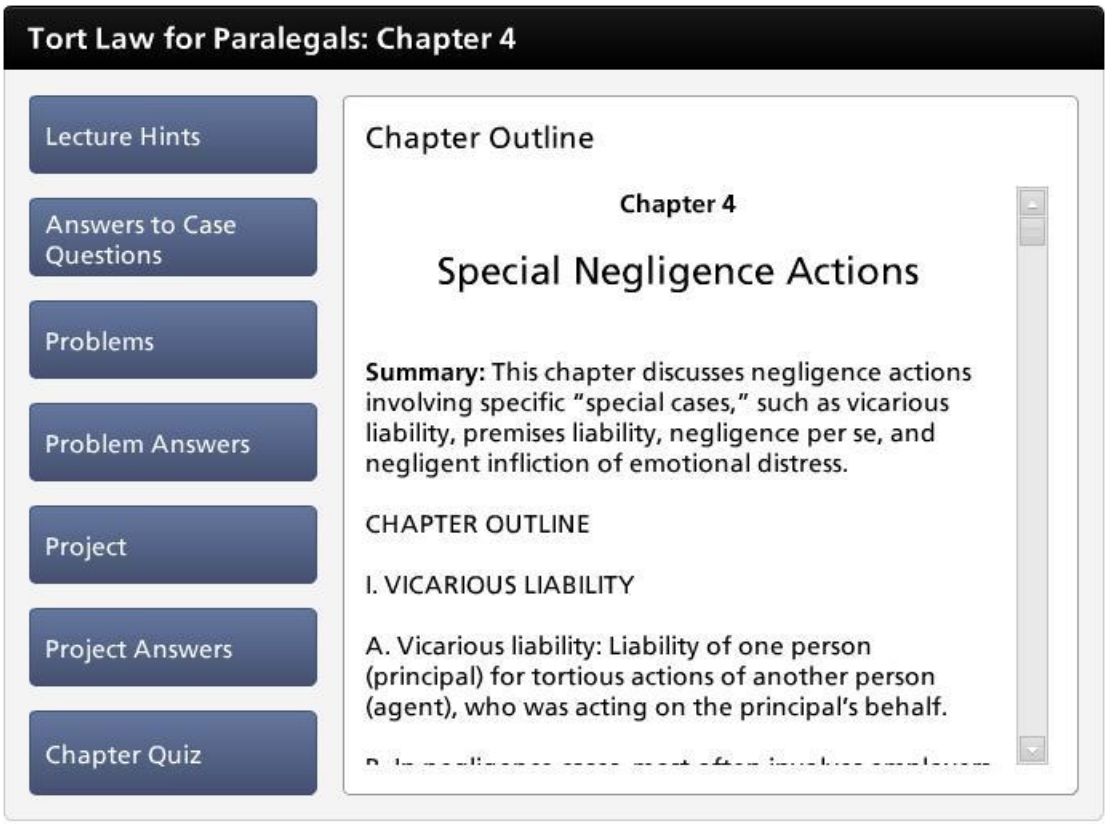
Tort Law for Paralegals: Chapter 4

Chapter Outline



Step Text

Chapter 4

Special Negligence Actions

Summary: This chapter discusses negligence actions involving specific "special cases," such as vicarious liability, premises liability, negligence per se, and negligent infliction of emotional distress.

CHAPTER OUTLINE

I. VICARIOUS LIABILITY

A. Vicarious liability: Liability of one person (principal) for tortious actions of another person (agent), who was acting on the principal's behalf.

B. In negligence cases, most often involves employers and employees or principals and agents.

1. Employment is not a required element, however.

2. Key question: Was the agent acting on behalf of the principal when the agent committed the tort?

C. Respondeat superior ("Let the superior answer")

1. Employer is responsible for torts committed by employees within scope of employment.

2. Doctrine also used for other principal/agent relationships.

3. Scope of employment = range of conduct that employer expects employee to perform as part of employee's job.

4. Activities outside scope of employment:

a. Coming and going rule:
(1) When employees are coming to or going from work, this is normally outside the scope of employment, and employers are not vicariously liable for employees' torts committed during such times.
(2) Exception: When employee is performing job-related tasks for employer while coming to, or going from, work.

b. Frolic and detour rule:
(1) When employees "sidetrack" (go off on their own) from ordinary employment duties and commit torts.
(2) Employers are not vicariously liable under such circumstances.

D. Independent contractors:

1. Persons who have entered into contract with another person to perform specific task.

2. Independent contractors are not considered employees or agents of persons who hired them, and the hirers are not vicariously liable for independent contractors' torts.

3. Independent contractors are distinguishable from employees, because contractors control how they perform job, whereas employers control how employees perform jobs.

E. Motor vehicle vicarious liability:

1. Early-twentieth-century common law-passenger vicarious liability:

a. Held motor vehicle passengers vicariously liable for negligence of drivers, if vehicle occupants were involved in joint enterprise.

b. Legal commentators and courts criticized this rule for decades as unduly harsh to passengers.

2. Vehicle owner vicarious liability a. For most of the twentieth century, courts have held that vehicle owner is vicariously liable for the negligence of the driver (when the driver is not the owner).

b. Public policy justification, as vehicle owners are more likely to obtain insurance to cover negligent injuries involving their vehicles.

3. Modern statutory trends: Most states have motor vehicle consent statutes, which affect vicarious liability for owners and occupants of vehicles.

II. PREMISES LIABILITY

A. Owners and occupiers

1. Landowners

2. Tenants (lessees)

B. Occupier's various and differing duties of reasonable care

1. Distinctions based on victim's status (reasons for being) on the land

2. Three common law categories-victim (plaintiff) as:
a. Trespasser
b. Licensee
c. Invitee

C. Modern judicial trends: Many courts have moved away from these common law categories and relied upon regular negligence theory instead.

See, e.g., *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

III. OCCUPIERS' DUTY OF CARE TO TRESPASSERS

A. Occupiers have "zero" duty to adult trespassers.

1. Occupiers owe no duty of reasonable care to trespassing adults.
a. This means that occupiers do not have to search their property to safeguard it from (or against) trespassers.
b. Trespassers assume risk when trespassing another's land.

2. Occupiers cannot intentionally injure trespassers on their land, however.

B. Special rule for trespassing children

1. Attractive nuisance:
a. The owner must know or have reason to know of the danger.
b. The condition or structure must be alluring to children and endanger them.
c. The presence of children must reasonably have been anticipated.
d. The danger posed to the children outweighs the cost of making the condition safe.

2. Restatement (Second) of Torts § 339:

a. No attraction element is required.

b. Elements (to establish occupiers' liability for injuries to trespassing children):
(1) Injury to trespassing child was reasonably foreseeable.
(2) Danger on land presented unreasonable risk of harm to trespassing children.
(3) Danger on land was artificial (manmade), rather than natural.
(4) Because of child's youth, he or she could not appreciate risks involved or did not discover (or understand) threat.
(5) Threatening condition was located at place across which children were likely to trespass.
(6) Occupier failed to exercise reasonable care to protect trespassing children from danger that caused harm.

c. The Restatement embodies regular negligence theory. d. Many courts have adopted the Restatement position, although some discard the artificial condition requirement.

IV. OCCUPIERS' DUTY OF CARE TO LICENSEES

A. Licensees = persons having occupier's permission to be upon occupier's land.

B. Occupiers have consented to licensees' presence. Consent may be expressed (e.g., social guests) or implied (e.g., frequent trespassers).

C. Occupiers' duty of care to licensees = duty of reasonable care.

1. Occupier has obligation to correct known dangers (both artificial and natural) on his or her land.

2. If occupier knows, or reasonably should have known, that hazardous condition existed on realty, then he or she must exercise reasonable care in safeguarding licensees from such risks. For example, guest is shocked by holding door to refrigerator that has electric short, about which landowner should have known (presumably having opened door and been shocked, too, at some time).

3. The occupier is not required to discover unknown dangers for licensees.

V. OCCUPIERS' DUTY OF CARE TO INVITEES

A. Invitees (business invitees) = persons invited upon occupier's premises by occupier.

B. Older cases limited term to persons invited upon occupier's premises for business-related purposes. Modern cases have discarded this limitation, indicating that anyone invited by occupier for any reason falls within the definition.

C. Occupier's invitation may be expressed (e.g., sign outside charitable organization stating "all are welcome here") or implied (e.g., store advertising sales).

D. Occupier's duty of care to invitees = duty of reasonable care.

1. Occupier must repair known (or reasonably knowable) dangers upon land.

2. Occupier must also discover and correct unknown dangers.

E. Invitees and licensees distinguished:

1. Occupier actively solicits invitees onto premises.

2. Occupier has granted permission, often passively and without encouragement, to licensees to be upon premises.

F. Limited areas of invitation:

1. Occupier may restrict invitees' access to certain areas on the real estate (e.g., storerooms, dressing rooms, management offices, machinery rooms, etc.).

2. Invitees who wander into restricted areas may become trespassers or licensees (if occupier tolerates frequent trespasses into restricted areas).

VI. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

A. Recall that emotional distress = mental anguish caused by tortfeasor.

B. Elements:

1. Tortfeasor's outrageous conduct, which

2. Tortfeasor reasonably should have anticipated would produce

3. Significant and reasonable foreseeable emotional injuries to a victim.

4. Tortfeasor breached duty of reasonable care to avoid causing such emotional harm to victim. 5. Victim was reasonably foreseeable plaintiff.

C. Extra elements (required in some jurisdictions). Some states' common law requires one or more additional elements:

1. Impact rule: Minority of courts hold that the tortfeasor must have physically impacted the victim if the victim is to recover for negligent infliction of emotional distress.

2. Physical manifestations rule:

a. Requires that, in addition to mental anguish, the victim must suffer physical symptoms associated with emotional distress.

b. The majority of courts have applied some variation of this rule.

3. Zone of danger rule:

a. If a bystander suffers emotional distress while observing negligent injury to another, the bystander may recover damages from the tortfeasor (who negligently injured other person) if the bystander fell within zone of danger created by the tortfeasor's negligent actions.

b. Additional elements of zone of danger rule (used by many courts):

(1) Family relationships rule-bystander must be related to negligence victim to recover for negligent infliction of emotional distress.
(2) Sensory perception rule-bystander must perceive negligent injuries to victim directly through senses (sight, hearing, smell, taste, touch).

c. California approach: (1) Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (2) The California Supreme Court jettisoned the zone of danger rule in favor of foreseeability.

(3) Court asked: Was it reasonably foreseeable that plaintiff would suffer severe mental anguish as result of defendant's actions?

(4) Dillon rule streamlined analysis for bystanders and negligence victims-same formula applied in all cases.

(5) Court's guidelines:

(a) Physical proximity: Bystander's closeness to emotionally disturbing incident.

(b) Family relationships rule: Bystander's relationship to injured party.

(c) Sensory perception rule: Whether bystander personally perceived emotionally distressing event.

(d) Physical manifestations rule: Whether bystander had physical symptoms accompanying mental anguish.

VII. NEGLIGENCE PER SE

A. Conduct that is automatically negligent as matter of law.

B. Behavior is negligent "by itself" because it violates a statute or ordinance.

C. To meet the burden of proof, the plaintiff need only prove that the defendant violated a statute or ordinance. The defendant is then presumed negligent.

D. The plaintiff must prove that he or she falls within a class of persons protected by statute. For example, the customer becomes ill from eating spoiled food at a restaurant, when spoilage occurred because of the restaurant's violation of public health statutes. The plaintiff, as a restaurant patron, was within a class of persons protected by public health statutes, and so the restaurant was negligent per se by violating the statutes).

E. The defendant may disprove the negligence presumption, perhaps through proof that the defendant did not proximately cause the plaintiff's injuries, or the like.

F. Applicability of negligence defenses

1. Sometimes defined by statutes or ordinances, but more commonly defined by common law interpretations of statutes or ordinances.

2. Often defenses of contributory negligence, comparative negligence, or assumption of risk apply in negligence per se cases.

G. Mislabeling of negligence per se as absolute liability

1. Courts sometimes confuse these concepts, but they are distinguishable.

2. Under negligence per se, the defendant is presumed to be negligent, but can disprove negligence to avoid liability. Under strict liability, the defendant cannot escape liability in this way.

Lecture Hints

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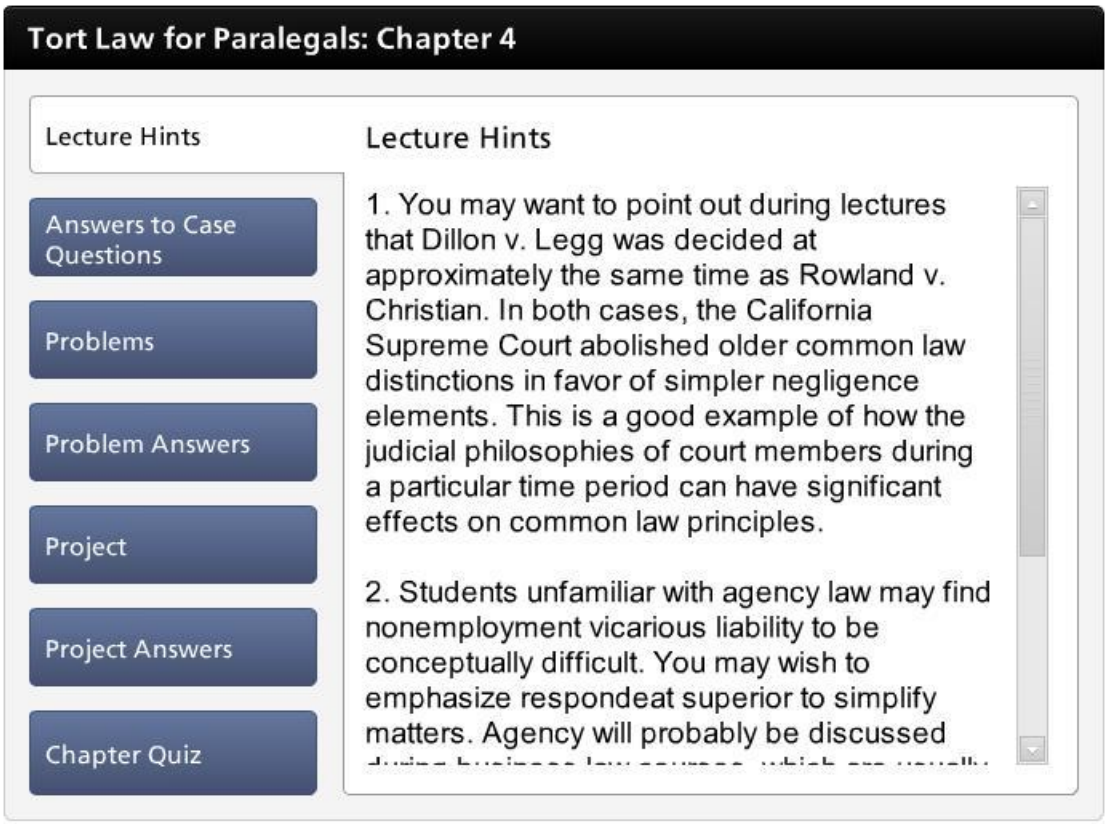

Step Text

1. You may want to point out during lectures that Dillon v. Legg was decided at approximately the same time as Rowland v. Christian. In both cases, the California Supreme Court abolished older common law distinctions in favor of simpler negligence elements. This is a good example of how the judicial philosophies of court members during a particular time period can have significant effects on common law principles.

2. Students unfamiliar with agency law may find nonemployment vicarious liability to be conceptually difficult. You may wish to emphasize respondeat superior to simplify matters. Agency will

probably be discussed during business law courses, which are usually required for paralegal students.

3. You may wish to discuss your jurisdiction's motor vehicle consent statutes in class.

4. Some instructors prefer to simultaneously discuss all three types of infliction of emotional distress: intentional, reckless, and negligent.

Answers to Case Questions

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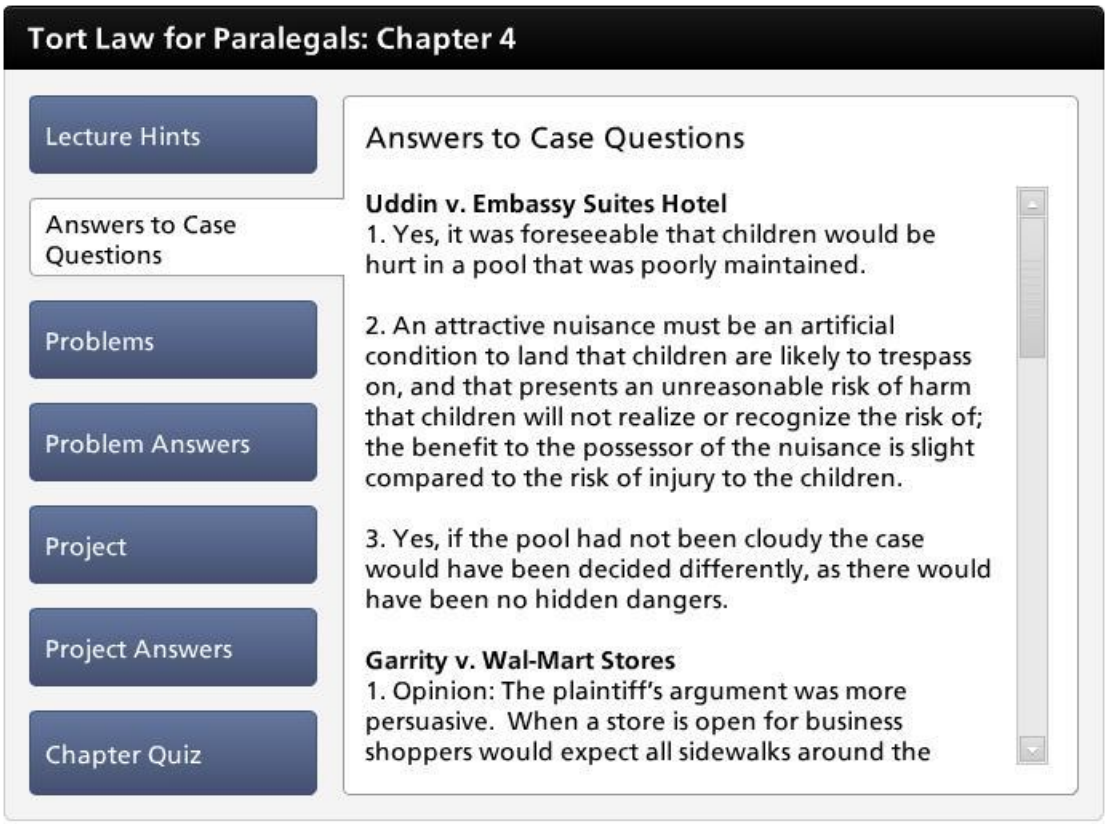

Step Text

Uddin v. Embassy Suites Hotel
1. Yes, it was foreseeable that children would be hurt in a pool that was poorly maintained.

2. An attractive nuisance must be an artificial condition to land that children are likely to trespass on, and that presents an unreasonable risk of harm that children will not realize or recognize the risk of; the benefit to the possessor of the nuisance is slight compared to the risk of injury to the children.

3. Yes, if the pool had not been cloudy the case would have been decided differently, as there would have been no hidden dangers.

Garrity v. Wal-Mart Stores

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1. Opinion: The plaintiff's argument was more persuasive. When a store is open for business shoppers would expect all sidewalks around the store to be cleared of snow and ice, even if one department of the store was not open. The fact that several witnesses claimed the path looked clear draws you to the plaintiff's view of the events. The store's position that the shopper should have waited for another day to return the item unless he was sure the path was clear is a silly argument at best.

2. Opinion: While it is difficult for anyone to detect black ice, one of the principles of tort law is assigning responsibility to the party who can best bear the loss. In a dispute between a shopper and a store owner, the result is clear.

Murphy v. Lord Thompson Manor, Inc.
1. It is very hard to judge the amount of another's suffering, particularly when you really do not know the person.

2. Considering the plaintiff was obsessed with a dream wedding and wanted it to last a whole weekend, and went to such great lengths in planning her ideal wedding, and the fact that she would not be content with a traditional ceremony, but wanted a weekend of continuing festivities, the amount awarded seemed small.

Tonner v. Cirian
1. The court was weighing the principle of comparative negligence. Even if one driver had the right of way, the driver still had an obligation to scan the intersection before proceeding.

2. The statute involved in the case was the duty to yield the right of way to a vehicle approaching from the right (§ 61-8-339(1), MCA (2007). If this statute did not exist, whoever approached the intersection first would most likely have had the right of way.

Problems

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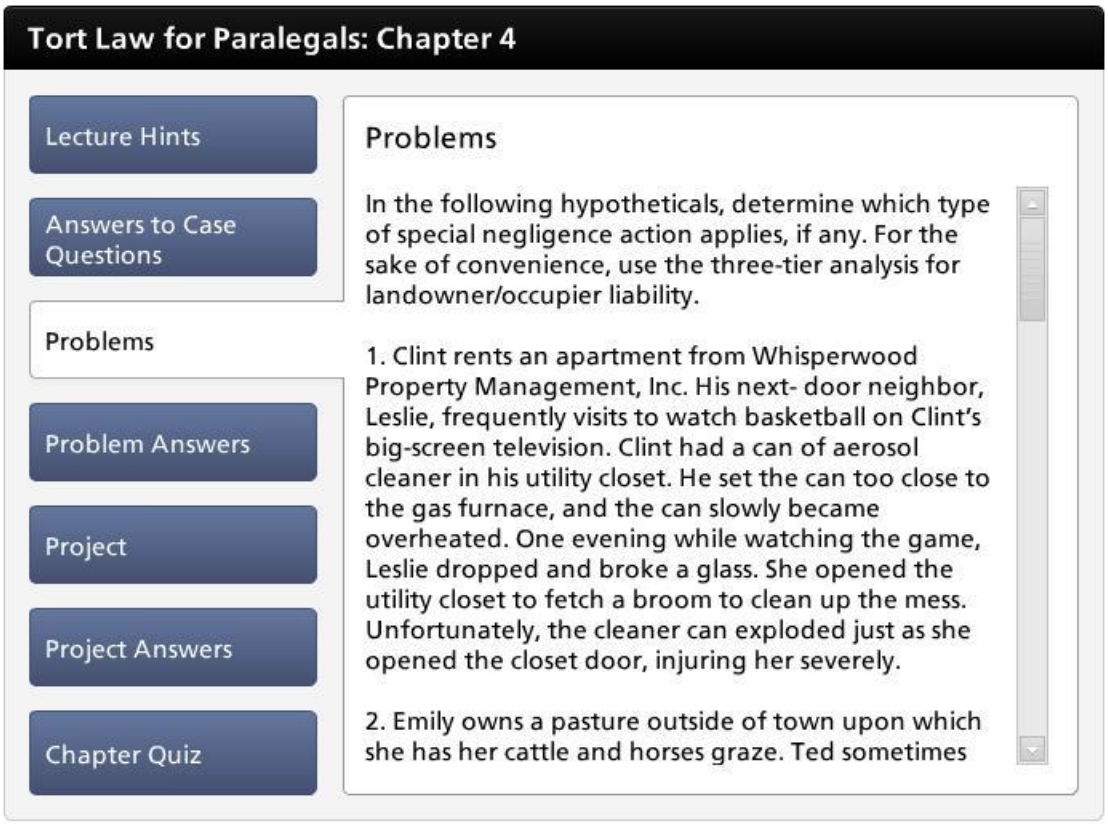

Step Text

In the following hypotheticals, determine which type of special negligence action applies, if any. For the sake of convenience, use the three-tier analysis for landowner/occupier liability.

1. Clint rents an apartment from Whisperwood Property Management, Inc. His next- door neighbor, Leslie, frequently visits to watch basketball on Clint's big-screen television. Clint had a can of aerosol cleaner in his utility closet. He set the can too close to the gas furnace, and the can slowly became overheated. One evening while watching the game, Leslie dropped and broke a glass. She opened the utility closet to fetch a broom to clean up the mess. Unfortunately, the cleaner can exploded just as she opened the closet door, injuring her severely.

2. Emily owns a pasture outside of town upon which she has her cattle and horses graze. Ted sometimes crosses the pasture as a shortcut to work. All around the property are posted signs stating in clear, red-and-black letters, "NO TRESPASSING! YES, YOU!" One day Emily saw Ted cutting across her land and warned him not to continue doing so in the future. Ted ignored the warning. Weeks later, Ted fell into a mud bog (which he could not see, because it was covered by fallen leaves). He sank to his chest and could not escape. He remained there for three days until a passing postal carrier stumbled upon his predicament. Ted suffered from severe malnutrition and exposure from the incident. As a result, he contracted pneumonia and was hospitalized for two weeks.

3. Davis operates a beauty shop. Kate comes in regularly for perms and haircuts. One of Davis's employees, Flower, absentmindedly left her electric shears on the seat of one of the hair dryers. Davis did not notice the shears when he had Kate sit in that chair to dry her newly permed hair. Unknown to everybody, the shears had an electrical short. When Davis turned on the hair dryer, the shears shorted out and electrocuted Kate, who was unknowingly sitting against the shears.

4. Susan hired Grass Goddess, a lawn care company, to fertilize and water her yard. One of the company's employees, Gupta, incorrectly mixed the fertilizer so that it contained 12 times the necessary amount of potassium. Gupta applied this mixture to Susan's grass. Honey , Susan's neighbor, came to Susan's party that night and played volleyball in the backyard. She frequently fell and rolled on the grass while diving to return the ball over the net. The next day, Honey developed a painful rash all over her body. She usually noticed these symptoms, although less severely, when she ate bananas, which are high in potassium.

5. Jon is a sales executive for a local automobile dealership. He often drives to the manufacturing facility 150 miles from the dealership to check on new orders. Jon's employer reimburses him for gasoline, food, and lodging, and provides John with a dealer car to drive. While driving to the manufacturing plant, Jon decided to stop by his cousin's house for dinner. His boss accompanied him on the visit "to get a decent meal for a change." While on the way there, Jon collided with and injured a motorcyclist.

6. Matthew has a five-year-old son with whom he often plays catch in the front yard. Sometimes the wind catches their ball and blows it into the street. Matthew has warned his son never to chase the ball into the road, but one day, when the ball blew into the street, Matthew's son ran after it. A truck driver swerved and struck the boy with the edge of the vehicle's bumper. The child suffered only a few bruises and scrapes. Matthew, however, developed a nervous twitch, ulcers, and an extreme sensitivity to

sudden movements. He lost weight and experienced terrible nightmares about the incident.

Problem Answers

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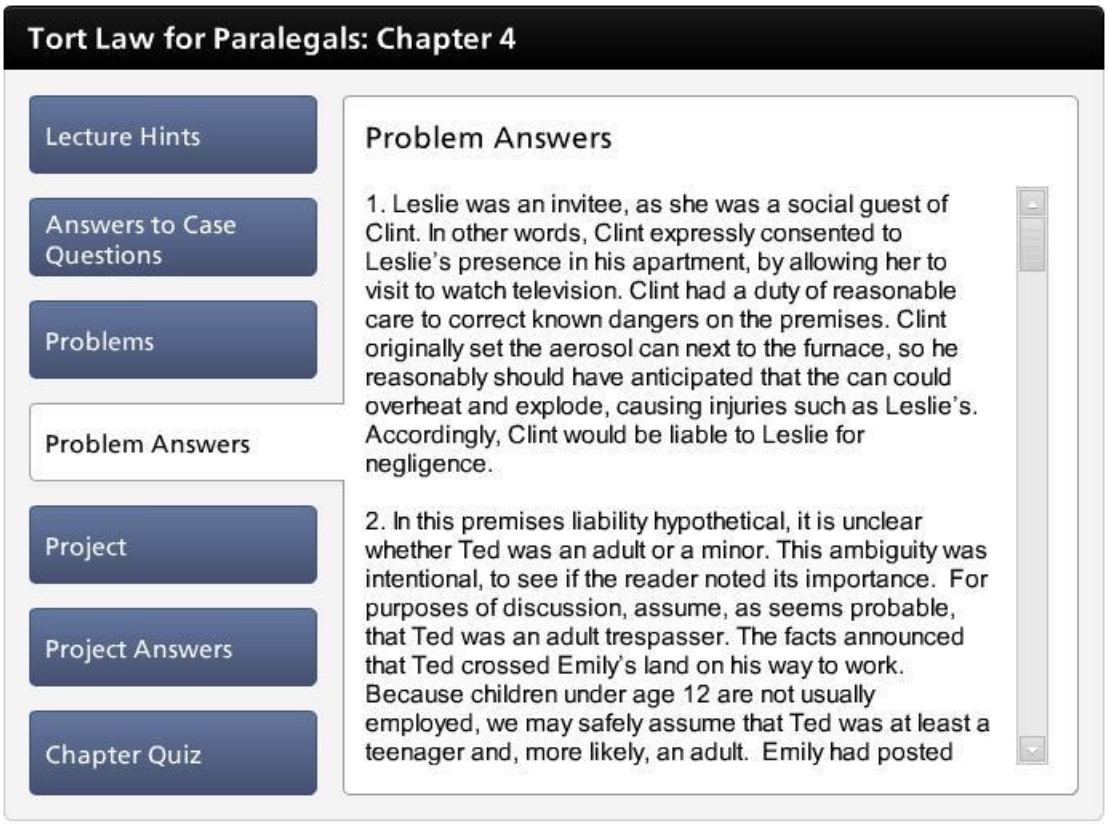

Step Text

1. Leslie was an invitee, as she was a social guest of Clint. In other words, Clint expressly consented to Leslie's presence in his apartment, by allowing her to visit to watch television. Clint had a duty of reasonable care to correct known dangers on the premises. Clint originally set the aerosol can next to the furnace, so he reasonably should have anticipated that the can could overheat and explode, causing injuries such as Leslie's. Accordingly, Clint would be liable to Leslie for negligence.

2. In this premises liability hypothetical, it is unclear whether Ted was an adult or a minor. This ambiguity was intentional, to see if the reader noted its importance. For purposes of discussion, assume, as seems probable, that Ted was an adult trespasser. The facts announced that Ted crossed Emily's land on his way to work. Because children under age 12 are not usually employed, we may safely

assume that Ted was at least a teenager and, more likely, an adult. Emily had posted many "no trespassing" signs; furthermore, she plainly warned Ted against further trespassing. Accordingly, Emily owed no duty of care to Ted. He assumed whatever risks he encountered while trespassing upon Emily's land, including the mud bog within which he became trapped. Emily did not intentionally injure Ted. Thus, Emily would not be liable for negligence for Ted's injuries. What if Ted had been between ages 12 and 18? Would the outcome of the case have been different, under attractive nuisance theory? No. As a teenager, Ted reasonably should have observed Emily's warning and "no trespassing" signs. He could have exercised greater caution while continuing to trespass. Attractive nuisance generally applies in situations involving younger children who cannot readily appreciate the dangers posed by trespassing. Clearly, Ted could have recognized the risks. Thus, attractive nuisance theory would not apply.

3. This hypothetical poses negligence issues regarding premises liability and vicarious liability. Kate was an invitee, because she was one of Davis's regular customers invited to patronize his business. Accordingly, Davis owed Kate a duty of reasonable care to inspect the premises to discover and correct known and unknown dangers. Clearly, Davis should have been aware of the electric shears left on the dryer seat. Further, through reasonable inspection of the shears, Davis could have discovered the electrical short. Thus, Davis breached his duty of care to Kate and would be liable for negligently causing her injuries. The second issue is vicarious liability. Is Davis responsible for Flower's negligent actions? Flower breached the duty of care by leaving the dangerous shears where someone would sit. Further, Flower should have recognized the electric short, simply by using the shears. Thus, Flower was negligent. Under respondeat superior, Flower's negligence may be imputed to Davis, her employer. Davis is responsible for Flower's negligent acts that fall within the scope of her employment. Flower's careless placement of the defective shears clearly falls within this scope. Thus, Davis would be vicariously liable to Kate for Flower's negligence.

4. This hypothetical involves issues of vicarious liability and premises liability. The analysis should focus upon Susan's liability to Honey for the latter's severe allergic reaction to potassium. Under vicarious liability, the issue may be phrased as follows: Is Susan liable for the negligence of Grass Goddess's employee, Gupta, under respondeat superior? Or is the company an independent contractor? The company (and its employee) are independent contractors. Although Susan hired the firm, it controlled how Susan's lawn was fertilized. Susan had no say in how the company performed its tasks. Thus, under vicarious liability, Susan would not be liable to Honey for the latter's injuries. Would Susan be liable to Honey under premises liability? Honey was a social guest, as Susan expressly consented to Honey's presence at the party. Moreover, Susan invited Honey onto the premises for a specific purpose that Susan wished to serve (namely, to hold a party). Arguably, then, Honey was

more than a mere licensee-she was an invitee. This distinction is critical to the outcome of the hypothetical. If Honey was a licensee, then Susan's duty of reasonable care only required her to correct known dangers on the premises. However, if Honey was an invitee, then Susan's duty required her to discover and correct unknown dangers, such as the excessive potassium treatment. If the invitee standard applies, Susan would be liable for Honey's injuries. If the licensee standard applies, Susan would not be liable. Most courts would hold that Honey was a licensee, because the common law routinely defined social guests in this category. However, a persuasive argument can be made that the invitee standard applies. Arguably, Honey's injuries were not reasonably foreseeable, as an acute allergic reaction to potassium is medically unusual. However, under "taking the victim as you find him" analysis, Susan would still be liable, provided that Honey was defined as an invitee.

5. Two issues arise in this hypothetical. First, assuming that Jon was negligent in colliding with the motorcyclist, is Jon's employer liable under respondeat superior for the cyclist's injuries? Second, again assuming Jon's negligence, is Jon's boss vicariously liable, as a passenger pursuing a joint enterprise? Under respondeat superior, Jon's employer is liable for Jon's negligence committed within the scope of employment. Jon's actions fall within this scope because he was driving to the manufacturing facility on business. Jon was not engaged in frolic and detour by going to his cousin's for dinner, because the company anticipated Jon's stopping for meals while traveling to the manufacturing plant. The fact that Jon's boss accompanied him to this cousin's validates the business-related nature of the meal stop. If Jon were negligent in hitting the cyclist, then his employer must answer for the negligence through vicarious liability. What about Jon's boss's liability as a passenger, under the old common law rule? Because Jon and his boss were engaged in a joint enterprise (i.e., driving to the plant), the boss could be held vicariously liable for Jon's negligence. However, there is almost certainly a relevant state statute that would affect his issue.

6. This hypothetical involves negligent infliction of emotional distress. There is a threshold consideration: namely, was the truck driver negligent toward Matthew's son? This is intentionally ambiguous in the facts, again to see if the reader spotted the issue. Presume, for the sake of argument, that the driver was negligent toward Matthew's son. Say the driver was speeding when he struck the child and, applying the elements, negligence can be easily demonstrated vis-à-vis the driver and child. Now proceed to the negligent infliction question. Here, the liability would be the driver's toward Matthew. First, consider whether the elements have been satisfied. Was the truck driver's conduct outrageous? Outrageousness is defined according to the reasonable person standard: Would a reasonable person have suffered substantial emotional anguish as a result of the tortfeasor's actions? It is reasonable that, as a parent, Matthew would suffer mental trauma from observing his son being struck by a speeding trucker. The driver reasonably should have anticipated that, if he struck a child, an onlooking

parent would be emotionally distraught. Thus, Matthew's mental anguish was reasonably foreseeable. The driver breached his duty of reasonable care to avoid causing such emotional harm to Matthew by striking his son while speeding. As the injured child's parent, Matthew is clearly a reasonably foreseeable plaintiff, for emotional distress purposes. This case would be determined by the so-called extra elements. In those few states adhering to the impact rule, Matthew could not recover, as he was not physically impacted by the driver's negligent action. Nor was Matthew within the zone of danger, as he was several feet safely removed from the collision site. However, Matthew suffered physical symptoms caused by the emotional distress, which satisfies the physical manifestations test. As the child's father, Matthew also satisfies the family relationships test. Further, Matthew saw and heard the collision; accordingly, he satisfies the sensory perception test. In states following the impact rule and zone of danger rule, Matthew could not recover against the driver for negligent infliction of emotional distress. However, in states following the physical manifestations, family relationships, or sensory perception rules, Matthew could recover. Under Dillon v. Legg, Matthew could recover, because his mental anguish was reasonably foreseeable, given the driver's actions, and the court's four guidelines have been met.

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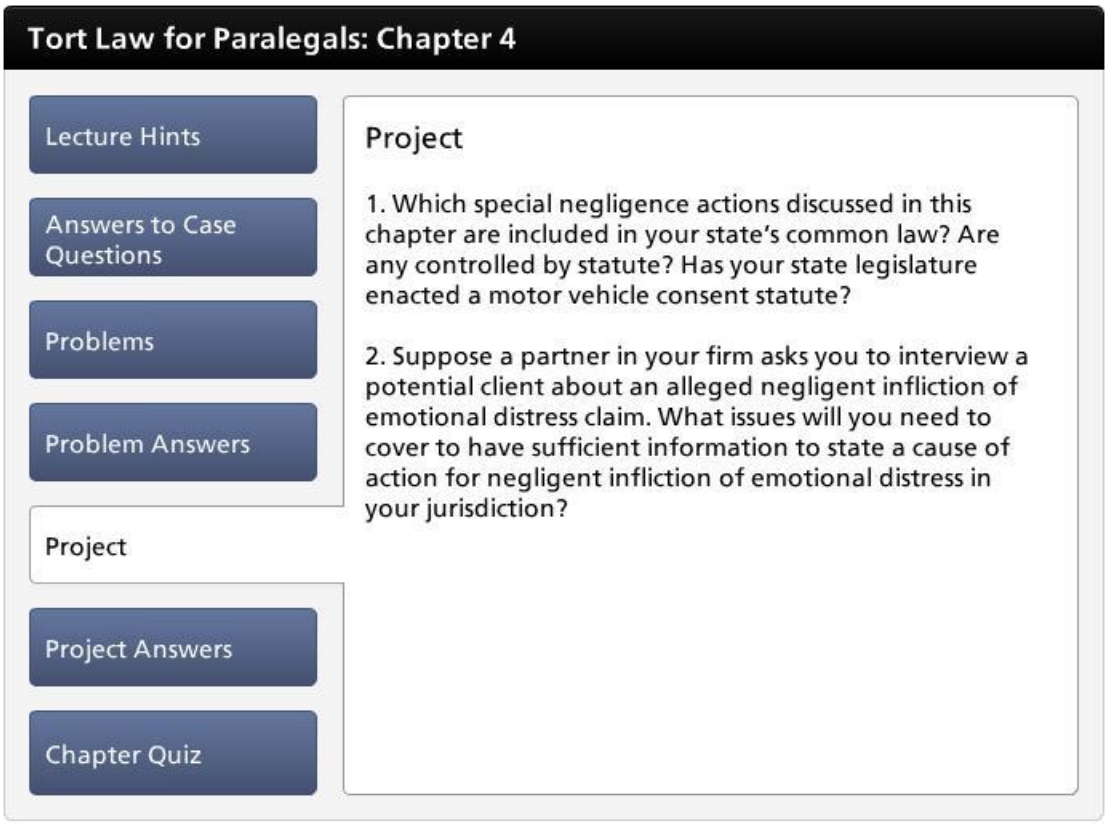

Step Text

1. Which special negligence actions discussed in this chapter are included in your state's common law? Are any controlled by statute? Has your state legislature enacted a motor vehicle consent statute?

2. Suppose a partner in your firm asks you to interview a potential client about an alleged negligent infliction of emotional distress claim. What issues will you need to cover to have sufficient information to state a cause of action for negligent infliction of emotional distress in your jurisdiction?

Project Answers

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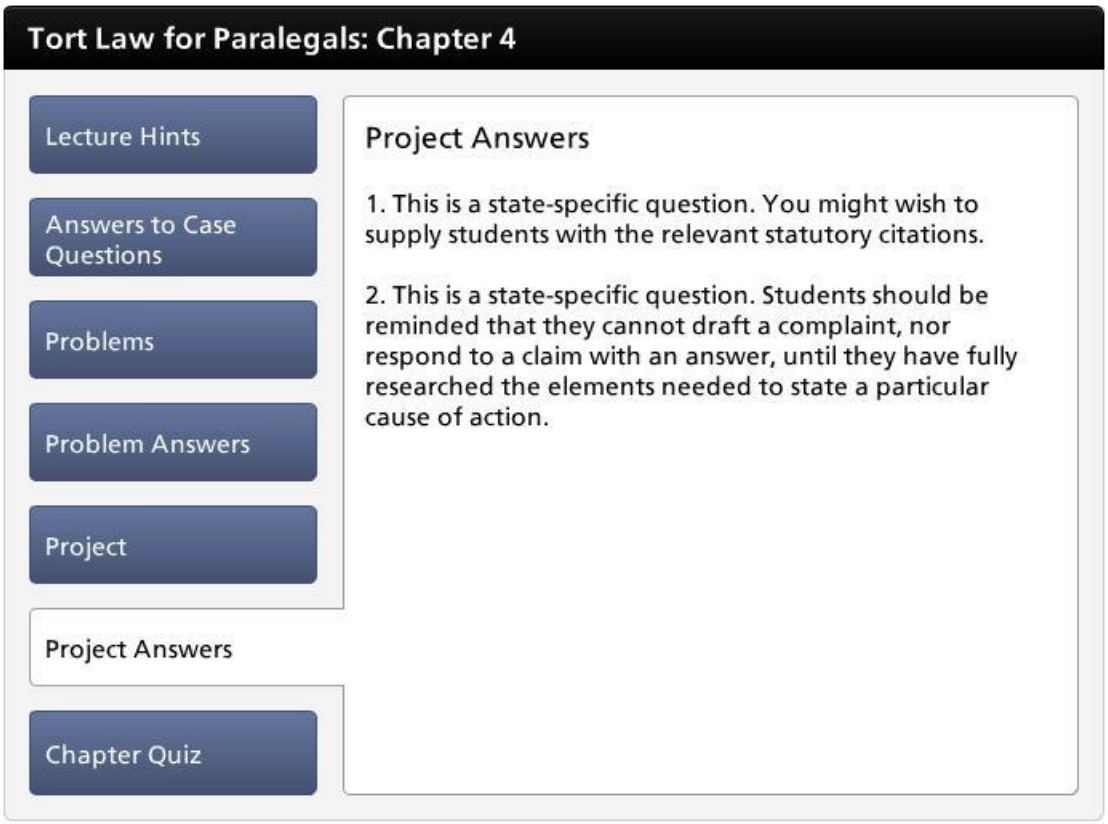

Step Text

1. This is a state-specific question. You might wish to supply students with the relevant statutory citations.

2. This is a state-specific question. Students should be reminded that they cannot draft a complaint, nor respond to a claim with an answer, until they have fully researched the elements needed to state a particular cause of action.

Chapter Quiz

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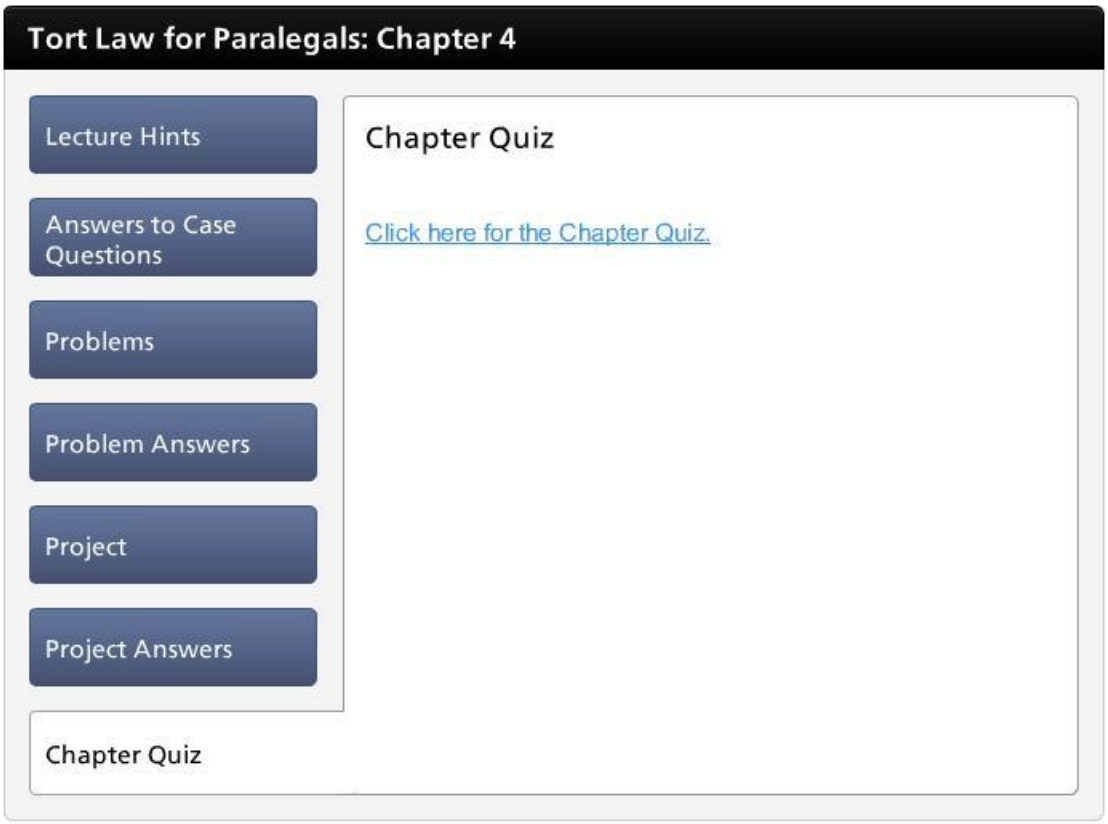

Step Text

Click here for the Chapter Quiz.