Taft Law School

Electronic Classroom – Baby Bar Mini-series

06/11/19 6:00 – 7:00 PM

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

Good evening, everybody, and welcome to tonight's baby bar mini series. We'll be starting in approximately two minutes. If you can make sure that you do have the three essay questions that were e‑mails out to you. That'll be the primary focus for tonight's lecture. Again, we'll be starting in approximately two minutes. Thank you.

We'll be starting in approximately one minute.

>> INSTRUCTOR: Good evening, everybody, and welcome to tonight's baby bar mini series. Hard to believe we've been doing this ‑‑ this is the tenth week. Hopefully you've learned quite a bit in regards to these sessions and what you need to do to go and conquer the up and coming baby bar. What we're going to review tonight is the three questions e‑mailed out to you. The first is the tort question with Roofer. Remember, on these exams ‑‑ which I believe these were sent to you without knowing the subject matter ‑‑ is on the baby bar you're not going to be told the subject matter. Torts, contracts, crim law you're on your own. By doing these, hopefully you got a good understanding you're gonna know if it's a tort question, crim law question, or a contract question. Remember, these sessions are recorded for your convenience so if you ever want to go back and listen to a lecture, you can go to Taft's Web site, sign up in the student section, then go to the baby bar mini‑series. Everything there is for you.

Also, I want to point out if you have any questions, please feel free to pop those in the chat I'll be more than help you in any way I can.

All right. Let's get started with the first question. Question 1. This is an actual baby bar question and it's rather odd, isn't it? Remember, always start off with the call of the question. In an action brought by Ned against Roofer for negligence, what defenses might Roofer reasonably assert, and what is the likely outcome on each? Explain fully.

So they did something a little bit differently here. First gave you the theory of negligence. That's more of a specific call. I want you to be thinking what element or elements within negligence are being tested here? The duty? Is it the breach? Is it the actual proximate cause? You've got to look. Obviously everybody saw what? The theory of negligence. Now you want to see how I'm going to do better than the other students and I've gotta go to the subissues and see what's being tested.

The other thing is it asks for defenses. Remember, I told you defenses can be true defenses so what are defenses to negligence? Contributory negligence, last clear chance, comparative negligence, and assumption of the risk; right? Or it could be counterarguments. I'm going in there looking for this based upon the call. It says what's the likely outcome? What's a little bit different is it says explain fully, versus discuss. That's different than some of the questions we've seen. They want you to break it apart to support your position. Show me your work and break it apart.

We know this is a tort question. We do know they're testing negligence. At this point I would write out my checklist on my scratch paper and probably break apart the sub elements of negligence and force myself through inners to see what's being tested here. Let's go through it.

It says Roofer contracted with Hal to replace the roof of on Hal's house.

What is the relationship here? You have Roofer and Hal that have an existing relationship.

The usual practice among Roofers was to place (reading from handout). What are they telling you? The usual practice among roofers was to place tarpaulins on the ground around the house to catch the nails and other materials that were scraped off during the removal of the old roof.

So what are they telling you? That you normally put tarpaulins around so you catch the debris.

On this occasion, Roofer did not have enough tarpaulins and he failed to place on the ground at the rear of Hal's house.

The issue, if he failed to do this, is he in breach? Well, if he failed to do it nothing happened he's not in breach. If he failed to do this and something occurred such as the debris hurt somebody we would find there is a breach.

Everybody hear me loud and clear?

Okay. So it says As a result, many nails and old roofing material fell into the grass of Hal's backyard. Roofer did his best to clean up the backyard but missed some of the nails that were embedded in the grass.

So again, although he did his best, was it enough? Goes to breach, doesn't it?

About six months later, as Hal was mowing his backyard lawn, his lawn mower ran over one of the nails and propelled it over the fence into the backyard of Ned, his neighbor A few days later, as Ned was walking barefoot in his back yard, he stepped on the nail, which pierced his foot, causing him severe injury.

How did the nail get into the backyard? Based upon the lawn mower. A lawsuit is where you have Ned suing Roofer. The one that caused the nail to get into the backyard was Hal. That is a what type of argument? Intervening act, proximate cause; right? Because the nail didn't just basically left there by Roofer. It got there based on the propelling from the lawn mower. We have causation issues don't we.

What other issue do we see? Well, we know we're going to go through negligence. This call's more ‑‑ it is a general call, but it is more specific as to at least telling you the theory of negligence but you have to go in there looking for sub issues. We know we have to show a duty, there was a breach of that duty, that the breached duty was the actual proximate cause of the plaintiff's damage.

First thing you look to here is we've got Ned suing Roofer. What duty does Roofer owe Ned? That's the problem. Why? The relationship was between Hal and Roofer, wasn't it? So this is what I call a remote plaintiff. A remote plaintiff is somebody that's outside the relationship here. So that triggers Cardozo. Right? So under the issue as to whether or not Roofer owes a duty of due care to Hal and he can argue a reasonable and prudent person's duty is the one that contracted me to replace the roofing but under Andrews it says wait a minute here, you owe a duty to all within that foreseeable zone of danger, don't you? The fact that you're working on this roof and you've got a neighbor here that was injured by your nail ‑‑ six months later but still injured by the nail ‑‑ is that neighboring home next to Hal's within that foreseeable zone of danger?

You're gonna argue. When you see Cardozo you're going to address Andrews. Very rare they don't come up together. And I want to make sure you understand when this is tested you generally have two sides of the argument. It's not a slam dunk oh, you live next door to me, we're done. No. Obviously it wouldn't be an issue. What can Roofer argue? He failed to place a tarpaulin near the rear end of his house. But he cleaned everything up best he could, so he acted reasonable under the circumstances. And you're not within the foreseeable zone of danger. It's Hal's house and his backyard. Argue.

However, it is neighboring things could fall ‑‑ propel, rip things off the roof can go into a neighbor's yard. I don't know about you, but most yards have a four‑foot setback but still, that's foreseeable that they could go that far. If not, don't care how you conclude. Get to Andrews and Andrews says you owe a duty to all so we're okay no matter what. So you do want to argue both sides.

The other thing I want to point out to you when you see an Andrews Cardozo problem, true problem, generally you have a proximate cause problem. So you want to make sure you understand that. In regards to the breach, it's not enough just to say what some students just said for the [inaudible] to place tarpaulins around the house. That didn't show I breached my duty. The fact even though you cleaned it up to the best of your ability A nail still was left and propelled over into the neighbor's yard. So you want to bring in those facts to show that's how he breached the duty. It's not enough just in regards to failing to put up tarpaulins. It's kinda like you park your car on a hill and don't turn your wheel against the curb. Did you breach your duty? My car didn't go anywhere. If it rolled backwards and hit a car now I breached even though I failed to put the parking brake on. You need to carry it all the way through.

In this case, the breach would be not only did you fail to put up the tarpaulins because you didn't have enough, but you failed to find that nail ‑‑ even though you gave your due diligence ‑‑ and it ended up in the neighbor's yard which pierced his foot. Therefore you breached the duty of care owed.

Actual cause, but for what? Leaving the nail behind it wouldn't have been run over by the lawn mower and ended up in Ned's foot. Then you've got a proximate cause problem here. Proximate cause is a big issue in this exam. What can you argue for proximate cause? If you look the at the facts, what'd they tell you? Hal was mowing his backyard, ran over the nail. The argument here, at least that Roofer's gonna bring up is, how is it an intervening act? He's the one that ran over the nail that propelled into the neighbor Ned's yard, which resulted in him stepping onto it. So my negligence in leaving that nail there's indirect and independent of my actions. But now the issue becomes is it foreseeable? And now you're gonna make your argument; right? So in regards to foreseeable, well, remember, acts of ‑‑ normal acts of animals; in regards to acts of God, normal acts of God; negligence of a third party. Based on the facts, I don't see Hal did it deliberately. He didn't know the nail was there. So if you feel he was negligent in running over the nail and not doing anything about it and propelling it into neighbor's yard, we do have what? Proximate cause. But do you see how proximate cause is at issue and you do need to argue both sides? That's your points.

Further, what else? Damages. What can we say about damages? Well, pierced his foot so I would say he's got pain and suffering and if you want to bring up the one‑liner as to medical damages being a special damage, that's fine.

Am I finished? No. Why? The call said in what defenses. This is what makes this an odd exam. The facts told you he was walking barefoot in his own backyard. Those facts were supposed to flag to you did he contribute to his own injury? That raises the issue of contributory negligence. With contributory negligence you're looking to whether or not the plaintiff fell below the standard of care. Based upon these facts, you want to argue walking barefoot in your backyard, did you fall below the standard of care of yourself? Because you're obviously going to step on things within the backyard because you're barefoot. What is he aware of? My backyard. What's in my backyard? Will I really be aware of a nail? Most likely not. Basically walking barefoot knowing what's in my backyard whether it's grass or rock, what have you. I know what's out there. Nothing in the facts show I should have been aware I'm falling below the standard of care and not wearing shoes when I should because there could be nails in my backyard.

Now, argue either way you could also bring up what's called the last clear chance doctrine. Remember, that's a plaintiff argument. How does that work? When you have the defense of contributory negligence and you find whether it's arguable or we can show you you did contribute to your own injuries, you want to bring up the last clear chance doctrine to see if the plaintiff can save himself. How do I do that? Well, in this case, Roofer could have avoid the accident all together. If he used the right tarpaulins and properly cleaned up after his job, the nail would have been left behind and paled over into the neighbor's yard. Therefore, Roofer had the last clear chance to prevent the injury. That's what you're gonna argue.

Remember, last clear chance, again, is a plaintiff argument and it basically negates the contributory negligence. So therefore you can recover. Remember, contributory negligence is a complete bar; right?

Now, we don't know which jurisdiction you're in. When you have contributory negligence you're going to talk about comparative negligence. Comparative negligence what I'd like you to do is steal what you just addressed above because it's fine and point out when you fall below standard of care it's proportion to fault. So if we argue Ned fell below the standard of care owed to himself ‑‑ going out there barefoot ‑‑ it should be proportioned to fault. However, based on the discussion above, he didn't fall below the standard of care so therefore he's not comparatively negligent.

Remember, the call did say defenses. Remember, I taught you defenses you're looking for two or more. And generally if you're talking about contributory you're always going to comparative because it's a difference of jurisdiction. I still know I have another defense that I need to address. And that defense I need to address is assumption of the risk. You need to show that you had knowledge of the risk and you voluntarily encountered it. Based on these facts, did he have knowledge of the risk? He might have seen the Roofer over there doing the roof but that was six months ago. If it just happened yesterday, maybe I should be more aware but it didn't. And of course did I know of the risk and did I encounter it by walking barefoot in my yard? Since it's been six months, I'm gonna argue he wasn't aware of the actual risk; he didn't voluntarily encounter stepping on the nails so therefore Ned is not assuming the risk based on the circumstances. So therefore there's no viable defense of assumption of the risk. Okay.

That is Question 1. Now, with this question where was your point value? Duty with your Andrews Cardozo. You needed to argue both in this particular exam. Proximate cause was a big issue here. Your intervening act because the facts did tell you that the neighbor house the one that propelled the nail by the lawn mower and breaking apart your defenses.

Make sure you go through your elements. People have a tendency to bring 'em up and they do a very poor job in your analyzing. Break them up and see if they're supported based on the facts.

This is one exam you could finish in 50 minutes. Go back and see if you missed anything. What made this example interested is it's an odd duck in regards to your Cardozo Andrews. Stepping on a nail? They didn't give us much to really argue so you had to take a step back. Put yourself in the exam. It's your backyard. Most of us would not foresee stepping on a nail. But if I have a tree in the backyard that has little sharp balls that drop off but not an actual nail. Okay.

Anybody have any questions on Question 1? Very odd exam. Gotta tell you that.

Okay. Let's take a look at Question 2. This is obviously contracts. I do want you to be prepared for contracts/U.C.C. so that is something I do want you to be reviewing and making sure you understand certain concepts. This particular exam does deal with contracts/U.C.C. First thing you should always do is read the call of the question. Can Cotton Co. prevail in an action for breach of contract against Buyer? Explain fully.

Call 2, Does Cotton Co. have the right to reclaim the unused batting? Explain fully.

Call 1 kind of is broad. Call 2 reclaim. Gave me the issue of reclaiming the goods. Let's say I don't know that rule. I want you to teach you to use that reclaiming the goods as a headnote and go with your gut instincts. If I ever give you goods that weren't paid for should you be able to reclaim them? The answer's yes. Say something. Use the headnote of right to reclaim goods. The reader knows what you're addressing, and go from there.

A lot of us don't know this specific rule and it deals with insolvency. It was a hard rule, so people didn't do too well in this exam on that call. If they came up with something, then you've got some credit. That's the goal. I want my credit. Okay.

Let's go ahead and go through the facts. Buyer manufactures mattresses, comma ‑‑ what's that tell you? He is a merchant; right ‑‑ which features an outer layer composed of a cotton material called "batting". Unexpectedly, Buyer's supply of batting ran out, which brought the entire production line to a halt at a time when Buyer was trying to fill a large, special order from Sleepco, one of his customers.

We see at this point we've got Buyer being a merchant, a need the batting ‑‑ can't manufacture for a customer I have right now 'cause I'm out ‑‑ Buyer's regular supplier of batting refused to deliver any more batting because Buyer was behind on payments to the supplier.

Mm. So kind of makes you think is he insolvent? Remember, I can make a demand if I feel you're insolvent in order to determine whether or not I should deliver you the goods so your insolvency does play a factor.

It says on May 1st, Buyer telephoned ‑‑ what'd that make you think of? Well, I told you already you've got Buyer manufacturing mattresses. You see in regards to them needing batting this is U.C.C. We're dealing with a transaction of goods. All right. When I see the term that they telephoned, what should come to mind? I'm hoping you're thinking statute of frauds because this is oral based on the telephone call.

Now it says, Buyer telephoned Cotton Co. and told Cotton Co. that he urgently needed a large bale of batting and that he was willing to pay "top dollar" if Cotton Co. would deliver the bale of batting by the end of the day.

That looks like the offer. The price term is what? Top dollar. It says on May 1st, Cotton Co delivered the batting ‑‑ we have acceptance by conduct ‑‑ and told Buyer would send him Cotton Co.'s invoice for $5,000 later in the week. Buyer was upset because the price was about 30% higher than that charged by his regular supplier but, because of his urgent need, Buyer opened the bale and began using the batting to make mattresses.

Since he opened it and starting using it. Acceptance of goods.

It says, On May 2, at a time when Buyer had used about 5% of the batting, Sleepco called and canceled the order. This cancellation was such a major blow to Buyer's financial condition that he announced that he would immediately close his manufacturing plant.

I just lost my major contract. What's that make you think of? Can I still perform? So you should be thinking of impossibility. Remember when you see impossibility which is what, impossibility's an excuse to the performance of a condition. What's that tell me? When you see impossibility, what are you looking for? Impracticability and frustration of purpose. They have a tendency to go with each other. Remember, when you see impracticability, I want you to look for impracticability, impossibility, and frustration of purpose. They have a tendency to have a relationship together so if you see one ‑‑ whether it's frustration or purpose ‑‑ you see one, look for the other two. That's important because they do, again, have a relationship. This is how you make sure you don't miss issues.

It says, On May 5, Cotton Co. learned that, in fact, Buyer had been insolvent for the past 60 days.

So he is insolvent.

On May 6, Cotton Co. demanded that Buyer either pay the invoice or return the unused part of the bale of batting immediately. Buyer refused, asserting that he and Cotton Co. had never entered into an enforceable contract ‑‑ that's step one, Call 1, isn't it ‑‑ and informed Cotton Co. that he had sold the remaining batting to another mattress manufacturer.

The first issue we're looking at is Call 1 in regards to was there a breach of contract? This is what's nice is you're gonna take what? Your actual checklist. Contracts checklist and run it down the line in regards to does the U.C.C. apply? Remember, the U.C.C. applies to transaction of goods. So do I have a transaction in goods? Yes, because I'm dealing with batting. So the U.C.C. would apply here, wouldn't it? Now what's next?

Well, I usually get out of the way merchants. Are we dealing with goods of a kind? Do they hold themselves out with special knowledge and skill? And break that apart.

So here, since we have Cotton Co manufactures the batting, obviously they deal with goods of a kind. Merchant. And then Buyer manufactures mattresses. I would hold them dealing goods of a kind. I'm gonna find both parties in this case are merchants.

Next I go to the issue of offer. With the offer, you're always going to talk about common law first and if it fails, bring up the difference in regards to the U.C.C. For common law, you need the manifestation of intent, the definite certain terms and the communication to the offeree. Based on the facts, when he telephoned and asked they urgently need this bale of batting, pay top dollar, that shows their outward manifestation of intent. Further, we're dealing with the bale of batting being the quantity delivery by the end of the day which is May 1st is the time period. Buyer and Cotton Co are the parties, top dollar's the price, and cotton batting's the subject matter. The terms are stated with particularity. I do have definite and certain terms, and you called so it shows communicated the offeree. I'm going to find there is a common law offer.

Acceptance. What'd they do? They deliver it had bale of batting. So based upon no words there's no unequivocal assent, but you can argue under the U.C.C. based on their conduct You can accept based upon conduct which they did here. Argue they have an acceptance. And then your consideration. The bargain for exchange of legal detriment. What are we giving up? The bale of batting in exchange for the top dollar which turned out to be $5,000.

So I do at this point have a viable contract. I see it's oral go through the statute of frauds. Your going to see the statute of frauds wasn't a big issue, was it? Here, we've got a contract for the sale of goods of over $500 or more. Dealing with a batting $5,000. But you telephoned it in. So it's an oral contract. It's not enforceable unless you can find your exception outside the purview view of the statute of frauds.

For a contract for sale of goods, there's several ways to take it out. You've got your common law sufficient memorandum; rite? You have in regards to your full in part payment or full in part delivery. What happened here? Full performance by Cotton Co. They delivered the bale of batting. So why would they do that unless we had a contract? That would satisfy the statute of frauds and take it outside. Run it through your checklist. Do I see anything else? Not really. Don't see mistake. Don't see parol evidence. Parol evidence would come in if you have a written contract. This is oral so I know parol evidence can't be there.

How about conditions? Is there an express condition? No. Don't see time of the essence or specifications. How about an implied condition? Sure. You deliver it before I pay. Did Cotton Co. deliver? Sure they did. They delivered now you owe me the five grand. They fully performed. What are the excuses that Buyer's going to make? The first one's going to be impossibility. Now, remember, when you look at these conditions and what I notice with students is what is Buyer supposed to do? Well, Cotton Co's supposed to deliver the bale of batting then you're supposed to pay for it. That's your duty to pay. So is it objectively impossible for Buyer to pay? They're going to argue that they unexpectedly ran out and had to go buy this bale of batting paid top dollar and Sleepco called and canceled the order. So impossible for them to pay. They had to close their plant. However, was Cotton Co ever aware that they had this contract with Sleepco and is Buyer's performance totally excused by it's objectively impossible? Somebody can pay so impossibility of performance is not gonna release them of liability. Remember, I told you based on impossibility what else should I look for? I can argue impracticability. Is it commercially impracticable, meaning the 10 times rule if I have to pay. Well, reasonable price for bale of batting says it was 30 percent higher. So no, it's not commercially impracticable to enforce this agreement.

What about frustration of purpose? Remember ‑‑ and this is something you should be seeing this on the multiple choice questions as well: Frustration of purpose has to be contemplated by the parties at the formation of the contract. And then of course an unforeseeable event makes the contract totally no good anymore; right? What am I gonna do? Something unforeseeable happened and I can no longer and my purpose was known. So when Buyer ordered the batting, in order to fulfill that large order with Sleepco, and then of course they canceled ‑‑ which is an unforeseen event ‑‑ was it the time of formation of Buyer and Cotton Co's contract was the purpose known as to why were they buying the batting to fulfill that order with Sleepco? Never discussed. Since it was not contemplated for at the formation stage of the contract, frustration of purpose is no defense. We do have the unforeseeablity; right? And I see that Buyer's purpose is totally frustrating but it wasn't made known. And remember, that's the key. It has to be made known at the formation stage of the contract, not later. And this is something, again, they test a lot on the multi states so I want you to be aware.

Then of course we go into breach. They delivered the batting, Buyer's not paying so they're in breach of contract. Then, of course, what would be your remedies? That could get the contract price of $5,000 because they actually gave the actual batting. Now, if they got the batting back, could they still get the $5,000? Hmm. Trying to trick you. In regards to the batting, if I sell lots of batting, have lots of batting on hand, have you heard of the lost volume seller? I still can recover my profit from you. If I took it back and sold it to somebody else, that doesn't get you off the hook because I have other batting to sell. And that's called the loss volume seller. That's something that has been tested on the baby bar so definitely look it up. If U.C.C. contract does come down, might be there. Okay.

Now, if other thing you could look at remedy‑wise that they have been testing specific performance. That's not at issue here. Why? It's not a unique good. So I want to make sure you understand when you have to go that far versus I don't. If you look at the call of the question, prevail on an action for breach of contract. So it didn't take me to my remedies or my damages did it? I would still bring up one or two sentences. It didn't force me there that I know I have to do a nice job and really break it apart. Again, the call kind of dictates.

So for Call 1 in regards to can Cotton Co prevail in a cause of action breach of contract the answer is yes based on the following of what we went through.

Call 2 deals with reclaiming goods. If you look at the code section ‑‑ or even in your sales Gilbert's ‑‑ you're dealing with seller's remedies after they discover Buyer's insolvency. Do most of us know this? Probably not. At this point I would put the right to reclaim the batting, right to reclaim the goods, something like. The issue is, can they get it back? Now, under the Code ‑‑ and it's 2‑702 ‑‑ when the Buyer discovers the Buyer's insolvent after the delivery of the goods. I gave you those goods on credit. They can reclaim within ten days of the receipt of the goods. That's a very specific rule. A lot of people don't know that rule. Most of us understand that if I do deliver goods and find you're insolvent should I have the ability to reclaim? The answer would be yes, I have the right to demand return of the goods or ask for payment. So at least that would get me something wouldn't it?

The other, issue that could come up here which wasn't addressed in a student answers on this exam. So obviously it looks like the baby bar wasn't looking for it, but it is an issue I want to point out because things change. The fact pattern told you that they sold the remaining batting to another mattress manufacturer. That sentence bothers me. What does that mean? If Buyer did truly in fact sell it, there's no way Cotton Co's getting the batting back because the new purchaser's a bona fide purchaser. As long as they paid value, they didn't have any knowledge there's debt owed on this, they're a considered a BFP, bona fide purchaser that Cotton Co would not get it back from that party either as long as they qualify as a bona fide purchaser. That's one thing that bothered me in that fact pattern is that sentence. Why is it there if it doesn't have anything? Students at this time this exam was given didn't address the issue so they didn't really mark it down against you either.

In this particular contract question, formation wasn't the big issue. U.C.C., merchants, offer, etc. You want to do a good job. And let the reader know you know how to analyze. Statute of frauds students missed this but they shouldn't of. It's fully obvious because of the telephone. Main thing to get your points here is you conditions, so make sure you type what condition is, which in this case it was what? An implied condition. And then your excuses to those conditions. Impossibility, frustration of purpose, impracticability. Very good. Make sure on this question you follow the call of the question. Some students left out Call 2 and I feel the reason they did this, they didn't know what to do. Headnote, steal it from the call itself and say something. Because if you do nothing, I can't give you credit because I don't know; right? So we don't wanna do that. Say something about it in order to get something. If you don't show the reader you know certain things, how can they award you points? They can't so I would break it apart in that way.

No matter what, you get an issue you don't understand, use the call and say something about it. Common sense to get something, to get some value. Okay. That is it for your contracts Question 2. Any questions on Question 2? I do want you to review, obviously, your U.C.C. because I feel it's ripe for testing. So something that I want you to break apart, go through it, and obviously master it if you can; right? That's important.

Okay. No questions on the contracts. Remember, I told you in regards to the exam that I feel there will still be two tort questions. But, again, you never know anymore. And of course I do feel the U.C.C. 2‑207 your statute of frauds, your warranties, your remedies are big to be aware of. Those are something I think are ripe for testing.

Let's go to the last question, crim law Question 3. Remember, we always read the call first. What's the call say? What criminal charges ‑‑ two or more ‑‑ if any, should be brought against Art and Ben?

Remember, pay attention to your parties. I got Art and Ben. I got two. I'm gonna look and see if there's something different between them, such as one did the act and the other one didn't so I'm thinking conspiracy with Pinkerton's. If you have three, definitely something different. Might be thinking of throwing in the issue there could be withdrawal issue for the conspiracy. Again, pay attention to the parties. Kind of gives things away.

Call 2 says, what defenses, if any, do Art and Ben have to the criminal charges? They kinda took things outta order for you. You're gonna breakup all the charges in Call 1, and then in Call 2 bring up your defenses. So you have to follow the call, unfortunately; right? So that's something I want you to pay attention to. Let's read the facts.

After drinking heavily, comma ‑‑ stop. What are you thinking of right there? Hope you're thinking of voluntary intoxication. When you see intoxication, remember I told you what other issue do we have a tendency to bring up with this? Diminished capacity. That would be another issue. Art and Ben decided that they would rob the local all‑night convenience store. "Decided they're gonna rob" so I'm thinking decided, conspiracy. And they're gonna rob the convenience store. So not only robbery but what about burglary? Common law modern law. Quite a few crimes just in the first sentence, isn't there? It says, They drove Art's truck to the store, entered, and yelled, "This is a stickup," while brandishing their unloaded pistols.

I'm thinking burglary on the verge of a robbery. They discovered that the only persons in the store were Mark, who worked at the store, and Fran, a customer. Okay. Art became enraged since he regarded Fran as his steady girlfriend and was jealous that she was spending time with Mark. Uh‑oh. Art announced, "We'll chill these lovers out," and loaded them into the truck. He loaded people onto the truck. What are you thinking? Kidnapping, false imprisonment. Art drove a very short distance ‑‑ remember, with kidnapping, any movement's going to work; the short distance is there for that ‑‑ down the dirt road behind the store to a large refrigerator. Art locked Mark and Fran in the refrigerator. Art then returned to the store to pick up Ben, who took $250 from the cash register on his way out of the store.

Wait, what? He went back, returned to the store? So wait a minute, I'm thinking when they said this is a stickup, then Art took the money ‑‑ oh, it wasn't simultaneously. So it looks like this is a stickup, that robbery's going to fail versus an attempt. When Ben took the money, that seems to be a larceny. Very clever on their part. Says the next day the store manager saw that things were amiss and called the police, who rescued Fran and Mark from the refrigerator. Fran suffered no significant injury, but Mark soon developed pneumonia and died of it as a result of it several weeks later. The coroner's report showed that Mark had an extraordinary susceptibility to pneumonia and that it was triggered by exposure to the combination of viruses and the intense cold of the refrigerator.

What's that sound like? Yes, we do have in crim law what's called the thin‑skull plaintiff doctrine. That's under your proximate cause you learned in torts, yes, that does also work in crim law.

What criminal charges? The first we're looking at is Art. So first thing I always get out of the way is the conspiracy since they decided. Conspiracy's an agreement, two or more to commit an unlawful act. They decided to rob the all‑night convenience store, so we have an agreement as between Art and Bob.

I go in chronological order of what occurred, to give myself structure. And that's most likely how the reader's looking for it. When they went and drove to the store next I'm thinking of burglary. Common law it needs to be nighttime, breaking and entering, dwelling house of another, specific intent to commit a felony therein. The problem here is it's a convenience store. So I'd argue it's nighttime. They entered the store, but there was no breaking but they entered. Further, it's a store not the dwelling house of another. They entered with the intent to rob, so they entered with the intent to commit a felony therein. However, since there's no breaking, no dwelling house, there's no common law burg. Then the issue of modern law. Again, you need a trespatory entry. You take any structure to commit any unlawful act. They went to the store open to the public. But remember, the law says if you enter with the intent to steal, you vitiate the owner's intent. That would be a trespatory entry. Store is a structure. You entered with intent to rob so you would have a modern law burg.

Next they yell this is a stickup, I'm gonna bring up robbery. This is a prime example that you understand that you need to address robbery in this case and show me where it fails. So in this case, he took the $250 to the cash register, which it did belong to the convenience store. Trespatory taking. Convenience store. He left with it ‑‑ carrying away personal property of the store. Was it by force, fear, intimidation? Of course when they were yelling this is a stickup and discovered the only persons in the store were Mark and Fran, and then, of course, we're going to chill these lovers out and loaded them up into the truck then later took the money, it wasn't under force, fear, intimidation.

This is a good MBE question. So you will find that the robbery fails at this point. Because it wasn't in force, fear, or intimidation of Mark and Fran. They were nowhere around. So then it would fall back on what's called attempted robbery. With attempt, what do we focus on? We focus on the elements of attempt. So was there specific intent? Substantial step, preparation versus perpetration to commit the underlining crime and the defense is [inaudible]. Based on these facts, they decided to rob the store and did drive there, took out the pistol, and yelled this is a stickup, so they had specific intent. However, based on seeing Fran and Mark and him getting jealous, they didn't take the money by force, fear, intimidation, so therefore there's no robbery. But it would be what? An intent to perpetrate a robbery. So we would find an attempt in this case.

So does everybody understand why the robbery failed and then we fell back on to the issue of attempt? This does come up every once in a while on the baby bar. It does come up on the multi states so I want to make sure you're aware of it. It's very subtle so I want to make sure you're looking at it. Good way to test.

All right. Taking it right in chronological order. We're going to chill these lovers out and load them up in a truck. That's kidnapping. The intentional and unlawful movement of another, he drove around the back of the store. You put them in a refrigerator so argue that's a kidnapping besides just loading them up in a truck. And of course the next big thing would be the murder.

Remember, with murder, you have an approach I would like you to follow. So we've got murder with malice, intent to kill, intent to cause great bodily harm, wanton and reckless, felony murder rule; those are your four ways to show malice. If I can argue all four, I want you to bring up all four on the exam. Now, based on these facts when they drove to the store and wanted to chill these lovers out, did he have the intent to kill? Chill them out. I'm not so sure he had the intent to kill based upon what he did. Definitely had the intent to cause great bodily harm. Was it wanton and reckless to lock 'em in a refrigerator? Sure.

What about the felony murder rule? Was this in the perpetration of a felony? Yeah. Modern law burg, attempted robbery; right? So the key thing I want you to remember for the felony murder rule, you have inherently dangerous felony at work. What are they? Arson, rape, robbery, kidnapping. But any attempted inherently dangerous felony works too. So it's a good argument based on these facts that it was an attempted robbery and I'm going to use that for the felony murder rule. You could argue the larceny here. To me, it happened after the fact so I would go with the attempt. So remember, any attempted inherently dangerous felony can work also for the felony murder rule. So I will find based upon the murder we got felony murder rule.

Now, is it first degree? You can argue the felony murder rule. But he got enraged. I would address to see if we can mitigate to voluntary manslaughter. The facts told you when he saw Fran and Mark in the store, he regarded Fran as his girlfriend, he became enraged. We're gonna chill these lovers out. Would that be adequate provocation? No. A reasonable person wouldn't be enraged to hurt or kill somebody. Insufficient time to cool. It was spontaneous so I would say there's no sufficient time to cool. A reasonable person wouldn't lose their mental equilibrium seeing what they thought was their girlfriend just with another person in the store. So I would argue in this case there's no voluntary manslaughter.

The facts, remember, told you that they saw Mark, who worked in the store, and Fran. Huh? So why would you become so enraged? So I will find that it will not mitigate to voluntary manslaughter and Art would be guilty of what? Most likely what? First degree.

And then of course you could bring up ‑‑ this is the harder of the issue to see the attempted murder of Fran. Well, he did lock her up in the refrigerator and say well chill these lovers out. So did he have the specific intent to harm her? Argue it doesn't matter. Argue both sides. Did he take a substantial step? Did he have the apparent ability? And I say no, but doesn't matter as long as you argue both sides and let 'em know you understand in regards to the facts and that raises the issue here in regards to your attempt. Okay.

All we've done now is just the criminal charges against who? Against Art.

Now Ben. What are we doing to Ben? Ben agreed so he is charged with conspiracy. He went into the liquor store. This is a stickup. We've got the burglary so I'm gonna define, discuss, supra on those two. But he didn't partake in driving them around, if kidnapping, he didn't partake in the false imprisonment, he didn't partake in putting them in the refrigerator. How can we impute Art's actions onto Ben? Through your Pinkerton's Rule. This is where you need to break it apart.

Is this a natural, probable result, and foreseeable if you're trying to rob or burglarize a store that you could foresee kidnapping or false imprisonment? Don't care how you argue. I could foresee a kidnapping maybe even a false imprisonment if I'm trying prevent my capture. Could you foresee a murder? They had unloaded guns, too. I don't think it matters which way you argue. Prosecution says when you burglarize anything it's a felony; it's a very dangerous crime, so you could foresee any type of killing of a customer, or shielding behind a customer, or imprisoning them in order to gain escape. Doesn't matter, though. Meaning argue both sides it doesn't matter how you conclude; right? And then tell me whether or not you're going to bind Ben liable pursuant to the Pinkerton's Rule.

You also do need to bring up the larceny because Ben's the one that took the money and left the very end of the story; right? In essence he took the money out of the cash register, trespatory taking; he left, carrying away; belonged to the store, he had the intent to permanently deprive; therefore, we have a larceny. The only way to impute this larceny to Art would be Pinkerton's Rule. He didn't do the actions. When you ever see one party only do the act you have to find how to impute it to the other party. If you have conspiracy it's generally going to be through your Pinkerton's Rule.

Any questions on Question 1?

All right. The last question's question 2. This was harder on people why? Everybody saw voluntary intoxication. When you voluntarily intoxicate yourself, what does it do? It negates specific intent; right? So you have to look and see in regards to where are our specific intent crimes are. Larceny's specific intent. Robbery, attempt, burglary. Hmm. So what do we need to argue here? Well, we wanna argue basically are you so intoxicated you're not fully aware of your actions that it would negate that intent? Based upon you recognizing Fran, we're gonna chill these lovers out. Are you really that intoxicated? Good argument, you're fully aware of your actions. And chill these lovers out, you lock them in a refrigerator? Good facts to show you're not so intoxicated that you cannot form or it does not negate the specific intent.

Now, remember, whenever you see intoxication because the call says defenses so be wary ‑‑ I need to talk about more than one ‑‑ the one we fall back on diminished capacity. Remember, with diminished capacity, that your capacity's so diminished, you can't form the specific intent to commit a crime or the specific intent crime. Again, based on the facts, are Art and Ben so diminished in their capacity that they cannot form specific intent? Again, they were drinking heavily but they drove to the convenience store, yelled this is a stickup ‑‑ doesn't sound like they're slurring their words to me ‑‑ they understood in regards to Mark and Fran in the store, became enraged, put them in the truck, took the money after. These are all good facts to use and say wait a minute here. Your capacity wasn't diminished; you're fully aware of your actions, so therefore no viable defense. So therefore you'll be charged and there's no defense to release you of liability. That's Call 2.

Any questions on Call 2? Now, in this question you'll see most people obviously saw a lot of the issues, but you see that they don't really do strong on the analysis so you want to break apart those elements and then steal from it. The thin‑skull plaintiff, remember, you'd bring up in regards to your issue of causation for the murder because he had a susceptibility. You'd bring that up. That always triggers what we call thin‑skull plaintiff. I want to make sure you're aware of that. It's been tested three times that I'm aware of on the baby bar ‑‑ and proximate cause. It doesn't come up a lot, but it has been tested. You want to be aware of it. It is something that can be tested.

All right. Any questions on this? Okay. Now, I'm hoping at this point we're doing nothing but practice, practice, and practice. That means you should be doing multi states every day. That's important; right? You've gotta get that score up so I'm hoping you're at 70 or better. If not, start working a little bit harder. Why am I picking A when it should be B? Hone that in otherwise we'll be in trouble when it comes to baby bar day. You should be working on your issue spotting. Go to Taft's Web site. All the prior baby bar questions are up there, we have e‑classes that we do for first year ‑‑ those are torts, contracts, crim law, and those are primarily bar and baby bar questions with model answers. The more exposure you can get, the better you're going to be. If your time's very limited, issue spot an exam and look at the model answer. Give yourself the idea am I seeing the issues? Or would I lay it out this way? Or would I make this argument. You've got to look at that. That's important. If I don't and I get there under the pressure of the baby bar I'm going to have trouble. I want to go in there and pass this examination. I'm putting my ownness in it, I want to make it happen. Use your tools; we've a lot up there for you to take a look at.

Everything that we've gone over's up on our Web site so if you have to go back over anything, it's there for you as well. So take a preview of it and whatever will help you, use it. Anybody have any questions? Okay.

So what are we on the 11th? Yes. The baby bar is on the 25th. So we've basically got two weeks before the big day. This is where you want your fine tuning. During your fine tuning, if you have questions on a multistate you're taking a look at or as essay question ‑‑ not sure why this is here ‑‑ shoot me an e‑mail at jolly@taftu.edu. Be more than happy to help in any way I can.

I did have a student e‑mail in regards to an actual baby bar question with the June 2010 with Don and Fluffy. The boyfriend basically threatened the girlfriend that if she didn't deliver these bags of drugs ‑‑ cocaine ‑‑ that he would kill her cat. Very odd exam. But she ended up striking a child because he darted out in front of her on her way to deliver the drugs. The question was, why wouldn't you use the murder approach. Apparently the student answer up there didn't go through murder with your malice, stuff like that, and you would have to break that apart and go through it. Sometimes you'll see when you go over exams, remember, these students are under the heat of battle. There's things missing. Doesn't mean they didn't pass. Anything published on that site should be a passing answer anyway. But doesn't mean, again, that you wouldn't do it. Moral of my story is I'm getting you to look at ‑‑ we don't have to be perfect ‑‑ but a strong answer choice. So I have safety net. So if I falter here, I pick it up here. That's our goal. I don't want to teach you mediocre. If I make a mistake, I'm out. Don't wanna be out right off the bat, or missing an issue. Make sense? So, again, you can look at my model answers and may not even be able to copy it in an hour. That's everything in the kitchen sink. We don't have to be that perfect.

I want a strong enough foundation and structure so if I falter somewhere, I'm not out. I don't wanna be out. I'm putting up too much work for this, aren't we? That miss an issue and it's over? Not gonna happen. Start practicing your multiple choice and hone in, hone in, hone in. In essence, why am I getting this wrong? Why am I not seeing this? And then start working on your issue spotting.

At this point, you should know your law. If not, still keep practicing on your multi states because it will come by when you get it wrong. You've got to start working on the application. We've got two weeks to get this down. Anybody have any questions? Pretty quiet tonight.

Okay. Well, if anything does come up, please feel free to shoot me an e‑mail. I wish you all the best of luck opt upcoming baby bar. Stay calm, cool, and collected. Go in there and take the tiger by the tail. You can do this, but you do need to maintain control of the exam. You have that power. If you go in there and give the examiners the power, it's over; you're not going to make it. Go in there and remain calm. Do not let the time dictate. We don't want that to dictate our performance on the exam. Start working your timing now so you'll go in there and be fine. If you let time control, probably won't do well on the exam because I'm panicking about it.

I wish you guys best of luck up and coming baby bar on the 25th. I'll be thinking of you all. Go in there and let's make it happen.

If any questions come up, please feel free to shoot me an e‑mail at jolly@taftu.edu. Be more than happy to help you in any way I can. Again, best of luck, and I hope to hear from you guys soon. Good night.

[END TIME: 6:55 PM]