

TORTS, Spring 2005
Mr. Robert B Leflar

Exam No. _____

FINAL EXAMINATION

PRELIMINARIES

1. 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 (except photocopies of cases) and writing implements (pens, pencils, paper, bluebooks, and ExamSoft-qualified word processors and diskettes). Access to other materials, such as the casebook, photocopies or scans of cases, commercially-prepared outlines, outlines prepared by former students, or parts or copies thereof, is prohibited. Cell phones must be switched off for the duration of the exam. If you have prohibited materials in your possession, please place them in the aisles or at the front of the room now. Switch off your cell phones.

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

- Part I: Ten short answer questions, of which you are to answer only nine, 60 minutes.
Part II: Ten multiple choice/explanation questions, 90 minutes.
Part III: One essay question, 30 minutes.
Part IV: One essay question, 60 minutes. This is the “thought question.”

The questions are weighted for grading purposes roughly in accordance with these suggested times.

3. Write your exam number at the top right of this page now. You must turn in these questions together with your exam answers.

4. If you are writing by hand, you will probably need four or five bluebooks. Write your exam number on each bluebook you plan to use. Do that now. Write each part of the exam in a separate bluebook. Number the bluebooks in this fashion: Part I, Part II # 1, Part II # 2, Part III, Part IV. When you turn in the exam, you will put each Part in a separate box at the front of the room.

5. 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.

6. If you are writing on a computer, type the question number at the beginning of each answer.

7. 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 the U.C.C., a law adopting "pure" comparative fault, and a law requiring car passengers to wear seat belts. There is no other binding law or precedent, unless otherwise stated in a question, but Waterman judges usually follow prevailing trends in other states.

8. Part II contains ten multiple choice questions. Answer each of them as follows:

- a. Selection: Each question has one best answer. Select one answer, and make it clear that that is your final selection. You may do this in any fashion, for example by circling your choice (if handwritten) or **underlining or boldfacing** your choice (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 more than one selection or no selection at all. You will receive a slight penalty for an incorrect selection.
- b. Explanation: At the beginning of each question is an instruction about what explanation, if any, is required for that question. For most questions, you are to explain only why the single answer you selected is correct. For questions 2, 3, and 4, you are to explain why each statement is right or wrong. For questions 5 and 6, no explanation is required. If the answer you selected is “None of the above” and an explanation of your selection is required, briefly explain why each other answer is incorrect. Keep your explanations brief. One to three simple sentences will be sufficient. You are wasting your time if you write long essays.

On questions requiring explanations, part credit will be given for correct final selections, and part credit for accurate and persuasive explanations.

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

PART I. SHORT ANSWER QUESTIONS (60 minutes).

Instructions: Briefly explain nine of the following ten phrases. In your explanations, (a) state what the phrase means and to what area(s) of law it is relevant; (b) give the reason(s) for the concept; and (c) briefly assess its current prevalence or significance in the law.

You would not be well advised to write detailed essays about these, given your limited time. Five or six simple sentences, and usually less, should be fully adequate for each question. You will not receive any extra credit for answering all ten questions.

1. Actual malice
2. Avoidable consequences rule
3. Initial permission rule
4. Joint and several liability
5. Libel per quod
6. Relationship between “non-natural use” and “non-reciprocal risk”
7. “Proof of negligence in the air, so to speak, will not do.”
8. Reduction to present value
9. Shopkeeper’s privilege
10. SLAPP suit

PART II. MULTIPLE CHOICE/EXPLANATION QUESTIONS (90 minutes).

→ Review Instruction # 8 on page 2 of this exam.

Question 1. (Explain the correct answer only.)

On a commercial airline flight, things were going fine until the captain accidentally played a prerecorded message saying the passenger cabin was losing oxygen, and all the oxygen masks dropped down from above. There was no actual emergency, and the captain soon realized his mistake, announced that all was well, and instructed the passengers to disregard the dangling masks. Edna, an elderly passenger, had a serious anxiety attack and heart palpitations. Dr. Davis, an emergency care specialist who was sitting right next to Edna, observed her condition but thought she would probably be all right. Fearing the malpractice implications, he did nothing to aid her. Neither spoke to the other. Edna wound up having to be hospitalized, and upon learning Dr. Davis could have helped but did not, she sued him. Which statement is most clearly correct?

- A. Dr. Davis will win, if a Good Samaritan law applies to the case.
- B. Dr. Davis will win, because he had no duty of care toward Edna.
- C. Dr. Davis will win, because Edna would be unable to prove general causation.
- D. Edna will win, because Dr. Davis's failure to act violated their special relationship arising out of their proximity on the plane.
- E. Edna will win, because Dr. Davis's failure to act violated a principle of medical ethics.

Question 2.

Which of the following accurately states a rule concerning the tort law effect of defendant's violation of a safety statute? Choose among answers A-H, and **explain why each statement I-IV is correct or incorrect.**

- I. Violation of a safety statute applicable to the standard of care generally raises a presumption that the defendant was negligent.
- II. The majority rule is that violation of a safety statute applicable to the standard of care constitutes evidence of the defendant's negligence.
- III. In Arkansas, violation of a safety statute designed to protect people in defendant's position from the type of harm that actually occurred constitutes evidence of negligence.
- IV. For violation of a safety statute to assist a plaintiff in proving a defendant's negligence, the violation must be at least a substantial factor in causing plaintiff's harm.

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| A. I only | F. II and IV |
| B. II only | G. III and IV |
| C. III only | H. I, III and IV |
| D. IV only | I. II, III and IV |
| E. I and IV | J. None of the statements is accurate. |

Question 3. (For this question, explain briefly why each answer is right or wrong.)

The deceased, driving a vehicle facing a setting sun on a clear, straight road in Waterman, rear-ended plaintiff's car which was stopped at a red light. Skid marks 40 feet long were left on the road ending at the point of collision. Just after the crash, the deceased, with no seat belt buckled, was half out of the car, unable to breathe. He died of a heart attack that occurred just before, during, or just after the impact; exactly when it occurred is unknown. Plaintiff sued his estate for injuries sustained. Upon proof of these facts at trial, at the close of evidence the defense moves for a directed verdict (judgment as a matter of law). The court should:

- A. grant the motion, because plaintiff presented no direct evidence that the deceased was negligent.
- B. grant the motion, because of the two possibilities that (1) the deceased had had a heart attack before the accident, or (2) plaintiff's car had stopped suddenly at the red light.
- C. deny the motion, because all the elements of res ipsa are met.
- D. deny the motion, because decedent was not wearing his seat belt.
- E. None of the above is correct.

Question 4. (For this question, explain briefly why each answer is right or wrong.)

Under the consumer expectation test, the plaintiff

- A. must present a reasonable alternative design, that would have prevented or mitigated the plaintiff's injury.
- B. may benefit from the "heeding presumption" that had the product manufacturer provided a warning adequate to meet reasonable consumer expectations, the plaintiff would have read and heeded it.
- C. cannot recover from the drug manufacturer for injuries caused by taking a prescription drug, as long as the manufacturer provided adequate risk information and dosage instructions to the prescribing physician.
- D. has a better chance of recovering from manufacturers of products whose propensity to injure is well known, such as gun and cigarette manufacturers, than under the risk-utility test.
- E. None of the above is correct.

Question 5. (You need not explain your answer to this question.)

Punitive damages

- A. are limited in amount by the federal constitution to a single-digit multiple of the amount of compensatory damages in a case, unless the defendant has engaged in particularly egregious conduct.
- B. are not taxable to the successful plaintiff as income.
- C. are awarded far more often in jury trials than in bench trials (non-jury trials where the judge makes the findings of fact).
- D. are awarded far more often in personal injury cases than in business tort cases involving merely economic injury.
- E. None of the above is correct.

Question 6. (You need not explain your answer to this question.)

When deciding whether a defendant has breached a duty of care, the factfinder must consider:

- A. how a reasonable person of defendant's physical and mental capacity would have acted under similar circumstances.
- B. the defendant's financial resources.
- C. whether the defendant's act was a but-for cause of plaintiff's injury.
- D. the expert witnesses' testimony on matters of common knowledge.
- E. None of the above.

Question 7. (Explain the correct answer only.)

The persuasive power of the instrumentalist "deterrence theory," said to underlie many tort doctrines, is strongest in a case in which the defendant is:

- A. a quail hunter toting a shotgun.
- B. the owner of an unleashed German shepherd.
- C. a kid pulling a chair out from where an old lady is about to sit.
- D. the manufacturer of a tippable vaporizer.
- E. an apartment renter with a defective bathroom faucet handle.

The next three questions are based on the facts in the following paragraph. **For questions 8 and 9, explain the correct answer only. For question 10, answer in one or two sentences.**

Recall McQuay v. Guntharp, the Arkansas case involving a doctor who fondled the breasts of some of his female patients. Suppose you represent another group of Arkansas women who want to file suit against their physician, a male obstetrician/gynecologist by the name of Dr. Groper. Each of the women has undergone a pelvic exam by Dr. Groper, for a medically sound reason, while under general anesthesia. The women suspect (because of rumors heard from nurses) that Dr. Groper extended those pelvic exams on their private areas, without their consent, while they were unconscious, at least in part due to non-medical, perverted personal motives like Dr. Guntharp's. The women were not psychically scarred or anything, but they are steamed, and they could use the cash if they have a case. It turns out that Dr. Groper, though he carried liability insurance while "treating" these women, is now personally bankrupt due to casino losses, and no longer practices medicine.

Question 8

Assume the nurses' rumors are factually confirmed, and you have found a qualified physician of the same specialty who is willing to testify that such acts by Dr. Groper were outside the profession's standard of due care. Which of the following is not a plausible cause of action against Dr. Groper?

- A. Assault
- B. Battery
- C. Medical negligence
- D. Outrage
- E. All of the above are plausible causes of action.

Question 9

Before filing suit, you must consider which of the causes of action listed in Question 8 should be included in the complaint. In this regard, which one of the following statements is correct, or at least most nearly correct?

- A. The outrage cause of action should be included, because that gives the plaintiffs the best chance of winning the case.
- B. The medical negligence cause of action should be included, because that gives the plaintiffs the best chance of winning a punitive damage award.
- C. The medical negligence cause of action should be included, because that gives the plaintiffs the best chance of collecting some damages.
- D. All of the causes of action listed in Question 8 should be included, because that gives the plaintiffs the best chance of winning on at least one of them.
- E. None of the above answers even approaches being nearly correct.

Question 10

State in one or two sentences the ethical problem faced by the attorney for Dr. Groper's liability insurance company.

PART III. ESSAY QUESTION (30 minutes).

W divorces her rich, abusive husband H because of his increasingly erratic and threatening behavior. She is awarded sole custody of their 5-year-old daughter D. The judge issues a restraining order forbidding H to go near W or D. H drives his red Porsche by W's house, finds D jumping on the trampoline in the yard, and kidnaps her. W, who witnesses the kidnapping, calls the police.

T, a state trooper in an unmarked patrol car, gets a call from the dispatcher, and sees H whizzing by in the Porsche with D, neither H nor D wearing a seat belt. T pulls out behind H, blue lights flashing. H leads T on a wild chase over curvy country roads at speeds exceeding 100 mph. H, an excellent driver, negotiates a curve that T can't handle at such high speeds. T's patrol car flips, and T is seriously injured, despite the fact that T was wearing his seat belt and the air bag properly deployed. D is scared out of her wits, but she suffers no physical injury or impact. All these events take place in Arkansas.

(A) T sues H for his injury. Discuss whether T should win, citing whatever reasons and authority (from Arkansas or elsewhere) that you think might be persuasive.

(B) Does D (or her mother, acting on her behalf) have any basis for a successful lawsuit against T or his employer, the Arkansas State Police? Why or why not?

PART IV. ESSAY QUESTION (60 minutes).

Consider the case of Thing v. La Chusa (limiting bystander recovery for negligently inflicted emotional distress, compared to previous California caselaw). Justice Kaufman, concurring in the result, criticized both the majority and dissenting opinions for failing to “articulate[] a genuinely ‘principled’ rule of law.” To Kaufman, the majority’s rule was “arbitrary” and failed to “consider the cost of such institutionalized caprice,” whereas the dissent’s position would create “even greater confusion and inconsistency of result.”

(a) Explain briefly what Kaufman is talking about.

- (1) Why is the majority’s rule on bystander recovery “arbitrary”?
- (2) What does Kaufman mean by “institutional caprice”?
- (3) Why would the dissent’s position create confusion?
- (4) How would Kaufman’s preferred rule minimize the problems he identified?

(b) Select another torts case we have studied – any case – to the holding of which Kaufman’s criticisms about arbitrariness, institutional caprice, and inconsistency of result could also be applied. Explain why those criticisms could be applied to the case you selected.