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\* Items not yet graded

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**Bold** values indicate all items have not been graded .

To access grade details and comments click on the \* or on the grade.

The grade to date shown above includes only the items that have been graded thus far-it does not take into account ungraded items.

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**Course Home**

## A n n o u nc e m e n t s

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| Module 6 - Intentional Torts | Mark Givens | 2/15/2016 12:00 AM |

Now it's time to move away from criminal law and to start talking about civil law.

This week in Module 6 we will be learning about intentional torts, as distinguished from negligent torts which we will cover in the subsequent module. A tort is basically a civil wrong , as distinguished from a crime or a breach of contract (while a breach of contract action is also a civil matter, it is treated as its own distinct category of civil law). An important element that distinguishes an intentional tort from a negligent tort is the actor's mental state. As the name implies, intentional torts require some sort of deliberate act; the tortfeasor doesn't necessarily have to intend the harm or the consequences of their act, but the act itself does require some mental state akin to "intentional." Just like when we were studying criminal law, it is important to keep in mind both the act and the mental state at issue in evaluating any given tort.

The reading for this week will define several of the most significant intentional torts, such as assault , battery, trespass , false imprisonment, conversion, libel, slander, tortious interference with contract, intentional infliction of emotional distress , and invasion of privacy. We also will be reading *Ryan v. Fox Television Stations, Inc.,* a case that involved an anti-SLAPP statute, which stands for Strategic Lawsuit Against Public Policy; those statutes are intended to protect the exercise of First Amendment rights, such as free speech, by throwing out lawsuits that threaten to chill the exercise of such fundamental constitutional rights.

An interesting aspect of intentional torts to keep in mind is that, not only can someone be sued civilly for committing them, but many intentional torts also can be prosecuted as crimes by the district attorney's office. Some examples that can be pursued as criminal or civil matters, or both, are assault, battery, theft (conversion), murder (wrongful death), false imprisonment, and trespass. Sometimes a person can win the criminal case but still lose a subsequent civil lawsuit (e.g. O.J. Simpson) because of the different standards of proof required in a criminal versus a civil case.

Module 5 - Criminal Procedure Mark Givens 2/8/2016 12:00 AM

Now that we've covered the basics of criminal law, such as what constitutes a crime, felonies versus misdemeanors, inchoate crimes (solicitation, conspiracy, attempt) , and some of the available defenses (self-defense , intoxication, insanity), it's time to move on to criminal procedure.

In this module we will track a criminal case as it proceeds through the system. We will begin with a look at the proceedings that take place prior to trial, including arrest, interrogation, the charging procedure, the preliminary hearing (or grand jury), the arraignment , and the right to counsel versus the right to represent oneself. We'll examine *Miranda* and Search & Seizure cases, including the Exclusionary Rule and the good faith exception to an unlawful search. Then we also will take a quick run through what takes place in a typical criminal trial, and the appeal and habeas corpus that often occur after someone is found guilty. The topic of criminal procedure will require us to take more in-depth look at several pertinent constitutional amendments : 4th, 5th, 6th, 8th, and 14th.

I don't feel that the textbook does justice to the very important topic of police-citizen encounters, although it does include a couple of important cases on the issue.

Therefore , to supplement what you read this week, here is a short summary of the primary types of contacts that police officers routinely have with people, and the applicable standards for each:

**Consensual Encounter** - No suspicion is required at all. There's nothing wrong with officers trying to talk to people, getting to know the community, or even slyly trying to see if something criminal is going on in these situations , but the citizen can refuse to stop or to talk to the police if it's just a consensual encounter situation (i.e. no reasonable suspicion and no probable cause).

**Stop** - In order to stop a citizen, whether that person is walking or driving, the police need to have what is known as "reasonable suspicion." That is, their suspicion must be based on specific and articulable facts that (1) some criminal activity is afoot, and (2) that this person they are stopping is the one involved in that criminal activity. The officer's reasonable suspicion often is the result of a victim's description of the crime and perpetrator, information put out by police dispatch over the radio, something that the officer observed himself, . . .

**Frisk** - Police officers are allowed to frisk someone that they have lawfully stopped (though if the stop was unlawful, then the frisk will be, too). As with a Stop, the officer needs to be able to articulate facts and circumstances that suggest that the person they have lawfully stopped might be armed. In this circumstance, the officer is allowed to pat someone down for weapons that might be used against the officer, but they are not allowed to search beyond that. If an officer goes beyond a pat-down for weapons, say by pulling a very small baggie (that could not possibly be a weapon) out of someone's pocket or by making a stopped person take off their shoes and socks so that the officer can search for contraband, then that more intrusive search exceeds a permissible pat-down for weapons and is invalid (unless supported by the higher standard of probable cause).

**Arrest** - In order to arrest someone, a police officer needs to meet the higher standard of probable cause, which is essentially a reasonable belief based on the

facts and circumstances that the person being arrested has committed a crime (or the officer must be acting pursuant to an arrest warrant, which also must be based on probable cause). This is a higher standard than the reasonable suspicion needed for a mere investigative stop.

**Search** -A search of a person, a vehicle, or a place also must be supported by probable cause. A search warrant requires this same standard. A person or a vehicle also can be searched incident to arrest, assuming the person is being arrested pursuant to probable cause.

HINT: In order to analyze the fact patterns in the Case Analyses this week, you will have to rely on what you've learned in Module 4 and Module 5. They cover both criminal law and criminal procedure.

Improper Paraphrasing (Plagiarism) Mark Givens 2/3/2016 12:00 AM

A lot of students have trouble figuring out what is the proper way to paraphrase versus what kind of improper paraphrasing constitutes plagiarism, *even though you've included a citation to the source.*

I have uploaded Stephen Fox's pleasant, easy-to-follow Powerpoint presentation on proper/improper paraphrasing; you can access it under the **Doc Sharing** tab above.

Here is one example from Fox's presentation regarding improperly paraphrasing not liking green eggs & ham:

**Many people have a strong distaste for forest-colored fowl embryos and cured domesticated pig products (Geisel, 1960). Is this plagiarism?**

**YES!**

**This is still not adequate paraphrasing. The sentence structure is still too similar to the original quotation, and you still can't put this one in quotes because it's not the exact words of Geisel.**

APA and Plagiarism Mark Givens 2/3/2016 12:00 AM

Because some of my past students have had trouble with following the APA guidelines

* improper, inadequate, or missing APA citations in your discussion posts, case briefs, and case analyses - Ifeel that it would be worthwhile to give everyone a little extra guidance on the importance of following the APA guidelines and avoiding charges of plagiarism in connection with your assignments.

First, you need to understand that **you must cite to the source of everything that isn't your original and unique thought.** This goes for all discussion posts, case briefs, and case analyses. This is true regardless of whether you are quoting or merely paraphrasing someone else's work. The failure to give credit to someone else's work or idea constitutes plagiarism and must be reported to the administration. What follows is a formal accusation and a hearing, resulting in the minimum sanction of an "F" on the assignment , but the usual sanction of an "F" in the entire course for a first offense (or a minimum of an "F" in the course and a usual sanction of suspension from the university for a second offense). *Shockingly, despite all my advice and warnings, I still have to refer at least one student to the administration for plagiarism each term.*

Per the Saint Leo University Online Course Policies and Information, plagiarism includes, among other things:

* + Stealing and passing off the ideas and words of another as one's own or using the work of another without crediting the source whether that source is authored by a professional or a peer;
  + Submitting an article or quoted material from a periodical or the internet as one's own;
  + Intentionally or unintentionally fai ing to cite a source.

Changing a few words here and there or "borrowing" parts of sentences from your sources and spreading them out in your paper (i.e. patch plagiarism) does not make the material your own. It still constitutes plagiarism if you haven't cited the source material properly. By the way, you are not even allowed to use your own prior work; each of your assignments must be original.

Even when you do properly include a citation, you need to keep in mind that if you are using someone else's words , you must use quotation marks. When you don't use quotation marks, you are (falsely) representing that the writing is your own. Even though you have included a citation to the source, this still constitutes plagiarism. If you haven't already taken a look at the Dr. Seuss Powerpoint that I uploaded to Doc Sharing, please do so now.

Take a good, long look at your APA guide, or some online APA sources; I think the examples they give of complete papers will be very helpful in giving you an idea of different types of citations and how plentiful they typically should be in a paper. The examples will give you a good idea of the overall format of a scholarly paper and what properly citing your sources should look like. When looking at examples of papers that have complied with the APA, you will see that most of the sentences in the body of the paper end with a citation at the end of the sentence. If you've ever seen papers by

masters or doctoral students, you'll notice that more than half of the sentences have citations at the end of them, giving credit to the sources of that information, idea, theory, . . .

Although this example has far more source material than Iwould like to see in any of your assignments in this class, as Iwould like to see plenty of your own writing and analysis, you can take a look at this link for a real-world example of how to cite to sources (and notice how many of her sentences have citations at the end): <http://www.westga.edu/-distance/ojdla/fall63/hutchins63.html>

Purdue is a big authority on the APA style. Their website has tons of easy-to-access information on what you need to be doing in your assignments: https://owl.english.purdue.edu/owl/resource/560/01/

Way down on the left side of the Purdue page is an "APA Sample Paper" you should look at: https://owl.english.purdue.edu/owl/resource/560/18/

Also, in the left column on this Learning Studio page under "Resources" is a link ("Writing Format and Style Guides") to the Purdue Owl Online Writing Lab. That website has a lot of very useful and easy-to-use guidance on following the APA.

Hopefully this helps.

With regards, Professor Givens

Module 4 - Criminal Law Mark Givens 1/31/2016 12:00 AM

Admittedly, Module 3 contained an awful lot of information to cram into just one week.

It is very difficult to give an adequate amount of attention to the whole of civil procedure in such a short time, though you hopefully got at least an overview of what is involved in preparing, filing, serving, pursuing (and defending), and trying a civil lawsuit. What I would most like for you to take away from Module 3 is that you should avoid civil litigation as much as possible in your lives, regardless of which side you potentially could end up on.

This week in Module 4 we tackle criminal law. It is important to keep in mind that, unlike with civil disputes between people (or companies), criminal law is all about the government prosecuting people for crimes. It is up to the government -the prosecuting authority -to decide whether to charge someone with a crime, which crimes and how many crimes to allege, and even whether to stop prosecuting someone. Contrary to what we so often hear people say, it is not up to the citizen­ victim to drop a case.

This week we will be covering the four components of a criminal offense: criminal act, criminal intent, concurrence of act and intent, and causation. We will learn about *actus reus,* that is the wrongful act that a defendant commits, and *mens rea,* the mental state

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Course Home [http://coursehome.next.ecol](http://coursehome.next.ecol/) lege.com/(N EXT(a9249d5ed4)) /Main/C...

that a defendant must have for criminal liability to exist. The assigned reading will explain what constitutes an attempt to commit a crime, solicitation crimes, conspiracy to commit a crime, and even a bit about racketeering (RICO). This week we also will cover the various defenses to a criminal prosecution, including self-defense and defense of others, the defense of necessity, and the defense of duress. The book even gives a short explanation of intoxication defenses and insanity.

The reading assignments in the course for Modules 4 and 5 overlap. Although our reading assignment says that you need to read pages 254-308 this week, Ithink you'll be fine reading just pages 254-277 in Module 4 (criminal law), and then pages 277-308 in Module 5 (criminal procedure).

Case Analysis - good example to follow Mark Givens 1/28/2016 12:00 AM

Here is a good example -not perfect , but still quite good -from Module 2's Case Analysis assignment. This student used headings to separate each section, though this isn't required if you'd rather write your case analysis in more of an essay format. Notice the appropriate length of the case analysis overall, and in particular the length and thoroughness of the student's analysis in the Rationale section. Also notice how few writing errors there are.

"A. *Brian Short v. State of Florida*

### Main Issue:

Has the State of Florida violated substantive due process by its "Maintaining the size of our children" law which prohibits short people from marrying each other?

### Relevant Legal Concepts from Text:

The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution provide that no person shall be "deprived of life, liberty, or property, without due process of law" (Schubert, 2015, p. 23).

These clauses allow courts to protect certain rights that are deemed fundamental from government interference. That is, all rights that the United States Supreme Court deems to be fundamental are included in the concept of "substantive Due Process." Fundamental rights include those that historically have been sacrosanct from government intervention in our

American legal tradition , such as the First Amendment freedom of religion and freedom of speech. However, other fundamental rights are understood to include intimate decisions relating to marriage, procreation , contraception , family relations, child rearing , and education (Schubert, 2015, p. 26).

Additionally , the Bill of Rights says that the "liberty" specifically protected by the Due Process Clause includes the right to marry (Schubert, 2015, p. 29).

### Relevant Case Law from Text:

*Loving v. Virginia,* 388 U.S. 1 (1967): "[T]he decision as to whether to enter into an interracial marriage was a matter for Richard and Mildred, not the Commonwealth of Virginia." "The Court said that Virginia had no legitimate interest in the races of married people and could not categorically prohibit black and white people from marrying one another" (Schubert, 2015,

p. 25).

"The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. . . . In a long line of cases, we have held that, in add ition to the specific freedoms protected by the Bill of Rights, the 'liberty ' specifically protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia,* 388 U.S. 1 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson,* 316 U.S. 535 (1942); . . ."

*( Washington et al. v. Harold Glucksberg el al.,* 521 U.S. 702 (1997)).

"[T]he Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest "' *( Washington el al. v. Harold Glucksberg et al.,* 521 U.S. 702 (1997)).

A "challenged state action that implicate[ s] a fundamental right" requires "more than a reasonable relation to a legitimate state interest to justify the action" *( Washington el al. v.*

*Harold Glucksberg et al.,* 521 U.S. 702 (1997)).

". . . interpreting the Due Process Clause to protect certain fundamental rights and "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,' and noted that many of those rights and liberties 'involv[e] the most intimate and personal choices a person may make in a lifetime . . .'" *( Washington el al. v.*

*Harold Glucksberg et al.,* 521 U.S. 702 (1997), quoting *Roe v. Wade).*

#### 4. Rationale:

The main issue in this case is whether the State of Florida is violating the substantive Due Process rights of short people by its "Maintaining the size of our children" (MSOOC) law.

This is a substantive Due Process case. The Fifth and Fourteenth Amendments to the United States Constitution provide that no person shall be "deprived of life, liberty, or property, without due process oflaw." The law in its very wording "prohibits two very short people from marrying." That violates short people's right to life and liberty granted by the Fourteenth Amendment. In the Bill of Rights, the "liberty" specifically protected by the Due Process Clause has been interpreted to include the right to marry (Schubert, 2015, p.29). Also, the Equal Protection Clause of the Fourteenth Amendment has been used to strike down legislation that was enacted for the purpose of discriminating against certain groupings of people

(Schubert, 2015, p.43 ; *see Loving v. Virginia,* 388 U.S. 1 (1967)). The long history of our legal tradition has kept those fundamental rights, such as marriage, from undue government interference . Keeping "vertically challenged" people from marrying would seem to violate the substantive Due Process rights of short people. Thus, the MSOOC law is unconstitutional towards short people because it violates short people's basic Due Process right to life and liberty, including their fundamental right to choose whom to marry.

This case is much like the facts and issue in *Loving v. Virginia* (1967). Inthat case, the state of Virginia prohibited blacks and whites from marrying each other. A black woman and a white man, who were married, had been sentenced to prison for "miscegenation," or interracial marriage. The United States Supreme Court determined that the anti-miscegenation statute was unconstitutional and banned all race-based legal restrictions in marriage . Brian and Jennifer are

in a similar position. They are short. They cannot help that. But the state is restricting whom they may marry, based on a trait that is inherent to them, similar to race. Although height may not be a "protected category" under Equal Protection (like race, religion, sexual orientation, and gender), the government still cannot intrude on such a fundamental , intimate right, such as by restricting the choice of marriage to a tall partner.

Just as with the anti-miscegenation law in *Loving v. Virginia,* MSOOC excessively intrudes on individual decision-making. The Florida law at issue here, just as the

anti-miscegenation law in *Loving ,* infringes upon a group of persons ' Due Process liberty interest. Even more so than the race issue which led Virginia to create its racist miscegenation law, there is no rational basis for this anti-short people marrying law. (At least in the racist law, the State could have enacted it during slavery when African Americans were not considered fully people-only % persons). Yes, football brings in a lot of money to the state of Florida, but there is no guarantee that Brian and Jennifer's kids will become football players. Maybe they will only have daughters. Or, maybe they will only be nerds. Not all children want to play football, even if they are male and tall. The state of Florida can find many other ways to make money besides requiring short people to marry tall people.

Even the state's concern about small children falling into holes and fitting into seatbelts is absurd. There are booster seats for children in cars, and children of all sizes (and some adults) can be vulnerable to such accidents. When the court examines the facts, it will discover that the government has no legitimate interest in the matter and is acting arbitrarily. There will be no countervailing interest to Brian and Jennifer 's substantive Due Process rights. Brian and Jennifer have an important, historically validated interest (a "fundamental right") to make the decision to marry each other (Schubert, 2015, p. 25).

5. **Ruling:**

There is no rational basis for such a restriction as that contained in MSOOC. The court should rule in favor of Mr. and Mrs. Short (Brian and Jennifer)."

Submitting Assignments in Module 3 Mark Givens 1/27/2016 12:00 AM

As you know, we have both a Case Brief and Case Analyses due by Sunday night in Module 3.

Please make sure that you upload your Case Brief as its own file to the appropriate Dropbox labelled "Module 3: Case Brief."

All three of your Case Analyses should be uploaded collectively as one file (separate from the Case Brief file) to their own Dropbox labelled "Module 3: Case Analysis."

So you will be uploading two separate files this week, one for your Case Brief and another for the Case Analyses .

- Case Brief - another example Mark Givens 1/27/2016 12:00 AM

Here's another example of a student's Case Brief. Notice the excellent content, the appropriate length, proper citations, and virtually no writing errors.

1. **Case Title and Citation**

Connecticut Department of Public Safety v. John Doe

(Plaintiff State Entity) v. (Defendant, unnamed individual) 538 us 1 (2003)

1. **Procedural History**

The District Court in Connecticut ruled in favor of John Doe, enjoining the State of Connecticut from publishing criminal sexual conviction about the defendant and others similarly situated pursuant to Megan's Law. The District Court certified the case as a class action. The Court of Appeals for the Second Circuit affirmed. The United States Supreme Court reversed the decision .

1. **Facts**

John Doe, a convicted sex offender, brought a suit in District Court in Connecticut, claiming that Connecticut's "Megan's Law" violated his Fourteenth Amendment rights to Due Process. Connecticut 's Megan's Law applies to all persons convicted of criminal offenses against a minor, violent and nonviolent sexual offenses , and felonies committed for a sexual purpose. Connecticut's Department of Public Safety (DPS) required Doe to register with the state entity, providing his name, address , photograph, and DNA sample. DPS then posted Doe's information on a sex offender registry on an internet website and made it available to the public in certain state offices. Doe had to periodically update his personal information and provide new photographs to the State. Doe objected to having to register and having his information publicized. Doe stated that the law violated his rights to Due Process because he is not a "dangerous sexual offender." He should have had the opportunity for notice and a hearing before being required to register and have his personal information posted on the State's convicted sexual criminal website . Doe stated that his liberty interest was his reputation combined with the alteration of his status under state law. The District Court granted summary judgment for Doe on his Due Process claim, and certified a class of individuals subject to Connecticut's Megan's Law. The District Court also permanently enjoined the law's public disclosure provisions. The Court of Appeals for the Second Circuit affirmed. The Court of Appeals held that Doe and other similarly situated individuals had a liberty interest because of the law's stigma among other things, and the fact that the registration process was "onerous." The Court of Appeals ruled that the Due Process Clause entitles individuals to a hearing "to determine whether or not they are particularly likely to be currently dangerous before being labeled as such by their inclusion in a publicly disseminated registry."

1. **Issue**

Are convicted sexual offenders' Fourteenth Amendment Due Process Clause rights violated by not receiving a hearing before disclosing their information to the public under Connecticut's " Megan's Law" and requiring them to register with the State?

1. **Ruling and Reasoning**

(Rehnquist, J.) No. The Supreme Court of the United States reversed the Court of Appeals for the Second Circuit. The Supreme Court said that it did not have to consider whether or not Doe (and the other similarly situated individuals) had a liberty interest. Instead, the Supreme Court said it was unnecessary to reach this question because Due Process does not entitle Doe and others to have a hearing to establish a fact that is not material under the Connecticut statute. The Connecticut statute is not based on how dangerous the sex offender is, but rather whether they were convicted of a crime fitting the category of Megan's Law. Thus , it was not necessary for the State to give Doe a hearing about whether or not he was "dangerous. " The registry and the website never said that the persons listed were "dangerous," just that they had been convicted of the crime. Since Doe already had a trial in which he was proven beyond a reasonable doubt to have committed the crime in question ("a procedurally safeguarded opportunity "), he did not need a second hearing to establish whether he should be on the list of convicted sexual offenders , and it was not a violation of Doe's rights to make him register. Therefore . the Department of Public service had not violated Doe's right to Due Process.

Lastly, the Supreme Court wondered if Doe was trying to say that the law itself was wrong, making a

"substantive challenge to Connecticut's statute," rather than a procedural one. But Doe said he was not saying he thought the law was wrong, only the procedure. The Court did not decide whether Connecticut's Megan Law violated substantive due process or not since the issue was not properly before them.

6. Dissenting or Concurring Opinion

It was an unanimous decision: 9-0 . Justices Scalia, Souter, and Stevens concurred. Justice Scalia concurred saying that he did not think it mattered if the Connecticut law implicated a liberty interest because the law was validly enacted. Justices Souter and Stevens concurred saying that they would allow the possibility that there was a substantive due process problem with the law.

Resources

Connecticut Department of Public Safety v. Doe. (n.d.). Oyez. Retrieved January 16, 2016 , from https:[//www.oyez.org/cases/2002/01-1231](http://www.oyez.org/cases/2002/01-1231)

Cornell University Law School Search Cornell (n.d.). CONNECTICUT DEPT. OF PUBLIC SAFETY V. DOE (01-1231) 538 U.S. 1 (2003). Retrieved from

[https://www.law.cornell.edu/supct/html/01-1231.ZO.html](http://www.law.cornell.edu/supct/html/01-1231.ZO.html)

Module 3 - Civil Procedure Mark Givens 1/24/2016 12:00 AM

Now that you have been given a good overview of both substantive and procedural due process, the next logical step is to examine the process of litigation, with a focus this week on civil lawsuits. In Module 3, we will cover how a lawsuit is initiated, what must happen in order to get the case ready for trial, and how a trial is conducted.

First we will learn about the various steps that one must go through to initiate a civil lawsuit. This includes preparing the complaint, in which a plaintiff sets out what happened, and why it constitutes a civil wrong for which the plaintiff can sue the defendant (e.g. a breach of contract, personal injury, fraud, wrongful termination, . . .). The complaint also will spell out the damages that the plaintiff alleges he has suffered, as well as the form of relief that he is seeking from the court. This may include things such as compensatory damages (money) or punitive damages (money), or even equitable relief like an injunction or specific performance of a contract. Chapter V also will explain how this complaint must be served on the defendant in order to give the defendant proper notice (i.e. due process) that they are being sued, and what the defendant must do to respond to the complaint. Every defendant must file a formal answer to the complaint within a specified number of days after being served, but may also have grounds for filing a cross-complaint (colloquially known as a countersuit) against the plaintiff or against another defendant. This phase of the process is known as the pleading phase; it defines the lawsuit.

Once the complaint, answer, and any cross-complaints all have been properly filed (and any legal challenges to them have been resolved), the stage is set for the lawsuit to proceed. This does not, however, mean that the case is ready for trial. Many things must occur before the parties and their attorneys are ready to present their respective cases to a jury. There will be many months, sometimes years, of discovery and

pre-trial motions in the case. Discovery includes such things as taking oral depositions of the parties and their witnesses, written requests for production of documents, written requests for admission, written interrogatories, requests for inspections of premises or for medical examinations of a party, . . . The general goal of discovery is to force each

side to produce everything that is in their possession , and that is arguably relevant to the case, to the opposing side. This reduces the chances of surprises and, ideally, leads to a fairer, more open process.

Pre-trial motions often include motions for summary judgment filed by either party, alleging that there is no "genuine" factual dispute and that the entire case should be decided in someone's favor without the need for a trial. It basically asks the judge to make a decision on the merits of the case based solely on the motion and any supporting documents (e.g. excerpts from sworn depositions , written admissions by a party, written responses to interrogatories, . . .). In some jurisdictions, a party also is allowed to file a motion for summary adjudication of one or more specific issues (not the entire case), such as on the specific issue of duty in a negligence case. If the motion is successful, this would remove that issue from the jury 's consideration , and could serve to streamline the trial. There are also pre-trial motions in limine, which seek to resolve evidentiary issues in advance of trial, perhaps to prevent the other side from introducing certain evidence , or to obtain an advance ruling from the trial judge on the admissibility of some piece of evidence. Any of these types of motions also often help to get the case into a posture that makes it more likely that one or both sides are willing to come to a settlement, as they narrow down the case to expose the strengths and weaknesses of one side or another.

Most cases never make it as far as trial, since it is usually advantageous to settle a case at some point in the process, if for no other reason than to cut off the expenditure of litigation costs and attorneys' fees. However, some cases simply cannot be settled, often due to the obstinance of one or both of the parties in the lawsuit. In that situation, after all efforts to settle the case have failed, including settlement negotiations , settlement conferences, and perhaps even mediation, then a trial is necessary. In this module, we will learn about the different stages of a trial, including jury selection , opening statements, direct and cross-examination of witnesses , the introduction (and exclusion) of various other types of evidence, and closing arguments. Then, once the jury has been given all of the appropriate evidence and argument, as well as the (often mind-numbing) jury instructions on the law that they must apply to the facts , they are sent into a room to deliberate and hopefully to come to a decision as to whom is at

fault , and what remedy is appropriate under the circumstances. Sounds fun, right?

You'll notice that we have both a Case Brief and Case Analyses due this week . They should be a little easier for you now that you already have a case brief and three case analyses under your belt.

- Discussion #1 Grades - CORRECTED Mark Givens 1/20/2016 12:00 AM How embarrassing ! I graded everybody 's discussion out of 10 points, but the Gradebook now uses a

100-point scale in this course (but still not in my other courses) and I hadn't noticed the change. The

discussion grades are all fixed now.

(SJ - Case Briefs and Case Analyses - Additional Guidelines

Mark Givens 1/20/2016 12:00 AM

Because a few of you had some trouble with the first Case Brief assignment, I'm going to give you some more advice on what you should, and should not, be doing. Much of this advice applies to the Case Analyses, as well. Here are some things to strive for if you want to receive good grades on these assignments:

1. Your Case Briefs should end up being anywhere from a little

, depending on how complicated the case is, how many issues there are, and how many rationales the court gave for its various holdings. Your Case Analyses should end up being about ; some will end up being over a page long.

1. Write the Case Briefs and the Case Analyses . Typing verbatim what already has been written by the appellate court, or what is written in textbook or the given fact patterns, will not lead to a very good grade. Even our textbook advises to keep copying from the court's opinion to a minimum, as this is not an exercise in stenography. Moreover, copying sentences and paragraphs from somewhere, even from the court's opinion or the textbook, constitutes **plagiarism.** That does not mean, however, that you cannot use the occasional quote from the court's opinion or the textbook. If you need to quote something , as is sometimes appropriate, then you must use quotation marks and include a citation to the correct page indicating that you have copied the language from someone else. Just make sure you are not passing off the writing as your own, without quotation marks and without giving proper credit. Also, often it is necessary to state a rule in the same language that is used throughout the legal world (and in the court's opinion or textbook), or to use specific terms of art (negligence per se, strict liability, mens rea, proximate cause, . . .), which is perfectly fine; just make sure the rest of the sentence is written in your own words.
2. Show in your assignments, most especially in your Case Analyses. Don't just regurgitate back what is written in the court's opinion, the textbook, or the given fact pattern. Do some analysis to show that you understand the fact pattern and the assigned reading. Writing the Case Briefs and the Case Analyses in your own words will go a long way towards accomplishing this.
3. Make sure you look at the for the Case Analyses, which you will find in the Case Analysis instructions, so that you can see what I am looking for when I grade them.

#### e very, very

It is usually obvious to me when a student has merely relied on

the internet to find test answers, portions of case briefs, or portions of case analyses . In the worst cases, students have copied and pasted directly from the Internet (Wikipedia, lawfirms' websites, attorneys' biogs, nolo.com, findlaw.com, an online legal dictionary, cliffsnotes.com , test answer websites, . . .) and have ended up with formal **plagiarism** referrals. Sadly, this happens at least once in every class that Iteach.

Your Case Briefs and Case Analyses will be much better if they come from a

combination of the assigned reading, the weekly Audio Video Presentations ("AVP"), the court's opinion or fact pattern given, and your own brains, as they should.

1. Be meticulous with your **a** . . .. Use

At this point in your college careers, you should not be using any slang, any contractions, any shorthand , or any exclamation points in your college writing . I strongly suggest that you proofread your written assignments, including your discussion posts, more than just once. Write like a college student. I shouldn't feel like I'm reading a text message or an email that you've sent to a friend . Your grade depends in large part on the quality of your writing , especially since we have no exams or quizzes in this course.

Good, college-level writing is very important, both now and in your future (and current) careers. I promise you that employers will not take you seriously if you don't write well (neither will judges, lawyers, business clients, commanding officers, employees, . . .); conversely, they will have extra confidence in your abilities as a whole if you do write well.

If you are having trouble with your writing , or even if you just want to improve your writing skills, there is free tutoring available to you through the university. Saint Leo University students also have free access to Grammarly.com, an online grammar tutor and revision tool. You can paste a sentence into Grammarly or even upload a file to reveal most of your errors. To access the website, go to [http://www.grammarly.com](http://www.grammarly.com/)

/edu/students and sign up to create an account using your Saint Leo email address. You also can learn about Grammarly to the left under the "Resources" tab, where it says "Grammarly@edu." Actually, all of the links under the "Resources" tab are quite helpful. Take a look.

I know that this is a law course, but it is also very much a writing course, evidenced by the fact that we have no quizzes or exams at all. You probably should think of me as an English teacher, as well as a law professor. If you have questions, don't hesitate to call or to email me. I will do what I can to help you to improve your writing skills throughout our short eight weeks together, as long as you make a concerted effort to produce high-quality writing for me to grade.

Hopefully this helps.

With regards, Professor Givens

Module 2 - Due Process Mark Givens 1/18/2016 12:00 AM

**Discussion:** Many of you did a great job on the first week's discussion. There were a lot of thorough, thoughtful initial posts and replies; I saw some very good sources; you showed a lot of insight into the problem I presented; most of you did more than the bare minimum of 2 replies to your classmates , and kept the discussion going quite well;

. . . I'd love to see that level of effort continue for the next seven weeks.

**Case Briefs:** I'll try to have your Case Briefs graded by the end of Wednesday. Generally, Itry to have all of your assignments graded by the end of the Wednesday following their due date. Make sure you look at my grading comments on your specific assignments , as they should help you on future assignments .

**Module 2:** Due Process clauses can be found in both the 5th and 14th Amendments to the United States Constitution. Most, if not all, states included similar provisions in their state constitutions . There are two types of due process that we'll be learning about this week: substantive due process and procedural process.

Substantive due process is what places limits on how broad or vague a law can be, and also requires that laws be clear enough for ordinary people to understand so that everyone can know what is allowed and what is prohibited. Substantive due process also is where our right to privacy originally came from.

Procedural due process concerns the procedures that governments must follow before depriving someone of life, liberty, or property. This includes the right to be notified before your life, liberty, or property is going to be taken away from you, the opportunity for a fair hearing, and the right to have your case decided by a neutral tribunal.

Substantive due process applies, in varying degrees, to both criminal and civil cases.

It is important to keep in mind that due process only constrains governmental action, not actions by private people or companies.

**Case Analyses :** In this second week, we will prepare our first three Case Analyses; the three "Case Analysis 1 Fact Patterns" for the assignment can be accessed via the hyperlink on page 11 of Module 2. Another hyperlink to detailed "Case Analysis Instructions" also can be found on page 11 of Module 2. I personally think that the "Rationale" section of the sample Case Analysis that you are given in the Instructions is too short; your analysis should be more thorough than the one in the example. Think about arguing the facts that support the position that you have taken, and interweaving those facts with the law; it is also a good idea to recognize the facts and law that go against your position, and to explain why the opposing side isn't as strong as your side, or why certain facts are distinguishable, inapplicable, . . . These are just some suggestions for making your Case Analyses more thorough.

Make sure you do **all three** Case Analyses (don't just choose one), and get them uploaded by Sunday night's deadline.

Case Brief - another example Mark Givens 1/17/2016 12:00 AM

Because a couple of you still have not received your textbooks, here is a sample case brief and introductory explanation from a different edition of our textbook. This will give you some further guidance for preparing your Module 1 Case Brief, in addition to the Audio Visual Presentation and the case brief instructions found in Module 1.

"Most students new to reading judicial opinions often find it helpful to brief a case. With practice it becomes possible to write a brief without having to refer back constantly to the j udicial opinion itself. Briefing with the case set aside provides a check on understanding and encourages careful reading. A brief should contain the parts of the case selected as important, organized for the purpose at hand rather than in the haphazard order in which they may be reported.

The following brief of *Miller v. Alabama* illustrates one way of briefing. The elements in the example are usually found in most briefs, though writing style is often a matter of individual preference. It is usually desirable to keep copying from the text of the case to a minimum; briefs are not exercises in stenography. This brief was written to help students who have not previously read a judicial opinion. It is intended to help these students understand what is important in the case reports they are reading.

#### Sample Brief

*Miller v. Alabama*

**Facts:** Two juveniles , one from Alabama (Evan Miller) and the other from Arkansas (Kuntrell Jackson) , were prosecuted, convicted, and sentenced in adult courts for capital murder. Miller's offense involved extreme brutality and cruelty on his part and occurred in conjunction with an arson. Miller was originally charged in juvenile court and then transferred into adult court. Jackson, although found by the jury to not have been the shooter, was convicted of aiding and abetting the person who shot and killed the victim in conjunction with the armed robbery of a video store. Jackson, although fourteen , was initially prosecuted in adult court. Miller and Jackson were sentenced in adult courts to mandatory terms of life in prison without possibility of parole. The appellate courts of the States of Alabama and Arkansas confirmed the convictions and sentences.

Miller and Jackson, acting independently, successfully petitioned the U.S. Supreme Court, which agreed to review both of their cases. The two cases were consolidated by the Supreme Court and were decided concurrently.

**lssue(s) Presented:** Does the Eighth Amendment's Cruel and Unusual Punishments Clause prohibit the sentencing of juveniles convicted of capital murder to mandatory sentences of life in prison without possibility of parole?

**Holding:** The Eighth Amendment's Cruel and Unusual Punishments Clause prohibits the sentencing of juveniles convicted of capital murder to mandatory sentences of life in prison without possibility of parole.

**Rationale:** The Supreme Court explained the reasoning behind its holding as follows :

1. The Eighth Amendment differentiates juveniles from adults when determining whether a punishment is so excessive as to be constitutionally disproportionate because juvenile offenders differ significantly from their adult counterparts . Juveniles

are immature, lack a developed sense of responsibility, are often impulsive and engage in risky behavior, and are impressionable and vulnerable to what Justice Kagan referred to as "negative influences and outside pressures." The constitutional significance of the differences between juveniles and adults in sentencing has been well established by the Supreme Court in such cases as *Roper v. Simmons* and

*Graham v. Florida.*

1. The Court noted that mandatory sentences of life in prison without the possibility of parole have much in common with capital punishment. Such a sentence is the most severe sanction that a juvenile can receive. Because juveniles are always younger than adults, a juvenile who receives a mandatory life without parole sentence will end up serving more time in prison than an adult who has committed an equivalent offense. The Court noted that it had previously ruled that individualized sentencing is

constitutionally required for convicted individuals who have been targeted for the death penalty *( Woodson v. North Carolina)* and for juveniles committing non-homicide offenses *( Graham v. Florida).* Justice Kagan wrote about Woodson:

"[W]e held that a statute mandating a death sentence for first-degree murder violated the Eighth Amendment. We thought the mandatory scheme flawed because it gave no significance to 'the character and record of the individual offender or the circumstances' of the offense, and 'exclud[ed] from consideration

... the possibility of compassionate or mitigating factors .' . . .."

Subsequent decisions have elaborated on the requirement that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses.

Justice Kagan's conclusion was that since individualized sentencing is required when an adult is facing the possibility of the ultimate punishment, individualized sentencing should also be required for juveniles convicted of capital murder facing the possibility of the ultimate sentence available to persons under eighteen.

* + Module 1: Introduction to the Law Mark Givens 1/6/2016 12:00 AM

In Module 1 we will begin with a little bit of legal history, an overview of our legal system, as well as the first 14 amendments to the United States Constitution.

Amendments 1 through 10 are known as the "Bill of Rights," and originally only applied to the federal government. It was the 14th Amendment that made most of these rights (and government restrictions) also applicable to the states. I think it is important for everyone to read and to understand the United States Constitution .

In this first week we also will be learning how to read, to analyze, and to brief an appellate court opinion. Even if your textbook has not yet arrived, you can still look up either of the cases that you choose as the subject of your written Case Brief assignment that is due on Sunday night by going to lp.findlaw.com or law.cornell.edu or oyez.org . There are links to these websites on page 10 of Module 1. Each of you also

have free access to Westlaw and to Lexis through the Saint Leo University online library; they are incredibly powerful tools, and I strongly suggest that you take advantage of them and at least use this free period to explore them. Also , as you might already have noticed, the Audio Visual Presentation on page 7 of Module 1 describes what a Case Brief should contain. Page 12 of Module 1 contains a hyperlink to your "brief instructions," which describe in more detail how to prepare your Case Brief. Please make sure that you upload your Case Brief to the Dropbox by the Sunday (January 17th) night deadline in order to receive credit.

Introductory Matters Mark Givens 1/5/2016 12:00 AM

Welcome to POL1232, Intro to Law and Legal System. My name is Mark Givens and I will be your professor for this course. I'm glad you've decided to take my class. The following are some introductory matters to help you get started:

* Make sure that you **order your books right away ,** as our assignments start immediately and you won't want to fall behind. Everybody must have their first week's assignments completed on time, regardless of which day you added the course.

Please refer to the syllabus for the specific titles and editions (and ISBN) of the books that are required for this course. Since we use a custom version of the textbook, you likely will not be able to find it by searching the Cengage website . The easiest way to find it, and the safest way to make sure that you are ordering the correct custom edition, is to use the bookstore link on the Home page of Learning Studio . You will see the online bookstore link(s) for ordering textbooks on the left-hand side of the Home page.

* Please make sure that you check the Announcements on the Course Home page every time you log in to the course. I post at least one or two announcements per week . **You are responsible for being aware of the information in all announcements.**
* When I enter a grade for each of your assignments , I**almost always include comments with your grade.** So look for my comments , as they will help you on the subsequent assignments.
* Definitely review the **Syllabus** and the **Policies and Information** by the beginning of the first week of class; they are located to the left under "Course Home." They will provide you with information on what is expected of you and how you will be graded.

in this course! Since everything is submitted electronically through this online Learning Studio platform, the deadlines for your discussion postings, your Case Briefs, and your Case Analyses are firm . Please allow yourself plenty of time to complete everything in a timely manner, taking into account all of those potentialities that could interfere with you getting something in on time (e.g.

Internet problems, personal computer problems, kids, job, illness, emergency, . . .). You are solely responsible for completing each assignment on time. If you are having an exceptional problem that is going to impact your ability to complete something on

time, then please contact me BEFORE the deadline so that we can discuss the matter; do not wait until after you have missed a deadline to come to me with an excuse. Your initial discussion post each week is due by the end of Thursday night; that means you have four full days to complete that task (Mon, Tues, Wed, Thurs); it is not a valid excuse that something happened on the last hour of Thursday night that prevented you from submitting your initial post on time. If your initial post is late, you will receive no credit for that portion of the assignment. Likewise, for the Case Briefs and Case Analyses that must be finished by the end of Sunday night, you have the preceding seven full days to complete each of them; if you wait until late Sunday night, then you are assuming the risk that something will get in the way of you submitting your assignment on time, causing you to get a zero for not completing the assignment by the Sunday night deadline . If you know that you're a procrastinator, maybe you should pretend that everything is due a day or two earlier than it actually is.

* Do your reading each week. The information in the textbook is critical to participating in the discussions, and to performing well on the case brief and case analysis assignments . Our course is only 8 weeks long and we have to get through 7 chapters in the book, just like we would have to in a regular 16-week course. Plus, the course moves so fast that you really cannot afford to fall behind. I recommend setting aside a few hours on the weekend prior to each module to do your reading. Highlight, use post-it notes, and take good written notes, as they will help you to understand the material and will assist you in the discussions and in writing your Case Briefs and Case

Analyses.

* Make sure you go to the Introductions section (under Module 1 to the left) and post your introduction to the class. Tell us whatever you'd like for us to know about you (e.g. the name you prefer to be called, where you're from, what you do for a living, what you'd like to do for a living, what your hobbies are, . . .). Feel free to post a photograph of yourself if you like, but certainly do not feel obligated to do so. Also, don't forget to respond to each of your fellow classmate's introductions to make them feel welcome.
* Overall, I feel that if you stay on top of the reading, participate meaningfully in the discussion boards, and put forth a solid amount of effort in your writing, you'll do fine in the course.
* If you have any problems or questions now or throughout the course, feel free to contact me through the email link in the toolbar (above) or by calling me at the contact number listed under "Instructor Contact" in the pane to the left. I'll do my best to help you.

With regards, Professor Givens

- Discussion Guidelines Mark Givens 1/5/2016 12:00 AM

In an online class, the weekly Discussion is our version of being called on in class and discussing topics together. It is an important part of the learning process.

Make sure that you read everybody's posts. It only takes a few minutes. That way you won't end up posting something that already has been answered by me or by one of your classmates. Instead, you' ll be in a position to add something new to the evolving discussion .

The discussions are a continuing assignment throughout each module. **Make sure you continue monitoring the discussion at least through the end of Sunday night each week.** Frequently, other students post additional information or questions about what you wrote, and I almost always post additional information and questions about what you wrote. **You need to continue participating in the discussion, and answer those questions ,** and not simply submit your bare minimum 1+2 posts.

Please make sure that you post replies to *a minimum of at least two* of your classmates' initial posts (more than the minimum would be a good idea if you want to receive a " 1O"). This means that you must post replies within two of your classmates threads. This is in addition to addressing whatever I or a classmate writes or asks you in your own discussion thread .

Unlike on exams, you do not always need to give the precisely correct answer in our discussion board interactions. I am more interested in getting you to think critically and analytically than I am in seeing the answer that I might have had in mind in posting the initial question. Do not be afraid to voice your opinion , or to posit something that might not be entirely correct. The purpose of our discussions is to explore concepts, to come up with various ways of looking at problems, and to hear what others have to say. You will not agree with all of your fellow students , or even with me, all of the time. That's ok. Sometimes we will be right, sometimes we will be wrong , and often our ideas will fall somewhere in between the two ends of that spectrum. Frequently there will be more than one "correct" way of looking at the problem. All answers are useful and instructive, as long as we all are respectful of others, and as long as we all keep open minds.

So give us your opinions , but **make sure that you also include evidentiary support for your position, like references, citations, quotes from what you found, links to government websites, caselaw, illustrative videos, et cetera. You need to do outside research (beyond just the textbook) on the discussion topic each week and to provide us with the results of your research if you want to receive full credit.** While our textbook gives a good summary/overview of each topic, it doesn't go as in-depth as I would prefer. The outside research that you do each week and the pertinent results that you provide us in the discussion are intended to supplement what is presented in the textbook . The outside research that you provide us in your discussion posts is intended to give everyone a broader, and also a more detailed, understanding of the weekly topic.

Show me your Intellectual Humility, your Intellectual Courage, and your Intellectual Empathy in our discussion board conversations . (I borrowed these terms from The

Miniature Guide to Critical Thinking Concepts and Tools, which you can read via the "Critical Thinking" link in the column on the left, under "Course Home.")

Just to clarify, your initial post is due by the end of Thursday during each module, and you must also post responses to at least two of your fellow classmates' posts (in their threads , not just in your own thread) by the end of Sunday. Remember, you have four full days each week (Mon, Tues, Wed, and Thurs) to get that initial post in. The fact that your internet was having problems on the last hour of Thursday night or that you unexpectedly got called into work are not valid excuses for being late. If your posts are not submitted on time, you will not receive credit for them. Please make sure to do your assignments early if there is any chance that something in your life potentially could get in the way.

## W ha t ' s Ne w

Module 6 - Discussion Postings: 1

See What's New Since: Last Login

Last Login: 2/17/2016 5:56:02 PM

## C o u r s e C h e c k l is t

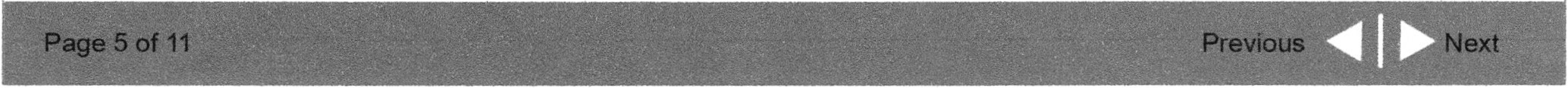
Students can keep track of the activities and due dates in the course with the Course Checklist.

.J Course Checklist

\* Times are displayed in (GMT-05:00) Eastern Time (US & Canada)

*CRMIPOL 123* Module 7 Reading

*Negligent Torts*



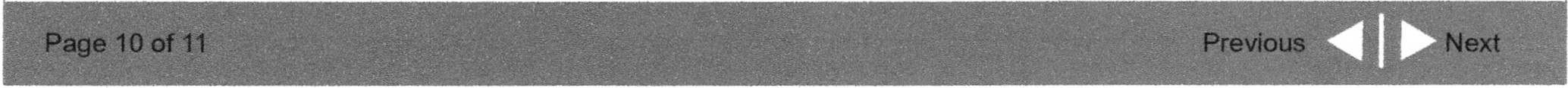
*Reading*

For this module, you are required to read the following:

* Chapter XI, pp. 423-447

***CRMIPOL 123* Module 7** j Case Analysis Assignment

***Negligent Torts***



**Case *Analysis Assignment***

In this assignment , you will prepare three case analyses based on hypothetical fact patterns. These fact patterns all deal with the topic of due process.

**Step 1:** Download and thoroughly read the Case Analysis instructions .

**Step 2:** Download the Case Analysis 4 Fact Patterns. Prepare your responses to each fact pattern based on the instructions.

Submit this assignment to the Dropbox **no later than Sunday 11:59 PM EST/EDT.** (This Dropbox basket is linked to Turnitin.)

**CRM 123 - Case Analysis Instructions**

**Purpose**

The goa!- of this assignment are to provide a valuable ski!! and to ass....ss your ability to comprehend and apply case law. Reading, briefing, and applying what you are reading in your textbook and learning in the modules are effective ways to become literate in the process of the U.S. legai system .

**Conducting an Analysis**

Before making and defending a decision, you must be familiar with the relevant law. For our purposes, your textbook and course material provide all the legal concepts needed to apply the law to a factual situation. Once you are famiiiar with the generai content of the chapter, you shouid be abie to recognize the issue involved in a case and find the legal concepts that will help you decide the case. For your reference , a sample analysis is provided at the end of this document.

First, you will read the assigned **fact patterns** (provided via a link in the module) . Then, you will complete an analysis for all fact patterns presented. Each analysis should contain the following :

1. **The main issue.** Identify and write (in your own words , at least 50% original) the central issue to be decided. As much as possible, set the issue in legal terms and concepts.
2. **Relevant legal concepts** quoted from textbook court opinions. Search the assigned chapter for legal concepts that will help you decide and justify your decision. Once you find the quotations you wish to use, copy them into the appropriate places in your analysis.
3. **Relevant case law** quoted from the textbook.
4. . **Rationale.** Write (in your own words , at least 50% original) a complete explanation about how you used the legal concepts you cited to make a decision about how the case should be resolved.
5. **Ruling.** Describe (in your own words , at least 50% original) what should happen to the parties involved as a result of your decision.

Submit your Case Analysis to the Dropbox **no later than Sunday 11:59 PM EST/EDT** of the assigned module. (The Dropbox baskets for these assignments are linked to Turnitin )

**Grading Rubric**

Ratings:

**Exceptional** corresponds to an A (90-100) . Performance is outstanding ; significantly above the usual expectations .

**Proficient** corresponds to a grade of B- to B+ (80-89%) . Skills are at the level of expectation .

**Basic** corresponds to a C- to C+ (70-79%). Skills are acceptable but improvements are needed to meet expectations well.

**Novice** corresponds to a D to D+ (60-69%). Performance is weak; the skills are not sufficiently demonstrated at this time.

**O** This criterion is missing or not in evidence.

I

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| --- | --- | --- | --- | --- | --- |
| **Criteria** | **Ratings** | | | | |
| 0 | **Novice** | **Basic** | **Proficient** | **Exceptional** |
| Correctly framing the specific legal question to be decided  I |  | 12-13 | 14- 15 | 16-17 | 18-20 |
|  |

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| !dentifring and quoting re!e,1ant material from the assiqned chapter |  | 12-13 | 14-15 I 16-17  I | | 18-20 |
| Correctly applying the cited legal concepts to your decision |  | 12-13 | 14-15 | 16- 17 | 18-20 |
| The insightfulness and organization of your rationale |  | 12-13 | 14-15 | 16-17 | 18-20 |
| Originality and writing quality |  | 12-13 | 14-15 | 16- 17 | 18-20 |
| **Total** | | | | | **100** |

**Academic Honesty**

This assignment should include your original work and be treated as a take-home examination . You may copy legal concepts and case law from the textbook into the "Relevant legal concepts" and "Relevant case law" sections, but the rest should be written "in your own words" (at least 50% original). The Dropboxes for ail Case Analyses are linked to Turnitin , and each submission will be scanned for originality . Substantial overlap with the writing of other students constitutes academic dishonesty and will result in appropriate sanctions .

**Sample Analysis Using Headings Main Issue** (your own words)

Has the State of Kentucky violated procedural due process by depriving inmates of a protected liberty

right to prison visitors with our a hearing to challenge a visitor who is banned?

**Relevant Legal Concepts From Text** (quoted from textbook opinions)

Procedural Due Process - 14th Amendment - *Section 1.* "...nor shall any state deprive any person of life, liberty, or property, without due process of law; ..." (pp. 28 & 671)

Relevant Liberty Definition: "...a vast scope of personal rights. It also infers *the absence of arbitrary and unreasonable government restraints.* (p. 29)

"The due process guarantee protects people from unfairness in the operation of both substantive and procedural law." Procedural law prescribes the method used to enforce legal rights. It provides the machinery by which individuals can enforce their rights or obtain redress for the invasion of such rights." (p. 29) .

Since procedural due process rights cost the government time and money: "Courts generally therefore generally try to balance accuracy against its cost on a case-by-case basis."

**Relevant case law from text:**

*Melinda Speelman v. Bellingham Housing Authority* " Finally, ... both the parties and the public have an interest in ensuring that BHA administers its programs lawfully, Contrary to ... contention, Speelman is not asking for an exception to be applied to her case. She is asking that she be given the process due her and everyone else in her situation. Therefore , the equities favor granting Speelman a preliminary injuncti on." (p.38)

**Rationale** (your own words):

Since BHA was aware that Speelman was in jai l, they had an obligation to do more, even though they reasonably attempted to reach Speelman. She was entitled to more due to the unusual set of circumstances presented in the case and the failure to take additional action to properly serve Speelman

deprived her of her constitutionally guaranteed due process rights and she was put in a position of facing eviction without benefit of a hearing.

**Ruling** (your own words)

The State of Kentucky need not provide hearings for denial of inmate visitors.

**Sample Case Analysis in Essay Style**

The main issue in this case is whether the State of Kentucky violated procedural due process by depriving inmates of a protected liberty right to prison visitors , without a hearing to challenge a visitor who is banned.

This is a due process case. Procedural Due Process is in the 14th Amendment - Section 1. "...nor shall any state deprive any person of life, liberty, or property, without due process of law..." (pp. 28 & 671). The relevant definitions here is the definition of liberty: "...a vast scope of personal rights. It also infers the absence of arbitrary and unreasonable government restraints. (p. 29)

"The due process guarantee protects people from unfairness in the operation of both substantive and procedural law." Procedural law prescribes the method used to enforce legal rights. It provides the machinery by which individuals can enforce their rights or obtain redress for the invasion of such rights." (p.29) Since procedural due process rights cost the government time and money: "Courts generally therefore genera!ly try to balance accuracy against its cost on a case-by-case basis.

The Court examined this issue in *Connecticut Depa,tment of Public Safety v. John Doe,* stating "In cases such as *Washington v. Constantineau* (1971) and *Goss v. Lopez* (1975) we heid that due process required the government to attord the plaintiff a hearing to prove or disprove a particular set of facts ." However, "...a convicted offender has already had a procedurally safeguarded opportunity to contest." '"Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they eek to establish in that hearing are relevant under the statutory scheme." (p. 46)

Since the State of Kentucky harl "...established regulations to guide prison officials in m?.king visitation decisions," one cou!d argue that an inmate's liberty to have;· isitors has bee, recognized. It could be further mgucd tr1c1t denial of a hec1ring to ci1:;illenge the finding that a specific visitor could be barred is protected by due proc s. However, conducting court hearings requiring an adversary proceeding could be unduly bwdens0me of the stat'" and the !iberty of ar? inmate has been deprived initially in a procedura!!y s;;ifegu;;:rc!ed hearing. Dep.-ivat1on of ti1e iiber,y of conv·ictecl i1 nnatP.'., to !l<'Jve cpc:cific visitors

is outweighed by the burden of e;unduciing such hec1rings.

The court should rule in favor of 01 -, Staie of K:1t11r:ky.

**CRM 123 - Case Analysis 4 Fact Patterns**

Write an analysis for each scenario below. See the **Case Analysis Instructions** for further information about completing the assignment.

1. During class on Wednesday , while showing a movie, Professor saw smoke and smelled odor of marijuana from the back of the class. When she turned the lights on, she could not tell who had been smoking, and no one confessed to smoking it. She told the class that no one could leave until the perpetrator was identified. Professor locked the doors. Four hours went by, and when still nobody confessed, the students began to get anxious. Tyler grabbed Professor by the arms and shook her, shouting "I'm not staying in here any longer!" Joseph helped him kick down the door and the entire class followed them out. While leaving, Ron grabbed a piece of the door and threw it at Professor, who ducked out of the way. The piece of the door instead hit Diana, injuring her leg. Describe any and all torts you observe, and identify who can sue whom and why.
2. Remember our friend Ana? You may recall she attempted to rob the bank, but mistakenly grabbed the duffel bag of the person next to her and ran out of the bank. When she got back to Summer's car. she opened the bag and discovered it held $100,000 and a gun. The tag on the bag read " If lost, return to Liz" along with an address and phone number. Ana's great attorney managed to have the case dismissed , and she used some of the money from the bag to pay him, buy a brand new Jeep Wrangler, and pay her tuition. She then spent the rest partying with Jennifer, Felicia, and Katie. The group decided to go to Club Disco to hang out. Alexis , the bartender, got a great tip by serving them Long Island Iced Teas all night. She was even nice enough to help them to the car safely since they were stumbling and falling. Ana sped *off* and hit Kurt's car, which he was driving on the wrong side of a two-way road with the headlights *off .* His car was totaled. Upon impact, Katie, who was not wearing her seatbelt, fell out the back of the Jeep and hurt herself. Describe any and all torts you observe, and identify who can sue whom, and why . Include any defenses you see.
3. Rich is an avid duck hunter. One day, he spotted a beauty flying over his neighbor Kim's house. He aimed, fired, and shot the duck, which fell onto Kim's roof. Matt hopped over the fence into Kim's yard then climbed on her roof. While retrieving the duck, Matt slipped and fell *off* the roof, but luckily landed on the balcony outside of Kim's window. Matt peeked in and saw Kim and Carolyn watching "Glee," dancing around and lip syncing to the songs. He took some photos with his cell phone and uploaded them to YouTube the next day. Describe any and all torts you observe, and identify who can sue whom , and why.

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**Infliction of Emotional Distress**

The intentional tort called **infliction of emo­ tional distress** evolved out of the need to recog­ nize tha t every person has a right to not be subjected intentionally and recklessly to severe emotional distress caused by some other person's outrageous conduct. A person has a cause of action for infliction of emotional distress when the con­ duct of the defendant is serious in nature and causes anguish in the plaintiff s mind . Because it is difficult to prove mental anguish and to place a dollar amou nt on that injury, early cases allowed recovery for emotional distress only when it was accompa­ nied by some other tort, such as assault, battery, or false imprisonment. Today, the infliction of emo­

tional distress generally is considered to be a stand­ alone intentional tort.7

Recovery for emotional distress is allowed only in situations involving extreme misconduct-for example, telling a wife the made-up story that her 1iusband shot himself in the head . Mental wony,

.istress, g1ief, and mortification are elements of mental suffe1ing for which an injured person can be awarded damages. Damages are not available for mere annoyance , disappointment, or hu rt feel­ ings. For example, the plaintiffs in a 2013 case

light, intrndes into the plaintiff's p1ivate life, discloses embarrassing private facts, or uses the plaintiff s name or likeness for the defendant's gain. Generally, the motives of the defendant are u nimportant .

The standard used to measure any type of inva­ sion of privacy is that the effect must be highly offensive to a reasonable person . For example, if a frnstrated creditor puts up a notice in a store win­ dow stating that a named debtor owes money, this is an invasion of the debtor's p1ivacy.

Technological developments in information storage and communications have subjected the inti­ macies of eve1yon e's p1ivate lives to exploitation. The law protects individuals against this type of encroach­ ment. A person who has become a public figure has less protection, however, becau se society has a right to infonnation oflegitimate public interest.

Although invasion of privacy and defamation are similar, they are distinct intentional torts, and both may be included in a plaintiff s complaint. The difference between a 1ight of privacy a nd a right to freedom from defamation is that the fom1er is concerned with one's peace of mind, whereas the latter is concerned with one's reputation or charac­ ter . Unlike defamation, truth is generally not a defense for invasion of privacy,

claimed tha t they had suffered emotional distress

resulting from a big gasoline leak that contaminated the aquifer from which they got their water. They argued they were entitiled to money damages because of their fear of contracting cancer and the "distress" resulting from their fea r that their property would decline in value. The court ruled

against the plaintiffs because they had not proven their claims clearly and convincingly. 8

**Invasion of Privacy**

The law recognizes one's 1ight to be free from unwar­ ranted publicity and, in general, one's 1ight to be left alone. If one person invades the 1ight of another to withhold self a nd property from public scrutiny, the invading party can be held liable in tort for invasion of the right of privacy . A suit for **invasion of privacy** may involve publicity that places the plaintiff in a false

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Readers can read on the textbook 's website the case of *Elli Lake v. Wal-Mart Stores, Inc.,* 582 N.W.2d 231. This is *a* 1998 case in which the Minnesota Supreme Court explains why it decided to recognize only three of the four types of activities that commonly are included in the

tort of invasion of privacy.

**N E G LI G E N C E**

The law recognizes a duty or obligation to confom1 to a certain standard of conduct for the protection of others against unrea sonable 1isk of harm. Ifthe person fails to confom1 to the required standard, and that failure causes damage or loss, the injured party has a cause of action for **negligence.** Negligence is the

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u nintentional failure to live up to the c01m11unity's ideal of reasonable care; it is not based on moral fa ult. The fact that defendants may ha ve suffered l osses of their own through their negligent acts doe, not render them any less liable for plaintiff,' injuries.

An infinite variety of possible situations makes the detem1ination of an exact set of rules for negb­ gent conduct impossible. Conduct that might be considered prudent in one situation may be deemed negbgen t in another, depending on such factors as the person's physical attributes, age, and knowledge; the person to whom the duty was owed; and the situation at the time. If the defenda nt could not rea­ sonably foresee any irtjrny as the result of a ce1tain conduct, there is no negligence and no liability.

The elements necessa1y for a cause of action for the tort ofnegligence are: (1 ) a duty or standard of care recognized by law, (2) a breach of the duty or fail ure to exercise the req u i site care, and (3) the occunence of ham1proximately ca used by the breach of duty. No cause of action in negligence is recognized if a n y of these elements are absent from the proof.

The plaintiff has the burden of proving, through the presen ta tion of evidence, tha t the defenda nt was negligent. Unless the evidence is such that it can reasonably lead to bu t one conclu­ sion , negligence is prima rily a question of fact for the jury. A jury m ust decide whether the defenda nt acted as a reasonably prudent person would have u nder the circumstances-that is, a person ha ving the same info1111ation, experience, physique, and professional skill. This standa rd ma kes no allowa nce for a person less intelligent than a verage .

Children a re not held to the same standard as adults. A child m ut conform merely to the conduct of a reasonable person of like age, intelligence, a nd experience u nder like circumstances. This standard is subjective a nd holds a l ess intelligent child to what a similar child would do.

**Malpractice**

The tem1**malpractice** is a nonlegal tem1for profes­ sional negligence. Professional negligence takes differ­ ent fo1111s in different fields. Attorney negligence would include drafting a will but failing to see that it

is properly attested; failing to file an answer in a timely man ner on behalf of a client, with the result that the opposing pa1ty wins by default; and failing to file suit prior to the running of the statute of limitations, thus barring the client's claim. Accountant negligence would occu r if a client paid for an audit but the accou n­ tant failed to discover that the client's employees were engaging i n embezzlement, exposing the client to post­ audit losses that could have been prevented. The case of *M11co111ber v. Di/11111111* (Chapter VII) is an example of medical malpractice. In that case, a surgeon improperly pe1fom1ed a tubal ligations, and the plaintiff subse­ quently gave bi1th to a child.

Plaintiffs in malpractice cases allege tha t the pro­ fessional specifically breached a contractual duty (if the suit is in contract) or tha t the professional breached a duty of care imposed by la w (if the suit is in tmt). Professionals have a higher degree of knowl­ edge, skills, or expe1ience than a reasonable person and are required to use that capacity. They are gen­ erally required to act as would a reasonably skilled, pmdent, competent, and expe1ienced member of tr profession i n good standing within that state. Negli­ gence in this area usually may be shown only by the use of expe1t testimony.

**Duty of Care**

There can be no actionable negligence without legal duty. Common law duty is found by courts when the kind of relationship tha t exists between the parties to a dispute requires the legal recogni­ tion of a du ty of care. Legislative acts also may pre­ scribe standards of conduct req uired of a reasonable person. It may be argued tha t a reasonable person would obey statutes such as traffic laws, ordinances, a nd regula tions of administrative bodies.

In the case of legislative acts, plaintiffs must establish that they a rc within the limited class of individuals i ntended to be protected by the statute. In addition , the ha rm suffered must be of the kind that the sta tute was intended to prevent. Often the class of people intended to be protected may be ve1y broad. For example, regula tions req uiring the labeling of certain poisons are for the protection of a nyone who ma y come in contact with the bottle.

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Ma ny traffic laws are meant to protect other people on the highway . Once it is decided tha t a statute is applicable, most courts hold that a n u nexcused vio­ la tion is conclusive as to the issu e of negligence. In other words, it is **negligence per** se, a nd the issue of negligence does not go to the ju ry. However, some courts hold that the viola tion of such a statute is only evidence of negligence, which the ju ry may accept or reject as it sees fit.

Common law provides that one should guard against that which a reason ably prudent person would a nticipate as likely to injure another. Damages for a n injury are not recoverable if it was not foreseen or could not have been foreseen or anticipated. It is not necessary tha t one anticipate the precise injury sustained, however.

Courts do not ignore the conu11on practices of society in detem1ining the duty or whether due care was exercised in a particula r situation. The scope of the duty of care that a person owes depends on the relationship of the parties . For example, those who 1ck capacity, the young, and the inexpe1ienced are entitled to a degree of care propo1tiona te to their relative ability to care for themselve s given their age, mental condition, and expe1ience.

As a general rule, the law does not impose the duty to aid or protect another. However , a du ty *is*

imposed where there is a special relationship between the parties-for example, parents must go to the aid of their children, and employers must render protection to their employees. In addi­ tion, if one puts another in peril, that person must render aid. A person can also assume a duty through contract where the duty would not othe1wise exist. Although persons seeing another in distress have no obligation to be Good Sama1ita ns, if they choose to do so, they incur the duty of exercising ordina1y care. Some sta tes have changed this common law duty by passing Good Sama1itan statutes that state that those administering emergency care are liable only if the acts performed constitute willful or wanton misconduct.

**Introduction to *Wright v.***

***House of Imports, Inc.***

This is a "slip-and-fall" tort case in which there was some confusion as to whether the case should be considered to be a common-law negligence case or a negligence per se action . The trial court found in favor of the plaintiff, the intem1ediate court of ap­ pea ls reversed, and th e plaintiff appealed to the state supreme court.

**Benjamin Wright, Jr . v. House of Imports, Inc.**

*381 S. W.3d 209*

*Supreme Court of Kentucky September 20, 2012*

**Opinion of the Court by Justice scon.**

A Jefferson Circuit Court ju ry awarded Appellant, Benjamin Wright, J r., $120,863 .75 in his simple negli­

gence action against Appellee, House of Imports, after he fe ll down a set of stairs at the retailer's bus iness establishment. The Court of Appeals reversed and remanded for a new trial, holding that the trial court committed palpable error in permitting expert testi­ mony of building code violations without instructing the j ury as to the applicability of the code....

* 1. *Background*

Wright visited House of Imports to buy a pair of shoes on August 3 1, 2007. He se lected a pair and ascended three stairs to an elevated level of the store where the

cash register was located. He paid for the shoes and proceeded to exit the building. As he placed his foot on the top step of the elevated level, he slipped and, fell down the stairs to the first level of the store, suf­ fering serious injuries as a result.

Thereafter, Wr ight filed a common-law negli­ gence cause of action against House of Imports alleg­ ing that the retailer negligently maintained its business premises in a dangerous and defective condition,

causing him to fall and suffer personal injurie s. The case was tried to a jury which, under Kentucky's com­ parative fault principles, assigned 25 % of the fault to Wright and 75 % of the fault to House of Imports. The ju ry further found that Wright suffered $75,000 in pain and suffering in addition to his $86,151.56 in medical

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expenses. Based on the jury's apportionment of fault, the trial court awarded Wright $120,863 .67 .

At trial, Wright introduced the expert testimony of engineer and board-certified safety professional John Schroering, who testified that the stairs at House of Imports violated several of the Kentucky Building Code's safety standards .... [T]he Court of Appeals reversed, finding that the trial court's failure to instruct the jury on the applicability of the Code left the jury " 'to decide for itself what, if any, was its rel­ evance and legal effect' " ... and constituted palpable error ....

* 1. *Analysis*

The precise issue before us is whether a trial court errs when it admits expert testimony concerning building code violations without instructing the jury as to the applicability of the code; and, if so, whether the trial court in this case committed palpable error in doing so....

Turning to our analysis, we note first that this is a common-law negligence case-not a negligence per se case. A common-law negligence claim requires proof of (1) a duty owed by the defendant to the plaintiff,

(2) breach of that duty, (3) injury to the plaintiff, and

(4) legal causation between the defendant's breach and the plaintiff's injury.... The standard of care appli­ cable to a common-law negligence action is that of ordinary care-that is, "such care as a reasonably pru­ dent person would exercise under the

circumstances ."...

Negligence per se, on the other hand, " 'is *a* neg­ ligence claim with a statutory [or regulatory] standard of care substituted for the common-law standard of

care.' " ... KRS [Kentucky Revised Statute] 446.070 co­ difies the doctrine of negligence per se, and provides: "A person injured by the violation of any statute may recover from the offender such damages as he sus­ tained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

Because Wright brought a common-law negli­ gence action against House of Imports, and not a neg­ ligence per se claim alleging statutory or regulatory violations, the testimony . . . offered regarding the statutory duties imposed by the building code (and the alleged breaches of those duties) was irrelevant-that is, it did not "fit" a fact in issue . . .. The trial court therefore erred in permitting ... [testimony] about alleged violations of the building code.

We cannot, however, conclude that it rises to the level of "palpable" error . Although the Court of Ap­ peals determined that the trial court erred in failing to instruct the jury as to the applicability of the building code, the allegedly fatal instructions were tendered by House of Imports.... When a trial court adopts a party's proposed jury instructions, that party cannot be heard to complain that its "substantial rights" have been affected by said instructions, nor that a "manifest injustice has resulted from the error." ... This has been the law of this Commonwealth for decades . ...

*Ill. Conclusion*

In conclusion, we find no palpable error in the trial court's decision to admit expert testimony of building code violations without a concomitant jury instruction as to the applicability of the code. We therefore reverse the judgment of the Court of Appeals and reinstate that of the trial court.

**Case Questions**

1. Why did the Kentucky Supreme Court conclude that the "ordinary care" duty was applicable in this case rather than negligence per se?
2. Why did Kentucky's highest court overrule the intermediate court of appeals in this case and restore the judgment of the trial court?

This case involves an alleged violation of the rule of general application in misfeasance cases that one has a legal duty to exercise ordinary care to prevent others from being injured as a result of one's conduct. How would Immanuel Kant probably react to this legal duty of ordinary care?

**Liability Rules for Specialized Activities**

The ordinary principles of negligence do not gov­ ern property owners' liability to those entering their

premises. For example, the duty the property owner owes to a trespasser is less than the duty the property owner owes to the general public under the ordina1y principles of negligence. 9 The

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special rules regarding liability of the possessor of land stem from the English tradition of high regard for land a nd from the domina nce and prestige of the English la ndowning class. In the eighteenth and nineteenth centuries, owners of land were con­ sidered sovereigns within their own bou ndaries and were privileged to do what they pleased within their domains. The unrestricted use of land was favored over hu man welfare. Visitors were classified as invitees, licensees, or trespassers. Although English law has since rejected these distinctions, they remain part of the U.S. common law.

An **invitee** is either a **public invitee** or a **business visitor (business invitee).** A public invitee is a 1nember of the public who enters land for the purpose for which the land is held open to the public-for example, where a visitor enters a bank and goes into a meeting room that the ba nk makes available at no cost to civic clubs, for the purpose of a ttending the club's monthly meeting. The club was meeting in this room in response to he bank's public invitation for civic groups to hold

such meetings on its premises. 10

A business visitor (also called a business invitee) enters land for a purpose directly or indirectly con­ nected with business dealings with the possessor of the la nd. Thus, plumbers, electricians, trash collec­ tors, and letter carriers are classified as business in­ vitees. Invitees are given the greatest protection by the courts. A landowner owes the invitee a duty to exercise ordinary care under the usual principles of negligence liability, and must exercise reasonable care to make the premises safe. This preferred status applies only to the area of invitation.

One who enters or remains on land by virtue of the possessor's implied or express consent is a **licensee**

-for example, door-to-door salespeople or social guests. In addition, police officers and firefighters are usually classified as licensees, because they often come on premises unexpectedly a nd it would not be fair to hold possessors to the standard of care applicable to invitees. Licensees ordinarily must accept the premises as they find them and look out for their own welfare. This is based on the principle that la nd occupiers can­ not be expected to exercise a higher degree of care for licensees than they would for themselves. A possessor

of la nd generally owes the licensee only the duty to refrain from willful or wanton misconduct; however, the comts have developed some exceptions to this rule. With respect to active operations, for example, the possessor ofland is subject to liability to licensees for injmy caused by failure to exercise reasonable care for their safety. What might constitu te activities dan­ gerous to licensees depends on the comt's interpreta­ tion, and knowledge of the nature of the activities norn1ally precludes recovery by the licensee. Gener­ ally, the possessor ofland is under a duty to give warn­ ing of known dangers.

A **trespasser** is one who enters and remains on the land of another without the possessor's express or implied consent. Licensees or invitees may become trespassers if they venture into an area where they are not invited or expected to venture, or remain on the premises for an u nreasonable pe1iod of time. Gener­ ally, possessors ofland are not liable to trespassers for physical ham1 caused by the owners' failure either to exercise reasonable care to make their land safe for the trespasser's reception or to cany on the owners' activities so as not to endanger them. The only duty that is owed to a trespasser by an occupier of land is to refrain from willful or wanton misconduct. How­ ever, a duty of reasonable care is owed to an adult trespasser whose presence has been discovered or who habitually intrudes on a limited area . Reason­ able care is also owed to the child trespasser whose presence is foreseeable (for example, erecting a child­ proof fence around a backyard swimming pool).

Ma ny have questioned the legal a nd moral justifica tion of a rule tha t determines the legal pro­ tection of a person's life and limb according to this classification scheme. Although courts ha ve been relucta nt to a ba ndon the land occupier's preferred position set forth by history and precedent, some courts have replaced the common law disti nction with ordina1y principles of negligence to govern occupiers' liability to those entering their premises.

The following case is from N01th Dakota, a state that has abandoned the conm1on law distinc­ tions . The defendants in *Schmidt v. Gateway Co111m11- 11ity Fellowship* were sponsors of an outdoor automotive show that was being held in a shopping mall parking lot. The defendants persuaded the trial

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court that th ey were immun e from suit under the state's recreational use immu nity law, and the court granted them summa1y jud gment. The plaintiff, who had injured her ankle while attending the show,

appealed to the sta te supreme coLnt. She maintained that the tria l comt's conclusion was erroneous in that these defendants were not entitled to protection under the recreational immunity statute.

**Schmidt v. Gateway Community Fellowship**

*2010 ND 69*

*Supreme Court of North Dakota Apri l 8, 2010*

**Kapsner, Justice .**

Jacqueline and Randall Schmidt appeal from a sum­ mary judgment dismissing their personal injury action against Gateway Community Fellowship and North Bismarck Associates II after the district court decided Gateway Community Fellowship and North Bismarck Associates II were entitled to recreational use immunity because Jacqueline Schmidt entered a parking lot at a shopping mall for recreational purposes and she was not charged to enter the premises. The Schmidts argue there are factual issues about whether Jacqueline Schmidt entered the premises for recreational pur­ poses and whether there was a charge for her entry to the premises....

*I.*

The Schmidts alleged Jacqueline Schmidt injured her right ankle on September 14, 2002, when she stepped in a hole in a paved parking lot on the north side of Gateway Mall shopping center in Bismarck while attending an outdoor automotive show and skate­ boarding exhibition sponsored by Gateway Community Fellowship, a non-profit church affiliated with the Church of God. At the time, Gateway Community Fel­ lowship leased space for church serv ices inside Gate­ way Mall from North Bismarck Associates II, the mall owner.

On September 14, 2002, Gateway Community Fel­ lowship sponsored an outdoor automotive show and skateboarding exhibition, the "Impact Auto Explo­ sion," on a paved lot on the north side of Gateway Mall from 10 a.m. to 4 p.m., which was during the mall's regular Saturday business hours.... The public was not charged an admission fee for entry to the exhibition, but Gateway Community Fellowship pro­ cured exhibition sponsors to defray costs. Additiona lly, the automotive show included several contests, and Gateway Community Fellowship charged car owners a registration fee to enter the contests.... The ... mall manager for North Bismarck Associates II directed Gateway Community Fellowship to hold the exhibition

... on the parking lot on the north side of Gateway Mall to increase visibility from Century Avenue in

Bismarck. North Bismarck Associates II did not separately charge Gateway Community Fellowship for use of the parking lot.... The parking lot on the north side of Gateway Mall had been part of a lumberyard of a pre­ vious mall tenant, and the area had holes and depres­ sions in the concrete from the removal of posts that had formed part of an enclosure around the lumberyard.

According to North Bismarck Associates II, the area of the parking lot used for the 2002 exhibition usually was roped off to be less accessible by the public.

On September 14, 2002, Jacqueline Schmidt and her son were driving by ... when they saw activity in the parking lot north of ... Gateway Mall, and they stopped at the exhibition. According to Jacqueline Schmidt, they decided "it would be fun. They had ska­ teboarders, and they had music, and it was a nice day out.... We were enjoying ourselves. We were watching the skateboarders. We were looking around, looking at the veh icles. It was a pleasant day out. It was very nice out, and we were just enjoying spending time together, looking at the activities."

Jacqueline Schmidt and her son were not charged an admission fee for entry to the property or to the exhibition. According to her, she severely injured her right ankle as she walked across the parking lot and stepped in a posthole from the prior tenant's lumberyard.

The Schmidts sued Gateway Community Fellow­ ship and North Bismarck Associates II, alleging they negligently and carelessly failed to eliminate the holes in the parking lot or to warn exhibition attendees about the holes and were liable for the hazardous condition on the premises. Gateway Community Fel­ lowship and North Bismarck Associates II separately answered, denying they were negligent and claiming the Schmidts' action was barred by recreational use immunity under N.D.C.C. ch. 53-08. Gateway Commu­ nity Fellowship and North Bismarck Associates II sepa­ rately moved for summary judgment, arguing they were entitled to recreational use immunity ... because the premises were used for recreational purposes and Jacqueline Schmidt was not charged to enter the premises.

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The district court granted summary judgment, concluding Gateway Community Fellowship and North Bismarck Associates II were entitled to recrea­ tional use immunity, because Jacqueline Schmidt entered the land for the recreational purpose of en­ joying the exhibition with her son and she was not charged to enter the premises. The court also decided the statutory provisions for recreational use immunity were not unconstitutional as applied to the Schmidts' action.

*II.*

Summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or infer­ ences that reasonably can be drawn from undisputed facts, or if the only issues to be resolved are questions of law....

*Ill.*

Under North Dakota law for premises liability, general negligence principles govern a landowner's duty of care to persons who are not trespassers on the pre­ mises.... See *O'Leary v. Coenen* ... (N.D. 1977) (aban­ doning common-law categories of licensee and invitee for premises liability and retaining standard that owner owes no duty to trespasser except to refrain from harming trespasser in willful and wanton man­ ner). Thus, a landowner or occupier of premises gen­ erally owes a duty to lawful entrants to exercise reasonable care to maintain the property in a reason­ ably safe condition in view of all the circumstances, including the likelihood of injury to another, the seriousness of injury, and the burden of avoiding the risk ....

Under that formulation, an owner or possessor of commercial property owes a duty to lawful entrants to exercise reasonable care to maintain the property in a reasonably safe condition in view of all the circum­ stances, including the likelihood of injury to another, the seriousness of injury, and the burden of avoiding the risk... 1 Premises Liability Law and Practice, at

§4.01 [2][a] (explaining owner or possessor of commer­ cial property must warn entrants of all known dangers, must inspect premises to discover hidden dangers, and must provide proper warning of known dangers); 62 Am. Jur. 2d Premises Liability, §§435, 439 (2005) (dis­ cussing commercial property owner's duty to custo­ mers and potential customers in shopping centers and malls). Similarly, a church or religious institution gen­ erally owes the same duty of care to lawful entrants on its premises....

In 1965, the Legislature enacted recreational use immunity statutes to encourage landowners to open

their land for recreational purposes by giving them immunity from suit under certain circumstances.

Under N.D.C.C. §53-08-02, "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, struc­ ture, or activity on such premises to persons entering for such purposes." Section 53-08-03, N.D.C.C., also provides:

Subject to the provisions of section 53-08-05, an owner of land who either directly or indirectly in­ vites or permits without charge any person to use such property for recreational purposes does not thereby:

1. Extend any assurance that the premises are safe for any purpose;
2. Confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed; or
3. Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons....

... In 1995 ... the Legislature amended the defini­ tion of "recreational purposes" to its present form to cover "all recreational activities."...

*IV.*

The Schmidts argue the district court did not view the evidence in the light most favorable to them and erred in finding, as a matter of law, that Jacqueline Schmidt's use of the land was recreational in character and that there was no charge for her to enter the land. They argue the court erred in failing to weigh the business purposes of Gateway Community Fellowship and North Bismarck Associates II in having the exhibition on the dangerous parking lot. They claim Gateway Commu­ nity Fellowship's purpose was to increase membership, including tithing, and North Bismarck Associate's pur­ pose was to increase foot traffic for its Gateway Mall tenants .... The Schmidts ... also assert a factual issue exists in this case because, although Gateway Commu­ nity Fellowship did not directly charge Jacqueline Schmidt to enter the exhibition, it procured sponsors for the exhibition and charged contestants a registration fee to enter the contests in the automotive show . ...

A common thread under our case law interpreting the recreational use immunity statutes is that the intent of both the owner and the user are relevant to the analysis and that the location and nature of the injured person's conduct when the injury occurs are also relevant.... Other jurisdictions have acknowledged that cases involving claims of recreational use immunity

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involve fact-driven inquiries in which nonrecreational uses or purposes may be mixed with recreational uses or purposes....

In *Auman v. School Distr. of Stanley-Boyd,* 2001 WI 125 ... the Wisconsin Supreme Court said the line between recreational and nonrecreational purposes was an intensely fact-driven inquiry and reiterated the test for resolving the issue:

Although the injured person's subjective assess­ ment of the activity is pertinent, it is not control­ ling. A court must consider the nature of the property, the nature of the owner's activity, and the reason the injured person is on the property. A court should consider the totality of circumstances surrounding the activity, including the intrinsic nature, purpose, and consequences of the activity . A court should apply a reasonable person standard to determine whether the person entered the property to engage in a recreational activity.

Under N.D.C.C. ch. 53-08 and our caselaw inter- preting those provisions, we decline to construe our

recreational use statutes to necessarily provide a com­ mercial landowner immunity where there is a recrea­ tional and commercial component to the landowner's operation . We conclude the rationale and balancing test ... provide persuasive authority for construing our statutes and assessing mixed use cases. We hold that [the *Auman]* balancing test applies to our recreational use immunity statutes in mixed use cases and that inquiry generally involves resolution of factual issues unless the facts are such that reasonable minds could not differ .

... We conclude the facts in this case are not such that reasonable persons could reach one conclusion and there are disputed factual issues about whether North Bismarck Associates II and Gateway Community Fellowship are entitled to recreational use immunity. We therefore conclude resolution of the issue by sum­ mary judgment was inappropriate and a remand is necessary for the trier of fact to apply the balancing test to this mixed-use case ....

We reverse the summary judgment and remand for proceedings consistent with this opinion.

**Case Questions**

1. What would it mean to these parties if ultimately on remand (i.e., when the case returns to the trial court for a jury trial), the North Dakota trial or appellate courts concluded that the trial court's original ruling on summary judgment was correct and that the plaintiff was engaging in a recreational activity when attending the auto show in the mall parking lot?
2. The North Dakota Supreme Court felt that the record was insufficient to permit the trial court to decide this case by summary judgment . Assume that the facts revealed upon remand indicate that the auto show contained some elements that were essentially recreational and other elements that were commercial. Which party do you think should ultimately win the lawsuit? Why?

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Readers will find *Benejam v. Detroit Tigers, Inc.,* on the textbook's website, a case in which a state interme­ diate appellate court concluded that the Tigers had a limited duty to make their stadium reasonably safe for fans.

**Proximate Cause**

One of the elements tha t m ust be proven to estab­ lish negligence is **causation.** 1 1 The plaintiff must prove that there is a reasonable connection between

the negligent act of the defendant and the damage suffered by the plaintiff. For tort liability, however, proof of factual causa tion is not enough. Tort lia­ bility depends on the existence of **proximate cause.** Proximate cause means legal cause and con­ sists of two elements: (1) causation in fact, and

(2) foreseeability. A plaintiff must prove tha t his or her injuries were the actual or factual result of the defendant's actions. **Causation in fact** may be established directly or indirectly. Courts usually u se a "but-for" test to establish causation in fact: but for the defendant 's negligence, the plaintiff s injuries would not have occurred. This test is an extremely broad one and could have far-reaching results.

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Every event h as many contributing causes, even though some may be very remote. The defendant is not relieved from liability merely becau se other causes have contributed to the result. In many situa­ tions, applica tion of the "but-for" test will identify several persons who could be placed on a causa tion continuum. Th e question before the comt in a neg­ ligence case is whether th e conduct has been so sig­ nificant and important a cause that the defendant should be legally responsible . For example, in a nighttime automobile accident, the fact that one of the drivers worked late at the office would be a factual cause of the collision. If she hadn't worked l ate, she wouldn't have been a t the location of the accident. But this cause should not be recogni zed as a l egal cause of the collision. Because cause demands that some boundary be set for the consequen ces of a n act, proximate cause (causation in fact plus fore­ seeability) , rather than causation in fact alone, is used to detemiine liability.

The second element of proximat e cause is **oreseeability.** An individu a l is only responsible for those consequences that are reasonably foresee­ able, and will be relieved ofliability for injmies that are not reasonably related to the negligent conduct. To illustrate , a driver d1ives his car carelessly an d collides with another car, causing it to explode. Four blocks away, a nurse canying a baby is sta rtled by the explosion a n d drops th e infant. It is doubtful if any court would hold the driver liable to the infant, even though the driver was negligent an d was the factual cause of the infant's injmy. The baby 's injmy is so far removed from the d1iver that it would be u nfair to hold the d1iver liable. The d1iver could not reasonably have foreseen the injmy sustained by the infant. In other words, the driving would not be the proximate cause of the injmy.

If there is more than one cause for a single injmy, liability is possible if each action by itself wou ld have been sufficient to cause the harm with­ out the other. If there are **joint tortfeasors** of a single injmy, each possible tortfeasor's actions must be examined to see if the acts were so closely related to the damage to have proximately caused the plaintiff' s injmy.

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Readers visiting the textbook 's web site will find there the 2002 Texas case of *McClure v. Roch,* a case that discusses the distinction between invitees and licensees, proximate cause, and foreseeabil ity.

**Contributory-Negligence and Assumption-of -Risk Defenses**

Even after a plaintiff has proved that a defendant was negligent and that the negligence was th e prox­ imate cause of his or her injury , some states permit the defendant to counter by proving a defense. Contribut01y negligence and assumption of risk are two such defenses.

**Contributory negligence** is a defense tha t exists when injured person s proximately con­ tributed to their injuries by their own negligence. This defense is based on the the01y tha t the pl a i ntiff is held to the same standard of care as th e defendant : th at is, tha t of a reasonable person u nder like circumstances. When proven, contrib­ utory negligence will usually bar a ny recovety by the plaintiff.

To illustrate, *D- 1* is d1iving his car and P is his passenger. Both are injured in a collision with *D-2 's* car. Ifboth cars were driven negligently, *D- 1* could not recover from *D-2* becau se his own negligence contributed to his own injuries. Yet *P* could recover from both *D- 1* and *D-2,* becau se they were both joint tortfeasors in causing *P's* injuries. The burden of proving contributory negligence is on the defendant.

The defense of **assumption of risk** exists when the plaintiff had knowledge of the risk and made the free choice of exposing himself or herself to it. Assumption of risk may be express or implied. In a n express assumption of risk , the plaintiff expressly agrees in advance that the defen­ dant has no duty to care for him or her, and is not liable for wha t otherwise would be negligent con­ duct. For example, parents often expressly assume the risk of personal injmy to their children in con­ junction with you th soccer, basketball, an d