

# Deepening Your Analysis: Torts

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This report walks through your Torts essay side by side with a model Band 6 analysis. For each issue, you will see your analysis, the model analysis, and targeted commentary on what to sharpen. The goal is not to rewrite your essay -- it is to show you the specific analytical moves that separate your current approach from a passing answer. At the end, you will find concrete rewrite examples that turn conclusory sentences into the kind of element-by-element reasoning graders reward.

## Issue 1: Duty to Act -- Special Relationship (MISSED)

### YOUR ANALYSIS

*This issue was not addressed in your essay. You discussed vicarious liability and attractive nuisance but never identified the core question the prompt was testing: whether Mr. Gopher had an affirmative **duty to act** based on his status as an on-duty lifeguard.*

### MODEL ANALYSIS

To establish a prima facie case for negligence, a plaintiff must prove duty, breach, causation, and damages. **Generally, there is no affirmative duty to rescue a person in peril.** However, exceptions exist where one has a **special relationship** with the person in peril or has **undertaken a duty to act**. An employer/employee relationship where the employee's duties include safety -- like a lifeguard -- creates such a duty to those within the zone of risk.

Here, Mr. Gopher was an on-duty, certified lifeguard. By accepting this position, he **undertook a duty** to monitor the pool and rescue anyone in distress. This duty extends to all persons in the pool area, **regardless of their status as a member or trespasser**. His belief that he had no duty to a trespasser is an incorrect understanding of the law; his role as a lifeguard imposes an affirmative duty to act. He breached this duty when he saw Leo fall in, watched him struggle, and did not intervene. This breach was the actual and proximate cause of Leo's serious and permanent lung damage. All elements of negligence are met.

Therefore, Mr. Gopher is liable to Leo for negligence.

### COMMENTARY

This was the central issue the prompt was testing, and missing it entirely is the single biggest factor in the Band 2 score. The call asked whether Mr. Gopher is liable to Leo *for negligence* -- which requires analyzing the four elements: duty, breach, causation, and damages.

**The critical gap is the duty analysis.** You discussed vicarious liability and attractive nuisance, but the prompt was not asking about the Club's liability here -- it was asking about *Mr. Gopher's personal liability*. The key legal question is whether a lifeguard has a duty to rescue *anyone* in the pool, including a trespasser. The answer is yes: a lifeguard's role creates a special relationship or undertaking that imposes an affirmative duty to act.

**Why this matters on the bar exam:** When a fact pattern involves someone failing to act (rather than acting negligently), the grader is looking for you to address the "no duty to rescue" general rule and then identify the exception. This is one of the most heavily tested torts patterns. You must train yourself to recognize it: *whenever the facts show someone watching harm happen and doing nothing, the prompt is testing duty to act.*

**Build this habit:** When you see a fact pattern where someone *fails to act*, always write this framework: "*Generally, there is no affirmative duty to rescue. However, a duty arises when [special relationship / undertaking / creation of peril]. Here, [defendant] had a [type of relationship] with [plaintiff] because [specific facts], which created a duty to [act]. By failing to [act], [defendant] breached this duty.*"

## Issue 2: Negligent Entrustment (Ms. Fox) and Negligent Hiring (Club)

### YOUR ANALYSIS

**Ms. Fox:** A parent is not held liable for the torts of their child. However, a parent can be held for the torts of their underage child if the parent has reason to know of the child's misconduct and allowed the conduct knowing damage is very likely to occur. Ms. Fox knew her son had a speeding ticket and two at-fault accidents. She allowed him to drive without supervision, putting her at fault.

**Club:** Vicariously liable rule above. The Country Club will likely be found liable for Mr. Gopher's inaction, for Mr. Gopher was under the scope of employment.

### MODEL ANALYSIS

**(a) Claim against Ms. Fox -- Negligent Entrustment:** Ms. Fox can be held liable under a theory of **negligent entrustment**. The Restatement (Second) of Torts provides that one who supplies a chattel for the use of another whom the supplier **knows or should know is likely to use it in a manner involving unreasonable risk of physical harm** is liable for the resulting harm. Ms. Fox knew that Ferret had a recent history of a speeding ticket and two at-fault accidents. This knowledge gave her reason to know he was a risky driver. By entrusting her car to him despite this knowledge, she acted negligently. Ferret's subsequent negligence in texting while driving was the type of harm that made the entrustment negligent. Therefore, Ms. Fox is liable for negligent entrustment.

**(b) Claim against Club -- Negligent Hiring:** The Club is liable for **negligent hiring**. This is a form of **direct, not vicarious, liability**. An employer has a duty to exercise reasonable care in hiring employees to ensure they are fit for the position. The Club breached this duty by failing to perform a simple background check on Mr. Gopher. Such a check would have revealed he was fired from his previous lifeguarding job for the very same failure to act in an emergency. Hiring him without this check was negligent, and this negligence was a cause of Leo's injuries. Therefore, the Club is liable for negligent hiring.

### COMMENTARY

Two critical problems here:

**First, you used the wrong legal theory for Ms. Fox.** You framed her liability as "parental liability for a child's torts," which is a narrow doctrine. The correct theory is **negligent entrustment** -- liability for supplying a dangerous instrumentality (a car) to someone you know is likely to use it dangerously. This is not about being a parent; it is about being the person who handed the keys to a known risky driver. The distinction matters because negligent entrustment has specific elements (supplier + chattel + knowledge of risk + resulting harm) that you need to state and apply.

**Second, you used vicarious liability for the Club instead of negligent hiring.** The prompt asked about the Club's liability for Mr. Gopher's *inaction*. Vicarious liability (respondeat superior) might apply, but the stronger and more precise theory is **negligent hiring** -- the Club's *own* negligence in hiring an unfit employee. This is *direct* liability, not vicarious. The distinction is legally significant: negligent hiring holds the employer liable for its own failure to screen, not for the employee's tort. The facts scream this theory -- the Club skipped a background check that would have revealed Gopher was fired for the exact same failure.

**Build this habit:** When the prompt gives you facts about someone's *knowledge of another person's dangerous tendencies* plus *providing them with something dangerous*, the theory is negligent entrustment: "One who supplies a [chattel] to another whom the supplier knows or should know is likely to use it in a manner involving unreasonable risk of harm is liable. Here, [supplier] knew [facts about risk] and supplied [chattel], making [supplier] liable for the resulting harm."

## Issue 3: Wrongful Death and Survival Actions

### YOUR ANALYSIS

Wrongful death suit entails 1) a wrongful death of a family member and 2) a defendant who negligently caused the death or had reason or control of someone who caused the death. Mrs. Crow would likely be able to present a wrongful death suit on behalf of herself and on behalf of Mr. Crow's estate. Mrs. Crow had suffered through the death of her husband, who succumbed to his injuries after being struck by a car due to the negligence of Ms. Fox and her son Ferret.

### MODEL ANALYSIS

At common law, a tort action abated at the victim's death. Modernly, statutes create **two distinct causes of action**:

A **survival action**, brought by the decedent's estate, allows recovery for the damages the decedent himself could have recovered before death. This includes pre-death medical expenses and pain and suffering.

A **wrongful death action** is brought by the decedent's statutory beneficiaries (like a spouse) to recover for **their own losses** resulting from the death, such as loss of economic support and loss of consortium.

Here, Mrs. Crow can bring **both actions**. First, as the representative of Mr. Crow's estate, she can bring a **survival action** to recover for the damages Mr. Crow suffered during the two weeks between his injury and death -- his medical bills and pain and suffering. Second, Mrs. Crow can bring a **wrongful death action** in her own name to recover for her personal losses -- loss of Mr. Crow's financial support, services, and companionship (loss of consortium).

### COMMENTARY

This was your strongest issue -- you correctly identified wrongful death and reached a sound conclusion. But you missed a significant component that would have earned more points:

**You omitted the survival action entirely.** The prompt asked what claims Mrs. Crow can bring "on behalf of herself *and* on behalf of Mr. Crow's estate." That "and" is a signal: there are two distinct claims. The wrongful death action is Mrs. Crow's *own* claim for her losses (loss of companionship, support). The survival action is the *estate's* claim for Mr. Crow's pre-death damages (medical bills, pain and suffering during those two weeks before he died).

**You also need to distinguish the damages.** The model answer explicitly separates what each action recovers. This distinction is a classic bar exam testing point -- graders are looking for you to recognize that these are two separate statutory actions with different plaintiffs (beneficiary vs. estate) and different damages.

**Build this habit:** When a prompt asks about claims after a death, always address **both**: "Mrs. [X] can bring two claims. First, a wrongful death action in her own name for [her losses: support, consortium]. Second, a survival action on behalf of the estate for [decedent's pre-death damages: medical bills, pain and suffering]." Stating both and distinguishing the damages is what earns full points.

## Conclusory Analysis vs. Proper Analysis

Below are four sentences from your essay rewritten to show the difference between asserting a conclusion and building toward one with element-by-element reasoning.

### 1. Lifeguard's duty

#### CONCLUSORY

"Mr. Gopher will likely be found liable to Leo under vicariously liable by the Country Club and personally liable because Mr. Gopher mistakenly believed he had no duty."

#### REWRITTEN

"Generally, there is no affirmative duty to rescue a person in peril. However, a duty arises when an actor has a special relationship with the person in danger or has undertaken to provide protective services. Here, Mr. Gopher was an on-duty, certified lifeguard whose job was to monitor the pool and rescue anyone in distress. This role created an affirmative duty to act -- a duty that extends to all persons in the pool area regardless of their membership status. By watching Leo struggle and choosing not to intervene based on an incorrect belief that he owed no duty to a trespasser, Mr. Gopher breached this duty. His inaction was the actual and proximate cause of Leo's permanent lung damage."

### 2. Parental liability vs. negligent entrustment

#### CONCLUSORY

"Ms. Fox allowing her son to drive the vehicle, without adult supervision with the past tickets and accidents puts Ms. Fox at fault for she was aware and knew her Son was not a safe driver."

#### REWRITTEN

"Under the theory of negligent entrustment, one who supplies a chattel to another whom the supplier knows or should know is likely to use it in a manner involving unreasonable risk of harm is liable for the resulting injury. Here, Ms. Fox knew that Ferret had received a speeding ticket and been found at fault in two accidents within the past year. This documented history gave her reason to know he was likely to drive negligently. By entrusting her car to him despite this knowledge, she supplied a dangerous instrumentality to a person she knew posed an unreasonable risk. Ferret's subsequent distracted driving and the fatal collision with Mr. Crow were the foreseeable type of harm that made the entrustment negligent."

### 3. Club liability -- vicarious vs. direct

#### CONCLUSORY

"The Country Club will likely be found liable for Mr. Gopher's inaction, for Mr. Gopher was under the scope of employment within the employment guidelines."

#### REWRITTEN

"The Club is liable for negligent hiring -- a form of direct, not vicarious, liability. An employer has a duty to exercise reasonable care in hiring to ensure employees are fit for the position. The Club failed to conduct a background check on Mr. Gopher, which would have revealed he was fired from his previous lifeguarding job for failing to act during an emergency drill -- the exact same failure that caused Leo's injuries. By hiring an employee it knew or should have known was unfit for a safety-critical role, the Club breached its own duty of care."

#### 4. Wrongful death -- adding the survival action

##### CONCLUSORY

"Mrs. Crow would likely be able to present a wrongful death suit on behalf of herself and on behalf of Mr. Crow's estate."

##### REWRITTEN

"Mrs. Crow can bring two distinct claims. First, a wrongful death action in her own name as a statutory beneficiary to recover for her personal losses -- including loss of Mr. Crow's financial support, services, and companionship (loss of consortium). Second, a survival action on behalf of Mr. Crow's estate to recover the damages Mr. Crow could have claimed before his death -- including his medical expenses and pain and suffering during the two weeks between the accident and his death. These are two separate statutory causes of action with different plaintiffs and different recoverable damages."

Intesar, this is your fifth essay, and I want to be direct: this is a step backward from your Contracts and Business Associations essays (both Band 4). The Band 2 is not because you cannot do this -- your wrongful death analysis (0.90 issue score) proves you can. The problem is that you applied the wrong legal theories to two of three calls and missed the central issue the prompt was testing.

Three patterns to address immediately:

**1. Read the call before you write.** Call 1 asked whether *Mr. Gopher* is liable for *negligence*. That means: duty, breach, causation, damages -- applied to the lifeguard personally. You wrote about vicarious liability and attractive nuisance instead. Before writing, underline the key words in the call and make sure every paragraph in your answer addresses those words.

**2. Use the correct legal theory.** Negligent entrustment is not "parental liability." Negligent hiring is not "vicarious liability." These are distinct doctrines with distinct elements. When the facts give you someone handing a dangerous thing to a risky person, or an employer skipping a background check, those facts are pointing you to specific theories. Name the theory and state its elements.

**3. When a call says "on behalf of herself *and* the estate," there are two claims.** The word "and" in a bar exam call is never decorative. It signals two separate analyses. Train yourself to see structural cues in the prompt.

Your wrongful death answer shows you have the analytical capacity. The issue is not ability -- it is issue recognition and theory selection. These are learnable skills. Keep writing.