

EXAM No. _____

Torts
Professor Simon
Final Exam
Fall 2008

INSTRUCTIONS

The total time for the exam is 3 hours. The exam has a two-part, targeted essay, a True/False with explanation question, and one “bigger picture” question. The questions have different point values. Thus, I have divided the available 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- 170 points; 90 minutes

Louis Lawstudent had just finished his Torts exam, the last of his first semester. He felt he had done well since the exam was fair, he had worked hard during the semester and he was thoroughly prepared by his beloved teacher and his crack team of TAs. Nonetheless, he was relieved the semester was over and decided to go to the Wheat House to have a few drinks with his classmates.

The few drinks turned into many, twelve in all. By the time he left the bar, it was after 5 PM and dark outside. Louis got in his car and tried to drive back to the law school to find some friends. He was completely drunk, though, of course, he did not know this.

He got a bit lost and wandered around town for a while. He finally was able to understand where he was when he saw a Rotary on Middle Street, which he recognized as being near the school. He decided to try to go around the rotary several times as fast as he could. After bouncing off a few curbs, he was laughing hysterically and enjoying himself. He exited the rotary, "flooring" the car and accelerated to over 50 miles an hour as he headed down the street.

Joe the Plumber and his fiancée Betty the Doctor were out for an evening jog on Middle Street. Joe, who was a collegiate runner, was feeling the need to push himself that evening since he had a tough day at work. As they were getting ready to cross the street, Betty heard the screeching of tires and saw the car speeding towards them, though it was still quite a distance away. She called out to Joe to cross carefully.

Joe reminded her that he was a sprinter and started to run across the street. When he was in the middle of the street, Betty saw him stop and grab his leg. She knew this was likely an aggravation of an old hamstring injury and that he would not be able to move. She then ran out to try to help him. But

by then Louis's car was right on them and unable to stop; he hit them both with his car. Joe was killed and Betty was severely injured.

Louis was ultimately convicted of negligent manslaughter and is serving 12 years in prison. Joe's family was trying to deal with this terrible loss when they learned that Louis would soon inherit a substantial sum of money. Both Joe's family and Betty thought he should not have the money waiting for him when he got out of prison, so they brought a wrongful death action within weeks of the funeral. Betty's claim for wrongful death was ultimately dismissed since she was not designated as one who could recover under the applicable statute. But her complaint also contained a negligence action against Louis for her injuries, which the court permitted to go forward.

You know that there is a statute in this state that says that "Any driver exceeding the posted speed limit on any public way shall be guilty of a violation of this chapter and shall be fined not more than \$500, unless the excess speed is greater than 15 miles an hour, in which case the fine, in the discretion of the judge, can be up to \$1000." Statutes of Mitch § 670:1-a.

The posted speed limit on Middle Street was 30 miles per hour. The accident reconstruction expert believes Louis was traveling at least 55 miles per hour at the time of the collision. He testified in his deposition that in his opinion even if Louis had been going 30 miles an hour, he was so drunk that he was unlikely to be able to stop in time to avoid the accident.

The Statutes of Mitch also provide at § 220:1 that:

(a) The contributory negligence of any party in a civil action shall not bar such party or such party's legal representative from recovering damages for negligence resulting in death, personal injury, property damage or economic loss, if such party's negligence was less than the causal negligence of the party or parties against whom claim for recovery is made, but the award of damages to any party in such action shall be diminished in proportion to the amount of negligence attributed to such party. If any such party is claiming damages for a decedent's wrongful death, the negligence of the decedent, if any, shall be imputed to such party.

You are a first year law student who has been hired for the summer by the firm defending the cases. The partner in charge of the case has asked you to answer two specific questions:

Part A- First, she wants to know if you believe we can defeat Betty's action against Louis by arguing that this case is outside the applicable scope of liability. Please analyze the viability of this defense.

Part B- Second, she wants to know what defenses we might be able to raise based on Joe's conduct. She tells you that another clerk is looking at ways of undercutting the prima facie elements (other than the scope aspect she asked you to address in part A), so you should not discuss any such defense. Analyze the affirmative defenses we might raise based on the facts of this case and assess their strengths and weaknesses.

Question 2-- 70 points; 35 minutes

A married couple invited two friends to go with them to an "off-the-road" recreation facility to test out their new Jeep. It was soft-top (convertible) model with a roll bar underneath the removable roof. The course consisted of a series of hills, jumps and trails at an abandoned granite quarry.

While the Jeep was negotiating a double-terraced hill, the rear of the vehicle raised up relative to the front and passed through the air in an arc of approximately 180 degrees. The vehicle landed upside down with its front pointing back up the hill. This is known as "pitch-over."

The accident either killed or severely injured the occupants. The survivors and the families of those who died sued Jeep alleging that the Jeep was defectively designed. Essentially, they claimed that the roll bar was designed defectively because it was bolted to a thin sheet metal housing, rather than to some stronger metal casing. This design, they alleged, caused the bar in a pitch-over to break on impact and thus allowed the occupants heads to hit the ground, causing serious injury and death.

You may note this case is factually similar to the *Leichtamer* case (Vetri p. 955). Assume a lawsuit on behalf of the injured parties is timely filed. This time, unlike in *Leichtamer*, Jeep defends by contending that if it used stronger steel in the housing or a different bolting system, the weight distribution of the Jeep would be improper, increasing the tendency for the

rear end to skid in wet weather (called fish-tailing). Given the amount of driving done in wet conditions (which it claims is far greater than the amount of time spent off-road), any increase in the tendency to skid could cause a significant number of injuries. Our jurisdiction uses the following jury instruction in design cases:

A defect in design occurs when the product sold has been manufactured in conformity with the manufacturer's design, but the design itself presents unreasonable dangers to users/consumers. In deciding whether a design presents unreasonable danger, you should consider the desirability and usefulness of the product to the public as a whole. Even if you decide that a product is desirable and useful to the public as a whole, consider whether the risk of unreasonable danger could have been reduced without significant impact on the effectiveness of the product and the cost of manufacturing; liability may exist if the manufacturer did not take reasonable steps to lessen or eliminate the danger of even a useful and desirable product. A manufacturer is not obliged to design the safest possible product, or a safer product, or one as safe as others make, so long as the design he/she has adopted is reasonably safe (is not unreasonably dangerous).

Plaintiffs' lawyers know that to prove their case they will need to hire an automotive design expert to testify about the technical design issues. They are considering also asking him to develop a prototype of a roll bar system that would protect occupants in a pitch-over situation, while not increasing the risk of fish-tailing. Since they know this latter type of work will be costly, they want your thoughts on whether such evidence is necessary in our jurisdiction.

A. State whether the following statement is true or false. "In this jurisdiction, the plaintiff must develop the prototype evidence described above in order to make out their prima facie case. B. Explain fully your reasoning.

Question 3--80 points; 55 minutes

Professor Carl Bogus has written the following introduction to a law review symposium on tort reform:

I am not sure who coined the term "tort reform," but as far as I know it was first used in 1974 in a student article published by the UCLA Law Review. That article was very much a 1960's piece. The author praised

Justice Roger Traynor and the California Supreme Court [who wrote Tarasoff & Rowland and inspired the adoption of Section 402A] for their leadership in “placing tort liability on the party who is best able to spread the risk of loss.” She [the student author] continued:

Though judicial activism is generally regarded by traditional legal process scholars as undesirable, in tort law, it appears to be an appropriate fulfillment of the historical function of the common law-to meld the precedents of the past and needs and concerns of the present.

For nearly a decade thereafter, “tort reform” was still occasionally used to refer to efforts to make the tort system more dynamic by making it easier for victims to hold accountable wrongdoers and those who were in a position to prevent harm.

Times, however, were changing. The modern conservative movement was gaining force. That movement was repelled by what is considered judicial activism.... They increasingly saw courts as anti-order, anti-establishment, anti-free enterprise. In 1971, Lewis F. Powell, Jr., who was then a corporate lawyer, [and subsequently became a U.S. Supreme Court Justice] wrote a memorandum for the U.S. Chamber of Commerce in which he... urged that the Chamber of Commerce lead a political and social counterassault. He wanted the counterassault launched in the venues where public opinion is molded—college campuses, graduate schools, secondary schools, textbooks, television and radio, scholarly journals, newspapers and popular magazines—as well as in all branches of government.

Powell wanted the Chamber and its allies to focus particularly on the courts. Powell was not arguing against an activist judiciary; he was arguing for a pro-business activist judiciary. “Under our constitutional system,” he wrote, “especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic, and political change.” Powell continued: “This is a vast area of opportunity for the Chamber, if it is willing to undertake the role of spokesman for American business and if, in turn, business is willing to provide the funds.”

Today “tort reform” means the opposite of what it meant a quarter of a century ago. Notwithstanding the progressive sound of the word reform, the phrase tort reform now stands for a collection of regressive proposals designed to shield big business and medicine from citizen lawsuits. It has

been enormously successful. The American Tort Reform Association is able to boast the “85 percent of Americans believe too many frivolous lawsuits clog our courts,” and “more than 45 states have enacted portions of ATRA’s legislative agenda [which include abolishing the collateral source rule, imposing shortened statutes of limitation and limiting informed consent lawsuits].”

The success of the tort reform movement is unfortunate. The common law plays an important role in protecting public health and safety. Lawsuits shine light into dark corners, exposing corporate wrongdoing or shortcuts that have placed citizens at risk. Indeed, it may be the exposure function that matters most, even more than the money judgments. But of course money matters too, providing incentives for business and health care providers to find ways to reduce injuries.

State whether you agree or disagree with Professor Bogus’s argument. Explain thoroughly and specifically with reference to cases or material we have covered in class, why you feel as you do. Credit will be given for depth of analysis and evidence of reflection and not for mere visceral feelings or partisan ideology.