TORTS MNEMONICS

1) Torts are done IN SIN:
   I – INTENTIONAL harm to a person (e.g., assault, battery, false imprisonment, or the intentional infliction of emotional harm)
   N – NEGLIGENT conduct causing personal injury, wrongful death, or prop damage
   S – STRICT tort liability (see the mnemonic A SWAN)
   I – INTENTIONAL harm to property (e.g., trespass, conversion, or tortious interference with a contract)
   N – NUISANCE

2) Tortious conduct makes you SING:
   S – STRICT tort liability
   I – INTENTIONAL conduct
   N – NEGLIGENT conduct
   G – GROSS negligence a/k/a reckless conduct

3) A D’s FIT conduct is unreasonable/negligent when P was within the foreseeable zone of danger:
   F – FAILURE to take reasonable precautions in light of foreseeable risks
   I – INADVERTENCE
   T – THOUGHTLESSNESS

4) To establish a negligence claim, P must mix the right DIP:
   D – DUTY to exercise reasonable care was owed by the D to the injured P and the D breached this duty (for a negligence claim the duty is always to conform to the legal standard of reasonable conduct in light of the apparent risks)
   I – Physical INJURY to the P or his property (damages)
   P – P’s injuries were PROXIMATELY caused by the D’s breach of duty
5) A parent is liable only for the torts of a SICK child:
   S – in an employment relationship where a child commits a tort, while acting as a SERVANT or agent of the parent
   I – where the parent entrusts or knowingly leaves in the child’s possession an 
       INSTRUMENTALITY that, in light of the child’s age, intelligence, disposition and prior 
       experience, creates an unreasonable risk of harm to others
   C – where the parent knows of the child’s tortious conduct and directs, approves or CONSENTS 
       to it
   K – where the parent has the ability to control the child, but fails to exercise that control 
       even though the parent KNEW of the infant’s violent tendencies, which could 
       endanger a 3P

6) F CLIPS can “cause” negligence:
   F – FACTUAL causes
   C – CONCURRENT causes of the P’s injuries
   L – LEGAL causes (Restatement language for both cause-in-fact & proximate cause)
   I – INDEPENDENT intervening causes (a.k.a., superseding cause)
   P – PROXIMATE causes
   S – SUCCESSIVE causes

7) LARGE C.D.²s are played in negligence:
   L - LAST clear chance
   A - ASSUMPTION of risk
   R - RES IPSA LOQUITOR
   G - GUEST statute
   E - EMERGENCY doctrine
   C - COMPARATIVE or contributory negligence
   D - DRAM shop act
   D - DANGER invites rescue

8) A plaintiff can find res ipsa loquitor in a PEA:
   P – PROBABILITY that the plaintiff was injured through no fault of his own
   E – D had EXCLUSIVE control over the instrumentality that caused the injury
   A – ABSENT negligence, the injury would not have occurred

9) The Emergency Doctrine arises only in the U.S.:
   U – UNANTICIPATED; and
   S – SUDDEN Emergency

9a) New York’s Emergency Vehicle Negligence Exception U.S. S.O.S.:
   U – An UNLAWFUL Turn
   S – Passing through a STOP SIGN on a red light after slowing down.
   S – SPEED
   O – Wrong direction on a ONE-WAY street
   S – STOPPING or parking on a street
10) **C²RAPED** conduct on NY realty equals strict tort liability:
   - C – CONSTRUCTION
   - C – CLEANING (windows)
   - R – REPAIR
   - A – ALTERATIONS
   - P – PAINTING
   - E – EXCAVATING
   - D – DEMOLITION

11) A municipality is liable for a **RAID** “special relationship”:
   - R – P’s justifiable **RELIANCE** on the municipality’s promise or on its affirmative undertaking
   - A – Either expressly or impliedly, through promise or action, the municipality **ASSUMED** a DIP duty to act for P’s benefit
   - I – The municipality knew that its **INACTION** could foreseeably harm P
   - D – Some **DIRECT** contact between the P and the municipality

12) Overgrown **LA²WNS** impose strict tort liability:
   - L – **LABOR LAW** § 240 & 241
   - A – Abnormally dangerous **ACTIVITY**
   - A – **ANIMALS**: wild animals or vicious domestic ones
   - W – **WORKER’S** job related injuries (Worker’s Compensation)
   - N – **NEGLIGENCE** per se
   - S – **STRICT** products liability

13) In determining whether a domestic animal has demonstrated vicious propensities, the court looks at whether the animal has in the past sung with the **B.G.s**:
   - B – **BITTEN** someone
   - G – **GROWLED** at someone
   - S – **SNAPPED** at someone

14) Put out the malicious prosecution **MAT**:
   - M – **MALICE** (spite or meanness) in instituting or continuing a criminal prosecution
   - A – **ABSENCE** of probable cause upon which P could be successfully prosecuted
   - T – **TERMINATION** of the malicious prosecution in favor of accused, either on the merits or as the result of a dismissal “not inconsistent with the accused’s innocence”

15) If you inflict emotional harm, you’ll have a **SAD CEO**:
   - CEO – D’s intentional or reckless **CEO** (**CONDUCT** that was **EXTREME** and **OUTRAGEOUS**) exceeding all bounds usually tolerated by a decent society, and
   - SAD – D’s conduct caused P to suffer **SAD** (**SEVERE AND DEBILITATING**) emotional anguish
16) An MBE landowner will have a different duty to an injured person, depending on whether the person was **LIT:**
   L – LICENSEE
   I – INVITEE
   T - TRESPASSER
*Note – This is NOT the rule in NY

17) A plaintiff has the privilege to **SIT** on one’s property in response to a:
   S – SERIOUS and
   I – IMMEDIATE
   T – THREAT
*But note – even though a D who SITs is not trespassing, liability will be imposed for any resulting damages

18) A Person who **RAN** onto P’s property is liable in trespass only if D’s entry caused harm to the land:
   R – RECKLESSLY
   A – As the result of **ABNORMALLY** dangerous activity
   N – **NEGLIGENTLY**

19) Consider whether the following **BODES** well for abnormally dangerous activities:
   B – whether its **BENEFIT** to the community is outweighed by its high risk of harm
   O – whether the activity is not a common **OCCURRENCE**
   D – whether there is a high **DEGREE** of risk of harm involved
   E – whether there is an inability to **ELIMINATE** that risk by the exercise of reasonable care
   S – whether there is a likelihood of **SEVERE** harm resulting from that activity

20) Only a **KID** can be sued for Tortuous Interference of a Contract:
   K – D had **KNOWLEDGE** of the K;
   I – D **INTENTIONALLY** induced a contracting party to breach that K; and
   D – **DAMAGES** resulted from the breach of the existing, enforceable K

21) A **CLIP** invades privacy:
   C – **COMMERCIAL** misappropriation of P’s name, likeness, or voice w/o P’s written permission (& compensation); taking commercial advantage of a living person’s reputation, prestige, or some other value associated w/ P’s name or likeness w/o compensating him or her for it
   L – False **LIGHT** publicity that unreasonably places P in highly objectionable false light before the public
   I – Highly offensive **INTENTIONAL** intrusion into another’s seclusion or solitude
   P – **PUBLIC** disclosure of highly offensive and deeply shocking private facts that are of no legitimate interest to the public
22) In slander actions, special damages must be pleaded and proven, unless those spoken words are **CLAMS** (slander “per se”):
   C – Falsely accusing the P of committing a serious **CRIME**
   L – Falsely stating that P has an existing (not former) communicable, **LOATHSOME** disease
      (e.g., a sexually transmitted disease)
   A – Making a false statement that **ADVERSELY** reflects on P’s trade or business
   M – Falsely accusing P of **MORAL** turpitude
   S – Falsely accusing P of serious **SEXUAL** misconduct (male or female)

23) A defamer is privileged when she has **JET LAG**:
   J – Defamatory statements in the course of a **JUDICIAL** proceeding
   E – Confidential defamatory communications spoken between spouses who are deemed one
      **ENTITY**, when the spouse is sued for defamation
   T – **TRUTH**
   L – Statements by **LEGISLATORS** made in legislative chambers
   A – State, local or federal **ADMINISTRATIVE** agency’s executives or government executives
      making defamatory statements in furtherance of their official duties
   G – Statements made to Bar Association **GRIEVANCE** Committees

24) A defamer gives **LIP** to a qualified privilege:
   L - **LOWER** echelon officials of government agencies
   I – A false statement in which the speaker & listener had some common **INTEREST** in the
      subject matter of conversation (and the defamatory statement must be pertinent to the parties’
      common interest & made to further or protect that interest)
   P – Defamatory statements made to the **POLICE** or District Attorney about P’s criminal
      activity
NO-FAULT INSURANCE

1) No-Fault pays up to $50,000 for a **LOT:**
   - L – **LOST** earnings/wages for up to 80% of injured person’s salary ($2,000/mo maximum, for lost wages up to three years from the date of injury)
   - O – **OTHER** out-of-pocket expenses relating to the injury
   - T – **TREATMENT** expenses

2) A serious injury is **3D F^2 UN:**
   - D – **DEATH**
   - D – Serious **DISFIGUREMENT**, which, when viewed by an RPP, would be unattractive, objectionable, or the object of pity or scorn
   - D – **DISMEMBERMENT**
   - F – Loss of a **FETUS**
   - F – Bone **FRACTURE**
   - U – Medically-determined permanent & total limitation on **USE** of body member or organ
   - N – **NINETY** out of the first 180 days after a vehicle accident the plaintiff is unable to perform substantially all of her usual daily activities. Medical testimony is required to establish this non-permanent limitation.

3) An insurance company does not have to pay no-fault benefits to **FIFI’S M.D.:**
   - F – A person **FLEEING** a lawful arrest
   - I – A person who **INTENTIONALLY** caused her own injury
   - F – A person who caused an accident during the commission of a **FELONY**, but a conviction or guilty plea is required to allow the NF carrier to disclaim
   - I – A person operating a vehicle while **INTOXICATED** by drugs or alcohol, intoxication where that caused the accident
   - S – A person knowingly operating or occupying a **STOLEN** vehicle
   - M – A driver or passenger of a **MOTORCYCLE** (but pedestrians hit by motorcycles are covered)
   - D – Drivers participating in a **DRAG** race
In-Class Multistate Questions: Torts

Breakdown of Torts on the MBE

Negligence (50%)
What Concepts Do They Expect You to Know?

A. The duty question, including failure to act, unforeseeable plaintiffs, and obligations to control the conduct of third parties

B. The standard of care
   1. The reasonably prudent person: including children, physically and mentally impaired individuals, professional people, and other special classes
   2. Rules of conduct derived from statutes and custom

C. Problems relating to proof of fault, including res ipsa loquitur

D. Problems relating to causation
   1. But for and substantial causes
   2. Harms traceable to multiple causes
   3. Questions of apportionment of responsibility among multiple tortfeasors, including joint and several liability

E. Limitations on liability and special rules of liability

F. Liability for acts of others
   1. Employees and other agents
   2. Independent contractors and non delegable duties

G. Defenses
   1. Contributory fault, including common law contributory negligence and last clear chance, and the various forms of comparative negligence
   2. Assumption of risk

1. Problems relating to “remote” or “unforeseeable” causes, “legal” or “proximate” cause, and “superseding” causes
2. Claims against owners and occupiers of land
3. Claims for mental distress not arising from physical harm; other intangible injuries
4. Claims for pure economic loss

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Intentional Torts, Strict Liability, Products Liability, and Other Torts (50%)
What Concepts Do They Expect You to Know?

I. Intentional Torts

A. Harms to the person, such as assault, battery, false imprisonment, and infliction of mental distress; and harms to property interests, such as trespass to land and chattels, and conversion
B. Defenses to claims for physical harms
   1. Consent
   2. Privileges and immunities: protection of self and others; protection of property interests; parental discipline; protection of public interests; necessity; incomplete privilege

II. Strict Liability: claims arising from abnormally dangerous activities; the rule of Rylands v. Fletcher and other common law strict liability claims; defenses

III. Products Liability: claims against manufacturers and others based on defects in manufacture, design, and warning; and defenses

IV. Other Torts

A. Claims based on nuisance, and defenses
B. Claims based on defamation and invasion of privacy, defenses, and constitutional limitations
C. Claims based on misrepresentations, and defenses
D. Claims based on intentional interference with business relations, and defenses
1. A massage therapist owned and operated a health spa. The owner of the adjoining property entered into a government contract to conduct experiments on animals, anticipating that such experiments would provide a cure for cancer. The experiments were not prohibited by any state or local ordinance or statute governing use of the property. Following some publicity, many of the therapist’s clients found out about the government contract and refused to continue services with her, fearing that some of the chemicals used in the experiments at the adjoining property would get into the water supply and harm them. The clients’ fears were unfounded.

Facing economic ruin, the massage therapist commenced a nuisance action against her neighbor seeking to enjoin the neighbor’s continued use of her land for animal experiments.

The neighbor moved for summary judgment claiming that the therapist’s action was not based on facts other than her clients’ baseless fears.

Is the neighbor likely to prevail?

(A) Yes, because the clients’ fears are unreasonable and cannot be supported by existing scientific basis.

(B) Yes, because the neighbor’s use of the property does not violate the existing zoning laws.

(C) No, because even though the therapist’s clients’ fears are unreasonable, the therapist will suffer economic injury from the neighbor’s continued use of her land.

(D) No, because in balancing the equities, the court will determine that the economic loss to the therapist is greater if the injunction is not granted than the loss to the neighbor if the injunction is granted.

1. A nuisance is defined as a substantial and unreasonable interference with the plaintiff’s use and enjoyment of his land due to the defendant’s unreasonable use of her land. “[M]any recent cases have denied [the plaintiff’s] recovery for conditions that diminish the plaintiff’s property value but do not physically invade or physically harm the [plaintiff’s] property.... [A] number of decisions have gone far beyond this by refusing to treat fear-creating activities as a nuisance in the absence of an actual invasion or physical harm to the land. Some [courts] have [denied recovery] even when the activity actually causes depreciation in the plaintiff’s land value, so-called stigma damages.” Dobbs, The Law of Torts § 466 at 1332. Although Prosser states “fears and feelings common to members of the community are to be considered; and the dread contagion from a pesthouse may make it a nuisance even though there is no foundation in scientific fact,” he cites only a 1910 case. Prosser, Law of Torts § 88 at 629 n. 25 (5th ed. 1984). Thus, choice (A) is the best choice.

Even if an unreasonable use of one’s land complies with existing zoning laws, it nevertheless may be found to be a nuisance. Thus, choice (B) is not correct.

As discussed above, choice (C) is not correct because when the fear of contamination is unfounded, then the resulting depreciation in the adjoining land’s value is not recoverable. Dobbs, The Law of Tort § 466 at 1332-33 n. 22.

Choice (D) is not correct because balancing the equities is only one element the court considers when determining whether to grant a preliminary injunction. The other two elements are inadequate remedies at law and likelihood of the plaintiff’s success on the merits of his claim. It is this latter element that will defeat the massage therapist’s claim, since the modern view denies a nuisance claim based on stigma damages to the plaintiff’s land.
2. An eight year old girl went to the grocery store with her mother. The girl remained near her mother at all times. While the girl was pushing the shopping cart, it struck another customer in the knee, and inflicted serious injury.

In a negligence action by the customer against the grocery store, another customer testified at the trial that he noticed the child pushing the cart, and it caused him no concern.

Which of the following would be the store’s best defense?

(A) The store does not owe a duty to its customers to control the use of its shopping carts.

(B) The store does not owe a duty to its customers to control the conduct of other customers.

(C) Any negligence of the store was not the proximate cause of the customer’s injuries.

(D) A supervised child pushing a cart does not pose an unreasonable risk of harm to other customers.

2. Regardless of whether the customer is treated as a business invitee or, as in New York, where the invitee-licensee distinction has been abolished, a supermarket is not an absolute insurer for the safety of its customers. It must act to discover and prevent foreseeable, dangerous conditions from inflicting injury on a customer. Thus, the store’s best defense under these circumstances is (D), that a child pushing a cart does not pose an unreasonable risk of harm to others.

Choice (A) is incorrect because a store has a duty to protect its customers from the foreseeably dangerous acts of other customers. Anytime the possessor of land opens it up to public access, the possessor’s right to control the land imposes a duty to use reasonable care to control permissive users to prevent them from inflicting harm on others. Dobbs, The Law of Torts § 330 at 892 (2000). Choice (B) is incorrect for the same reason; avoid answer choices claiming “no duty to its customers,” as “no duty” often is too broad.

Finally, choice (C) is not the best answer because the store’s negligence could be a proximate cause of injuries inflicted on the customer by another customer.
3. A physician obtained his patient’s consent to surgery but failed to disclose a significant risk which a reasonable doctor would have disclosed to his patient.

Will the patient recover damages in an action against the physician?

(A) Yes, provided the undisclosed risk materialized and resulted in harm to the patient due to the physician’s incompetence.

(B) Yes, provided the undisclosed risk materialized and resulted in harm to the patient.

(C) Yes, at least nominal damages on a battery theory.

(D) Yes, at least nominal damages on a negligence theory.

3. Failure to disclose a significant risk may be considered negligence if a reasonable physician would have said more. The patient will recover if the undisclosed risk results in harm to the patient. Thus, (B) is the correct answer.

The negligence involved was the failure to inform the patient adequately; incompetence need not also be shown. Either alone would provide an adequate ground for a negligence action, so (A) is incorrect.

(C) is incorrect because lack of informed consent to surgery is not considered a battery under modern law. Rather, it is treated as a form of negligence. This case should be distinguished from the case where a doctor physically exceeds the patient’s consent (e.g., after obtaining consent to operate on one organ, the doctor operates on another). This latter type of case may constitute battery.

(D) is incorrect because nominal damages are not allowed in negligence. The plaintiff must experience some actual, compensable harm to recover for negligence.
4. A television star was seriously injured in an automobile accident caused by the defendant’s negligent driving. As a consequence of the star’s injury, her television series was canceled, and one of the supporting actors was laid off.

In an action against the defendant, will the supporting actor recover his loss of income attributable to the accident?

(A) Yes, because the defendant’s negligence was the cause in fact of the supporting actor’s loss.

(B) Yes, unless the supporting actor failed to take reasonable measures to mitigate his loss.

(C) No, unless the defendant should have foreseen that by injuring the star he would cause harm to the supporting actor.

(D) No, because the defendant’s liability does not extend to economic loss to the supporting actor that arose solely from physical harm to the star.

4. The correct choice is (D) because, generally, tort law does not permit recovery to third persons who suffer pecuniary loss as a result of a tortious injury to another. There are several exceptions to this rule (e.g., wrongful death claims and a parent’s claim for loss of a child’s services), none of which apply here.

“[A] plaintiff may not recover [solely] for economic loss resulting from negligent infliction of bodily harm to a third person.... Reasons for denial of such recovery of damages arising from injury to third persons include:

(1) The defendant owed no duty to the plaintiff.
(2) The damages are too remote.
(3) The damages are unforeseeable.
(4) There was no proximate cause.
(5) Permitting the recovery of damages for injury to third persons will allow limitless recoveries and have ruinous consequences.” Ore-Ida Foods, Inc. v. Indian Head Cattle Co., 627 P.2d 469, 473 (Ore. 1981).

Tort law does not extend a duty to all who suffer pecuniarily because of an inflicted injury. Accordingly, even if such losses were foreseeable, the actor could not recover, and thus choice (C) is not correct. For example, when rhythm and blues vocalist Aaliyah tragically died in an airplane crash, her employer’s claim for its economic loss because of her death did not spell out a viable claim against the alleged tortfeasor. Barry & Sons, Inc. v. Instinct Productions LLC, 15 A.D.3d 62 (1st Dep’t 2005).

Choice (A) is not correct because a plaintiff must show more than cause in fact; a plaintiff must show proximate cause.

Choice (B) is not correct because, even if the supporting actor established that he took reasonable measures to mitigate his damages, he could not recover any damages.
5. A father falsified his son’s age in order to enroll the son in little league.

During a ball game, the umpire called the son out on strikes. The father, infuriated with the call, shouted, “Kill the umpire!” Still holding his bat, the son swung at the umpire. The umpire ducked, the bat flew out of the son’s hands and struck a spectator, who was seriously injured.

How should the trial judge rule in the spectator’s negligence action against the father?

(A) The father is liable to the spectator for falsifying his son’s age.

(B) The father is liable to the spectator for shouting, “Kill the umpire.”

(C) The father is vicariously liable to the spectator.

(D) The father is liable to the spectator only if he should have been aware of the son’s propensities for such violent conduct.

5. (C) is incorrect as a matter of law, because parents generally are not vicariously liable for the tortious acts of their children.

(B) is incorrect because, in order to prevail using this argument, the spectator would probably still have to show that the father knew that the son had a propensity for violence. Merely shouting, “Kill the umpire” is not enough to recover on a negligence theory.

(A) is incorrect because falsifying his son’s age was not the proximate cause of the spectator’s injury. The age requirement is most likely designed to protect the children themselves, not to protect the spectators and umpires from violence caused by younger children. The harm that occurred was not of the type the rule was designed to prevent.

(D) is correct because parents are liable for the tortious acts of their child if they know of the child’s propensity to act violently and negligently allowed the child to act in such a manner.
6. Over a two-month period, a tenant complained to her landlord about the lack of security in her apartment building, including a broken lock at the building’s main entrance. There was a history of crime in the building and the immediate neighborhood, the landlord was aware of it, and the tenant indicated that she felt unsafe.

Five days after the tenant’s most recent complaint to the landlord, the tenant was attacked and robbed in the stairway of the building. The tenant looked at the assailant, but had never seen him before. The assailant was never apprehended or identified. The tenant commenced a negligence action against the landlord on the basis of inadequate security.

If the landlord moves for summary judgment and prevails, what is the most likely reason?

(A) The tenant did not prove that the landlord breached her duty.

(B) The tenant did not prove that her injuries were proximately caused by inadequate security.

(C) The tenant did not prove that the landlord owed her a duty.

(D) The assailant’s conduct was an independent intervening cause.

6. A landlord has a duty to take reasonable precautions to protect tenants from foreseeable harm, including foreseeable harm from criminal activities. Thus, choice (A) is not the best choice. Nevertheless, if a tenant is injured by criminal activity in her building, the landlord will not be liable unless the tenant can prove that the landlord’s alleged negligence (breach of duty) in maintaining the security of the building was the proximate cause of the tenant’s injuries.

Even if the tenant knew all the tenants in her building, this does not establish that the intruder gained entry through the broken lock; the intruder could have been a guest who accompanied another tenant into the building.

New York’s Court of Appeals addressed this very issue in Burgos v. Aqueduct Realty Corp., 92 N.Y.2d 544 (1998). The Court stated that for a tenant to defeat a landlord’s summary judgment motion, the tenant need only present an issue of fact on the causation issue by “showing through circumstantial evidence that it is more likely or reasonable than not that an unlicensed assailant was an intruder who got into the premises through the negligently maintained door and then injured the plaintiff.” Id.; Pieper, NYAA at 786 (2014).

In the absence of proof that the assailant was an intruder who entered through the negligently unlocked door, rather than another tenant or a tenant’s invitee, there frequently is insufficient evidence of proximate cause to defeat the landlord’s summary judgment motion. Thus, choice (B) is the best choice.

Choice (C) is incorrect because a landlord has a duty to maintain security, especially where criminal activity is foreseeable.

Choice (A) is incorrect, because there was sufficient proof of the landlord’s duty and breach of duty especially in light of the foreseeable dangers to the tenants.

A criminal act by a third person is not an independent intervening proximate cause where the criminal act was foreseeable. Thus, choice (D) is not the best answer.
7. Two brothers cut down a Christmas tree which landed on the plaintiff’s tent, causing him to suffer extensive injuries. The brothers and the plaintiff were all rightfully on public land, with proper permits. The plaintiff sued the brothers for his injuries, claiming $100,000 in damages.

On the eve of trial, the plaintiff and one of the brothers agreed to a settlement which provided that the plaintiff would dismiss his case with prejudice against both defendants upon the one brother’s payment of $70,000 to the plaintiff. The brother paid the agreed amount to the plaintiff, and the plaintiff dismissed the case with prejudice. There are no statutes governing the brother’s release.

If the settling brother sues the non-settling brother for contribution, will he prevail?

(A) No, because he should have sought indemnification.
(B) Yes, because the brothers are joint tortfeasors.
(C) No, because judgment has not been entered against him.
(D) Yes, because the brother who settled the action had cut down the tree as a gratuitous service to the other.

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7. Remember, this is a Multistate question so you are not going to apply New York’s General Obligation’s 15-108 rules on the release of a tortfeasor.

A right to indemnification arises when a third party is liable to a paying party for all of the amount paid by the paying party. Indemnification would only be the appropriate remedy if the settling brother was not at all negligent and had been held liable only on the basis of vicarious liability for the other brother’s negligence. Since both brothers were negligent, the settling brother cannot obtain complete indemnification from the other. Therefore, (A) is an incorrect answer.

Keeton, Prosser & Keeton on Torts § 50 at 339 (5th ed. 1984) states that where there is no statute expressly addressing this issue, “it is almost invariably held that one who settles without a judgment can recover contribution.” At common law, a release of one tortfeasor released the other tortfeasor. “This conception led courts to say if the plaintiff released Tortfeasor A, that automatically released B as well, since the cause of action being relinquished no longer existed.” Dobbs, The Law of Torts § 388 at 1083 (2000).

When one tortfeasor, A, settles the plaintiff’s claim but the other does not and the plaintiff releases B as well, “A, by settling, has brought protection for B and is entitled to contribution against him...” Id.

Note, the released party who sues for contribution “must sustain the burden of proof, not only as to the original tortfeasor, but also as to the amount of damages [the apportioned share of the non-settling brother’s fault] and the reasonableness of the settlement.” Keeton, Prosser & Keeton on Torts § 50 at 339.

(D) is incorrect because it improperly limits the settling brother’s ability to obtain contribution from the other brother. The settling brother can obtain contribution from his brother as long as he was also negligent and the settling brother was held liable, at least in part, for the other’s negligence. The settling brother could obtain contribution from the other even if the situation were reversed and he had only been helping the other, so long as the non-settling brother had been negligent.

The only issue is whether the settling brother may obtain contribution in a situation where no judgment was entered against him. Some states allow contribution only on the basis of a court judgment, but where the right is not so limited, there is no reason that the settling brother should not be able to obtain contribution. He has been held liable, at least in part, for his brother’s negligence. Moreover, the non-settling brother cannot be held liable twice, because the plaintiff’s suit was dismissed with prejudice. There is no sign of collusion, especially since the settling brother will have to pay at least part of the settlement amount. Therefore, (B) and not (C) is the correct answer.
8. A man negligently drove his car into the rear of another automobile driven by a woman. The woman, who was driving with due care at the time of the accident, suffered injuries to both her chest and neck. During the collision, the woman’s automobile was pushed to the other side of the road, where it was struck by an automobile negligently driven by a teenager. As a result of the second impact, the woman suffered a fractured skull and an aggravation of the chest injury.

The woman sued the man and teenager as joint tortfeasors. The applicable jurisdiction has a contribution statute.

Is the teenager liable to the woman?

(A) The teenager is liable for one-half of all of the woman’s injuries.
(B) The teenager is liable to the woman for one-half of the damages attributable to the fractured skull and one-half of the damages attributable to the chest injury.
(C) The teenager is liable to the woman for all of her injuries.
(D) The teenager is liable to the woman for her fractured skull and her aggravated chest injuries.

8. (A) and (B) are incorrect because a contribution statute does not affect plaintiff’s rights.

The teenager is not responsible for the woman’s neck injury and the original chest injury because she had nothing to do with them. Thus, choice (C) is incorrect.

The teenager is jointly and severely liable for the injury caused by the second collision (the fractured skull). The teenager is liable for aggravating the chest injury, originally caused by the man. Thus, the correct answer is (D).
9. A driver parked his car so that it protruded three feet into the traffic lane, while his friend was asleep in the back seat. The friend awoke, saw where the car was parked, and went back to sleep. Before the driver returned, his car was hit from the rear by another vehicle. The friend was injured.

The friend sued both drivers jointly to recover the damages he suffered from the accident. The jurisdiction has a pure comparative negligence rule and has abolished the defense of assumption of risk. With respect to other issues, the rules of the common law remain in effect.

Is the friend entitled to recover damages for his injuries?

(A) No, if he was more negligent than either of the other two drivers.
(B) No, unless the total of both drivers’ negligence was greater than the friend’s.
(C) The friend will recover from both drivers, jointly and severally, the amount of damages he suffered reduced by the percentage of the total negligence that is attributed to the friend.
(D) The friend will recover from both drivers, severally, a percentage of his damages equal to the percentage of fault attributed to each of the defendants.

9. Under “pure” comparative negligence, the plaintiff recovers a proportion of his losses regardless of his degree of fault. Thus choice (C) is correct. Choices (A) and (B) are incorrect because they apply a modified comparative negligence standard in which the plaintiff may recover only if the plaintiff’s negligence is less than the defendant’s.

(D) is incorrect because such a rule would alter the joint and several liability rule that permits a plaintiff to recover the full amount of all defendants’ liability regardless of one defendant’s apportioned fault.
10. While driving his car, the plaintiff sustained injuries in a three-car collision. The plaintiff sued the drivers of the other two cars, D-1 and D-2. Both defendants cross-claimed against the other for contribution and both asserted the affirmative defense of plaintiff’s comparative negligence. The jurisdiction has adopted a rule of pure comparative negligence and permits contribution based upon proportionate fault. The common law rule of joint and several liability is retained.

The jury found that the plaintiff sustained damages in the amount of $100,000, and apportioned the causal negligence of the parties as follows: Plaintiff 40%, D-1 35%, and D-2 25%.

What is the most that the plaintiff may collect from D-1, and the most, if anything, that D-1 may collect from D-2 in contribution?

(A) The plaintiff may not collect anything from D-1, and D-1 may not collect from D-2.
(B) The plaintiff may collect $60,000 from D-1, but D-1 may not collect from D-2.
(C) The plaintiff may collect $40,000 from D-1, and D-1 may collect $5,000 from D-2.
(D) The plaintiff may collect $60,000 from D-1, and D-1 may collect $25,000 from D-2.

10. This question will quickly reveal whether you understand the concepts of comparative negligence, joint and several liability, and contribution among joint tortfeasors. The plaintiff was 40% at fault, but even though he was more responsible for his injuries than either D-1 or D-2, he may recover under a “pure” comparative negligence rule. The plaintiff may recover $60,000 (60%) from D-1 and D-2. Since joint and several liability exists, the plaintiff may recover the full $60,000 from either D-1 or D-2; if D-1 paid the full $60,000 judgment, D-1 may then seek contribution for $25,000 from D-2. Thus choice (D) is the best choice.
11. Assume the following facts occurred in a state having a “pure” comparative negligence statute.

Three drivers were involved in a three-car accident. The driver of car 1 was grossly negligent and the drivers of car 2 and 3 were each negligent. The driver of car 2 sued the drivers of cars 1 and 3 as joint tortfeasors, and the drivers of cars 1 and 3 each counterclaimed against the driver of car 2 and cross-claimed against the other on the same theory of joint liability. Each of the three parties had $50,000 in liability insurance. The jury, by way of a special verdict, found that each party had suffered $20,000 in damages. It also determined that the driver of car 1 was 70% negligent and that the drivers of cars 2 and 3 were each 15% negligent.

Will the driver of car 1 be entitled to recover anything from either driver?

(A) Yes, a judgment for $6,000 against both drivers jointly.
(B) No, because he was grossly negligent.
(C) No, because his negligence exceeds that of both drivers combined.
(D) No, because his judgment is set off by the larger judgments obtained by both drivers against him.

11. This question involves the calculation of damages in a pure comparative negligence jurisdiction. Under this doctrine, unless the plaintiff was totally (100%) at fault, the plaintiff can always recover something, no matter how negligent the plaintiff himself might have been. The facts indicate that the driver of car 1 was 70% negligent; therefore, the driver of car 1 will recover 30% of his damages (30% of $20,000 is $6,000), and (A) is the correct answer.

The fact that the driver of car 1’s negligence is greater than the negligence of the drivers of cars 2 and 3 does not preclude him from recovering in a pure comparative negligence jurisdiction. Thus, (C) is an incorrect answer.

(B) is incorrect because there is no rule of comparative negligence that bars recovery simply because one’s conduct was grossly negligent. The fact that this problem involves the doctrine of pure comparative negligence will allow the driver of car 1 to recover regardless of the extent of his own negligence.

(D) is incorrect because a set-off is not used when calculating damages in a comparative negligence jurisdiction. Damages may be recovered from each defendant jointly and severally.
12. The plaintiff commenced a negligence action against a medical technician, claiming that the plaintiff sustained injury to a nerve in her arm as the result of the medical technician’s negligent administration of a needle while withdrawing her blood. The plaintiff’s complaint alleged that as a result of the medical technician’s negligence, she is no longer able to perform her daily workout.

At the trial, the plaintiff proceeded on a theory of res ipsa loquitur.

If the applicable jurisdiction allows res ipsa loquitur to be used in a medical malpractice action, will the plaintiff prevail?

(A) Yes, only if a qualified expert testifies that the procedure used by the medical technician to withdraw blood did not conform to acceptable medical practice.

(B) Yes, if a qualified expert testifies that the unfortunate result to the plaintiff was more likely due to the negligence of the medical technician than some other cause.

(C) Yes, despite the absence of any expert testimony, because the purpose of allowing res ipsa loquitur in medical malpractice cases is to counteract the so-called “conspiracy of silence.”

(D) No, the medical technician will prevail because the plaintiff cannot prove medical malpractice by res ipsa loquitur.

12. The test of res ipsa loquitur is whether it was more probable than not that the defendant’s negligence caused the harm. The plaintiff will probably prevail if a qualified expert testifies as to the likelihood of negligence, and (B) is correct.

(A) is incorrect because such evidence is direct, rather than inferred, evidence of negligence. Requiring direct evidence is inconsistent with allegations of res ipsa loquitur.

Avoid general policy answers like (C). Choice (D) is incorrect because res ipsa loquitur is an appropriate way for a plaintiff to prove negligence even in medical malpractice.

The minority view is that a plaintiff cannot use expert testimony to establish a res ipsa loquitur case in a medical malpractice action. Instead, lay-persons must know, based on their common knowledge or experience, that the cause of the injury does not ordinarily exist, but for the negligence of the party in control. Spears v. Capital Region Medical Center, 86 S.W.3d 58 (Mo. App. W.D. 2002).

The majority approach, adopted in New York, permits expert testimony to establish what is common knowledge in a specialized field. Restatement (Second) Torts § 328D; States v. Lourdes, 100 N.Y.2d 208 (2003); Pieper, NYAA at 836 (2014).

Note, that in order for the expert testimony to be admissible, the theory concerning the arm injury must either be “generally accepted” in the medical field (see Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) (the New York approach) or “reasonably reliable” under the Federal Rules of Evidence). Marsh v. Smyth, 12 A.D.3d 307 (1st Dep’t 2004).
13. In preparation for a mountain-climbing expedition, a climber purchased necessary climbing equipment from a sporting goods retailer. A week later, the climber fell from a rock face when a safety device he had purchased from the retailer malfunctioned because of a defect in its manufacture. A witness to the accident was severely injured when he tried to rescue the climber on the ledge to which the climber had fallen. The witness’s injury was not caused by any fault on his own part.

If the witness brings an action against the retailer to recover damages for his injuries, will the witness prevail?

(A) No, unless the retail store could have discovered the defect by a reasonable inspection of the safety device.
(B) No, because the witness did not rely on the representation of safety implied from the sale of the safety device by the retail store.
(C) Yes, unless the climber was negligent in failing to test the safety device.
(D) Yes, because injury to a person in the climber’s position was foreseeable if the safety device failed.

13. The doctrine of danger invites rescue applies to a strict product liability defendant. Thus choice (D) is correct.

Choice (A) is not correct because even if the defect could not have been discovered by the retail store, it would still be liable for strict products liability or for breach of warranty.

Choice (B) is not correct because reliance is relevant only in a breach of the implied warranty of fitness for a particular purpose.

Choice (C) is not the best choice because, even if the climber was negligent in failing to test the device, the retail store will not be relieved from its strict tort liability.
14. A driver got into his car and released the brake, but prior to starting the engine, he got out of the car to pick up a broken bottle lying in the path of the car. When the car started to roll in the driver’s direction, a bystander immediately pushed the driver out of the path of the approaching car. The bystander was then struck by the car and seriously injured. The driver lost his balance from being pushed by the bystander, struck his head on the curb and was injured.

If the driver sues the bystander for negligence, will he prevail?

(A) Yes, if his injury from hitting his head on the curb was proximately caused by the bystander.
(B) No, because the bystander acted instinctively.
(C) No, because the bystander, under the circumstances, was privileged to push the driver.
(D) No, because the bystander acted reasonably in an emergency.

14. This fact pattern indicates an emergency situation, and (D) is correct because the bystander acted reasonably during the emergency.

When an actor is faced with a sudden and unexpected event which leaves no time for thought or deliberation, and the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable in the emergency context. Caristo v. Sanzone, 96 N.Y.2d 172 (2001); Pieper, NYAA at 770-71 (2014).

The instinct doctrine is a minority rule, so (B) is incorrect.

(C) is incorrect because privilege is a defense to a battery action and this is a negligence action.

(A) is incorrect because it assumes that the bystander’s conduct was unreasonable (i.e., that the bystander breached his duty of reasonable care). Under the facts of this question, the bystander’s actions would not be unreasonable because there he acted immediately in response to an emergency.
15. A customer in a supermarket was seriously injured when he slipped and fell on a bunch of grapes that had been dropped on the floor by another shopper.

The customer brought an action against the supermarket to recover damages for his injuries.

In order to recover for his injuries, what must the customer prove?

(A) The supermarket had actual notice of the condition.
(B) The supermarket had either actual or constructive notice of the condition.
(C) The customer need not prove that the supermarket had either actual or constructive notice of the condition, because the supermarket is strictly liable.
(D) The supermarket was grossly negligent.

15. The duty owed by a possessor of land under these circumstances is to inspect and make safe any dangerous condition on the premises of which the possessor was aware (actual notice) or with reasonable care should have been aware (constructive notice). Thus, (B) is correct, and (A) is incorrect.

To recover in tort, the injured plaintiff must prove that the possessor (the supermarket) either created the dangerous condition, had actual notice of it, or that it existed for a long enough time that the possessor, by exercising reasonable care to inspect the premises, should have known of it (constructive notice).

Strict tort liability is not imposed on the possessors of land for injuries caused by a latent dangerous condition on the land. Thus, (C) is incorrect. Finally, (D) is incorrect because the plaintiff must demonstrate that the supermarket’s conduct amounted to mere negligence, not the heightened standard of gross negligence.
16. Two police officers found a man, who appeared to be in a highly intoxicated state, wandering around a playground yelling at children playing soccer. The officers told him that they could either arrest him and put him in jail for the evening or escort him out of town. The man opted for the trip out of town. The officers placed him in the patrol wagon, drove him to the outskirts of town, and dropped him off at the side of the interstate highway at the edge of town. Still intoxicated, the man wandered onto the highway and was struck by an automobile traveling in excess of the speed limit.

In an action against the police officers, will the man recover for his injuries resulting from the automobile accident?

(A) Yes, because the officers were negligent in leaving him close to a busy highway in a state of intoxication.
(B) Yes, because his injuries were the proximate result of his false imprisonment.
(C) No, because the officers’ conduct was not the proximate cause of the injury, nor under municipal law, does the municipality owe the man a special duty.
(D) No, because he was intoxicated.

16. (A) is correct because negligence is shown on these facts.

The injuries were not the result of the intentional tort of false imprisonment, even if such tort occurred, but were the result of the officers’ negligence, so (B) is incorrect.

While the man was actually hit by another car, such an intervening cause, even if constituting a criminal act, does not cut off the officers’ liability because it was foreseeable and they owed the man a duty of care. Also, the municipal police formed a “special relationship” with the man through the officers’ direct contact with him and their awareness of the need to exercise due care. Therefore, (C) is incorrect.

The officers should not be allowed to assert the man’s intoxication as contributory negligence, because the man’s intoxicated state is what made the officers’ action negligent in the first place.
17. Two students in an advanced high school Russian class argued in the high school cafeteria and in the presence of other students. One, in Russian, falsely accused the other of taking money from his locker.

If the falsely accused student sues the other for defamation, will he prevail?

(A) Yes, because the accusation constituted slander per se.
(B) Yes, because the defamatory statement was made in the presence of third persons.
(C) No, unless the accusation was made with knowledge of its falsity or with reckless disregard of the truth.
(D) No, unless one or more of the other students understood Russian.

17. A basic element of defamation is that the false statement harmful to the accused’s reputation be communicated to a third person. *Restatement (Second) Torts § 577(1).* If no one understood what the student said, then the speaker has not published the defamatory statement. Choice (D) is correct.

Even though the statement was made in the presence of other students, no defamation claim arises unless the other students understood it. Thus, choice (B) is not the best answer.

Even if the statement constituted slander per se (stealing money imputes criminal conduct to the accused student), no claim exists unless the statement was published to a third person. Thus, choice (A) is not the best choice.

Since students are not “public figures” or public officials, the actual malice standard in choice (C) is not applicable here.
18. A woman and man were attending a computer industry dinner where each was to receive an award for achievement in the field of data processing. The man engaged the woman in conversation and expressed his opinion that if they joined forces, they could do even better. The woman replied that she would not consider the man as a business partner, and, when he demanded to know why, she told him that she considered him to be totally incompetent in all aspects of his professional life. The woman had no basis for the comment.

The exchange was overheard by other people at their table who attended the dinner. The man suffered emotional distress but no pecuniary loss.

If the statement is untrue and the man asserts a claim against the woman based on defamation, will he prevail?

(A) No, because he suffered no pecuniary loss.
(B) No, because the woman’s statement was made to the man and not to the other people at the table.
(C) No, unless the woman should have foreseen that her statement would be overheard by another person.
(D) No, unless the woman intended to cause the man emotional distress.

18. If a false statement is heard by someone other than the person defamed, the plaintiff must plead that it was communicated to the third person intentionally or negligently. Restatement (Second) Torts § 577. Thus, (C) is correct.

A false statement disparaging the man in the conduct of his business, trade, or profession is actionable without proof of special damages. Thus (A) is incorrect.

Even though a statement is made directly to the person defamed, if, under the circumstances, it is foreseeable that a third person would overhear it, and a third person, in fact, overhears it, it is sufficient for a publication. Thus, (B) is incorrect.

A plaintiff suing for defamation need not prove that the defendant intended harm. Thus, (D) is incorrect.
19. The treasurer of a corporation erroneously, but in good faith, believed that the president of the company was embezzling corporate funds. The treasurer reported this to the District Attorney’s office.

A grand jury was convened to hear evidence against the purported embezzler. The vice-president knowingly testified falsely against the president, but the grand jury declined to indict the president, finding the evidence against him was not sufficiently convincing.

Thereafter, the president commenced defamation claims against both the treasurer and the vice-president.

Will the president prevail in her slander action?

(A) Yes, but against the treasurer only.
(B) Yes, but against the vice-president only.
(C) Yes, against both the treasurer and the vice-president.
(D) No, not against the treasurer or the vice-president.

19. In reporting criminal conduct to the District Attorney, the treasurer had a qualified privilege that she would forfeit only if her false accusation against the president was motivated by common law malice (spite, ill-will or meanness toward him). Here, the facts specifically said her report was made in “good faith”. Thus, the treasurer’s defamation was privileged and would defeat the president’s defamation claim.

Although the vice-president knowingly (and thus maliciously) testified falsely against the president, the vice-president had the judicial proceeding absolute privilege since the defamatory statement was relevant and arising out of judicial proceedings. Thus, choice (D) is your best choice to this question.

Note, the vice-president has committed the crime of perjury. In both MBE and under New York’s Penal Law § 210.15, a person is guilty of perjury in the first degree (a class D felony) when he intentionally testifies falsely about a material issue in judicial or quasi-judicial proceedings.
20. A college built a three-acre, man-made lake which it stocked with piranhas for a study being conducted by the graduate students at the college’s renowned biology department. The piranha is a predatory fish with powerful jaws and razor-sharp triangular teeth and is commonly known to be capable of easily killing humans and cattle who enter its waters. It is naturally found in the Amazon and in Africa. To warn passersby, the college posted “no swimming” signs around the lake, because it knew that children frequently used the pond to swim.

One day, a 14 year old boy dove into the lake for a refreshing swim. The movement of fluttering legs caught the attention of the largest piranha in the lake, which began biting the boy’s leg. By the time the boy crawled out of the lake screaming, his leg had been gnawed off up to the knee joint.

If the boy sues the college for his injuries, what is his best theory of recovery?

(A) Intentional tort.
(B) Strict tort liability.
(C) Negligence.
(D) Prima facie tort.

20. The piranha is not a “domestic animal” but rather a dangerous, wild animal. Here, clearly the harm was caused by the piranha’s normal dangerous propensities. Ordinarily, the possessor of a wild animal is strictly liable in tort, but strict liability is not imposed if the injury is inflicted on an intentional trespasser. Restatement (Second) Torts § 511. Strict liability is imposed only for injuries to those who enter the land by privilege or are properly on the land as invitees or licensees. Dobbs, The Law of Torts § 349 at 961 (2000). Thus, choice (B) is not correct.

Choice (A) is not correct because the intent of the college in stocking its lake with piranhas was not to cause physical injury to the boy or to others. Likewise, the college’s conduct here did not make injury substantially certain to happen. “Mere risk, however, even a very high risk, is not enough to show substantial certainty.” Dobbs, The Law of Torts § 25 at 48 (2000).

Choice (D) is not correct because prima facie tort requires malicious and intentional conduct by the college to harm the plaintiff. This clearly was not the case.

The college, however, may be liable to a trespasser injured by the wild animal on the basis of negligence in keeping the animal when trespassers are known to frequent the land. Restatement (Second) Torts § 339. Under the attractive nuisance doctrine, liability is imposed for artificial conditions highly dangerous to trespassing children. The possessor of land who fails to exercise reasonable care to eliminate the danger or to protect children from injury may be liable in negligence. Thus, the best choice is (C).
21. A horticulturist’s flower beds were constantly being trampled upon by bird watchers going through her property from the public road onto a nearby bird sanctuary where a rare red breasted pelican was drawing large crowds.

She purchased two trained vicious attack dogs, previously used to guard a junk yard, and put them in her backyard.

A bird watcher, while cutting through the horticulturist’s backyard to get to the bird sanctuary, was attacked by the dogs and seriously injured.

The bird watcher commenced an action against the horticulturist.

Will she prevail?

(A) Yes, the horticulturist is strictly liable.
(B) Yes, the horticulturist is liable in negligence because she failed to take precautions to protect trespassers from the dangerous animals.
(C) No, the horticulturist is not liable because she did not owe a duty to warn trespassers.
(D) No, the horticulturist is liable only if she previously ordered the bird watcher not to trespass.

By knowingly harboring dangerous, vicious dogs, the horticulturist is not strictly liable for injuries inflicted by the dogs on trespassers. Thus, choice (A) is not the best answer. Restatement (Second) Torts §§ 511 & 512 state that the rules as to strict liability of the possessor of a wild or an abnormally dangerous animal do not apply when the plaintiff intentionally or negligently trespasses on the land of the defendant.

Choice (B) is correct because the horticulturist is liable to the plaintiff on the basis of horticulturist’s negligence in keeping the animal or otherwise failing to exercise reasonable care to protect known trespassers from harm. When there is frequent trespass upon a limited area, the possessor may be liable for failure to take precautions against harm to the trespasser from the animal.

Generally, there is no duty owed to trespassers except to avoid intentional or reckless conduct directed at the trespasser. Putting trained guard dogs on her property knowing it is frequently used by the public, however, amounts to reckless conduct. Thus, choice (C) is incorrect.

Also, where the horticulturist is aware that her land frequently is being used by trespassers, tort law requires that she carry on activities on the land with reasonable care for the foreseeable safety of the known trespassers. Under the circumstances, simply warning trespassers to cease trespassing would not relieve the horticulturist from her duty. Where land is frequently used by trespassers, a “DIP” duty arises requiring the possessor to make the land safe. Thus, choice (D) is incorrect.

A possessor may be relieved from liability for harboring wild animals or vicious domestic animals if the possessor takes steps that a reasonable person would take (e.g., posting warning signs) and would believe to be effective in excluding trespassers, unless the possessor discovers that the signs are ineffective and disregarded. Restatement (Second) Torts § 334, Comments E & F.

“...it seems clear that the owner may not intentionally keep such a [vicious] dog for the purpose of attacking mere trespassers, where he would not be privileged to inflict serious injury if he were present in person.” Prosser & Keeton, Law of Torts § 79 at 562 (5th ed. 1984).
22. A state had a Sunday closing law which prohibited the sale of beer or liquor before noon on Sundays. At 10:00 a.m. last Sunday, an elderly man went into a supermarket and purchased a case of beer. The man sat in his car, drank all 24 cans, and became intoxicated. Thereafter, while operating the vehicle, he ran over a pedestrian, resulting in serious injuries to him.

In a lawsuit against the supermarket, will the pedestrian prevail?

(A) Yes, because the Dram Shop Act applies.
(B) Yes, because the sale to the man was negligence per se.
(C) Yes, because the Dram Shop Act applies and the sale was negligence per se.
(D) No, because the supermarket did not breach any duty to the pedestrian.

22. (A) is incorrect because the sale occurred when the man was not intoxicated. Thus, there was no sale to an infant or to an intoxicated person, and the Dram Shop Act was not violated.

(B) and (C) are incorrect because a Sunday closing law does not seek to protect this particular plaintiff or to prevent this particular type of harm. “Sunday blue laws do not purport to protect anyone or to set any standard of care.” Prosser & Keeton, Law of Torts § 36 at 231 (5th ed. 1984). Thus, (D) is the correct answer.
23. The plaintiff fell at the defendant’s skating rink and broke her arm. Over the protests of the plaintiff, the defendant’s employees proceeded to manipulate the arm in an attempt to set it. The conduct of the defendant’s employees neither benefitted nor aggravated the plaintiff’s condition. It did, however, cause the plaintiff additional pain.

In a battery action by the plaintiff against the defendant, the defendant requests that the trial judge instruct the jury that the plaintiff cannot prevail on a battery theory if the jury finds that the defendant’s employees acted for the purpose of benefitting the plaintiff, even though no benefit actually occurred.

With respect to the jury instruction, how should the trial judge proceed?

(A) Refuse to give the instruction.

(B) Give the instruction, but also instruct the jury that the plaintiff may recover on a negligence theory for her additional pain resulting from the conduct of the defendant’s employees.

(C) Give the instruction, because such a finding precludes a finding of the hostile intent necessary for a battery.

(D) Give the instruction, because such a finding precludes a finding of an intent to bring about a harmful or offensive contact necessary for a battery.

23. Motivation is irrelevant in determining intent; a battery need only be contact to which the plaintiff did not consent. Since the motivation instruction need not be given, (A) is the correct answer, and (B), (C) and (D) are incorrect.

As stated in Prosser on Torts, “[t]he defendant may be liable when intending only a joke, or even a compliment ... or [when] a misguided effort is made to render assistance ... [attempt to manipulate broken arm to set it].” Prosser & Keeton, Law of Torts § 9 at 42-43 (5th ed. 1984); Clayton v. News Dreamland Roller Skating Rink, 14 N.J. Super. 390 (1951). “Even medical treatment that involves a touching is a battery if the health care provider has no reason to believe it is consented to.” Dobbs, The Law of Tort § 28 at 53 (2000).

If life-saving treatment is given against the plaintiff’s express wishes, a battery claim arises. Id. § 29 at 54 n.2 (2000).
24. A reporter lied to a groundskeeper and gained entrance to a celebrity’s home. As the reporter approached the celebrity, he made nasty comments about the celebrity’s past. The celebrity instructed her bodyguard to remove the reporter from her premises. In doing so, the bodyguard broke the reporter’s arm.

Will the reporter prevail in a subsequent battery action against the bodyguard?

(A) No, because the bodyguard was merely following orders from his employer.
(B) No, because the reporter was a trespasser.
(C) Yes, because insulting words do not justify the use of force.
(D) Yes, if the bodyguard used unreasonable force in ejecting the reporter.

24. Following the orders of the employer does not provide a defense to the employee, so (A) is incorrect.

(B) is incorrect because trespassers may recover when unreasonable force is used against them.

(C) states a correct proposition of law but does not fit the facts, since a possessor may use reasonable force to repel a trespasser. “[T]he owner is viewed as defending his own possession. In such case, if he uses no more force than necessary and reasonable, he is privileged and not subject to liability.” Dobbs, The Law of Torts § 80, at 182 (2000).

The reporter may recover from the bodyguard in battery if the bodyguard used unreasonable force in ejecting him. Unreasonable force exceeds whatever privilege may apply. Thus, (D) is the correct answer.
25. The plaintiff purchased a stove from the defendant on credit by misrepresenting his assets. The defendant immediately discovered the fraud and overtook the plaintiff about one-half block away. When the plaintiff refused to surrender the stove, the defendant attempted to remove it from the plaintiff’s truck. The plaintiff resisted and the defendant shoved the plaintiff away from the truck and took the stove.

In an action for battery against the defendant, will the plaintiff prevail?

(A) Yes, because the defendant’s privilege was limited to retaking the stove without the use of force.
(B) Yes, because the plaintiff did not use force in acquiring the stove.
(C) Yes, because the defendant’s proper remedy was to bring an action to regain possession of the stove.
(D) No, because the plaintiff wrongfully obtained possession and the defendant’s pursuit was fresh.

25. This question deals with the problem of when force may be used to recover a chattel.

If the plaintiff acquired the property wrongfully (e.g., by fraud), then the defendant, in fresh pursuit, may use reasonable force to recover the property. If, on the other hand, the plaintiff has received the property rightfully to begin with, but wrongfully refuses to turn it over, then the defendant may not resort to force and must use legal remedies to recover the property.

Here, the question indicates that the plaintiff obtained the property by misrepresenting his assets and, thus, he acquired the property wrongfully. In addition, the defendant was in fresh pursuit, and it appears that the force used was reasonable under the circumstances. Therefore, all the conditions for a proper retaking by force have been met, and the correct answer is (D). *Hodged v. Hubbard*, 18 Vt. 504 (Sup. Ct. Vt. 1846).

(A) is incorrect because reasonable force may be used to repossess chattel wrongfully taken.

(B) is incorrect because the plaintiff’s action was wrongful even though he did not use force.

(C) is incorrect because force is permissible under the circumstance.
26. A stockbroker had developed an intense hatred for one of his co-workers after years of working with the co-worker at the stock exchange. The stockbroker was known as a violent person with an uncontrollable temper. The stockbroker threatened to burn down his neighbor’s home when he heard she was selling her home to the co-worker. Knowing the neighbor was greatly attached to her dog, the stockbroker then shot the dog before the neighbor’s eyes to ensure that she knew he was serious. The neighbor called off the sale to the co-worker.

If the neighbor sued the stockbroker for intentional infliction of emotional distress, will she prevail?

(A) No, because she did not suffer physical harm.
(B) Yes, because the stockbroker meant to frighten her.
(C) No, because the stockbroker made no threat of immediate physical harm to the neighbor or her family.
(D) Yes, if the neighbor suffered severe emotional distress.

26. In order to recover for intentional infliction of emotional distress, the neighbor must show that the stockbroker’s conduct was extreme and outrageous, and that he intentionally or recklessly caused severe emotional distress to her.

The “outrageous” requirement “serves the dual function of filtering out petty and trivial complaints that do not belong in court, and assuring that plaintiff’s claim of severe emotional distress is genuine....” Howell v. N.Y. Post Co., 81 N.Y.2d 115, 121 (1993). Here, the stockbroker’s conduct was “outrageous.” Restatement (Second) Torts § 46; Dobbs, The Law of Torts § 304 at 827 n.10 (2000).

The fact that the stockbroker intended to frighten the neighbor is not enough; the neighbor must also show that she suffered severe emotional distress as a result. Moreover, (B) is also incorrect because it is not necessary that the stockbroker intended to frighten the neighbor; it is sufficient if he recklessly frightened her.

(C) states the basis of recovery in an assault action. Since the question asks about liability for intentional infliction of emotional distress, (C) is an incorrect answer.

Physical harm is required only in a case of negligent infliction of emotional distress. Thus, (A) is an incorrect answer. To recover for intentional infliction of emotional distress, the neighbor need only show severe emotional distress as a result of conduct that is extreme and outrageous. (D) is the correct answer.

Note, in New York, New Jersey and the majority of the country, a pet owner cannot recover for emotional harm suffered as a result of observing the negligently caused death of the pet. Johnson v. Douglas, 289 A.D.2d 202 (2d Dep’t 2001); McDougall v. Lamm, 211 N.J. 203 (2012).
27. The plaintiff became violently ill and almost died several years ago when she accidentally ate a cockroach at a local diner. She was severely traumatized by that event, and has developed an extreme dislike for and fear of cockroaches. One day, after purchasing a doughnut at the local market, she saw a cockroach on the piece of doughnut in her hand. She immediately dropped the remaining piece of doughnut and ran home, locking herself in her apartment. The plaintiff did not suffer any overt physical harm, but lost several nights’ sleep as a result.

Assume the cockroach got into the doughnut due to the negligence of the market’s employees.

In an action by the plaintiff against the market, will the plaintiff prevail?

(A) No, because there was no actionable harm.
(B) Yes, even if a person of normal sensitivities would not have been upset, but she is limited to recovering an amount of damages that would have been incurred by a normal person.
(C) Yes, she will recover for her emotional distress.
(D) Yes, because the acts of the market’s employees were within the scope of their duties and they caused her harm.

27. Under Restatement (Second) Torts § 436A, in order to recover for negligent infliction of emotional distress, generally the plaintiff must show that her emotional distress either resulted from or resulted in some physical harm. Her loss of sleep here will not suffice for a physical harm. Therefore, (A) is the correct answer, and (C) is an incorrect answer.

(B) is incorrect for two reasons: in order to recover for emotional distress, the defendant’s conduct must have been such that it would have severely distressed a reasonable person who is normally constituted. It does not mean, however, that the plaintiff’s vulnerability is ignored. If the defendant knew or should have known of the plaintiff’s overly sensitive nature, that is all the more reason for the defendant to exercise reasonable care. Dobbs, The Law of Torts § 313 at 851-52 (2000).

“If the defendant’s conduct would subject him to liability for severe distress to a normal person, he is also liable for damages to an especially sensitive person, even if those damages are much greater because of the special sensitivity. This rule is merely the familiar thick skull or eggshell rule as applied to emotional harm.” Dobbs, The Law of Torts § 313 at 852 (2000). Thus, choice (B) is not a correct choice.

If the market’s employees were liable for the plaintiff’s emotional distress, the market itself would be liable under the principle stated in (D). But since the plaintiff cannot bring a successful suit in this case, (D) is an incorrect answer.

Most jurisdictions follow the rules of negligence when faced with suits for emotional distress caused by a defective product where there is no physical injury. The majority position is that there is no recovery absent some physical harm. 1990 N.Y.U. Annual Survey of American Law 395, 444-45.
28. A car driven by the defendant entered land owned by and in the possession of the plaintiff, without the plaintiff’s permission.

Which of the following allegations, without additional facts, would provide a sufficient basis for a prima facie trespass claim by the plaintiff against the defendant?

(A) The defendant intentionally drove his car onto the plaintiff’s land.
(B) The defendant negligently drove his car onto the plaintiff’s land.
(C) The defendant’s car damaged the plaintiff’s land. Thus, choice (C) is incorrect.
(D) None would provide a sufficient basis for a prima facie claim. Thus, choice (D) is incorrect.

28. At common law, an action for trespass could be maintained without proof of actual damage. Today, in order to recover without proof of damages, the invasion must be intentional. Thus, choice (A) is correct.

If the entry resulted from the defendant’s negligent conduct, then the plaintiff would also have to plead resulting damages to his land. Restatement (Second) of Torts § 163. Thus, choice (C) is incorrect.

Also, if the entry was non-negligent and unintentional, there is no liability even if damage is caused. Restatement (Second) of Torts § 165. Thus, choice (D) is incorrect.
29. The buyer and seller entered into a contract for the sale of the seller’s home subject to a favorable inspection report. The home inspector hired by the buyer discovered that the oil tank was leaking. As a result of the leak, the buyer was able to cancel the contract. The seller then had the oil tank retested by two different inspectors, who each determined that the oil tank was not leaking and that the buyer’s inspector conducted an inaccurate test.

Is the seller entitled to recover damages from the inspector?

(A) Yes, for breach of contract to recover the costs incurred in having the tank retested.
(B) Yes, for tortious interference with the seller’s contract with the buyer.
(C) Yes, for negligence by the inspector in conducting the test.
(D) No, the seller does not have a viable claim against the inspector.

29. Regardless of whether the inspector properly tested the tank, any failure on his part was negligent rather than intentional. The seller cannot recover for tortious interference with the contract with the buyer since the inspector’s conduct was not intentional. *Feller v. Siwek*, 151 A.D.2d 813 (3d Dep’t 1989).

The seller cannot sue for his economic loss based on the inspector’s contract with the buyer since the seller lacked privity of contract with the inspector and no special relationship existed between the inspector and the seller.

Likewise, the seller has no claim for negligence against the inspector, since the seller suffered no “physical injury.” When the only loss suffered is economic loss, no claim for negligence can be asserted.

Accordingly, the correct answer is (D).
30. A brother borrowed $12,000 from his sister which he promised to pay back within 30 days. The brother did not repay back the loan.

While the loan was outstanding, the brother negotiated for a $20,000 unsecured loan with a bank. The brother assured the lending officer that he was debt free and an extremely low credit risk for the bank.

While attending a football game attended by more than 80,000 football fans, including the lending officer, the sister flew over the stadium in a plane pulling a large banner which indicated for everyone to see that the brother owed her $12,000 that he refused to pay back. Although the brother liked the attention, the sister’s banner caused the lending officer to deny the loan application.

If the brother sues his sister, what is his best theory for a recovery?

(A) Intentional interference with a contract.
(B) Intentional infliction of emotional distress.
(C) Defamation.
(D) Invasion of privacy.

30. The best way to correctly answer this question is by basic process of elimination. The tort of intentional infliction of emotional harm requires two components (SAD C.E.O.). First, the defendant’s conduct must be extreme and outrageous; second, the plaintiff must suffer severe debilitating emotional harm. This second element is what would defeat the brother’s claim for this tort. The facts state that the brother “liked the attention.” Choice (B), therefore, is incorrect.

The sister, although holding her brother up to ridicule, contempt or scorn, is not liable for defamation because her statement was not false, i.e., the brother had not timely paid her the $12,000 loan. Thus, choice (C) is ruled out, too.

Finally, the sister’s conduct did not constitute tortious interference with a contract (“KID”) for two reasons: (1) she did not know of her brother’s contract arrangement; and (2) at the time of the sister’s conduct, the brother did not yet have an enforceable contract. Thus, (A) is eliminated, leaving (D) as the best answer.
Examples of Duties of Care:

1. A landlord is not an insurer for those entering the premises, but a LL owes a duty to take minimal precautions to protect tenants and visitors from foreseeable criminal harm by 3rd persons. To defeat a LL’s § 3212 motion for SJ, the Π must plead and prove that the crime committed on the premises was reasonably foreseeable based on prior criminal activity in that building and the Π must further show that the criminal actor gained access to the building due to the LL’s negligence.

PROBLEM: P was shot in the face in an attempted robbery while P was using B Bank’s outdoor ATM machine. The court found there was no pattern of similar criminal activity, which might have made the crime foreseeable, even though B was located in a high crime neighborhood. The bank was granted SJ by NY COA (2007).

2. A school district owes a duty of adequate supervision and will be held liable for foreseeable injuries proximately caused by the absence of adequate supervision of the students.

3. A duty is owed by a psychiatrist to a specifically identifiable victim who the patient expressed an intent to kill. The therapist/patient confidentiality privilege must give way to the greater duty to prevent a clear and imminent harm to others. Terasoff case. However, where a prison psychiatrist negligently failed to report a prisoner’s dangerous mental disorder which resulted in the prisoner being released and enrolling in college where he raped and murdered a co-ed on the first night of class, no duty was owed by the doctor to the general public, so no tort liability could be asserted against the psychiatrist even though the injury was foreseeable.

4. A duty is owed by a driver to others on the road. However, if a non-negligent driver has a sudden, unexpected heart attack, he will not be liable for the injuries he causes.

Examples of Where No Legal Duty of Care is Owed:

1. A property owner to a passerby who is dragged by a criminal through the front door with a broken lock, even though the owner breached its duty owed to tenants and guests visiting the building;

2. A golfer owes no duty to a motorist out on the highway and there’s no duty to warn others on a different fairway. The only duty owed is to those within the intended flight of the ball.

3. No duty is owed by a theatre to protect patrons sitting in the theatre when someone comes in late for the performance and falls onto the sitting patron;

4. Owners of buildings do not owe neighborhood businesses a duty to protect them from economic harm caused by the negligent collapse of their own building.

5. After a powerful storm, an 80 ft. tree on Blackacre leaned dangerously over the driveway of Whiteacre. The owner of Whiteacre called the village to report the damaged tree and reported that the roots were dangerously loosened and could fall at any moment.

QUERY: Does the owner of Whiteacre have a DIP duty to warn a delivery truck (business invitee) who drove up Whiteacre’s driveway and was killed when the tree suddenly fell? No, there’s no duty to warn of a condition on adjoining property where the owner did not cause or create the dangerous condition on adjoining land.

6. An uninvolved bystander has no civil or criminal duty to aid a person in peril, even though the rescue could have been performed with no risk to the rescuer, unless the actor’s activity or an instrumentality under his control tortuously or innocently caused the plaintiff’s peril.

PROBLEM: If Barbara is blind and bumps into P on the riverbank and P falls into the water and begins to drown, D, a bystander, has no duty to help P even though it would pose no risk to D. However, if D accidentally bumped into P and P fell in, now a duty is owed.
TORTS IN-CLASS PROBLEM #1

Ian, a 15-year old was tossing lighted firecrackers off the roof of his apartment. One landed in Paul’s convertible causing Paul to lose control of his car, and to slam into Xavier’s car which, because of a defectively designed gas tank, exploded, causing both Paul and Xavier to be burned. Frank, Ian’s father, was up on the roof with Ian but Frank did not throw any of the firecrackers. What are the rights of the parties?

Under the Palsgraf foreseeable zone of danger doctrine, Ian is liable for his own negligence because, under the circumstances, he owed a duty of care to those persons to whom he reasonably could foresee some injury occurring as a result of his dangerous, tortious conduct.

It is not necessary that the negligent defendant (Ian) should have anticipated Paul’s particular injury; it is sufficient that his act was likely to result in injury to someone within that zone of danger. 73 Ohio.3d at 619 (1995). That a defendant could not anticipate the precise manner of the accident or the exact extent of the injuries, does not preclude liability where the general risk of the injuries are foreseeable. 51 N.Y.2d 308, 316-17.

The exploding gas tank is not an independent intervening cause that would relieve Ian of liability for Paul & Xavier’s injuries. There is no requirement that a defendant foresee the exact circumstances that caused Paul’s injuries. Here, Xavier’s car was impacted as a direct proximate cause of Ian’s tortious conduct.

Under the “second impact doctrine” (a.k.a. “second injury” theory), the manufacturer of Xavier’s car would be liable for those injuries proximately flowing from the explosion. When a second instrumentality aggravates an injury due to a “DIM” (design, inadequate warning, manufacturing) defect in that product, then the manufacturer will be liable for those additional injuries under strict products liability. The plaintiff must establish that his injuries were more severe than they would have been had the car not been dangerously defective. Cornier v. Spagna, 101 A.D.2d 141 (1984).

Frank would be liable to Paul and Xavier because he entrusted or knowingly allowed Ian, his SICK child, to possess a dangerous instrumentality (firecrackers) which under the circumstances created a foreseeable unreasonable risk of harm to others.

Based upon the “substantial certainty” of harm (intentional tort standard) or the fact that the risk of harm to others was so great that it was “highly probable” that harm would result (reckless conduct standard), Ian and Frank may be liable for punitive damages.
PROBLEM: T, tenant, leased a one-family house in MBE from O, Owner. In the lease, O agreed to make any necessary repairs. T repeatedly notified O that there was a hole in the front walk about 1-foot wide and 8-inches deep. P came to visit T’s daughter to do homework. As P was leaving, he fell into the hole, which was covered with leaves. P sprained his ankle. T’s milkman, M, who was bringing milk to T’s front door, saw P fall. M ran to P’s aid. Just at that moment, a flowerpot fell from the second floor window smashing onto the front walk causing serious facial injuries to M and P.

QUERY: What are the rights and liabilities of the parties?

ANSWER:

1. O is liable to P because a landlord who expressly covenants to make repairs (POLICE) can be sued in tort for a breach of that duty which proximately causes personal injury.

2. T is also liable to P for P’s ankle. In MBE, P is a licensee, and thus T’s only duty was to warn P of the latent defects of which the tenant was aware. He was aware of the hole as evidenced by his repeated complaints to O. P failed (breached a duty of care) to warn P of the latent dangerous condition which proximately caused P’s injury.

3. T is not liable to P for P’s facial injuries because T’s liability and duty to a licensee was limited to warning P of latent defects of which T was aware. The flowerpot is not considered to be such a defect. P’s facial injuries were not proximately caused by the hole in the front walk, but rather by the falling flowerpot which was an independent intervening, superseding cause not proximately flowing from the hole in the front walk.

4. Since M, the milkman, was an invitee, M was owed a greater duty of care by T to inspect the premises for dangerous conditions and to make the premises reasonably safe for invitees. The duty owed to an invitee is not only to prevent harm from known defects, but also from latent risks that T could have discovered by exercising reasonable care. To assist M in circumstantially proving T’s lack of due care, M could invoke the (LARGE CDD) doctrine of Res Ipsa, because (PEA) the plaintiff’s conduct did not contribute to his own injury, the instrumentality (the flowerpot) was under T’s exclusive control, and in the absence of negligence flowerpots generally do not fall out of windows (it speaks for itself).

QUERY: Could M sue O under the (LARGE CDD) doctrine of Res Ipsa or Danger Invites Rescue?

ANSWER: No, Danger Invites Rescue cannot be invoked because O’s liability from breach of his duty was cut off by the independent intervening bizarre and unforeseeable superseding cause of the falling flowerpot. Likewise, Res Ipsa cannot be invoked against O because O, as a LL out of possession, did not have exclusive control of the windowsill. Thus, M’s injuries were not proximately caused by O’s breach of duty.