FIRST YEAR REVIEW CHECKLISTS

Criminal Law
Torts
Contracts

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USE OF CHECKLISTS

These checklists are designed to present a logical approach to the substantive law in Torts, Contracts and Criminal Law. They are designed to aid in your preparation for the First Year Law Students Exam.

Checklist approaches are vital to your success on the First Year Law Students Exam. Since you must have a working understanding of all three subjects on the day of the exam, you need the help of checklists to organize the substance into recallable forms so that you can spot appropriate issues and deal with them accordingly.

The checklists are not designed to be complete statements of the law. They are simply skeleton approaches that you must flesh out if you are to be successful. You should add appropriate information to the checklists where necessary to make them complete. You need not include every point or nuance, only those that you feel are necessary to complete your understanding of the proper approach to the law.
CRIMINAL LAW CHECKLIST

1. Who or what is the defendant targeting?
   1. Person
      1. Criminal Homicide
         1. Was there a HOMICIDE for which the defendant was responsible?
            1) Is the victim dead as a result of the DEFENDANT’S ACT? If so, are there any CAUSATION issues?
            2) Is the victim dead as a result of the ACT OF A THIRD PARTY? If so, is there a VICARIOUS LIABILITY argument as to why this defendant should be responsible? (Accomplice liability, Felony Murder Rule)
            3) Is the victim dead as a result of the defendant’s OMISSION TO ACT? If so, did the defendant have an affirmative DUTY TO ACT?

2. Did the defendant act with MALICE?
   1) Did the defendant act with the INTENT TO KILL?
   2) Did the defendant act with the INTENT TO SERIOUSLY INJURE?
   3) Did the defendant act with WANTON AND WILFUL DISREGARD for human life?
   4) Does the FELONY MURDER RULE apply?
      1) Was the crime an INHERENTLY DANGEROUS felony?
      2) Did the homicide occur during the perpetration of the felony?

3. If malice exists, then MURDER unless:
   1) JUSTIFICATION (converts murder into no crime).
      1) Was the victim engaged in the COMMISSION OF A CRIME? If so, does either CRIME PREVENTION or APPREHENSION OF A FLEEING FELON apply?
      2) Can the defendant claim either SELF DEFENSE or DEFENSE OF OTHERS?
      3) Did the defendant act under a REASONABLE AND GOOD FAITH MISTAKE?
   2) EXCUSE (converts murder into no crime).
      1) Was the defendant TOO YOUNG to be criminally liable?
      2) Was the defendant INSANE?
      3) Was the defendant INVOLUNTARILY INTOXICATED?
   3) MITIGATION (converts murder into VOLUNTARY
MANSLAUGHTER)
1) Did the defendant act under PROVOCATION?
2) Did the defendant act under COERCION or out of NECESSITY?
3) Did the defendant act under an UNREASONABLE but GOOD FAITH MISTAKE?

4. If malice does not exist, then:
   1) Did the defendant act with CRIMINAL NEGLIGENCE? If so, then INVOLUNTARY MANSLAUGHTER.
   2) Does the MISDEMEANOR MANSLAUGHTER RULE apply? If so, then INVOLUNTARY MANSLAUGHTER.

5. If it is murder, then what is the degree?
   1) FIRST DEGREE MURDER
      1) Did the defendant act with the PREMEDITATED AND DELIBERATE INTENT TO KILL?
      2) Did the victim die during the commission of an INHERENTLY DANGEROUS FELONY?
   2) SECOND DEGREE MURDER--all others.

2. Non-homicide crimes against persons:
   1. BATTERY: Defendant, with requisite intent, unlawfully applies force to victim.
      1) Did the defendant act with the REQUISITE INTENT?
      2) Did the defendant act UNLAWFULLY (without consent or privilege)?
      3) Did the defendant apply FORCE TO THE PERSON OF THE VICTIM?

2. ASSAULT
   1) Did the defendant commit an ATTEMPTED BATTERY?
   2) Did the defendant intentionally cause the victim to be APPREHENSIVE OF AN IMMEDIATE BATTERY?

3. MAYHEM: Defendant, with requisite intent, unlawfully dismembers, disfigures or disables the victim.
   1) Did the defendant act with the REQUISITE INTENT?
   2) Did the defendant SUFFICIENTLY INJURE THE VICTIM?

4. RAPE: Unlawful sexual intercourse with a woman without her consent.
   1) Did the defendant act UNLAWFULLY?
   2) Was there SEXUAL INTERCOURSE?
   3) Did the victim CONSENT?
   4) Special Problem: STATUTORY RAPE: Sexual intercourse with a person under a specified age (usually 14-18).

5. FALSE IMPRISONMENT: Intentional unlawful confinement of a
2. Property

1. Theft crimes.

   a. Did the defendant TRESPASSORILY TAKE the victim’s personal property? If so, then three crimes possible:

      1) LARCENY: Trespassory taking and carrying away of tangible personal property of another with intent to permanently deprive.

         a) Did the defendant trespassorily take and carry away TANGIBLE PERSONAL PROPERTY?
         b) Was it property OF ANOTHER?
         c) Did the defendant act with the INTENT TO PERMANENTLY DEPRIVE the victim of ownership (INTENT TO STEAL)?

      2) ROBBERY: Larceny from the victim’s presence by force or threat of force.

         a) Was the property taken from the VICTIM’S PERSON OR PRESENCE?
         b) Did the defendant take the property BY FORCE OR THREAT OF FORCE?

      3) EXTORTION: Larceny accomplished by threat of future force.

         a) Did the defendant make a THREAT OF FUTURE FORCE?
         b) Did the defendant make the threat with the INTENT TO ACQUIRE PROPERTY?

   b. If the victim DELIVERS the property to the defendant, then the potential crime depends upon when the defendant forms the intent to steal.

      1) If the defendant had the intent to steal AT THE TIME of acquisition of the property, then it must be determined what degree of control the defendant gained over the property.

         a) Custody (only in issue when defendant is an employee): LARCENY.
         b) Possession: LARCENY BY TRICK.
         c) Title: FALSE PRETENCES (obtaining title to property of another by a false representation with
2) If the defendant formed the intent to steal AFTER the acquisition of the property, then it must be determined what degree of control the defendant gained over the property.
   a) Custody: LARCENY.
   b) Possession: EMBEZZLEMENT (fraudulent conversion of the property of another by a defendant in rightful possession of that property).
   c) Title: No crime at common law.

C. RECEIVING STOLEN PROPERTY: Receiving stolen property, knowing that it is stolen, with the intent to permanently deprive the rightful owner.
   1) Did the defendant receive STOLEN PROPERTY?
   2) Did the defendant KNOW THAT THE PROPERTY WAS STOLEN?
   3) Did the defendant possess the INTENT TO STEAL?

2. Structure crimes.
   a. BURGLARY: Trespassory breaking and entering of the dwelling house of another at night with the intent to commit a felony therein.
      1) Did the defendant TRESPASSORILY BREAK AND ENTER the structure?
      2) Was it a DWELLING HOUSE?
      3) Was it AT NIGHT?
      4) Was the structure in the POSSESSION OF ANOTHER?
      5) Did the defendant have the INTENT TO COMMIT A FELONY THEREIN?
   b. ARSON: Burning of the dwelling house of another with malice.
      1) Was there a BURNING OF THE STRUCTURE?
      2) Was it a DWELLING HOUSE?
      3) Was the structure in the POSSESSION OF ANOTHER?
      4) Did the defendant act with MALICE?

3. If the defendant had not yet completed the target crime, then consider:
   1. SOLICITATION: Soliciting another to commit a crime.
      a. Did the defendant SOLICIT another to commit criminal acts?
      b. Did the defendant have the SPECIFIC INTENT that the target crime be committed?
      c. Does the solicitation MERGE into a conspiracy, attempt or completed crime?
   2. CONSPIRACY: Agreement between two or more persons for an unlawful purpose.
      a. Was there an EXPRESS OR IMPLIED AGREEMENT?
b. Are there at least TWO GUILTY MINDS?
c. Was the agreement for an UNLAWFUL PURPOSE?
d. Does the jurisdiction require an OVERT ACT to form the conspiracy?
e. Did the defendant WITHDRAW from the conspiracy?

3. ATTEMPT
   a. Did the defendant have the SPECIFIC INTENT to commit a crime?
   b. Did the defendant enter the ZONE OF PERPETRATION of the crime?
   c. Does the defense of IMPOSSIBILITY apply?
   d. Does the attempt MERGE into the completed crime?

3. Is the defendant VICARIOUSLY LIABLE for the criminal actions of another?
1. Is the defendant vicariously liable as an ACCOMPLICE?
   a. Did the defendant AID AND ABET the commission of a crime?
   b. Did the defendant have the SPECIFIC INTENT that the crime be committed?
   c. Special problem: Was the defendant an ACCESSORY AFTER THE FACT?
2. Is the defendant vicariously liable as a co-conspirator?

4. Are there any applicable DEFENSES TO CRIMINAL LIABILITY?
1. Was the victim TOO YOUNG to be criminally liable?
2. Was the defendant INSANE?
3. Was the defendant INTOXICATED?
   1. If the intoxication was INVOLUNTARY, then the defendant may have a complete defense.
   2. If the intoxication was VOLUNTARY, the defendant may have a defense to a SPECIFIC INTENT crime only.
4. Did the defendant act out of NECESSITY or out of COERCION?
   1. Does the GREATER EVIL doctrine apply?
5. Did the defendant make a MISTAKE?
   1. If the defendant made a MISTAKE OF LAW, then there generally is no defense.
   2. If the defendant made a MISTAKE OF FACT, then the degree of mistake required to constitute a defense depends upon the intent level of the crime involved.
      a. If the crime is a SPECIFIC INTENT crime, then the mistake need only be in GOOD FAITH.
b. If the crime is a GENERAL INTENT crime, then the mistake must be both a REASONABLE AND GOOD FAITH mistake.

c. If the crime is a STRICT LIABILITY crime, then mistake can never be a defense.

6. Can the defendant raise the defense of ENTRAPMENT?
   1. Traditional view: Was the defendant PREDISPOSED to commit the crime?
   2. Modern view: Were the actions of the police sufficient to have INDUCED A REASONABLE PERSON to commit the crime?
TORTS CHECKLIST

Most Torts questions are party-oriented problems. Therefore, the best way to approach a Torts problem is to examine the parties in the lawsuit and quickly determine the nature of the injury suffered by the plaintiff and the action (or inaction) of the defendant which caused the injury to the plaintiff. You will then be able to focus on the appropriate Tort(s) in issue.

I. INTENTIONAL TORTS: Each intentional tort requires a VOLITIONAL ACT done with the REQUISITE INTENT which is the CAUSE of the RESULTING HARM suffered by the plaintiff.

A. Potential torts when the plaintiff suffers injury to his/her BODY:
   1. ASSAULT: Volitional act done with the requisite intent which causes the plaintiff to suffer reasonable apprehension of an immediate battery.
      a. Did the defendant engage in a VOLITIONAL ACT?
      b. Did the defendant INTEND TO PLACE THE PLAINTIFF IN APPREHENSION OF AN IMMEDIATE BATTERY?
      c. Did the actions of the defendant CAUSE the harm to the plaintiff?
      d. Did the plaintiff suffer REASONABLE APPREHENSION OF AN IMMEDIATE BATTERY?
   2. BATTERY: Volitional act done with the requisite intent which causes the plaintiff to suffer a harmful or offensive contact.
      a. Did the defendant engage in a VOLITIONAL ACT?
      b. Did the defendant INTEND TO TOUCH the plaintiff?
      c. Did the actions of the defendant CAUSE the harm to the plaintiff?
      d. Did the plaintiff suffer a HARMFUL OR OFFENSIVE TOUCHING?
   3. FALSE IMPRISONMENT: Volitional act done with the requisite intent which causes the plaintiff to be confined to a bounded area.
      a. Did the defendant engage in a VOLITIONAL ACT?
      b. Did the defendant INTEND TO CONFINE OR RESTRRAIN the plaintiff within a bounded area?
      c. Did the actions of the defendant CAUSE the harm to the plaintiff?
      d. Was the plaintiff CONFINED?
         1) Was the plaintiff AWARE OF THE CONFINEMENT? If not, no recovery UNLESS the plaintiff was actually harmed by the confinement.
         2) Was there a REASONABLE MEANS OF ESCAPING THE CONFINEMENT?

B. Potential torts when the plaintiff suffers injury to his/her EMOTIONS:
   1. Was the emotional distress ASSOCIATED WITH A SEPARATE TORTIOUS INJURY to the plaintiff’s body? If so, then recovery awarded...
under the separate tort. Otherwise:

2. **INTENTIONAL INFILCTION OF EMOTIONAL DISTRESS**: Volitional act done with the requisite intent which amounts to extreme and outrageous conduct and which causes the plaintiff to suffer severe emotional distress.
   
a. Did the defendant engage in a VOLITIONAL ACT?
b. Did the defendant INTEND TO CAUSE SEVERE EMOTIONAL DISTRESS or RECKLESSLY DISREGARD THAT SEVERE EMOTIONAL DISTRESS MIGHT OCCUR?
c. Did the actions of the defendant CAUSE the harm to the plaintiff?
d. Did the plaintiff suffer SEVERE EMOTIONAL DISTRESS?

C. Potential torts when the plaintiff suffers injury to his/her PROPERTY:

1. Injury to REAL PROPERTY:
   
a. **TRESPASS TO LAND**: Volitional act done with the requisite intent which causes a physical invasion of plaintiff’s land.
      
      1) Did the defendant engage in a VOLITIONAL ACT?
      2) Did the defendant INTEND TO CAUSE A PHYSICAL INVASION OF THE PLAINTIFF’S LAND? (Note: Intent to trespass not required.)
      3) Did the actions of the defendant CAUSE the harm to the plaintiff?
      4) Did the plaintiff suffer a PHYSICAL INVASION of his/her land?

b. **NUISANCE**
   
   1) **PRIVATE NUISANCE**: Volitional act done with the requisite intent which causes a substantial and unreasonable interference with the plaintiff’s use and enjoyment of his/her land.
      
      a) Did the defendant engage in a VOLITIONAL ACT?
      b) Did the defendant INTEND TO CAUSE A SUBSTANTIAL AND UNREASONABLE INTERFERENCE with the plaintiff’s use and enjoyment of his/her land? (Note: Defendant can also be liable in Negligence or Strict Liability.)
      c) Did the actions of the defendant CAUSE the harm to the plaintiff?
      d) Did the plaintiff suffer a SUBSTANTIAL AND UNREASONABLE INTERFERENCE WITH THE USE AND ENJOYMENT OF HIS/HER LAND?

   2) **PUBLIC NUISANCE**: Volitional act done with the requisite intent which unreasonably interferes with the health, safety, or property rights of the community at large.
      
      a) Did the defendant engage in a VOLITIONAL ACT?
      b) Did the defendant INTEND TO
UNREASONABLY INTERFERE with the health, safety, or property rights of the public?

c) Generally, only a REPRESENTATIVE OF THE PUBLIC can sue to abate a public nuisance. However, did the plaintiff suffer DAMAGE DIFFERENT IN KIND FROM THOSE INFLICTED ON THE PUBLIC? If so, plaintiff can sue.

2. Injury to PERSONAL PROPERTY:
a. CONVERSION: Volitional act done with the requisite intent which causes the destruction of or serious and substantial interference with plaintiff’s chattel.
   1) Did the defendant engage in a VOLITIONAL ACT?
   2) Did the defendant INTEND TO DO THE ACT which caused the conversion? (Note: Intent to convert not required.)
   3) Did the actions of the defendant CAUSE the harm to the plaintiff?
   4) Did the plaintiff suffer a DESTRUCTION OF OR SERIOUS AND SUBSTANTIAL INTERFERENCE WITH his/her chattel?
   5) What is the available remedy?

b. TRESPASS TO CHATTELS: Volitional act done with the requisite intent which causes an interference with plaintiff’s chattel.
   1) Did the defendant engage in a VOLITIONAL ACT?
   2) Did the defendant INTEND TO DO THE ACT which caused the interference? (Note: Intent to interfere not required.)
   3) Did the actions of the defendant CAUSE the harm to the plaintiff?
   4) Did the plaintiff suffer an INTERFERENCE WITH his/her chattel?
   5) What is the available remedy?

D. PRIVILEGES AND DEFENSES to Intentional Torts

1. CONSENT
   a. Did the plaintiff either EXPRESSLY or IMPLIEDLY CONSENT to the defendant’s action?
      1) Did the plaintiff LACK THE CAPACITY TO CONSENT?
      2) Was the consent induced by FRAUD, DURESS OR MISTAKE?

   b. Did the defendant’s actions EXCEED THE SCOPE OF THE CONSENT?

2. DEFENSES
a. SELF-DEFENSE
   1) Did the defendant REASONABLY BELIEVE that he/she was under IMMINENT AND UNPRIVILEGED ATTACK?
   2) Did the defendant use REASONABLE FORCE in response?

b. DEFENSE OF OTHERS
   1) Did the defendant REASONABLY BELIEVE that another person was under IMMINENT AND UNPRIVILEGED ATTACK?
   2) Did the defendant use REASONABLE FORCE in response?

c. DEFENSE OF PROPERTY
   1) HARM TO PROPERTY: Did the defendant use REASONABLE NON-DEADLY FORCE to prevent harm to his/her property?
   2) RECOVER REAL PROPERTY: May the defendant use force to recover wrongfully dispossessed land?
   3) RECOVER PERSONAL PROPERTY
      a) Was the defendant TORTIOUSLY DISPOSSESSED of personal property?
      b) Must the defendant FIRST MAKE A DEMAND for return of the property?
      c) Did the defendant use REASONABLE NON-DEADLY FORCE to recover the property?

3. AUTHORITY
   a. Can the defendant claim the PRIVILEGE TO ARREST the plaintiff?
   b. Can the defendant claim the SHOPKEEPER’S PRIVILEGE to detain the plaintiff?
   c. Can the defendant claim the right to use REASONABLE FORCE TO MAINTAIN DISCIPLINE?

4. NECESSITY
   a. PRIVATE NECESSITY: Can the defendant INJURE THE PROPERTY OF ANOTHER to avoid SUBSTANTIALLY GREATER HARM TO HIMSELF/HERSELF OR HIS/HER PROPERTY?
   b. PUBLIC NECESSITY: Can the defendant INJURE THE PROPERTY OF ANOTHER to avoid SUBSTANTIALLY GREATER HARM TO THE PUBLIC?

II. NEGLIGENCE

A. Did the defendant BREACH A DUTY owed to the plaintiff?
   1. Was there a DUTY owed?
a. Are there any applicable SPECIAL DUTY RULES or SPECIAL FACTORS?

1) Did the defendant VIOLATE A CRIMINAL STATUTE?
   a) Was the statute designed to protect this CLASS OF PLAINTIFF from this TYPE OF INJURY?
   b) Was the defendant’s violation of statute EXCUSED?
   c) What is the EFFECT of the violation of statute?

2) Did the defendant possess INCREASED KNOWLEDGE OR SKILLS greater than the average person?

3) Was the defendant engaged in a type of activity that imposes a HIGHER DUTY OF CARE?

4) Was the defendant and OWNER OR OCCUPIER OF LAND? If so:
   a) Was the defendant engaged in an ACTIVITY on the land? If so, defendant owes a DUTY OF DUE CARE. If not:
   b) What was the STATUS OF THE PLAINTIFF?
      (1) If the plaintiff was a TRESPASSER, no duty is owed UNLESS:
          (a) The plaintiff was either a KNOWN OR FREQUENT TRESPASSER. If so, what duty is owed?
          (b) The plaintiff was a CHILD WHO IS TOO YOUNG TO KNOW AND APPRECIATE THE RISK INVOLVED. If so, what duty is owed?
      (2) If the plaintiff was a LICENSEE, what duty is owed?
      (3) If the plaintiff was an INVITEE, what duty is owed?
      (4) If the plaintiff was a person OFF OF THE LAND, what duty is owed?
   c) Was the defendant a LANDLORD? If so:
      (1) What duty, if any, is owed to THE TENANT?
      (2) What duty, if any, is owed to THIRD PERSONS ON THE LAND?
      (3) What duty, if any, is owed to THIRD PERSONS OFF THE LAND?
   d) Was the defendant a SELLER OF LAND? If so, what duty is owed?

5) Does the jurisdiction have a GUEST STATUTE?

6) Did the plaintiff suffer ONLY MENTAL DISTRESS?
a) Did the plaintiff experience a PHYSICAL MANIFESTATION of the mental distress?
b) Is the plaintiff experiencing the mental distress as a result of WITNESSING ANOTHER being injured by the defendant?

b. If no special duty rules or special factors, was the GENERAL RULE OF DUTY owed?
   1) Does the jurisdiction follow the “CARDOZO VIEW” as to whom the duty is owed?
   2) Does the jurisdiction follow the “ANDREWS VIEW” as to whom the duty is owed?

c. Did the injury to the plaintiff result from an OMISSION TO ACT by the defendant? If so:
   1) Did the defendant CAUSE THE PERIL to the plaintiff?
   2) Did the defendant UNDERTAKE OR PROMISE TO AID PLAINTIFF?
   3) Did a SPECIAL RELATIONSHIP exist between the plaintiff and the defendant?

2. Was the duty BREACHED?
   a. Did the defendant fail to act as a REASONABLE AND PRUDENT PERSON?
      1) Does allowance have to be made because the defendant was acting under an EMERGENCY?
      2) Does allowance have to be made because the defendant was A CHILD?
   
   b. If it cannot be proven that defendant breached a duty, does the doctrine of RES IPSA LOQUITUR create an INFERENCE OF NEGLIGENCE?

B. Was the defendant the ACTUAL AND PROXIMATE CAUSE of the plaintiff’s injury?
   1. Was the defendant the ACTUAL CAUSE?
      a. Will the BUT FOR TEST work? If not:
      b. Was the defendant a SUBSTANTIAL FACTOR in bringing about the plaintiff’s injury? If not:
   
      c. Will the SUMMERS v. TICE TEST work? If not:
      d. Will the MARKET SHARE TEST work?
   2. Was the defendant the PROXIMATE CAUSE?
      a. Were there any INTERVENING ACTS?
         1) IF NO, then defendant is the DIRECT CAUSE of the plaintiff’s injury. Was the injury suffered by the plaintiff FORESEEABLE?
            a) IF YES, the defendant is the proximate cause.
            b) IF NO, was the extent or TYPE of injury that was unforeseeable?
(1) If the EXTENT was unforeseeable, does the THIN SKULL PLAINTIFF doctrine apply?
(2) If the TYPE was unforeseeable, does either the POLEMIS rule or the WAGON MOUND rule apply?

2) IF YES, then the defendant is the INDIRECT CAUSE of the plaintiff’s injury. Was the intervening act DEPENDENT or INDEPENDENT?
   a) IF DEPENDENT, was the act ABNORMAL?
   b) IF INDEPENDENT, was the act FORESEEABLE?

C. Did the plaintiff suffer DAMAGES?

D. Are there applicable DEFENSES?
   1. Did the plaintiff FAIL TO ACT REASONABLY IN HIS/HER OWN PROTECTION?
      a. If the jurisdiction follows the doctrine of CONTRIBUTORY NEGLIGENCE:
         1) Was the plaintiff’s negligent conduct the PROXIMATE CAUSE of his/her own injuries?
         2) Could the contributory negligence of another be IMPUTED TO THE PLAINTIFF?
         3) Does the doctrine of LAST CLEAR CHANCE apply?
      b. If the jurisdiction follows the doctrine of COMPARATIVE NEGLIGENCE:
         1) Does the jurisdiction follow PURE comparative negligence?
         2) Does the jurisdiction follow PARTIAL comparative negligence?
   2. Does the doctrine of ASSUMPTION OF THE RISK apply?

III. STRICT LIABILITY

A. Did the defendant POSSESS AN ANIMAL which injured the plaintiff?
   1. Was it a WILD ANIMAL?
   2. If the animal was a DOMESTIC ANIMAL, did the animal possess KNOWN DANGEROUS PROPENSITIES?

B. Did the defendant engage in an ABNORMALLY DANGEROUS ACTIVITY?
   1. Does the activity present a RISK OF SERIOUS INJURY?
   2. Does the activity present a RISK THAT CANNOT BE ELIMINATED BY THE EXERCISE OF ORDINARY CARE?
   3. Was it an activity that IS NOT USUALLY CONDUCTED IN THE AREA?

C. Was the defendant the ACTUAL AND PROXIMATE CAUSE of the plaintiff’s
injuries?

D. Did the plaintiff suffer DAMAGES?

E. Are there applicable DEFENSES?

IV. PRODUCTS LIABILITY: Special body of law to be considered whenever the lawsuit involves injuries which arise from a DEFECTIVE PRODUCT.

A. STRICT LIABILITY IN TORT
1. Was the plaintiff the TYPE OF PERSON who can sue?
2. Was the defendant the TYPE OF PERSON who can be sued?
3. Was the PRODUCT DEFECTIVE?
   a. Did the product contain a MANUFACTURING DEFECT?
   b. Did the product contain a DESIGN DEFECT?
   c. Did the defendant FAIL TO ADEQUATELY WARN of a danger presented by the product of which the defendant KNEW OR SHOULD HAVE KNOWN?
4. Was the defendant the ACTUAL AND PROXIMATE CAUSE of the plaintiff’s injuries?
5. Did the plaintiff suffer DAMAGES?
6. Are there applicable DEFENSES?

B. BREACH OF WARRANTY
1. Did the defendant make an EXPRESS WARRANTY as to the NATURE OR QUALITY OF THE PRODUCT?
2. Was their an applicable IMPLIED WARRANTY OF FITNESS OR MERCHANTABILITY?
   a. Was the plaintiff the TYPE OF PERSON who can sue?
   b. Was the defendant the TYPE OF PERSON who can be sued?
3. Was the defendant the ACTUAL AND PROXIMATE CAUSE of the plaintiff’s injuries?
4. Did the plaintiff suffer DAMAGES?
5. Are there applicable DEFENSES?

C. NEGLIGENCE: What special modifications need to be made to the basic negligence cause of action?

D. INTENTIONAL TORT: What special modifications need to be made to the basic intentional tort cause of action?

V. DEFAMATION: Defamatory message concerning the plaintiff, published by the defendant, which causes the plaintiff damage.

A. Was there a DEFAMATORY STATEMENT OF FACT?

B. Was the statement CONCERNING THE PLAINTIFF?
   1. Was the statement DEFAMATORY ON ITS FACE? If not, can
EXTRANSCIB EVIDENCE be used to show that the statement was
UNDERSTOOD AS APPLYING TO THE PLAINTIFF?

2. Did the statement refer to a GROUP OF WHICH THE PLAINTIFF WAS
A MEMBER?

C. Was the statement PUBLISHED TO A THIRD PARTY?
1. Did the defendant either INTENTIONALLY OR NEGLIGENTLY permit
the statement to be COMMUNICATED TO A THIRD PARTY?
2. Is the defendant liable as a REPUBLISHER?

D. Did the plaintiff suffer RECOVERABLE DAMAGES?
1. Was the statement SLANDER OR LIBEL?
2. Must PECUNIARY DAMAGES BE PROVEN?
   a. Was the statement SLANDER PER SE?
   b. Was the statement either LIBEL PER SE or LIBEL PER QUOD?

E. Do CONSTITUTIONAL PRINCIPLES apply to the cause of action?
1. Was the plaintiff a PUBLIC FIGURE OR PRIVATE PERSON?
2. Was the subject matter a PUBLIC OR PRIVATE CONCERN?
3. What is the appropriate standard for each of the following lawsuits:
   a. PUBLIC FIGURE V. MEDIA DEFENDANT?
   b. PUBLIC FIGURE V. NON-MEDIA DEFENDANT?
   c. PRIVATE FIGURE V. MEDIA DEFENDANT?
   d. PRIVATE FIGURE V. NON-MEDIA DEFENDANT?

F. Are there applicable COMMON LAW PRIVILEGES AND/OR DEFENSES?
1. DEFENSES
   a. Was the statement TRUE, and who bears the BURDEN OF
      PROOF on this point?
   b. Did the plaintiff CONSENT TO THE PUBLICATION OF THE
      STATEMENT?
      1) Did the plaintiff either EXPRESSLY or IMPLIEDLY
         CONSENT?
         (a) Did the plaintiff LACK THE CAPACITY TO
             CONSENT?
         (b) Was the consent induced by FRAUD, DURESS OR
             MISTAKE?
      2) Did the defendant’s actions EXCEED THE SCOPE OF
         THE CONSENT?
   2. ABSOLUTE PRIVILEGES
      a. Was the statement COMMUNICATED BY THE DEFENDANT
         TO HIS/HER SPOUSE?
      b. Was the statement MADE DURING A LEGISLATIVE
         PROCEEDING?
      c. Was the statement MADE DURING THE COURSE OF A
JUDICIAL PROCEEDING?

d. Was the statement MADE BY A MEMBER OF THE EXECUTIVE BRANCH IN THE COURSE OF HIS/HER DUTIES?

3. CONDITIONAL PRIVILEGES

a. Was the statement made as part of a FAIR AND ACCURATE REPORT OF A PUBLIC PROCEEDING?

b. Did the statement concern a MATTER OF PUBLIC INTEREST and was it communicated to one EMPOWERED TO PROTECT THAT INTEREST?

c. Was the statement a FAIR COMMENT ON A MATTER OF PUBLIC INTEREST?

d. Was the defendant privileged to make the statement to protect his/her own interest?

e. Are there any factors which would cause the defendant to LOSE THE QUALIFIED PRIVILEGE?

VI. INVASION OF PRIVACY

A. Did the defendant make an UNREASONABLE INTRUSION INTO THE PLAINTIFF’S SECLUSION?

B. Did the defendant make an UNAUTHORIZED USE OF THE PLAINTIFF’S IDENTITY for the defendant’s COMMERCIAL ADVANTAGE?

C. Did the defendant make an UNREASONABLE PUBLIC DISCLOSURE OF PRIVATE FACTS about the plaintiff?

D. Did the defendant PORTRAY THE PLAINTIFF IN A FALSE LIGHT?

E. Do CONSTITUTIONAL PRINCIPLES apply to the cause of action?

F. Are there applicable COMMON LAW PRIVILEGES AND/OR DEFENSES?

VII. ECONOMIC TORTS

A. DECEIT: A misrepresentation made by the defendant with the requisite intent and with scienter which causes the plaintiff to suffer damages.

1. Was there a MATERIAL MISREPRESENTATION OF FACT?

2. Did the defendant INTEND THAT THE PLAINTIFF RELY on the misrepresentation?

3. Did the defendant act with SCIENTER?

4. Did the plaintiff JUSTIFIABLY RELY on the misrepresentation?

5. Was the plaintiff’s reliance an ACTUAL AND PROXIMATE CAUSE of the damages suffered?

6. Did the plaintiff suffer DAMAGES?

B. NEGLIGENT MISREPRESENTATION

1. Was there a MATERIAL MISREPRESENTATION OF FACT?

2. Did the defendant FAIL TO EXERCISE DUE CARE in making the
misrepresentation?
3. Did the plaintiff JUSTIFIABLY RELY on the misrepresentation?
4. Was the plaintiff’s reliance an ACTUAL AND PROXIMATE CAUSE of the damages suffered?
5. Did the plaintiff suffer DAMAGES?

C. INTERFERENCE WITH CONTRACT
1. INDUCING BREACH OF CONTRACT: Volitional act done with the requisite intent which causes a third person to breach an existing contract with the plaintiff.
   a. Did the defendant engage in a VOLITIONAL ACT?
   b. Did the defendant INTEND TO INDUCE A THIRD PERSON TO BREACH THE CONTRACT?
   c. Did the actions of the defendant CAUSE the harm to the plaintiff?
   d. Was there a BREACH OF AN EXISTING CONTRACT which caused harm to the plaintiff?
   e. Are there any applicable defenses?
2. INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE: Volitional act done with the requisite intent which causes a third person to refrain from entering into a contract with the plaintiff.
   a. Did the defendant engage in a VOLITIONAL ACT?
   b. Did the defendant INTEND TO INDUCE A THIRD PERSON TO REFRAIN FROM ENTERING INTO THE CONTRACT?
   c. Did the actions of the defendant CAUSE the harm to the plaintiff?
   d. Did the plaintiff SUFFER HARM?
   e. Are there any applicable defenses?

VIII. GENERAL PRINCIPLES CONCERNING THE EXTENT ON LIABILITY

A. LIABILITY-WIDENING factors
1. PLAINTIFF’S DEVICES
   a. Is there a RELATIONSHIP BETWEEN THE TORTFEASOR AND THE DEFENDANT which justifies the doctrine of VICARIOUS LIABILITY?
   b. Was the defendant under a DUTY TO CONTROL the actions of the tortfeasor?
2. DEFENDANT’S DEVICES
   a. Can the defendant seek CONTRIBUTION from another tortfeasor?
   b. Can the defendant seek INDEMNITY from another tortfeasor?

B. LIABILITY-NARROWING factors
1. Is there an applicable IMMUNITY FROM LIABILITY?
2. Has either the VICTIM OR THE TORTFEASOR DIED?
   a. If so, does the jurisdiction have a SURVIVAL STATUTE?
   b. If so, does the jurisdiction have a WRONGFUL DEATH
If there are multiple tortfeasors:

a. Has one tortfeasor SATISFIED ALL OR PART OF THE
   PLAINTIFF’S INJURIES?

b. Has one tortfeasor been granted a RELEASE?
CONTRACTS CHECKLIST

Preliminary Orientation:

WHO are the PARTIES to the contract?
--Two parties: set up two-party model
   A = aggrieved party
   B = party breaking the promise
--Three parties: set up three-party model (see III, below)

What KIND OF CONTRACT is involved? (If sale of goods, apply U.C.C.; otherwise, apply modern common law.)

I. FORMATION: Does B have an OBLIGATION to perform?

   A. Has there been MUTUAL ASSENT?
      1. Was there an OFFER MADE?
         a. Did the offeror appear to have the requisite INTENT?
         b. Are there any problems with the CONTENT (terms) of the offer?
         c. Was the offer COMMUNICATED?
      2. Was the OFFER STILL OPEN?
         a. Has the offer been TERMINATED by one of the following:
            1) Its OWN TERMS?
            2) LAPSE OF TIME?
            3) DEATH of the offeror or DESTRUCTION of the subject matter?
            4) Supervening ILLEGALITY?
            5) ACTS OF THE PARTIES?
         b. Is this a special kind of offer that is NOT FREELY REVOCABLE, such as:
            1) an OPTION?
            2) a MERCHANT’S FIRM OFFER (UCC 2-205)?
            3) an EQUITABLE OPTION?
      3. Was the offer ACCEPTED?
         a. Does the person making the acceptance have the CAPACITY TO ACCEPT?
         b. If this is a common law BILATERAL contract, is the acceptance a RETURN PROMISE?
         c. If this is a common law UNILATERAL contract, is acceptance by PERFORMANCE OF THE ACT REQUESTED?
         d. If this is a U.C.C. shipment contract, is there any problem with shipment of NONCONFORMING GOODS?
e. Was the acceptance UNEQUIVOCAL?
   1) If this is a common law contract, is the acceptance a MIRROR IMAGE of the offer?
   2) If this is a U.C.C. contract, does the acceptance contain NEW OR ADDITIONAL TERMS (UCC 2-207)?
      a) Is the acceptance EXPRESSLY CONDITIONAL upon agreement to the new or additional terms?
      b) Is the contract BETWEEN MERCHANTS?

B. Is there CONSIDERATION or some CONSIDERATION SUBSTITUTE?
   1. Was there a BARGAINED-FOR EXCHANGE?
      a. WHEN was B’s promise made?
         1) Are there any problems with PAST CONSIDERATION?
         2) If so, can the contract be enforced under the doctrine of MORAL OBLIGATION?
      b. WHY was B’s promise made?
         1) Could it be argued that B’s promise was really a DISGUISED GIFT?
         2) Are there any problems with a GIFT SUBJECT TO A CONDITION?
      c. WHAT did B get in return?
         1) Are there any problems with PRE-EXISTING DUTY?
         2) Was A’s FORBEARANCE TO SUE good consideration?
         3) Was one of the promises ILLUSORY?
   2. If consideration was lacking, could the promise be enforced through PROMISSORY ESTOPPEL?
      1) Did the aggrieved party FORESEEABLY AND REASONABLY RELY to his/her detriment on B’S PROMISE?
      2) Is enforcement of the promise NECESSARY TO AVOID INJUSTICE?
   3. Has A conferred a benefit on B so that, as a matter of law, B owes A something to avoid unjust enrichment?

C. Is there any DEFENSE TO ENFORCEMENT of B’s promise?
   1. Is there any problem with the CAPACITY of the parties?
   2. Are there any PUBLIC POLICY problems?
      a. Is the subject matter of the contract ILLEGAL?
      b. Is enforcement of the deal UNCONSCIONABLE?
   3. Are there any problems with FRAUD, DURESS or MISTAKE?
   4. Does the contract fall within the STATUTE OF FRAUDS?
      a. Does the contract involve the SALE OF REAL PROPERTY?
      b. Does the contract involve the SALE OF GOODS FOR $500 OR
MORE?

c. Is the contract capable of PERFORMANCE WITHIN ONE YEAR?
d. Is this a GUARANTEE CONTRACT?
e. Is there an APPLICABLE EXCEPTION which takes the contract OUT OF THE STATUTE?
f. Is there a WRITING SUFFICIENT TO SATISFY THE STATUTE?
g. Could B be ESTOPPED FROM ASSERTING THE STATUTE as a defense?

D. Is any party seeking to introduce any PAROL EVIDENCE to vary or contradict the terms of the writing?

E. Have the parties MODIFIED the terms of the original agreement?
   1. Is the modification VALID?
      a. Was the modification the product of MUTUAL ASSENT?
      b. Is CONSIDERATION required to enforce the modification?
      c. Are there any applicable DEFENSES TO ENFORCEMENT?
   2. Has there been a valid ACCORD AND SATISFACTION?

II. PERFORMANCE: Has B’s obligation ripened into an ABSOLUTE DUTY to perform?

A. Are there any EXPRESS, IMPLIED, OR CONSTRUCTIVE CONDITIONS to B’s performance?
   1. If yes, have they been SATISFIED?
   2. If no, have they been EXCUSED?
      a. Has there been a WAIVER of the condition?
      b. Has B engaged in BREACH ACTIVITIES?
      c. Could the condition be excused to AVOID FORFEITURE?

NOTE: If there are no conditions, or if all conditions have been satisfied or excused, B has an ABSOLUTE DUTY to perform.

B. Has B’s absolute duty been DISCHARGED by some unforeseeable changed circumstance?
   1. Has performance become IMPOSSIBLE?
      a. Has performance become ILLEGAL?
      b. Has there been a DEATH OR DISABILITY of a person NECESSARY TO THE PERFORMANCE?
      c. Has there been a DESTRUCTION of a thing NECESSARY FOR PERFORMANCE?
   2. Has performance become SEVERELY IMPRACTICABLE?
   3. Has the principal purpose of the contract been TOTALLY
FRUSTRATED?
NOTE: If B has an absolute duty to perform which has not been discharged, B has no excuse for not performing his/her promise.

C. Has B refused or failed to perform as A expected?
   1. Is the breach PRIOR TO THE TIME B’s performance is due (PROSPECTIVE)?
      a. Are B’s words or conduct merely expressions of DOUBT OR AN UNEQUIVOCAL REPUDIATION?
      b. What OPTIONS are available to A?
   2. If B is in PRESENT BREACH, is that breach MINOR or MATERIAL?
      a. Is B’s breach WILLFUL?
      b. Is B entitled to a reasonable TIME TO CURE?
   3. Are there any theories under which B (the breaching party) can recover?
      a. Has B already SUBSTANTIALLY PERFORMED?
      b. Is the contract DIVISIBLE?
      c. Can B recover in RESTITUTION?

III. REMEDIES: How should A be compensated for B’s breach?

A. Does the contract contain a valid LIQUIDATED DAMAGES CLAUSE?

B. Can A receive EXPECTATION DAMAGES?
   1. What is the STANDARD MEASURE OF DAMAGES for this type of contract?
   2. Are there any CONSEQUENTIAL DAMAGES which can be recovered?
   3. Can the amount of the damages be determined with sufficient CERTAINTY?
   4. Is A under a DUTY TO MITIGATE his/her damages?

C. Can A recover RELIANCE DAMAGES?

D. Can A recover in RESTITUTION?

IV. THIRD PARTY PROBLEMS: Are there more than two parties involved in the transaction? If so, what kind of a third party contract is involved?

A. Is it a THIRD PARTY PROMISOR, and if so, is the third party promise ENFORCEABLE??

B. Is it a GUARANTEE CONTRACT which triggers a STATUTE OF FRAUDS analysis?
C. Is it a THIRD PARTY BENEFICIARY CONTRACT?
1. What TYPE OF BENEFICIARY is involved?
   a. What are the classifications under the FIRST RESTATEMENT?
   b. What are the classifications under the SECOND RESTATEMENT?
2. Have the original parties attempted to MODIFY OR RESCIND the original terms of the contract? If so, had the third party beneficiary’s rights VESTED before the attempted modification/rescission?
3. What are the RIGHTS AND LIABILITIES of the parties?
   a. If the beneficiary does not receive performance, WHO CAN THE BENEFICIARY SUE?
   b. Can the PROMISSEE SUE the PROMISOR, and if so, for what?
   C. Who can the PROMISOR sue? What DEFENSES can the promisor assert?

D. Is it an ASSIGNMENT OF A CONTRACTUAL RIGHT?
1. Did the assignor have a present INTENT TO TRANSFER the right assigned?
2. Is the assignment VALID?
   a. Are there any problems with CONTRACTUAL LANGUAGE PROHIBITING ASSIGNMENTS?
   b. Does the potential assignment INCREASE THE PROMISOR’S DUTY OR RISK?
   c. Is the right assigned as EXISTING RIGHT?
3. Has the assignor attempted to REVOKE THE ASSIGNMENT?
   a. If so, was the assignment REVOCABLE or IRREVOCABLE?
      1) Was the assignment WRITTEN?
      2) Was CONSIDERATION GIVEN for the assignment?
      3) Was there any TOKEN CHOSE (symbolic writing) exchanged?
   b. Who wins in the case of MULTIPLE ASSIGNMENTS?
4. What are the RIGHTS AND LIABILITIES of the parties?
   a. Can the ASSIGNOR SUE THE OBLIGOR?
   b. If the assignee does not receive performance, who can the ASSIGNEE SUE?
      1) If the assignee sues the obligor, what DEFENSES can the obligor raise?
      2) If the assignee sues the obligor, has there been a BREACH OF AN IMPLIED WARRANTY?

E. Is it a DELEGATION OF A CONTRACTUAL DUTY?
1. Did the delegator have a present INTENT TO TRANSFER the duty delegated?
2. Is the delegation VALID?
   a. Are there any problems with CONTRACTUAL LANGUAGE PROHIBITING DELEGATIONS?
   b. Is the DUTY DELEGABLE?
3. Has the delegatee ASSUMED THE OBLIGATION OF PERFORMANCE?
4. What are the RIGHTS AND LIABILITIES of the parties?
   a. Who can the OBLIGEE SUE?
   b. Can the DELEGATOR SUE THE DELEGATEE?
5. Has the delegation produced a NOVATION?
Handout Completion
Code:

RESIPSA