M E M O R A N D U M

To: Students in Torts I, Fall 2007, UND Law
From: Professor Eric E. Johnson
Re: Comments on Midterm Essay Responses and Exam Writing Advice
Date: November 26, 2007

General Comments

Note that I am directing my comments in this memorandum to the question of how one writes a good exam. I am purposely refraining from pointing out instances -- of which there were many -- where respondents got the law wrong. Therefore, do not read the midterm exam responses as a study aid for learning the law -- they will, in many cases, mislead you. That being said, if you try to read these essay responses as I have -- as a teacher trying to assign a grade -- I think you will learn a lot about what is effective and what is not with regard to framing an exam answer. By reading all the essays, you will also, I think, be impressed with how many issues other students spotted that you may have missed. These sorts of exams are sometimes called "issue spotters" -- because spotting the legal issues is half the battle.

Overall, the essays were sorely lacking in legal analysis. Legal analysis is the key to writing a law school exam. How do you accomplish this? <u>Now, here comes the most important piece of advice I have for all of you: You must apply the law to the facts.</u> Reciting the law does not earn points. Reciting the facts does not earn points. You must apply the law to the facts to earn points. That is legal analysis. Applying law to facts is how you show me that you actually understand the law, as opposed to being able to regurgitate it onto paper. Anyone can rehash facts and mix in buzzwords. That is not nearly enough. You need to show me that you can analytically attack a legal problem. Generally, to accomplish this, you should be talking about the facts and the law <u>in the same sentence.</u> Try using words such as "<u>because</u>" and "<u>therefore</u>" to force yourself to show the legal analysis. Here are some examples:

- Abby has a good claim for assault against Danny because, by shouting "That saw blade is going to hit you!" while triggering the loud saw noise, Danny created an immediate apprehension of a harmful touching.

- Administrative regulations, as opposed to statutes, may or may not be used to establish the standard of care under the negligence-per-se doctrine, depending on the jurisdiction; therefore, the lack of a flashing red warning light does not necessarily constitute a breach of duty.

- Proximate cause can be judged by application of the harm-within-the-risk test. The risk of not having a flashing red warning light is that someone will have their limbs unintentionally in the way when a saw starts up, but Burt's limbs were not accidentally in the way; rather, his theory of actual causation is that he would have been scared out of lumber surfing by a flashing red warning light because of his childhood trauma; therefore proximate cause is likely lacking here.

Don't those passages sound good? Doesn't that sound like a lawyer or judge talking? That's what we want you to sound like when you are out there practicing with your degree on the wall.

To try to help you see how you need to discuss both the law and facts together to have legal analysis, I have diagrammed the above sample sentences in color. You can find the diagrams at the end of this memo. But look at those later. For now, keep reading.

In class, you may remember that I said that the IRAC -- Issue, Rule, Analysis, Conclusion -- style of answering a law essay exam is not essential. The first two bullet-point examples above show how all the essential elements of legal analysis can be artfully packed into a single sentence. If you can do that, IRAC is almost certainly a waste of time.

I should say, however, that in reading these midterm responses, I often wondered if I should have brushed aside IRAC so quickly. Why? I think IRAC might have pushed some groups to apply the law to the facts where they didn't otherwise. That being said, check out Group U's essay as an example of how <u>not</u> to use IRAC. If you are going to use IRAC, think of the whole IRAC block (that is, the I, the R, the A, and the C) as a unit that fits within a paragraph, or even a couple of sentences – not something that plays out over pages. Better still, you might use IRAC as a mental checklist without using it as a pedantically applied format for phrasing your answer. Again, look at the bullet-point examples above. They do not use an IRAC format, but they are absolutely top-shelf and would get full credit.

Notice also in the second and third bullet-point examples above, there is no "conclusion" in the sense of saying whether the claim would succeed or fail. You should know by now, after a semester of reading close cases, that it is often the case that you cannot say with certainty that a claim will succeed or fail. Good lawyers know that honest assessments of legal rights and liabilities are often phrased with references to probabilities rather than statements of certainty.

Okay, on to something else. Now, this is very, very basic, but many of you would appear to be well served to keep in mind the seven basic points of analysis for negligence problems: (1) duty, (2) standard of care, (3) breach, (4) actual causation, (5) proximate causation, (6) damages, (7) defenses. If you deal with these issues in order for each pairing of plaintiff and defendant, it may help in forcing you to be organized, complete, and analytical. But again, for an example of how this can go too far, see Group U's response. The seven points of analysis may be better thought of as a mental checklist rather than a laundry list of what should be discussed. For instance, in most cases, actual and proximate causation is a slam dunk. In such cases, if you say anything at all, it is sufficient to say, "Clearly, the plaintiff can establish actual and proximate causation." Or something of the like. Law exams obey the general rule that there is little need to dwell on the obvious.

And now, on to comments about the individual exam responses.

Group S

Pros:
Occasional flashes of insight. Caught some subtle points. Coverage was better than some.

Cons:
This exam response was generally quite lacking in legal analysis. Bare assertions of law, unconnected to facts, were not helpful. Remember, reciting law earns no points. You need to apply the law to facts.

The outline format did not help. My advice is that you would be much better off answering essay style. Also, this exam response ignored my instructions to double space.

The document turned in by Group S seemed to be a good start, but, overall, an unfinished effort. With some more work, it might have been a decent response.

Grade:
Low Pass

Group T

Pros:
Very good legal analysis in several places. The essay picked up on some subtle and interesting facts and made some clever finds. The authors did a good job of discussing claims that were colorable though ultimately untenable.

Cons:
Overall, there was a lack of clear organization.

Also, in some places, there was a tone that was too conclusory and not as analytical as it should be. For example, on the bottom of page 4: "Therefore we would assign responsibility 40% to Danny and 60% to Burt. Thus, depending upon the jurisdiction, Danny would either have to pay 40% or nothing in determining amount of fault." Think about this in terms of how a lawyer would talk to a client or how an associate would talk to a partner. It would be better to say, "Based on these facts, it seems quite likely that a jury could assign more than half of the responsibility to Burt -- for instance, 40% to Danny and 60% to Burt." Then you can go on to a more all-encompassing legal analysis: "If that were the case, in a pure-comparative-negligence jurisdiction, Burt could recover from Danny 40% of his damages. But in a modified-comparative-negligence jurisdiction, because Burt would be more than 50% responsible, he would recover nothing. In a contributory-negligence jurisdiction, where any contributory fault of the plaintiff bars recovery, Burt's claim is almost certainly a loser, because we

think it very unlikely that a jury would not find Burt at least some small percentage at fault."

Although this essay did a pretty good job with legal analysis, in places, attention to how the response is worded would have made it clearer that there is legal analysis going on, rather than mere editorializing on the facts. For instance, consider this sentence from page 7: "The trauma Abby suffered was so severe she had to seek medical treatment for post-traumatic stress disorder." It would be much better to say, "The severity element of the claim is satisfied with evidence that Abby sought and received medical treatment, including anti-depressants and sleep aids prescribed for a diagnosis of post-traumatic stress disorder."

Grade:
High Pass

Group U

Pros:
Made many good points. The authors clearly put in a lot of effort on this response, and it showed.

Cons:
This exam is -- I am sorry for saying this -- a good example of what not to do in terms of structure.

For one, this exam was highly disorganized. How can I say that when the whole thing makes such liberal use of headings and IRAC? Take a careful look. Under the hood, it's a little chaotic. For instance, on page 4, the authors discuss breach of duty under "standard of care" and duty under "breach of duty." On page 11, proximate cause (if I understand it correctly) is discussed under "damages." The "conclusion" section in several places is a kitchen sink of topics. Other examples abound. If the content doesn't track the headings and the purported organizational scheme, then the headings and purported structure are unhelpful.

Moreover, IRAC is being used on too large a scale. The essay purports to analyze six issues. If you only found and discussed six issues in a law exam, you'd be in big trouble. Of course, in fact, the Group U response discusses far more than these six issues. Many issues are mixed together under what are often misleading labels. I would say that whether one party has a negligence action against another party is not one "issue," but a complex question that involves consideration of a number of issues. Also, as I noted above, if you are going to use IRAC, think of it as something that takes place on the scale of a paragraph. Keep in mind that IRAC can be a waste of time -- that appeared to be the case here. The important thing is to spot the issues and then apply the law to the facts to analyze them.

A final thought: I did not see the benefit to the outline at the beginning of the response. It was not bad, but I am not sure what I am to do with such a thing. If I try to grade it, assuming it is duplicative of the content that follows, it would be double-counting. And, of course, it contains no real legal analysis. At any rate, you will busy enough during the exam that doing such an outline at the beginning could be a real waste of time. I do think that doing something on scratch paper might be very helpful, perhaps even essential, to keep you organized. But I don't need to see it as part of your answer.

Grade:
Pass

Group V

Pros:
Some good analysis in places. Factual analysis was a relative strength. Found some subtle legal points.

Cons:
This exam was comparatively heavy on factual analysis, but light on legal analysis. That is to say, it's not enough to be Sherlock Holmes and make clever deductions from the facts. You need think like a lawyer and apply the law to the facts. This exam was also pretty disorganized. But the jumbled nature of the response did not hide the fact that steps were missing in the legal analysis.

When you are on to something, make sure you finish it off and explain the bottom-line impact to the legal analysis. For instance, on page 3, from a discussion of comparative negligence: "It is likely that Danny will hold the higher degree of liability." I have to ask: "So what?" Follow up your factual conclusion by explaining how this helps Burt's legal case. You might mention, for instance, that this would mean that even in a partial-comparative-negligence jurisdiction, Burt would still be able to recover.

Grade:
Pass

Group W

Pros:
Good analysis on assault. Made many nice points. There were places with solid legal analysis.

Cons:
The coverage was not very extensive. Legal analysis was lacking. Look at the top paragraph on page 3. The authors argue that Burt has no claim against Danny

because of Burt's own negligence in participating in lumber surfing. My question: On what legal basis? Would it be contributory negligence? Is it that Burt is more at fault than Danny and would therefore be barred under a partial comparative negligence regime? What about a defense of assumption of the risk? The authors of this response purport to deny Burt's recovery on the basis of "public policy." That might be persuasive if this were an issue of first impression, but it is not. We have hundreds of years' worth of tort doctrine to apply to this situation. So, answer the question by applying the doctrine -- don't argue from the gut.

Grade:
Pass

Group X

Pros:
I loved the point about Judge Andrews. Very nice citation to *Beswick* and *Hamil*. There is much to be admired in this fine response. I think this will open up many students to the possibilities that are out there in applying the knowledge you've learned over the semester to a novel fact pattern.

Cons:
The response was pretty disorganized. I felt like the authors were randomly throwing a lot of things up into the air -- but, for the most part, what they were throwing up in the air was pretty good stuff.

In many places, the legal analysis was lacking. For instance, from page 3, "The hazards of log surfing and other dangerous sawmill activities were not hidden to A, B, and C because they signed a waiver. D also discussed the dangers with them before asking them to participate in log surfing." My question: "So what?" What bottom-line impact does this have to your legal analysis? What turns on these facts? You need to spell that out.

While this exam was a stand out among its peers in this midterm exercise, I do hope that the overall quality of the final examination responses will be higher. So don't get too excited about the grade I'm giving it for purposes of this midterm. The grade does not necessarily translate into what it would get if submitted as a final exam answer. In other words, I think someone could do quite a bit better with the "Ye Olde Sawmill" exam than was done here. That being said, congrats on a very good job.

Grade:
Honors

Group Y

Pros:
Nice point about the good samaritan statute.

Cons:
This exam response lacked legal analysis. There was a large amount of recitation of facts and assertion of conclusions -- but little real legal analysis. Remember, reciting facts earns no points. Reciting law earns no points. You need to apply the law to facts. This essay rarely did that.

Overall, I got the impression that many things were being thrown up in the air with the hope that something would stick. The end result is that this essay did not demonstrate mastery of the material.

In addition, this response was quite disorganized, both on a large scale (broad topics) and on a small scale (individual points within a topic).

Grade:
Low Pass

Group Z

Pros:
Good organization.

Cons:
In large part, this essay rehashed facts in a way that assigned blame, but without applying the law. Overall, the essay was lacking in legal analysis. The tone was more that of a lawyer delivering a closing argument to a jury -- concentrating on facts and leaving out the law -- than that of a lawyer talking to another lawyer (such as an associate communicating with a partner). For example, conclusions were made without being backed up with legal analysis. Several times, the authors stated that punitive damages would be available. Why?

Grade:
Pass

Diagramming of Sentences Applying Law to Facts

As I said, aim for using words such as "because" and "therefore," and aim for talking about facts and law in the same sentence. By doing so, you may help push yourself into applying the law to the facts. Below, I've diagrammed, in color, the bullet-point examples I used above. Facts are red. Law is blue. Legal conclusions are purple. (The idea is that red plus blue makes purple. But I bet you already got that.)

legal conclusion → **because** → facts + law

> *Example:* Abby has a good claim for assault against Danny because, by shouting "That saw blade is going to hit you!" while triggering the loud saw noise, Danny created an immediate apprehension of a harmful touching.

statement of law → **therefore** → facts → legal conclusion

> *Example:* Administrative regulations, as opposed to statutes, may or may not be used to establish the standard of care under the negligence-per-se doctrine, depending on the jurisdiction; therefore, the lack of a flashing red warning light does not necessarily constitute a breach of duty.

statement of law + statement of facts → **therefore** → legal conclusion

> *Example:* Proximate cause can be judged by application of the harm-within-the-risk test. The risk of not having a flashing red warning light is that someone will have their limbs unintentionally in the way when a saw starts up, but Burt's limbs were not accidentally in the way; rather, his theory of actual causation is that he would have been scared out of lumber surfing by a flashing red warning light because of his childhood trauma; therefore proximate cause is likely lacking here.

You are almost set for December 12. Now you just need to learn torts. Good luck!