to warn of the sharks, although even under the rigid system, exceptions are being made.

In Peterson, the court found that a landowner has a duty to at least warn and take reasonable steps of precaution to protect an invitee from criminal intervention where the landowner knew of previous criminal acts and the invitee did not. It is difficult to imagine that the court would have held differently had the criminal acts been occurring frequently at the entrance to the property, or on the sidewalk just outside the gate which was the students' only entrance onto the property.

Relevant to exceptions and leeways made into the classifications is the Apple River case. This case is especially comparable to the case at bar. The court held that an individual may be liable to invitees for dangerous conditions on another's property when he treats that property as if it is his own. Somerset Hotel is built on the beach, as a resort. Its obvious purpose is to draw people to the beach to enjoy the sun and surf. It "entices" its customers to stay in the Hotel and to make use of the beach just a few yards away. Many of the guests may not even be aware of the fact that Somerset does not own this portion of the beach. In a sense, the Hotel holds itself out as being a resort entity, which includes the beach, and for which most of its guests would assume it to be responsible at least for warning of known sharks in the area.

To hold the Hotel to ordinary negligence principles would set beneficial precedent. Such a holding would encourage greater care of the Hotel in surveying the area, since they are in a better position to know of the dangers, being there year-round as opposed to the average stay of a guest. They undoubtedly have better access to resources--coast guard, etc., than do the guests. Additionally, a Hotel of this size is much better equipped to shift and spread the costs of resulting liability than a single individual. Most of all, liability would be based on fault--where the Hotel has knowledge of such a danger and fails to take precautions, it has much more fault than an injured plaintiff who not only did not know of the danger, but from whom information was intentionally not made available by the Hotel.

Assuming that the court decides a duty may be imposed, it still remains for consideration whether the Hotel acted reasonably. Negligence is behavior which creates an unreasonable risk of harm to another. In the consideration of whether one is negligent, the court will apply a balancing test of weighing the burden and utility to the defendant against the probability of the harm and the risk involved.

The utility at stake for the Hotel was great--they had invested $8 million and had in their employ 130 people. If the presence of the sharks were made known, it is likely that the Hotel would have difficulty maintaining business, at least for a while. With a new business, however, the first few months are critical. However, the risks involved here are extraordinarily high. Shark injuries are not minor occurrences; the risk of serious bodily injury or death is great when known sharks are near the shore. When the gravity of the danger is to this degree, the probability of its occurrence need be less to outweigh the utility. Here, I think both the gravity and the probability outweigh. Additionally, the Hotel's burden of warning is not unduly great in light of the fact that they may have considered

alternatives. Upon warning, they could have encouraged use of their own pools, stated a swim at your own risk rule but hired posted lookouts to watch the waters, or have consulted with the coast guard or marine biologists.

There is great tension in tort law to both expand and limit liability. However, one should not lose sight of basic negligent principles which establish duties and the policies upon which duties are based. One should not be allowed to escape liability because of an outdated mode of classification upon which, in light of the circumstances, would result in great inequities.

For jury consideration: ordinary negligence principles, the balancing test, in addition to issues of causation, damages, and defenses.

ST. MARY'S UNIVERSITY SCHOOL OF LAW

TORTS I - LW 6231 A and D
Professor Vincent R. Johnson
December 1986

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. Within one month of the date of the exam, I will return post cards left with me. I will not reurn grades, except by post card.

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

Recently a number of articles have appeared in the national media concerning right-to-life clinics. (See, e.g., Newsweek, Sept. 1, 1986, p. 20; ABA Journal, Dec. 1, 1986, p. 21). The ABA Journal article states:

> "Lured by the offer of a free pregnancy test at a 'clinic' in San Francisco, Carla ... went in believing she could get an abortion or at least a referral for one.
>
> "[Carla] ... got her test results, but there was a catch. She first had to watch a 25-minute film that included pictures of bloody fetuses and 'horror stories' about women dying from abortions....
>
> "The film also claimed abortion causes sterility, deformed children and death, she said.
>
> * * * *
>
> [The San Francisco center is similar to centers in other major cities.]
>
> "These centers follow guidelines in a 93-page handbook provided by ... an anti-abortion group in St. Louis. This group has helped set up an estimated 200 facilities in the United States....
>
> "... [T]he handbook recommends that centers choose an unprovocative name. A woman seeking an abortion might not come to the center if it appears to be pro-life, it notes. 'In using a neutral sounding name such as Pregnancy Problem Center to attract women wanting an abortion, you are not deceiving but are being very honest,' says the handbook. 'You are looking for the girl with a pregnancy problem and ... you are probably the only one who will offer her all the true information."

Discussing the anti-abortionists' strategy, the Newsweek article states:

> "Location is critical. 'Clinics' placed near real ones often draw women who, in confusion, walk into the wrong office. 'The best part is that the abortion chamber is paying for advertising to bring that girl to you,' says the handbook. The strategy calls for evasion when a woman phones. Do not indicate you are pro-life. Too much information may sometimes cause her not to come in."

Assume that Carla has come to your office as a prospective client. She indicates that she phoned the "San Francisco Care Center" after a friend told her of seeing a billboard advertisement which read as follows:

PREGNANT?
Worried?

San Francisco
Care Center

262-CARE
Free Pregnancy Test - No Fees

The phone conversation was brief. Carla said: "I think I want to have an abortion. I need to make an appointment with you." The Center receptionist answered simply: "We have an excellent safety record. We can see you Friday at 2:00." The Care Center was in fact located next door to an abortion clinic. Carla kept the appointment.

After the pregnancy test was conducted, Carla was told to wait to talk with the doctor in a room where she would meantime see a film. After seeing the film described above, which ended with a fundamentalist preacher exhorting Carla to pray, and stridently stating that "God wanted this [baby] for [her]," Carla ran from the Clinic in tears. She spent several sleepless, anxious days, alternating between shame and depression, confusion and resentment. Five days after the events at the Clinic, she had a miscarriage. She now harbors deep anger against the operators of the Clinic. "What they did to me is not right, and I don't want it to happen to other pregnant women," she says. "The people who run the clinic are nothing better than sado-masochistic religious hypocrites, who delight in torturing young women," she added.

Based on your knowledge of first semester Torts, what causes of action, if any, might Carla allege in a tort action? Are they likely to be successful? Candidly recognize any uncertainties or ambiguities in your analysis. In addition, if more information is required, indicate what questions you will want to explore. What defenses do you anticipate? You may make reasonable inferences from the facts stated.

Finally, could Carla's statement about the Clinic staffers being "hypocrites" who delighted in "torture" expose her to legal liability in a cross-suit by persons she sues?

TORTS I FINAL EXAMINATION
December 1986

MODEL 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 possible causes of action that Carla might bring against the Clinic, its members, and the St. Louis organization sound in Intentional or Reckless Infliction of Severe Mental Distress (IRISMD), Intentional Misrepresentation (deceit), and, perhaps, False Imprisonment. Any members of the clinic who participated in tortious conduct can be held personally liable; the Clinic can be held liable on the basis of respondeat superior for actions of individual staffers taken within the scope of their employment; and, if tortious acts occurred, the St. Louis organization might be held liable under a concerted action rationale, since they appear to have aided and abetted the Clinic's conduct by publication of the handbook, and perhaps in other ways as well ("helped set up"), depending on what the facts show.

Intentional or Reckless Infliction of Severe Mental Distress

To establish IRISMD, a plaintiff must prove that the defendant engaged in extreme and outrageous conduct, with intent to cause mental distress or with reckless indifference thereto. The plaintiff must also show that severe mental distress in fact resulted from the conduct.

Conduct is extreme and outrageous if it is beyond all bounds of decency and is utterly intolerable in civilized society. In determining whether that standard is met, it is appropriate to take into account facts known to the defendant which would show that the plaintiff was especially vulnerable to the defendant's acts. Here, the plaintiff was a pregnant woman, and it reasonably may be argued, in view of the stress associated with pregnancy, that women in such condition are particularly susceptible to the infliction of distress. Indeed, this is all the more true where the woman is anguishing over whether to have an abortion. Many cases have taken into account the fact the plaintiff was a child, or was elderly, or was ill at the time of the defendant's conduct in finding that the acts were outrageous under the circumstances. A number of cases have involved pregnant women who suffered miscarriages after the allegedly tortious acts. While the defendants may have acted with good motives, good motives alone cannot justify the adoption of outrageous

means. To trick a pregnant woman into watching a bloody film is conduct which a jury might find to be beyond the pale of acceptable behavior. Especially is this so in view of the fact that the conduct intruded upon the privacy interests of the plaintiff and her constitutional right to have an abortion. However nobel the defendants' goals, however accurate the information they presented in the film, they are not privileged to adopt wholly deceptive practices and highly unreasonable means. Whether conduct here is in fact extreme and outrageous will be a question for the jury, but a good argument can be made that it is.

As to the fault requirement, a showing of intent or recklessness is required. It might well be argued that the defendants acted with intent to inflict mental distress in that their purpose was to create such a high degree of guilt and anxiety in pregnant women, including the plaintiff, as to dissuade them from seeking abortions. The fact that the defendants may have been actuated by good motives is irrelevant. One may be found to have acted with tortious intent even though he seeks to confer a benefit on the plaintiff. Alternatively, it may be very plausibly urged that, regardless of the purpose of the defendants, their means were "substantially certain" to produce mental anguish or recklessly indifferent to that result. Consequently, the fault requirement should not be a problem.

The causation and damages elements would also seem to present no obstacle. The evidence of distress (tears, sleeplessness, anger, etc.) followed quickly on the heals of the events at the Clinic. Depending on the precise nature of the evidence, a jury might well find both that the distress was severe and that it was caused by the defendant's conduct. Because of the short lapse of time, five days, the jury might also find that the miscarriage was causally related to the defendant's conduct and that it is evidence of the fact that the plaintiff indeed suffered severe mental distress. It should be noted, however, that the defendant will likely attempt to rebuff these arguments by arguing that the distress was a result of Carla's pregnancy predicament, but this contention likely will be unsuccessful before the jury.

Deceit

An action for deceit will lie where the defendant makes a misrepresentation of material fact, with scienter and intent to induce reliance, and the plaintiff thereafter relies to his detriment. Here, it is not so much what the clinic said, as what it did not say, which created the misrepresentations. The most readily actionable misstatement was the one which occurred on the phone. The receptionist apparently knew, based on both the information Carla disclosed on the phone ("I think I want an abortion") and her response thereto ("We have an excellent safety record"), that Carla was under the impression that she could obtain an abortion through the clinic. The receptionist reinforced that impression and in fact misled Carla by responding with a half-truth. A speaker has an obligation to provide further information where she knows that an ambiguous or incomplete statement has been misunderstood by the listener. To be sure, the undisclosed facts were material, for there is every reason to think that Carla's decision to go to the Clinic might well have been influenced by disclosure of the true nature of

the services it sought to render. A similar argument could be predicated on the statements on the billboard since they were ambiguous, though the claim based on the conversation directly with Carla is obviously stronger.

There should be no difficulty establishing scienter and intent to induce reliance. The statements in the handbook -- about naming the clinic, locating its offices, and answering phone calls -- all indicate that the Clinic knew it was creating a false impression that abortion services would be available. And those statements, coupled with the language on the billboard show that it intended to persuade pregnant women to procure its services. Even though Carla learned of the Clinic through a friend who read a billboard, this is not a case of misrepresentation liability to a third party, because as events matured, the plaintiff dealt directly with the staff of the Clinic, including the receptionist.

There are no facts to indicate that Carla should not have relied upon the information made known to her, and in fact she did act in reliance on the misleading statements of the receptionist by keeping the appointment.

Damages may be more difficult to measure than in the usual commercial case. But clearly, Carla has lost something important, namely mental equilibrium. Just as in the recent cases involving the communication of herpes, a jury can place a reasonable value on the mental and physical injuries she suffered.

False Imprisonment

An action for false imprisonment will lie only if Carla was intentionally locked in the room to see the film. We have insufficient evidence on this point. If she could readily have left by way of a reasonable, available exit, no action may be maintained. If the other elements of the tort can be shown, she may be able to recover even if she was unaware of the imprisonment, if the court accepts the argument that harm, in the form of serious mental distress, resulted therefrom.

Defenses

Two possible defenses are consent and general justification. Consent likely will be unsuccessful as a total bar, since her presence at the Clinic and at the showing of the film was based on mistake as to nature of the services to be rendered. This misconception was known to the defendant, and thus constitutes fraud in the factum and is sufficient to destroy the consent. The result would be the same under the more recent scholarship on whether mistake vitiates consent, since those standards are even more liberal.

An argument can be made, however, that at some point during the 25-minute film, the message of the film became clear, and that damages resulting from the events thereafter depicted are not recoverable. That is, failure to leave may at some point constitute apparent consent, if it was possible to exit. Presumably, Carla did not have to leave at the very first moment the nature of the film became apparent. But any unreasonable delay should be charged against her to reduce the amount of her damages.

The argument based on general justification would be that the interests to be advanced by the methods adopted by the defendants outweighed those imperiled by their conduct. This will likely fail. Right to life groups have other avenues available for pursuing their goals. Where there are other alternatives, deceitful means will not be favored by the law. In addition, the law will be chary to approve means which interfere with the exercise of constitutional rights.

Punitive Damages

If liability is established under IRISMD, deceit, or false imprisonment, punitive damages may be available. Each of those torts constitutes intentional wrongdoing and a jury might conclude that an exemplary award is necessary to deter similar practices in the future by these defendants or others.

Defamation

Carla's statement about the Clinic and its members was intentionally published to an understanding third person (me, the attorney) and would probably be regarded as defamatory, since being labeled a sado-masochist and torturer would tend to lower one in the eyes of others. There may be some question as to whom the statement applies. The clinic? The employees? The St. Louis group? The Clinic could likely sue, since the statement appears to have reflected directly upon its institutional cmpetence. It also appears to defame the individual workers, so long as the group is not too large. A suit by the St. Louis group is less attractive, since they were only peripherally involved. In any event, the expression will probably not give rise to liability.

First, it may well be regarded as a statement of opinion rather than one of fact, because of the inflammatory context in which it was made. One expects a tort victim to be less than purely objective. Moreover, the facts on which the statement was based were disclosed, and that too tends to establish that it was an opinion.

Secondly, the defendant's burden of proof would appear to be very high. The Clinic and its supporters and members would probably be classed as public figures, at least with respect to abortion issues, since they voluntarily have sought to influence decisions on that topic, and the matter would appear to be one of public concern, relating as it does directly to the pro-choice/pro-life debate. Consequently, the defendants would have to prove both actual malice and the falsity of the statement. It would be difficult to show that the plaintiff acted with knowledge of falsity or reckless disregard of the truth -- since here Carla based her statement on personal experience and there is nothing to show that she in fact entertained serious doubts as to the truth of her publication. Ill will is not enough to establish actual malice.

Finally, even if the issue were somehow held to be a matter of private concern, it is likely that the communication would in many states be qualifiedly privileged since we want people to be able to communicate freely with their attorneys. There was no excess publication or improper motivation sufficient to defeat such a privilege. Depending on the state, negligence as to falsity or actual malice may also defeat a qualified privilege -- but there are no facts to show such blameworthiness here.

Miscellaneous

It might be argued, based on analogy to the blood sample cases, that the pregnancy test constituted an invasion of privacy in the form of intrusion upon seclusion. The facts relating to the test might also establish an assault or battery. However, since Carla properly understood the nature to the acts being performed, consent may well be a valid defense.

A Strong Student Answer
Torts I Final Exam, December 1986

This is an actual student essay which was written during the December 1986 Torts I final exam. It has been faithfully reproduced, and received an above average grade.

CARLA'S CAUSES OF ACTION AGAINST SAN FRANCISCO CARE CLINIC

I. MISREPRESENTATION

If Carla brings an action for misrepresentation, she may very well be able to get the Care Clinic in two different ways. First, their billboard advertisement may be seen in the eyes of a court as a misrepresentation in and of itself. Generally, advertisements and labels put forth by the seller of goods are considered strict liability misrepresentation if they, in fact, misrepresent a material fact that induces the reliance of someone. The question here is whether the billboard actually does misrepresent a material fact. It really does not say much, and it did not directly induce Carla's reliance, rather the reliance of her friend who told her of the clinic. A vague billboard will probably not support an action for strict liability misrepresentation.

Carla's better chance at recovery comes with her charging the Clinic with deceit--the true, intentional form of misrepresentation. This action will be based on the statement by the receptionist who answered the phone on the initial contact by Carla. For the misrepresentation to be actionable, we need an intentional misrepresentation of a material fact, as well as the intent to induce reliance. These elements should be fairly tough to prove in court. What the receptionist actually said, although she said it very factually, really does not seem to misrepresent much. Her statement about having a "excellent safety record" does not seem to be untrue. But it is obvious that Carla needs an abortion, and that the clinic does not perform abortions. So, the nurse has misrepresented the clinic by NOT revealing the fact that they do not do abortions, and that in fact they aim to prevent such operations. The nurse's failure to mention this satisfies the element of the false statement of material fact. Additionally, the intent to induce reliance is obvious from the facts. The very handbook on which the entire operation is based clearly points out that getting the women into clinic is the main objective, therefore proving that reliance should be induced at all costs.

Carla needs to have reasonably relied on the statement of material fact, and there is no doubt that she did, since she kept her appointment, expecting to at least be somewhere where such an operation can be performed.

Scienter is also an element of this intentional tort. Scienter is "knowledge of falsity and reckless disregard for the truth". This too is simple to prove, as we can safely say from the facts that the Care Clinic knew they did not perform abortions, and that knowledge did not prevent them from representing themselves as a clinic that does perform the abortions.

The clinic may be able to defend itself by saying that no representation was really made, and that Carla assumed the risk by not delving further into the background and reputation of the clinic. But, these defenses seem weak with all of the elements of the misrepresentation charge being strongly supported by facts. It is possible that Carla should have explored the situation closer, but she did rely on the receptionist's silent confirmation that they do indeed perform abortions.

By the way, an action for misrepresentation against the friend who told Carla about the clinic will not lie, because the friend was merely suggesting the place as a possibility. She gave no statement as to the reputation of the place, nor did she have the requisite scienter for the action to lie.

Also, an action for false imprisonment brought by Carla against the clinic will not lie unless they locked here in the room where the movie was being shown. She could have left, and in absence of any more facts I would not try to sue for false imprisonment. There would need to be barriers fixed by the defendant, and the plaintiff would have to know of her confinement, or be injured as a result of the confinement.

II. IRISMD

Another action that will lie is that of intentional or reckless infliction of severe emotional distress...IRISMD. I think I would pursue this as the intentional variety, since it seems to be intentional from the facts given. The elements of the tort are fairly simple: the intentional infliction of severe emotional distress, as well as a causal relationship between such distress and the requisite damages. The damages manifest themselves in the form of anger, depression, fear about the future...all of which are provided for by the fact situation. It is obvious that Carla cannot lead her prior life, since she is losing sleep over the episode. The facts mention that she is depressed and angry. We can show the causal relationship by showing that the distress mentioned, which does seem to be SEVERE AND OUTRAGEOUS (to say the least), started after she left the clinic, and we would also need to show that Carla was in pretty solid shape before the incident. There are no facts that indicate that Carla was not a fairly normal person before the incident, so we can assume, on this basis, that the IRISMD action will lie, and Carla will recover damages, compensatory and possibly punitive, for her severe mental and emotional distress. The loss of her baby, although it may have been due to the stress of the incident, may not be compensated for directly because she was there

to abort the pregnancy in the first place. Obviously she was not expecting to have a happy long life with her child, and the fact that she had a miscarriage, although it would end up being a jury question, is likely not compensable.

The defendant will try to show that Carla's depression and anger are from her own guilt, ie. getting pregnant in the first place, but this is unlikely to help unless they can show she was a total "basket case" before she ever entered the clinic, because of her pregnancy. Again, we are back to the causal relationship between the event and the distress. More facts in this area, about her prior condition, would be helpful, and may make a big difference as to whether Carla recovers. Although from the facts given I believe Carla can recover from the clinic for her mental distress.

Another factor to consider is Carla's known sensitivity to the subject of abortion. It is obvious to me that Carla, as any woman would be, is greatly affected by her pregnancy and her desire to abort. With this known sensitivity in mind, the clinic, as reported in the paper, means to play on that sensitivity in order to save the life of the unborn fetus. This harping on the known sensitivity of Carla will aid her case greatly, especially for the IRISMD charge.

By the way (again), no action for battery, via the pregnancy test, will lie, because "volenti fit non injuria". She was there for the test, and she obviously consented to it. In some situations, as supported by common law precedent, a situation in which there is consent can certainly turn into one where there is no consent. Although she consented to the test, she did not consent to watching the gruesome film. This situation took such a turn, and I would definitely argue this point in court.

Carla might also want to sue the clinic for invasion of privacy, saying it is up to her whether to have an abortion, and the clinic invaded her right to make her decision. I would advise her that I do not believe such an action will lie. If at all, the showing of the film would have to be forced (shoe horn and all) into the Prosser category of intrusion upon seclusion. But I simply do not think it would fit. For this tort there has to be an intrusion that is highly offensive to the reasonable person. Although the films probably are offensive, Carla does not seem to have been intruded upon. She was there of her own free will, and, absent facts to the contrary, she could have left at any time. The seclusion of an examining room may be enough for some other type of intrusion, but in this case, Carla's misrepresentation action and IRISMD action are the strongest, and may permit her recovery.

III. CROSS-SUITS AGAINST CARLA

Carla's statements about the operators of the clinic, as far as I can discern from the facts given, were said to me during our initial consultation. Since I am her attorney, and she is my client, it seems as though the confidentiality of our dealings would preclude

anyone from ever knowing that she said such things to me. However, if my secretary happened to be in the room, and knew what we were talking about, and heard Carla's statements, a cross-suit for defamation may be a good idea for the clinic.

Defamation, a still developing tort, includes several elements, including a false and defamatory statement of fact about the plaintiff, publication to a third party who understands, fault as to falsity of the statement, and damages. The first thing that would determine any liability would be whether the plaintiff is a public or private figure. Since they are operating as a business, and absent any other facts, I would say the clinic could be considered public, but it is possible that the owner of the clinic is not a public individual. The next thing to be determined is whether the matter is one of public or private concern. Although Carla's situation may not be, the general subject of abortion clinic seems very public. If the statement was made about both a public figure and about a public concern, then TIMES V. SULLIVAN kicks in, and the clinic would have to show actual malice...knowledge of falsity and reckless disregard for the truth. They would also have to show that the statement was one of fact. I think their action would fail at this fault, since Carla's statement seems to be one of opinion. The fact-or-opinion question is usually decided as to whether the statement is verifiable and reasonably believable. I think it is not. Any one can go down to the clinic and see for themselves whether the people who run it are terrible. In addition, the statement is not one a reasonable person will take seriously, or believe to any degree.

I believe that the communications that go on between attorneys and their clients should be protected by privilege, and that this one is. The clinic's action for defamation will not lie.

Weak Student Answer
Torts I Final, December 1986

What follows is an actual student essay written during the December 1986 Torts I final exam. It has been faithfully reproduced. It received a below average grade. Part of the essay is on target, but much of the analysis is thin and conclusory. A number of important issues are not discussed. A few of the somewhat troublesome portions have been underlined. Compare the factual detail, clarity, and depth of this answer to that of the Model Answer.

An action by Carla (C) for misrepresentation by Clinic (X) is fairly strong. X's intentional misrepresentation may be evidenced by the intentions set out in the handbook provided by an anti-abortion group in St. Louis. However the only evidence of the handbook or actual backing by anti-abortion group is in a periodical -- more facts would be necessary to infer the intent of the St. Louis group to X Clinic, to determine whether the clinic employs the tactics purported. If true, the evidence will strengthen C's case.

Outside the handbook or pro-life backing, the billboard itself is not evidence of intentional misrepresentation of the Clinic's services -- the Clinic did offer free testing. The receptionist's statement, knowing that C was seeking an abortion, could be evidence of subjective intent to misrepresent the Clinic's purpose. The receptionist's failure to inform of Clinic's true purpose may imply a duty to speak -- to correct misunderstanding or previous view of agency. The receptionist's remark of safety and appointment set up are evidence of intention to induce reliance on part of C. Since these statements are extremely broad and could also be intended not to induce reliance, C will have a hard time establishing intent from remarks in and of themselves.

Clinic's location may also be evidence of apparent intent to reduce reliance, by proximity to abortion Clinic, in order to clothe itself as an abortion clinic by association.

Carla relied on the center's representation as evidenced by her keeping her appointment. However C also relied on her friend's representation, so she did not primarily rely on representation of Clinic or receptionist. The fact that the Clinic did not perform abortions if C desired one is material.

No defense that Clinic had C's best interests at heart. Damages suffered are severe mental distress and anguish as result of reliance or Clinic's representation.

Carla's action for intentional or reckless infliction of mental distress (IRISMD) is strong. If the client did misrepresent its purpose, ads might to intent to inflict mental distress--to shock, or shame C into having the child. The film can probably be found to be extreme and outrageous. Particularly

since C is in a "delicate" condition and easily upset. The film would probably offend a normal person of reasonable sensibilities.

C's fright and shock at viewing of the film, her anxiety about the future, humiliation, if forced into delivery of child; inability to lead her former life and anger at Clinic are relevant and supported by events following the viewing of the film--ultimately resulting in miscarriage.

Consent to viewing film may be a relevant factor, C also had ability to leave.

ST. MARY'S UNIVERSITY SCHOOL OF LAW

TORTS I
Professor Vincent R. Johnson
December 1987

FINAL EXAMINATION
(Two hours)

SECRET EXAM NUMBER_____

General Instructions

1. Immediately place your secret exam 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 secret exam number, followed by five zeros, in the appropriate blocks at the left-top of the computer score sheet and blacken in the corresponding spaces. For example, if your number is "1234," write "123400000."

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

   The exam will be weighted as follows:

MULTIPLE CHOICE (3 pnts each)	--	78 Points
ESSAY	--	140 Points *
		218 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 (below) 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 multiple choice 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.

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- 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 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. Grades will be posted in accordance with school rules.

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

Former United States Senator Gary Heartless was a leading candidate in a heated race for the presidential nomination of the Democratic Party. During the campaign, rumors widely circulated that he was a "womanizer" who frequently engaged in extra-marital affairs. An editorial in the Washington Globe went so far as to state that "Heartless's record of sexual exploits proves that he is a moral Pygmy oblivious to decent Christian principles."

Although Heartless had in fact "slept around" some while single in law school, he had been faithful ever since to his wife of now 15 years. In an attempt to meet the various allegations, Heartless called a press conference at which he challenged the press to either prove that the rumors were true or to cease their repetition. "I dare you," he said. "Put me under 24-hour surveillance, and report everything that you see."

Shortly thereafter, Heartless was observed entering his Washington apartment, on an evening when his wife and family were out of town, with an attractive young woman who did not leave until the next morning. This event was reported in the next edition of the Globe, and was carried in other newspapers throughout the country via United Press International (UPI). Following these revelations, Heartless's ratings in the polls plummeted. He tried to explain that the young woman who spent the night at the apartment was his niece who had been stranded in Washington after a flight from National Airport was cancelled. This was true, but he was unable to stem the tide of public opinion about his "character," and was forced to withdraw from the race.

Interestingly, it was later revealed that the Globe writer who reported the overnight stay was aware of the fact that the young lady was Heartless's niece, although he did not reveal that fact to his superiors. The original Globe article omitted any reference to the fact, and described the young woman simply as a "shapely blonde." Only months later, long after Heartless had withdrawn, did the truth come to light and the Globe print a full apology for having omitted the fact about the uncle-niece relationship.

Several months later, the Globe's chief competitor, the Capitol Star, printed a report that Heartless -- who had since dropped almost wholly out of sight and whose name was rarely mentioned in the course of the campaign -- had been convicted of plagiarism in law school and had been required to re-take the course in African Water Rights. As it turned out, this report was erroneous. The incident had involved Gary Heartless's classmate, Harry Gartless. The normally accurate memory of the elderly professor who provided the information in a letter to the Star had simply failed.

Based on your knowledge of first semester Torts, may Heartless successfully sue the Globe, the Star, or anyone else for defamation? (Do not discuss other torts.) Candidly recognize any uncertainties or ambiguities in your analysis. In addition, if more information is required, indicate what questions you will want to explore. What defenses do you anticipate? You may make reasonable inferences from the facts stated.

-- End of Exam --

TORTS I FINAL EXAMINATION
December 1987

MODEL ANSWER

There are many ways to analyze any legal problem. The following reflects only one approach that a good response might have taken.

There are at least five different causes of action for defamation which we will want to consider: two against the Globe (one based on the editorial, the other based on the sleep-over report); others against the newspapers and UPI, each of whom repeated the sleep-over story; another against the Star based on the plagiarism story; and the last against the professor who provided the information to the Star.

In each of these cases, the standard of proof required of GH will be high, since for all of these actions GH arguably qualifies as a public figure. One who seeks national political office thrusts himself into the vortex of current events in an attempt to influence their resolution. Consequently, such persons fall within the classic Gertz definition of public figure. It might be argued that GH ceased to be a public figure with regard to the statements by the professor and the Star since he had left the public stage by the time they were made. However, this argument should be rejected because the statements were intimately tied in the public mind to the time when he was voluntarily in the public eye, and in any event it may reasonably be presumed that he still had access to the media for the purpose of exercising self-help to correct the statements. One does not immediately cease to be a public figure by withdrawing from the public stage. Indeed, this would seem to be especially true in the case of politicians, since political comebacks are always an option. Even if GH no longer wished to be a public figure, it might well be appropriate to treat him as an involuntary public figure for a reasonable period of time.

Moreover, the statements in question all arguably related to matters of genuine public concern, since the legitimate public interest is very broadly defined in the case of one who seeks the nation's highest office. Each of the assertions, to a greater or lesser extent, reflected upon the "character" of the candidate. The public moreover, would be asked to vote on his qualifications.

In view of the foregoing facts, the suits will involve a public figure suing for defamation with respect to a statement involving a matter of public concern. Therefore, GH will be required to prove:

(1) A false and defamatory statement of fact;
(2) Intentional, reckless, or negligent publication to a third person who understood its meaning; and
(3) Actual Malice.

If actual malice is shown, presumed and punitive damages may be recovered. Inasmuch as the statements here were all in writing, and that libel is actionable without proof of special damages in many jurisdictions and under the Restatement rule, special damages will not have to be proved and damages could be awarded based on the nature of the statement at issue, the standing of the plaintiff in the community, the breadth of the statement's dissemination.

In addition, it should be noted that Hepps appears to make clear in dicta that a public figure must also prove that the utterance was false; truth is not an affirmative defense.

On the facts given, it appears that all of the allegedly defamatory statements were published within the meaning of requirement number 2, having been communicated to one or more persons. The proposed causes of action will be discussed in sequence.

(1) Editorial The most likely reason that the editorial in the Globe will not give rise to liability is that it is a constitutionally protected expression of opinion. It appeared on the editorial page, where people more readily expect to see statements of conclusion or opinion, rather than assertions of fact, and it occurred during the course of a heated campaign. In addition, statements that one lacks "decent Christian principles" or is a "moral Pygmy" lack specificity and are not easily verified. To that extent they are likely to be regarded as statements on opinion, merely expressing that the speaker thinks ill of the plaintiff. Nevertheless, these opinions seem inextricably bound to an assertion of fact. Namely, that GH has "record of sexual exploits." At least this much of the statement is actionable since it is false in view of his fidelity. Clearly such an assertion is defamatory in the sense that it would tend to cause many others to think less of an individual.

If the statement is held to be actionable, it will be no defense that similar rumors were in circulation -- although that fact will bear upon the issue of damages.

The critical problem will be proving that the Globe acted with actual malice -- knowledge of falsity or reckless disregard for the truth. On the facts given, we have no indication that the Globe in fact entertained serious doubts as to the truth of the assertion -- which is the applicable standard. Mere negligence as to falsity will not suffice.

GH will not be precluded from proving that the statement is false by reasons of his college-days exploits. Those events are long past, as he has been faithful for 15 years. The facts are wholly unlike those in Guccione v. Hustler. Substantial truth as to this general allegation will not bar the action. The opprobrium that would flow from revelation of the true facts is wholly different from that which would attend allegations of present-day "womanizing" by a presidential candidate.

(2) Globe - Sleep-Over Report An action for defamation may be predicated on a half-truth which gives rise to a false innuendo. See Grant v. Reader's Digest. Consequently, the fact here will give rise to a cause of action, if the actual malice requirement can be met. The reporter was aware of information which must have caused him to seriously doubt the truth of the

innuendo conveyed by his report. This knowledge will be imputed to the Globe under respondeat superior principles, and thus causes of action against either the reporter, or the Globe, or both, are likely to be successful.

The Globe or the reporter may also be held liable for the foreseeable republication of the statement by the other media entities.

The apology, assuming it as full and unequivocal, may reduce damages, depending upon the existence and contours of a local retraction statute.

The defendants may argue an absolute privilege based on consent arising from GH's challenge to the press to follow him. This will likely fail. Consent to tell the whole truth is not consent to deliberate dissemination of a half-truth or other falsehood.

(3) UPI and Other Newspapers A reporter may be liable for republishing a defamatory statement, even if the statement is attributed to another (e.g., "the Globe reported"). However, these entities will likely escape liability, since there is no proof of actual malice on their part.

(4) Professor and (5) Star Report of Plagiarism There is no proof of actual malice and thus these actions will fail. The professor appears to have been at most negligent, and perhaps not even that -- his memory was usually good. There are no facts to show that the Star entertained serious doubts as to the truth of the professor's statements. Failure to confirm such a report with a third party is mere negligence, not actual malice. See St. Amant.

Student Answer
Torts I Essay
December 1987

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[This essay received an above average grade. The long introductory recitation of the law of defamation was a risky approach. It was so long that the student almost ran inexcusably short of time to discuss the facts. A few unintelligible or incorrect statements have been deleted. Not everything in this version of the essay is necessarily correct.]

The first thing that must be discussed in the tort of defamation are the elements necessary to prove it. The elements are: a false and defamatory statement of fact about the plaintiff (the statement, to be defamatory, must diminish the plaintiff's reputation, esteem, regard, etc. in the eyes of others.* (*Note: It is not necessary that "right thinkers" think less of the plaintiff--it is enough that a minority of "wrong-thinkers" do--as long as they aren't a clearly anti-social or criminal group. Why? Because courts don't get into dismissal always of right v. wrong thinkers.) It cannot be merely bothersome or annoying to the plaintiff, e.g. call a Republican a Democrat); the intentional or negligent publication to a third party who understands the defamatory meaning (Strict liability doesn't apply, e.g. an eavesdropper. Publication is a legal term of art; it doesn't mean publish as in a paper, but to communicate to another. Also, the party must understand the communication, and the defamatory meaning, e.g. saying it in Greek to an American who doesn't speak Greek won't work for publication, e.g. Economopolous) (Here, there is a presumption of understanding if a large number of people receive the communication--someone will likely understand it!). The third element only applies in some cases (will be discussed later): some kind of fault as to falsity of the statement; finally, damages, in some cases, or the "per se" distinctions may apply.

Back at Common Law we had slander (oral) and libel (written, perhaps manifest,) and the per se distinctions. Some slander was actionable per se, i.e. damages were presumed. (*Note: no necessity for proving fault as to falsity at C.L.). There were four categories: major crime, loathsome disease, incompetence in business, trade, profession, or unchastity to a woman. If the slander didn't fall into one of these four, then plaintiff had to prove special damages, i.e., people treated him differently because of the statement.

With libel, some said it was all actionable per se, (because back then the written word was sacred because of great illiteracy!) some applied the four slander categories, or looked at it on its face within the four-corners of the document.

Beginning very recently, we have begun a trend, with Supreme Court cases, that has changed this C.L. idea to certain degrees. Because of our Constitution's First Amendment, re: freedom of

speech, it became necessary to look at defamation in the context of this Constitutional principle: "We don't want to chill freedom of speech (esp. in some areas); we want to allow the free flow of information."

The landmark cases of N.Y. Times v. Sullivan, Gertz v. Robert Welch, Inc., Dun & Bradstreet v. Greenmoss Builders have tried to align the First Amendment with the tort of defamation. These cases created pigeonholes, and depending on which you fall in, will tell the plaintiff what kind of fault as to falsity he must prove and what damages he may recover. The first is: public officials and figures suing with regard to statements about their capacity in their official roles must prove actual malice, i.e. knowledge of falsity by defendant or reckless disregard for the truth. He may recover actual, punitive, and perhaps presumed damages. The second category (Gertz) is: private figures suing with regard to matter of public concern. Some fault must be shown. States may set it as low as negligence or as high as actual malice. Plaintiff can get actual damages for negligence, plus punitive and presumed if actual malice. The third pigeonhole is: private figures suing with regard to matters of private concern. (Dun & Bradstreet). The opinion seems to be that "per se" distinctions still apply, or else necessary to prove the special damages (discussed before). The four dissenting justices (authorized by Brennan) seem to say Gertz should apply here as well, but we shall have to wait and see.

Applying this background to the facts stated here, we see that Heartless (H) is at the least a public figure. He was a public official, U.S. Senator, but is no more. So, we can see that H is going to fall into the category described first (public official/figure), and it will be necessary for him to prove actual malice to sue the Globe. There are several considerations brought up by the facts however. First, (As to the editorial!) is this really a statement of fact or is it an opinion? If the Globe can show by a preponderance that it is an opinion, they're free and clear, because in defamation there is no actionable opinion, unlike misrepresentation. To determine whether it's fact or opinion we can look at several things: the context in which the statement is made, is it in a place where one expects hyperbole/exaggeration, the ordinary meaning of the words, how it is likely to be understood by others. In this case, the Globe has a good shot at "opinion" because the statement was in an editorial which (I'm sure) appeared on the editorial page. This is where everyone expects exaggeration and poking fun at politicians and other public figures. It is a place where people are known to express their opinions! Also, calling H a "moral pygmy" shows colorful language. H also has another problem in proving his case (even if he can prove actual malice, etc.). The statement must be false. It is true that H slept around in law school. The statement refers only to sexual exploits over time, not limited to the time of his fifteen year marriage. The same idea applied in Guccione v. Hustler Magazine, and the court here said the statement, while not true now, had been true for a stretch of time to allow the statement. The question here would be whether three years of law school is sufficient time to allow such, I think it is.

H's next problem is (as to the later report) strictly of his own making--"volenti non fit injuria"--to one who is willing no harm is done! H consented to have everything seen published. However, remember consent to one thing doesn't mean he consented to have lies written about him, e.g. consent to a fistfight is not consent to be beaten with brass knuckles.

So far, I believe H is going to have a difficult time because of (1) not false in entirety (as to the edit) (2) consent to report (as to later story). There is no question as to whether the statements are defamatory, or to whether there are intentional publications to a third party, and believe me, everyone understood what they meant. Obviously, he was diminished in others' eyes (whether they be wrong-thinkers or not) because of the statements.

As to actual malice proof, (as to the later report) I believe H has a good case--the reporter KNEW what she was printing was at best a half-truth. (As to the edit--actual malice is weak because of the earlier argument about lack of substantial falsity!) The paper will likely be liable under respondeat superior because it employed the reporter, and papers are usually accountable for reporters. Note: H was obviously damaged by the report.

To sum up, I believe H will have a very tough time with the Globe, not because of actual malice, but because of falsity in light of the Guccione decision. Truth (even sub.) is an absolute bar to plaintiff recovery for defamation.

As to the other papers, that picked up the story via UPI, they may try to assert the Reporter's Privilege and bar any action against them since they fairly reported just what the other paper said and it was a matter of public concern. However, the report didn't come out of a judicial proceeding or legislative proceeding, nor from a town meeting--or any place where one could've gotten first hand knowledge. Since, then this is a renewal of the publication (and not just the same publication to many) the Single Publication Rule doesn't hold. (See note below!) The other papers could be sued by H because I don't believe they apply the Reporter's Privilege--remember "tale repeaters are just as bad as tale makers" (V. Johnson).

*Note: If H proves defamation as to the Globe, he will likely have a better case against the others. His case against the "pick-up" papers, I believe, will likely fail because he won't be able to show the actual malice that he must prove. The other papers had no knowledge, nor any reasons (in the facts) to believe the reporter would lie by half-truth.

As to the retraction, there are statutes that govern in this area. Some juries allow defendants to escape liability or mitigate damages by a retraction. However, the jury see it was too little too late, H had already "lost" the race.

As to the Star, H has a better chance because I would now consider him a private figure suing as to a private matter (the Star will try to argue otherwise as a defense, so he will have to prove actual malice--say he hasn't been out of arena long enough). As a private figure he can use per se category (yes, for libel) of incompetence in profession because they say he cheated and that goes to professional ethics, I assume he's now practicing law (in view of death of political career). So, no need for fault as to falsity against Star or the old professor.

Sample Student Answer
December 1987 Essay Question
(The essay received an above average grade.)

Heartless' candidacy for the presidential nomination would definitely make him a public figure. As such, after the Supreme Court's decisions in New York Times v. Sullivan, and Gertz, actual malice must be proved for a cause of defamation to lie. Actual malice could be defined as "knowledge as to falsity or reckless disregard for the truth." Morality is important for the office of the presidency, since the public demands honesty, fidelity and generally a good moral character of the person who will lead them. Thus although infidelity would be a private matter for the majority of the people, for the presidency it is a matter of public concern.

The first article, appearing in the Globe, commenting on Heartless' Christian principles would, with no doubt, be shocking to the moral majority in this country. The publication comments on a fact of the plaintiff's life that happened 15 years ago and no mention of this appears. The Globe would have a defense to an action of defamation if it had stated that Heartless' sexual exploits happened then, but as it stands, the Globe is recklessly disregarding the truth and damaging Heartless.

Another defense of the Globe would be that the statement made is only opinion and not fact, but with words as "proves" the Globe communicated something which some people would take as fact. It would also be more damaging to the Globe if it is a respected newspaper, to which people look for reliable news.

The second publication of the Globe, concerning Heartless' all-nighter with a "shapely blonde," would be less actionable for several reasons. First, Heartless had given expressed consent to the media to "report everything that you see." Since the Globe reported just that, the maxim "volenti non fit injuria" would apply. There is nothing false about the publication since a voluptuous blonde had spent the night in the Washington apartment. One might argue that this is a half-truth and thus the fact that the blond was Heartless' niece should have been mentioned. This brings up the second point. The fact was only known to the Globe writer, and since actual malice must be shown, the principle of "respondeat superior," cannot as easily be used. The higher the blameworthiness, the less likely that the principle can be used. The writer on the other hand can be held liable for defamation since with actual malice, he conveyed to the public the notion that Heartless was cheating on his wife. As previously discussed, the consent would not be admitted since the writer should've put down the whole truth.

Nevertheless, if the court finds that the Globe or the writer are liable, then more than one cause of action will lie since the article was transmitted and published by other newspapers. The other newspapers, on the other hand could defend against actual malice, by bringing out that the Globe is a respected newspaper and so they did not act with recklessness in publishing the article.

Heartless incurred incalculable damages (How much is a presidential candidacy worth?) and so he should ask for compensatory and punitive damages since the defamation, if found, is so greatly damaging that an example must be set. On the other hand, the court might be reluctant to award punitive damages since that would put a further strain on the media's First Amendment rights.

Globe's apology would not amount to much since it was made after all the damage had been done and after a long time.

Star's article raises the question of Heartless' classification as a public figure or a private person. Since the article made false accusations about private matters, though, actual malice would not have to be shown. Plagiarism in law school is a private matter and it would be of public concern if Heartless was still in the race for the presidency. This is so because the public expects the president to be honest and so anything pertaining to his moral character would be important.

The Supreme Court has never made it clear what level of blameworthiness is necessary for private matters but it seems that it requires only negligence. Also proof of damages need not be shown since Heartless' profession is law and a statement about an attorney's honesty reflects his occupation. Besides the article is considered libel and so common law has made it defamatory per se.

Star was negligent in its publication since it didn't bother to check and find out if the statement is false or not. A newspaper, when publishing about private matters, should be certain that they are not false and failure to find out using reasonable means would be negligence.

A problem would come up with damages since they are not readily ascertainable, and since it's negligence, perhaps punitive damages would not be granted.

The elderly professor on the other hand, acted with recklessness, since he should have known who the real cheater was. This is especially true when the one that he accused was an ex-presidential hopeful, and so he should have checked more closely. He would be liable for defamation and besides compensatory or nominal damages would be liable for punitive damages also. His age and his senility would all be factors for the jury.

Student Answer
Torts I Final Exam
December 1987

[This essay received an above average grade. The portion of the essay reproduced below relates to the claims against the Star and the professor.]

If Gary also attempted to sue the Star we gave a considerably different situation. Remember at the time of the Globe's articles Gary was running for president of the United States and was an important and influential public figure. However, at the time of the Star article Gary had dropped out of sight for several months. Whether this changes his status as a public figure is a question to be debated. Because Gary was no longer in the "public eye" can the Star maintain that he is still a public figure and assert the requirement of actual malice for liability in a defamation suit? If not then the requirement for fault as to falsity could go as low as negligence and Gary would have a good chance of recovery. Once a person becomes a public figure, by choice, as in this case can he ever really turn back into a private individual? We would still consider ex-presidents public figures and even those who failed along the way as public figures. Star would argue and I can see their point, that once Gary decided to become a public figure and thrust himself into the public eye that is the way people will continue to see him. We must also look to what concern Gary's law school record is now. Gary would argue that now that he is out of the campaign and has dropped out of sight his record is no longer of public concern. Therefore he is a private person or any person suing in regards to a private matter and should have to prove only negligence if any fault at all. However Star would counter that Gary never left the public eye and remains a public official or figure. Star would assert that Gary at any time can rejoin the race, as people have been known to do, or run at some time in the future. The importance of the dissemination of information concerning the morals and professional endeavors of our public figures are of utmost important and shouldn't be prohibited. At the most the publisher could be held to the actual malice requirement which was most likely not met in this case. Because the Star's report relied on a normally accurate source and the confusion of the names is quite possible, I strongly doubt that the actual malice standard can be invoked here. Of course this is assuming that we are still viewing Gary as a public figure and his law school career a matter of public concern. Actual malice requires knowledge of falsity or recklessness. I see neither in the Star's actions. I see possibly negligence but no knowledge or recklessness and if we hold Gary up as a public figure and his law school history as public concern, which I believe we would, I think Gary would most likely fail in a suit against the Star or the elderly professor.

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ST. MARY'S UNIVERSITY SCHOOL OF LAW

Torts II Final Exam
Focus: Nuisance, Negligence,
Strict Liability

Prof. Vincent R. Johnson
April 24, 1987
Three hours

PLEASE WRITE YOUR PERSONAL EXAM NUMBER HERE: _____

YOU MAY BEGIN READING THE INSTRUCTIONS;
PROCEED TO WHERE IT SAYS "STOP"

General Instructions:

1. Immediately place your personal exam number (not the number the secretaries have written on this set of exam questions) on:
   a) this set of questions (in the space provided above);
   b) all blue books; and
   c) the right side of the the multiple choice answer sheet where it says "Student Name"

In addition, write your 4-digit exam number, followed by five zeros in the "social security number" boxes at the top, left-hand corner of the multiple choice answer sheet. Then, blacken-in the nine spaces corresponding to those nine digits.

Finally, 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. Grades will be posted after the conclusion of the examination period. I will not return post cards.

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. The exam questions will be destroyed shortly after they are counted at the end of the exam.

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 45 min.; essay - 1 hr. 15 min.

14. Good luck! Do your best! Have a great summer!

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 a minority rule, the former is the "best" answer.

STOP READING HERE UNTIL INSTRUCTED TO GO FURTHER

Essay Question Instructions

There are two parts to the essay. Your answers will be read as a whole and will be given a single grade. You should make every effort to complete each part, though failure to do so will not necessarily be fatal.

Part I is a brief, short answer question. Parts II is more complex and deserves the bulk of your time; on that part it is 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 desirable, 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.

Part I

Briefly list, without elaboration, five rules of law which, in jurisdictions which have replaced contributory negligence with comparative negligence, some courts (but not necessarily a majority) have found it necessary to abandon or modify in order to be consistent with the policies underlying comparative negligence. (This should require no more than a few minutes and half a page.)

Part II

Select and address from a public policy perspective ONE of the following questions. You should, where appropriate, discuss not only public policy, but related doctrinal developments in modern tort law. You may wish to refer to history, sociology, economics, and the like, in order to present a convincing legal argument to support your position.

Choice (A) Should a person who communicates AIDS to another, through sexual relations or blood transfusion, be held strictly liable in tort for the losses caused to the other? If so, what defenses, if any, should be available to the defendant and what effect should they have?

Choice (B) In a jurisdiction which has legislatively adopted comparative negligence and which follows the traditional common law rules of joint and several liability, should the state high court abolish joint and several liability in some or all cases?

Choice (C) In a jurisdiction which has no seatbelt statute, should the state high court adopt a rule of law which provides that an auto accident plaintiff's recovery in a tort action for negligence may be reduced so as to deny compensation for those injuries which would not have been sustained if they plaintiff had worn a seatbelt? What limitations, if any, should be placed on such a seatbelt defense?

Choice (D) In the absence of controlling legislation, should the state high court adopt the rule of "social host liability," under which one who serves alcohol to another is held liable in negligence for those injuries which foreseeably result from the donee's inability to control a motor vehicle after leaving the place where the alcohol was served? What limitations, if any, should be placed on the rule?

Choice (E) Should the state high court abolish the general rule of "no duty to rescue" (and its numerous exceptions) and subsstitute in its place a duty of reasonable care under the circumstances? What restrictions, if any, should be placed on the new rule, if it is adopted?

Choice (F) In a state with a legislatively adopted rule of contributory negligence, which the legislature, under the influence of insurance lobbyists, has refused to revise, how should the state high court treat the rule if it believes it is out-of-date and inconsistent with current tort doctrine.

[END OF EXAM]

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ST. MARY'S UNIVERSITY SCHOOL OF LAW

Torts II Final Exam
Focus: Nuisance, Negligence,
Strict Liability

Prof. Vincent R. Johnson
April 20, 1988
Three hours

PLEASE WRITE YOUR PERSONAL EXAM NUMBER HERE: _____

YOU MAY BEGIN READING THE INSTRUCTIONS;
PROCEED TO WHERE IT SAYS "STOP"

General Instructions:

1. Immediately place your personal exam number (not the number the secretaries have written on this set of exam questions) on:
   a) this set of questions (in the space provided above);
   b) all blue books; and
   c) the right side of the the multiple choice answer sheet where it says "Student Name"

In addition, write your 4-digit exam number, followed by five zeros in the "social security number" boxes at the top, left-hand corner of the multiple choice answer sheet. Then, blacken-in the nine spaces corresponding to those nine digits.

Finally, 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. Make sure there is a seat between you and the next person.

4. Except where instructed otherwise, you may assume that comparative negligence and comparative fault have 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. Grades will be posted after the conclusion of the examination period. I will not return post cards.

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. The exam questions will be destroyed shortly after they are counted at the end of the exam.

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 - 2 hours; essay - 1 hour.

14. Good luck! Do your best! Have a great summer!

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 a minority rule, the former is the "best" answer.

STOP READING HERE UNTIL INSTRUCTED TO GO FURTHER

Essay Question Instructions

It is 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 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 part of the discussion, include it where you have space and, if necessary and desirable, 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.

Select and address from a public policy perspective ONE of the following six questions. You should, where appropriate, discuss not only public policy, but related doctrinal developments in modern tort law. You may wish to refer to history, sociology, economics, and the like, in order to present a convincing legal argument to support your position.

Choice (A) Under what circumstances, and to whom, should a clergyman be held liable for negligent counseling of, or failure to counsel, a church member who proposes to take his own life because of his (the member's) "sinfulness"? No action for "clergy malpractice" has ever been recognized in the state.

Choice (B) A United States Government space shuttle explodes in mid-air, killing all seven crew members on board, including a civilian elementary school teacher. May a wrongful death action be commenced as a result of the teacher's death? Against whom? On what theories? With what limitations and likelihood of success?

Choice (C) Should educators or educational institutions be subject to liability for "educational malpractice" where a child of normal intelligence graduates from high school with seriously deficient reading and writing skills, allegedly attributable to negligent teaching? If so, what limitations should be placed on the doctrine by a court which adopts this cause of action?

Choice (D) Should the traditional premises liability categories (trespasser, licensee, invitee) be judicially abrogated in Texas? If so, what should replace them? Why would the new rule(s) be preferable?

Choice (E) The "Rescue Doctrine" (the rules applicable to actions by or against rescuers, not the "no-duty to rescue" rule) creates various exceptions to otherwise well-established common law tort rules. Should it be abolished, in whole or in part, so that the usual liability rules will govern legal issues relating to rescuers? What rules of tort law would be affected by the total or partial abrogation?

Choice (F) Should the state high court adopt a new doctrine which provides that day care centers will be held strictly liable for physical and mental injuries sustained by a child when a day care center employee sexually molests a child less than 10 years of age on the day care center premises?

[END OF EXAM]

Torts II Exam, Spring 1988

Actual Student Answer

Essay Choice A

This essay answer received an above average grade. The markings in the margin are mine.

Choice A A clergyman could be held liable for negligent counseling of a church member who attempts to, or commits suicide depending upon certain factors. These would include: A) The absence or presence of a standardized state-wide or national criteria for licensing (or an objective standard of fitness for Counseling; B) The length of time that the Church member was under counseling; c) a determination of how credible any previous suicide threats by the particular individual might have been (e.g. was this individual objectively manifesting traditional warning signs to suicide, or just being dramatic); and perhaps a determination of the religious tenets of the Church denomination (as the differences in religious doctrine may have a bearing on the depth of the guilt).

A person in the capacity of a religious Counsellor is in a confidential position with regard to a disturbed member, not unlike that of a medical professional, or legal professional. Thus, some traditional mal-practice legal theories should apply. For example, if it may be established that the Counselor has had the requisite training of an ordinary

counselor (in the same faith) in good standing, this is what he or she implicitly warrants to the counselee. If he or she falls below this standard, or if the counselor warrants that he is of a specialist variety (eg. marriage, youth, drugs etc). then he should be held to that ordinary or additional standard of care. Similarly, if he holds himself out (explicitly or implicitly) less than the ordinary in training and expertise, he would be held to a correspondingly lower standard. However he might still be liable to sanctions imposed by his counseling industry.

Under traditional tort theories of malpractice, a professional implicitly warrants that he will exercise good faith due diligence in performing his professional tasks. If he performs negligently viz. the counselee, the traditional reasonable care - under the circumstances analysis should apply. In both of the foregoing requirements, the law seeks to encourage persons with superior skill or ability to utilise these, and by holding a professional to a duty of reasonable care under the circumstances, the law seeks to

advance the theory that an actor's liability should be based on a showing of fault and the extent of their liability should correspond to their degree of fault.

As stated supra, the major problems that would arise do not concern professional malpractice theory, but rather, defining an applicable standard of judgment. In the religious context, Counseling more often than not, is involved more with ethereal concepts of morality, eternal life, or retribution, as well as any peculiar tenets of the particular religious faction. The problem is that there is no set criteria for judging what say, a Baptist counsels as "wrong", and what a Roman Catholic says is "wrong". In this aspect, there are very definite first amendment questions that would arise. I believe that this would be an almost insurmountable obstacle.

The law could adopt a "static concept" approach to the problem by stating that whenever a person's life is threatened, any religious Counselor

would be required to counsel against it (regardless of the doctrines of the respective church) based on the deterrence aspect of legal policy. If a Counselor knows or should know of a Counselee's probability of taking his own life, and then fails by reasonable means (fact question) to dissuade the individual, the Counselor could be held liable to the Counselee or his estate. Because most religious Counselors are either unpaid, or if so, underpaid, (with the exception of television faith healers from Oklahoma) the liability could attach to the affiliated church, bishopric etc. This would have the additional effect of deterring not only the individuals negligence, but also parish or Convention (?)-wide negligence. Put differently, the parish or other political body would have an ~~excessive~~ incentive to standardize their Counseling policies and procedures (to the extent possible) in order to better predict similar outcome. Further, it would provide the impetus for training standards (maybe licensing?) of its Counselors.

Another possibility would be to require the religious counselor to refer a counselee to professional medical (mental health) agencies if it is apparent to a reasonable person in the counselor's position that the counselee is suffering extraordinary psychic problems. This determination does not have to be medically determined, just objectively reasonable (eg. the counselor is over his head and knows it.)

Liability for negligent failure to counsel or negligent counseling should be determined after considering relevant factors pertaining to the counselee.

1) The length of time under this particular counselor's care (was it long enough for the persons suicidal tendencies to become foreseeable)
2) The doctrines of the particular denomination (are they so ~~rigid~~ rigid that it would be foreseeable that a counselee would feel there is no alternative)
3) The age, intelligence, maturity, and personality of the counselee (is he a young person who may not understand the concept of death, or an aged terminally ill cancer patient).

4) The frequency or lack thereof of previous suicide threats (has he cried wolf, is he a dramatic that craves attention) in otherwords is he credible enough to satisfy foreseeability.

5) Does this denomination have a standardised training programme, are their counselors licensed by the denomination (or is the counselor also the church bus driver and general all 'round do gooder?)

It should be noted that if traditional malpractice theory is employed (as say in re lawyers) that a counselor of religious member need not guarantee success - they could not be held to a standard whereby the implicitly warrant that they do not make errors in judgment. This aspect would be another relevant factor to be weighed. How far does a clergy counselor hold himself out to his flock (perhaps based partially on the doctrines of his faith) that he has the answers to their problems.
⇒ there might be a detrimental reliance component to the equation.

One of the policy underpinnings of the law is to try and avoid the "dismal swamp". This expression is usually well suited to the "state of mind / insanity" inquiry. As alluded to supra it could also be a consideration in the Courts' attempt to precedentially standardise religious Counseling practice.

I feel that it would be socially advantageous to hold those who counsel people in the religious context liable for failure to counsel or to negligently counsel a person who feels suicide is the answer. Today, more than ever before, young people are confronted with suicide as a viable option. But as a lawyer I would argue that the legal policy consideration of limiting liability in proportion to fault would prevent Clergy Counselors from becoming convenient scapegoats for a frustrated and anguished public grappling to cope with a problem that has no simplistic band aid answer.

If it can be shown that a Clergy Counselor was negligent in discharging his duties, he should be liable to the extent that he failed to exercise reasonable care under the particular circumstances of a particular client, pursuant to the Considerations aforementioned. Because of the inviolate nature of religion in the psyche of people in this Country, I feel that a Clergy Counselor is in a superior position and hence owes a slightly higher duty of care. In the religious Context, as contrasted with the medical Context in Counseling, there is no chemical treatment that a client can undergo, further the Counseling process is not as "arms length" as the medical Context. (there is no Contractual relationship). I would argue that a religious client is more ready to accept, without question, the priests' advice, than the doctors. ⇒ there is more a fiduciary relationship. Therefore the Priests negligency should have to be correspondingly less than a psychiatry

A final Consideration, would be the financial infrastructure of the Church or ecclesiastic body.

Mental hospitals and professional Counselors are because of government support, insurance, and the like, better able to absorb and spread the costs of malpractice litigation. From an economics prospective, it becomes a cost of doing business to be added to their average variable cost curve. Further, they may incrimentally increase the cost of medical services to the population and because the elasticity of demand for medical care in this Country is almost perfectly vertical, the same ~~them~~ number of people will still demand the same amount regardless of price

The religious Community (by & large) does not have these "safety valves" of absorbing and spreading costs. Further, any attempt by the state to cartelise the religious Counselors would be deemed impermissible from the Separation of Church & State prespective. As a result the amount of damages that a plaintiff could recover would, as a matter of necessity, have to be limited. Courts are well situated to effect this through remittitur.

But perhaps the legislature would be compelled to place a cap on negligence claims viz religious Counselors as an economic necessity.

Yuck!

I see I am out of time. I have enjoyed this Semester with you, and hope you excel in all you endevours. If I dont see you before next Semester, have an elegant Summer, and good luck in D.C.

Torts II Exam, Spring 1988

Actual Student Answer

Essay Choice C

This essay answer received an above average grade. The inserted words are those of the student. The lines in the margin and the questions at the end are mine.

Choice C: Yes, educators or educational institutions should be subject to liability for educational malpractice.

Educators are well respected, trained individuals who are ordinarily held to have a higher degree of skill THAN that the ordinary citizen, BUT much like an attorney or a doctor. i.e. PROFESSIONALS. Therefore, it seems to follow that when a teacher takes on the job of becoming an educator or when a school holds itself out to be an educational institution, they are representing to the public that they possess: 1. the requisite degree of learning, skill and ability necessary to their particular and chosen field of profession which all teachers in good standing and accreditation are deemed to possess; 2. they also represent that they will exert all their best care and judgment to see that the children are adequately educated who have been entrusted to their particular classrooms or school; 3. that ~~he~~ they will use and exercise reasonable and ordinary care and diligence in educating these children so that they will be adequately educated to function in society; and 4. that they will exercise all good faith and honesty in performing their job and will exert all efforts to insure that the best interests ~~fo~~ OF the children are provided for. It is also recognized that if they have performed all their duties to the best of their beliefs and act in the best interests of the children, then they (TEACHERS) will not be answerable. When a child graduates with deficient reading and writing skills, it appears that these duties have not been reasonably fulfilled and the duty to these children has been breached which is a cause to their not having obtained the primary skills to function in our society.

The main policy considerations which support ~~this~~ the conclusion TO IMPOSE LIABILITY are: 1. deter future accidents; 2. avoid wasting resources; 3. promote economic growth and stability; 4. foster predictability and somewhat weaker notions of basing liability on fault and in proportion to fault.

By holding the teachers responsible, society in effect will be detering future accidents. If nothing is done to promote an adequate education, then the problem will continue at its present rate and will likely increase since nothing is being done about its deficient condition. By requiring teachers to held responsible, they will know what their duty is and they will provide a better education and prevent future generations of children from graduating without the adequate reading and writing skills so necessary to survival today.

In avoiding the wasting of resources, by promoting this type of negligen ACTION upon the teachers, we are preventing them from wasting their own ~~resrouces~~ RESOURCES as well as preventing the waste of the nation's most precious ~~reerouce~~ RESOURCE, the next generation. In order for teachers to receive their degree and teaching certificate, ~~must~~ much time and energy was expended. For them not to put their knowledge and skill to good and productive use, all the time and money spent to educate them will be wasted as well. Even more waste is committed when the youngsters of our society are not adequately educated. If the next generation is not adequately taught how to read and write it seems very difficult to assume that our nation will continue to grow or advance technology or science or in the humanities. If we continue to produce an inferior edcuation for our children, other countries like Japan, Russia, West Germany will be able to surpass us in industry and technology and will be more than ever be able to come into our country and buy up large companies and the import deficit will continue to increase. To be a continuing world power, we must promote education in our schools. One way of promoting this ~~fact~~ need is by requiring the schools themselves as well as their staffs to be liable when the normal child of average intelligence is graduated without these skills.

Tied closely with the wasting of resources is the promotion of the economic growth and stability of our nation. This policy consideration was of great importance during the time of the industrial revolution which

which allowed the industries to avoid liability in order to promote economic growth and stability. Using this consideration to the contrary, it can promote economic growth and stability by requiring the educators to graduate educated children which is the prime responsibility of their industry today.

One argument might be that by imposing such a liability upon educators we will not be able to recruit more in the future. That may be true at the onset, but we will probably only then get the teachers who are truly dedicated and want to teach the children. Under the proposed liability theory, the teacher however will not be held liable if he or she educates the children to the best of their ability. Knowing of the possibility of liability, should give greater incentive to properly teach since no liability is imposed only because of a mere error of judgment or some remote possibility that the child didn't learn. as with other professionals. If they are only required to assert their best efforts, the liability theory will only promote are more concerned & productive teaching staff.

By implementing this plan, the teachers will know exactly where they stand and thus it will foster predictability. As in the case involving the doctor who failed to give the eye test, for glaucoma it was not the necessary standar at the time, but was found to be reasonable because it did not require great expense. So too, with the teacher's liability. They will know that they are responsbile for teaching the children to read and write and not allow them to graduate unless they have acquired and mastered these skills. This standard will have to be implemented nation-wide in order to be effecti and foster the predictability proposed.

In a sense, this type of liability will in some way base liability on fault and in proportion to fault. I am not saying that the teachers are the only ones responsible for the fact that children of normal intelligen cannot read or write. They are the people who are paid to teach these children and have dedicated their lives to that job. It seems that they will be better to bear the burden when their job is not satisfactorily accomplished.

Since it appears that the education dilemma still persists in our country, something more drastic needs to be done. The mandatory testing for teachers in Texas did nothing to promote a better, or more qualified teaching staff and did nothing to promote economic growth for our country. It appears that whenever a change in the law is to be made, the topic of torts and negligence seems to be a much used field to foster change. In negligence where there is a duty, that duty has been breached, it causes some type of harm and damage results, the tortfeasor is liable. In the field of education, the teachers have the duty to educate the child, and when they fail, that duty is breached and causes a child to be graduated without the minimal skills necessary to function and grow in today's society of high technology. Since the child cannot function to his potential, damage has been caused not only to the child but the society as a whole who then through social programs has the duty to rescue. Since the elements of negligence can be found in the teacher's unreasonable exercise of due care in graduating children without reading or writing skills, it seems that liability might promote what the education systems needs.

Teachers not only owe a duty to the child but to society as well since negligence is not cut off by a person who rescues. Society has to step in and rescue the child from a peril which the negligent teacher has put him or her in. Although subjecting the teaching profession to liability for negligence seems to be drastic, it seems to be an alternative which will most likely promote the health, welfare and needs of our society.

What about comparative fault? Should institutions rather than individual teachers be held liable?

Torts II Exam, Spring 1988

Actual Student Answer

Essay Choice F

This essay answer received an above average grade. The marking in the margin are mine.

F. YES, THE STATE HIGH COURT SHOULD ADOPT A STRICT LIABILITY APPROACH WITH RESPECT TO CHILD MOLESTATION ON DAY CARE CENTER PREMISES. DAY CARE CENTERS ARE A RELATIVELY NEW DEVELOPMENT BUT ARE BECOMING SOCIOLOGICALLY AND ECONOMICALLY VITAL IN THE U.S. ADDITIONALLY, THERE ARE SEVERAL POLICY REASONS WHICH SUPPORT ~~AN ADOP~~ THE ADOPTION OF A STRICT LIABILITY APPROACH, NAMELY: DETERRANCE; SPREADING COSTS, FOSTERING ECONOMIC GROWTH; AND PREDICTABILITY. OPPOSING, BUT NOT OUTWEIGHING, SUCH A DECISION

ARE CONCERNS FOR LIABILITY IN PROPORTION TO FAULT AND RESPECT FOR CO-EQUAL BRANCHES.

IN THE EARLY DAYS OF INDUSTRIAL AMERICA, DAY CARE CENTERS WERE NOT REQUIRED BECAUSE WE ADHERED TO A TRADITIONAL "FATHER GOES OF TO WORK WHILE MOTHER STAYS HOME WITH THE CHILDREN" ATTITUDE. WITH THE HIGHER COSTS OF LIVING MORE MOTHERS ARE FORCED INTO THE WORK PLACE JUST TO MAKE ENDS MEET, LEAVING NO ONE TO WATCH OVER THE CHILDREN. HENCE THE NEED FOR DAY CARE CENTERS FOR PRE SCHOOL CHILDREN.

BY ADOPTING A STRICT LIABILITY APPROACH TO THE PROBLEM OF CHILD MOLESTATION, THE COURT WOULD DETER SUCH ACTS, BY PLACING THE BURDEN OF ENFORCEMENT ON THE DAY CENTER MANAGEMENT. THESE EMPLOYERS WOULD BE FORCED TO BE MORE CAREFUL IN SCREENING & SUPERVISING THEIR EMPLOYEES. IN THE EVENT THAT THEY FAIL TO DO SO AND ARE HELD LIABLE, THEY ARE BETTER ABLE TO ABSORB AND SPREAD THE COST (EITHER THROUGH INSURANCE OR TO THE REMAINDER OF THEIR CUSTOMERS). THAN

ARE THE PARENTS OF THE MOLESTED CHILD.

WHILE ONE MIGHT BE MORE HESITANT TO ESTABLISH AND OPERATE A DAY CARE CENTER, PARENTS MIGHT BE MORE AT EASE ENTRUSTING THEIR CHILDREN TO DAY CARE CENTERS, KNOWING (ASSUMING?) THAT THE CENTERS WILL BE MORE CLOSELY SUPERVISED AND EMPLOYEES MORE CLOSELY SCREENED, AS A RESULT OF THIS LAW. THIS WILL FREE THE HOUSE BOUND SPOUSE TO SEEK EMPLOYMENT, BOLSTERING THE GNP AND FACILITATING ECONOMIC GROWTH.

IMPOSITION OF A STRICT LIABILITY APPROACH WILL ALSO FOSTER PREDICTABILITY WITH RESPECT TO LITIGATION IN SEXUAL ASSAULT/MOLESTATION CASES.

THIS IS NOT A DEPARTURE FROM ~~CONTEXT~~ MODERN TORT LAW. STRICT LIA. IS OFTEN IMPOSED W/ RESPECT TO CONSUMER PRODUCTS THAT MAY CAUSE PHYSICAL/MENTAL HARM. HERE, A CONSUMER SERVICE IS THE CAUSE OF THE HARM, AND THE EMPLOYER SHOULD BE HELD LIA THROUGH RESPONDENT SUPERIOR FOR THE TORTIOUS ACTS OF HIS EMPLOYEE.

STRICT LIABILITY IMPOSES LIABILITY WITH-
OUT FAULT. WHILE THIS IS NORMALLY AT ODDS WITH THE
POLICY OF LIABILITY BASED ON FAULT, THE CONSIDERATIONS
IN THIS SITUATION ARE DIFFERENT. AS BETWEEN
THE DAY CARE CENTER AND THE VICTIMIZED CHILD,
THE FAULT ~~MUST BE~~ CANNOT REASONABLY BE
PLACED ON A CHILD LESS THAN 10 YRS. OLD.
AS BETWEEN EMPLOYER AND EMPLOYEE THE
FAULT COULD BE PLACED ON EITHER PARTY
OR BOTH, BUT LIABILITY ~~SHALL~~ IN PROPORTION TO
FAULT COULD BE DETERMINED IN A SUBSEQUENT
ACTION, WITH THE EMPLOYER RECEIVING

CONTRIBUTION (WHERE APPLICABLE) FROM THE TORTFEASOR-EMPLOYEE. AS BETWEEN THE CHILD CARE CENTER AND THE PARENTS, WHILE THE LATTER HAVE SOME DUTY AS PARENTS TO PROPERLY SELECT A CHILD CARE CENTER, ~~PUBLIC POLICY DEMANDS A HIGH STANDARD OF CARE, WITH THE COSTS OF SUCH CARE BEING SPREAD BY THE DAY CARE CENTER.~~ PLACING LIABILITY ON THE PARENTS FOR IMPROPER SUPERVISION OF DAY CARE CENTER EMPLOYEES WOULD DEFEAT THE PURPOSE OF THE SERVICE.

WHILE THIS MIGHT BE A BETTER DECISION