BU Law Student Affairs
Academic Enhancement Program

As you outline each segment of the course, ask yourself the following questions…

1. What is this about?
2. What set of concrete problems is presented by the different fact patterns?
3. What set of issues arise out of these problems?
4. What set of rules (and principles) is applied to these problems to "solve" them?
5. What policy rationales are served by these rules (and principles)?

At the end of each segment, ask yourself this set of questions….

1. Do I understand the key problems and issues here?
2. Do I understand what rules and principles apply and any relevant policy?
3. What are the likely issues to appear on the exam?
4. Can I apply this knowledge to hypothetical problems?

A great link with handouts and information on outlining:
http://www.law.berkeley.edu/students/asp/handouts.htm

EXAMPLE OUTLINES

Attached please find a few sections from some example outlines. Some of these are more traditional in format while others are more unique, tailored to the specific student who created them. Remember that you need to figure out what method best fits the way that you learn. You may be a traditionalist or you may invent your own design that compliments your learning style. There are others who don't outline at all and use other resources such as flashcards, audio tapes, their notes and commercial study aids. Just find what best suits you and you will be well on your way to success.

EXAMPLE #1

Property Outline

Acquisition of Property

Wild Animals

- A person acquires a wild animal by reducing it to possession. This can be accomplished by killing or mortally wounding it, or by capturing it. Simply running after it with intention to capture, or marking trees near the area that a treasure is located, is not sufficient. [*Pierson v. Post*, *Eads v. Brazelton*]
- Business practice or convention can alter the way that animals are possessed. For example, in the whaling industry, putting a harpoon in the whale is sufficient to generate ownership. *[Ghen v. Rich*] Likewise, in modern times, just discovering a sunken ship can be sufficient for acquiring ownership. [*Titanic* cases.]
- All this assumes that the animal was caught on unowned land.

Ad coelom and ad inferos and how they affect the acquisition of property

- Under common law, a person who owns land also owns to the depths of the earth and to the heavens.
- This principle has been qualified as regards the heavens, to permit air travel. However, regarding caves the rule is the same.
- If an animal is found on owned land, though, the animal belongs to the owner of the land. [*Fisher v. Steward*.] This is called the doctrine of *accession.* Moreover, the owner of the land has exclusive rights to convert the animal into an ownable item. Indeed, if I shoot a deer on my friend's property, he owns the deer.
- However, the owner of the land may choose not to exercise his rights of ownership, in which case the *Irving Principle* (*principle of relativity of title)* gives ownership to the person with the better claim.

Losing Foxes

- If a wild animal that had been reduced to possession escapes, it is no longer subject to ownership. The original ownership just vanishes. *Reese v. Hughes.*

Oil and Gas (analogized to foxes)

- Gas is often stored in vast underground reservoirs. *Hammonds* treated oil and gas like an escaped fox to avoid making the gas company a trespasser under Mrs. Hammonds' property.
- However, this resulted in other problems for gas companies, as people would drill into the reservoir and remove the gas. *Lone Star* rejected the comparison between gas and wild animals. Gas in a reservoir, if it's like an animal at all, is like a fox in a cage.

Relativity of Title and Nemo Dat

- Nobody can sell something that they didn't have. When you buy something, you acquire the rights in the chain of possession that the seller had.
- There are exceptions, by which a person can actually jump up in the chain of possession. One such exception is the *good faith purchaser from a person with voidable title*.

Lost and Found Property

Lost property belongs to the original owner, assuming that he claims it. *Ganter v. Kapiloff*. The finder is a bailee for the owner.
Abandoned property can no longer be claimed by the owner.
If the statute of limitations runs out, or if the owner never shows up, the common law adopts the following scheme for deciding ownership between the finder and the land/locus owner:

	Finder	**Land/Locus Owner**
Lost	Normal winner	
Mislaid		Normal winner
Abandoned	Normal winner	
Treasure Trove	Normal winner	

- The rationale for why a locus owner keeps mislaid property is that he is in the best position to return it to the original owner, since the original owner will seek his property where he lost it.
- This rule is superseded if the finder is a trespasser. In that case, the land owner will always have priority over him.
- Some English sources give anything in a home to a homeowner, even lost or abandoned property. American law doesn't follow this. However, even in American law, a person can contract with a plumber etc. that all found property belongs to the homeowner.
- A legislature can always override the common law and issue statutes relating to found property.
- A locus is almost always land; but the Iowa court ruled that an airplane is the locus (because it's the location where the loser will attempt to locate the item). We won't have to worry about this in 99.9% of the cases.
- If there is a tenant, since he holds the present use, he is the landowner for this purpose.

We decide the status of found property based on the following scheme:

	Accidentally Lost Possession	**Intentionally Lost Possession**
Loss Intended to Be Permanent		Abandoned
Loss Not Intended to Be Permanent	Lost	Mislaid (treasure trove too)

How can we tell what happened? Since the loser isn't around to ask, we try to infer the most likely scenario. A trial judge's decision is reviewed deferentially. *Benjamin v. Lindner Aviation*.

- Who is a finder? As with first possession, it isn't sufficient to desire to get the item; you actually have to do a physical act of ownership. *Eads v. Brazelton*.
- You may also need to have the mental desire to possess. [*Kieran v. Cashman;* wad of money in sock case.]

EXAMPLE #2

Civ Pro Outline

Table of Contents

Checklist

1. Read the full text of the rule. Read it again.
2. Apply the rule to the facts.
3. If words are unclear, decide their meaning based on 1. Context of the rule. 2. Dictionary definition. **BRING A LAW DICTIONARY TO THE EXAM.**
4. Think about the purposes (in plural) to the rule. If the application is ambiguous, then consider which applications best uphold the purposes of the rule.

The first class exposed us to the various types of legal arguments available to lawyers. These include:

a. Textual arguments –
    i. In the case of statutory law, these are the most important. If the text is clear, there is nothing else to discuss
    ii. Text can be bypassed when:
        1. meaning is unclear or
        2. when the literal meaning leads to an absurd conclusion
    iii. Meaning can be determined by:
        1. lexicon (eg dictionary)
        2. context in the rest of the text of the law
        3. "natural language" (what people understand when they hear certain words). This makes sense since, after all, the law was written to influence people's behaviors. However, it is not always precisely measurable
    iv. One test for determining whether a particular meaning is included, is whether the statute could have been written more clearly to support that meaning. We also can ask whether a statute makes sense under a particular reading.
    v. Often statutes have a list of examples followed by a general category "or other things fitting description X." The function of the list could be either to exempt those things from the need for description X, or to give examples for the application of the rule.
b. Purpose of the law
    i. Can possibly be related to the events that precipitated the writing of the statute
    ii. Look out for multiple purposes
    iii. Just b/c you know the purpose doesn't mean that it's always relevant! You need to have some textual ambiguity that allows you to call in the purpose to resolve the question.
c. *Reductio ad absurdum* or "next case" arguments
    i. These are hypothetical extensions of a certain understanding of the law
    ii. To be useful, they have to be just the right amount absurd – not too far-fetched that it isn't even related anymore to the law.
d. Policy arguments (aka administrative arguments) – an argument about incentives

i. *Marginal deterrence* is an example of an incentive that might influence how we read a law
ii. *Horizontal Equity*
iii. *Least Cost Avoider*
iv. *Tension between compensation and deterrence*

e. Analogy and Precedent
i. Commonly used in civil proceedings which don't have statutes, like common law torts.

Rule 8 - General Rules of Pleading

Text: (a) **Claim for relief.** A pleading that states a claim for relief must contain:

(1) A short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support.
(2) A short and plain statement of the claim showing that the pleader is entitled to relief; and
(3) A demand for the relief sought, which may include relief in the alternative or different types of relief.

(d) **Pleading to be Concise and Direct; Alternative Statements; Inconsistency.**
(1) **In general**. Each allegation must be simple, concise, and direct. No technical form is required.
(e) **Construing pleadings.** All pleadings shall be so construed as to do substantial justice.

Comments

The purpose of notice pleading is to make the filing of lawsuits easy.
We can determine the scope of the rule by considering the legislative intent – namely to move away from the writ system and code pleading, and to move towards a simpler form of pleading.
Bennett v. Schmidt shows that it's virtually impossible to throw out a claim on the basis of it's being too long.
The traditional reading of 12(b)(6) is that it's all about stating a legal claim of relief, and that a claim can't be dismissed just because of insufficient proof of facts. Twombly suggests a more demanding requirement of facts is necessary – at least one that would give rise to a right to relief above a speculative level. However, it's not clear what the practical difference would be, as courts tend to interpret the law their own way.

Rule 12 (b)

How to present defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) Lack of subject-matter jurisdiction
(2) Lack of personal jurisdiction
(3) Improper venue
(4) Insufficient process
(5) Insufficient service of process
(6) Failure to state a claim upon which relief can be granted; and
(7) Failure to join a party under rule 19.

EXAMPLE #3

	Strict Liability	Negligence
Fairness/ Reciprocity 1. Compensate victims for wrongs done to them 2. Respect for persons 3. Fairness/reciprocity in allocation of risks, burdens & benefits 4. Tort as a form of private redress for individuals *Plaintiff-focused*	Bohlen, Fletcher (when non-reciprocal risks) • "He who acts must pay" (*Case of the Thorns)* • Between 2 innocents, he who acts should suffer (proportionate distribution of risks based on benefits received). (Enterprise) • Actors should be held accountable for harms flowing from their purposeful activities, <u>not</u> through wrongful conduct. "Natural v. Non-natural" activities (*Rylands v. Fletcher)* • *Sic utere*: use your property so as not to injure others (*Rylands v. Fletcher)*	Fried, Fletcher (when reciprocal imposition of risk) • <u>Wrong</u> to hold actors responsible for harms when they have acted *justifiably* (taken all reasonable care) • No fault, no liability • Liability only when D's risk rises above <u>reciprocal</u> (background risk) due to negligence (Fletcher) o Social contract allows certain everyday risks ("highway") • Negligent conduct occurs when actors don't respect others' interests--morality (Fried)
Utility/ Efficiency 1. Deter defendants from inefficiently using resources (waste) 2. Waste of resources 3. Efficiency in allocation of resources 4. Tort as a body of public law to regulate safety *Defendant-focused*	Calabresi • SL makes the enterprise internalize costs as a part of business • More rational pricing, "externalities" included and economic resources efficiently allocated • Distribute costs of activity to beneficiaries (species of taxation) • Cheapest Cost Avoider: enterprise is the party best able to detect and prevent harm (deep precautions)	Posner • BPL test maximizes accident prevention • Fault regime doesn't hamper action/innovation whereas SL does • Cheapest Cost Avoider is the one best able to prevent the fault based on negligent activity • Allows the court to substitute for the open market (market fails to allocate risks fairly b/c injurers/injured are strangers and unable to bargain for reciprocal risks)

EXAMPLE #4

Intentional Torts

BATTERY

1. Harmful/Offensive Contact

- *Intent*

  Act → contact → **harmful or offensive** → specific injury

  *If actor **knows to a substantial certainty** that harmful/offensive contact would occur, she is liable.

  - *Garratt v. Dailey*: don't need to intend injury, just harmful contact. Age doesn't shield from liability (would a "reasonable" 5 yo know harmful contact would occur?) *Ellis v. D'Angelo* (4yo pushes babysitter down).
  - *Polmatier v. Russ*: Insanity doesn't shield
- *Offense:* OBJECTIVE understanding: "reasonable person"

  1) Conventional: *would* conduct offend?
  2) Prescriptive: *should* conduct offend?

  - *Jones v. Fisher*: False teeth incident—no objective proof of injury, but a "reasonable person" would find it offensive
  - *White v. U of Idaho*: piano teacher's conduct wasn't meant to harm, but a "reasonable person" would know that it would be offensive. It was an intended act, unpermitted, which caused injury.
  - *Mink v. U of Chicago*: DES contact was not subjectively offensive (didn't know) BUT it was objectively offensive because the pts didn't know.

2. No Consent for Contact

OBJECTIVE and SUBJECTIVE: at bottom, consent is *subjective* (did this plaintiff consent?); BUT consent is determined by **external manifestation** which is *objective*.

<Policy: PRO: Eases burden on potential injurer/judge & jury to determine; CON: society's expectation trumps individual idiosyncrasies (bias).>

1) Presence of consent: inferred from conventional meaning of behavior
   a) Explicit; b) Passive; c) Implied
   - *O'Brien v. Cunard*: vaccination of Irish immigrant; overt acts, not subjective lack of intent establishes consent as a matter of law. (*Kirshbaum* & *Wright*: sexual assault consent, soc. bias)
   - *Markley v. Whitman*: by playing and knowing rules of "game" you give consent to contact. Consent must be contemporaneous to contact. (Good Samaritan case: lady didn't give consent even though she knew the rules)
2) Content of consent: what a reasonable person would have understood what was consented to
   a) Conventional: what people normally think; b) Prescriptive: what is fair to expect from activity
      - Consent to a game/activity encompasses contact permitted by terms of the game (*Markley*, boxing match, practical joke, football *Hackbart*).

Intentional Torts

Medical Consent:

1. Traditional rule: "specific consent" for procedure (*Mohr v. Williams)*
2. Modern rule: "general consent"
    a. Physical limitation: operation can be extended within area of "single incision"
        - *Kennedy v. Parrott:* phlebitis from removal of cysts during appendectomy. General consent given and was within the general area of incision; sound judgment.
        - *Rogers v. Lumbermen's Mutual:* removal of reproductive organs during appendectomy; no consent b/c harm not imminent, should have gotten consent (family nearby).
    b. Normative: duty to exercise "sound professional judgment"

➔ Can be conditioned by *specific request* of patient (*Ashcraft v. King,* family donated blood). Returns autonomy to patient, who must exercise power of control wisely.

➔ **EMERGENCY RULE**: if patient is unable to give consent, can give care if:

1) Incapacitated (unconscious, child)
2) Needed to save life (grave situation)
    i. *Moss v. Rishworth*: no consent for tonsillitis surgery; had time to get parents' consent as it was not emergent (even though sister, a nurse gave consent, no replacement for parents).
3) No reason to believe wouldn't consent (knowledge of religious beliefs)
4) A *reasonable person* would consent in the circumstances

3. Contact is not Privileged

Basic principle **"proportionality"**: party claiming self defense must use force proportional to the force defended against. Tension between subjective and objective determination:

OBJECTIVE

a) IN FACT: *Chapman*. Even if *reasonable*, if mistaken about the situation, can't argue self defense, must prove culpability of person injured to invoke SD. (wrong person defended against)

b) "REASONABLE PERSON": *Fragulia, Fixico, Hattori*
    ➔ "bare belief/sincere belief" not enough to prove reasonability.
    a. "Excessive force" *Fraguglia* (pitchfork):
        i. Amount of force proportional?
        ii. Means/instrument (deadly weapon?)
        iii. Manner/method (knock down or keep going)
        iv. Circumstances
    b. Self-defense availability *Drum*
        i. No means of escape (no retreat). Ex. LA & TX: no duty to retreat
        ii. Necessary to protect against death/grave injury
        iii. Disproportionality: disparities in size/strength and violence (imminent harm)
        iv. Burden on D to prove SD

c) "RP w/ particularities": *Nelson, Liedholm* (extended time frame for "threat")
    a. Phys/psych/temperamental standard w/in RP—"particular qualities
    b. Assume qualities particular to accused (reasonable battered woman *Liedholm)*
    c. Subjectified standard approp. b/c party defended against was the cause of defense (no stranger)

d) "In Mind" *Dupre* (hotel bellboy)
    a. The SD must know what he does is "excessive"—intent to inflict unnecessary injury must be established
    b. Excuse for no "detached reflection" in the circumstances

SUBJECTIVE

Intentional Torts

ASSAULT

Protects "peace of mind" from <u>fear</u> of <u>physical harm</u>; right to live in society w/o fear

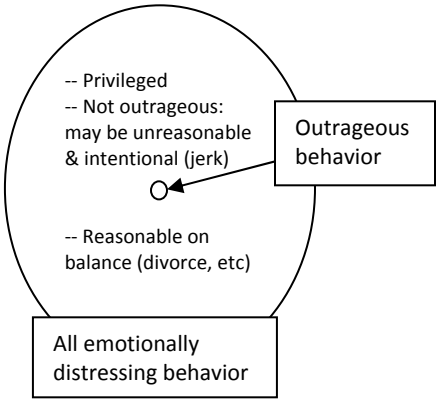
➔ Two-sided tort: D ⟶ "bad conduct" / ⟵ "bad experience" P

1) "Bad conduct" of D:
   a. *Miscarried* battery: "swing & a miss" D <u>intends</u> phys harm, but contact doesn't happen
      i. *I de S. & Wife v. W de S*: Eng common law case from 1348, allowed damages tho no phys contact
   b. *Seeming* battery: D intends to frighten P by <u>threatening physical harm</u>. Not a battery.
      i. *Beach v. Hancock*: pointing a gun at P (though unloaded) = assault (no battery). Reasonable fear by P.
2) "Bad experience" of P: D's *intentional* misconduct + P's imminent apprehension = assault
   a. P must have specific distressful mental state
      i. *Read v. Coker:* D lent P $, wanted to end rlsnhip. Imminently threatening behavior = threat, even though violence was conditional & no violence was attempted b/c P gives in to threat.
      ii. *State v. Ingram:* D's leering at P was not a threat. P was reasonably frightened by the behavior, but no *specific* threat of *imminent physical* harm was there.
         1. **DUTY vs. LIBERTY**: burdens v. freedom
   b. Can be a battery w/o assault if the P has no apprehension
      i. *State v. Barry* (didn't see gun pointed at him), *Wilson v. Bellamy* (unconscious during rape)*:* harm = battery, but no assault b/c P not cognizant of danger

Intentional Infliction of Emotional Distress (IIED)

Protects emotional tranquility against severe disruptions from <u>outrageous</u> conduct aimed at emotional distress, "modern tort": with "pure IIED" no intention of or actual phys harm

1) ***Intent*** to cause severe emotional distress
   a. *Substantial certainty* that one will cause emotional distress
   b. *Reckless disregard* of a very high probability of causing severe emotional distress
2) ***Severe*** *emotional distress* experienced by P (some emotional distress common to life)
   a. Objective standard, but some subjectivity (If D has knowledge of a particular vulnerability of the P and uses it *Eckenrode*)
3) OUTRAGEOUS conduct of D



CONTEXT matters, but cts disagree if expands/contracts permitted behavior

1. <u>Consensual</u> Relationships:
   a. Marriage: *Jackson* (leaving @ altar not IIED, but being already married might be); *Whelan* (divorce is not IIED, but lying about contracting AIDS is).
   b. Religion: *Schieffer* (priest seducing married parishioner; *consent* blocks IIED); *Watchtower* (religious "shunning" protected by free exercise of rel)
2. <u>Institutional</u> Actors: D has power over P, check on abuse of power of rlnship
   a. *Siliznoff*: garbage collectors threatening violence to give up acct, not an assault b/c no fear of imm. Battery
   b. *Eckenrode:* fear of fin. Ruin by ins co: 1st instance of IIED as full-tort