

Below is one essay question. This question is worth 180 points, which is 2/3 of the exam score. Please write your answer using ink, in a blue book, *skipping every other line and writing on one side of the page only*. You should spend no more than 2 hours on this portion of the test.

Two friends Cora Day and Littia Weeks, rented a suite at the Annual Arkansas Bar Meeting held in Hot Springs, Arkansas. They were delighted to discover that their suite opened onto the roof of the hotel because they were planning a large party. On the first night of the meeting Cora and Littia opened their suite to guests and provided a full, open bar and various munchies.

Soon after the party had begun they noticed that one of their guests, Jerry Jones who was intoxicated when he arrived, seemed to be getting out of control. Jones who was 6'3" tall and weighed 225 pounds, picked a fight with another guest, Minnie Maus who was 5'2" and weighed 105 pounds. Jones became physical with Maus, shoving her while calling her names that insulted her parents, her integrity and implied she had an sexually transmitted disease. Maus who was a 3<sup>rd</sup> degree black belt in karate fought back breaking Jones' nose and arm. Jones' wife, who knew he tended to become violent and threatening when intoxicated, fainted when she hear her husband cry out in pain.

Day and Weeks called the hotel front desk to get help for Jones. The desk sent the hotel Engineer, Craver, a former navy medic to the suite. He applied heat packs to Jones' nose and performed CPR on Jones, bruising one on Jones' ribs in the process. He also placed a tourniquet on Jones' arm, "to hold the bones in place."

In the meantime, the party on the roof continued. Several teenage children of Bar Association members had entered the party and were drinking heavily from the keg. Frances, a 17 year passed out and hit her head on the wall as she fell. Afraid they would be kicked out of the party, her friends shoved her into the stair well and locked the door. Another teen, Tad, was dancing on the roof when a weak spot gave way, badly injuring his leg. Two other teenage guests, Cy and Earl fell off the roof after wrestling while sitting on the ledge.

The hotel management, hearing all the commotion sent Kopp, an off-duty police officer to shut down the roof top party. Instead Kopp went to another room in the hotel where friends of his were hosting a card party. While Kopp was playing cards, Ty Thugg robbed party and left with all the guest's jewelry and cash.

At some point, the local police and paramedics arrived. They secured the scene and took the injured to Our Lady of Sorrow Hospital. However, Our Lady refused to serve Jones, because he could not find his insurance card. This greatly exacerbated his injuries. Dr. Al Practize of Our Lady failed to properly treat Earl's internal bleeding. Earl died as a result, although he might not have survived even without the error. One of the paramedics slipped on the recently waxed and polished hospital floor while going to get a drink of water.

Discuss all issues raised by the fact pattern. For any potential claim you discuss, be sure to state what the possible defenses might be as well as the likelihood of the success of each claim, and possible damage awards.

This section contains 30 questions, worth 90 points. You should spend no more than one hour on this portion of the exam.

Multiple Choice. Select the most correct answer. You may write on the test if you wish, however please indicate your answer on the scantron sheet. Use a number 2 pencil. **YOU MUST TURN IN YOUR EXAM FORM AS WELL AS THE SCANTRON IN ORDER FOR YOUR TEST TO BE GRADED.**

1. As you know, Arkansas has a comparative fault statute. Under the Arkansas comparative fault statute, the plaintiff is not barred from recovery even where the plaintiff has been negligent unless:

- a. the fault allocated to the plaintiff by the jury is less than the fault allocated to the defendant
- b. the plaintiff assumed the risk of the defendant's conduct
- c. the plaintiff's negligence was a breach of warranty
- d. the fault allocated to the plaintiff by the jury is greater than or equal to the fault allocated to the defendant
- e. both a & b
- f. none of the above

2. Courts have a great deal of difficulty with tort claims based on repressed memories. In particular, there has been a great deal of controversy over the notion of using hypnosis to retrieve the repressed memories of sexual abuse victims. Fortunately, the 2nd Circuit *Borawick* opinion has provided guidance on this issue. According to the *Borawick* court, the district court should consider a list of factors when deciding whether to admit post-hypnotic testimony. Which of the following is not one of the factors suggested by the *Borawick* court?

- a. The length of the hypnotic trance
- b. the purpose of the hypnosis
- c. whether the hypnotist was appropriately qualified by training in psychology or psychiatry
- d. the presence or absence of a permanent record which can help the court ascertain whether suggestive procedures were used
- e. whether the witness received any suggestions from the hypnotist or others prior to hypnosis
- f. evidence of the subject's hypnotizability

3. Select the incorrect statement

- a. Under the sudden emergency doctrine the actor must exercise the duty of care of an ordinarily prudent person in the same situation
- b. The intent element of intentional torts is satisfied if the actor acts with purpose or substantial certainty
- c. An actor with a disability is expected to act as a reasonable person with the same or similar disability
- d. Under the theory of contributory negligence, the plaintiff's recovery is reduced by the percent of fault allocated to her by the jury
- e. Custom may be used as evidence of whether the defendant breached the duty of care
- f. None of the above is incorrect

4. Under certain circumstances, the courts will not allow a business to avoid liability through the use of an exculpatory clause. This is especially true where the court finds the business is one that owes a duty to the public. In order to determine the existence of a public duty the court considers all but which of the following factors?

- a. the transaction concerns a type of business generally thought suitable for public regulation
- b. the party seeking exculpation is engaged in performing a service of great importance to the public
- c. the party seeking exculpation holds itself out as willing to offer this service to any member of the public who seeks it
- d. the party seeking to invoke the exculpation has a decisive advantage in bargaining strength against any member of the public who seeks his services
- e. as a result of the transaction, the person or property of the purchaser is placed under the control of the seller
- f. all of the above are factors the court will consider

5. Loss of consortium claims

- a. by children for the loss of parental consortium are not recognized in any state
- b. by parents for loss of a child's society and companionship have been allowed in a few states
- c. by unmarried cohabitants have been accepted in the majority of courts
- d. are basically recovery for loss of earnings
- e. are just another name for wrongful death claims
- f. none of the above

6. In tort, a duty is generally a standard or principle that measures the defendant's obligation to the plaintiff. This obligation ranges from no duty to the plaintiff, to strict liability. Which of the following is a basis upon which a duty may be imposed on the defendant?

- a. duty to protect an employee from dangerous conditions in the workplace
- b. duty based on a special relationship
- c. duty based on a custodial relationship
- d. duty of a professional
- e. landowner duties
- f. all of the above

7. According to the Restatement of Torts, Second, all of the following will excuse an actor for violation of a legislative enactment except when:

- a. the violation is reasonable because of the actor's incapacity.
- b. the actor neither knows nor should know of the occasion for compliance.
- c. the actor is capable of compliance after reasonable diligence or care.
- d. the actor is confronted by an emergency not due to his own misconduct
- e. compliance would involve a greater risk of harm to the actor or to others.
- f. All of the situations listed above are excusable under the Restatement of Torts, Second.

8. Carl was an eager Gamma Delta Iota pledge at the University of Arkansas. He completed the pledging process and was happily awaiting the day he could wear his letters. On the night of initiation Carl was taken into a dark room where three "big brothers" fed him the "elixir of life." Unfortunately for Carl, the elixir was amaretto (Carl had a serious allergy to nuts of any kind). Carl spent a week in the hospital as a result of ingesting the amaretto. If Carl sues the fraternity, which of the following statements is correct?

- a. The fraternity should argue comparative negligence if Carl brings a battery claim.
- b. The fraternity will probably argue consent as a defense to Carl's negligence action.
- c. Carl's claim will likely fail on the issue of cause in fact if brought as a negligence action.
- d. In order to prevail on a negligence cause of action, Carl would have to prove the fraternity brothers created an unreasonable risk of foreseeable harm.
- e. The fraternity should raise contributory negligence as a defense to Carl's negligence action.
- f. None of the above is correct.

9. Which of the following statements is true?

- a. Parental immunity has been totally abrogated
- b. Some courts use the reasonable parent standard as articulated in the Goller case to determine parental liability for negligence towards children
- c. Courts are willing to impose liability upon spouses for intentional torts to the other spouse even when they are not willing to do so for negligent torts
- d. Spouses are not allowed to sue each other for property torts such as conversion
- e. Parents are granted immunity from suits by their children for negligence arising from the parent carrying on a business or vocation
- f. both c & e

10. An insane person:

- a. is seldom liable for his intentional torts
- b. is never liable for his intentional torts
- c. is not liable for intentional torts if suffering from an unpredictable insane delusion
- d. is never liable for negligence
- e. who is institutionalized with a mental disability and does not have the capacity to control or appreciate his conduct is not liable for injuries caused to caretakers who are employed for financial compensation.
- f. both a & e

11. Courtney and Khan have been friends since kindergarten. They grew up next door to each other, attended the same high school and went away to Bendrix College together. Khan is a horrible driver. He has been involved in several accidents including one in which he rolled and totaled his car. Khan had an important date and asked Courtney if he could borrow her car. If Khan is involved in an accident while driving Courtney's car she may be liable under what theory?

- a. extended personalty
- b. battery
- c. negligent entrustment
- d. contributory negligence
- e. entrapment
- f. transferred intent

12. If the plaintiff in each of the following fact patterns were to bring a claim for battery, in which of the following situations would the judge most likely refuse to allow a jury instruction based on the defense of consent?

- a. Bruce gave his doctor permission to perform an appendectomy. While operating the doctor found a growth on Bruce's intestine which, according to standard operating procedure, should be removed immediately.
- b. Carolyn gave the dentist permission to extract 2teeth. While she was under anaesthesia the doctor removed an additional 3 teeth.
- c. When Marla asked Kip if he would mind if she kissed him, he just smiled and said nothing.
- d. Sade asks the doctor to use blood donated by herfamily during her operation and the doctor agrees to do so, but in fact does not use the family blood. Sade develops AIDS as a result.
- e. both a & d
- f. both b & d

13. Tara hit Dallas in the head with a fly swatter. Which of the following statements concerning this incident is untrue?

- a. Tara has committed a battery.
- b. If Dallas were sleeping and did not anticipate the blow, no battery occurred.
- c. Even if Dallas were sleeping and failed to anticipate the blow, Tara has committed a battery.
- d. If Dallas anticipated the blow, Tara has committed an assault as well as a battery.
- e. If Tara is a 7 year old minor, her intent will likely be an issue in the case.
- f. Both c & e are untrue.

14. Which of the following statements is true?

- a. An actor is privileged to use deadly force to protect property.
- b. An actor is privileged to use deadly force to protect another, however the other bears the risk of mistake.
- c. An actor who is a shopkeeper may lawfully detain another if he believes that person has tortiously taken his property.
- d. In Arkansas, an actor may use deadly force if provoked.
- e. Because police officers act under the color of law, they are never liable for use of excessive force.
- f. All of the above are true.

15. Prosser sorted and synthesized the various claims brought under the rubric of privacy and came up with distinct torts, including all but which of the following?

- a. intrusion or prying into an area entitled to be private
- b. malicious communications by a public official
- c. public disclosure of private matters
- d. public exposure in a false light
- e. appropriation of the plaintiff's identity by the use of his likeness without the plaintiff's permission
- f. All of the above are privacy torts.

16. Select the untrue statement.

- a. The fire fighter's rule generally meant that the landowner owed no duty to a fire fighter and could not be held liable in tort for negligent acts that led to the fire or brought the fire fighter to the premises.
- b. The fire fighter's rule is not recognized in Arkansas.
- c. One policy justification for the fire fighter's rule is that without this immunity, the public would be discouraged from seeking assistance.
- d. The fire fighter's rule has been justified on the basis that allowing liability for negligence to fire fighters would be too burdensome on society.
- e. Once tied to the land, the fire fighter's land has been applied to professional rescuers who are not on the defendant's land at all.
- f. The fire fighter's rule has been expanded to other professionals in the course of their duties.

17. The Yang case involved a shoe store owner who was dragged down the street while holding onto a police car. After the police officer brought the car to a halt, this same police officer punched Yang in the face, knocking him to the ground. During the entire confrontation a second police officer watched and did nothing to come to Yang's aid. Yang brought a §1983 claim. The court found Yang stated a claim, and set out the elements a plaintiff must prove in order to recover for an officer's failure to aid or intervene. Select the incorrect statement concerning the opinion.

- a. The court stated that one given a badge of authority of a police officer may ignore the duty imposed by his office and need not stop another officer who summarily punishes a third person in his presence.
- b. According to the court the duty to intervene applies equally to supervisory and non supervisory officers.
- c. The court held that an officer who is present and fails to intervene to prevent another officer from infringing on the constitutional rights of a citizen is liable if the officer had reason to know: 1) that excessive force was used; or 2) that a citizen was unjustifiably arrested; or 3) that any constitutional violation was committed by another law enforcement officer; and the officer had a realistic opportunity to prevent harm from occurring
- d. According to the court omissions as well as actions may violate civil rights. Under certain circumstances a state actor's failure to intervene renders him culpable under §1983.
- e. The §1983 violation alleged was a deprivation of Yang's rights under the Fourth Amendment to be free from unreasonable seizure.
- f. None of the above statements is incorrect.

18. Which of the following is not a theory used by courts in determining whether an actor is a cause in fact of a plaintiff's injuries?

- a. substantial factor
- b. concerted action
- c. but for
- d. natural and continuous consequence
- e. indivisible injury
- f. All of the above are theories used by courts in determining whether an actor is a cause in fact of the plaintiff's injuries.

19. A cause of action for educational malpractice

- a. generally covers ordinary physical harms
- b. is widely accepted
- c. would encompass affirmative misbehavior of teachers
- d. is well established, factually and legally clear
- e. has inherently difficult issues concerning the nature and cause of damages
- f. none of the above

20. Is proof that the defendant conformed with industry customs enough to relieve a defendant actor of liability for negligence?

- a. Yes, because custom establishes the standard of care
- b. No, because the compliance with custom may not be sufficient to meet the required level of care
- c. Yes, because otherwise the defendant is being held to a standard of care greater than that normally observed in the industry.
- d. No, because what is usually done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence
- e. a & c
- f. b & d

21. Which of the following is neither a current nor proposed legal definition of death?

- a. cardiopulmonary death; a human being dies when breathing and heartbeat stop entirely without possibility of resuscitation
- b. brain death; irreversible cessation of all function of the entire brain, including the brain stem
- c. Uniform Determination of Death Act; an individual who has sustained either: 1) irreversible cessation of circulatory and respiratory functions or; 2) irreversible cessation of all functions of the entire brain stem
- d. Anencephaly; the absence of an upper brain
- e. All of the above are current or proposed legal definitions of death
- f. Neither a nor c are current or proposed legal definitions of death

22. Which of the following statements concerning medical malpractice is true?

- a. One element of a cause of action is proof of the standard of care by which the physician's conduct is to be measured.
- b. If the proof is sufficient to get the plaintiff to the jury the instructions must reflect the ordinary care standard.
- c. The proof is sufficient to get the plaintiff to the jury if plaintiff can prove a bad result.
- d. The majority rule is to hold specialists to the standard of care in the same locality.
- e. A plaintiff who slips and falls while a patient in the hospital has an excellent prima facie malpractice claim.
- f. It is sufficient for plaintiff to establish a prima facie case by presenting testimony of another physician that he would have acted differently.

23. A plaintiff need not prove which of the following in a claim for malicious prosecution?

- a. want of probable cause
- b. a prosecution
- c. termination of the prosecution by acquittal
- d. instigation of the prosecution by the defendant
- e. defendant acted maliciously
- f. A plaintiff must prove all of the above elements

24. What is the doctrine of private necessity?

- a. One is privileged to sacrifice the property of another to save his life or the life of another.
- b. One is privileged to enter the land of another if it is necessary for the purpose of averting public disaster.
- c. A governmental entity is liable for property damaged for public use.
- d. In situations where an innocent third party's property is taken, damaged or destroyed by the police in the course of apprehending a suspect, the municipality must compensate the innocent party for the resulting damages.
- e. The state has the right to abate a nuisance.
- f. None of the above is correct.

25. One June afternoon at approximately 3:00 in the afternoon, Plaintiff walked over to his father-in-law's house. There he found his father-in-law trimming the limb off of a hardwood tree with a chain saw while standing on a 20 ft. extension ladder. The tree was 15 feet tall with limbs drooping to the ground.

The father-in-law then showed plaintiff where to place the ladder in order for plaintiff to cut another limb. The ladder was placed against the designated limb, and plaintiff climbed to the appropriate level and proceeded to cut it. When the weight of the cut part fell away, the limb rose abruptly, the ladder lost its support and plaintiff fell to the ground. Because of the fall he sustained serious injuries to both wrists. Would the Arkansas court find the father-in-law liable for negligence based upon the son-in-law's injuries?

- a. Yes, because he would be held to the standard of a reasonable parent
- b. Yes, because the son-in-law was an invitee to whom the father-in law owed the highest duty of care which he breached by failing to properly supervise the cutting, and by failing to properly secure the limb
- c. Yes, because the father-in-law was acting in loco parentis
- d. No, because the son-in-law was not invited onto the property and therefore was a trespasser to whom the father-in-law owed a duty not to act wantonly
- e. No, because the father-in-law did not violate the Goller standard
- f. No, because the son-in-law was a licensee, not visiting for any stated business purpose, and the father-in-law need only refrain from willful or wanton conduct and to warn of hidden dangers

26. Decedent had passed out from taking barbiturates. The police officer who found him in the parking lot assumed he was drunk. He attempted to get decedent into a car to be taken to the hospital, but at some point decided to let decedent sleep it off in the park. Decedent died of barbiturate poisoning a few hours later. Which of the following jury instructions would be the best for the plaintiff?

- a. The city had a general duty to aid those on the streets and in public places.
- b. There was a special relationship between the city and decedent created by the officer when he took the decedent into custody.
- c. The decedent was denied his substantive due process protections when the city failed to act on his behalf.
- d. The city had a duty to act for the protection of others and the officer did not meet this duty.
- e. The decedent would have survived but for the officer's failure to act.
- f. The city owed no special duty and the officer did not act.

27. A landowner does not owe a duty of care to a child trespasser based upon the fact that:

- a. trespass by children is foreseeable
- b. the landowner knows or has reason to know of the danger
- c. there is reason to think the child by reason of his age will be unable to protect himself
- d. the child is of tender years
- e. the child's parent is irresponsible
- f. both c & e

28. Which of the following statements concerning immunity of state actors is true?

- a. In the case of legislative action there is a qualified immunity.
- b. Judicial action has qualified immunity.
- c. Individuals exercising executive power are protected by qualified immunity.
- d. State officers are not liable under federal statutes for violating a citizen's constitutional rights.
- e. States are persons who can be sued under §1983 .
- f. both a & e

29. In the *DeShaney* case the Supreme Court held that the Department of Human Services had no duty to act to protect a child who was a victim of child abuse. However, in the *Sinthusomphone* case involving Jeffrey Dahmer, a Federal District Court found that *DeShaney* did not bar the claim of the decedent's family against the police. How can this be explained?

- a. The *Sinthusomphone* court characterized the police conduct as affirmative acts, not mere inaction.
- b. The *Sinthusomphone* court found that the police had established a special relationship with the decedent when they took him into custody and escorted him into danger.
- c. *Sinthusomphone* was based on equal protection and not substantive due process grounds.
- d. The facts established that the actions of the officers were the product of intentional discrimination and therefore were violative of the equal protection clause.
- e. all of the above
- f. a & c only

30. The traditional rule was that a lease was a conveyance of land. The lessee became an "owner" of the land in question for the period of the lease. Thus the lessor had no more responsibility for the upkeep of the land than any other person who conveyed land. In what ways has this rule been modified over time?

- a. At least one court has departed from the traditional rules by imposing upon the landlord the duty to exercise ordinary care towards the tenant.
- b. Lessors are liable for known latent defects.
- c. Courts may hold a lessor liable, even where a tenant knows of the danger and agrees to fix it, where the lessor knew that the premises were leased for public use.
- d. If a lessor undertakes repairs, and does so negligently, though under no contractual obligation to do so, the lessor is liable.
- e. Criminal and civil statutes regulate the duties of lessors.
- f. All of the above are ways in which the rule concerning lessor liability has been changed.