responsible for that further injury. Normal acts of God, animals, and then negligence of a third party are foreseeable.

Once you prove your causation, go through your damages break it apart general or special. If they give you any facts, one or two sentences. Get in and get out. If there's no facts you'll say pain and suffering and then medical and ‑‑ medical damages and any lost wages and get out. A lot of times you'll see with damages they have it in the call of the question but no facts so you still need to answer it and make sure you answer your call. Okay.

Now, once you find your prime fascia case for negligence what do we do? Look for defenses. So can I argue contributory negligence? With contributory negligence, it's a complete bar. That means sorry even though you showed I was negligent, you criminal intented, you get nothing, plaintiff. I use a mnemonic called CLARC. Contributory negligence, last clear chance, assumption of the risk, and then comparative. The reason I want to do that, I want to remind myself if you show that the plaintiff was contributory negligence complete bar. The plaintiff with come back with an argument of the last clear chance doctrine. The plaintiff can point the finger wait a minute you had the last clear chance to prevent the injury. So if they can prove that, then of course there's not a complete bar. Of course you're comparative's based on a jurisdiction according to fault. Then your assumption of the risk would be knowledge, you're aware of the risk and you have knowledge of that risk.

So make sure you look to those elements. If I see there's a fire and someone's screaming help me and I run into a burning building, am I aware of the risk and I assume it? I'm acting out of kindness, compassion. They would not hold me accountable for assumption of the risk.

That is your negligence. Highly testable concept so I want to make sure you are aware of it.

Next is in regards to your strict liability. Strict liability you see in two forms. You can see based upon animals or inherently dangerous activity. With animals the key thing there is the propensity. Cows and horses trespass. Dogs bite. So you're gonna look to the nature of the animal to see if you're strictly liable. Then you have your abnormally dangerous activities which deals with explosives, crop dusting. There's one with a day care center where they did fumigation. Abnormally dangerous activity, fumigation. Strict liability is liability imposed regardless of fault. So liability imposed regardless of fault.

Once you show it's triggered, then look to your causation, actual and proximate cause, damages, and then the defenses for district liability are only comparative and assumption of the risk. Your cannot use contributory. We're imposing liability regardless and I can knock it back out with contributory negligence so it's contra to public policy. Not a true defense for strict liability.

It's an area that comes up so look for it. When you see strict liability on the land I want you to be aware of crossovers. Can I argue the theory of nuisance? A lot of times they coexist. The other thing I want you to remember with strict liability not based on fault but if you have a multistate to choose strict liability versus negligence what's the better answer choice? Always strict liability. It's a lesser burden. Liability regardless of fault. Show causation in damages and look to defenses. Negligence you have to show the duty, then a breach of that duty. So if you can't determine, it's strict liability so best answer choice. That's important. Remember, again, in regards to strict liability can cross over with the theory of private nuisance so look for that as well.

Another big area and this might be ripe for testing ‑‑ I haven't looked at the last baby bar and I don't think it was there ‑‑ products liability. Good theory to test. It's liability imposed on a manufacturer, distributor, and/or a retailer. And there's certain theories, obviously, that you can sue under. We always plead the alternative. So talk about two or more theories. You have the first which is battery. Battery you look to see if they knew. I can't hide from you. One in regards to a allergy medicine. The manufacturer knew it could cause a loss of eyesight. Battery. Based on those facts, they knew. They gave it to you. Okay.

Negligence. Remember with negligence you have a duty as a manufacturer distributor to inspect, discover, or correct and warn of the defect in and of itself. That's why you see recalls. I'm warning you of it so it cuts off my liability. The key thing there in regards to the duty is with the retailer. Remember retailer's duty's a little bit different. They have to have a duty to inspect, discover, and correct based on knowledge. If they get a carton of milk do they have a duty to open it up and check it out? No. It's a sealed container. Unless it was dented or it had a foul odor or something like that, no duty imposed upon them because of the sealed container itself. With your negligence under your breach, look to the type of defect. You have got a manufacturing defect, a warning defect, and a design defect. Manufacturing defect the product's different than the rest of the line. Warning defect you failed to warn based upon the defect (reading from handout). Roller blades when they first came out didn't have brakes. People node to stop. Design defect. Those are your defects.

Remember, when you show negligence, duty to breach, you still need to show actual cause, proximate cause, damages X look for defenses. The primary difference under products is the language is different for your duty isn't it? What we impose on the manufacturer distributor. When you see products liability being tested, you look for warranties. You have an express warranty, an implied warranty and merchantability, an implied warranty for purpose [inaudible]. Express warranty you look for representation. If I say this is the best product in the world, is that an express warranty? Not going to uphold. Puffery. So puffery basically is allowed.

If I say this helmet that you use for baseball obviously would last and never shatter and a ‑‑ that's an express warranty. That's a breach, isn't it, because it did shatter. It went against my representation. Again, I would show the express representation, showed how that representation failed. Actual cause, proximate cause, damages, and look for defenses. Defenses you can use for express warranty. Your misuse, disclaimer, or assumption of the risk.

Your implied warranty merchantability, you impliedly warned the product is fit for its fair and average use. If I buy a chair, it's fair for me to sit in. If I buy a bicycle, it's fair for me to ride it down the street. Then of course if I show it's not fair, actual cause, proximate cause, damages, defenses. Then of course you have your implied warranty of fitness. So in regards to your implied warranty of fitness you have a representation made for its intended use. So if you go ask a clerk would this work for this, then you would actually make that argument itself and that's important.

When you do see warranties, the one that's always tested is implied warranty and merchantability. So you want to bring that up. Then look for the express or implied warranty of fitness for particular purpose. Look for one versus the other. That's important. Again, general rule, always have implied warranty of merchantability go look for the other two. If you see in regards to fact pattern dealing with products and it says on what theory or theories for liability what do you talk about? I don't have to read the fact pattern. I know I'm going to talk about negligence, I know I'm going to talk about implied warranty of merchantability, I know I'm going to talk about strict liability and tort.

Even reading the call and understanding the call, you know what theories before reading the call itself. Grab on as many theories as you can in order to support your argument that's important.

The other thing I want you to be aware of is focus on the call. What theory or theories multiple; right? There's one exam out there with a child and a banana. The facts told you they sued under strict liability. You were stuck. You got everybody talking about other theories, you got hurt. They gave you the specific liability. You got to go dig deep. Students wasted time on theories that were worth nothing. They didn't see the subissues within the strict liability and that hurt them. So you want to stay focused and break that apart. That's important.

The last theory under products is strict liability and tort. Basically you placed a product in the stream of commerce, it's used by a foreseeable user. Causation, your actual proximate cause, damages, then go through your defenses.

The other thing you want to be aware of if you're suing an endoser for products, so like Tiger Woods representing the Buick. Can you sue an endorser for products? No, you can't. You're suing them for misrepresentation, or negligence, or both. But you never can sue an endomere for products [inaudible]. They're not a manufacturer, distributor, or retailer of the product. Don't want to fall for that and lose points.

That's your products liability in a nutshell. Good area for testing. You want to get it. What I like about products liability. Have handout and insert facts here. All you have to do is comprehend the facts and plug 'em in and you're off and running.

Another theory is your vicarious liability dealing with employer employee being vicariously liable [inaudible] within the course and the scopes. See if the context is within that course and scope. The area they like to test is in the independent contractor and your nondelegable duties. If I have any brakes fixed and I'm in an accident because they weren't fixed correctly, can I argue it's not my fault? No. I'm still responsible. It's a nondelegable duty. Anything that has a peculiar risk like maintenance of an elevator. You're going to be accountable. It's a non‑delegable duty.

Parent child generally not vicariously liable unless they have knowledge and know. Or if they're acting in and of their own product. Bailor and bailee. If I set up the situation so let's say I go put up a sign valet parking here. I'm stealing cars. They kind of create a situation. They're going to be accountable as a bailor/bailee because they didn't prevent it from occurring so they'll be accountable under vicarious liability under those circumstances. Harsh, I know, but true.

You have your nuisance ‑ remember, public versus private. With your public, the only person they can bring is the attorney general or the person who has harm different in kind. You have to have harm different in kind. So let's say airplane flies over and dumps jet fuel and kills your lawn and trees and everything else and everybody else through the whole block. Harm's not different in kind. Versus it just affects your property or burned it up to nothing, yet everybody else just had a little set side back of where they needed to feed it with feeder then you have harm different in kind. You'll know based on the facts.

All right. Another theory's defamation. Defamation hasn't been tested for a while. Defamation is a different beast for students. They don't break apart the elements and you need to. So dissect it. Is it a false defamatory statement? Fact versus opinion. She looks ugly. Opinion? She's pretty stupid. Defamatory statement or opinion? So you have to look for that. That's what they test. Generally what they do with defamation you'll see multiple statements. All right? She's a snob and she kept people from joining the club and she sabotaged the presidency. That's three separate statements. Break 'em apart and analyze 'em. She's a snob, kept people from joining the club, and the president. Those are three separate that you're gonna isolate and beak apart and determine if it's a fact versus a payment. So is it a false defamatory statement? This is testable and you want to break it apart. Remember, it has to be published either intentionally or negligently. Negligently is you knew or should have known. I haven't seen that tested in the multi states. We get in a fight and I send you a defaming e‑mail. Was that a publication negligently? I didn't know so no that wouldn't be a publication to a third party. I didn't know. It has to be a third party and under. Liable per quad is that you have a statement and okay how is it defamatory? You need to introduce extrinsic evidence to produce its meaning. In regards to liable per quad you have your innuendo inducement. Your (reading from handout). The inducement is the fact coming connected to it. Those go together. If it's innuendo is inducement. Remember, that was a [inaudible] case. Is the group selected enough that I know it's you? So if you sit there and defame me all lawyers are shysters, suing for defamation. Too broad of a group. There's too many so it has to be a specified narrow group in order to know who you're talking about in order to bring about a cause of action. That's liable per quad. Introducing ‑‑

Defamation you need to determine if it's libel or slander. Slander's spoken, and libel's in print, something that you physically see. So slander's something you hear, the ears, and then libel's something you see with the eye. Now, I'll elaborate on that. With slander, it's spoken and the premise behind it is people forget what you say. So you'll have to prove general damages unless you can show it falls in a special category dealing with, you know, crime, loathe and disease, chastity of a female, or dealing with your business. If it disparages your business or I said you did a crime you didn't do, that would be slander per se. General damages will be presumed. So it probably did hurt you so general damages are presumed. If you want special, prove 'em up. They're never, ever presumed.

Versus if I show it's libel in written form general damages are presumed. Again, if it's libel, general damages are presumed. What people don't realize yeah, it's a book, yeah, it's a letter, an e‑mail. But it could be a broadcast. They consider that permanent. Anything on the television, anything broadcasted on radio would be considered as libel. You wouldn't call it slander if I'm hearing it on the radio because it's media they're looking for the permanency that would be considered libel. Okay.

And then of course once you show damages, or general damages are presumed, you always wanna look to defenses. Alms. And you got your qualified privileges, your constitutional privileges, as well as your absolute privileges. Qualified, that breaks apart all these categories break apart ‑‑ qualified between a husband and wife. Spousal privilege. Or you have a privilege in regards to ‑‑ I can't think of the name now ‑‑ going to court. So anything that's said inside the court we're getting divorced you say derogatory things it's protected. Once you're outside those proceedings you don't have that protection of the privilege anymore. Those are qualified privilege.

Debating on the floor of the house or something like that, those are protected.

Then your constitutional privileges basically what you'll see is you have a media defendant. Now the issue is do we need to show malice or not? Who's the plaintiff? Private plaintiff, do I need to show actual malice? No. But it's a public official or in the limelight of the public, you'll have to show actual negligence in regards to the publisher. Newspaper, magazine. You're gonna look to, again, do I need to determine as to malice or mere negligence is enough? Your *Gertz* and time. Now, other defenses I don't think is listed here is you have your truth as well as your consent. Those are actual defenses to defamation as well.

Now, when you see defamation, I want to always look for crossover torts. And crossover torts what that means is there are other torts that have a tendency or relationship with each other. If I see defamation and that's done intentionally, what crossover tort do I have here? Intention, infliction of emotional distress. You did this on purpose. You would argue with intentional defamation, not negligent, intentional infliction of emotional distress. The other thing when you see defamation look for invasion of privacy. Now, invasion of privacy look at it as an umbrella. It breaks apart into four. You've got your false sight in the public eye, you have your intrusion upon seclusion, your public disclosure of private facts, and appropriation of name or likeness. Defamation, you know I have false sight and the public eye. You portrayed me falsely to the public. It has an element of defamation. False. It's a falsity there. False sight in the public eye. Intrusion upon seclusion. You've invaded my case. The Jackie O. case; right? In regards to the photographer getting too close and invading her space. If someone's taking your picture and they follow you into the dressing room, that might be an argument for intrusion upon seclusion; right?

Public disclosure of private facts. It does come up on the multi states it has to be a private fact. Police reports, those aren't private facts. Convictions aren't private facts. They're public record. Make sure like your medical records those are private facts. So you cannot public lie disclose private facts.

The key or the kicker where student v. a hard time on this tort is appropriation of name or likeness. The purpose of the tort is you can't appropriate my name or likeness for commercial gain. If I take a picture of a movie star and I go sell it, is that appropriation of name or likeness? The answer is no. Right? If you think about it we wouldn't have People Magazine or Enquirer, stuff like that. That's exactly what they do. If I take a picture of Miley Cyrus and sell it on Ebay, that's okay. Now let's say I take a picture of Miley Cyrus and I place it in my restaurant saying, "Look who frequents here?" Now I have appropriated her name because I'm indicating she always eats in my restaurant so you should eat in my restaurant. So I'm using it to make a commercial gain off the benefits of her image, eating in my restaurant, to get me more profits for my restaurant. Do you see how it works? The fact that you take the picture and sell it, that's okay. If I take that photo and use it to benefit my business somehow conferring of look who eats here, then of course that's appropriation in name or likeness. This came up with a movie star in regards to the voice as well. In essence, if you use another impersonator's voice and people think wait, that's that actress, that's appropriation of likeness. Can't do that. Bette Midler had a problem with that. Someone else had a voice that sounded very much like her that people thought was Bette Midler basically advertising the product and it wasn't. That would be appropriation of likeness. People automatically heard the commercial and thought it was her. So obviously that's a no‑no. That would be a tort of appropriation of name or likeness.

Do you understand the likeness? That's what they test and that's what you need to understand.

Okay. Everybody understand that? Now, we also have in regards to business torts interference with contract, perspective advantage. Haven't seen those tested forever. You have to have a contract already in existence (reading from handout). Perspective advantage same thing except for you don't have a contract already. You're dealing with trying to get the contract and someone interferes. (reading from handout) more bar oriented. Then you have your misrepresentation. That comes up.

Misrepresentation you can break apart in intentional which would be the same thing as fraud or deceit. Intentional misrepresentation, fraud or deceit, all the same. If you see that language, I want to make sure you connect that. People might think deceit's a different tort. Professors interchange the language without thinking about it.

Then you have your negligent misrepresentation. The main difference is intent. You knew or should have known you made a misrepresentation. If you're selling your house, are we in the flood zone? You don't know. Nobody ever discussed that with you before you walked in. No, no, we're not, and you actually are. Negligent misrepresentation. You should have checked it out. Should have said I don't know. Shouldn't have answered the question. That's important because you just made a misrepresentation. And obviously it's a material fact and of course the person probably bought the property based on that reliance so we do have the tort of negligent misrepresentation. That has come up on the baby bar so I want you to be prepared for it.

But you can see in regards to torts not hard. They're going to test little nuances on multi states sometimes on the essays as well. Pull out that checklist and start applying it. You've reviewed torts. So go to my Finn's multistate method. Intentional torts. Pull out 10 or 15 multi states intentional torts and do them. What I want you to do is narrow down your weakness. That's important. If I don't see the problem or what I'm doing, I'm gonna make the same mistake over and over and over and not know why. What you want to do is I call it a diagnostic. If I sat down and did 50 torts and got 25 correct in my mindset I don't know torts. If I break it apart pursuant to the checklist and do intentional torts then negligence then products and I break it apart by section see my weakness. Causation. Bad at causation. Then you know you need to work on it. You'll know based upon breaking this apart. You've got time. Baby bar's not until October. We've got to know our strengths but we have to work on our weaknesses. So at this point don't do simulateds. We can hone in as to your weakness and what you need to work on. If I don't do that, I'm going to be frustrated because I think I don't know torts.

You've been sent a checklist so you can use that one; right? I don't want you to reinvent the wheel. What else? At this point you should start reviewing, going through it by section and start issue spotting on the weekend essay questions. Go to Taft Web site prior bar questions and click on that, prior baby bar questions. All our eclasses, first year classes, all relevant questions that are either baby bar or bar questions, those are up there for you with Taft model answers. If you run out, then you can go to the bar Web site.

I would like you to start with Taft's and use the most current first and work your way backwards because they have model answers. If you just go to the bar Web site the problem is you have student answers and remember, with the student answers those were under the heat of battle. Some of the law's not strong, sentence structure not so hot. Some of them might be missing issues but they got the crux in there and that's why they pass the exam. That's not a good foundation to learn from. How I use those is issue spot exams and I'm feeling down myself, I'll go read a couple student answers on the Web site and realize I don't need to be perfect. I just need to see a vast majority of the issues but I don't have to be a scholar. I think we put so much on ourself that it has to be perfect and guess what, it doesn't. So if you go back and look to those student answers that's gonna build up your little ego that I know it's not a bad.

I want you to do a study schedule. You're time's gonna get away from you. I don't want you to say, in regards to ‑‑ what's today, the 20th ‑‑ the 21st, Wednesday, I'm going to study torts. What? That's too generic. Break it apart. When I get home I'm going to study intentional torts and negligence and I'm going to do five MBEs per. And the twenty‑second what am I going to do? Products liability and I'm going to do ten tort MBE questions and the intentional torts of negligence. Whatever it is. Break it apart for yourself. This is gonna give you structure and then, again, sometimes we feel so overwhelmed you can go back and say I have accomplished certain things. When we studied, we sometimes get in a rut. We've all been there. We all get there. But go back and look what you've done and that builds you back up. We get in this mindset of defeat and we have to bring ourselves back up. So break it apart, go back, keep track of what you're doing. You don't feel the negativity. Build yourself back up.

Then of course once you get the subject matter done, then we go to contracts. Start the same thing all over. Except still keep a review of your torts. If you don't keep rotating it you'll forget what you learned. When we get to September, I don't remember torts. We started it in August. That's why you have to keep your checklist in rotation once you learn them, and reviewing them. And you can do it by talking yourself to and from your drive to work. Lunch hour. You have to find ‑‑ study smarter. Use your time wisely.

What happens at this point? You're gonna receive an e‑mail most likely tomorrow of a tort essay question. I go over the black letter law and then I'll send you to our essay question as well as your multiple choice questions. Am I getting it or not? With the tort essay question I want you to send the answer back. I want to look at it and get an idea as okay are we missing issues? What are we doing here? Where's our weakness? Where's the holes? That's important. If we're doing great, fine. Move on: Or did I answer the call and just talk about one tort when the call said theories? Gives an idea what students are missing. We will go over the essay question together. I'll have it on the screen for you and show you how to dissect the facts and break it apart. We have a tendency to read as a whole. You have to break it apart. A sentence or a word or two can change everything. If I told you a tossed the wallet and it hit you in the face what are you thinking? Maybe negligence. If I told you a hurled the wallet? Same facts, one word. Battery. You've got to learn how to read the facts and see what they're trying to tell you.

You're going to be sent multistat questions. I want you to get exposed and that's why we send you multi states each time. You'll have 33 on torts. With these multistate questions, shoot me an email. I don't know Question 1 and Question 4. If you don't understand why A instead of B, probably not the only one to have a problem. There's about five in here that people say that they have trouble W. I'm sure if that's your case, it's multiple people having the same problem.

You will be getting an e‑mail with an essay question as well as multi states. Monday they send out the answers to those multi states. I want you to take time so you have the weekend because some of us work to issue spot that exam and hopefully you can write it so we can get some idea where you're at. Also, let you know your timing. Are you getting through it in an hour or not or something that you have to work on? Obviously in September we will. That's something I need to make note of so I do work on implementing that in my structure.

Anybody have any questions more at this point? Now, remember, these sessions are recorded so you can always go back in Taft's Web site and go to the student section they're there for you. Or you can look to the previous if you feel there's something there that will be helpful. Especially in the midst of taking finals. If anything does come up during your preparation or studies shoot an e‑mail at jolly@taftu.edu. I'll be more than happy to help you in any way I can. Keep your studying. Look for that tort essay question and after that next week, we'll head right into your contracts. Favorite subject, contracts. I'll break it apart for you. I wish you guys a good evening. Have a good night.

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