A. Themis Technique
   • Find all of the torts—be aggressive with your issue checklist
   • For the bigger issues, don’t forget to discuss the elements of a rule under separate headings
     (e.g. negligence—duty, breach, causation, & damages)
   • Discuss any applicable defenses

B. Summary of Issues Tested
   1. Negligence
      o Duty
         ▪ Duty of care owed to all foreseeable persons that may be injured by D’s failure to meet
           reasonable standard of care
         ▪ Failure to act
         ▪ Foreseeable Ps—Cardozo & Andrews
      o Standard of care
         ▪ Reasonably prudent person under the circumstances – objective standard
         ▪ Other standards (child, professional, common carriers, trespassers, licensees, invitees)
         ▪ Negligence per se
         ▪ Exceptions to affirmative duty to act
      o Breach—(preponderance of the evidence)—greater probability than not that D failed to
        meet standard of care (custom/usage, statutory violation, or res ipsa loquitur)
      o Causation
         ▪ Actual—but for test
         ▪ Proximate—direct and indirect
            • Intervening Cause – Superseding Cause
      o Damages
      o Defenses—contributory/comparative negligence and assumption of the risk
2. **Strict Liability**
   - Elements—absolute duty, breach, causation, damages, & defenses
   - Abnormally dangerous activities
   - Animals—wild and domestic (if owner knows of dangerous propensities)

3. **Products Liability**
   - Strict products liability
     - Product defective when sold—manufacturing or design defect, and failure to warn
     - Actual & Proximate Cause
     - Damages & defenses
   - Negligence—duty, breach, causation, & damages

4. **Defamation**
   - Defamatory language
   - Of or concerning P
   - Publication by D to a 3rd person
   - Damage to P’s reputation
   - Matters of public concern
     - Falsity (private figure = negligence; public figure = malice)
     - Fault
   - Defenses—truth, consent, and absolute/qualified privileges
   - Warranties—implied and express

5. **Invasion of Privacy**
   - Misappropriation
   - Intrusion upon seclusion
   - False light
   - Public disclosure of private facts

6. **Intentional Torts**
   - False Imprisonment
   - Battery
   - Assault
   - IIED
   - Trespass to Chattels
   - Conversion
   - Trespass to Land
   - Nuisance

7. **Vicarious Liability**
Exam Tip 1: Negligence is a big issue on the bar exam (and sometimes it can even be tested multiple times on the same question), so make sure you have your approach memorized and ready to go.

Negligence

To establish a prima facie case for negligence, a plaintiff must prove duty, breach, causation, and damages.

Duty

Who is owed a duty

A duty of care is owed to all foreseeable persons that may be injured by a defendant’s failure to meet the reasonable standard of care. Under the majority view (Cardozo), a defendant is only liable to plaintiffs within the zone of foreseeable harm. Under the minority view (Andrews), a defendant owes a duty to everyone harmed.

FACTS from exam:

Standard of Care

The standard of care owed by defendant to plaintiff is that of a reasonably prudent person under the circumstances as measured by an objective standard.

Exam Tip 2: Apply the general standard of care to defendant unless a special standard of care applies (i.e. landowner, physician, etc.) or there is a statute (negligence per se).

FACTS from exam:
Breach

Defendant will be in breach of his duty to plaintiff if he fails to meet the applicable standard of care.

**FACTS from exam:**

### Negligence Per Se – Alternative Duty/Breach Analysis

When a statute imposes upon any person a specific duty for the benefit or protection of others, a violation of the statute will constitute negligence per se.

**Exam Tip 3:** If there is a statute provided in the facts, you should always discuss Negligence Per Se.

**Statute**

Write out the statute from the exam question: [Here, the statute states...]

**Class of person:** In order for the statute to apply, the plaintiff must be in the class of people meant to be protected by the statute.

**FACTS from exam:**

**Type of Harm:** The plaintiff must also suffer the type of harm the statute intended to protect against.

**FACTS from exam:**

**Proximate Cause:** If the statute applies, the defendant will be liable to the plaintiff if his violation of the statute proximately caused harm to the plaintiff.

**FACTS from exam:**

### Causation

**Exam Tip 4:** Discuss actual and proximate cause under separate headings.

To be liable, defendant’s act must be both the actual and proximate cause of plaintiff’s injury.

**Cause in Fact/Actual Cause**

To prove actual causation, plaintiff must show that but for defendant’s act, plaintiff’s injury would not have occurred. If there are multiple causes, defendant will be a cause in fact if he was a substantial cause of plaintiff’s injury.

**FACTS from exam:**

**Proximate Cause**

The plaintiff must show that her injuries were the foreseeable result of defendant’s conduct.
Intervening Cause

An intervening cause is an outside force/action that contributes to the plaintiff’s harm after the defendant’s act/omission has occurred. If the intervening cause is unforeseeable, it is a superseding cause and defendant’s liability will be cut off.

Exam Tip 5: There can be more than one intervening cause in an exam question. Address each intervening cause separately and analyze whether they are foreseeable or unforeseeable.

Damages

To recover damages, plaintiff must prove actual injury and not just economic loss.

Defenses

Exam Tip 6: Only discuss the defenses that apply, and if none apply, simply state this in your answer.

Contributory Negligence

In a contributory negligence jurisdiction, plaintiff’s negligence is a complete bar to recovery.

In a pure comparative negligence jurisdiction, plaintiff’s negligence is not a complete bar to recovery, but her damages are reduced by proportion that plaintiff’s fault bears to the total harm.

Assumption of the Risk

Plaintiff’s recovery may be barred if she voluntarily and knowingly assumed the risk of her behavior.
CHAPTER 2: SUBSTANTIVE ISSUES (CONT’D)

Strict Liability

A defendant engaged in an abnormally dangerous activity will be held strictly liable – without any proof of negligence – for personal injuries and property damage caused by the activity.

Exam Tip 7: Strict liability focuses on the danger of the activity, regardless of how careful the defendant acts. If the activity is abnormally dangerous, a defendant will be held strictly liable for injuries.

Abnormally dangerous activity

An abnormally dangerous activity is one with a high risk of harm, that is not commonly found in the community, which has a risk that cannot be eliminated with due care.

Exam Tip 8: Be sure to address all three of the elements of abnormally dangerous activity in your analysis. Consider writing a separate paragraph for each element. Examples of abnormally dangerous activity include using explosives, fumigating, disposing of hazardous waste, and storage of chemicals.

FACTS from exam:

Causation

To be liable, the abnormally dangerous activity must be both the actual and proximate cause of plaintiff’s injury.

Cause in Fact/Actual Cause

To prove actual causation, plaintiff must show that but for defendant’s act, plaintiff’s injury would not have occurred. If there are multiple causes, defendant will be a cause in fact if he was a substantial cause of plaintiff’s injury.

FACTS from exam:
**Proximate Cause**

To prove proximate cause, plaintiff must show that her injuries were the foreseeable result of defendant’s conduct.

**FACTS from exam:**

**Intervening Cause**

An intervening cause is an outside force/action that contributes to the plaintiff’s harm after the defendant’s act/omission has occurred. If the intervening cause is unforeseeable, it is a superseding cause and defendant’s liability will be cut off.

**Exam Tip 9:** There can be more than one intervening cause in an exam question. Address each intervening cause separately and analyze whether they are foreseeable or unforeseeable.

**FACTS from exam:**

**Damages**

To recover damages, plaintiff must prove actual injury and not just economic loss.

**Defenses** (The best defense to Strict Liability is Assumption of the Risk)

**Assumption of the Risk**

Plaintiff’s recovery may be barred if she voluntarily and knowingly assumed the risk of her behavior. Assumption of the risk is not the only defense, but it is the best defense.

**FACTS from exam:**

**Wild Animals**

Strict liability also applies to owners of wild animals or domestic animals, if the owner knows of dangerous propensities of the domestic animal.

**Exam Tip 10:** If a wild animal or domestic animal with dangerous propensities is involved, the analysis of causation, damages, and defenses is the same as abnormally dangerous activity.
Products Liability

Exam Tip 11: You should discuss Products Liability under both a Strict Liability theory and a Negligent Products Liability theory. You should also discuss Express Warranties and Implied Warranties.

Strict Products Liability
A defendant who is in the business of selling a commercial product may be strictly liable for a defective product causing foreseeable injuries to a plaintiff. To establish a prima facie case for strict products liability, the plaintiff must prove that defendant had an absolute duty as a commercial seller of the product, that defendant produced or sold a defective product, actual and proximate causation, and damages.

Absolute Duty
A defendant who is in the business of selling a commercial product—including manufacturers, distributors, and retail sellers—is under an absolute duty to provide a safe product.

Exam Tip 12: Discuss here whether defendant qualifies as in the business of selling a commercial product (as opposed to a casual or occasional seller of this particular product).

FACTS from exam:

Defective Product
A product is defective when, at the time of the sale or distribution, it contains a manufacturing defect, a design defect, or inadequate instructions or warnings (i.e., failure to warn).

Exam Tip 13: It is possible for a product to be defective based on more than one theory. You should discuss all defect theories that are raised by the facts.

Manufacturing Defect
A manufacturing defect is a deviation from what the manufacturer intended the product to be that causes harm to the plaintiff. The test for the existence of such a defect is whether the product conforms to the defendant’s own specifications.

FACTS from exam:
**Design Defect**

Depending on the jurisdiction, courts usually apply either the consumer-expectation test or the risk-utility test (or a hybrid of both tests) to determine whether a design defect exists.

Under the consumer-expectation test, plaintiff must prove that the product is dangerous beyond the expectation of an ordinary consumer.

**FACTS from exam:**

Under the risk-utility test, the plaintiff must prove that a reasonable alternative design that is economically feasible was available to defendant, and failure to use that design rendered the product unreasonably safe.

**Exam Tip 14:** Look for facts in the exam question about the availability of alternative designs and the cost of these alternative designs.

**FACTS from exam:**

**Failure to Warn**

A failure to warn defect exists if there were foreseeable risks of harm, not obvious to an ordinary user of the product, which could have been reduced or avoided by providing reasonable instructions or warnings.

**Exam Tip 15:** Read the exam facts carefully- the defendant might provide a warning about one type of harm, but not warn about the type of harm that actually occurred.

**FACTS from exam:**
Causation

Actual Causation
To be the actual cause of plaintiff’s injury, the product must have been defective when it left defendant’s control.

FACTS from exam:

Proximate Causation
To be the proximate cause of plaintiff’s injury, the defect causing plaintiff’s injuries must have occurred when the product was being used in an intended or reasonably foreseeable way. A defendant will still be liable if the plaintiff misuses the product and is injured, if the misuse is foreseeable.

FACTS from exam:

Damages
Plaintiff must also suffer personal injury or property damage.

FACTS from exam:

Defenses

Contributory Negligence
In a contributory negligence jurisdiction, plaintiff’s negligence is a complete bar to recovery when the plaintiff’s fault consisted of unreasonably proceeding in the face of a known product defect.
In a pure comparative negligence jurisdiction, plaintiff’s negligence is not a complete bar to recovery, but her damages are reduced by proportion that plaintiff’s fault bears to the total harm.

FACTS from exam:

Assumption of the Risk
Plaintiff’s recovery may be barred if she voluntarily and knowingly assumed the risk of her behavior.

FACTS from exam:
Negligent Products Liability

Exam Tip 16: After you analyze strict products liability, you should always discuss negligent products liability. This analysis is the same as a typical negligence analysis and analyzes whether the defendant acted negligently in relation to the product.

Under a negligent products liability theory, a plaintiff must prove duty, breach, causation, and damages.

Duty
Who is owed a duty
A duty of care is owed to all foreseeable persons that may be injured by a defendant’s failure to meet the reasonable standard of care. Under the majority view (Cardozo), a defendant is only liable to plaintiffs within the zone of foreseeable harm. Under the minority view (Andrews), a defendant owes a duty to everyone harmed.

FACTS from exam:

Standard of Care
The standard of care owed by defendant to plaintiff is that of a reasonably prudent person under the circumstances as measured by an objective standard.

Exam Tip 17: Apply the general standard of care to defendant unless a special standard of care applies (i.e. professional, physician, etc.) or there is a statute (negligence per se).

FACTS from exam:

Breach
Defendant will be in breach of his duty to plaintiff if he fails to meet the applicable standard of care.

FACTS from exam:

Causation, Damages, & Defenses
Exam Tip 18: The causation, damages, and defenses analyses for negligent products liability are the same as the analyses for strict products liability. To save time, you can cut/paste the causation, damages, and defenses analysis sections from your earlier strict products liability section, or say “see above for the causation, damages, and defenses analyses.

Warranties

Exam Tip 19: Products liability questions are lengthy. When you reach warranties, you quickly analyze express warranty (if applicable) and the two implied warranties.

Express Warranty (if applicable)
An express warranty is a promise or guarantee made by the defendant about the product. If the product does not meet this warranty, the defendant has breached this warranty and plaintiff can recover damages.

FACTS from exam:

Implied Warranty of Merchantability (always discuss)
Under the implied warranty of merchantability, a product that is sold is impliedly warranted to be reasonably useful and safe for average use.

FACTS from exam:

Implied Warranty of Fitness for Particular Purpose (if applicable)
Under this implied warranty, if a seller knows or has reason to know of a particular purpose for which some item is being purchased by the buyer, the seller is guaranteeing that the item is fit for that particular purpose.

FACTS from exam:
Defamation
A plaintiff may bring an action for defamation if the defendant’s defamatory language is of or concerning the plaintiff, is published to a third party who understands its defamatory nature, and damages the plaintiff’s reputation.

Defamatory Language
To be defamatory, the language used must diminish the respect, esteem, or goodwill towards plaintiff.

FACTS from exam:

Of or Concerning Plaintiff
A reasonable person must believe that the defamatory communication refers to this particular plaintiff and holds him up to scorn or ridicule in the eyes of a substantial number of respectable members of the community.

FACTS from exam:

Publication
Publication of defamatory matter is its intentional or negligent communication to a third party.

FACTS from exam:

Damage to Plaintiff’s Reputation
General damages are presumed when the comments involve libel, which are written statements. However, they are not presumed when it involves slander, which are oral comments. Damages for slander per se are presumed when the comments involve the professional reputation, disease, crimes of moral turpitude, or unchaste behavior.

FACTS from exam:
Constitutional Defamation Requirements

The Constitutional defamation requirements apply if:

1. The plaintiff is a public official/figure, or
2. The plaintiff is a private individual, but the statement involves a matter of public concern.

Exam Tip 20: Be sure to explain why the plaintiff is a public official/figure or why the statement involves a matter of public concern (if the plaintiff is a private individual).

FACTS from exam:

First Constitutional Requirement: Falsity

The plaintiff (public figure/official or private individual and statement involving a matter of public concern) must also prove that the statement is false.

FACTS from exam:

Fault

If the plaintiff is either a public official or a public figure, he is required to prove that the defendant acted with actual malice, and either had knowledge that the statement was false or acted with reckless disregard as to the truth or falsity of the statement.

FACTS from exam:

If the plaintiff is a private individual and the defendant’s statement involves a matter of public concern, the plaintiff is constitutionally required to prove that the defendant acted with fault—either negligence or actual malice.

FACTS from exam:
Damage to Plaintiff’s Reputation
Plaintiff must prove actual damages if he is a public figure/official or a private figure but a matter of public concern is involved. If the plaintiff is a private figure and shows malice, he can recover punitive damages as well.

**FACTS from exam:**

Defenses

**Exam Tip 21:** Only raise the defenses that apply.

Truth
Truth is an absolute defense.

**FACTS from exam:**

Consent
Consent is an absolute defense as long as defendant did not exceed the scope of consent.

**FACTS from exam:**

Absolute Privilege
An absolute privilege can never be lost, and is used for remarks during judicial or legislative proceedings, between spouses, or in required publications.

**FACTS from exam:**

Qualified Privilege
A qualified privilege is one affecting an important public interest, in the interest of defendant or a 3rd party, and it can be lost if the statement exceeds the scope of the privilege or the speaker acted with malice.

**FACTS from exam:**
Invasion of Privacy Torts

Exam Tip 22: Look for the call of the question to ask you about “Invasion of Privacy”. If the question asks about this issue, you should discuss the torts below.

Misappropriation

Misappropriation is the unauthorized use of P’s name, likeness, or identity for D’s advantage (commercial or otherwise). Plaintiff must prove lack of consent and injury.

FACTS from exam:

Intrusion upon Seclusion

An intrusion upon seclusion is defendant’s act of intrusion into plaintiff’s private affairs that are objectionable to a reasonable person. Note that no publication is required.

FACTS from exam:

False Light

To maintain an action for false light, plaintiff must prove that defendant published facts about plaintiff or attributed views/actions to plaintiff that place him in a false light and are highly offensive to a reasonable person.

FACTS from exam:

Public Disclosure of Private Facts

The public disclosure of private facts is actionable if the publication would be highly offensive to a reasonable person, and is not of legitimate concern to the public.

FACTS from exam:
Intentional Torts
Personal Injury

Battery
Battery requires harmful or offensive contact (objective standard) with the plaintiff’s person (or anything connected to it), intent by defendant to cause the touching (transferred intent applies), and causation.

Assault
Assault requires an act/threat (mere words not enough) placing the plaintiff in in reasonable apprehension of imminent harmful or offensive contact with his person, intent by defendant to place defendant in apprehension (transferred intent applies), and causation.

IIED
IIED requires extreme and outrageous conduct by the defendant causing severe emotional distress to plaintiff and intent (transferred intent does not apply) by the defendant to cause distress.

---

Liability to third parties
- Defendant can be liable if he distresses a member of victim’s immediate family
- Defendant can be liable if he distresses a bystander (not family) if the distress results in bodily injury to the bystander.

False imprisonment
False Imprisonment is the intentional confinement/restraint of defendant (methods of confinement include physical barriers or force, threats, invalid use of legal authority, duress) for any amount of time. There must be no reasonable means of safe escape and actual damages are unnecessary if P was aware of confinement.

Shopkeeper’s Privilege (Defense)
If a shopkeeper reasonably suspects plaintiff of stealing, he can detain the plaintiff for a reasonable amount of time in a reasonable manner.

Defenses
Consent
Consent is a defense against intentional torts. However, it must be voluntary and a defendant will be liable if he exceeds the scope of plaintiff’s consent.
Harm to Property

Trespass to chattels (tangible personal property)
Trespass to chattels is an interference with the plaintiff’s possession of her chattel, intent to perform the act that interferes with the possession (transferred intent applies), causation, and damages. Damages are limited to compensation for the loss in value or cost of repair of the property.

Conversion
Conversion requires serious interference with plaintiff’s possession of her chattel, intent to perform the act that interferes with the possession (transferred intent applies), causation, and damages. The serious interference with plaintiff’s personal property results in damages for the full value of property.

Trespass to land
Trespass to land requires the physical invasion of another’s land and intent to enter the land or cause physical invasion (transferred intent applies).

Necessity (Defense)
- Private Necessity allows a person to enter plaintiff’s land to protect her own person/property from harm; she is not liable for trespass but responsible for actual damages.
- Public Necessity allows a person to enter plaintiff’s land to prevent an imminent public disaster; the person is not liable for damage if her actions were reasonable or she had a reasonable belief that necessity existed, even if initial entry was not necessary.

Nuisance
Private Nuisance is a substantial (offensive to a reasonable person) and unreasonable (balance the interests of the plaintiff and defendant) interference with another’s use or enjoyment of his land.

Public Nuisance is an unreasonable interference with a right common to the general public

Defenses
- Regulatory compliance is a partial defense if the defendant is following the law.
- Coming to the nuisance is a defense.

Exam Tip 23: When analyzing Private or Public Nuisance, be sure to balance the interests of the plaintiff in being free from the nuisance with the interest of the defendant in continuing his activities.

Remedies available are money and damages and injunctive relief

Abatement (eliminating the nuisance)
• Private Nuisance: Reasonable force is permitted to abate the nuisance; P must give D notice of the nuisance first and D must refuse to act before action can be taken.

• Public Nuisance: Absent unique injury, public nuisance may be abated only by public authority.

Vicarious Liability

Generally, an employer is liable for the torts of an employee, but not for the torts of an independent contractor.

Exam Tip 24: The first issue to discuss in a vicarious liability analysis is whether the person who committed the tort is an employee or an independent contractor. This will be a factual based analysis and you can argue for both sides.

FACTS from exam:

Exam Tip 25: After you determine the status of the person who committed the tort, you should analyze the liability of the employer under an employer-employee relationship and/or an employer-independent contractor relationship.

Under the theory of vicarious liability, an employer is liable for the torts of an employee if the employee is acting within the scope of the employment (even if the employee commits an intentional tort). An employer will not be liable for negligence of their employees outside of the duties.

FACTS from exam:

An employer is generally not liable for the negligence of an independent contractor. However, a defendant will be liable for the negligence of a contractor if the negligence involves a non-delegable duty or an inherently dangerous activity.

FACTS from exam:

CHAPTER 3: PRACTICE QUESTION

Torts Exam Question
July 2010, Question #1
Homeowner kept a handgun on his bedside table in order to protect himself against intruders. A statute provides that “all firearms must be stored in a secure container that is fully enclosed and locked.” Burglar broke into Homeowner’s house while Homeowner was out and stole the handgun.

Burglar subsequently used the handgun in an attack on Patron in a parking lot belonging to Cinema. Patron had just exited Cinema around midnight after viewing a late movie. During the attack, Burglar approached Patron and demanded that she hand over her purse. Patron refused. Burglar drew the handgun, pointed it at Patron, and stated, “You made me mad, so now I’m going to shoot you.”

Patron fainted out of shock and suffered a concussion. Burglar took her purse and fled, but was later apprehended by the police. Cinema had been aware of several previous attacks on its customers in the parking lot at night during the past several years, but provided no lighting or security guard.

Under what theory or theories, if any, might Patron bring an action for damages against Homeowner, Burglar, or Cinema? Discuss.

© State Bar of California. Reprinted with permission.
ISSUES CHECKLIST

I. P V. H
   A. Negligence
      1. Duty
         a. To whom the duty is owed
         b. Standard of care
      2. Breach
         a. Negligence per se
      3. Causation
         a. Actual cause
         b. Proximate cause
      4. Damages
      5. Defenses
         a. Contributory negligence
         b. Comparative negligence
         c. Assumption of the risk

II. P V. B
   A. Assault
   B. Battery
   C. IIED
      [D. NIED]
   E. Trespass to Chattels
   F. Conversion
   G. False Imprisonment

III. P V. C
   A. Negligence
      1. Duty
         a. To whom the duty is owed
         b. Standard of care
      2. Breach
      3. Causation
         a. Actual cause
         b. Proximate cause
      4. Damages
      5. Defenses
Sample Answer

I. PATRON (P) V. HOMEOWNER (H)

Negligence

Negligence is conduct without wrongful intent that falls below the minimum degree of ordinary care imposed by law to protect others against unreasonable risk of harm. A prima facie case for negligence consists of four elements: (i) duty; (ii) breach; (iii) causation; and (iv) damages.

Duty

To whom the duty is owed

The majority rule (the “Cardozo view”) is that a duty of care is owed to the plaintiff only if she is a member of the class of persons who might be foreseeably harmed as a result of the defendant’s negligent conduct. This means a defendant is liable for negligence only to those plaintiffs who are “within the zone of foreseeable harm.” The minority view (the “Andrews view”) states that if the defendant can foresee harm to anyone as a result of his negligence, then a duty is owed to everyone (foreseeable or not) injured as a result of his breach.

In this case, P was arguably in the zone of danger because if H leaves his gun unsecured in his home and someone steals it, it is foreseeable that the thief would use the gun to commit a crime and/or cause harm to another person. On the other hand, H will argue that the zone of danger was within his home and P was not in the zone of danger because she was attacked in the Cinema parking lot. This is a close call and the court could out either way.

Under the Andrews view, P would be owed a duty because H could foresee harm to someone if he left his gun unsecured in his house; therefore a duty is owed to everyone.

Standard of care

In most cases, the standard of care imposed is that of a reasonably prudent person under the circumstances as measured by an objective standard. Therefore, H has a duty to act like a reasonably prudent gun owner.

Breach

The defendant will be in breach of his duty to the plaintiff if he fails to meet the applicable standard of care. Although H kept a handgun on his bedside table in order to protect himself against intruders, doing so constitutes a breach of his duty. By leaving the (presumably) loaded handgun out in the open, he has created a risk of harm to himself, visitors, and future victims of intruders. Most gun owners have safes that their guns are kept in at all times. A reasonable gun owner would at least put the gun away whenever he wasn’t home. After all, if he came home and an intruder was already there, then the intruder would likely have found the gun with greater ease than if it had been put away in a drawer, safe, etc. H’s act of leaving the handgun on his bedside table is a breach of his duty.
Negligence per se

P may also attempt to invoke the doctrine of negligence per se. When a statute or administrative regulation defines the standard of reasonable conduct, that standard supersedes common law standards. The plaintiff may establish duty and breach by proving that: (i) he was in the class of people intended to be protected by the statute; (ii) the harm was of the type intended to be protected; and (iii) the harm was proximately caused by defendant’s violation of the statute.

Class of People

H will argue that P was not in the class of persons intended to be protected by the statute because the requirement that guns be stored in a secure container seems to be intended to protect children in the home. It does not seem to protect people who will be harmed by guns that are stolen. If that were the case, the requirement might be that guns be kept in a hidden location, or that they must be kept in rooms with locked doors, but not necessarily in “secure containers.” P will argue that the statute is broader, and legislative intent may show that it was designed to protect all people who might be injured by guns. This why they specified that the gun be in a locked container. Although not hidden, this would deter someone from taking the gun because they might not be able to cut the lock or decipher the lock code. This is a close call, but the court will probably conclude that P was within the class of persons intended to be protected.

Type of Harm

As for the second requirement, P will argue that her harm is the type the statute was designed to protect against, because it was designed to protect people from being injured by handguns. Although a bullet didn’t injure her, the handgun arguably injured her because she fainted from shock at having one pointed at her. The court will likely agree.

Proximate Cause

Finally, with regards to the third requirement, P’s injuries were not proximately caused by H’s failure to lock the gun in a container (see discussion below).

Thus, because the third requirement is not satisfied, it is likely P will not be able to establish breach based on a negligence per se argument. However, P can still establish breach based upon a reasonable person standard.

***

[END OF HANDOUT]