

Student Exam Number: _____

**Lewis & Clark Law School
FINAL EXAM – Spring 2007
Torts I – Prof. H. Tomás Gómez-Arostegui**

Exam Packet & Instructions:

- A. Please write your exam number on the top of this instruction sheet **and on the outside of your exam envelope**. Do not unstaple this exam packet.
- B. This exam packet contains nine (9) pages, including this cover page.
- C. There are five (5) questions with the following approximate weights:
 - Question [1] is worth 30% Question [4] is worth 10%
 - Question [2] is worth 45% Question [5] is worth 5%
 - Question [3] is worth 10%
- D. You have **3 hours (180 minutes)** to complete this exam. Explain your answers. Use the relevant facts, and make sure to argue all sides. Discuss each claim and defense fully. Predict whether you think a claim or defense will be successful or unsuccessful and tell me why. At the same time, remember that your time is not unlimited, so manage your time with care. If your analysis of an issue or statement of the law has already been undertaken earlier, you may simply refer back to it rather than repeat it.
- E. If you find that you need additional facts beyond those stated in the question in order to analyze or reach a conclusion or prediction on an issue, state the facts you believe are needed and how they would affect your answer.
- F. You are free to write on this exam packet. However, nothing written on this exam packet will be considered in determining your score on this exam.
- G. If you use a **computer** to prepare your response, please make sure that your individual exam number appears as a header on every page of the document, that the pages are numbered, and that there is no other identifying information on any page. Use at least 1 inch margins all around and set your font size to 12 point. For **bluebooks** write on one side of the page only. You may single space your answer in either format.
- H. **YOU MUST TURN IN THIS EXAM PACKET WITH YOUR EXAM ANSWERS. FAILURE TO TURN IN THIS PACKET CONSTITUTES FAILURE TO TAKE THE EXAM ITSELF AND WILL RESULT IN A FAILING (F) GRADE FOR THE COURSE.**

QUESTION [1] (30%) [Suggested time: 50 minutes]

Carlos Zerbini is a photographer and reporter employed in the entertainment department of Enquirer magazine. Zerbini hears from an informant that Tommy Gomez the famous actor might be dating Paris Hilton the actress. A photograph of the two of them together would be a scoop and would certainly be worth a lot of money to Zerbini and his employer.

Zerbini learns that Hilton will be having a costume party at her mansion. All the major players in Hollywood, including those working in film and music, will attend. Zerbini believes the party may present an excellent opportunity to get his photograph and story.

On the night of the party, Zerbini arrives at the mansion dressed as Freddy Krueger, the fictional horror-movie character whose entire body is scarred from fire and who has knife blades for finger nails. While the doorman is talking to another guest, Zerbini looks over the doorman's shoulder at the guest list for the name of a non-famous person. He chooses and uses "Captain Sticky," the professional trade name of up-and-coming musician Constantine Papadopoulos, whom Zerbini knows is out of town. The gamble pays off, perhaps because of his concealing costume, and the doorman lets him into the party.



Once inside, Zerbini sees Hilton walking alone into a study room. He follows her, planning to corner her inside so he can question her about Gomez. After walking into the study room, Zerbini closes the door behind him, startling Hilton, who swings around and screams when she sees Zerbini dressed as Krueger. Thinking she is in mortal danger, Hilton runs for the only door, but Zerbini lunges toward the door as well and, without touching her, blocks the exit with his body, frightening her further.

He then quickly takes off his mask and finger blades (having forgotten his costume and having had no intent to frighten her) and explains that he only wants to interview her. He says he is a reporter and that if she will just answer a few questions, he will leave and never bother her again. Believing that he will hound her relentlessly otherwise, and wanting to get out to join the others at the party, Hilton agrees and answers several of Zerbini's questions.

After five minutes, Gomez opens the door and walks into the study. Sensing an opportunity, Zerbini asks if he can photograph the two together for the Enquirer, and they approve. Zerbini uses his digital camera to take several photographs. To his surprise, Gomez then invites Zerbini to stay at the party. Hilton looks at Gomez perplexed, but Gomez then whispers something in Hilton's ear. She smiles, whispers something back,

and points Gomez in the direction of the kitchen. Zerbini accepts the invitation to stay, puts his mask back on, and returns to the main room where the party is in full swing.

Gomez goes to the kitchen and spikes a drink with an herb which he knows acts as a super laxative in about 10% of the population; for the remaining 90% of the population it is completely harmless. In cases where it is effective, the herb causes no physical harm or pain to the drinker, just loss of bowel control, and its effects fade after 2 minutes.

Gomez offers the drink to Zerbini, not knowing whether he will take it or not, and having no idea whether it will actually work. Zerbini takes the drink gladly. Within minutes of consuming it, Zerbini loses all bowel control.

Grabbing the D.J.'s microphone, Gomez stops the music and yells over the speaker system: "Look everyone, this guy s**t himself!" The doorman then runs in, seeing what has happened, and also yells: "Check it out, Captain Sticky just s**t himself!" 300 people erupt in laughter. While Zerbini tries to compose himself, Gomez takes Zerbini's camera and quickly deletes from the memory card the digital images Zerbini had taken of them. Gomez then returns the camera to Zerbini, saying: "We changed our minds."

Mortified, Zerbini runs out of the party and straight home where he proceeds to have a nervous breakdown. Remarkably, this is not the first time this sort of thing has happened to him, and he is therefore particularly hypersensitive about it. He has broken out in hives, become paranoid, and been unable to return to work.

Directions:

1. Discuss all possible tort claims and defenses.
2. Do not discuss any contribution or indemnity claims that one tortfeasor could bring against another.

QUESTION [2] (45%) [Suggested time: 90 minutes]

Joe Miller and Brian Blum are the morning commute disc jockeys at WKRP, a radio station in Cincinnati, Ohio. They are well known for their irreverence and for often playing practical jokes on the air. Once a month, they host a "Show Me the Money" contest in which listeners are invited to the radio station to partake in some outlandish contest. These contests have made the program the highest rated morning show in town.

Last week, the contest was called "I Will Not Burst!" Miller and Blum announced to their listeners that contestants would be asked to drink a liter of water every 15 minutes. Whoever lasted the longest without having to urinate would win \$10,000. Miller and Blum then proclaimed that the first three listeners at or above the age of 18 to arrive at the station would be selected as contestants. Blum announced the address and stated: "You guys better get your butts down here in a hurry if you want a chance to win this money!"

Lydia Loren heard the announcement on the radio and immediately jumped into her car. Though Loren was only 16, she had, in addition to her legitimate driver's license, a second Ohio identification card which she had obtained by fraud from the Department of Motor Vehicles and which listed her as 18 years old. On the way to the station, Loren found herself at a stoplight behind another car. When the light turned from red to green, the car in front of her did not move. The driver of the car, Bill Funk, was having car trouble. Loren honked her car horn for 20 seconds straight, screaming "Move It!" Loren then drove around Funk and continued on to the radio station.

As it turns out, Loren's honking caused Funk's left ear drum to rupture. Funk had been on his way home from the doctor's office where, just hours before, the doctor had thoroughly and non-negligently cleaned Funk's ears. The doctor had warned Funk that his ears would be hypersensitive to sound for 12 hours and that, in order to avoid hearing loss, Funk had to wear ear plugs for the remainder of the day. Funk got into this predicament because he had driven to the doctor's office alone, and had no way of getting home unless he called a cab or drove himself. Not wanting to spend \$25 for a cab (home and back the next day) and \$7 for overnight parking for his own car, and knowing that it would be unsafe to drive with the plugs in place, Funk had decided to drive himself home without wearing the ear plugs.

After his ear drum ruptured, and Loren had driven around him, Funk wrote down Loren's license plate. He was then able to start up his car, and he pulled over to the side of the road and parked. After putting in the ear plugs, he called a cab to take him to the hospital, where this time a different doctor negligently treated his newly ruptured ear drum, thereby causing total and permanent hearing loss.

Loren in the mean time appeared at the radio station where she found that she was the third person to arrive. Miller and Blum checked her identification to see if she was 18, and she was then selected along with Bernie Vail and Beth Enos to participate in the "I

Will Not Burst!” contest. None of the contestants was asked to sign a release or other waiver of liability in order to participate.

In the process of putting the contest together, neither Miller nor Blum had investigated whether a water-drinking contest would endanger the health of the participants. The two of them guessed that the only risk was bladder rupture or injury and they further surmised that a contestant would give up well before that happened. Therefore, not surprisingly, the contestants were not informed of any potential health risks in engaging in the contest. Moreover, contrary to the custom of most radio stations that run contests in which listeners are invited to participate at the radio station, Miller and Blum did not have a paramedic on site in the event of a medical emergency.

The contest began, and after 1 hour and 4 liters of water, Enos quit and left. Loren then began to feel ill. Miller and Blum teased Loren for being weak. Loren then nearly fainted and had to lie down on the floor. Miller and Blum did nothing to assist her. To the contrary, Blum announced jokingly on the air: “Looks like Loren is about to bite the dust! She is about to pass out!” Though no one knew it at the time, Vail was a registered nurse who recognized the dangers and symptoms of excessive water consumption. Yet Vail did and said nothing either, not wanting to risk the contest being terminated prematurely.

Fifteen minutes later, just as it was becoming time to drink another liter of water, Loren went into shock and convulsions. Blum realized something was wrong and screamed on the air: “Something is seriously wrong! Call an ambulance! Loren is seizing!” By the time the paramedics arrived 5 minutes later, Loren was dead. Blum announced on the radio: “Oh my god! Contestant Loren is dead. I think her bladder burst!”

As it turns out, her bladder was uninjured. Loren had instead suffered from acute hyponatremia. This condition commonly results when the sodium level in a person’s blood plasma drops due to over-dilution by excessive water intake. Loren was more susceptible to the condition than the other contestants because of her age and smaller size. Even more tragic is the fact that a simple saline injection would have restored the balance in Loren’s blood plasma within minutes. Paramedics always carry saline injections with them.

To top things off, Loren’s mother Judy had been listening to the program, hoping to hear that her daughter would win the money. Instead, she heard Blum screaming that her daughter had died. Judy collapsed to the floor and now suffers from severe emotional distress. Judy also suffers from the loss of affection, companionship, and assistance of her daughter.

WKRP had specifically told Miller and Blum in the past that they were not to offer prizes that exceeded \$1,000, and that they were not to find contestants for their contests under a first-to-arrive-at-the-station standard. There is no evidence whatsoever, however, to indicate that WKRP was negligent in hiring or supervising Miller and Blum.

Relevant Statutes/Rules:

Here are some statutes and rules in Oreglorida of which you should be aware:

- [1]. *Whereas*, the incessant honking on the streets of Oreglorida has become a nuisance to the peace of mind of its citizens and visitors, and *whereas* studies have shown that honking can lead to hearing loss, the legislature hereby enacts the following statute:

It shall be a Class B misdemeanor to use a vehicle horn unless done to indicate or signal to another vehicle or a pedestrian that they are in imminent danger of physical harm. No excuses or justifications for a violation of this statute shall be entertained in the courts of this State for any purpose whatsoever.

Nearly everyone in Cincinnati is aware of this statute, including Funk and Loren, because there was a lot of publicity surrounding its passage. It has been fairly successful, and Cincinnati has become largely free of honking noises.

- [2]. Oreglorida continues to adhere to the traditional doctrine of contributory negligence and all the other doctrines associated with it.
- [3]. Oreglorida has enacted a survival statute but not a wrongful-death statute.
- [4]. In Oreglorida the legal driving age is 16 and the age of majority is 18.

Directions:

1. Discuss all possible tort claims (with the exception of intentional torts) and defenses.
2. Do not discuss any claims that could be brought against the doctor that negligently treated Funk's injured ear.
3. Do not discuss any contribution or indemnity claims that one tortfeasor could bring against another.

QUESTION [3] (10%) [Suggested time: 17 minutes]

The State of Calidonia has the following statutes/rules :

- [1]. Contributory negligence does not bar recovery in an action by any person to recover damages for negligence resulting in injury to person or property, if that negligence was not greater than or equal to the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of fault attributed to the person recovering.
- [2]. In an action for injury to person or property, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in proportion to the amount of fault attributed to that defendant. Economic damages are governed by traditional rules of joint and several liability.
- [3]. Contribution/indemnity is neither recognized by statute nor judicial decision.

A, B, C, and D all negligently drive their cars too fast in the fog and collide into each other in a four-car pile up. They all sue each other for negligence, and the jury finds that each party has suffered personal injury in the amount of \$200,000, caused indivisibly by the other three parties. The jury has split the award as follows for each plaintiff: \$100,000 for pain and suffering and \$100,000 for medical expenses. The jury assigns fault to the four as follows: A 5%, B 20%, C 25%, and D 50%.

Directions:

Please indicate how much A will be permitted to recover from B, C, and D; how much B will be permitted to recover from A, C, and D; how much C will be permitted to recover from A, B, and D; and how much D will be permitted to recover from A, B, and C.

QUESTION [4] (10%) [Suggested time: 17 minutes]

You are in a jurisdiction that, like others we have studied, treats persons suffering from a mental disability differently from those suffering from a physical impairment when it comes to instructing the jury on the proper standard of care in a negligence action.

Directions:

1. Describe how these two circumstances are treated differently.
2. Present your best policy arguments for why you believe they should continue to be treated differently or for why you believe they should be treated similarly.

QUESTION [5] (5%) [Suggested time: 6 minutes]

Joe Smith was driving his car in the far left fast lane on the I-5 freeway near Downtown Portland. As he was driving, he saw the rush-hour traffic ahead and began to slow down as he approached. Smith eventually came to a complete stop behind Judy Jones' Ferrari.

As he was waiting, Smith suddenly noticed that a car approaching him from behind had slammed on its brakes and was about to hit Smith. Smith accelerated to move his car to safety in the far left emergency lane. In the process he negligently (but not intentionally) clipped Jones' Ferrari, damaging her car. The approaching car would have hit Smith had he not moved out of the way.

Jones sues Smith for negligence only. Smith wants to argue that he should not be held liable given the urgent situation he was in. He asks his attorney to present the argument in whatever "lawyer-speak you lawyers use." Smith's attorney tells him that their best way to raise the argument would be under the affirmative defense of private necessity.

Directions:

Please discuss whether or not you agree with Smith's attorney.