

Student I.D. # 7

EXAMINATION CHECKLIST

Course/Section ID Torts (LAWK-1001 D1)

Professor Colin Doyle

Date of Examination May 5, 2025

Examination Testing Time 4 Hours

MATERIALS ALLOWED AT YOUR DESK

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

ESSAY EXAMINATION

3 Total Essay Questions

Limited to 2 bluebooks per question, writing on every other line, only on the front of each page.

Limited to 8,000 characters per question (this number includes spaces and appears just above the typing area).

ALL MATERIALS ARE TO BE TURNED IN

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

EXAM INSTRUCTIONS

Final Exam | Torts (Spring 2025) | Professor Colin Doyle

Exam Format

This exam is **23 pages** including the instructions. Please make sure that you have all the pages.

This exam has three parts and two appendices.

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

On the Examplify 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 **four hours** to complete this exam, and the exam has three equally weighted parts, arithmetic and common sense may lead you to spend one hour and 20 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 8,000 characters. Let's spell this out so that no one is mistaken:

Part I (Question 101) has a character limit of 8,000 characters.

Part II (Question 102) has a character limit of 8,000 characters.

Part III (Question 103) has a character limit of 8,000 characters.

You can track the length of your answer with Examplify'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 two bluebooks 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 two bluebooks.

Do not exceed the character or bluebook limits. You will not receive credit for any part of an answer that exceeds these limits.

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. 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.

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.

Causation

Loyola uses a "but-for" test for factual causation.

Comparative Responsibility

Loyola has a pure comparative negligence regime. Intentional torts of a third party cannot be compared against the negligence of a defendant for the purpose of reducing the defendant's potential liability. 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.

Damages

Damages are apportioned based on comparative responsibility. Loyola is a several liability jurisdiction. Loyola does not have a state statute that addresses when a plaintiff is permitted to recover punitive damages.

FACT PATTERN FOR PARTS I AND II

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

You are a junior attorney at a law firm that represents two plaintiffs, Patricia Bell and Diego Ortiz. A senior associate has asked you to draft a memo evaluating their potential tort claims related to the facts below.

Loyola International Airport operates a bus shuttle that drives in a loop, carrying passengers between the economy parking garage and the airport terminals A, B, C, and D. In April 2022, a federal law requiring face coverings in all U.S. transportation hubs was still in effect as a response to the COVID pandemic. The airport supplemented the federal law with its own policy: Masks were mandatory within the airport terminals and “at all times while riding any airport shuttle.” Large red-and-white signs announcing this rule were posted both inside each bus and on the terminal walls.

One morning that month, a shuttle driven by Byron Gates — an airport employee — pulled away from the economy garage with eleven passengers on board. Among them were our plaintiffs, Patricia Bell and Diego Ortiz. Bell worked as a janitor employed by the airport. Every day she would park her car in the economy garage and take the shuttle to the airport as there is no employee parking at the airport itself. At the time she boarded the bus, she was wearing her company uniform but would not clock in to start her shift until after arriving at terminal D. Ortiz was a ticketed passenger flying to visit relatives in Los Angeles.

A couple minutes into the trip, another passenger on the bus — Riley Sloan — removed her mask and stuffed it into her carry-on bag. Other passengers told her to obey the rules and put her mask back on. Sloan stood up and yelled, “Grow up, people! COVID is just the flu. These rules are all just a liberal conspiracy to take away our liberty and freedom.” Several other passengers yelled at Sloan to put her mask back on and demanded that the bus driver, Gates, eject Sloan from the bus. Bell and Ortiz, who were sitting near Sloan, watched the spectacle with concern but did not say anything.

Gates replied, “Everyone should keep their masks on.” When Sloan refused to comply and the passengers again demanded that Gates kick her off the bus, he replied, “I’m driving the bus here. I’m not a security guard. If there’s still a problem once we’re back at the garage, I’ll get my manager. Anyone who wants to can get off at the next terminal and wait for the next shuttle bus.” Industry practice for shuttle-bus drivers is for drivers not to become directly involved in disputes between passengers. Under the airport’s employee manual, bus drivers confronted with “an emergency situation” must radio airport security immediately. Gates did not radio dispatch but continued driving his route.

Sloan remained unmasked for the remainder of the loop as Gates made stops at terminals A, B, C, and D. The other passengers huddled away from her, but there was not enough room for Bell and Ortiz to get more than a few feet away from Sloan. As the passengers continued to ask Sloan to put her mask on, she pretended

to have a loud coughing fit, with her mouth pointed in their direction. Bell and Ortiz both turned away from Sloan as they could feel her breath against their faces. Neither Bell nor Ortiz said anything to Sloan or Gates during the bus ride. Ortiz did not get off the shuttle at terminals A, B, or C because he thought that Sloan should be the one to get off the shuttle, not any of the innocent passengers. Bell did not get off the shuttle at terminals A, B, or C because she was afraid that this would result in her being late for work and being fired from her job. She is the sole caretaker of her four-year-old daughter and must work to support her family. Bell, Ortiz, and Sloan all disembarked at terminal D before Gates's final stop back at the garage. After returning to the garage, Gates spoke with his manager who told him that his job as a bus driver did not require him to do anything other than what he did.

When Sloan reached the TSA checkpoint inside terminal D, agents noted that she appeared feverish. A rapid COVID test administered by the airport medical staff returned a positive result, and Sloan was denied boarding. These COVID tests rarely return a positive result for a person who is not infected with COVID. The bus shuttle's total run time from the garage to terminal D was twenty minutes. This was potentially enough time for Sloan to have infected other passengers but was not significant enough of an exposure to guarantee that Sloan had infected any other passengers. COVID tests from April 2022 tended to show positive test results in infected people 5-7 days after COVID exposure. Six days after this trip in the bus shuttle, both Bell and Ortiz tested positive for COVID. The night before riding the bus, Ortiz had attended an indoor dinner party with seven friends. Three of those friends tested positive for COVID on the same day that Ortiz tested positive. Both Bell and Ortiz developed severe respiratory complications. Both were hospitalized, incurred substantial medical bills, and were forced to miss weeks of work. Ortiz now suffers from severe anxiety attacks and nightmares of being trapped on the bus and dying of respiratory failure. Bell has become deeply depressed because of her mounting medical debts.

Bell and Ortiz are now considering their legal options for redress for this harm. A senior associate has asked you to write a memo evaluating different aspects of this case.

Questions on the next page.

PART I (QUESTION 101)

Evaluate the merits of the plaintiffs' potential negligence claims against Gates (the bus driver), including any affirmative defenses that Gates might raise. Also evaluate whether Loyola International Airport can be held vicariously liable for Gates's conduct. Some aspects of each of the plaintiffs' claims will result in identical analysis. You can write out this analysis only one time but be sure to indicate that the analysis applies to both Bell and Ortiz. Other aspects of the plaintiffs' claims may require separate analysis for each plaintiff.

PART II (QUESTION 102)

Evaluate the merits of the plaintiffs' potential intentional tort claims against Sloan for battery, assault, and intentional infliction of emotional distress. Also evaluate any affirmative defenses that Sloan might raise. Some aspects of each of the plaintiffs' claims will result in identical analysis. You can write out this analysis only one time but be sure to indicate that the analysis applies to both Bell and Ortiz. Other aspects of the plaintiffs' claims may require separate analysis for each plaintiff.

PART III (QUESTION 103)

You are a law clerk for Justice Clark on the Supreme Court of the state of Loyola. She has asked you to write the first draft of part of a legal opinion for a case that concerns a defendant's liability for negligently exposing a plaintiff to a toxin that has not yet resulted in a physical injury but has resulted in a plaintiff incurring costs for medical treatment to detect early signs of illness caused by this toxin.

For over a decade, the Holmes Chemical Corporation discharged into the Stubbs River a solvent byproduct called Riskitol that has been linked to kidney cancer, heart disease, and various neurological disorders. Despite internal health and safety reports warning that their waste treatment system was inadequate to safely process and neutralize the chemical, Holmes Chemical's management chose not to upgrade the treatment system due to cost concerns. The Loyola Department of Health and Environmental Safety has since confirmed that the levels of Riskitol in the river were over ten times the state-mandated safety limits.

The Stubbs River is the primary source of drinking water for the plaintiffs, who consumed this water daily for years, unaware of the contamination. Although no plaintiff has developed a diagnosable illness yet, medical experts have testified that the plaintiffs now face a significantly increased risk of serious disease due to their prolonged exposure. Some of the plaintiffs have already tested positive for Riskitol-related biomarkers, which signal the need for regular medical monitoring, including periodic blood tests and imaging, to detect early signs of illness. Early detection of some illnesses could allow plaintiffs to receive medical treatment that can cure the disease or limit its severity. Early detection of other illnesses would not significantly affect treatment but could lead to more accurate predictions of the disease's severity.

The plaintiffs sued Holmes Chemical for negligence. The trial court granted Holmes Chemical's motion to dismiss, finding that under existing Loyola tort law, liability for negligently exposing a plaintiff to a toxic substance requires a showing of physical harm, not merely the increased risk of physical harm. The Loyola Court of Appeals affirmed.

The case is now before the Loyola Supreme Court. Justice Clark thinks that the court should adopt a new legal rule that allows for a defendant to be held liable for negligently exposing a plaintiff to a toxic substance if that exposure has resulted in an increased risk of physical harm that requires medical monitoring treatment — at least under some circumstances. Justice Clark needs your help to figure out what those circumstances should be. She is sensitive to the unfairness of a rule that forces plaintiffs to pay for their own medical monitoring after a defendant has tortiously exposed them to a toxin. But the Justice is also concerned about the unfairness of an open-ended rule that would make defendants broadly liable not just for harm but for merely exposing plaintiffs to risk of harm.

Continues on next page.

Your job is to draft

- 1) a legal rule,
- 2) an explanation of this rule, and
- 3) a persuasive argument for this rule.

The legal rule should precisely articulate the conditions under which a defendant can be held liable for negligently exposing a plaintiff to a toxic substance if that exposure **has not** resulted in a physical harm but has resulted in an increased risk of physical harm that requires medical monitoring treatment. With regard to formatting and writing style, Justice Clark has instructed you to use the Restatements as a guide (see Appendix B for examples).

The explanation following your rule should provide greater detail, clarifying aspects of the rule and addressing questions that a legal reader may have. Make sure that your rule and explanation together provide answers to the following questions:

- What is a plaintiff required to prove?
- How can a defendant prevail?
- What can the plaintiff recover?
- How does this litigation affect any future claims the plaintiff might wish to bring against the defendant?

For your persuasive argument in support of this rule, Justice Clark wants you to write the first draft of the part of the legal opinion that — after announcing the rule — justifies the rule. Her hope is that your arguments will convince the other justices on the court that this is the right rule to adopt. Be sure to articulate how this rule best serves the values and goals of tort law, fits within our common law tradition, and is a fair and just rule. Don't forget to address counterarguments, as some justices may be tempted to adopt alternative rules.

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 Damages and Due Process”

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. Ellman: “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.: “Another Railroad that Ran Someone Over”

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”

Steinhausner 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 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 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.”

Section 228 of the Restatement (Second) of Agency:

- (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.

Section 13 of the Restatement (Second) of Torts provides a definition of battery:

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 or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results.

Section 21 of the Restatement (Second) of Torts provides a definition of assault:

An actor is subject to liability to another for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension.

Section 35 of the Restatement (Second) of Torts provides a definition of false imprisonment:

An actor is subject to liability to another for false imprisonment if (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and (b) his act directly or indirectly results in such a confinement of the other, and (c) the other is conscious of the confinement or is harmed by it.

Section 46 of the Restatement (Second) of Torts provides a definition of intentional infliction of emotional distress:

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Section 63 of the Restatement (Second) of Torts on self-defense:

An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him.

Student I.D. # 7 _____