

Student I.D. # 7

EXAMINATION CHECKLIST

Course/Section ID Torts (LAWK-1001-D1)

Professor Colin Doyle

Date of Examination April 30, 2024

Length of Examination 4 Hours

MATERIALS ALLOWED AT YOUR DESK

No Materials Allowed (Closed Book Examination). Appendices included in the exam.
Scratch paper attached to exam.

ESSAY EXAMINATION

5 Total Essay Questions

ALL MATERIALS ARE TO BE TURNED IN

ALL DISTRIBUTED EXAM MATERIAL WILL BE COLLECTED AT THE END
OF THE EXAM.

FINAL EXAM

Torts (Fall 2023 to Spring 2024) | Professor Colin Doyle

INSTRUCTIONS

Exam Format

This exam is 22 pages including the instructions. Please make sure that you have all the pages.

This exam has five parts and two appendices.

Parts I, II, III, and IV are essay questions that involve the same fact pattern. Part V has a separate fact pattern and essay question.

On the Exemplify software, enter your answers to Part I under Question 101, your answers to Part II under Question 102, your answers to Part III under Question 103, your answers to Part IV under Question 104, and your answers to Part V under Question 105.

The appendices included in this exam packet are identical to the appendices on our course website. Appendix A is a list of cases discussed in-depth during class. Appendix B is a list of legal rules that you are not expected to have memorized.

Given that you have four hours to complete this exam and five equally weighted parts, arithmetic and common sense may lead you to spend 48 minutes on each part. But your mileage may vary. Four hours should be ample time to complete this exam. Whether and how you use the four hours is up to you.

If you are using a computer to type your answers, the character limit for each of the five parts of the exam is 5,000 characters. Let's spell this out so that no one is mistaken.

Part I (Question 101) has a character limit of 5,000 characters.

Part II (Question 102) has a character limit of 5,000 characters.

Part III (Question 103) has a character limit of 5,000 characters.

Part IV (Question 104) has a character limit of 5,000 characters.

Part V (Question 105) has a character limit of 5,000 characters.

You can track the length of your answer with Exemplify's on-screen character count tool. Make sure that you are tracking the "characters with spaces" count, not the word count. The character limits apply to each part of the exam individually.

If you are writing your answers by hand, limit your answers to one bluebook per part, writing on every other line, only on the front of each page. Your answer to each of the five parts of the exam should not exceed one bluebook.

Do not exceed the character or bluebook limits. Failure to comply with these limits will result in a severe loss of points.

The purpose of the character limit is to encourage you to organize your answers and write clearly. You should spend a fair amount of time thinking and taking notes before starting to write your exam responses. A shorter answer that is focused and organized is much better than a longer answer that is disorganized and unfocused. You do not need to reach the character limit to perform well on this exam.

You can use contractions but do not use abbreviations unless those abbreviations are supplied in the fact pattern. Refer to plaintiffs and defendants by their last names or as plaintiff or defendant. You may abbreviate intentional or negligent infliction of emotional distress as IIED or NIED. If you use abbreviations that are not permitted, during grading those abbreviated words will be replaced with the full version of the word for determining the character count.

The events in the exam take place in the fictional state of Loyola. Unless otherwise specified, the cases we have read from other states are persuasive, not binding, authority. Like all other states in the union, the state of Loyola is bound by Supreme Court precedent on issues of constitutional law that apply to the states.

For every question on the exam, Loyola follows the same jurisdictional rules. Page 4 of the exam lists out all the jurisdictional rules that are settled law in the state of Loyola. Not every rule will be relevant to every question. If a jurisdictional rule is not included on that list, you may assume that there is no governing precedent on that issue in the state of Loyola.

If you believe that you need to know facts that the questions do not provide, please state the assumptions explicitly and proceed to answer the question. But please read the questions carefully. Do not waste your time and character count by addressing issues that are not raised by the facts specified in the question.

Reliance on materials not covered by the course — including cases, other legal authorities, law review articles, treatises, and hornbooks — will not be credited when evaluating your answers.

Confidentiality

This exam is confidential. You may not share or discuss the exam — including its contents or your answers — with anyone at any time after you receive the exam, or after the other person has received the exam, until the final grades for the course are posted. In answering the questions on this exam, you may not ask others for help or use artificial intelligence for help. Violation of these rules constitutes prohibited conduct under Section 11.1 of the JD Handbook and similar rules in Handbooks for Graduate Programs.

Exam Questions

Any questions about the exam that arise during the exam must be directed to the proctor in the exam room. After the exam, any questions about the exam must be directed to Office of the Registrar, not the professor. The Office of the Registrar may be contacted in person at the office located in Founders Hall, Room 105, by phone at

213-736-1130, by email at registrar@lls.edu, or by chat on the Office of the Registrar's website at <https://www.lls.edu/academics/officeoftheregistrar/>.

You are not permitted to contact the professor concerning any exam-related questions on the day of the exam or for the remaining exam period until final grades are posted, because it is important to preserve anonymity during the exam administration process.

Anonymity

Use your 7-digit LLS ID Number on this exam. Do not include your name and do not make any remarks that will jeopardize your anonymity or anyone else's anonymity on the exam before the exam grades are posted.

STOP!

DO NOT READ

BEYOND THIS PAGE

UNTIL INSTRUCTED TO DO SO

JURISDICTIONAL RULES

For every question on the exam, Loyola follows the same jurisdictional rules. This page lists out all the jurisdictional rules that are settled law in the state of Loyola. Not every rule will be relevant to every question. If a jurisdictional rule is not included on that list, you may assume that there is no governing precedent on that issue in the state of Loyola.

Duty

For affirmative duties, Loyola only recognizes the classic common law exceptions. Loyola is not a state like California that uses the *Rowland* factors.

Causation

Loyola uses a “but-for” test for factual causation.

Comparative Responsibility

Loyola has a “no greater than” comparative negligence regime. After adopting a comparative responsibility scheme, Loyola eliminated the “last clear chance” rule.

Assumption of Risk

Assumption of risk is allowed as an affirmative defense. When determining whether a liability waiver is against public policy, Loyola uses a totality of the circumstances test.

Strict Liability

Across various cases, Loyola courts have found that strict liability applies by relying on either *Rylands v. Fletcher* or the Second Restatement.

Products Liability

Loyola is a modern jurisdiction where strict liability — not negligence — governs products liability litigation, and a plaintiff must prove either a manufacturing defect, design defect, or failure to warn. Privity is not allowed as a defense in products liability cases.

Damages

Damages are apportioned based on comparative responsibility. Loyola is a several liability jurisdiction. There’s no statutory law on punitive damages and there’s no governing state case law on either punitive damages or noneconomic damages.

FACT PATTERN FOR PARTS I, II, III, AND IV

Parts I, II, III, and IV of this exam concern the following fact pattern.

You are a junior attorney at a law firm that represents a potential plaintiff, Lauren Avila.

After working for nearly twenty years as an administrative assistant at “Prankster's Paradise,” a company that designs and manufactures gag or prank toys, Avila retired earlier this year. In the days leading up to her retirement, none of Avila's coworkers spoke with her about her impending departure or offered her well wishes for the future. Avila had assumed that her coworkers had forgotten that she was retiring. But at the end of her last day of work, as Avila left the office and stepped out into the company parking lot, her coworkers jumped out from behind the parked cars and yelled “Surprise!” Instead of forgetting about her retirement, all of Prankster's Paradise had been secretly planning a retirement party in the company parking lot, complete with a cotton candy machine, an ice cream truck, and a DJ and dance floor, all paid for by the company.

“I should have known there'd be one last prank!” said Avila. For years, Avila had been the favorite unwitting victim of the “Prankster's Paradise” toy designers. The designers would test out their latest product ideas by playing pranks on her, including leaving exploding pens on Avila's desk, staging fake mice and vomit in the kitchen, and giving Avila cans of potato chips that released spring-loaded toy snakes when opened.

Quinton Kidd was a coworker of Avila's who always took pranks too far. At the party, Kidd was responsible for cutting and serving Avila's retirement cake. As he offered Avila a slice of cake, she said, “I should know better than to trust a slice of cake from you.” Kidd replied, “You don't work here anymore. I'm not allowed to prank you.” But the slice of cake that Kidd served Avila was not the same as the slices served to other guests. It was a prank slice of cake called the “Sneak Heat Sheet Cake” that Kidd had purchased from another gag toy company, “Whoopee Works.” The box for the cake contained the following message: “Turn Up the Heat at Your Next Party! Invite your guests to a taste challenge they'll never forget with Sneak Heat Sheet Cake — where the only thing hotter than the candles is the cake itself! WARNING: Spicy!”

After taking a bite of the slice of cake, Avila's mouth immediately began to burn because of the spiciness of the cake. “Gotcha!” Kidd yelled, pointing both fingers at Avila. She began to panic as her doctor had advised her to avoid spicy foods because of an underlying heart condition. Concerned that she was not reacting well, Kidd gave Avila a glass of milk that she gulped down immediately. “We were just having some fun with you for old time's sake,” Kidd explained. As the burning sensation in Avila's mouth subsided, she said, “I think I'm okay.” She was not. Moments later, she suffered a heart attack, had to be taken by ambulance to the hospital, and spent the next week being treated in the hospital before returning home.

Prankster's Paradise formally reprimanded Kidd for his behavior, including a written statement by his direct superiors that, “Pranking people outside of official prank testing procedures is neither condoned by this business nor a part of your job.”

Investigation into Kidd's behavior revealed that he had chosen the "Sneak Heat Sheet Cake" because it used the "Posner Peppercorn," an incredibly hot type of chili pepper that is banned in the State of Loyola because it often carries a bacteria harmful to citrus plants that could decimate the orange and grapefruit trees within the state. Before deciding to use the "Sneak Heat Sheet Cake," Kidd and his coworkers tested out the prank spicy cake slices offered by other companies. These other companies used milder types of pepper that resulted in less of a spicy reaction.

Avila's doctors are confident that eating the spicy cake was "the straw that broke the camel's back" and triggered Avila's heart attack. But they also point to Avila's unhealthy lifestyle and eating habits as the primary cause of her heart attack.

According to Avila's doctor, "It is a medical certainty that, absent a radical change in lifestyle and eating habits, Avila would have suffered a heart attack within the next year."

Avila is now considering her legal options for redress for this harm. A partner at your firm has asked you to write one memo with four different parts (Part I, Part II, Part III, and Part IV of this exam) analyzing different aspects of this case.

Your memo should be organized around the following issues:

- I. Intentional torts
- II. Negligence
- III. Products liability
- IV. Miscellaneous issues: workers' compensation, vicarious liability, and insurance

Read through the instructions for each of these parts before you start your memo. Be sure to confine your analysis of issues of workers' compensation, vicarious liability, and insurance to Part IV, even though these issues relate to the claims addressed in Part I, II, and III.

PART I (QUESTION 101)

Evaluate the merits of Avila's potential intentional tort claims against Kidd for assault and battery. Also evaluate any affirmative defenses that Kidd might raise.

PART II (QUESTION 102)

Evaluate the merits of Avila's negligence claim against Kidd. Also evaluate any affirmative defenses that Kidd might raise.

You are asked to evaluate *only* a negligence claim against Kidd. Do not evaluate any negligence claims against Prankster's Paradise as we have other attorneys analyzing this issue.

PART III (QUESTION 103)

Evaluate the merits of Avila's products liability claim against Whoopee Works under a design defect theory. Also evaluate any affirmative defenses that Whoopee Works might raise.

You are asked to evaluate *only* a design defect claim. Do not analyze potential

negligence claims or potential products liability claims related to a manufacturing defect or failure to warn.

PART IV (QUESTION 104)

Please resolve the following miscellaneous issues:

Does workers' compensation prevent Avila from being able to utilize the tort system at all?

If Kidd is found liable, can Avila hold Prankster's Paradise vicariously liable for Kidd's tortious conduct?

If Prankster's Paradise can be held vicariously liable, can Avila introduce into evidence the fact that Prankster's Paradise has third-party liability insurance to show the jury that Prankster's Paradise's insurance company would be responsible for paying damages and that a ruling for Avila would not financially devastate Prankster's Paradise?

PART V (QUESTION 105) ESSAY QUESTION

You are a wise Loyola trial judge with experience managing complex tort cases. Policymakers in Loyola are considering a set of reforms to tort law in the state entitled “The Equitable and Certain Compensation Act” (ECCA). You have been asked to advise the group that oversees the drafting of the proposal.

The proposal is currently in the earliest stages of development and a rough draft of the key provisions have been cobbled together for experts in the field to consider. Here are some features of the current plan:

- **Economic Damages Multiplier:** Jury awards of economic damages would be recalculated according to a formula that would increase awards for low-income plaintiffs and decrease awards for high-income plaintiffs. For plaintiffs earning below the median state income, economic damages would be calculated using a multiplier to increase a jury’s award of economic damages proportionally to the plaintiff’s economic disadvantage. For plaintiffs earning above the median state income, economic damages would be calculated using a multiplier to reduce a jury’s award of economic damages proportionally to the plaintiff’s economic advantage. The multiplier would be capped. Lower income plaintiffs could receive no more than twice as much in economic damages as the jury’s initial award. Higher income plaintiffs could receive no less than half as much in economic damages as the jury’s initial award.
- **Non-Economic Damages Schedule:** The amount of money that plaintiffs can recover for non-economic damages would be determined by a statutory schedule rather than being determined on a case-by-case basis by individual juries. A jury would still decide whether a plaintiff should be compensated for a particular non-economic harm, but the compensation that the plaintiff would receive for that harm would be set by a predetermined schedule. Under the schedule, the amount of money awarded for a particular harm would reflect the average noneconomic damages award for that kind of harm that plaintiffs in Loyola have been awarded over the ten years prior to the schedule being enacted. There would also be a cap on noneconomic damages. For an individual case, awards of noneconomic damages could not exceed one million dollars. The award amounts and damages cap would increase over time based on the rate of inflation.

You have been asked to speak at a roundtable discussion of the current plan. Along with other guests — including judges, attorneys, and law professors — you are expected to share your thoughts on the plan’s strengths, weaknesses, and your most important suggestions for revision. Enlighten your audience about how these reforms relate to tort law’s underlying values, what the likely consequences of these reforms would be, and what you think the best policy would be.

APPENDIX A: LIST OF CASES

This list includes cases discussed in-depth during class. It is not an exhaustive list of all cases. You are welcome and encouraged to reference cases discussed in the casebook that are not included in this list. You will not receive credit for referencing cases that were neither discussed in class nor included in the casebook. The cases are listed chronologically in the order that we discussed them in class.

Hammontree v. Jenner

“The Driver with Epilepsy”

Vosburg v. Putney

“The Schoolboy Kicker”

Seffert v. Los Angeles Transit Lines

“Suffering by Bus”

McDougald v. Garber

“The Comatose Sufferer”

BMW of North America, Inc. v. Gore

“Punitive Damages and Due Process”

State Farm Mutual Auto Insurance Company v. Campbell

“More on Punitive

Mathias v. Accor Economy Lodging, Inc.

“Punishing the Bedbug Hotel”

Adams v. Bullock

“The Swinging Wire and Electric Trolley”

Braun v. Buffalo General Electric Co.

“Electrocution at a Construction Site”

Bethel v. New York City Transit Authority

“Bus Seat Collapse”

Baltimore & Ohio Railroad v. Goodman

“Reasonable People and Railroad Crossings”

Pokora v. Wabash Railway Co.

“Revisiting Reasonable People and Railroad Crossings”

Akins v. Glen Falls

“Baseball Park Injuries”

The T.J. Hooper

“Tugboats and Radios”

Martin v. Herzog

“The Buggy Without Lights”

Tedla v. Ellum

“Walking on the Side of the Highway”

Rushink v. Gerstheimer

“Leaving Keys in the Ignition”

Trimarco v. Klein
“Broken Shower Door”

Robinson v. District of Columbia
“Jaywalking”

United States v. Carroll Towing Co., Inc.
“The Hand Formula”

Byrne v. Boadle
“The Falling Flour Barrel”

Larson v. St. Francis Hotel
“The Falling Armchair”

Connolly v. Nicollet Hotel
“The Chaotic Convention”

McDougald v. Perry
“The Flying Tire”

Ybarra v. Spangard
“The Unconscious Patient”

Harper v. Herman
“The Boat Owner in Shallow Water”

Farwell v. Keaton
“The Fatal Pickup Attempt”

Union Pacific Railway v. Cappier
“The Railroad that Ran Over a Man and Let Him Die”

Maldonado v. Southern Pacific Transp. Co. (Ariz. App. 1981)
“Modern Rule for Non-negligent Creation of Injury”

Tarasoff v. Regents of University of California
“The Psychiatrist Who Didn’t Warn the Murder Victim”

Randi W. v. Muroc Joint Unified School District
“The Alleged Sexual Predator’s Recommenders”

Strauss v. Belle Realty Co.
“Falling Down the Stairs During a Blackout”

Reynolds v. Hicks
“Underage Drinking and Driving”

Carter v. Kinney
“Bible Study Slip-and-Fall”

Heins v. Webster County
“Hospital Slip-and-Fall”

Sheeley v. Memorial Hospital
“Expert Testimony”

Matthies v. Mastromonaco
“Informed Consent”

Falzone v. Busch
“Almost an Automobile Accident”

Portee v. Jaffee
“Watching Your Child Die”

Gammon v. Osteopathic Hospital of Maine
“Unexpectedly Receiving a Severed Leg in the Mail”

Stubbs v. City of Rochester
“Sewage in the Drinking Water”

Zuchowicz v. United States
“Prescribed Drug Overdose”

Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co.
“Multiple Fires Whodunnit”

Summers v. Tice
“Hunting Party Whodunnit”

Garcia v. Joseph Vince Co.
“Fencing Sabre Whodunnit”

Sindell v. Abbott Laboratories
“Toxic Harms”

In re Polemis
“The Plank that Made a Ship Explode”

Wagner v. International Railway Co.
“The Injured Rescuer”

Benn v. Thomas
“The Time-Delayed Heart Attack”

Steinhauser v. Hertz Corp.
“Sudden Schizophrenia”

Gibson v. Garcia
“The Rotten Telephone Pole that Fell on the Car”

Berry v. Borough of Sugar Notch
“The Rotten Tree that Fell on the Speeding Car”

Palsgraf v. Long Island Railway Co.
“Fireworks on the Train Platform”

Miller v. Reiman-Wuerth Co.
“The Bank Errand”

Christensen v. Swensen
“The Lunch Break”

Kuehn v. Inter-city Freight
“Road Rage”

Sage Club v. Hunt
“The Violent Bartender”

Butterfield v. Forrester
“Blocking a road with a pole”

Davies v. Mann
“The Donkey on the Road”

Li v. Yellow Cab Company
“Car Accident Comparative Negligence”

Fritts v. McKinne
“The Doctor Who Blamed the Drunk Driver”

McCarty v. Pheasant Run, Inc.
“Unlocked Hotel Room Door”

Wassell v. Adams
“Opened Hotel Room Door”

Hanks v. Powder Ridge
“Snowtubing Waiver”

Murphy v. Steeplechase Amusement Co.
“The Flopper”

Knight v. Jewett
“Touch Football Injuries”

Fletcher v. Rylands
“PWFOPBOHL&C&KTALDMIIE”

Rylands v. Fletcher
“PWFOPBOHL&C&KTA ‘non-natural’ LDMIIE”

Indiana Harbor Belt R.R. v. American Cyanamid Co.
“Trainyard Chemical Spill”

MacPherson v. Buick Motor Co.
“Broken Wooden Wheel”

Escola v. Coca Cola Bottling Company of Fresno
“The Exploding Coke Bottle”

Barker v. Lull Engineering Co.
“High-lift Loader Design”

Soule v. General Motors Corp.
“The Crumpling Toe Plate”

Hood v. Ryobi America Corp.
“Removing Bladeguards from an Electric Saw, What Could Go Wrong?”

Speller v. Sears, Roebuck & Co.
“Refrigerator Fire”

Jones v. Ryobi, Ltd.
“The Modified Printing Press”

Anderson v. Nissei ASB Machine Co.
“The Bottle-Making Machine that Amputated an Arm”

Garratt v. Dailey
“The Five-Year-Old Who Pulled the Chair Out from Under Her”

Alcorn v. Mitchell
“The Angry Spitter”

Picard v. Barry Pontiac-Buick, Inc.
“The Camera Toucher”

Wishnatsky v. Huey
“The Offended Interrupter”

O’Brien v. Cunard
“The Silent Vaccine Objector”

Lopez v. Winchell’s Donut House
“The Accused Employee Who Freely Left”

Shen v. Leo A. Daly Co.
“Confined to Taiwan”

Womack v. Eldridge
“The Distressing Accusation of Molestation”

Snyder v. Phelps
“Protesting Soldiers’ Funerals”

Hart v. Geysel
“Consenting to a Prize Fight”

Hackbart v. Cincinnati Bengals
“Professional Football Injury”

Courvoisier v. Raymond
“Mistaken Self-Defense”

Katko v. Briney
“The Spring-Gun Boobytrap”

Ploof v. Putnam
“The Private Island in a Storm”

Vincent v. Lake Erie Transportation Company
“The Boat Slamming Against the Dock”

Kenney v. Liston
“Discounted medical bills”

Frost v. Porter Leasing Corp.
“Subrogation Provisions”

Pavia v. State Farm Mutual Automobile Insurance
“Insurance Bad Faith”

Lamson v. American Axe & Tool Co.
“The Axe that Fell on the Employee”

APPENDIX B: LEGAL RULES

This list includes legal rules covered in class that you are not expected to have memorized. You should commit to memory any legal rules covered in class or in the casebook that are not listed below.

Do not use this list to predict the legal rules that you will be tested on during the exam. That would be a big mistake, as the many of the most important rules are *not* included in the list because you are expected to have them memorized.

Keep in mind that the midterm exam will not address every topic covered in class. Therefore, only some of these rules will be relevant to answering the exam questions.

Rules of Civil Procedure

Motion to Dismiss

A motion to dismiss is a formal request for a court to dismiss a case. A defendant may file a motion to dismiss for failure to state a claim upon which relief can be granted. With this motion, the defendant contends that even if all the factual allegations in a plaintiff's complaint are true, they are insufficient to establish a cause of action. A trial court should grant this motion if the plaintiff has not asserted a plausible claim for relief based on well-pleaded facts.

Summary Judgment

Summary judgment is a judgment entered by a court for one party and against another party without a full trial. In civil cases, either party may make a pre-trial motion for summary judgment. Rule 56 of the Federal Rules of Civil Procedure governs summary judgment for federal courts. Under Rule 56, in order to succeed in a motion for summary judgment, a movant must show 1) that there is no genuine dispute as to any material fact, and 2) that the movant is entitled to judgment as a matter of law. "Material fact" refers to any facts that could allow a fact-finder to decide against the movant. Many states have similar pre-trial motions. If the motion is granted, there will be no trial. The judge will immediately enter judgment for the movant.

Directed Verdict

A directed verdict is a ruling entered by a trial judge after determining that there is no legally sufficient evidentiary basis for a reasonable jury to reach a different conclusion. Directed verdicts have been largely replaced by judgment as a matter of law. In federal court, motions for a directed verdict are governed by Rule 50 of the Federal Rules of Civil Procedure. A court should grant this motion if no reasonable jury could have legally sufficient evidence to find for a party on a particular issue.

Excessive Verdict

An excessive verdict is a verdict that shocks the conscience because it appears to stem from factors extraneous to the judicial proceedings. For instance, the jury may have been prejudiced against the defendant or overly swayed by emotionally draining evidence. Most verdicts are deemed excessive because the money damages

awarded far exceed the compensation given in similar cases; the typical result is a judge-ordered decrease of the award.

Remittitur

Remittitur is a trial court order in response to an excessive damage award or verdict by a jury which gives the plaintiff the option to accept a reduced damage award or conviction, or the court may order a new trial. Latin for “to send back, to remit.” The purpose of remittitur is to give a trial court the ability, with the plaintiff’s consent, to correct an inequitable damage award or verdict without having to order a new trial.

Additur

Additur is a procedure by which a court increases the amount of damages awarded by the jury. A party may move for additur, or the court may *sua sponte* order additur, if the jury awards an inadequate amount of damages. The purpose of additur is to allow the court to assess and increase the jury award having to order a new trial. The Supreme Court held in *Dimick v. Schiedt* that additur violates the Seventh Amendment and so is not permissible in federal courts. Many state courts allow additur, however, when the defendant agrees to the increased award on the condition that the court deny plaintiff’s motion for a new trial.

Punitive Damages

In *BMW of North America, Inc. v. Gore* the Supreme Court instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

As an example of state law governing punitive damages, under California Civil Code § 3294, “where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to actual damages, may recover damages for the sake of example and by way of punishing the defendant.”

These terms are defined as follows:

- (1) “Malice” means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
- (2) “Oppression” means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.
- (3) “Fraud” means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

Rules from Tort Law

According to the California Jury Instructions, “Negligence is the doing of something

which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence. It is the failure to use ordinary or reasonable care. Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence.”

Section Three of the Restatement Third:

A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.

Section 283 of the Restatement Second:

Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.

Section 10 of the Restatement Third:

- (a) A child's conduct is negligent if it does not conform to that of a reasonably careful person of the same age, intelligence, and experience, except as provided in Subsection (b) or (c).
- (b) A child less than five years of age is incapable of negligence.
- (c) The special rule in Subsection (a) does not apply when the child is engaging in a dangerous activity that is characteristically undertaken by adults.”

Section 11 of the Restatement Third:

- (a) The conduct of an actor with a physical disability is negligent only if the conduct does not conform to that of a reasonably careful person with the same disability.
- (b) The conduct of an actor during a period of sudden incapacitation or loss of consciousness resulting from physical illness is negligent only if the sudden incapacitation or loss of consciousness was reasonably foreseeable to the actor.
- (c) An actor's mental or emotional disability is not considered in determining whether conduct is negligent, unless the actor is a child.”

Section 299A of the Restatement Second:

Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

Section 295A of the Restatement Second:

In determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account, but are not controlling where a reasonable man would not follow them.

Section 14 of the Restatement Third:

An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.

Section 288A of the Restatement Third:

- (1) An excused violation of a legislative enactment or an administrative regulation is not negligence.
- (2) Unless the enactment or regulation is construed not to permit such excuse, its violation is excused when
 - (a) the violation is reasonable because of the actor's incapacity;
 - (b) he neither knows nor should know of the occasion for compliance;
 - (c) he is unable after reasonable diligence or care to comply;
 - (d) he is confronted by an emergency not due to his own misconduct;
 - (e) compliance would involve a greater risk of harm to the actor or to others.

Section 315 of the Second Restatement:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

- (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
- (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Section 314A of the Second Restatement:

Generally, a special relationship giving rise to a duty to warn is only found on the part of common carriers, innkeepers, possessors of land who hold it open to the public, and persons who have custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection.

Section 322 of the Second Restatement:

If the actor knows or has reason to know that by his conduct, whether tortious or innocent, he has caused such bodily harm to another as to make him helpless and in danger of further harm, the actor is under a duty to exercise reasonable care to prevent such further harm.

Section 324 of the Second Restatement provides that one who, being under no duty to do so, takes charge of another who is helpless is subject to liability caused by:

(a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him."

The Restatement expresses no opinion as to whether "an actor who has taken charge of a helpless person may be subject to liability for harm resulting from his discontinuance of the aid or protection, where by doing so he leaves the other in no worse position than when the actor took charge of him." The Third Restatement requires an actor to exercise reasonable care in discontinuing aid for someone who reasonably appears to be in imminent peril. Restatement (Third) Torts: Liability for Physical and Emotional Harm § 43.

Section 327 of the Second Restatement:

One who knows or has reason to know that a third person is giving or is ready to give to another aid necessary to prevent physical harm to him, and negligently prevents or disables the third person from giving such aid, is subject to liability for physical harm caused to the other by the absence of the aid which he has prevented the third person from giving.

Section 311 of the Restatement Second of Torts, involving negligent conduct, provides that:

(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results (a) to the other, or (b) to such third persons as the actor should reasonably expect to be put in peril by the action taken.

(2) Such negligence may consist of failure to exercise reasonable care (a) in ascertaining the accuracy of the information, or (b) in the manner in which it is communicated."

Rowland v. Christian, 443 P.2d 561 (Cal. 1968), enumerates a number of considerations that have been taken into account by courts in various contexts to determine whether a departure from the general rule of not imposing an affirmative duty is appropriate:

[T]he major [considerations] are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved."

For specific policy reasons thought to be important, courts sometimes determine that no duty exists, thereby withdrawing the possibility of the defendant being held liable

for the harm, even if negligent. Courts properly do this, according to the Third Restatement, when they articulate “categorical, bright-line rules of law applicable to a general class of cases.” Restatement (Third) Torts: Liability for Physical and Emotional Harm § 7(b).

Carter v. Kinney, 896 S.W.2d 926 (Mo. 1995), traces the historical rules of premises liability:

Historically, premises liability cases recognize three broad classes of plaintiffs: trespassers, licensees and invitees. All entrants to land are trespassers until the possessor of the land gives them permission to enter. All persons who enter a premises with permission are licensees until the possessor has an interest in the visit such that the visitor ‘has reason to believe that the premises have been made safe to receive him.’ That makes the visitor an invitee. The possessor’s intention in offering the invitation determines the status of the visitor and establishes the duty of care the possessor owes the visitor. Generally, the possessor owes a trespasser no duty of care; the possessor owes a licensee the duty to make safe dangers of which the possessor is aware; and the possessor owes invitees the duty to exercise reasonable care to protect them against both known dangers and those that would be revealed by inspection. The exceptions to these general rules are myriad.”

Section 332 of the Restatement Second extends invitee status to a person who is “invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.”

Section 333 of the Restatement Second states the duty owed to trespassers:

Except as stated in §§ 334–339, a possessor of land is not liable to trespassers for physical harm caused by his failure to exercise reasonable care (a) to put the land in a condition reasonably safe for their reception, or (b) to carry on his activities so as not to endanger them.” “The listed exceptions create obligations to warn, for example, when the possessor knows that persons “constantly intrude upon a limited area” of the land and may encounter a hidden danger, or when the possessor fails to exercise reasonable care for the safety of a known trespasser. Generally, though, the duty is simply not to willfully or wantonly harm trespassers.

Section 342 of the Restatement Second provides that an occupier is subject to liability to invitees if the occupier:

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Section 339 of the Restatement Second provides rules governing child trespassers,

A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if (a) the place where the condition exists is one upon which the possessor

knows or has reason to know that children are likely to trespass, and (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

Portee v. Jaffee 417 A.2d 521 (N.J. 1980), recognized a cause of action for negligent infliction of emotional distress requiring proof of four elements:

(1) the death or serious physical injury of another caused by defendant's negligence; (2) a marital or intimate, familial relationship between plaintiff and the injured person; (3) observation of the death or injury at the scene of the accident; and (4) resulting severe emotional distress”

Section 47 of the Restatement Third provides for liability when negligently inflicted serious emotional harm “occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm,” but also specifies that “an actor who negligently injures another’s pet is not liable for emotional harm suffered by the pet’s owner.”

Section 228 of the Restatement (Second) of Agency:

General Statement

(1) Conduct of a servant is within the scope of employment if, but only if:

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master, and

(d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Section 2 of the Third Restatement provides the following approach to recklessness, usually considered to be synonymous with willful or wanton misconduct:

A person acts recklessly in engaging in conduct if: (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person’s situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person’s failure to adopt the precaution a demonstration of the person’s indifference to the risk.

In *Tunkl v. Regents of the University of California*, 383 P.2d 441 (Cal. 1963), the court concluded that exculpatory agreements violate public policy if they affect the public interest adversely and identified six factors (Tunkl factors) relevant to this determination:

[1] [The agreement] concerns a business of a type generally thought suitable for public regulation.

[2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.

[3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.

[4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.

[5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.

[6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

“[T]he true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.” *Fletcher v. Rylands*, 1 LR Exch. 265 (1866).

“[I]f the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land,—and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril.” *Rylands v. Fletcher*, 3 LRE & I. App. 330 (HL) (1868).

Section 520 of the Restatement (Second) of Torts provides a set of factors to be considered for determining whether an activity is abnormally dangerous:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;

(b) likelihood that the harm that results from it will be great;

- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

Section 20 of the Restatement (Third) of Torts provides a definition of abnormally dangerous activity:

An activity is abnormally dangerous if:

- (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and
- (2) the activity is not one of common usage.

END OF EXAM

Student I.D. # 7_____