

Exam # _____

TORTS
FALL 2011

PROFESSOR DEWOLF
December 6, 2011

FINAL EXAM

Instructions

DO NOT GO BEYOND THIS PAGE UNTIL THE EXAM ACTUALLY BEGINS. THIS IS A CLOSED BOOK EXAM! Follow all of the directions of the proctor.

IMPORTANT: This exam will last THREE HOURS. You should plan on spending AT LEAST 20 minutes reading the questions carefully and outlining your answers on a separate sheet of paper. Before writing 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* (15 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. Circle the correct answer on the exam. Write your answers to the multiple choice questions at the beginning of your answer to Essay #1.

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

Question 1: **45** points

Question 2: **75** 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 the other; make sure that each essay answer stands 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 Evergreen, 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.

MERRY CHRISTMAS! / HAPPY HOLIDAYS!

MULTIPLE CHOICE QUESTIONS

1. Cindy and Martha were good friends. Martha knew that at one time Cindy was married to Slinger Sam, a professional NFL football player, but now she was a single mother with a 16-year-old son. Martha arranged for Bill to call her while Cindy was visiting. When she answered the phone, Martha pretended it was Slinger Sam. "Oh, really?" Martha said. "Yes, she's here. I'll put her on speaker phone." Martha then turned to Cindy and said, "Cindy -- it's Slinger Sam on the phone." Cindy fainted. Unbeknownst to Martha, Slinger Sam was reported missing and presumed dead after a fishing boat capsized in Lake Michigan. Which of the following is true?

- (a) Martha is liable to Cindy for battery, if it was substantially certain that Cindy would suffer physical harm from her actions.
- (b) Martha is liable to Cindy for assault, if it was substantially certain that Cindy would experience apprehension as a result of Martha's conduct.
- (c) Both (a) and (b) are correct;
- (d) Neither (a) nor (b) is correct.

2. George was a custodian at a large office building. Maxine and Linda, partners in a law firm that occupied the top floor of the building, were working late one night on a corporate merger. George had been instructed to make sure that the glass doors at the entrance to the law firm were securely locked when he left the building. George thought he heard voices in the conference room while he cleaned the other offices, but he assumed it was just a television set that had been left on. An hour after he locked the front doors and left, Maxine and Linda finished their work and were heading home when they discovered that the only exit was closed. If Maxine and Linda sued George for false imprisonment, which of the following is true?

- (a) George would not be liable unless he intended to confine Maxine and Linda.
- (b) Maxine and Linda could only recover if they suffered damage as a result of being locked in;
- (c) Both (a) and (b) are correct;
- (d) Neither (a) nor (b) is correct.

3. Ben Blaylock rode the subway every day, during rush hour when the cars were usually crowded. He made a point of standing next to Anita Arkes, who commuted on the subway to her job at the stock exchange. Anita found his presence annoying, but she would acknowledge that she might be called hypersensitive. The subway stop where she got on the train was further down the line, so she typically couldn't get a seat and had to stand. Typically Ben was already on the subway car when she entered, and even if he was seated he would offer his seat to someone else and work his way over to where she stood. The jostling of the subway car resulted in Ben bumping up against her. If Anita sued Ben for battery, which of the following is correct?

- (a) Anita would prevail if she could show that Ben intended to have contact with her, which he knew that she would find offensive;
- (b) Ben would prevail if a reasonable person would consider the contact a normal aspect of riding in a crowded subway car;
- (c) Both (a) and (b) are correct;
- (d) Neither (a) nor (b) is correct.

ESSAY QUESTIONS

QUESTION 1 (45 points)

On March 24, 2009, Emily Edwards was riding her motorcycle on an Evergreen State Highway Route 837 when she hit a pothole and was thrown 120 feet, receiving serious injuries.

In the course of your investigation you have discovered:

(1) On June 29, 2008, State Senator Sean Logan wrote to the Evergreen Department of Transportation the following letter:

I am writing to you concerning the condition of Route 837 located in the City of Duquesne.

It has been brought to my attention that this roadway has fallen into disrepair. It is my understanding that some patchwork has been done. However, the patchwork itself has seemingly caused more problems than it solved. The Mayor of Duquesne has contacted me expressing his concern over the potential of chipped paint or broken windshields due to loose gravel on the roadway. As you are aware, Route 837 is used as a primary artery of travel for the residents of Duquesne as well as commuters and motorists throughout the region.

I respectfully request that this road be evaluated and that subsequent repairs be undertaken as soon as possible.

I appreciate your time and attention to this important matter. If you have any questions or concerns regarding this letter, please do not hesitate to contact me directly.

Two weeks later the Department replied as follows:

Thank you for your letter of June 29, 2008 on behalf of the City of Duquesne concerning the condition of State Route 837.

The Department would like to make major improvements to this section of roadway but has been unable to secure the necessary funding. We will certainly keep this project at the top of our priority list.

Our Maintenance Crews have been patching with materials that work best with concrete surfaces. They had street sweepers clean up the excess chips associated with this operation. I apologize for any inconveniences that may have occurred.

If you have any further questions about this issue please contact [a certain individual] of our District Maintenance Unit at [phone number provided]

Edwards has filed a tort claim against the State of Evergreen. You work for the Attorney General's Office of the State of Evergreen, which handles tort claims. A state employee who investigates motor vehicle accidents reports the following:

- (1) Motorcycle riders often travel above the speed limit. Although there is no direct evidence in this case that Edwards was speeding, it could be a factor.
- (2) The accident occurred in broad daylight. The investigator believes that a prudent motorcycle rider would have slowed in recognition of the less than ideal conditions on the roadway.
- (3) An experienced lawyer in your firm has estimated the damages that a jury would award in a case like this to be in the range of \$2 million.

Please prepare an analysis of the likelihood that tort liability would be imposed upon the State of Evergreen, and any defenses that the state might raise.

QUESTION 2 (75 points)

On August 23, 2010, Kathryn C. Rodriguez and two of her friends (Deborah Dubis and Lisa Nunnaly) went wine tasting. Dubis was driving her Suzuki Samurai on Highway 94, with Rodriguez and Lisa Nunnaly as passengers. While on the return trip, there was an accident. The vehicle left the right side of the roadway, traveled into the ditch, and struck a 14-inch-high dirt headwall, the side of a cemetery driveway. What happened next is hotly disputed. According to Dubis and her passengers, the Samurai returned to the roadway, and crossed the center line. To return to the normal lane of travel, Dubis turned sharply right to correct, and then the vehicle rolled over. One of Suzuki's investigators, who studied the accident reports and other evidence, believes that the Samurai never returned to the roadway. Instead, he believes that the impact with the cemetery driveway launched the vehicle into the air, causing the Samurai to roll in the ditch.

Rodriguez has come to your law firm to ask for assistance in seeking tort compensation. Another lawyer in the firm estimates that the case has the potential of generating \$30 million in compensatory damages, and even more in punitive damages.

In interviewing your client and other witnesses, you have learned the following:

- (1) Both the driver and the two passengers admit that they had been drinking wine prior to the accident. Nunnally stated that she felt "tipsy." The state trooper who responded to the accident reported that he smelled alcohol on Dubis' breath.
- (2) An automotive design expert retained by your law firm believes that the design of the Suzuki Samurai made it prone to "rollover" accidents, and that the high center of gravity and relatively narrow wheelbase made it unreasonably dangerous.

Please provide an analysis of the potential for establishing liability as the basis for tort compensation, as well as any defenses that might be raised. Assume for purposes of your analysis that there was no negligence on the part of any of the wine vendors who supplied wine to Rodriguez and her friends.

EVERGREEN REVISED STATUTES
Judiciary and Judicial Procedure
Part VII. Civil Actions and Proceedings
Chapter 85. Matters Affecting Government Units
Subchapter B. Actions Against State Parties
Sovereign Immunity

§ 8522. Exceptions to sovereign immunity

(a) *Liability imposed.*--The General Assembly, pursuant to section 11 of Article I of the Constitution of Evergreen, does hereby waive, in the instances set forth in subsection (b) only and only to the extent set forth in this subchapter and within the limits set forth in section 8528 (relating to limitations on damages), sovereign immunity as a bar to an action against State parties, for damages arising out of a negligent act where the damages would be recoverable under the common law or a statute creating a cause of action if the injury were caused by a person not having available the defense of sovereign immunity.

(b) *Acts which may impose liability.*--The following acts by a State party (except where such acts consist of the exercise, or failure to exercise, a discretionary function) may result in the imposition of liability on the State and the defense of sovereign immunity shall not be raised to claims for damages caused by:

(1) Vehicle liability.--The operation of any motor vehicle in the possession or control of a State party. As used in this paragraph, "motor vehicle" means any vehicle which is self-propelled and any attachment thereto, including vehicles operated by rail, through water or in the air.

(2) Medical-professional liability.--Acts of health care employees of State agency medical facilities or institutions or by a State party who is a doctor, dentist, nurse or related health care personnel.

(3) Care, custody or control of personal property.--The care, custody or control of personal property in the possession or control of State parties, including State-owned personal property and property of persons held by a State agency, except that the sovereign immunity of the State is retained as a bar to actions on claims arising out of State agency activities involving the use of nuclear and other radioactive equipment, devices and materials.

(4) State real estate, highways and sidewalks.--A dangerous condition of State agency real estate and sidewalks, including State-owned real property, leaseholds in the possession of a State agency and State-owned real property leased by a State agency to private persons, and highways under the jurisdiction of a State agency, except conditions described in paragraph (5).

(5) Potholes and other dangerous conditions.--A dangerous condition of highways under the jurisdiction of a State agency created by potholes or sinkholes or other similar conditions created by natural elements, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the State agency had actual written notice of the dangerous condition of the highway a sufficient time prior to the event to have taken measures to protect against the dangerous condition. Property damages shall not be recoverable under this paragraph.

(6) Care, custody or control of animals.--The care, custody or control of animals in the possession or control of a State party, including but not limited to police dogs and horses and animals incarcerated in State agency laboratories. Damages shall not be recoverable under this paragraph on account of any injury caused by wild animals, including but not limited to bears and deer, except as otherwise provided by statute.

(7) Liquor store sales.--The sale of liquor at Evergreen liquor stores by employees of the Evergreen Liquor Control Board created by and operating under the act of April 12, 1951 (P.L. 90, No. 21), known as the "Liquor Code," if such sale is made to any minor, or to any person visibly intoxicated, or to any insane person, or to any person known as an habitual drunkard, or of known intemperate habit.

(8) National Guard activities.--Acts of a member of the Evergreen military forces.

(9) Toxoids and vaccines.--The administration, manufacture and use of a toxoid or vaccine not manufactured in this State under the following conditions:

(i) The toxoid or vaccine is manufactured in, and available only from, an agency of another state.

(ii) The agency of the other state will not make the toxoid or vaccine available to private persons or corporations, but will only permit its sale to another state or state agency.

(iii) The agency of the other state will make the toxoid or vaccine available to the State only if the State agrees to indemnify, defend and save harmless that agency from any and all claims and losses which may arise against it from the administration, manufacture or use of the toxoid or vaccine.

(iv) A determination has been made by the appropriate State agency, approved by the Governor and published in the Evergreen Bulletin, that the toxoid or vaccine is necessary to safeguard and protect the health of the citizens or animals of this State.

(v) The toxoid or vaccine is distributed by a State agency to qualified persons for ultimate use.

The State shall make the toxoid or vaccine available to a qualified person only if the person agrees to indemnify, defend and save harmless the State from any and all claims and losses which may arise against the State from the manufacture, distribution, administration or use of the toxoid or vaccine.

§ 8528. Limitations on damages

(a) General rule.--Actions for which damages are limited by reference to this subchapter shall be limited as set forth in this section.

(b) Amount recoverable.--Damages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed \$250,000 in favor of any plaintiff or \$1,000,000 in the aggregate.

(c) Types of damages recoverable.--Damages shall be recoverable only for:

(1) Past and future loss of earnings and earning capacity.

(2) Pain and suffering.

(3) Medical and dental expenses including the reasonable value of reasonable and necessary medical and dental services, prosthetic devices and necessary ambulance, hospital, professional nursing, and physical therapy expenses accrued and anticipated in the diagnosis, care and recovery of the claimant.

(4) Loss of consortium.

(5) Property losses, except that property losses shall not be recoverable in claims brought pursuant to section 8522(b)(5) (relating to potholes and other dangerous conditions).

Chapter 537
Comparative Fault

§ 537.01. Effect of Contributory Fault

In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant, if not greater than the combined fault of all other parties to the claim, including third-party defendants and persons released, diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

§ 537.067. Joint and several liability of defendants in tort actions, allocation of responsibility for judgment--defendants several liability for punitive damages

1. In all tort actions for damages, if a defendant is found to bear fifty-one percent or more of fault, then such defendant shall be jointly and severally liable for the amount of the judgment rendered against the defendants. If a defendant is found to bear less than fifty-one percent of fault, then the defendant shall only be responsible for the percentage of the judgment for which the defendant is determined to be responsible by the trier of fact; except that, a party is responsible for the fault of another defendant or for payment of the proportionate share of another defendant if any of the following applies:

- (1) The other defendant was acting as an employee of the party;
- (2) The defendants were acting in concert;

2. The defendants shall only be severally liable for the percentage of punitive damages for which fault is attributed to such defendant by the trier of fact.

3. In all tort actions, no party may disclose to the trier of fact the impact of this section.

Chapter 537. Torts and Actions for Damages
Products Liability

§ 537.765. Contributory fault as complete bar to plaintiff's recovery abolished--doctrine of comparative fault to apply--fault of plaintiff an affirmative defense to diminish damages--fault defined

1. Contributory fault, as a complete bar to plaintiff's recovery in a products liability claim, is abolished. The doctrine of pure comparative fault shall apply to products liability claims as provided in this section.

2. Defendant may plead and prove the fault of the plaintiff as an affirmative defense. Any fault chargeable to the plaintiff shall diminish proportionately the amount awarded as compensatory damages but shall not bar recovery.

3. For purposes of this section, "fault" is limited to:

- (1) The failure to use the product as reasonably anticipated by the manufacturer;
- (2) Use of the product for a purpose not intended by the manufacturer;
- (3) Use of the product with knowledge of a danger involved in such use with reasonable appreciation of the consequences and the voluntary and unreasonable exposure to said danger;
- (4) Unreasonable failure to appreciate the danger involved in use of the product or the consequences thereof and the unreasonable exposure to said danger;
- (5) The failure to undertake the precautions a reasonably careful user of the product would take to protect himself against dangers which he would reasonably appreciate under the same or similar circumstances; or
- (6) The failure to mitigate damages.