contribution is available. Under the first view, the non-settling defendant enjoys a credit for the amount paid by the settling joint tortfeasor and may obtain contribution from that party, on a pro rata or proportional basis, depending on the jurisdiction. This view discourages settlement in that the would-be settler will not be sure that settling with the victim will put the matter to rest so far as he is concerned. Under the second view, a credit is allowed but contribution is denied so long as the settlement was made in good faith. While this approach does not discourage settlement, it has the untoward effect of skewing the distribution of losses based on the fortuity of who settles first.

Answer to Part (4)

If the operators of the bars are joint tortfeasors with Ansel with respect to the injuries suffered by Blake, contribution can be sought from them in most jurisdictions even though they were not sued by Blake because the injuries were not intentionally inflicted. Whether the computation will be made on a pro rata or proportional basis will depend upon the state. Since there was no concert of action between Blake and the owners, if joint and severally liability is to arise, it must stem from the fact that negligence on the part of each contributed to the production of single and indivisible harm. Here, there is no real problem with saying that the harm is single and indivisible. We have one injured plaintiff and one damaged car, and no basis for rationally apportioning the damages is readily apparent. The difficulty, rather, is with proving that any or all of the owners were negligent and that their acts of negligence were factual and proximate causes of the injuries sustained.

Each of the bars on Eddy Street served reduced price drinks on the evening in question, in violation of the statute. In a civil tort action for damages, a court may rely upon a criminal enactment to set the standard of care. Normally, in deciding upon whether to embrace as standard-setting a statute which does not expressly or implicitly provide for civil liability (which appears to be the case here), the court considers whether the harm which occurred was of the type the legislation intended to prevent and whether the plaintiff was a member of the class intended to be protected. Here, it seems likely that a court could determine that the Happy Hour law, being part of an anti-drunk driving campaign, was intended to protect highway users such as Blake from physical injuries and property damage. Nonetheless there may be several reasons why the court may wish to eschew reliance on the statute.

First, a court should not adopt as setting the relevant standard of care a criminal law which imposes a penalty which the legislature intended to be exclusive. Here the statute provided that the penalty for violation was to be not "in excess of $500." It did not permit higher fines nor provide for imprisonment. The legislative history may reveal that the legislature expressly rejected more serious sanctions for political or other reasons. If that is the case, it

might reasonably be argued that the penalty was intended to be exclusive and the statute should not be employed in a civil cause of action.

In addition, relying upon this statute may create problems for proving causation. Essentially one would have to argue that if drinks were sold at regular prices, the accident probably would not have occurred. This may or may not be the case, though, guided by past experience and common sense, perhaps such a finding could be made without too much difficulty.

Of course, even if reliance on the statute is ruled out, it may be possible to prove negligence under the reasonable person standard as applied to the facts of the specific case. Essentially, the question would be whether a reasonable bar operator would have sold beer at two-for-one prices, given the strong possibility that this might lead to accidents on the highway. To the extent that it could be foreseen that this manner of doing business was likely to lead to drunk driving, it would not be necessary to prove that any bar had specific knowledge of Ansel's intoxicated condition (cf. the Pizza case).

The overarching problem with any of these theories is, of course, one of causation, both factual and proximate. As to the latter, courts have often held that the acts of a drunk driver are a superseding cause absolving social hosts and sellers of alcohol of liability. While there is currently some drift away from this position, it may still pose a serious obstacle. Second, as to factual causation, normally the burden is on the plaintiff (here, a plaintiff in a contribution action, rather than a true victim) to establish an affirmative causal link between the defendant's conduct and the harm that ensued. Ansel, however, does not recall which bars he frequented, or in what sequence, or how much he drank at any of them. Although there are theories under which the plaintiff's burden of proving factual causation can be eased or shifted to the defendants -- res ipsa loquitur, alternative liability, enterprise liability, and market share liability -- there is at least a serious question as to whether any of these should apply here.

Res ipsa loquitur generally is not available against multiple defendants unless it can be said that they stood in some integrated relationship giving rise of a joint duty of care, as in Ybarra v. Spangard, the case involving the injury during surgery. Here, there were nearly twenty bars and in no real sense any integrated relationship between them. They appear to have operated independently and presumably they served different clientel. It would be unrealistic to argue that one bar had an obligation to ensure that another treated the clients of that establishment properly. A factor which frequently has been influential (though not essential) in determining when the doctrine will be available is that the defendant has better information as to what in fact occurred. This, too, argues against application of the doctrine in the present case. Bars serve many customers. It is unlikely a particular bar operator could recall all of his patrons on a particular occasion,

let alone establish that plaintiff must have been elsewhere. Finally, the equities of the situation and the unfairness of requiring the plaintiff to produce proof often come into play. Because here it is to some extent the blameworthy intemperance of the plaintiff which accounts for failed recollection and the unavailability of the information, this factor also weighs against invocation of the doctrine.

The theory of alternative liability turns upon showing that all of the defendants were at fault, that plaintiff in contrast was not, and that it is more reasonable to expect the defendants to provide an explanation of what occurred. Here, even if we assume that it can be shown that all of the defendants, by flouting the Happy Hour law, were negligent and that the actual culprits were in fact in court, it seems fair to say that (unlike the case in Summers v. Tice) Ansel was at least as blameworthy as the defendants by reason of his voluntary intoxication, and that defendants did not have better access to information. (Of course, fault on the part of the plaintiff may be ignored if the statute is held to set the standard of care and is interpreted as intended to protect persons such as Ansel from their own imprudence.)

Enterprise liability, which is much less well established than res ipsa loquitur and alternative liability, was applied in Hall v. Dupont to a small group of manufacturers which composed virtually all of the blasting cap industry. They had delegated certain safety functions to a trade organization and the very nature of the product which they made accounted for the difficulty in proving causation. The facts here do not seem sufficiently analogous. The group of bars is somewhat larger, there was no common delegation of authority and, while the alcoholic beverages they served may to some extent lead to failure of recollection and difficult problems of proof, plaintiff must bear some responsibility for the same by reason of his voluntary consumption thereof.

In contrast to the above theories, market share liability is somewhat attractive. It is of recent origin and its contours are not yet clear. What seems to be necessary is simply a showing that its invocation would advance important tort policies and would be more likely than not to avoid an unjust result. Employing this theory in the present case to shift the burden to defendants to disprove causation would tend to deter negligent conduct in the future. It would, moreover, arguably lead to a less burdensome distribution of losses by placing the loss on parties capable of spreading it to the consuming public as a part of doing business and by shifting the loss to "deeper pockets" -- although this latter point seems inescapably speculative to the extent that we have no knowledge about Ansel's wealth. In Sindell v. Abbott Laboratories, the DES case in which the theory was employed, it seemed to be important that the defendants were at fault whereas the plaintiff was innocent and that the defendants were at least as much responsible for the unavailability of the information as was the plaintiff. These criteria, as noted above, do not appear to be met here and that may prove to be a critical deficiency. If, nonetheless, the theory were to be

available, it would seem to be necessary to sue a sufficiently large number of the Eddy St. bars so that application of the doctrine would not be unfair. Just how many this would be is unclear. In Sindell, the court found that suit could be brought against 5 of 200 DES manufacturers who accounted for 90% of the market. Because in the present case it would be possible to ascertain the market shares of each of the bars and to limit their liability to a corresponding percentage, the theory does hold a certain attraction.

Another alternative, perhaps the most attractive of them all, would be for plaintiff to proceed on a concerted action theory. One who aids, abets, councils, procures, commands, ratifies, or adopts the tortious actions of another is as fully liable therefore as if he had done them himself. By engaging in conscious parallel activity in disobeying the Happy Hour law, the bars presumably gave moral support to one another to break the law. It could therefore be argued, as in Bichler v. Eli Lilly, that they are jointly responsible as concerted action joint tortfeasors. The question of whether it is fair to employ this approach in the case of a large group was raised but not addressed in Bichler because of lack of preservation. This question would have to be taken into account, for as the group increases in size it may be assumed that there will be greater judicial reluctance to invoke the theory to impose liability. To the extent that a concerted action theory, as opposed to, for example, market share liability, imposes full rather than partial liability, it is generally less desirable, since liability should be not only based on fault but in proportion to fault. Of course, the effect of this will be somewhat mitigated here being that the claim is one for contribution, which presumably will still be computed on a pro rata or proportional basis.

In sum, it seems that Ansel will have a difficult time securing contribution.

Torts I
(Misrepresentation Hypothetical)
Handout #4

Prof. Vincent R. Johnson
November 14, 1985

You may find it helpful to consider this hypothetical in connection with the chapter on misrepresentation. There is no deadline. It will not be discussed in class.

* * *

Zero at Law School

You are a new associate at the law firm of Grabem and Squeeze, a litigation powerhouse. During a client interview with Zero, a summa cum laude graduate of Slippery Rock College, with a B.A. in Noetic Perjinkities, you learn the following:

During his senior year in college, Zero applied to several law schools, including Shaky University Law School, a small institution located in the hills of the State of Despair. The law school catalog from Shaky listed nine full-time faculty members, including Professor A, an authority on New Guinea tribal law, Professor B, a scholar on Ecclesiastical Administration in Medieval England, and Professor C, an expert on Third Amendment litigation.

During an interview at the school, Zero met the Dean. The Dean said, "Zero, this is where you want to go, especially if you are interested in becoming a top-notch trial lawyer. Professor S, who teaches trial advocacy is a giant in the field. Our library now has 100,000 volumes. We do not plan to increase tuition next year."

Upon asking the Dean whether there was a Moot Courtroom, the Dean responded "Yes there is," neglecting to mention that for years it had only been used for storage of university band equipment.

Zero decided to enroll and paid his tuition for the first semester in full. Upon the arriving at the University in August, the Dean greeted Zero at the gate, saying "It is a pleasure to have you here, you will do fine."

After classes were underway, Zero learned that Professor A had died in May, Professor B had left to accept an appointment to chair at Yale, and Professor C's health had declined so far that he could only teach one hour per week, instead of his usual load of six hours. The faculty had not been augmented to make up for these losses.

Zero also discovered that the library in fact had only 99,500 volumes, only a fourth of which were in English. Everyone at the school had long anticipated a dramatic tuition increase for the coming year. Further, he learned that Professor S had not tried a case, published an article, or attended an academic conference in more than twenty years, though he was rather tall.

Zero continued his studies until the end of the first semester, when he was permanently dismissed for academic reasons, having failed all of his courses, except Torts in which he received an "A."

Still smarting from the sting of failing out, Zero now wonders whether he can bring some type of tort action against the law school for fraud. He is not sure whether it makes a difference that the Dean failed to mention at any time that last summer the ABA revoked its accreditation of the law school, and that students still in school will therefore not be able to take the bar exam in most states, even if they do graduate.

Based on what you know, what would be the best arguments Zero could make? Which show the least promise?

NOTES ON ANSWERING "ZERO AT LAW SCHOOL"

1. The catalogue's statement that there were nine full-time professors, including A, B, and C, was an assertion of fact. We have no reason to think it was not true when made, though circumstances did later change. A very relevant question is whether the changes occurred prior to the time Zero enrolled and paid his tuition. On this point the facts are unclear. The size of a law school's faculty and the identity of its professors might well be material to a student's decision of which school to attend. Whether or not there was a duty to update the information (assuming the changes occurred prior to Zero's enrollment) might well turn upon the presence of statements in the catalogue indicating something along the following lines:

> The information contained herein is correct as of the date of publication. Subsequent changes may occur, and the faculty reserves the right to modify at any time the program of study.

We would want to examine the catalogue for any such language. Even if no such provisions are present, it might be difficult for Zero to prove justifiable reliance since most people know that there is some turn over of faculty at academic institutions. In any event, Zero would have to prove that he had read the catalog and was influenced by it in deciding to enroll. There is no liability for misrepresentation unless the statement plays a role in leading the plaintiff to adopt a particular course of conduct.

2. The Dean's statement that "this is where you want to go" is an expression of mere opinion or puffing, upon which no reliance could be placed by a reasonable person.

3. The assertion that Prof. S was a giant in the field of trial advocacy was an ambiguity apparently calculated to mislead Zero. An ambiguous statement can give rise to misrepresentation liability if the listener accepts the incorrect interpretation as true and that interpretation is either intended by or known to the maker of the statement. Assuming that these requirements are now satisfied and further that the statement is not regarded as mere puffing, it may be difficult for Zero to predicate a misrepresentation claim on this ground inasmuch as it is unlikely that he suffered any damage by reason of

the fact that Prof. S is not an influential authority in the field of trial advocacy. Trial advocacy is generally not a first-year course and thus would be unrelated to Zero's failing out.

4. The fact that the library has only 99,500 volumes rather than 100,000 is probably insignificant. Trivial misstatements unrelated to anything of real importance are not material. On the other hand, the fact that only one-fourth of the volumes were in English was a critical non-disclosure which might reasonably be linked to Zero's failure, assuming appropriate facts can be adduced. While normally there is no duty to speak, here the Dean had gone far enough in stating a half-truth (namely that there were 100,000 volumes) to create such an obligation.

5. The Dean's statement that "We do not plan to increase tuition next year" should be treated as a reliable statement of intention rather than a prediction, since presumably such a decision would be somewhere within the Dean's sphere of influence. If no such intention was in fact entertained, as is suggested by the fact that everyone else believed otherwise, the false statement could give rise to liability. However, assuming the statement was false when made, Zero cannot base a claim upon it, since apparently he was in no way damaged by the statement. That is, tuition never in fact went up.

6. The Dean's statement that there was a moot courtroom was an actionable half-truth since the Dean failed to disclose that the room had long been used for other purposes. Again, it will be difficult if not impossible to show any relationship between the assertion and the damages sustained by Zero.

7. The Dean's statement to Zero that "you will do fine" is a mere opinion or prediction which is not actionable. Justifiable reliance cannot be placed on such casual banter.

8. The Dean's failure to disclose that the school is not accredited is probably the most serious misstatement at issue. A colorable argument could be made that there was a duty to reveal this fact because it was basic to the transaction. It relates to the essential matter of whether legal education will unable one to take the bar,

and failure to disclose the same would amount to a form of swindling shocking to the conscience of the community. Because accreditation of an institution depends to some extent on the quality of the educational facilities and the quality of the education being furnished, it seems likely that the deficiencies underlying the lack of accreditation can be casually linked to the academic failure of Zero. To the extent that any of the above misstatements or non-disclosures are actionable, it will be necessary to show that the defendants acted with scienter (i.e., with knowledge of falsity or reckless as to the truth) or negligently, and that in either case there was intent to induce or reason to expect reliance -- which on the present facts would apparently not be difficult to show. Whether it is preferable to proceed by way of an action for deceit as opposed to negligent misrepresentation will depend upon how that would affect such matters as applicable statutes of limitations, claims for punitive damages, and so forth.

Torts II Practice Exam
March 15, 1985

Professor Vincent R. Johnson
St. Mary's School of Law

(Suggested time: three to three and one-half hours)

See p. 77 of class binder for answers.

Question 1: (Approximately two pages)

Professor S offered to drive Professor R to the Law Student Banquet in downtown Nifftyville. Despite the fact that S had asked R to lock the door on his side of the car, Professor R forgot. This was uncharacteristic of R, for he always made it a point never to leave an unlocked vehicle on a public thoroughfare. After S and R entered the Banquet Hall, a block from where they had parked, R recalled his error, told S, and S ran back to the car to remedy the problem. Immediately after locking the car door, S turned to go back to the fete, but in the process twisted his foot on the curb and broke his ankle. The injury was severe and required medical treatment.

(A) Was the conduct of Professor R negligent? Why or why not? If you need more information, what questions do you want to ask?

(B) Assume that Professor R's conduct was negligent. Was that negligence a proximate cause of S's injury? Indicate concisely the best arguments you could make on each side of the question.

(C) Suppose that when R told S that he had forgotten to lock his door, S recalled that he too had committed the same mistake on his side of the car, and that the injury was sustained when S went back to lock both doors. Would this alter your assessment of the factual causation issue?

Question 2:

Bedrock College, a private institution, had long been known as a "party school." It had, over the years, encouraged this reputation, for it seemed to attract as students the children of wealthy familites and to

(See page 77 of exam binder for sample answers.)

Torts II Practice Exam
March 21, 1984

Professor Vincent R. Johnson
St. Mary's School of Law

(Suggested time: three to three and one-half hours)

Question 1: (Approximately two pages)

Professor S offered to drive Professor R to the Law Student Banquet in downtown Nifftyville. Despite the fact that S had asked R to lock the door on his side of the car, Professor R forgot. This was uncharacteristic of R, for he always made it a point never to leave an unlocked vehicle on a public thoroughfare. After S and R entered the Banquet Hall, a block from where they had parked, R recalled his error, told S, and S ran back to the car to remedy the problem. Immediately after locking the car door, S turned to go back to the fete, but in the process twisted his foot on the curb and broke his ankle. The injury was severe and required medical treatment.

(A) Was the conduct of Professor R negligent? Why or why not? If you need more information, what questions do you want to ask?

(B) Assume that Professor R's conduct was negligent. Was that negligence a proximate cause of S's injury? Indicate concisely the best arguments you could make on each side of the question.

(C) Suppose that when R told S that he had forgotten to lock his door, S recalled that he too had committed the same mistake on his side of the car, and that the injury was sustained when S went back to lock both doors. Would this alter your assessment of the factual causation issue?

Question 2:

Bedrock College, a private institution, had long been known as a "party school." It had, over the years, encouraged this reputation, for it seemed to attract as students the children of wealthy families and to foster the emergence of loyal alumni who fondly reminisced about "good ole college days."

Consistent with its reputation, Bedrock tolerated more robust behavior from its students than did most other schools. Fraternities and sororities were abundant on campus, and were not too closely monitored by the school administration. Only once, many years ago, did things really get out of hand. On that occasion, a massive pillow fight on the Commons, between rival groups, led to the severe injury of four students. But that was 16 years ago.

In October, Aldo, a popular transfer student, was invited to pledge the Zeta Zeta Zeta fraternity. The fraternity, not surprisingly, had its own distinct rites of initiation, but all candidates for membership were repeatedly assured that no hazing, horseplay, or otherwise hazardous conduct would take place.

On Friday evening of the last weekend of the month, Aldo and the other candidates assembled as instructed at the Boat House on the lake at the far end of the campus. It normally was not used at that time of year. They found there waiting for them ten members of the fraternity (Bonzo, Carlos, Darwin, Ezra, Flip, Grant, Hal, Ira, Jose, and Kris). Food and drinks were served, including beer. While the college had granted its permission for the fraternity to use the Boat House, it had not been specifically informed that that beer would be served. Campus rules required that a security guard be present at organization gatherings of more than 25 persons where alcohol was to be consumed, unless the group was accompanied by its faculty sponsor. The fraternity sponsor had been informed of the event, but was unable to attend.

After more than a hour of drinking and socializing, about five of the fraternity members left the building and went to a nearby Beach Cabin. Aldo did not notice specifically who went out, because he was as yet not familiar with who was who, having only that evening met most of the ten. He was sure, however, that Grant was not among them, because Grant invited him to go for a walk. He accepted the invitation, albeit somewhat reluctantly. As they proceeded toward the Beach Cabin, Aldo demanded assurances that nothing was going to happen to him. Grant complied with the request and led him into the building. As soon as Aldo entered the lights, which had been on, were turned off and he was jumped from the side by persons he did not see and whose voices were disguised. A blanket was immediately pulled over his head and tied to his body with twine or rope. He could see nothing. He was spun in circles, paddled and otherwise roughed up, then taken outside and doused with water. Finally, he was picked up and heaved into a tall trash dumpster. Inside the dumpster he landed on glass and was severely cut. He wanted to call for help, but in his dazed and slightly inebriated state was not immediately able to do so. By the time he finally started to cry out, he had lost a great deal of blood. His calls were apparently ignored or not heard for ten or more minutes. Finally, Bonzo decided to investigate, and discovered Aldo in a very bloody and seriously weakened condition.

Bonzo then dashed to the nearest phone to call for an ambulance. The ambulance dispatcher insisted on making lenghty inquiries about the state of the victim and his precise condition, which B was unable to answer to her statisfaction. Many minutes elapsed. Bonzo finally concluded that he could not convince the dispatcher to send an ambulance and that he would have to drive Aldo to the hopspital himself, notwithstanding the fact that he knew he had done a good deal a drinking just a short while earlier. En route, the car carrying Aldo and Bonzo was involved in an accident, when quite unexpectedly a trailer truck's breaks failed and the truck entered an intersection hitting the car broadside.

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As a result of the foregoing, Aldo has been left paralyzed from the neck down. One of the doctors has speculated that if he had called for help earlier and had not lost so much blood, paralysis might have been avoided or been less severe. In addition, his wallet containing his credit cards was lost, perhaps in the trash dumpster, and since then someone has run up $200 in charges on his American Express account. Aldo has retained you as his attorney. Consider, as fully as necessary, the following quesions:

(A) Can Aldo sue the college, on a negligence theory, for all or part of his injuries? (About one page.)

(B) Can Aldo sue, on a negligence theory, any or all of the ten members of the fraternity present on the evening in question? Which ones? For what injuries? In part, consider specifically problems that may arise in connection with proving causation and how you will propose that the court should deal with them. (About five pages.)

(C) Can the hospital be sued for failure to dispatch an ambulance? Detail briefly the relevant considerations. (About one page or less.)

(D) A statute in the jurisdiction provides that it is a misdemeanor for any person to operate a motor vehicle if its breaks are not in working order. Is this statute relevant to a negligence claim against the trucker? Discuss briefly. (No more than one page.)

(E) Kris honestly believes he is in no sense responsible for the injuries to Aldo. However, into to avoid the burden of proving his position in court, he offers to pay Aldo $1000 to leave him out of any lawsuit. Aldo accepts the offer and in exchange for the money signs a document which states in its entirity:

> Non-Suit Agreement
>
> In consideration for the payment of $1000, I promise not to sue Kris for injuries arising out of events which occurred on Friday of the last weekend in October.
>
> (Signed, Aldo)

What effect, if any, does this document have on a suit against Bonzo and Carlos? (Less than one page.)

All suggestions as to answer length are somewhat flexible. A "page" here means the equivalent of a handwritten, single-spaced, letter-sized sheet of lined paper.

Any persons who wish to type their final examination should speak to me in advance so appropriate arrangements can be made.

Practice exams will not be individually graded by me. I will, however, hold a "review" session on Monday March 26, 1984, at 4:00 in classroom 104 at which I will discuss my views on the exam and will take questions.

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Prof. Vincent R. Johnson
Torts II

March 27, 1985
H/O #6

Old Examination Questions

To assist you in preparing for the Torts II final examination, I am making available to you this handout which contains some questions from my past courses. The three multiple choice questions are from spring 1983 and are similar in format to those asked on the Multistate Bar Examination. I generally allow an average of two to three minutes to answer each question. None of the questions that will be used on this semester's examination have ever appeared on a Multistate exam. The multiple choice portion of the final exam will probably account for about one-third of the total points.

The two essay questions are from spring 1984. I gave students 1 hour 30 minutes to answer the first question and 1 hour 10 minutes to answer the second question. These time allocations proved to be a little tight.

On reserve are answers to the multiple choice questions. In addition there is an outline of major points that should be discussed in connection with essay question one and a memorandum on question two which I wrote to myself concerning what to look for on essay answers to that question.

I hope these materials will be of assistance.

Omitted

Question 15

In this problem you are given four statements which are portions of a jury charge proposed by opposing counsel in a negligence case. You may assume adequate factual support for each requested instruction. (For example, if the instruction purports to state the rule applicable in the case of an emergency, you may assume that the facts would support a finding that an emergency existed.) The sole question is whether each requested instruction correctly states the rule of law applicable on the subject in a majority of jurisdictions.

(1) To recover for negligence, a plaintiff must prove that the defendant breached a duty owed to the plaintiff, and that the breach caused damage. Where no actual loss has been incurred by the plaintiff, the law presumes nominal damages, and a token amount may be awarded to vindicate the technical right.

(2) In determining whether the defendant's conduct was reasonable, you may consider the likelihood that the risk would be realized. However, you may not find the defendant liable unless the damage, viewed prospectively, was more likely than not to occur.

(3) There can be no liability for negligence if the defendant acted in good faith to the best of his judgment.

(4) A child of tender years, engaged in an activity which is neither common to adults nor inherently dangerous, is held to the standard of a reasonably careful child of like age, intelligence, maturity, training, and experience.

If you object to all four submissions as misstatements of the law, a trial judge will most likely sustain your objection to:

(A) 1, 2, and 3 only

(B) 2 and 3 only

(C) 1, 2, 3, and 4

(D) 1 and 3 only

(E) 1, 2 and 4 only.

19. Bob negligently sets fire to north end of Jane's barn. Simultaneously, but independently, Randy negligently sets fire to the barn's south end. The entire barn is destroyed. Bob's conduct will not be found a factual cause of the entire destruction if:

(A) Bob's fire alone would have been insufficient to destroy the total barn, and Randy's fire alone would have been sufficient to destroy the entire barn.

(B) Bob's fire alone would have been insufficient to destroy the entire barn, and Randy's fire alone would have been insufficient to destroy the entire barn.

(C) Bob's fire alone would have been sufficient to destroy the entire barn, and Randy's fire alone would have been insufficient to destroy the entire barn.

(D) Bob's fire alone would have been sufficient to destroy the entire barn, and Randy's fire alone would have been sufficient to destroy the entire barn.

(E) Both (A) and (B)

(F) Both (B) and (D)

20. Which of the following is false?

(A) The existence of an unsatisfied judgment against one joint tortfeasor bars plaintiff from enforcing a subsequently obtained judgment against a different tortfeasor, at least to the extent that the second judgment exceeds the first.

(B) Where separate judgments exist against joint tortfeasors, partial payment of the one must be credited to the other tortfeasor if plaintiff seeks to enforce the other judgment.

(C) Most states which permit contribution allow a joint tortfeasor who has settled out of court with the injured party to obtain contribution from non-settling joint tortfeasors, if he proves the amount of the settlement was reasonable.

(D) Most states hold that contribution may not be obtained from a joint tortfeasor who was immune from suit by the plaintiff.

Torts II Practice Exam
Spring 1985
Sample Answer

Question 1:

Part (A): Negligence is conduct which creates an unreasonable risk of harm to the person or property of another. Conduct is unreasonable or negligent when its utility is outweighed by the gravity and probability of harm. Here, it cannot be asserted that there was great utility in R's conduct, since admittedly it was a mistake. As to probability of harm, we know that the car was parked "downtown" on a "public thoroughfare." To that extent, it is more likely that leaving the door unlocked created a risk of theft than if the car had been left in a deserted or unfrequented area. We would want to obtain further information concerning such things as the character of the neighborhood, whether valuables were visible through the windows of the vehicle, whether the car was old or new, and whether the open lock could be seen easily through the car's windows, since all of these factors would bear upon whether it was likely that a thief would attempt to interfere with S's vehicle or its contents. Presumably such intervention could be serious, not only because of the potential risk of damage to R's property or loss thereof, but also because a car is a dangerous instrumentality and could be used in a manner that would cause harm to others. The presence of S's request to lock the door makes R's conduct all the more unreasonable. R's usual habits are largely irrelevant, though if anything they would tend to show the unreasonableness of R's actions. It seems fair to tentatively conclude that R's conduct was to some extent unreasonable and therefore negligent.

Part (B): Proximate causation is a determination made by the finder of fact as to whether liability for negligence should be precluded despite the presence of a factual connection between the defendant's conduct and the plaintiff's injury. In many instances, the critical question is whether the harm was foreseeable or normal in a loose sense, that is, not totally unexpected or bizarre.

The best argument in favor of finding that R's negligence caused S's injury is that rescuers or persons seeking to remedy harm are ordinarily deemed to be foreseeable intervenors and that those responsible for creating the negligent conditions are liable for the injuries such persons sustain. In Cardozo's phrase: "Danger invites rescue ... The emergency begets the man." Here, even though the accident occurred after the door had been locked by S, the events had not yet returned to status quo since S had not reentered the banquet hall. S's conduct was not a superseding cause.

The strongest argument against a finding of proximate causation is that liability should not extend to situations where the defendant's conduct in no way increased the risk of harm which befell

the plaintiff. (Cf. Reynolds v. Texas and Pacific Ry. Co.) The defendant's conduct must multiply the chances of injury. Thus, there is no liability when lightning strikes a car delayed in traffic even though there was a storm in progress and lightning was foreseeable. Here, even though the attempt to remedy the dangerous condition was foreseeable, it was solely fortuitous that the plaintiff was injured in returning to the banquet hall. R's conduct did not in any way increase the risk of that type of harm befalling S.

Part (C): A finding of factual causation could still be justified under either of two theories. First, it could be argued that R's negligence was a but for cause of S's return to the car and his subsequent injuries since but for his failure to lock the car and his recollection thereof, R would not have mentioned the matter to S so as to jog S's memory on the subject and thereby prompt him to undertake efforts to remedy the condition. Second, aside from any but for analysis, it could be argued that factual causation is established under the concurrent causation exception to the but for rule since the negligence on the part of either would independently have been sufficient to have spurred the return and to have precipitated the injury.

Question 2:

Part (A): The college (a) maintained a loose rein on fraternities, (b) allowed Zeta Zeta Zeta to use the Boat House, and (c) the initial accident occurred on its property. Yet it seems difficult to charge the college with negligence, that is, with having engaged in an unreasonably dangerous course of conduct. There was utilitarian justification for the college's fraternity policy in that it fostered such goals as alumni support and financial stability for the institution. The only prior serious incident occurred a long time ago (specifically, 16 years), and there does not appear to have been actual knowledge on the part of the institution that liquor was to be served. Consequently, the probability of harm, viewed prospectively, would have been low. We would, of course, want to enquire as to just what the group's sponsor knew, which is not clear from the facts. If he was aware that alcoholic beverages were to be available, his failure to act might be found to be negligence imputable to the college under the doctrine of respondeat superior. It is not clear whether the campus rule requiring the presence of a security guard or faculty sponsor was violated since the facts do not state that persons attending the event numbered more than 25. However, even if the rule was breached, a finding of negligence could not be predicated solely on that basis, since the standard was one adopted merely by a private organization, rather than judicially or legislatively promulgated. A violation of the rule would of course tend to show that the occurrence of harm under such conditions was foreseeable and to that extent would support a finding of negligence

under the reasonable person standard. Since the students were neither employees or agents of the college, their actions could not be imputed to the school on a respondeat superior basis, and a property owner will not be held strictly liable merely because an accident occurs on his property. Further, inasmuch as the college authorities were unaware of the injuries, there was no duty to rescue. Consequently, except as noted above, it seems very unlikely that the college could be successfully sued by Aldo on a negligence theory.

Part (B): Surely not all pranks or horseplay constitute negligence; playfulness serves important human needs. The relevant question then is at what point joking around becomes too dangerous to be tolerated. That is, when is the risk of harm so significant that the utility of the conduct pales by comparison. Here, drapping Aldo with a blanket, then spinning, paddling, and dousing him with water, did not create too great a risk of harm. Throwing him into the dumpster, on the other hand, was a different matter. Dropping a helpless individual from a height of perhaps five or more feet inevitably poses some risk of harm, particularly if he is dropped head first, as may have been the case here. In addition, dumpsters often contain dangerous items -- for example, sharp, rusty or hard objects -- so it will be important to determine whether anyone had reason to think that the dumpster was or was not empty and whether anyone bothered to check. Depending on the facts adduced, a finding of negligence may be warranted. Of course, it will be for the finder of fact, probably a jury, to determine whether the activities created an unreasonable risk of harm.

Whereas it may be relatively easy for Aldo to establish that the conduct was negligent, it may be very difficult for him to attribute that conduct to particular individuals. Aldo did not see who "attacked" him and apparently does not even know how many persons were involved. Thus, while the burden of proof is normally on a plaintiff to prove who caused the injuries, it seems most unlikely that Aldo will be able to meet that burden. At best, he might identify who the members of the group were and indicate that Grant was the one who walked him to the building. In some instances, courts, with good reason, have eased the plaintiff's burden of proof on the issue of factual causation or have shifted that burden to the defendants. One device often employed is the doctrine of res ipsa loquitur (RIL). The doctrine applies where the injuries in question are more likely than not the result of negligence and the negligence is more likely that not that of the defendant. Here, there would be little difficultly satisfying the first criteria for the reasons stated above, but the second requirement may pose certain obstacles because of the multiplicity of potential defendants, namely the ten members of the fraternity and perhaps others. RIL is not always available against multiple defendants. Courts have tended to limit its application (as in Ybarra v. Spangard) to cases where the defendants were to some extent interrelated and bore some integrated duty to protect the plaintiff from harm. Because here the ten members were not strangers to one another and presumably were acting

in furtherance of some common plan, it is not unrealistic to assume that a court might allow the doctrine to be invoked. It has been applied in at least a few non-medical, multi-defendant cases, and its availablility here could be justified on the policy ground that it would foster deterrence of future accidents in that it would be clear that clever pranksters could not assume that they would be beyond the reach of tort liability. Moreover, it seems fair to apply the rule because the plaintiff is wholely innocent and the defendants, even if not all guilty, have better access to information concerning who was involved, and the number of defendants involved is not so great as to make application of the doctrine unjust. If applied, the likely effect of RIL is that it will raise an inference of negligence which the jury can accept or reject, since that is the rule subscribed to in a majority of jurisdictions. In a minority of states, it might be treated as creating a presumption which shifts the burden of proof as to production or persuasion.

Another alternative for Aldo would be to allege that the ten members acted in concert. Where individuals aid, abet, counsel, procure, encourage, command, or ratify the negligent conduct of another, they become as fully liable for the harm as if they had inflicted it themselves. Under this theory, liability could attach not only to those members who threw Aldo into the dumpster, but also to those who approved of the initiation plan or gave moral support, as by cheering on the active participants. This alternative may be less attractive than the one based on res ipsa loquitur since under it the burden of proof remains on the plaintiff with all of the attendant practical problems. Before ruling it out as impractical, however, we will want to see what the discovery process reveals.

Other theories which courts have used to shift the burden of proof to the defendants -- such as alternaitve liability, enterprise liability, and market share liabilty -- do not seem to be precisely on point. Alternative liability only applies where all of the parties sued were to some extent blameworthy -- which we cannot say with certainty about all ten members here. Enterprise liability has only been applied to industrial settings, and market share only to the marketing of products. Of course, the policies underlying these doctrines -- fault, deterrence, spreading and shifting of losses, access to information, etc. -- can be used to support the RIL argument to the extent that they are relevant, as noted above.

Assuming that causation can be established, damages for physical injuries should not be reduced by reason of the fact that plaintiff did not readily call out for help because of his drunkenness. The defendant takes his plaintiff as he finds him and cannot complain that a person in better condition would not have suffered injuries so extensive or so severe. Moreover, Aldo's drinking could not be termed contributorily negligent since it did not in any real sense increase the risk of harm (being cut in a dumpster) which in fact occurred. As to the crash on the way to the hospital, it probably will not be termed a superseding cause since an automobile accident is not so extraordinary an event as to be deemed unforeseeable or abnormal. In any event, the main physical injury, paralysis, is

unapportionable through no fault of the plaintiff, and thus the fraternity members, as a legal cause of part of the harm, will be jointly and severally liable for the full amount, though they may have rights to contribution against the truckdriver if he is deemed to have been negligent. The fact that Bonzo had been drinking before he took Aldo to the hospital appears to be irrelevant, since the facts do not indicate that he failed to exercise proper care. As to the credit card charges, liability may be precluded if the criminal act is deemed unforeseeable, or reduced under the avoidable consequences rule if Aldo's failure to notify the American Express Company of the loss of his cards is held to have been unreasonable post-accident conduct.

Part (C): Generally, there is no duty to render aid or assistance to one who is injured. However, where a hospital or ambulance service holds itself out to the public in such a way as to induce them to call upon them for services, it may be found that there has been a voluntary assumption of duty. Of course, even if this exception to the no duty rule is applicable, it will be necessary to show that the dispatcher's conduct was negligent. In this connection it will be relevant to determine whether the person violated any in-house rules or any custom in the profession, since either would tend to show that the conduct was unreasonable and therefore negligent. Much significance will likely be placed on factual details of the conversation, and in the end the question will be one for the finder of fact. If negligence is shown, the hospital may be held jointly and severally liable for the paralysis, since that injury is not apportionable and the hospital's conduct may be found to be a proximate cause of part of it in that its conduct multiplied the chances of the harm occurring. Presumably the jury may be able to apportion certain elements of damage, such as pain and suffereing prior to the failure to dispatch the ambulance, since they are distinct in time. The fact that these amounts cannot be ascertained with certainty is not controlling, since in many instances it is deemed more just to attempt a rough apportionment than to hold a defendant liable for harm which he clearly did not cause.

Part (D): A finding of negligence may be based on violation of statute, even where the statute neither expressly nor implicitly creates a civil cause of action, and in fact even where the enactment is of criminal origin. The question for the court to consider in determining whether to embrace the statute as setting the standard of conduct of a reasonable person is whether the harm which occurred is the type which the statute intended to prevent and whether the plaintiff is within the class of persons the legislation intended to protect. Here there would seem to be no difficulty with either of these matters, since obviously bad brakes statutes are intended to safeguard persons rightfully abroad on the highways from the threat of physical injury or property damage. Some bad brakes statutes have been held to impose an inexcusable duty (essentially strict

liability) which means that in jurisdictions following the per se and prima facia approaches, the negligence issue will be taken from the jury once there is a factual finding that the brakes were defective. In states which follow the some evidence of negligence approach, presumably the violation would not be dispositive of the negligence issue. In states which do permit the defendant to establish an excuse for the violation -- for example, ignorance of the defect, no prior warning, exercise of reasonable care -- such proof would defeat the plaintiff's attempt to rely upon the statute to prove negligence, and would probably preclude an adverse finding under the reasonable person standard applied to the facts of the case.

Part (E): Some settlement documents extinguish rights against non-settling joint tortfeasors and others do not. This document does not denominate itself a "release," nor indicate an intent to relinquish rights against other parties, nor suggest that the plaintiff considered the amount received to be full compensation for the injuries suffered. All of these factors weigh in favor of holding that the document should not preclude suit against Bonzo or Carlos. However, some jurisdictions (contrary to the Restatement) hold that rights against other joint tortfeasors are not retained unless that is expressly provided for by the document. In such states, consequently, the document might be held to bar actions against other joint tortfeasors. From a jurisprudentail standpoint, the latter view is undesirable because it discourages settlements, creates a trap for the unwary, and risks frustrating the intent of the parties. In any event, if Bonzo and Carlos are found liable for negligence, they likely will enjoy a credit for $1000 (unless the state adheres to the view under which there is a pro rata or proportional reduction of the claim). There is a split of authority as to whether they may obtain contribution from Kris, a settling joint tortfeasor.

[An occurrence involving professors at St. Mary's School of Law during spring 1984 provided the factual inspiration for Question 1. The events in Question 2 bear some resemblance to those in Maines v. Cronomer Valley Fire Dept., 50 N.Y.2d 535, 407 N.E.2d 466 (1980), a case involving an initation by a volunteer firemen's organization and raising substantially different legal issues.]

MEMO

TO: Torts Sections C, E, and F

FROM: Professor Vincent R. Johnson

RE: Answers to Old Exam Questions Contained in Handout #6

Copies of answers to the three multiple choice questions are attached. For the first essay question there is a brief outline of some of the main points which should have been addressed. For the second, I have attached a file memo that I wrote at the time I drafted the question concerning how one might approach the problem.

Answer to Question 15:

"A" is the correct answer.

(1) is false because there is no right to nominal damages in negligence. (See Horn. 4th. 143.)

(2) is false because there may be liability for negligence where the probability of harm is small (less than 50%), if the gravity of the threatened loss is great. (See Gulf Refining, PWS 147.)

(3) is false. Conduct undertaken in good faith may still be unreasonable. (See Menlove, PWS 158.)

(4) is correct. (See Robinson, PWS 174.)

Answer to Question 19:

"A" is correct.

"B" -- Both are but for causes. (See Hill, PWS 289.)

"C" -- Bob's conduct is the only but for cause.

"D" -- Both are concurrent causes, since each alone would have been sufficient.

"A" is the only choice where factual causation is not satisfied. Bob's conduct is not a but for cause, since the destruction would have occurred without his contribution. It is not a concurrent cause, because it alone would not have been sufficient. (See Anderson, PWS 295.)

Answer to Question 20:

"A" is the answer because it is false. (See Horn. 4th 300.)

"B" is true. (See Horn. 4th 300.)

"C" is true. (See PWS 396 n. 8.)

"D" is true. (See PWS 397 n.1.)

Notes on Spring 1984 Essay Question #1:

Concerning the liability of Reed Manufacturing:

Was its conduct unreasonable, i.e., negligent?

- How does the Learned Hand Balancing Test apply? Were there feasible alternatives? What was the utility, economy, and convenience of the chosen method? Was harm foreseeable? Did they know the safety device was necessary? Did they know Plastic Parts would circumvent the safeguard? Was the warning attached to the machine inadequate? What difference does it make that Reed observed the custom of the industry? Is it impractical to require manufacturers to produce completely safe machines?

- Can negligence be based on violation of the regulation? Was it enacted too late? Was Oscar within the class intended to be protected? Was the harm of the type intended to be prevented? Was the penalty intended to be exclusive? What effect would the violation have on plaintiff's burden of proof?

Was there a duty?

- Was Oscar within the Palsgraf class?
- Are any limited duty rules applicable?

Causation?

- Is there any problem as to factual causation?
- Was proximate causation cut off by a superseding cause?

Defenses?

- Was Oscar contributorily negligent? If so, what effect does that have? What about comparative negligence?

- Did Oscar assume the risk? Does that doctrine apply to workplace accidents? Is the youth of Oscar relevant? Does assumption of the risk survive comparative negligence?

- Statute of limitations?

- Would worker's compensation bar an action against the manufacturer?

Damages?

- If Reed and Plastic Parts are joint tortfeasors, can the

former obtain contribution or indemnity from the latter?

Policy?

- Would imposition of liability on Reed facilitate the absorbtion or spreading of losses or deter future accidents? Would it place the burden on the party best positioned to take preventive measures? Would it mean, for example, that automobile manufacturers would be liable for injuries incurred after car owners foreseeably removed seat belts or disconnected alarm systems?

The case against Plastic Parts:

Does worker's compensation bar the action? How large was the firm? Are reckless or intentional torts covered? If action is not barred, does gravity of harm outweigh utility of conduct?

[The facts in question one were inspired by the events giving rise to Robinson v. Reed-Prentice Division, Etc., 426 NYS2d 717 (Ct. App. 1980). The dissent by Judge Fuchsberg is well reasoned.]

Final Exam, Spring 1984, Torts II
Notes on Essay Question #2, The Acid Rain Problem

(1) It is probably not possible to satisfy the but for test, since a large part of the harm might still occur even without the negligent conduct of any particular utility. A court might, however, narrowly frame the question as being not whether all of the damage would have occurred without the utility's conduct, but whether but for that conduct part of the harm would not have occurred. Presumably, it might be possible to take this approach. One would then have to argue whether, when the harm of the particular utility merged with the harm of other utilities, the former should be held liable for all of the harm or for nothing at all. Though the Restatement takes the position that the burden is on the defendant to prove apportionability, it seems that might be unfair, since the number of potential contributors is so great. In any event, it might be impossible to prove beyond a preponderance that the conduct of a particular utility caused harm to a particular farmer. It might be preferable to pursue a concerted action theory . . . .

(2) The concurrent causation exception to the but for rule is inapplicable since it only comes into play when the entire harm would have been caused by the contributing force in question.

(3) When it is especially difficult for the plaintiff to carry his burden of proof and unfair to deny him relief, courts sometimes ease the plaintiff's burden of proving causation or relieve him of it entirely. This case may fall into such a category.

- Since utilities account for approximately 70% of the relevant pollution, it seems clear that any one of the defendants is more at fault than any of the plaintiffs.

- Defendants are, presumably, better situated to distribute the losses or to absorb them.

- Defendants have better access to information about the amounts and types of discharges, though they do not necessarily have better access to information about their dispersion through air currents.

- Placing the burden on defendants would be an incentive to better practices in the future.

In sum, relevant policy considerations tend to favor easing or removing plaintiff's burden of tracing with precision factual causation.

There are several theories to which a court might look for

assistance in accomplishing this goal: alternative liability; enterprise liability; market share liability; and concerted action liability.

- Alternative liability seems to require that all of the potentially responsible parties be before the court. Since it would be impracticable to sue all utilities everywhere, plus all other potential sources, a strict reading of this theory, which would impose joint and several liability on each of the defendants in the absence of a showing by any one of them that it was not the cause, seems not to fit.

- Enterprise liability has been applied only in limited circumstances. Only where the group of potential defendants is small, which is not the case here. Also, unlike, Hall v. Du Pont, we do not have any delegation of safety standards here....

- Market share liability may have potential. It was imposed in Sindell v. Abbott, one of the the DES cases. The court there seemed to find significant the fact that the parties sued accounted for 90% of the market. It would be difficult to show what the likelihood was that the Texas utilities accounted for the pollution which caused the damage to the East Texas farmers, especially in light of fact that pollutants can travel thousands of miles. On the other hand, since the doctrine imposes liability not for the full amount of the harm, but for the market share which the particular defendant contributes, it might not be unduly onerous to shift the burden of proof to a particular defendant.

- Concerted action liability makes liable for negligence anyone who aids, abetts, counsels, procures, encourages, ratifies, adopts, or otherwise substantially facilitates the tortious conduct of another. In Bichler v. Eli Lilly, this theory was employed to hold responsible a single DES manufacturer, even when others were not joined in the suit. The court said that the concert of action could be established by way of tacit agreement (based on conscious parallel activity) or by showing that independent actions had the effect of substantially encouraging or assisting the wrongful conduct. Here the wrongful conduct might be the failure to use the advanced pollution control equipment, especially if the cost of doing so was reasonable. Since no one seems to use it, this might be evidence of conscious parallel activity, or if not that, might be evidence of independent acts which had the effect of encouraging others to do that same. Assuming that this theory can be fairly used against a single polluter (the issue was not preserved in Bichler, and a recently Michigan case suggests the contrary), this might be a productive avenue of argument. One substantial shortcoming, however, is that it imposes liability for the full amount of the harm, and thus runs counter to the principle that liability should be in proportion to fault. Perhaps the best argument would be to ask for a merger of concerted action and market share theories.

(The long and short of these theories seems to be that the smaller

the group of potential defendants, the larger the number of the those sued, the greater the likelihood that those sued accounted for the harm, the more limited the liability that will be imposed on the individual defendant, then the more likely it is that the court will ease the plaintiff's burden of tracing with precision the chain of factual causation.)

In grading exams, look for:

1) discussion of but for rule

2) discussion of concurrent causation exception

3) identification of policy considerations which here weigh in favor of easing the plaintiff's burden of proving factual causation.

4) identification and discussion of alternative liability, market share liability, enterprise liability, concerted action liability.

5) some discussion of apportionment of damages and who should bear burden

6) recommendation of which course is the best (concerted action or market share)

[See generally 36 Maine L. Rev. 117 (1984).]

Torts I Final Exam, December 1983 -- Student Answer

This student answer received a high "B" grade on the essay portion of the exam. Many points could have been dealt with better, but in general, the paper evidenced strength. Any comments in brackets are mine.

V.R.J., 12/3/85

I. The tort of intentional infliction of severe mental distress requires on intentional or reckless act on the part of the defendant which causes severe mental distress to the plaintiff. The act must be outrageous, beyond the bounds of decency, utterly intolerable by society. The reason for the necessity of such severity is that courts are unwilling to open the floodgates to litigation based on every instance of mere bruised feelings. The act must be extreme and outrageous to reasonable sensibilities, though if it is shown that the plaintiff is weak or hypersensitive and the defendant took advantage and played upon her weakness, the tort can lie.

I shall begin by discussing Belle's potential causes of action for intentional infliction of severe mental distress (IISMD), following each with the potential defenses, which could be used. Then, Devereau's causes of action for IISMD shall be analyzed, followed by possible defenses or weaknesses. Finally, the potential for other causes of action shall be reviewed.

Belle's Causes of Action in IISMD

[The next three paragraphs are a little far-fetched, but generally well-reasoned.] To begin with, although perhaps not relevant here, Belle might have had an IISMD action against her mother for so graphically, intentionally committing suicide in her playroom. The action is extreme and outrageous, and can reasonably be said to have caused severe mental distress to Belle.

It is important to note that some jurisdictions, including Texas, require some physical manifestation of harm, a further screening mechanism for IISMD suits.

In an action against her mother's estate for the IISMD, Belle would probably not prevail, as it has been some time since the tort was committed, and the court does not look favorably upon those who "slumber on their rights." In addition, the intra-family immunity doctine might be some impediment in a suit against a deceased relative.

In an IISMD action against Biltmore, Belle would need to prove various elements intent or recklessness, extreme and outrageous conduct, severe mental distress, causation between the two, and perhaps physical harm, depending on the jurisdiction.

Biltmore certainly intends to commit the action, as he does so freely and under no threats. His additional fault of possible malice or ill will, evidenced by the "relish" and "zeal" of his cross-examination, and its underlying reason--personal hatred between LeBeau and Babbit--will be a factor not only in determination of damages. In addition, considering Belle's physical unattractiveness and history of mental illness, Biltmore could be seen as playing upon her peculiar sensitivities--which would not only vitiate his defense that she is particularly sensitive, but also be a factor in determining damages.

The statements by Biltmore seem to be sufficiently outrageous aspersions callously aimed at her sanity, and in particular to her sexual characteristics, which have no bearing whatsoever on the trial. [A better view would be to say that the remarks were pertinent to the trial, at least in a broad sense, since the bore on credibility, and that therefore they were absolutely privileged.

Biltmore's possible defenses are based on a privilege which he might have as a participant in a trial. However, the bounds of the privilege cannot be exceeded, and the privilege will fall if relied on for gratuitous harassment.

Belle's mental distress seems severe enough--to the point of requiring further hospitalization. The financial loss of hospitalization might be a major factor in determining the sufficiency of her distress.

The final element required in some jurisdictions, physical harm, might be difficult for Belle to show, based on the instant facts. However the costs of hospitalization might be persuasive here.

Did the acts of Biltmore cause the mental distress? Arguably so, based on the proximity between the two. Biltmore, however, might argue that the relapse was merely coincidental, or that it was caused not by his acts, but by subsequent publicity.

Given the above analysis, Belle may have a strong cause of action for IISMD against Biltmore.

Devereau's Actions Based on IISMD

Devereau, too, might have an IISMD action based upon his wife's suicide; the facts of which have been discussed previously. His burdens of proof and possible weaknesses in the claim would be identical to his daughter's, with the possible exception that, because his wife killed herself in Belle's playroom, her claim might be stronger.

Devereau's claim against Biltmore is far stronger, but he must first prove that Biltmore was either reckless in causing his mental distress, or intentionally caused it. As it is not one of the five torts descended from "writ of trespass," "transferred intent" does not apply to IISMD. An important issue here is whether Biltmore knew he was being watched by Devereau, since this bears upon whether he intended or was reckless in inflicting the mental distress on Devereau.

The causation element seems to be present, though Biltmore could argue that Devereau's mental anguish was caused not by the cross-examination, but by the fact that his daughter was on trial to begin with.

In regards to Biltmore's conduct, the same criteria would apply as previously discussed.

Devereau's mental anguish might not be severe enough, as "outrage" must be very extreme. This might serve as a strong defense for Biltmore. [A better analysis might be to say that the indication that he was "horified and outraged" is a sufficient showing of mental distress.] In addition Devereau does not show physical manifestations of the harm, if they are necessary in this jurisdiction.

Biltmore's possible privilege as a participant in the trial is identical in this case to that in Belle's cause of action.

In sum, Devereau's cause of action in IISMD is not very strong, due to the seeming lack of severity of his mental distress and the possible lack of intent on Biltmore's part.

Other Potential Causes of Action

[The next two paragraphs are a little strained.] Belle will not have a cause of action based on Misrepresentation against Biltmore, even if she can prove falsity of his statements, that they are not opinions, and that his privilege as a participant in the trial does not stand as it has been exceeded.

Misrepresentation, an intentional or negligent misstatement of fact, necessitates a showing of reasonable reliance, and here there is no showing that Belle was in any way led astray.

Could the jurors or judge sue Biltmore for misrepresentation? Probably not, since even though his statments will be relied upon in their decisionmaking process, they tend to be mere expressions of opinion, and the judicial proceedings privilege likely carries over to preclude an action for this tort.

The rape is obviously battery--harmful or offensive, unconsented, intentional touching--against Belle. If it occurred, she could sue the rapist..

In a defamation suit against Biltmore, Belle would have to show falsity, disgrace in the eyes of the community, intent to make the statement, and communication to at least one person who understands.

All of these seem present; however, Biltmore might defend by claiming either that the statements were true, or manifestations of mere opinion. Perhaps he could rely on his privilege again.

An absolute privilege against defamation charges, based on participation in judicial proceedings, might become a mere conditional privilege if its bounds are exceeded. In addition, if Belle is required to prove "actual malice" in her defamation case, that qualified privilege would be useless--in effect, thrown out before it is exerted.

Defamation might still have a per se distinction, and as this is libel (recorded by the court) she might collect damages regardless of fault. Punitive damages could then be attached to the presumed damages. [Note: this was written before Dun & Bradstreet.]

Invasion of Privacy in the form of False Light could be a cause of action for Belle: Untruths which are unreasonable to ordinary sensibilities, and offend Belle could qualify. Truth would be an absolute defense for Biltmore, both here and for the defamation charge. This privacy tort is defined as "Unreasonable depiction of

plaintiff in a false light." If Time v. Hill still applies, this requires a showing of Actual Malice.

The "lunatic" remark by Biltmore might be actionable under publicity of private facts, but if it had been previously publicized, that would preclude a cause of action.

[Note the next two paragraphs are surplusage, since the question did not ask for a discussion of Devereau's other causes of action. Devereau might have causes of action in invasion of privacy: publicity of private facts--if he can show gratuitous prying into his privacy by the papers. The news media can invade voluntary seclusion in some cases, though, even after some lapse of time. This is defined as "Unreasonably publicity of private facts which would be offensive to reasonable sensibilities." Some damages would have to be shown.

That the facts were legitimate public concerns would be a defense for Biltmore.

It is important to ask whether one should be justified in suing under a different tort, collecting damages, etc. simply by calling it by a different name. Does this "chill" the rights which the 1st Amendment strives to protect? Or do these different causes of action protect different interests?

There are subtle differences between for example, defamation and "False Light" privacy--defamation may need a showing of "special harm", if the per se distinction is valid. Filing of a bond and retraction statutes are further limits to defamation suits.

Futhermore, defamation protects against disgrace, while false light protects against the plaintiff's personal harm.

One should not collect twice for one harm.

Any privileges which Biltmore would rely on as defenses against the IISMD claim could be used against the defamation and "false light" claim.

Again, this privilege can be exceeded, and is invalid if so.

Claims by Belle and her father against the newspapers for invasion of privacy, specifically publication of private facts, could be rebutted by a showing by the media that the reported facts are "newsworthy which they probably are. [Why?]

It is important that we not stifle the conduits to information such as the news media, so courts take an increasingly broad interpretion of this.

II. Nemo's causes of action

Nemo might sue under public nuisance, an unreasonable interference with a right common to the public in general.

Because he lives within 83 feet of a 150 feet tower, he is in real danger if it falls. He must show harm greater not just in degree, but in kind. The risk of property damage from a collapse is probably harm different in kind, since presumably not too many people live that close to the tower, and the facts indicate that the harm to the public in general is one concerning aesthetics, for which no action normally will lie.

The reason for the necessity of showing harm different in kind is that the general welfare of society, that of those generally harmed by actions of others, should be left to appointed

representatives and majoritarian bodies, for example, the legislature.

Nemo must show that the antenna is unsafe by reasonable standards.

No action can probably be maintained based on the "intrusion" of "bible-thumpers," as this violates Constitutional considerations.

In an action for an injunction to prevent future harm, the court will weigh the value of the antenna in CEP's operations and to the community at large versus the rights of Nemo and the rest of the community (and their danger). [The considerations relevant to the balancing test should be discussed at this point.]

If money damages are being asked for, there are two theories: the first is that the value of the antenna will be balanced against the rights of the citizens.

A second theory, more of a modern trend, is that if the actions of CEP in building and maintaining the antenna are intentional--which is proved prima facie, since they disregarded notice by the community--and if it is feasible that CEP pay, without going out of business, they may be forced to pay damages.

Nemo's best cause of action is for private nuisance, perhaps. It is defined as "unreasonable interference with another's use or enjoyment of a property interest in land." If the fear of the antenna falling on his property is proven substantial enough, this is a sufficient impairment of his property interests. Also, an public nuisnace or private nuisance action might lie based on the noise the antennna is making.

Dingo's possible causes of action

Because of his lack of proximity, Dingo's causes of action are more difficult to maintain. He is probably out of earshot of the "buzz" (which is discussed later), and, again, an "eyesore" is a weak basis on which to anchor a nuisance claim, either public or private.

If Dingo sues in public nuisance he will have difficulty proving damages different in kind, as there are many potential plaintiffs who have a similar view of the antenna.

An important policy consideration behind the "harm different in kind" element, besides its deference to public legislative action, is that it hopefully negates some potential for suits which could be pressed by hundreds of plaintiffs. It is important not to overly penalize a creator for nuisance for potentially limitless claims by affected parties.

In a suit for private nuisance, Dingo may have difficulty showing how his property interest in his land is impaired. It is not a very strong claim, and is substantially certain to fail, as will his public nuisance claim.

Many interesting issues are raised here, outside of the constitutional one of religious freedom, which of course might figure into any balancing of interests as an argument against granting damages or an injunction.

The fact that the CEP facility is widely regarded as an "eyesore" is of little merit, since "eyesores" are seldom actionable in any form.

95

If the antenna casts a shadow, particularly on Nemo's house, he might try to sue, but claims of nuisance based on violations of a "right to sunlight" are very tenuous--though there has been some recognition of actionability. Factors would include duration of the shadow during the day, amount of property covered by it, and special harm to the plaintiff if it affected him or his machinery (e.g. solar collectors) adversely.

If the antenna causes interference in radio or television reception, it might be actionable, though not a strong claim. The extent of interference would be perhaps the most important consideration.

The "buzz" might be the strongest "non-concrete" cause of action, next to the imminent danger of the antenna's collapse. This could be actionable under private nuisance, and perhaps under public nuisance, if plaintiff could show particular sensitivity to the noise, or if it caused him harm or deafness. An issue here would be reasonableness--if plaintiff is particularly sensitive, "harm different in kind" probably would not hold.

Trespass QCF could not be charged, for it requires some physical intrusion, not a shadow or radio interference.

Factors in Nuisance claims would be: foreseeability of harm, the intent (rejection of notice), nature of the community and the locality 9residential, not industrial), the public interest in the CEP activities (constitutional value), the necessity of the antenna to CEP (why was it located here, rather than 4 miles away of the Reverend's house? Spite? Good transmission location?), and the interests of the community in safety from a faulty structure.

An injunction, which would require dismantling the antenna, would be very strictly regarded by a court--a strict balancing of the values of it versus its detriment to the community. The reason for this is that the property interests of the neighbors is no more important than those of CEP.

The fact that CEP's activities are being "squeezed onto the property" might factor into the unreasonableness requirement, but does not seem to be a tort in and of itself.

The issue of potential relocation would be important as to its feasibility, and CEP might argue that the cite in question is necessary for its attributes such as height, clearance, and freedom from surrounding obstructions.

Factors might also include the CEP itself: Is it substantial? Is it a hobby of Spoon's (he operates it from his basement).

Perhaps it is best to allow Cando the opportunity to solve the problem in the legislature as to the Public Nuisance issues.

IISMD claims would be very difficult, as there is no showing of intent or recklessness in causing any severe mental distress. This claims are not colorable.

ST. MARY'S UNIVERSITY SCHOOL OF LAW

TORTS I - LW 6231 B, E, & F
Professor Vincent R. Johnson
December 18, 1985

FINAL EXAMINATION
(Two hours)

SOCIAL SECURITY NUMBER_____

General Instructions

1. Immediately place your social security number 1) in the space above, 2) on the computer sheet for the multiple choice questions, and 3) on your blue book(s) for the essay questions.

   All three items — (1) test questions, 2) computer answer sheets and 3) blue book(s) must not be removed from the examination room at any time without the permission of the professor and must be handed in at the end of the exam. If you fail to hand in your test questions, you run the very serious risk of a failing grade.

   Please place your social security number in the appropriate blocks at the top of the computer score sheet and blacken in the corresponding spaces.

2. I strongly suggest that you proceed through the test questions in sequence. That is, do the multiple choice first, then the essay question.

   The exam will be weighted as follows:

MULTIPLE CHOICE (3 pnts each)	—	72 Points
ESSAY	—	140 Points *
		212 Points Total

   * Note: Virtually all of my essay grades will fall into the 70-140 point range if the pattern of past years holds true. Don't, therefore, short change the multiple choice questions, thinking that your time would be better spent on the essay. The suggested time allocation should be a fair guide as to how you should allocate your time.

3. The exam will last exactly two hours. Failure to stop writing and promptly surrender your exam when notified that time has expired will be treated as a very serious violation of the exam rules and appropriately penalized.

Some very rough guidelines for allocating your time are as follows:

Multiple Choice	70 Minutes
Essay	50 Minutes

4. On the multiple choice:

- Watch for important words like "most," "only," "least," "unless," etc.

- Any reference to the Restatement is a reference to the Second Restatement of Torts.

- Each question is worth 3 points; no deduction will be made for wrong "guesses."

- Please be very careful to place your answers in the correct spaces on the computer forms.

- Please keep your answer sheet covered. To the extent that you let others have your hard-earned answers, you not only chance becoming involved in an Honor Code violation, but also run the very substantial risk that you will come out lower in the scaled distribution of grades.

5. Regarding the essay:

- Your essay will be read as a whole and given a single grade. It is not necessarily fatal to fail to complete the essay question, but you should make every effort to do so.

- Please attempt to clearly structure your answer. It will be to your advantage. However, if you forget a point at the beginning, but mention it at the end, I will do my best to sort things out. Sometimes a cross-reference in the margin is helpful (e.g., "but see p. 4, below").

- If it saves you time, you may abbreviate the names to a single initial (e.g., Paul = P, Ron = R, Queasy = Q, etc.).

- Unless your handwriting is exotic or atrocious there is no reason not to write on every line. However, if you think of it, please skip a line between paragraphs. Please write legibly. Failure to write legibly runs the risk that you exam will be read by an irate person. I prefer that you write on only one side of a page, but don't worry if you forget about this preference.

- If you need extra paper, some will be available at the front of the room, along with a few pens. Please make sure that any loose pages are neatly stapled to your blue book at the end of the exam.

6. Trips to the restroom are discouraged and should be made only in the case of manifest necessity. Additionally, no food or drink may be brought into the examination rooms or otherwise retrieved.

7. As soon as the grading is finished in early January, the exams will be returned and an optional review session will be held for those who wish to attend. I will not accept or return post cards.

8. You may mark on the exam questions, but no such markings will be taken into consideration in grading your exam.

9. Good luck! Do your best! Have a happy holiday season!

ESSAY QUESTION You learn the following information during a client interview with Paul and his friend Queasy:

In June 1984, Paul, a hospital worker, purchased a new condominium. Prior to closing, he was told by Ron, a sales representative for the Builder/Seller (which a year earlier had built a virtually identical condo complex in another part of town), that the cost of heating the unit would be "inexpensive, as low as you can find for a unit this size, because all of the units were well insulated." "A typical heating bill," Ron had said, "for each of the three coldest winter months likely won't exceed $55." Ron also told Paul, prior to the purchase, that the builder intended to install a privacy fence around the back of the property later in the summer.

As events developed, the fence was never put in, apparently because the builder decided that the entire project was costing too much money. When Paul's November heating bill came in, he was shocked. Although his thermostat was always set no higher than 68-70 degrees, the bill was $152, and colder weather was still to come in December and January, and perhaps even February. Paul had taken Ron's statements with a grain of salt, expecting that they were on the conservative side, but this was something entirely different. Irate, Paul talked to his neighbors and found that their winter bills during the preceeding winter when the complex first opened were always in the high $90s or $100s. Paul then called the electric company and asked them to check his unit. They took special infrared "pictures" of the exterior, to see where heat was escaping. The pictures disclosed that one entire 45 foot exterior wall, spanning both the dining room and kitchen, had no insulation whatsoever. Apparently, his was the only unit that suffered this defect. The electric company said that the only way to cure the problem would be to tear off the interior sheet rock and insert insulation, which would be both complex and expensive.

A series of hot discussions then ensued between Paul and Ron, until Paul took ill. Paul's good friend and neighbor, Queasy, who had heard about the dispute from Paul, then asked Ron whether

everything he heard was true and whether the builder was really refusing to take any corrective action. Ron responded: "You can't believe a word Paul says. He's nuts. I'm told by a reliable source at the hospital that tests have been run on him and they indicate that he may have AIDS." In fact Ron had heard no such story. Queasy said, "I don't believe it," to which Ron responded "Do me a favor creep, see a psychiatrist." When Queasy got home, he related to his wife what Ron had said about Paul, but nothing else.

Paul and Queasy wish you to advise them about <u>his tort rights against the Builder</u>. Prepare a memorandum discussing colorable cause of action, if any. (<u>Do not</u>, however, spend any time discussing intentional or reckless infliction of severe mental distress.) Candidly recognize any uncertainties or ambiguities in your analysis. In addition, if more information is required, indicate what questions you will want to explore. You may make reasonable inferences from the facts stated.

TORTS I FINAL EXAMINATION
December 18, 1985

SAMPLE ANSWER

There are many options in analyzing any legal problem. The following sample answer to the essay question reflects only one approach that a good response might have taken.

The causes of action that Paul might bring sound in misrepresentation and defamation (slander).

Misrepresentation

Legal rights based on misrepresentation may arise whenever the dissemination of the erroneous information infects the decisionmaking process. There are three forms of tort action for misrepresentation: intentional (deceit), negligent, and strict liability. In addition, the victim of a misrepresentation may have rights under contract law for breach of warranty, recision, restitution, and so forth. Because the question asks only about Paul's "tort rights," I will not discuss relief in contract, though an attorney in practice would of course want to consider the advantages or disadvantages of those alternatives (e.g., with regard to the availability of punitive damages, statutes of limitations, defenses, etc.).

At the outset it should be noted that it seems likely that all of the acts of Ron can be imputed to the Builder on a respondeat Superior basis, since they apparently were motivated by the Builder's business interests and were within the scope of Ron's employment.

Where, as here, (a) the parties stand in privity, (b) only pecuniary losses are at issue, and (c) the alleged misstatements were made in connection with sales transaction in which the defendant had a financial interest, the three forms of the tort action are in many respects the same. Each depends on a showing that there was (1) a misstatement of fact (or an actionable misstatement of opinion), (2) which was material, (3) and upon which the plaintiff reasonably relied. Only the necessary levels of blameworthiness will differ. A complaint may plead alternative causes of action, although we may later determine to press one rather than another because of advances it offers with regard to insurance coverage, damages, or the like.

There appear to be two bases for a misrepresentation claim. The first concerns the heating costs; the second concerns the fence. To the extent that the statements relating to heating talk about what

will happen in the future, under circumstances not under the builder's control (e.g., the maintenance of the furnace and the setting of the thermostat will be under the owner's control) they sound like mere predictions, not statements of verifiable fact. Further, insofar as Ron used language like "inexpensive" and "as low as you can find," his claims sound like unreliable sales talk. Either of these varieties of opinion are generally not actionable because they are deemed not worthy of reliance.

However, there seem to be at least two potentially actionable assertions relating to the heating. The first is that the unit was well insulated. In fact, it was not insulated at all on one wall. Such a misstatement, even if made without fault, will give rise to a cause of action for innocent misrepresentation in a minority of jurisdictions, entitling Paul to recovery for pecuniary losses, which here would encompass the the cost of repair, and perhaps his additional heating expenses in the meantime. Whether this same misstatement can give rise to an action for negligent misrepresentation or deceit will depend upon what the defendant knew or should have known that the wall was not insulated. Since we have no facts indicating that the Builder was aware or should have been aware of this construction defect, and because we will probably be unlikely to obtain such information, these causes of action for deceit and negligent misrepresentation do not sound promising.

The second basis for a claim relating to the heating costs concerns implicit statements of fact. Even an expression of opinion carries with it certain implicit assertions. For example, that the maker knows no totally inconsistent facts, that he has some factual basis for asserting an opinion, and that any amounts or quantities stated, while not necessarily precise, are more or less accurate. Here the facts show that other condo owners at the development experienced costs per month last winter substantially in excess of $55. If their units were the same size, if we are talking about a representative sampling, and if those facts were known or should have been known to the builder, then there may be a basis for negligent misrepresentation or deceit. Moreover, since the builder had built a "virtually identical" complex at another location recently, we would want to inquire about his knowledge of heating costs there, assuming the construction and insulation of those units were similar. The bottom line is that the builder had better have had some basis for the $55 figure and that figure cannot be too far off from the truth. If he had no basis for making that statement, then he will likely be held to be at least negligent, if not reckless. Indeed, the Restatement provides that one who does not have the basis for a statement which he implies he has is reckless. Of course, it would probably be better to argue that the builder was reckless rather than negligent, since that tends to open the door for punitive damages, a longer period of limits, and so forth.

Although the facts indicate that Paul took the statements with a "grain of salt," they do not indicate that he entirely discounted them. So long as he allowed them to play some role in his decision making process, and so long as a reasonable person would have taken

some account of them, there is both materiality and reasonableness of reliance. Although a buyer normally must make his own investigation and form his own judgment, he may rely upon the affirmative assertions of the seller, even though the seller has adverse interests. Here there is no showing of any reason for Paul to have disbelieved Ron's statements, nor would the truth have been apparent through cursory sensory observation.

There may be some problem with causation of damages. The high heating cost appears to be due not only to the fact that Ron's statements were inaccurate, but to the fact that the insulation was left out. A reasonable approach would be to say that if the seller negligently, recklessly, or intentionally misrepresented the anticipated heating cost, Paul can recover the amount by which the true cost was substantially misstated. If he can show liability for the missing insulation or the representation that the building was well insulated, then can recover the addition increment which that caused in the cost of heating, plus an amount to cover repairs.

As to the fence, a statement of intention to do something may be actionable if it can be proved that the party in fact never truly intended to carry though. For liability to attach here, Paul would have to show not merely that the fence was never built, but that that the builder never intended to do so, which may be impossible to prove. If the proof is adduced, an action will lie for deceit.

Defamation

The statement that Paul "may have AIDS" may give rise to liability for defamation. A defamatory communication is one that tends to diminish another in the eyes of third persons. A statement that a person may have an incurable disease is clearly of this variety, indeed the common law treated such statements as actionable per se. The fact that the assertion was qualified -- "may have" -- probably will not avoid liability, for otherwise, all defamation could be made immune from action by the statement of minor qualifications. In any event, there was a false statement of fact to the extent that Ron said that a reliable source had made the speculative comment. In fact, there was no source and no such statement. The strongest argument against a finding that there was a statement of fact is the fact that the assertion was made in the course of what appears to be a heated, exaggerated exchange, where Ron goes so far as to say Paul "is nuts," which presumably should not be taken literally.

The requirement of publication to a third person was satisfied when the statement was made to Queasy. The fact that Queasy said he did "not believe it," does not prevent there from being a publication, although that fact, and the scope of eventual dissemination, will be relevant to the amount of damages recoverable. Nor does the fact that Ron has attributed the statement to a third party prevent there from being a publication. A republisher commits a publication even though he states his source -- and here the source did not even exist. Ron may even be liable for

Queasy's republication to his wife, if a jury finds that to have been foreseeable.

There is no showing that Paul has AIDS. If he does, or if tests did indicate that he may have Aids, substantial truth or truth itself will totally bar the action.

Everything we know shows that Paul was a private figure. However, whether one has AIDS many be a matter of public concern, particularly in view of heightened attention to the subject recently and the danger to public health. This being the case, the Gertz rules apply and Paul must prove fault as to falsity and cannot recover presumed or punitive damages in the absence of a showing of actual malice. A wholly fabricated statement, such as the one made here, is one made recklessly. Thus, regardless of whether the state in which suit is brought has adopted a negligence or actual malice standard of fault, Paul will be able to satisfy the test, since recklessness establishes actual malice.

Actual malice justifies punitive damages, which may well be appropriate here because of the blameworthiness of Ron's conduct and the need to deter such conduct by others. It is unclear whether, when actual malice is shown, presumed damages can be recovered or whether damages are available only to compensate for actual injury. The former would be advantageous to Paul, since we have no showing of actual injury, although the later would include compensation for mental distress, which presumably Paul has suffered.

Queasy's Right

Queasy has no right to sue the builder. The only colorable cause of action would be for defamation (since intentional/reckless mental distress is not to be discussed), and here there was no publication to a third person.

Words alone do not constitute an assault, except perhaps in the rarest of cases. There is nothing here to show that Queasy was place in reasonable apprehension of imminent contact or that Ron made a threatening gesture.

ST. MARY'S UNIVERSITY SCHOOL OF LAW

Torts II Final Exam
Focus: Defamation Privileges
Privacy
Negligence
Strict Liability

Prof. Vincent Johnson
April 24, 1986
Three hours

PLEASE WRITE YOUR SOCIAL SECURITY NUMBER HERE:_____

General Instructions:

1. Immediately place your social security number on:

   a) this set of questions (in the space provided above);
   b) all blue books; and
   c) the answer sheet for the multiple choice.

   Also, place your section letter on the front of each blue book. (This assists me in filling out grade reports; the exams are not graded by section.)

   These questions, as well as your answers, must be handed in at the end of the exam. If your questions are not promptly turned in, your answers will not be graded and you will risk a failing grade.

2. No one should leave the examination room prior to handing in their exam, except to find the professor, if he is in a different room, or to go to the restroom. Trips to the restroom are discouraged and should be made only in the case of manifest necessity. Questions to the professor during the examination are generally frowned upon. Under no circumstances should examination materials be removed from the examination rooms. If you finish before the end of the examination time, you should review your answers. You may leave quietly once you have turned in your exam. If you leave, please do not congregate in the hall outside the examination rooms or talk in the hall, as other examinations will be in progress.

3. Place all books and papers, other than your examination materials, on the floor, out of sight.

4. Except where instructed otherwise, you may assume that comparative negligence has not been adopted.

5. Watch for important words like "only," "most," "least," and so forth.

6. Multiple choice questions are worth 3 points each. No penalty will be assessed for wrong answers on the multiple choice. The essay portion is worth 140 points.

7. If you leave me a stamped post card, I will mail you your grade. Please place your social security number somewhere on the post card, as well as your section letter.

8. Please keep your multiple choice answer sheet covered. To the extent that you let others have your hard-earned answers, you run a substantial risk not only of becoming involved in an honor code violation, but that you will come out lower in the scaled distribution of grades.

9. Cheating or giving assistance to another are, of course, absolutely forbidden. The requirements of the Code of Student Conduct will be strictly enforced.

10. The exam will last three hours and will end promptly at the time I indicate.

11. You may make scratch notes on the test questions. But all answers must be appropriately placed on your answer sheet or in your blue books.

12. If you use more than one blue book, staple them together. Do not, however, staple the multiple choice answer sheet to your blue book. It goes on a separate pile.

13. Approximate time allocations: multiple choice - 1 hr 35 min.; essay - 1 hr. 25 min.

14. Good luck! Do your best! Have a great summer! It has been a pleasure working with you. I look forward to seeing you in the fall.

Multiple Choice Instructions

Select the best answer for each multiple choice question and mark it on the computerized answer sheet in pencil.

If, for example, you have narrowed the field of possible answers down to two choices and one accurately states the majority rule and the other accurately states the minority rule, the former is the "best" answer.

Essay Question Instructions

There is one essay question. Your answer will be read as a whole and will be given a single grade. You should make every effort to address all of the points suggested in the question, though failure to do so will not necessarily be fatal.

Because of the nature of the question, it is especially important for you to organize your answer. Please express your thoughts clearly and accurately in properly punctuated, correctly spelled sentences. Above all, please write legibly. Failure to do so runs the risk that your answers will be read by an irate professor. It is generally not necessary to double space your handwriting.

Often it is useful to skip a line between paragraphs and to write on only one side of a page.

If during the essay you remember that you neglected to mention a point relevant to an earlier discussion, include it where you have space and, if necessary and possible, place a cross-reference notation in the margin adjacent to the earlier discussion (e.g., "But see * on p. 6") I will make every effort to sort things out.

If appropriate, discuss both majority and minority views on a given topic.

The Essay Question

You are a law clerk for Justice B.D. Gunch, a new judge on the state Supreme Court. The case of Chris v. Somerset Hotel is presently pending before the court, and raises the question of whether a resort may be held liable for failing to warn a guest of the possibility of injury by shark bite in nearby ocean waters not belonging to the hotel. No case in the jurisdiction has ever held a possessor of land liable for failure to warn a guest of dangers posed by conditions outside the premises. Thus, the case is one of first impression in the state, and will likely affect numerous subsequent decisions.

The lower courts ruled in Chris that as a matter of law there could be no liability because the hotel was under no duty to warn or otehrwise act. The case never went to the jury. Judge Gunch has not made up her mind as to whether the case should be reversed or affirmed, and she is clearly open to persuasion. She has asked you to prepare for her a memorandum recommending how she should vote on the case and why. Although you may (and should) recognize arguments on both sides of the question, you must recommend a specific course of action -- affirmance or reversal -- and you must convincingly support your recommendation.

Your memorandum should indicate whether your recommended disposition adheres to or departs from prior tort precedent, and why it does so. Indeed, the judge has particularly indicated that whatever decision is made must be founded upon sound public policies. To explain and support your recommendation, you may:

- draw into your discussion existing rules of tort liability;
- reason by analogy;
- discuss trends in modern tort law; and
- make arguments based on policy.

If your memorandum suggests that under some circumstances there may be liability, you should indicate the nature of those conditions or limitations.

If you recommend that the court create a new duty, you should address the issue of whether the new rule should be "prospective only" in effect.

If the case is to be remanded for trial, what questions should the jury consider?

The following facts are taken from the briefs, record, and oral argument in Chris v. Somerset Hotel:

Somerset Hotel opened in May 1986 at the northern-most end of Sandstone Island, long a popular summer resort area. A totally new development, the hotel is located more than a mile and a half from the nearest other businesses and lodgings. The six-building hotel complex was constructed at a cost of more than $8 million dollars and employs more than 130 persons on a part-time or full time basis.

The hotel is immediately adjacent to the beach. Under state law, the hotel's property extends to the high water mark. The state owns that portion of the beach between the high and low water marks, and that area is dedicated to the use of the general public. The hotel has no property interest in the water immediately off shore; the title thereto vests in the state or federal government.

In March 1986, while construction at the hotel was still underway, an off-duty, part-time worker on the project was attacked by a shark and seriously injured while swimming 65 feet off shore in the waters immediately bordering the hotel. The hotel, anxious about bad publicity, kept the event very quiet. Although contending that it was not responsible for the injury, the hotel paid the injured worker $125,000 in exchange for a release from all liability. Under the terms of the arrangement, the worker agreed to move from the state and not to publicize the event. He has complied with these conditions.

The hotel opened on May 15, 1986. Between the March shark attack and the opening of the hotel, employees of the hotel cited sharks off shore near the hotel on five occasions. They were directed by the hotel to keep this information very quiet. The hotel sincerely hoped that there would be no future incidents. However, it did nothing to apprise guests of the hotel of any risk they might suffer as a result of swimming in the ocean.

Although the hotel had two fresh water pools and a large jacuzzi as part of its facilities, many of the guests swam in the ocean, especially when the waves were large.

Mr. J.D. Chris was a guest at the hotel for two nights. Check out time was 11:00 am, June 11th. On that day, he planned to swim in the ocean prior to departing around 4:00 pm for the 300 mile drive home. While he was paying his bill at about 10:30 am, he told the employee at the hotel desk that he planned to swim in the ocean. He asked if it was alright for him to leave his wallet in the hotel safe until he departed and if he could use the showers near the large swimming pool to change clothes when he was ready to leave. On each account permission was given.

At about 1:00, while swimming about 90 feet off shore, Chris was attacked by a shark and his leg was severely mauled. The facts are unclear, but there is some speculation that, prior to the attack, Chris might have seen the shark if he had paid more attention. Apparently several persons on the beach had left the water for that very reason. Chris maintains that he was never warned of the danger, never saw the shark, and would certainly have left the water if he had known of the risk.

After the attack, Chris was taken into the hotel where first aid was administered, then rushed to the hospital by an ambulance. As a result of the accident, he has lost the full use of his leg.

Please be assured that it makes no difference whether you recommend affirmance or reversal. What is important is the quality of the reasoning used to support your recommendation.

[END]

Torts II Final Examination
April 24, 1986

Essay Question Model Answer

Prefatory Note: (1) In virtually all law school exams, there are numerous junctures at which the analysis may turn in any number of diverse directions. One might reasonably disagree with part of the analysis proffered below and still merit a good grade. No effort has been made to identify all possible lines of analysis. (2) For the purpose of furnishing a useful model, the answer here is slightly longer than what one might reasonably expect from a student devoting the allotted time (approximately one hour and twenty-five minutes) to the essay portion of the exam.

TO: Justice B.D. Gunch

FROM: Law Clerk

Re: Chris v. Somerset Hotel

I recommend that you vote to reverse the judgment of the lower court and remand the case for trial on the ground that at least under some circumstances a hotel may have a duty to warn a patron of unknown dangerous conditions outside the premises.

At common law, a person is generally under no duty to prevent harm to another, even though he might easily do so. Exceptions have been created where the defendant stands in some special relationship to the victim -- as where the defendant is the possessor of the land on which the injury will occur -- but even these exceptions have limits. No decision in this jurisdiction presently imposes on a possessor of land a duty to warn a guest about dangers outside of his property. Yet the judicial creation of such a duty would appear to be consistent both with trends in modern tort law and with the policies which have proved influential in the shaping of tort doctrine over the past several decades.

What will be said below assumes that Chris was a patron of the Somerset Hotel at the time of the duty to warn arose; I am not suggesting that the hotel owes a duty to complete strangers to warn them of the perils of the ocean. The conclusion that Chris was a patron would appear to be supported by the fact that he did business with the hotel and had not fully checked out at the time the hotel knew of his plans to swim in the ocean. Moreover, his wallet was

still in the safe and he was given permission to later use the showers. (If the categories of trespasser, licensee, and invitee are followed in this jurisdiction, it would seem appropriate to classify Chris as a business invitee, since presumably he was encouraged to come to the hotel through advertising or otherwise and his continued presence would normally be thought economically advantageous to future business. And even if he is only a licensee, by reason of being given only permission (not invited or induced) to continue using the showers and safe, it is reasonable that the hotel's duty should not be less, for the question is one of duty to warn of known latent danger -- a duty traditionally owed to licensees. Of course, if the state has abolished the categories in favor of a reasonable care standard or merged the licensee and invitee distinctions, the same conclusions would likely follow.)

Moreover, for the purpose of deciding the case on as narrow a ground as possible, the court need only address what duty a business owes a patron when it specifically knows of his intention to encounter a potentially perilous condition -- as it did here when it was told that Chris intended to swim in the ocean.

Trends in Tort Law Recent years have witnessed the decline, in this jurisdiction and elsewhere, of sovereign immunity, intra-family immunities, and charitable immunity. In addition, courts in a number of jurisdictions have taken steps to erode many no duty rules: claims for negligent infliction of mental distress and injuries to unborn children are more readily permitted than just a few years ago; a number of states have abolished or modified the limited duty rules based on the categories of trespasser, licensee, and invitee; courts are more willing to entertain suits arising out of alcohol-related injuries, victim suicide, criminal intervention, and voluntary assumption of duty. Throughout all of these areas, runs the idea that courts are reluctant to allow victims, particularly innocent victims, to go uncompensated (and here Chris many well be completely innocent). Moreover, the theme of deterrence is ever present: courts seek to place the risk of loss on the party best situated to avoid the accident. A finding that the Hotel owed Chris a duty may well be consistent with these trends.

Relevant Policy Considerations To say that there is a duty is not to say that liability must always follow. It is merely to state that the law will not shut its eyes completely to the question of whether the defendant acted reasonably under the circumstances. In numerous recent decisions, courts have recognized that duty is not a talismanic phrase. It is merely the statement of the law's conclusion that the interests of the public are better served by requiring the defendant to exercise due care. In deciding whether there is a duty, courts in cases such as Rowland v. Christian, Peterson v. Community College, Paglesdorf v. Safeco and Soldano v. Daniels have considered a number of factors, including:

(1) deterrence/prevention
(2) fault
(3) foreseeability
(4) ability to absorb the loss or spread it through

insurance or otherwise
(5) the closeness of the connection between the failure to act and the injury
(6) the burden a duty would impose on the defendant
(7) the ease or complexity of administering a duty rule.

A review of these considerations argues in favor of the imposition of duty.

(1) Deterrence/Prevention Requiring disclosure in cases such as this would tend to prevent injuries, because to the extent that the risk is known, there is reason to think that it would be avoided. The hotel, being permanently located at the seemingly perilous site, was more likely to have relevant information than transient guests, many of whom, including the plaintiff, lived in far distant areas and presumably visited the Island only for short periods of time. Guests cannot be expected that have the same access to the critical facts as the hotel -- and to the extent that they are deprived of relevant information, they are denied the opportunity to take precautions.

The law has frequently adopted rules -- such as res ipsa loquitur, alternative liability, enterprise liability, and market share liability -- which seek to encourage the production of useful information as part of the trial process. There would seem to be all the more reason to avoid non-disclosure in a pre-litigation context where the harm might still be avoided.

In some instances, courts have adopted rules based primarily on deterrence considerations. Thus, for example, mental health professionals are obliged to take action to protect complete strangers when they acquire information in their profession which unveils a risk of harm. The adoption of a duty rule here would not only be consistent with such decisions, it would encourage other businesses to provide warnings under circumstances where they might well be of use.

Under the peculiar circumstances of the present case, it appears that if the Hotel did not warn Chris, no one else would be in a position to do so. If there was evidence that the state or federal government had lifeguards on the beaches, and that they possessed the relevant information, then it might be argued that the duty to warn should be on the government, not on the Hotel. But there are no such facts here.

(2) Fault As to fault, although the hotel did not create the peril, its conduct smacks of moral blameworthiness. The case here involved not mere non-disclosure, but active concealment. The employees of the hotel were told to keep the information quiet and the first victim was hushed up. The law does not countenance concealment in other areas of the law, such as the law of misrepresentation, nor should it do so here. (Indeed, it might be argued that by acting to silence the first victim, the hotel was not a mere non-participating bystander -- that it elected to become involved and therefore was under a duty to act reasonably.)

In addition, the hotel sought to make a profit notwithstanding the fact that others could be subjected to serious physical harm. Surely such conduct is not without fault. The fact that the hotel

sincerely hoped that no further accidents would occur is largely irrelevant to any negligence inquiry.

(3) Foreseeability Foreseeability, too, appears to weigh against the hotel. Although the hotel had two swimming pools, it was foreseeable that many patrons would also swim at the beach. Patrons had done so in the past, and presumably that fact is one of the things which caused the hotel to select this location rather than one inland. In addition, there had been not only several shark spottings in the past, there had in fact been a serious injury. While it might be argued that it was not certain that another attack would occur, absolute certainty of injury has never been a prerequisite to duty. So long as the risk is appreciable in view of the probability and gravity of the harm -- and here the gravity was great -- a duty should arise. As the foreseeability of the injury declines, the duty will correspondingly decrease. It cannot be said here that another injury was unforeseeable to the hotel.

(4) Absorbing and Spreading Losses The law should not necessarily impose liability on whichever party is the richest. Yet, it may, and frequently does, take into account the fact that the defendant is in a better position than the plaintiff to spread the losses which inevitably result from an industry or business. By doing so, it endeavors to minimize the pain which results from the loss -- which from a utilitarian viewpoint is sound. Here, the Hotel sought to make a business and earn a profit from operating at a location which posed certain risks to patrons. It is not unreasonable to suggest that it should be called upon to spread those losses which befall its patrons. It might well be better able to spread or absorb the losses resulting from the injury to Chris.

(5) Closeness of Connection The connection between the failure to warn and the injury is not attenuated. We have no succession of foreseeable and unforeseeable intervening events. The risk which was foreseen, namely the shark, was precisely the force which caused the harm.

(6) Burden The burden that would be imposed on the hotel is slight. No one is suggesting that the hotel has a duty to keep the waters safe. All that it is being asked to do is to warn guests of the possible danger.

Of course, there may be indirect costs. Guests may no longer wish to frequent the hotel, business may decline, profits may fall. These considerations are not to be ignored in view of the substantial financial investment in the complex and the number of persons it employs. Yet, surely, the law should hesitate to say there is no duty simply because precautions might entail some expense. Businesses open to the public are routinely required to spend money on greater security, better lighting, needed repairs. Building contractors cannot use inferior materials simply because they will save money. This case should be no different. All that is asked of the defendant here is to furnish the plaintiff with sufficient information to make an intelligent decision.

There is of course generally no duty to warn of an open and obvious danger. The fact that there is always some small possibility of a shark attack in ocean waters does not make the danger here an obvious one. What would be required would be either knowledge of the past attack and sightings or of the actual presence of sharks on the day of Chris' accident. I am aware of no facts to support any such finding, although the question of obviousness (as it related to the issues of duty, and contributory negligence, or assumption of the risk) may properly be considered by the jury if evidence is presented on the subject.

(7) Administrability The proposed rule would not entail undue administrative inconvenience. It would entail an assessment of essentially the same factors which presently govern the question of whether a possessor has exercised due care with respect to conditions on his premises.

A decision that the hotel was under a duty to warn Chris would not require any substantial departure from precedent. Decisions in some jurisdictions already hold that if one treats the land of another as his own, he may be held liable for injuries to his invitees occurring thereon. The facts here are only a little different. While there was apparently no exercise of dominion or control over the place where the injury occurred, there was every reason to expect patrons to frequent that area. Hotels historically have been held to a higher duty of care to patrons. Indeed, one might in fact find precedent holding that the existence of the hotel/guest relationship is itself sufficient reason to impose a duty here.

The court should hold that where a business has reason to foresee that, in connection with the use of the business premises, a patron will encounter a latent condition outside the premises which poses a serious risk of harm, under circumstances such that the patron is unlikely to discover or otherwise learn of the peril, the business has a duty to warn the patron of that danger.

Questions of causation and defenses (such as contributory negligence on the part of Chris in failing to heed signs of sharks) may be considered at the new trial. (If the defendant's conduct is termed reckless, comparative negligence may or may not be available as a defense to reduce the amount of damages, depending on the jurisdiction. Prior to comparative negligence, contributory fault was no defense to recklessness in any jurisdiction.) In addition, the jury will be able to assess the question of whether the harm was really foreseeable in light of the time which had passed since the earlier attacks and like factors.

Because such a ruling would alter existing rules upon which parties may have heretofore relied, it should be applicable only to cases involving facts arising after this date, except that the plaintiff herein should have the benefit of the new rule as a reward for having brought the issue before this court.

Student Answers to Torts II Essay Question, April 1986

The two essays which follow are actual student answers written during the Torts II final exam. Each received an above average grade on the essay portion of the test.

Student Answer #1

The Somerset Hotel was not negligent in failing to warn Mr. Chris of the occasional and unpredictable passing of sharks. If the Hotel is to be liable for C's (plaintiff's) injury, it would be for negligence since the Hotel did not intentionally or recklessly cause the injuries.

Negligence is conduct which creates an unreasonable risk of harm. Here, the Hotel's failure to warn of the prior sighting was not unreasonable. Under the test first enunciated by Learned hand in the Carrol Towing case the utility of the Hotel's conduct must be greater than the risk and gravity of the harm. The Hotel business is extremely competitive. Bad publicity can greatly harm the Hotel's business. Requiring only one hotel of many to warn of shark attacks would be manifestly unjust as it would ruin their reputation. The social value with the natural environment and the Hotel interest in a profitable business are great when combined with the burden of knowing whether a shark is in the area. On the other side of the formula we can see that the evil was slight.... It can be argued that the proximity of the attack on Chris and that on the employee were coincidental. Such attacks are an improbable event. The gravity of the harm is high, but when one considers the common knowledge that shark attacks are a possibility, the risk taking bather must have accepted the risk. To hold the Somerset Hotel liable would lead to slippery slope litigation. If the Hotel is required to warn of obvious danger it will be held liable for failing to tell its guests to look both ways before crossing the street, or other absurd results. For these reasons the conduct of the Hotel was not unreasonable but was reasonable and practical in light of the negative impact on the Hotel's reputation, on the potential negative precedent which could be applied in the future, and the low probability of harm.

In addition to their reasonable behavior toward Mr. Chris, the Hotel had, or should have no duty toward him. This issue raises the spectre of limited duty rules since ordinarily there is no duty to act.

While in the past a limited duty to act has been applied to hotels, the reasoning for these rules has since faded. Originally, since hotels had a monopoly on housing since there were very rare. The advent of numerous hotels on Sandstone island warrant the application of the maxim cessante rationi legis, cessat et ipsa lex.

Here since the Hotel is one of many the original rule no longer applies. For this reason the Hotel has no duty to act.

Additionally, the Hotel has no duty to act because it neither owns the beach or the water, nor did it exercise acts of dominion over the beach. In actuality, the Hotel encouraged guests to use its 2 large pools and hot tub. The land itself is owned by the government.... Since Mr. Chris was on the beach which is held open to the public and was using it for the purpose for which it is held open, the government may be the one at fault by virtue of its land title and deeper pockets. Lest this court force the waste of resources, a duty to act must not be imposed. A third reason why there should be no duty to a court is because under the rule enumerated by J. Cardozo in Palsgraf there is no duty.

J. Cardozo reasoned that the risk reasonably to be perceived defines the duty to be obeyed. Here, the risk to be perceived was small. Under an exception to the doctrine of informed consent, there is no duty to inform of risks if the risk is one known to the public at large. Here there was no duty to inform and risk was apparent. This being so the risk was to be perceived not by the Hotel but by Mr. Chris or the federal government.

Since the Hotel had no duty under the Palsgraf or limited duty rules, the essential element of a negligence suit cannot be shown.

There may be an exception to this lack of duty. If the Hotel is aware of the actual presence of a shark, at any given time, off or on the shore line, the risk would be reasonably to be perceived, and thus there would be a duty to be obeyed. Here, no shark was seen on the day in question. Sharks are migratory and by virtue of this it is not reasonable to foresee a daily danger of sharks. Since no shark was seen there was no duty to warn.

Even if the Hotel had a duty to warn, there is a lack of causation present here. Factual causation may be satisfied, but for Mr. Chris' ignorance of the potential presence of sharks he would not have been bitten while swimming. Proximate causation presents a more difficult issue. On a strict direct causation doctrine the Hotel would clearly be liable. However, most jurisdictions follow a hybrid called modified foreseeability which considers policy goals and circumstances. Here it was clearly unforeseeable that Mr. Chris would have swam ninety feet into the ocean. This, in light of the obvious risk of other harm in the ocean, must have been foreseeably dangerous to Mr. Chris. The actual cause of harm need not be foreseen by the Hotel but only the general type of harm. Here, a shark attack was of this general type of harm, but for policy reasons the Hotel should not be held liable for not telling Mr. Chris of the danger. If Mr. Chris did not appreciate the danger of an attack due to a mental deficiency that may affect his liability. The majority hold that mental deficiency will not affect his recovery if because of it he could not appreciate the risk. If this is a minority jurisdiction the mental deficiency will not bar recovery if it was sudden and unanticipated. An additional reason why the Hotel was not he proximate cause is that the deterrence aspect is most important. The cause of this regrettable accident surely needs to be deterred and for this reason Mr. Chris should be barred from recovering for his lack of common sense.

Mr. Chris should be held contributorily negligent for failing to exercise reasonable care in the face of a risk known to the public at large. The Hotel did not have the last clear chance to warn or avoid the injuries. Rather, when Mr. Chris took his first step into a world where the acts of dangerous unpredictable sharks are a possibility and an improbability at the same time, he himself had the last clear chance to look before he leaped. As he swam further into the sea his risk taking increased. For these reasons, the unreasonable conduct of the plaintiff should reduce his potential recovery or bar recovery completely. To hold otherwise would be to burden the investment potential of hotels. This would burden economic growth....

To hold the Hotel liable for its failure to warn will lead to a downplaying of relevant policy considerations. For this reason the case should be affirmed.

Student Answer #2

I must recommend that the case be reversed and remanded.

Every action in negligence must first be founded on a concept of duty. As established in Palsgraf, the risk reasonably to be perceived defines the duty to be obeyed. However, in certain circumstances, the court had found it appropriate to apply limited duty rules. Such rules are applied to possessors of land. Guests of the Somerset Hotel may be classified as invitees; they were most likely invited or enticed to come there and they are there for the financial advantage of the Hotel as well as for their own pleasure. Generally, the duties owed to business invitees are: 1) to warn of latent dangers; 2) to inspect the premises; and 3) to make safe and exercise reasonable care in the ordinary operations of the premises. All of these duties refer directly to the premises, as a landowner generally has no duty to warn of dangers beyond his land. However, it would be contrary to public policy as well as recent trends in tort law to allow the Hotel to escape liability for harm resulting from a danger which, by Palsgraf principles, was well within the risks reasonably foreseen. Because of the location of the Hotel, the beach and water were extremely convenient and enticing to its guests. The Hotel's sole motive for refusing to warn was monetary. The only chance the guests may have had to be warned was through news reports of prior accidents which the Hotel quelshed by paying the first victim to keep quiet and not warn others.

Several trends support reversal of this case. First, several jurisdictions have begun to abolish the landowner's limited duty. They point out that the original common law reasons behind the classifications are no longer consistent with modern tort policy. Liability should be based on fault which results in predictable conclusions. In most cases, neither the landowner nor the visitor acts with greater or lesser care depending on whether the visitor is a licensee or an invitee. Special problems arise in various fact situations. In the case at bar, Chris was originally a business invitee of the Hotel. There may be a question of whether his status became that of a licensee once he check out. In any event, if the classifications are maintained, strictly the Hotel may not have a duty