Starting Off Right in Torts

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Preface

How to Use This Book

This book is designed to provoke thought and discussion, not provide answers. It will suggest organization, analysis and writing techniques helpful to you from the first day of class. As you become more sophisticated in your knowledge of the law, your analysis and writing skills will also become more sophisticated. This book can only give you a foundation. But it is our hope that by providing you with that foundation, everything you do in your first weeks and months of law school will be done with greater purpose and direction. Nevertheless, we encourage you to change our rule statements and listings of elements, create your own methods of organizing the material, challenge our analysis of the facts, add philosophical and policy considerations, and even come to different conclusions. In order to help you, the methods we suggest have to be seen as a starting point which is then adapted to your needs and to the expectations of your professors.

The book starts with a short introduction entitled "The Study of Torts is Unique" that discusses how studying torts is different from studying any other course. Chapter One discusses information necessary for law school survival. A version of Chapter One appears in every book in this series except Civil Procedure (with each version having examples from the subject matter of the particular book). If you have already read the first chapter in another one of the books in the series, you may want to skip over Chapter One and go right to Chapter Two on intentional torts if that's where your course starts. If you have not yet covered intentional torts in class, you should still read the section on battery in Chapter Two for the important skills components it addresses, and then proceed to the topics in the book you have covered in your class.

The tort of battery in Chapter Two is followed by sections on some of the other intentional torts. We have not covered all of them, and we have spent very little time on defenses (but the same step-by-step approach we set out for the intentional torts we do cover can be applied to other topics as well). We also have not covered defamation. Although it can sometimes be an intentional tort, most professors either cover defamation at the end of the course or not at all.

Chapter Three is a long chapter on negligence. Your professor is likely to devote substantially more time to negligence than to intentional torts. Therefore, we have tried to point out many problem areas. Chapter Four covers strict liability and products liability. Chapter Five addresses multiple issue fact patterns, with suggestions about how to practice handling the organizational problems of torts exams. Chapter Six provides some specific hints on how to approach your final exams (though of course the entire book sets out an approach to outlining and answer-writing that is designed to improve your exam performance).

This book is not designed to teach you the law. Although most students find that they need more than their casebooks and class notes to learn the rules of law, your bookstore already is full of various commercial outlines and hornbooks to explain the law. We have found that almost all students learn more than enough law. What many students find difficult is learning what to do with all that substantive knowledge, and how to organize what they know in a usable way. That is the focus of this book. Assuming you know the law, this book will enable you to demonstrate your knowledge on an exam.

Each chapter begins with an explanation of useful techniques used to approach problems in a particular torts topic. This will be followed by a draft outline of the topic. The draft outline consists of basic rule statements, usually in the form of a listing of elements. It is suggested that you insert the information you've learned from the cases, your class, and any outside sources about how these rules have been interpreted. The rules in torts have been centuries in the making and no two people would state them in exactly the same way. If you have looked at more than one commercial outline or hornbook, you will find that the statements of any given rule differ. What's worse, even if you have a case in your casebook where the court states a rule, it may not be precisely the same as in another case or in a hornbook. Unfortunately, the judges who decided the cases in your book and who wrote the opinions did not have your understanding of torts in mind when they wrote those opinions. Do not let any of this disturb you. The basic elements of the rules probably are similar in any of these sources. Because there is no one authoritative phrasing of the rules, one is usually free to compose a rule that makes sense as long as it contains the accepted elements. Of course if your professor gives you a particular rule statement, you would be very wise to use it. Each chapter will also include sample exam questions, sample notes for an answer, and some sample answers.

These books are designed to give you organizational strategies for answers to exam questions, not a complete explanation of every rule and every doctrine.

These books are particularly good for study group use. If you are part of a study group, you might want to turn to Chapter Six to read the suggestions of how study groups can work on exam preparation. The material in each of the chapters can be used throughout the semester as your group meets, or near the end of the semester as you begin to review.

The approach we suggest attempts to insure that a student addresses all the issues in an exam question. We explain below and again in the section on battery how to answer a question by first doing a "top-down" analysis—going step by step through each element or sub-element that applies to a particular tort or defense. Then we suggest that you proceed "bottom up", looking more closely at each fact in the question to make sure you have not missed its possible significance. At some point before you begin actually writing your exam answer (either after you have done your top-down analysis, or after you have done both the top-down and bottom-up analysis) we suggest you underline or cross out the words in the fact pattern that you have used in your notes. You should then look at the words not crossed out to see if you have missed something important. Sometimes words you have not crossed out are there only to advance the story of the fact pattern. But sometimes they may prompt you to notice a major issue you may have missed. So why not cross those words out the first time you use them? Because sometimes the same fact can fit into your answer in more than one place. Going step by step (top down) and then focusing more closely on facts and crossing out words in a fact pattern (bottom up) are important exam techniques for many students. However, these are not techniques that can be successfully employed for the first time during an actual exam. They require practice. We therefore provide the opportunity to practice in each chapter.

Here is one suggested way to use the book:

After each sample answer there is a copy of the question. We provide a second copy of the question because most law students seem compelled to underline words in a question the first time they read it. This way you will have a clean copy of the question when you practice giving your own answer, including the method of identifying important words. We suggest that you read the Notes for Answer and then the sample answer as many times as necessary in order to follow our approach. Then read the copy of the question. First apply the top-down method of reading the facts given and determining what tort or torts are likely to be involved. Then for each arguable tort, try to recall everything you know about it. That means the elements, of course, but it also means anything else you learned about an element or the tort in the course. Once you have

outlined all of this—the things the legal system considers relevant for that tort, and thus the things that must be demonstrated—you then apply the facts to the existing rules, elements, policy, etc. Then, after having done this top-down analysis, taking what you already know about a tort and seeing if the facts of this case demonstrate it, you should use the bottom-up approach. This means taking another close look at each fact given, underlining or crossing out the words from the question that we used in our suggested answer or that you used in your top-down draft of an answer. Using the notes you have from your reading of cases and from class, see if there are any issues or sub-issues we did not include in our Notes for Answer and Sample Answer, and add those to your analysis. Although legal doctrines will be similar in any given sources, the cases you have read or the notes you have taken may modify what we have said, and obviously should be taken into account. After you have added to the Notes for Answer, put the book answer out of sight. Put the question with the underlinings you have made and your modified notes in front of you. Write out your own answer to the question—taking as much time as you need to be satisfied with your work. Then you may want to write the answer again, but using less time. We have left some questions without answers so that you can practice on your own or with a study group.

Most professors do not provide a format for a model exam answer. We are suggesting a generic format that can be adapted to fit most classes. If your professor gives you an answer format that differs, obviously that is the one you should use.

Chapter Six is meant to be read now and shortly before your final exam. This book cannot prepare you for every question asked by every professor. Rather, its purpose is to provide you with a deliberate approach and the building blocks of answers so that you can construct your own answers. Chapter Six contains suggestions for exam preparation (including a checklist of torts issues) and some hints for strategizing during your actual exam.

In a law school exam situation you will need to spend from one third to one half of the time allotted for each question in thinking and planning, because the questions will be complex. Once you have done so, you must be able to compose your answer and write it out quickly. Exam writing is a skill, and as with any other skill, good results are achieved by practice. Although practicing writing and rewriting simple answers may seem mundane, the time is well spent. The more complicated questions in the law school exam are usually no more than a combination of simpler questions similar to those you will find in this book.

You can expect this book to help you in four ways:

1. We give you draft outlines so that you don't have to agonize over starting your own.
2. We provide techniques for reading fact patterns successfully.
3. We make suggestions for how to organize your answers coherently on exams, using a step-by-step approach.
4. We supply sample questions and suggested answers for each topic so you can practice your writing.

Your feedback is welcome. Please email comments and suggestions to Howard Katz, hkatz@elon.edu.

Introduction

The Study of Torts Is Unique

The organization of the traditional torts casebook is usually pretty straightforward. That makes torts a unique course, as it is sometimes very difficult to see the organizing principles in other courses. The organization helps the novice law student learn the complexities of legal analysis logically and gradually. Most, but not all, torts courses start with intentional torts. It is easy to understand imposing liability on someone for causing harm to someone else intentionally. Of course you will soon see that intent can mean something fuzzier than conscious desire, but intentional torts are still fairly clear, and lend themselves well to element-by-element analysis. The next topic—negligence—is perceived by students as somewhat more murky. Negligence imposes liability, not for our intentional acts, but for our failures to take proper care to prevent harm that we should be able to foresee. Where the creation of risk is overt, this still makes a lot of sense. But as the cases and your professor cause you to wrestle with just what should be considered a foreseeable harm, you are likely to feel things have gotten mushier. This is where the discipline of a step-by-step analysis will really begin to pay off, even if there is no one right answer. The final point along the fault spectrum—strict liability—is limited in most modern courts to a few specific situations, and will probably seem clearer than negligence. A related topic—products liability—will have aspects of negligence and aspects of strict liability to it, and so it can also serve as a review or second look at some of the doctrines discussed earlier in the course, with a heavy dose of policy added in (as most professors teach it).

Some casebooks do not follow this sequence. If your casebook and course start with negligence, it may help you to get the bigger picture of torts if you think of negligence in the middle of a continuum of fault-based tort liabilities (from intentional to negligent to strict liability).