in modern tort law. He called for a definition based on "practical politics" -- on policy.

Through the lens of such a policy-determined notion of duty, the ~~harsh~~ callousness of the No-Duty rule becomes quite evident. And this is particularly clear when the traditional rule is weighed against the fundamental, cornerstone tort policy: Compensation of those injured by negligence of others.

California appears to be pioneering the drive toward the demise of no duty, especially in the areas of rescuers and premises liability.

The case of Soldano v. Daniels put an end to no duty with reference to rescuers by using the more humanitarian negligence approach. The Soldano Court imposed a duty upon a bar-owner (who refused to allow a rescuer the use of his phone

to call for help). based upon the foreseeability of the harm, the certainty that harm occurred, the nexus between the harm and the defendant/bartender's conduct, the policy of deterring ~~such~~ future ~~harm~~ conduct of such a nature, the moral blameworthiness of the conduct, the prevalence of insurance to absorb the costs and the community's ability to bear such a burden of duty.

Certainly such a measure of duty is not consistent with such pro-growth (economic) policies as those which foster economic growth. However, it is consistent with our enhanced contemporary interests in the policies of placing liability on fault and in proportion to fault as well as deterrance of future intransigence by able-bodied "rescuers". Further, by holding the bar liable for the

injured victim's losses (a victim who may have been saved but for the bar's negligent failure to act) appropriately spreads losses and shifts to deep pockets.

The same California test was applied to abolish the premises liability classifications in Rowland v. Christian. The Court recognized the arbitrary, harsh and perfunctory nature of these classifications and instead based duty on ~~reasonableness~~ negligence. It seems totally absurd to refuse relief to an injured party merely because she happened to enter the land as a social guest and not a business invitee. In rejecting these classifications, the Court affirmed society's value in human life over property interest. Again, the Court -- in spite of legislative inertia -- recognized that the old (no duty) rule

is no longer applicable in a society where citizens' lives are so closely intertwined and when modern technology places so many dangerous instrumentalities in our hands.

This erosion of no duty reflects a tipping of the balance from an old-style favoritism toward individual and business interests (which in the past could be favored with little harm) and in favor of modern social and economic realities which make one actor's conduct likely to implicate another's health or safety. ~~Modern society can no longer tolerate arbitrary~~

CHOICE D - Discuss the manner + extent to which the law of negligence seeks to promote economic progress from a legal and public policy perspective.

Tort law has developed over the years and is continually changing rules. Though these changes, both legal + public policies have been developed to promote economic progress in this country.

Legal rules have developed over the years. Originally, this country used to abide by the "survival of the fittest" doctrine in which the strongest and more wealthy survived and those individuals or companies who were weak did not survive. Over ~~time~~ time to our court system it became apparent that this could not continue. We see in the Palsgraph case that Justice Cardozo adopts relational negligence in which the railroad is only liable for those patrons who could

have been foreseen to be injured by negligence on the part of the railroad. This majority opinion was in direct contrast to that of Justice Andrews who dissented. Justice Andrews promoted the idea of universal negligence in which the railroad would be liable to anyone damned by their actions, whether foreseen or not.

It is evident from the Palsgraph decision that the courts are beginning to look at the economic consequences of liability associated with foreseeability. If Justice Andrews idea of universal negligence had prevailed, we would have companies liable for so many actions that could not be planned or even anticipated. If there is something that you cannot even vaguely anticipate will occur, how can you try to prevent it? How much money should you spend to make all precautionary safety measures? When would you have done enough - if ever. It is

obvious that this would be a very expensive way of doing business. If it becomes too expensive to do business, then you have many companies closing down, higher prices to consumers resulting from the higher costs incurred, and you begin losing competition. Loss of competition in itself will drive up the cost to consumers. Consequently, as the suppliers shrink and the cost to consumers rises, there would be a slow-down or possibly a total stoppage of economic growth in this country.

Thankfully, as a result of the Palsgraf decision in which Justice Cardozo's idea of relational negligence prevailed, we do not have the problems that would have been encountered under universal negligence. By requiring a company to be held liable for negligence to those things and people that are foreseeable ~~the~~ ~~one~~ the courts have tried to establish a system in which

people or companies can reasonably foresee who they may harm with a negligent act. This allows companies to limit their costs to some extent and thereby, promotes economic growth.

Through the legal system we have also experienced another change which promotes economic growth. This is the transition from contributory negligence to comparative negligence. Under the old ~~common~~ common law rules of contributory negligence, if the plaintiff in any way contributed to the incident, then he or she would be totally BARRED from seeking damages from the defendant. This meant that if the defendant was 99% in the wrong and the plaintiff contributed 1% to the incident, the plaintiff could recover nothing. ~~This can't~~ Hence, it can be seen how contributory negligence fostered a restriction in economic growth because plaintiff's could

not recover damages that were wrongfully due to them and defendants (the "big companies") abused their economic power.

More recently the legal system has adopted the idea of comparative negligence to remedy the wrongs of contributory negligence. Under comparative negligence you find three types: purely comparative, 50% or less, and slight. Under purely comparative negligence the plaintiff can recover damages from the defendant up to 100%. The amount the plaintiff recovers is in relation to the percentage, if any, that the jury finds he contributed to the incident. Under 50% or less comparative negligence, the plaintiff must be 50% or less of a contributing factor in the incident. The types of comparative negligence used varies depending on the jurisdiction of the United States.

By allowing the plaintiff to recover at least some of his

~~from~~ damages from the defendant in an incident in which he was a contributing factor, economic growth is spurred. Defendants cannot completely get off the hook anymore and must stand up for their negligent actions or partners ~~there~~.

Recently, courts have adopted strict liability in many cases. Under strict liability a manufacturer or retailer can be held liable without any proven fault. Strict liability applies only to store in a commercial setting and does not apply to the ordinary citizen who does not ordinarily deal in a particular type of business.

Strict liability was established in the legal system for many reasons. First, it promotes economic progress by shifting costs to "deep pockets". In other words, the cost of doing business is borne by those who conduct the business and ~~so~~ are in the best

position to bear the cost, i.e. obtain insurance. This will ~~cause the~~ cause prices to rise just a little bit to the consumer as the company must pass on its cost of doing business; but this will spread costs broadly throughout the country. Economic growth is enhanced by having several million people pay just a ~~little~~ little more for something, rather than having one person, company or a small group bear all the costs. If only ~~one~~ one group had to bear a cost that could occur under strict liability, you could have a whole sector of the economy that would have to shut down ~~the~~ which results in severe economic ramifications.

The advent of strict liability also helps encourage economic growth by deterring accidents. Because companies can be held strictly liable, they should

- be more careful in their manufacturing + research processes. By having fewer accidents, there will be fewer costs associated with these accidents such as medical expenses. This helps economic growth.

E. The eggshell skull rule is an exception to the general requirement that foreseeability of the risk to the plaintiff govern the imposition of liability for negligence. The rule holds that a negligent defendant takes his plaintiff as he finds him in an accident producing personal injuries and is responsible for any additional injury he inflicts upon the plaintiff as a result of the plaintiff's pre-existing weakness. Application of this rule is illustrated by the McCahill case in which a plaintiff who negligently struck an alcoholic defendant was held liable for the defendant's death from delirium tremens, held to have been brought on by the plaintiff's injuring him, but which would never have happened if the plaintiff had not been alcoholic. In applying this rule the courts are emphasizing direct causation at the expense of foreseability in determing proximate causation.

The seatbelt defense, on the other hand, is an exception to the eggshell skull rule or a return to the requirement of foreseeability in establishing proximate causation. If the negligent defendant injures another driver who is not wearing a seatbelt, he is liable only for the injuries that would have been inflicted had the other driver been wearing a seat belt. In other words, the defendant does not take the plaintiff as he finds him.

An evaluation of which is the better approach to determining proximate causation, i.e. whether the courts should emphasize its foreseeability aspect, can be made on the basis of how foreseeability promotes the policies of modern tort law. Since the paramount aim of modern tort law is full compensation of the victim and some of the other aims may conflict with full compensation, such an evaluation is basically a balancing test.

Foreseeability, of course, has nothing to do with whether or not an injured victim is fully compensated for his injuries. Nor does it have anything to do with tort law's aim of shifting losses to deep pockets, i.e. those most able to pay, or spreading them as when a manufacturer passes his liability costs on to a consumer. (It may have an effect of raising insurance costs in as much as an insurance company cannot function efficiently when joint and several liability makes it an insurer of uninsured tortfeasors, but that is a different part of unforeseeability problem.)

Tort policies that are affected by foreseeability include liability based on and proportional to fault, deterrence, predictability, promoting economic growth and progress. The basic tort duty rule is that the risk to be perceived defines the duty to be obeyed.

That rule recognizes that someone should not be held liable for creating or acting in response to a risk that he could not or should not have been expected to foresee. Thus, a requirement of foreseeability for the determination of duty or proximate cause is consistent with tort law's goal of imposing liability based on and proportionate to fault.

Foreseeability is also required for deterrence of accidents. In theory perhaps a person who may be liable will be all the more careful and attempt to foresee the unforeseeable if he may be liable for it also. But in fact foreseeability is the limiting factor in deterrence. A defendant cannot take pains to avoid a risk he cannot see. While holding a defendant liable for an eggshell skull plaintiff's aggravated injuries may fully compensate the victim, it provides no extra protection for the victim in advance.

~~Predictability as a policy of modern tort law can have two different meanings. First,~~ Predictability as a policy of modern tort law can have two different meanings. First, it can refer to the predictability that an injured plaintiff will be fully compensated for his injuries. Foreseability does not bear on this sort of predictability. However, it is very much related to predictability on the defendant's side because, basically, without foreseability there is no

predictability. One cannot plan his life or conduct it in an intelligent way if he has no means of predicting what will happen if he starts a certain course.

This is not [redacted] to say that a person who ends up paying for the aggravated injuries of a frail plaintiff will have a disintegrated life. Or that every person who does not have to pay for injuries aggravated by another's not wearing a seat belt will be prosper from his ability to plan. It is to say that in general the practice of dispensing with foreseeability as a requirement for liability helps to create an environment in which people who plan and try to live rationally are penalized for doing so. Such an environment is one that cannot foster personal security — [redacted] not even for the accident victim who may someday be an unwary defendant himself.

Finally, foreseeability is certainly a requirement for economic growth. Business cannot flourish when planning is of no avail.

The requirement

CHOICE F.

THE ADOPTION OF COMPARATIVE NEGLIGENCE AND COMPARATIVE RESPONSIBILITY WAS A NATURAL OUTGROWTH OF JUDICIAL AND LEGISLATIVE CONCERN FOR THE BROAD PUBLIC POLICY CONCERNS ILLUSTRATED IN CLASS. THIS ESSAY FIRST WILL ADDRESS THE BIFURCATED ADOPTION OF COMPARATIVE RESPONSIBILITY AND THE AFFECT THAT ADOPTION HAD ON OTHER TORT DOCTRINES. IT THEN WILL REVIEW THE PROPRIETY OF THE ADOPTION FROM THE STANDPOINT OF INDIVIDUAL POLICY CONSIDERATIONS.

AS MENTIONED ABOVE, THE SWITCH TO COMPARATIVE RESPONSIBILITY PRINCIPLES WAS A TWO-STEP (AND STILL, IN MANY JURISDICTIONS, ON-GOING) PROCESS. THE FIRST STEP CAME IN THE 1970S, WHEN THE COMMON LAW DOCTRINE OF CONTRIBUTORY NEGLIGENCE GAVE WAY TO COMPARATIVE NEGLIGENCE. CONTRIBUTORY NEGLIGENCE WAS A HARSH DOCTRINE, ONE FOUNDED IN OUR NATION'S INDIVIDUALISTIC AND CALVINISTIC HERITAGE. IT WAS A DOCTRINE THAT ACTED AS A COMPLETE

BAR TO RECOVER. THAT IS, ANY PLAINTIFF FOUND TO BE CONTRIBUTORILY NEGLIGENT WAS PRECLUDED FROM RECOVERING DAMAGES FOR NEGLIGENTLY INFLICTED INJURY. THIS HELD TRUE EVEN IF THE PLAINTIFF'S NEGLIGENCE WAS SLIGHT IN COMPARISON TO THE DEFENDANT'S. THERE WERE [redacted] ACCOMPANYING DOCTRINES THAT SOFTENED THE HARSHNESS OF [redacted] CONTRIBUTORY NEGLIGENCE — THE LAST CLEAR CHANCE RULE, FOR EXAMPLE — BUT IT NONETHELESS LED TO IMPALITABLE RESULTS. THE ADOPTION OF COMPARATIVE NEGLIGENCE CHANGED THAT. UNDER PURE COMPARATIVE NEGLIGENCE, A PLAINTIFF'S [redacted] NEGLIGENCE IS NOT A COMPLETE BAR, BUT INSTEAD AN OFF-SET TO DEFENDANT'S DAMAGES. IF PLAINTIFF IS DAMAGED $1,000, IF PLAINTIFF IS 20% RESPONSIBLE AND DEFENDANT IS 80% RESPONSIBLE, THEN PLAINTIFF RECOVERS $800. MODIFIED COMPARATIVE NEGLIGENCE, A LESS SALUTORY RULE, WOULD SOMETIMES STILL ACT AS A COMPLETE BAR: IN THOSE SITUATIONS WHERE PLAINTIFF'S CONDUCT IS MORE BLAMEWORTHY

THAN THE DEFENDANT'S.

THE SECOND STEP ON THE ROAD AWAY FROM CONTRIBUTORY NEGLIGENCE CAME IN THE 1980S, WHEN COMPARATIVE PRINCIPALS WERE APPLIED TO TORTS OTHER THAN MERE NEGLIGENCE. ONE FACTOR USED TO SOFTEN THE COMMON LAW BLOW OF CONTRIBUTORY NEGLIGENCE WAS ITS LIMITED APPLICABILITY. CONTRIBUTORY NEGLIGENCE APPLIED TO ONLY NEGLIGENT TORTS: INTENTIONAL, RECKLESS, AND STRICT LIABILITY TORTS FELL OUTSIDE THE BOUNDS OF CONTRIBUTORY NEGLIGENCE DOCTRINE. AS OFTEN PROPOUNDED IN CLASS — CESSANTE RATIONI LEGIS, CESSAT ET IPSA LEX — THE REASON FOR THE RULE CEASING, THE RULE CEASED ITSELF. THE REASON FOR THE LIMITED APPLICABILITY OF CONTRIBUTORY NEGLIGENCE CEASED WHEN THE HARSHNESS OF ITS TOTAL BAR TO LIABILITY CEASED. UNDER THE RUBRIC OF COMPARATIVE RESPONSIBILITY, THE PLAINTIFF'S OWN NEGLIGENCE NOW IS A FACTOR IN ALL BUT INTENTIONAL TORTS.

IN MOVING FROM CONTRIBUTORY NEGLIGENCE TO COMPARATIVE RESPONSIBILITY, A NUMBER OF RELATED TORT DOCTRINE HAVE BEEN ABOLISHED OR MODIFIED. THE QUESTION OF LAST CLEAR CHANCE, FOR EXAMPLE, IS ALL BUT MOOT SAVE IN THOSE JURISDICTIONS WHERE MODIFIED COMPARATIVE FAULT SOMETIMES STILL IS A TOTAL BAR TO RECOVERY. OTHER ~~AFFECTED~~ AREAS OF TORT LAW INCLUDE:

* ASSUMPTION OF THE RISK: THOUGH EXPRESS ASSUMPTION OF THE RISK STILL CAN BE A TOTAL BAR, IMPLIED ASSUMPTION OF THE RISK HAS MERGED WITH COMPARATIVE NEGLIGENCE.

* JOINT AND SEVERAL LIABILITY: THOUGH STILL A VALID CONCEPT, JOINT + SEVERAL LIABILITY HAS COME UNDER ATTACK IN JURISDICTIONS WHICH HAVE ADOPTED COMPARATIVE PRINCIPALS

* RES IPSA LOQUITUR: USING COMPARATIVE PRINCIPALS, A PLAINTIFF NO LONGER HAS TO SHOW NO NEGLIGENCE BEFORE INVOKING

IN ALL, WHILE COMPARATIVE RESPONSIBILITY HAS ITS WEAKS OR COUNTER-INTUITIVE POINTS, IT IS A MUCH IMPROVED SYSTEM WHEN COMPARED TO CONTRIBUTORY NEGLIGENCE. THIS PERHAPS CAN BE SEEN BEST BY REFERENCE TO THE BROAD TORT POLICIES DISCUSSED IN CLASS

✡ BASE LIABILITY ON FAULT: WIDER CONTRIBUTORY NEGLIGENCE, BLAMELOORTHY DEFENDANTS ESCAPED LIABILITY.

✡ LIMIT LIABILITY IN PROPORTION TO FAULT: WIDER COMPARATIVE PRINCIPALS, A DEFENDANT'S LIABILITY IS LIMITED IN PROPORTION TO HIS FAULT

✡ DETER FUTURE ACCIDENTS: DEFENDANTS, AWARE THAT THEIR NEGLIGENCE WILL NO LONGER BE PROTECTED BY THE COMPLETE BAR OF CONTRIBUTORY NEGLIGENCE, ARE INDUCED WIDER COMPARATIVE PRINCIPALS TO STRIVE FOR SAFER, AND LESS EXPENSIVE, CONDUCT.

* SPREAD COSTS BROADLY
* SHIFT COSTS TO DEEP POCKETS: CONTRIBUTORY NEGLIGENCE WAS A TOOL OF BIG BUSINESS AND INSURANCE
* AVOID DISMAL SWAMPS: while CONTRIBUTORY NEGLIGENCE AVOIDED THE ARBITRARY SWAMP OF WEIGHING ONE PERSON'S NEGLIGENCE WITH ANOTHER'S, IT ALSO CREATED THE DISMAL SWAMP OF THE LAST CLEAR CHANCE RULE AND ITS SOMETIMES ABSURD RESULTS
* FOSTER PREDICTABILITY:
* FACILITATE ECONOMIC GROWTH AND PROGRESS:
* AVOID WASTING OF RESOURCES
* RESPECT CO-EQUAL BRANCHES: NOTE THAT COMPARATIVE RESPONSIBILITY HAS, IN SOME JURISDICTIONS, BEEN A CREATURE OF THE LEGISLATURE, NOT THE COURT,

Essay Question - Choice F

This essay will discuss the affect that comparative negligence and Comparative responsibility have had on tort law doctrine. This discussion is divided into distinct components. There will be a brief history of contributory negligence first. Next, a short description of the more common public policy observations. The effect of comparative negligence will then be specified as it relates to each element of negligence and various other ~~[redacted] principal~~ principles (defenses, proving negligence). Concluding the discussion will be the effects of comparative responsibility. The more common policy observations will be interjected throughout the discussion, and others will be mentioned where applicable and appropriate.

At common law, an individual who sued to recover damages

from a negligent tortfeasor was told he could not do so if he (the injured party) was at fault at all. This was contributory negligence and was justified because of the belief that the injury party ought not recover when he was part of the cause. This tended to be rigidly applied and enforced, leading to inequitable and often unjust results. For example, an injured party was precluded from ~~any~~ any recovery, even if he was only 1% negligent, and the tortfeasor was 99% negligent. This philosophy coincided with the ~~rise~~ rise of the Industrial Age, where "the courts" were not as concerned will ensuring compensation to injured persons. The doctrine, however, was still perceived as unduly harsh in certain situations. As such, it was hedged with a variety

of limitations. For example, the defendant was required to plead and prove contributory negligence as an affirmative defense.

As "industrialism" seemed to become more advanced, however, there seemed to develop more of a willingness to compensate individuals. With increased sophistication came increased responsibility. Concurrent with this notion developed the notion of comparative negligence, where a tortfeasor's liability was reduced proportionately to his fault (that is, each actor's culpability was assessed, the injured party recovering only for the tortfeasor's culpability and not his own).

It seems, therefore, that there is a direct conflict between two fundamental

Social policies: compensation for injured parties and liability based on fault. Specifically, limiting this liability in proportion to one's personal fault. These pervasive policies will be more clearly enunciated in the following paragraphs with references to specific doctrinal changes. However, there are several other policies which deserve preliminary mention. High on this list is the social concern for safety and minimizing the cost of accidents by deterring conduct which causes them. Second is the aversion to forcing any one person (or small group of persons) pay for all of the loss, even considering comparative negligence. These and other policies are addressed below.

(CN)

COMPARATIVE NEGLIGENCE EFFECT ON DUTY

As the duty concept has evolved from the detailed limited duty at common law (premises, failure to act, public, etc) to the more general duty concept enunciated in Palsgraf, comparative negligence has had little direct effect. Perhaps the significance is more symbolic by saying that individuals in general are expected to have more of a "duty" to themselves. Contributory negligence, after all, is the failure to exercise reasonable care on one's own behalf.

Perhaps CN, then, is an effective "balance" of the competing notions of full compensation - liability based on fault - proportionality. It seems fair to tell a tort feasor that he is liable only for that which he

caused. It also seems fair to tell an injured party that he is liable to himself for his own failures. Both, after all, are "at fault".

For those who are not convinced this is a proper balance, they make reference to the availability of insurance as a way for the defendant to "pay." This, however, is an unacceptable alternative for a number of reasons. Foremost, while insurance does "spread" the loss, the end result is increased rates for those who are not at fault. There seems to be no equity at all in this rationale. Further, insurance does not provide the incentive for anybody to exercise care on anyone's behalf.

CN EFFECT ON BREACH

CN EFFECT ON CAUSATION

The effect of comparative negligence on causation has occurred in a relatively piecemeal fashion concerning specific issues. The "seatbelt" defense provides an instructive example. This defense provides that where an individual fails to "buckle up" when the opportunity presents itself, a tortfeasor (driver) was

thereby relieved of liability. Most jurisdictions no longer adhere to this philosophy because it seems unfair to expect a plaintiff to predict the negligent acts of others.

However, there are a number of jurisdictions which have retained the defense in some manner. They provide that such failure is relevant to a damage assessment, whereby the tortfeasor is responsible for injury sustained had the seatbelt been worn. The plaintiff, then, would be responsible for "aggravated" injuries as a result of not wearing the belt. In those rare occasions where the failure to wear would constitute factual causation, the jury could so consider.

This approach seems to be wiser from a deterrence

perspective. If an individual knows he cannot recover for such injuries, perhaps he will be more inclined to "exercise more care on his own behalf."

CN EFFECT ON DAMAGES

This is the element of negligence which tends to focus our competing policies the most. The doctrine of joint and several liability is prominent. This doctrine allows the plaintiff to recover from any one tortfeasor for injuries caused by more than one tortfeasor. The policies come into direct conflict when the plaintiff is found to be negligent.

The majority of jurisdictions have retained the doctrine. This allows a 5% negligent plaintiff to recover 95% damages from one tortfeasor (in some

places this still may be 100%). This conflicts directly with our proportionality principle.

Other jurisdictions have abolished the doctrine entirely, and proportionally award damages based on fault. This position, however, does not provide as complete compensation to the injured party.

As can be expected, perhaps a wiser approach seems to fall somewhere in the middle. It appears fair to retain JSL where the plaintiff is not negligent at all. In this situation policy should afford full compensation for an innocent over the fault principle. The "dismal swamp," however, rears its head when the plaintiff is negligent. These obstacles are not insurmountable One option is to require

the plaintiff to join all possible defendants. (the price for being "at fault"). One court (in a dissenting opinion) has suggested that when the plaintiff does not do so, the remaining damage that is not paid (by parties not before the court) is split proportionately as between the plaintiff and parties present!

(See next page)

CN EFFECT ON DEFENSES

There are two areas of defenses seriously affected by CN. They are indemnity and assumption of the risk. Indemnity is rooted in the common law tradition. ~~and developed also~~ Since contribution was not available at common law, this was used to "get around" that bar. Understandably, this has been "merged" into CN in many places.

Generally, express assumption of the risk survives as a total bar. However, it is understandable how implied AR has been merged into CN as well.

CN EFFECT ON RES IPSA LOQUITUR

CN EFFECT ON LAST CLEAR CHANCE

Torts I Exam
St. Mary's University School of Law
December 1992
Vincent R. Johnson

Essay Question Notes and Model Answer

[Note: During Fall 1992, Torts I was a three credit course covering the basic intentional torts and defenses thereto, basic rules on damages, and part of negligence (including the Palsgraf duty rule, breach, and factual and proximate causation -- but not including limited duty rules, defenses, or joint and several liability). A good answer to the essay question could have taken any of several forms, and was not expected to discuss in any detail claims for negligent infliction of mental distress or invasion of privacy. What follows is a list of thoughts on answering the essay question and an example of one approach to the tort of outrage claim.]

Thoughts on the essay question

1. The answer should have discussed actions for both negligence and the tort of outrage.

2. In connection with the discussion of the tort of outrage, the answer should have:

- stated that the action could be based on recklessness or intent; defined those levels of culpability and identified the facts relevant to such findings; precisely indicated that the crucial factor was whether there was intent or recklessness with respect to the mental distress, and not with respect to the act of voyeurism.
- stated that the facts presently known do not appear to be sufficient to satisfy the demanding standard imposed by courts for proving the severity of mental distress; identified the types of evidence that might satisfy that requirement; discussed the remote, but colorable, possibility of persuading a court to dispense with the severity element, as some scholars (including Pedrick) have argued.
- defined "extreme and outrageous conduct" and taken a position on whether that requirement was satisfied.
- identified the apparently insuperable problems in proving causation, including the fact it was not known who looked through the peep hole or whether anyone viewed the plaintiff; stated that intentionally or recklessly tortious actions on the part of employees, if they occurred, probably would not be

imputed to the fitness center under respondeat superior; discussed the unlikelihood that problems in proving causation could be obviated by employing a res ipsa loquitur or alternative causation theory, because such rules apply only in cases where there is clear proof of harm and are normally limited to negligence actions.

- discussed the availability of punitive damages, if somehow an action for outrage could be stated.

3. In connection with the discussion of negligence, the essay should have:

- identified the elements of that cause of action.
- clearly stated a theory of negligence liability -- e.g., unreasonable failure to discover and repair the peep hole during the lengthy period in which it apparently existed.
- discussed the importance of whether the hole was located in an area where it would have been observable through the exercise of reasonable care.
- considered whether the loss of a promotion was damage proximately caused by the alleged negligence and whether the decision of the plaintiff's employer was a superseding cause.
- discussed the policies relevant to the imposition of negligence liability.
- identified briefly, if at all, the possibility of an action for negligent infliction of mental distress, subject to the limitations of that doctrine.
- discussed the application of respondeat superior to a negligence claim.
- stated that nominal and punitive damages are not available for negligence.
- stated that there are no facts presently available to establish liability on the part of individuals or any form of concerted action liability.

Sample Discussion of The Tort of Outrage Issue

The egregious conduct which forms the basis for the present case suggests an action under the tort of outrage (also know as an action for intentional or reckless infliction of severe mental distress). Most jurisdictions agree that in such a suit the plaintiff must prove, by a preponderance of the evidence, that:

(1) the defendant engaged in extreme and outrageous conduct;

(2) the defendant intended to inflict mental distress or was recklessly indifferent thereto;

(3) the plaintiff suffered severe mental distress; and

(4) the plaintiff's mental distress was caused by the defendant's actions.

Although the first requirement is very demanding, it may be possible to establish that men spying on unclothed women is extreme and outrageous, for that conduct so offends commonly accepted notions

of decency that it is possible to argue that the conduct is "utterly intolerable in civilized society."

In addition, depending upon how the facts develop, it may be possible to show that the plaintiff suffered severe mental distress. In general, courts require a plaintiff to prove, through specific evidentiary particulars, that the distress resulting from the conduct was severe. Some courts go so far as to state that the distress must be so extreme that no reasonable person could be expected to endure it. The facts given to me indicate that female members of the club have been embarrassed, and that Ms. Rangel thinks that the embarrassing publicity accounts for a loss of her promotion. Clearly, much more will be needed to prove severe mental distress. We must obtain further information about exactly how her life has been altered by the revelation. We need to explore such matters as medical care, irritability, sleeplessness, ability to perform her job, weight loss, and the like. If there is no convincing evidence of severe mental distress, it will be difficult to prevail on a claim under the tort of outrage, as that tort is currently interpreted. However, one might then argue that the doctrinal contours of the tort should be changed. It could be argued to a court, as some scholars have asserted, that the severity of mental distress should only affect the assessment of damages. That is, it could be urged that interests of the law in deterring extreme and outrageous conduct are sufficiently great to warrant an award of nominal damages.

It may be possible to establish the mental state that is required for an outrage action. It seems likely that the voyeurs did not act "intentionally" because they did not desire to cause mental distress and that they were not substantially certain -- certain for all practical purposes -- that the same would result. However, their conduct may well qualify as reckless. As long as the peep hole existed, it could be discovered; if it was discovered and publicized, there was a high probability that the possible victims would learn of it and suffer severe mental distress. That was a risk totally disproportionate to the utility of the conduct (which was zero) and it was a risk consciously run by those who used the peep hole.

The major problem in an outrage action will be in proving causation. Specifically, the identities of those who used the hole is unknown. Indeed, it is not even known whether anyone viewed Ms. Rangel while she was using the dressing room. Ms. Rangel will not be able to recover if she must prove that some particular person looked at her.

There are occasions when the law eases or shifts the plaintiff's burden of proof on the issue of causation. However, it is not clear that any of the recognized theories -- res ipsa loquitur, alternative liability, enterprise liability, or market share liability -- would fit here. Each of those theories comes into play only when it is clear that the plaintiff has been injured and it would be unfair to force the plaintiff to go uncompensated. Here, there is no clear evidence of injury, only a possibility that Ms. Rangel's privacy may have been invaded. Where the fact of injury is uncertain, there is

little reason for the courts to alter the usual rules on causation. Moreover, if any of the above-mentioned theories were invoked, they would be employed against a group of potential voyeurs. In a res ipsa case, it would be difficult or impossible to show that the defendants stood in an integrated relationship which made it fair to require each to guard the plaintiff from harm by the other, because the voyeurs may have included both employees and patrons. In the absence of a showing of integration, res ipsa has not been available against multiple defendants. Alternative liability, enterprise liability, and market share liability cannot be invoked against multiple defendants, unless the plaintiff can show that each was at fault; in the face of the denials of knowledge made by the fitness center staffers, it will be impossible to make such a showing. That lack of evidence will also make it impossible to rely on a concerted action theory to circumvent the necessity of proving who in particular, if any one, viewed Ms. Rangel.

In the absence of proof of causation, an action for outrage will fail.

The December 1992 Torts I Essay Question

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. Please write legibly.

The Essay Question

A recent law school graduate, you are a new associate in a law firm which normally handles business matters. A senior partner has called you into her office to discuss what may be a personal injury case. The matter involves Juanita Rangel, the daughter of the principal owner of one of the firm's major corporate clients. Following an interview with Ms. Rangel, the partner authorized an investigation of the events surrounding her case. Based on the investigator's report and information learned directly from Ms. Rangel, it appears that the evidence will establish the following -- although this information is subject to change as the facts of the case are developed:

> Since early 1990, Ms. Rangel, an advertising executive, has been a member of the Imperial Fitness Center, an elite athletic club adjacent to an upscale shopping mall. Ms. Rangel has used the facilities of the fitness center, including the women's shower and locker rooms, on a regular basis since joining the club. She has typically gone to the center three or four times each week, with the exception of the last six months, during which time she has used the facilities, on average, not more than once every week or ten days.
>
> It has been learned recently, from a variety of sources, that since the opening of the Imperial Fitness Center in late 1989, male employees have been spying on naked females in the women's locker room through a peep hole concealed behind a utility vent. Apparently, several men have been involved in these voyeuristic activities. In all likelihood, the "peeping Toms" have included some, but not all, members of the seven-member janitorial staff. It is also possible that some of the twelve men on the fitness training staff, and perhaps some of the male patrons of Imperial Fitness Center, have participated in the conduct which is now the center of the dispute.
>
> Since the Center opened in late 1989, several employees have left the janitorial and fitness staffs, and others have been hired. The list of patrons has also changed on a continual basis, as persons have been added to or dropped from the membership roster.

The concealed peep hole was first made public on television during a news program called The Ten O'Clock Report. An investigative reporter had received an anonymous tip about the existence and location of the hole. The reporter, accompanied by a film crew, called upon the Imperial Fitness Center. Startled by the presence of the entourage, a recently-hired assistant manager allowed the crew to enter, confident that no peep hole existed. The footage shot by the film crew clearly documents the existence of the hole. Moreover, the nature of the opening suggests that it was made solely for the purpose of enabling persons to spy on women undressing, or already disrobed, in the adjacent locker room.

Of course, there is no documentary evidence to show when the peep hole was used, or who was spied upon. The present members of the janitorial and fitness staffs all deny that they knew of or looked through the hole. They state that they first learned of the hole's existence during or after the television

ST. MARY'S UNIVERSITY
SCHOOL OF LAW

TORTS I — FINAL EXAMINATION
Professor Vincent R. Johnson
December 1993

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. Please write legibly.

The Essay Question

A recent law school graduate, you are a new associate in a law firm which normally handles business matters. A senior partner has called you into her office to discuss what may be a personal injury case. The matter involves Juanita Rangel, the daughter of the principal owner of one of the firm's major corporate clients. Following an interview with Ms. Rangel, the partner authorized an investigation of the events surrounding her case. Based on the investigator's report and information learned directly from Ms. Rangel, it appears that the evidence will establish the following -- although this information is subject to change as the facts of the case are developed:

Since early 1990, Ms. Rangel, an advertising executive, has been a member of the Imperial Fitness Center, an elite athletic club adjacent to an upscale shopping mall. Ms. Rangel has used the facilities of the fitness center, including the women's shower and locker rooms, on a regular basis since joining the club. She has typically gone to the center three or four times each week, with the exception of the last six months, during which time she has used the facilities, on average, not more than once every week or ten days.

It has been learned recently, from a variety of sources, that since the opening of the Imperial Fitness Center in late 1989, male employees have been spying on naked females in the women's locker room through a peep hole concealed behind a utility vent. Apparently, several men have been involved in these voyeuristic activities. In all likelihood, the "peeping Toms" have included some, but not all, members of the seven- member janitorial staff. It is also possible that some of the twelve men on the fitness training staff, and perhaps some of the male patrons of Imperial Fitness Center, have participated in the conduct which is now the center of the dispute.

Since the Center opened in late 1989, several employees have left the janitorial and fitness staffs, and others have been hired. The list of patrons has also changed on a continual basis, as persons have been added to or dropped from the membership roster.

The concealed peep hole was first made public on television during a news program called The Ten O'clock Report. An investigative reporter had received an anonymous tip about the

existence and location of the hole. The reporter, accompanied by a film crew, called upon the Imperial Fitness Center.

Startled by the presence of the entourage, a recently-hired assistant manager allowed the crew to enter, confident that no peep hole existed. The footage shot by the film crew clearly documents the existence of the hole. Moreover, the nature of the opening suggests that it was made solely for the purpose of enabling persons to spy on women undressing, or already disrobed, in the adjacent locker room.

Of course, there is no documentary evidence to show when the peep hole was used, or who was spied upon. The present members of the janitorial and fitness staffs all deny that they knew of or looked through the hole. They state that they first learned of the hole's existence during or after the television report. The hole was sealed by the fitness center immediately after the report aired.

The embarrassment suffered by female members of the fitness center has been greatly increased by recent newspaper reports of rumors about photographs. According to the rumors, pictures of some naked patrons were taken and are going to be used for blackmail purposes. These allegations have attracted a great deal of attention because, like Ms. Rangel, many of the female patrons of the club occupy high-profile positions in the community. Ms. Rangel believes that she was passed over for a promotion at her advertising firm because it was well-known that she was a regular user of the Imperial Fitness Center, and thus there was a "risk" that embarrassing photos might become public and adversely reflect upon her firm.

The partner who has sought your advice does not regularly practice in the field of torts. Based on your knowledge of Torts I, please prepare for her a brief memorandum discussing any claims Ms. Rangel might file, including a candid assessment of their likelihood of success. It is especially important that you be realistic in your assessment of the changes of prevailing, for the firm will handle the case on a contingent fee basis, if it recommends filing suit. (Do not discuss any possible claims by Ms. Rangel against the television station, television reporter, film crew, or newspaper.)

[END OF EXAM]

Torts I Fall 1994 Essay Question

(This question raises a range of issues relating to simple intentional torts and basic negligence, including parental liability for the torts of children, concerted action liability, insurance coverage of tort damages, and the consequences of classifying a defendant's conduct as intentional, reckless, or negligent.)

It is important for you to organize your answer. Please express your thoughts clearly and accurately in properly punctuated, correctly spelled sentences. Please write legibly.

Alvin Archtall had just turned seventeen years of age. To celebrate the event, his friends, Bob Boxer, 16, and Camilo Cochran, 18, decided to "do some damage." They told Alvin that they would pick him up at 11 p.m. for an evening he wouldn't forget. Alvin said that he would be waiting in his mother's Winnebago travel trailer parked along side their house. Alvin's parents were away on vacation in the Virgin Islands.

In preparation for the evening, Bob brought a semi-automatic rifle that his father had purchased so that he could protect the Boxer family. (Unlike the Archtalls and the Cochrans, the Boxers lived in a bad part of town.) Bob's father had told him on several occasions never to touch the gun. Bob was able to "borrow" it because the gun cabinet in which it was kept had a broken latch, which hadn't worked for years.

Camilo had crashed his parents' Lexus a week earlier, and they refused to let him use any of their other cars for 3 months. To deal with that problem, Bob borrowed his girlfriend's car, a white '69 Mustang with a hood scoop, dual racing mirrors, and a loud muffler, telling her that he needed it for some "special business."

At 11 p.m., Bob and Camilo picked up Alvin. They all had been drinking. Notwithstanding a curfew ordinance which made it unlawful for persons under 17 years of age to be on the streets after 10 p.m. (except when accompanied by a parent or guardian), they headed for Royal Boulevard, the wealthiest street in the city. As the car squealed around the corner onto Royal, Bob pointed the rifle out the window. Camilo pressed the gas pedal to the floor, then yelled "watch this." The car roared up the street. As it did, Bob fired a round of ammunition toward the houses they passed. Alvin was startled, indeed horrified. But he didn't want to let his true feelings show for fear of being ridiculed. As soon as the noise died down, he managed to say "That is so cool," but nothing more.

The bullets cut a swath of destruction, splintering trees, striking walls, and breaking glass. One shell broke through the library window of one of the mansions, injuring a young child, who was being rocked to sleep in his mother's arms. When the child's mother, Delia, saw the baby spattered with blood, she collapsed with grief and shock. The child fell from her arms, struck his head on the marble floor, and died.

Delia and her husband have consulted you for advice on whether anyone can be held liable for the harm that has been done. Indicate what theories of liability, if any, are worth pursuing, and whether you would be willing to handle the case on a contingent fee basis. If your analysis

requires additional information, please indicate what facts you want to investigate. Candidly acknowledge any obstacles to recovery.

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TORTS I FINAL EXAMINATION
DECEMBER 1996

ST. MARY'S UNIVERSITY
SCHOOL OF LAW
PROFESSOR VINCENT R. JOHNSON

The Essay Question

The following article appeared in the *San Antonio Express-News* on November 13, 1996. Please read the article, then discuss whether, and on what basis and to what extent, *The Jenny Jones Show* could be held liable in tort to the Amedure family. You should assume that the person grading your essay is unaware of any facts relating to the matter other than those discussed in the article. Therefore, if you know other information about the case and intend to rely on that information in your analysis, you must disclose those facts in your essay. The essays with be graded in a manner so that a good grade does not depend upon whether the writer has information not contained in the article quoted below.

> PONTIAC, Mich. -- In a case that put "ambush television" on trial, a "Jenny Jones Show" guest Tuesday was spared a mandatory life in prison and convicted of second-degree murder for shooting a gay man who revealed a crush on him during a taping.
>
> In deciding against a first-degree murder conviction, the jury found 26-year-old Jonathan Schmitz acted without premeditation in the 1995 slaying of Scott Amedure, 31.
>
> Schmitz could get anywhere from eight years to life in prison, with the possibility of parole. First-degree murder carries no hope of parole.
>
> Jurors said they concentrated almost entirely on Schmitz's state of mind when he shot Amedure, who revealed an attraction to Schmitz three days earlier as a studio audience whooped and hollered.
>
> Juror Joyce O'Brien said that for Schmitz, it was like "someone pulls the rug out from under you."
>
> "Even a sane person might have trouble dealing with all that stuff," O'Brien said.
>
> The case had focused attention on "ambush" television and titillating daytime TV tactics, with Schmitz's lawyers arguing that the show misled him into believing he was going to meet the woman of his dreams.
>
> They said he was publicly humiliated when his secret admirer turned out to be a man. That, coupled with his history of depression, suicide attempts, a thyroid ailment and

other problems, left him incapable of forming the intent necessary to commit first-degree murder, his lawyers said.

The jury of seven men and five women deliberated all day Friday and about 2 ½ hours Tuesday before reaching its verdict, rejecting the lesser charge of manslaughter.

"We all felt he had a definite mental problem ... and the show exacerbated that," said another juror, Dale Carlington.

Prosecutor Roman Kalytiak said: "I think we had a more compelling case with the facts. The defense had a more compelling case with making jurors feel sorry for Jonathan Schmitz."

Defense attorney James Burdick said Schmitz would appeal and predicted the judge would be lenient at Schmitz's sentencing Dec. 4 and give him the minimum.

Amedure's brother, Peter Amedure Jr., said he was disappointed by the conviction on a lesser charge and that his family would press ahead with its $25 million lawsuit against "The Jenny Jones Show."

"None of this would have happened if it wasn't for the Jenny Jones show's exploitation of homosexuality, a sensitive issue, and then exploiting those persons that had difficulty with the tolerance of homosexuality, such as Jonathan Schmitz," he said.

The show's producers denied misleading Schmitz to get him to go on the episode, which was titled, unbeknownst to Schmitz, "Same-Sex Secret Crushes."

Jones testified she knows very little about how her show operates and usually gets the scripts the night before a taping.

The show was never aired, but was played for the jury.

In it, Amedure outlined sexual fantasies of Schmitz involving "whipped cream and champagne" and rhapsodized about his "cute, little, hard body."

Schmitz reacted with an embarrassed smile but no apparent anger. He turned away when Amedure put an arm around him and tried to kiss him.

"I'm definitely a heterosexual, I guess you could say," Schmitz said.

Three days later, Schmitz bought a shotgun, drove to Amedure's mobile home nearby and killed him at his doorstep.

Schmitz's parents testified that their son behaved oddly as early as 3 years old, when he would bang his head against the wall in anger. They said by the time he was 16,

he was battling weeks-long periods of depression. Later, he attempted suicide several times.

A Detroit gay rights group that saw the shooting as a hate crime said it was satisfied by the conviction.

In a statement, Telepictures Productions, which owns "The Jenny Jones Show," said of the verdict: "It doesn't lessen the sadness and sorrow we feel about the senseless murder of Scott Amedure and the pain and sorrow his family and friends have been suffering."

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Torts II
Final Examination (Essay Portion)
Spring 1995

Vincent R. Johnson
St. Mary's University, Revised 4/5/95

Question:

Senator Verde, at the behest of constituents, has proposed to the state legislature the following piece of legislation:

Property Possessor Protection Act of 1995

1. No possessor of real property shall be liable in tort for the death or injury of an invitee resulting from a condition or activity on the property, unless it is established that the possessor's conduct amounted to gross negligence, recklessness, or intentional tortious conduct.

2. Subdivision one of this Act does not apply or modify existing law if a profit-generating business relationship existed between the possessor and invitee for a continuous period of not less than two years immediately prior to the date of the accident.

3. Notwithstanding subdivisions one and two, no tort action may be commenced against a possessor based on death or injury of an invitee if such harm resulted from a dangerous condition which existed on the property at the time the possessor first acquired possession of the property.

Except as modified by subdivisions one, two, and three of this Act, prior law remains in effect.

The Senator for whom you work has asked you to assess the impact and desirability of the proposed changes in light of relevant policy considerations and contemporary trends in tort law. Your memorandum should reflect a clear understanding of tort law and your capacity for careful evaluation of legal issues.

You are not expected to undertake independent legal research; rather you are to demonstrate your knowledge of the Torts I and II courses as they were taught. You may discuss this question with anyone. You may work alone or in a team of two or three persons, in which case the secret exam number of each contributor must be placed on the memorandum. No one outside of your team may read or comment upon your written memorandum. Please

follow this rule faithfully in order to avoid becoming involved in charges of an honor code violation.

Time:

Do not spend a disproportionate amount of time writing your memorandum. The project is not intended to derail your work in this or other courses. Rather, the objective is to ensure that you have a chance to demonstrate what you know under circumstances that minimize the potential unfairness of a timed essay examination. Once you have thoroughly reviewed the course, it should take no more than a few hours to draft and polish your memorandum. A solid, thoughtful effort will carry the day; brilliance is not required for a good grade on this part of the exam.

Points:

Memos will be scored on a 140 scale, and most grades will fall between 75 and 125. The examination administered during the assigned final exam time slot will consist solely of multiple choice questions. They will be worth 3 points each, and there will probably be a total of about 40 or 50 questions, although the exact number has yet to be determined.

It makes no difference whether you favor or oppose the proposed legislation. What matters is how well you justify your position from the standpoint of existing law, public policy, legal history, and practical implications.

Format:

Your memo should be typewritten or computer printed. The length must be not more than one and one-half, single-spaced pages, with one inch margins and 12-point (standard) typeface. Footnotes (or endnotes) are not permitted. Include citations, if any, in the text of the memo. You may (but need not) cite or quote cases in support of your argument, but only cases set forth or cited in SATL. You may also cite or quote law review excerpts and textual notes contained in SATL, if you think that is useful. Your citations may be in abbreviated form (e.g., See Palsgraf, SATL 218).

Do not plagiarize.

Do not place your memo in a special folder or binding. Simply staple the pages securely in the upper left-hand corner. You do not need to use special fonts; plain typeface is fine.

Due Date:

A student should never attempt to write a paper during examinations. Therefore, all memos will be due on Wednesday April 26 by 4:00 p.m. They may be turned in to Caroline Buckley, the secretary near my office (LF 250).