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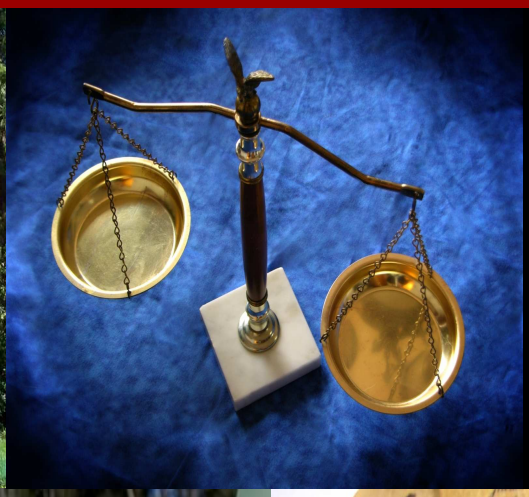

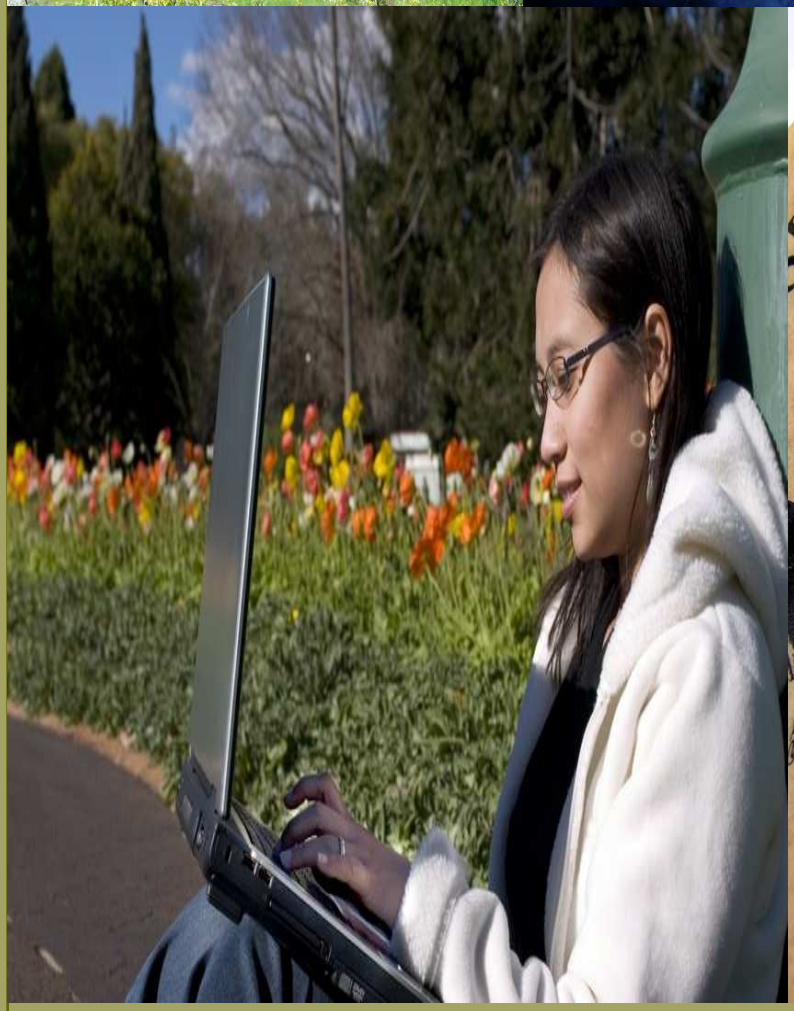

Torts

TORTS

TORTS 101 & 102 Course Schedule

Week #1 – 2

Material	**Subject**
Text	Chapter 1, Introduction to Intentional Torts, Pages 3 - 84
Roadmap Outline	Read and Finish Q & A for Chapter 1 (Pages xxxi - xxxvii and Pages 3 – 78), Pages 1 - 14
CALI	"Intent One: The Use of Intent in Tort" by Robert E. Keeton
CD-ROM	Video Lecture Series: (take notes) -Lesson 1 Intentional Torts -Lesson 2 Battery -Lesson 3 Self-Defense -Lesson 4 False Imprisonment -Lesson 5 Trespass
Brief Secondary Authorities	Submit Secondary Authorities: Restatement 2nd Torts, Sec. 280 (Intent), Pg. 8 Restatement 2nd Torts, Sec. 46(2) (Reckless Harm), Pg. 78 Restatement 2nd Torts, Sec. 21 (Assault), Pg. 64 Blackstone Commentaries (Vol. 3, Pg. 120) Pg. 62-63
Brief 11 Cases – Chapter 1	Vosburg v. Putney (Battery), Pg. 4 Garratt v. Dailey 279 P. 2nd 1091 (Battery), Pg. 7 Mohr v. Williams 104 NW 12 (Implied Medical Consent), Pg. 12 * McGuire v. Almy 8 NE 2nd 760 (Insanity), Pg. 30 Courvoisier v. Raymond 47 P. 284 (Self-Defense), Pg. 34 **

	M'Ilvoy v. Cockran 2 AK Marsh 271 (Implied Force), Pg. 38 *** Kurby v. Foster 22A.1111(Recapture of Chattels), Pg. 46 **** Alcorn v. Mitchell 63 Ill. 553 (Offensive Battery), Pg.

Week #1 – 2 (continued)

Brief Cases (continued)	65 ***** Bird v. Jones (False Imprisonment), Pg. 67****** Wilkinson v. Downtown 2Q.B.57 (Intentional Infliction of Emotional Distress), Pg. 76 Tubervill v. Savage 86 Eng.Rep 684 (Defenses), Pg. 62 *******
Audio	Listen to Tapes 1A & 1B

Professor Comments:

*Mohr v. Williams: (page 12) Mohr also shows the difficulty of specifying the required element of intention, for the references to the violent assault neatly show how far the opinion strays from the ordinary understanding of the situation. The critical point is that, even if the prima facie case is strict, in most medical situations consent is a powerful and complete defense, as it must be if the principle of autonomy and personal integrity adopted by the court are to make any sense. This case is atypical because consent was not present at all, even though the action was in the interest of the patient who was spared the risk of a second operation to which consent would have been in all probability extended. The precise problem here is typically answered today by paragraph 2 of the standard consent form (page 15), which extends the patient's consent from the particular operation to others rendered necessary by unforeseen conditions. Problems of informed consent, postponed until chapter 3, do loom large even after the consent if obtained, as is hinted at in paragraph 8 of the form, whose institution importance should be stressed.

These noted also show that the issue of consent raises a number of important collateral issues in medical contexts. Often it is hard to know whether the consent given was consent to the act that was performed. In some cases there is a question of who can consent for the plaintiff, an issue raised in Mohr by the presence of plaintiff's family physician at the operation.

The emergency rule raises the question of necessity, which is a recurrent theme in the law of intentional torts. The basic idea is that the ordinary rules of autonomy and consent are suspended when there is no opportunity to transact in ways that advance one's own interest. In cases like Cotnam the necessity allows the surgeon to supply services without consent and to charge for them, even if the treatment is not successful. . But the set off is that the higher fees cannot be charged because that would allow the surgeon to exploit the situation, where exploitation is measured against the fees that could be charged in a competitive situation, where price discrimination based on the wealth of the consumer is not possible.

**Courvoisier v. Raymond: (page 34) Courvoisier is not the ordinary self0defense case because the defendant labors under a mistake of fact concerning the plaintiff's intentions. One nice way to approach the case is to compare the legal rule adopted by the trial judge in his jury instruction with the legal rule adopted on appeal. The difference is that the trial court refused to allow a defense based on reasonable mistakes induced by third parties. That ruling is consistent with the basic strict liability position, which uses these mistakes to furnish the grounds for an action over against the third party. Needless to say any such action would be difficult to maintain here, since that third party is a crowd, not a single individual.

Week # 1 – 2 (continued)

Professor Comments: (continued)

On the appeal, however, the court framed the issue so that the liability turned on the use of negligence within a system of intentional torts, by asking whether someone who has intentionally hurt another has unreasonably exceeded the scope of a permissible justification. It is worth asking the students to point out which facts cut in which direction: did the Sheriff give a clear signal? Did it matter that the defendant was somewhat disoriented? That there was a previous incident of which the defendant knew and the plaintiff did not?

My own view is to accept the self-defense defense against the so-called innocent aggressor. It is the usual hard choice between one party, the aggressor, has done something, while the other fellow, the target aggression, has done nothing at all.

It is the same kind of comparison made for holding insane people liable in McGuire. Now the issue surfaces with plaintiffs, not defendants, but it could be resolved the same way.

***M'Ilvoy v. Cockran: (page 38) Here the defense of property is accorded a lower level of protection than the defense of the person, in part because property may be better protected by money damages than life and limb. The greater the adequacy of the legal remedy, the greater the reluctance to permit self-help.

****Kirby v. Foster: (page 46) The case asks the question, when may force be used to recapture money or chattels taken by the plaintiff? The line that is drawn here accepts that hot pursuit may be used where things are taken by force, and even allows force in response to fraud. But it rejects the use of force by the defendant where he voluntarily parts with his property, which is then retained by the plaintiff against the defendant's will. The rule makes good sense because it is far easier for the plaintiff to protect himself in this last situation, especially with an employee with whom he has continuing arrangements, and of whose dissatisfaction he is aware.

Note there is still the possibility of criminal sanctions against the employee for wrongful conversion, and of course the tort right of action for the same offense.

Page 49, Note 2: Another consideration that weighs in these cases, especially those by landlords for repossession of rented premises, is that private acts of force may invite third party intervention. As with other forms of self-help, the need for the repossession remedy is reduced by the development of the public police force. Even so, the Minnesota decision in Berg v. Wiley may go too far because it reduces to a nullity the class of peaceable evictions. So long as the tenant is not present when the locks are changed, the risk of direct confrontation is sharply reduced. That should not be regarded as a mere happenstance, but as a critical element for justifying the defendant's conduct. Of course if the eviction were illegal under the lease, then the tenant should have a clear remedy against the landlord, not only to regain possession of the premises for the duration of the term, but for interim damages as well.

*****Alcorn v. Mitchell: (page 65) The case presents the very simple situation where one person deliberately spat in the face of the other, in a courthouse, at the conclusion of a trial. Here it is quite clear that without the deliberate action the "physical" harm would be captured under a deminimus rule.

But the deliberate nature shows that the actions were designed to show disrespect and to invite force by way of retaliation. It is also of no little consequence that the action took place in a court

Week # 1 – 2 (continued)

Professor Comments: (continued)

room, where the seriousness of the place and the occasion revealed the contempt and disrespect that the defendant displayed both to the plaintiff, and the judicial process. Setting counts for a lot with dignitary torts. The repeated stress on the mental element – malice is a long way from the refined intention to do the act complained of in Vosburg v. Putney – shows the power of this dignitary element.

******Bird v. Jones: (page 67) The case involved the blocking of a right of way, which though actionable, was not false imprisonment because the plaintiff could return freely from whence he had come. In an odd sense, therefore, the case turns on the choice of the form of action. In the usual case of obstruction the plaintiff gets hurt, by tripping over the obstruction. In this instance he mitigates his loss by stopping.

A general action on the case should suffice, and the entire dispute here should evaporate after the abolition of the forms, as under the modern state and federal rules of procedure. Denman, J., recognizes the problem in his dissent, but is appalled at the cost of a new and separate writ to remedy what was a deliberate wrong conducted solely for the defendant's profit.

Page 69, Note 1: The initial question in false imprisonment actions is whether the defendant imprisoned or confirmed the plaintiff – the point on which Bird ultimately turned. Whittaker comes closer to the line because of the appreciable limitations on the plaintiff's freedom of motion. When she is isolated at sea, it looks like a short-term imprisonment.

Even when given her partial freedom to move about on land with an escort, the limitation on her liberty should still be actionable, although the damages would be less. (Suppose she were kept in a cage that moved about freely?) Obviously as the restrictions on liberty are reduced, the proper metaphor becomes one of exclusion rather than one of imprisonment.

*******Tuberville v. Savage: (page 62) This case raises the question of the conditional assault, but does so in a procedural context that is often difficult to students to grasp. It is critical to note that the conditional threat was made not by the defendant in this case but by the plaintiff. The issue was raised as an affirmative defense to an action for assault, battery and wounding (especially the last).

The implicit logic of the case is that if the plaintiff did assault (i.e. threaten the use of force) the defendant, then the defendant has a good defense to an otherwise valid prima facie case.

Blackstone Commentaries: (page 62) This note material is designed to bring the law of assaults closer to the present day. Allen v. Hannaford is important because it makes clear that threats of force are not made randomly but are used to get one's way in a dispute. If threats may be made without hindrance, then there is an open invitation to violence, which will occur in some instances. Threats will often be credible only if the defendant is capable of carrying them out, which, when done, brings violence in their wake. In this instance, moreover, where the plaintiff does not know that the gun is unloaded, the right response still is to treat the conduct as wrongful: otherwise, the defendant can get her way by the threat because it is just too risky for the plaintiff, who does not know the truth, to call the bluff.

Week # 1 – 2 (Continued)

The harder question, asked in the notes, is what should be done when the plaintiff knows the gun is empty. One response, congenial to realists, is that many people have been killed and maimed by guns "known" to be empty.

The threat is potent even when that knowledge is indubitable. In addition, if someone is prepared to point an empty gun at you, it is at best an antisocial act, and as such may well portend a willingness to commit other kinds of violence against the person, say by using the gun as a club, or by an ordinary beating. It is very unlikely that any of us are indifferent to having any gun pointed in our face, even if unloaded.

If the amenities of life are impaired, then the prima facie case seems appropriate. References: "Cases & Materials on Torts" by Richard Epstein (Pages 1-5 to 1-27)

Week # 3 – 4

Material	**Subject**
Text	Chapter 1, Intentionally Inflicted Harm, Pages 3-84
Roadmap Outline	Read and Begin Q & A for Chapter 1, Pages 1 - 14
CALI	"Intent One: The Use of Intent in Tort" by Robert E. Keeton (review again including any assignments)
CALI	"Intent Two: Computer Aided Intent Questions" by Robert E. Keeton
CALI	"Intentional Torts" by Douglas D. McFarland
CD-ROM	Video Lecture Series #1-#20 (take notes using freeze frame in Windows Media Player)
Audio	Listen to all Tapes (take notes on 5 X 7 cards)

End of Week #4

Study Record	Study Record Due (include any Roadmap Assignments)

Week # 5 – 6

Material	**Subject**
Text	Chapter 1, Intentionally Inflicted Harm, Pages 3-84
Roadmap Outline	Read and Finish Q & A for Chapter (Intentional Torts), Pages 1 - 14

Week # 7 – 8

Material	**Subject**
Text	Chapter 2, Negligence & Strict Liability, Pages 85–152 (Overview)
Roadmap Outline	Read and Finish Q & A for Chapter 2, Pages 81 – 109 & Pages 257 - 267
CD-ROM	Video Lecture Series: (take notes) -Lesson 11 Negligence -Lesson 12 Proximate Cause -Lesson 13 Duty -Lesson 14 Breach -Lesson 15 Cause in Fact -Lesson 16 Defenses -Lesson 17 Vicarious Liability -Lesson 18 Strict Liability -Lesson 19 Strict Liability

Week # 7 - 8 (Continued)

Brief 6 Cases – Chapter 2	➡ The Thorns Case Y.B. Mich. 6 Ed. 4 (Trespass), Pg. 86* ➡ Weaver v. Ward 80 Eng.Rep. 284 (Trespass), Pg. 92** ➡ Scott v. Shepherd 96 Eng.Rep. 525 (Trespass), Pg. 98*** ➡ Brown v. Kendall 60 Mass. 292 (Strict Liability), Pg. 106**** ➡ Fletcher v. Rylands (3 cases) 159 Eng.Rep. 737 (Strict Liability), Pages 111-123 ➡ Stone v. Bolton (2 cases) 1 K.B. 201(Strict Liability),

	Pages 138-148
Audio	Listen to Tapes 2B, 3A, 3B, 4A & 4B

Professor Comments:

*The Thorns Case: (page 86) The Thorns case contains a wonderful collection of short hypothetical cases which illustrate the breadth of the old trespass action, including its application in cattle and water cases.

The actual choice between negligence and strict liability is raised only in an oblique fashion here, because the facts indicate that the entrance was deliberate, so that the question was whether the defendant could justify the entry by showing that he needed to recover the thorns which had fallen on the plaintiff's land after the defendant had cut them.

A conditional privilege solves this problem with the judgment for the plaintiff but leaves open the question of whether all or some accidental harms committed during recovery are compensable. (The same anti-holdup point also explains why in cattle trespass cases the landowner is limited to amends for actual damages).

**Weaver v. Ward: (page 92) The case brings up the familiar themes.

There is an initial question of assumption of risk because the parties were all members of the same band. But that point was put aside (just as it was in Vincent) and only three very narrow defenses were allowed. First, there is the general denial ("as if a man take my hand by force").

Next, there is something akin to contributory negligence, ("the plaintiff ran across his piece when it was discharging"), which is consistent with Arnold's view. Finally, there is a residual category of inevitable harms, which in the original does not read like a backhanded way of saying that the want of negligence is a defense.

***Scott v. Shepherd: (page 98) The sequence of action amongst the multiple parties is again critical. My own view is that the plaintiff can sue anybody, and each intermediate party in the chain has actions in principle against those further back, so long as their own conduct was constrained by the prior conduct of these earlier actors. Shepherd is on this view the obvious defendant, and all judges agree with this on the merits, even though Blackstone alone thinks that trespass is the wrong action.

The trickiness in selecting the form of the action rests in the difference between the stone and the explosive. The stone has only motive force, so once it comes to rest, only the party who then picks it up and throws it is responsible for the damage attributable to its motion. So too with a soccer ball that is kicked.

Week # 7 – 8 (continued)

Professor Comments: (continued)

But when there is an explosive force, then the risk to nearby parties is enormous even if the squib is at rest. Trespass seems proper if we look to explosions; case if we look to motion; hence the tension.

****Brown v. Kendall: (page 106) Shaw's opinion is notable for two reasons:

First it sets the stage for 100 years of American thought. Second (as Harry Kalven loved to point out) it offers no reasoned defense on behalf of its preferred negligence rule. Shaw does not tell us why this particular dispute could not be decided by giving the plaintiff a strict cause of action, coupled with a possible assumption of risk defense, based upon the plaintiff's decision to move himself into the line of fire during the dogfight. Nor at any point does he explain why contributory negligence should be an absolute defense even if negligence is the basis of liability.

Rather it looks as though he thinks that all ties go to the defendant, such that proof of contributory negligence and negligence means that both are wrong, so that the defendant prevails. The splitting of the loss was not discussed even though the admiralty rules were well established at the time.

Shaw's opinion is also instructive because it shows two different efforts to determine the proper scope of the inevitable accident defense.

The trial judge senses that the defense is more stringent that a simple showing of "no negligence" by the defendant.

The trial judge tries to handle the point by imposing a heavier burden of proof on the defendant where his conduct was not a "necessary" act.

Shaw simply rejects this maneuver in favor of the modern interpretation, that inevitable accident means a want of negligence raised as an affirmative defense.

End of Week #8

Study Record	Study Record Due (include any Roadmap Assignments)

Week # 9 – 10

Material	**Subject**
Text	Chapter 3, Negligence, Pages 153 - 307
Roadmap Outline	Read and Finish Q & A for Chapter 3
CD-ROM	Video Lecture Series: (take notes) -Lesson 11 Negligence -Lesson 12 Proximate Cause -Lesson 13 Duty -Lesson 14 Breach -Lesson 15 Cause in Fact -Lesson 16 Defenses -Lesson 17 Vicarious Liability -Lesson 18 Strict Liability -Lesson 19 Strict Liability
Brief Secondary Authorities	Submit Secondary Authorities: Restatement 2nd Torts, Sec. 328, Pg. 284 ➡ Restatement 3rd Torts, Sec. 12 (Negligence Per Se), Pg. 247
Brief 7 Cases – Chapter 3	Vaughan v. Menlove 132 Eng.Rep. 490 (The Reasonable Man), Pg. 155* Breunig v. American Family Insurance Co.(Liability

Week # 9 – 10 (continued)

Brief 7 Cases – Chapter 3 (Continued)	of the Insane), Pg. 170** Denver & Rio Grande R.R. v. Peterson 69 P. 578 (Damages), Pg. 177*** Blyth v. Birmingham Water Works 156 Eng.Rep. 1047 (Strict Liability), Pg. 179**** Andrews v. United Airlines 24 F. 3rd 39 (Common Carrier), Pg. 197***** Ross v. Hartman 139 F. 2nd 14 (Negligence), Pg. 257 Pakora v. Wabash Ry. 292 US 98 (Judge and Jury), Pg. 271

Professor Comments:

*Vaughan v. Menlove: (page 155) This key early decision rejects the subjective standard in negligence cases. The result is somewhat ironic because criminal, or at least gross negligence, could be found on the facts of the case, and the opinion of Vaughan J., although far less well known than Tindal C.J.'s, expresses the evident frustration with the

defendant's conduct by noting that the instructions as given were, if anything, far too favorable for the defendant: someone who says that he does not care about the risks he creates for others because he has insurance is the paradigmatic illustration of moral hazard and reckless behavior.

**Breunig v. American Family Insurance Co.: (page 170) with facts like this, who needs the law? The case illustrates, like Hammontree, how negligence rules can lengthen the relevant causal chain. Breunig also raises the question of whether the reasons for holding the permanently insane liable for their torts apply with equal force to the temporarily insane. The innocent person s should be protected from a party who is temporarily insane as much as she is protected from one who is permanently insane, so the first factor mentioned by Hallows C.J. seems to apply to both cases. The second factor is harder to make out in temporary insanity cases because the lack of forewarning makes it difficult for others to take precautions against the harm.

But the difference may be a matter of degree: on the facts of this case there were enough irregularities in Mrs. Veith's conduct to induce her in her lucid moments to take precautions; when she could not. Finally, if anything, the fear of false claims, the last point, is far greater with temporary insanity where the so-called insane condition has never been documented and may disappear by trial.

***Denver & Rio Grande R.R. v. Peterson: (page 177) The case states the general rule, for which an economic analysis is given by Professors Abraham and Jeffries, with rebuttal by Professor Arlen. The key point of Abraham and Jeffries is that the level of wealth possessed by any defendant does not affect the marginal incentives to take care. Whether one is rich or poor, the right question to ask is how much will be lost if certain precautions are taken, and what is the expected value of the fain, here in the form of reduced anticipated liability. All persons will make that same comparison regardless of their net worth, which is why wealth, however relevant to the question of solvency, should not influence the choice of care level. Note also that even under a strict liability regime the defendant's private calculations will be governed by the same logic. All that differs is the distributional consequences by requiring payment

Week # 9 – 10 (continued)

Professor Comments: (continued)

for accidents which could not be avoided by taking reasonable care.

****Blyth v. Birmingham Water Works: (page 179) The case is best known for Baron Alderson's formulation of the rule of reasonable care, but it is also of interest on its facts. There are two possible sources of liability: either from possible defects in the original installation of the pipes or from the subsequent failure of the Water Works to do something to correct the situation once the accumulation of ice and snow became evident. On the first point, negligence is easy to deny, given the necessity of providing water and the want of any superior technology. Indeed, even on a strict liability theory the defendant has a strong likelihood of winning on the defense of the act of God, a result hinted at in the last sentence of Alderson's opinion which called the result "an accident".

The case is, however, more attractive for the plaintiff on the second count. Here the duty to repair after the risk becomes apparent is more easily cast upon the defendant than upon the plaintiff for at least two reasons. First, the defendant is a public utility charged with a various affirmative obligations.

Second, it is far easier for the defendant to eliminate the risk.

There are many potential plaintiffs, and only a single potential defendant, and there is a real danger that if this plaintiff took precautions he would damage the integrity of the entire system and expose himself to the needless risk of trespass action, and his neighbors to a further risk of flooding or a disruption of essential services.

On its facts, the case would likely be decided for the plaintiff today. The good Samaritan rhetoric does not work powerfully for institutional defendants that have already undertaken common callings, and cannot claim any sanctuary of nonfeasance.

*****Andrews v. United Airlines: (page 197) This simple fact pattern offers a useful insight into the variations on the Hand formula. Although the formula has been touted as a universal solvent for negligence cases, it meshes uneasily with the heightened standard of duty that some courts place on common carriers.

The impulse for the higher duty was originally that customers had no other placed to go than to the common carrier for transportation. The implicit claim (less true today) was that the carrier had a monopoly position, for which the higher standard of care was thought to be some offset. Here the Kozinski judgment has its usual humor, but query is there anything more than the warning that could be done to make the process safer?

I am very uneasy about allowing a jury to find negligence without having any clear sense wherein that negligence consists. And the strict liability position seems to be odd here because at least for the question of loading and unloading bins, the real control is with the passengers, not with the airline, once the warning has been given. It seems therefore that the higher standard for common carriers drives this result, which would come out the other way under the Hand formula.

Week # 11 – 12

Material	**Subject**
Text	Chapter 2, Negligence & Strict Liability, Review Pages 85–152 & Pages 153 – 306

Week # 11 – 12 (Continued)

Roadmap Outline	Review Q & A for Chapter 6, Pages 81 – 108 & Chapter 15, Pages 257 - 267
CD-ROM	Video Lecture Series: Review Lessons #11-#19 (review notes)
Brief 6 Cases – Chapter 2	Review Case Briefs listed for Week #7 - 8
Audio	Review Tapes 2B, 3A, 3B, 4A & 4B
Professor Comments: Review Professor Comments from Week # 7 - 8	

End of Week # 12

Study Record	Study Record Due (include any Roadmap Assignments)

Week # 13 - `14

Material	**Subject**
Text	Chapter 3, Negligence, Pages 153 - 306 Chapter 4, Plaintiff's Conduct, Pages 307 - 384
Roadmap Outline	Review Q & A for Chapter 6, Pages 81 – 108 & Chapter 15, Pages 257 - 267 Read and Begin Q & A for Chapter 4
CALI	"Negligence" by Douglas McFarland
CALI	"Sprague Case: Child Injury in Torts Law" by Robert E. Keeton
CD-ROM	Video Lecture Series: Review Lesson #11 - #19 (review notes)
Brief Secondary Authorities	Submit Secondary Authority: Restatement 2nd Torts Secs. 479 & 480 (Last Clear Chance), Pg. 333
Brief 1 Case – Chapter 3	Ybarra v. Spangard 154 P. 2nd 687 (Conspiracy of Silence), Pg. 297

Brief 2 Cases – Chapter 4	Butterfield v. Forrester 103 Eng. Rep. 926 (Contributory Negligence), Pg. 308* Fuller v. Illinois Central R.R. 56 SD. 783 (last clear Chance), Pg. 331**

Professor Comments:

"Res Ipsa Loquitor 3 Prong Test": "the thing speaks for itself"

1. Accident must be of a kind that does not ordinarily occur in the absence of someone's negligence.
2. It must be caused by an agency or instrumentality within the exclusive control of the defendant.
3. It cannot be caused by any voluntary action on the part of the plaintiff.

(see generally) Pages 290-292

Res Ipsa Loquitor: (page 281) For a subject that speaks for itself, res ipsa has generated an enormous amount of litigation and confusion. One way to understand these cases is to ask first, what is the legal standard of liability, and second what states of affairs give rise to liability and to no liability. Viewed this way, res ipsa loquitor is not only a standard of proof in negligence cases, but a more general mode of proof (applicable with modification as will in strict product liability actions, see chapter 9, pages 769-774) which only demands that the plaintiff prove by a

Week #13 – 14 (continued)

Professor Comments: (continued)

preponderance of evidence that the harm could not have come about in a way for which the defendant escapes liability.

In dealing with the issue generally, I favor setting out the various kinds of causes, by source: Plaintiff's conduct, third party conduct, defendant's conduct and act of God. The next question is which third parties is the defendant responsible for, which invokes debates over the extent of vicarious liability beyond the employer-employee relationship. And then when it is back to the defendant, directly or vicariously, the negligence question comes if that is made the substantive requirement by the positive law.

*Butterfield v. Forrester: (page 308) This is the first case in which the issue of contributory negligence enters the lists as a separate doctrine.

The precondition for its emergence is the existence of dual causes (the speeding and the pole across the road), both of which were operative at the time of the accident. Bayley's position reflects the older view, that contributory negligence need not be an issue, because "the accident appeared to happen entirely from his [the plaintiff's] own fault".

His position has the minor defect that it is wrong on the facts, given that the defendant has blocked the street with a pole that may (at twilight) have been difficult to detect, perhaps another latent defect. Ellenborough's opinion sees that the conduct of both parties must be taken into account in reaching a decision, and he than argues that the one being at fault will not excuse the other. He does not explain why this justifies a total bar to recovery, for then the formula, like comparative negligence or admiralty is considered.

**Fuller v. Illinois Central R.R.: (page 331) This case illustrates the classic pattern of last clear chance; and open road and an inattentive engineer. One of the reasons why the record does not explain what was going through the head of the engineer is that there probably wasn't much of anything happening at all, which is why accidents of this sort take place. Even so, this opinion is better known for its florid prose –prose that needs no embellishment here.

Week # 15 – 16

Material	**Subject**
Text	Chapter 4, Plaintiff's Conduct, Pages 307-384 Chapter 5 Multiple Defendants, Pages 385-432
Roadmap Outline	Read & Finish Q & A for Chapter 7 & 8, Pages 109 - 138 Read & Finish Q & A for Chapter 9, Pages 139 - 152
CALI	"Negligence" by Douglas McFarland
CALI	"Sprague Case: Child Injury in Torts Law" by Robert E. Keeton
CD-ROM	Video Lecture Series: Review Lessons # 11 - #19

Brief Statutes	Federal Employer's Liability Act 45USC53
Brief 2 Cases – Chapter 4	Lamson V. American Axe & Tool Co. 58 N.E. 585 (Assumption of Risk), Pg. 341* Li v. Yellow Cab Co. of California 532 P. 2nd 1226 (Comparative Negligence), Pg. 362

Week # 15 – 16 (continued)

Brief 2 Cases – Chapter 5	American Motorcycle Assoc. v. Superior Court (Joint & Several Liability), Pg. 392** Ira S. Bushey & Sons Inc. v. United States (Vicarious Liability), Pg. 413***
Audio	Listen to Tapes 2B, 3A & B, 4A & B

Professor Comments:

"Imputed Contributory Negligence": The doctrine of imputed contributory negligence means just what it says. The negligence of one party is "imputed" or charged to the plaintiff, where it acts to bar or diminish recovery, as the case may be. The doctrine had its roots in the nineteenth century, when the negligence of the parent was imputed to a child (otherwise incapable of contributory negligence) to bar a recovery under the then applicable rule that treated contributory negligence as a total defense. The rule has fallen into disfavor today, and its domain continues to shrink. The reaction started toward the end of the nineteenth century with the notable opinion of Lord Herschell in the following case.

*Lamson v. American Axe & Tool Co.: (page 341) Lamson illustrates the application of the doctrine in employment contexts before the adoption of worker's compensation. Note first that the case is brought under the Employer's Liability Act, which precluded any common employment defense. In addition, Holmes takes the view that the continuation of work in face of the risk, when there is a contract at will, marks an assumption of risk by the plaintiff.

**American Motorcycle v. Superior Court: (page 392) the first issue in AMA was whether the Li doctrine precludes the application of the traditional joint and several liability position toward the original plaintiff. Here the argument that it should do so has considerable force.

The necessary presupposition of any comparative negligence doctrine is that it is in principle possible to isolate individual causal contributions for indivisible harm.

If that can be done between plaintiffs and defendants, then it can be done among defendants as well. On this view, it follows that holding any single defendant responsible for the whole harm is like holding A, who inflicts one harm, responsible for the harms that B inflicts on a separate occasion.

On the question of the apportionment of liability among codefendants, there is an evident tension between the flexible comparative negligence rules of Li and the rigid statutory apportionment under the 1957 Act. The court's approach does not quite repeal the act but it comes perilously close to doing so by expanding the idea of "equitable" indemnity.

***Ira S. Bushey & Sons, Inc. v. United States: (page 413) The questions of vicarious liability are among the most pervasive in the law, and it is useful to point out from the outset that every case against an institutional defendant implicitly depends upon the smooth application of the vicarious liability principle.

Bushey represents one of the occasional cases in which the application of that principle is problematic on its facts. As a basic matter, it is clear that since the employer does not own the employee, some distinction must be made between those which are done on the employer's account.

The "arising out of and in the scope of employment" requirement (a phrase that is critical in workers' compensation cases as well) is designed to discharge that sorting function. The maxim works very well (to provide for liability) when the work from

Week # 15 – 16 (Continued)

Professor Comments: (continued)

which the harm arises is done for the benefit of the employer, even if the means chosen are against the employer's explicit instructions.

End of Week #16

Study Record	Study Record Due (include any Roadmap Assignments)

Week # 17 – 18

Material	**Subject**
Text	Chapter 6, Causation, Pages 433 - 546
Roadmap Outline	Read & Finish Q & A for Chapter 7, Pages 109 - 122
CD-ROM	Review Video Lecture Series: Lessons # 11 - #19
Brief 6 Cases – Chapter 6	New York Central R.R. v. Grimstad 264 F. 334 (Cause in Fact), Pg. 435 Kingston v. Chicago & N.W. Ry. 211 N.W. 913 (Proximate Cause), Pg. 461 Summers v. Tice 199 P. 2nd 1 (Joint Tortfeasors), Pg. 468 Palsgraf v. Long Island R.R. 162 N.E. 99 (Foreseeability), pg. 501* Mitchell v. Rochester Railway 45 N.E. 354 (Emotional Distress), Pg. 530 Dillon v. Legg 441 P. 2nd 912 (Emotional Distress), Pg. 534
Audio	Listen to Tapes 2B, 3A & B, 4A & B

Professor Comments:

*Palsgraf v. Long Island R.R.: (page 501)The case has as many views as there are commentators, so a few short remarks will have to suffice.

First, how could the blast have thrown the scales without causing serious physical injury to other people closer to the explosion, like the conductor or the passenger carrying the explosives:

Second, do we treat this as a stranger or a consensual (common carrier) case? If the former, then there could be a strict liability rule. If the later, then there may be a stronger case for an exception for natural events or third party misconduct.

Third, Palsgraf has generated far more academic debate than litigation, perhaps because it (like Bolton v. Stone) deals on its facts with very low probability events, which by definition have little institutional importance.

Week # 19 – 20

Material	**Subject**
Text	Chapter 7, Affirmative Duties, Pages 547 - 628
Roadmap Outline	Read and Finish Q & A for Chapter 10, Pages 153 – 172 & Chapter 13, Pages 211 - 244
Brief Secondary Authorities	Submit Secondary Authorities: Restatement 2nd Torts Sec. 324, Pg. 564 Restatement 2nd Torts Sec. 339, Pg. 571
Brief 3 Cases – Chapter 7	Buch v. Amory manufacturing 44A. 809 (Duty to Rescue), Pg. 548*

Week # 19 – 20 (continued)

Brief 3 Cases – Chapter 7 (Continued)	Coggs v. Bernard 92 Eng.Rep. 107 (Gratuitous Undertakings), Pg. 589** Tarasoff v. Regents of University of California 551 P. 2nd 334 (Psychiatrist Duty to Disclose), Pg. 618***

Professor Comments:

*Buch v. Amory Manufacturing: "The Good Samaritan" (page 548) The case illustrates the classical common law attitude toward the good Samaritan problem; there is no duty to rescue a stranger whose peril is in no sense your own making.

The court takes the position that there is a "broad gulf" between misfeasance and nonfeasance, which is not an artifact of language, nor of passing social convention. One question is why does this inquiry of duty to strangers arise at all here in the context of trespassing children. The parties are not strangers, and the equipment owned and operated by the defendant poses some peril to the plaintiff.

Here it is critical to note that the allegation of negligence which made the good Samaritan question relevant was the failure to eject the child from the premises, and not the poor maintenance of the equipment. Given that difference, the court is right to treat this case as one that does fall clearly on the nonfeasance side of the line.

The comparison to the stranger case was used by the court to make this trespasser situation as a fortiori case of no liability for the defendant.

If there is no duty to rescue a helpless stranger, then how, one can ask, can there be a duty to rescue a person who has committed a wrong against you?

That the wrongdoer may be a child cannot be decisive. In principle, the child could be held in tort for the consequences of his trespass. But even if infancy is some kind of an excusing condition, it only places the child back in the position of a stranger, where again the no duty of rescue rule would apply.

The attack on this court's decision comes from a very different quarter and concentrates upon the various costs of the no duty rule in these two situations, that is trespassers and strangers. One objection to a universal duty of rescue is that it is impossible to determine who owes the duty to whom: which of the 50 people on the bridge has the duty to throw the rope? Here with the single landowner / employer, the source of that duty is clear and the costs of its discharge are lower.

There is thus a utilitarian counterweight to the very powerful individualistic arguments of Buch. Note (and the point is controversial) that I do not think that the decision in Buch can be attacked on the ground that the line between misfeasance and nonfeasance is itself uintelligible.

**Coggs v. Bernard: (page 589) Here we have one of the easiest of the special relationship cases, arising out of a bailment between two parties, where the only duty cast upon the defendant is to guard against his own misconduct.

The difficulties with the case stem from the bargain theory of consideration accepted at common law.

The Roman system, with its explicit recognition of gratuitous contracts, did not need to develop a tort theory to handle the bailment cases.

Faced with the structure of the English law, Holt simply finessed the consideration doctrine ("the owner's trusting him with the goods" is not consideration under orthodox contract doctrine) and thus adopted, in essence, the Roman position.

Week # 19 – 20 (Continued)

Professor Comments: (continued)

The bargain requirement should, in principle, make a difference on the question of executory enforcement. But it should not, and does not, negate a duty after the delivery of the goods has been made. This result is, in effect, duplicated under the estoppel notions of modern American contract law because the reliance is manifest given that the plaintiff has temporarily and voluntarily relinquished possession to the defendant.

***Tarasoff v. Regents University of California: The California cases after Tarasoff have tended to limit its scope. There is no duty of private foundations to hold persons in custody or to warm, and there may be no duty to warn if the person threatened is not identified. The influences of Mosk's brief concurrence are strong here, and the new provision in Cal. Civ. Code, Sec.s 43.92, stresses the importance of the identification (by name or close proxy) of an identifiable victim,

And the ability to turn the matter over to a law enforcement agency may make good sense if that agency develops some continuous expertise in handling problems of this sort.

One problem with Tarasoff is that an individual psychiatrist may not face this problem more than once in a blue moon, and hence have no sense of the norms for dealing with it. The law enforcement organization has greater control over the options, and can accumulate more experience.

Week # 21 – 22

Material	**Subject**
Text	Chapter 8, Strict Liability and Chapter 9, Products Liability, Pages 629 - 926
Roadmap Outline	Read & Finish Q & A for Chapter 15 & 16, Pages 257 - 292
CD-ROM	Video Lecture Series: Review Lessons # 11 - #19
Brief 5 Cases – Chapter 8	Moore v. The Regents of the University of California (2 Cases) 249 Cal.Rptr.494 (Conversion), Pg. 630 Baker v. Snell 2KB 825 (Animals), Pg. 639

	Garcia v. Sumrall 121 P.2nd 640 (Fencing In v. Fencing Out), Pg. 645 Spano v. Perini Corp. 250 N.E. 2nd 31 (Ultrahazardous Activities), Pg. 647 Rogers v. Elliott 15 N.E. 768 (Nuisance), Pg. 684
Audio	Listen to Tapes 2B, 3A, 3B, 4A & 4B

Week # 23 – 24

Material	**Subject**
Text	Chapter 9, Products Liability, Pages 715 - 850
Roadmap Outline	Review & Finish Q & A for Chapter 16, Pages 267 - 292
CALI	Review All Previous CALI
CD-ROM	Video Lecture Series: Review Lessons #1 - #20 & note cards
Brief Secondary Authorities	Submit Secondary Authority: Restatement 3rd Products Liability Sec. 1 & 2, Pg. 749
Brief 4 Cases – Chapter 9	➡ Winterbottom v. Wright 152 Eng.Rep. 402 (Privity),

Week # 23 – 24 (continued)

Brief 4 Cases – Chapter 9 (Continued)	Pg. 719* MacPherson v. Buick Motor Co. 111 N.E. 1050 (Products Liability), Pg. 722** Escola v. Coca Cola Bottling Co. 150 P. 2nd 436 (Products Liability), Pg. 729 Volkswagon of America, Inc. v. Young 321 A. 2nd 737 (Design Defects), Pg. 774***
Audio	Review All Audio Tapes 1 - 4

Professor Comments:

"Products Liability": In many schools, products liability is treated as a separate course, largely to accommodate the enormous growth in the case law over the last thirty or so years. While there is something to be said for treating the area as a specialized upper division course, there is also much to be said for keeping it in the basic first year curriculum, where it is possible to see the evolution of the tort law from its highly restrictive beginnings with the privity limitation, to its modern position as a major regulator of product safety.

Once privity has been eliminated, the traditional issues of tort law reemerge in one specific context: what is the appropriate standard of liability how is a breach of that standard established, how is causation proved, and what are the appropriate defenses?

*Winterbottom v. Wright: (page 719) The case contains the classic articulation of the privity limitation, that the duty undertaken by contract only extends to the other contracting party and not to any third party, and this whether we speak of litigation sounding in contract or tort. One way to understand the case is to ask, who else might the plaintiff have sued? The Postmaster-General was protected by the doctrine of sovereign immunity, although otherwise he could arguably be liable as the supplier of the dangerous chattel, at least as the law emerged later in Devlin v. smith, discussed in MacPherson.

**MacPherson v. Buick Motor Co.: (page 722) Understood in its historical perspective, MacPherson departs from Huset and Kuelling on the question of whether negligence will substitute for fraud in cases of latent defects, which were not concealed because they were not known to the defendant. This gulf is surely an important one because the line between fraud and negligence bites in this context. But that said, there are still many key

points of resemblance in MacPherson to Huset and the earlier cases, so in many ways MacPherson has more in common with Huset to include imminent defects that were not known to the defendant, but which were discoverable by the exercise of reasonable care. Then, it takes this exception and merges it with the first two from Huset and calls them the new rule instead of calling them a set of balky exceptions. But all the limitations on latent defect, tight causation, and ordinary use still remain.

***Volkswagon of America, Inc. v. Young: (page 774) The crashworthiness cases represent a major extension of design defect cases beyond Greenman, with the combination of latent design defect that causes harm in ordinary use. Volkswagon follows the broader line of Larson that applies a general cost / benefit analysis to determine whether a vehicle is reasonably safe, just as in ordinary negligence cases. Yet how ordinary these cases are is a open question, as the duty imposed is the

Week # 23 - 24

Professor Comments: (Continued)

protection against third party invasions of a massive dimension.

Note that once the design defect cases are recognized, a strict liability standard merges imperceptibly into a negligence standard, as the court in Young seems to recognize. Absolute prevention of all injuries is not possible; and it would be odd to impose a duty on manufacturers to achieve what no consumer expects them to do. So the duty is scaled back to something more reasonable, which is consistent with consumer preferences, at least at some very high level of abstraction.

End of Week #24

Study Record	Study Record Due (include any Roadmap Assignments)
Midterm	Submit Torts Midterm Exams: Essays #1 & 2, with Midterm MBE Q's (listed on MBE page)

Week # 25 – 26

Material	**Subject**
Text	Chapter 10, Damages, Pages 851 - 926
Roadmap Outline	Read & Finish Q & A for Chapter 12, Pages 191 - 210
Brief Statutes	California Civil Code Secs. 3333.1, Pg. 898: "Negligence of Health Care Provider; Evidence of Benefits and Premiums Paid; Subrogation" *
Brief 4 Cases – Chapter 10	McDouglas v. Garber 536 N.E. 2nd 372 (Pain & Suffering), Pg. 853

	O'Shea v. Riverway Towing 677 F. 2nd 1194 (Economic Losses), Pg. 862 Baker v. Bolton 170 Eng.Rep.1033 (Wrongful Death), Pg. 902 Kemezy v. Peters 79 F. 3rd 33 (Punitive Damages), Pg. 909
Audio	
Statutes* (a) In the event the defendant so elects, in an action for personal injury against a health care provider based upon professional negligence, he may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services. Where the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence.	

Week # 27 – 28

Material	**Subject**
Text	Chapter 11, Insurance, Pages 927 - 960
Roadmap Outline	Read & Finish Q & A for Chapter 17, Pages 293 - 296

End of Week #28

Study Record	Study Record Due (include any Roadmap Assignments)

Week #29 – 30

Material	**Subject**
Text	Chapter 12, No-Fault Systems, Pages 961 – 1028
Roadmap Outline	Read & Finish Q & A for Chapter 17, Pages 293 - 296

Week #31 – 32

Material	**Subject**
Text	Chapter 13, Defamation, Pages 1029 - 1154
Roadmap Outline	Read & Finish Q & A for Chapter 20, Pages 315 - 330
Brief 7 Cases – Chapter 13	Zeran v. America Online Inc. 129 F. 3rd 327 (Internet Defamation), Pg. 1037* Veeder v. Freedom of Public Discussion Harvard Law Review 413, + 419-420, Pg. 1055 Smith v. Smith 142 N.E. 292 (Libel Per Quod), Pg. 1070 E. Hulton & Co. v. Jones, A.C. 20 (Strict Liability Defamation), Pg. 1071 Anvil v. CBS 60 Minutes 67 F. 3rd 816 (Truth as a Defense), Pg. 1088 New York Times v. Sullivan 376 U.S. 254 (Defamation), Pg. 1115** Gertz v. Robert Welch, Inc. 418 US 323 (Private Parties), Pg. 1138
Audio	Listen to Tapes 2A & 2B

Professor Comments:

"Introduction": The point of the introduction is to give a glimpse of the modern constitutional developments before going in detail into the common law rules.

I believe that it is quite important to work through the common law materials before coming to the constitutional ones for the reasons set out in the text, and I think that it is vital for students to appreciate the integrity of the common law structure, and the extensive protections that it afforded for freedom of speech (the fair comment privilege and the prohibition against injunctions in defamation cases, for example) before asking whether the constitutional developments are a good or bad thing.

To start with the constitutional law questions is to make it too difficult to return to the mundane world of the common law.

*Zeran v. America Online, Inc.: (page 1037) The collision between the widespread publication on the net and the law of defamation had to come sometime, and Zeran is the leading case on how AOL and the other internet service providers have won, first in Congress, and then in the courts.

The first point to note about the case is that if the actual perpetrator had been caught, the question is whether AOL or Zeran has to bear that risk.

The argument for Zeran is that AOL may not have had perfect information and the capacity to stop the loss, but it certainly was in a better position to do so than Zeran, whose only course of action was to complain loudly about the hostile treatment as the losses aggravated.

Week # 31 – 32 (continued)

Professor Comments: (Continued)

I might well be that AOL should not be liable in principle for the first message that gets out there, any more than the government is not liable for injuries caused by reckless drivers along public roads. But here notice was given, not once, but often to AOL, which promised to follow up. So here is a line of action that is not sufficiently explored by the Court.

**New York Times v. Sullivan: (page 1115) If there were ever a case for which a teacher's manual seems unnecessary, this is it. The opinion ranks as one of the most important in the history of the Supreme Court, and the literature on it is extensive and penetrating. In teaching the case, one can approach it from any one of the number of different vantage points. How does the case square with the common law rules that it rejects? My view is that the Alabama court was wrong on the "of and concerning" issue, and that setting this point correct could have ended the constitutionalization of the case, by throwing the plaintiff out on his ear.

In a similar vein, it seems that the plaintiff acted precipitately in rejecting the Times' effort to find out his objection to the story.

The qualified privilege to attack public figures on matters of fact, defeasible only on a showing of actual malice, runs against the dominant common law line, and it is a fair question to ask whether Brennan, who recognizes the need for some balance, ever discredits the position that he repudiates. By the same token, one can note that the decision can be attacked from the other side, as today the continued litigation against the press has led to renewed calls for an absolute privilege, at least within some confined scope, usually that of political speech.

If the actual malice rule goes too far (by shielding inaccurate litigation that itself can distort public debate), then surely the absolute privilege envisioned by Black and Douglas goes way too far. It is hard to see why the First Amendment gives any protection to the deliberate lie.

There are always some risks or error in all determinations, and it would be ironic to hold up that concern as a justification for banning all actions, for now the error rate of uncorrected misstatements could easily shoot up, precisely because people know that the only remedy is counterspeech which is likely to be ineffective and, in its effects on third parties, diminish the quality of the public debate.

Libel v. Slander: (page 1067) The basic distinction between libel (writing or other permanent form) and slander responds to some strong instincts of common sense, for certainly casual statements in luncheon conversations are not treated in the same way as those made in published articles or even ordinary correspondence. Indeed, as every writer knows, committing yourself in print has a binding power that ordinary conversation lacks. Indeed one danger of email is that the ease of communication lowers the barriers to writing, and this lets more impulsive stuff out into the world, where the forward-all button can do the rest.

Week # 31 – 32 (Continued)

Professor Comments: (Continued) Libel Per Quod v. Libel Per Se: The shadowy line between libel per quod and libel per se is quite different from that between slander per se and other forms of slander. What is at stake here is, first, whether the libel is complete upon its face or requires additional information to become libelous: i.e. the question is really indistinguishable from that on the role of innuendo, with which it is closely paired, for once statements uttered are combined with other propositions already known to the audience, the consequences can be devastating, leading to charges of illicit relations, as in Smith v. Smith, or violations of the Jewish dietary laws for kosher butchers in Braun v. Armour & Co.

End of Week #32

Study Record	Study Record Due (include any Roadmap Assignments)

Week # 33 – 34

Material	**Subject**
Text	Chapter 13, Defamation, Pages 1029 - 1154
Roadmap Outline	Review Q & A for Chapter 20, Defamation, Pages 315 - 330
Audio	Review Tapes 2A & 2B

Week # 35 – 36

Material	**Subject**
Text	Chapter 14, Privacy, Pages 1155 - 1222
Roadmap Outline	Read & Finish Q & A for Chapter 21, Pages 331 - 338
Brief Secondary Authorities	Submit Secondary Authority: Justice Warren & Justice Brandeis "The Right to Privacy"*
Brief 4 Cases – Chapter 14	Nader v. General Motors Corp. 255 N.E. 2nd 765

	(Invasion of Privacy), Pg. 1163 Vanna White v. Samsung Electronics 971 F.2nd 1395 (Appropriation of Name or Likeness), pg. 1180 Sidis v. F-R Publishing Corp. 113 F. 2nd 806 (Public Disclosure), Pg. 1199 Time, Inc. v. Hill 385 US 374 (Falselight), pg. 1215
Audio	

Secondary Authority*: "Warren & Brandeis, The Right to Privacy": (page 1155) The Warren and Brandeis article stands as one of the immortals because it argues for the recognition of new interest, privacy, that is entitled to legal protection..

The article is written in a masterly style and shows a keen ability to marshall support for the new tort from bits and pieces of the common law history.

Still, in the end one can question how effective its argument is. For example, why isn't the protection of unpublished materials the protection of a property right, If a manuscript, for example, is unpublished, then any use of its material appears to be a violation of the right.

This cannot be said of material information which moves thereafter freely from person to person. Yet if ordinary property analysis works for unpublished materials, then how can one extend it to cases of admitted publication, where the owner has not evinced an effort to keep matters wholly private.

In addition, there are other disquieting elements. Thus it is not quite clear where this tort fits into the general legal landscape, given the other forms of protection.

One way to test this is to ask whether it is possible to decompose the privacy tort into Prosser's four areas, of which only one (revelation of past embarrassing facts) seems to provide protections that is not available under the traditional legal views.

Yet ironically it is just that form of the tort that has been subject to the most sustained constitutional and intellectual barrage, so that if it breathes at all today, its life is

Week of # 35 – 36 (Continued)

confined to a very narrow class of cases indeed. More generally, Warren and Brandeis rest their case for the new interest in privacy upon an evident hostility to the press, which runs against the constitutional guarantees that it enjoys, which were themselves hardly explicated when the piece was written.

End of Week #36

Study Record	Study Record Due (include any Roadmap Assignments)

Week # 37 – 38

Material	**Subject**
Text	Chapter 15, Misrepresentation, Pages 1223 - 1268
Roadmap Outline	Read and Finish Q & A for Chapter 19, Pages 305 - 314
CALI	An Introduction to Equitable Remedies
CALI	Review "Negligence" by Douglas McFarland
CALI	Review ""Sprague Case: Child Injury in Tort Law" by Robert E. Keaton
CALI	Review all CALI assignments
CD-ROM	Review all CD–ROM Video Lecture Series Lessons
Brief 4 Cases – Chapter 15	Pasley v. Freeman 100 Eng. Rep. 450 (Third party Benefits from Fraud), Pg. 1224* Laidlaw v. Organ 15 US 178 (Fraud), pg. 1238 Laborer's Local 17 v. Philip Morris 191 F. 3rd 229 (Disclosure), Pg. 1248 Ultramares v. Touche 174 N.E. 441 (Negligent Misrepresentation), Pg. 1256**
Audio	Review all Audio Tapes

Professor Comments:

*Pasley V. Freeman: (page 1224) This is the classic, foundational common law decision on the subject. In the usual case of fraud, the defendant lies for self-grain, and not to benefit some third party. Here it was stipulated that the statements were false, but that the defendant was not the beneficiary, if only because the sale on credit was to a third party, Falch. One way to attack the case is to bring it back into the benefit to the defendant mold, by finding some indirect gain, as might be done by showing that the third party had some relation to the defendant, be it as his debtor or partner. When that fails, as it does here, do we treat the case as an exception to the general behavioral rule of self-interest, or do we just assume that there is some hidden connection in the overall triad that escapes the report, but which would give an accurate motivational account of the defendant's conduct? I prefer the latter approach, which treats the motive of the fraud as immaterial, and concentrates on the consequences.

Why fish around for further information if what you know is sufficient to dispose of the case?

**Ultramares v. Touche: (page 1256) This is the classic decision on accountant's liability, denying an action for negligent misrepresentation at the instance of a plaintiff, not the defendant's client but a party who had made advances to Stern & Co., the client, on the faith of the defendant's representations. Here the absence of privity is important, because it makes it clear that there can be no express allocation of the risk of misinformation as between plaintiff and defendant.

Week # 37 – 38 (Continued)

Professor Comments: (Continued)

The purpose of the legal rule on allocation loss is to fill in the gap where direct contracting is hardly feasible, and the Cardozo result could be defended on the simple ground that because the defendant has received no additional payment for the services rendered, it should not be exposed to a financial loss which is beyond its power to monitor or control.

Where at long last Cardozo hits the gut issue, by noting that you don't expect to get protection for which you do not pay.

Week # 39 – 40

Material	**Subject**
Text	Chapter 16, Economic Harms, Pages 1269 - 1326
Roadmap Outline	Read and Finish Q & A for Chapters 22 & 23, Pages 339 - 350
CALI	Review all CALI Lessons
CD-ROM	Review all CD-ROM Video Lecture Series Lessons
Brief 3 Cases – Chapter 16	Tarleton v. M'Gawley 170 Eng. Rep. 153 (Interference with Prospective Advantage), Pg. 1281 People Express Airline v. Consolidated Rail Corp. 495 A. 2nd 107 (Interference with Prospective Advantage), Pg. 1284 Mogul Steamship Co. v. Mc Gregor, Gow & Co. 23 QBD 598 (Unfair Competition), Pg. 1295
Audio	Review all Audio Tapes

Week # 41 – 42

Material	**Subject**
Text	Chapter 17, Tort Immunities, pages 1327 - 1364
Roadmap Outline	None
CALI	Review " Sprague Case: Child Injury in Tort Law" by Robert E. Keeton
CD-ROM	Review all CD-ROM Video Lecture Series Lessons
Brief 5 Cases – Chapter 17	➡ Hewlett v. George 9 So. 885 (Parent – Child), Pg. 1328 ➡ Phillips v. Barnett 1QBD 436 (Husband & Wife), Pg. 1332 ➡ Russell v. The Men of Devon 100 eng. Rep. 1 (Municipal Immunity), Pg. 1335 ➡ Berkovitz v. United States 486 US 531 (Sovereign

	Immunity), Pg. 1343 ➡ Bill Clinton v. Paula Jones 520 US 681 (Official Immunity), Pg. 1354*

Professor Comments:

*Bill Clinton v. Paula Jones: (page 1354) This case is one on which every instructor will have his or her opinion. My own view is that this was the classical case I which the Court should have risen above principle to find the Presidential immunity on the very mundane ground that any suit against the President is certain to have powerful political ramifications that transcend the actual dispute.

Week # 41 – 42 (Continued)

Professor Comments: (Continued)

I have no doubt that it is easy to imagine cases where a President tries to tough it out in divorce court or in a routine business dispute or traffic accident, but think that the political pressure from those tactics would force some kind of a quick settlement. But here, whatever one thinks of the underlying dispute, it is fanciful to assume that one can use the tricks of scheduling and secrecy to limit the impact of litigation, even in the discovery stages on Presidential behavior. It is clear that the President should not be above the law, but the better approach is to wait until impeachment and conviction, resignation or the end of term before commencing hostilities. It is not, on this view, critical that the subject matter of the litigation arose out of official duties of the President qua President. We need only look at the name of the defendant and stop matters there. The tragedy of all this is simple: the law suit provoked a political crisis of which the nation could have been spared.

Clinton clearly distinguished Nixon, where a claim of absolute immunity was allowed when Nixon was sued for the improper dismissal from a government position by the plaintiff Fitzgerald who worked as a management analyst in the Air Force. The key element was, of course, the reluctance of the court to review work that involved the political and legal judgments made by the President in office. That case is no doubt stronger than Clinton. But the issue is whether Clinton's case was strong enough. The obvious inspiration for the decision in Nixon was the long line of cases that established absolute immunity for judges and prosecutors for work within their official function. But here the limitation makes sense because there are many judges and prosecutors who can take over if one is immobilized by suit.

That is not the case with the President.

The questions of immunity for a full range of public officials is obviously a delicate matter, and the cases have generally come down in favor of absolute immunity for official functions. The explanation given by Learned hand in Gregiore strikes me as correct: it is done to protect honest officials from groundless suits, even at the cost of letting some scoundrels escape. But even if tort liability is negated, other forms of sanction including discipline within the organization remain.

Week # 43 – 44

Material	**Subject**
Text	Review all Chapters
Roadmap Outline	Review all Q & A from all Chapters
CALI	Review all Assignments
CD-ROM	Review all Video Lecture Series Lessons (including note cards)
Audio	Review all Tapes

End of Week #44

Study Record	Study Record Due (include all Roadmap Assignments Not Previously Submitted)

Week # 45 – 46

Material	**Subject**
Text	Review all Chapters
Roadmap Outline	Review all Q & A from all Chapters

Week # 45 – 46 (Continued)

CALI	Review all Assignments
CD-ROM	Review all Video Lecture Series Lessons (including note cards)
Audio	Review all Tapes

WEEK # 47 –48

Material	**Subject**
All	Review Material for Final Exam

End of Week # 48

Final Examination	Submit Torts Final Exams: Essays # 1 & 2, with MBE Final Q's (listed on MBE page)

ESSAY EXAMINATION INSTRUCTIONS

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns.

Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.
Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

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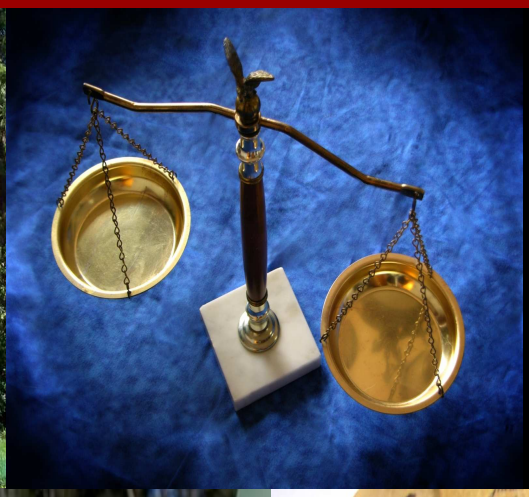

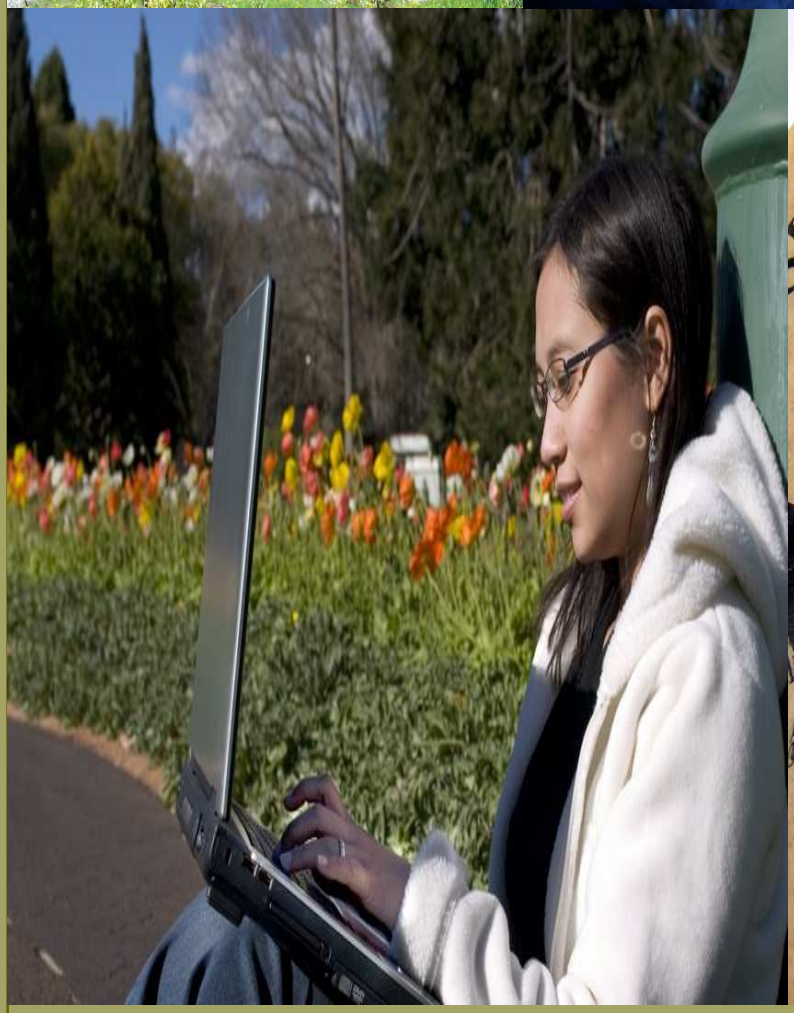

Torts