Exercise 3-A (pp. 31–32)

Toad v. Ulrich (1972)

Facts: The plaintiff sells wooden stools called "Toad Stools" at a roadside stand. The defendant sells similar stools from another roadside stand and has advertised them as "Toad Stools." When the defendant began selling his stools, the plaintiff asked him not to use the name "Toad Stools." Even though the defendant continued to do so, the plaintiff took no further action until he filed this lawsuit for trademark infringement two years later. The trial court awarded damages and granted the plaintiff an injunction.

Rule: If a person does not actively defend his trademark against known infringements, including the bringing of a lawsuit if necessary, a competitor is free to use the trademark after two years.

Issue: Did the plaintiff actively defend his trademark?

Holding: Yes. Asking the defendant not to use the name "Toad Stools" was sufficient for a small businessman to actively defend his trademark.

Reasons and policies: Small businesses have fewer resources than large businesses and should not be held to the same standard. The smaller the business, the easier it should be to satisfy the active defense requirement.

Exercise 3-B (pp. 32–33)

Branson v. Road Runner Shoe Co. (1976)

Facts: The plaintiff was injured when struck by a truck owned by the defendant and driven by one of the defendant's employees. The employee was on his way back to work after visiting his girlfriend during his lunch hour. He had not been given permission to use the truck, but normally he had sole possession of the keys during working hours. The company had never objected to his private use of the truck. The plaintiff sued the defendant under the theory of respondeat superior. The trial court granted summary judgment to the defendant.

Rule: An employer is liable for the torts of its employees when they are acting within the scope of their employment.

Issue: Was the employee acting within the scope of his employment?

Holding: Yes. Even though the employee did not have permission to use the truck during lunch, he was acting within the scope of his employment while he was driving back to work.

Reasons and policies: Because employers have control over their employees, employers are responsible for the torts their employees commit. Employers cannot avoid such responsibility by asserting that the actions of their employees were not authorized; few employers actually authorize employees to commit tortious acts.
Exercise 3-C (p. 33)

*State v. Phillips (1975)*

**Facts:** The defendant set a building on fire. While on the way to the fire, a fireman was killed when he fell off the truck and was run over by a car that was speeding and following too closely. The defendant was convicted of arson, a felony, and felony-murder.

**Rule:** If someone is killed during the commission of a felony, the defendant is guilty of felony-murder.

**Issue:** Is the defendant guilty of felony-murder?

**Holding:** No. The defendant cannot be held criminally liable for the death of the fireman from an unforeseeable risk, even though it occurred during the commission of a felony.

**Reasons and policies:** The felony-murder rule is intended to deter people from committing felonies, especially those which are inherently dangerous to human life. Holding a defendant responsible for a death from an unforeseeable risk created by an intervening force would not further that purpose. There must be a limit to the nearly strict liability imposed under the felony-murder rule.