

To: students in Torts Spring 2008  
From: Naomi Roht-Arriaza  
Re: Torts exams

What follows is not by any means a sample answer. I have had the benefit of reading all your exams, and of leisurely thinking about the responses. You had neither, so I wouldn't expect anyone to actually answer a question this way. I intend rather to summarize some of the things you might have written about, and my thoughts on what a good answer might have contained.

In general, this was a good bunch of exams. The main shortcoming, which I find regularly, was that people were too quick to find a duty, without considering all the objections to duty adequately. Pretty much everyone got the basics on these questions. Where there were large chunks missing, they seemed due to lack of careful reading, either of the facts or of what the question asked you to do. The differences came in how well you saw counter-arguments and subtleties in the analysis, and the opportunities for creative argument. Those of you who had trouble were often conclusory, i.e. "D was clearly a but-for cause of P's harm." Why? The other major failure was lack of organization – you had the right ideas, but didn't connect them to the right places in your answer. I tried to point these out. Most of my comments on the exams themselves are negative. This doesn't mean you didn't do things right – I just didn't often bother to comment on it, so the amount of writing on the exam is not indicative of either success or failure. I also saw much less of the confusion between it's (it is) and its (possessive) so thank you for listening to my complaints/nagging on this.

Here's the question by question breakdown:

Question I:

As many of you pointed out, this question was based on a real, and horrifying, case. I've attached a newspaper article for those who missed it. I did change the facts around a bit to test more of the issues raised in the course.

Paula vs. Deb (usually not much point in suing kids but maybe she has a trust fund or homeowner's insurance covers negligence, although probably not intentional torts).

IIED

Requires intentional or reckless extreme or outrageous behavior causing severe emotional distress. Intent, or at least recklessness, could be shown by D's wanting to get back at P for "trash-talking," her recruitment of other kids to send harassing messages, the messages apparently calculated to exacerbate P's vulnerabilities. Extreme or outrageous conduct is, of course, in the eyes of the jury, but you needed to analogize to the cases we read to see if this case would be likely to come out the same way. D knew of P's vulnerability because they had known each other for years and played on them to create maximum damage, and one could argue that given the pecking order of middle school girls D, as a popular leader, was in a position of authority over P, a shy loner tagged as a

“loser.” D’s counterargument would be that this was just normal 13-year old teasing and goes on every day, there’s nothing extreme about it. Note that the child standard of care is inapplicable in IIED, the question is just whether D can form the requisite intent. Severe emotional distress is easy to show given the temporal relation between the taunts and the suicide attempt, and the lack of any other explanations in the fact pattern. Scope will be the same as below, except that there is usually greater latitude for scope in an intentional tort.

### Negligence

Duty: Since D’s own actions are at issue here, she owes a duty to avoid reasonably foreseeable harm to foreseeable others. P is a foreseeable other since the conduct was aimed at her: whether the harm was foreseeable is debatable. D will argue that she could foresee some emotional harm but certainly not a suicide attempt and physical harm; although you could do it here, I will deal with this issue under Scope.

Breach: The standard of care here would be that of a 13-year old of like maturity, intelligence and experience. In this case, you’re told D is bright, tech-savvy, a leader – thus will be held to a standard of a pretty mature, even precocious, 13-year old. Because the website is aimed at kids, hard to argue logging on is an adult activity (or inherently dangerous, even given incidents of stalking). Would such a person orchestrate the messages? On a B<PL basis it seems like there were alternatives if she wanted to deal with P that were not very burdensome, and we know (and P would introduce evidence) that pre-pubescent girls run a high risk of emotional damage from teasing, etc.

There is a statute that may be relevant, and if it is, it would normally constitute negligence per se unless excused. To determine relevance, ask whether the plaintiff is in the class to be protected. Here, the statute talks about “anyone,” but by its terms it only applies to the U.S. mail or third parties. Some of you thought MyZone was a third party, others argued that the statute should be broadly read to effectuate the legislature’s purposes, since people now use the Internet for much of the communication that used to take place through the U.S. mail. Second, ask whether the harm to be prevented is the same. P will argue the harm is emotional distress as a result of harassment, so she qualifies. D will respond that the harm the legislature contemplated was older men stalking girls for sex, not teenagers teasing each other, no matter how harshly. Even if the statute is relevant, there is still the problem of intersection with the child standard of care: in most places, the statute becomes evidence of negligence rather than neg per se, and the jury must consider whether a child of the D’s characteristics would violate the statute – answer is not clear. Some of you wanted to argue incapacity as an excuse based on D’s age, but incapacity refers to real not legal incapacity.

### Causation

Causation

As mentioned, under either but-for or substantial factor causation it seems that the coincidence in time, the intention to cause some kind of distress, the lack of any other cause in the fact pattern all indicate that more likely than not D's actions are causally related to the harm. D will argue that P was a lonely and not very accomplished teenager, and that even had she not posed as Adam and sent messages it was likely that P would try to take her life; this probably won't work.

### Scope

The first scope issue is the foreseeability of the harm. D will argue that this is a completely different type of harm from the kind expected: one might expect tears, or feeling sad or angry, but certainly not infection and brain damage as a result of a prank gone awry. P will argue that the consequences to be expected are emotional harm, and that's what you got, the subsequent events are merely the manner in which the emotional harm manifested, or simply a greater extent of harm than expected, neither of which relieve the D of liability. P might argue that the suicide constituted an irresistible impulse attributable to the D's negligent action. P will also argue under the "eggshell skull" plaintiff rule that preexisting conditions like an allergy to antibiotics, although they might be unforeseeable, do not break the chain of liability. Similarly, any malpractice by the hospital would come within the medical complications rule, and there is no indication that any negligence was so egregious or extraordinary as to supercede that rule.

### Defenses

D can argue that P was comparatively at fault for continuing to log on and read messages even after they turned ugly. Here too the standard of care would be a child standard, except that P, unlike D, was probably immature and not too intelligent for her age and so would be held to a lower standard. It's not clear whether under that standard there's any breach - perhaps most reasonable 13 year olds would keep reading to see if the situation improved. A claim of implied assumption of risk would end up merging with the comparative fault standard since this would be secondary assumption of risk. D might also try to implead P's mother on grounds that she should have supervised P's internet use better or noticed that her child was getting more and more upset.

### Paula v. Wanda

#### Duty

Parents are not liable for their children's torts. There are two possible duty arguments here, but neither is great. One would be to argue that by suggesting a "prank" to get back at the unnamed girl, Wanda voluntarily got herself involved and assumed a duty to control her daughter's behavior. The analogy here would be to Tarasoff: because of her relationship to Deb, and her intervention, she has a duty to warn P. The problem is that, unlike in that case, the facts tell us she doesn't know who D will go after: there's no identifiable victim. One could argue that the history of enmity between the girls makes P

a foreseeable victim, but that's not good enough. On the other hand, a simple question to D would have made clear who the intended victim of the prank was supposed to be.

The other way to go would be a variation on negligent entrustment. Wanda pays for D's computer and buys her upgrades and peripherals. She is on notice from the conversation that D will try to get back at some kid in her class, and her providing the means of doing so gives rise to a duty to supervise more closely, put the computer in a common area, etc.

### Breach

It's not clear that even if there is a duty, W breached under an RPP duty of care. The statute probably doesn't apply since she didn't harass (using D as a third party? Even so, no indication she meant to harass). Under regular negligence, perhaps argue that there's a very small burden involved in not telling your kids to play pranks on friends, but W will argue that because she didn't know Paula's identity there is no foreseeability. Under a negligent entrustment theory the problem is effectiveness of the untaken precautions: a tech-savvy kid would know how to send the messages even with greater supervision or the computer in the living room.

### Causation

W will argue that D more likely than not could have come up with the idea to get back at P on her own, and that better supervision would not have mattered. P will argue they would have made D's actions more complicated, and probably led to her desisting.

### Scope

Much the same as under P v. D., with the addition of D's acts as an intervening unforeseeable and egregious act.

### P. v. MyZone/NewsCorp

This is the big ticket item, but it's also the hardest case to make.

### Duty

Many of you did not do nearly enough with this. There are two clearly delineated perspectives here: Paula will argue this is merely a default duty to act reasonably carefully toward foreseeable others for foreseeable risks. She was a foreseeable other because she was a user of the site (whether she pays or not, they get advertising revenue from having people like her sign on) and this was a foreseeable risk because they had warned in newspapers, etc. about stalking risks so they had to know there was some danger associated with false profiles.

MZ will argue that they did not actually create the harm or even the risk of harm. The site works as it should, and they are unable to control the conduct of third parties and should not be expected to do so. They will argue that they are like the phone company, simply transmitting data, and that they cannot be held liable for messages because to do so would create unlimited and uncontrollable liability. (See below for the waiver issue).

You have no idea from the cases we read whether internet social networking sites have a duty to their users to prevent harmful messages. So you have to argue to the court whether there should be a duty imposed. You should start by thinking of the relevant analogies. Some of you went to products liability and started talking about design defects, but it's not a product. You have to explain why it should be treated like one - perhaps going back to Traynor's concurrence in *Escola*, you could argue they are in the best position to prevent the harm, make money from the service, know it's aimed at kids and that kids are particularly vulnerable and can't protect themselves, that MZ could spread the costs of installing further controls, etc. Some of you argued as though this were a premises defect, talking about a "virtual space." Again, you have to explain why the analogy holds. (There's a billboard on highway 101 that says "Yahoo: a nice place to stay on the internet" in the shape of a motel sign, but I'm not sure that's enough...) A more plausible variation on this theme are duties to control third parties, for example a landowner's duty to protect against criminal activity on the premises. By analogy, one could argue that the site owner is, like the landowner, in the best position to avoid the harm and that individual site users are unable to do so (how would P. even know that the person sending her messages was not actually Adam?) If you use this analogy you say that a duty exists if there is heightened foreseeability: if you apply a totality of the circumstances test, for example, you could point to prior incidents, the existence of the hotline, the ads, etc. as evidence that there had been prior similar incidents and that the type and conditions of service were such that a duty should be imposed. You could couple this with a policy argument about why a duty to avoid this type of harm is best placed on MZ. The legislative intent, as demonstrated by the statute, will play a role here. MZ of course will argue that D (or either girl's parents) are in the best position to avoid the harm, that if they were forced to install controls this would chill communication, etc.

Alternatively, you could avoid this line of argument by saying that MZ voluntarily assumed a duty when they set up the complaints hotline, and that their users relied on the hotline such that removing it without notice constituted breach (like the railroad watchman case, even if no duty existed originally it was created). Along the same lines you can argue that MZ created the peril because it was easy for people to create false profiles, so that gives rise to a duty.

## Breach

Standard of care: RPP, or RPP+ if you argue they had specialized knowledge and skill. The easiest breach is the lack of a complaint hotline. "A few" of MZ's competitors have such hotlines. Is that enough to establish the existence of a custom from which MZ

deviated? Would depend on how many there are. If there is a safety-related custom, deviation from it constitutes evidence of breach.

Even if no custom, on a simple untaken precaution theory the lack of a complaint mechanism may be breach. It was apparently not that hard to set up, although MZ will argue it was ineffective and created much graver problems of privacy, etc., so that the burden outweighed the expected risk. Many of you suggested other untaken precautions, including verifying identities of those opening accounts, restricting access by minors (but doesn't that defeat the whole purpose of the site?), having spot checkers for abusive language, etc. Whatever you suggested, I wanted to see you analyze it in terms of SAFETY. There isn't a whole lot that seems both effective and not overly burdensome.

You could also focus on the warning: they took out ads in local papers aimed at parents, warning of dangers on the Internet. Several of you suggested that such warnings would have been better placed on the site itself, especially where the parent had to sign the waiver. You could argue that such warnings were inadequate because they were not adequately placed, the language was not explicit enough, etc. MZ will argue compliance with custom (all the sites do it this way) and that they are entitled to presume that once the parents see the warning they will heed it, but P's mother didn't.

#### Causation

If you went with the lack of a complaint hotline as breach, you then have to explain how if there had been a hotline more likely than not P would have called it and found out about the fake i.d. MZ will argue that a shy girl with a crush on a guy was hardly likely to call to complain that he was treating her badly, especially since she didn't even complain to her mother. The hotline would not have mattered. They will make similar arguments about the warning.

#### Scope

Many of the scope arguments re antibiotics, hospital etc are the same. In addition, MZ will argue that D's acts constitute an independent, superceding intervening cause that is egregious enough to cut off their liability - like the fireman's act in *McLaughlin*. P will argue that it's precisely the type of harm they foresaw and tried to avoid by setting up hotlines, warning parents, etc. and that the details don't matter.

#### Defenses

The big one here, as almost all of you recognized, is the waiver, which constitutes an express assumption of risk. It seems pretty clear and unambiguous. There's some argument that it should be void on public policy grounds because it's an adhesion contract, you can't bargain for more expensive no waiver coverage, the site is held open to the public, it would be inappropriate to relieve defendants of liability, etc. On the other hand, it's not a necessity like a hospital (or is it for a 13 year old?) and there is more than one social networking site.

Paula's mom vs. everyone - NIED

You're told that she's suffering from clinical depression. Does she meet the tests? I told you to use California rules, so the test is Dillon/Thing. She's clearly related to P as her mother, but it's not clear she contemporaneously witnessed the harm although she was probably close to the scene. Perhaps if you define harm as the entire process from last email to infection and coma you could argue she witnessed that, and that therefore she fits the rule. Although you'd need experts to prove it, she probably has severe enough ED.

You could also try to argue independent duty vs. MZ. When she as well as P signed the waiver, did that create a relationship such that they owed her a duty for her emotional wellbeing, given the known risks to her child? Probably not, if Burgess is the comparison.

Question II: Mack v. Zack (TipTop)

Here you needed to do two things: evaluate the strength of Mack's case against the TipTop (and his case against any other defendants, like the chair manufacturers, to see what his total recovery might look like) and then take what you know about his chances of winning and about him and Z., and evaluate whether to take the settlement. You didn't have enough information to make detailed mathematical calculations, but could get some general ideas on the table.

M. v. Z. : duty

These facts are a poster child for the difficulties of the traditional landowner status trichotomy, which is what the instructions asked you to use. The harm arises out of a defect in the chair on the premises. Is M. an invitee, a licensee or a trespasser? He could be an invitee because he came in before closing time, consumed a drink at the invitation of an employee (maybe he would have left him a tip?) and was there for the mutual benefit of himself and an employee of the bar, acting within the scope of his employment (is getting a ride home part of the scope of employment? Not clear.) However, he was hurt after the bar had closed and after Sam had made it clear that he had no permission to be there because the boss didn't let anyone be there after closing. Did Sam's telling him to pull up a chair change his status from trespasser to licensee because an employee gave him permission? What about the drinks "on the house?" Do they make him into a licensee, there for his own benefit to drink for free and help his friend?

Finally, does it matter? If he's a trespasser there's no duty except to refrain from willful and wanton acts, which it's hard to find here. If he's a licensee, the only duty beyond this is to warn him of known defects. Is the fact that the chair was off in a corner evidence that someone at the bar knew there was something wrong with it? If not, no actual

knowledge. If he was an invitee Z. had a duty to inspect. But given the testimony of the Tip-Top's expert it may be that even inspection would not have revealed the defect.

Perhaps the breach can be framed in terms not of lack of inspection, but of having old chairs around that can break, or of not giving him one of the "regular" chairs that were put up for sweeping.

Many of you had difficulty framing the breach. Although you have one expert's opinion, it's hard to say if he's right since the chair has been thrown away. When you see "evidence destroyed - not clear what happened" you should think *res ipsa*. You don't need a theory of breach (although in a majority of states you could plead both *res ipsa* and a specific theory). However, you do need to show this was the kind of accident that generally doesn't occur without negligence. Here, stools don't generally fall apart on their own when people sit on them, and there's no evidence of misuse. The defendant has to be the most likely source of the negligence (or D must have exclusive control). Here there's a bit of a problem since it's not clear if the defect came from the manufacturers or from Z, but one could say that at the moment of the accident Z had control. Finally, P must not have contributed to the harm. Perhaps he had had one free beer too many? Unlikely since the facts talk about two beers and suggest that he is a full-grown man (welder, heavy industry).

#### Causation

Was the chair breaking a substantial factor in his injuries? Probably.

#### Scope

The old war wound aggravation is another "eggshell skull plaintiff" issue - doesn't break the chain of causation. Perhaps Z. can argue he's an unforeseeable P because no one is supposed to be in the bar after closing, and he will try to shift the blame to the manufacturers.

#### Defenses:

Maybe comparative fault for drinking? But unlikely. Perhaps argue that Mack pulled out an old chair himself and sat on it without asking if it was safe, and so bears responsibility. But what was it doing there in the first place?

Mack can also bring products liability or negligence suits against the manufacturers, AC/DC ( :-)). They can't sue the distributor because Stools, Inc. is out of business, but it doesn't matter because under a products liability theory you can sue anyone in the chain of distribution.

Under products liability, the first question is whether it's a manufacturing or design defect. It would be important to know if all these chairs are made the same way, and have the same metal in the pin. If not, it's just this one that's defective, but hard to prove

a manufacturing defect, and you will run into problems with alternative liability if both manufacturers didn't do the same thing. If they all have the same design, you would argue it's defective under Restatement 2nd 402(a). If so, there are two tests to apply: you could argue that the consumer expectation test is the appropriate one, since everyone knows how a chair is supposed to work - it's not supposed to fall apart and dump you on the floor. You don't need experts to explain this. On the other hand, perhaps you need an expert to explain how the metal content of a hidden pin affects how the chair works. In that case, you would have to use the risk-utility test. Tip-top has an expert, although it's not clear his conclusions have any validity or have been subjected to the peer review/replicability/etc. tests of the Daubert case and its progeny. In terms of evaluating risk v. utility, if a stronger metal would keep the chair from breaking apart, it's probably quite inexpensive as a part of the chair's costs, and so would be worth doing. Not clear what, if any, disadvantages this would have - maybe the decrease in flexibility creates other safety problems, but we don't have enough information on this. Under CA law the burden of showing there's no RAD would fall on the defendant; you didn't need to worry about the 3<sup>rd</sup> Restatement's RAD requirement, per the instructions.

You might allege a warning defect, but it's hard to imagine what the warning should say - careful, chair may break? Perhaps "check after x time for weakness" ....

After all this, you now needed to discuss the question - should Mack take the \$50K? The case seems quite weak due to the limited duty issues and the difficulty in specifying breach, he's unlikely to win unless he uses res ipsa and can show some duty to inspect. He has a stronger case against the manufacturers except for the alternative liability, so maybe he should take the money and use it to finance litigation against AC/DC. You don't really have all the info you need re his salary, age, medical expenses, etc. to come up with a solid number for what he'll need, but you do know he is not that young, has other health issues, and does not like courts - all reasons to push for a settlement. On the other hand, if you make a wild guess as to what a welder makes the settlement will cover at most a couple of years of salary and if he can't work and has continuing medical expenses and no insurance, it's not very much money at all. But it's better than nothing. On the other hand, Zack has a strong legal case but also may not be interested in protracted litigation if he's trying to sell the bar and move, plus a disgruntled employee (Jack) and a reputation for having funky chairs is not helpful, so he may be interested in paying something to make the case go away. Perhaps these interests leave room for some integrative bargaining: a job and training as a bartender for Mack, payment of his health insurance (or help getting the VA to take him on as a war veteran), a structured settlement with very little upfront and more once the bar is sold, a confidentiality agreement, a joint suit against AC/DC, an apology...you came up with lots of possibilities.

Q. 3

These were pretty straightforward, and pretty much everyone got most of the issues.

a. what torts and what issues?

The easiest was battery for breaking down P's door and beating her. Clearly a harmful and intentional contact. A bit more iffy is the first battery: is it a battery when he gets into the car and puts his hand on her shoulder? Given the invasion of her "space," the debtor/creditor and man/woman context, it probably constitutes an offensive contact. Perhaps you could even argue his contact with the car is enough (like eyeglasses) although that probably won't work. In any case, there's the issue of consent: by saying "be quick" does she consent to the touching?

Assault in tort is not exactly the same as assault in criminal law: it's the reasonable apprehension of an imminent intentional harmful or offensive contact. Here you could find an assault as the creditor breaks down her door, but not clear you could find it in the conversation in the car. Even if he threatens her, is there imminence? Perhaps the very act of a strange man getting into a woman's car uninvited is enough for assault (cf. Vetter).

You could argue for IIED, but the facts don't tell you there's any severe emotional distress, nor is it clear that there's the requisite intent.

False imprisonment occurs when the defendant intentionally confines plaintiff without legal authority. Here when he enters the car and puts a hand on her shoulder, is she confined? Arguably she could have just opened the driver side door, but confinement can also take place through threats of force, express or implied. Simply being a creditor is not legal authority, but consent will be an issue as discussed above.

There are also trespass issues, but since we didn't talk about them I didn't include them.

b. There is generally no tort liability on the police for failing to protect the public. In order to find liability under Cuffy and similar cases, plaintiff must show that there is a promise by the police to protect, knowledge that inaction will lead to harm, direct contact between the P and the police, and reasonable reliance on the promise. Here P will argue the 911 operator telling her they would pick up the guy and call her to i.d. him is sufficient promise, while the police will argue they never said they'd protect her. Re knowledge, she will argue they said they knew the guy and that implies knowledge of his dangerous tendencies, while the police will argue they merely knew him as an aggressive creditor, not as someone who would engage in violence. Re contact the issue is whether the 911 operator is sufficient - probably. The biggest problem for P is reasonable reliance. If under Cuffy the court found that police inaction for a day was enough to dispel any reasonable reliance on the police showing up, it should be even harder for P to show that two days later she should still have relied on the police. After all, they said they would pick him up but didn't give any time frame and didn't tell her to stay at home waiting. Probably a loser.

c. This one's an even more probable loser. There is no duty to act to rescue others, so unless you can find an exception the neighbor has no duty to P. Best possible exception is voluntary assumption of a duty, by picking up the phone. Once he did that he had to

act reasonably, that is, by calling the police if he got no answer. However, he didn't leave her worse off, and the question of what's reasonable is complicated by his memory problems. If you consider memory a mental disability issue he will still be treated like a RPP, but if you consider old age a physical disability he will be held to the standard of a reasonable person with memory loss. Not clear there's a breach. Even if you get that far there's a serious causation issue in that he observes the creditor going into the house - even if he had called 911 immediately it's not clear help would have arrived in time to avoid the beating.