

SAMPLE OUR MATERIALS—

APPROACH BOOK (Bar Review “Bible”)

THE APPROACH BOOK COVERS:

The Approach Book covers all the essay-tested areas—Contracts, Torts, Real Property, Evidence, Constitutional Law, Criminal Law, Criminal Procedure, Civil Procedure, Remedies, Business Associations, Community Property, Trusts, Wills, and Professional Responsibility.

You don't have to re-organize or re-work the materials in order to write a passing Bar Exam answer. Our substantive approaches and rule statements are simple, straightforward and easy to memorize. We also give you the substantive law within the fact situations tested by the Bar Examiners. You are shown how each issue must be written and analyzed. You are given all the headings, sub-headings, and rules of law exactly as they should appear on your Bar Exam essay answer. All you have to do is apply the facts to the pre-memorized approaches during the actual exam. This maximizes your issue spotting and you will find that your answers practically write themselves.

SAMPLE OF BARWINNERS APPROACH BOOK

NEGLIGENCE APPROACH AND STRICT PRODUCTS' LIABILITY APPROACH

BAR HINT: REMEMBER TO PUT IN ALL CAPS YOUR HEADNOTES. CENTER, AND UNDERLINE THEM EXAM BOOKLET ON THE BAR EXAM. WRITE ALL OF THE APPLICABLE HEADINGS YOU SEE BELOW YOUR BAR EXAM BOOKLET.

NEGLIGENCE

In order for Plaintiff to recover in negligence s/he must plead and prove **DUTY, BREACH OF DUTY, ACTUAL CAUSATION, PROXIMATE CAUSATION, AND DAMAGES.**

A. DUTY (Bar Writing Tip: You must always write BOTH the General Duty and any Special Duties that apply).

1. **General Duty:**

D has a duty to act as a **reasonable person would in like or similar circumstances** to avoid causing **unreasonable risk of harm to others**.

2. **Special Duty Issues:**

a. **AGE, MENTAL AND PHYSICAL DISABILITIES**

Children -- Are held to standard of care of a **reasonable child of like age, intelligence and experience**.

Adults with Mental Disabilities -- Are held to the same standard of care as non-disabled.

Adults with Physical Disabilities -- Are held to standard of care of **reasonable blind, deaf or disabled person in like or similar circumstances**.

b. **PROFESSIONALS (Heavily Tested)**

Doctors

(i) Specialists -- Are held to a **national** standard of care and must conduct themselves as a **reasonable specialist would nationally**.

(ii) Generalists -- Are held to standard of care of a **reasonable** physician in same or similar **locality**.

Other Professionals

Must possess the **minimum, common skill** of members in good standing in the profession. Professionals must act as a **reasonable expert would in like or similar circumstances**.

Example: Architects, lawyers, accountants, engineers.

2. **Special Duty Issues (cont'd):**

c. **VIOLATION OF CRIMINAL / CIVIL STATUTE OR "EXPRESS RULES"**

For **criminal statute, civil statute or "express rule of employer"** to establish a **civil** standard of care you must establish that:

- (i) Plaintiff was in the **class of person's** statute or rule was designed to protect;
- (ii) The **injury** was the type the statute or rule was designed to protect against; **and**
- (iii) D **violated** the statute and P's injury was caused by violation of the statute.

Note: Jurisdictions vary in how they treat violation of a criminal statute in setting the civil standard of care. Some treat it as:

- (a) Negligence Per Se -- Violation of statute amounts to negligence per se. **D may not argue conduct was reasonable.**
- (b) Rebuttable Presumption of Negligence -- Violation of statute raises **inference of negligence** but D **can rebut with evidence of reasonable behavior.**
- (c) Mere evidence of negligence.

d. GUESTS AND COMMON CARRIERS (Heavily Tested)

Common Carriers -- are held to a **higher** standard of care to prevent risk of harm to others.

Automobile Guests -- Standard of care will depend on the jurisdiction and whether the guest is paying or gratuitous.

- (i) Common Law -- Driver owes full duty of care in operation of vehicle.
- (ii) Paying Passenger -- Driver owes **full duty of care.**
- (iii) Gratuitous Passenger -- Driver held liable only if **grossly negligent.**

e. OWNERS AND OCCUPIERS OF LAND (Very Heavily Tested)

State on the Bar Exam: **Liability rests on the STATUS of the person coming into the land.**

Adult Trespasser -- No duty is owed by land occupier to make premises safe.

Modernly: Rowland v Christian -- Full duty is owed even to trespassers.

Known Adult Trespasser -- Land occupier has duty to warn of dangerous conditions on the land

Child Trespassers -- "Attractive Nuisance Theory." Land occupier is liable to children only if:

- (1) Possessor **knows or has reason to know** that children are likely to trespass.
- (2) Land occupier **knows or has reason to know** condition is dangerous to children.
- (3) **Risk to the child outweighs** the utility of maintaining the condition and the **burden of eliminating the danger.**
- (4) Child is **too young to appreciate and understand the risk.**

BAR HINT: An attractive nuisance must be a dangerous condition on the land (e.g. a giant hole being dug for a swimming pool.) This issue is rarely tested and only under obvious, precise facts giving rise to it. (Example: A can of bug spray with pretty roses on the label is NOT considered an attractive nuisance.)

Licensees --People who come onto the land for **their own benefit** (Social guests, Charity Workers, Police.) The duty is to **warn the licensee of a known dangerous condition on the land.**

Note: Owner/occupier has no duty to inspect for defects or to repair known defects.

Invitees --People who come onto the land to **confer some benefit on the occupier** (Paying Customers.) Duty is to **inspect, warn and make safe dangerous conditions on the land.** P

Note: People outside the Land -- Land Occupier is required to correct conditions which are **unreasonably dangerous to those outside the land.**

f. OMISSIONS TO ACT

ISSUE: Will Defendant's failure to act result in liability being imposed on Defendant?

RULE: As a general rule, Defendant's failure to act **will not result** in liability being imposed on Defendant for injury caused thereby.

However, liability will be imposed if there was **an affirmative duty to act** and Defendant failed to act.

Bar Exam Hint: Whenever a fact pattern indicates that the culpable conduct may be that of an omission to act, give the general rule of "no duty" then examine the facts for an exception.

Affirmative Duty to Act

1. Duty to Aid Others:

Common Law: D is never under a duty to go to the aid of P where P's predicament was in no way D's fault (However, if Defendant is at fault, Defendant must aid.)

Modernly: Some statutes make it a criminal offense for drivers of autos to fail to aid any person involved in an accident even though Defendant

was not involved in any way.

Good Samaritan Rule: One who, though under no legal duty to do so, aids a person who is hurt or in peril, must exercise due care not to worsen the victim's situation.

2. Duty to Control Third Persons:

Bailment Cases:

If the owner of chattel permits a third person to use his chattel, the Bailor will be liable for failure to exercise due care to prevent intentional or negligent acts of Bailee if committed in his presence, or if knows or has reason to know that such Bailee is likely to commit such act.

Public Premises Cases:

Those who hold premises open to public must use due care to protect persons coming onto the premises from theft of property, attack, etc. from other persons on the premises. (This includes restaurants, innkeepers, and common carriers.)

Duty to Control Children Cases:

Parent will be liable for acts of child if parents know or should have known of the child's dangerous propensities and had an opportunity to exercise control over the child. Otherwise, parents are generally not vicariously responsible for acts of child committed in their presence or otherwise.

Special Relationships:

Defendant may be under a duty to act where there is a special relationship such as school-pupil, hospital-patient, jail keeper-prisoner.

B. TO WHOM THE DUTY IS OWED (*This entire analysis is NOT proximate cause. Do not confuse this with proximate causation!*)

BAR HINT: Discuss this issue only when the injured Plaintiff is arguably outside the physical zone of Danger created by Defendant.

Palsgraf

- (a) Cardozo -- A duty is owed to foreseeable Plaintiffs in D's physical zone of danger.
- (b) Andrews -- One owes a duty to the whole world to behave in a manner so as to not create unreasonable risk of harm.

C. BREACH OF DUTY

1. Breach of duty is basically a factual discussion. Take the standard of care you have established in duty and apply it to the facts to determine if D breached his duty to P.

BAR HINT: Always discuss what a **reasonable person** would have done in the same circumstances.

2. Where the facts are silent: Often in a question the facts are silent as to exactly how the accident occurred or **what the Defendant did**. This usually requires discussion of *Res Ipsa Loquitur*.
 - (a) *Res Ipsa Loquitur* -- To apply this doctrine you must establish:
 - (i) The accident **would not have occurred in the absence of someone's negligence;**
 - (ii) The event was **caused by an instrumentality in the exclusive control of D;**
 - (iii) Plaintiff **did not contribute to his/her own injuries.**

D. ACTUAL CAUSATION

1. **Where there is only One D: "But-for Test":** Write: *Defendant is the actual cause of Plaintiff's injuries because 'but for' _____ the Defendant's acts the P would not have been injured.*
2. **Where there are two or more Defendants: "Substantial Factor Test"** -- Where several defendants concur to bring about an injury -- and any one alone might have been sufficient to bring about the injury:
Write on the Bar: *Each (act or defendant) was a **substantial factor** in causing P's injuries. Either Defendant's act alone would have been sufficient to cause the results, thus both are a substantial factor in bringing about P's harm.*

E. PROXIMATE CAUSATION (Only do the full analysis shown below when Proximate Cause is a MAJOR issue).

ISSUE: Did anything intervene between Defendant's negligent act and Plaintiff's injuries such that Defendant would be relieved of liability?

RULE: Proximate cause is a policy consideration that in certain instances will limit Defendant's liability.

Sub Issue: Was causation **direct or indirect**? Did anything intervene between Defendant's act and Plaintiff's injuries?

DIRECT CAUSATION -- MINOR ISSUE:

BAR HINT: Direct Causation -- Where causation is direct, proximate cause is ALWAYS A MINOR ISSUE.

Write on the Bar: *Causation is direct here, because there were no intervening acts between P's injury and D's act. Further, it is foreseeable when D did _____ someone would be injured.*

INDIRECT CAUSATION -- MAJOR ISSUE:

Indirect Causation -- (Note: something intervened between Defendant's negligent act and Plaintiff's injuries). Discuss whether the intervening force was **dependent (define)** or **independent (define)**. Then discuss if the intervening act was **foreseeable** or

Unforeseeable. If the intervening act was unforeseeable, then the chain of causation is broken.

BAR HINT: If there are two or more intervening acts, headnote each intervening act separately.

FOR EACH INTERVENING ACT, discuss whether the intervening act was dependent on the original tortfeasor's negligent act, or independent. Then discuss whether that intervening act was foreseeable or unforeseeable.

PROXIMATE CAUSATION FLOWCHART

Write: *Is causation direct or indirect?*

**DIRECT CAUSATION
(NO BREAK IN THE CHAIN OF CAUSATION)**

Where nothing has intervened between Defendant's act and Plaintiff's injuries the Defendant will be held responsible. Write: *Since nothing has intervened between D's act and P's injuries, P's injuries were foreseeable.*

**INDIRECT CAUSATION
(A BREAK IN THE CHAIN OF CAUSATION)**

Where something(intervening act) has come between Defendant's negligent act and Plaintiff's injuries.

ANALYSIS:

Write: *Was the Intervening Act, Dependent or Independent of D's negligent act?*

DEPENDENT ACTS:

Dependent forces are those, which occur as a result of Defendant's original negligent act. (Examples: Medical malpractice, injuries occurring en route to the hospital, rescuers) D will be held to be the proximate cause of P's injuries if the intervening force was dependent.

INDEPENDENT ACTS

Independent forces not arising from D's act may relieve D of liability. These forces are called **superseding**. (Acts of God, animals, intentional criminal acts only if unforeseeable.)

FORESEEABLE or UNFORESEEABLE (Superseding)

Write: *Were the intervening act(s), foreseeable or unforeseeable?*

Analyze whether the intervening act(s) were foreseeable or unforeseeable (use the fact pattern to make this determination).

F. DAMAGES

P is entitled to recover all compensatory damages, including general damages such as pain and suffering, and special damages, which must be specifically pleaded and proved. Punitive damages are **NOT** recoverable for negligence UNLESS facts specifically show D's conduct was wanton, willful, or reckless. (*Don't imply facts.*)

G. DEFENSES

BAR HINT: You must **always** raise the defenses, even if briefly in a sentence or two.

1. **Contributory Negligence** -- Plaintiff has a duty to act as a reasonable person would in like or similar circumstances to prevent an unreasonable risk of harm to himself.
2. **Contributory Negligence Per Se** -- If PLAINTIFF violates a statute or express rule of employer (see *Duty Section-negligence*) then same standard applies. **Watch out for this situation.** Often the facts are given which show that the PLAINTIFF violated a statute or express rule of employer.

Two-Prong Test if P Violates a STATUTE OR EXPRESS RULE OF EMPLOYER

- a. **Class of Persons** -- Is P within the class of persons the statute or rule was designed to protect?
 - b. **Type of Injury** -- Is P's injury the type the statute was designed to protect against?
3. **Comparative Negligence** -- Some jurisdictions will assign a percentage of fault attributable to P's negligence and reduce P's damage award by that percent.
 4. **Assumption of Risk** -- The test is whether Plaintiff knew of the risk and voluntarily assumed it.

a. **Rescue Attempts -- Exception**

Where P voluntarily attempts a rescue of one in peril, the court will not find the rescuer contributorily negligent nor to have assumed the risk. Public policy encourages rescue attempts. Particularly where the P is forced to make an emergency decision concerning saving the life of a fellow human being. Technically, the P did not "assume the risk" in such a situation but only reacted to the emergency before him/her because "danger invites rescue."

PRODUCTS LIABILITY

(Only Use this Approach and Please Use it Exactly the Way it is)

Bar Exam Hint: Begin your analysis with this statement:

"There are five possible theories of recovery Plaintiff can assert in **products liability**. They are

Negligence, Strict Liability, Implied Warranty, Express Warranty and Misrepresentation. Only those applicable will be discussed.”

REMEMBER: You must discuss **only those theories applicable** to the fact pattern.

A. NEGLIGENCE -- Product’s Liability (different from ordinary negligence)

Remember, “ordinary negligence” focuses on the acts of the defendant, while products liability focuses on the defective product.

1. PROPER PLAINTIFF (Briefly state why P is a proper plaintiff in one sentence.)

RULE: The plaintiff can be anyone within the *foreseeable use* of the product.

Write on the Bar: Here, Johnny was a household guest and Rosebrite is a common household product. Thus, a household guest is likely to come into contact with a household product. Therefore, Johnny is a proper plaintiff because he is within the foreseeable use of the product.

2. PROPER DEFENDANT (Briefly state why D is a proper defendant in one sentence.)

Manufacturers, Product Designers, Wholesalers, Retailers.

Note: The standard of care for Manufacturers and Designers is different from the standard of care for Retailers (*see below*.)

Write on the Bar: Here Acme is the manufacturer of the product and is therefore a proper D.

3. DUTY

a. Manufacturers, Designers

Rule: Standard of care for the manufacturer or designer is that they must act as a **reasonable manufacturer or designer would act in the same or similar circumstances in designing and manufacturing the product**. Manufacturer and Designer may also have a duty to inspect, discover and correct defects, which a reasonable inspection would reveal. This also includes a **duty to warn** if the product is unavoidably unsafe.

b. Retailers, Wholesalers

Rule: Retailer has no duty to inspect **unless s/he knows or has reason to know that the product is likely to be dangerous.**

Minority Rule: Retailer has a duty to **inspect and discover defects that a reasonable inspection would show.**

4. TO WHOM IS DUTY OWED?

Is a duty owed to this particular Plaintiff? (This is Andrews and Cardozo Analysis.)

5. BREACH OF DUTY

A. Plaintiff Must Show That Breach Of Defendant's Duty Resulted In A Defective Product.

Rule: There are three types of breach. They are:

- (i) **DEFECT OF MANUFACTURE** (error in production line.)
- (ii) **DEFECT IN DESIGN** (inadequate testing and safety checks.)
- (iii) **DEFECT IN WARNING** (lack of adequate warning.)

Test: The central question is how would a reasonable manufacturer or designer with the same skill, knowledge and experience act in like or similar circumstances.

b. Proving Breach of Duty

Use the Facts: Discuss what a reasonable manufacturer/designer would have done in like or similar circumstances.

RES IPSA LOQUITUR -- Sometimes the facts are silent as to how the breach occurred. In these situations apply *Res Ipsa* if all of the following requirements are met:

- (i) Injury **would not have occurred** in the **absence of someone's negligence.**
- (ii) **Instrumentality** was defectively made while under the **exclusive control** of Defendant.
- (iii) Plaintiff did **not contribute** to his/her own harm.

6. ACTUAL CAUSATION

Use the “**But-for-test**” and the **substantial factor tests**.

7. PROXIMATE CAUSATION

Same discussion as for ordinary negligence.

8. DAMAGES

Plaintiff may recover for pain and suffering. Economic damages alone are insufficient. (Damages resulting from product’s failure to perform as well as expected are **not recoverable**.)

9. DEFENSES

Contributory Negligence -- same discussion as for ordinary negligence. (*See BARWINNERS Torts “Negligence” Outline.*)

Assumption of Risk -- same discussion as for ordinary negligence. (*See BARWINNERS Torts “Negligence” Outline.*)

Misuse of Product -- Determine whether Plaintiff properly used product for intended purpose. If not, this is an extremely valuable defense. Not a defense if misuse foreseeable.

B. STRICT PRODUCTS LIABILITY

This theory does **not focus on fault**. Liability attaches when persons involved have exercised **all possible care**. Under Strict Liability the focus is on the product and not on the conduct of the defendant. (Discussion of theory is optional on exam.) P may recover from any commercial supplier (manufacturer, retailer, wholesaler, lessor) who places an article on the market which is in a **defective condition unreasonably dangerous to users, consumers, bystanders**. (Strict liability does not apply to suppliers of services.)

I. PROPER PLAINTIFF (Discuss briefly in one sentence.)

Rule: All persons who are endangered by the defective product.

Write: *Here, Johnny was endangered by the product and was a social guest of the user of the product. Therefore, Johnny is a proper plaintiff.*

2. **PROPER DEFENDANT** (Discuss briefly in one sentence.)

Rule: All persons engaged in the **commercial distribution** of products are liable. Here, Johnny was endangered by their product and was a social guest of the user of the product. J is a proper plaintiff.

3. **IS THE PRODUCT DEFECTIVE? (MAJOR ISSUE)**

BAR HINT: You must discuss **all three tests** below to get full points on the Bar.

MAJOR ISSUE: Tests for determining whether the product is defective. **Separately headnote A, B, & C exactly like below.)**

TESTS:

A. Consumer Expectation Approach -- RS 402 (a)

1. Product must be defective -- Product is defective when the product is **unreasonably dangerous in its normal intended use**. To determine if product is unreasonably dangerous, use the following two tests:

The tests are:

- (a) Product may be dangerous **beyond the expectation of the ordinary consumer**; and
- (b) Manufacturer must have been able to **foresee** the dangers of the product.

B. Feasible Alternative Test -- Cost-Benefit Analysis

The court will balance what it would cost to market the product as it is against what it would have cost to market the product free of danger. If a safer product would require **unreasonably** high costs, the product is not defective. If a safer product could be produced at a reasonable cost, the product is defective because there was a "reasonable alternative" and the D failed to choose it.

C. California Test --Barker v. Lull Engineering Co.

California Combined Approach Test: California and at least one other state consider a **product defective if the product is unreasonably**

dangerous beyond the expectation of the ordinary consumer (i.e. Consumer Expectation Approach) AND plaintiff proves that the defect proximately caused her injury. The burden of proving that the utility outweighed the danger shifts to the defendant.

1. There was a defect in the product (Consumer Expectation Approach); and
2. The defect was the proximate cause of P's injury. (Foreseeability not an issue.)

4. ACTUAL CAUSE

- a. The defect that injured P was in existence at the time it left the D's control. You may need to show that distributors and suppliers did not mistreat or alter the product and D's acts must have been at least a substantial factor in bringing about P's injuries

5. PROXIMATE CAUSATION

Look at wrongfulness of intermediate handler's conduct to determine whether such conduct will be superseding. (Criminal or intentional tortious conduct will relieve D of liability. Rare to find break in chain of causation.)

6. DEFENSES

- (a) Misuse of product-product may be safe if used as intended--may involve serious dangers if used in other ways. Note: Suppliers must anticipate reasonably foreseeable uses.
- (b) Scientifically unknown risks-Problems with the product can't be known until product is marketed.
- (c) Allergies-- if allergic group is significant, manufacturer must warn if they know there is a danger of allergic reaction. (Note: Unique allergic reactions not recoverable for P.
- (d) Assumption of the Risk--P knew of risk and voluntarily assumed it.

7. DAMAGES

- (a) Under Strict Liability, there is no recovery for economic loss.
- (b) There is recovery for pain and suffering.

C. EXPRESS WARRANTY-- UCC 2-316

DEFINITION

Express Warranty requires **an affirmation of fact made by seller to Buyer relating to the goods**, which is the **basis of the bargain**.

1. Affirmation of fact must be **misrepresentation of material fact** concerning character or quality of the product.
2. **Representation must be made** to the public by label or advertising.
3. **Justifiable reliance** on representation must influence the transaction.

D. IMPLIED WARRANTY

DEFINITION

Under this theory a commercial seller is liable to an ultimate user if the product fails to satisfy the implied covenant of **fitness for intended purpose** (UCC 2-314.)

- (1) Implied to every sale of goods is a warranty that the goods are of a **quality equal to that generally acceptable** among those who deal in similar goods; and
- (2) **Goods are fit for the ordinary purpose for which they are foreseeably used**
-- warranty of fitness for a particular purpose.

2. PRIVACY

UCC 2-318 (a) and in the majority of states, privity is required between the seller and injured party. This theory is extended to the purchaser and his family and is sometimes extended to guests in his home (i.e. privity is extended to buyer's family, household members and guest injured by the product.)

3. DEFENSES

- (a) Assumption of the Risk-UCC 2-715.
- (b) Contributory Negligence-After discovery of defect, P acts unreasonably
- (c) Timely Notification of the Breach under UCC
 - (i) UCC 2-607-Buyer must notify the Seller within a reasonable time after s/he discovers or should have discovered the defect or Buyer's claim will be barred.

E. MISREPRESENTATION

DEFINITION

For Plaintiff to recover for a cause of action of misrepresentation, s/he must plead and prove misrepresentation of a material fact, reasonable reliance, scienter, intent or negligence, causing damage.
