NAILING THE BAR

HOW TO WRITE ESSAYS FOR

TORTS

LAW SCHOOL AND BAR EXAMS

WHAT to Say and HOW to Say It!

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Attorney at Law
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Chapter 4: Spotting Tort Issues

Since you lose points for every required issue you fail to discuss, it is CRITICAL TO SPOT all of the issues. BUT DON'T waste time discussing issues that do not really exist. This is easier said than done and introduces a certain level of sadism peculiar to law school.

The grader wants you to discuss certain required issues. But graders fall into two basic schools. The first, rational school, simply states the issues to be discussed in the call of the question.

The second, less rational and often sadistic school of question writers uses only hints about the intended issues. Sometimes the "hints" are rather obvious. Other times they are so subtle the student has to be a psychic. At this extreme this approach is called HIDING THE BALL, and it is the stuff of law school horror stories.

The HIDE THE BALL question utilizes words and fact patterns that only vaguely suggest issues. This is like a code language known only to law school professors. The following is a list of "code" words and facts that are often used to indicate intended issues.

**TORT Issue Spotting Hints**

**TORTS:**

<table>
<thead>
<tr>
<th>Issue Area and Coded Hint</th>
<th>Intended Issue</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTENT:</td>
<td></td>
</tr>
<tr>
<td>1. Apprehensive/concern:</td>
<td>Assault?</td>
</tr>
<tr>
<td>2. Touching/contact/ate/drank:</td>
<td>Battery?</td>
</tr>
<tr>
<td>3. Intent to touch/scare another:</td>
<td>Transferred intent to plaintiff.</td>
</tr>
<tr>
<td>4. Pranks and jokes:</td>
<td>Intent to cause apprehension/touching?</td>
</tr>
<tr>
<td>5. Act by child:</td>
<td>Intent? Knowledge with reasonable certainty?</td>
</tr>
<tr>
<td>6. Mistaken entry to land:</td>
<td>No defense to Trespass to Land?</td>
</tr>
<tr>
<td>AWARENESS/INJURY BY PLAINTIFF:</td>
<td></td>
</tr>
<tr>
<td>7. No apprehension:</td>
<td>No cause of action for Assault?</td>
</tr>
<tr>
<td>8. No awareness of confinement:</td>
<td>No cause of action for False Imprisonment?</td>
</tr>
<tr>
<td>9. Aware of confinement but stays:</td>
<td>False Imprisonment if wrongful taking of child?</td>
</tr>
<tr>
<td>10. No awareness of taking:</td>
<td>No cause of action for Conversion?</td>
</tr>
<tr>
<td>11. No humiliation/distress:</td>
<td>No cause of action for IIED?</td>
</tr>
<tr>
<td>12. No damage to land:</td>
<td>Cause of action for Trespass to Land?</td>
</tr>
<tr>
<td>NEGLIGENCE ISSUES:</td>
<td></td>
</tr>
<tr>
<td>13. Remote plaintiff?</td>
<td>Palsgraf. Did defendant have Duty to plaintiff?</td>
</tr>
<tr>
<td>14. Injury despite reasonable actions?</td>
<td>Was there any Breach?</td>
</tr>
<tr>
<td>15. Defendant is professional?</td>
<td>What is the standard of care?</td>
</tr>
<tr>
<td>16. Defendant failed to act?</td>
<td>Did defendant have a Duty to act?</td>
</tr>
<tr>
<td>17. Chain of events lead to injury?</td>
<td>Actual cause without proximate cause?</td>
</tr>
<tr>
<td>18. Criminal causes the injury?</td>
<td>Intervening superceding event?</td>
</tr>
<tr>
<td>DEFAMATION ISSUES:</td>
<td></td>
</tr>
<tr>
<td>20. Former, retired official, celebrity:</td>
<td>Still Public Figure?</td>
</tr>
<tr>
<td>21. Well known/star/performer:</td>
<td>Public figure?</td>
</tr>
<tr>
<td>22. Crime victim or unwilling person:</td>
<td>Are they a Public Figure?</td>
</tr>
</tbody>
</table>
Chapter 16: Answering Tort Questions

There are 5 basic types of tort essay questions; issues can be skipped if the question does not call for their discussion.

1. **INTENTIONAL TORTS AND NEGLIGENCE** – Intentional torts are deliberate ACTS causing CONFINEMENT, FEAR, OFFENSE or other harm and negligence is a NEGLIGENT act causing harm. If both intentional torts and negligence are suggested by the facts, address the INTENTIONAL TORTS first and the possible defenses. Then address NEGLIGENCE second with the possible defenses to that cause of action.

2. **PRODUCTS LIABILITY** – Anyone who releases an UNREASONABLY DANGEROUS product into the stream of commerce may be held liable for any personal injury, property damage or other economic losses caused, but the extent of liability depends on the legal theory proven by the plaintiff.

3. **DEFAMATION AND INVASION OF PRIVACY** – Defamation is a false assertion causing damage to REPUTATION. Invasion of Privacy can be any of four theories for unreasonable acts causing EMBARRASSMENT or INCONVENIENCE.

4. **NUISANCE** – Nuisance is an unreasonable interference with the plaintiff’s ability to enjoy and use private LAND or else to enjoy the use of PUBLIC resources.

5. **MISCELLANEOUS MALICIOUS TORTS** -- MALICIOUS PROSECUTION / ABUSE OF PROCESS, INTERFERENCE WITH CONTRACT / INJURIOUS FALSEHOOD, DECEIT -- Watch out for these. They are often too simple for an entire essay answer so they may be mixed in with intentional torts, negligence or other issues.

**Mnemonics for Tort Essays:**

- **ABC-FITT** = The intentional torts – Assault, Battery, Conversion, False imprisonment, Intentional infliction of emotional distress, Trespass to land and Trespass to chattels.
- **DARN COPS** = The intentional tort DEFENSES. Discipline, Authority of law, Recapture, Necessity, Consent, Others (defense of), Property (defense of), Self (defense of).
- **SCRAP** = DUTY can be based on Statute, Contract, Relationship, Assumption, and Peril caused (both a TORT and a CRIMES factor).
- **CLUB** = Slander per se – Crime, Loathsome disease, Unchaste behavior, Business practices
- **LAID** = Invasion of Privacy – false Light, Appropriation of likeness, Intrusion into privacy, public Disclosure of private facts.

**Recommended Tort Essay Answer Strategies:**

1. Discuss INTENTIONAL TORTS first and NEGLIGENCE second.
2. Always DEFINE “INTENTIONAL” in the discussion of the first intentional tort.
3. Discuss both intentional torts and negligence UNLESS it is CLEAR there was NO INTENTIONAL ACT done to cause the tortious event that caused the injury.
4. For ASSAULT and BATTERY be clear you are talking TORT and not CRIMINAL law.
5. BATTERY suggests an issue of ASSAULT and possibly INTENTIONAL INFLICTION.
6. FALSE IMPRISONMENT suggests an issue of INTENTIONAL INFLICTION.
7. NEGLIGENCE INFLICTION OF EMOTIONAL DISTRESS is only for BYSTANDERS.
8. CONVERSION suggests TRESPASS TO CHATTELS.
9. DEFAMATION suggests NEGLIGENCE; separate analysis is often needed.
10. DEFAMATION and PRIVACY INVASION may be in the same question, but often not.
11. MALICIOUS PROSECUTION may suggest FALSE IMPRISONMENT.
12. ABUSE OF PROCESS often suggests a DEFAMATION issue.
13. Discuss the AFFIRMATIVE DEFENSES as separate issues.
14. For NEGLIGENCE, always discuss CONTRIBUTORY and COMPARATIVE NEGLIGENCE. Also maybe ASSUMPTION OF THE RISK.

COMMON TORT ISSUES AND ANSWERS

FOLLOW THE CALL of the question. But if the call is general, such as "discuss the rights and remedies," list the issues as follows:

1. **ASSAULT?**  
   
   Under tort law ASSAULT is an intentional act done to cause reasonable apprehension of a battery, and which actually does cause such apprehension. A BATTERY is a harmful or offensive touching of the person. Important!

   [Every “intentional tort” has the element of INTENTIONAL ACT! Always DEFINE “intentional act” in the definition of the FIRST intentional tort issue as follows:]

   An INTENTIONAL ACT is one done for the purpose of causing or with knowledge with reasonable certainty that it will cause the result that produces injury. Important!

   [ALWAYS state this in your discussion of the first intentional tort. For TORTS an act is intentional if it is done for the PURPOSE of producing a RESULT, or if the actors knows that result will almost certainly occur! But the result does not necessarily have to be injury. All that matters is that the result CAUSES injury.]

   Here ... because...

   Therefore, the defendant may be liable for tortious assault.

2. **BATTERY?**  
   
   Under tort law BATTERY is an intentional act to cause a touching of the person of the plaintiff causing harm or offense to the plaintiff. Important!

   Here ... because...

   Therefore the defendant may be liable for battery.

---

8 Note that for “assault” and “battery” you can either call them “tortious assault” or “tortious battery” in the issue statement or else you can say “Under tort law…” in the rule. But somewhere you MUST make it clear you are talking about a tort and not a crime.

9 Note that the “intent” of the defendant must be to cause a touching, and the touching must cause harm or offense, but the intent of the defendant does not necessarily have to be to cause harm or offense.
49. **ILLEGAL INTERFERENCE?** [Paraphrase as necessary] 47

Under tort law a person is liable for unreasonably and illegally interfering with another person’s known or apparent business relationships.

Here the defendant’s acts caused unreasonable interference because... Therefore, ...

50. **DECEIT (or FRAUD or MISREPRESENTATION)?**

Under tort law a person is liable for making 1) a **FALSE STATEMENT OF MATERIAL FACT** 2) **KNOWING** it was false 3) with **INTENT TO DECEIVE**, 4) that was **REASONABLY RELIED** upon by the plaintiff, 5) **CAUSING** the plaintiff **INJURY**.

Here there was **FALSE STATEMENT** of **MATERIAL FACT** because... And the statement was made by the defendant with **KNOWLEDGE** it was false because... Further the defendant had an **INTENT TO DECEIVE** because... Also the plaintiff **REASONABLY RELIED** because... And the plaintiff was **INJURED** because...

Therefore, ...

51. **NONDISCLOSURE (CONCEALMENT)?**

Under tort law a prima facie case of **NONDISCLOSURE** (or **CONCEALMENT**) requires showing 1) a **DUTY** to disclose material facts, 2) **BREACH** of that duty, 3) **REASONABLE RELIANCE** by the plaintiff on facts as they appeared to be, and 4) **INJURY CAUSED** by the nondisclosure.

Here the defendant had a **DUTY** to disclose because...And the defendant **BREACHED** that duty because they did not disclose...Further, this was a **MATERIAL FACT** because...And the plaintiff **REASONABLY RELIED** on appearances because...This nondisclosure **INJURED** the plaintiff because...

Therefore, ...

52. **TORT RESTITUTION?**

Under tort law plaintiffs may “waive the tort” and instead of seeking an award of damages based on their own injury, they may seek **RESTITUTION**, an award of damages based on the amount the defendant has wrongfully benefited to **PREVENT UNJUST ENRICHMENT**.

Here...because...Therefore...

**Note:** The above issue statements provide virtually every important issue, definition, rule and term that you will ever see on a Torts examination in law school or on a Bar Exam. If you know the above issues and responses you have everything you really need.

47 I have heard this called “interference with contract” and then I have heard it called “interference with prospective economic advantage”. Pulleezze, if that is not the most awkward legal phrase I have ever heard? Let’s just use football terminology and call it “illegal interference”.

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WHAT to Say and HOW to Say it on

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