

TORTS, Spring 2000
Mr. Robert B Leflar

Exam No. _____

FINAL EXAMINATION

PRELIMINARIES

1. Are you ready? Four hours of intense concentration coming up: Answer or die!

2. You may have access to any outline, notes, or similar course review materials in the preparation of which you have substantially participated, as well as course handouts and writing implements (pens, pencils, paper, bluebooks, diskettes, word processors and typewriters). Access to other materials is prohibited. A few extra copies of course handouts will be available at the front of the room.

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

Part I: ten multiple choice/explanation Qs, 100 minutes

Part II: four short essay questions, 60 minutes

Part III: one essay question, 60 minutes

The questions are weighted roughly in accordance with these suggested times. The suggested times add up to 3 hours and 40 minutes. The remaining time you may consider as a grace period.

4. Write your exam number on this page. You must turn in these questions together with your exam answers.

5. If you are writing by hand, write your exam number on each bluebook you plan to use. You will probably need three to five bluebooks. Write each part of the exam in a separate bluebook. Number the bluebooks in this fashion: Part I, Part II, Part III # 1, Part III # 2. Handwritten answers either should be double spaced or should use only one side of each page. Write neatly so that I can credit your ideas. Leave at least a one-inch margin on the left of each page.

6. If you are writing on a computer or typing, start each part of the exam on a separate page and write your exam number at the top of that page. Set a one-inch left margin, number your pages and double space. Computer users: write your exam number and the name of the word processing program you are using on a label and affix that label to the diskette you turn in. Labels will be available in the front of the room.

7. These questions arise in the newly admitted 51st state of Waterman, unless the question specifically refers to Arkansas. Waterman has enacted the U.C.C. and a law adopting "pure" comparative fault. There is no other binding law or precedent, unless otherwise stated in a question. If any question seems to involve a legal issue that we have not covered in Torts, you need not concern yourself with that issue.

8. If you need further facts to answer any question, make and state reasonable factual assumptions consistent with the facts stated in the question.

9. Part I contains 10 multiple choice questions. Each question has only one best answer, and you may select only one answer as correct. You will be penalized slightly for incorrect answers, so guess at your own risk. Answer these questions as follows:

- a. State the one correct answer, and circle it (if handwritten) or ***underline or boldface it*** (if written by computer or typed) to indicate that that is your final selection. (You will be neither credited nor penalized for any selection that you have not circled or otherwise indicated that it is your final selection.)
- b. Explain in 50 words or less why each answer is either correct or incorrect. (One simple sentence will be sufficient explanation for most answers. You are wasting your time if you write long essays on these.) However, you do not need to explain your answer to Question 2.

Part credit will be given for a correct circled (or underlined or boldfaced) selection, and part credit for accurate and persuasive explanations.

10. Work quickly, and keep to (or ahead of) your schedule. This is a rigorous exam, and there is not a moment to lose.

PART I. MULTIPLE CHOICE/EXPLANATION QUESTIONS (100 minutes).

Review Instruction # 9 on the previous page.

Question 1: D, upset with P's failure to pay a debt, pulled a handgun from his jacket and, holding the gun by the barrel, swung the butt end at P's head. P dodged. The butt end of the gun hit an overhead chandelier, causing the gun to fire, puncturing P's lung. The butt end of the gun never touched P. P sued D for battery, and the above facts were proven at trial. D's attorney has offered the trial court a proposed instruction that to establish liability for the shooting, P had to prove that D intended to shoot him. The trial court should:

- A. accept the proposed instruction, since battery is an intentional tort and the flexible definition of "intent" gives P a fair opportunity to prove his case.
- B. modify the proposed instruction to read: "To establish liability for the shooting, P must prove that D acted unreasonably in harming P."
- C. reject the proposed instruction, since it was foreseeable that some kind of injury might result from the swinging of the gun.
- D. reject the proposed instruction, since D intended a harmful contact and one resulted.
- E. None of the above is an accurate statement.

Question 2: (Choose one of answers A-H. You do not need to explain your answer to this question.) In Arkansas, a child can recover for:

- I loss of consortium, when a parent dies due to defendant's negligent act.
 - II mental anguish, when a parent dies due to defendant's negligent act.
 - III her own physical injuries suffered due to a parent's negligent act.
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- A. I only
 - B. II only
 - C. III only
 - D. I and II only
 - E. I and III only
 - F. II and III only
 - G. I, II and III
 - H. None of the above

Question 3: Which of the following, if any, is a true statement?

- A. The First Amendment to the U.S. Constitution precludes any tort judgment against a newspaper for intrusion or trespass.
- B. The First Amendment to the U.S. Constitution precludes any tort judgment against a newspaper for truthful publication of a fact on a newsworthy topic.
- C. If a factual assertion published in a newspaper is on a topic of public concern, the plaintiff must prove that the newspaper published it either with knowledge of its falsity or with reckless disregard for whether it was true or false.
- D. If a factual assertion published in an Arkansas newspaper is on a topic of private concern, a defamation plaintiff in our courts need not prove actual or special damages to make out a prima facie case.
- E. None of the above is a true statement.

The next five paragraphs provide factual background for Questions 4, 5, and 6.

Federal law requires hospitals, before hiring or giving staff privileges to a new doctor, to check on that doctor's past record -- disciplinary actions, adverse malpractice judgments, and the like.

H Hospital, an Arkansas hospital, without performing the legally required background check, granted staff privileges to Dr. D, a general surgeon. "Staff privileges" means that Dr. D is permitted, for example, to conduct surgery on Dr. D's private patients at H Hospital, with assistance from H Hospital nursing staff; but Dr. D is considered an independent contractor, not a hospital employee.

Dr. D was successfully sued for malpractice twice in the year before he came to H Hospital, by patients whose surgical incisions had become infected due to improper infection control in the operating room. H Hospital did not know about, or even inquire about, these two cases. According to a recent well-designed study (Gawande et al., 126 *Surgery* 66 (1999)), wound infections are a common adverse result of surgery, and 23% of them are preventable -- by the surgeon, nursing staff, proper hospital procedures, or a combination of them.

P, a private patient of Dr. D, underwent liposuction surgery by Dr. D at H Hospital and suffered a serious wound infection. Dr. D had informed her in advance about the risk of infection. P was under general anesthesia during the operation.

P sued Dr. D, H Hospital, and the members of the nursing staff (who were all H Hospital employees) who participated in the operation. Unfortunately for P, she cannot find an expert witness to testify that Dr. D breached the standard of care of a reasonable member of the surgical profession, nor can she determine from medical records or from testimony of those present what negligent act (if any) caused P's infection.

Question 4: In P's case against Dr. D,

- A. D will win as a matter of law, because P has failed to make out a prima facie case on breach of duty.
- B. the case will go to the jury, based on *res ipsa loquitur* doctrine.
- C. the case will go to the jury, since D has breached his contractual duty to P.
- D. the case will go to the jury under *Helling v. Carey*, the eye pressure test case.
- E. None of the above is correct.

Question 5: In P's case against H Hospital,

- A. the case will go to the jury, based on *res ipsa loquitur* doctrine.
- B. the case will go to the jury, based on H's violation of a safety statute.
- C. H will win as a matter of law, because P has failed to make out a prima facie case on causation.
- D. the judge will direct the jury to award P 23% of the amount they find P was injured by the infection.
- E. None of the above is correct.

Question 6: Suppose, for purposes of this question only, that P obtains evidence that Nurse N was the only member of P's operating team who was also a member of the operating team for the next patient to undergo surgery at H Hospital that day, patient Q. One of Nurse N's jobs was dressing surgical incisions after the surgeon stitched the covering skin back together. Q suffered a wound infection identical to that suffered by P, involving the same unusual bacteria. N testifies in P's trial that he can't remember if he washed his hands and changed into a new surgical gown and new gloves between P's and Q's operations, as H Hospital procedure requires surgical nurses to do. This evidence:

- A. is most favorable to H Hospital, since it shows the hospital had appropriate anti-infection procedures in place.
- B. is most favorable to Dr. D, since it shows he was not the source of P's infection.
- C. is most favorable to P in his action against H Hospital, because H is strictly liable for the acts of all members of the medical team.
- D. is most favorable to P in his action against H Hospital, because it constitutes direct evidence of the negligence of H's employee.
- E. None of the above is correct.

Questions 7 and 8 are based on the following facts:

Adam Allen was giving his acquaintance Brenda Bailey a ride home after U of A law school classes one drizzly day. He needed to buy some stamps before the Fayetteville post office closed, but all the parking spaces were taken. So he parked illegally in front of a fire hydrant on Dickson Street and ducked into the post office, leaving Brenda sitting in the passenger-side seat, next to the fire hydrant, with the window open. Not thirty seconds later, Chris Chang, turning into Dickson from a side street, braked hard to avoid a small child that had darted into the rain-slickened street. Chris's car skidded into Adam's, knocking it into the fire hydrant. The hydrant broke and a stream of high-pressure water spewed into Adam's car, injuring Brenda and severely damaging the car.

Question 7: If Brenda sues Adam, the most likely result is that Brenda will:

- A. recover, because Adam's parking job was negligence per se.
- B. recover, because Adam had not acted as a reasonably prudent person.
- C. lose, because Brenda was a guest in Adam's car.
- D. lose, because Adam's act was not a legal cause of her injury.
- E. None of the above is correct.

Question 8: If Adam sues Chris, Chris's most plausible defense will be based on:

- A. the argument that Chris had acted with reasonable care.
- B. the sudden emergency doctrine.
- C. the contributory negligence rule.
- D. the doctrine of purely consequential economic loss.
- E. None of the above is a plausible defense.

Question 9: Assume that well-conducted scientific studies establish that nonsmoking female airline flight attendants exposed to cigarette smoke in passenger cabins have a relative risk of lung cancer of between 1.3 and 1.6, compared to nonsmoking women of similar age. The results are “statistically significant”: it is > 95% likely that the true relative risk is from 1.3 to 1.6. Based on this scientific evidence alone, if a group of female flight attendants with lung cancer sues the tobacco companies for damages, a court would find:

- A. cabin cigarette smoke was not an actual cause of the plaintiffs’ lung cancer.
- B. cabin cigarette smoke was not a proximate cause of the plaintiffs’ lung cancer.
- C. plaintiffs have proved a statistical association between cabin cigarette smoke exposure and their lung cancers, but have not proved causation to a preponderance of the evidence.
- D. plaintiffs have proved a causal link between cabin cigarette smoke exposure and their lung cancers, to a preponderance of the evidence.
- E. None of the above is an accurate statement.

Question 10: Examine the following recent news article:

FDA moves to make more drugs Rx-free

April 28, 2000

By Dennis Cauchon, USA TODAY

The Food and Drug Administration said Thursday that it would consider making several kinds of drugs -- from blood pressure treatments to birth control pills -- available without a doctor's prescription for the first time.

The FDA also said it would consider becoming more active in moving prescription drugs to over-the-counter (OTC) status, a move that generally lowers a drug's price and gives consumers easier access.

If the FDA decides to go forward with this proposed initiative, which one of the following would be the most likely tort law consequence of the agency’s move?

- A. The manufacturers whose drugs were moved to OTC status would become subject to strict liability, rather than just negligence.
- B. The scope of those drug manufacturers’ duty to warn would change.
- C. Market share liability theory, based on Sindell and similar cases, would be more widely adopted.
- D. Punitive damage awards against manufacturers of such drugs would become more widely available.
- E. None of the above would be likely to happen.

PART II. SHORT ESSAY QUESTIONS (60 minutes).

These questions explore your understanding of the rationales, or reasons, underlying various doctrines of tort law. Your answers should be concise and to the point; don't ramble. You should be able to give an excellent answer to each question in fewer than 200 words. I will look for:

- A. a clear statement of the reasons underlying each doctrine (this is most important); and
- B. one or two well-chosen examples from the case law illustrating your point(s).

In citing case law examples, you need not cite the names of the cases if you can't remember them. A short description of the salient facts or holding, together with an explanation of why each case illustrates your point(s), should be sufficient. You may cite relevant Restatement provisions, if you wish, in addition to your example(s) from the case law.

Question 1: Public figure plaintiffs in defamation actions are required to carry a different burden of proof than private figure plaintiffs. Why?

Question 2: Why does tort law need a doctrine of proximate cause?

Question 3: There seems to be more to nuisance law than just negligence principles. *Should* there be more than negligence to nuisance -- or is nuisance law simply unnecessary?

Question 4: In Arkansas, a fetus (or unborn child, take your pick) suffering prenatal injury from someone's negligent act must be born live in order to have a cause of action. Other states differ. What position should a court (such as Waterman's) take when deciding the issue as a matter of first impression, and why?

PART III. ESSAY QUESTION (60 minutes).

Congratulations on passing the Waterman bar exam, and landing a job with a small plaintiffs' firm in Waterman City. The first folder on your desk is labelled "Edna Estes." The senior partner is on vacation, and the other partners are preparing for a big trial, so you'll have to plan a strategy for developing this case file yourself. Its contents -- rather sparse, I'm afraid -- are summarized below.

Edna Estes, age 65, broke her hip when she stepped into a pothole in a parking lot in Waterman City. It is a serious injury, healing slowly, and she may well be confined to the use of a walker for the rest of her life. She has incurred and will incur substantial medical bills (which fortunately are covered by Medicare), and there is little doubt her mobility will be significantly impaired.

The accident occurred on April 14, when Ms. Estes was on the way to visit her tax consultant, Mary Miles. She drove her car into an open-air unpaved gravel parking lot across the street from the 12-story Cannon Towers building in which Ms. Miles had her office. Each space in the parking lot was denoted by a sign reserving the space for one of various businesses located in Cannon Towers, with a few spaces reserved for Cannon Towers residents. Ms. Estes saw the two spaces marked "Miles Tax Consulting" were already taken, so she parked in a space with a sign marked "Jon Johnson -- Private." Ms. Estes was a social acquaintance of Mr. Johnson, and had visited his Cannon Towers apartment once or twice in the past. Ms. Estes noticed that her left front wheel bumped as she was pulling into the parking space. When she opened the driver's side door and stepped out, her left foot went into a four-inch pothole, she lost her balance and fell.

The parking lot is one of several owned and maintained by Waterman Properties, Inc. ("WPI"). WPI leases the spaces on a yearly basis to neighboring businesses and residents. A large sign posted by WPI at the entrance of the parking lot says, in conspicuous letters: "RESERVED PARKING. UNAUTHORIZED VEHICLES WILL BE TICKETED AND TOWED AT OWNERS' EXPENSE!" Another less conspicuous sign says: "This private lot is for customer and resident parking only! WCO § 232. Use this lot at your own risk. WPI is not liable for injury or damage resulting from removal of unauthorized vehicles or otherwise." All WPI lots in Waterman City had similar signage.

Waterman City Ordinances (WCO) § 232 states in relevant part: "It is unlawful for any person to cause or permit any vehicle owned or operated by him to be parked in any space in which parking is prohibited, on public or private property. The police department is authorized to remove vehicles improperly parked, at the owner's expense, if the space is properly designated as a tow-away zone."

Before he left on vacation, the senior partner gave you these somewhat rambling instructions: "Go through the Estes file and figure out whether she's got a case against anybody, and if she does, what kind of damages she can recover. The file's pretty thin, so you'll have to write down a list of the additional facts we need to find out. Write me a memo explaining your thinking -- why we need each of the facts you say we need, how we get them, what difficulties and defenses we might run into. As for the law, our courts pretty much go with the general trend. But if there are any points of law you think we might need to argue, set out what they are, what different directions the court might go, which way we ought to try to persuade the judge, and what our best arguments are. I'll read your memo first thing when I get back." The partner is due back shortly after 5 pm today.