

Student Exam Number: _____

Lewis & Clark Law School

Torts I — FINAL EXAM — Fall 2008 — Prof. H. Tomás Gómez-Arostegui

- A. Please write your exam number on the top of this instruction sheet **and on the outside of your exam envelope** (if not already printed there). Do not unstaple this exam packet.
- B. This exam packet contains seven (7) pages, including this cover page. There are three (3) questions with the following approximate weights:
- | | |
|---------------------------|-----------------------------|
| Question [1] is worth 65% | Suggested time: 117 minutes |
| Question [2] is worth 25% | 45 minutes |
| Question [3] is worth 10% | 18 minutes |
- C. 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 relevant 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.
- D. 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. Inferences based on your common sense or on common knowledge are permitted and expected, but you must explain to me what you believe the common sense or knowledge to be.
- E. Unless the call of the question states otherwise, assume that all events occurring in this exam occurred in a fictional U.S. state called Oreglorida which would consider all the U.S. cases we have read in this course as potential precedent. Thus, to the extent there are contradictory doctrines, be sure to discuss them 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 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.**
- I. Because of the weather problems, this has become an unscheduled exam, which means that after you take the exam there may still be others who have not yet taken it. Therefore, **do not discuss this exam with others until after the exam period.**

GOOD LUCK!

QUESTION [1] (65%) [Suggested time: 117 minutes]

Carlos Tevez and Lionel Messi, law students at Lewis & Clark Law School, had just finished taking their fall-term 1L final exams and were in the mood to celebrate. Their last exam of the term, torts, had been dreadful, and they both jokingly agreed that they would seek their revenge on their torts professor, Tommy Gomez, just as soon as they got a chance.

Tevez drove home to the Pearl District, took a well-deserved power nap, and then drove back to Messi's apartment near the Law School at 4:00 p.m. Messi had just rented a new pre-furnished apartment from the Law School—he had moved in over the weekend—because it meant that starting in January he could walk to school. Messi did not own a car, and he had grown tired of taking the bus to the Law School from his old apartment in the Northwest 23rd area. Tevez had not yet seen the new place and was eager to check it out.

When Tevez arrived, Messi was in the shower. Tevez let himself in and screamed that he had arrived. Messi screamed back from the shower: “Hey dude, I’ll be out in a minute. Just make yourself at home!” Tevez looked around and plopped himself onto what looked like an inviting Lazy-Boy chair. As soon as he sat on it, the back cushion fell back suddenly, leaving Tevez unhurt but causing his glasses to fly off his head and break.

Two minutes later, Messi shouted from the shower: “Oh, before I forget, don’t sit in the Lazy-Boy. The thing is busted.” “Too late!” Tevez responded. When Messi emerged he saw Tevez holding his glasses. “Dang it, my Versace glasses shattered when they hit the floor. Those things were expensive.” Messi said he was sorry and informed Tevez that the Law School learned the chair was defective shortly after Messi moved in, and the School had said they’d come back to fix or replace it soon. That was two days ago.

Tevez said, “Whatever dude. Let’s deal with that later. Let’s hit the town!” Messi asked, “But wait, are you okay to drive without your glasses? Those things are pretty thick.” Tevez replied he would be okay driving while it was still light out. “I’ll get them fixed later,” Tevez added, “and I have a backup pair at home.”

Tevez then drove with Messi to a restaurant in the Pearl District and hours later they walked to a bar called the Vault Martini. Tevez had one drink, but no more. Messi was getting slightly tipsy by the time they left the bar at 11:00 p.m. They weren’t sure what to do next, so they walked around the Pearl, all the while Messi drinking from a flask of whiskey in his jacket. By the time they entered another bar, Betty Ford, at 11:30 p.m. Messi was visibly intoxicated. Tevez and Messi each bought a rum Coke and tried to work their “magic” with the ladies. It probably goes without saying that they both failed miserably. Messi ordered several more rum Cokes, but Tevez switched to water.

Just as they were getting ready to leave, at 1:00 a.m., Tevez noticed that Tommy Gomez had walked into Betty Ford. Tevez informed Messi of Gomez’s presence. Messi, in a drunken rage, ran up to Gomez intending to punch him. Unbeknownst to anyone, Gomez is a third-degree black-belt, whose body is so limber that he can bend like a reed in the wind. Gomez was confident that there was no way Messi would ever land the blow. Messi swung, but being drunk, and thus without good depth perception, Messi missed Gomez by two whole feet and without Gomez even having to move an inch to avoid the punch. The “air punch”

GOOD LUCK!

caused Messi to spin around. He became dizzy and promptly vomited on Gomez. Gomez was not offended by the vomit, but he told Messi he was going to sue him anyway, as this would make for a good “teaching moment.” Gomez then left the bar.

Tevez was, not surprisingly, ready to call it a night. He was stone-cold sober, bored, and tired. His sleep-number bed, only blocks away, called out to him. Messi wanted to continue—claiming he now felt much better—and he also needed a ride home in any event. So they decided they would drive to Tryon Grill near Lewis & Clark, which was 8 miles away, for a strong coffee and late-night snacks, and eventually back to Messi’s apartment.

Messi was too drunk to drive Tevez’s car, so Tevez drove. As they were driving, at around ten m.p.h., Tevez told Messi that he couldn’t see without his glasses and that he was going to crash! He intentionally swerved the car, frightening Messi. Tevez turned to Messi and laughed “You are such a wimp! Can’t you take a joke?!”

Just as Tevez was turning back to look at the road, he saw what looked like a shadow in the street. Four seconds later he realized it was a person. Tevez slammed on the brakes and came to a screeching halt one inch away from Ed Brunet Jr., a 14-year-old kid who had been crossing the street in the middle of the block rather than at a crosswalk at the intersection. (Brunet Jr. was out walking his dog so that it could relieve itself.) Had Tevez been wearing his glasses he would have immediately realized that the “shadow” was a person and been able to slowly and safely bring the car to a complete stop.

Brunet Jr. was unhurt physically but fell to the ground in fear. Tevez asked if the kid was okay. Brunet Jr. responded he was. (As it turns out, that was incorrect. Starting that night Brunet Jr. suffered from severe distress, primarily in the form of constant nightmares.)

Tevez then screamed at Messi: “I knew we should have just called it a night!” Messi didn’t respond. Stopping the car suddenly had led to Messi slamming his face on the dashboard. Messi was not wearing a seatbelt. Tevez was. Messi was bleeding from his nose. Tevez asked Messi if he was okay. Messi responded that his head hurt but that this was the biggest night of their lives, having finished their first semester, and that he was not going to let a bloody nose get in the way of their fun. Tevez responded they should get it checked out, but Messi, still clearly inebriated, declined, screaming “I’m invincible!” Tevez said: “Fine, whatever. You are on your own man. I’m going home.” And he did.

Having exited the car, Messi (still visibly drunk) walked into a café at 1:30 a.m. for a coffee where he met Amy York, an architect, and discovered she lived two miles from the Law School. He asked if she could give him a ride home. Against her better judgment, as she did not know him, York agreed. As she was driving toward the Law School, Messi passed out. York tried to wake Messi as she had no idea what his actual address was. Messi had only told her to exit on Terwilliger Blvd., after which he would give her directions for the rest of the way. She pulled over to the side of the road near Terwilliger and tried to wake him again. He just sat there snoring.

Unsure of what to do next, York rummaged through Messi’s pockets in an effort to find an identification card with his address on it. She found his wallet but the identification card was from out of state, and no other card had a local address on it. Messi also had \$50 in cash,

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enough she thought, to have covered a \$25 cab ride home had she put him in one. York became frustrated. She shook Messi vigorously, trying to wake him up, but he appeared totally wasted. She felt trapped, not knowing what to do. She certainly was not going to bring him to her home and she couldn't drop him off at his. She sat there for another 20 minutes seeing if Messi would wake up, all the while thinking what to do.

York recalled that Messi was a Lewis & Clark Law School student, as he had mentioned to her about 100 times that he was studying law. Wanting to get home herself, she decided to drop Messi off at the entrance to the Legal Research Center. He would sleep it off, she thought. Or at the very least, campus security would discover him, learn where he lived from his student identification card, and then drop him off at his home. York propped Messi up against the door to the entrance and left. It was only after she got home that she realized she still had Messi's wallet in her car. Already upset with Messi for getting her into this mess, she opted to toss the wallet (but kept the money) in the garbage.

Campus security found Messi six hours later, dead. An autopsy performed the following morning discovered he had died from an intra-cerebral hemorrhage. Unbeknownst to anyone, including Messi himself, Messi had a rare genetic disorder, which made his brain prone to internal bleeding from even the most minor trauma. Though hitting one's head on the dashboard would have resulted in no more than a nose bleed in other people, in Messi's case it lead to a slow but steady internal bleeding of the brain.

The doctors added that, left untreated, the injury would become fatal only after 24 hours. Indeed, had Messi sought treatment within that time he would have survived, with no long-term ill effects. He simply would have had incurred some medical bills to treat him after the accident, but afterward, so long as he was careful, he would have no reoccurrence. Two factors accelerated his death, however. First, was the fact Messi was inebriated. The second factor was that he had been left out in the cold. As was typical for December, night temperatures had fallen to around 40 degrees Fahrenheit. Either factor standing alone would have been sufficient to accelerate his death.

York read about Messi's death the next day and told the police what had happened. Messi's parents have had to spend \$6,000 on funeral expenses.

Relevant Statutes/Rules:

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

1. *Whereas*, to promote the safety of pedestrians and drivers of motor vehicles, it is hereby enacted that it shall be a Class C misdemeanor to operate a motor vehicle without corrective lenses if the operator would normally require corrective lenses.
2. Oreglorida follows all the traditional rules of premises liability.
3. Oreglorida continues to adhere to the traditional doctrine of contributory negligence and all the other doctrines associated with it.

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4. Oreglorida has enacted a survival statute but no wrongful-death statute.

Directions:

1. Discuss all possible tort claims and defenses.
2. Be sure to give a brief description of the remedies that might be available to a successful plaintiff (other than punitive damages; *i.e.*, do not discuss punitives).
3. Do not discuss any contribution or indemnity claims that one tortfeasor could bring against another.

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QUESTION [2] (25%) [Suggested time: 45 minutes]

Negligence claims require a legally cognizable harm. Traditionally this meant actual physical harm or pain to person, property, or chattel. Courts have in recent years loosened this requirement to permit other types of harms as legally cognizable in certain special circumstances. One area in which the rule has been relaxed is where necessary to allow claims that would otherwise fail under the cause-in-fact element of the cause of action.

Directions:

1. Describe two instances of harm that have received this special treatment in the area I noted above, viz., involving cause in fact. (5%)
2. Present your best policy arguments as to why you believe special treatment is proper or improper under the instances you described above. (20%)

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QUESTION [3] (10%) [Suggested time: 18 minutes]

The State of Oregon 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 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 economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of economic damages allocated to that defendant in proportion to the amount of fault attributed to that defendant. Non-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 emotional distress and \$100,000 for lost past earnings. The jury assigns fault to the four as follows: A 15%, B 15%, C 25%, and D 45%.

Directions:

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

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