OLD EXAMINATIONS AND PROBLEMS

Professor Vincent R. Johnson

Index to Contents

(1)

ST. MARY'S UNIVERSITY LAW SCHOOL

Criminal Law - Section C
Exam primarily focusing on:

- Complicity
- Conspiracy
- Homicide
- Defenses
- Burdens of Proof
- Impossibility

Prof. Vincent R. Johnson
(Three hours; 2/3 of final grade).
December 17, 1982

WRITE YOUR EXAM NUMBER HERE: _____

GENERAL INSTRUCTIONS

1. Immediately place your exam number in the indicated space on the front of:

   1) this set of questions
   2) your multiple choice and true/false answer sheet
   3) your essay answer sheet

   All three items must be handed in. If you fail to hand in your test questions at the end of the exam, your exam will not be graded and you risk a failing grade. No name should appear on any answer sheet.

2. Write or print your name, legibly of course, on the sheet with your exam number. Keep it -- perhaps safely in your criminal law book -- until the exams are returned in January. You will have to hand it in to me to receive your graded exam.

3. No questions may be asked of the person administering the exam during the exam period or afterwards, unless they deal exclusively with administrative matters.

4. No one may speak to me about the exam until the grades are handed back in January. Since you will receive your test back as soon as I grade it in January -- probably by January 15 -- there is no need to leave a post card or envelope with the proctor so that your grade can be mailed. I will post a notice of when exams will be handed back to this section.

5. Watch for important words like "most," "only," "least," and so forth.

6. Maximum points: Multiple Choice - 96
   True/False - 12
   Essay - 125

   The 24 multiple choice questions will be worth 4 points each; no deduction will be made for wrong answers. In contrast,

the true/false questions are worth 2 points each and 1 point will be deducted for each wrong true/false answer. For example, if you answer all six true/false questions and get five right, you will receive 9 points ((5 X 2)- 1 = 9) If you answer only five of the six and get all five correct, you will receive 10 points (5 X 2 = 10).

8. The three hour time limit will be strictly observed. Do the multiple choice and true/false questions first. Your multiple choice and true/false answer sheet will be collected at the end of two hours -- which is long after you should have finished those questions. Your essay answer sheet will be collected at the end of the exam. If you finish your multiple choice and true/false questions before the end of two hours, begin the essay. Once you have handed in your multiple choice and true/false answers, you may not later ask to change them.

9. The following may serve as a reasonable guide for allocation of time.

Multiple Choice	-	1 hour 25 minutes
True/False	-	5 minutes
Essay	-	1 hour 30 minutes
		3 hours

10. Please keep your answer sheets covered, especially the multiple choice and true/false answer sheet. To the extent that you allow others to have your hard-earned answers, you run the very substantial risk that you will come out lower in the scaled distribution of grades.

11. If some of the questions seem difficult, don't worry, just do your best. If none of the questions seem difficult -- worry.

12. The pages of the exam are sequentially numbered. Check to make sure you are not missing any. Total number of pages - 26.

13. If you run out of space for your essay answers, obtain more paper from the proctor or from the desk at the front of the room, or as a last resort use the back of your answer pages. Make sure that any additional pages are stapled to your answer sheet, or if no stapler is available, call them to the attention of the proctor when you hand in those answers.

14. If you finish the exam before the end of the three hours, check your work and correct any grammer, spelling, or punctuation errors. If you have done that, you may leave by turning in your questions and answers to the proctor.

15. It will be to your advantage to clearly organize your essay and to limit your discussion to the questions asked below.

16. Good luck! Have a happy holiday season!

(Pages 3-20 have been omitted.)

ESSAY QUESTION:

Note: While the essay is composed of two parts (I-A & B and II), it will be read as a whole, and you will be given a single grade for the entire essay.

I-A

The Relevant facts are as follows:

Amos, the Grand Imperial Wizard of the local chapter of the Ku Klux Klan, was furious. For three months the new federal prosecutor, Tex (an old classmate of his, who he always hated) had been on a crusade to weaken and destroy the Klan, an organization well-known in the locality for its reputation for violence. Indictment after indictment had been sought and obtained by Tex from the Grand Jury charging known or suspected members of the local chapter with a host of minor crimes relating to the revenue laws and business fraud. The burden of defending against such charges (most of which had merit) had become so onerous and the risk of conviction so substantial that participation in local Klan activities had declined precipitously. Tex's prosecutorial fervor was spured by the fact that within the past year his estranged, younger brother, Dan, had dropped out of school and had become a protégé of Amos.

Amos walked to Bobby's house and told him that it was high time to retaliate. The two decided that later that night, with a couple others, they would go to Tex's house in Loyalhanna and cut an half inch deep cross on Tex's chest -- to see if that would scare some sense into him.

Bobby and Amos left the house and walked to Nemo's Un-Sporting Goods Shoppe, where Amos told Nemo that he needed "a small, sharp knife, to do some cutting with." Nemo displayed three models, and sold the one for $3.98, the cheapest of the three

Upon leaving the store, Bobby called Clive and Dan from a pay phone, explained the plan, and told them to meet him and Amos in front of the drug store in 15 minutes. As soon as they arrived, the foursome walked to Orville's Laundry and Dry Cleaners, a block away, and entered just before the usual 9:00 closing time. Amos held up the new knife, twirled it in his fingers, and told Orville, "We need four of the fitted sheets I left here last Friday, with pillow cases, so we can pay a visit to Tex." From the back room, Orville produced a bundle wrapped in brown paper and tied with string, saying: "I will send the bill at the end of the month, as usual." In better days, the Klan's laundry had regularly accounted for 40% of Orville's business.

Upon leaving the store the group ran into Penge. Amos asked if he could give them a lift to Loyalhanna. Penge responded that he was happy to oblige if they didn't mind riding in the back of the truck.

Upon reaching the village, six miles distant, the group bailed out, thanked Penge, and proceeded on foot to Tex's house. The yard was dark, but there were lights on inside. The group donned their white regalia, then stepped quietly onto the front porch. They could see no one through the window, but could hear a radio and voices in a room above. Finding the front door unlocked, Amos led the group in and they ascended the stairs. Amos threw open the door to the room from which the sound was coming and to his utter shock and outrage found his married sister Azalea in bed with Tex. Amos dragged her out of bed and she went running from the room.

Bobby and Clive piled onto the bed and pinned down Tex's arms and shoulders. Amos then threw the knife to Dan, and said that in view of the new and disgusting turn of events, it was only fitting that he do the honors. Dan replied that he changed his mind and wanted no further part in the venture. At that point, Amos pulled a pistol from in under his sheet, pointed it at Dan, and said that if he did not start the cutting by the count of five, he would blow Dan's brains out. Knowing Amos' reputation for violence, Dan capitulated. Bobby and Clive smothered Tex's face in a pillow, Amos held his legs, and Dan cut a quarter inch deep cross into his brother's chest. As soon as it was done, Dan fainted to the floor.

Just as Amos handed his gun to Bobbie, Tex's father, Turk, burst into the room with a handgun. Amos, Bobby, and Clive all looked to the door. Seeing the blood on Tex's chest and seeing the gun in Bobby's hand pointing directly at him, Turk shot Bobby through the neck. As he fell dead to the floor, the gun in his hand discharged, the bullet passing through the bed and into Clive's spine, killing him instantly.

Turk held Amos and his son, Dan, at gunpoint until the police arrived and took them into custody. A few minutes later, an ambulance came for Tex. On its way back to the hospital, eight miles from Tex's house, the ambulance accidently ran a traffic light and was hit broadside by a crossing trailer truck. The ambulance driver, Ramo, and Tex died instantly. Two paramedics, who survived the crash, later indicated that in their professional opinions, Tex was seriously wounded, but would not have died except for the traffic accident.

I-B

In Part I of the essay, you are asked to determine, with reference to several of the actors (a) whether the actor may be held liable for a particular death on the basis of being a primary perpetrator, an accomplice, or a co-conspirator, and (b) the highest level of homicide (under the statute set forth below) consistent with each finding. (E.g., A was an accomplice to B's intentional killing of X because he did . . . and therefore he is liable for murder under 101.1 (a) of the statute).

While your conclusions are important, it is even more important that you demonstrate your reasoning process. For example, if you say Nemo is a co-conspirator, you must indicate what legal standard you are employing in making that determination and what facts or reasonable inferences bring him within the standard.

Of course, some matters will require more extensive analysis than others. Also, it may be unnecessary to discuss whether a particular actor is an accomplice or co-conspirator with respect to a specified death, if you can clearly term the actor the primary perpetrator of the killing.

Naturally, your determination of whether liability may be imposed under a given theory must address questions of excuse, privilege, and so forth.

Liability for homicide is this jurisdiction is governed exclusively by sections 101.1 thru 101.3 of the state penal law, set forth below. Your discussion must be guided by reference to this stateute not by what common law, the Model Penal Code, or the Texas Penal Code [illegible]

however, that interpretations of similar language in such bodies of law may be reasonably relied upon to illuminate the meaning of language in this statute.

If language contained in sections 101.1 thru 101.3 is susceptible of more than one colorable interpretation, each of which finds significant support in the case law of other jurisdictions, make reference in your answers as to how such differences in interpretation or application might affect whether a particular actor is liable for a particular death.

The homicide statute provides:

Sec. 101.1 A person commits murder if he:

a. intentionally or knowingly causes the death of an individual;

b. intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual;

c. recklessly causes the death of an individual under circumstances manifesting extreme indifference to the value of human life; or

d. commits or attempts to commit an inherently dangerous felony which results in the death of an individual.

Sec. 101.2. A person commits voluntary manslaughter if he causes the death of an individual under circumstances that would constitute murder under Sec. 101.1(a) of this code, except that he caused the death under the immediate influence of sudden passion arising from an adequate cause.

Sec. 101.3. A person commits involuntary manslaughter if he recklessly causes the death of an individual.

As to matters not covered by the homicide provisions -- for example, other crimes or defenses -- the jurisdiction may adhere to either the Model Penal Code or the common law. Thus, you should state whether the same analysis applies, under both bodies of law, and if not, wherein the difference lies.

Discuss fully, but concisely:

(1) Dan's liability for the death of:

a. Tex
b. Ramo

(2) Amos' liability for the death of:

a. Tex
b. Bobby and Clive

(3) Turk's liability for the death of:

a. Bobby
b. Clive

(4) Nemo's, Orville's and Penge's liability for the death of:

a. Tex

Please keep your answer as organized as possible. Please write legibly.

If you address a particular matter, for example a defense, and then later need to mention it again regarding a different actor or victim, you may make a shorthand reference to your earlier discussion, if that is convenient.

II.

A state legislator would like your opinion on a proposed statute which would provide:

Section 101. Criminal homicide.

a. A person commits the offense of criminal homicide if he causes the death of another human being by voluntary acts the ordinary consequence of which is death of another.

b. Criminal homicide is aggravated criminal homicide (carrying a maximum term of life imprisonment) or simple criminal homicide (carrying a maximum term of imprisonment for five years).

c. It is an affirmative defense to aggravated criminal homicide, but not to simple criminal homicide, that the actor did not kill purposely or knowingly.

Briefly (maximum 15 lines) tell him on whom the burden of production and persuasion would rest, with respect to issue of mens rea, and whether that is constitutional. Cite case names in support of your analysis, if possible.

ST. MARY'S UNIVERSITY SCHOOL OF LAW

Torts - Section D
Exam primarily focusing on:
- Damages
- Nuisance
- Misrepresentation
- Defamation
- Privacy

Prof. Vincent R. Johnson
December 13, 1982

(Two Hours: 50% of final grade.)

WRITE YOUR EXAM NUMBER HERE:

_____

General Instructions

1. Immediately place your exam number in the appropriate spaces on both your test questions and your answer sheet. Both must be handed in at the end of the exam. If you fail to hand in your questions with your answer sheet, your answers will not be graded and you risk a failing grade.

2. Write or print your name, legibly of course, on the sheet with your exam number. Keep it -- perhaps safely in your torts book -- until the exams are returned in January. You will have to hand it in to me to receive your graded exam.

3. Any reference to the Restatement on the exam is a reference to the Restatement (Second) of Torts.

4. Watch for important words like "only," "most," "least," etc.

5. The multiple choice are worth four points each; no deduction will be made for wrong multiple choice answers. In contrast, the true/false are worth 2 points and 1 point will be deducted for each wrong answer.

6. Multiple Choice - 80 points maximum
   True/False - 18 points maximum
   Essay - 125 points maximum

7. No one may speak to me regarding the exam until the grades are handed back.

8. Please keep your answer sheet covered. To the extent that you let others have your hard-earned answers, you run the very substantial risk that you will come out lower in the scaled distribution of grades.

9. Exam ends promptly at 12:30.

10. Good luck! Do your best! Have a happy holiday season!

(Pages 2-15 have been omitted.)

ESSAY QUESTION - 125 Points

Note

Although I have divided the question into three major parts (A,B, and C) in order to focus your discussion, your essay will be read as a whole and you will be given one grade for the entire essay.

Please attempt to clearly structure your discussion. It will be to your advantage. However, if you forget a point at the beginning, but mention it at the end, the chances are good that I will sort things out.

Please skip a line between paragraphs, and please write legibly.

Alice contracted herpes after having sex with Brad, an anchorman on the nightly news at the television station where she worked. According to Alice, though she was always strongly attracted to Brad, she only agreed to the one-time liaison after Brad assured her that he did not have veneral disease. Upon discovering her malady a few weeks later, Alice was overcome by outrage, guilt, and shame. Outrage at the fact that Brad had deceived her. Guilt because she knew she had been unfaithful to her husband, Carter, and her infidelity might endanger her marriage. Shame because she feared that she had unwittingly passed the disease to Dave, young sportscaster at the station, whom she had seduced during the intervening weeks after telling him that there was no chance of "catching anything" from her. During the following days, Alice was unable to eat, sleep, or concentrate on her work. She frequently slipped into intense melancholia and depression. She began to make up excuses for not having sex with her husband, but feared that he had already contracted the disease from her

Soon thereafter, Carter confronted Alice, told her that he showed symptoms of herpes, and insisted that it must have come from her since he had never had extramarital sexual relations. Alice admitted responsibility and confessed the whole story about Brad and Dave. A day later, Carter permanently moved out of their apartment, telling Alice that he wanted a divorce.

When later Dave confronted Alice with his infectation, she told him the entire story. Dave no longer wishes to have anything to do with Alice. He worries constantly about how the disease will affect his future health and sex life.

(A)

Assume Alice, now embittered and alone, contacts your law firm, Grabem and Squeeze, and wants to sue Brad "for all he is worth." Prepare a memo to a senior partner addressing fully but concisely the various tort theories under which Brad might be liable to Alice for damages. (The senior partner has had a course in torts, but does not regularly practice in that area. You need not list separately the elements of a cause of action, but may integrate them as necessary into your discussion of the facts.) If a cause of action is colorable, but there are as yet insufficient facts upon which to predict likelihood of success, illuminate the factual considerations that will bear upon whether the claim will be found to have merit. (E.g., Brad will be liable to Alice for X if he acted intentionally in doing Y, but not if he . . . because . . .). As relevant, and to the extent possible, discuss defenses, privileges, damages, and other matters relevant to the firm's ability to successfully litigate the case. (I assume that on the foregoing facts an ethical question would arise as to whether the firm should represent Alice in this type of action. You may set this question aside and need not address it -- not because it is unimportant, but because of the constraints of time.)

(B)

Assume that Carter and Dave have each sought out Grabem & Squeeze and separately wish to sue Brad for damages. Discuss colorable theories of tort liability. To the extent relevant and necessary, address issues of defenses, privileges, damages, and so forth. Compare the likelihood of success in the two cases. You may assume that part (A) of your memo has already been read and may make shorthand reference to it if that is convenient. (You need not explore the question of whether there would be a professional conflict of interest if the same firm represented Alice, Carter, and Dave in separate or joint actions against Brad).

(C)

Assume that you file a complaint in state court on behalf of Alice against Brad, alleging, detailed facts concerning their sexual affair. Upon leaving the courthouse that day, you make statements to waiting newspaper reporters similiar to those contained in the complaint as you explain Alice's contentions. As a result of the publicity, Brad loses his job and institutes a common law action for invasion of privacy against both you and Alice for public disclosure of private facts, or alternatively, for false light in the public eye. May such action be maintained? Specifically, what will Brad have to attempt to show? Would either or both of the claims be successful against either or both of the defendants?

A Few Notes on the Essay Question

These comments are not intended as a comprehensive answer to the essay question, but are offered merely to illustrate a few of the important distinctions a good answer would make.

Obviously Alice could bring some type of misrepresentation action against Brad. Her action might also be framed in terms of ordinary battery or intentional infliction of severe mental distress. As to each of these theories it is important to focus on the defendant's state of mind at the time he acted. Battery requires only intent to make contact. There was consent, but the crucial question is whether fraud vitiated the consent. This would require discussion of the essence/inducement dichotomy, the recent authorities rejecting that dichotomy, and the defendant's knowledge of whether he had the disease.

Intentional Infliction of Severe Mental Distress will lie if Brad knew he had the disease or if he was reckless as to that fact. The conduct might be classed as extreme and outrageous. . . .

Misrepresentation could be based on either intentional or negligent conduct, but probably not innocent conduct.

Whether Carter or Dave could recover against Brad on a third-party misrepresentation theory may depend on whether the statement to Alice was intentionally or negligently made. Where the loss in question is a non-tangible, economic loss, liability extends further if the misrepresentation is intentional. That is, if the defendant acts with scienter, the third-party may recover if the maker intended or had reason to expect that the substance of the statement would be communicated to the plaintiff and would influence his conduct, whereas if the maker was only negligent as to the falsity of the statement, the third-party must be a member of the limited group for whose benefit the statement was made and who the maker intended or knew the recipient intended to reach. Here, however, we must ask whether the same rules apply to a case involving physical injury, rather than non-tangible economic loss. At least we can say that where personal injury results, the scope of liability is likely to be broader.

In Brad's action, the judicial proceedings privilege does not apply to proceedings outside the courthouse. The privilege to report on an official proceeding does not apply to a complaint that has not yet been judicially acted upon, since any other rule would permit a person to utter damaging statements merely by filing a sham complaint he never intended to follow through with. . . .

The above remarks provide only the barest outline of the legal theories a good answer would have mentioned. It is vitally important to speak not only about rules, but about how they apply to the facts presented. Of course the facts define the parties' respective claims for damages.

St. Mary's University School of Law

Torts II Final Exam
Focus: Negligence
Strict Liability

Professor Vincent R. Johnson
April 29, 1983
Three hours.

Write your Social Security Number Here: _____

General Instructions:

1. Immediately place your social security number in the appropriate space on this sheet and on the answer sheet. Both must be handed in at the end of the exam. If you fail to turn in your questions with your answer sheet, your answers will not be graded and you risk a failing grade.

2. Unless instructed otherwise, you may assume that comparative negligence has not been adopted.

3. Watch for important words like "only," "most," "least," and so forth.

4. Multiple Choice questions are worth 4 points each, and no penalty will be assessed for wrong answers.

Total points -	Multiple Choice	88
	Essay	125
		213

5. No one may speak to me about the exam until the grades are mailed out.

6. If you leave me a stamped envelope, you will probably receive your exam in the mail by mid-or late-May.

7. Please keep your answer sheet covered. To the extent that you let others have your hard-earned answers, you run the very substantial risk that you will come out lower in the scaled distribution of grades.

8. Cheating, of course, is absolutely forbidden.

9. The exam will last three hours and will end promptly at the time I indicate.

10. You may make scratch notes on the test questions. But all answers must be on the answer sheet.

11. If you use extra pages for your essay answers, it is your responsibility to staple them to the answer sheet. A stapler is provided.

12. Good luck! Do your best! Have a great summer! It has been a pleasure working with you.

(Pages 1-11 have been omitted.)

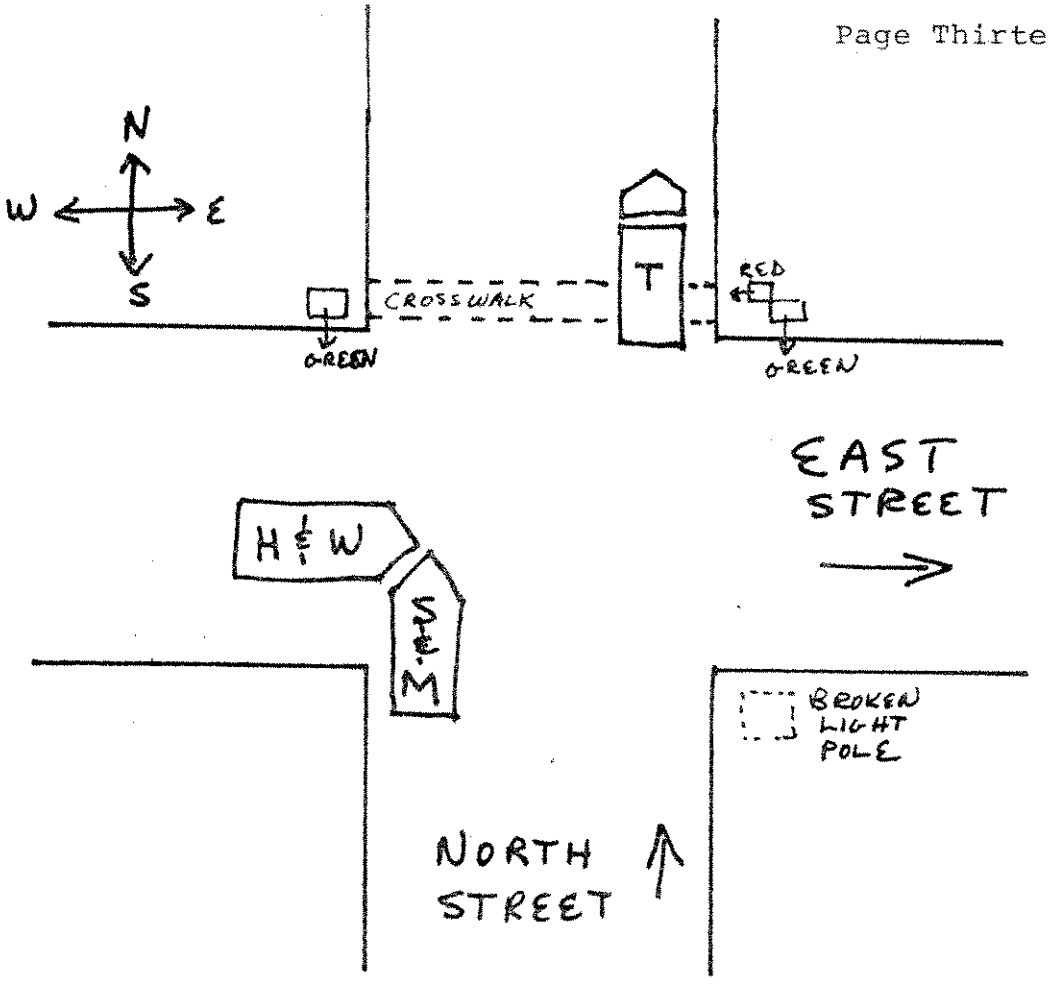
ESSAY QUESTIONS

If there is a split of authority which is relevant to your analysis of any question, please address that split of authority. In none of the questions below do you need to discuss liability for battery, assault, false imprisonment or arrest, trespass to land or chattels, nuisance, misrepresentation, defamation, or invasion of privacy.

Please complete essay question number one before proceeding to question number two. Your essay answers will be read as a whole, and given a single grade. You should make every effort to get to question number two, but if you do not have sufficient time to do so, that will not necessarily be fatal.

Essay Question #1

East Street is a one-way, east-bound thoroughfare in the City of Laurel. North Street is one-way, northbound thoroughfare in the same city, which intersects East Street, forming a right angle. The intersection is controlled by traffic lights. There are two sets of lights, one at the northeast corner and one at the northwest corner, for traffic on North Street. There are also two sets of lights, one at the northeast corner and one at the southeast corner, for traffic on East Street.



Trucker (T), an independent trucker who delivers blasting materials for a dynamite manufacturer, was making a delivery of a very small quantity of dynamite to a hardware store on the east side of North Street, just north of the intersection with East Street. There being insufficient space for his trailer truck, he temporarily parked it with the rear of the trailer extending entirely across the east-west crosswalk on the north side of the intersection. The height of the trailer was such that it entirely obscured the traffic light on the northeast corner from the view of traffic moving east on East street. Unknown to the Trucker, the traffic light

at the southeast corner was not functioning, because a collision seventy-two hours earlier had knocked down the pole on which the light was suspended. Although Trucker's trailer contained a large quantity of explosives and nothing else, there were no special markings on the truck to indicate the nature of the contents.

Husband (H), on his first trip to Laurel, was traveling east on East Street, with Wife (W) his only passenger. Not seeing any traffic light or pole, Husband entered the intersection at the same time the light was red for eastbound traffic and green for northbound traffic.

Son (S), who had only gotten his driver's license three days earlier was proceeding north on North Street in the car his father had given him as a gift. Son's Mother (M) was a passenger in the car. Son, seeing the green light in his favor, entered the intersection without looking for any cross traffic, and was struck by H's car.

Both cars were severely damaged. Husband was killed instantly. Wife, who was 8 months pregnant with twins, and not wearing her seatbelt, was thrown about and immediately went into labor. At a hospital an hour later the first twin was stillborn, due to injuries sustained in the crash. The second twin was born alive, but with permanent injuries caused by the accident.

Son was severely cut, suffered a massive loss of blood, and died nine days later. Mother was not injured, but suffered great distress at seeing her son lie bleeding while she looked on helplessly. As a result, she lost a great deal of weight, and became irritable and unable to perform her household chores. Mother's daughter (D), who is son's sister and lives in a different city began to experience similar emotional distress with the same symptoms after she was told by telephone of the accident an hour after it occurred.

Statutes of the state of Highland, in which Laurel is located, provide:

1.01 It is a misdeamor punishable by fine to park any motor vehicle so that any part projects into a crosswalk.

2.02 It is a misdemeanor punishable by fine to enter an intersection contrary to a traffic signal.

3.03 It is a misdemeanor punishable by fine to transport dangerous explosives within the city limits of an incorporated or unincorporated city in a vehicle not clearly marked in ten-inch high, florescent red letters on each side, "DANGER-EXPLOSIVES."

Discuss clearly, thoroughly, but succiently, the following questions. Begin each part of your answer with the letter corresponding to the question you are addressing (e.g., "(A)"). If you forget to mention a particular point when you are addressing a question, include it later, and perhaps add a cross-reference (e.g., "see below, p. 4"). I will do my best to sort things out.

(A) May Son's estate sue (a) Trucker, (b) Husband's estate or (C) the City of Laurel for damages in tort? Discuss theories of liability, types of damages available, and colorable defenses. Assess the likelihood of success in each cause of action. (You need not discuss here the question of whether a wrongful death action could be commenced by Son's survivors or the question of whether there could be contribution or indemnity between joint tortfeasors.) (Relatively detailed answer.)

(B) Assume that the state of Highland has a typical wrongful death statute. (1) On whose behalf may an action be commenced arising out of the death of Husband? (2) What type of damages will be recoverable? (3) Would the viability of this cause of action be affected by a finding that negligence on the part of Husband contributed to his death? (Your answer should probably be relatively brief -- no more than 15 to 20 lines.)

(C) What effect will Wife's failure to wear a seat belt have on an action for personal injuries to herself? (Brief answer -- about 10-12 lines maximum.)

(D) May an action be commenced by any party with respect to the death of the stillborn twin. If so, what damages may be sought? Are any defenses relevant? (About 10-12 lines maximum.)

(E) May an action be maintained by any party with respect to the prenatal injuries to the twin who was born alive? What type of damages may be sought? (Do not discuss defenses.) (About 6 lines maximum.)

(F) May Mother or Daughter recover for the emotional distress they have suffered? (About twenty/twenty-five lines.)

Essay Question #2

Senator Green, at the behest of various constituents, has proposed in the state legislature the following piece of legislation:

Medical Practice Improvement Act of 1983

1. No licensed physician shall be liable in tort for malpractice, except where it is established that the patient was injured through gross negligence, recklessness, or intentional misconduct.

2. Subdivision (1) does not apply, nor modify prior law, if a fee-generating relationship existed between the physician and patient for a continuous period of not less than two years immediately prior to the date of the allegedly injurious conduct.

3. No licensed physician or registered nurse shall be liable for improperly dispensing medication, which aggravates a pre-existing allergy, if the patient knew of his allergic condition and failed to voluntarily disclose it.

Except as modified by provision 1 through 3 of this Act, prior law remains in effect.

The Senator that you work for has asked you to explain the effect of each provision and how it changes present law. The Senator would also like your prudential assessment of the proposed changes -- that is, whether the suggested modifications would be desirable in light of relevant policy considerations and contempary trends in modern tort law. Address positive as well as negative attributes of the proposed act.

For this question only, you may assume that your state presently adheres to the majority view on all aspects of tort law. For the sake of clarity, address the subdivisions of the act one at a time.

ST. MARY'S UNIVERSITY SCHOOL OF LAW

Torts I
Final Exam
(Two and one-half hours)

Professor Vincent R. Johnson
December 14, 1983

WRITE YOUR SOCIAL
SECURITY NUMBER HERE _____

General Instructions

1. Immediately place your social security number 1) in the space above, 2) on the computer answer sheet for the multiple choice questions, and 3) on your blue book(s) for the essay questions.

   All three items (1) test questions, 2) computer answer sheet and 3) blue book(s)) must not be removed from the examination room at any time and must be handed in at the end of the exam. If you fail to hand in your test questions, you run the very serious risk of a failing grade.

2. I suggest that you proceed through the test questions in sequence. That is, do the multiple choice first, then essay #1, finally essay #2.

   The exam will be weighted as follows:

Multiple Choice	--	84 Points
Essay (Parts I & II)	--	135 Points
		219 Points Total

3. The exam will last exactly two and one-half hours. Failure to stop writing and promptly surrender your exam when notified that time has expired will be treated as a very serious violation of the exam rules and appropriately penalized.

   Some very rough guidelines for allocating your time are as follows:

Multiple Choice	45 Minutes
Essay #1	65 Minutes
Essay #2	40 Minutes

4. On the multiple choice:

   - Watch for important words like "most," "only," "least," "unless," etc.

- Any reference to the Restatement is a reference to the Second Restatement of Torts.

- Each question is worth 4 points; no deduction will be made for wrong "guesses."

- Please be very careful to place your answers in the correct spaces on the computer forms.

- Please keep your answer sheet covered. To the extent that you let others have your hard-earned answers, you not only chance becoming involved in an Honor Code violation, but also run the very substantial risk that you will come out lower in the scaled distribution of grades.

5. Regarding the essay:

- Although there are two essay questions, they will be read together and given a single grade. It is not necessarily fatal to fail to complete both questions, but you should make every effort to do so.

- Please attempt to clearly structure your answer. It will be to your advantage. However, if you forget a point at the beginning, but mention it at the end, I will do my best to sort things out. Sometimes a cross-reference in the margin is helpful (e.g., "but see p. 4, below").

- Unless your handwriting is exotic or atrocious there is no reason not to write on every line. (I read 210 papers in Professional Responsibility this semester -- most of which were handwritten and single-spaced -- without much difficulty.) Please skip a line between paragraphs and please write legibly. Failure to write legibly runs the risk that your exam will be read by an irate person.

- If you need extra paper, some will be available at the front of the room, along with a few pens. Please make sure that any loose pages are neatly stapled to your blue book at the end of the exam.

6. No one may speak to me about the exam until I have indicated that the grading has been completed. As soon as the grading is finished in early January, the exams will be returned and an optional review session will be held for those who wish to attend.

7. You may mark on the exam questions, but no such markings will be taken into consideration in grading your exam.

8. Good luck! Do your best! Have a happy holiday season!

(Pages 1-12 have been omitted.)

ESSAY QUESTION #1

Belle Le Beau is a singularly unattractive girl of 24 years. Despite a promising early childhood, her life has turned out rather sad. When she was six years old, her father, Devereau Le Beau, one-term governor of the state, was defeated for re-election by Brucella Babbit, the former governor who Le Beau himself had beaten in a bitter general election just two years earlier. Following his defeat, Governor Le Beau plummeted to near obscurity, entering the private practice of law in a rural area. Belle's mother, Azalea Le Beau, began drinking heavily and was given to bouts of extraordinary anger and severe depression. On Belle's eighth birthday, Azalea committed suicide in Belle's playroom by impaling herself on a fireplace iron. For a time, the event made front page headlines across the state. Belle always blamed herself for her mother's death, and by the time she reached adolescence was under the care of a Freudian psychoanalyst. When her mental problems worsened, Belle was institutionalized. Between the ages of 15 and 23, she spent more than half her time in a series of mental hospitals, being treated for delusions, schizophrenia, and paranoia. Following her most recent discharge, at age 23, Belle claims to have been raped. At the urging of her father, the prosecutor brought charges against the individual Belle identified in a line-up. Belle appeared at trial as the prosecutor's chief witness and unequivocally pointed out the defendant as the assailant. The defendant was represented by Biltmore Babbit, grandson of the former governor. Because of the deep-seated political animosity and personal hatred between the Le Beau and Babbit families, it was with particular relish and extraordinary zeal that Biltmore cross-examined Belle. For the purpose of destroying the reliability of Belle's eyewitness testimony, Biltmore brutally elicted the details of her theretofore relatively private history of mental illness and repeated treatment for delusions. At several points, Belle was reduced to uncontrollable weeping and the trial had to be recessed. Belle's father, who was present in the court, was horrified and outraged at the way his daughter was treated. On summation, the defense counsel referred to Belle as a "deluded freak," a "crazy person," a "lunatic who still belonged in the nut house," and "a disgustingly unattractive thing that no one in their right mind would have sex with."

Belle suffered greatly from the defense counsel's accusations which were widely reported in the press, and subsequently required further hospitalization after a complete physical and mental collapse.

Armstrong Grabem, the senior partner in Grabem & Squeeze, the firm you recently joined, has been consulted by Deverau Le Beau regarding possible causes of action. Grabem does not

regularly practice tort law, but has heard a great deal in the news lately about the tort of intentional infliction of mental distress and strongly believes such an action could be filed on behalf of Belle or her father.

(A) Provide Grabem with a detailed, but relatively concise, memo carefully evaluating the likelihood of success of actions based on intentional infliction of mental distress.

(B) If there are other possible causes of action which Belle (not Deverau) could bring against Biltmore and of which your senior partner should be aware, mention them in your memo, even if you do not think they will be successful. Briefly indicate whether they present any special advantages or difficulties, and whether there is likelihood of success.

ESSAY QUESTION #2

The Church of Eternal Punishment (CEP), a strict fundamental sect, purchased a small vacant lot in Sludge Falls, an unzoned but posh, exclusively residential area. Residents of the quiet neighborhood were in an uproar over speculation that a facility for worship services might be squeezed onto the tiny property, attracting to the community intolerant, bible-thumping types. But the uproar turned to widespread outrage when, within the course of a single week, and without warning, CEP quickly erected not a church, but a 150 foot broadcasting antenna which dominates the landscape and which is uniformly regarded by Sludge Fallsians as hideously ugly. The antenna serves CEP's "world crusade" radio station located 4 miles away in the basement of the home of Reverend Spoon. In addition to being unattractive, the tower, having been quickly and perhaps carelessly constructed, sways noticeably when there is a light breeze, causing concern to the homeowners nearby. Moreover, certain electrical equipment located at the base of the tower emits a very annoying electrical buzz which can be heard for at least a 100 yards. In response to the public uproar, Cando, a candidate for township supervisor, has vowed that if elected he will do everything within his power, through eminent domain or otherwise, to have the tower removed. Notwithstanding this sincere pledge, Nemo, a neighbor whose dining room is precisely 83 feet from the base of the tower, and his friend Dingo, who lives a quarter of a mile away, but from whose house the tower is plainly visible, have contacted your senior partner, Mr. R.D. Squeeze, expressing a desire to sue to force the tower to be dismantled. Mr. Squeeze regularly practices in the field of Torts. In a memo to him, briefly discuss any colorable tort causes of action and their likelihood for success.

ST. MARY'S UNIVERSITY SCHOOL OF LAW

Torts II Final Exam
Focus: Negligence
Strict Liability

Professor Vincent R. Johnson
May 3, 1984
Three and one-half hours

WRITE YOUR SOCIAL SECURITY NUMBER HERE: _____

General Instructions:

1. Immediately place your social security number on:

   a) this set of questions (in the space provided above);
   b) all blue books; and
   c) the answer sheet for the multiple choice.

   These questions, as well as your answers, must be handed in at the end of the exam. If your questions are not promptly turned in, your answers will not be graded and you will risk a failing grade.

2. No one should leave the examination room prior to handing in their exam, except to find the professor, if he is in a different room, or to go to the restroom. Trips to the restroom are discouraged and should be made only in the case of manifest necessity. Questions to the professor during the examination are generally frowned upon. Under no circumstances should examination materials be removed from the examination rooms. If you finish before the end of the examination time, you should review your answers. You may leave quietly once you turn in your exam. If you leave, please do not congregate in the hall outside the examination rooms.

3. Place all books and papers, other than your examination materials, on the floor, out of sight.

4. Except where instructed otherwise, you may assume that comparative negligence has not been adopted.

5. Watch for important words like "only," "most," "least," and so forth.

6. Multiple Choice questions are worth 3 points each. No penalty will be assessed for wrong answers on the multiple choice.

Total Points -	Multiple Choice	69
	Essay	140
		209

7. If you leave me a stamped post card, you will probably receive your grade in the mail by the last week of May.

8. Please keep your answer sheet covered. To the extent that you let others have your hard-earned answers, you run the substantial risk that you will come out lower in the scaled distribution of grades.

9. Cheating or giving assistance to another are, of course, absolutely forbidden. The requirements of the Code of Student Conduct will be strictly enforced.

10. The exam will last three and one-half hours and will end promptly at the time I indicate.

11. You may make scratch notes on the test questions. But all answers must be appropriately placed on your answer sheet or in your blue books.

12. If you use more than one blue book, staple them together. Do not, however, staple the multiple choice answer sheet to your blue book.

13. Good luck! Do your best! Have a great summer! It has been a pleasure working with you.

Multiple Choice Instructions

Select the best answer for each multiple choice question and mark it on the computerized answer sheet in pencil.

If, for example, you have narrowed the field of possible answers down to two choices and one accurately states majority rule and the other accurately states the minority rule, the former is the "best" answer.

(Pages 3-19 have been omitted)

Essay Question Instructions:

Your answers to the two essay questions will be read together and will be given a single grade. You should make every effort to answer both questions completely. While failure to do so will probably not be to your advantage, it will not necessarily be fatal.

Please take time to organize your answer and to express your thoughts in clear, accurate, properly punctuated, correctly spelled sentences. Above all, please write legibly. If you fail to do so, you run the risk that your answers will be read by an irate professor. It is generally not necessary to double space your handwriting.

Often it is useful to skip a line between paragraphs and to head each new section of your essay answer with the letter corresponding to that part of the essay question you are addressing.

If during the essay you remember that you neglected to mention a point relevant an earlier discussion, include it where you have space and, if appropriate, place a cross-reference note in the margin adjacent to the earlier discussion (e.g., "But see p. 6). In any event, I will make every effort to sort things out.

For the purposes of both essay questions, you may assume that it is not known whether the relevant jurisdiction has adopted comparative negligence and that you need to discues both contingencies.

Essay Question #1:

You are a new associate in the law firm of Reedem and Weep. You learned the following information while sitting in on an interview with a new client, Oscar Garza, conducted by one of the firm's senior partners on May 1, 1984:

Oscar Garza was born into a Mexican farm family in 1962 and lived in Mexico until early 1979. At seventeen years of age, he immigrated to Texas and sought employment in San Antonio. On March 1, 1979, two weeks after his arrival in Texas, he found work with a small manufacturing firm called Plastic Parts, Inc., a company which produces strings of plastic beads. After three

weeks on the job, Oscar, on March 22, was involved in a serious industrial accident which required the amputation of his right hand.

Oscar's job was operating a plastic injection molding machine. In the simplest terms, the machine would melt plastic pellets, then inject the liquified plastic into a mold, where it would be allowed to cure into the desired shapes. The mold was formed by two metal platens. The bottom platen remained stationary; the top platen moved vertically, such that it was hydraulically lowered to form the completed mold prior to the injection of the liquified plastic, then hydraulically raised once the plastic cured to allow the finished product to be removed. It took seven seconds for the top platen to be completely raised or lowered. In order for the plastic beads to be formed into strings, the machine was designed to automatically thread nylon cord through the molding area prior to the begining of each cycle, while the platens were open.

The operator of the machine was separated from the platens and the molding area by a safety door on the front of the machine. The door was one foot wide and two feet high, and was made of a plexiglas-type of material so that the operator could view the closing of the platens. The door was hinged on the left side and designed such that once it was opened the machine would shut down. This arrangement was intended to prevent the operator from reaching into the molding area while the platens were closing and running the risk of getting his hand crushed in the hydraulic press.

The molding press on which Oscar worked (Press No. 3) had been sold to Plastic Parts in 1974 for $28,000 by Reed Machinery, which had manufactured the press to meet the special requirements of Plastic Parts' business. Following installation of the machine by Reed early that year, Plastic Parts cut a 6 inch by 14 inch hole into the plexiglas shield, so that the machine operator could reach into the machine without triggering the shutdown mechanism. It did this because the nylon cord often did not thread properly and required manual adjustment in the short span of time prior to the closing of the platens. Without the hole in the safety door, the door had to be opened, the machine would shut down, and considerable time would be lost in getting the machine restarted.

Reed Machinery was not unaware of the threading problem. It had sold two identical machines to Plastic Parts in 1973 and during that year had been informed of the difficulty on numerous occasions. Within the same time frame, Reed made several unsuccessful attempts to correct the problem.

In addition, it seems most likely that Reed was cognizant of Plastic Parts' method of dealing with the problem. Representatives of Reed who visited the plant prior to the sale of the third press saw that holes had been cut through the safety gates of the two identical presses previously sold to Plastic Parts. In fact, the contract for the third press was negotiated and signed in full view of the altered, earlier purchased machines.

An alternative design for Press No. 3 had been discussed by engineers for Reed prior to its constuction. Instead of installing a single button which the operator would push once to start or restart the machine (as had been installed on the two earlier presses), double hand-grip controls could have been used. Under this arrangement it would be impossible for the operator to endanger his hand by reaching into the moving platens, for the machine would operate only so long as the operator lightly squeezed both hand-grips. This option was rejected by Reed primarily because of its expense, since it would have added $250 to the cost of the press. In addition, no other manufacturer of similar equipment had yet adopted the use of similar saefty feature, since the dual hand-grip control was generally thought to be inconvenient.

On the day that Oscar began working on the press, he was instructed by his supervisor to reach through the hole to correct the frequent mis-threading of the cord, without turning off the machine. He was repeatedly cautioned that he had to act quickly or else his hand might be caught in the closing platens. Though Oscar understood very little English, he followed these instructions without incident until March 22, 1979, when, distracted by an incident of horseplay between two fellow workers, he moved too slowly. Oscar's hand was caught between the platens and crushed. Amputation was required. Ironically, Oscar had been unable to read the sign on the front of the machine which stated in English: "Danger -- Do Not Reach Into Molding Area While Press Is Operating."

* * * * * * * * * * * * *

The senior partner has asked you to consider these facts and construct a memorandum addressing the question of whether Oscar has a viable cause of action against either Plastic Parts or Reed Manufacturing. Your analysis should address all relevant issues and should candidly assess the strengths and weaknesses of Oscar's case.

Relevant to your assignment, the senior partner has called to your attention a regulation of the federal Occupational Safety and Health Administration, recently adopted pursuant to the authority conferred upon OSHA by Act of Congress, which provides:

> OSHA Regulation 601.1:
>
> (a) All hydraulic presses used for manufacturing purposes by companies subject to the terms of the Act shall be equipped with double hand-grip safety controls.
>
> (b) Failure to comply with the terms of this regulation shall subject an employer to a fine not in excess of $2000.

In sequence, discuss the following in your memorandum:

(a) Whether Oscar can successfully sue Reed Manufacturing for negligence. Include in your analysis a discussion of any defenses Reed may raise and any rights to contribution or indemnity it may have. Additionally, briefly address the question of whether it is jurisprudentially desirable impose liability on a defendant such as Reed under the circumstances of this case.

(b) Whether Oscar can successfuly bring a tort action against Plastic Parts for the injuries he sustained.

(In writing your answer, you may use appropriate abbreviations. For example, Oscar Garza = Oscar or "O"; Reed Manufacturing = Reed or "RM"; Plastic Parts = Plastic or "PP"; Occupational Safety and Health Administration = "OSHA.")

Essay Question #2:

On May 2, 1984, a senior partner in your firm conducted an interview with a new client, Anna Ruth Goodson, president of the East Texas Farmers Federation. Information gained during the interview and certain preliminary research has led the partner to believe that the scientific phenomenon of "acid rain" has caused a substantial decline in the productivity of East Texas farmlands during the past year or so. The ultimate question, as the partner sees it, is whether the affected farmers can bring a negligence

action against certain electric utilities to recover for damages they have suffered. Although you have no particular scientific expertise, the partner has consulted you to seek your advise on proving causation.

The essential facts, as summarized for you by the senior partner, are as follows: "Acid rain" is a general term denoting a type of pollution that occurs when chemical compounds in the atmosphere are transformed into acids and brought to earth in the form of precipitation (wet deposition) or dry fall (dry deposition). Studies document a large spread and intensification of acidic precipitation during the past 25 years. In the areas most severely affected, precipitation is often 25 to 40 times more acidic than natural rainfall.

The process of acid rain formation begins when sulfur dioxide and nitrogen oxides are emitted into the atmosphere. Natural emissions of these compounds are insignificant in comparison to manmade emissions, which are caused by the burning of fosil fuels. Coal and oil-fired electric power plants are the largest source of manmade emissions, accounting for perhaps 70% of the total load. Motor vehicles also account for a significant, but smaller, amount of nitrogen oxides in the air.

A major component of the acid rain problem is the process by which emissions are transported far beyond their sources. Prevailing planetary winds cause long range transportation of pollutants. Among the relevant factors are temperature, wind speed and direction, time of day and of year, topography, and smoke stack height. (Many utilities have recently shifted to the use of "tall stacks" in order of meet local ambient air quality standards, with the untoward consequence of causing pollutants to travel greater and greater distances.) Under proper conditions, emission plumes can be transported hundreds, even thousands, of miles before significant deposition occurs.

While the effects of acid rain are not fully understood, many of the adverse effects on aquatic life and vegetation can be traced to changes in soil chemistry caused by acid rain.

The partner has identified five major electric utilities in West and Central Texas that she believes might be held responsible in negligence for damage to the East Texas farmlands. While other out of state utilities may in fact have caused part of the harm, it might be difficult to subject them to the jurisdiction of the Texas state courts, the forum in which the partner would like to

initiate suit.

During the course of the interview, the client, Ms. Goodson, indicated that she has learned from persons with expertise in the field that certain pollution control equipment is available that will minimize the production of those compounds which lead to the formation of acid rain. She further indicated that to the best of her knowledge none of the five West and Central Texas utilities employs such devices - nor are they generally in use elsewhere - nowithstanding the fact that their cost, in her opinion, is not unduly prohibitive. Ms. Goodson had no strong feelings or information on whether the non-usage of this equipment is the result of mere coincidence or of some type of understanding between the utilities.

The partner has indicated that you need not concern yourself with any questions of duty, breach, damages, or defenses, except as specifically noted hereafter. Rather you are to focus your attention primarily on whether it will be possible for the firm to prove factual causation in an action against any or all of the utilities. At present, the partner believes it will be impossible to establish but for causation or to bring the case within the concurrent causation exception to the but for rule. You are to indicate whether you agree with this assessment and whether you see any alternative avenues for dealing with this aspect of the case. Further, you should give some attention to the question of whether it will be possible to successfully sue less than all of the responsible parties and to the portion of the overall damages for which each responsible utility should be held liable.

Your analysis should be objective and unbiased, and should candidly recognize any obstacles that a court might find significant. Insofar as relevant, you should address appropriate policy considerations. If you see more than one alternative available, you should indicate which course you believe to be the most desirable and why that is so.

Finally, if you think there is a more effective way of dealing with the acid rain problem than through private negligence actions, state your suggestions very briefly.

ST. MARY'S UNIVERSITY SCHOOL OF LAW

Torts I
Final Examination
(Two hours)

Professor Vincent R. Johnson
December 19, 1984

SOCIAL SECURITY NUMBER: _____

General Instructions

1. Immediately place your social security number 1) in the space above, 2) on the computer sheet for the multiple choice questions, and 3) on your blue book(s) for the essay questions.

   All three items -- (1) test questions, 2) computer answer sheets and 3) blue book(s)) must not be removed from the examination room at any time without the permission of the proctor and must be handed in at the end of the exam. If you fail to hand in your test questions, you run the very serious risk of a failing grade.

2. I suggest that you proceed through the test questions in sequence. That is, do the multiple choice first, then essay #1, finally essay #2.

   The exam will be weighted as follows:

MULTIPLE CHOICE (4 pnts each)	-- 68 Points
ESSAY (Parts I and II)	--135 Points
	203 Points Total

3. The exam will last exactly two hours. Failure to stop writing and promptly surrender your exam when notified that time has expired will be treated as a very serious violation of the exam rules and appropriately penalized.

   Some very rough guidelines for allocating your time are as follows:

Multiple Choice	40 Minutes
Essay #1	50 Minutes
Essay #2	30 Minutes

4. On the multiple choice:

   - Watch for important words like "most," "only," "least," "unless," etc.

   - Any reference to the Restatement is a reference to the Second Restatement of Torts.

   - Each question is worth 4 points; no deduction will be made for wrong "guesses."

- Please be very careful to place your answers in the correct spaces on the computer forms.

- Please keep your answer sheet covered. To the extent that you let others have your hard-earned answers, you not only chance becoming involved in an Honor Code violation, but also run the very substantial risk that you will come out lower in the scaled distribution of grades.

5. Regarding the essay:

   - Although there are two essay questions, your answers will be read together and given a single grade. It is not necessarily fatal to fail to complete both questions, but you should make every effort to do so.

   - Please attempt to clearly structure your answer. It will be to your advantage. However, if you forget a point at the beginning, but mention it at the end, I will do my best to sort things out. Sometimes a cross-reference in the margin is helpful (e.g., "but see p. 4, below").

   - Note that in each essay, the characters appear in alphabetical order. If it saves you time, you may abbreviate the names to a single initial (e.g., Alvin = A, Bismark = B, etc.).

   - Unless your handwriting is exotic or atrocious there is no reason not to write on every line. However, if you think of it, please skip a line between paragraphs. Please write legibly. Failure to write legibly runs the risk that your exam will be read by an irate person.

   - If you need extra paper, some will be available at the front of the room, along with a few pens. Please make sure that any loose pages are neatly stapled to your blue book at the end of the exam.

6. Trips to the restroom are discouraged and should be made only in the case of manifest necessity. Additionally, no food or drink may be brought into the examination rooms or otherwise retrieved.

7. No one should speak to me about the exam until I have indicated that the grading has been completed. As soon as the grading is finished in early January, the exams will be returned and an optional review session will be held for those who wish to attend.

8. You may mark on the exam questions, but no such markings will be taken into consideration in grading your exam.

9. Good luck! Do your best! Have a happy holiday season!

(Pages 4-13 have been omitted.)

Essay Question #1: (approximately 50 minutes)

You are a new associate at the law firm of Reedem & Weep. A senior partner has just conducted a client interview with one Alvin Alabaster and relates to you the following information:

Alvin, a single parent, and his four year old son Bismark, recently moved into town. In order that Alvin could take a full schedule of classes at the community college, he found it necessary to enroll Bismark in a pre-school, child-care program. Being new in the area with no first-hand knowledge of whose programs were good, and having heard a great deal in the news recently about child abuse at such facilities, Alvin consulted his landlord, Cora, explaining his dilemma and concern. Cora, a jovial, thoroughly ingratiating woman in her mid-60s, always wanted to be of help, even when she couldn't. She told Alvin that there was a place down the street called Delphine's Pre-School Center. She said, "I've heard good things about it. I think you will be happy if you send little Bismark there." In fact, as Alvin later learned, Cora had seen the sign for the school, but had never heard anything about the quality of its program one way or the other. There is no evidence that Cora's statements were maliciously made or that she intended to hurt Alvin or Bismark; more likely, she was simply overly eager to be of help.

Alvin visited the Pre-School Center and spoke with Delphine. He

expressed his concerns and she assured him that her program was "the best in the city" and that her staff was "extraordinarily conscientious and of high moral character." She neglected to mention that a woman named Elipsa had recently started to work for her after abruptly leaving another child-care program under highly suspicious circumstances and that she was keeping a close watch on Elipsa's performance. Based in part on Cora's commendation, but primarily upon Delphine's assurances, Alvin decided to enroll Bismark.

During the first several weeks, things seemed to go just fine. Then yesterday Elipsa, who had no training in the healthcare field, told Bismark that she was the school "nurse" and that it was necessary for her to conduct a very thorough examination of his body, including his "private" areas, to check him for a rare and deadly disease which was going around the neighborhood making young children ill. Afraid that he would become sick, Bismark readily agreed to go with Elipsa to a small room where, with the door locked, she asked him to disrobe. She then conducted her "examination," which lasted about twenty minutes. Bismark apparently did not at all mind, and in fact laughed and giggled when she tickled various parts of his body.

Afterwards, Bismark returned to the playroom. While the instructors were busy elsewhere, he entered Delphine's office in pursuit of a butterfly which had been was flitting about. Though he and the other children had been repeatedly warned not to enter that room, he chose not to heed the warning. The butterfly came to rest upon an antique vase which stood atop a small pedestal. As Bismark jumped to catch the insect -- realizing that even with a good jump it

would probably be slightly out of his reach -- the butterfly flew away and his hand struck the vase. It crashed to the floor. Frightened by the sound, Bismark reflexively jerked backwards, and when he did he struck an end table, causing a lamp to fall and break.

Delphine, attracted by the commotion, came running. She scolded Bismark and sent him back to the playroom. Big tears welled up in his eyes and breathlessly he blurted out, "I--, I--, I didn't mean to do it!"

At the end of the day, when Alvin came to pick up Bismark, Delphine met him at the door. She told him of the broken vase and lamp and stated that if he did not pay her the $300 it would cost to replace them, she would not release Bismark, who was then in a different room. Alvin refused, declaring, "It's your stupid fault for not locking your office door and for keeping fragile things where there are a lot of children." Dephine nonetheless remained adamant, and finally Alvin wrote her a check for the amount.

Once the money was paid, Delphine sent for Bismark, who apparently was previously unaware that his father had arrived. Immediately the two went home. On the way, and much to his father's distress, he related the details of the "nurse's examination." Alvin was horrified by what he learned but did not frightenen the child by scolding him or telling him that he had been sexually abused. He simply explained, firmly, that he should be sure to ask his father's permission before doing anything like that again. To the best of Alvin's knowledge, Delphine is still unaware of the "examination." Neither Alvin nor the senior partner have ever heard of any serious

disease going around the neighborhood.

During the interview with the senior partner, Alvin asked whether he can get his $300 back and what rights and liabilities, if any, he and Alvin have based on the foregoing.

The senior partner, who does not regularly practice tort law, has asked you to prepare a memorandum fully discussing the rights and liabilities of Alvin and Bismark. Candidly recognize any uncertainties or ambiguities in your analysis. In addition, if more information is required, indicate what questions you want to ask. You of course may make reasonable inferences from the facts stated.

Essay Question #2: (approximately 30 minutes)

From a different senior partner, who regularly practices in the field of Torts, you learn the following information which is based on his interview with one Rupert Resolute.

Every Sunday night for the past month at about 9:00, just as Rupert sits down in the living room to watch Masterpiece Theater, sounds from some type of radio transmission have come across his six-year old television, about twice as loud as usual, and have interferred with the audio portion of the program. There is a lot of static and he cannot quite make out what is being said, but it sounds like a two-way conversation, with occasional laughing. Rupert has found that if he moves the television to his bedroom the interference, which lasts, off and on, for about an hour, disappears. But he likes to watch TV in the living room, not in his bedroom.

Rupert is almost positive that the interference emanates from the adjoining unit. He knows that his neighbor Sandy, with whom he does not get along well, has a short wave radio of some sort, and he has been told by friends that this type of interference could be caused by improper use or maintenance of that device. He asked Sandy whether he uses the radio regularly at the time of the week when the interference most often occurs and whether it could be causing the trouble. Sandy abruptly responded that it was none of Rupert's

business who he talks to or when. Sandy's uncooperativeness irritated Rupert so much that he concluded his only means of self-help was to get Sandy, who lets his unit under a month-to-month unwritten lease, kicked out. To that end, he passed along to the manager of the property what he described as "gossip," to the effect that Sandy is gay and the fellow visiting his apartment recently is his lover. Sandy's lease has not been terminated, but it may soon be.

Since making these statements, Rupert has had second thoughts about the wisdom of his action. He wants to know whether he is risking some type of legal liability and also whether he can do anything to stop the television interference problem which still continues, mainly on Sunday nights, but occasionally at other times.

Write a brief memorandum advising the senior partner on these matters.

[The End]

Notes on Torts I Final - 12/84

Essay Question #1

Suit Against Cora for Misrepresentation

- Where knowledge is possible (e.g., people either did or did not say good things about the school) one who represents unsubstantiated opinion as a fact speaks recklessly and thus with scienter. Additionally the Restatement defines scienter to encompass situations where the maker of the statement does not have the confidence in or basis for his statement which he purports to have. Thus Cora acted with scienter.

- "I have heard good things" is a statement of fact upon which reliance could be placed. Whereas "I think you will be happy" is a mere statement of unreliable opinion, unless we state that the opinion carries with it an implicit representation that there are facts to support it. None of the exceptions to the no-reliance-on-opinion rule appear to be applicable.

- Cora clearly knew that Alvin was going to rely, since he was new in town, explained his dilemma, and requested her advice for the purpose of taking action. Moreover, he in fact based his decision "in part" upon Cora's commendation. It makes no difference that the statement was not the controlling factor in his decisionmaking process.

- Whether people spoke well of the program is of course a material factor, since it would ordinarily be attributed some weight by parents in making a decision as to where to enroll their child.

- Perhaps the most significant problem with suing Cora for deceit is proving damages. The child apparently suffered no physical injury, though mental damages may be recoverable. But perhaps a persuasive argument can be made that Alvin wasted his money on the program. He may be able to recover the amount of the tuition and then tack onto that punitive damages. However, since Cora did not act maliciously, it may be difficult to persuade the jury that a punitive award is appropriate. On the other hand, since the risk involved -- namely child abuse -- is serious, that weighs in favor of some type of punitive award. Recall that McGrath said that punitive damages are available in all fraud cases, even in the absence of ill will and malice.

Suit By Alvin Against Delphine for Misrepresentation

- Delphine's statements sound like mere puffing upon which no reliance can be placed. It would seem like the expert exception to

43

the opinion rule should not overcome this because puffing statements are often made by experts and here it seems unreasonable to require Delphine to give a dispassionate assessment of her school. On the other hand, it seems that Delphine should not be able to conceal what she knows about Elipsa, or she should at least have to temper her puffing statements. An opinion carries with it the implicit assertion that the speaker knows no facts completely inconsistent with the opinion, and here inconsistent facts are known. Whether Delphine's statements are treated as reliable opinions, or as half-truths which there is a duty to correct, or as non-disclosure of a fact basic to the transaction (since presumably persons in the community would be shocked at non-disclosure under these circumstances), we probably have an adequate misrepresentation upon which to base the action.

-There is no question that it would have been a material consideration.

- As to damages, perhaps the amount of the tuition can be recovered, and maybe punitive damages -- though the latter sounds severe in view of the fact that Delphine was not sure of any wrongful conduct on the part of Elipsa. Indeed, it sounds as though the action might be more properly for negligent misrepresentation than for deceit. An action for negligent misrepresentation will lie in most jurisdictions, even where there is no physical harm, if the maker of the statement has a financial interest in the transaction as was true here.

Action by Bismark against Elipsa for Battery, Assault, and False Imprisonment

- All of these actions will turn upon the validity of Bismark's consent to the examination. To begin with there apparently was no disease to justify the exam. In addition, the lack of the necessity for the procedure was known to Elipsa. Under the traditional dichotomy, the failure to reveal those facts which would make the invasion of the defendant offensive to a reasonable person constitutes fraud in the factum (cf. DeMay v. Roberts). Thus under either the old approach or the new approach, consent is vitiated. At least a nominal award for any of these torts would be recoverable. There is no showing of actual harm -- unless testimony can be produced about the likelihood of mental distress in the future. Punitive damages could be tacked onto a nominal award in a minority of jurisdictions and would likely be appropriate here because of the extreme and outrageous nature of the conduct and the need to make an example for others.

44

Action by Alvin against Elipsa (but not Delphine) for Reckless Infliction of Severe Mental Distress

Conduct directed at one can give rise to IRISMD where there is substantial certainty or recklessness toward the plaintiff. Normally the plaintiff has to be present, but here that requirement should be dispensed with because of the high probability that distress would result. There was a case in the book indicating that liability attached where a babysitter molested a child. Compensatory and punitive damages should be available.

Action by Delphine Against Bismark for Conversion and Trespass

- A child can be liable for intentional tort if he was capable of entertaining the requisite degree of intent. Here there seems to have been intent to enter the room and substantial certainty (based on the fact that he thought he would miss the butterfly) that he would strike the vase. The entry constituted trespass since permission to be upon the land of another can be limited in space, and the destruction of the vase is a major interference which constitutes conversion.

- A trespasser is strictly liable for all damages causally connected to his trespass, therefore there will be liability for the broken lamp, too, even though the action appears to have been merely a reflex.

- In some jurisdictions, a parent is liable by statute for the torts of the minor child. In Texas, liability extends to property torts only which result from the "wilful and malicious" conduct of a child between 12 and 18. Under that statute, liability here would fail for several reasons. In most jurisdictions the amount is much lower.

- Delphine's carelessness is irrelevant because contributory negligence is not a defense to intentional tort.

Action by Bismark against Delphine for Making Him Cry

- No action. Parents have a privilege to discipline and school authorities have the same rights. There is no indication here that the scolding was unreasonably abusive so as to give rise to Intentional or Reckless Mental Distress.

Suit for False Imprisonment by Bismark against Delphine

- An action will not lie since there is no indication that Bismark was aware of the threatened confinement.

45

Suit by Alvin against Delphine for Conversion

- The consent to hand over the money was invalid because there is no right to falsely imprison a child based on the parent's failure to pay a debt.

Essay Question #2

Private Nuisance

- If the TV interference would be deemed unreasonable by an ordinary person, private nuisance may lie, assuming the Rupert's suspicions as to the origin of the problem are correct. The essential gist of nuisance is unreasonableness. The question for injunctive relief is whether harm outweighs utility. There is little utility in improperly maintaining or using a piece of equipment, thus injunctive relief may be available. However, Rupert's ability to avoid the interference is relevant. Damages would lie where payment is feasible and the harm substantial, but it does not seem that Rupert is interested in money; he wants to watch TV.

- While there is a right of self-help to abate a nuisance it is not available where there is time to resort to legal redress as here. Moreover, defamation is probably not a reasonable means of self-help.

Defamation:

- Charging that another person is gay may be defamatory because some persons, not clearly anti-social, would think less of the person. The question is not what right-thinking people would conclude.

- While a landlord might reasonably decide that he did not want to rent to a gay (and this might involve civil rights questions), there was probably no qualified privilege here to provide the information because the publisher acted with ill-will.

- Since this was a statement by a private person about a private person and a private matter, the rules of per se defamation apply. This might be actionable per se -- serious sexual misconduct -- and in any event, loss of a lease would be pecuniary loss. If Gertz sets the standard as to fault as to falsity, plaintiff must prove that Rupert was at least negligent as to falsity, unless the state standard is higher.

- It makes no difference that Rupert said it was a rumor.

- Truth of the charges would preclude the action.

ST. MARY'S UNIVERSITY SCHOOL OF LAW

Torts II Final Exam
Focus: Negligence
Strict Liability
Privacy

Prof. Vincent Johnson
April 25, 1985
Three hours

PLEASE WRITE YOUR SOCIAL SECURITY NUMBER HERE:_____

General Instructions:

1. Immediately place your social security number on:

   a) this set of questions (in the space provided above);
   b) all blue books; and
   c) the answer sheet for the multiple choice.

   These questions, as well as your answers, must be handed in at the end of the exam. If your questions are not promptly turned in, your answers will not be graded and you will risk a failing grade.

2. No one should leave the examination room prior to handing in their exam, except to find the professor, if he is in a different room, or to go to the restroom. Trips to the restroom are discouraged and should be made only in the case of manifest necessity. Questions to the professor during the examination are generally frowned upon. Under no circumstances should examination materials be removed from the examination rooms. If you finish before the end of the examination time, you should review your answers. You may leave quietly once you have turned in your exam. If you leave, please do not congregate in the hall outside the examination rooms or talk in the hall, as other examinations will be in progress.

3. Place all books and papers, other than your examination materials, on the floor, out of sight.

4. Except where instructed otherwise, you may assume that comparative negligence has not been adopted.

5. Watch for important words like "only," "most," "least," and so forth.

6. Multiple choice questions are worth 3 points each. No penalty will be assessed for wrong answers on the multiple choice. The essay portion is worth 140 points.

7. If you leave me a stamped post card, you will probably receive your grade in the mail by the last week of May.

8. Please keep your multiple choice answer sheet covered. To the extent that you let others have your hard-earned answers, you run the substantial risk that you will come out lower in the scaled distribution of grades.

9. Cheating or giving assistance to another are, of course, absolutely forbidden. The requirements of the Code of Student Conduct will be strictly enforced.

10. The exam will last three hours and will end promptly at the time I indicate.

11. You may make scratch notes on the test questions. But all answers must be appropriately placed on your answer sheet or in your blue books.

12. If you use more than one blue book, staple them together. Do not, however, staple the multiple choice answer sheet to your blue book. It goes on a separate pile.

13. Approximate time allocations: multiple choice - one hour
essay - two hours

14. Good luck! Do your best! Have a great summer! It has been a pleasure working with you.

Multiple Choice Instructions

Select the best answer for each multiple choice question and mark it on the computerized answer sheet in pencil.

If, for example, you have narrowed the field of possible answers down to two choices and one accurately states majority rule and the other accurately states the minority rule, the former is the "best" answer.

(Pages 3-19 have been omitted.)

Essay Question Instructions

All four subparts to the essay question will be read together and will be given a single grade. You should make every effort to answer all parts completely, though failure to do so will not necessarily be fatal.

Please take time to organize your answers and to express your thoughts clearly and accurately in properly punctuated, correctly spelled sentences. Above all, please write legibly. Failure to do so runs the risk that your answers will be read by an irate professor. It is generally not necessary to double space your handwriting.

Often it is useful to skip a line between paragraphs and to head each new section of your essay answer with the letter corresponding to the portion of the essay question you are addressing.

If during the essay you remember that you neglected to mention a point relevant to an earlier discussion, include it where you have space and, if necessary and possible, place a cross-reference notation in the margin adjacent to the earlier discussion (e.g., "But see * on p. 6.") I will make every effort to sort things out.

You should assume that it is not known whether the relevant jurisdiction has adopted comparative negligence and should therefore discuss both contingencies.

The Essay Question

You are a new associate with Reedem and Weep, a general practice firm which does some personal injury defense work. The firm has been asked to represent one Ansel Arkbottom, a graduate student who was involved in a serious auto accident. A senior partner has compiled the following information on the basis of a client interview and inquiries made by the firm's investigator.

Blake and Clark, both 18 years of age and students at Easypass University, planned to go to Blake's parents' ranch for the weekend. They started out in Blake's car at 8:30 P.M. Friday evening, but at about 9:00 P.M. developed car problems on the expressway. Blake suspected that the problem had to do with the electronic fuel injection system, which he had meant to have a mechanic look at earlier in the week, but was not sure. A telephone callbox was located nearby, on the opposite side of the highway. They considered calling Blake's parents for help, but instead of inconveniencing them phoned the National Motor Club, of which Blake was a member. As part of its membership benefits the club offered emergency road service. Blake asked the club representative to dispatch one of its tow trucks to the site, and was assured that one would be sent. The two boys then waited at the car for help to

arrive.

By 10:45 P.M., the tow truck still had not reached the scene. Apparently it had been dispatched, but the driver, because of inexperience, unclear instructions, and a badly torn, old map, had been unable to find the site. It is unclear whether at that point he had ceased his efforts or was continuing to search for the vehicle.

At that moment, Blake's car, which was positioned just off the road, close to the traffic lanes, was struck from behind by Ansel's vehicle. The force of the impact propelled the car over an embankment and Blake, who was inside, suffered severe injuries, attributable mainly to the fact that a loaded shotgun located in the trunk unexpectedly discharged. Clark, who had been standing outside the car, had been looking in a different direction so that he did not see the car coming. Upon hearing the impact, he turned and watched the car break through the guard rail and plunge down the hill. He was horrified by the spectacle, knowing that his best friend was in the car. Five year's previous, Clark's twin sister had been killed in a similar, freakish, hit-and-run accident. Clark immediately dashed across the highway to call for help, but in the process was struck and injured by a pick-up truck which, had the driver been paying more careful attention, might have avoided hitting him.

Immediately prior to the accident, Ansel, age 22, had been drinking. In a word, he was "wasted." Between about 7:00 P.M. and 10:00 P.M., he had made the rounds of several bars on Eddy St., the principal thoroughfare in Collegetown, a place where large numbers of Easypass students frequently went for entertainment and refreshment.

Ansel admits that on the evening of the accident he had several beers, but does not recall which bars he visited, or precisely how much he drank at any location. He is sure that all of the bars he visited offered Happy Hour two-for-one specials on beer, because the legality of Happy Hours had been much discussed as of late. In open disregard of a new state statute which as a part of a campaign against drunk driving had recently outlawed reduced price drinks, all of the nearly twenty bars on Eddy Street continued their long standing tradition of two-for-one drinks on Friday evenings. So far, none of the owners or operators had been prosecuted under the law which provided for penalties not to exceed $500 per violation.

According to Ansel, Blake's vehicle did not have any lights on at the time it was hit. Blake disputes that. Ansel also complains that the injuries sustained by Blake would not have been as serious if he had been wearing seat belts at the time of the crash.

The senior partner who has consulted you does not normally practice Tort law, though, of course, several years ago, he once had

a course in the subject. He has asked you to prepare a memorandum discussing the following:

(1) Is it likely that Ansel can be held liable in damages for the injuries suffered by Blake and Clark?

(2) [Ignore subpart 1.] May Blake successfully sue the Motor Club for the injuries he suffered?

(3) [Ignore subparts 1 and 2.] Suppose that Ansel paid Clark $1000 in exchange for an agreement called a "covenant not to sue," which reserved his rights against all other parties, and that thereafter Clark sued only Dravo, the driver of the pickup truck, and obtained a judgment for $20,000. (a) How much must Dravo pay Clark? (b) May Dravo seek contribution from Ansel?

(4) [Ignore subparts 1, 2, and 3.] Assume that Ansel is held liable after a jury trial for the injuries suffered by Blake. May Ansel seek some type of reimbursement from the operators of the bars?

Torts II

Spring 1985 Final Examination

Essay Questions and Model Answers

Professor Vincent R. Johnson

St. Mary's University School of Law

San Antonio, Texas

Professor Vincent R. Johnson Torts II Final Examination
April 25, 1985

Essay Question Instructions

All four subparts to the essay question will be read together and will be given a single grade. You should make every effort to answer all parts completely, though failure to do so will not necessarily be fatal.

Please take time to organize your answers and to express your thoughts clearly and accurately in properly punctuated, correctly spelled sentences. Above all, please write legibly. Failure to do so runs the risk that your answers will be read by an irate professor. It is generally not necessary to double space your handwriting.

Often it is useful to skip a line between paragraphs and to head each new section of your essay answer with the letter corresponding to the portion of the essay question you are addressing.

If during the essay you remember that you neglected to mention a point relevant to an earlier discussion, include it where you have space and, if necessary and possible, place a cross-reference notation in the margin adjacent to the earlier discussion (e.g., "But see * on p. 6.") I will make every effort to sort things out.

You should assume that it is not known whether the relevant jurisdiction has adopted comparative negligence and should therefore discuss both contingencies.

The Essay Question

You are a new associate with Reedem and Weep, a general practice firm which does some personal injury defense work. The firm has been asked to represent one Ansel Arkbottom, a graduate student who was involved in a serious auto accident. A senior partner has compiled the following information on the basis of a client interview and inquiries made by the firm's investigator.

Blake and Clark, both 18 years of age and students at Easypass University, planned to go to Blake's parents' ranch for the weekend. They started out in Blake's car at 8:30 P.M. Friday evening, but at about 9:00 P.M. developed car problems on the expressway. Blake suspected that the problem had to do with the electronic fuel injection system, which he had meant to have a mechanic look at earlier in the week, but was not sure. A telephone callbox was located nearby, on the opposite side of the highway. They considered calling Blake's parents for help, but instead of inconveniencing them phoned the National Motor Club, of which Blake was a member. As part of its membership benefits the club offered emergency road service. Blake asked the club representative to dispatch one of its tow trucks to the site, and was assured that one would be sent. The two boys then waited at the car for help to

arrive.

By 10:45 P.M., the tow truck still had not reached the scene. Apparently it had been dispatched, but the driver, because of inexperience, unclear instructions, and a badly torn, old map, had been unable to find the site. It is unclear whether at that point he had ceased his efforts or was continuing to search for the vehicle.

At that moment, Blake's car, which was positioned just off the road, close to the traffic lanes, was struck from behind by Ansel's vehicle. The force of the impact propelled the car over an embankment and Blake, who was inside, suffered severe injuries, attributable mainly to the fact that a loaded shotgun located in the trunk unexpectedly discharged. Clark, who had been standing outside the car, had been looking in a different direction so that he did not see the car coming. Upon hearing the impact, he turned and watched the car break through the guard rail and plunge down the hill. He was horrified by the spectacle, knowing that his best friend was in the car. Five year's previous, Clark's twin sister had been killed in a similar, freakish, hit-and-run accident. Clark immediately dashed across the highway to call for help, but in the process was struck and injured by a pick-up truck which, had the driver been paying more careful attention, might have avoided hitting him.

Immediately prior to the accident, Ansel, age 22, had been drinking. In a word, he was "wasted." Between about 7:00 P.M. and 10:00 P.M., he had made the rounds of several bars on Eddy St., the principal thoroughfare in Collegetown, a place where large numbers of Easypass students frequently went for entertainment and refreshment.

Ansel admits that on the evening of the accident he had several beers, but does not recall which bars he visited, or precisely how much he drank at any location. He is sure that all of the bars he visited offered Happy Hour two-for-one specials on beer, because the legality of Happy Hours had been much discussed as of late. In open disregard of a new state statute which as a part of a campaign against drunk driving had recently outlawed reduced price drinks, all of the nearly twenty bars on Eddy Street continued their long standing tradition of two-for-one drinks on Friday evenings. So far, none of the owners or operators had been prosecuted under the law which provided for penalties not to exceed $500 per violation.

According to Ansel, Blake's vehicle did not have any lights on at the time it was hit. Blake disputes that. Ansel also complains that the injuries sustained by Blake would not have been as serious if he had been wearing seat belts at the time of the crash.

The senior partner who has consulted you does not normally practice Tort law, though, of course, several years ago, he once had

a course in the subject. He has asked you to prepare a memorandum discussing the following:

(1) Is it likely that Ansel can be held liable in damages for the injuries suffered by Blake and Clark?

(2) [Ignore subpart 1.] May Blake successfully sue the Motor Club for the injuries he suffered?

(3) [Ignore subparts 1 and 2.] Suppose that Ansel paid Clark $1000 in exchange for an agreement called a "covenant not to sue," which reserved his rights against all other parties, and that thereafter Clark sued only Dravo, the driver of the pickup truck, and obtained a judgment for $20,000. (a) How much must Dravo pay Clark? (b) May Dravo seek contribution from Ansel?

(4) [Ignore subparts 1, 2, and 3.] Assume that Ansel is held liable after a jury trial for the injuries suffered by Blake. May Ansel seek some type of reimbursement from the operators of the bars?

Torts II Final Examination
April 25, 1985

Essay Question Answers

Prefatory Note: (1) In virtually all law school exams, there are numerous junctures at which the analysis may turn in either of two conflicting directions -- just as at the trial court level questions of fact can be resolved in different ways. One might reasonably disagree with part of the analysis proffered below and still merit a good grade. No effort has been made to identify all possible lines of analysis. (2) For the purpose of furnishing a useful model, the answer here is slightly longer than what one might reasonably expect from a student devoting two hours to the essay portion of the exam.

Answer to Part (1)

(a) Blake's Action Against Ansel: If Ansel is to be held liable to Blake it will be for negligence, since the injuries were not intentionally inflicted and were not the result of strict liability conduct. Negligence is conduct which creates an unreasonable risk of harm to the persons or property of others. Clearly, driving after drinking to the point of being "wasted" is unreasonable conduct. A reasonable person does not drive while intoxicated, and except under exceptional, emergency circumstances -- not shown here -- it cannot be said that the utility of the defendant's conduct outweighed the gravity and probability of harm. The unreasonableness of Ansel's conduct is further demonstrated by the fact that his car left the road at a high rate of speed.

Under the Palsgraf rule that the risk reasonably to be perceived defines the duty to be obeyed, there was surely a duty of care owed to the class of persons of which Blake was a member, namely those rightfully abroad on the public highway and the rights of way adjacent thereto.

There is no problem with factual causation: but for the crash, the car would not have gone down the embankment and the gun would not have discharged. Without it, neither the property damage nor the personal injuries would have resulted. Proximate causation will pose a somewhat more serious obstacle, but will still likely be satisfied. A defendant need not foresee the exact manner in which harm occurs. It is enough that the broad outlines of the harm be generally foreseen. Clearly the property damage was not unforeseeable. Moreover, when a vehicle standing along the road is hit, it is likely to travel some distance. As to the personal injuries, Blake was a member of the class as to which harm was to be anticipated, and the risk was one of physical injury, which is in fact what occurred. It may be expected in a given case that the

injuries to an auto accident victim will be more directly attributable to the structure or contents of the vehicle in which he is riding, than to instrumentalities then or previously within the control of the defendant. The defendant should not, in the absence of extraordinary circumstances, be able to complain that if the plaintiff's vehicle had been more sturdy or had been carrying different contents, the injuries would not have been so great. Consequently, the fact that the gun discharged should not relieve the defendant of liability, at least insofar as concerns plaintiff's prima facie case. To some extent, the defendant takes the plaintiff as he finds him.

[An alternative line of argument might contend that the discharge of a firearm was totally unforseeable; that the harm risked was property damage and personal injury resulting from physical impact or gasoline explosion, not injury by firearms; and that the requirements of proximate causation are therefore satified only with regard to part of Blake's injuries -- namely that portion resulting from the firing of the shotgun.]

The more difficult issue concerns defenses, such as contributory negligence. If Blake's car was too close to the highway, if its lights were not on, if Blake should have left the vehicle and gone to a place of safety, or if under the circumstances some warning should have been given to oncoming motorists regarding the location of the vehicle, then Blake may be held to be contributorily negligent. His failure to exercise reasonable care on his own behalf will have the effect, in most jurisdictions, of reducing the amount of his recovery, rather than precluding it altogether, since comparative fault principles have been widely adopted. However, in states subscribing to a 50% rule, damages will be unavailable (assuming last clear chance does not apply) if Blake is found to be more blameworthy than Ansel, which on the facts here is unlikely, since drunk driving is generally regarded as very serious misconduct.

The above arguments concerning contributory negligence will of course take on different significance if the defendant's conduct is termed reckless, which it may well be since its utility is so far outweighed by the gravity and probability of harm. At common law, contributory negligence was no defense to recklessness, though some jurisdictions which have adopted comparative negligence now allow plaintiff's contributory fault to be balanced against the fault of the defendant and thereby reduce the defendant's liability. In addition, if the defendant's conduct is found to be reckless, punitive damages may be available in some jurisdictions.

Carrying a <u>loaded</u> gun in a car may also constitute contributory negligence, so we would want to find out whether Blake knew of its presence, knew that it was loaded, or had any justification for its presence.

Assuming that the problem with the car did concern the electronic fuel injection system, it is unlikely that Blake's failure to have had it checked prior in the week will bar or reduce his recovery. The reasonable person need not be super-cautious and his conduct need not be free of all risks of harm, only free of those

risks which are unreasonable. Thus, it is improbable that the conduct could be termed negligent, unless the problem was known (or should have been known) to be of a very serious nature. Moreover, even if Blake's acts could be cast as negligent, the consequences which ensued were so unforeseeable, so attenuated and remote, so trivial in comparison to the fault of the defendant, that conduct should not properly be regarded as a proximate cause of the accident.

Ansel's argument as to Blake's failure to wear a seat belt will likely fail. Even assuming that there is some statutory or common law obligation to wear a seat belt in a moving vehicle, it is unlikely that the duty extends to persons sitting in a vehicle at rest. A few states have held that failure to use a seat belt will permit a reduction of damages to the extent that the harm would have been minimized by the use thereof, and more can be expected to follow in view of the widespread adoption of comparative fault principles, which avoid the problem of all or nothing recovery. At least five states have passed mandatory seat belt laws. But again, it is unlikely that these rules will apply here, since the vehicle was stationary and the ignition was turned off.

Clark's Action Against Ansel: Clark appears to have suffered two separate types of injuries: first, fright and shock at the time of the accident; second, physical injuries when he was struck by the truck. Concerning the first set of injuries, an action against Ansel for negligent infliction of severe mental distress may be possible. All courts require evidence of physical impact or physical consequences (in the absence of special circumstances, not present here) to guarantee the genuineness of the claim. Here, Clark suffered no physical impact insofar as concerns the event which caused the distress, and therefore we will want to enquire whether there is evidence of physical consequences, such as, for example, shaking, nervousness, stuttering, or the like. However, even where physical impact or physical consequences are shown, not all claims are compensated, because the resources of society for redressing harm are just too limited. One of two tests will be used to determine whether Clark may recover. Some jurisdictions subscribe to a zone of danger test. Under that rule, if plaintiff was endangered by the defendant's conduct, then he may collect damages for mental distress, assuming severe distress resulted. On the facts we are given, it is unclear whether Clark was close enough to the vehicle to have been imperiled by the accident. Other jurisdictions employ a foreseeability test which takes into consideration such factors as the plaintiff's proximity to the accident, contemporaneous observation, and relationship to the victim. Here, Clark saw part but not all of the accident, and may have been nearby. He was not related by blood or marriage to the victim, but was a close friend. Whether this is enough is unclear. We need more facts. Foreseeability will be a question for the jury. The fact that Clark's twin sister had been killed in a similar accident may mean that he will be more sensitive to the events which transpired and will suffer greater distress. But this will be irrelevant unless a reasonable person would also have suffered serious emotional distress, since the law generally does not impose liability for harm

resulting from hypersensitivity on the part of the plaintiff unknown to the defendant.

As to the injuries sustained by Clark when he was hit by the truck, Ansel may be liable. Danger invites rescue and reasonable efforts by rescuers which result in injuries to themselves will be regarded as factually and proximately caused by the defendant's antecedent negligence. A critical question here will be whether or not Clark's hurried attempt to cross the road will be deemed reasonable. To the extent that he was acting in an emergency and for the purpose of saving human life, less in the way of caution is required of him, though the standard will still be that of reasonable care under the circumstances. If his efforts are deemed unreasonable, his contributory fault will bar or reduce his recovery. The doctrine of last clear chance (if it still survives in the jurisidiction) would not alter this fact in an action against Ansel, since (1) it was the trucker (not Ansel) who had the chance to avoid the accident and (2) the trucker did not have the last chance, since Clark was also inattentive (not helpless) and through the exercise of greater care could also have avoided the accident.

The negligence of the truck driver, who by "paying more careful attention, might have avoided hitting" Clark, will not be regarded as a superseding cause, unless it is held to rise to the level of gross negligence.

Answer to Part (2)

This question raises the spectre of limited duty rules. The issue is whether the Motor Club was under a duty to render aid or assistance to Blake and if so whether it breached that duty.

At least two theories come to mind for arguing that the Club was under a duty to affirmatively act. First, in certain instances, the existence of a contract may create an exception to the general rule that there is no duty in tort to render aid or assistance. Thus, a lifeguard at a swimming pool may be obliged to rescue a drowning child who is, essentially, a third party beneficiary of the contract between the pool and lifeguard. Here, there apparently was a contract between the parties, namely the auto club membership agreement which obligated the Club to provide road service. Before relying on this ground, however, to establish a duty to act, we will want to determine the exact terms of the agreement. It may contain language limiting the liability of the Club.

Second, apart from the contract, it could be maintained that the Club voluntarily assumed a duty of care. The threshold question with this exception is whether there was a voluntary undertaking by the alleged tortfeasor. Here the club assured Blake that a truck would be sent and a truck was in fact dispatched. This surely is a sufficient undertaking; it is more than a mere promise not acted upon. However, one who voluntarily assumes a duty need not continue his efforts indefinitely, and may discontinue whenever the

circumstances are such that termination is reasonable. Here it is not clear whether the truck stopped searching for the car. If it did, it seems likely that a jury would find the termination unreasonable. By promising to send help, the Club discouraged Blake from seeking other assistance. He could have called his parents (as he in fact considered) or could have taken other action. Thus, if the efforts to assist were in fact abated, that in itself could be a basis for liability.

If the search for the car continued and was still underway at the time of the accident, then the question is whether the Club's failure to locate the car sooner constituted negligence. It may reasonably be perceived that harm can easily befall persons stranded along the highway. For that reason, it is essential that auto clubs respond promptly to calls for help. Relying on an inexperienced driver and furnishing him with poor instructions and a torn map might well be deemed by the finder of fact to be unreasonable conduct in light of the gravity and probability of harm.

The issue of contributory negligence on the part of Blake, previously discussed in part (1), could of course be raised here. Also, the Club might argue that the negligence of the drunk driver was a superseding cause, but this argument would likely fail. Although Ansel's conduct might be found to be grossly negligent, Blake could colorably argue that even drunk driving should not break the chain of proximate causation since the risk of such harm was foreseeable and was precisely one of the risks to which the Club subjected the plaintiff.

Answer to Part (3)

(a) Assuming that Ansel is a joint tortfeasor with Dravo with respect to the injuries suffered by Blake, Dravo will at least enjoy a credit for $1,000 and will therefore be obliged to pay only $19,000 in order to satisfy the judgment. However, some jurisdictions hold that by settling with a joint tortfeasor the victim gives up part of his claim, with the portion computed on a pro rata or proportional basis, depending on the jurisdiction. Thus, for example, in a pro rata state, assuming Ansel and Dravo were the only two joint tortfeasors, Blake would be deemed to have given up one-half of his claim and thus could collect only $10,000 of the $20,000 judgment against Dravo. In proportional jurisdictions adhering to this approach, the degree of fault of the settling and non-settling joint tortfeasors is determined by the jury. Thus, for example, if the jury found that Ansel was 60% responsible for the accident and Dravo 40%, Dravo would be obliged to pay only $8,000 of the $20,000 judgment.

(b) Assuming that we are not in a jurisdiction which reduces the enforceability of the claim against the non-settling joint tortfeasor, as described immediately above, and non-settler has paid more than his fair share, there are two views as to whether