



Torts

Discovering Connections

ACTIVITY (PAGE 111)

1 and 2. Student resource. These questions have no right or wrong answers; they are merely a request for information. Obviously you will get a variety of different answers since you are soliciting information about your students' own legal systems. At this point be careful not to impose the American answers onto the question, for the answers under American law will be addressed in the next exercise.

Legal Discussion

Putting the Terms to Use (page 112)

1. a. Under American tort law, a wrongful death action is possible, though it would be necessary to have more facts to determine that for certain. If a wrongful death lawsuit were possible, it would be brought by the woman's children, who, if they won the suit, would be awarded monetary damages. Since this situation deals with a loss of life, it might seem that it could also fall under the criminal code. In that instance, the state would prosecute, and if it won, there would be no monetary compensation; instead, the guilty party would be imprisoned. There are instances

in which both types of action are brought. In the *O. J. Simpson* case, the defendant was found not guilty at the criminal trial, but he lost the wrongful death action.

You might ask your students under what circumstances it would be more desirable to bring a wrongful death action—remember, in that type of action, the plaintiff stands the chance of actually receiving monetary damages.

- b. Tort—not addressed in essential terms above. Since Adnan was warned about the possibility of eye injury, he might not be able to recover damages.
 - c. Tort—false imprisonment
2. The following intentional torts have been committed.

Jennifer and Giorgio were classmates at Cleghorn Community College in Pocahontas, Arkansas. Though Giorgio, a male student from Greece, thought he and Jennifer, a female student from Michigan, were only friends, unbeknown to him, she had become obsessed and determined to marry him at all costs. She began to slip into his yard every night and watch him sleeping through an open window. She never hurt or disturbed anything in the yard; she merely watched him. **Trespass: Jennifer enters Giorgio’s yard without his permission.**

Unfortunately, Jennifer did not know that Giorgio and his fiancée, Mary, whom he met while an exchange student in North Dakota, had already decided to marry but had not announced their engagement. Because Mary was completing her studies at the University of Texas, Jennifer never saw Mary—that is, until the holiday break, when her midnight vigil revealed that Giorgio was not alone anymore. Jennifer was distraught—her dreams dashed. Then she decided if she could make Mary see reason, all was not lost. She cornered Mary in the ladies’ room at the local movie theater, locked her in a toilet stall, and would not let her out, all the while making a plea for Giorgio’s affection. After twenty minutes or so, Mary agreed to give up Giorgio, and Jennifer released her. Mary had lied, as Jennifer’s moonlight vigil soon revealed. **False imprisonment: Jennifer restrains Mary’s movement, that is, locks her in a stall in the restroom, and Mary does not agree to such restraint.**

Jennifer became incensed and stopped Giorgio and Mary at church the next day. She shouted terrible insults at Mary, calling

her vile names and calling on the minister to impose religious sanctions on Mary. Mary was so distressed that she experienced severe panic attacks, developed hives, and lost her beautiful blonde hair. **Intentional infliction of mental distress: It is safe to conclude that Jennifer's behavior before Mary's congregation was designed to cause injury or, at the very least, a reasonable certainty that her behavior would cause injury. Slander: Since Jennifer also said things that were designed to interfere with Mary's good reputation, Jennifer could also be accused of defamation, specifically, slander, since the defamation was oral.**

Not satisfied with that, Jennifer typed up a scathing indictment of Mary, complete with picture, and stuck a copy on every car in a department store parking lot. **Libel: Jennifer is interfering with Mary's interest in her reputation by distributing a written document containing defamatory language.**

Finally, Jennifer began following Mary and bumping, shoving, or tripping her whenever possible, though it always appeared to be an accident on Jennifer's part. **Battery: The unlawful interference with another's person.**

Mary can take no more; she seeks legal advice from you, the new lawyer in town.

3. Student opinion

Legal Thumbnail

Exercise A. Case Hypotheticals and Discussion

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[*Note:* You should advise your students that they should look at the elements of false imprisonment and think of them in terms of *yes* and *no* questions. For example, was there intent to confine the plaintiff? Was there actual confinement? In a court of law, each of the elements must be proven before there can be a finding of false imprisonment.]

1. Yes. The following elements were present: (1) there was intent to confine the crew member on the ship; (2) there was actual confinement; (3) the crew member was aware of the confinement; and (4) there was no safe means of exit from the ship. There does not have to be physical force involved in preventing a person from leaving.

2. No. There is no clear evidence that any of the elements were met, but most assuredly, Jane was not aware of the alleged confinement since she was unconscious nor was she in any way prevented from leaving except by her own self-induced condition.

Exercise B. Listening

(page 117)

Listening Scripts

In both cases, the discussions are between neighbors. In the second case, the neighbors are discussing the flight pattern of the jets at a new airport that has been built close to their housing development.

Case One: Jane and Patrick (neighbors)

Jane: Hello. Patrick, is that you?

Patrick: Yeah, Jane. What can I do for you?

Jane: I was calling about the apple tree that you were trimming yesterday.

Patrick: That was hard work.

Jane: I'm sure it was. It sure looked difficult. Took you most of the afternoon, too.

Patrick: Yeah, I'm sure glad it's finished. Hauling the branches to the front for garbage pickup was no fun either.

Jane: Well, I don't think you're quite finished yet. Some of the larger branches fell over into my yard, and I think you should come and get them.

Patrick: Listen, Jane, I don't see why I should do that. You get to eat all the apples that fall in your yard, and you have never complained about that before.

Jane: Well, it's easier to pick up apples than drag tree branches all the way to the curb. My kids pick up the apples, and the branches are just too big for them to drag.

Patrick: Well, I guess you'll just have to do it yourself, Jane. I don't think it's my problem.

Jane: Patrick, I wish you would reconsider. We've always gotten along fairly well, but I think you're out of line here. The branches are your responsibility.

Patrick: Sorry, Jane. I disagree. You take the benefits of the apple tree but refuse to deal with the bad side of it. Besides it won't take you any time to get the branches out front.

- Jane:* Patrick, you just said yourself that it was the worst part of the job, dragging the branches off your property. I'm not going to do it. They're from your tree.
- Patrick:* Jane, just think about it for a little while. You're not being fair about this.
- Jane:* I think I am, Patrick. Get the branches off my property, or I'll have to sue you.
- Patrick:* Yeah, for what? You're taking those law classes too seriously. I've got to go. I have to pick up my son.
- Jane:* You'll be hearing from me.
- Patrick:* Yeah, yeah. See you in court, Jane.

Answer: There has been a tort committed—trespass. Remember, trespass covers unauthorized entry of a person or thing on another's property. The failure to remove something from another's land can also be considered trespass, so it would appear that Patrick is in more trouble than he thought.

Case Two: Mary and Barb (neighbors)

- Mary:* Barb, how noisy is it in your place when the planes are flying over?
- Barb:* I can't hear a thing anyone is saying, and my dishes even rattle.
- Mary:* Mine too. The baby was crying yesterday, and I didn't even hear her at first.
- Barb:* I just can't believe that the planes have to fly so low directly over our houses. We ought to get a petition or something.
- Mary:* We really should do something. Maybe one of us should sue the airport for trespass.
- Barb:* Trespass? Are they really trespassing?
- Mary:* I'm not really sure, but I swear I read something about a property owner suing an airport for something similar in the newspaper about three years ago. Maybe Baxter and I should go see that attorney friend of his sister's and ask him what he thinks.
- Barb:* That might not be such a bad idea. Sometimes it gets so noisy I can barely think. These houses weren't built with an airport next door in mind.
- Mary:* Yeah, the insulation is fine for winter but not for jet engines.

Answer: The rights inherent in the possession of land extend above and below the surface. The airplanes enter that space, and there is some authority to indicate this would be considered a trespass.

Exercise C. Summarizing

(page 119)

1. “ . . . there was nothing in its appearance to give notice of its contents.”
“The shock of the explosion threw down some scales at the other end of the platform many feet away.”
2. Sample answer: At one end of a rail platform, a passenger rushing to catch his train dropped an unmarked parcel of fireworks while being helped onto the train by guards who worked for the railroad company. The fireworks exploded, and the shock from the explosion knocked down some scales at the other end of the platform where plaintiff was standing. The scales hit plaintiff, and she is suing the railroad company. We have to decide whether Palsgraf was a foreseeable plaintiff or not.

[*Language note:* In legal English definite articles are often not used when they would be in normal English. For example: “The scales hit plaintiff. . . .” Do not encourage your students to imitate this usage, but they should be aware of its use in legal documents.]

Exercise D. Analysis and Collaboration

(page 121)

1. Student opinion
2. Student opinion. The actual court decisions are provided for your reference.
 - a. Strict liability. The lower court first found for the defendants (builders of the reservoir) because there was no negligence. On appeal, however, the court found that damage (weakening of reservoir) that results from an activity that is unusual (building of a reservoir) should result in responsibility for damage (flooding of the mines) caused by the unusual activity.
 - b. Negligence. The public service company created an unreasonable risk of harm since the copper wire blended into the landscape.

- c. Intent. This is trespass. Remember that a property owner's interest in the land extends above and beneath his or her property.
- d. Negligence. Howard Johnson's created an unreasonable risk of harm by having sliding glass doors that could be easily opened from the outside.

Exercise E. Reading for Details

(page 124)

- 1. The exclusive right to make, use, sell, and import the invention, the process, or a product made by the process
- 2. File an application and pay the patent fees
- 3. 20 years

Exercise F. Analysis

(page 125)

- 1. Infringement. Trademark.
- 2. Infringement. Patent.
- 3. Infringement. Trademark. The court held that the Coca-Cola® name was so closely related to the soft drink product that Koke was trying to take advantage of the goodwill and advertising already established by the Coca-Cola® Company.

Exercise G. Statutory Interpretation

(page 128)

- 1. One possible explanation of the fair use exception:

Fair use is the use of copyrighted material without the intention of depriving the copyright holder of any financial benefit of his or her copyrighted material. For example, a teacher might make copies of a short story that is protected by copyright if the purpose of the copying is to teach. To decide if the use of copyrighted material is covered by this exception, the courts look at four things: the purpose for which the material was used; the kind of copyrighted work; how much of the copyrighted work

was used; and whether the use harms the potential market for the copyrighted material.

2. Varying student responses.

Exercise H. Analysis and Role Play

(page 129)

1. The five elements for your use:
 - purpose and character of the use
 - nature of the copyrighted work
 - amount of the work used
 - effect on the potential market for the work
 - transformative use
2. After dividing into teams, direct the students to read Question 2 closely since it sets out arguments that might be advanced by the different attorneys.

[*Cultural note:* In the United States, no person or topic seems to be too serious to be parodied by someone. You may wish to have your class watch the film *The People v. Larry Flynt*, which contains a famous trial about satire and parody and a well-known religious figure. This film is violent and graphic so you will have to determine if it is suitable for use in your class. Many international students are astonished at the often very rude parodying of the American president or other major figures of authority that appears on TV and in magazines; they see it as a lack of respect while some Americans see it as a proof that we do indeed enjoy freedom of speech.]

Court's Decision of the Demi Moore case [*Leibovitz v. Paramount Pictures Corporation*]:

Three of the four fair use factors in the present case militate in favor of a finding of fair use, largely because the defendant's transformation of the plaintiff's photograph has resulted in public access to two distinct works, serving distinct markets, with little risk that the creator of the first work will be disinclined to create further works that may be open to parody. Because I agree with the Second Circuit that in this case "further protection against parody does little to promote creativity, but it places a substantial inhibition upon the creativity of authors adept at using

parody, . . . ” I hold that the fundamental purposes of copyright are best served by a finding that the defendant’s use of the Moore photograph is a fair one. *Warner Bros., Inc., v. American Broadcasting Companies, Inc.*, 720 F.2d 231, 242 (2d Cir. 1983). Accordingly, defendant’s motion for summary judgment is granted and plaintiff’s motion for summary judgment is denied.

Exercise I. Appellate Argument: Oral Communication

(page 131)

Notes to Instructor that Will Help in Argument Development

The purpose of a synthesis is to use the cases to reflect the clearest meaning of the law. The statutory provisions, plus the fifth element added by the *Campbell* decision, are set forth below.

Fair use (17 U.S.C. §107) [factors in determining]

1. “the purpose and character of the use, . . . ;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used . . . ; and
4. the effect of the use upon the potential market . . . ”

a nonstatutory element:

5. the transformative use.



Transformative use requires the transformation of the quoted material: the purpose and the manner of use in the copied work must be different from that of the original work. [*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S. Ct. 1164, 127 L.Ed.2d 500 (1994)]



All three cases addressed the question of whether the cases were parodies and as such fell under the fair use exception to copyright infringement. Since each court in these decisions focused primarily on “commercial use” and on the fourth element (“the effect of the use upon the potential market”), the students should be steered in those directions also. Think of the transformational element almost as an exception to the fourth element or as an additional element to be considered in connection with each of the statutory elements. (Though the focal points of all of these cases are the first and fourth elements, the students would probably benefit by taking the statute element by element and discussing how the *Dr. Seuss* case meets or fails to meet each element.)

Focus: The effect of the allegedly violative use on the potential market and the commercial nature of the work. Was the use transformational in nature?

The *Campbell* decision, in which a fifth and nonstatutory element to be considered in a finding of fair use—transformational use—is set out, held the work to be an allowable parody because it “viciously commented on and criticized the original work.”

The court in *Leibovitz* also focused on the transformational nature of the parody, stating that “the more transformational a work is,” the less important the other issues become. The nature of parody is to ridicule or criticize a previous work. The court stressed that the parody in this case was “visually ridiculous” and linked the original of Demi Moore to the parody through the issues of pregnancy and childbearing.

However, the court in the *Dr. Seuss* case found that there was no parody since *The Cat NOT in the Hat* did not ridicule or criticize the previous work but merely capitalized on the best-known features of the original work in order to get attention and thereby make sales.

Looking at all three of these cases in this light, it is clear that in order for the court to sustain a finding of fair use, not only must there be a parody (criticism/ridicule of the original work) but it must be transformational in nature with a purpose and use different from the original.

What Penguin Books will try to prove:

- That the use was a parody.

Look at the definition; provide facts to meet that definition.

- That the use was transformational in nature.

Cite statute and first two cases. Show via the facts how *The Cat NOT in the Hat* transformed the original work and did not simply capitalize on its popularity.

What *Dr. Seuss Enterprises* will try to prove:

- That the use by Penguin was not in the true nature of a parody.

Again, rely on a definition and present evidence to meet that definition.

- Argue that Penguin's use is not transformational in nature but merely an attempt to benefit from Dr. Seuss's reputation.

The students must find some way to distinguish this case from *Leibovitz* and *Campbell*, and the definition is pivotal here.

Practical Notes

If your class is very large, you may wish to divide it into several groups of two teams each and have each group present its own version of the debate. Have the students look at the issues they debated in the *Leibovitz* case to give them some ideas on what issues they might want to consider as they prepare for their appellate argument, which is similar to a debate. Remind the students that in a debate they must not only advance their client's stance but must also think about what issues the opposing side might raise and prepare responses to them. The students might want to consider the technique of taking one's adversary's strongest point and defusing it.

The information provided in the case synthesis exercise can also be of use in this section. Simply because the Court of Appeals for the Ninth Circuit found that there was no fair use in *The Cat NOT in the Hat* does not mean that another appellate court in another circuit would decide the case in the same fashion.

This exercise also gives the students an opportunity to conduct some online research. The sites listed in the student book are full of information that students may use for this exercise and in the future.