

FINAL EXAMINATION FOR TORTS FALL 2002 Professor MaatmanInstructions:

- 1) This examination has nine pages, including this one. Count your pages and make sure your exam is complete.
- 2) The exam has four sections and a total point value of 400.
 - a) **Multiple choice:** there are five multiple choice questions, worth five points each. You are not required to explain your answers, but you may choose to do so. **WARNING:** If you explain your answer, and your choice is correct but your explanation is wrong, you will not receive credit for the answer. **Therefore,** don't provide an explanation for a pure guess, but do explain answers based on assessment of ambiguities or arguments you see in the choices. You should allot no more than thirty minutes total to this part of the exam. (You should need less than thirty minutes for this section—this is where I've built in some spare time.)
 - b) **Essay Section One** should take an hour, encompasses 100 available points, and has three focused subquestions. One is focused, and the other is open-ended.
 - c) **Essay Section Two** should take one and one half hours, encompasses 150 points, and has two open-ended subquestions.
 - d) **Essay Section Three** should take an hour, encompasses 125 available points, and has two subquestions.
- 3) I do not deduct points for "wrong" answers, so everything you write will either gain points or have no effect on your score. But see the warning regarding explanation of multiple choice answers in paragraph 2.
- 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 separate envelope designated for the sheets. Do not give me your honor code sheet.

Stay calm. Show me that you know the rule, that you know what its parts mean, and that you can measure the facts against that meaning.

NOTE: THE ESSAY QUESTION FACT PATTERNS, AND SOME MULTIPLE CHOICE FACT PATTERNS, ARE BASED ON REAL CASES. SOME OF THE FACTS ARE GRAPHIC, THOUGH NEVER MORE SO THAN THE CASES WE'VE STUDIED. I HAVE TRIED NOT TO DWELL ON SUCH FACTS BEYOND WHAT IS NECESSARY FOR YOUR ANALYSIS OF THE LEGAL QUESTIONS THEY IMPLICATE.

MULTIPLE CHOICE

- ❑ Five questions worth 5 points each/25 points total
- ❑ Spend between 15-30 minutes on this section.

A. Use the following fact pattern for questions 1-3.

Petronella (“P”) was a bad-tempered but cash-rich regular at Delicious Diner (“DD”) restaurant. She was so unpleasant to the waitstaff that none of them ever wanted to wait on her. The manager set up a rotation system, which ensured that all waitstaff took regular turns waiting on Petronella.

Emma (“E”) was a waitress who particularly disliked Petronella. As she told her colleagues and manager, Petronella reminded her of her rich aunt Cruella, whom she hated because she died without leaving a penny to Emma’s destitute family, instead choosing to bequeath her entire estate to an animal shelter populated by Dalmatians.

One day, the manager informed Emma that she would have to wait upon Petronella a second day in a row, because other available waitstaff were otherwise occupied, and the waiter who should have been Petronella’s server that day was out sick. Emma protested, saying it was “unfair” that she should have to deal with Petronella two days in a row. “I know you hate her,” the manager said, “but so does everybody else. You have no choice, and I expect you to be professional about this.”

As Emma feared, Petronella was even ruder than usual. She prefaced her order by remarking, “oh, you’re the ugly waitress I had yesterday.” When Emma picked up Petronella’s soup order in the kitchen, she decided to take revenge. Making sure none of her fellow employees saw her, she spat in the soup. She then proceeded to serve it to Petronella. After Petronella ate the soup, Emma asked her if she had enjoyed it. Petronella answered in the affirmative. “I’m so glad you liked it,” Emma said. “I added a special ingredient to it, myself.” Petronella then asked what the ingredient was, and Emma was only too happy to tell her.

1) If Petronella sues Delicious Diner for vicarious liability for Emma’s acts, she will

- a) Lose because Delicious Diner’s business does not include serving tainted food and the manager instructed Emma to act professionally.
- b) Lose because an employer can never be liable for an employee’s intention torts.
- c) Lose because neither the manager nor the other employees knew of Emma’s act.
- d) None of the above.

2) If Petronella sues Emma, Petronella will

- a) Lose her battery claim because Emma never directly touched her.
- b) Lose her battery claim because she provoked Emma, and Emma merely acted in self-defense.
- c) Lose her assault claim because contact was completed rather than imminent when she became aware of it.
- d) Win her assault claim because Emma both spoke and acted.

- 3) If Petronella sues Delicious Diner for failure to protect her from a third party,**
- a) She will win because Delicious Diner has a relationship with both her and Emma.
 - b) She will win because she was an invitee, to whom a business/land owner owes an absolute duty of care.
 - c) She will lose because DD did not know of any specific peril to her.
 - d) She will lose because she assumed the risk that her rude behavior would provoke vengeful acts.

B. Use the following fact pattern for questions 4-5.

A statute in the State of Widener states: “No one may block the ordinary and safe flow of traffic, thereby creating a hazard in a roadway of this State.”

Dave recently bought a mega-SUV and drove it all around town to show it off. He then stopped at a grocery store to get medicine for his sick child, who needed her next dose within the hour. He parked in the only available space in the store’s lot. Faded paint on the pavement marked the space for “compact cars only.” Dave did not notice this restriction because his extra-long SUV covered the notice.

Dave went into the store, and shopped for an hour. While he was in the store, Pam Petite (who is 5 feet tall) exited the store and proceeded to her very small Volkswagen “Beetle.” She found her car between Dave’s and a pick-up truck. Unable to see on either side, she backed up slowly and hoped for the best. Unfortunately, she rammed right into a car that had been proceeding down the aisle into which she was backing. The impact injured the driver, Clem, and damaged his car. Pam and her car sustained similar damage.

- 4) If Pam sues Dave, she can attempt to argue negligence per se on the grounds that**
- a) The statute is designed to prevent harm of the type she experienced, to the class of persons into which she fell.
 - b) The statute is a safety measure that should be broadly construed.
 - c) The statute should be strictly construed against anyone whose vehicle creates an inherent obstacle on any roadway.
 - d) The statute sets the standard of care for her situation because a parking lot is a roadway.

- 5) If Pam sues Dave and attempts to use negligence per se principles to establish Dave’s duty and breach, Dave will**
- a) Successfully argue that any violation of the statute is excused because he did not know of the occasion for compliance with it.
 - b) Successfully argue that any violation of the statute was excused by the size of his car, which made him unable after reasonable diligence or care to comply with the statute.
 - c) Successfully argue that any violation of the statute is excused because his daughter’s medical needs and the absence of any other parking space created an emergency not due to his own misconduct.
 - d) None of the above.

ESSAY SECTION ONE

- ❑ **One hundred (100) points total.**
- ❑ **Spend up to one hour on this section.**

In keeping with emerging food trends currently sweeping high-end restaurants, Haricot Vert (“HV”) Restaurant recently introduced a new “all raw foods” tasting menu. To produce such menus, chefs create elaborate vegetarian dishes using only raw vegetables and fruits. Crushed and pureed nuts are an important ingredient in these creations, because they provide protein and hold the dish together. HV’s chefs had never before attempted such trendy creations, and were eager to try them out.

HV’s owners and manager approved the idea because they believed it would help HV to remain competitive. HV ran ads in newspapers announcing the new offerings, and posted a sign at the entrance to draw patrons’ attention to its new specialties. The marketing plan succeeded: the new menu drew rave reviews, and crowds followed.

Approximately a week after the new tasting menu went into effect, Paula Prudhomme and Jules Child went out for a first date at HV. Jules had selected the restaurant specifically to try the raw food offerings. When Paula ordered her meal, she asked Wally Waiter to name the ingredients used to prepare each selection, explaining that she was allergic to nuts and that it was very important that her food be free of all nuts and nut oils. Wally correctly assured Paula that none of her choices called for nuts or nut oils.

As the waiter submitted Paula’s order, he called out, “no nuts!” and wrote a note to that effect on the bottom of the accurately written order slip. The kitchen crew filled the order exactly as written. When the order was ready, Wally whisked it to Paula’s table and served it.

Paula took two bites of her meal and became swiftly and seriously ill, suffering what is known as an “anaphylactic” allergic reaction. These reactions are very rare, but very serious. They can occur even upon exposure to only minute or trace amounts of the substance to which the victim is allergic. Neither medical professionals nor the sufferer can predict the severity of any individual reaction; however, some reactions are so serious as to threaten death within 15 minutes of onset.

Unfortunately, this was the case for Paula. Her throat swelled up, she experienced severe gastrointestinal distress, and she blacked out. Jules, who had only recently met Paula and knew nothing of the details of her allergies, thought she was having a heart attack and cried out for help. Upon hearing his cries, waiters and waitresses raced to assist Paula, and also called an ambulance. They tried to clear her airway and then administered CPR, to no avail. When Wally came upon the scene, he yelled, “it’s an allergy, it’s an allergy!” Everyone then stood by helplessly, unsure what to do. The ambulance arrived 15 minutes after Paula’s attack began, but she was dead by that time.

When Paula’s waiter told the emergency medical technicians of her allergy, they searched her purse and found an Epi-pen injector, which many people with severe allergies carry in case of an anaphylactic reaction. An Epi-pen costs \$100, but is available in the United States only by prescription. Absent a prescription, pens can be ordered via the internet from Canadian

and Mexican suppliers. Neither HV nor any competing restaurants in the area have an Epi-pen on hand.

Paula's parents have filed wrongful death claims (claims for their own losses, including loss of consortium) and a survival action (asserting Paula's claims). Both actions are based on HV's alleged negligence. Plaintiffs have retained an expert who has opined that Paula's food could have been tainted with nut oils through cross-contamination on an insufficiently clean cutting board.

Your jurisdiction

- Has not abolished traditional landowner categories.
- Has a pure comparative negligence statute.
- Has not abolished implicit assumption of the risk analysis.

Assess whether Paula's mother can prove that HV breached its duty to Paula. To do so, address ONLY these questions, one at a time.

- 1) Whether HV can successfully argue that it owed no duty to Paula. (40 points)**
- 2) Whether Paula's mother can prove a breach of duty in HV's manner of preparing and serving Paula's meal. (30 points)**
- 3) Whether Paula's mother can use BPL principles to prove a breach of duty in HV's failure to have an Epi-pen on hand, or, in the alternative, in its failure to have a policy of asking customers for their Epi-pens. (30 points)**

ESSAY SECTION TWO

- One hundred and fifty (150) points.**
- Spend up to one and one half hours on this section.**

Ollivander's Toy Store has been in business for more than 60 years in the same ten-story building on East 88th Street in Tort City in the State of Widener. Ollivander's is a very successful business that does especially well during the holiday season. At that time of year, many families make a special trip to Ollivander's to see the holiday display windows and shop.

Children love to ride the store's escalators and elevators to the ten floors, each of which has a spectacular display devoted to a special category of toys. Sales are briskest on the tenth floor, where the season's most popular toys are stocked. This floor pattern increases the likelihood that customers will make multiple purchases as they progress to the tenth floor.

Ollivander's lets children play with all the toys on display, provided they are with their parents. Large signs at the store's entrance, and throughout the store, remind parents that they must remain with their children at all times. In particular, signs posted at escalators and elevators state: "CHILDREN UNDER THE AGE OF TEN MAY RIDE ONLY WITH AN ADULT."

Last holiday season, eight year old Neville Longbottom and his grandmother took their annual trip to Ollivander's. Neville was eager to try out a new line of Peg-o construction toys on the tenth floor, but his grandmother told him to save it for last. Neville grudgingly agreed to wait while his grandmother shopped on the ninth floor for baby toys for his cousins.

As his grandmother shopped for infants' toys, Neville became bored. The displays of baby toys weren't interesting for an eight year old, and his grandmother seemed to be taking forever as she dithered over her selections. For about ten minutes, he drifted aimlessly about the floor. When he circled back to check on his grandmother's progress, he found her in an extremely long checkout line. Only one cashier served the long line.

Neville decided he would have time to go to the tenth floor to look at the Peg-o toys, then come back down, with his grandmother and the store's personnel none the wiser. Neville briskly proceeded to the store's bank of elevators. He pushed the up button, and waited for a car to come down. When the car arrived, he opened its old-fashioned swing door and reached to open its inner collapsible gate, stepping past the outer door as he did so.

Before he could open the inner gate, the outer door closed behind him and the elevator began to ascend with Neville trapped in the space between the door and the gate. Neville frantically struggled, but he was effectively immobilized. He shrieked, and shoppers—including his grandmother—could hear the muffled yet clearly terrified cries of a child in some kind of danger. Mrs. Longbottom turned towards the sound just in time to see Neville's body—clad in a distinctive red jacket--disappearing from view through a small window on the elevator door. Horrified, she fainted.

The elevator took only a few seconds to travel to the tenth floor, completing its ascent before anyone could stop it. When it reached the tenth floor, the swinging door opened and Neville's body fell out. He was dead of massive head injuries he sustained when the elevator car reached the tenth floor landing. Mrs. Longbottom was spared this sight because she was still on the ninth floor, but later had to identify Neville's body.

Old-style elevators such as that in Ollivander's store have killed at least eight children in the last decade. A 1994 report written by the Elevator-Escalator Trade Association states that such elevators are dangerous because children can get trapped between the doors, just as Neville did. According to the report, the elevator industry has known of these dangers since the 1950's. The report further states that the industry's standards call for replacing such old model elevators with modern, safer cars and doors. In the alternative, industry standards recommend that a space guard be installed to fill up the space between the swinging door and gate so that people cannot get trapped between the two. The cost of installing new elevators varies, depending upon the number of elevators and the model selected. The cost of installing a space guard is \$400 in materials and labor per elevator, per landing. Using sales and maintenance records, the trade association mailed this report, complete with all of the preceding information, to all known owners of these old-style elevators. Ollivander's received a copy of the report on July 31, 1995.

Ollivander's building was constructed according to its specifications in 1942. The building's elevators—three cars running to each of the ten floors--are the originals installed in that year. In 1996, the elevator manufacturer sent Ollivander's a letter recommending that the old-style elevators be replaced or modified with a space guard. Ollivander's chose not to do so. Until Neville's death, no accident like his had ever occurred in the store's history.

The common law of the State of Widener:

- ❑ Has abolished the traditional landowner categories.
- ❑ Does not recognize parental immunity from tort suits brought by their children.
- ❑ Holds that children under the age of four are incapable of negligence, and follows the majority approach to the question of whether the conduct of a child older than four is negligent.
- ❑ Follows the Dillon rule for analysis of bystander claims for negligent infliction of emotional distress.

The State of Widener also has the following statutes:

- ❑ A statute specifying that pure comparative negligence principles apply to all negligence claims.
- ❑ A statute specifying that implied assumption of the risk principles are abolished, and have no force in any tort actions governed by Widener's common and statutory law.

You are a judge. Using the common and statutory law of the State of Widener, analyze and rule on the following claims arising from the foregoing facts.

- 1) The Estate of Neville Longbottom versus Ollivander's, stating claims for negligence (in a survival action stating claims belonging to him). Include in your ruling an analysis of whether damages for pain and suffering should be awarded, but do not discuss any other aspects of compensatory or punitive damages for this claim. (100 points)**
- 2) Mrs. Longbottom versus Ollivander's for negligent infliction of emotional distress. (Do not discuss any issues beyond the question of whether Mrs. Longbottom can satisfy the requirements of the Dillon rule.) (50 points)**

ESSAY SECTION THREE

- ❑ **125 points.**
- ❑ **Spend no more than 1 hour on this section.**

Larry Lawstudent and Pete Plaintiff were first year students at Liabilityland Law School. As the end of their first semester drew near, they began to study especially hard. Finding their dorm surroundings too chaotic, they decided to move into a motel where they could rent a room and study undisturbed. They checked into the motel, locked themselves into their room, and emerged only to accept and pay for food deliveries from local restaurants. Inside the room, they refined their outlines, debated hypotheticals, and wrote practice exams.

Three days before their Torts exam, one of their classmates, Susan Student, tracked them down by calling Pete at his cell phone number. Pete answered, impatiently told Susan they were at the Starlight Motor Inn, and then barked, "we're not talking until after the exams."

"Wait," Susan wailed. "You have my Torts outline and my disk with the outline on it. I need it!" Her plea came too late—Pete had already hung up the phone. Frustrated, she re-dialed

his number, and then Larry's. Neither of them answered. After an hour of repeated attempts to call them, she concluded they had shut off their phones.

Susan decided to go to the Starlight Motor Inn to retrieve her outline and disk. When she got to the motel, she asked at the desk for her friends' room number, then proceeded to their room. The old-style motel was designed so that every room opened onto the parking lot or a balcony leading to the stairs. Pete and Larry's room was on the second floor, off the balcony. It had a large window overlooking the balcony, but thick, insulated curtains blocked its view.

Susan stood in the cold and pounded on the locked door. The only response was a muffled "go away!"

"I'm here for my outline," Susan yelled through the door. "You have to give it to me. You can even keep the hard copy if you want, but I've got to have the disk. The outline isn't on my hard drive."

Pete's answer came through the door: "Sorry, we don't have time to look for your stuff."

Now infuriated, Susan pounded on the door and told the men she would gladly look for her things herself. At last, unable to stand the noise any longer, they told Susan she could come in when they finished the practice exam they had just started. Fearing she would never be able to retrieve her things if she left, Susan sat down on the cold cement stairway at the end of the balcony, and waited for two hours until Larry finally opened the door.

The room was a shambles. Books and papers were piled knee deep. As Pete and Larry continued to study, Susan searched the room as best she could. She was unable to find her things, and left in disgust. She returned to her dorm room, then brewed a pot of coffee and studied from her notes. As she studied, she realized she knew her outline so well that she could recall it in great detail.

For their part, Pete and Larry kicked into overdrive and studied around the clock for the Torts exam. Although they became giddy with sleep deprivation, the marathon became something of an unspoken contest to see who could study hardest and suffer most.

At three in the morning on the day of the exam, six hours before it was to begin, Pete suddenly found Susan's disk. "Look," he said. "Here it is. Let's make it up to her and deliver it this minute." Larry shook his head in disagreement. "It's too late now; there's no point. You can take my car if you're so set on it, but I'm not going."

Taking Larry's keys, Pete staggered out into the cold night and climbed into Larry's car. Exhausted, he decided to close his eyes for just a few minutes. He fell fast asleep, and a few minutes turned into many hours.

In the meantime, Larry fell asleep inside the warm motel. Overcome by exhaustion, he slept soundly and awoke just fifteen minutes before the exam. He rushed out the door to find Pete asleep in his car, which was locked. The only set of keys was on the seat next to Pete. He tried to awaken Pete by banging on the car window, but Pete did not respond. Frantically, Larry called a cab and managed to make it to the exam in the nick of time.

After the four hour exam, Larry returned to his car and was surprised to find Pete still there, apparently still asleep. It then dawned on Larry that Pete was unconscious. He immediately called an ambulance, which took Pete to a nearby hospital.

Doctors at the hospital could not determine exactly how long Pete had been unconscious. Apart from that, Pete's ten hours in the cold car had left him with frostbitten fingers and toes. As a result, they amputated one of Larry's fingers and two of his toes.

Your jurisdiction:

- Has abolished the landowner categories.
- Has abolished implied assumption of the risk.
- Follows pure comparative negligence principles.

ANALYZE ALL OF THE FOLLOWING CLAIMS ARISING FROM THE FOREGOING EVENTS:

- 1) Susan's claims, if any, against Pete and Larry. (50 points)**
- 2) Pete's claims, if any, against Larry. (75 points)**

DO NOT CONSIDER QUESTIONS OF DAMAGES APART FROM ANY HARM REQUIREMENTS FOR ANY OF THEIR CLAIMS. YOUR ANALYSIS SHOULD INCLUDE CONSIDERATION OF ANY DEFENSES AND COUNTERARGUMENTS.