

EXAM # _____

TORTS II
SPRING 2008

PROFESSOR DEWOLF
May 6, 2008

FINAL EXAM

Instructions

DO NOT GO BEYOND THIS PAGE UNTIL THE EXAM ACTUALLY BEGINS.

THIS IS A CLOSED BOOK EXAM!

IMPORTANT: This exam will last THREE HOURS. Plan on spending at least 20 MINUTES reading the questions and outlining your answers. REREAD each question to be sure you haven't missed anything.

POINTS are assigned to each section of the exam based on the rough number of minutes it is expected you will need to complete each portion.

(1) *Multiple Choice* (10 points). Please select the *best* answer. Some answers may give a wrong reason for an otherwise correct result. Make sure that you read all the answers thoroughly and select the one that comes closest to a correct statement of the law. Please enter the answers either in the same bluebook as Essay Question 1 or at the beginning of your answer (on Softest) for Question 1

(2) ESSAYS: You will have two essay questions. The division is as follows:

Question 1:	65 points
Question 2:	60 points

PLEASE IGNORE issues relating to legal causation; assume that any but-for cause of an injury is also a proximate cause of that injury.

DO NOT cross-refer from one essay answer to another; make each essay answer stand on its own.

Plan on spending at least 15 minutes at the end PROOFREADING your answers. You may not write ANOTHER WORD after time is called.

A STATUTORY APPENDIX is provided that gives the law of this jurisdiction, the State of Linden, on some issues. If no law is specified on the point you are interested in, please comment on the possible alternatives.

REMEMBER THE HONOR CODE! Don't identify yourself.

GOOD LUCK!!!

MULTIPLE CHOICE (10 points)

MC Question 1

Bill told Jim to meet him at a bar downtown. Bill was an avid cyclist and frequently wore a cycling jersey and matching shorts. Jim arrived at the bar during Happy Hour, and there was a large crowd. Jim saw a guy in a cycling jersey with his back to the entrance, so Jim squeezed through the crowd until he was able to tap the guy on the shoulder. He yelped and turned around. It turns out it was not Bill, but someone who looked like him from the rear, who had a very tender shoulder from a recent crash. Did Jim commit an assault on the cyclist?

- (A) No, because Jim didn't mean to cause any harm
- (B) No, because Jim thought it was Bill
- (C) Yes, if the cyclist genuinely experienced pain
- (D) None of the above.

MC Question 2

Sarah and Elaine were shopping at a department store located in the mall. While Sarah was trying on a new dress in the dressing room, Elaine wedged a door stop under the dressing room door so that she could finish buying Sarah a surprise birthday present. The sales clerk took an extra minute to process the credit card purchase, so Sarah wound up pounding on the door, saying "Let me out!" After sixty seconds Elaine took the door stop away and pretended that it got stuck. Did Elaine commit the tort of false imprisonment?

- (A) Yes, because Elaine intended to confine her.
- (B) Yes, but only if Sarah suffered severe emotional distress.
- (C) No, because Elaine did not intend to cause harm.
- (D) No, because the confinement only lasted a short period of time.

(ESSAY) QUESTION 1 (65 points)

On the morning of January 29, 2007, Linden State Police ("LSP") officers Michael Moss and Edward Brown were on patrol when a call alerted them to an ongoing bank robbery. Moss and Brown drove to Chemical Bank on 91st Street and Broadway in Springfield, Linden. As they responded, one of the robbers, Sidney Fisher, fired at them with a large semi-automatic handgun before fleeing north along Broadway with the officers in pursuit. Meanwhile, Transit Officers Ronald Bauman and Anthony Savarese were on patrol in the vicinity when they received a radio transmission regarding the robbery, and they immediately saw the gunman running toward them. They exchanged shots, and the robber continued his flight to and along West End Avenue and then toward Riverside Drive. During this chase, numerous shots were fired by the robber as well as by police. No shots hit the robber, despite some being fired from relatively short distances. Bauman was hit in his bulletproof vest but was uninjured. As the robber passed 202 Riverside Drive, he grabbed Bonnie Vargas, who had just exited her apartment building.

By now, police officers Patrick White, Jose Brizuela, Silvano Brajuha, Eugene Kastner and Michael Sosa were also responding from the nearby 24th precinct. By this time, the robber was

backed against 202 Riverside Drive, which was enclosed by a fence. He was surrounded on his other three sides by police officers. The robber held Ms. Vargas in a chokehold as he waved his handgun toward the officers. Clearly, he had nowhere to go, the flight and pursuit were over, and the robber and the police were in a standoff. Capture of the gunman was prevented only by the fact of the hostage.

Bauman shouted "just look around, there's no place to go, it's over, just put down your gun." Although the robber subsequently fired in the general direction of police, they were all behind cars and other obstructions and they did not return fire at this time. No civilians, other than the hostage, were in the open or otherwise exposed to gunfire from the robber at this time.

As the standoff continued, Officer White maneuvered his way from across the street to the south side of Riverside Drive, about 10 or 15 feet from where the robber was located. Around this time, the robber started to slowly maneuver toward Riverside Drive. The robber held the hostage in front of him, but was not pointing a gun at her head or chest. While under cover of a parked car, White positioned himself to fire at the gunman. The events that followed are less than clear in particular details, owing to different points of observation by different officers and varying degrees of recall regarding split-second occurrences, but a general narrative can be discerned. From the outset, no ranking officer gave orders.

As officer White stood and positioned himself, the robber shot in his direction. Although White was uninjured, Officer Kastner, misapprehending what White was doing, thought that White had been hit and consequently had fallen between parked cars. White stated that he had intentionally ducked. Kastner, thinking he was returning fire when an officer was down, shot at the robber. These shots initiated a volley of gunfire by the robber and other officers who, hearing the shots, believed that a gun battle had commenced. Kastner believed that the next shot was fired by Sgt. Venezia, a ranking officer, who, rather than taking command, simply joined in the shooting. Although Kastner stated that he thought that the hostage had been able to break away, he also stated that the robber was still using the hostage as a shield when he shot at the robber. Officer Brizuela thought that the hostage either tripped or fell when the firing began, and he fired four shots as he ran toward the robber. He also stated that no one took command and no orders had been given. Officer Brajuha thought that the hostage managed to move a couple of steps away when the firing began. Brajuha admits that it would violate standard police procedure for any officer to fire a weapon while a suspect held a hostage. Bauman, too, acknowledged that standard police procedures prohibit an officer from firing if doing so would place an innocent person in jeopardy. He initially withheld his fire because of the hostage and noted that all officers were adequately protected and that the robber never pointed his gun at the hostage or seemed to threaten her directly. However, upon hearing the shooting, Bauman also started shooting. Bauman himself fired 13 to 15 rounds. Officer Sosa also initially declined to return fire, fearing that the hostage would be struck. But when he saw Brizuela fire, Sosa changed position and began firing. Sosa admitted having had no idea where the hostage was at that time. Sosa stated that no one took command and no orders were given. Sergeant Savarese stated that he did not fire because he thought that the hostage was too close to the robber. Savarese also recalled that at this time all police officers were adequately protected by cover. Savarese was one of the ranking officers at the scene, and though he had a radio, he failed to take command. Not being able to think of any orders to give, he gave none. Officers Brown, Moss and White could clearly see, though, that the hostage was still being held by the robber when the firing began.

A bystander, Hagit Gal-Ed, who observed the incident from an upstairs window, stated that

all officers at all times were under cover, and that the hostage at all relevant times was still firmly held by the robber. She believed that more than 30 officers were present by now. She heard some officers yell at the robber to drop the gun, and some officers urging others to shoot the robber. No one seemed to be in command. By the time the shooting started, the robber, with his hostage, was positioned directly below her window. The robber fired the first shot, toward the officers. But, she stated he had never placed the gun against the hostage's head, the hostage was firmly in his grip and positioned directly in front of him, and police then returned fire. Another bystander, Leon Marashaj, observed the pursuit and standoff from the street near the back of his UPS truck. Marashaj saw the robber, with the building at his back, surrounded by a semi-circle of police and saw that at all times he held the hostage in a chokehold in front of him. When the robber fired twice toward police, they immediately returned fire.

The hostage's brother, plaintiff Ramon Santiago, also lived at 202 Riverside Drive, where he worked as a handyman. His father, with whom the hostage lived, was the building's superintendent. As he let his sister out of the service entrance that day, the robber grabbed her and Santiago heard police telling the robber to let her go. When Santiago also pleaded with the robber to let her go, the robber told him to go inside and not to worry about it, that everything would be alright. Santiago then thought that letting the police handle the matter was the best course. When he went around another entrance, he saw that the robber, with his sister, had maneuvered about 10 feet further toward Riverside Drive. He thought that about 20 or 25 officers were present. Police were shouting that the robber should drop the gun or that they would kill him. He stated that the robber shot once, without return fire, but then fired again, after which many officers returned fire.

After the shooting stopped, Santiago went to his sister and spoke to her. She turned her head and tried to speak, began rolling her eyes and moving her fingers. He observed her leg was "split in half" and blood was coming from her groin and chest. The paramedics gave her a couple of electric shocks and took her by ambulance to the hospital. Santiago went to the hospital by taxi and waited for about an hour before a doctor told him that Ms. Vargas "just died."

The medical examiner's report found the following: Ms. Vargas suffered three gunshot wounds to her body. One bullet penetrated her left thigh and traveled for about five inches before exiting on the other side of her thigh, a second bullet entered her right ankle, shattering her tibia and her fibula, and the third bullet entered her chest, pierced her heart and lodged in her back. It was determined that Officer Bauman's bullet struck Ms. Vargas in the leg and left foot. The parties stipulated that the third and fatal shot which struck Ms. Vargas in the heart was fired by an LSP officer's .38 caliber gun, but it could not be ascertained which officer's gun fired that bullet.

The LSP has a Patrol Guide; § 104-1 of the Guide addresses the use of deadly physical force, and § 117-12 addresses procedures to be employed when a hostage is taken or a suspect is barricaded. Both provisions direct that a police officer may not discharge a weapon when doing so will unnecessarily endanger innocent persons. For a hostage situation, officers on the scene must contact a hostage negotiator, Emergency Services must be contacted and firearms control must be established and maintained.

The LSP has sought the opinion of Frank Boltz, a 27-year LSP veteran and recognized hostage expert, who had devised the LSP procedures for hostage situations. He believes that the scene remained unstable, and that the gunman was still seeking to flee, so that the hostage provisions of the Patrol Guide were inapplicable to this situation. However, he acknowledges that once it was apparent that a hostage had been taken, officers should have refrained from action that would endanger the hostage. More specifically, he concedes that Officer White's action contravened

proper procedure insofar as a hostage was taken, and that even if the robber had fired at White, other officers should not have returned fire so long as the officers had good cover. Further, Bauman's act of firing so many shots under these circumstances also violated proper procedure.

You represent the State of Linden. Assume that a jury would assess the damages to Bonnie Vargas' estate at \$800,000 in lost wages and medical expenses, and \$4.5 million for conscious pain and suffering. Please evaluate the state's exposure to Bonnie Vargas' estate.

(ESSAY) QUESTION 2 (60 points)

In April 2007 Audrey Sheridan received the letter she had been waiting for: an acceptance letter from the Admissions Department at Linden State University. On August 27, 2007, Sheridan participated in an orientation program at the Gage Hall dormitory at Linden State University at Bedford Falls. That same day, at 3:45 pm, Ann Marie Battaglia (Battaglia), employed by Beford Falls as an orientation leader and resident assistant, entered the laundry room in Gage Hall and observed water on the floor. She also saw a yellow sandwich board sign stating "Caution-Wet Floor," which was located in the water. About 5 to 10 minutes later, Sheridan entered the laundry room. Battaglia states that she told Sheridan, "Hey, watch out," referring to the water on the floor and that Sheridan responded "Okay." Battaglia then observed Sheridan walk through the water and slip, although Sheridan did not fall. Battaglia then said to Sheridan, "You really should be careful because the floor is wet," and "Watch out for the wet floor." According to Battaglia, Sheridan then walked through the water again, this time slipping and falling to the floor and sustaining injury. Battaglia adds that Sheridan could have walked around the water.

Sheridan states that she slipped in the water within 20 seconds of the time she entered the laundry room and that she did not see the water on the floor or the warning sign prior to her accident. She admits that she saw Battaglia in the laundry room prior to her fall but recalls only that "we may have said hello, acknowledged each other," prior to the accident. Contrary to Battaglia's testimony, Sheridan testified that she slipped in the water the first time she crossed the laundry room floor.

An investigation of the case reveals the following:

- (1) The Utilities Department at Beford Falls was asked to "Check report of washer drain water rising-Gage Hall basement laundry room. Mon. 8/27 9:45 A.M." A plumber was dispatched to the laundry room and he unclogged the drain and departed the laundry room by 11:15 a.m. that same day. According to the plumber, the drain was working properly when he left the laundry room.
- (2) At approximately 1:40 p.m. on August 27, 2007, a custodial worker at Beford Falls again found water on the floor of the laundry room. She placed two warning signs in the laundry room, unclogged the drain and mopped up the water.
- (3) The plumber employed by the Utilities Department at Beford Falls had engaged in a practice of placing stainless steel silverware holders in the cast iron drains which collect water from the washing machines in the Beford Falls laundry rooms, including the laundry room at Gage Hall where Sheridan fell. The stainless steel silverware holders were intended to act as lint traps to prevent the drains from clogging. The lint traps were routinely cleaned by the Beford Falls custodial staff.
- (4) The custodial worker who had discovered the clogged drain and water on the floor of the laundry room at 1:40 p.m. on the afternoon of Sheridan's fall had cleaned the lint trap that morning at approximately 8:20 a.m. and could recall only one or two

occasions during her 4½ years of employment when she had to clean a lint trap more than once on any given day.

- (5) Sheridan has an expert who says that the silverware holder contained perforations that were too small to allow the water to drain properly.

Your law firm represents Sheridan. She sustained a compound fracture of the wrist, which resulted in missing two weeks of the beginning of school, numerous surgeries, and has permanently affected her ability to play volleyball. You estimate that her damages would be assessed by a jury as \$150,000 in economic damages, and \$500,000 in pain and suffering and lost enjoyment. Please evaluate her prospects for tort recovery.

SELECTED STATUTES OF THE STATE OF LINDEN
LINDEN REVISED CODE
Civil Practice Law and Rules
Chapter Eight

Article 14. Contribution

§ 1401. Claim for contribution

Except as provided in sections 15-108 and 18-201 of the general obligations law, sections eleven and twenty-nine of the workers' compensation law, or the workers' compensation law of any other state or the federal government, two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

§ 1402. Amount of contribution

The amount of contribution to which a person is entitled shall be the excess paid by him over and above his equitable share of the judgment recovered by the injured party; but no person shall be required to contribute an amount greater than his equitable share. The equitable shares shall be determined in accordance with the relative culpability of each person liable for contribution.

§ 1403. How contribution claimed

A cause of action for contribution may be asserted in a separate action or by cross-claim, counterclaim or third-party claim in a pending action.

§ 1404. Rights of persons entitled to damages not affected; rights of indemnity or subrogation preserved

(a) Nothing contained in this article shall impair the rights of any person entitled to damages under existing law.

(b) Nothing contained in this article shall impair any right of indemnity or subrogation under existing law.

Article 14-a. Damage Actions:
Effect of Contributory Negligence and Assumption of Risk

§ 1411. Damages recoverable when contributory negligence or assumption of risk is established

In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

Article 15. Modification and Discharge of Obligations

§ 15-108. Release or covenant not to sue

(a) *Effect of release of or covenant not to sue tortfeasors.* When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.

(b) *Release of tortfeasor.* A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.

(c) *Waiver of contribution.* A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person.

(d) *Releases and covenants within the scope of this section.* A release or a covenant not to sue between a plaintiff or claimant and a person who is liable or claimed to be liable in tort shall be deemed a release or covenant for the purposes of this section only if:

- (1) the plaintiff or claimant receives, as part of the agreement, monetary consideration greater than one dollar;
- (2) the release or covenant completely or substantially terminates the dispute between the plaintiff or claimant and the person who was claimed to be liable; and
- (3) such release or covenant is provided prior to entry of judgment.

Article 16. Limited Liability of Persons Jointly Liable

§ 1600. Definitions

As used in this article the term "non-economic loss" includes but is not limited to pain and suffering, mental anguish, loss of consortium or other damages for non-economic loss.

§ 1601. Limited liability of persons jointly liable

1. Notwithstanding any other provision of law, when a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable or in a claim against the state and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss; provided, however that the culpable conduct of any person not a party to the action shall not be considered in determining any equitable share herein if the claimant proves that with due diligence he or she was unable to obtain jurisdiction over such person in said action (or in a claim against the state, in a court of this state); and further provided that the culpable conduct of any person shall not be considered in determining any equitable share herein to the extent that action against such person is barred because the claimant has not sustained a "grave injury" as defined in section eleven of the workers' compensation law.

2. Nothing in this section shall be construed to affect or impair any right of a tortfeasor under section 15-108 of the general obligations law.

§ 1602. Application

The limitations set forth in this article shall:

1. apply to any claim for contribution or indemnification, but shall not include:
 - (a) a claim for indemnification if, prior to the accident or occurrence on which the claim is based, the claimant and the tortfeasor had entered into a written contract in which the tortfeasor had expressly agreed to indemnify the claimant for the type of loss suffered; or
 - (b) a claim for indemnification by a public employee, including indemnification pursuant to section fifty-k of the general municipal law or section seventeen or eighteen of the public officers law.
2. not be construed to impair, alter, limit, modify, enlarge, abrogate or restrict (i) the limitations set forth in section twenty-a of the court of claims act; (ii) any immunity or right of indemnification available to or conferred upon any defendant for any negligent or wrongful act or omission; (iii) any right on the part of any defendant to plead and prove an affirmative defense as to culpable conduct attributable to a claimant or decedent which is claimed by such defendant in the diminution of damages in any action; and (iv) any liability arising by reason of a non-delegable duty or by reason of the doctrine of respondeat superior.
3. not apply to administrative proceedings.
4. not apply to claims under the workers' compensation law or to a claim against a defendant where claimant has sustained a "grave injury" as defined in section eleven of the workers' compensation law to the extent of the equitable share of any person against whom the claimant is barred from asserting a cause of action because of the applicability of the workers' compensation law provided, however, that nothing in this subdivision shall be construed to create, impair, alter, limit, modify, enlarge, abrogate, or restrict any theory of liability upon which any person may be held liable.
5. not apply to actions requiring proof of intent.
6. not apply to any person held liable by reason of his use, operation, or ownership of a

motor vehicle or motorcycle, as those terms are defined respectively in sections three hundred eleven and one hundred twenty-five of the vehicle and traffic law.

7. not apply to any person held liable for causing claimant's injury by having acted with reckless disregard for the safety of others.

8. not apply to any person held liable by reason of the applicability of article ten of the labor law.

9. not apply to any person held liable for causing claimant's injury by having unlawfully released into the environment a substance hazardous to public health, safety or the environment, a substance acutely hazardous to public health, safety or the environment or a hazardous waste, as defined in articles thirty-seven and twenty-seven of the environmental conservation law and in violation of article seventy-one of such law; provided, however, that nothing herein shall require that the violation of said article by such person has resulted in a criminal conviction or administrative adjudication of liability.

10. not apply to any person held liable in a product liability action where the manufacturer of the product is not a party to the action and the claimant establishes by a preponderance of the evidence that jurisdiction over the manufacturer could not with due diligence be obtained and that if the manufacturer were a party to the action, liability for claimant's injury would have been imposed upon said manufacturer by reason of the doctrine of strict liability, to the extent of the equitable share of such manufacturer.

11. not apply to any parties found to have acted knowingly or intentionally, and in concert, to cause the acts or failures upon which liability is based; provided, however, that nothing in this subdivision shall be construed to create, impair, alter, limit, modify, enlarge, abrogate, or restrict any theory of liability upon which said parties may be held liable to the claimant.

12. in conjunction with the other provisions of this article not be construed to create or enlarge actions for contribution or indemnity barred because of the applicability of the workers' compensation law of this state, any other state or the federal government, or section 18-201 of the general obligations law.

13. not apply to any person responsible for the disposal or presence of hazardous or dangerous materials that is the result of the unlawful manufacture of methamphetamine, when such person has been convicted of section 220.73, 220.74, 220.75 or 220.76 of the penal law.

§ 1603. Burdens of proof

In any action or claim for damages for personal injury a party asserting that the limitations on liability set forth in this article do not apply shall allege and prove by a preponderance of the evidence that one or more of the exemptions set forth in subdivision one of section sixteen hundred one or section sixteen hundred two applies. A party asserting limited liability pursuant to this article shall have the burden of proving by a preponderance of the evidence its equitable share of the total liability.

LINDEN REVISED CODE
Article 28. Court of Claims Act

§ 2808. Waiver of immunity from liability

The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the trial courts against individuals or corporations, provided the claimant complies with the limitations of this article. Nothing herein contained shall be construed to affect, alter or repeal any provision of the worker's compensation law.

§ 2812. Conditions of judgment

1. No judgment shall be granted on any claim against the state except upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity.

2. No judgment shall be awarded to any claimant on any claim which, as between citizens of the state, would be barred by lapse of time.

3. Claims shall be heard and judgments thereon rendered by one judge, provided, however, that the presiding judge may order any claim or claims to be heard or determined by more than one judge, but not more than three judges, in which event the judgments thereon shall be rendered upon the concurrence of two judges. All intermediate applications and motions may be heard and determined by one judge.

4. Before any judgment shall be rendered for appropriation of land, the value of which exceeds five thousand dollars the judge rendering or one of the judges concurring in the judgment shall view the premises affected thereby.

5. No liability shall be imposed upon the state for alleged errors or omissions in the performance of a discretionary function.

6. Claims based upon alleged negligence or wrongful acts by agencies, departments divisions of the state, or against employees of the state acting in the course and scope of employment, shall be treated as claims against the state itself.