

EXAM No. _____

Torts
Professor Simon
Final Exam
Fall 2007

INSTRUCTIONS

The total time for the exam is 3 hours. The exam has 3 targeted essays and one “bigger picture” question. Each question will be worth an equal number of points. I have divided the time in proportion to the points to give you some rough guidance.

You may bring to the exam the Vetri text, the Concise Restatement, and a **hard copy** of an outline that you prepared. No other materials or commercial outlines are permitted.

This exam is worth 80% of the final grade (320 points). The remaining 20% of the grade is based on the mid-term (15% -- 60 points) and class participation (5% -- 20 points).

Be sure to answer the questions I ask. Do not waste your time with speculation for which neither the question nor the answer calls. Brevity and precise analysis will be rewarded; rambling answer will not (and will cost you valuable time). Thus, please organize your answers carefully.

Note though that adequate answers may require discussion of related issues or application of missing facts, as long as they are logically presented by the question. Also, despite the role that I designate in the question, you may need, in order to fully answer the question, to identify and address arguments that would be made by another party or participant and are not specified in the question.

Please either 1. Follow the Registrar’s instructions for computer use, or 2. Put your written answers in the bluebooks and make sure your exam number is on each. Write only on **one side** of the page and use ink. Although given my own penmanship, I am clearly not the one to ask this, try to write legibly. I can’t give credit for that which I am unable to read.

If you find yourself running out of time, you might try, at least, to outline your answer. You may receive some credit for this effort. Good luck and thank you for a semester I enjoyed greatly.

Question 1 (80 points; 45 minutes)

To: Associate
From: Partner

Josephine Braxton recently sued our client, Dr. Charles Golden, for injuries she claims to have sustained as a result of the stillbirth of her first child. Stillbirth is the birth of an infant who has died in the womb. Both parties agree that during the pregnancy Golden correctly diagnosed Josephine as suffering from toxemia, a condition that entailed serious risk to mother and child. Ms. Braxton alleges that Dr. Golden did not provide her with adequate treatment for this condition.

Dr. Carol Simms, our medical expert, has provided us an affidavit indicating that a pregnant woman with toxemia has a 46 percent chance of delivering a normal baby if she has adequate care. Without adequate care, she believes the chance of delivering a normal baby is reduced to 15 percent.

I want to file a motion for summary judgment based on Dr. Simm's affidavit. I have been unable to find any controlling law on this specific issue in our jurisdiction. (Just for your information, I did learn that our jurisdiction allows wrongful death claims even if the child is not born alive. Therefore, you need not be concerned about this potential duty issue). Please: 1. Describe fully the specific basis you suggest we use in our summary judgment motion based on Simm's affidavit; 2. Analyze carefully our chance of success on this motion.

Question 2 (80 points; 45 minutes)

Harry met Sally at a party hosted by mutual acquaintances. On their third date, they went out for dinner and drinks. Afterwards, they returned to Sally's apartment where they had unprotected sex. Some weeks thereafter, Harry was diagnosed as having genital herpes. Enraged, he went to Sally's apartment and confronted her. She tearfully admitted that she knew she had

herpes. But Sally indicated that she believed, based on a conversation with a friend who worked at a hospital, that once she was in remission for three months, she presented no real risk of transmission to a sex partner unless she at the time of the contact had an active outbreak. She had not had an outbreak for almost six months.

Harry filed a battery action based on the above facts. Sally testified as described above.

Assume the parties have stipulated that Plaintiff contracted the herpes from Defendant. At the close of the evidence, **plaintiff** has moved for a directed verdict. You are the judge. Rule on this motion.

Question 3 (80 points; 45 minutes)

On a Sunday morning in June, Sherry Franklin went to visit her family in Oakton, Nirvana. She is a licensed pilot who two months ago bought a used twin-engine plane. Sherry only recently received her license, having failed the test twice. This will be the first time she has flown to visit her family.

Sherry properly inspected the plane before take-off, as required by Federal Aviation Regulations (FAR) and found no maintenance or repair needs. Her plane is a little over one year old, was inspected four months ago, and is in good shape. Normally, planes must only be inspected yearly. However, FAR require any purchaser of a used aircraft to get it inspected by the federal authorities within one month of purchase. Sherry has been too busy to get this done and plans to do so soon.

Before taking off, Sherry obtained a preflight weather briefing (also required by FAR), which indicated a line of thunderstorms moving rapidly from the northwest to the southeast. It appeared that the storms were going to pass north of the flight path Sherry had to take to get to Oakton. Sherry knows how unpredictable thunderstorms can be, but Oakton is only one hour by air from Pleasantville (where Sherry lives) and the storm system was about one and one-half hours distant. Sherry decided to make the trip in spite of the possibility of bad weather.

As Sherry approached the halfway point to Oakton, she encountered heavy rain and moderate turbulence, leading her to believe the weather

report she had obtained was not quite accurate. The rain and turbulence continued unchanged until Sherry reached Oakton.

As Sherry began her approach to the Oakton airport, the turbulence became severe and the rain intense. Sherry tried to control the plane during the landing as best she could but was unnerved by the lightening and thunder. The plane ran off the end of the runway, crashing into an embankment. The plane slammed into the embankment with such force that it jarred a nearby utility pole and the high voltage wires attached to the pole broke free. Sparks and live wires were thrown everywhere.

The utility pole was close enough to the airport terminal building, and the wind velocity sufficiently strong, that the downed wires seriously burned Mrs. Wilkins as she exited the terminal building. She was at the airport to pick up her husband, who had just arrived on a flight from Europe. In addition to her burns, Mrs. Wilkins has been diagnosed as having a rare form of skin cancer, generally thought to result from electric shock burns.

As it happens, the manager of the airport terminal, Mr. Lorenzo, had failed to maintain the utility pole. Its foundation was decaying and the power line connections needed repair. The airport had been operating at a loss for some time and Lorenzo had decided to forego the repairs until he had some extra cash.

Wilkins filed a negligence claim for her injuries against the Oakton Airport. Our firm represents Wilkins, and the partner in charge would like to use a negligence per se theory against the Airport.

She attached to her memo to you asking for your help the following Federal Aviation Regulations and Nirvana statutes:

Nirvana Revised Statute: 25- 507 (Apportionment of Damages).

I. In all actions, the court shall:

(a) Instruct the jury to determine, or if there is no jury shall find, the amount of damages to be awarded to each claimant and against each defendant in accordance with the proportionate fault of each of the parties; and

(b) Enter judgment against each party liable on the basis of the rules of joint and several liability, except that if any party shall be less than 50 percent at fault, then that party's liability shall be several and not joint and he shall be liable only for the damages attributable to him.

(c) Notwithstanding section (b) above, in all cases where parties are found to have knowingly pursued or taken active part in a common plan or design resulting in the harm, grant judgment against all such parties on the basis of the rules of joint and several liability.

Nir.Rev.Stat. 25-688: Operation of Airport Terminals:

It shall be a misdemeanor, punishable by a fine of not more than \$2000, to fail to adequately maintain, inspect, and repair all power generating and transmission equipment in and around Airport Terminals in this State, to insure the safe transportation of the flying public.

FAR 91.3: Airplane Registration--Private Airplanes:

No privately owned airplane shall be flown without a valid inspection certificate. A violation of this Regulation shall be punishable by (a) a fine of not more than \$1000; and (b) immediate suspension of the operators license of the owner of such airplane.

You are to write a memo to the partner: 1. Explaining in detail what you think is the most fertile negligence per se claim based on the material you have been given; and 2. Assessing fully its chance of success.

Question 4 (80 points; 45 minutes)

Oliver Wendell Holmes, in his book The Common Law said:

“[A]ny legal standard must, in theory, be capable of being known. When a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was.

If, now the ordinary liabilities in tort arise from failure to comply with fixed and uniform standards of external conduct, which every man is presumed and required to know, it is obvious that it ought to be possible, sooner or later, to formulate these standards at least to some

extent, and that to do so must at last be the business of the court. It is equally clear that the featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances.”

We have considered throughout this course the functions of judge and jury. Is it possible to devise criteria that would translate Holmes's position into manageable guidelines for the court and thus re-allocate those functions? Evaluate this possibility and the advisability of such a reallocation.