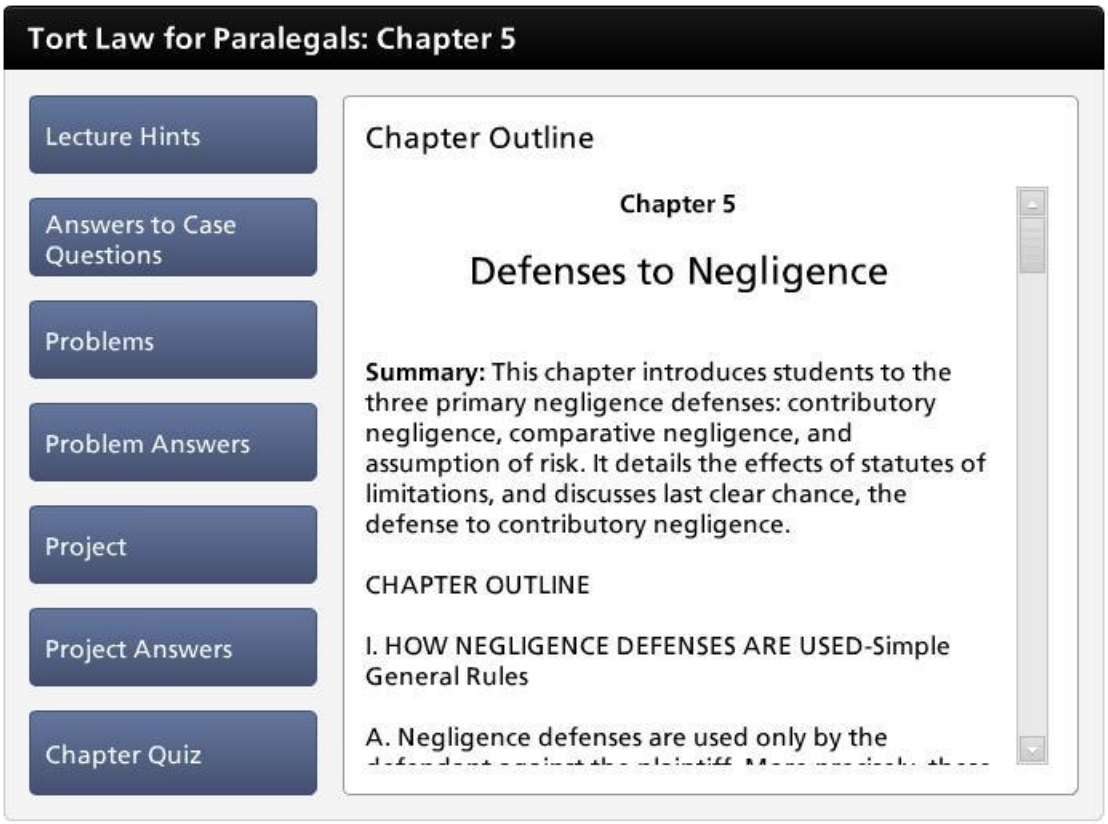
Tort Law for Paralegals: Chapter 5

Chapter Outline



Step Text

Chapter 5

Defenses to Negligence

Summary: This chapter introduces students to the three primary negligence defenses: contributory negligence, comparative negligence, and assumption of risk. It details the effects of statutes of limitations, and discusses last clear chance, the defense to contributory negligence.

CHAPTER OUTLINE

I. HOW NEGLIGENCE DEFENSES ARE USED-Simple General Rules

A. Negligence defenses are used only by the defendant against the plaintiff. More precisely, these defenses are used in response to one party's allegations that another party has been negligent.

B. Negligence defenses are applied only in response to the plaintiff's allegations that the defendant acted negligently or with willful or wanton negligence.

C. Ask yourself who is alleging negligence and who is alleged to have been negligent. The latter is entitled to use defenses.

II. CONTRIBUTORY NEGLIGENCE

A. Used by a minority of jurisdictions; in some jurisdictions this doctrine totally bars recovery by an injured plaintiff.

B. Plaintiff's negligence must have contributed to his or her injuries.

C. Elements:

1. Plaintiff's duty of reasonable care

2. Plaintiff's breach of duty

3. Causation

4. Injury

D. Common law rule:

1. Contributory negligence was an absolute bar to the plaintiff's negligence claims against the defendant.

2. For decades, courts and legal commentators criticized the harshness of this rule. Thus, the comparative negligence defense has largely replaced contributory negligence, discussed later in this chapter.

III. LAST CLEAR CHANCE

A. Plaintiff's defense against defendant's contributory negligence defense

B. The defendant cannot escape negligence liability if he or she had the last clear chance to avoid injuring the plaintiff

C. This rule is not followed in all states and has many variations and different names.

IV. COMPARATIVE NEGLIGENCE

A. Largely a statutory defense (although also established by common law decisions) created to avoid unfairness of contributory negligence defense

B. Fairly recent defense; product of 1960s legislation and appellate court decisions

C. Effect of comparative negligence defense: Defendant's negligence liability is adjusted according to extent of plaintiff's contribution to his or her own injuries.

D. Elements:
1. The plaintiff was negligent in contributing to his or her own injuries.
2. Calculate the percentage of the plaintiff's negligence that contributed to his or her injuries.
3. Calculate the percentage of the defendant's negligence that caused the plaintiff's injuries.
4. Some jurisdictions add fourth element: Defendant's negligence must be greater than plaintiff's.

E. Culpability factoring (liability apportionment): Comparative negligence is the measurement and comparison of the plaintiff's and the defendant's negligence in causing plaintiff's injuries.

F. The trier-of-fact decides comparative negligence percentages.

G. Criticism of comparative negligence: Critics argue that the defense is arbitrary and capricious. Critics say, "How can negligence be converted into percentages?" The same criticism is leveled for hard-to-quantify damages such as emotional distress.

V. ASSUMPTION OF RISK

A. The plaintiff assumed the risk of doing (or not doing) something that caused his or her injuries.

B. Elements:

1. Plaintiff's voluntary assumption of known risk,
2. With full appreciation of dangers involved in facing that risk.

C. Voluntary assumption of known risk: 1. The plaintiff must knowingly or willingly face a known danger.
2. Knowledge is defined by reasonableness-should the plaintiff reasonably have anticipated the risk he or she faced?

D. Full appreciation of danger
1. The plaintiff must fully understand the nature of the risks he or she assumed.
2. Knowledge is defined by reasonableness-should the plaintiff reasonably have comprehended the risk he or she faced?

E. Assumption of risk as complete defense: Defense absolutely bars the plaintiff's negligence claims against the defendant.

F. Proof of assumption of risk:
1. Express assumption of risk-by agreement
2. Implied assumption of risk-by knowledge.

VI. STATUTES OF LIMITATIONS

A. Most negligence actions must be brought within a statutorily defined period or are forever barred.

B. Use examples from your jurisdiction. Contrast with decisions from other jurisdictions.

C. In some jurisdictions, these statutes are called limitations of actions.

Lecture Hints

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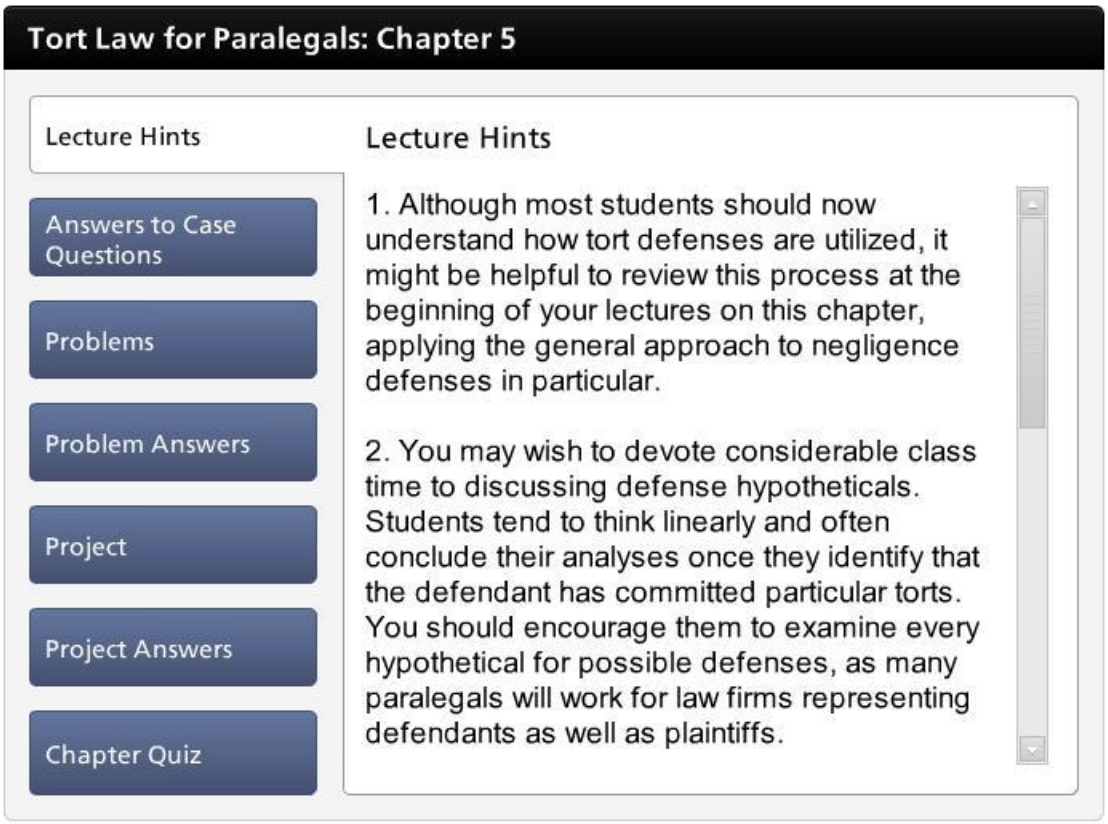

Step Text

1. Although most students should now understand how tort defenses are utilized, it might be helpful to review this process at the beginning of your lectures on this chapter, applying the general approach to negligence defenses in particular.

2. You may wish to devote considerable class time to discussing defense hypotheticals. Students tend to think linearly and often conclude their analyses once they identify that the defendant has committed particular torts. You should encourage them to examine every hypothetical for possible defenses, as many paralegals will work for law firms representing defendants as well as plaintiffs.

3. You might want to have students research and save a copy your state’s comparative negligence statute(s) for future reference.

4. Some instructors entirely omit contributory negligence from lectures, assuming that comparative negligence has thoroughly gutted its predecessor defense. However, in many jurisdictions, contributory negligence remains in existence for particular torts. Often, comparative negligence statutes focus only upon specific torts and omit others. Thus, it seems prudent to discuss both defenses.

Answers to Case Questions

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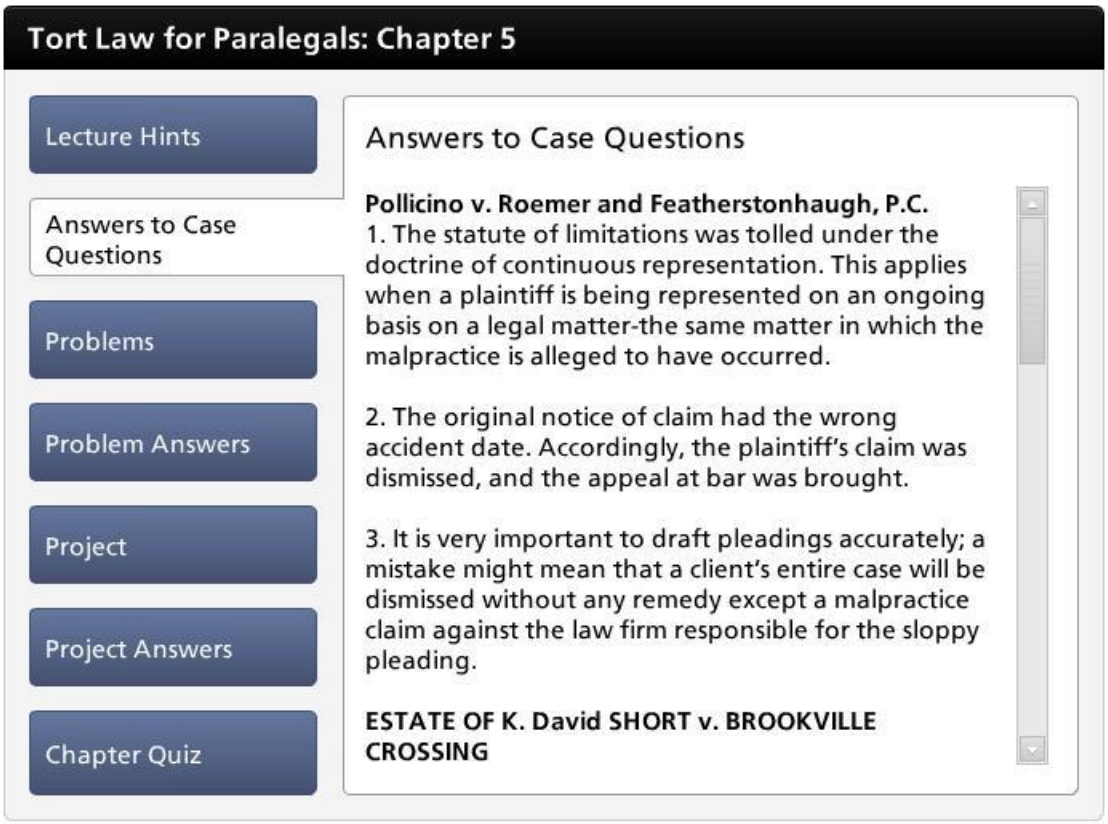

Step Text

Pollicino v. Roemer and Featherstonhaugh, P.C.
1. The statute of limitations was tolled under the doctrine of continuous representation. This applies when a plaintiff is being represented on an ongoing basis on a legal matter-the same matter in which the malpractice is alleged to have occurred.

2. The original notice of claim had the wrong accident date. Accordingly, the plaintiff's claim was dismissed, and the appeal at bar was brought.

3. It is very important to draft pleadings accurately; a mistake might mean that a client's entire case will be dismissed without any remedy except a malpractice claim against the law firm responsible for the sloppy pleading.

ESTATE OF K. David SHORT v. BROOKVILLE CROSSING
1. The estate was proceeding under the theory that the hotel has an affirmative duty of care to help and assist its guests.

2. The estate most probably selected this theory because it is an exception to the rule that there is no obligation to assist others, and imposes a duty on the hotel.

3. Opinion: No my expectations were not met. When you see security cameras in operation you assume they are there for your security. You might also assume that a hotel would have security personnel who periodically inspect the premises for intruders and unsafe conditions.

Penn Harris Madison School Corp. v. Howard
1. Students should weigh the policy considerations discussed in the text and in Penn.

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

Main v. Gym X-Treme
1. Had the gym owners not properly maintained the spring floor and failed to repair holes, or improperly cleaned the floor leaving it abnormally slippery, then the doctrine of assumption of the risk would not apply.

2. It is possible the attorneys believed that the court might rule that a child of 10 years was not capable of having knowledge of the risk of danger, nor could the child appreciate the danger in jumping on a spring board. In that case, the assumption of the risk doctrine would not be applicable, and the issue of negligent supervision would be primary.

Problems

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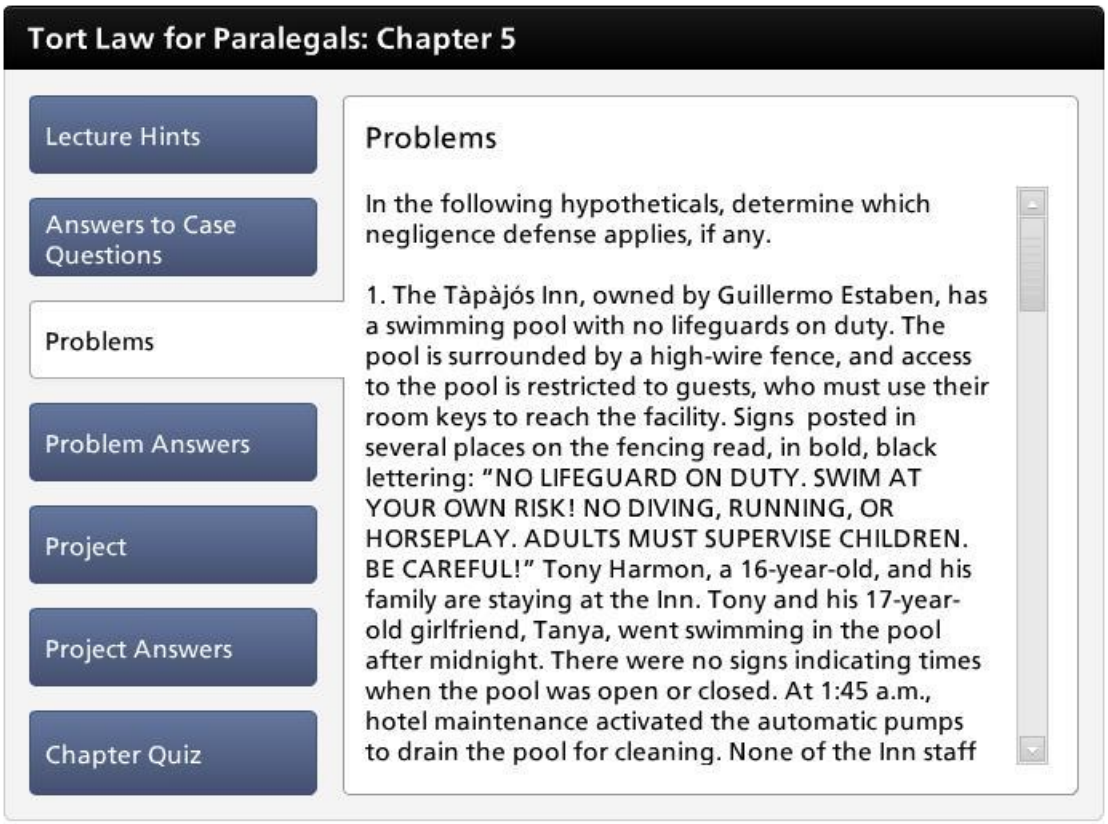

Step Text

In the following hypotheticals, determine which negligence defense applies, if any.

1. The Tàpàjós Inn, owned by Guillermo Estaben, has a swimming pool with no lifeguards on duty. The pool is surrounded by a high-wire fence, and access to the pool is restricted to guests, who must use their room keys to reach the facility. Signs posted in several places on the fencing read, in bold, black lettering: "NO LIFEGUARD ON DUTY. SWIM AT YOUR OWN RISK! NO DIVING, RUNNING, OR HORSEPLAY. ADULTS MUST SUPERVISE CHILDREN. BE CAREFUL!" Tony Harmon, a 16-year-old, and his family are staying at the Inn. Tony and his 17-year- old girlfriend, Tanya, went swimming in the pool after midnight. There were no signs indicating times when the pool was open or closed. At 1:45 a.m., hotel maintenance activated the automatic

pumps to drain the pool for cleaning. None of the Inn staff checked to see if the pool was being used. While swimming underwater, Tanya got her left foot caught in a pool drain, as a result of the powerful suction of the pumps. She would have drowned had Tony not rescued her. She suffered torn tendons in her foot and ankle, and she developed an extreme phobia of water. She experienced nightmares and acute nervousness after the incident. There were no signs indicating that the pool could be drained remotely, nor that the drains were dangerous when the pumps were running.

2. Farabee St. Claire owns an ice-skating rink. Charles and Kelly visited the rink on their 10th wedding anniversary. Charles had not skated since high school (15 years earlier), but Kelly often went skating at the rink. Because of a broken thermostat, one corner of the ice thawed and a small puddle formed. As Charles skated through the water, he slipped and fell to the ice, breaking his right arm. Kelly, who was skating close behind, collided with Charles and also fell to the ice, suffering a concussion. Kelly was a talented skater and could have avoided Charles by leaping over his body, but she did not think to do so in her surprise and confusion under the circumstances.

3. The Happy Hollow Mental Health Facility treats many emotionally disturbed individuals. One patient, Jasmine, a convicted arsonist, escaped from her maximum- security room. No guards were on duty in that part of the hospital, and an attendant had left Jasmine's door unlocked. As Jasmine wandered out of a wooded area onto a highway, she hitchhiked a ride from Kate, who was driving back to the university at which she worked. Kate noticed that Jasmine was dressed in a hospital gown and blue jeans, but Jasmine explained that she was a medical student at the university and often wore these gowns because they were comfortable. Kate dropped Jasmine off at a bus stop located only a few hundred yards from Kate's home. Jasmine saw Kate stop at the house and then drive away again. Later that day, Kate's house burned down. Police arrested Jasmine for having set the fire.

4. Beth is an accountant. Ruben is one of her clients. Beth completed Ruben's federal and state tax returns for 1991. Beth made a critical addition error, however, and as a result, Ruben underpaid his taxes. Both the Internal Revenue Service and the State Department of Revenue assessed hefty penalties against Ruben for the underpayment. Ruben had signed the returns without reading them, although the instructions on each return clearly advised the taxpayer to read carefully through the returns to verify their accuracy, even if a professional tax preparer had been used.

5. Beau owns a sporting goods store. Matt came in to buy a new shotgun. One of Beau's employees, Saul, handed Matt a shotgun that, unbeknownst to Saul or Matt, was loaded. Neither Saul nor Matt checked the gun to see if

it was loaded. The trigger, however, had a keyed lock that prevented it from being pulled. Matt asked that the lock be removed so that he could feel the trigger's sensitivity. Saul opened the lock, and Matt tested the trigger. The gun discharged, shooting another customer, Clay, in the stomach. Clay saw Matt aim the gun in his general direction. Instead of stepping aside, Clay jokingly shouted, "Hey, don't shoot me, I'm on your side!"

Problem Answers

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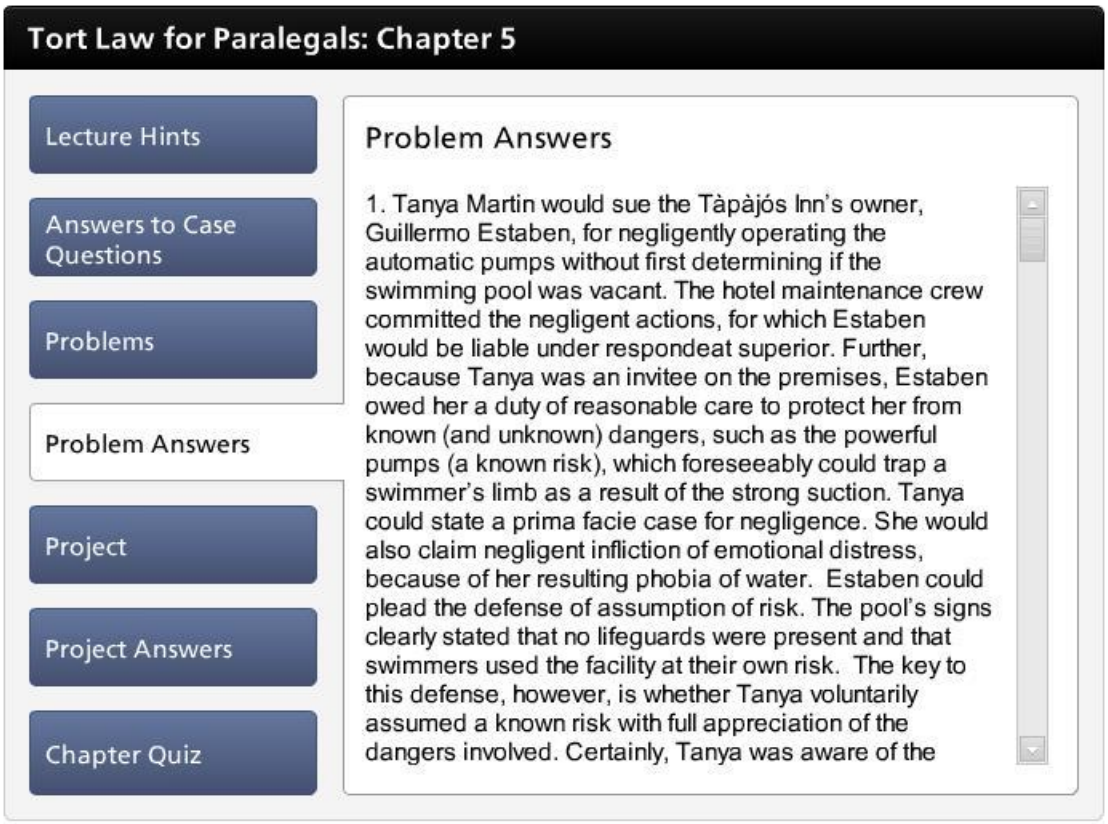

Step Text

1. Tanya Martin would sue the Tàpàjós Inn's owner, Guillermo Estaben, for negligently operating the automatic pumps without first determining if the swimming pool was vacant. The hotel maintenance crew committed the negligent actions, for which Estaben would be liable under respondeat superior. Further, because Tanya was an invitee on the premises, Estaben owed her a duty of reasonable care to protect her from known (and unknown) dangers, such as the powerful pumps (a known risk), which foreseeably could trap a swimmer's limb as a result of the strong suction. Tanya could state a prima facie case for negligence. She would also claim negligent infliction of emotional distress, because of her resulting phobia of water. Estaben could plead the defense of assumption of risk. The pool's signs clearly stated that no lifeguards were present and that swimmers used the facility at their own risk. The key to this defense, however, is whether Tanya voluntarily assumed a known risk with full

appreciation of the dangers involved. Certainly, Tanya was aware of the ordinary risks of swimming-getting cramps, hitting one's head against the side or bottom while diving, and so forth. However, Tanya could not have anticipated the danger that caused her injuries. There were no signs warning patrons that the pool would be automatically drained at night. No hours of use were posted for the area. Tanya could not have reasonably anticipated the risk of powerful pumps trapping her underwater. Thus, Tanya did not voluntarily assume a known risk with complete comprehension of the danger. Accordingly, Estaben's assumption of risk defense would fail. Estaben might also plead the defenses of contributory and comparative negligence, but both would likewise fail. Tanya did not breach her duty of reasonable care toward herself by swimming in the pool late at night. There was no reason for her to know that swimming at 1:45 a.m. was any more dangerous than swimming during daylight, as no open/closed or maintenance schedule signs were posted. Because the drain danger was not reasonably foreseeable, she was not contributorily (or comparatively) negligent in swimming.

2. Charles and Kelly were invitees at the ice skating rink. Accordingly, the owner, Farabee St. Claire, owed them a duty of reasonable care to discover and correct known and unknown dangers on the premises. This includes thawing areas of ice. Farabee breached this duty, and the remaining negligence elements can also be demonstrated. Charles and Kelly would have stated successful causes of action against Farabee. Farabee has no negligence defenses against Charles. Charles did not assume a known risk, as he was unaware of the melted ice, so no assumption of risk existed. Further, Charles did not breach his duty of reasonable care to himself. As a novice skater, he could not reasonably have been expected to avoid the slick spot. In fact, his injuries, caused by falling, were not only reasonably foreseeable but practically inevitable, as any beginning skater/juror could imagine. Thus, neither contributory nor comparative negligence applies to Charles's case. Farabee would be liable to Charles for negligently causing his injuries. However, Farabee would claim that Kelly committed contributory negligence by failing to avoid striking her fallen spouse. Kelly was a talented skater and, according to the facts, could have avoided Charles's sprawled body by leaping over him. By failing to react in this reasonable fashion, Kelly breached her duty of care to herself, which contributed to her injuries. Thus, contributory negligence would bar Kelly's negligence claim against Farabee. This outcome seems unduly harsh for Kelly. One could argue on her behalf that her failure to avoid Charles (i.e., by freezing up) was perfectly reasonable. She was taken by surprise and would have been concerned for Charles's well-being, even in the instant before hitting him. So, arguably, Kelly was not contributorily negligent. Assume, however, that contributory negligence is established. Applying comparative negligence, the outcome for Kelly's case would be different. The melted ice created the initial risk, which caused Charles to fall. But for this added danger (Charles lying on the ice), Kelly would not have been at risk herself. Thus, Farabee's negligence was greater in permitting the ice to thaw than Kelly's in failing to jump across her prone husband. What negligence

percentages should be applied? Consider the following: Farabee's liability-95 percent; Kelly's contribution-5 percent.

3. One may become immersed in the threshold question, namely, was the Happy Hollow Mental Health Facility negligent in permitting an arsonist/patient to escape and burn down Kate's home? Certainly, the issue of proximate cause is indefinite. Was it reasonably foreseeable that Jasmine would escape, hitch a ride with an unsuspecting passerby (Kate), and conclude by torching Kate's house? Jasmine was a convicted arsonist. Thus, the facility was fully aware that, if freed, she might be inclined to set fire to property, perhaps that of the first person she encountered on the "outside" (which, in this hypothetical, was Kate). Thus, jurors could be persuaded that the events in this problem were reasonably foreseeable, and thus the facility could be liable to Kate for negligently allowing Jasmine to escape and commit arson. First, the facility would argue that Kate was contributorily or comparatively negligent by picking up the hitchhiking Jasmine. Kate knew, or reasonably should have known, that the facility was located nearby. She recognized that Jasmine was wearing a hospital gown and blue jeans. Would a reasonable person have recognized that Jasmine was most likely an escaped patient? Yes. Would a reasonable person have avoided picking up such a hitchhiker? Yes. So it would seem that Kate breached her duty of reasonable care to herself by picking up Jasmine. That, however, would be an incorrect analysis. There remains another, fundamental inquiry, namely, would a reasonable person have anticipated that picking up a hitchhiker, even an escaped patient from a mental health facility, would result in the burning of the reasonable person's house? No. Kate might reasonably have anticipated being attacked while Jasmine was inside the vehicle, but Kate could not reasonably have expected that Jasmine would return later to set Kate's house ablaze. Because the fire was not a reasonably foreseeable consequence of Kate's self-negligence, Kate was not contributorily (or comparatively) negligent. The hospital's defense would be unsuccessful. Nor could the health facility claim assumption of risk as a defense. Kate did not assume a known risk with full appreciation of the danger involved, because she could not have anticipated that Jasmine would burn down her house, which was the particular risk that Kate would have had to assume for this defense to protect the hospital from liability.

4. Ruben would sue Beth for negligence in the form of professional malpractice. Clearly, Beth violated her professional community's standard of care by making an elementary addition mistake (the accountant's equivalent of a surgeon's leaving a scalpel inside a patient's abdomen). The negligence elements may be easily demonstrated in this hypothetical. Beth would argue that Ruben assumed the risk of mathematical mistakes by failing to review the returns before signing them. Did Ruben voluntarily assume a known risk with full appreciation of the dangers involved? A reasonable person would know that addition mistakes can occur on complex mathematical documents such as tax returns. By signing the forms without reading them, Ruben willfully assumed this known risk. He also

should have known that addition errors could result in tax penalties, as reasonable persons are presumed to know that tax authorities levy such penalties under law. This satisfies the requirement as to full appreciation of danger. Thus, Ruben assumed the risk of incurring fines for inaccurate tax returns and, accordingly, Beth would not be liable for malpractice. One might argue that Ruben justifiably relied upon Beth's expertise in computing his tax liability on the forms. However, this does not excuse Ruben's failure to read the returns before signing them. Even experts, such as accountants, occasionally make mathematical mistakes. Beth could also successfully plead contributory and comparative negligence against Ruben, since, by signing without reading, he violated his duty of reasonable care to himself. Ruben's contributory negligence would absolutely bar his recovery, as would assumption of risk. However, his comparative negligence would only reduce Beth's liability. The probable percentages would be: Beth-60 percent; Ruben-40 percent (based primarily upon the expectation that most jurors would be more sympathetic to Ruben, unless the voir dire happened to select an unusually high number of professionals).

5. Initially, this hypothetical involves issues of vicarious liability and joint and several liability. Under respondeat superior, Beau would be responsible for the negligence of his employees, such as Saul. Therefore, vicarious liability would exist if Saul had been negligent. Clay, the innocent bystander in this hypothetical, would sue Beau and Saul, as well as Matt, the other customer. Herein lies the joint and several liability issue. Both Matt and Saul were negligent by not first checking to see if the shotgun was loaded. The duo acted together to cause Clay's injuries. Thus, all three defendants would be liable under negligence. The defendants would respond with the defense of contributory or comparative negligence. The critical question is whether Clay breached his duty of reasonable care to himself by standing in the direct line of fire instead of standing clear. Would a reasonable person have anticipated that the gun might be loaded and prudently step clear? Yes. So Clay breached his self-duty, which contributed to his injuries. Contributory negligence would totally bar Clay's recovery; comparative negligence would require culpability factoring (liability apportionment). What percentages should be applied? One could pick Saul (vicariously, Beau)- 40 percent (supplying loaded gun); Matt-40 percent (firing loaded gun); Clay- 20 percent (failing to avoid line of fire). One may argue vehemently that Clay was not contributorily or comparatively negligent. Why, one might say, would Clay have reasonably anticipated that Saul would hand Matt a loaded weapon inside the store to test its trigger? Arguably, this situation would not be reasonably foreseeable, and so Clay would not have proximately caused his own injuries. Thus, neither defense would apply.

Project

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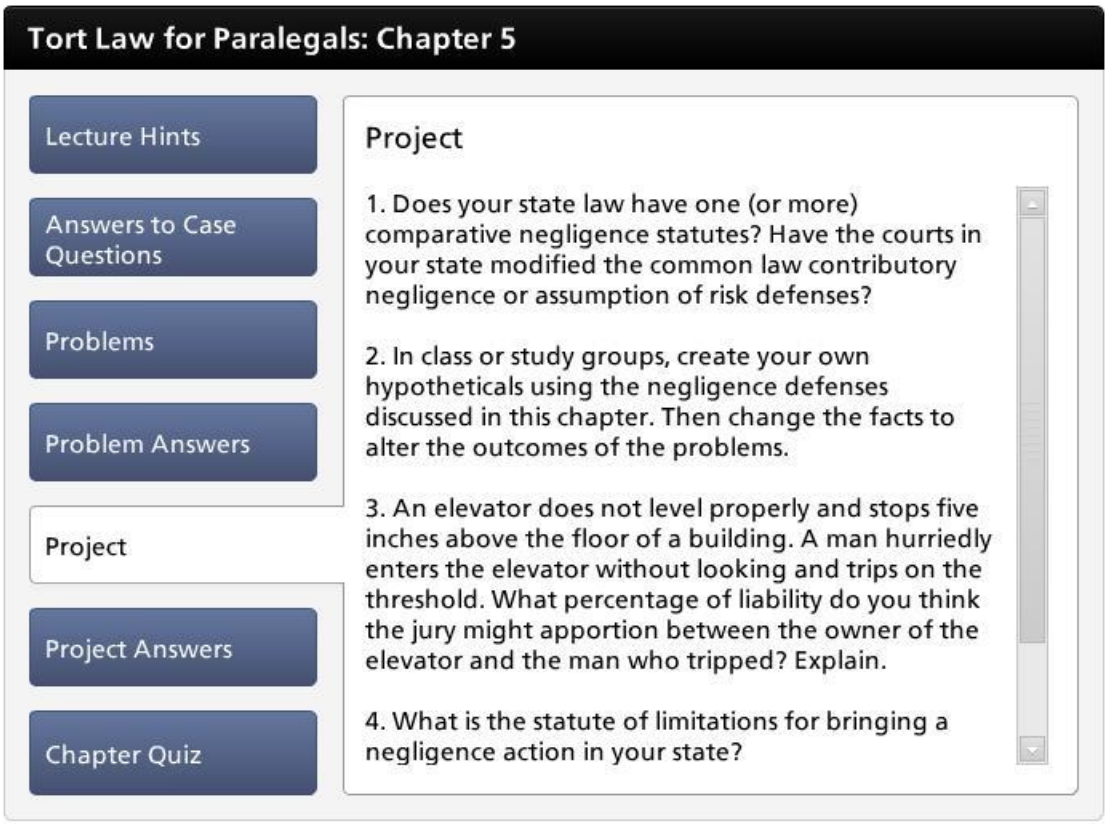

Step Text

1. Does your state law have one (or more) comparative negligence statutes? Have the courts in your state modified the common law contributory negligence or assumption of risk defenses?

2. In class or study groups, create your own hypotheticals using the negligence defenses discussed in this chapter. Then change the facts to alter the outcomes of the problems.

3. An elevator does not level properly and stops five inches above the floor of a building. A man hurriedly enters the elevator without looking and trips on the threshold. What percentage of liability do you think the jury might apportion between the owner of the elevator and the man who tripped? Explain.

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4. What is the statute of limitations for bringing a negligence action in your state?

5. Does the same statute of limitations apply for medical, dental, and legal malpractice actions in your state?

Project Answers

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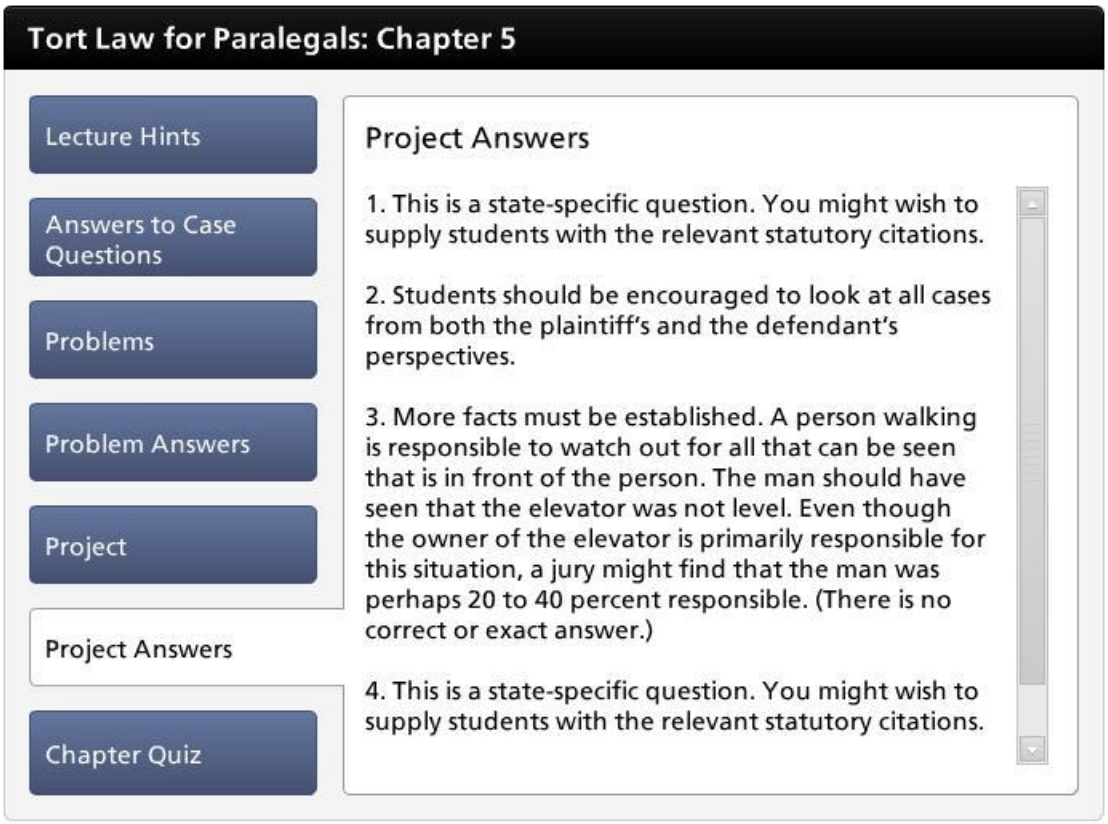

Step Text

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

2. Students should be encouraged to look at all cases from both the plaintiff's and the defendant's perspectives.

3. More facts must be established. A person walking is responsible to watch out for all that can be seen that is in front of the person. The man should have seen that the elevator was not level. Even though the owner of the elevator is primarily responsible for this situation, a jury might find that the man was perhaps 20 to 40 percent responsible. (There is no correct or exact answer.)

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

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

Chapter Quiz

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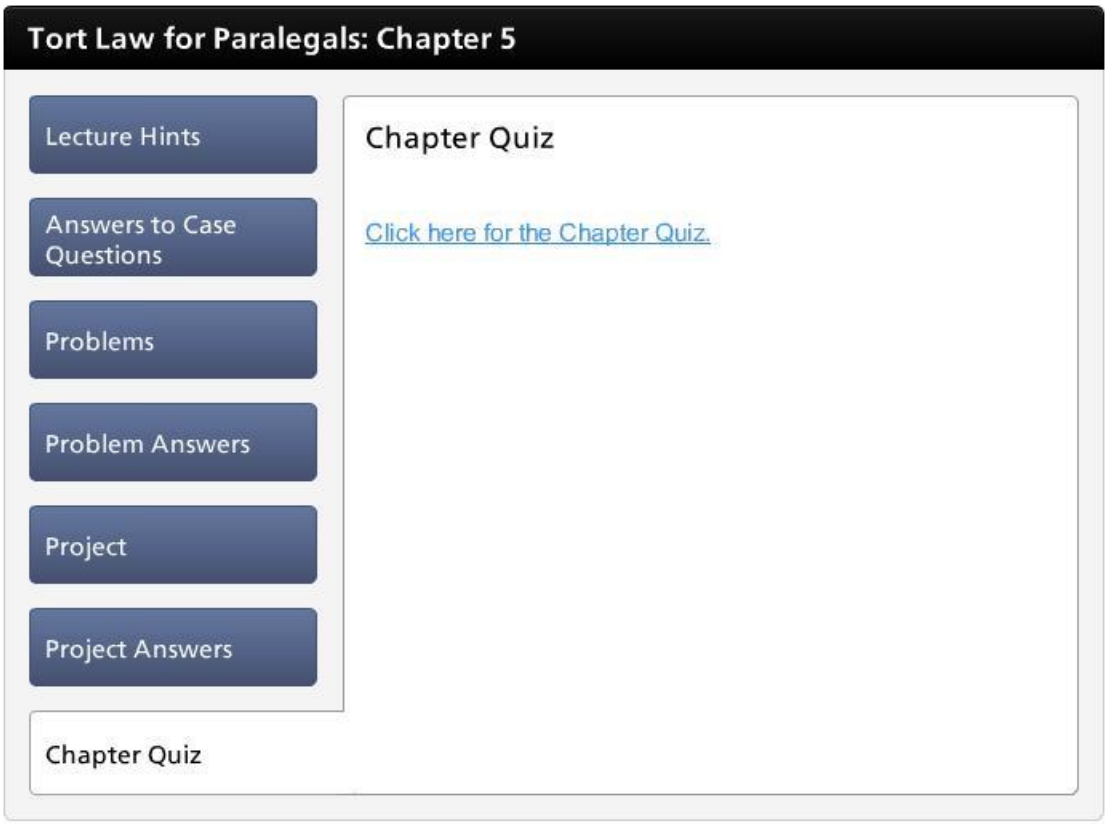

Step Text

Click here for the Chapter Quiz.