

## CHAPTER 9 [THERE'S MORE TO THE FIVE WS (WHO, WHAT, WHEN, WHERE, AND WHY) THAN MEETS THE EYE]:

### Practice Exercises:

1. In determining the meaning of a particularly difficult sentence or paragraph in an opinion, it is often helpful to simplify the court's words or sentence structure. One trick when rephrasing a complex sentence is to change the "voice" of the speaker, taking the words from the judge and putting them into the "voice" of whoever the judge is attributing the thought to. Another good reading trick is to break a long sentence into several shorter sentences and/or to add more punctuation to the existing sentence. Finally, it is often helpful to *add missing* words or thoughts to a sentence to clarify its meaning. Read, for example, the following unedited excerpt from *Parker v. Twentieth Century-Fox Film Corp.*, 3 Cal. 3d 176, 474 P.2d 689 (1970)<sup>1</sup>:

"As stated, defendant's sole defense to this action which resulted from its deliberate breach of contract is that in rejecting defendant's substitute offer of employment plaintiff unreasonably refused to mitigate damages."

That sentence is hard to understand in only one reading. To make comprehension easier, the reader could have rewritten the sentence more simply. Here's an example:

"The defendant, whose breach of [employment] contract caused this action, raises only one argument in defense. The defendant argues that the plaintiff unreasonably refused to mitigate damages when [she] rejected the defendant's offer of substitute employment."

Rewriting complex sentences to ease understanding is a good reading habit to develop in law. Such rewriting can be done in actuality, in the margin of the casebook, or merely in your head as you read. Try it with the following phrase, taken from the same case:

"No expertise or judicial notice is required in order to hold that the deprivation or infringement of an employee's rights held under an original employment contract converts the available 'other employment' relied upon by the employer to mitigate damages, into inferior employment which the employee need not seek or accept."

Here's one example of a valid rewrite: "When an employer offers an employee 'other employment' in an effort to mitigate damages for breach of an employment contract, and this 'other employment' deprives or infringes on the employee's rights established by the original

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<sup>1</sup> The *Parker* case concerns an employment contract dispute between actress Shirley MacLaine and Twentieth Century Fox Film Corporation. The facts in the opinion show that she was initially signed to star in a musical to have been filmed in California but that the film never went into production. The film company offered her alternative employment in a Western that would have been shot in Australia. She turned down the role in the Western and sued the film company for breach of contract.

contract, the substitute employment is legally ‘inferior’ and need not be accepted by the employee.”

One possible rewrite (or mental paraphrase) for this difficult passage could have been:

“This court is free to hold that, when an alternative employment offer made by an employer infringes on an employee’s rights under an original employment contract, the substitute employment is ‘inferior.’ An employee is not required to seek nor to accept ‘inferior employment’ in order to mitigate damages that may result from the employer’s breach of the original employment contract.”

How does this rewrite compare to yours? Does yours work, too?

Each student’s answer here and immediately below will be different, but should reflect an understanding of the meaning of the phrase, at least as rewritten by the textbook author, and a willingness to be intellectually flexible about learning how to paraphrase.

In the space below, explain what is effective about each of the paraphrases (including your own) that was less effective in the original excerpt taken from the opinion itself:

See above.

2. The following is a challenging case to read. It was decided in 1853, when writing conventions were very different than they are today. Read the case first to see if you can understand what the legal conflict is about. It will help to know that a “conflagration” is a massive fire. It will also help to know that this case appears in *Torts and Compensation*, a Torts casebook by Dan B. Dobbs and Paul T. Hayden.<sup>2</sup> The case appears in “Chapter 4: Defenses to Intentional Torts – Privileges” in Subsection 3, labeled “Privileges Not Based on Plaintiff’s Conduct.”

After reading the case enough times to “see” the factual situation underlying the conflict between the parties, answer the four questions that follow the case.

(a) Even the opening sentence of this case is confusing. “This was an action, commenced in the court below, to recover damages for blowing up and destroying the plaintiffs’ house and property, during the fire of the 24<sup>th</sup> of December, 1849.”

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<sup>2</sup> DAN B. DOBBS & PAUL T. HAYDEN, *TORTS AND COMPENSATION* 94-96(4<sup>th</sup> ed. 2001).  
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(i) Who suffered damages? (note that it's hard to figure out because the opinion does not say expressly who the "actor" in the sentence is). *The owners of a home that was destroyed in an effort to prevent the spread of an out-of-control fire in San Francisco.*

(ii) Who allegedly destroyed plaintiffs' house and property? (Note that one of the confusing things about this sentence is that it does not identify who caused the damage, but seems to assume the reader knows. You have to move to the second sentence to have enough information to infer who may have caused the damage.) *Geary, who appears to have been the fire marshall.*

(iii) As you read this sentence, did you imagine that the words "house and property" were redundant or that there was a house and there was also separate property (perhaps contained in the house or outside, around the house)? As you read further in the case, did your initial "vision" become more clear?

This question is designed to help students take ownership of what visions they are developing as they read cases, and to feel comfortable moving forward in a case as the vision evolves.

(iv) Did you notice that this fire occurred in San Francisco on Christmas Eve in 1849? What kind of fire prevention technology might have existed in that era?

Almost all of us would have to guess at an answer to this question, but could surmise that fire prevention technology was probably pretty rudimentary compared to today, and that building fire walls was probably a common technique (and maybe the only technique) for keeping fires from spreading.

(b) The second sentence of the opinion is: "Geary, at that time Alcalde of San Francisco, justified, on the ground that he had the authority, by virtue of his office, to destroy said building, and also that it had been blown up by him to stop the progress of the conflagration then raging."

(i) Do you know for certain what an "Alcalde" is? *No.*

(ii) What do you imagine an "Alcalde" is? *I think an "Alcade" is a fire marshall.*

(iii) What is the best reading cue in the sentence to help you figure out what an "Alcalde" might have been in 1849? *The fact that he argued, in court, that he had the authority to blow up buildings to stop the progress of the fire tells me he had to have been pretty high up in the fire prevention world.*

(iv) What might the word "justified" mean, in more modern terms, in this sentence? *In the context, it sounds like "justified" was a term similar to "asserted in his defense."*

(c) The third sentence reads, “It was in proof, that the fire passed over and burned beyond the building of the plaintiffs’, and that at the time said building was destroyed, they were engaged in removing their property, and could, had they not been prevented, have succeeded in removing more, if not all of their goods.”

(i) Why does it matter that the fire burned past the plaintiffs’ house and property? Perhaps because whatever measures were taken didn’t even work so perhaps they were undertaken negligently? Maybe to impress upon the reader how major and out of control this emergency situation was? Maybe to clarify that the plaintiffs were going to lose their property anyway (but that doesn’t seem relevant to the legal point the court is making in this case – which is that the Alcalde had the authority to destroy this property without personal liability).

(ii) Who is the “they” referred to in this sentence?  
“They” refers to the property owners.

(iii) Who prevented the actors from removing their property from the burning building? Why were the actors prevented from removing more of their property?

It seems like someone acting under the Alcalde’s authority (maybe local firemen? Maybe volunteers?) told the Suroccos that they could not continue to bring things out of their house and that the house was going to be destroyed. These people might have physically prevented the Suroccos from doing anything more, but that fact is not clear and is not really relevant anyway.

(d) In your own words, write out a short description of what happened between the parties in this case (or, alternatively, draw a diagram with stick figures that illustrates the events of the underlying conflict):

It seems like there was a major emergency going on and that the Suroccos were trying pretty desperately to get their possessions (personal property) out of their house which was a block or so from the approach of the fire. The defendant (or his agents) made them stop and blew up the building to make a kind of fire break that might keep the fire from spreading (although apparently that idea didn’t work).

3. Reread the case again, this time focusing on the “legal facts” of the case. When you are finished, please answer the questions below:

(a) Note that there is only one party named as the plaintiff in the heading of the case (Surocco), but the court refers consistently to the plaintiffs in the plural. Who do you imagine the

plaintiffs are in this lawsuit? You don't have any way, given the facts as presented in the casebook, to confirm that understanding. Do you need to confirm that understanding to continue to read for the "main idea" of this case?

I'm imagining co-owners of the house, and thought perhaps they might be husband and wife. Who the actual parties are is not a big deal and would not have made a difference in the outcome of the case under the rule of law applied.

(b) Was there a jury in this case? If not, who decided the outcome of the case?

In the fourth paragraph, the opinion states that the court (meaning the trial judge, I presume) was sitting as the jury. In that capacity, the trial judge would have decided questions of fact as well as questions of law.

(c) What do you imagine (even if you have never studied the "Intentional Torts" referred to in the title of "Chapter 4" of this casebook) the plaintiffs think gives them a right to recover for the loss of their property? In other words, what is the legal theory upon which they based their original claim in the trial court?

I imagine that they're working on some kind of trespass to chattel (to personal property) theory.

(d) Looking only at the second paragraph of the case, what do you think the defendant's legal theories are for why he should not have to pay for the plaintiffs' property damage? In other words, why do you think the defendant thinks he should have won in the trial court? [As an aside, do you think I am right to assume that the defendant is a "he"? Are there any actual facts in the case, or words used by the court, that give me the gender of the defendant? Even without any reference to gender by the court, would I have any historical grounds for making the assumption that the defendant is male?]

I expect that, in 1845, the Alcalde of San Francisco (which sounds like a pretty powerful position) was probably a man. That was probably a pretty safe inference to make.

I think the defendant is saying that he was legally justified (i.e., had the legal right to do what he did by virtue of his office).

(e) If the fire burned past the plaintiffs' house, then did it do any good for the Alcalde to blow up the house? Did the court care?

*Apparently the Alcalde's theory didn't work (although it's possible that it slowed the progress of the fire down and protected other property significantly beyond that of the plaintiffs). The court*  
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*didn't care – the legal question was not whether the decision was made negligently or wisely, but rather who had the authority to make the decision at all.*

4. List at least four words or allusions that you did not understand when you read the case. Did you need to understand them to continue to read for the “main idea” of the case within the context of a Torts casebook?

There were lots of difficult words or allusions in this antiquated case. Some that jumped out at me were:

*Alcalde*

*Justified*

*The Practice Act of 1850*

*The prosecution of an appeal*

*Conflagration*

*An expert reader could have moved on through this case without needing to look up any of these words or becoming hung up on the fact that he or she didn't know exactly what they meant or what they were referring to – unless the lack of understanding interfered with their comprehension enough to warrant going to a dictionary or if they thought the word was worth learning because they might see it again in other readings.*

5. If you were going to read this case in preparation for a class discussion in Torts tomorrow, what could you take as your “working hypothesis” of the “main idea” of the case?

The point of a working hypothesis is that it doesn't have to be perfect, but rather that it is in the ballpark and gets you in the door. Following is an example of a good working hypothesis for this case:

*“There are times when individuals in positions of official authority can use their own best judgment to destroy the property of others (or, presumably, to do other things that would otherwise be tortuous) without liability. This is called a defense of necessity.”*

6. As you have learned throughout this book, it is a good habit to keep track of time when you are reading law. How long did it take you to read this case? When did you start? When did you finish? *At this point in their work, students should be anticipating this question and should be able to articulate how much time they put into this reading.*