On Reserve Prof Mastons Tarts Professor Maatman

FINAL EXAMINATION FOR TORTS FALL 2001

Instructions:

- 1) This examination has ten (10) pages, including this one. Count your pages and make sure your exam is complete.
- 2) The exam consists of three sections. The total points available for the exam are 300.
- a) Multiple choice: there are four multiple choice questions, worth 4 points each (5% of exam value). You are not required to explain your answers, but you may choose to do so. You should allot no more than 15 minutes total to this part of the exam.
- b) Essay One presents one fact pattern with five questions. Your work on these questions will be worth up to 165 points (55% of exam value). You should allot approximately one hour and forty minutes to this part of the exam; this time frame includes the time necessary to read the materials and plan your answers.
- c) Essay Two presents one fact pattern with four questions embedded within the fact pattern. Your work on these questions will be worth up to 119 points (40% of exam value). You should allot approximately one hour to this part of the exam; this time frame includes the time necessary to read the materials and plan your answers.

NOTE: The suggested time allocations leave you five extra minutes.

- 3) I do not deduct points for "wrong" answers, so everything you write will either gain points or have no effect on your score. <u>But see</u> the WARNING regarding explanation of your answers in the multiple choice section.
- 4) Please try to write on every other line, using the right hand page only. When necessary, you can use the left hand page for inserts. I will not deduct points if you forget to do this.
- 5) The only identification that should appear on your exam and your booklets is your anonymous number.
- 6) If you use more than one booklet, please number them in the sequence in which they should be read.
- 7) When you have finished your exam, place the exam and your answer booklets in a manila envelope. Sign your honor code sheet, and place it in the envelope designated for the sheets.

Stay calm. This is an opportunity to show me what you know. Remember to state your reasoning: for each issue, state the rule, then define and apply each part of the rule that you use.

HAVE A WONDERFUL BREAK!

MULTIPLE CHOICE (16 points total; no more than 15 minutes)

Directions:

Read the fact pattern and then circle the *best* of the four options provided. If you wish, you may explain one or more of your answers in your booklets, in a section labeled "multiple choice explanations." You are not required to explain your answers. Warning: If you select the correct answer and choose to explain yourself but your explanation is wrong, you will lose some or all points for your answer.

If you are typing your exam, please type the letter for each of your selections next to the question number, followed by any explanation you choose to provide.

For questions 1-3, use the following fact pattern:

Emeril owned a charming restaurant in a Victorian townhouse in the State of Prosser. The lights in the old building sometimes flickered, but customers didn't seem to mind, as high class cuisine and candlelight distracted them from such small annoyances. Unfortunately, the persistently erratic lights were a symptom of bad electrical wiring. When Emeril moved into the building, an electrician told him the wiring was not up to the local fire code's standards for restaurants. The electrician further explained that the wiring would need to be replaced, which meant, in turn, ripping out parts of walls to get at the wiring. Emeril then learned that ripping out walls would release large quantities of lead paint chips and lead dust. Thus, the wiring job would require the services of a licensed lead paint abatement expert, as required by Prosser state law. Emeril could not afford such expenses until his restaurant had been profitable for a year.

Six months after the restaurant opened, an electrical fire broke out while diners were being served. Greg Gourmand, who was seated near the fire's source, suffered respiratory injury from smoke inhalation. He and all the other customers got out otherwise uninjured, knocking dishes off tables in their haste to flee. A pedestrian who was not eating at the restaurant but had sneaked past the host to use the restroom sprained his ankle as he ran for the exit. As they exited, firefighters arrived. Fred Fireman was injured when he slipped on a dish of bananas foster that had fallen on the restaurant floor.

1. If Gourmand sues Emeril,

- a. Gourmand will be able to establish negligence per se based on Emeril's violation of the fire code, but Emeril will successfully defend on the grounds of impossibility because he could not afford to fix the wiring.
- b. Gourmand's claim will be barred, because continuing to dine while the lights flickered signified that he assumed the risk of an electrical fire.
- c. Gourmand will be able to establish negligence per se based on Emeril's violation of the fire code, but Emeril will successfully defend on the grounds that he avoided a greater risk of harm from lead paint hazards.
- d. Gourmand will be able to establish negligence per se based on Emeril's violation of the fire code, and Emeril will not be able to successfully invoke an excuse for his violation.
- 2. If the pedestrian sues Emeril and the State of Prosser follows the landowner liability categories:
 - a. The pedestrian will be regarded as an invitee because the restaurant is a business.
 - b. The pedestrian will be regarded as a licensee because he was in the restaurant during business hours and the restroom was not locked.
 - c. The pedestrian will be regarded as a trespasser because he was not there to purchase a meal and he used the restroom without permission.
 - d. The pedestrian will be regarded as a foreseeable trespasser because the restaurant failed to put up a sign that said "restrooms are for customers only."

3. If Fred Fireman sues Emeril,

- a. The firefighter's rule will not bar his claim because the fire arose from Emeril's violation of the fire code for restaurants.
- b. The firefighter's rule will not bar his claim because his injury was from a slippery substance on the floor, not from the fire, and Emeril had a duty to see and clean up such spills.
- c. The firefighter's rule will bar his claim because he was injured while fighting a fire.
- d. The firefighter's rule will bar his claim because Emeril did not purposely set the fire.

4. Harry Potter is a 14 year old student at Hogwarts Academy. Last year, he entered a tri-school tournament consisting of three challenges, with a new challenge conducted approximately every three months. Although the tournament's organizers warned the four competitors that the tournament was dangerous, they did not specifically describe the dangers involved. Instead, the competitors chose to participate based on the promises that tournament officials would closely monitor the safety of each event, no competitors had been seriously injured in the past, and that the winner would accrue substantial acclaim. As the tournament unfolded, Harry learned that cheating and reckless play were traditional aspects of the competition; nonetheless, he chose to continue playing. During the third and final challenge, one competitor died and Harry was seriously injured. These accidents occurred because the tournament officials failed to keep the playing field free from unauthorized, dangerous objects.

If Harry sues Hogwarts College,

- a. He will lose because he expressly agreed to assume the risks of participation in the tournament.
- b. He will win because, as a minor, he is deemed incapable of negligence himself, so that any causative fault is Hogwarts'.
- c. He will win because he did not sign a contract agreeing to absolve Hogwarts from any duty to refrain from negligence.
- d. He will win because the tournament officials failed to ensure that the tournament conditions were as safe as they appeared to be, so that his consent to participate did not function as implied assumption of the risk.

ESSAY QUESTION ONE (165 points total; one hour & forty minutes)

The common law of the State of Cardozo still recognizes the landowner liability categories. In all other respects, it follows majority rules.

Geek Engineering Company is located in the State of Cardozo. Geek offers a wide range of engineering and consulting services. Its non-staff employees all have degrees in engineering or science. The company's success is built upon attracting many brilliant and innovative young workers who put in long hours.

To reward the hard work of its engineers, the company hosts a "Geek Picnic" every summer. The picnic is held on the company's corporate grounds, which include a large baseball field and picnic area. The event is billed as a family outing, and employees bring their partners and children.

With the economic downturn that began in the end of 2000, Geek's employees worked especially hard, and the atmosphere had become tense. A group of high-level

managers decided that it was particularly important that the 2001 picnic be a mechanism for "blowing off steam" and "building team spirit by having fun." In May 2001, they sent the following notice to all Geek engineers:

Dear fellow engineers:

We know you have been working hard. In light of all that you have been doing, we want this year's Geek Picnic to be an especially fun, memorable event. Therefore, we are adding a new event to this year's picnic: "The Spud Gun Challenge." We will award a week's paid vacation to the designer and builder of the spud gun that, in our judgment, is the most effective of all the entries. All spud gun entries will be tested commencing at noon on the date of the picnic. Testing will cover three categories: 1) the vegetable launch; 2) creative objects; and 3) most spectacular launch. Testing will take place on the company ball field. To get started, consult the world wide web. Ladies and gentlemen, may the best spud gun win!

The managers selected this activity because several of them were spud gun enthusiasts. Spud guns are built of polyvinyl chloride ("PVC") piping. A one foot length of three inch PVC pipe fitted with a cap serves as the gun's "combustion chamber." In turn, that part is affixed to a two to three foot long barrel made of two inch PVC pipe. Users inject aerosol propellant such as hair spray into the combustion chamber, and ignite the propellant with a barbecue sparker. As the propellant gas expands, it pushes whatever is loaded into the barrel up and out of the gun. Such guns can launch potatoes up to 200 feet.

No one is sure who invented the first spud gun, or when he or she did so; however, they have been in use at least thirty years and have spawned an enthusiastic, multinational subculture that has taken to the world wide web. Web sites post all sorts of design and "ammunition" suggestions, as well as safety advice. In particular, sites caution that the guns can be difficult to control, and they post occasional stories of accidents with spud guns. A few states and municipalities ban spud guns outright. Neither the State of Cardozo nor the municipality in which Geek is located does so.

As the day of the picnic approached, spud gun excitement swept through Geek's corporate headquarters. Numerous side bets were made, and management established a staff betting pool. As the managers had hoped, competitive juices flowed.

At the appointed hour, the competitors gathered on the corporate ball field. Preliminary rounds eliminated competitors whose guns failed to fire, or who tired of the sport and wandered off to other activities. Four competitors remained for the final three rounds. For the vegetable round, three of the four chose to use the standard potato projectile. The fourth competitor, Russ Burbank, used frozen potatoes. To achieve a long-ranging launch, he angled his gun on his shoulder. When he fired his gun, it emitted an enormous bang. Burbank's ears immediately began ringing, and he withdrew from competition. Burbank's doctor later diagnosed permanent hearing loss.

The three remaining competitors, Ida Baker, Rose Firr, and Ukie Gold, moved on the "creative objects" round.

Ida Baker knew that a good seal was essential to a successful launch. She used a Barbie doll with its legs wrapped in duct tape so that it would fit the spud gun's barrel and achieve a good seal. Ida used so much duct tape that the Barbie was a very tight fit. When she fired the gun, there was a moment's pause, then the entire gun barrel blew off. As the barrel flew through the air, a flaming Barbie shot out of it. The barrel fell away and landed on an onlooker's head. Embarrassed that her gun had broken and injured someone, Ida dropped out of the competition. The injured onlooker, Fluffy Mash, was taken to the hospital, where doctors diagnosed a concussion.

Rose Firr and Ukie Gold proceeded through the "creative objects" round without further incident. Rose used a raw corn cob stolen from the food stand; Ukie used frozen french fries to achieve a "shotgun" effect.

All that remained was the "spectacular" launch round.

Rose stepped up to the firing line and loaded a large "super ball" (designed to bounce sharply) into the barrel, then rammed a potato on top of it to achieve a good seal. The gun fired successfully, and the super ball flew through the air, then bounced wildly off a tree, flew into a rock, and landed on a barbecue grill located 10 feet away from the side of the ball field. Hot grease splashed up on a cook tending the barbecue. He shrieked and jerked back from the grill, hitting Geek's CEO in the face with a hot barbecue fork. The resulting gash in the CEO's face required stitches and subsequent cosmetic surgery.

Ukie Gold was declared winner by default. He nonetheless insisted on performing his "spectacular" launch, as a kind of "victory lap." Before the judges could stop him, Ukie loaded his gun with a tennis ball soaked in gasoline, then fired. A flaming fireball flew out of his gun.

Still flaming, the ball sailed far beyond the ball field and over a small rise in the ground. It landed in an area laid with sawdust and hay, where children were taking pony rides. The sawdust and hay caught fire, and smoke began to form. As smoke became visible, onlookers rushed towards the scene only to find ponies stampeding towards them. Red Bliss, the owner of the ponies, did not work for Geek, and hadn't known there would be a spud gun competition. She was injured when ponies trampled her as she rescued a pony and child trapped in the blaze.

The child's mother, Wendy Wales, was at the back of the crowd by the pitcher's mound on the ball field. She knew her daughter had been taking a pony ride, and became convinced her daughter would die in the fire. In fact, Red safely rescued both pony and child, who suffered only a few cuts and bruises. Although the child cried, she said it was only because she was "scared for the pony." Nonetheless, Wendy had to be treated for shock, and required therapy and anti-anxiety drugs for the next six months.

Answer the following questions:

- 1) Other than Wendy Wales, who can sue what parties <u>based on the acts of Ukie</u>
 <u>Gold during the competition's final phase?</u> Analyze the claims of any plaintiff
 and the likely defense arguments. (For the elements of duty and breach, use only
 the general duty of care standard.) (60 points)
- 2) If Wendy Wales sues Ukie Gold, will she be able to meet the requirements for a cause of action for negligent infliction of emotional distress? Assume the State of Cardozo applies the <u>Thing</u> analysis to such claims. (20 points)
- 3) In an action brought by Russ Burbank against Geek Company for his lost hearing, what duty does Geek owe Burbank? What is Geek's best argument—other than an affirmative defense--for saying it did not breach this duty? (20 points)
- 4) For a lawsuit brought by Fluffy Mash against Ida Baker, analyze the parties' arguments on the element of breach of duty. (25 points)
- 5) For a lawsuit brought by CEO against Rose Firr, analyze the parties' arguments on the element of proximate cause. (40 points)

SPUD GUNS ARE REAL. SO ARE THE INJURIES THEY MAY INFLICT. DO NOT TRY THIS AT HOME (OR ANYWHERE ELSE, FOR THAT MATTER)!

ESSAY QUESTION TWO (119 points; one hour)

Instructions:

- Specific questions for this fact pattern will appear at junctures within the narrative.
- The questions call for short answers of no more than 1-3 pages in your booklets; take cues from the point allocations to gauge how complex or murky the question is and how long your short answer should be.
- Your answer should include the applicable rule statement, an explanation of the meaning of the parts of the rule statement you must use, and application of those rule parts to the pertinent facts.
- Your answer may draw upon all of the facts that have preceded the question (e.g., for question (4), your answer can use the facts preceding questions (1)-(4)).
- NOTE: a question that asks for a "best" argument does not imply that the argument must be a "winner"; rather, pick the strongest possible argument to be made, even if it has weaknesses. If the argument has weaknesses, identify and explain them.

Skeeterville is a gated residential community in the State of Widener. Skeeter Development Corp. ("SDC") designed Skeeterville to appeal to well-off, retired executives. Residents own single-family homes with yards, and enjoy common areas. These common areas include several man-made ponds that enhance the development's scenery.

SDC sold all the lots by 1996, and no longer owns any part of the land; common areas belong to all residents who have bought into the community. By contractual agreement with the residents, SDC supplies maintenance services for the community. These services include maintenance of the common areas.

In the summer of 1999, Widener state health officials announced that dead birds carrying the West Nile virus had been found in the Skeeterville area. West Nile virus is a disease that can only be transmitted to humans through the bite of an infected mosquito. Seven different mosquito varieties carry the virus; each of the seven varieties has different breeding, flying, and biting habits. Carrier mosquitoes become infected by biting infected birds. Thus, the presence of infected birds in an area means that humans in that area are at risk for bites from mosquitoes carrying the virus.

Not everyone who is bitten by an infected mosquito will fall ill. In most persons, West Nile virus symptoms are either nonexistent or mild. Mild symptoms consist of fever, headache, and body aches. For a few persons, infection with the virus can be deadly; within five to fifteen days of the bite, they will suffer the rapid onset of encephalitis (inflammation of the brain). Those who get encephalitis have a high risk of dying, as there is no specific treatment for the disease. Persons over the age of fifty are at highest risk of severe disease as a result of infection with West Nile virus.

There is no vaccine for the virus, so prevention efforts must be focused upon mosquito abatement programs. Such programs primarily rely upon chemical spraying, using potent insecticides sprayed from helicopters or trucks. The most effective sprays are under EPA safety review, and several are known to cause health problems in persons exposed to them. The efficacy of spraying is widely debated. No research has been done on spraying effectiveness, and experts state that on average less than 1/10 of 1% of droplets released from a spray vehicle actually hit a mosquito. Other experts claim that mosquito counts can be as much as 80% lower after spraying.

During the summers of 1999 and 2000, Skeeterville's management engaged Big Sleep Bugco ("BSB") to perform mosquito abatement services. BSB sprayed the Skeeterville development several times. No Skeeterville residents became infected with West Nile virus; however, several residents began to suffer symptoms of asthma. Their doctors confirmed that they were suffering allergic reactions to the mosquito spray, and that they had sustained permanent respiratory impairment.

1) The asthma sufferers sued BSB. BSB now argues that it did not breach any duty owed to the plaintiffs. Using only BPL analysis, assess the parties' arguments on this issue. (25 points)

During the summer of 2001, Skeeterville management again wished to engage the services of BSB, but the company declined the work because it did not desire to defend any more lawsuits. Management therefore engaged Last Roundup Exterminators ("LRE"). Aware of the Skeeterville lawsuits, LRE took a conservative approach to mosquito abatement. It began by mailing a letter to all Skeeterville residents. The letter stated in part:

Dear Skeeterville Resident:

We have been engaged to provide mosquito abatement services. We will exercise our professional judgment to determine whether and when spraying is necessary to abate mosquitoes. When spraying is necessary, we will advise you 24 hours in advance, and recommend that you remain indoors for the duration of the spraying. To reduce the likelihood that spraying will be necessary, we ask that you observe the following practices recommended by the State of Widener's Health Authority: 1) eliminate pools of standing water in which mosquitoes may breed; 2) clean bird baths weekly; 3) drain unused pools; 4) clean clogged gutters; 5) stay indoors after dusk; and 6) wear long-sleeved shirts and pants.

In the State of Widener, early July 2001 was hot and humid. At the end of the month, relief came with a week of heavy rain. Pleasant weather followed. As the skies cleared, health authorities were able to go out in the field to perform mosquito counts and look for birds infected by West Nile virus. Mosquito counts in the Skeeterville area were high, and several dead, infected birds were found in the area. Not wishing to create a panic, the health authorities decided to notify only mosquito abatement companies and to advise them to commence spraying.

LRE decided not to spray. Instead, it re-mailed its original letter to Skeeterville residents, amended by the statement that "recent rains make these measures all the more important." LRE also sent a copy of this letter to SDC, with the notation: "State of Widener Health Authorities report high mosquito counts and infected birds in the area, but the Authorities do not wish to panic area residents. We will monitor the situation and keep you informed. If human infection is reported, we will spray." SDC received the letter but took no further action.

2) Did SDC have any duty to protect Skeeterville residents by warning them of the dangers of West Nile virus and LRE's decision not to spray? (15 points)

As soon as the weather cleared, Anna and Nat Pheles, two retired Skeeterville residents, had their grandchildren over to visit for a week. To entertain the children, they purchased a wading pool. Other activities included going for a walk after dinner and looking at the geese and ducks on the many Skeeterville ponds. There were so many things to do in Skeeterville that the family never left the grounds that week. Busy with the grandchildren, Anna and Nat forgot household tasks, including emptying the wading pool.

By the end of the week, Nat fell gravely ill. His illness began with severe headaches, confusion, and muscle weakness. When he fell into a coma overnight, Anna and the grandchildren were extremely frightened. Anna called an ambulance, and Nat was rushed to a hospital. There, he died. An autopsy confirmed that the cause of his death was encephalitis brought on by infection with the West Nile virus. Nat was 78 years old when he died, and enjoyed excellent health until his last illness.

- 3) If Anna sues LRE, what problems will she face when she attempts to establish that LRE is the cause-in-fact of her husband's death? What are her best arguments for attempting to establish this element? Explain your answers. (34 points)
- 4) Assuming that the jury finds that LRE was the cause-in-fact of Nat's death, assess LRE's best arguments for the proposition that the extent of harm to Nat was unforeseeable, and, therefore, that it cannot be the proximate cause of Nat's death. (30 points)
- 5) Widener is a pure comparative negligence jurisdiction. In Anna's lawsuit against LRE, will the plaintiffs' conduct comprise comparative negligence that will reduce any damages they would otherwise receive? Explain your answer. (30 points)