

TORTS, Spring 2010
Mr. Robert B Leflar

Exam No. _____

FINAL EXAMINATION

PRELIMINARIES

We will begin by reading these preliminary instructions together. Then I will answer any questions before the exam clock starts..

1. You may have access to any outline, notes, or similar course review materials in the preparation of which you have substantially participated; to course slides on the TWEN site; and to the Arkansas Civil Justice Reform Act of 2003. (Extra copies are available at the front of the room.) Access to other materials, such as the casebook, photocopies or scans of cases or of other materials distributed by the instructor, commercially-prepared outlines, outlines prepared by former students, or parts or copies thereof, is prohibited. If you have prohibited materials in your possession, please place them in the aisles or at the front of the room now. Please switch off your cell phones now.

2. You have FOUR HOURS to write this exam. There are three parts to the exam, with the following suggested times:

Part I: 16 multiple choice questions (no explanations required), 80 minutes.

Part II: One essay question with three sub-questions, 100 minutes.

Part III: One essay question with three sub-questions, 40 minutes.

The questions are weighted for grading purposes roughly in accordance with these suggested times. The remaining 20 minutes you may consider a grace period.

3. Write your exam number at the top right of this page now. You must turn in these questions together with your exam answers. Note: nothing you write on these question pages will receive any credit. You get credit only for what you write on your computer or in your bluebooks.

4. Handwritten answers either should be double spaced or should use only one side of each page. (This will make later-added insertions possible.) Write legibly so that I can credit your ideas. Leave at least a one-inch margin on the left of each page, where I score the answers.

5. In Part I, write the question number at the beginning of each answer. Begin Parts II and III each on a new page (if writing by computer) or in a new bluebook (if writing by hand). If you are writing by hand, you will probably need three to five bluebooks. Write your exam number now on each bluebook you plan to use. Number the bluebooks in this fashion: Part I, Part II # 1, Part II # 2, etc.

6. These questions arise in the newly admitted 51st state of Waterman, unless the question specifically refers to another state such as Arkansas. Waterman has enacted a law adopting pure comparative fault and a wrongful death statute like Arkansas's, but no other statutes relating to tort law. The Waterman Supreme Court has adopted traditional joint and several liability, and has rejected Anderson v. Somberg (the medical/products liability case in which the court concluded that the jury must find at least one defendant liable). There is no other binding law or precedent, unless otherwise stated in a question, but Waterman judges usually follow the Restatement (2d) of Torts and prevailing trends in the other states.

7. Part I contains 16 multiple choice questions. They require only selections, not explanations, but you may briefly explain your selections if you wish. (However, you will receive no credit for any explanations.) Questions 1-9 have only one best answer. Questions 10-16 may have one or more correct answers. Select your answer(s), and make your final selection(s) clear. You may do this in any fashion, for example by circling your choice(s) in the bluebook (if handwritten) or **underlining or boldfacing** your choice(s) (if written by computer). You will be neither credited nor penalized for any selection that is not clearly your final selection, or if you make no selection at all, or if you make more than one selection on questions listed here as having only one best answer. You will receive a slight penalty for each incorrect selection.

8. Parts II and III each contain one essay question, each with three sub-questions. Address the issues posed.

9. *Work quickly*, and keep to (or ahead of) your schedule. It would be unwise to shortchange Part III. This is a rigorous exam, and there is not a moment to lose.

PART I. MULTIPLE CHOICE QUESTIONS (80 minutes).

For Questions 1-9, choose one best answer as correct.

(Questions 1 and 2 are based on these facts.) Jeremy owns a 3-story house in Fayetteville. Ten years ago he granted an easement across his property to Arkansas Power & Light Co., which installed an uninsulated high-voltage power line stretching over the fenced back yard at a height of 20 feet, near a tall cedar tree. Last year Jeremy asked AP&L to insulate or bury the power line for safety purposes, but AP&L declined to do so because of the considerable cost.

One midnight Leroy, Jeremy's 16-year-old neighbor, climbed unseen over Jeremy's fence and up into the cedar tree with his binoculars, so he could get a look through an uncurtained window into Jeremy's beautiful daughter's third-floor bedroom. Having attained the needed height, Leroy climbed out on a limb, which broke. Leroy fell onto the uninsulated wire, causing him serious injuries.

Question 1: If Leroy's parents, on his behalf, sue Jeremy for Leroy's injuries, which of the following states the most likely outcome of the action?

- A. Jeremy will be liable because the uncurtained window constituted an attractive nuisance.
- B. Jeremy will be liable because, as landowner, he was responsible for the negligent placement of the uninsulated power line.
- C. Jeremy will not be liable because he had no duty to protect Leroy from the harm that occurred.
- D. Jeremy will not be liable because of Leroy's contributory fault.
- E. None of the above states a likely outcome of the action.

Question 2: If Leroy's parents, on his behalf, sue AP&L for Leroy's injuries, which of the following states the most likely outcome of the action?

- A. AP&L will be liable because electric power transmission is an abnormally dangerous activity.
- B. AP&L will be liable if plaintiffs' counsel can persuasively "pump the B" at trial.
- C. AP&L will not be liable because its negligent placement of the uninsulated power line was not the actual cause of Leroy's injury.
- D. AP&L will not be liable if it can prove the sum total of safety measures it had taken regarding its power grid far exceeded the damage to Leroy and others injured by power line contacts.
- E. None of the above states a likely outcome of the action.

Question 3:

"My right to swing my fist stops at your nose."

- A. True.
- B. False.
- C. It depends on the jurisdiction.

(Questions 4 and 5 are based on these facts.) Randy the lonely bachelor, studying for his final exams, took yet another Tyson's frozen dinner out of the microwave. Intent on mastering his "O → A for life," he absent-mindedly bit into a decayed mouse head that a disgruntled Tyson employee had concealed within the chicken-part entree. Disgust and revulsion overwhelmed Randy, causing him to puke all over his carefully prepared Property outline, rendering it difficult to use.

Question 4: Randy's lawsuit against Tyson will be successful

- A. only if he can show his grade was adversely affected by the experience.
- B. only if he can show Tyson was negligent in either supervising its employees or quality control.
- C. because Tyson failed to warn on the package about the possible presence of impurities.
- D. because Tyson's production line was improperly designed to prevent the defect from occurring.
- E. . (This is a strict liability case, and no proof of fault is necessary.)

Question 5: Randy comes to your law office and recounts the facts outlined in Question 4 above. He brings the Tyson package (containing no warnings about the possible presence of impurities) and the puke-soaked outline. He mentions his grade in Property (an A). You conclude that:

- A. this case is a loser, and no responsible lawyer would take it.
- B. this case is worth investigating, to see if Tyson was negligent either in supervising its employees, in quality control, or in design of the production line.
- C. Randy needs to see a competent psychologist.
- D. this case will settle quickly for a relatively small sum.
- E. None of the above is correct.

Question 6: Choose among answers A. B. C, D, E, and F.

- I. Contributory negligence, once the universal rule in the U.S., is no longer the governing rule except in a few U.S. jurisdictions.
 - II. Arkansas enacted the "Prosser law," adopting pure comparative fault.
 - III. Arkansas enacted a modified comparative fault rule with a 50% bar.
 - IV. Under current Arkansas law, a plaintiff cannot recover from a defendant who is less at fault than the plaintiff.
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- A. I and III only are correct.
 - B. III and IV only are correct.
 - C. I, III, and IV only are correct.
 - D. II and III only are correct.
 - E. All four statements I-IV are correct.
 - F. None of the choices A-E is correct.

Question 7: Whether maternal exposure to a drug such as Bendectin can cause birth defects in the fetus is typically a question of:

- A. concurrent causation.
- B. general causation.
- C. proximate causation.
- D. specific causation.
- E. superseding causation.
- F. None of the above is correct.

Question 8:

The epigram “Danger invites rescue” is an illustration of the operation of:

- A. foreseeability analysis.
- B. the “firefighter’s rule.”
- C. Good Samaritan laws.
- D. duty-to-rescue laws, such as Minnesota’s.
- E. None of the above.

Question 9: The “made-whole” doctrine in Arkansas:

- A. is a limitation on a liability insurer’s right of subrogation.
- B. provides that injured employees who receive partial recovery through a workers’ compensation award have the right to be “made whole” through an action against a non-employer third party, such as the manufacturer of a workplace machine or chemical.
- C. allows plaintiffs’ attorneys broad scope in closing arguments about the proper level of nonpecuniary (pain-and-suffering) damages.
- D. gives plaintiffs unable to show physical harm a means of avoiding the strictures of the economic loss rule.
- E. None of the above is correct.

For Questions 10-16, one or more answers are correct. You need not explain your answers, but you may provide brief explanations (for which you will receive no credit) if you choose.

Question 10: In awarding tort damages as a lump sum, reasons courts and scholars give for discounting future lost earnings and future medical expenses to present value include:

- A. the possibility of spendthrift plaintiffs.
- B. the general preference for present asset acquisition over future asset acquisition.
- C. the increasing intrinsic value of the dollar over time.
- D. the plaintiff's opportunity to invest the award.
- E. none of the above.

(Questions 11 and 12 are based on these facts.) Suppose the National Highway Traffic Safety Administration (NHTSA), which regulates auto safety, learned in 2008 of the problem of Toyota accelerator pedals sticking. However, the NHTSA official in charge, looking forward to a promised high-paying executive position at Toyota USA after retiring from NHTSA, decided not to investigate or make any public announcements. Plaintiff Pat, driving her Toyota Avalon, is injured in an accident in Arkansas involving a sticking accelerator pedal and a negligent oncoming driver, Don from Denver. Pat files suit in federal court in Arkansas against (1) Toyota USA, for selling her a defective product, (2) Don, for negligent driving, and (3) NHTSA, for regulatory negligence. Suppose Arkansas law applies. Suppose also that P can prove, in addition to the (hypothetical) facts above, that the Avalon was defective and that P was not at fault.

Question 11: Regarding Pat's claim against NHTSA, the trial judge should:

- A. give the jury a punitive damage instruction, since governmental corruption constitutes at least wilful or wanton behavior.
- B. instruct the jury to apportion P's compensatory damages between Toyota, Don, and NHTSA in accordance with the jury's determination of their relative fault shares.
- C. instruct the jury to apply the $B < P \times L$ Learned Hand balancing test to determine whether NHTSA's decision not to investigate or make a public announcement was negligent.
- D. grant judgment as a matter of law for NHTSA.
- E. None of the above is correct.

Question 12: Suppose for purposes of this question only that NHTSA is out of the case: it either settled with Pat before trial or was dismissed from the case as a matter of law. Suppose that the jury finds Don and Toyota each 50% at fault. (Ignore NHTSA's share of the fault, whatever it may be.) Suppose also that Don has no liability insurance or assets. The trial judge should:

- A. reallocate all of Don's liability share to Toyota under the principle of joint & several liability.
- B. reallocate up to a 20% liability share from Don to Toyota.
- C. reallocate up to a 10% liability share from Don to Toyota.
- D. reallocate no liability share at all, since the Arkansas Supreme Court declared the relevant section of the Civil Justice Reform Act unconstitutional.
- E. None of the above is correct.

(Questions 13 and 14 are based on these facts.) Three hunters, Al, Boris, and Chuck, went out in Waterman Woods to shoot wild turkeys. Pete was out hiking for pleasure, wearing orange as you should during hunting season. The three hunters flushed a rafter (flock) of turkeys and they all shot at them. As you have guessed, one of the shots hit Pete in the eye. Without doubt Al and Boris, walking side by side, must have seen Pete behind the turkey rafter, but Chuck, who was some distance away, could not have seen Pete from where he fired.

Question 13: Pete sues Al and Chuck, but not Boris (who has gone home to Russia). So far Pete has been unable to obtain proof as to whose shot hit him in the eye. In a pretrial motion, Pete argues that the burden of proof should shift to Al and Chuck on the question of actual causation. The court should rule that:

- A. the burden shifts to defendants, under Summers v. Tice.
- B. the plaintiff must bring Boris into court or lose, under the “empty chair” doctrine.
- C. the burden does not shift, because not all the defendants were negligent.
- D. the burden does not shift, because the plaintiff has not assembled all possible harm-causers in the court.
- E. None of the above is correct.

Question 14: Same facts as in the previous question except that (a) they were out in the Ozark National Forest in Arkansas, rather than in Waterman Woods; (b) Pete is scheduled to testify against Al, Boris, and Chuck in a federal criminal trial in which the three of them are defendants, and Pete alleges that the three were out to kill him to prevent him from testifying; and (c) at trial, Chuck presents (without objection from Pete) uncontradicted testimony from a qualified ballistics expert that Chuck’s gun could not have fired the shot that struck Pete in the eye. At the close of evidence, Chuck moves for a directed verdict. The court should:

- A. grant the directed verdict motion, because Pete has failed to prove Chuck was negligent.
- B. grant the directed verdict motion, because Pete has failed to prove causation against Chuck.
- C. grant the directed verdict motion, because Pete failed to bring Boris into court and the “empty chair” doctrine applies.
- D. deny the directed verdict motion, because Chuck’s expert’s testimony might not have met Daubert standards.
- E. deny the directed verdict motion, because Chuck may have been acting in concert.
- F. None of the above is correct.

Question 15: “Loss of chance” doctrine:

- A. is most useful in damage calculations, in assessing future lost earning capacity.
- B. requires proof that the relative risk (RR) of the harmful exposure is greater than 2.0 compared with the background risk.
- C. requires expert testimony for a plaintiff to establish his or her case.
- D. has been adopted by the Arkansas Supreme Court.
- E. None of the above is correct.

Question 16: John Jackson, age 17, is the lead singer in a popular Waterman City band, Death Star. The band practices at night in the Jackson garage, which is in a densely populated neighborhood where the houses are packed closely together. When the band turns up the amps, the noise is enough to generate complaints from the neighbors to John’s mother Jill. Three times this past year, the circuits have blown in the garage during band practice, plunging the house and garage into darkness. Jill doesn’t mind any of this, since she’s a hippie mom and believes in giving John free rein.

Greg Grump, the next-door neighbor, files a lawsuit against the Jacksons seeking an injunction and damages. Which of the following statements is accurate?

- A. If the noise from the band practices poses an unusually high probability of serious harm, it is more likely that Greg will win.
- B. If noisy activities are common in the neighborhood, it is more likely that Greg will win.
- C. If the noise could be prevented by the exercise of reasonable care, it is more likely that Greg will win.
- D. If the band’s activities have not caused a physical intrusion on Greg’s property, such as by sound waves knocking objects off Greg’s shelves, Greg cannot win.
- E. None of the above is correct.

PART II. ESSAY QUESTION (100 minutes).

The facts for this question are on this page. On the next page are Questions II-A, II-B and II-C.

“Moose” Miller, a starting defensive lineman with the Waterman Warhorses pro football team, and his buddy and second-string teammate “Slick” Stone were drinking and complaining about women they had known. Both were 25 and unmarried. It was the off-season, so team training rules were relaxed, and by 8 pm Moose had put away a fifth of whisky and a case of beer, much more than Slick had drunk. Lacking weaponry, Moose drove Slick in Moose’s Lexus to a nearby Wal-Mart and wove his unsteady way down the aisle to sporting goods. Moose told store employee Chuck Clerk to take down a Ruger P90 .45 caliber pistol and ammunition. Chuck, a Warhorses fan, recognized Moose and asked for his autograph, but Moose had difficulty signing his name. Chuck filled out ATF Form 4473 (see 27 C.F.R. § 478.32 below) for Moose, who wasn’t barred from gun ownership but couldn’t figure out how to check the right boxes. Chuck wrote in the incorrect address Moose gave him. The computerized background check cleared in a minute. Moose took the gun and ammo, peeled off a wad of cash in payment, and staggered out of the store with his arm around Slick.

Dr. Tom Therasoph, a mental health therapist employed by the Warhorses, had advised Slick the week before not to get into these drinking bouts with Moose, because they tended to lead to episodes of angry violence against women Slick was involved with. Therasoph was particularly worried by Slick’s tirades about what he was going to do to Pam Perry, who had recently told Slick to get out of her life, and six other women who had insulted him. Slick had paid no attention to Therasoph’s advice, since angry violence is a way of life for linemen on pro football teams, since Moose was his buddy, and since Therasoph had no clue how to help with Slick’s severe depression.

Since Moose was clearly in no shape to drive, Slick took the Lexus keys from him and drove out of the Wal-Mart lot. Fuming about the way Pam Perry had dissed him, Slick drove to her house and parked in front. Moose had passed out in the front seat. Slick took Moose’s pistol, loaded it, and headed for the front door. Pam saw him coming, but whether she saw the pistol or not we will never know. She opened the front door and said “Sic him Spike!” Her pit bull charged out into the yard and leapt at Slick’s throat. The first shot killed the dog. The second shot killed Pam, and the third – fired a minute later – killed Slick, the gun still in his hand. Pam was four months pregnant with Slick’s child. The baby-to-be died too. A horrified passerby witnessed the events at Pam’s house.

A federal regulation, 27 C.F.R. § 478.32, requires licensed gun dealers such as Wal-Mart to run a computer check on each customer – name, address, date of birth, photo ID, and responses to questions on ATF Form 4473 establishing that the purchaser is not disqualified to own a gun.

Waterman Code § 22-335 provides as follows: “Whoever sells, hires, barter, lends, or gives any minor under 18 years of age any pistol, dirk, electric weapon or device, or other arm or weapon, other than an ordinary pocketknife, without permission of the parent of such minor, or the person having charge of such minor, or sells, hires, barter, lends, or gives to any person of unsound mind an electric weapon or device or any dangerous weapon, other than an ordinary pocketknife, is guilty of a misdemeanor of the first degree.”

Question II-A: On the basis of these facts, list (1) each tort that may have been committed, (2) against whom that tort may have been committed, (3) who the tortfeasor may have been, (4) who or what entity in addition to (3), if any, may also be liable for the tort, and (5) the plausible theory or theories of legal liability, i.e., why might it be a tort on these facts.

Question II-B: Place yourself in the role of attorney for plaintiff(s). Is there any additional evidence, beyond that stated on the previous page, that is *necessary* to make out a prima facie case regarding any of the torts you listed in II-A?

Question II-C: Now shift to the role of law clerk for the judge trying this case. Assume the plaintiff(s) pleaded each theory you mentioned in II-A, that the facts on the previous page were entered into evidence at trial, and that any additional evidence you mentioned in II-B was also entered into evidence. Defendant(s) have moved for directed verdicts on every theory.

For each theory, advise your judge whether the defendant(s) should be granted a directed verdict as a matter of law, or whether the theory should go to the jury. (This gives you the opportunity to explain to the judge why Waterman should or should not recognize the plaintiff's theories that are not settled law.) For each theory presented to the jury, specify also the defenses on which the jury should be instructed if any, and state on what elements of the tort the plaintiff's case seems weak.

PART III. ESSAY QUESTION (40 minutes):

Perhaps the most famous exponent of law-and-economics theory (or "efficiency theory") in the law of torts is Judge Richard Posner, author of Indiana Harbor Belt R.R. v. American Cyanamid Co. (acrylonitrile leak in a railyard, Ch. 10.B). This question invites you to engage with Judge Posner's perspective on law.

- A. Explain briefly why, according to Posner and law-and-economics theory, the hazardous chemical shipper in Indiana Harbor Belt should not be strictly liable for damage caused by the leak.
- B. Under that law-and-economics reasoning, would the defendants be liable in the following cases? Briefly explain why or why not, for any one of these three cases.
1. Turner v. Big Lake Oil Co. (pollution of water and grassland from oil drilling operations)
 2. Boomer v. Atlantic Cement Co. (air pollution from cement operations)
 3. Vincent v. Lake Erie Transportation Co. (damage to dock by storm-tossed ship)
- C. Pick any one of the three cases in III-B (not necessarily the one you just discussed) and construct an argument against the application of law-and-economics theory to the decision of that case.