TORT LAW WORKBOOK

GOULD’S LAW BOOT-CAMP SERIES:
BOOT CAMP
AN INNOVATIVE APPROACH TO LEGAL EDUCATION

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Chapter 1.

INTRODUCTION TO

PROFESSOR GOULD’S

LEGAL LEARNING METHOD
My techniques have been honed over many years. My unique and innovative learning strategies focus on long-term storage of important and cognizable concepts. These larger concepts are learned until they are second-nature. Then, additional related concepts are learned, until students have a solid grasp of Gould’s Law Templates. Students then learn the rule statements that relate to each concept, to fill out their understanding of each area of legal doctrine.

Before exams begin, students write out a cognizable list of possible issues, aiding them in spotting more issues. Gould’s Shopping Lists consistently help students to spot more issues on each essay that they write. My Shopping Lists allow students to cue in on the important concepts in each essay, and remember to write their essay responses from an holistic and comprehensive perspective.

Many legal exams are based on strict timing, and Gould’s Techniques comport nicely with speed testing. Gould’s Issue Templates, and Gould’s Shopping Lists, focus the students on the ISSUES AND SUB-ISSUES, quickly, and precisely, thereby enhancing the ability of law students to write dynamic essays.
Chapter 2.

SHOPPING LIST OF

ISSUES FOR TORTS
GOULD’S SHOPPING LIST OF ISSUES FOR TORTS.

• Perhaps the most important tip for improving your score on any essay, is my technique of memorization, and replication of Shopping Lists for each area of law.

• First, memorize the applicable shopping list for torts. Then, before you even read the essay, write down your shopping list of issues. As you read the essay question, highlight the issues which are present. Then, read the question again, to spot more issues. When you are sure an issue is not present, cross it off of the list or otherwise delete it. You will be left with a full set of issues to write about.

• The beauty of the shopping list, is that it focuses you on considering all of the issues in tort law, while under an extreme time pressure. Under such a pressure, students are often in a hurry to start writing, and they often miss spotting issues they would have spotted if they would have approached their essay a little more methodically. A couple of more issues spotted, translates into more than a couple of more points per essay. Therefore, the development of my shopping lists, could be the single most valuable tool which you can use to increase your scores.

• Again, many students miss issues on an essay because they immediately start writing about a few issues which they have spotted. However, IT REALLY PAYS to take a few seconds at the beginning of each essay to write a SHOPPING LIST OF ISSUES which covers all of the major issues in torts.
Gould’s Shopping List for Torts.

1. Negligence -- Battery.

2. Products Liability -- Negligence -- Implied Warranty -- Battery.


4. Defamation -- IIED.


7. Intentional Torts -- Private Nuisance -- NIED.

8. Respondeat Superior -- Joint Liability.

9. Remedies.

Nine items, yet it comprises all of tort law!!

- Negligence is the largest area of tort law, so it is in a primary position. Battery is often present as an issue whenever there is a Negligence claim, so it is included with Negligence.

- Both Strict Products Liability and Implied Warranty (along with Negligence and Battery), are issues whenever a product causes injury to plaintiff.

- Strict Liability in Negligence and Public Nuisance (along with Negligence and Battery), are issues where there is dangerous activity in the public domain.

- Defamation is often achieved through invasion of privacy, and economic harm often results, so Defamation, the Privacy Torts and the Business / Contract Torts are closely related to each other. Remember to always consider IIED in a Defamation situation.
• Misrepresentation is related to Express Warranty.

• Trespass to Land is closely related to Private Nuisance, because they are both based in land ownership.

• IIED is closely related to NIED, because they are both related to emotional distress of plaintiff.

• Respondeat Superior and Joint and Several Liability are common litigation issues.

• Remedies is the final issue.

• Write the list in abbreviated form if you like:

  Neg / B
  PL / Neg / IW / B
  SL / Neg / PubN / B
  Def / IIED
  Privacy / Contract
  Mis / EW
  IT / PriN / NIED
  ResP / JL
  Rem

• If you like, you can go ahead and spend an extra minute or two to write out the intentional torts, or otherwise provide yourself a more detailed shopping list, so that you increase your chances of spotting more issues.
Chapter 3.

NEGLIGENCE
ESSAY HINTS.

- Negligence is almost always, THE MOST IMPORTANT CLAIM IN A TORTS LAW ESSAY. Often, it is present more than once. Know all of the sub-elements of a negligence claim backwards and forwards.

- It has the first position in my Shopping List for Torts. It should be discussed first, so that you can have enough time to discuss it fairly thoroughly.

PROFESSOR GOULD'S BASIC TEMPLATE FOR NEGLIGENCE.

NEGLIGENCE.

DUTY.

STANDARD OF CARE.

BREACH OF DUTY.

ACTUAL CAUSE.

PROXIMATE CAUSE.

PERSONAL INJURY TO PLAINTIFF.

DEFENSES.

REMEDIES.

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PROFESSOR GOULD’S FULL TEMPLATE FOR NEGLIGENCE.

NEGLIGENCE.

DUTY.
Cardozo’s and Andrews’ Views.

STANDARD OF CARE.
Apply Applicable Standard.

BREACH OF DUTY.
Hand Formula.
Negligence per se.
Res ipsa loquitur.

ACTUAL CAUSE.
But For Test.
Substantial Factor Test.

PROXIMATE CAUSE.
Foreseeability of Harm, Extent of Injury, Modality of Injury.
Eggshell Skull Plaintiff.
Intervening Events.
Superseding Intervening Events.

PERSONAL INJURY TO PLAINTIFF.

DEFENSES.
Contributory Negligence.
Last Clear Chance Doctrine.
Comparative Negligence.
Assumption of the Risk.
Express Assumption.
Implied Assumption.

REMEDIES.

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THE DOCTRINE FOR NEGLIGENCE.

NEGLIGENCE.
Negligence is defined as unreasonable conduct by a defendant, where defendant’s conduct fails to rise to a standard of care of that of a reasonable person in the same or similar circumstances. Defendant's conduct must breach a duty to prevent a foreseeable risk of harm to the plaintiff, and defendant’s breach must actually and proximately cause injury to the plaintiff. Prima facie issues are: Duty, Standard of Care, Breach of Duty, Actual Cause, Proximate Cause, Damages, Defenses, and Remedies.

DUTY.
Almost all people owe others a duty of reasonable care to act as an objectively reasonable person would act in similar circumstances. In Palsgraf, the Cardozo majority view posits that a duty extends just to those in the zone of danger which was created by defendant’s conduct. Alternately, the Andrews minority view is that a duty extends to everyone.

STANDARD OF CARE.
There are various measures for determining a standard of care depending on the situation.

REASONABLE PERSON STANDARD.
Under a reasonable person standard, the defendant should have acted as a reasonable person in similar circumstances would have acted.

Physical Disability. When a person has a physical disability, the question posed is what a reasonable person with a similar disability would have done in similar circumstances.

Intoxication. Reasonable people are considered sober, so intoxication is not a viable standard of care.

Mental Characteristics. The mental characteristics of people are considered under an objective reasonableness standard.

Children. Children are measured against another child of the same age and experience. If a child is involved in a potentially dangerous adult activity, then the standard of care is that of a reasonable adult in the same activity. Statutory limitations presume that a child under seven years of age lacks the cognitive ability for fault, and that a child between seven and fourteen years of age proceeds with a rebuttable presumption of incapacity of negligence.
Emergency Situations. In an emergency situation, the defendant must act as a similar person would have acted in the same type of emergency, with little time for thought.

DETERMINATION OF OWNERSHIP FOR LANDOWNERS.
It is necessary to determine the current liability situation regarding owners and occupiers of land.

Tenants and Owners. Tenants are the owner when the lease agreement is complete. However, an owner is responsible for dangers at the beginning of the lease which they knew about, or should have known about, and that tenant did not know of. Landlords are also liable for injuries taking place in a common tenant area, or where the landlord contracted for or made negligent repairs. For public leases, the owner has a duty to inspect and repair dangers before the lease agreement is complete.

Sellers and Buyers. The seller of property is responsible for concealment of latent dangers or dangerous conditions, which the buyer could not be said to be aware of.

STANDARDS OF CARE FOR LANDOWNERS.

Natural Hazards Outside of Property.
There is no duty for landowners to remove hazards, or to prevent harm, related to natural conditions to others outside of the owner's property. However, an owner may be liable for damage from controllable items, and for falling trees.

Hazards on Property.
Artificial hazards created by owner have a higher duty than natural hazards.

Natural Hazards. An owner is not liable for natural hazards on the property, unless the owner can easily avoid injury through basic precautions.

Adult Trespassers. For adult trespassers that are unknown and uninvited, an owner has no duty to make safe or to warn. However, an owner does have a duty against willful negligence or excessive force.

Constant / Known Trespassers. Where an owner knows about a trespasser on a limited area of land, then the owner has a duty of reasonable care to make the property safe, and to warn of danger.

Attractive Nuisance for Children. Where an owner is aware that children will reasonably stop and explore because of an artificial and dangerous condition on the owner's property, that the children would thereby be presented with an unreasonable risk of serious injury, and where
such a young child would not recognize a dangerous situation due to their age, the owner of the
property will be held to a standard of care that is sufficient to stop children from stopping and
exploring.

Licensee. Where a person has the consent of an owner to be present on the property as a
social guest for a non-business purpose, the owner has a duty to warn of visible or known
dangers. Licensees also include police officers, firemen, salesmen and emergency workers.
There is no duty to inspect for unknown dangers.

Invitee. Where a person is invited to conduct business related activity on the property of the
owner in order to benefit the owner, the owner has a duty of reasonable inspection for hidden
dangerous conditions, and a duty of reasonable care to repair, to make safe or to warn. This is a
higher duty than for a licensee. However, where the plaintiff exceeds the scope of their
invitation, the duty of care is reduced.

PROFESSIONAL STANDARDS / MALPRACTICE.
A professional must use the superior knowledge and ability commonly possessed by other
professionals in their specific field or sub-specialty. If a person is a health care professional,
they need informed consent from their patient, with full disclosure of risks and benefits, and an
explanation of feasible alternatives. However, when confronted with a life threatening situation,
implied consent will exist. If a health care professional exceeds the scope of the consent given
by a client, the health care professional may be liable for battery.

PRODUCTS LIABILITY.
People who place products into the stream of commerce, such as manufacturers, wholesalers and
retailers, owe a duty of care to reasonably foreseeable users of the products. However, a retailer
does not owe a duty to inspect the goods that they sell.

Businesses. Businesses must give warning and assistance to those in peril on their property.
Also, businesses are required to hire and supervise their employees with care.

VEHICLES.
In the absence of traffic lights or signs, a vehicle on the left must yield right-of-way to a vehicle
on the right. Likewise, a vehicle in back must yield right-of-way to a vehicle in front. Where a
parent allows their child to use a car for a family purpose or benefit, both the parent and the child
are liable for the negligent driving of the child.

Negligent Entrustment. If an owner of a vehicle gives their permission to another to drive
the owner's vehicle, and the person given permission is one known to be negligent or reckless,
there will be liability to the owner under negligent entrustment. However, there is no liability for
an unknown vehicle defect, when allowing another to drive a car. Additionally, there is no
liability if the car is stolen, unless the keys were left in the car. Guest statutes bar driver liability
to other passengers unless the driver is grossly negligent.

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**VENDORS OF ALCOHOL.**

**Commercial Vendors.** There is no duty of care for commercially bottled alcohol that is meant to be taken away.

**Commercial Hosts / Business Parties.** There is no duty to the purchaser of alcohol. Dram shop statutes protect injured third parties within a class of plaintiffs that is reasonably foreseeable to a commercial host regarding potential plaintiffs. Additionally, liability may ensue for selling alcohol to an already intoxicated person.

**Social Hosts.** A social host has liability if they knowingly over-serve, and actively assist, a drunken person. Further, giving alcohol to a minor is negligent *per se*.

**FAILURE TO ACT / NONFEASANCE.**

There is no duty to act to rescue or to give / render aid to one in peril.

**Rescue Doctrine.** The creation of danger invites rescue, and the original tortfeasor is liable for injury to the victim, and for additional injury created by the rescuer, along with injury to the rescuer.

**Special Relationships.** Under a special relationship between two parties, such as parent-child, teacher-student, and similar special relationships, a defendant has a duty to aid and to protect the others in their care. Likewise, business owners must give warning and assistance to those in peril on their property.

**Cause of the Peril.** The person who causes a perilous situation, must try to aid the plaintiff or summon help.

**Good Samaritan Rule.** If the defendant assumes a duty by starting to render aid to plaintiff, they must proceed with reasonable care, especially if others are pushed away from giving aid due to defendant’s actions. If the defendant uses gross negligence or wanton misconduct to rescue, then they will be liable under negligence. Additionally, if the defendant stops rendering aid, and leaves the plaintiff in a worse situation due to the defendant’s actions, the defendant may be liable for subsequent injury to the plaintiff.

**COMMON CARRIERS, INNKEEPERS, PUBLIC UTILITIES.**

Compensated common carriers, innkeepers and public utilities must use the utmost care and specific due diligence to protect others, and their property, from harm. However, there is no vicarious liability for torts committed by other guests.

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BREACH OF DUTY.
A breach of duty exists where the defendant did not act to reasonably protect the plaintiff from foreseeable harm. There are three main ways in which breach of duty may be shown, including the Hand Formula, violation of a statute through negligence *per se*, or through the doctrine of *res ipsa loquitur* / the thing speaks for itself.

**The Learned Hand Formula.** $B<PxL$. The defendant’s burden to have acted differently, or the reasonable precaution cost, is balanced against the probability of harm ($P$), multiplied by the severity of harm ($L$). Defendant breaches their duty where the burden is less than the probability times the liability.

**Custom.** The defendant’s use of current customs of an industry, may modify the Hand Formula by lowering the defendant’s burden to have acted differently.

**Social Utility.** $B+U<PxL$. A high social utility ($U$) of the defendant’s action, may modify the Hand Formula by lowering the defendant’s burden to have acted differently.

**Negligence *per se*.** A plaintiff may establish the defendant’s duty and its breach, if the plaintiff can show that the defendant violated a safety statute / regulation / ordinance.

**Injury Intended to Protect Against.** The injury suffered by plaintiff must be the same type of injury that the statute was intended to protect against.

**Class of Persons.** The plaintiff must be part of the class of people the statute is meant to protect.

**Excuses.** The plaintiff must show that defendant had no viable excuses for violation of the statute. An excuse may exist where the defendant attempted to comply with the statute, where the defendant encountered an emergency situation, or where there would have been a greater risk of harm had defendant complied with the statute.

**Res ipsa loquitur.** Where direct evidence of an accident remains unclear, and there is little direct evidence regarding the scenario of an injury, circumstantial evidence relating to the accident may create an inference of the defendant’s negligence. The plaintiff must show that the harm would not have taken place without the defendant’s negligence, that the instrumentality of harm was in exclusive control of the defendant, and that the harm was not due to the actions of the plaintiff. *Res ipsa loquitur* is often used in products liability situations.

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**ACTUAL CAUSE.**
Actual cause is present where the defendant’s conduct actually caused harm to the plaintiff.

**But For Test.** The 'but for' test for actual cause will be satisfied, where but for the actions of the defendant, the plaintiff would not have been injured.

**Substantial Factor Test.** Where two defendants act separately, and both of their acts would be sufficient for actual cause, then both defendants will be liable.

**Alternative Causes.** Where there are multiple defendants and acts, the burden of proof is on a defendant to show that they did not cause an injury to the plaintiff.

**PROXIMATE CAUSE.**
A defendant is only liable for consequences which are reasonably foreseeable at the time of plaintiff's injury, and which are not too remote or improbable.

**FORESEEABILITY.**

**Foreseeable Extent of Harm / Eggshell Skull Plaintiff.** The defendant takes the plaintiff as they find them, and will be responsible for greater than normal extent of injury to the plaintiff.

**Foreseeable Plaintiff / Transferred Intent.** An unintended plaintiff may still be a proper plaintiff under the doctrine of transferred intent.

**Foreseeable Manner and Type of Harm.** An unusual manner or type of harm will not indicate lack of foreseeability, if the manner or type of harm could have been reasonably expected as a consequence of the defendant’s conduct.

**INTERVENING CAUSES OR EVENTS.**
Only superseding intervening events, which are unforeseeable, will break the chain of defendant’s causation. The types of situations in which defendant's causal chain will be broken include: unforeseen criminal behavior or willful wrongdoing by third parties, unforeseen acts of God, or grossly negligent medical care. However, foreseeable intervening causes or events which take place after the defendant’s actions and contribute to the plaintiff’s harm, will not break the causal chain of the defendant. Further, defendant's causal chain will not be broken by independent forces such as regular medical malpractice, additional diseases, or negligent rescuers, as these are all foreseeable occurrences.
DAMAGES / PERSONAL INJURY.
Damages to plaintiff may be shown through a consumer’s property damage, or through plaintiff’s physical injury, due to the actions of the defendant. Pure economic loss is recoverable in negligence only rarely, and if the injury was foreseeable, there are few plaintiffs that could sue for a similar incident, and the defendant was especially blameworthy.

DEFENSES TO NEGLIGENCE.
The defenses to a negligence claim include contributory negligence, comparative negligence and assumption of the risk.

CONTRIBUTORY NEGLIGENCE.
Contributory negligence is a total bar to recovery for plaintiff. Contributory negligence occurs where the plaintiff’s unreasonable conduct proximately causes their harm. Contributory negligence is also called the doctrine of unavoidable consequences. Contributory negligence is not available in situations where the defendant engages in willful, wanton and reckless conduct.

Contributory Negligence per se. Where the plaintiff violates a safety statute, this will serve as a form of contributory negligence.

Last Clear Chance Doctrine. Where the defendant had the last clear chance to prevent harm to the plaintiff, any contributory negligence of the plaintiff will be vitiated.

COMPARATIVE NEGLIGENCE.
Fault by the plaintiff prior to the injury may proportionally diminish plaintiff’s recovery.

Pure. In a minority of jurisdictions, pure comparative negligence is used through a percentage system of fault, depending on the culpability of each party.

Modified / Recklessness / Felony. In the majority of jurisdictions, if the plaintiff is more than 50% culpable, the plaintiff was unnecessary reckless, or the plaintiff committed a felony, then comparative negligence will bar plaintiff’s recovery.

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ASSUMPTION OF THE RISK.
Assumption of the risk is not an effective defense for a defendant, if the plaintiff is placed under duress by the defendant through willful and wanton behavior.

Express Assumption of the Risk. Express assumption of the risk occurs where there is a specific agreement by the plaintiff in advance of the potentially dangerous activity, stating that the plaintiff will bear the possible costs of any resultant harm. An express assumption of the risk agreement must be separately negotiated, and must be specific as to type of liability.

Implied Assumption of the Risk. Implied assumption of the risk is strictly construed. It occurs where the plaintiff shows by their actions, that they had an implied awareness of a risk of potential harm, and that they acted voluntarily even with the risk of potential harm.

Assumption of the Risk for Recreational Activity. A player in a recreational activity will be said to assume the risk of injuries which may occur during the game, even if the injury occurs through routine negligence. However, such a player does not assume a risk of potential harm for intentional torts which may occur during the activity.

REMEDIES.
The plaintiff in a negligence claim is entitled to recover for property damage, medical expenses, for pain and suffering, for out-of-pocket losses, loss of bodily functions, future damages, and for loss of the ability to enjoy life.
Chapter 4.

STRICT LIABILITY IN NEGLIGENCE
PROFESSOR GOULD'S TEMPLATE FOR STRICT LIABILITY IN NEGLIGENCE.

Strict Liability.

Animals.
- Wild Animals.
- Domestic Animals.

Ultra-Hazardous / Abnormally Dangerous Activity.

Causation.
- Actual Cause.
- Proximate Cause.

Defenses.
- Scope of the Risk.
- Abnormally Sensitive Activity by Plaintiff.
- Assumption of the Risk.
ESSAY HINTS.

• Strict Liability in Negligence is not related to Strict Products Liability, they are two fully separate legal concepts. Strict Liability in Negligence is a subset of a Negligence claim, where plaintiff is free not to have to establish duty and breach of duty, because the activity by defendant is so inherently dangerous, that the defendant should be held liable for injury to the plaintiff without a showing of duty and breach of duty. Strict liability for negligence occurs in two different situations, either through harm caused by an animal, or through ultra-hazardous / abnormally dangerous activity.

• If an animal is involved, remember to distinguish between a wild animal and a domestic animal.

• Remember to always discuss causation (actual cause and proximate cause), but you can normally just "Supra" this discussion from your Negligence claim, because you should always discuss Negligence when have a Strict Liability in Negligence situation. The reason that you should discuss a regular Negligence claim in addition to a Strict Liability in Negligence claim, is that plaintiff may not successfully prove that Strict Liability in Negligence is applicable, so, in such an event, they would have to rely on a regular Negligence claim by establishing duty and breach of duty.
THE DOCTRINE FOR STRICT LIABILITY IN NEGLIGENCE.

STRICT LIABILITY IN NEGLIGENCE.
Strict liability in negligence is a subset of a negligence claim, where plaintiff shows duty and breach of duty through the high degree of risk of harm engaged in by the activity of the defendant. In other words, the type of activity that defendant engages in establishes an absolute duty of care, without the need for establishing duty and its breach, as in a normal negligence claim. Strict liability in negligence may be shown through action by animals that cause harm to plaintiff, or though ultra-hazardous / abnormally dangerous activities by the defendant which cause harm to plaintiff.

ANIMALS.
Trespassing Animals. An owner will be held strictly liable for property damage or personal injury caused by an animal that is trespassing.

Non-Trespassing Animals. An owner will be held strictly liable for property damage or personal injury caused by an animal that is exceedingly dangerous.

Wild Animals. An owner will be held strictly liable for property damage or personal injury caused by a wild animal, such as those that are typically kept in a zoo, and where the injury caused is due to a dangerous propensity of the animal.

Domestic Animals. An owner will be held strictly liable for property damage or personal injury by a domestic animal, if the owner knew, or had reason to know of, a dangerous characteristic of their animal, and did not take suitable precautions against potential harm to another. In relation to dogs, there is a one free bite rule, which holds that an owner is liable for property damage or personal injury that occurs after an owner has knowledge of a dog's vicious propensities.

ULTRA-HAZARDOUS / ABNORMALLY DANGEROUS ACTIVITIES.
An action may be considered to be ultra-hazardous or abnormally dangerous, and where the defendant engages in such an activity, they may be held strictly liable in negligence. The most important element in determination of whether an activity is ultra-hazardous or abnormally dangerous, is whether or not the activity could not be made safe, even with the exercise of reasonable care. Courts will also consider other factors in determining whether an activity by defendant was ultra-hazardous or abnormally dangerous, and will lean in the direction of declaring an activity as a strict liability activity where the potential of harm to others is high, the potential danger of the activity outweighs the value of the activity to the community, and where the defendant's activity is unusual or inappropriate for the community in which the activity takes place.

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**DAMAGES / PERSONAL INJURY.**
Damages to plaintiff may be shown through a consumer’s property damage, or through plaintiff’s physical injury, due to the actions of the defendant.

**ACTUAL CAUSE AND PROXIMATE CAUSE.**
Strict liability is a sub-set of a negligence claim, therefore, plaintiff must show actual and proximate causation for a viable claim of strict liability.

**ACTUAL CAUSE.**
Actual cause is present where the defendant’s conduct actually caused harm to the plaintiff.

**But For Test.** The 'but for' test for actual cause will be satisfied, where but for the actions of the defendant, the plaintiff would not have been injured.

**Substantial Factor Test.** Where two defendants act separately, and both of their acts would be sufficient for actual cause, then both defendants will be liable.

**Alternative Causes.** Where there are multiple defendants and acts, the burden of proof is on a defendant to show that they did not cause an injury to the plaintiff.

**PROXIMATE CAUSE.**
A defendant is only liable for consequences which are reasonably foreseeable at the time of plaintiff's injury, and which are not too remote or improbable.

**FORESEEABILITY.**
**Forseeable Extent of Harm / Eggshell Skull Plaintiff.** The defendant takes the plaintiff as they find them, and will be responsible for greater than normal extent of injury to plaintiff.

**Forseeable Plaintiff / Transferred Intent.** An unintended plaintiff may still be a proper plaintiff under the doctrine of transferred intent.

**Forseeable Manner and Type of Harm.** An unusual manner or type of harm will not indicate lack of foreseeability, if the manner or type of harm could have been reasonably expected as a consequence of the defendant’s conduct.

**INTERVENING CAUSES OR EVENTS.**
Only superseding intervening events, which are unforeseeable, will break the chain of defendant’s causation. The types of situations in which defendant's causal chain will be broken include: unforeseen criminal behavior or willful wrongdoing by third parties, unforeseen acts of God, or grossly negligent medical care. However, foreseeable intervening causes or events which take place after the defendant’s actions and contribute to the plaintiff’s harm, will not
break the causal chain of the defendant. Further, defendant's causal chain will not be broken by independent forces such as regular medical malpractice, additional diseases, or negligent rescuers, as these are all foreseeable occurrences.

**DEFENSES.**
The defenses to a claim of strict liability, include the scope of the risk defense, abnormally sensitive activity by plaintiff, plaintiff’s assumption of the risk, and comparative negligence.

**Scope of the Risk Defense.** The damage caused by the defendant must be within the scope of the risk assumed which made the activity dangerous.

**Abnormally Sensitive Activity by Plaintiff.** The defendant is not liable to plaintiff, if the plaintiff engaged in an abnormally sensitive activity.

**Comparative Negligence.**
Fault by the plaintiff prior to the injury may proportionally diminish plaintiff’s recovery.

- **Pure.** In a minority of jurisdictions, pure comparative negligence is used through a percentage system of fault, depending on the culpability of each party.

- **Modified / Recklessness / Felony.** In the majority of jurisdictions, if the plaintiff is more than 50% culpable, the plaintiff was unnecessary reckless, or the plaintiff committed a felony, then comparative negligence will bar plaintiff’s recovery.

**Assumption of the Risk.**
Assumption of the risk is not an effective defense for a defendant, if the plaintiff is placed under duress by the defendant through willful and wanton behavior.

- **Express Assumption of the Risk.** Express assumption of the risk occurs where there is a specific agreement by the plaintiff in advance of the potentially dangerous activity, stating that the plaintiff will bear the possible costs of any resultant harm. An express assumption of the risk agreement must be separately negotiated, and must be specific as to type of liability.

- **Implied.** Implied assumption of the risk is strictly construed. It occurs where the plaintiff shows by their actions, that they had an implied awareness of a risk of potential harm, and that they acted voluntarily even with the risk of potential harm.

**REMEDIES.**
The plaintiff in a strict liability in negligence claim is entitled to recover for property damage, medical expenses, for pain and suffering, for out-of-pocket losses, loss of bodily functions, future damages, and for loss of the ability to enjoy life.

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Chapter 5.

STRICT PRODUCTS LIABILITY
PROFESSOR GOULD'S BASIC TEMPLATE FOR STRICT PRODUCTS LIABILITY.

Strict Products Liability.

Proper Parties.

Defective Product.

Actual Cause.

Proximate Cause.

Plaintiff Injury.

Defenses.

Remedies.

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PROFESSOR GOULD'S FULL TEMPLATE FOR STRICT PRODUCTS LIABILITY.

Strict Products Liability.

Proper Parties.

Proper Plaintiff.

Proper Defendant.

Defective Product.

Manufacturing Defect.

Design Defect.

The Consumer Expectation Test.

The Risk-Utility / Feasible Alternative Design Test.

Inadequate Warning.

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Actual Cause.
   But For Test.
   Substantial Factor Test.

Proximate Cause.
   Foreseeability of Harm (Manner, Type and Extent), and of Plaintiff.
   Intervening Events.

Plaintiff Injury.

Defenses.
   Plaintiff Misuse.
   Alteration of Product.
   Regulatory Compliance Defense.
   State of the Art Defense.
   Comparative Negligence.
   Assumption of the Risk.

Remedies.
ESSAY HINTS.

- Strict Products Liability refers to situations where a defendant is liable because a product causes an injury to plaintiff. Liability may be based in Negligence, Strict Products Liability, Warranty, and Battery.

- Strict Liability in Negligence and Strict Products Liability are two separate and distinct claims. Strict Liability in Negligence refers to situations where an animal or an ultra-hazardous / abnormally dangerous situation causes injury to a plaintiff, while Strict Products Liability refers to situations where a plaintiff is hurt by a product.

- Strict Products Liability is a large claim. However, remember to discuss Negligence first, and then Supra Actual Cause, Proximate Cause, Damages, and Remedies, to order to save valuable time on your timed essay exam.
THE DOCTRINE FOR STRICT PRODUCTS LIABILITY.

STRICT PRODUCTS LIABILITY.  
A claim in strict products liability is proper where a product causes damage to the plaintiff, and the product was sold in a defective condition which was unreasonably dangerous to a normal consumer of the product.

PROPER PARTIES.

Proper Plaintiff. At common law, a proper plaintiff needed privity with the defendant. However, modernly, a proper plaintiff is any foreseeable user of the product.

Proper Defendant. Proper defendants are retailers, manufacturers, or others in the distributive chain, and that are in the business of selling that type of product.

DEFECTIVE PRODUCT.
A product is deemed as a defective product where it has a defect that makes the product unreasonably dangerous at the time of the sale of the product. There are three ways to establish that a product is defective: through a manufacturing defect, through a design defect or through inadequate warnings or instructions.

MANUFACTURING DEFECT. A manufacturing defect exists where the manufacturing process itself caused the defect, resulting in an unreasonably dangerous product. A manufacturing defect may arise due to lack of appropriate standards or testing, thereby producing a product that is more dangerous than expected by a normal consumer of the product.

DESIGN DEFECT. A design defect exists where the design of a product makes it unreasonably dangerous. A product may have a design defect where, under the consumer expectation test, the product is more dangerous than expected by a normal consumer of the product. Additionally, under the risk-utility / feasible alternative design test, where a product presents a risk of potential harm that outweighs the use or utility of the product to the consumer, it will be seen to have a design defect. Defendant will have a difficult time to prevail under the feasible alternative design test, if they could have made the product safer with the current technology available at the time of injury, and which would have made the product safer within a reasonable cost analysis.
**INADEQUATE WARNING OR INSTRUCTIONS.** A defective product will exist where the defendant fails to give adequate warnings or instructions related to non-obvious risks of using the product, through clear language which the average consumer can both see and understand.

**ACTUAL CAUSE.**
Actual cause is present where the defendant’s conduct actually caused harm to the plaintiff.

**But For Test.** The 'but for' test for actual cause will be satisfied, where but for the actions of the defendant, the plaintiff would not have been injured.

**Substantial Factor Test.** Where two defendants act separately, and both of their acts would be sufficient for actual cause, then both defendants will be liable.

**Alternative Causes.** Where there are multiple defendants and acts, the burden of proof is on a defendant to show that they did not cause an injury to the plaintiff.

**PROXIMATE CAUSE.**
A defendant is only liable for consequences which are reasonably foreseeable at the time of plaintiff's injury, and which are not too remote or improbable.

**FORESEEABILITY.**
**Foreseeable Extent of Harm / Eggshell Skull Plaintiff.** The defendant takes the plaintiff as they find them, and will be responsible for greater than normal extent of injury to plaintiff.

**Foreseeable Plaintiff / Transferred Intent.** An unintended plaintiff may still be a proper plaintiff under the doctrine of transferred intent.

**Foreseeable Manner and Type of Harm.** An unusual manner or type of harm will not indicate lack of foreseeability, if the manner or type of harm could have been reasonably expected as a consequence of the defendant's conduct.

**INTERVENING CAUSES OR EVENTS.**
Only superseding intervening events, which are unforeseeable, will break the chain of defendant’s causation. The types of situations in which defendant's causal chain will be broken include: unforeseen criminal behavior or willful wrongdoing by third parties, unforeseen acts of God, or grossly negligent medical care. However, foreseeable intervening causes or events which take place after the defendant’s actions and contribute to the plaintiff’s harm, will not break the causal chain of the defendant. Further, defendant's causal chain will not be broken by independent forces such as regular medical malpractice, additional diseases, or negligent rescuers, as these are all foreseeable occurrences.

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**DAMAGES / PERSONAL INJURY.**
Damages to plaintiff may be shown through a consumer’s property damage, or through plaintiff’s physical injury, due to the actions of the defendant.

**DEFENSES.** The defenses for strict products liability include plaintiff misuse, plaintiff overuse, product alteration, regulatory compliance, comparative negligence and the state of the art defense.

**Plaintiff Misuse or Overuse.** A defendant may have a defense where the plaintiff used a product in a different, or more intense manner, than the defendant intended the product to be used for. A defendant must make design changes to protect against foreseeable misuse by a plaintiff, but a defendant need not make design changes for unforeseen misuse by a potential plaintiff.

**Product Alteration.** A defendant may have a defense where a third party changes the product in an unforeseen way.

**Regulatory Compliance Defense.** The regulatory compliance defense is a partial defense, where defendant complies with state and federal requirements.

**State of the Art Defense.** The state of the art defense is appropriate when a defendant used all of the available knowledge to make the product safe at the time of design and manufacturing of the product, and the dangerous condition of the product was not known by the defendant at the time of manufacturing.

**Comparative Negligence.** Comparative negligence is a possible defense where the plaintiff fails to discover a defect and uses the product.

**Contributory Negligence.** Contributory negligence is not a viable defense to a strict products liability claim.

**Assumption of the Risk.** Assumption of the risk is a complete bar to recovery, and is applicable where the plaintiff assumed the risk of harm of an activity.

**REMEDIES.**
The plaintiff in a strict products liability claim is entitled to recover for property damage, medical expenses, for pain and suffering, for out-of-pocket losses, loss of bodily functions, future damages, and for loss of the ability to enjoy life.
Chapter 6.

WARRANTY
PROFESSOR GOULD'S TEMPLATE FOR WARRANTY.

WARRANTY.

Privity.

Express Warranties.

Implied Warranties.
  Fitness for a Particular Purpose.

Limitations.

Disclaimers.
ESSAY HINTS.

- Warranty relates to goods which are not as buyer expected, plaintiff may have a claim of Breach of Express Warranty, or Breach of Implied Warranty.

- Warranty should be discuss in a strict products liability situation, or where a product does not work as expected by the consumer.
THE DOCTRINE FOR WARRANTY.

WARRANTY. A purchaser or consumer may sue for personal injury and property damage under the theories of strict liability, negligence and warranty.

PRIVITY. At common law, plaintiff must have directly purchased the defective product from the seller. Modernly, this requirement has been relaxed, to include all foreseeable users of the product, which may include family members, household members, or guests. Foreseeable users may sue any defendant in the distributive chain.

EXPRESS WARRANTY. An express warranty includes seller’s express affirmations of fact, and promises delivered through statements, descriptions, or through use of models, which indicate that goods have a specific quality, which they do not have. Affirmations must be more than opinions, puffing or preliminary negotiations.

IMPLIED WARRANTY. IMPLIED WARRANTY OF MERCHANTABILITY. There is an implied warranty of merchantability that goods are of fair or average quality, and fit for the ordinary purpose for which they are to be used. Containers, packages, and labeling must meet a similar standard. If the buyer inspects goods before purchasing, there is no implied warranty related to the defects which should have been detected. Implied warranty does not apply to a casual seller.

FITNESS FOR A PARTICULAR PURPOSE. Fitness for a particular purpose will exist where the buyer relies upon the seller’s expertise to select an appropriate item, and seller knows that buyer is relying on the seller's advice in order to purchase an item. This provision also applies to sellers that are non-merchants.

LIMITATIONS. A limitation on a product may include such things as the recoverable amount for the product, return and refund amounts, or the repair or replacement of goods. A limitation may be used as the sole remedy if the contract states that it is the exclusive remedy. However, there must be a fair amount stated for a breach of contract.

DISCLAIMERS. Disclaimers must be clearly written so that a regular person is capable of understanding the disclaimer. Implied warranty disclaimers must have the word ‘merchantable,’ and must be conspicuous so that a regular person can see it. A disclaimer must not be unconscionable or in bad faith, such as a limitation for personal injuries. A disclaimer must be consistent such that other warranties are not included. A disclaimer must include the qualities and characteristics that are not warranted if the product is for personal, family or household use. Exclusionary language must be specific and must state ‘as is,’ ‘with all faults,’ ‘not merchantable,’ or other such language.
Chapter 7.

DEFAMATION
Defamation.

Defamatory / False Statement.

Concerning Plaintiff.

Libel or Slander.

Publication / Communication.

Harm to Plaintiff.

Defenses and Privileges.

Remedies.

PROFESSOR GOULD'S FULL TEMPLATE FOR DEFAMATION.

Defamation.

Defamatory / False Statement.

Concerning Plaintiff.

Libel or Slander.

Publication / Communication.

Negligent Communication.

Actual Malice for Public Figures.

Private Person in a Public Controversy.

Harm to Plaintiff.

Monetary.

Slander per se.

Defenses and Privileges.

Truth.

Absolute Privileges.

Qualified Privileges.

Remedies.
ESSAY HINTS.

- Defamation is a major issue, and you should spend a considerable amount of time studying it.

- Defamation does not relate to a physical injury, which is one way to differentiate it from other claims such as Negligence and Strict Products Liability. Rather, Defamation relates to more of an emotional and monetary harm, where a person’s reputation is tarnished through the actions of defendant.

- Commonly, the Business / Contract Torts, and the Privacy Torts, will be related to a Defamation claim.

- Consider discussing IIED whenever there is a Defamation issue.
THE DOCTRINE FOR DEFAMATION.

DEFAMATION.
Defamation concerns a false statement by defendant, communicated to at least one other person, that causes harm to plaintiff.

DEFAMATORY / FALSE STATEMENT.
A defamatory false statement tends to impugn the reputation of the plaintiff, and it constitutes more than mere opinion.

CONCERNING PLAINTIFF.
Where a defendant cites more than one person, colloquium requires additional facts to establish that the defendant meant to defame a particular plaintiff.

LIBEL / SLANDER.
Libel. Libel is written defamation, and it tends to be more serious than slander, due to the fact that libel is permanently fixed in a reproducible medium.
Slander. Slander is oral defamation.

PUBLICATION / COMMUNICATION.
The defamatory / false statement must be published, or communicated, to a person who understands the communication. Publication may occur through intentionally wanting the communication to occur, or through unintentional / negligent means. Each additional publication by each potential defendant is actionable.

Actual Malice for Public Officials.
Under *NY Times v. Sullivan*, a plaintiff who is a public official, must show that the defendant communicated the false information either intentionally, or with a reckless disregard of truth or falsity.

Gertz v. Welch / Private Persons Engaged in Public Controversy.
Private persons suing in regards to a public controversy, may recover without a showing of actual malice, all remedies, except presumed or punitive damages.

HARM TO PLAINTIFF.
Plaintiff must show monetary or emotional harm, in order to prevail in a defamation claim.

Slander *per se*.
Under slander *per se*, a plaintiff need not show damages or harm, because the slander is inherently damaging. Slander *per se* applies to statements about plaintiff related to felonious
criminal behavior, immoral acts, loathsome diseases, sexual misconduct or an inability to engage properly in professional duties.

DEFENSES.

Absolute Privilege.
An absolute privilege will exist where the defendant is free to make statements with impunity. Absolute immunity applies to judicial proceedings, government officials and legislators acting within their duties, and communications between a husband and wife.

Qualified Privilege.
A defendant is protected for statements made within the scope of their privilege under a qualified privilege. Such protected statements must be made with the good faith of a reasonable person in similar circumstances. However, there is no privilege for a statement made outside of the scope of defendant's privilege, which would be considered an abuse of the qualified privilege.

Retraction.
A retraction of a defamatory statement is a defense, where the defendant publishes a retraction within a certain time period.

Truth.
Truth is a full defense to a defamation claim, whether or not the defamatory statement was intentional.

Consent.
Consent to a defamation claim occurs where the plaintiff agrees to a public representation of themselves.

Subjective Opinion.
A defendant may have a defense where they prove that their statement about the plaintiff was not an objective statement of fact, but just a subjective opinion. However, where facts justify the opinion, an opinion defense may be invalid.

REMEDIES.
A plaintiff in a defamation claim may recover general damages, monetary damages, damages related to humiliation, damages related to loss of friendship, and damages related to loss of associations in the community. A plaintiff may also recover punitive damages, where the defendant's actions to defame the plaintiff were outside the bounds of civilized society.
Chapter 8.

BUSINESS / CONTRACT TORTS
ESSAY HINTS.

- The business torts are most often applicable in defamation-related essay questions. Often, the person defamed will be a business person, and their ability to carry forth their business interests in the community may be severely hampered by a defamatory statement, that is publicized. Discuss injurious falsehood in such a situation if it seems applicable, along with any other applicable business / contract torts.

- Other situations are more straightforward, such as where the defendant tries to interrupt the business flow of the plaintiff.

- The harm suffered in a defamation context often relates to loss of current, or potential, clients. So, especially look for the business / contract torts within a defamation context.
THE DOCTRINE FOR BUSINESS TORTS.

INJURIOUS FALSEHOOD
Injurious falsehood, is also called trade libel or product disparagement. Injurious falsehood is a claim based on false statements made by defendant about plaintiff’s business or product, in a commercial context. It occurs where the defendant makes false statements, with awareness or reckless disregard of falsity as regards the false statements.

Defenses.

Truth. Truth is a full defense to a claim of injurious falsehood.

Fair Competition. Fair competition is a defense to injurious falsehood, and includes puffing as between two products, where there are no clearly false statements about plaintiff’s business or products.

INTERFERENCE WITH CONTRACT OR BUSINESS EXPECTANCY.
Interference with contract or business expectancy occurs when a defendant, through intentional, wrongful and officious intermeddling, acts to make another person disrupt or breach a current valid contract with the plaintiff.

Defense.

Privilege to Interfere through Justifiable Conduct. A defendant may have a privilege to interfere through justifiable conduct, related to legitimate business competition.

INTERFERENCE WITH PROSPECTIVE ADVANTAGE.
Interference with prospective advantage takes place when defendant’s interference causes plaintiff to lose potential business.

Defense.

Privilege to Interfere. The privilege to interfere is broadly interpreted, and a defendant may interfere if they have an honest desire to procure business, but such a defendant must not employ illegal tactics while procuring business.

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Chapter 9.

PRIVACY TORTS
ESSAY HINTS.

- The privacy torts include misappropriation of plaintiff’s identity, intrusion of seclusion, undue publicity of plaintiff’s private life and false light publicity.

- Privacy torts often occur within a defamation context, because defendant often causes harm through defamation which is amenable to a number of separate claims.

- The privacy torts are minor issues, and can often be discussed quickly, with only minor templating.
PROFESSOR GOULD’S DOCTRINE FOR PRIVACY TORTS.

FALSE LIGHT PUBLICITY.
False light publicity provides protection against harm to the emotional well-being of the plaintiff. False light publicity occurs where a plaintiff is placed before the public eye, through a false representation, which would be considered highly offensive to a reasonable person. The plaintiff must show actual damages such as mental humiliation, and actual malice is needed for a public official.

MISAPPROPRIATION OF PLAINTIFF’S IDENTITY.
Misappropriation of plaintiff's identity occurs where defendant uses plaintiff's name, photo or other representation of the plaintiff, in an inappropriate manner, and for a financial gain or to promote the defendant's business.

INTRUSION OF PLAINTIFF’S SECLUSION.
Intrusion of plaintiff's seclusion occurs where the defendant intrudes upon a private place or private affairs of the plaintiff, in a manner that would be highly offensive to a reasonable person. The plaintiff must show actual damages, such as mental humiliation.

UNDUE PUBLICITY OF PLAINTIFF’S PRIVATE LIFE.
Undue publicity of plaintiff's private life occurs where a defendant publicizes areas of plaintiff’s private life which are not of a public concern, in a public arena which would be highly offensive to a reasonable person. The plaintiff must show actual damages, such as mental humiliation.

Defenses. The defenses to the privacy torts include consent, actual malice for public figures, legitimate news stories and the defamation privileges.
Chapter 10.

MISREPRESENTATION / FRAUD
PROFESSOR GOULD'S TEMPLATE FOR MISREPRESENTATION.

INTENTIONAL MISREPRESENTATION / DECEIT / FRAUD.

Material Misrepresentation.

Scienter.

Justifiable Reliance by Plaintiff.

Direct Damage to Plaintiff.

Opinion as a Defense.

Remedy.
ESSAY HINTS.

- Misrepresentation is a fairly detailed issue. You should spend a considerable amount of time where it is applicable.

- Misrepresentation is also called Intentional Misrepresentation, Fraud, or Deceit. It occurs where the plaintiff is tricked into buying or doing something, that the plaintiff otherwise would not have purchased or done.
THE DOCTRINE FOR INTENTIONAL MISREPRESENTATION / DECEIT / FRAUD.

INTENTIONAL MISREPRESENTATION / DECEIT / FRAUD.
Intentional misrepresentation by a defendant entails fraud through material misrepresentation, along with justifiable reliance by plaintiff, that causes a plaintiff to suffer foreseeable economic damages.

FALSE MATERIAL STATEMENT.
The defendant must present to the plaintiff a false statement of material fact that relates to the basic parameters of the deal.

SCIENTER.
The defendant must act with a culpable state of mind, or scienter. Scienter is present where the defendant knew they were telling a falsity, or were not confident / or did not have a reasonable belief that their statements to the plaintiff were true.

JUSTIFIABLE RELIANCE BY PLAINTIFF.
The plaintiff must take into consideration, and actually rely on, the false statements of the defendant in order to make their purchase. If the plaintiff makes their own analysis of the facts, and relies on their own conclusions, then there is no justifiable reliance.

DIRECT DAMAGE TO PLAINTIFF.
The plaintiff must suffer direct damage, that is due to the material misrepresentation.

OPINION AS A DEFENSE.
Puffing, opinions by non-experts, and other general assertions are not material facts, and thus such statements may be used as a defense to intentional misrepresentation.

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THIRD-PARTY RECOVERY.
If a subsequent transaction of the property that is transferred through intentional misrepresentation of the defendant is foreseeable to the defendant, then a third-party may recover from the original defendant.

REMEDIES.
The plaintiff in an intentional misrepresentation claim is entitled to the benefit of the bargain, that puts the plaintiff into the same position they would have been in if the representation had been true, but this may not be too speculative. Punitive damages are also possible, as well as recission of a contract and recovery through restitution.

NEGLIGENT MISREPRESENTATION.
Negligent misrepresentation exists where the defendant negligently gives plaintiff negligent information, causing the plaintiff to suffer damages, and where the defendant knew that the plaintiff risked financial harm. The defendant does not have the scienter present in intentional misrepresentation. The defendant in a negligent misrepresentation claim is often a business person, who acts with a lack of reasonable care in their fact finding or in their presentation of the facts.

   JUSTIFIABLE RELIANCE BY THE PLAINTIFF. The plaintiff must suffer non-speculative monetary damages due to the plaintiff's justifiable reliance on the defendant's negligent misrepresentation of the facts.

FRAUDULENT CONCEALMENT.
Fraudulent concealment is an active and intentional non-disclosure by a defendant, of a serious defective condition. The remedy for fraudulent concealment is recission of a contract, or the value lost due to the defect.
Chapter 11.

INTENTIONAL TORTS
ESSAY HINTS.

- If a plaintiff is ultra-sensitive, and the defendant is aware of such, then the intent threshold is lowered.

- When there are numerous issues in an essay, the intentional torts should often be discussed with an awareness of the amount of time needed to discuss the larger issues.
THE DOCTRINE FOR THE INTENTIONAL TORTS.

TORT TO TORT AND BETWEEN PARTIES TRANSFER.
For battery, assault, false imprisonment, trespass to land, and trespass to chattels, if a defendant intends to commit one of these torts and commits another tort, or an additional tort, then the defendant will have the requisite intent for the additional tort through tort to tort transfer.

TRANSFERRED INTENT.
Transferred intent occurs where the defendant has an intent to cause an intentional tort to occur to one person, but instead causes the intentional tort to occur to another person. Transferred intent may occur through a transfer of intent from person to person, or from tort to tort. Transferred intent is applicable to assault, battery, trespass to land, trespass to chattels and false imprisonment, but transferred intent is not applicable to intentional infliction of emotional distress or to conversion.

ASSAULT.
Assault occurs where the defendant intends to cause a plaintiff to experience a fearful apprehension of an imminent battery. Assault normally occurs through an interaction of words and actions with some kind of threatening gesture by the defendant. The plaintiff must be aware of the threat posed by the defendant, and the defendant must have the apparent ability to cause a battery.

BATTERY.
A battery occurs where the defendant intends, or takes action with an intent to a substantial certainty, to cause a harmful or offensive touching to another, or something connected with that person. An offensive touching is present when the dignity of a reasonable person would be hurt.

FALSE IMPRISONMENT.
False imprisonment occurs where a defendant intends, or takes action with knowledge to a substantial certainty, to confine plaintiff to a bounded area with physical means or threats, for any length of time, and in which plaintiff has no reasonable means of escape. The plaintiff must be aware of the confinement.
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS / IIED.
Intentional infliction of emotional distress occurs where a defendant engages in extreme and outrageous conduct outside of the bounds of societal appropriateness, while intending or with knowledge to a substantial certainty, that plaintiff will suffer severe emotional distress causing plaintiff to seek medical care for resultant physical manifestations of emotional distress. The speaking of words alone may be sufficient to establish IIED for common carriers or innkeepers. Transferred intent is not applicable to intentional infliction of emotional distress.

THIRD PARTY RECOVERY. A person to person transferred intent may be applicable where the other person is a family member that is present at the scene and within the zone of danger, and is known to be present by the defendant, who acted intentionally or recklessly.

TRESPASS TO LAND.
Trespass to land entails a defendant’s intentional entry onto the land of another through their person, objects, particles, or gases, and without the consent of the plaintiff. Continuing trespass occurs when the defendant stays on the land of another past the defendant's scope of consent to be present on the land. Plaintiff may recover nominal damages for a trespass to land claim, and in a negligent trespass situation the plaintiff must suffer actual damages in order to recover. Good faith by the defendant is not a defense to a trespass to land claim. Trespass to land may occur through flooding, tunneling, or through spreading a fire. Trespass to land will not exist where a defendant is pushed onto the property of another, because defendant did not act in a voluntary manner.

TRESPASS TO CHATTELS.
Trespass to chattels is an intentional interference with the ownership / possession of the personal property of another, which is minor, allowing partial damages to the plaintiff if there is actual damage or a deprivation of the use of the chattel. Good faith of the defendant is not a defense to a claim of trespass to chattels. As compared with conversion, a defendant in a trespass to chattels situation will have intended to exercise less dominion over the chattel, have held the property for a shorter duration, have caused less harm to the chattel, have caused less inconvenience to the plaintiff, and will not entail bad faith by the defendant.

CONVERSION.
Conversion is an intentional, substantial interference with plaintiff’s dominion and control of their personal property by a defendant, allowing possible full damages to the plaintiff. As compared with trespass to chattels, a defendant in a conversion situation will have intended to cause more dominion over the chattel, have held the property for a longer duration, have caused more harm to the chattel, have caused more inconvenience to the plaintiff, and may entail bad faith by the defendant. There is no transferred intent for conversion because the defendant must have intended to exercise dominion over the chattel. Replevin is the proper route for recovery when property is sold to a third person.

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THE DOCTRINE OF INTENTIONAL TORT DEFENSES.

SELF-DEFENSE.
Self-defense is available as a defense when the defendant uses reasonable, non-retaliatory force, against an imminent threat of harmful touching or a false imprisonment. There is no requirement that the defendant retreat if they are in their own dwelling home. Deadly force may be justified to prevent serious bodily harm to one's person.

NECESSITY.
Necessity is available as a defense when a defendant finds it necessary to harm the property of another in order to prevent a larger harm from taking place.

PUBLIC NECESSITY.
Public necessity is an applicable defense where a defendant takes reasonable action that is necessary to prevent a disaster or harm to many. Under public necessity, the defendant is not liable for damages to the plaintiff.

PRIVATE NECESSITY.
Private necessity is an applicable defense where a defendant takes reasonable action that is necessary to prevent harm to the defendant or to a third person. Under private necessity, the defendant is liable for actual damages to the plaintiff.

DEFENSE OF OTHERS.
Defense of others is an applicable defense where a defendant uses reasonable force to protect another from imminent harm. At common law a defendant stepped into the shoes of plaintiff, and was responsible for a mistake in the use of force. Modernly, courts allow a reasonable mistake.

CONSENT.
Consent consists of an express or implied agreement between the defendant and the plaintiff, garnered from the circumstances, for defendant to engage in the activity that caused the intentional tort. However, the defendant may not exceed the scope of any consent given by the plaintiff, and the defendant may not use fraud or duress to induce the consent of the plaintiff.
**DEFENSE OF PROPERTY.**
A defendant may use reasonable, non-deadly force in defense of their real property, as long as the defendant gives a verbal warning, and the defendant takes action only to defend against a trespass to land.

**RECAPTURE OF CHATTELS.**
A defendant may use reasonable, non-deadly force to recover wrongly taken personal property, if the defendant acts immediately in hot pursuit. After a demand to return defendant's property, the defendant may enter the property of another to recover their personal property. A reasonable mistake is not allowed.

**SHOP-OWNER’S PRIVILEGE.**
A defendant shop-owner may detain a customer, in order to conduct a reasonable and timely investigation, if the defendant has a reasonable belief that the customer was shoplifting. A reasonable mistake is allowed.

**ARREST.**
Police and citizens may arrest others for crimes, but only through the use of reasonable force. A citizen may make an arrest if a felony was committed in their presence, but the citizen will bear the risk of mistake for false arrest. Police under the authority of law through probable cause, may make arrests for felonies committed in their presence, and police may be reasonably mistaken about facts of the crime or the identity of a suspect. Deadly force is allowed if a fleeing suspect poses a threat of death, or has just committed a serious felony.

**DISCIPLINE.**
Parents, teachers, and military personnel have a privilege for reasonable discipline, that is legitimately motivated in good faith, and is carried out with a proper purpose, with reasonable force, or through reasonable rules and regulations.

**JUSTIFICATION.**
Where other specific defenses are not applicable, but where defendant acted in a reasonable manner under the circumstances, the defense of justification may be applicable.

**REMEDIES.**
Plaintiff is entitled to general damages, specific damages, punitive damages and nominal damages, for a successful intentional tort claim.
Chapter 12.

NEGLIGENT INFILCTION

OF EMOTIONAL DISTRESS
PROFESSOR GOULD'S TEMPLATE FOR NIED.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS / NIED.

Emotional Distress.

Zone of Danger for Non-Physical Manifestations of Distress.

Actual Cause.

Proximate Cause.
ESSAY HINTS.

- Negligent infliction of emotional distress is often an issue when a family member is present at, or near, the scene where a family member is hurt through defendant’s negligence. Since NIED is a sub-set of a claim of negligence, it is necessary to discuss causation for this claim.

- NIED can be distinguished from intentional infliction of emotional distress, because the defendant in an NIED claim need not act with an intent to cause emotional distress.
THE DOCTRINE FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS / NIED.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS / NIED.
Negligent infliction of emotional distress is a subset of a negligence claim, where the acts of defendant serve to put plaintiff in danger, but plaintiff suffers no actual resultant physical harm. NIED is accompanied by emotional distress with physical consequences of such distress.

   Zone of Danger for Non-Physical Manifestations of Distress.
NIED may be present for non-physical symptoms of emotional distress, when plaintiff is a close family member of another who is fearful of danger to their family member, the plaintiff is in the zone of danger created by defendant and is fearful for the safety of others, or plaintiff observes an accident to another.

ACTUAL CAUSE.
Defendant’s conduct must have actually caused harm to plaintiff.

PROXIMATE CAUSE.
Defendant is only liable for consequences which are reasonably foreseeable at the time of injury.
Chapter 13.

NUISANCE
PROFESSOR GOULD'S TEMPLATE FOR NUISANCE.

NUISANCE.

PUBLIC NUISANCE.
  SUBSTANTIAL HARM FOR CITIZENS.
  PARTICULARIZED DAMAGE FOR INDIVIDUALS.

PRIVATE NUISANCE.
  SUBSTANTIAL INTERFERENCE WITH USE AND ENJOYMENT OF LAND.

DEFENSES.
  SELF-ABATEMENT.
  COMING TO THE NUISANCE.
  CONTRIBUTORY NEGLIGENCE.
  ASSUMPTION OF THE RISK,
  ULTRA-SENSITIVE PLAINTIFF.

REMEDIES.
ESSAY HINTS.

• There are two types of nuisance claims, public nuisance and private nuisance.

• Public nuisance is often found through acts which could potentially harm a number of people. Therefore, look for situations in which plaintiff also has a strict liability in negligence claim for dangerous animals, or ultra-hazardous / abnormally dangerous activities, since such activities will often entail a discussion of public nuisance.

• A requirement of private nuisance is that plaintiff either own or lease the land.
THE DOCTRINE FOR NUISANCE.

NUISANCE.
A private or public nuisance is an unreasonable interference with the use and enjoyment of land.

PUBLIC NUISANCE.
Public nuisance occurs where a defendant substantially interferes with a right of the public to enjoy public land, or with a right common to the general public such as public health, safety or peace. In order to determine whether or not substantial harm to the citizens has taken place due to defendant's actions, courts consider the character of the neighborhood, the nature of defendant's conduct, the proximity of defendant's conduct to the home of the plaintiffs, the frequency and duration of defendant's conduct, the social utility of the defendant's actions, and the harm done to the plaintiffs. A substantial interference will exist where the harm related to the defendant's conduct outweighs the usefulness of defendant's conduct.

PARTICULARIZED DAMAGE FOR INDIVIDUALS.
A public nuisance action is normally brought by a public official, but a private individual may bring a claim based on particularized damage, that differs in kind and not just in severity from the harm suffered by the public.

PRIVATE NUISANCE.
A private nuisance is an intentional, unreasonable and substantial interference with the use and enjoyment of plaintiff’s land. Courts balance the interests of the defendant who has a right to enjoy their land, against the right of the plaintiff to be free from excessive interference in the use and enjoyment of their land. Defendant's conduct will be unreasonable where the gravity of the harm to the plaintiff outweighs the utility of the conduct by the defendant, or where the harm to plaintiff should be compensated because the plaintiff has endured significant interference with the use and enjoyment of their property. Substantial interference will exist where a normal person living in the community would consider defendant's interference as strongly offensive or seriously annoying. The plaintiff in a private nuisance action must own or lease the land.

DEFENSES.
SELF-ABATEMENT. In order to use self-abatement as a defense, first, plaintiff must notify and complain to defendant about the nuisance. If the defendant is non-compliant in ceasing the nuisance, the plaintiff may enter the defendant's property and remove the nuisance, but may only use reasonable force.

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COMING TO THE NUISANCE. The coming to the nuisance defense may be applicable where the plaintiff was aware of the nuisance before they decided to move, and plaintiff still moved to the area.

CONTRIBUTORY NEGLIGENCE. Contributory negligence is a total bar to recovery for plaintiff, and is applicable where the plaintiff contributed proximately to their harm.

ASSUMPTION OF THE RISK. Assumption of the risk is an applicable defense where the plaintiff knows of the risk of a nuisance and comes to the nuisance. If assumption of the risk is applicable, damages may be limited or barred.

ULTRA-SENSITIVE PLAINTIFF. Recovery in private nuisance is not available to a plaintiff with hyper-sensitivity, because the standard used to determine whether a private nuisance exists relates to a person of reasonable sensibilities.

REMEDIES
The remedies for nuisance include compensatory damages for harm already done to plaintiff, and an injunction against future harmful activity by the defendant.
Chapter 14.

LITIGATION

CONSIDERATIONS
ESSAY HINTS.

• Vicarious liability is often present in a situation where an employee takes actions in the interest of the business of an employer, but the actions of the employee operate to harm the plaintiff. Remember to discuss the concept of scope of employment, as often it will be questionable as to whether or not the employee was acting within, or outside of, their scope of employment. Also, look for independent contractor situations, which may indicate that such an employer did not have enough control over the independent contractor, to consider the independent contractor an employee under the vicarious liability doctrine.

• Whenever, there are two or more defendants, remember to discuss the concept of joint liability quickly. Students rarely spot this issue, so you can easily pick up a few points if you spot it and quickly discuss it.
THE DOCTRINE FOR LITIGATION CONSIDERATIONS.

VICARIOUS LIABILITY / Respondeat Superior.
An employer is jointly responsible for the actions of their employees, while the employees are acting within the scope of their employment duties.

EMPLOYEES V. INDEPENDENT CONTRACTORS.
Employees are those that work directly under the supervision of their employer. Independent contractors will be considered as employees only if they do not control the safety considerations, were hired or supervised in a negligent manner, the work is inherently dangerous, there is a joint enterprise, or they perform duties which are non-delegable.

SCOPE OF EMPLOYMENT / FROLIC AND DETOUR.
The employee must be enacting the furtherance of the business objectives of their employer at the time of the negligent act. Trips by an employee from and to their home, are not considered a business interest of an employer. However, the frolic and detour doctrine states that minor trips within the context of carrying out employment duties, will be considered within the scope of business, if they are reasonably foreseeable. Even acts that an employee is forbidden to do, will be seen to be acts taken under the scope of employment if the acts are reasonably foreseeable by the defendant.

WORKER’S COMPENSATION.
Worker's compensation statutes compensate employees for on-the-job injuries, that take place during the normal course of employment. Fault is not necessary to prove.

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JOINT AND SEVERAL LIABILITY.
Where a claim has multiple defendants who are liable for the same indivisible harm, each defendant may be jointly and severally liable to plaintiff.

CONTRIBUTION.
Contribution occurs after percentages for apportionment of fault for each defendant are determined. Where one defendant pays more than their percentage of damages, they may secure reimbursement from another defendant.

INDEMNIFICATION.
Indemnification is a prior agreement between defendants, where one party agrees to pay for the liability of another, should future liability occur. Indemnification is common in products liability situations.

MALICIOUS PROSECUTION.
Malicious prosecution is applicable in either a criminal or a civil context. Where a criminal or civil claim is initiated for an improper purpose, with malice, and with lack of probable cause, the defendant may sue the plaintiff if the claim is later resolved on the merits in favor of the defendant.

ABUSE OF PROCESS.
Abuse of process entails the use of a legal process for an improper purpose that is not related to the legal proceeding.

WRONGFUL CIVIL PROCEEDING.
A wrongful civil proceeding is a kind of frivolous civil claim. A party asserting wrongful civil proceeding, may seek sanctions against the other party.

SLANDER OF TITLE.
Slander of title occurs when title to real property is slandered through the use of a legal process, often in an attempt to wrongfully impair the plaintiff’s ability to sell their property.
Chapter 15.

REMEDIES
REMEDIES.

COMPENSATORY DAMAGES.
Compensatory damages consist of money to compensate the plaintiff for the harm they have suffered.

GENERAL DAMAGES.
General or presumed damages, flow directly from the injury, such as pain and suffering.

SPECIAL DAMAGES.
Special damages are specific and quantifiable damages to plaintiff, such as lost wages.

NO PROOF OF DAMAGES.
Certain claims do not require proof of damage to the plaintiff, such as assault, battery, false imprisonment, trespass to land and defamation _per se._

FUTURE DAMAGES.
Future damages may be awarded, if the future damages were a foreseeable consequence of the tort, but future damages must not be too speculative in nature.

COLLATERAL SOURCE RULE.
Under the collateral source rule, evidence is excluded that is related to receipt of payments from other sources pertaining to the same injury.

MITIGATION OF DAMAGES.
The plaintiff must take reasonable action to mitigate their damages, which is also called the doctrine of avoidable damages. The plaintiff must reasonably seek medical care, or they may have their damages reduced by the amount that the damages could have reasonably been prevented or reduced through prompt medical care.
STATUTE OF LIMITATIONS.
The trigger date for a statute of limitations is the date that the statute starts running, and it normally begins at the time of the injury to plaintiff. However, if the plaintiff is not aware of an injury when the injury first occurs, and the severity of the injury accrues over time, then the trigger date of the statute of limitations begins on the date of the last incident, or when the injury becomes known to the plaintiff via discovery.

TOLLING.
The statute of limitations may be suspended if the defendant leaves the state, the plaintiff develops a physical disability, a child has yet to reach majority, or there is active concealment by the defendant preventing the plaintiff from knowing of the injury.

PUNITIVE DAMAGES.
Punitive damages are also called exemplary damages, and punitive damages serve both to punish the defendant for behavior that is outside the rubric of civilized society, and to serve as a deterrent to others from engaging in the same type of activity as the defendant.

INJUNCTIVE RELIEF.
Injunctive relief necessitates a showing that monetary damages are inadequate. Injunctive relief may be appropriate for claims related to nuisance, conversion, invasion of privacy, or continuing trespass.

MEDICAL EXPENSES.
Medical expenses include payment for medical tests, present medical care, and future medical care.

HEDONISTIC DAMAGES.
Hedonistic damages are damages related to the loss of the ability to enjoy life.

PECUNIARY DAMAGES.
Pecuniary damages are monetary damages, that are often awarded in a defamation claim.

NOMINAL DAMAGES.
Nominal damages are damages that are awarded in the amount of one dollar, in order to symbolically and practically indicate that plaintiff has prevailed in a claim, often for an intentional tort.
CHILD DEFENDANT AND LIABILITY OF A PARENT.
Parents are not vicariously liable for the acts of their children, except:

   Agency / Family Purpose.  Where a child acted as an agent of a parent for a family purpose.

   Facilitator.  Where the parents provided a dangerous instrumentality to the child with knowledge that the child lacked sufficient maturity to handle the situation.

   Supervision / Negligent Entrustment.  Where parents were aware of a dangerous proclivity of the child, and the parents failed to adequately protect or supervise the child.

WRONGFUL DEATH.
A personal representative, a spouse or children may bring a claim for monetary loss of future earnings, loss of companionship, and grief.

IMMUNITY.
Immunity from suit may exist for government entities concerning discretionary acts.  However, there may be operational liability for failure to take reasonable actions, or for reckless actions.

ALIENATION OF AFFECTIONS / CRIMINAL CONVERSATION.
Alienation of affections is a common law claim based on an adulterous relationship.

LOSS OF CONSORTIUM.
Loss of consortium occurs where a spouse claims deprivation of their partner’s love, affection, care and support.

CHILD RECOVERY.
A child may claim deprivation of their parental support and consortium.

PARENT RECOVERY.
A parent may claim deprivation of their child’s consortium.
Chapter 16.

FINAL THOUGHTS
GOULD'S TEMPLATES.

- One of the keys to doing well on timed comprehensive essays, is to know the basic structure of the essays backwards and forwards. Therefore, it is important that you practice writing out the various templates.

- Work on replicating the templates without the rule statements. When you become comfortable with the complexity of issues which have a number of sub-issues, then you will be on your way to understanding the law very well.

ESSAYS.

- After you have memorized the various templates, you should start writing practice essays using the shopping list technique, and the templating technique. You should practice dozens of essays.

- The above two techniques will assist you to spot more issues, and to more fully discuss the issues which you do spot.
CLASSES AND PRODUCTS.

Please make sure you visit my website at:

http://www.GouldsLegalEducation.com

I continually add and revise my classes and products, including online webinar classes, in-person Legal Learning Boot-Camps, rule statement audiotapes, lecture audiotapes, flash cards, multiple choice examination questions, workbooks in many areas of law, and MORE!

If you have any questions, please write my Secretary at:

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Chapter 17.

GOULD'S LEARNING SYSTEM
GOULD'S 3 R'S:

READING, 'RITING, REPETITION

Gould's Learning System is an holistic framework, that embeds legal doctrine into a cognizable cognitive structure, so that students gain a mastery of their legal studies.
GOULD'S SHOPPING LISTS

Gould's Shopping Lists are unique and innovative tools, expertly developed, after many years of study and experimentation. Shopping lists enable students to quickly recall and apply, huge amounts of legal doctrine, in a patterned, reliable and replicable manner.
GOULD'S ISSUE TEMPLATES

Gould's Issue Templates give law students a solid grounding in the substantive law, while providing guidance and direction when writing essay examination responses. Issue Templates enable law students to precisely discuss relevant legal doctrine. In fact, a student that has learned Issue Templates to Automaticity, will find it difficult to forget legal doctrine, once they have learned the doctrine! It is Tenacious Learning.
GOULD'S DOCTRINE INTEGRATION

Physical performance is vital to learning. Military cadets, after initial classroom instruction, must field strip their m-16 rifles, and then quickly re-assemble their rifles. Each cadet must break down their rifle into its smallest physical components, and then put it back together, so that it works correctly and precisely. The cadet learns the names of the components of the rifle, how to assemble those parts correctly, and what happens when the parts are not correctly assembled. Through physical practice, the cadet learns the various interconnections between the different aspects of the rifle.

Likewise, when a law student learns the law in a cognitive manner, and in a physical manner, through Gould's Law Workbooks, they learn that the various rule statements of each subject area are not inert or unconnected. Such students learn that legal doctrine is best learned through an holistic process of Doctrine Integration, through cognitive and physical assembly of Shopping Lists and Rule Statements. Gould's law students master the doctrine of the law, so that they may delve into ever more broad and complex legal waters.
SHOPPING LIST PRACTICE

Just as military cadets field-strip their m-16 rifles daily, you should also physically assemble the Templates and Shopping Lists through the mechanical and practical repetition of the Shopping Lists and Templates. You should build mechanical and practical habits, so that you are armed for the battles called law examinations.

Write out the Shopping List from memory, until you make no mistakes. Then, continue writing out the Shopping List, numerous times, until you are Automatic. Then, practice as needed, to maintain your Automaticity. Use the space below to begin your practice.

MY SHOPPING LIST

___________________________________________

___________________________________________

___________________________________________
TEMPLATE PRACTICE

Just as military cadets field-strip their m-16 rifles daily, you should also physically assemble the Templates and Shopping Lists through the mechanical and practical repetition of the Shopping Lists and Templates. You should build mechanical and practical habits, so that you are armed for the battles called law examinations.

Write out all of the Issue Templates from memory, until you make no mistakes. Then, continue writing out the Templates, numerous times, until you are Automatic. Then, practice as needed, to maintain your Automaticity. Use the space below to begin your practice.

MY TEMPLATES

________________________________________________________________________

________________________________________________________________________

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