

MIDTERM EXAM

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

INSTRUCTIONS

Exam Format

This exam is 21 pages including the instructions. Please make sure that you have all the pages.

This exam has three parts and two appendices.

Part I consists of three short answer questions. Part II consists of a fact pattern and an essay question. Part III consists of a fact pattern and an essay question. The three parts are equally weighted at one-third of your total grade.

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

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 (4) four hours to complete this exam and three equally weighted parts, arithmetic and common sense may lead you to spend eighty 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 three 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. 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 three 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 negligent infliction of emotional distress as 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.

Do not address issues that we haven't covered yet in class, including contributory and comparative negligence, assumption of risk, factual causation, and proximate cause. Analysis of those topics will not be credited when evaluating your answers.

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.

Damages

Loyola does not have a state statute that addresses when a plaintiff is permitted to recover punitive damages. There's no governing state caselaw on either punitive damages or noneconomic damages.

Res Ipsa Loquitur

A plaintiff can establish the defendant's negligence by proving either that the defendant failed to exercise reasonable care or that *res ipsa loquitur* applies. The plaintiff is not permitted to present both theories of the case to the jury. In other words, in circumstances in which *res ipsa* may apply, the plaintiff must choose between proving negligence through *res ipsa* or proving negligence based on the defendant's failure to exercise reasonable care.

Affirmative Duties

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

Duties of Landowners and Occupiers

For duties of landowners and occupiers, Loyola follows the classic common law rules recognizing three broad classes of plaintiffs: trespassers, licensees and invitees.

Medical Malpractice

The State of Loyola uses a reasonable patient standard for determining informed consent.

Negligent Infliction of Emotional Distress

The Loyola Supreme Court has recognized NIED claims based upon physical impact, "zone of danger," and "bystander liability."

PART I (QUESTION 101) SHORT ANSWER QUESTIONS

Question 1

You are an attorney at a plaintiff-side firm in a small town nestled in a valley of Mount Posner in the State of Loyola. In this town, an elderly woman, Evelyn Harris, lives next door to Gabe Leggett, a first-year law student who volunteers with his local “Neighbors Helping Neighbors” program. This program, organized by the Mount Posner Community Association for Advancing Overall Public Welfare, encourages residents to assist elderly and disabled neighbors with household tasks.

Last week, the Mount Posner area experienced a heavy snowstorm typical for the area. Harris, who has mobility issues, was unable to clear the snow from her driveway and walkway. Leggett, aware of Harris’s situation and her reliance on the cleared walkway for essential activities like fetching mail and groceries, had previously assisted her with various outdoor chores and snow removal through the volunteer program.

On the day of the storm, Leggett cleared his own driveway using his snowblower. He was in a cranky mood because he had just realized that his Torts class was a year-long course and was only halfway over. Harris opened the front door of her house, inched out onto her front stoop, and waved to Leggett. He waived back. She called out, “Can you help me clear this snow? I have a doctor’s appointment.” Even though Leggett could hear her, he called back, “What did you say? I can’t hear you! This snowblower is so loud!” They repeated this exchange ten times until Harris gave up and went back inside.

The next morning, Harris attempted to leave her house for a doctor's appointment, slipped on her snow-covered walkway, and broke her hip. Harris’s adult son, Jeff, who flew in from Los Angeles to attend to his mother in the hospital, is now considering whether his mother should sue Leggett for negligence. He has requested your legal advice. What do you tell him?

Question 2

You are an attorney representing a plaintiff, Harris Barron, in a negligence suit against the Traynor Running Club. The Traynor Running Club recently organized its annual half-marathon in Loyola City. Despite the event's increasing popularity, Traynor Running Club decided against implementing safety measures that included creating wider running lanes, limiting the number of runners, and providing more water stations along the route, all aimed at reducing runner congestion and the risk of dehydration.

During this year's event, your client, Barron, an amateur runner, was nearing the final stretch of the half-marathon. Due to the overcrowded track, Barron was unable to maintain a safe distance from other runners. In an attempt to navigate through the crowd, Barron tripped over a discarded water bottle, which — as you convincingly argued in your closing argument at trial — should have been cleared by the event organizers. As a result, Barron fell and suffered a broken wrist and severe dehydration, necessitating hospitalization and causing him to miss important work deadlines.

Pretrial discovery revealed that the Traynor Running Club had deliberately chosen not to implement recommended safety measures to maximize participant entry fees. Internal emails from the club's board showed a disregard for these safety concerns, with one board member commenting, "A few stumbles are part of the race excitement."

Barron sued the Traynor Running Club for negligence, and the case went to trial. The jury awarded Barron \$20,000 in compensatory damages for medical expenses, lost wages, and pain and suffering. In response to the club's disregard for runner safety, the jury awarded Barron \$300,000 in punitive damages.

Following the verdict, Traynor Running Club filed a motion for remittitur, arguing that the punitive damages award is excessive. As Barron's attorney, construct a compelling legal argument for why the court should find that the damages award is not excessive and deny the motion for remittitur.

Question 3

You are a trial court judge in the State of Loyola overseeing a medical malpractice lawsuit. The plaintiff, Clara Clearchoice, a 45-year-old patient with a long-standing and severe phobia of anesthesia and needles, sued her orthopedic surgeon, Dr. Ivan Opere, for medical malpractice. The case concerns surgery for a torn ligament in Clearchoice's knee.

Clearchoice's medical history, which Dr. Opere had access to, documented her longstanding phobia of anesthesia and needles. Despite this, Dr. Opere recommended and performed a standard arthroscopic surgery for her torn ligament, a procedure that required general anesthesia and multiple injections. Unfortunately for Clearchoice, the surgery was not successful. Her torn ligament failed to heal and she continues to receive medical treatment for the injury.

Clearchoice claims that she was not informed of an alternative treatment option: a specialized physiotherapy regimen combined with a knee brace, which, while having only a 30% success rate (as opposed to the 85% success rate of the surgery) and requiring a longer recovery period, did not involve anesthesia or needles.

During the trial, Clearchoice testified about her phobia and stated that — had she been aware of the non-surgical option — she would have chosen it despite its lower success rate and longer treatment duration. She also testified to experiencing significant post-surgical trauma due to the anesthesia and injections, exacerbating her phobia. After Clearchoice rested her case, Opere moved for a directed verdict, arguing that Clearchoice had not established a prima facie case of medical malpractice.

How do you rule on the motion and why?

PART II (QUESTION 102) ESSAY QUESTION

You are a junior attorney at a plaintiff-side law firm. A potential client, the Poole family, reached out to your firm following their child's injury at a local playground, "Learned Hand Park." Known colloquially as "Splinter Haven," this playground is known for its rustic charm, featuring old-fashioned wooden playground structures that echo the area's fondness for a natural, woodsy aesthetic.

The Pooles' daughter, Trina Poole, suffered a serious personal injury while climbing on a wooden ladder connected to a fort-like structure, a popular attraction among the local children. As she reached the top, a nail that was protruding from a rung tore into her leg, causing a deep, jagged laceration that extended from her knee to her ankle. The injury resulted in profuse bleeding and required immediate medical attention. Trina was rushed to the emergency room, where she underwent emergency surgery to repair the damage. The surgery involved complex stitching and was followed by a blood transfusion due to significant blood loss. After surgery, Trina faced a prolonged and challenging recovery period. She developed a severe infection in the wound, requiring a lengthy course of intravenous antibiotics and extended hospitalization. This further complicated her recovery process, leading to multiple additional hospital visits and ongoing medical treatments. The physical impact of the injury was severe, leaving Trina with limited mobility in her leg and requiring physical therapy to regain basic functions. The injury also had profound psychological effects on her; she developed a fear of outdoor play and experienced nightmares and anxiety, for which she needed psychological counseling. The injury left Trina with a permanent and prominent scar.

The Poole family is now contemplating a lawsuit against the park for negligence. A partner at your firm has asked you to consider some preliminary issues before the firm decides whether to take the case. Here are some additional facts that may be helpful for your analysis:

A state statute, the "Safe Playgrounds Act," was passed in Loyola fifteen years ago. This law mandates that all newly constructed playgrounds use materials and designs that minimize the risk of injury, favoring rubber and plastic over traditional wood. Because the law does not apply retroactively, Splinter Haven, built several decades prior, was not required to update its structures.

"Learned Hand" park is on a privately owned property, managed by the Hand Estate. The playground features an adjacent parking lot with a large sign, "All Are Welcome to Play at Learned Hand Park!" Since the incident, the park has reached out to the Pooles, pleading with them not to pursue legal action. The park claims that, due to financial constraints, if it was required to meet current safety standards for new construction, rather than update the playground the park would be forced to demolish the playground and prohibit the public from entering the grounds.

Over the past year, the park has experienced a troubling increase in vandalism including minor graffiti and littering. This vandalism has been primarily attributed to a gang of local teenagers, known in the community as the "BPL." In response, the park has hired a part-time security guard, but the guard is responsible for multiple parks and has been unable to prevent all acts of vandalism due to the large area she

is responsible for patrolling. The severity of the vandalism came to light following the injury of Trina Poole, when a detailed inspection of the playground equipment revealed multiple instances of tampering, including apparent attempts to pull out nails and dismantle playground equipment.

The park's management has expressed frustration over the situation, citing their limited resources to both repair ongoing damage and implement more robust security measures. The financial strain has been exacerbated by the threat of a lawsuit, which could potentially divert funds from maintenance and safety improvements, further complicating the park's efforts to provide a safe environment for its visitors.

Email #1

From: Process, Drew Drew.Process@deweycheatemhowe.com
Sent: Tuesday, November 21, 2023 10:49 PM
To: You
Subject: Need your big brain on playground case

If we're going to take this case on, we need a solid legal argument that the defendant failed to exercise reasonable care under the circumstances. What have you got? If your response doesn't address the park's best counterarguments, you're fired.

Because we have other attorneys analyzing issues of contributory and comparative negligence, assumption of risk, factual causation, and proximate cause, please don't address those issues.

Best,
Drew

Email #2

From: Process, Drew Drew.Process@deweycheatemhowe.com
Sent: Tuesday, November 21, 2023 11:39 PM
To: You
Subject: Playground case - Reasonable Care vs. Res Ipsa Loquitur

Did you get my last email? Chop chop. Let's go.

I was thinking, what about res ipsa? Seems like it might work? Am I a legal genius? What's our best argument there?

Let's not forget that under Loyola state law, we can establish the defendant's negligence by proving either that the defendant failed to exercise reasonable care or that res ipsa loquitur applies. Unfortunately, we practice in a lousy state where we can't present both theories of the case to the jury.

Given that we're stuck between making out a res ipsa case and making out a case where the defendant failed to exercise reasonable care, which is the better option for us?

Also, same as the last email: because we have other attorneys analyzing issues of contributory and comparative negligence, assumption of risk, factual causation, and proximate cause, please don't address those issues.

Best,

Drew

PART III (QUESTION 103) ESSAY QUESTION

A case has recently come before the Supreme of the State of Loyola. The plaintiff, Willa Frayed, recently attended a tech expo at the Loyola Convention Center. The expo featured a variety of booths presenting cutting edge technologies. Among them, Unforeseeability, Inc., had set up a “Virtual Reality Experience” booth, draped in tapestries, surrounded by faux crystal formations, emitting soft ambient lighting, and projecting interactive displays of chakra alignments.

Frayed was drawn to Unforeseeability’s main attraction: a virtual reality headset experience titled “Your Own End,” in which the user witnessed — from a third person perspective — a simulation of the final moments of their life. The staff at Unforeseeability, dressed in flowing garments and necklaces made of flowers, assured visitors that the experience was transformative and life-affirming. The staff reminded visitors that death is guaranteed for all of us and assured users that the simulation’s purpose was to empower users to accept that truth and live their lives fully in the present. Prior to the simulation, none of the staff knew what experience Frayed would have as each user’s death is determined by an algorithm and kept secret until the user experiences it firsthand. The user’s depicted death scenario is somewhat randomized but is also influenced by machine learning models’ predictions of how the user will die based upon publicly available information about the user. The Unforeseeability staff assured Frayed that the experience of almost all users at the expo was bearing witness to a geriatric version of themselves surrounded by loved ones in a hospital room or hospice care.

Frayed was not so lucky. In her simulation, she watched a replica of herself at her present age go for a jog around her neighborhood only to be set upon by a pack of wild dogs that viciously mauled her and tore her apart piece by piece. In the simulation, Frayed watched helplessly as her avatar screamed out in agonizing pain and eventually succumbed to her injuries.

The aftermath of this virtual experience has had a profound and debilitating impact on Frayed. She has developed an intense and overwhelming fear of encountering dogs, to the extent that it has severely disrupted her daily functioning. Simple activities like walking through her neighborhood, previously a source of relaxation, have become fraught with anxiety and fear. The mere sound of barking triggers acute panic attacks, leaving her feeling trapped and unsafe even within her own home. Professionally, Frayed’s performance as a personal organizer has deteriorated due to her inability to focus, haunted by the vivid imagery from the simulation. Her social interactions have dwindled as she avoids any situation where dogs might be present. A psychiatrist has diagnosed Frayed’s condition as PTSD, requiring ongoing psychological treatment and medication.

Frayed sued Unforeseeability for negligent infliction of emotional distress. To date, the Loyola Supreme Court has recognized NIED claims based upon physical impact, “zone of danger,” and “bystander liability.” Finding that none of those bases for liability applied, the trial court dismissed the case. Frayed now appeals that dismissal.

The issue on appeal is whether the Loyola Supreme Court should recognize a cause of action for negligent infliction of emotional distress under these circumstances. Keep in mind that the issue on appeal is fundamentally a question of whether Loyola should recognize a legal duty in these kinds of cases — not about whether Unforeseeability breached their duty in this particular case.

Part 1

Write the majority opinion for the Loyola Supreme Court.

DO NOT address issues that we haven't covered yet in class, including contributory and comparative negligence, assumption of risk, factual causation, and proximate cause. Those issues may matter for the outcome of a particular case, but those issues do not need to be addressed to determine whether Loyola should recognize this cause of action in general.

Part 2

Write the dissenting opinion for the Loyola Supreme Court.

DO NOT address issues that we haven't covered yet in class, including contributory and comparative negligence, assumption of risk, factual causation, and proximate cause. Those issues may matter for the outcome of a particular case, but those issues do not need to be addressed to determine whether Loyola should recognize this cause of action in general.

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”

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 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.”

END OF EXAM

Student I.D. # 7_____