

**TORTS I**  
**COURSE MATERIALS**

**Professor Nancy Levit**

**Fall 2009**

**Story Suite, 2-411**  
**816-235-2391 (o)**  
**Office Hours: Anytime**  
**E-mail: [levitn@umkc.edu](mailto:levitn@umkc.edu)**

## TORTS I SYLLABUS 2009

### 1. Policies of Tort Law and Procedural Devices

What Is Tort Law?	pp. 2-3
Reading Torts Cases: Trial Procedures	
Motion to Dismiss	
Motion for Summary Judgment	
Objections to Evidence and Offers of Evidence	
Motion for Directed Verdict	
Proposed Instructions and Objections to Them	
Motion N.O.V.	
Motion for New Trial	pp. 22-27 (up to Appendix)

### 2. Intentional Torts

Battery	pp. 35-43
<u>Leichtman v. WLW Jacor Communications</u>	(Supp. pp. 60-62)
	pp. 43-56
Assault	pp. 57-61
False Imprisonment	pp. 61-64
Intentional Infliction of Mental Distress	pp. 510-518
Trespass to Land, Conversion, Trespass to Chattels	pp. 65-71
Civil Rights Violations	pp. 71-77

### 3. Defenses to Intentional Torts

Self-Defense, Defense of Third Persons, Arrest and Detention	pp. 78-83
Defense of Property and Recapture of Chattels	pp. 83-87
Discipline	pp. 87
Consent	pp. 88-95
<u>Bailey v. Belinfante</u>	(Supp. pp. 63-64)
Public and Private Necessity	pp. 96-103

<u>Negligence</u>	pp. 105-08
-------------------	------------

<u>Duty of Care</u>	pp. 108-24
---------------------	------------

Negligence Per Se (“Specification of Particular Standards or Duties”)	pp. 124-37
---	------------

<u>Breach</u>	pp. 138-160
---------------	-------------

Proof: Witness Testimony  
and Custom Evidence

pp. 161-177

Flom v. Flom  
Res Ipsa Loquitur

(Supp. p. 65)

pp. 177-193

**Damages**

Copeland v. Compton

pp. 194-197

(Supp. p. 66)

**Causation**

Cause in Fact

pp. 197-217

Proximate Cause

pp. 218-250

Pryor v. Tunc Problem

(Supp. p. 67)

**Defenses to Negligence Actions**

Contributory and Comparative Fault

pp. 252-278

Assumption of Risk

pp. 279-291

Rickey v. Boden

(Supp. pp. 68)

Edmonds v. Schlag Problem

(Supp. p. 70)

Statutes of Limitation

pp. 292-310

Compliance with Statute

pp. 311-12

**Disabled Student Services**

UMKC endeavors to make all activities, programs and services accessible to students with disabilities. A Campus Coordinator for Disabled Student Services is available to arrange for reasonable accommodations. If you need accommodations, it is important that you contact the Coordinator as soon as possible to arrange for providing appropriate documentation and the prescribing of reasonable accommodations in the classroom and for exams. For information call (816) 235-5696. Speech and hearing impaired use Relay Missouri, 1-800-735-2966 (TT) or 1-800-735-2466 (Voice.) For questions or further information, see Adela Fleming in the Law School Administrative Suite.

It is understood by the student whose Student Number is entered below that this examination is given and the student's response is made and submitted pursuant to the conditions and provisions of the Honor Code.

Student Exam No. \_\_\_\_\_

UNIVERSITY OF MISSOURI-KANSAS CITY  
SCHOOL OF LAW

TORTS I  
Professor Levit

Fall Semester, 2007

MIDTERM  
(1 hour)

Instructions

1. Read each question carefully and pay close attention to the facts and to what the question is asking you to do. Discuss all issues presented by a question. Remember to argue issues both ways. Do not engage in a discussion of issues not raised.
2. I have included all of the facts I think you will need to answer the questions. If a necessary fact is missing, please identify it in your answer and explain how it affects your conclusion.
3. Nothing is intentionally ambiguous. If anything about a question appears to be ambiguous, decide what you think is meant, tell me what you think is meant, and answer the question accordingly. No reasonable resolution of an ambiguity will be penalized.
4. Please write legibly, because I can only give credit if I understand what you write. Only answers written in the blue book will be given credit.
5. Think before you write. Organize your answer. You get extra points for clarity and succinctness. You are penalized for an answer that is disorganized and confusing.
6. In answering this exam you may use your casebook, any supplementary materials handed out for class, and any outlines or notes you yourself have prepared. You may not use commercially prepared outlines or hornbooks. The applicable law is the law of this State, the State of Bliss, which consists of all cases in your casebook and any cases discussed in class.
7. TURN IN THIS EXAMINATION WITH YOUR BLUE BOOKS. Good luck!

**Question 1: Multiple Choice**

(10%)

**DIRECTIONS:** Choose the single best answer from among the choices given in questions 1-5. Write or type only the letter of the best answer in your Bluebook or on your paper.

1. D saw his classmate P carrying a pile of books he suspected P had stolen from his locker. The books in fact belonged to P. D said to P “Let me see those books.” When P refused, D reached out to grab them, but P who was a black belt in karate and not afraid of D, scowled and dodged away from D without being touched.

- A. D has committed no tort against P because he was privileged to use reasonable force to recover chattel he reasonably believed to be his.
- B. D has committed no tort against P because P suffered no fear of a harmful or offensive contact.
- C. Both A and B are true.
- D. D has committed an assault on P because P experienced anticipation of a harmful or offensive bodily contact.
- E. D has committed no tort against P because he attempted only to grab books P was holding, not to harm or offend P himself.

2. D was celebrating the fourth of July by shooting a gun in the air in a sparsely populated semi-rural area. One of the bullets fell through the roof of a neighbor’s house striking P in the foot.

- A. D has not committed a battery because although he was recklessly increasing the risk of harming someone, he was not substantially certain that a contact would occur.
- B. D has not committed a battery against P, because his intent was celebratory.
- C. D has not committed a battery because one must intend contact with a specific person not merely a member of a group.
- D. Both A and B are correct.

3. Bluto, a very large man, annoyed at standing behind Wimpy in the line at a hamburger stand began shadow boxing (turned away from Wimpy and punched at the air), and said to Wimpy, “You’re lucky you’re so little. If you weren’t, I’d smack you.” Wimpy a small and uncommonly timid man, was terrified by Bluto’s shadow boxing, as he was by almost everything.

- A. Bluto committed no assault against Wimpy because his words negated any apprehension of immediate contact a reasonable person might have felt from the shadow boxing.
- B. Bluto committed no assault because a reasonable person would not apprehend an imminent contact merely from shadow boxing and Wimpy's excessive timidity alone does not make shadow boxing into an assault.
- C. Both A and B are correct.
- D. Bluto committed an assault against Wimpy since his actions were calculated to strike terror into Wimpy and that is exactly what they did.
- E. Bluto committed an assault against Wimpy because Bluto's conduct combined with the words which gave it character caused Wimpy to fear a battery.

4. Adam and Barbara were walking on a public sidewalk that ran along the edge of Philip's rose garden. Adam thought it would be funny to push Barbara into the garden so that Barbara's shoes would get muddy. As they passed the garden, Adam shoved Barbara toward the garden. Barbara lost her balance for a moment, and one of her arms went into the air above some of the roses, on Philip's side of the property line, but Barbara managed quickly to regain her balance and to avoid stepping off the sidewalk or touching anything with her arm. Philip was looking out the window, saw what happened, and was very angry that anyone was acting so silly around his beloved roses. He told a lawyer that he wanted to file a lawsuit against Adam and Barbara. The lawyer said that even if Philip had a claim for trespass to land, he would not be able to recover anything more than a nominal or trivial amount of damages. Philip said that he didn't care about the money, and just wanted to sue to prove a point and to establish that an intentional tort had occurred. If Philip files a lawsuit, what is the most likely result?

- A. Adam and Barbara will both be liable for trespass to land.
- B. Adam will be liable for trespass to land, but not Barbara.
- C. Barbara will be liable for trespass to land, but not Adam.
- D. Neither Adam nor Barbara will be liable for trespass to land.

5. Which one of the following is a true statement about a claim for intentional infliction of emotional distress?

- A. The plaintiff must prove that defendant did an act that average, reasonable people would consider extreme and outrageous.
- B. Respondeat superior cannot apply to a claim for intentional infliction of emotional distress.
- C. A plaintiff who suffers a mild amount of emotional distress can recover, but the amount of the damages awarded will probably be less than if the distress were severe.
- D. A defendant cannot be liable for intentional infliction of emotional distress if his actions were merely reckless and not intended to upset anyone.

## **Question 2: Essay**

(90%)

Danforth Pigeon was a remarkably obnoxious young man. In spite of, or perhaps because of, his dreadful behavior, Danforth rose quickly up the corporate ladder at United Industries. So it was that on August 3, 2003, Danforth was named Vice President of United Industries, the youngest, and undoubtedly the least qualified, Vice President in the company's history.

Young Danforth began his celebration by gloating at every opportunity. At a morning conference with four other workers, Danforth encountered Norine Cole, who lost out to Danforth in a bid for the promotion. "Tough luck, girl," Danforth said when he saw Norine, "I guess the best man won." Danforth offered his hand to Norine, who ignored the hand and replied in a cool tone, "I guess the best man did win." Undaunted, Danforth reached out and shook Norine's hand. "Ugh," Norine grimaced, "gross!" Norine ran to the rest room and washed her hand vigorously, cursing all the while. When she emerged, she bumped right into Danforth, waiting outside the rest room to continue gloating. Danforth spilled his coffee all over her suit. Norine left in disgust, her clothes ruined and her pride hurt; Danforth just laughed. Norine has had stress headaches since early August.

Danforth left the office that day without further incident, and wandered the streets looking for more fun. Just around the block, he happened upon ten-year old Alice Allen, walking her dog, Buddy. Danforth nearly tripped over the dog's leash, and Buddy growled at him. Furious, Danforth kicked Buddy hard in the dog's hind quarters; the dog yelped and limped over to cower behind Alice, who burst into tears. "Quit your whining, brat," Danforth said, making a fist, "or I'll really give you something to whine about." Alice continued to cry. Unknown to Danforth, the entire incident with Alice was witnessed by her neighbor, the elderly Elwood Fudd. Elwood, who has a serious heart condition, suffered a mild coronary at the sight of Danforth's mistreatment of young Alice.

**DIRECTIONS: Please identify the viable causes of action in intentional tort by or against any named individual that arise from the above scenario and any possible defenses to those torts. Discuss the likely issues and arguments for each party. Do not address any possible liability of United Industries.**

## Torts I Midterm 2007 Answer Key

### Question 1

1. D 2. A 3. C 4. B 5. A

### Question 2

1. Norine (N) v. Danforth (D) – Intentional Infliction of Emotional Distress (IIED) (“Tough luck, girl”; unwilling handshake; lurking outside restroom to gloat)

IIED requires extreme or outrageous conduct and intent or recklessness in causing severe emotional distress. Severe emotional distress (SED) must occur. N claims that the cumulative package of repeated incidents is extreme or outrageous conduct: D caused her public humiliation in front of four co-workers. He is arguably a power-abusing defendant: because of the promotion, he may be in a position of power over N. GTE Southwest v. Bruce. D will argue he was not using power, just being mildly obnoxious, as is his nature—he’s egalitarian in his abuse and offends everyone equally. Query whether the gendering (“tough luck, *girl*” and “best *man* won”) involves an abuse of power, analogous to the racial slur in Taylor v. Metzger? Adding to the power abuse, D’s lurking outside restroom to continue to gloat and invading N’s personal space so as to cause a coffee spill that ruined her suit (to which he added degrading laughter) was repeated harassment that supports the finding of outrage. Samms v. Eccles. D argues this was mere insult, rubbing in that he got the promotion and she did not, and it all occurred in one episode on a single day. Jones v. Clinton.

D’s arguably had a purpose to cause distress, Garratt v. Dailey; at a minimum, D was reckless, disregarding a substantial risk of offending. Chuy v. Philadelphia Eagles. Reasonable people would perceive that N, a competitor for the position, would be sensitive to not obtaining the promotion and consider that before making comments. D argues he didn’t intend to cause emotional distress, only to tease and that mere words are first amendment protected. Fallwell v. Flynt. There were no immediately visible manifestations of SED, unless one counts the “Gross” comment. SED does not have to be medically diagnosable. Query whether the stress headaches were directly caused by D or by N’s failure to get promoted or some other cause. If SED can be established, the damage to N’s suit may be recoverable through the extended consequences doctrine. In some jurisdictions, like Missouri, if other torts are available, IIED might not be, K.G. v. R.T.R.; query the rule in Bliss?

2. N v. D—Assault (reaching to shake N’s hand)

Assault is intentionally putting another in reasonable apprehension of imminent harmful or offensive bodily contact. D’s purpose was to shake N’s hand. Garratt v. Dailey. He also knew she ignored the proffered hand, so he could assume that a hand-grab would be offensive. Cohen v. Smith. Because she did not want to shake his hand and given the fact of her losing the promotion to him, it is reasonable to assume a person in her position would be apprehensive about such a contact, even if

only for a second, and would find the contact offensive. Snyder v. Turk. If N saw D's hand coming, she could anticipate the contact. On the other "hand," her ignoring his outstretched hand might indicate a lack of seeing it. Koffman v. Garnett. It is questionable whether D had a purpose or knew with substantial certainty that N would be apprehensive of a harmful or offensive bodily contact.

### 3. N v. D—Battery (D shaking N's hand)

Battery is the intentional infliction of harmful or offensive bodily contact. Bodily contact is unquestionable, since D touched N's hand. Regarding intent, D had substantial certainty, Garratt v. Dailey, that N would find the contact at least offensive since she attempted to avoid the contact, Cohen v. Smith, and D's purpose was to continue the taunting on a physical plane. Her later reaction ("ugh, gross" and running to the restroom to wash her hands) confirmed that the contact was offensive. D would argue that a mere handshake would not offend a reasonable sense of personal dignity. Snyder v. Turk. D also might argue this is a de minimis contact, since people shake hands daily, especially in a business setting—and if every unwanted handshake were a battery, this would flood the courts. A handshake is professional and courteous, anything but offensive. He might also argue that if N is offended, she is reacting not reasonably, but immaturely. But Cohen shows that an unconsented contact, repugnant to the plaintiff, especially if coupled with negative intent (as with the ridicule here), is sufficient, particularly since D's purpose was to obtain an invasive result. Damages are presumed from the offensive contact; no injury is required. A.R.B. v. Elkin.

#### Consent defense

D could argue implied consent to a handshake, based on social custom. D might also argue that N's response "I guess the best man did win" was a tacit consent (an agreement or willingness) for a handshake, thus obviating both the battery and assault causes of action, but this statement must be evaluated in the context of her ignoring his offered hand. Bailey v. Belinfante. The statement, tone of delivery (cool), plus her behavior of ignoring his hand are not tantamount consent. While the employment relationship alone is not enough to create incapacity to consent, Reavis v. Slominski, her clear indication of refusal to shake trumps any social conventions that presume willingness.

### 4. N v. D—False Imprisonment (hostage in restroom; handshake)

False imprisonment is the intent to confine and actual confinement of the plaintiff to a bounded area, and plaintiff must have knowledge of confinement or suffer physical harm. Even though D followed N to the restroom and waited outside until she came out, there was no evidence of intent to confine her. McCann v. Wal-Mart. Since N chose to enter the restroom in the first place, D performed no act of confinement. Also no evidence exists that N knew she was "confined." D will say he was merely waiting outside for her so they could continue their pleasant chat. Once she emerged from the restroom, there was no bounded area. Although N might argue that if D's promotion resulted in a position of authority over her, his continual presence was sufficient for psychological confinement, this is a weak tort. The handshake alone is not false imprisonment because it did not confine her to a bounded area, it was transitory, and she had a safe, easy means of escape.

5. D v. N—Battery (bumping into D outside restroom)/Possible assault

Elements above. This is a weak cause of action because there is no evidence to indicate N had a purpose to contact D or that any contact was harmful or offensive to him. She was simply emerging from the restroom.

6. N v. D—Battery (spilling coffee on N)/Possible assault

Elements above. Spilling the coffee may or may not have been physically harmful (if it were hot), but it harmed her pride and her clothing. There was at least indirect bodily contact with the coffee. Fisher v. Carousel Motors Hotel. Again, intent would be difficult to prove, particularly since N bumped into D. N's best argument is that D was purposefully lurking outside RR in such close proximity to the door to continue the offensive gloating that contact was substantially certain to occur. Given that the harm was not that great, the intent requirement probably will not be relaxed in this situation. D had no faulty purpose to make physical contact here, Van Camp v. McAfoos, and spilling the coffee after being bumped into was reflexive or involuntary. Since N bumped into D without seeing him, she did not apprehend the contact before it occurred.

7. N v. D—Trespass to Chattel; Conversion (spilling coffee on clothing) Trespass to chattel requires intentional interference with plaintiff's possessory rights and actual damages. While there was actual interference with N's property (clothing), unless the proximity = substantial certainty argument above wins, and intent can transfer, Hall v. McBryde, D had no intent to spill coffee on her; it was an accident. She bumped into him.

Conversion requires intentional exercise of substantial dominion over chattel, causing such serious damages that the D should be required to pay the full value of the chattel. Transferred intent does not apply to conversion, so N would have to establish D purposely tried or was substantially certain to exercise dominion over her clothing with the coffee poised to spill on it. Although the facts say the dress was ruined, question whether dry cleaning would revive it—if so, D would not have to pay the full value and the tort would not exist. Given the weak evidence regarding intent, this tort is also likely to fail.

8. D v. N—Assault; Battery (coffee spill)

D v. N—Trespass to Chattel; Conversion (coffee spill)

D would argue that since N was annoyed with him, she purposely sought offensive contact with him. D's laughter indicates he suffered neither harm nor offense. Since D was standing so close to the restroom that when N "emerged, she bumped right into him," it is highly unlikely that she could formulate any faulty intent—to contact D or to interfere with his property or to exercise substantial dominion over the coffee. Van Camp v. McAfoos.

9. A v. D—Battery (kicking the dog as offensive contact with A)

Since D was "looking for more fun," perhaps he intended harmful or offensive interactions

with more people (given his prior behavior). The leash could be considered an extension of A. Fisher. However, knocking a plate gripped in someone's hand, as in Fisher, (particularly when coupled with the racial epithet in that case), is different than the twice-removed kicking a dog at the end of leash. This is a weak case: it is doubtful that a dog some feet away from the owner would be considered an extension of the owner the way the plate was in Fisher.

10. A v. D—IIED (kicking Buddy; threatening to hit child)

Kicking a ten year old child's dog when one "nearly" trips over the leash is not reasonable and is both extreme and outrageous. The package of outrageous conduct also included an adult stranger threatening a vulnerable child with physical violence (raised fist, plus explicit threat) after he actually committed violence on her dog. In kicking Buddy intentionally, it is a reasonable inference that D meant to cause A distress. D's intent can also be established by his reaction to A's crying: he threatened her further. This is a pattern of repetitive, harassing conduct (although in a short span of time) of a vulnerable (in size, strength and age) plaintiff. This might also be a situation in which because the conduct was so extreme and outrageous, a court might be more lax on the intent requirement. D at least acted with reckless disregard for A's feelings by kicking her dog, threatening her, and calling her names ("brat"). Chuy. D might respond that his intent was to hurt the dog, not A (and there is no transferred intent for IIED), but this is a weak argument since it would help establish recklessness with respect to A's emotions. It is questionable whether severe emotional distress resulted. For a ten year old child, seeing her dog kicked would be traumatic, and the physical manifestation of that would be the crying. Whether she suffered severe emotional distress would depend on the duration and intensity of the emotional effects, and there are no facts regarding those issues.

11. A v. D—Trespass to Chattel (kicking Buddy)

D intended to interfere with A's property by kicking Buddy, and the kick is actual interference. While some jurisdictions require a purpose to interfere with possessory rights (and D did not attempt to interfere with Buddy on a leash), most jurisdictions find this element satisfied by purposeful interference with property. Since Buddy yelped and limped to cower behind A, arguably he suffered actual damages. This element can be disputed, since a momentary dog bruise may not be significant for damages.

D has a possible, but unlikely, defense of self-defense, in response to the dog's growl. D would claim a reasonably apparent need for self-defense (and D can make a reasonable mistake that a growl is likely to be followed by a bite), and that a kick is a reasonable amount of force in relation to a threatened dog bite. However, the amount of force used was arguably excessive (if some lesser force—yelling "No" perhaps) would do, particularly since Buddy was on a leash. The kick thus looks retaliatory.

12. A v. D—Assault (threatening to hit A)

Elements above. D had a purpose to put A in apprehension because he demanded that she

stop whining. Garratt. Also, D's purposeful interference with her chattel (Buddy) creates sufficient intent to transfer for assault. Hall v. McBryde. Since D is an adult and A is a child, the threat of "give you something to whine about" coupled with the closed fist threatens imminent bodily contact, particularly since D had just kicked Buddy. Thus A would reasonably believe that contact was imminent. Her continued crying could indicate apprehension. D will argue that he used mere words which are not enough for an assault and that he would not hit her if she would quit crying. Yet he had no right to impose the condition of "quiet" on A. A will counter that there was also an overt act—making a fist—which, when coupled with the threatening words, is sufficient for an assault.

It is unlikely that D would have a privilege of reasonable discipline as in Thomas v. Bedford, since he is not a parent, teacher, or in loco parentis. Also under the facts, no justification exists to imply such a privilege, since A was just walking her dog and crying—neither of which are activities for which children should be disciplined.

### 13. Elwood v. D—IIED (witnessing outrageous acts to A)

Elements above. Elwood suffered severe emotional distress resulting in a physical manifestation (coronary) from witnessing D's mistreatment of A. However, there was no evidence of intent on D's part to do anything to E, a third party witness, as required by Restatement Second of Torts § 46. An argument could be made that abusing a child in a neighborhood is reckless with respect to whether neighbors are watching, but without more facts there is no evidence of a deliberate disregard of a high degree of probability of witnesses. Also the facts say Fudd was "unknown to D." Transferred intent does not apply to IIED, so D is simply not liable.

It is understood by the student whose Student Number is entered below that this examination is given and the student's response is made and submitted pursuant to the conditions and provisions of the Honor Code.

Student Exam No. \_\_\_\_\_

UNIVERSITY OF MISSOURI-KANSAS CITY  
SCHOOL OF LAW

TORTS I  
Professor Levit

Fall Semester 2008

MIDTERM  
(1 hour)

Instructions

1. Read each question carefully and pay close attention to the facts and to what the question is asking you to do. Discuss all issues presented by a question. Remember to argue issues both ways. Do not engage in a discussion of issues not raised.
2. I have included all of the facts I think you will need to answer the questions. If a necessary fact is missing, please identify it in your answer and explain how it affects your conclusion.
3. Nothing is intentionally ambiguous. If anything about a question appears to be ambiguous, decide what you think is meant, tell me what you think is meant, and answer the question accordingly. No reasonable resolution of an ambiguity will be penalized.
4. Please write legibly, because I can only give credit if I understand what you write.
5. Think before you write. Organize your answer. You get extra points for clarity and succinctness. You are penalized for an answer which is disorganized and confusing.
6. In answering this exam you may use your casebook, any supplementary materials handed out for class, and any outlines or notes you yourself have prepared, in whole or in part. You may not use commercially prepared outlines or hornbooks. The applicable law is the law of this State, the State of Missouri, which consists of all cases in your casebook and any cases discussed in class.
7. TURN IN THIS EXAMINATION WITH YOUR BLUE BOOKS. Good luck!

Question 1  
(10%)

1. Luis, a retired professor of psychology, had lived next door to Chloe for over 20 years. One day Luis noticed that Chloe began to talk to invisible friends and respond to bizarre requests from a voice emanating from Luis's bird feeder. Luis informed Chloe's children, who thought that she was trying to get attention. One morning, while Luis was filling the bird feeder, Chloe rushed over and pushed Luis away, shouting, "Don't hurt him."

- A. Chloe has not committed a battery against Luis because spontaneous insanity is a defense to tort liability.
- B. Chloe has not committed a battery against Luis because Chloe clearly has delusions about the inhabitants of the bird feeder.
- C. Chloe has committed a battery against Luis because Chloe had a purpose to push Luis away from the bird feeder.
- D. Luis has committed a tort against Chloe because Chloe has an eggshell psyche and, by filling the bird feeder, Luis is preying on a known mental sensitivity of Chloe's.

2. Gunner was a fanatically competitive 1L. After the first semester grades were out, Gunner was outraged when she heard Humble was in the top 5% of the class. Gunner approached Humble at his locker. Humble saw Gunner and stepped back to let her squeeze through. As Gunner passed by with ample room, she angrily brushed up against Humble causing his rib to crack. Gunner had no prior knowledge that Humble had brittle bones.

- A. Gunner has committed no tort against Humble because one may act in the reasonable appearance of consent.
- B. Gunner has committed no tort against Humble because Humble's initial consent to let Gunner pass will extend to the consequences.
- C. Gunner has committed no tort against Humble because she had no knowledge of Humble's brittle bones.
- D. Gunner has committed a battery against Humble because she intended an offensive contact and a harmful contact resulted.
- E. A, B & C

3. Jack and Jill were arguing over a book, and Jill was determined to have the book so she grabbed it from where it lay on a nearby table. Jack rolled his eyes in disgust and turned away. Then Jill noticed that the book she grabbed was not the book she sought and she became furious. Jill launched the book at Jack, but her aim was bad and she missed him by several feet, instead hitting Hillary who inadvertently passed in front of her. Hillary did not see the book coming. Jack saw the damage to Hillary's head and then he was shaken when he realized he might have been the actual target. Jill was upset and apologetic when she saw that the book hit Hillary.

- A. Jill has not committed a battery against Hillary because she was merely negligent and had no intent to hit Hillary nor anyone else.
- B. Hillary cannot sue Jill because no torts were completed against Jack, so there is no tortious intent to transfer.
- C. Hillary has no cause of action against Jill because she suffered no imminent

- apprehension and unless the tort is completed, the extended consequences rule does not apply.
- D. Jack can sue Jill for assault, because of the doctrine of transferred intent.
  - E. Jack cannot sue Jill for assault because he was shaken after the events took place, but Hillary can sue Jill for battery.

Question 2  
(90%)

Following a save against the league leading Mudville Maniacs, “Cyclone” Jeune, a new French pitcher for the Coastal Cubs, announces to his teammates that he will host a party the next night at his seaside estate. To make the necessary arrangements for the party, Cy calls his favorite local caterer, Emile.

The next day at the airport, Scoup Jackson, a sports writer for the Daily Bugle, waits at the gate for the Cubbie players to deplane. Scoup has been desperately trying to get an interview with Strongarm. Once again seeking an interview, Scoup approaches Cy as he exits the team plane. Recognizing the despised Scoup and trying to avoid him, Cy yells to Rodney, a rookie, to pick up his bag and bring it to the party later that evening. Cy then attempts to make a hasty exit.

Trying to catch up with the evasive pitcher, Scoup follows Cy to his auto, repeatedly requesting an interview. Fed up with the incessant badgering, Cy reaches into the back seat of his car, pulls out a baseball bat, and points it in the direction of the approaching writer, telling him to “bug off.” Undaunted by the bat, Scoup closes the gap between the two men until the end of the bat is touching the writer’s abdomen. Astounded by the reporter’s perseverance, and realizing that if he does not depart he might be tempted to engaged in batting practice, Cy scrambles into his car, slams the door, and speeds away.

Scoup had overheard the players mentioning the evening’s party at the Strongarm estate. Thinking that a party would provide an interview situation, Scoup jumps in his car and races to Strongarm’s address.

Upon arriving at his home, Cy informs Emile, the caterer, that the night’s event is open to team personnel only. Nodding his approval, Emile turns to check on the arriving food.

That evening, as each guest arrives at the Strongarm estate, Emile’s assistant, Igor, asks for the guest’s name and association with the team. Then Igor marks the guest’s name from the list and allows the guest to enter. Scoup arrives while the party is in full swing and is stopped by Igor. Quick to catch on to the security measures, Scoup uses the recently acquired Rodney’s name in the hope that the young player had not arrived and would not be well known. Noting the name on the guest list, Igor allows Scoup to enter Cy’s house.

Scoup eventually corners Cy alone in the study, closing and locking the massive oak doors behind him, and removing the key. Cy orders Scoup to leave. Determined to get his interview, Scoup whines pitifully that if Cy will just answer a few questions, he will leave quickly and never bother him again. Cy, tired of the cat and mouse game, and feeling surprisingly charitable, decides to answer a few questions from the reporter.

Satisfied with the information he received, Scoup informs Cy that he is going to stay at the party in the hopes of picking up additional material for the article. Infuriated by Scoup's refusal to leave his estate, Cy orders Scoup to hand over the key to the door, which Scoup does. Cy then unlocks the door to the study and immediately calls for Igor to remove the intruder. Igor races to the study, grabs Scoup firmly by the arm, and shows him out.

**DIRECTIONS:** Discuss all possible torts and defenses. Do not discuss any torts by or against the Coastal Cubbies, the Mudville Maniacs, the Daily Bugle, or Emile. Clearly caption each tort and defense.

**REMEMBER TO TURN THIS EXAMINATION IN WITH YOUR BLUE BOOKS!**

## 2008 Torts I Midterm Answer Key

1. C
2. D
3. E

### Cy v. Scoup—IIED (pattern of harassing conduct)

This tort requires outrageous conduct, an intent to inflict or recklessness in inflicting severe emotional distress, and that severe emotional distress results. The pattern of repetitive harassing conduct—repeated interview requests over time, following Cy at the airport, trailing him home, deception to gain entry, taking his keys, locking Cy in the study, and refusing to leave—could be seen as outrageous. Samms v. Eccles; George v. Jordan Marsh Co. Scoup (S) will respond that a ballplayer is a public figure with diminished expectations of privacy, Hustler v. Falwell, and a reporter badgering notorieties for stories is not outrageous. A professional ballplayer is not particularly vulnerable as were the plaintiffs in GTE Southwest v. Bruce.

Cy will argue that Scoup was at least reckless regarding his emotional distress. Chuy v. Philadelphia Eagles. Given Cy's initial violent reaction of whipping out a bat, S was deliberately disregarding a high degree of probability that all of the subsequent conduct would emotionally distress Cy.

Cy will claim he suffered severe emotional distress. As evidence, he will claim he was so angered he was forced to pull a bat, he was "infuriated" at the invasion of his home and his imprisonment in his own study, he was "tired of the cat and mouse game," and he ultimately wonders whether he should give up his career because of this sort of invasion. S will point out that anger is not tantamount to severe emotional distress. There is no evidence of lasting emotional trauma that is medically diagnosable or medically significant. Ford v. Aldi. The duration of anger is typically short, and Cy exhibited no physical manifestation of his distress other than sitting down on his couch.

### First amendment defense

Most of Scoup's actions were simply mere words, and as to those, Cy must show actual malice Hustler Magazine v. Falwell since Cy, a professional ballplayer, is a public figure. Cy responds that while the questioning is mere words, the physical activities (batteries, F.I., trespass, deception) have no first amendment protection.

### Scoup v. Cy—Assault (pulling out bat)

Assault requires the intentional infliction of apprehension of imminent harmful or offensive bodily contact. Cy intended to cause S apprehension of contact because he wanted to be left alone: he was "fed up with the incessant badgering" and pointed the bat at S while ordering him to "bug off." In fact, Cy left "to avoid batting practice," indicating that he wanted S to be apprehensive about

the possibility of harmful contact with the bat. A reasonable person would be apprehensive at an angered professional slugger wielding a bat and Cy has the apparent ability to carry out the threat. Cullison v. Medley. The facts say, however, that S was undaunted and approached the bat, indicating a lack of apprehension—although apprehension need not be fear, but just the expectation of contact. Although the threat of the bat was conditional, it was still a threat of a condition that Cy had no right to impose, since the airport is public place.

#### Scoup v. Cy—Battery (bat)

Battery is the intentional infliction of harmful or offensive bodily contact. Although the bat contacted S, it caused no harm. S could argue it offends a reasonable sense of personal dignity to be poked with a bat. Snyder v. Turk. While intent can transfer from the assault to a battery, Davis v. White, the problem here is the lack of a tortious act causing contact by Cy, since S “close[d] the gap” until the bat touched his abdomen. Van Camp v. McAfoos.

#### Self-Defense regarding the Assault and Battery

Self-defense permits the use of a reasonable degree of force that is apparently necessary and responsive to a threat. Cy can argue that he used the *threat* of a reasonable amount of force in self-defense to repeated physical intrusions, and that one can threaten more force than one can use Brown v. Martinez. A bat pointed toward a relentless stalker is a reasonable amount of threatened force to warn S away when he will not comply with verbal requests to leave. Regarding this specific set of facts, though, a threat of physical force is generally unreasonable when it is responsive to only verbal intrusions. Further, S can argue that this was the threat of deadly force (an angry professional baseball player wielding a club) and was thus excessive. The facts indicate Cy “despised” S and was angry at seeing him upon deplaning, which may have motivated the use of force excessive to the situation of a reporter approaching for an interview.

#### *Consent*

Cy could also defend that S’s approach toward the bat amounted to implicit consent—an agreement or willingness to permit the touching and apprehension of it. Reavis v. Slominski.

#### Cy v. Scoup—Assault (approaching bat)

Although Cy was pointing the bat, S approached it, indicating a purpose to threaten an imminent contact. In the face of Cy’s order to desist, S should have been substantially certain, Garratt v. Dailey, the contact would be offensive to Cy, even if not harmful. Snyder v. Turk.

#### Cy v. Scoup—Battery (touching bat)

S had a purpose to create an offensive touching (see analysis in the prior tort). While Cy argues that contact can be indirect and touching his bat is touching an extension of him, Fischer v.

Carousel Motors Hotel, S responds that the Fischer case is inapposite since there is no racial epithet or other heightened offensiveness and thus no reason for a court to stretch on the contact element. Cy replies that the relentless badgering amplifies the offensiveness and thus Fischer should apply. This is at least a technical battery.

#### Cy v. Scoup—Trespass to Land (entering D’s home)

Trespass to land is the intentional entry by the defendant onto the land of another. S had a purpose to enter, since he used a false name to get into the party. He invaded Cy’s home. Although damages are not required, dignitary damages are recoverable for the home invasion. Parrish v. Civil Service Comm’n.

#### Consent by Igor

Consent is an agreement or willingness to permit an act to occur. Bailey v. Belinfante. Igor gave S permission to enter. However, S’s deception to gain entry vitiates consent. Johnson v. Doe.

#### Rodney v. Scoup—Conversion/Appropriation of Name or Likeness (using R’s name)

Conversion is an act of interference with property, the intention to exercise substantial dominion over someone else’s property and damage to the property so severe that the defendant should pay its full value. S used Rodney’s name to gain entry to Cy’s home and thus his purpose was to have substantial dominion over the name, since he (and not Rodney) would thus be admitted to the party. Query whether a name is “property” that can be converted, Moore v. Regents. It is probably intangible. It is also unclear what the full value would be of what was taken—the party invitation, besmirching Rodney’s good name because of S’s conduct?

#### Cy v. Scoup—False Imprisonment (locking in study)

False imprisonment requires the intent to confine and actual confinement of the plaintiff to a bounded area, and the plaintiff must have knowledge of the confinement. S intended to confine Cy, since his purpose was to keep Cy away from the party guests to obtain an interview. The confinement was to a bounded area, since S locked the massive oak doors. In this case, there was actual physical restraint. McCann v. Wal-Mart. Cy knew of the confinement because he ordered S to leave and attempted to call the police. S can argue that no confinement occurred because Cy chose to stay and answer questions.

#### Cy v. Scoup—Trespass to Chattel (taking keys)

Trespass to chattel requires intentional interference with the plaintiff’s possessory rights and actual damages. S intended to possess the keys to prevent Cy from leaving the room. Dispossession constitutes significant interference with chattel. S can argue that the keys were not damaged, but Cy can argue that lost use of chattel is sufficient damage. The deprivation was transitory, though, and S returned the keys some minutes later upon request. Since the keys were dispossessed for such a short

time and there was no damage to them, a court might find no TC. On the other hand, the fact that the key deprivation was used to commit another tort (FI) and S's lack of good faith might combine with finding that the damages were human damages (the loss of their use and the consequences of dispossession) to establish the tort. Rest. 222A. This would certainly not be a conversion. Although S exercised substantial dominion over the keys, making them his, it was only for a brief period. He did not cause such serious damage to the keys that he should be required to buy Cy new ones.

### Consent defense

S says that Cy's agreement to answer questions is implied consent to the confinement and key deprivation. Query whether consent can operate retroactively? Prior to Cy's agreement to answer questions, he was falsely imprisoned. He didn't demand the keys until later, but plaintiffs are not required to test their confinement. Cy can reply that coerced consent is not willingness. But if an employment situation is not coercive, Reavis v. Slominski, then certainly an interview situation would not be. Also, whining is not forceful coercion, but taking keys would be. Even if Cy gave consent, it was only for limited questions, not for any prior completed torts, such as F.I. Bailey v. Belinfante. Further, a consent to answer questions would not extend to the lost use of keys. Indeed, the requested return of the keys indicates no explicit consent. Finally, S exceeded the scope of the consent given when he refused to leave. Ashcraft v. King. The consent was to answer a few questions, not to give S permanent houseguest status.

### Cy v. Scoup—Trespass to Land (refusing to leave)

Even if prior entry and remaining was somehow privileged, S's refusal to leave after lawful right of entry expired is trespass to land.

### Scoup v. Igor—Battery (arm grab)/possible Assault

Igor has a purpose to grab S to escort him out, and the arm grab was at least offensive, since S wanted to remain. Cohen. If S saw the grab coming and suffered apprehension (an expectation) of the contact, he may have a cause of action for assault.

### Scoup v. Igor—False Imprisonment (same conduct)

If the arm grab immobilized S, he may have been confined to the area bounded by Igor's reach. Igor intended a confinement for escorting purposes or intent to confine would be satisfied through transferred intent from the battery. Davis v. White. The duration of confinement is usually immaterial, except that this one may be so transitory that it was a momentary hold that did not confine S to any bounded area. S knew of the confinement because he felt resistance was futile.

## **Defense of third persons**

Under the majority view one can defend others in the same circumstances as one can defend oneself. See self-defense definition above. It is factually unclear what Igor knew about need for the defense of Cy from Scoup (did he know of the F.I.?), but Igor will argue that he worked as the agent of the house owner, Cy, and that the amount of force (an arm grab) was reasonable compared to the need for it (to eject an unwanted, relentless, property-invading reporter who will physically imprison Cy to get a story and who will not comply with previous verbal requests to leave).

## Defense of property

Defense of property permits the use of a reasonable amount of force to eject an intruder from land. The amount of force (an arm grab, with no apparent injuries) is reasonable under the circumstances described in defense of third persons above.

## Privilege of citizen's arrest

Igor has an interesting argument that he was "arresting" S, Great Atlantic & Pacific Tea Co. v. Paul, but query whether S was committing a felony or misdemeanor involving breach of peace? (perhaps criminal trespass or robbery or assault).

It is understood by the student whose Student Number is entered below that this examination is given and the student's response is made and submitted pursuant to the conditions and provisions of the Honor Code.

Student Exam No. \_\_\_\_\_

UNIVERSITY OF MISSOURI-KANSAS CITY  
SCHOOL OF LAW

TORTS I  
Professor Levit

Fall Semester, 1999

FINAL  
(3 hours)

Instructions

1. Read each question carefully and pay close attention to the facts and to what the question is asking you to do. Discuss all issues presented by a question. Remember to argue issues both ways. Do not engage in a discussion of issues not raised.
2. I have included all of the facts I think you will need to answer the questions. If a necessary fact is missing, please identify it in your answer and explain how it affects your conclusion.
3. Nothing is intentionally ambiguous. If anything about a question appears to be ambiguous, decide what you think is meant, tell me what you think is meant, and answer the question accordingly. No reasonable resolution of an ambiguity will be penalized.
4. Please write legibly, because I can only give credit if I understand what you write. Only answers written in the blue book will be given credit.
5. Think before you write. Organize your answer. You get extra points for clarity and succinctness. You are penalized for an answer which is disorganized and confusing.
6. In answering this exam you may use your casebook, any supplementary materials handed out for class, and any outlines or notes you yourself have prepared, in whole or in part. You may not use commercially prepared outlines or hornbooks. The applicable law is the law of this State, the State of Euphoria, which consists of all cases in your casebook and any cases discussed in class.
7. This exam consists of 15 pages. It is an Honor Code violation to copy or photocopy any part of this exam. TURN IN THIS EXAMINATION WITH YOUR BLUE BOOKS. Good luck!

Question 1  
(Multiple Choice)  
(25%)

DIRECTIONS: Determine the single most appropriate answer for each question, and write the letter of that answer in the bluebook. If I cannot tell what your answer is or if you have indicated more than one choice, you will receive no credit for the problem.

Question 2  
(Essay)  
(75%)

From November 1, 1995, to August 1, 1997, Paul Bogart, a commercial artist, and his son, Vernon, occupied an apartment at 18 Arthur Street in the city of New Haven. Leona Helms has owned 18 Arthur Street for seven years and she leased the premises to Bogart. Before leasing the apartment to Bogart, Helms painted it with fresh paint herself, hung new curtains in the windows, and installed some new plumbing fixtures.

In March of 1996, Bogart noticed that his son was eating paint chips from the living room window sill. Bogart immediately warned his son not to eat paint chips and, since Vernon was a bright child, explained in some depth that although the chips may taste sweet, eating paint chips could make him very sick. Vernon, who was seven at the time, promised he would not eat any more chips, but over the course of the next year, he snacked on paint chips now and then to satisfy his sweet tooth. Bogart observed Vernon eating the chips twice more, once in June of 1996 and once in November of 1996, and each time lectured him severely. Bogart also made efforts to keep more appealing snack foods available for Vernon, preparing fresh fruit plates for him and putting Vernon's favorite cereal, Chocolate Frosted Sugar Bombs, on a low shelf in the pantry where Vernon could reach it. Bogart noticed in January of 1997 that Vernon was very sleepy much of the day, but assumed that was the result of a winter cold.

In February of 1997, Vernon's teacher at his private school, Ms. Giannini (Ms. G), became tired of Vernon acting up in class and continually bullying a classmate, "Mouse" Mosier. During the class Groundhog Day party, Vernon threw a wadded up paper napkin at Mouse. The napkin glanced off Mouse's shirt, but Mouse broke down crying, and said to Ms. G., "Can't you make him stop it! He does something like this every day!" Ms. G. grabbed Vernon by the arm and marched him to the principal's office. Ms. G. and the principal called Bogart, told him of the pattern of misbehavior and complained to him about Vernon's continued bullying of Mouse (which she had mentioned at parent-teacher conferences two months before). Ms. G. specifically said she thought Vernon was suffering from attention deficit disorder (ADD) and she wanted him placed in the special class for children with learning disabilities. The next Monday he was moved to the special needs class.

In mid-May of 1997 Bogart took Vernon for medical tests to confirm the ADD diagnosis. At about the same time, the school was conducting its own psychological tests to confirm the

ADD diagnosis. The results of both sets of tests showed that Vernon did not have ADD, but the medical tests showed that he did have a high level of lead in his blood.

On June 22, 1997, an official from New Haven's lead poisoning prevention program conducted tests at the apartment using a lead paint analyzer. In the living room, where chips of paint were found on the window sill, the analyzer indicated a measurement of 8.3 milligrams of lead per square centimeter, far in excess of federal allowable standards. The official also found that the apartment was painted but that the previous coats of paint were not scraped. When she conducted the tests, the official said to Bogart, "This doesn't look good. These underlying coats are thick and chipped and peeling." On July 14, 1997, the New Haven official subsequently notified Bogart and Helms of the results of the tests and put Helms on notice that repairs were required.

Vernon is still exhibiting behavioral and learning abnormalities. He has a marked inability to concentrate and to organize his thoughts. It is unlikely that he will be able to graduate from high school. Bogart filed suit on Vernon's behalf on July 1, 1999. With Vernon out of his class, Mouse has become socially accepted, has stopped wetting the bed at night, and is generally a much happier child.

**Directions: Clearly caption each tort. Discuss all possible causes of action, defenses, and probable resolution of them. Confine your answer only to the liability and claims of any named parties (for example, do not discuss the claims or liability of the school, the principal or the New Haven official) and only to tort theories we have discussed this semester.**

The city of New Haven's Code has several ordinances that may be relevant to your analysis:

N.H.C.O. § 47-1-8: The presence of paint which does not conform to federal standards as required in accordance with the federal Lead-Based Paint Poisoning Prevention Act, or of cracked, chipped, blistered, flaking, loose or peeling paint which constitutes a health hazard on accessible surfaces in any dwelling unit, tenement or any real property intended for human habitation shall constitute noncompliance with section 47-1-9.

N.H.C.O. § 47-1-9: Landlords have a responsibility to comply with all applicable building and housing codes materially affecting health and safety.

The state of Euphoria has several statutes that may be relevant to your analysis:

Euphoria General Statutes § 52-584. Limitation of action for injury to person or property

No action to recover damages for injury to the person, or to real or personal property, caused by negligence, or by reckless or wanton misconduct shall be brought but within two years from the date when the injury is discovered or in the exercise of reasonable care should have been discovered.

Euphoria General Statutes § 59-607. Actions involving fault

Contributory fault does not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, in injury to person or property, or in economic loss, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed must be diminished in proportion to the amount of fault attributable to the person recovering. As used in this chapter, "fault" means one or more acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others.

END OF EXAM

Torts I 1999 Final Answer Key

Question 1

Number correct \_\_\_\_\_ x 4

Question 2

- \_\_\_ 5 Bogart & Vernon v. Leona Helms -- straight negligence (used lead-based paint and/or failed to scrape underlying coats)
- \_\_\_ 5 elements (D, B, C, D) and explanation of them
- \_\_\_ 5 duty as a landlord and a painter and contractual obligation
- \_\_\_ 5 standard of care: reas LL or special knowledge of lead paint dangers (LL for 7 years) Hill v. Sparks v. Fredericks v. Castora (is this more like specialized equip. or driving?); needs facts regarding her expertise
- \_\_\_ 5 breach: Carroll Towing (B of using non-lead based paint or not scraping < PL); Rest. factors; compare to Stinnett v. Buchele, risks fall on painter
- \_\_\_ 5 cause in fact Salinetto: but for the paint chips, V wd have no damages; V not ADD, but had high lead level
- \_\_\_ 10 prox. cause: results foreseeable Wagon Mound, extent of harm need not be foreseeable, Hammerstein v. Jean Development West, Rest. § 435, LH liable for full range of V's disabilities. LH argues risk terminated when B discovered and became responsible, Pittsburgh Reduction v. Horton, Ventricelli v. Kinney but greater exposure to risk Marshall v. Nugent LH says no notice of V munching chips, but she leased to dad and child and knew she painted over.
- \_\_\_ 5 "misdiagnosis" by Ms. G does not supersede Smith v. Hardy and she is not a prof. diagnostician; V's chip-eating intervening but foreseeable Derdarian
- \_\_\_ 5 damages: behavioral and learning problems, medical bills, lost future income based on probability of no high school degree Copeland v. Compton
  
- \_\_\_ 10 Vernon v. Leona -- lost chance cause of action (a "bright child" in 1996, but now "unlikely that he will be able to graduate from high school") Wollen v. DePaul Health Center
  
- \_\_\_ 5 Vernon v. Leona -- increased risk or fear of future toxic effects at least medical monitoring damages Hagerty
  
- \_\_\_ 5 Bogart & Vernon v. Leona Helms -- NPS New Haven Code § 47-1-8
- \_\_\_ 5 city ordinance or federal statutory standard imported? Negligence per se or some evidence effect?
- \_\_\_ 5 possible strict liability ord. because health & safety related (not negligence, no excuses)

- \_\_\_ 5 class of persons (human habitation), scope of risks (chipped and flaking paint as a health hazard on accessible surfaces) Wright v. Brown
  
- \_\_\_ 5 duty specifically applies to landlords New Haven Code § 47-1-9; std is mandatory Tedla
- \_\_\_ 5 ord. violated bk 8.3 mg. exceeded allowable federal standards; was ord. viol. cause?
- \_\_\_ 5 Impson defense of impossible to comply because did not know risks unlikely
- \_\_\_ 5 custom defenses (store sold the paint or customary to paint over old paint) unworkable Mississippi Power
  
- \_\_\_ 5 Vernon & Bogart v. Leona -- res ipsa loquitur: probably no res ipsa claim because causation is clear; only file if available in tandem with straight negligence C/A Widmeyer v. Southeast
  
- \_\_\_ 5 Vernon contributory negligence Butterfield v. Forrester
- \_\_\_ 5 standard for a reasonable child of the same age, intelligence, etc. Robinson v. Lindsay and Vernon was a bright child, at least until a few chip snacks eroded his intellect
- \_\_\_ 5 Bogart contributory negligence (lectured, provided sweet snacks, but had clues this wasn't enough, observed him eating chips twice more and sleepy)
- \_\_\_ 5 Vernon implied AOR Rickey v. Boden (Dad lectured, but 7 yr old may not fully appreciate health risks)
- \_\_\_ 5 Bogart implied AOR (commercial artist knows risks)
- \_\_\_ 5 § 59-607 comparative greater fault bar ( $\pi$  can recover if 50% or less at fault)
- \_\_\_ 5 unknown whether Leona was reckless in using paint, Poole v. City of Rolling Meadows but even so, it would not relieve CN under majority view, her recklessness wd be compared
  
- \_\_\_ 5 Bexiga (eating chips is precisely the danger, plus economic, superior knowledge and policy reasons, as embodied in statute, to require LH to guard against V's negligence), so contrib neglig defense fails; Bexiga survives adoption of comparative fault Suter
  
- \_\_\_ 5 Vernon v. Bogart (Dad) -- negligence duty as a parent
- \_\_\_ 5 standard of care Hill v. Sparks Fredericks v. Castora commercial artist should have specialized knowledge about toxicity of lead-based paint
- \_\_\_ 5 no breach: lectures, plus made sweet fruit and cereal available v. lectures not enough, since V continued eating paint chips and Bogart saw he was sleepy; delay in getting V tested
- \_\_\_ 5 but for causation problematic, because V had already ingested chips before B was aware, but perhaps B was a sub factor Anderson v. Minneapolis, St. Paul, Busta v. Columbus Hosp.
- \_\_\_ 5 same contributory negligence and Bexiga arguments with parental twist
  
- \_\_\_ 5 Vernon & Bogart v. Ms. G -- negl. misdiagnosis of ADD, IIED stigma of moving class
  
- \_\_\_ 10 joint and several liability of Bogart, Leona and perhaps Ms. G Landers v. East Texas Salt Water single indivisible injury

- \_\_\_ 5 statute of limitations Euphoria Gen. Stat. § 52-584 discovery rule and 2 year SOL; suit filed July 1, 1999
- \_\_\_ 10 when, in the exercise of reasonable care, should Bogart have discovered and connected V's symptoms with paint chips, Schiele v. Hobart? (1) noticed him eating chips in March of 1996; (2) observed eating chips again in June of 1996 and Nov. 1996; (3) noticed in Jan. 1997 Vernon was sleepy; (4) Dec. 1996-Feb. 1997 behavioral disorders and parent teacher conference; (5) May or June 1997, blood lead test results; (6) official's statement to Bogart June 22, 1997; (7) apartment paint test results, July 14, 1997 Kubrick v. United States
- \_\_\_ 5 SOL does not apply to Vernon's claims because of his incapacity as an infant; mental impairment? Dasha v. Maine Medical Center
  
- \_\_\_ 5 Mouse v. Vernon -- battery (paper napkin)
- \_\_\_ 5 substantial certainty of offensiveness Garratt v. Dailey; paper napkin = offensive contact if smoke is Leichtman; no harm needed if result is offensive Cohen
- \_\_\_ 5 seven or eight year old can form necessary intent Walker v. Kelly, but what about lead-impaired child? Incapacity defense Polmatier v. Russ, but not if V knew what he was doing
- \_\_\_ 5 defense: de minimis (if all in-school touchings are batteries, the courts will be flooded; this is a paper napkin that glanced off Mouse's shirt); child playfulness = implied consent
  
- \_\_\_ 5 Mouse v. Vernon -- IIED (continued bullying)
- \_\_\_ 10 repetitive pattern of harassment – “He does something like this every day” -- is outrageous, Samms v. Eccles v. not outrageous because children tease constantly; Mouse suffered severe ED, evidenced by immediate reaction of crying and unhappiness and bed-wetting, LaBrier v. Anheuser Ford; at least reckless with respect to emotional sensitivities of Mouse
- \_\_\_ 5 possible first amendment defense if bullying was verbal Hustler v. Fallwell
  
- \_\_\_ 5 Vernon v. Ms. G -- battery (arm grab)
- \_\_\_ 5 Vernon v. Ms. G -- false imprisonment (arm grab, escort to principal) V submitted Hardy v. LaBelle's v. not free to go, and Ms. G is an authority figure
- \_\_\_ 5 defense of reasonable discipline Thomas v. Bedford (amount of force to restrain and take to principal permitted with a physical 7 or 8 year old who was “acting up”), corporal punishment even allowable Ingraham v. Wright
- \_\_\_ 5 defense: defense of third persons (Mouse)
  
- \_\_\_ 5 Mouse v. Ms. G -- negligent supervision; Mouse v. Bogart -- negligent control of a child of known bad habits (parent-teacher conference)
- \_\_\_ 5 Mouse v. Leona -- consequences of her negligence Meah v. McCramer v. unforeseeable plaintiff Palsgraf
- \_\_\_ 10 Organization
- \_\_\_ 10 Innovative arguments/thorough analysis
- \_\_\_ 300 Total

It is understood by the student whose Student Number is entered below that this examination is given and the student's response is made and submitted pursuant to the conditions and provisions of the Honor Code.

Student Exam No. \_\_\_\_\_

UNIVERSITY OF MISSOURI-KANSAS CITY  
SCHOOL OF LAW

TORTS I  
Professor Levit

Fall Semester, 2000

FINAL  
(3 hours)

Instructions

1. Read each question carefully and pay close attention to the facts and to what the question is asking you to do. Discuss all issues presented by a question. Remember to argue issues both ways. Do not engage in a discussion of issues not raised.
2. I have included all of the facts I think you will need to answer the questions. If a necessary fact is missing, please identify it in your answer and explain how it affects your conclusion.
3. Nothing is intentionally ambiguous. If anything about a question appears to be ambiguous, decide what you think is meant, tell me what you think is meant, and answer the question accordingly. No reasonable resolution of an ambiguity will be penalized.
4. Please write legibly, because I can only give credit if I understand what you write. Only answers written in the blue book will be given credit.
5. Think before you write. Organize your answer. You get extra points for clarity and succinctness. You are penalized for an answer which is disorganized and confusing.
6. In answering this exam you may use your casebook, any supplementary materials handed out for class, and any outlines or notes you yourself have prepared, in whole or in part. You may not use commercially prepared outlines or hornbooks. The applicable law is the law of this State, the State of Bliss, which consists of all cases in your casebook and any cases discussed in class.
7. This exam consists of 12 pages. It is an Honor Code violation to copy or photocopy any part of this exam or to fail to turn the exam itself in at the end of the test. TURN IN THIS EXAMINATION WITH YOUR BLUE BOOKS. Good luck!

Question 1: Multiple Choice  
(25%)

DIRECTIONS: Determine the single most appropriate answer for each question, and write the letter of that answer in the bluebook. If I cannot tell what your answer is or if you have indicated more than one choice, you will receive no credit for the problem.

Question 2: Essay  
(75%)

On October 25, 2000, it was a dark and stormy night in the city of Sunnyville in the State of Bliss. At approximately 3 a.m., Adelaide Cosgrove was awakened by thunder, and looked out the window into the backyard. She saw a flash of lightening and observed a tall blue flame shooting into the air at about the same time. Sleepy, she shrugged off her fears and went back to bed. Minutes later, she heard more thunder and went back to the window, where she saw a nearby tree catch on fire. Cosgrove called the fire department, but the fire spread quickly to Cosgrove's residence. In escaping her burning home, Cosgrove stumbled down her front steps, twisting her ankle sharply. As she limped down the path from her house to the street, she tripped over the red wagon her seven year-old next door neighbor, Timmy Green, had left in her front yard, falling and breaking her wrist. Getting up from her fall, angry and in pain, Cosgrove kicked the red wagon, causing one of its small tires to fly off, and opening a gash on her right big toe.

A Northern Illichigan Gas Co. (NiGas) natural gas pipe line ran under the yard behind Cosgrove's residence. In their depositions, neither Cosgrove nor the fire captain could recall noticing the smell of natural gas before or during the fire, but the fire captain did notice that they had difficulty extinguishing the fire even in the rain, which could have meant the fire was "gas fed." Several hours after the fire had been extinguished the fire department was recalled to the scene because of the smell of gas, and a NiGas crew was called in for the first time by the fire department personnel after they detected a leak in the gas line in the backyard behind Cosgrove's residence. The pipe was laid about 22 inches below the surface of the ground at the point of rupture. Like several of her neighbors, Cosgrove was in the habit of parking around back on the grass right above the pipe. When it repaired the gas leak on October 26, NiGas removed the piece of pipe from which the gas escaped.

When Cosgrove returned from having her wrist put into a cast and her ankle taped at the emergency room, she saw her neighbor, Missy Green, Timmy's mother, out raking leaves. Cosgrove walked over to Missy and said, "Missy, I have repeatedly asked Timmy to pick up his toys, and now I've tripped over his wagon and broken my wrist." Missy shrugged and said, "Well, you know how kids are . . ." Cosgrove came closer to Missy, causing her to back up a step into a shrub, and said, "How kids *are* is how parents expect them to be. Little Timmy is the spawn of Hell and I hope you both burn in the afterlife!" Missy, who was very devout, was so shocked by this language that she fainted, falling against her front stoop and suffering permanent

injuries.

Directions: Clearly caption each tort. Discuss all possible causes of action, defenses, and probable resolution of them. Confine your answer only to the liability and claims of any named parties (for example, do not discuss the claims or liability of the fire captain or fire department) and only to tort theories we have discussed this semester.

The city of Sunnyville's Code has several ordinances that may be relevant to your analysis:

Sunnyville Ordinance 38.10 (passed May 10, 1997)

The exterior property areas of all residential premises shall be kept free of any debris, object, material or condition that constitutes a blighting or deteriorating influence on the neighborhood. Brush, broken glass, stumps, roots, filth, garbage, trash, debris and motor vehicles, boats or trailers in a condition of disrepair or deterioration of parts thereof, shall not be permitted on any property.

Sunnyville Ordinance 38.11 (passed May 10, 1997)

No vehicle shall be parked or stored on the lawn or grass of a private residence, apartment or condominium or on any sidewalk abutting a private residence, apartment or condominium.

The state of Bliss has several statutes that may be relevant to your analysis:

Bliss Statutes Annotated 652 Effect of Contributory Fault

In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. "Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others.

Bliss Statutes Annotated 1004.2 Water, Oil, Gas and Gasoline Pipe Lines on State Property

All oil, gas and gasoline transmission pipe lines, except service connections crossings, installed under State property should be placed a minimum of 24 inches below the pavement surface or deeper if the District Engineer so determines.

END OF EXAM

Torts I Fall 2000 Answer Key

**Question 1**

\_\_\_\_\_ correct x 3 =

**Question 2**

- \_\_\_ 5 Cosgrove v. NiGas—Negligence (gas leak)
- \_\_\_ 5 explanation of DBCD
- \_\_\_ 5 duty to act as a reasonable gas company, perhaps heightened duty because of danger, Butler v. Acme, or superior skill in gas pipe laying, Hill v. Sparks; duty to prevent leaks or inspect regularly?
- \_\_\_ 5 breach evaluated by Carroll Towing, Rest. 291, 292, magnitude of risk v. social value: 22 inches when 24 is safe
- \_\_\_ 5 but for causation, Salinetto: difficulty extinguishing fire “could have meant gas-fed”—is statement of possibility sufficient to show substantial factor? Anderson v. Minneapolis St. Paul? but no smell of gas before or during fire; could lightening alone cause a tall blue flame?
- \_\_\_ 10 proximate cause: fire department detected leak, but query whether pipe placement 2 inches caused leak; if NiGas caused leak, fire is exactly what is foreseeable, Wagon Mound; precise manner of harm need not be, Hammerstein, Doughty is minority view; Cosgrove in a greater position of fire risk from gas leak, Marshall v. Nugent; but is lightening unforeseeable superseding cause? Parking superseding cause?
- \_\_\_ 5 Rest. 451, while force of nature extraordinary, harm was not of a different kind from that which made D negligent (the risk of escaped gas is that it may be lit)
- \_\_\_ 5 damages: burning home, twisted ankle Copeland
- \_\_\_ 5 wrist break—second injury (tripping on wagon would not have happened but for emergency exit, but is it a normal consequence); Smith v. Hardy (ordinary negl foreseeable) v. intervening superseding cause
- \_\_\_ 5 Timmy and NiGas joint & several liability for indivisible injury of wrist? Landers v. East Texas
- \_\_\_ 5 NiGas defends: unclear what occurred; the mere happening of an accident does not mean negl by D, Gift v. Palmer
  
- \_\_\_ 10 Cosgrove v. NiGas—RIL (gas leak): event wouldn’t occur w/o negl, bring fault home to NiGas, P need not elim fault in comp state, but shd exclude other causes; satisfies D, B & C, Valley Properties; gas lines do not normally leak; NiGas had duty, but question whether exclusive control because of Cosgrove’s parking; NiGas removal of pipe reason to impose RIL, Warren (absent evidence has an impact on courts)
- \_\_\_ 5 Propriety of both straight negl & RIL (as long as straight negl falls short of complete

explanation, Widmyer)

- \_\_\_ 5 Cosgrove v. NiGas—NPS 1004.2 (shallow pipe): 22” v. 24” and below pavement, not grass; class of persons (public), scope of risks (contact that can cause leak) Wright v. Brown
- \_\_\_ 5 possible strict liability statute, since concerns public safety
- \_\_\_ 5 State property or private property; does statute even apply? Tedla; even if not controlling, could it offer some evidence re safe standard of pipe depth?
- \_\_\_ 5 Impson, Rest. 288 defense: unable after reasonable diligence to comply, emergency not of their making, no reason to know of leak; is 22” after years of parking on ground?
- \_\_\_ 5 causation question: is pipe depth violation cause of fire igniting and spreading to house?
- \_\_\_ 5 Defense: AOR (sleep): knowing and voluntary encountering of risks; after seeing lightening and a tall blue flame, she went back to bed
- \_\_\_ 5 Defense: CN (sleep): faulty or acting reasonably in face of serious danger for sleep-muddled person, Wassell v. Adams
- \_\_\_ 5 Defense: CN (stumbled in exiting home): but probably acted reasonably for an emergency situation, Wilson v. Sibert
- \_\_\_ 10 Defense: CN (parking in violation of 38.11), but since passed same day as debris ordinance, intended to reduced blight, not risks of parking atop gas lines, Wright v. Brown (purpose aesthetic); even if applicable, evidentiary effect of ordinance: some evidence; the custom of neighborhood to violate ordinance is not an excused violation, Mississippi Power
  
- \_\_\_ 5 Bexiga: NiGas duty to protect from foreseeable CN of parking over lines, thus depth requirement; social policy to shift safety risks and expense to utility company v. car parking not the sort of negl. NiGas should have to guard against
  
- \_\_\_ 5 Statute 652 Pure Comparative (diminishes recovery proportionately but does not bar even if P is primarily at fault)
- \_\_\_ 5 Was NiGas reckless or wanton? After comparative fault, recklessness compared, Poole v. Rolling Meadows
  
- \_\_\_ 5 Cosgrove v. Timmy—Negl (leaving wagon in dangerous spot): he had been repeatedly warned; broken wrist is damage
- \_\_\_ 5 standard of care for child, Robinson v. Lindsay (reasonably careful child of like age, intelligence, training, maturity; red wagon is not an adult activity, and even if left underfoot, probably not a dangerous instrumentality); 7 probably not too young to formulate intent, Garrett, Walker
- \_\_\_ 5 gash on big toe her own responsibility
- \_\_\_ 5 Cosgrove v. Timmy—NPS Ord. 38.10 (residential areas free from debris): but ordinance directed to property owners, not kids, and blight, not intended to set a safety standard, Tedla, physical injury not type ord. intended to prevent, just aesthetic, Wright v. Brown; red wagon doesn’t fit specified categories)
- \_\_\_ 5 Impson, no RTK of occasion for compliance, capacity; Rudes, common law standard

- would apply
- \_\_\_ 5 Ordinances, even if applicable, at most only some evidence of negligence
  
  - \_\_\_ 5 Cosgrove v. Timmy—Trespass to land: while children liable for trespass, Kinney v. Barna, no direct evidence of intent or causing object to enter; could storm have blown wagon to her property?
  - \_\_\_ 5 Implied consent defense, Bailey v. Belinfante: repeatedly asked him to pick up toys before implies knowledge and acquiescence to presence, but toy-dropping exceeds scope of consent
  - \_\_\_ 5 Timmy v. Cosgrove—Trespass to chattels/Conversion (wheel of wagon): intent to interfere with possessory rights or was intent to exercise substantial dominion, probably should not have to pay full value, if only missing a wheel, but should pay for damage
  - \_\_\_ 5 Frustration no defense; not self-defense (retaliatory) or necessity; but defense of property to expel wagon with reasonable force Brown v. Martinez wheel removal = excessive force; pay for wheel fix
  
  - \_\_\_ 5 Cosgrove v. Missy—Negl supervision of Timmy: no evidence of negl; parents generally not responsible for kids' torts, absent encouragement or statute Walker v. Kelly
  - \_\_\_ 10 Missy v. Cosgrove—IIED (spawn of Hell comment): query whether single comment \ sufficiently outrageous, although knowledge of susceptibility to emotional distress (probably knew neighbor was devout and religious slur), LaBrier; purpose to cause distress (damning child) or, at a minimum, reckless, Chuy v. Philadelphia Eagles; although outrageousness weak with single epithet, proof of intent is strong, Fisher v. Carousel Motors; is Missy's fainting and permanent physical injuries sufficient evidence of emotional distress?; Falwell v. Flynt, first amendment defense to words alone
  - \_\_\_ 5 Missy v. Cosgrove—Assault (came close): imminent apprehension because she stepped back, but mere words usually not enough, Dickens v. Puryear, although pretty strong language; no threat or purpose or substantial certainty of apprehension of contact (besides, broken wrist), but apparent ability, Cullison, and Cosgrove was enraged
  - \_\_\_ 5 Missy v. Cosgrove—Trespass to land; Implied consent bk neighbors, but limited to neighborly visits
  - \_\_\_ 5 Missy v. Cosgrove—Battery: backing her into a bush, indirectly causing contact, Fisher, T.I.
  - \_\_\_ 5 Missy v. Cosgrove—F.I.: query whether Cosgrove, brush, and psychological confinement constituted a bounded area, Andrews v. Piedmont Airlines, safe means of escape to side? Even if no intent to confine, intent could transfer from trespass to land or assault
  - \_\_\_ 5 Falling against stoop as extended consequences of assault or IIED; fainting probably not interruptive human action because essentially reflexive and caused by D
  
  - \_\_\_ 5 Organization
  - \_\_\_ 10 Innovative arguments/thorough analysis
- 
- 245 Total

It is understood by the student whose Student Number is entered below that this examination is given and the student's response is made and submitted pursuant to the conditions and provisions of the Honor Code.

Student Exam No. \_\_\_\_\_

UNIVERSITY OF MISSOURI-KANSAS CITY  
SCHOOL OF LAW

TORTS I  
Professor Levit

Fall Semester, 2001

FINAL  
(3 hours)

Instructions

1. Read each question carefully and pay close attention to the facts and to what the question is asking you to do. Discuss all issues presented by a question. Remember to argue issues both ways. Do not engage in a discussion of issues not raised.
2. I have included all of the facts I think you will need to answer the questions. If a necessary fact is missing, please identify it in your answer and explain how it affects your conclusion.
3. Nothing is intentionally ambiguous. If anything about a question appears to be ambiguous, decide what you think is meant, tell me what you think is meant, and answer the question accordingly. No reasonable resolution of an ambiguity will be penalized.
4. Please write legibly, because I can only give credit if I understand what you write. Only answers written in the blue book will be given credit.
5. Think before you write. Organize your answer. You get extra points for clarity and succinctness. You are penalized for an answer that is disorganized and confusing.
6. In answering this exam you may use your casebook, any supplementary materials handed out for class, and any outlines or notes you yourself have prepared, in whole or in part. You may not use commercially prepared outlines or hornbooks. The applicable law is the law of this State, the State of Bliss, which consists of all cases in your casebook and any cases discussed in class.
7. This exam consists of \_\_\_ pages. It is an Honor Code violation to copy or photocopy any part of this exam or to fail to turn the exam itself in at the end of the test. **TURN IN THIS EXAMINATION WITH YOUR BLUE BOOKS.** Good luck!

## **Question 2: Essay**

(70%)

On the afternoon of June 4, 2001, Brenda Helton went alone to a Save-A-Lot grocery store. Helton has Huntington's disease, a muscular, neurological condition characterized by jerking, uncontrollable movements of her limbs and progressive dementia. The Save-A-Lot company had built its store two years ago at the Industrial Park location. Helton parked her car in the front row handicapped space nearest the store entrance. The parking lot where she parked her car extended 40 feet behind her vehicle to a grass embankment owned and maintained by the city. The grass embankment extended 60 feet at an 18% slope down to Industrial Park Road. It is a flat parking lot but with a sloping embankment next to it.

Upon leaving the store, Helton started the engine and placed the transmission in reverse. The vehicle suddenly accelerated at a high rate of speed. Helton says that when she looked out her rear view mirror, she saw Grant Thorn's car backing towards her from a parking space directly behind her. She saw that he was not looking behind him, so she swerved to avoid being hit by Thorn. She missed hitting Thorn's car by a matter of inches.

Helton's car traveled approximately 40 feet across the parking lot, which was mostly level, hit the 10 inch high square curb at the edge of the Save-A-Lot parking lot, at which point she lost control of her car. The car rolled down the sloping embankment to the road, across the two-lane Industrial Park Road, down yet another 25-foot grass embankment, and over a steep five-foot drop-off, where it landed in the Cumberland River. Tony Larusso observed the incident and was the first to reach Helton and help extract her from her car. In the process of helping her out, Larusso slipped in the mud of the river and gashed his thigh on a protruding branch. Ultimately, Helton was extricated and she was taken to the local hospital for a fractured left knee.

For the next month, Helton was essentially confined to a hospital bed. During the first three weeks following her surgery, Helton was placed on a strong pain medication. As a result of the pain medication, which made her a bit dizzy, she tripped when going to the bathroom and broke her right big toe. While Helton can now walk with a limp and requires the assistance of a cane, her orthopedic surgeon will testify that as a result of the car accident Helton has a high probability of suffering premature arthritis in her knee at some point in the future.

Bliss state ordinances sections 827(1)-(5) are building code regulations facilitating access by persons with disabilities. They are modeled upon the federal Americans with Disabilities Act (ADA) guidelines. (Note: The ADA, an anti-discrimination statute, does not grant a private cause of action for failure to comply with its requirements. In other words, Congress provided no money damages remedy for violations of the ADA facilities provisions.)

## Bliss State Ordinances § 827 Access by Persons with Disabilities

(1) Access Aisle. An accessible pedestrian space is required between elements, such as parking spaces, seating, and desks, that provide clearances appropriate for use of the elements;

(2) Accessible Route. A continuing unobstructed path connecting all accessible elements and spaces of a building or facility is required. . . . Exterior accessible routes include parking access aisles, curb ramps, crosswalks at vehicular ways, walks, ramps, and lifts;

(3) Acceptable Slopes and Ramps. Exterior parking areas may not have a slope greater than 16%. An interior ramp may not have a slope greater than 12%;

(4) Parking Spaces. Accessible parking spaces shall be at least 96 in. (2440 mm.) wide.

(5) Curbs in Parking Areas. All curbs must be beveled and rounded sufficiently to permit wheel chairs to roll smoothly over them.

Bliss also has the following state statute which may be relevant to your analysis:

### Bliss State Statutes § 190.67

In all actions brought to recover damages for negligence which results in death or injury to person or property, the fact that the plaintiff may have been contributorily negligent shall not bar a recovery by the plaintiff or the plaintiff's legal representative where such negligence was not greater than the negligence of the defendant or the combined negligence of all defendants against whom recovery is sought, but any damages awarded shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

**Directions: Discuss all possible causes of action, defenses, and probable resolution of them. Confine your answer only to the liability and claims of any named parties, companies or entities (for instance, do not sue the city, Helton's surgeon or the car manufacturer, etc.) and only to tort theories we have discussed this semester. Clearly caption each tort and defense.**

### Question 3: Essay

(20%)

Richard Poff was a runner and law clerk at the law firm of Robert Hayes. Poff worked for Hayes after school on Tuesdays and Thursdays and some Saturday mornings. One Saturday, three weeks after Hayes told Poff he simply didn't have the resources to offer him a position as an associate after Poff graduated, Poff stayed late into the afternoon to secretly photocopy records in Hayes's office. He copied them to collect evidence to present to the Bliss State Bar regarding what he thought were unethical practices at the firm. Specifically, Poff suspected that Hayes charged personal expenses to clients and committed other unethical billing practices. Poff filed a

disciplinary complaint with the Bar against Hayes. Following a 13-month investigation of Poff's complaint by the Bar, a 10-month period passed during which no action was taken on the complaint. Then, almost two years from Poff's filing of the complaint, the Bar filed formal disciplinary charges against Hayes. The Bar later dismissed its own proceedings, deciding that its own delay in pursuing the charges warranted dismissal.

Poff gathered evidence against Hayes by copying various documents and records located throughout the office, in such places as Hayes's desk and the bookkeeper's office. The materials he copied included checks, credit-card statements, and ledgers. He also removed from Hayes's desk drawer some documents, checks and credit-card statements related to Hayes's partial ownership and management of a car-washing business. The undisputed evidence shows that Poff removed all of the documents from Hayes's desk and the bookkeeper's office for the sole purpose of photocopying them to support the ethics complaint he filed against Hayes. After he completed this task, he returned each document to its original place. He never removed the documents from the premises.

**Directions: In a lawsuit by Hayes against Poff, evaluate the intentional tort claims that Hayes might raise and the defenses might Poff have. Address only intentional torts and defenses that we covered this semester (for instance, no defamation, malicious prosecution or privacy invasion claims). Clearly caption each tort and defense.**

END OF EXAM

Torts I Final Fall 2001 Answer Key

**Question 1: Multiple Choice (10%)(30 points possible)**

**Question 2: Essay (70%)(210 points possible)**

- \_\_\_ 5 Helton v. SAL negl (parking lot construction, slope, additional barriers needed?)
- \_\_\_ 10 DBCD elaboration
- \_\_\_ 5 duty to patrons (invitees) safe parking; std. R co.; super. Know? Hill v. Sparks
- \_\_\_ 10 breach oblig. guard rolling Bernier v. no breach since no control of embank + 10" square curb and no slope in parking lot; BPL Carroll Towing, Rest. 291-292; fact of injury not negl Gift v. Palmer; Helton in best position to control risks, Stinnett v. Buchele
- \_\_\_ 10 causation: but for v. actual cause Helton's bad driving; type harm foresee, Derdarian; foresee car might roll over nearby embankment; Wagon Mound; within scope risk?, Medcalf v. Washington Heights v. manner of occurrence irrelevant, Hughes; extent injury need not be foresee, Hammerstein v. Jean Devlop.
- \_\_\_ 5 Thorn superseded cause?, but driver backing up in pkg lot foresee, Concord Florida
- \_\_\_ 5 joint & several liab Thorn & SAL indivis injury Landers or SAL created risk
- \_\_\_ 5 damages knee & car Copeland v. Compton; discount damages since heading toward accident? Dillon v. Twin States v. not separate cause like Dillon
- \_\_\_ 5 second injury: breaking toe, Anaya, Rest. 460; was toe a normal consequence or result of neurological cond.? but thin skull rule McCahill; med. mal. foreseeable.
- \_\_\_ 5 increased risk arthritis; >50%? Alexander v. Scheid may need med. monitor
  
- \_\_\_ 10 Helton v. SAL RIL: elements, Giles; can't bring fault home: curb cause? Thorn? car malfunc? Huntingtons?; car caused harm, not parking lot, w/in P's control; P can't exclude her own fault v. not req'd in comp state; combine w/specific negl? Widmyer
- \_\_\_ 5 Helton v. SAL NPS (establishes duty & breach)
- \_\_\_ 5 § 827(3) slope prov. N/A (slope not part of parking lot) Rudes inappropriate ord.
- \_\_\_ 5 § 827(5) square curb provision
- \_\_\_ 5 Wright v. Brown: Helton in class of persons, but risks different—leg. intent access for wheelchairs to store not to avoid car wrecks at edge of pkg lot near grass
- \_\_\_ 5 no damages remedy intended; regulatory bldg. code, not safety code Tedla
- \_\_\_ 5 causation: not the cause of the damage, acceleration & swerving were; square curb actually might have helped slow her car Impson (greater risk of rolling w/rounded curbs)
- \_\_\_ 5 effect of administrative ordinance some ev. v. statute NPS (but federal parallel)
- \_\_\_ 5 Helton v. Thorn negligence (backing up w/o looking)
- \_\_\_ 5 duty to protect others against unreas. risks RP std.
- \_\_\_ 5 breach BPL Carroll Towing & Rest. 292-292 (req'd & not costly to look)
- \_\_\_ 5 causation: but for = swerve v. but-for not met, since his backing up didn't cause her to accelerate so rapidly she traveled 40 ft across parking lot + across 2 lane road + 25 ft

embankment + 5 ft drop (if swerving wouldn't she brake instead?); actual cause of sudden acceleration or Huntington's (jerking limbs) or overreaction Salinetto

\_\_\_ 5 prox cause: cars in pkg lot + conseq not looking foresee, Palsgraf; greater position risk from swerve and avoid, Marshall; manner (rolling over curbs and embank while accelerating) not, but doesn't need to be Hughes Rest. 435; slope as intervening cause?; position of safety after missing Thorn's car, Ventricelli

\_\_\_ 5 Thorn v. Helton negl. no damages-- missed hitting his car Copeland v. Compton

\_\_\_ 5 Helton v. Thorn RIL (caus. unclear): other causes (curb, disease); no RIL

\_\_\_ 5 § 190.67 comparative greater fault (51%) bar (Helton had most control)

\_\_\_ 5 Helton contrib. negl. (Huntington's, cars don't accelerate) emerg of her making

\_\_\_ 5 std. of care RP w/like disability Shepherd v. Gardner; can't disregard her limits, Roberts v. Louisiana; did dementia undermine her understanding of her limitations?

\_\_\_ 5 Helton LCC to avoid harm, but doctrine eliminated in comparative juris.

\_\_\_ 5 Helton AOR (known risks driving w/jerking motions of disease) Rickey v. Boden

\_\_\_ 5 SAL duty to protect Helton from her own fault Bexiga? (safety dev., econ reason)

\_\_\_ 5 Larusso v. SAL/Thorn (rescue foreseeable) Lambert; rescuer not reckless Ouellette

\_\_\_ 5 Larusso v. Helton (negl. invite rescue v. negl. only re self) Thorn decided to help

\_\_\_ 5 AOR by Larusso (knowing, mud and protruding branch visible, voluntary, should have waited for professionals)

\_\_\_ 5 CN by Larusso (lack of caution in mud) v. emergency situation Stewart v. Motts

\_\_\_ 5 organization

\_\_\_ 10 innovative arguments/thorough analysis

### Question 3: Essay (20%)(60 points)

\_\_\_ 5 Hayes v. Poff trespass to land (staying Sat. aft; places he has no authority to be)

\_\_\_ 5 no damages required, but if trespass is deliberate or malicious, can get punitives Jacque v. Steenberg

\_\_\_ 5 Consent (implied agree.), but exceeded scope of consent given Ashcraft v. King

\_\_\_ 5 Hayes v. Poff trespass to chattels (copying bus. & personal car wash documents); TC originally only personal property, but extended to interference w/co. bus CompuServe v. CyberPromo; rts in prop. really rts of people "Operation Bedcheck" dignity invasion

\_\_\_ 5 what are damages? no dispossession, except transitory, loss of use; no harm to chattel, returned documents immediately v. used copies to cause reputation/business loss

\_\_\_ 10 Hayes v. Poff conversion: exercise substantial dominion since took copies?; Rest. 222 factors (good faith, appropriate ethical complaint v. retaliation, transitory deprivation for photocopying, no damage to chattel); full value = pay for copies?

\_\_\_ 10 Hayes v. Poff IIED: elements, retaliatory behavior for not hiring at least reckless re ED, Chuy; outrageous? since repeated copying, 13 mo. invest. GTE Southwest; violate trust Winkler, but employee not fiduc. + bar proceeded; no ev of SED, but license at risk

\_\_\_ 5 Public necessity: elements; suspect unethical pract., threat injury public (clients), but self-interest motivates, Surroco v. Geary; no emergency (other means to obtain info)

\_\_\_ 5 Defense of others/1<sup>st</sup> Amend. right to file bar complaint Falwell v. Flynt

\_\_\_ 5 innovative arguments/thorough analysis

It is understood by the student whose Student Number is entered below that this examination is given and the student's response is made and submitted pursuant to the conditions and provisions of the Honor Code.

Student Exam No. \_\_\_\_\_

UNIVERSITY OF MISSOURI-KANSAS CITY  
SCHOOL OF LAW

TORTS I  
Professor Levit

Fall Semester, 2002

FINAL  
(3 hours)

Instructions

1. Read each question carefully and pay close attention to the facts and to what the question is asking you to do. Discuss all issues presented by a question. Remember to argue issues both ways. Do not engage in a discussion of issues not raised.
2. I have included all of the facts I think you will need to answer the questions. If a necessary fact is missing, please identify it in your answer and explain how it affects your conclusion.
3. Nothing is intentionally ambiguous. If anything about a question appears to be ambiguous, decide what you think is meant, tell me what you think is meant, and answer the question accordingly. No reasonable resolution of an ambiguity will be penalized.
4. Please write legibly, because I can only give credit if I understand what you write. Only answers written in the blue book will be given credit.
5. Think before you write. Organize your answer. You get extra points for clarity and succinctness. You are penalized for an answer that is disorganized and confusing.
6. In answering this exam you may use your casebook, any supplementary materials handed out for class, and any outlines or notes you yourself have prepared, in whole or in part. You may not use commercially prepared outlines or hornbooks. The applicable law is the law of this State, the State of Bliss, which consists of all cases in your casebook and any cases discussed in class.
7. This exam consists of 12 pages. It is an Honor Code violation to copy or photocopy any part of this exam or to fail to turn the exam itself in at the end of the test. **TURN IN THIS EXAMINATION WITH YOUR BLUE BOOKS.** Good luck!

**Question 1: Multiple Choice**

(20%)

**Question 2: Essay**

(80%)

Floyd Sill, a 22 year-old college student majoring in physical education, was driving home on a country highway on Thanksgiving eve around 6 p.m. when his vehicle collided with Bessie, a cow owned by Maggie O'Leary. Burlington Northern Railroad owned and maintained a railroad line north of the highway, with a fence that was between the tracks and O'Leary's property that served as pasture for Bessie. O'Leary's land was bounded on its south side by the right of way and tracks of Burlington Northern. The highway on which Sill was driving when he hit Bessie was south of the tracks. The fence Burlington Northern constructed runs along O'Leary's land and separates it from the railroad tracks; it has one gate in it. O'Leary says she has never forgotten to close the gate and has never before had a cow get loose. She also says that she closed the gate the day before the accident and did not use the gate again, and had no visitors. She remembers that several times in the past she has seen the gate left open, presumably by some children on a nearby farm.

An inspection of the fence the day after the accident showed a significant sagging in the barbed wire between two fence posts about 200 yards from the accident site. At one point, the four strands of barbed wire sagged to within a foot and a half of the ground. Burlington Northern says that like other railroads around the country it has no procedure for inspecting the fences but instead relies on complaints from landowners or the general public to learn about problems with the fences.

When Sill crested the hill near O'Leary' property, he saw a cow approximately 100 yards away, but since the cow seemed to be moving across the road at a good clip, Sill did not slow down much. As he passed this cow, he suddenly noticed another cow, Bessie, a brown Guernsey, some 20 yards away. Then Sill applied his brakes, but it was too late. As his car skidded, he pumped the brakes again and swerved to avoid the cow, but the car slammed into Bessie anyway and the gas tank exploded. The cow was severely burned and bleeding profusely. Sill emerged from his car, cradling his left arm.

Kurt Helfgot was driving on the same highway, saw Sill's damaged car and the injured cow, and pulled his car over. Helfgot gave Sill his cell phone to call for help, and then turned his attention to the cow. Since the cow's injuries looked severe and it was mooing pitifully, Helfgot took a large rock from the side of the road and put Bessie out of her misery. Then he tried to drag Bessie from the roadway so that she would not be a traffic hazard. Helfgot wrenched his back trying to lift and pull the 500 pound cow to the side of the road.

At that time, Jane Chitwood's truck crested the hill and though she slowed down significantly because she saw both Sill's and Helfgot's cars, her attention was fixed on Helfgot

bashing the cow with the rock. She didn't see Sill staggering partly in the road and she clipped his right arm with her side view mirror, causing a fractured elbow.

Having heard the commotion, Maggie O'Leary came out of her house. From the porch of her house, she could see the car lights. She ran down to the road, where she saw Bessie. Sill explained what had happened and that Helfgot had put Bessie out of her misery. O'Leary turned to Helfgot and screamed, "You stupid jerk, you killed my cow!" To avoid a confrontation, Helfgot stepped backward and inadvertently tripped over the rock he had used on Bessie. Helfgot twisted his right knee and bruised his hand.

Sill sustained injuries including a broken left arm, a fractured right elbow, and other injuries to his shoulders, neck, and back. Sill was a significant allergy sufferer and so was unusually susceptible to the fumes that resulted from the burning tires. Since the accident, he has had extreme difficulty breathing and sometimes wears a portable oxygen machine. Because of the injury to his left shoulder, Sill can no longer participate in golf, his favorite sport. He graduated from college the June after the accident, with fairly low grades, and said he was interested in becoming a physical education teacher. He had held a retail job as a manager at a video store over the summer, for which he earned \$8 per hour, and had not really sought out teaching positions. Sill was instructed to start physical therapy in February in order to strengthen the muscles and increase his shoulder's range of motion. Although the doctor prescribed physical therapy three times per week, Sill only met with the therapist three times before he decided that the therapy wasn't doing him any good. In September following his graduation, Sill was advised by his doctor not to go into teaching physical education, which pays about \$26,000 per year, but instead to pick a more sedentary occupation.

The State of Bliss has several statutes that may be relevant to your analysis:

§ 389.650. Lawful fences, gates

(1) Whenever their tracks pass through or abut private property or a public way, every railroad shall erect and maintain on both sides of its road good and sufficient fences and suitable and convenient farm crossings for the use of the occupants of the adjoining lands.

(2) Every railroad shall be liable for all damages done to domestic animals or persons on the railroad right of way occasioned by their negligence by the want of such fences or cattle guards.

§ 260.658 Negligence

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.

**Directions: Discuss all possible causes of action, defenses, and probable resolution of them. Confine your answer only to the liability and claims of any named parties, companies or entities (for instance, do not sue the State of Bliss, the doctor, or the cow) and only to tort theories we have discussed this semester. Clearly caption each tort and defense.**

Torts I Final Fall 2002 Answer Key

Question 1: Multiple Choice (20%) \_\_\_\_ correct x 3 points =

Question 2: Essay (80%)

\_\_\_ 5 Sill v. BNR Negligence (explanation of DBCD)

\_\_\_ 5 duty R co.; super. knowledge of fences and dangers Hill v. Sparks

\_\_\_ 10 breach oblig. to maintain fences: cost of fence monitoring astronomical v. risk analysis, BPL Carroll Towing, Rest. 291-292, Bernier v. no breach bk industry custom is to rely on complaints, but custom doesn't justify negl procedure, T.J. Hooper; fact of injury not negl Gift v. Palmer; Sill in best position to control risk, unreas to assume RR can fix all fences Stinnett v. Buchele

\_\_\_ 10 causation: but for & proximate cause: is type of harm (car plus cow, rather than train plus cow) reas. foresee, Derdarian; foresee animals might escape sagging fences in farmland and cross road, Wagon Mound; within scope risk?, Medcalf v. consequences foreseeable, even if manner of occurrence (cow + explosion) isn't, Hughes; extent injury need not be foresee, since type of harm is Hammerstein; D argues cause was Sill's bad driving; Chitwood superseded. cause re elbow injuries, Sill had reached a position of safety, Ventricelli, but still in a greater position of risk because of RR's negl., Marshall

\_\_\_ 5 Sill's damages, lost potential earnings (\$10,000/yr?), med bills, pain Copeland

\_\_\_ 5 eggshell plaintiff rule: although burning tires caused fumes that triggered allergic sensitivity, D takes P as is and D still responsible for consequences of Sill's pre-existing allergies and susceptibility to fumes, breathing difficulties, oxygen

\_\_\_ 5 hedonic damages for loss of golfing pleasure; typically not freestanding, but included in pain & suffering

\_\_\_ 5 loss of chance re career aspiration in P.E. Wollen Fennel, but low grades, worked retail and had not sought teaching positions

\_\_\_ 5 failure to mitigate damages: no regular physical therapy as prescribed by doc

\_\_\_ 10 Sill v. BNR – NPS violation of § 389.650 (maj. view establishes duty & breach) statute mentions cattle guards, animals and persons thus envisions public and cow escapes v. liab. only for damages to “persons on the RR right of way,” not for the benefit of motorists on the highway Wright v. Brown; although statute provides for tort liability, Tedla, not for this class of persons or these risks (car + cow, with no train involved)

\_\_\_ 5 was violation of statute cause of the accident? No witnesses, but post-accident inspection shows fence sagged 18” off the ground, which a cow could step over

\_\_\_ 5 Impson: given extent of RRs, impossible to conform to std for all fences; diligent, but unable to comply Rest. 288A; custom. viol. of RR industry no excuse, Miss. Power

\_\_\_ 5 Sill v. BNR – RIL elements of RIL, Valley Properties v. Steadman's; establishes D, B, C; use when caus uncertain; RIL in comparative state, no exclusion of P's fault and other causes” required Giles; both RIL & straight negl. bk incomplete explan. Widmyer

\_\_\_ 5 negl. m/b more likely than not the explanation Byrne v. Boadle; presence of unrestrained cow on the highway = negl., Escola, but whose? was the gate left open?

\_\_\_ 5 “bringing fault home to D” within scope of RR’s duty to maintain fence; fence sags, Warren; if Bliss requires super. know. of fences, like Hale, D is charged with know.

\_\_\_ 5 Sill v. O’Leary – RIL odd against 2 separate Ds; children as other cause?

\_\_\_ 10 Sill v. O’Leary – Negl. re cow out: super. know. re gate? Hill v. Sparks; burden of locking gate and checking is low compared to harm, Carroll; she has never had a cow get loose before, but has seen the gate open, so cows out are foreseeable, but facts unclear

\_\_\_ 5 Sill v. Chitwood – Negl. duty to react reas, saw 2 cars, no emergency instruc., Lyons, distracted, “attention fixed on Helfgot” but “slowed signif.”; damages rt. elbow

\_\_\_ 10 Joint & several liability of O’Leary and BNR re fire injuries bk tortfeasors contrib to an indivisible injury Landers v. East Texas or at least obscured causation; re damage to Sill’s right elbow, Ds1&2 (O’Leary & BNR) created risk and D3 (Chitwood) caused, but O’Leary & BNR still responsible for it too, Anaya

\_\_\_ 10 Contrib negl: saw 1<sup>st</sup> cow 100 yds., “didn’t slow down much,” hit Bessie, the 2<sup>nd</sup> cow, dark cow at dusk, Butterfield; “staggering partly on the road” but away from car fire

\_\_\_ 5 Bexiga: this is precisely the negl that RR should guard against, McNamara

\_\_\_ 5 Implied AOR: a known risk given cow #1 and driving home (knew area) v. no choice of alternatives or apprec., not voluntary encountering of risk Rickey v. Boden

\_\_\_ 10 O’Leary/Helfgot/Chitwood v. BNR – NPS but liab only for animals “on RR right of way,” not highway, Wright; was cause statute or gate? foresee. since land abuts tracks

\_\_\_ 10 O’Leary v. Sill – Negligence (driving) injured cow; not trespass to chattel or conversion, no intent; RP in emergency situation (brown cow at dusk), but Sill saw the first cow, was on notice, and “did not slow down much”

\_\_\_ 5 Contrib. negl. by O’Leary re gate and not reporting sagging fence (fact questions)

\_\_\_ 10 O’Leary v. Helfgot – Conversion/Trespass chattel of cow: intended to exercise substantial dominion “to put cow out of its misery”; question whether Helfgot should pay the full value. Rest. 222 factors (good faith, humane action to avoid misery, chattel already damaged). Like Dillon v. Twin States damages should be discounted by cow’s value or life expectancy; no IIED – humane, not outrageous act; no evidence of SED

\_\_\_ 5 Implied consent defense; public or private necessity defense Surroco v. Geary

\_\_\_ 10 Helfgot v. BNR/O’Leary/Sill – Negl. rescue foreseeable, Wagner; if Helfgot was reckless dragging 500 lb. cow, no recovery Sears v. Morrison; process of rescue over, Lambert; goes to jury in comp. state Govich; AOR; contrib. negl. since he killed Bessie

\_\_\_ 5 Helfgot v. O’Leary – Assault (“you stupid jerk”) elements; words alone rarely create apprehension Dickens v. Puryear, but backing away = apprehension; no purpose or sub cert. re apprehension of *contact*, Garratt, just venting, and Helfgot misstepped

\_\_\_ 5 Helfgot v. O’Leary – IIED, not reckless, Chuy, no SED; 1<sup>st</sup> A. defense Falwell

\_\_\_ 5 § 20-658 comparative equal fault bar (P can recover if 49% or less at fault)

\_\_\_ 10 Innovative arguments/thorough analysis

\_\_\_ 10 Composition, grammar, use of complete sentences, clarity, cogency of writing

\_\_\_ 5 Organization

\_\_\_ 230 possible

It is understood by the student whose Student Number is entered below that this examination is given and the student's response is made and submitted pursuant to the conditions and provisions of the Honor Code.

Student Exam No. \_\_\_\_\_

UNIVERSITY OF MISSOURI-KANSAS CITY  
SCHOOL OF LAW

TORTS I  
Professor Levit

Fall Semester, 2004

FINAL  
(3 hours)

Instructions

1. Read each question carefully and pay close attention to the facts and to what the question is asking you to do. Discuss all issues presented by a question. Remember to argue issues both ways. Do not engage in a discussion of issues not raised.
2. I have included all of the facts I think you will need to answer the questions. If a necessary fact is missing, please identify it in your answer and explain how it affects your conclusion.
3. Nothing is intentionally ambiguous. If anything about a question appears to be ambiguous, decide what you think is meant, tell me what you think is meant, and answer the question accordingly. No reasonable resolution of an ambiguity will be penalized.
4. Please write legibly, because I can only give credit if I understand what you write. Only answers written in the blue book will be given credit.
5. Think before you write. Organize your answer. You get extra points for clarity and succinctness. You are penalized for an answer that is disorganized and confusing.
6. In answering this exam you may use your casebook, any supplementary materials handed out for class, and any outlines or notes you yourself have prepared. You may not use commercially prepared outlines or hornbooks or outlines prepared by other students. The applicable law is the law of this State, the State of New Madrid, which consists of all cases in your casebook and any cases discussed in class.
7. This exam consists of 14 pages. It is an Honor Code violation to copy or photocopy any part of this exam or to fail to turn the exam itself in at the end of the test. **TURN IN THIS EXAMINATION WITH YOUR BLUE BOOKS.** Good luck!

## **Question 2: Essay**

(75%)

Two prosecutors in the district attorney's office, Aiden Arkin and Bella Brazelton, are upset at the outcome of the 2004 state congressional election. They begin talking at work about what to do to win back the seat in the next election. They decide to begin the grassroots campaign early, taking it from their workplace to their neighborhoods, and then to the streets and the airwaves. They begin at work by talking to co-workers who they think might agree with their views. A few are receptive to their overtures. Most are weary after the 2004 election and just have no interest in discussing politics. After several informal lunches and after work meetings, Aiden, Bella and several other interested parties arrange to hold a political meeting at Aiden's house. Bella tries to talk her secretary, Frances Finney, into coming to the meeting. Frances is mostly apolitical, but feels she should attend to please her boss. To make sure only sympathetic supporters attend, Aiden and Bella print a handbill to distribute. However, since they are not sure that even those who are invited will share similar views on what to do, a sentence at the bottom of the handbill advises that discussion might be heated and quotes John Fitzgerald Kennedy, "Those who make peaceful revolution impossible will make violent revolution inevitable."

An investigator in the prosecutor's office, Cary Carruthers, who holds opposing political views, discovers a copy of the handbill wadded up on the floor near a trashcan. He smooths it out and makes several copies of it, which he passes along to his politically active friends. They are upset that Aiden and Bella have been using the prosecutor's office as a launching pad for political activity. They think this is in violation of the state Hatch Act and decide to hold a protest Aiden's house. Cary and his friends prepare signs saying "Keep Partisan Political Activity Out of the DA's Office" and "Hatch-et Job."

On the night of the protest, as Aiden, Bella and the others hold their meeting, Cary and his friends stand on the sidewalk in front of Aiden's house and hold their signs. After about an hour of holding their signs in the cold and not being noticed, they move onto Aiden's lawn and begin to chant, "Hatchet Job!" Aiden looks out the window, notices them, wonders how they knew about the meeting, and becomes extremely angry. Aiden emerges from his house, followed by Bella and Frances. Seeing the small crowd, Frances decides to slip away and moves down the driveway toward her car. Aiden picks up a rock and yells at Cary, "Get out of my neighborhood!" Cary yells back a few choice epithets. Bella comes out behind him, sees Aiden with the rock, and says, "Shut that jerk up!" Aiden heaves the rock at the sign held by Cary. The rock misses the sign, but grazes Frances's arm.

At just this time, DeAnne DeLong, an arthritic 82 year-old with high blood pressure, is driving along the street in her car. She is already driving well under the posted speed limit of 25, but slows even further when she comes upon the protestors. When the rock makes several people in the crowd move into the street, this startles DeAnne who swerves out of her lane, nearly hits a tree, and jerks the wheel. Her car spins and comes to rest in the opposite lane. She is trembling with fear. After several cars bear down on her and honk at her for being in their lane, she turns her car around and proceeds on her way. Following this incident, DeAnne's blood pressure skyrockets, and she has severe headaches.

Watching all this unfold on the street outside his house is Aiden's neighbor, Evan Evans, a concert pianist and winner of the Gold Medal at the 14th Annual Van Cliburn International Piano Competition. As Evan sees the two groups yelling at each other, the rock throwing incident, and DeAnne's car swerve, he decides to do something about it. He goes out in his front yard, yells to Cary's crowd to disperse, and when no one listens to him, he goes to the side of his house, turns on his garden hose on full force and points it at Cary. The cold water effectively disperses the crowd, but the force of the water knocks Aiden's glass gazing ball off of its stand in the garden and it shatters.

As Cary runs across Evan's yard to get to his car, somehow a guide wire holding the flag pole in Evan's front yard is dislodged. The pole collapses and spears Evan's left hand as he raises it to shield himself from the falling pole. Evan lies moaning in his front yard, begging his neighbor Aiden to call for help. Aiden is busy picking up the broken glass pieces of his gazing ball and trying to calm himself down. Finally, he dials 911 for Evan. The neurosurgeon who treats Evan says that in all probability, he would have retained much better use of his left hand if there had not been a delay in calling for emergency assistance.

**Directions: Discuss all possible causes of action, defenses, and probable resolution of them. Confine your answer only to the liability and claims of any named parties or entities (for instance, do not sue the State of New Madrid, the prosecutor's office, or any political parties) and only to tort theories we have discussed this semester. Clearly caption each tort and defense.**

The jurisdiction has the following statutes:

New Madrid § 7324 (Hatch Act)

State and local officers and employees may not:

- (1) use official authority or influence for the purpose of affecting the result of an election or a nomination for office; or
- (2) coerce or attempt to coerce a subordinate to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or
- (3) take an active part in political management or in political campaigns.

A state or local officer or employee retains the right to vote to express opinions on political subjects and candidates.

Penalties for violation of this section include the removal of the officer or employee or a fine in the amount of two years of the offender's salary.

New Madrid § 604.01

Contributory fault does not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death, injury to person or property, or in economic loss, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed must be diminished in proportion to the amount of fault attributable to the person recovering.

END OF EXAM

Torts I Final Fall 2004 Answer Key

Question 1: Multiple Choice (25%) \_\_\_\_\_ correct x 4 points =

Question 2: Essay (75%)

\_\_\_ 5 A & B v. C—TC/Conv. (copying handbill) exercise sub. dominion, but no damages to property v. Moore v. Regents; property abandoned as trash

\_\_\_ 5 Implied consent to distribution v. consent limited to like-minded, Bailey

\_\_\_ 5 C, D, E & F v. A & B—NPS (Hatch Act)(establishes duty and breach)

\_\_\_ 10 evaluation of terms of statute: (1) A & B used influence, but attempt to affect future elections; (2) attempted coercion of F to contribute her time to their political causes; (3) active political movement, but not management or a current campaign; not acting in official capacity re lunches or mtgs after work

\_\_\_ 5 class of persons (public or ees who might be pressured?), scope of risks (purpose to foster public perception of impartial gov't officials and avoid political unrest v. partisan political influence, not physical risks at rallies) Wright v. Brown; D not class, F is, C?

\_\_\_ 5 causation—even if foreseeable that violation of statute would lead to political unrest; intervening intent. acts of many people and events break causal chain, Watson

\_\_\_ 5 statute inappropriate Rudes (aimed at clean political process, not safety v. effect of corrupt process is violence); prohibited conduct not clear

\_\_\_ 5 fines, no damages in statute indicates no civil remedy, no std. of care Tedla

\_\_\_ 5 1<sup>st</sup> A. defense pol. speech, Fallwell; stat. has defense of rt to express pol. opinions

\_\_\_ 5 C & F v. A & B—Negl. (creating risky situation with handbill and meeting)

\_\_\_ 5 explanation of elements

\_\_\_ 5 duty based on RP std. Stewart v. Motts; as DAs, superior know. of risks of law violating and situations escalating? Hill

\_\_\_ 10 breach Indiana Consolidated BPL Carroll Towing §§ 291-292 (# people affected, tried to get more like F to come, value of political rally in democracy, even if small likelihood violence); no know. protestors were coming; A held event at his home v. A position control, Stinnett; risks v. utility of confront. protestors, Bernier

\_\_\_ 5 but for meeting, all Ps would have avoided injury, Salinetro

\_\_\_ 10 prox. cause: handbill anticipates violent rebellion v. purpose of handbill to avoid dissenters; harm a for. consequence of heated debate, Wagon Mound; occurred in manner expected, Medcalf; all Ps in greater position of risk, Marshall; intervening acts superseded.

\_\_\_ 5 damages—C no damages from rock, Ponder; water damage his responsibility

\_\_\_ 5 were A & B reckless in organizing?

\_\_\_ 10 CN/AOR by C & F—vol. encounter of known risk Rickey v. Boden; handbill express AOR; meaning of “violent revolution inevitable”—is it fair warning of risks of home mtg; some risks come with their own warning, Halek

\_\_\_ 5 D v. C—Negl. (gathering crowd to protest in residential areas)

\_\_\_ 5 D, C & F v. B—Negl. (encouragement) was B. at least sub. factor, Anderson; harm to F was same type as for., but not for C & D; A’s rock-throwing superseded., but precisely what was encouraged, Concord Florida

\_\_\_ 5 D, C & F v. A—Negl. (rock throwing)

\_\_\_ 5 mere happening of an accident is not negligence, Gift v. Palmer

\_\_\_ 10 prox. cause—drivers foreseeable on a street, Palsgraf v. not invited member of public and not w/in scope of risks, Medcalf; manner and extent of injures need not be foreseeable, Hughes, § 435; crowd movement as intervening super. act or for. consequence of throwing rock at a crowd Derdarian; reached position of safety with no scratches, Ventricelli v. risk did not terminate (“cars bearing down”), Horton

\_\_\_ 10 No damages (fear alone, no contact v. BP and headaches) Copeland; HBP preexisting condition, Carlson v. K-Mart, but D can be responsible for aggravation under eggshell skull rule, *if* negl. action complete; damages ltd. by age? Dillon; extent of damages need not be for., Hammerstein, McCahill; med. monitoring required?

\_\_\_ 5 D v. A, B, C—RIL (elements, satisfies DBC, Valley Prop.) cause of swerve uncl.

\_\_\_ 5 can’t bring fault home to multiple Ds, no excl. control, Eaton, other factors, crowd, Warren; cannot use both RIL and straight negl. unless incomplete explan. Widmeyer

\_\_\_ 10 A, B & C jt. & several liability. A & B concerted action under Robicheaux rule; A & B created orig. risk of for. injury; A B & C tortious acts combine to produce indivisible injury, Landers v. East Texas; negl. of each obscures causation, BOP shift, Summers

\_\_\_ 5 Contrib. negl. of D—arthritic, overreactive driving? Not paying atten. Butterfield v. driving under speed limit or not slow enough; AOR—assumed risks of pedes., not mob

\_\_\_ 5 Acting reas. in emerg., Lyons; Effect if Ds are reckless; Not Bexiga situation

\_\_\_ 5 § 604.01 greater fault comparative statute—P can recover if 50% or less at fault with proport. damages reduction; maj. rule requires her fault to be = or less than all Ds

\_\_\_ 5 A v. C—Trespass to Land (intent + phys. invasion of real prop.) E v. C—TL (yard)

\_\_\_ 5 consent from open invitation in flyer, scope of consent exceeded, flyers to like-minded, not protestors, Ashcraft, revoked at “Get out” Bailey

\_\_\_ 10 A & B v. C—IIED (protesting, epithets, home invasion): elements; rudeness, yelling, repeated chants but short time, public humiliation in neighborhood, but no power position (C is an investigator, A is a prosecutor) Taylor v. Metzger, so prob. not outrageous; no evid. of med. signif. or diag. severe emot. distress, Ford v. Aldi; 1<sup>st</sup> A. defense of words alone, Fallwell; D no witness claim, Homer, not even reckless re her

\_\_\_ 5 Public Necessity defense (elements), Surroco v. Geary v. Private necessity, so liable for any damages, Ploof

\_\_\_ 5 protecting political rep of department v. balancing test in favor legal process; C not without fault in creation of situation

\_\_\_ 5 C v. A & B—Assault (rock), def., TI from TC; B words alone, Dickens defense

\_\_\_ 5 C v. A & B—IIED (“Get out” + rock) although power position, Taylor, conduct doesn’t amount to more than assault, GTE v. Bruce, no severe emot. distress

\_\_\_ 5 A Defense of property w/ reas. force, Katko; was rock excessive, “Get out” request to leave first; can threaten more force than use, Brown v. Martinez, so privileged

\_\_\_ 5 Defense of third parties (rock less than riot v. provoked it); Bella 1<sup>st</sup> A. defense

\_\_\_ 5 F v. A—Battery (rock)/Assault (if saw it), def., TI (from assault to C) Alteiri v. Colasso; sub. cert. from rock into crowd? Garrett; “grazing” sufficient contact, Leichtman

\_\_\_ 5 F does consent to meeting extend to consequences? Actions exceed scope of consent given, Ashcraft consent under duress since F feared losing her job, Reavis

\_\_\_ 5 C v. E—Battery/Assault (hose) if smoke can make contact, so can H2O Leichtman

\_\_\_ 5 A v. E—T.C./Conversion (gazing ball) defs; no intent to ex. sub. dom., no faulty intent, Van Camp v. TI assault; TL (water) causing object to enter enough; ext. conseq.?

\_\_\_ 5 Evan necessity defense—even though decisionmaker affected too, protecting his own turf, not a direct threat to his interests, probably public, since aiding a small segment of the public, like D. Harm avoided (dispersed a riot) greater than harm caused (water damage), Surroco. Not required to pay for gazing ball.

\_\_\_ 5 Evan defense of others (e.g., D): hose reas. apparent need, reasonable in degree, responsive v. call the police (anything else is excessive)

\_\_\_ 5 Citiz. arrest for misd. breach of peace, Great Atlantic, but dispersing not holding

\_\_\_ 5 A involved in illegal activity re Hatch Act, Zysk, Barker v. Kallash

\_\_\_ 5 A v. E—Negl. (gazing ball) risk-utility balanc., expectable result? Wagon Mound if privileged defense to IT, should not be liability in negligence

\_\_\_ 10 E v. C—RIL—guide wires don’t usually dislodge w/o negl.; hard to bring fault home to C (occurred when C ran across yard, so C in control at time of probable negl., Escola, Eaton v. no excl. control by C; E’s pole; other causes crowd or H2O); wd C or E have super. know.; since comp. fault system, E doesn’t have to exclude own fault, Giles

\_\_\_ 5 E v. C—Negl. (pole injury) unreas. speed v. RP run away from H2O; circum. evid. can prove breach, Forsyth; rescue doc.; rescue for., Anaya v. not resc. anyone, Lambert

\_\_\_ 5 E v. A—Negl. (delayed 911 call)—A has no duty to act v. created risky situation

\_\_\_ 5 non reckless rescue is no liability situation; no compar. inst. re A’s fault, Ouellette v. Carde v. rescuer’s fault considered as comp. negl. Govich v. North Am. Sys.

\_\_\_ 5 E v. A—Loss of chance/hedonic damages from losing piano playing ability Wollen

\_\_\_ 5 CN/AOR by Evan: assumed all risks of tumult, by spraying water, Crews v. Hollenbach v. flag pole falling is an unfor. hidden risk, Bjork v. Mason or rare, Bass

\_\_\_ 5 Organization

\_\_\_ 5 Use of captions

\_\_\_ 5 Composition, grammar, use of complete sentences, clarity, cogency of writing

\_\_\_ 5 Use of cases and Restatement authority

\_\_\_ 10 Innovative arguments/thorough analysis

It is understood by the student whose Student Number is entered below that this examination is given and the student's response is made and submitted pursuant to the conditions and provisions of the Honor Code.

Student Exam No. \_\_\_\_\_

TORTS I

Fall Semester, 2007

Professor Levit  
FINAL  
(3 hours)

Instructions

1. Read each question carefully and pay close attention to the facts and to what the question is asking you to do. Discuss all issues presented by a question. Remember to argue issues both ways. Do not engage in a discussion of issues not raised.
2. I have included all of the facts I think you will need to answer the questions. If a necessary fact is missing, please identify it in your answer and explain how it affects your conclusion.
3. Nothing is intentionally ambiguous. If anything about a question appears to be ambiguous, decide what you think is meant, tell me what you think is meant, and answer the question accordingly. No reasonable resolution of an ambiguity will be penalized.
4. Please write legibly, because I can only give credit if I understand what you write. Only answers written in the blue book will be given credit.
5. Think before you write. Organize your answer. You get extra points for clarity and succinctness. You are penalized for an answer that is disorganized and confusing.
6. In answering this exam you may use your casebook, any supplementary materials handed out for class, and any outlines or notes you yourself have prepared. You may not use commercially prepared outlines or hornbooks or outlines prepared by other students. You may use a dictionary and a legal dictionary. The applicable law is the law of this State, the State of Grace, which consists of all cases in your casebook and any cases discussed in class.
7. This exam consists of 18 pages. It is an Honor Code violation to copy or photocopy any part of this exam or to fail to turn the exam itself in at the end of the test. **TURN IN THIS EXAMINATION WITH YOUR BLUE BOOKS.** Good luck!

**Question 1: Multiple Choice**  
(42 questions; worth one-third of the points)

**Directions: Determine the single most appropriate answer for each question, and write the letter of that answer in the bluebook or type it on your paper. If I cannot tell what your answer is or if you have indicated more than one choice, you will receive no credit for the problem.**

**Question 2: Essay**  
(worth two-thirds of the points)

Carol Norman started working for her employer Executrain in December of 2006. Executrain owned the building in which the company was housed. Beginning in July of 2007, the ceiling lights in Carol's office did not work. She asked the building manager, Tomas Prather, to fix it, but after several days of delay, Carol again complained to Tomas. He took her to a storage area where she found a large desk lamp to light her office. Several days after that, Carol passed Tomas in the hall and he asked her how the desk lamp was working. "It is working well," Carol said, "It actually puts out more light than that weak ceiling fixture did." "You okay, then?" Tomas asked. "Yes, that's working fine for now until you can get around to the ceiling light." Carol replied.

On Monday, November 5, 2007, Carol arrived at work at approximately 6:45 a.m., when it was still dark outside. She was running late for a 7:00 a.m. presentation and still had to assemble some paperwork for the meeting. As Carol hurried into her office, which she described as "totally dark," she tripped and fell over a box right inside the doorway on the floor in her office. Carol struck her left eye on the corner of her desk, functionally blinding her in that eye. She also put her arm out to brace her fall and dislocated her elbow.

When she tripped, she knocked her desk chair into a surge protector on the floor that furnished power for her computer equipment. This caused a short in the surge protector and a fire began. Carol saw the burst of flame and staggered out of her office. The smoke from the fire activated the smoke detector, which automatically notified the fire dispatch service. The call rang to the 24 hour dispatch service, Fires 'R Us; however, Molly Gornau who was working the desk had just stepped away from the switchboard to get a donut. When Molly went to the adjacent break room, she caught up with a co-worker and chatted for a few minutes. Molly's back was to her lighted switchboard, but after they had chatted for several minutes, the co-worker noticed a light flashing behind Molly and alerted her.

When Fires 'R Us purchased its switchboard system a number of years ago, it had a choice between a system that operated on lights and one that operated with ringing bells. The flashing lights system was less expensive than one with sound, the sound signals model did not have distinct sounds (so that if more than one call came in at once, there was a risk of cutting off an incoming call), and because two of its primary four dispatchers, including Molly, were hearing impaired, the company decided to purchase a system that operated with flashing lights on the switchboard. By the time Molly dispatched the nearest fire crew, the fire had consumed most of Carol's office.

Tomas rushed to the scene immediately and found Carol shaking outside her office and

whispering, “I can’t see out of my left eye. I can’t see . . . Take me to the hospital.” Tomas tried to calm her down, found a chair for her to sit in, and ask her what happened, but she was too upset to say much more than “I tripped on something. I can’t see out of my left eye. I’m afraid I’ll go blind.” When Carol again asked Tomas to take her to the hospital and started to stand up, he held up his hands in a “wait” gesture and said, “I don’t want to move you. The firefighters should be here in just a minute. Let’s stay put so we can tell them what happened. They’ll have some medical knowledge too.” Once the firefighters reached Executrain, they found that several of her co-workers had used hand held fire extinguishers to put out the blaze. Just inside the door of Carol’s office were the charred remains of a box, but it was impossible to tell what had been in the box. The injury to Carol’s eye turned out to be retinal detachment and the delay in treatment resulted in a permanent loss of vision in her left eye.

According to Carol, the box was not there when she left work for a meeting about 3:00 on Friday afternoon. Carol’s secretary says he remembers a delivery late Friday from Speed Ex and he just told the Speed Ex delivery driver, Walker Sorenson, to put the box on Carol’s desk. When he was called several weeks later and asked about the situation, Sorenson remembers making a delivery to Executrain, but says he does not remember specifically where he delivered the box.

The state of Grace has several statutes and ordinances that may be relevant to your analysis:

Grace Statutes Annotated § 78-2-6

In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant’s contributory fault, but does not bar recovery. “Fault” includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others.

Grace Statutes Annotated § 51-3-1

An owner or occupier of land has a duty to keep its premises reasonably safe and is liable in for damages caused by his failure to exercise ordinary care to keep the premises safe.

Grace Administrative Code § 27-127

(A) Every building or portion thereof must be provided with a means of egress. All . . . means of egress . . . that are required in a building shall be maintained in good working order.

(B) A means of egress is an exit system that provides a continuous, unobstructed and undiminished path of exit travel from any occupied point in a building or structure to a public way.

**Directions: Discuss all possible causes of action that Carol might have (yes, Carol is your only plaintiff), defenses, and probable resolution of them. Confine your answer only to the liability and claims of any named parties or entities (for example, do not sue the firefighters, Carol’s secretary or Molly’s co-worker) and only to tort theories we have discussed this semester. Clearly caption each tort and defense.**

**REMEMBER TO TURN THIS EXAMINATION IN WITH YOUR BLUE BOOKS!**

Torts I Final Fall 2007 Answer Key

Question 1: Multiple Choice (one-third) \_\_\_\_\_ correct x 3 points =

Question 2: Essay (two-thirds)

\_\_\_ 5 Carol v. Tomas, Executrain—Negligence—explain negligence D, B, C, D; duty RP under circs. std. Stewart v. Motts

\_\_\_ 5 superior knowledge of building maintenance=higher degree of care? Hill v. Sparks

\_\_\_ 5 duty to provide reas. safe workplace, Siragusa; duty to maintain building

\_\_\_ 10 breach BPL Carroll Towing (negl when risks outweigh utilities); §§ 291-292; probability of harm from lack of lighting small or significant, # persons affected low v. burden of fixing ceiling light minimal, company has dedicated building manager; suff. time to address danger and avoid fall, Thoma v. Cracker Barrel; when employee's knowledge of dangers exceeds employer's, employer not liable, Stinnett v. Buchele (Carol encountered lighting every day); Tomas says he did not act unreasonably under circs. Indiana Consol. v. Mathew

\_\_\_ 5 but for failure to fix ceiling light, would Carol have been injured? Salinetto. Δ's conduct a sub. factor, Anderson (box and bad lighting possibly concurrent suff. causes)

\_\_\_ 10 prox. cause: Risk of poor lighting might just be eye strain v. injury from lack of lighting can occur in many ways—a trip is one possible risks, Carol is a foreseeable Π, Palsgraf; manner of occurrence, Hughes, § 435, and extent of harm, Hammerstein, need not be foreseeable; fire not foreseeable, Wagon Mound; in position of safety after Tomas found the desk lamp, Ventricelli, Tomas argues that Walker's negl. and Carol's hurrying both supersede, but dangers Δ must guard against don't supersede, Derdarian. Rescuer (Molly, Tomas) negl. anticipatable, Anaya; Oulette

\_\_\_ 5 damages, Preston, Copeland; dislocated elbow, blindness in one eye, pain and suffering, lost wages; responsible for foreseeable injuries, even if extent not foreseeable, Hammerstein; hedonic damages from loss of sight included in general pain and suffering

\_\_\_ 5 Carol v. Tomas—Increased risk of blindness Alexander v. Scheid (unspecified percentage of greater risk, so can't tell if substantially increased risk. If provable, damages proportional to probability risks, Lord v. Lovett

\_\_\_ 10 Joint and several liability betw. Tomas, Walker/SpeedEx and possibly Molly/Fires—was injury indivisible because occurred from combination of bad lighting and bad box placement, Landers; did the negl. of each obscure the causal issue? Summers; most likely Tomas (Δ1) created risk, and Walker (Δ2) caused injury = each resp. all Π's damages

\_\_\_ 5 Carol v. Executrain—Respondeat superior for Tomas, Leichtman

\_\_\_ 10 Carol v. Executrain—NPS (G.S.A. § 51-3-1)—satisfies duty and breach. Duty to keep premises safe violated by not fixing light. While Carol in class of persons on premises, scope of risk more difficult, Wright v. Brown: it is a general safety statute, but injury came from box delivered to premises. Evid. effect in maj. juris., NPS. “duty to keep its premises reasonably safe” just repeats ordinary care std. and doesn't add anything, Rains; lacks a clear standard

\_\_\_ 10 Carol v. Executrain—NPS (G.A.C. § 27-127)—Ord. definition of “means of egress” defined as “path of exit travel . . . to a public way”; Carol was coming in, not exiting; box didn't block her means of egress. Is ord. applicable to these risks—does leg. history say if intended just for fire safety

or multiple risks. Admin. code only some evidence of negl. Executrain didn't know or RTK of need for compliance, since Carol stopped complaining and didn't see placement of box v. should have checked, Impson. Building code, so probably not applicable to Walker's conduct.

\_\_\_ 5 were violations of statute and ordinance cause of injury? Intervening factors (box, trip)

\_\_\_ 10 CN defense—(hurrying because running late)—reas. people don't run into "totally dark" offices; risk-utility balance (late v. serious injury); but for, prox. cause—accident foreseeable, Wagon Mound; damages; extent harm need not be for. Hammerstein. Although Π may have had LCC to avoid injury, Davies, doctrine doesn't survive adoption of comparative negl.

\_\_\_ 10 AOR (Carol expressly assumed risk of no ceiling light)—vol. acceptance of known risk, Rickey v. Boden, agreed to poor lighting + knows it is dark v. no subjective apprec. of this risk, and no choice, doesn't relieve Δ of duty to maintain safe workplace, Siragusa, Crews; not a rec. activity, but perhaps a concealed risk, Sunday; Carol said "working well," acceptance limited because she said, "fine for now until you can fix it"—is four months later a reasonable amount of time v. she did not complain again. Reduces damages in comparative jurisdiction.

\_\_\_ 5 Bexiga survives in comparative jurisdiction, but even if this was anticipatable CN, is there an econ or policy reason to make Δ resp. for Carol's contributory negl.? Unlike McNamara no custodial duty but employer in better financial position to make building repairs

\_\_\_ 10 Carol v. Molly/Fires 'R Us—Negligence (delay dispatch)—duty to monitor switchboard v. need breaks; burden of watching switchboard low, prob. missed call and gravity of loss enormous, Carroll Towing; utility of chatting with co-workers low; foreseeable that missed call could lead to personal injury damages; reas. hearing impaired std. Shepherd but no diff outcome

\_\_\_ 5 Carol v. Molly/Fires 'R Us—Lost chance of substantially better outcome bk of delay, can recover prop. damages even if less than 50% chance to start, Lord v. Lovett; delay a sub. factor in vision loss, Anderson; argues Tomas supersedes

\_\_\_ 10 Carol v. Fires 'R Us—Negligence (lighted system). Lights less expensive than bells, but compare added costs (or hiring another worker) to possible loss of lives, Bernier v. Boston Edison Responding to needs of hearing-impaired employees v. hiring hearing impaired on emergency switchboard not sensible; what would reas. 24-hour dispatch service do? Actual + prox. causation

\_\_\_ 5 Carol v. Fires 'R Us and Speed Ex—Respondeat Superior

\_\_\_ 10 Carol v. Walker/SpeedEx RIL (deliver box)—elements, establish DBC; causation is not uncertain, since Carol tripped over box; question whether more likely than not, Δ was negl?, Koch, Cosgrove, Valley Properties; Δ was in control at time of probable negligence, like Escola, but Carol in control at time of accident, Eaton (her office, she ran in, and she had agreed to accept risks of limited lighting), so query whether can infer that harm to Π was caused by Δ; while Π does not have to exclude own fault in compar. system, must elim. other causes (e.g., bad lighting) Safe pkg. delivery within scope of Δ's duty, Giles v. fact an acc. happened insuff. Gift v. Palmer

\_\_\_ 5 No RIL if specific evid. of causation, but can bring both RIL and spec. negl. (not in MO, Balke) if evid. doesn't fully explain. occurrence, Widmeyer; Walker/Speed-Ex have superior knowledge about delivery/causation, even if not req'd in most jurisdictions

\_\_\_ 5 Carol v. Walker Negligence (deliver box)—reas. delivery people should not leave boxes where tripping can occur; he was told to leave it on desk and cannot remember; but for box, Carol would not have fallen, and trip from box on floor is foreseeable

\_\_\_ 5 Carol v. Executrain—Negligence (slip and fall) any actual or const. know. of box? Thoma

\_\_\_ 5 Carol v. Tomas—False Imprisonment (in chair)—definition; weak, because words alone

and no intent (purpose or sub. certainty, Garratt) to confin. bounded area (chair?) v. psychol. confinement Wal-Mart v. McCann

\_\_\_ 5 Consent defense: agreement to sit v. consent under duress or during incapacity, Bailey

\_\_\_ 5 Carol v. Tomas—Negligence—purpose was not to jar her. Would Tomas have a duty to take her to the hospital? Std. reas. person in emergency situation, Wilson v. Sibert. Not unreasonable to wait for prof. rescuers

\_\_\_ 5 Carol v. Tomas—Lost Chance—deprivation of substantial chance of recovery, Lord v. Lovett v. she could have insisted or obtained her own transportation; future medical monitoring

\_\_\_ 5 Recognition Other possible Int. Torts (e.g., SpeedEx Battery, Tomas Assault) weak

\_\_\_ 5 G.S.A. § 78-2-6 is pure comparative fault (explain: no upper limit, damages reduced propor.) like Gustafson

\_\_\_ 5 Organization; Use of captions

\_\_\_ 10 Composition, grammar, use of complete sentences, clarity, cogency of writing

\_\_\_ 10 Use of cases and Restatement authority

\_\_\_ 10 Thorough analysis and innovative arguments

\_\_\_ 235 essay / multiple choice 126

**Leichtman v. WLW Jacor Communications, Inc.**

643 N.E.2d 697 (Ohio Ct. App. 1994).

The plaintiff-appellant, Ahron Leichtman, appeals from the trial court's order dismissing his complaint against the defendants-appellees, WLW Jacor Communications ("WLW"), William Cunningham and Andy Furman, for battery, invasion of privacy, and a violation of Cincinnati Bd. of Health Reg. No. 00083. In his single assignment of error, Leichtman contends that his complaint was sufficient to state a claim upon which relief could be granted and, therefore, the trial court was in error when it granted the defendants' Civ.R. 12(B)(6) motion. We agree in part.

In his complaint, Leichtman claims to be "a nationally known" antismoking advocate. Leichtman alleges that, on the date of the Great American Smokeout, he was invited to appear on the WLW Bill Cunningham radio talk show to discuss the harmful effects of smoking and breathing secondary smoke. He also alleges that, while he was in the studio, Furman, another WLW talk-show host, lit a cigar and repeatedly blew smoke in Leichtman's face "for the purpose of causing physical discomfort, humiliation and distress."

Under the rules of notice pleading, Civ.R. 8(A)(1) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." When construing a complaint for failure to state a claim, under Civ.R. 12(B)(6), the court assumes that the factual allegations on the face of the complaint are true. For the court to grant a motion to dismiss, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *Id.* A court cannot dismiss a complaint under Civ.R. 12(B)(6) merely because it doubts the plaintiff will prevail. *Slife v. Kundtz Properties, Inc.* (1974), 318 N.E.2d 557. Because it is so easy for the pleader to satisfy the standard of Civ.R. 8(A), few complaints are subject to dismissal. *Id.* at 560.

Leichtman contends that Furman's intentional act constituted a battery. The Restatement of the Law 2d, Torts (1965), states:

"An actor is subject to liability to another for battery if

"(a) he acts intending to cause a harmful or offensive contact with the person of the other \* \* \*, and

"(b) a harmful contact with the person of the other directly or indirectly results[; or]

"[c] an offensive contact with the person of the other directly or indirectly results."<sup>FN2</sup>

FN2. Offensive contact: See, generally, *Love* at 99-100, 524 N.E.2d at 167, in which the court: (1) referred to battery as "intentional, offensive touching"; (2) defined offensive contact as that which is "offensive to a reasonable sense of personal dignity"; and (3) commented that if "an arrest is made by a mere touching \* \* \* the touching is offensive and, unless privileged, is a 'battery.'"

In determining if a person is liable for a battery, the Supreme Court has adopted the rule that “[c]ontact which is offensive to a reasonable sense of personal dignity is offensive contact.” *Love v. Port Clinton* (1988), 524 N.E.2d 166, 167. It has defined “offensive” to mean “disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insult.” *State v. Phipps* (1979), 389 N.E.2d 1128, 1131. Furthermore, tobacco smoke, as “particulate matter,” has the physical properties capable of making contact. R.C. 3704.01(B) and 5709.20(A); Ohio Adm.Code 3745-17.

As alleged in Leichtman's complaint, when Furman intentionally blew cigar smoke in Leichtman's face, under Ohio common law, he committed a battery. No matter how trivial the incident, a battery is actionable, even if damages are only one dollar. The rationale is explained by Roscoe Pound in his essay “Liability”: “[I]n civilized society men must be able to assume that others will do them no intentional injury—that others will commit no intentional aggressions upon them.” Pound, *An Introduction to the Philosophy of Law* (1922) 169.

Other jurisdictions also have concluded that a person can commit a battery by intentionally directing tobacco smoke at another. *Richardson v. Hennly* (Ga. 1993), 434 S.E.2d 772, 774-775. We do not, however, adopt or lend credence to the theory of a “smoker's battery,” which imposes liability if there is substantial certainty that exhaled smoke will predictably contact a nonsmoker. . . . Finally, because Leichtman alleges that Furman deliberately blew smoke into his face, we find it unnecessary to address offensive contact from passive or secondary smoke.

Neither Cunningham nor WLW is entitled to judgment on the battery claim under Civ.R. 12(B)(6). Concerning Cunningham, at common law, one who is present and encourages or incites commission of a battery by words can be equally liable as a principal. *Bell v. Miller* (1831), 5 Ohio 250. Leichtman's complaint states, “At Defendant Cunningham's urging, Defendant Furman repeatedly blew cigar smoke in Plaintiff's face.”

With regard to WLW, an employer is not legally responsible for the intentional torts of its employees that do not facilitate or promote its business. *Osborne v. Lyles* (1992), 587 N.E.2d 825, 828-829. However, whether an employer is liable under the doctrine of *respondeat superior* because its employee is acting within the scope of employment is ordinarily a question of fact. Accordingly, Leichtman's claim for battery with the allegations against the three defendants in the second count of the complaint is sufficient to withstand a motion to dismiss under Civ.R. 12(B)(6).

By contrast, the [invasion of privacy] counts of Leichtman's complaint do not state claims upon which relief can be granted. The trial court correctly granted the Civ.R. 12(B)(6) motion as to both counts. Leichtman acknowledges that he willingly entered the WLW radio studio to make a public radio appearance with Cunningham, who is known for his blowtorch rhetoric. Therefore, Leichtman's allegations do not support his assertion that Furman, Cunningham, or WLW intruded into his privacy.

In his third count, Leichtman attempts to create a private right of action for violation of Cincinnati Bd. of Health Reg. No. 00083, which makes it illegal to smoke in designated public places. Even if we are to assume, for argument, that a municipal regulation is tantamount to public policy

established by a statute enacted by the General Assembly, the regulation has created rights for nonsmokers that did not exist at common law. Therefore, because sanctions also are provided to enforce the regulation, there is no implied private remedy for its violation. R.C. 3707.99, 3707.48(C); *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9* (1991), 572 N.E.2d 87, 89-90.

Arguably, trivial cases are responsible for an avalanche of lawsuits in the courts. They delay cases that are important to individuals and corporations and that involve important social issues. The result is justice denied to litigants and their counsel who must wait for their day in court. However, absent circumstances that warrant sanctions for frivolous appeals under App.R. 23, we refuse to limit one's right to sue. Section 16, Article I, Ohio Constitution states, "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

This case emphasizes the need for some form of alternative dispute resolution operating totally outside the court system as a means to provide an attentive ear to the parties and a resolution of disputes in a nominal case. Some need a forum in which they can express corrosive contempt for another without dragging their antagonist through the expense inherent in a lawsuit. Until such an alternative forum is created, Leichtman's battery claim, previously knocked out by the trial judge in the first round, now survives round two to advance again through the courts into round three.

**F. E. Bailey v. L. S. Belinfante**

218 S.E.2d 290 135 Ga. App. 574 (Court of Appeals of Georgia 1975)

Patient sued oral surgeon to recover for battery and negligent extraction of teeth. The Superior Court, Fulton County, Charles A. Wolford., J., granted directed verdict for oral surgeon, and patient appealed. The Court of Appeals, Pannell P. J., held that trial court properly directed verdict for oral surgeon as to patient's action for negligent extraction of teeth; that whether specific agreement to extract teeth rescinded patient's prior general consent to whatever operation surgeon felt necessary was a question for the jury; that whether hospital consent form signed by patient authorized surgeon to removal all of patient's teeth was a question for the jury; and that whether patient was competent to give consent to additional extraction of teeth directly before operation because of his drugged state was a question for the jury.

Reversed.

PANNELL, Presiding Judge.

Plaintiff brought an action charging defendant with battery and the negligent extraction of sixteen teeth without plaintiff's permission. At the conclusion of a jury trial, the defendant moved for a directed verdict and the trial judge granted the motion. Appellant alleges error in the court's directing a verdict for the defendant.

The evidence shows that on January 6, 1971, appellant went to the offices of Dr. Belinfante, an oral surgeon. Upon arrival, appellant filled out and signed an information chart containing the following language: "I agree for Dr. Lewis S. Belinfante to perform whatever surgery or treatment he feels is required and to use whatever anesthesia, local or general, he feels is best for my case." After an examination, appellee advised that eleven teeth should be extracted, and appellant agreed to surgery to remove same. On January 21, appellant entered the hospital and signed a "consent to operation" form, containing the following language: "I authorize the performance upon Franklin Bailey of the following operation, teeth extraction, to be performed under the direction of Dr. Belinfante. Two, I consent to the performance of operations and procedures in addition to or different from those now contemplated, whether or not arising from presently unforeseen conditions, which the above-named doctor or his associates or assistants, may consider necessary or advisable in the course of the operation."

Before the operation, Dr. Belinfante reviewed the patient's records and decided that all of the teeth (27) should be removed. The doctor testified that he told appellant just prior to surgery that all the teeth should be removed, and appellant replied, "You're the doctor." Appellant had been administered "pre-operative medicine" at the time of this alleged conversation. Appellant testified to no recollection of having seen the doctor prior to surgery.

Plaintiff testified that Dr. Belinfante had done a good job in removing his teeth, and that there was no quarrel with the work itself; the only question was whether the doctor should have taken out all of the teeth or only some of them. There was *no* testimony that the extraction was performed in a negligent manner, and accordingly, the trial court was correct in directing a verdict as to the action for negligent extraction.

Plaintiff's charge of battery was based on the "unconsented" removal of all of his teeth. "[A]n unauthorized surgical operation by a physician upon the body of his patient is a wrongful and unlawful act for which the surgeon will be liable in damages . . . In the relationship of doctor

and patient, as in other situations involving a touching of another's persons, consent to the act by the person affected negates the contact as an actionable tort." *Mims v. Boland et al.*, 110 Ga App. 477, 481, 482, 138 S.E.2d 902, 906.

Plaintiff testified that he never consented to the extraction of the additional sixteen teeth. Appellee contends that the two consent forms, signed by appellant, expressly authorized the doctor to perform whatever surgery he deemed necessary. He argues that this evidence conclusively established plaintiff's consent to the extraction of the additional teeth, and therefore, there was no question regarding consent for the jury to decide.

The first consent form was signed before appellant ever saw the doctor. Therein he authorized the doctor to perform whatever surgery he felt was required. Appellant had the right to withdraw this consent up until the operation was started. See *Mims v. Boland*, supra. The jury could have concluded that the subsequent agreement between appellant and the doctor, that eleven teeth were to be extracted, rescinded any prior general consent.

The consent form signed upon entering the hospital authorized different from those contemplated, which the doctor considered necessary "in the course of the operation." The jury could consider this form to only authorize a different operation if the necessity became apparent after the operation had already begun. This was not the situation here.

Further, appellee contends that he was given oral authorization when he told appellant of the need for the additional extractions, and the appellant responded, "You're the doctor." Appellant testified to no recollection of having seen the doctor prior to surgery or to having had this conversation with the doctor. "While ordinarily a jury should attach more weight to positive than to negative testimony, yet they are not absolutely bound to do so. Therefore, where the existence of a material and controlling fact in a case is strongly affirmed by positive testimony, and denied by other testimony, although somewhat negative in character, the question is issuable and can not be determined by the court as a matter of law . . . The want of recollection by some men of the existence of a fact might be considered as weighty as the positive recollection of some other men that the fact did not exist. The weight of the testimony, whether positive or negative, is for the jury, and ordinarily they are not bound to accept positive in preference to negative testimony." *Pendergrast v. Greeson*, 6 Ga.App. 47, 48, 64 S.E. 282. Plaintiff's testimony that he did not remember the conversation, as testified to by the doctor, created a question of fact to be resolved by the jury.

The jury could have concluded that appellant did not expressly or impliedly consent to the extraction of sixteen additional teeth. If he did not consent, the extraction constituted a technical battery. There being a conflict as to a material issue of fact, it was error for the trial judge to direct a verdict for the defendant.

Judgment reversed.

**Flom v. Flom**

291 N.W. 2d 914 (Minn. 1980).

Robert and Ruth Flom and their 5-year-old son and his friend went to a city park. Robert pushed the children on a manually operated merry-go-round. After some effort they coaxed Ruth Ann, the plaintiff, to ride in spite of her fear of “rides.” Robert pushed them a while, then let go. At this point he heard a “chattering sound” from the merry-go-round, observed it wobble and pitch 3-4 inches and attempted to stop it. The plaintiff, Ruth Ann, fell off at this point. After this event the city removed the merry-go-round and for repainting and found that it did not wobble at that time. An accident reconstruction expert testified that he also examined the merry-go-round and gave his opinion that a wobble, if any, could be no more than 1/8 of an inch of vertical movement. Nevertheless, the jury found for the plaintiff against the city. *Held*, affirmed. The city had a duty of due care to the plaintiff. “[T]he jury, through their prerogative as factfinders, could have discounted the testimony of the expert witness. The jury could have credited the Floms’ testimony that the merry-go-round in fact pitched and wobbled excessively, and reasonably inferred that such a substantial wobble could only have been caused by a defect in the mechanical structure of the merry-go-round, and from the specific nature of the defect that caused the wobble, the injury could further have inferred that the defect had existed for a sufficient period of time that the city should reasonably have discovered and repaired it. Under the circumstances, the jury could have found that the city was negligent in failing to repair the merry-go-round so that it would not pitch and wobble extensively.”

**Copeland v. Compton**

914 S.W.2d 378 (Mo. Ct. App. 1996)

Joe and Tracy Copeland (Plaintiffs) appeal from an adverse judgment entered pursuant to a jury verdict in their damage suit against Amy Nelson (Defendant) for her alleged negligent operation of an automobile.

Plaintiffs charge that there was a complete absence of probative facts to support the jury's verdict that Defendant was not liable and, consequently, the trial court erred and abused its discretion in denying their motion for a new trial on that basis. . . . We affirm.

Plaintiffs insist that Defendant conceded "liability" when her counsel made certain statements in the jury's presence to the effect that "fault" was not a significant issue in the case. They also point to trial testimony which tends to show that Defendant negligently operated her automobile. The flaw in Plaintiffs' position is their failure to recognize the breadth of meaning associated with the term "liability.

"In any action for negligence, the plaintiff must establish that (1) the defendant had a duty to the plaintiff; (2) the defendant failed to perform that duty; and (3) the defendant's breach was the proximate cause of the plaintiff's injury." . . . Liability is the conclusion when there is a duty, breach, and causal connection between the conduct of the defendant and the resulting injury to the plaintiff.

In this case, if Defendant conceded anything it was "negligence," i.e., duty and breach; not liability—the whole prima facie case. However, we need not decide if "negligence" was admitted since Plaintiffs apparently assert that the alleged concession of these two elements made a jury finding against them impermissible, any other issues notwithstanding. This is obviously not so, since a plaintiff with a negligence claim must also prove the element of causation and damages.

Joe claimed that injuries to his neck and back resulted from his collision with Defendant. However, evidence of similar ailments which predated the accident as well as statements made by Joe following the collision contradicted the testimony offered by Plaintiffs. In 1972, Joe fractured his back in a bicycle accident, and that injury resulted in chronic and severe neck, head, and back pain. At that time (1972), Joe was obese and continued to be overweight throughout his adult life. At one point prior to 1992, his weight reached 336 pounds, although he was only 5'5" tall. Joe was involved in no fewer than three automobile accidents which predated his collision with Defendant, in 1979, 1980, and 1987. In all three he was treated for either neck or back pain, or both, as a result of the accidents. Joe testified that he had no complaints of pain at the scene of the accident in question. Joe also admitted that he lied about his medical condition to a doctor he saw in connection with an on-the-job injury he sustained after the collision with Defendant.

We conclude that this record contains probative facts to support a jury verdict for Defendant. The jury was entitled to believe that Joe's injuries did not directly result from Defendant's negligence. . .

If the negligence causes no actual damages to plaintiff, defendant is entitled to a verdict. . . .

We affirm the judgment of the trial court.

***Pryor v. Tunc***  
**Problem**

Driving east on 13th Street, L. C. Tunc felt what he feared was a heart attack. He sped up and headed for the emergency room of the hospital. As he approached the intersection of 13th and Norris Avenue, he observed a stop light against him. Nevertheless, he did not stop. He slowed, looked in both directions and proceeded into Norris against the light. He struck a car driven in a northerly direction on Norris by Earl Thomas Pryor. The impact threw Pryor from the car. He was unconscious for a short while. Tunc called an emergency number from a nearby phone booth and both police and an ambulance arrived. Pryor was put aboard the ambulance, which then proceeded north on Norris toward the hospital.

While the ambulance, driven by Scott McCabe, was on its way to the hospital, it was struck in the side by a pickup truck driven by Al Hall. Hall ran a stop sign and from what one could judge, he was driving a high rate of speed. He claimed he had a tire blowout and that this caused him to lose control. Evidence indicated that his left front tire was, in fact, blown out. The Hall ambulance collision caused a fire. Pryor had suffered some serious burns. He also had a badly broken hip resulting from this second collision.

In Pryor's action against Tunc, Tunc first moved to dismiss so far as the claim for burns and hip injury were concerned. When this motion was denied, Tunc established the facts by deposition and affidavit and moved for summary judgment. The judge denied this motion as well. The case went to trial. At the end of the trial, Tunc's counsel moved for a directed verdict, which was denied. The jury found in favor of Pryor in the sum of \$350,000. Tunc's counsel then moved for judgment n.o.v. on the ground that, as a matter of law, Tunc was not a proximate cause of the burns. The trial judge, Judge Maureen Wexler, has asked for written briefs.

**Rickey v. Boden**

Supreme Court of Rhode Island, 1980.  
421 A.2d 539.

BEVILACQUA, CHIEF JUSTICE.

[Lillian Rickey was an elevator operator in a building in Providence, R.I. As she ascended a circular staircase to reach the area designated for her coffee break, she stepped on the narrow end of the tread-only three inches wide-slipped, and fell, causing apparently serious injuries. She was holding the handrail available on the narrow side. None was available on the side with wider treads. The trial judge directed a verdict for defendants, one of whom was responsible for building maintenance.]

The doctrine of assumption of risk is an affirmative defense which, when applicable, operates to absolve a defendant of liability for having created an unreasonable risk. In the absence of an express agreement, an individual does not assume the risk of harm arising from another's conduct unless he knows of the existence of the risk and appreciates its unreasonable character. To decide whether an individual was aware of the risk and understood its character, we shall look to the record to ascertain what the particular individual in fact saw, knew, understood, and appreciated. When a person voluntarily proceeds, knowing and appreciating the danger, he will be held to have assumed the risk incident to his conduct.

Generally, the resolution of the issue whether a plaintiff assumed the risk of injury is for the trier of fact. If the facts suggest only one reasonable inference, however, the issue becomes a question of law for the trial justice and may be the basis of a directed verdict.

Accordingly, in examining the record in the light most favorable to plaintiffs, we find that the evidence supports the trial justice's decision in granting Boden's motion for direction on the basis of the doctrine of assumption of the risk. Lillian herself testified that she had used the stairway on a daily basis for several years prior to the date of her fall. The record indicates that at all pertinent times there were no material changes in the condition of the stairway. Moreover, Lillian does not dispute that she knew of the absence of a handrail along the outside wall of the stairwell or that at a certain point in the staircase the treads became wedge-shaped and thus narrowed at the points closest to the inside handrail. In light of these facts and circumstances, we conclude that Lillian knew of the condition and structure of the stairs and that as a matter of law she knowingly assumed the ordinary risks associated with walking on the narrow portion of the treads, including the chance that she might slip and fall because of inadequate footing on the narrow portion of the treads.

The plaintiffs argue, however, that Lillian did not voluntarily encounter the aforementioned risks because there were no reasonable alternative means of reaching the twelfth floor coffee-break area. We do not dispute the principle that the doctrine of assumption of risk operates only when a plaintiff has voluntarily assumed an unreasonable risk that a defendant had created. If a plaintiff has voluntarily elected one of a number of alternatives, however, he will be held to have assumed the risks attending the choice of such alternative if the other conditions of the assumption-of-risk doctrine are present.

In the case before us, Lillian had several options reasonably available to her. There is

nothing in the record to indicate that Lillian was under any compulsion to use the coffee room during her break. To the contrary, her testimony indicates that the employees of the national bank could leave the Westminster Street building during their coffee or lunch breaks. This choice notwithstanding, Lillian elected to proceed to the coffee room. Furthermore, Lillian chose to walk on the inside portion of the stairway treads which she knew to be considerably narrower than the middle or outside portions of the treads. In view of the evidence in the record, we cannot say that there were no reasonable alternatives open to her which would have helped her avoid the recognized risks involved in the use of the stairway. We are of the opinion that the trial justice was correct in granting defendant Boden's motion for direction on the basis of the doctrine of assumption of the risk.

***Edmonds v. Schlag***  
**Problem**

Vanessa Edmonds enrolled in a noncredit course called “The Opera Workshop,” which was run under the auspices of the Exhaustion Association for the Promotion of Fine Arts. Under the direction of Professor Schlag, the workshop group developed a performance of the opera “Xerxes.” During a rehearsal of the opera, Edmonds was directed by Schlag to make a “haughty” exit without looking down. This involved stepping down 20 inches from the stage to the auditorium floor.

Prior to stepping down, Edmonds protested that to do so without looking down was dangerous. She said, “But I’ll break my neck if I do this!” Edmonds was wearing a long, flowing dress, and heels to give her an additional couple of inches of regal height. Professor Schlag responded that to look down would destroy the theatrical moment. It would be yet another instance of her failure to comply with his direction, so he added, “If you want to keep the part, you’ll follow the stage directions.” Then, realizing his tone may have been harsh for a temperamental actress he added, “Don’t be afraid. It will be all right. You can look haughty, look up and then look down.”

On the opening night of the opera, Edmonds complied with Schlag’s direction. She twisted her face into a derisive grimace, tilted her head back, looked off into the distance, stepped briskly off the platform and promptly broke her left ankle. The audience gasped. The music stopped. The opera was over.

Vanessa Edmonds sues Schlag. You are a clerk for the judge about to hear the case. Write a memorandum analyzing the possible legal claims and arguments that are likely to be advanced by both Edmonds and Schlag. Legal research reveals the case of Hoffman v. Jones, 280 S.A.2d 431, 450 (1979), in which the Exhaustion Supreme Court held that in negligence actions, Exhaustion courts should “apportion the total damages resulting from the loss or injury according to the proportionate fault of each party.” Advise the judge as to which aspects of the case present legal difficulties and why.