EXAMINATION FOR TORTS II FALL 2000 Professor Maatman

- 1) Your copy of this examination should have ten (10) pages, including this page. COUNT YOUR PAGES NOW AND ALERT ME IF YOU ARE MISSING A PAGE.
- 2) There are three parts to the exam. They are:
 - a. Five (5) multiple choice questions, each worth three (3) points (15 minutes suggested time).
 - b. One long essay question covering four topics, worth 100 points (1hour & 20 minutes suggested time).
 - c. One essay question with four (4) short answer essay questions embedded in the fact pattern. Please note that some of these short answer essay questions have subparts. The total point value of the short answer essay question section is 100 points (1 hour & 20 minutes suggested time).

Note: The combined suggested time allocations leave you with 5 extra minutes.

- 3) You may answer the questions in any order you like. Just be sure to clearly mark your answers, so that I can match your answer to my questions.
- 4) Please write as legibly as you can, preferably using every other line and only the right hand pages of your booklets.
- 5) Number your booklets in sequence.
- 6) Do not put your name on anything other than the Honor Code sheet. Put your anonymous number on this exam, on each of your booklets, and on the manila envelope I have provided you.
- 7) When you have finished, put the exam and your booklets in the manila envelope. Hand in your envelope, and separately hand in your Honor Code sheet.

<u>NOTE</u>: It is said that truth is stranger than fiction. In the immortal words of columnist Dave Barry, "I am not making this stuff up." Nearly all the fact patterns that follow are based on real cases, although I have creatively embellished some fact patterns (just to add to the fun).

REMEMBER, THE OBJECT ISN'T TO PROVIDE "THE RIGHT ANSWER." THE OBJECT IS TO DO YOUR BEST TO DEMONSTRATE YOUR KNOWLEDGE OF THE MATERIAL WE HAVE COVERED THIS SEMESTER, AND TO DEMONSTRATE YOUR ABILITY TO USE THAT KNOWLEDGE TO WORK OUT WELL REASONED SOLUTIONS TO LEGAL PROBLEMS.

MULTIPLE CHOICE QUESTIONS (THREE POINTS EACH) (15 minutes suggested time) Read the fact pattern and then circle the best of the options offered. If you wish to explain your answer, you may do so by writing your explanation in your exam booklets in a section marked "multiple choice explanations."

- 1) Mr. Magoo rear-ended another car and caused a six car pile-up. Plaintiff's car was sandwiched between two others, and was totally destroyed. Mr. Magoo has testified that he could not gauge the distance between his car and the car ahead of him because it was foggy outside and his glasses weren't strong enough. In fact, he was on his way to pick up his new prescription glasses when the accident occurred. Consider whether Mr. Magoo will be held liable.
 - a. Mr. Magoo will not be held liable because he can argue his actions are excused by impossibility given his vision problems and the fog.
 - b. Mr. Magoo will not be held liable because the fog created conditions that excuse his conduct under the emergency doctrine.
 - c. Mr. Magoo will be held liable because he failed to exercise the care that a reasonable, prudent person without a visual disability would have exercised.
 - d. None of the above.
- 2) Twelve year old Susie suffered bodily injuries when she walked through the plate glass barrel surrounding the revolving door of Toodeloo Toy Store. Susie did so because she rnistook the unmarked, clear glass barrel for the opening in the revolving door. This revolving door is the store's only means of entry and exit for the public other than its emergency exit in the back of the store. The only affirmative defense available to Toodeloo is:
 - a. Susie failed to exercise the care of a reasonable, prudent person under the circumstances.
 - b. Susie impliedly assumed the risk because she saw and used the revolving door on her way into the store, and, therefore, knew and appreciated the risks the door posed.
 - c. The risk posed by a plate glass door is open and obvious.
 - d. Susie failed to act as a reasonably careful child of the same age, intelligence and experience would have acted.
- 3) Meryl wanted to go whitewater rafting. She had never before rafted, but she was a good swimmer and had a lot of boating experience. Meryl selected Kelley's Rattani Raft Company to take her on a guided whitewater rafting vacation. Before the trip began, the company asked Meryl to sign a form entitled "Release From Any and All Liability in Connection with Your Whitewater Rafting Trip." Attached to the form was a list of risks involved in whitewater rafting, all of which concerned the possibility of rafts overturning in unpredictable, rough waters. Meryl read the description of risks and signed the form. During the trip, all went well until their group met up with a raft guided by Richard Hatch Tours. Kelley and Richard, who despised each other, got into a fight on the river. In the course of the fight, Kelley stood up and hurled an oar at Richard. This action upended her raft. As the raft flipped over, Meryl fell out, became pinned underneath the raft, and struck her head on a rock. She has sued Kelley, who is defending herself on the grounds that Meryl's signature on

the release form constitutes an express assumption of the risk. Consider whether Kelley's defense will succeed.

- a. The release is a contract of adhesion; therefore, it is invalid and does not constitute an express assumption of the risk in this case.
- b. This is not a case in which the defendant owed a duty to the public; therefore, the release is valid and constitutes an express assumption of the risk in this case.
- c. The release was fairly entered into; therefore, the release is valid and constitutes an express assumption of the risk in this case.
- d. Meryl was not aware of, and did not intend to accept, any enhancement of the risks spelled out in the attachment to the release; therefore, the release does not constitute a valid express assumption of the risk in this case.
- 4) Sam Racer was a 10 year old boy who loved the new motorized scooter his parents bought him this summer. The scooter could achieve speeds up to 15 miles per hour. Sam's parents restricted the use of the scooter to local sidewalks, but Sam thought the rule was silly because all the kids in his suburban residential neighborhood rode their scooters (both motorized and regular) in the street. One day, Sam decided to ride on the road rather than the sidewalk. He started the motor, hopped onto the scooter, and glided out between two cars. Unfortunately, he was hard to see and he was moving fast as he emerged onto the street; a car hit him and he was injured. The driver of the car had never before been in Sam's neighborhood. The car was going about 25 miles per hour when it hit Sam. In Sam's lawsuit against the driver of the car who hit him, consider the standard of care to which Sam will be held in the context of the driver's comparative negligence defense.
 - a) Sam will be held to an adult standard of care for purposes of assessing his comparative negligence because he was playing in the road, an area reserved for adults and their cars.
 - b) Sam will be held to an adult standard of care for purposes of assessing his comparative negligence because he was engaged in an adult activity, riding a motorized vehicle.
 - c) Sam will be held to an adult standard of care for purposes of assessing his comparative negligence because he disobeyed his parents.
 - d) Sam will be held to an adult standard of care for purposes of assessing his comparative negligence because all children are held to an adult standard of care for all their activities.



5) Alice moved from rural Tennessee to the big city. On Election Day, she drove her car to her new polling place, a local recreation center. She parked her car near the entrance to the facility. Figuring it would only take a few minutes to look at the butterfly ballot and punch out chads, she left her keys in the ignition of her car, just as she always did at home in Tennessee. When she emerged from the polling place, she found her car was gone. Looking down the street, she could see her car slamming into a tree. As it turned out, a 13 year old, Georgina, had seen the car with the keys in the ignition, and couldn't resist the temptation of a joyride. Unfortunately, Georgina had never before driven a car. She survived the crash, but sued for her injuries. Georgina's lawyer has now moved for summary judgment in plaintiff's favor, on the grounds that Alice violated a statute that prohibited leaving keys in the ignition of an unattended car, and that this violation constituted negligence per se. In response, Alice's best argument is:

- a. Her violation of the statute cannot be negligence per se, because, having just moved from a rural area in which people commonly leave their keys in the ignition, Alice neither knew nor should have known of the occasion for compliance with the statute.
- b. Her violation of the statute cannot be negligence per se because Georgina's conduct created an emergency not due to Alice's own misconduct.
- c. Her violation of the statute cannot be negligence per se because the statute was enacted to prevent thefts and thereby conserve law enforcement resources, not to protect thieves from the consequences of their conduct.
- d. Her violation of the statute cannot be negligence per se because the statute merely states a general rule of conduct without fixing a definite standard of care.

ESSAY QUESTION ONE 100 points/1 hour and 20 minutes suggested time

Paul Plaintiff (PP) is suing Den O'Dollars (DD) in the trial court for the State of Widener.

Pertinent statutes (and the <u>only</u> pertinent statutes) in the State of Widener are as follows:

14 Wid. § 50

The State of Widener has no "Dram Shop Act." Accordingly, casinos and all other licensed servers of alcohol in this state are subject to all liabilities, and may invoke all defenses, available and applicable under the common law.

14 Wid. § 51

The State of Widener is a pure comparative negligence jurisdiction.

14 Wid. § 52

The State of Widener has abolished the distinction under common law among invitees, licensees, and trespassers as to the duty owed by an owner or occupier of any premises towards such entrants. The duty owed to such entrants is that of reasonable care under the circumstances.

The pertinent facts are these:

The Den O'Dollars casino opened its doors in the State of Widener a year ago. Since opening, it has done a brisk business. Among other things, DD offers blackjack, roulette, slot machines, roving entertainers, and plenty of free alcohol. DD's General Manager explained DD's free alcohol policy at his deposition. He testified, "offering free drinks is commonplace in the casino business in the State of Widener. The cost of doing so is more than offset by the revenue gained in attracting patrons and keeping them at the gaming tables." He explained, "people come to casinos for gambling and free alcohol, and they gamble more and longer when they've had alcohol."

On March 17, 1999, Paul Plaintiff (PP) came with Fred Friend (FF) to gamble at DD. FF has testified to what happened that evening, and his uncontradicted testimony has been corroborated in all respects by several witnesses.

PP, a recovering gambling addict, had not been to a casino in five years. Nonetheless, PP came to DD to gamble because he was low on cash and thought he might have a run of "Irish luck" for St. Patrick's Day, even though he wasn't Irish. FF (who did not know that PP was a gambling addict) accompanied PP to do a little gambling and to serve as PP's designated driver.

FF soon realized that it was a good thing PP had a designated driver. Before proceeding to the gambling floor, PP consumed several free martinis. As he gambled, and became alternatively elated by winning and anxious about losing, PP consumed still more alcohol.

As the night wore on into the early morning hours, FF had run through all the money he was willing to spend, and was tired and wanted to go home. PP was so drunk he could barely stand up, but he was on a rare lucky streak, and belligerently pushed FF away when he suggested they leave. Alarmed and disgusted, FF found the floor manager and asked him to cut off PP's gambling activity. The floor manager declined, saying DD patrons were free to gamble or not as they chose. FF then suggested that PP's alcohol supply be cut off, but the manager said that DD had no ability to determine which of its customers had consumed excess alcohol, and that each patron was the best judge of his or her own drinking limits. At his wits' end, desperate to get home, FF asked the manager to provide PP with a free cab or a room at the casino hotel. The manager then explained that such "comps" were provided only to "high rollers," who spent a minimum of \$5,000/night for two nights in a row. Although PP had gambled a lot, he had not reached this level.

FF waited another hour for PP to tire of gambling, and finally gave up. He pressed \$20 into PP's hand and told him, slowly and loudly, to use the money to take a cab. Without taking his glazed and bloodshot eyes off of the roulette wheel, PP nodded his assent. After FF left, PP proceeded to gamble away all of his remaining money, including the \$20 FF had given him.

Finally, having briefly gained and ultimately lost several thousand dollars, PP staggered out of DD at 3:00 a.m. Having forgotten that FF had driven him to the casino, he looked for his car in the DD parking lot. As he stumbled about the lot, he became increasingly confused by the fact that he couldn't find his car. Exhausted by his search, he decided to sit down and rest a moment. He closed his eyes and soon fell into a stupor, sprawled out in the middle of the parking lot. At approximately 3:30 a.m., another patron, who was driving out of the parking lot, accidentally ran over PP. The driver, who was sober, simply hadn't seen PP on the ground in the dark parking lot. PP sustained severe head and bodily injuries, and was rendered paraplegic and brain damaged.

Since DD opened, PP is the tenth patron to have passed out and been injured in the parking lot. Cars hit three of these patrons; the other seven injured themselves in one manner or another. Of the ten, PP was the most seriously injured.

Casino security officers patrol the lot as well as the casino interior. Nonetheless, the head of security testified, "we just don't see all the drunks all the time." When asked why the lot was not better lit, the general manager testified that bright lighting in the lot would draw attention away from the neon green dollar signs atop the casino, which are its signature advertising mark. When asked why the casino did not post a warning sign advising drivers to look out for drunken patrons, the manager testified that a sign that effectively said drunks might be sprawled about the lot would detract from the casino's attractiveness as a site for "sophisticated" entertainment.

PP seeks compensation for his personal injuries, and for the money he lost gambling, on the grounds that DD negligently caused those losses. Provide an essay answer that covers the following four topics (and only these topics):

1) Explain the grounds, strengths, and weaknesses of PP's arguments that DD breached its duty towards him.

- 2) Explain the grounds, strengths, and weaknesses of PP's arguments that he suffered actual harm.
- 3) Explain the grounds, strengths, and weaknesses of PP's arguments that he suffered actual harm. DD was Poximally caused PP's injuries.
- 4) Explain the grounds, strengths, and weaknesses of any affirmative defenses that DD can colorably argue.

ESSAY QUESTION TWO 100 points/1 hour and 20 minutes suggested time

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 rule application may draw upon all of the facts that have preceded the question (e.g., for question (c), your answer can use the facts preceding questions (a) through (c)).
- □ 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.

At 3:00 p.m. on a late December afternoon in New England, Delia Driver (DD) lost control of her car, drove over a curb, and smashed into an electrical switchbox that controlled all traffic lights within five blocks of the switchbox. Upon impact, the switchbox and all the traffic lights it controlled ceased to function.

Moments after DD crashed into the box and the traffic lights went out, two cars collided in the nearest intersection because neither driver saw a red light. Both drivers (P1 & P2) suffered bodily injuries and damage to their cars.

As soon as DD's car came to a rest, she called 911 on her car phone and reported the accident. She also advised the 911 operator that a crew would be needed to put the affected traffic lights back into operation.

Within 5 minutes, police were on the scene and began to direct traffic and gather information for accident reports. With the police presence, mayhem at the intersections died down and traffic once again proceeded in an orderly fashion.

1. Can DD avoid liability for the injuries suffered by P1 and P2 by arguing she was not the proximate cause of their injuries? Explain your answer. (5 points)

Approximately 20 minutes after the accident, workers for the Traffic & Lights Utility Company ("TLUC"), arrived to bring the switchbox back on line. TLUC operates traffic lights and provides electricity for residential and commercial use.

After the TLUC technicians spent 10 minutes working on the switchbox, they had results—but not the ones they wanted. Instead of restoring the traffic lights, the workers

had somehow triggered a total electrical blackout in a 5 block area, all of which was served by TLUC for its electrical needs. Residences, businesses, and traffic and street lights all were blacked out.

2. Who was the cause in fact of the blackout—DD, TLUC, or both? Explain your answer. (15 points)

The blackout lasted several hours. On the streets, police used flashlights to continue to direct traffic. Occupants of affected buildings lit candles and brought out their own flashlights. Unfortunately, residents of the Holmes Apartments faced other problems besides lack of light: their stovetops, ovens, and water all depended upon electricity. Thus, the blackout deprived them of these amenities. Most of the residents in this 20 apartment building were elderly.

In apartment number 5D, Robert Ames began to feel anxious about his elderly father, whom he was visiting. Like other residents of the Holmes Apartments, Mr. Ames was without light and water. He also was without a telephone, as his portable phone's batteries had run low and needed to be electrically recharged. Robert was worried that his father might be without water for a long time, and also would be unable to contact his landlord. Thus, he decided to go down to the basement to see if he could find and turn on a back up generator switch.

Robert's father had no flashlight, so Robert lit a candle and took it with him to descend six flights to the basement. The stairway had a bannister on the open side, and another affixed to the wall. As Robert felt his way down the steps, he clung to the bannister along the wall, and held his candle in his other hand. Suddenly, the bannister came away from the wall. Robert lost his footing; as he tried to regain his balance, he grabbed at the opposing bannister. This bannister had been decorated for the Christmas season with pine boughs, which were now dry. Robert was unable to get a grip on the bannister, managing only to clutch at the boughs long enough to ignite the dried branches with his candle.

Within moments, one bannister had ripped from the wall, another bannister had caught fire, and Robert had fallen down an entire flight of stairs, sustaining a broken ankle and wrist, plus bruises and a mild concussion. Injured and pinned underneath the detached bannister, which had fallen with him, Robert was unable to move. When he called out for help, several elderly residents emerged from their apartments to see what had happened. One used a cell phone to call 911. A few others used blankets and pillows to beat down the fire, which grew smoky and then subsided. Help soon arrived, but not before Robert sustained lung damage due to smoke inhalation.

3. Assume Robert sues DD, TLUC, and his father's landlord.

State and explain the legal meaning of the standard for determination of what constitutes proximate cause, and then answer these subquestions, focusing <u>only</u> on the defendants' attempts to prevent establishment of the proximate cause element, and <u>not</u> on any affirmative defenses (30 points):

- a) How can DD argue that she is not the proximate cause of Robert's injuries?
- b) How can TLUC argue that it is not the proximate cause of Robert's injuries?
- c) How can the landlord argue that he is not the proximate cause of Robert's injuries?
- 4. In Robert's suit against the landlord, assume that the jurisdiction follows traditional landlord liability rules.
 - a) What status does Robert have in relation to his father's landlord? Explain the basis for your conclusion. (5 points)
 - b) Based on that status, what duty does Robert's father's landlord owe Robert? Explain the basis for your conclusion. (5 points)
 - c) Explain Robert's best res ipsa loquitor argument for establishing that the landlord breached the duty owed Robert. If there are weaknesses in the argument, identify and explain them. (20 points)
 - d) A state statute requires "all landlords," for "the safety and security of their tenants," to provide their tenants with "habitable apartments which shall include basic amenities such as heat, light, and water." How does this statute affect analysis of the landord's negligence, and defenses, if at all? (20 points)