

For THE LEGISLATURE TO DECIDE, THEIR

INACTIVITY IN THIS AREA SHOULD NOT SERVE

AS A BANE TO JUDICIAL ACTIVISM. IN ANY

EVENT, THE LEGISLATURE COULD ENACT SIMILAR

LEGISLATION WITHOUT AT A LATER DATE

IN SUM, JUDICIAL IMPOSITION OF

A STRICT LIABILITY APPROACH TO PHYSICAL +

MENTAL INJURIES SUSTAINED BY A CHILD AS A RESULT

OF SEXUAL MOLESTATION WOULD SERVE A

DETERRENT TO SUCH ACTIVITIES IN THE FUTURE,

SPARE THE ECONOMIC COST OF SUCH DAMAGE,

AND FACILITATE ECONOMIC GROWTH. THIS ACTION

IS NOT DIRECTLY IN OPPOSITION TO THE POLICIES

OF BASING LIABILITY ON FAULT OR IN PROPORTION TO

FAULT, NO DOES IT FORCLOSE ACTION BY

CO EQUAL BRANCHES.

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Torts II Exam, Spring 1988

Actual Student Answer

Essay Choice F

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

essay, page 1  
Choice F

A policy which would provide day care centers to be held strictly liable for any sexual misconduct by their staff would not fall in the ordinary "Master/Servant" categorization currently under strict liability. The only time an employer is strictly liable for the actions of their employees is when the action is in furtherance of their business, and is an activity within the scope of the employment of the employee. Sexual molestation of a child by a day care provider obviously does not fall within the scope of his/her employment. Therefore, a duty would have to be established which would then become strict liability duty.

To establish a duty, the situation must be analyzed per Soidano. This risk of harm is foreseeable, in a broad sense. Sexual molestation is rampant, and much of it occurs in day care settings. Whether or not the specific incident of molestation was foreseeable would be a question of fact. ~~Facts~~ There is usually enough of a pattern to situations involving child molestation that a trained observer would be able to pick up on it. The adult spends an inordinate amount of time with the child, earning his/her trust and friendship. They spend time alone, away from other people. The child becomes secretive about the relationship as well as about other things. Once actual molestation starts, the child may become withdrawn, quiet, moody, etc. They may cling to the very person who is molesting them, and become very protective of the relationship. There can be other physical attributes, as well: shying away from being touched; touching themselves; expressing words, knowledge, etc., they wouldn't know otherwise. All of these signs could be observed if day care providers were trained to do so. They would have to watch for any staff who spent secretive, private time alone with children. It would be possible, however, for the provider to reasonably foresee problems between staff and children. Another way they could foresee would be to conduct very thorough research on potential employees before they were hired.

The fact that harm occurs is obvious. Children suffer physically as well as mentally, for the rest of their lives. The harm is a direct result of the abuse they receive by day care providers. Their care has been entrusted

to the day care providers - the providers have voluntarily assumed the duty to provide for their safety and well-being during the period of time the child is in their care. The providers, then, are in the best position to prevent the harm. (Actually, the only people in position to prevent the harm). The burden on the providers wouldn't be too great - they would have to be in more control, perhaps of their staff, and would have to make more thorough background searches into potential hires, but that would be a small price to pay to provide for the safety of the children entrusted to their care. To fail to provide for the safety of the children leaves the providers highly blameworthy - their lack of care is the direct reason the child becomes a abuse statistic.

A proposal to make providers STRICTLY liable is supported by the policy reasons governing strict liability. A strong deterrence motive would be provided to day care providers if they knew they would be held strictly liable for the actions of their employees. They would have an incentive to thoroughly research a potential employee's background, to pay close attention to the activities of their staff with the children, etc. Providers may be encouraged to provide children with information concerning abuse - the "good touch/bad touch" kind of programs, which would encourage the children to report any kind of questionable behavior by the staff. They could establish rules, or guidelines concerning physical contact with children - and discourage any repeated, recurring private, secretive meetings with individual children without properly checking out what was going on. Children would benefit from this not only by getting abuse-free day care, but by getting information about dealing with abuse outside of the day care facility, as well.

A doctrine of strict liability would also help spread and shift costs. Facilities could obtain insurance which would cover expenses - they could even require their staff to carry personal liability insurance, indemnifying the provider in case of loss. Providers would be in a better position to spread any additional costs among families using the facility, whereas an individual family may not be able to provide adequate long-term insurance to cover the mental damage suffered by an abuse victim.

A doctrine of strict liability would also serve the purpose of fostering predictability - allowing abused children an assurance that they will be compensated for their injuries. Without strict liability, the individual tortfeasor may not be able to compensate the victim for injuries, either because of no insurance, or because the insurance won't pay for intentional criminal acts. As a result, parents of abused children may have to foot the bill themselves, and they may not be able to do so. Without strict liability, each individual must also go through litigation, which may be an impossibility to a family with no money. If a strict liability doctrine is imposed, even if a family did have to litigate and didn't have money, they would have a better chance of getting good representation from an attorney who knew he/she was filing a strict liability claim. The bottom line here, is that without strict liability, the chances are that the victim may never recover anything from anyone. The provider would most likely be off the hook because the molestation would probably be found to be outside the scope of the employee's employment, and therefore, not covered under master/servant strict liability. They may have a chance against the employer himself/herself under negligence, but would have a much heavier burden of proof (and, again, may not be able to afford taking the case to court). The individual would probably never pay, because even if there was insurance, the insurance probably wouldn't cover intentional criminal acts. If there were no insurance, the tortfeasor probably wouldn't have the money to pay, unless independently wealthy. If the tortfeasor goes to jail for the criminal act, there's even less chance to collect. And the parents will probably also not be in a position to pay. Even if medical insurance covers the physical injuries (which may be slight); and some counseling, it's doubtful it would be enough, and no insurance provides for the mental anguish and suffering resulting from molestation. Thus, the victim would be out of luck. Since a major concern in society is that the victim be compensated, strict liability is warranted on those grounds.

Changes in overall tort decisions over the years also warrant a change in this liability. While initially, victims seldom recovered for tortious acts, the trend in the recent past has led to a presumption of recovery for tortious acts. A trend is also to favor compensation to the victim for tortious acts. Since victims seldom recover from tortfeasors who commit criminal acts against them, making their employers responsible may be the answer. The day care

providers are also in a better position to determine if an employee is a potential abuser. Parents are unable to tell by just checking a day care facility, and children, of course, can't tell. With appropriate liability, the providers, supported by parents, etc., may be able to force better recording of complaints of child abuse/molestation, so that providers could run a better check w/access to that kind of records.

Day care providers are also becoming a more integral part of society. With more and more dual-career families, day care facilities are raising our children; becoming responsible for their upbringing along with their parents.

If parents can be sued for neglect, abuse, etc. with the downfall of familial immunity in tort law, then day care providers should be able to be sued as well. A reason for holding them strictly liable, rather than liable for negligence, only, would be that they contractually agree, for money, to provide for the welfare of the children. In a way, they are providing a product of sorts - safe, quality care for children. When their product proves to be faulty, as in other product liability cases, they should be held strictly liable. This will provide the necessary incentive to improve the product, and guarantee its quality.

In summary, the day care providers have voluntarily assumed a duty a providing a safe environment for the children they care for. That duty includes the responsibility of assuring the child will not be sexually assaulted on the premises while in their care. This duty should be a strict liability one in order to appropriately give adequate incentive to prevention of the harm; in order to best spread the costs and shift the costs to parties best able to carry them; and in order to assure compensation for victims and foster predictability as to outcome when the duty is breached.

The providers are in the best position to ensure that child molesters are not hired to care for children - strict liability will provide the incentive for them to do so.

## ST. MARY'S UNIVERSITY SCHOOL OF LAW

TORTS I  
Professor Vincent R. Johnson  
December 1989

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)	-- 90 Points
ESSAY	-- <u>140 Points *</u>
	230 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 serious violation of the exam rules and appropriately penalized.

Rough guidelines for allocating your time are as follows:

Multiple Choice	75 Minutes
Essay	45 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 your 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

Butch, a student on the high school football, basketball, and track teams, was constantly in academic trouble and in danger of being excluded from sports by a "no pass, no play" rule. After several disastrous relationships with girls in his class, Butch became romantically involved with one of his teachers, a 23-year-old woman named Ms. C.C. Sistofix (affectionately nicknamed by everyone "Sissy"). The relationship lasted for two months, and involved several clandestine meetings, which on more than one occasion culminated in sexual intercourse.

Although Sissy was in all respects an attractive and personable woman, a large part of Butch's motivation in the affair was a desire to "earn" higher grades from Sissy based on extracurricular activities. Sissy knew that this was the case, and she did nothing to dispel the notion. However, she also said nothing to reinforce the idea that Butch's grade would be based on anything other than his final exam in the course. In fact, Sissy wasn't sure just what she would do when it came to giving Butch a grade in her course.

Before and throughout the affair, Butch used heavy amounts of cocaine. Two months into the relationship, which coincided with the end of the academic term, Sissy turned in her grades. She decided that she could not fabricate a grade for Butch. Based on his written final, Sissy gave Butch what he deserved, an "F" -- fearing that it would probably end their relationship. The grade meant that Butch immediately would become ineligible for all scholastic sports for the next six months. When Butch received the news he became immensely depressed and, later that day, took an overdose of illegal drugs.

(A) As a result, Butch has suffered permanent brain injuries. Can actions be commenced on his behalf against Sissy and the school district?

(B) The apparent suicide attempt was widely reported in the media, along with the details of the affair, which had been leaked to the press by some of Butch's classmates? Sissy was greatly embarrassed by the publicity and was subsequently fired from her job. Can she sue either the classmates who leaked the information or the media which published the revelations. (Only a short answer is required for Part B.)

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TORTS I  
Professor Vincent R. Johnson

FINAL EXAMINATION  
(Two hours)  
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Based on your knowledge of first semester torts, what causes of action can be alleged, what damages would be available, what defenses should be anticipated? Candidly recognize any uncertainties or ambiguities in your analysis. To the extent possible, indicate the likelihood of success of each argument. If more information is required, indicate what questions you will want to explore and why they are important. You may make reasonable inferences from the facts stated.

-- End of Exam --

Model Answer  
Final Exam Essay Question  
Torts I, December 1989

[The following illustrates merely one approach which might have been taken in answering the essay question.]

(A) Sissy colorably may be sued for battery, intentional or reckless infliction of severe mental distress, and misrepresentation. However, the first two claims will be met by a defense of consent, which may well succeed in precluding liability on those counts.

Battery is the intentional, unconsented harmful or offensive touching of another. Here, physical contact occurred on several occasions, and undoubtedly the contact was intentional, in the sense that it was desired or substantially certain to occur. The critical question is whether Butch's consent to the sexual liaisons was valid. If so, an action for battery is totally barred. It appears that Butch was laboring under a misconception that having sex with Sissy would raise his grade. This mistake was known to Sissy, and may have the effect of invalidating the consent. Under the traditional fraud in the factum/fraud in the inducement dichotomy, it is arguable that the mistake related to a collateral matter, rather than to the nature of the invasion, the harm reasonably to be expected, or the facts which made the invasion offensive. That being the case, the mistake, even though known to the defendant, would be treated as irrelevant and the action for battery would be barred by consent. Under the modern approach to mistaken consent, the consent would likely be held invalid. The error was known to the defendant and related to a material fact -- one which the actor would have taken into account in deciding whether to consent. Here, the facts indicate that Butch was motivated by the erroneous assumption that the liaison would help his grades.

Butch's consent might also be invalid because Butch lacked capacity to consent by reason of his heavy drug use. We need more facts on this point. Further, there may be a question concerning the validity of consent to a criminal act. State law may provide that it is unlawful for an adult to engage in sexual relations with a person below a certain age. Butch probably is not so young that he falls within that statutory rape category (again, we need more facts), but if he is, then his consent to the sexual relations will probably be vitiated since he falls within the class intended to be protected by the law. The parties do not stand in pari delicto.

If an action for battery is not barred by consent, the plaintiff can recover compensatory damages for the mental distress resulting from the invasion. Since we are dealing with an intentional tort, it is possible that the train of causation may extend to the damages suffered in the suicide attempt. If Sissy's exploitation of Butch's

vulnerability is regarded as egregious, punitive damages might be recovered.

The chief obstacle to an action for intentional or reckless infliction of severe mental distress would be establishing that Sissy's conduct was extreme and outrageous. While romantic involvement between teachers and students is uniformly discouraged, it is debatable whether such conduct involving a young teacher and a teenage student is utterly intolerable in a civilized society, beyond all bounds of decency, or atrocious. In determining whether the extreme and outrageous conduct requirement is met, the subjective characteristics of the plaintiff may be taken into account. On the one hand, it can be said that Butch was a minor and was not smart. It may also be true that Sissy knew that Butch was under the pressures of the "no pass, no play" rule and cocaine use, and that she abused a relationship which gave her the opportunity to exploit one to whom she owed certain duties of trust. On the other hand, Butch was not an innocent infant. Probably between 14 and 19 years of age, Butch was a man of the world, having engaged in several prior relationships with women. Of course, if Butch is the one who initiated the affair with Sissy, there is all the more reason to not view her as the villain. It seems unlikely that the circumstances here rise to the level of being extreme and outrageous. However, if that requirement is satisfied, it seems clear that Sissy's conduct might be termed recklessly indifferent to causing Butch mental distress, for she knew of, and failed to correct, his misconceptions. Of course, it appears that severe mental distress was caused by conduct in question. Even if the prima facie elements of IRISMD are established, the action may be barred by consent (see the discussion above). If consent does not bar the action, compensatory damages for the mental distress and the damages resulting from the suicide attempt can be recovered. In addition, extreme and outrageous conduct will support an award of punitive damages.

An action for misrepresentation can arise from silence where the defendant is under a duty to speak. Here, Sissy knew Butch was operating under a misconception concerning whether the affair would help his grades, and she failed to correct that error. It might be argued that Sissy was under a duty to reveal her true intentions concerning grading because a fiduciary relationship existed between them by reason of the student/teacher relationship. The matter at issue pertained to an aspect of that relationship, namely grading. It would be a clearer case if Sissy had been sure all along that she would base Butch's grade wholly on the exam, but in any event it might be argued there was a duty to disclose her uncertainty. An action for deceit requires proof of scienter. Creating one impression while in fact doubting the certitude of that view may be regarded as recklessness, and thus satisfy the scienter requirement. An action for deceit would support an award of compensatory and punitive damages. Consent could not easily be raised as an affirmative defense, for reliance (consented participation) is an element of the prima facie case: whether there was fraud sufficient to vitiate the consent is best viewed as part of the prima facie

inquiry. It might be argued that Butch was gullible or stupid, which is to say contributorily negligent. But contributory negligence is not a defense to deceit. If the action were based on negligent misrepresentation, such a defense could be raised. Although such an action might make it easier to recover from Sissy's insurance, if any, and to bring her actions within the doctrine of respondeat superior, punitive damages would not be available, and causation of damages might be traced less far.

There are two theories upon which the school district could be held liable. The first is respondeat superior. This would probably not apply here, since there is nothing to indicate that Sissy was acting within the scope of her employment or that her actions were intended to in any way advance the business purposes of her employer.

Secondly, the school district could be sued on the ground that it was negligent. If it hired Sissy with knowledge of her propensity to engage in sexual conduct with students, it could be held liable for negligent hiring. However, there are no facts here to indicate that this rule applies.

Finally, an action against the school district might be barred by sovereign immunity.

(B) The revelations appear to be true. Therefore, they will not support an action for defamation or false light. The only colorable action is invasion of privacy based on public disclosure of true private facts. Here, it seems likely that such a claim would be defeated because whether high school teachers engage in sexual relations with students is a matter of legitimate public concern. Thus, neither the media nor the classmates could be successfully sued. Further, no action for IRISMD will lie, for providing information to the public on a matter of public concern is not extreme or outrageous.

Thoughts on Grading the December 1989  
Torts I Exam

At a minimum, a good answer to the essay question should have:

- (1) Fully discussed whether Butch's consent to the sexual contact was vitiated by mistake. Both the traditional view and the recent view should have been discussed.
- (2) Specifically stated what facts (e.g., age, prior sexual history, "no-pass, no play rule") are relevant to the issue of whether Sissy's conduct was sufficiently extreme and outrageous to support an IRISMD action. Conclusory assertions will not do.
- (3) Differentiated the three types of action for misrepresentation and discussed the facts relevant to the issue of whether Sissy acted with scienter.
- (4) Discussed why Sissy had (or did not have) a duty to speak (e.g., the exceptions to the general rule which are based on superior knowledge, fiduciary relationship, and facts basic to the transaction).
- (5) Stated that truth precludes actions by Sissy for defamation and false light.
- (6) Differentiated respondent superior liability of the school district from liability for negligent hiring or negligent supervision.

Relevant cases

While it is not necessary to discuss cases, the following decisions had some bearing on the analysis.

Micari v. Mann  
McGrath v. Zenith  
DeMay v. Roberts  
Kathleen K. v. Robert B.  
Sovereign Pocohontas v. Bond

TORTS I - EXAM  
December 1989

This "Better Than Average" Essay Answer  
Was Written by a First Semester Law Student in the Course

[Part] I.

A. Actions Against Sissy.

(1) MISREPRESENTATION.

Sissy knew that Butch's motivation in the affair was his desire to earn a higher grade. This was a fact material to [Butch's continuation of] the "affair[,]" and since Sissy had "superior knowledge" that Butch was proceeding based on a mistaken fact, [which was] basic to the "transaction", she had a duty to speak. Generally, there is no duty to speak, however, in this situation there was for the reason stated. It could also be stated that there was a fiduciary relationship (teacher/student) which would require Sissy to speak.

Since this was an intentional misrepresentation, Butch could receive actual & punitive damages. He does not appear to have incurred any financial-pecuniary losses. However the misrepresentation could be said to have caused the resulting physical damages, in which case Sissy would be liable for his hospital bills.

(2) BATTERY.

The action for Battery will be determined [based] on the validity of Butch's consent.

Sissy intended to have sex with Butch, thereby satisfying [the] 1st element - intent to make contact. The 2nd element - harmful or offensive touching - also appears to be met since they did have sex which [it] could be said was harmful to Butch, and was definitely offensive.

The key is consent. Butch was mistaken as to the reason for consent - a better grade. Under the traditional approach, this would be a collateral matter (fraud in the inducement) and the consent would be valid. However, under the modern approach, his consent would be invalid, as it was known to Sissy, but not to Butch.

Two other consent issues could be brought up - (1) Butch's capacity to consent, in that he is a minor and (2) whether or not the affair was illegal.

If the affair was illegal, there are 2 views as to the validity of the consent. However, Butch appears to be a minor, and under either view, his consent would be invalid, as he is in a "protected group."

Therefore, Butch's action for battery would lie.

(3) IRISMD.

Butch could also have an action for IRISMD against Sissy. Sissy would have been (1) substantially certain that her affair with Butch would cause severe mental distress. This is based on his age and reasons for the affair. Therefore, Sissy would meet the intention to

cause severe mental distress [requirement]. Sissy's conduct was (2) highly outrageous and (3) caused Butch to have (4) severe mental distress. (See [infra])

B. ACTIONS AGAINST SCHOOL.

If any action would lie, it would be under the doctrine of respondeat superior. However, the school district is not liable for intentional torts of employees NOT acting in their employed capacity. Clearly having sex with a student is not within the teacher's scope of employment and no action would lie for any of the intentional torts noted.

There could perhaps be an action for negligence if the school failed to exercise due care in hiring Sissy.

[Part] II.

A. Sissy's actions against classmates and the papers would be based on publication of a true private fact. Since this is a matter of legitimate public concern, no action would lie. The competence/morals of teachers is a matter of public concern.

Since the [statements were] true, no defamation action would be actionable.

Since the newspaper was able to print the story based on a matter of public concern, no action would lie against the students for reporting the story to the press.

BATTERY DAMAGES. No proof of actual damages is required for battery, since it is one of the five intentional torts which descended from the writ of trespass (except for trespass DBA).

Butch would therefore be entitled to at least nominal damages and any actual damages proven as a result of the battery. Punitive damages could also be awarded.

INTIMIDATION DAMAGES. Since Butch has proven he has suffered severe mental distress, he could obtain actual damages for this. No need to show physical harm. Butch could also be awarded punitive damages.

ST. MARY'S UNIVERSITY SCHOOL OF LAW

Torts II Final Exam  
Focus: Negligence,  
Strict Liability

Prof. Vincent R. Johnson  
May 1990  
Three hours

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PLEASE WRITE YOUR PERSONAL EXAM NUMBER HERE: \_\_\_\_\_

YOU MAY BEGIN READING THE INSTRUCTIONS  
CONTINUE READING UNTIL YOU REACH THE POINT 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 multiple choice answer sheet where it says "Student Name"

In addition, write your four-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.

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 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 frowned upon -- and generally do not elicit helpful answers. Under no circumstances may the 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 all parts of 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.
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 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.

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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) Senator Hay's proposed tort reform statute provides for the abolition of the "eggshell skull" rule which presently requires a personal injury defendant to take the plaintiff as she finds him? You are a legislative staffer for Senator Leah Hinojosa, and have been asked to advise Senator Hinojosa as to: the doctrinal impact of the proposed change; its desirability as a matter of tort policy; and its likely effect on already-high consumer insurance premiums.

Choice (B) Jeff and Amelia Gonzalez had planned to watch their daughter Catlin skate in the World Ice Skating Championships on television at the home of their neighbors, the Sajoess. Immediately prior to Catlin's performance, the television cable connection was disrupted as a result of negligent equipment maintenance on the part of the Cable Company. The Sajoess' television could not work without cable, and before the Gonzalezes could get to another TV, Catlin's performance was over -- and they had missed a moment in their daughter's life which they had waited a lifetime to see. The Gonzalezes have sued the Cable Company for damages based on negligence. The Cable Company argues that the public duty rule -- which never before has been applied to an action against a cable service -- should bar the action. Should the rule be extended to this context to preclude an award of damages?

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) George, an 82-year-old hospital patient, probably would have died of a heart attack had he not been revived through electric shock. The shock was administered by a hospital nurse who was unaware that George had exercised his statutory right to execute a "do not resuscitate" order. The order had been negligently misplaced by another hospital employee. Two days after George was revived, he suffered a debilitating stroke, which has left him partially paralyzed, bed-ridden, and unable to speak. George has commenced a "wrongful life" suit, alleging that the hospital wrongfully saved his life. The suit is the first of its kind in the state. Should the state high court recognize such a cause of action? If so, what damages should be awarded?

Choice (E) During the past century, most jurisdictions have abolished the concept of common law crimes and have provided that all criminal offenses must be of statutory origin. Should common law tort law be abolished in favor of an omnibus statutory tort code which would comprehensively set forth the elements of all tort actions?

Choice (F) Mr. Huber has proposed a change in the rules of product liability. The change would bar any action for damages against the manufacturer of a consumer product, if the product was manufactured in conformity with federal agency-prescribed safety guidelines and placed on the market with agency-prescribed warnings. Should this new rule be legislatively or judicially adopted?

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ST. MARY'S UNIVERSITY SCHOOL OF LAW

TORTS I  
Professor Vincent R. Johnson  
December 1990

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 for the essay question.

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 corner 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 points each)	-- 96 Points
ESSAY	-- <u>140 Points *</u>
	236 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. Do not, therefore, short change the multiple choice questions, thinking that your time is better spent on the essay. A suggested time allocation is stated below.

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 serious violation of the exam rules and will be appropriately penalized.

Rough guidelines for allocating your time are as follows:

Multiple Choice Questions	80 Minutes
Essay Question	40 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, unless otherwise indicated.

- 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.

- 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 structure your answer clearly. If you neglect to cover a point at the beginning of your discussion, 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. Please write legibly. Failure to write legibly runs the risk that you exam will be read by an irate professor. I prefer that you write on only one side of a page, but don't worry if you forget this preference.

- Extra blue books will be available at the front of the room, along with a few pens. Please make sure that all blue books are neatly stapled together.

6. Trips to the restroom are discouraged and should be made only in the case of necessity.

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!

Essay Question

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Graffiti on bathroom walls has long been sophomoric amusement for men. Recently, women students at Summa University have begun scribbling in one such location with extremely serious intentions and potentially serious consequences. As a result of the university's perceived insensitivity to complaints of sexual assault and harassment and its disbandment of a campus violence and discrimination taskforce, the women have begun compiling a list of male students alleged to have harassed, assaulted, or raped women.

The list began early in the semester when someone wrote the name of a male student on a bathroom stall and accused him of rape. That single scribble triggered several sympathetic responses. "Compile a list of other men on campus to watch out for," urged one writer. At least 15 male students were thereafter listed, most identified as rapists. One unsigned entry on the list reads: "Believe me, I know what I'm talking about. Enid Fog raped me on August 29 in the basement of the Chemistry Building."

The university views the list as every bit as unacceptable as typical sexist or racist scratchings. It has issued a statement condemning the list, and has indicated that it will have the stall repainted as soon as the current strike by university groundskeepers and maintenance workers ends.

Fog, a widely known leader of a major campus environmental organization and an activist in community recycling efforts, was told by a female friend that his name was on the list. She said that she was knew the charge was untrue, and that when she asked other women about the graffiti, she could not find a single person who would credit the statement about Fog.

In a letter to the editor of the Summa Daily News, headlined "I AM NOT A RAPIST," Fog insisted that he was innocent of any offense. He wrote in part: "I am terribly embarrassed and deeply resent the fact that from now on there will be women on campus who fear me."

Fog has contacted you to determine whether he has a colorable claim for damage to reputation against either (a) the university; (b) the woman who urged creation of the list (call her Liz); (c) the woman who wrote the entry about Fog (call her Ruth); or (d) the woman who informed him of the entry (call her Farah). Discuss all relevant issues and, to the extent possible, evaluate the likelihood of success of each claim. Candidly recognize ambiguities and uncertainties. Indicate what additional evidence, if any, should be secured.

-- End of Exam --

Torts I Final Exam  
December 1990

Model Answer

Defamation - In General

Damage to reputation may be compensated through an action for defamation. Falsity is an essential element of such an action; therefore, the viability of any such claim on the part of Fog depends upon the falsity of the rape charge. If the charge is substantially true -- which may be largely a matter of whether Ruth consented to sexual relations with Fog -- no action for defamation can lie.

The requirements of a defamation action vary according to the status of the plaintiff and the interest, if any, which the public has in the discussion of the issue. Here, there is some uncertainty as to whether Fog should be considered a private person or a public figure. On the one hand, there is no evidence that he has thrust himself into the forefront of any public controversy. That tends to suggest that he is best considered a private individual. On the other hand, he is well known on campus as a result of his work for the environmental organization and his recycling efforts. To that extent, there is reason to think that he may have good access to means of rebutting false charges -- in fact the campus newspaper published his letter. Fog's proper classification is a question of law for the court.

The subject matter of the defamatory utterance at issue here is not one of purely private concern. Many persons would find that there is an important public interest in knowing whether a major campus organization or community recycling effort is headed by a rapist, a person willing to resort to violence or forcibly place his own gratification above the rights of others. Moreover, community concern about rape, which is evidenced by the creation of the list, strongly suggests that the charge against Fog relates to a matter of public interest. Accordingly, under Curtis Publishing and Walker, Fog will be required to prove actual malice if he is deemed by the court to be a public figure. If he is classified as a private figure, then, under Gertz, he will have to prove that the defendant acted with fault as to falsity, meaning that the state may set the standard as low as negligence or as high as actual malice. In the absence of proof of actual malice, a Gertz plaintiff must prove that he suffered actual injury. That requirement can be satisfied here by evidence of Fog's humiliation. If Fog proves actual malice, an award of presumed damages is constitutionally permissible and could be justified in many jurisdictions by the fact that the scribbling constituted libel and charged Fog with the commission of a serious crime.

Presumably some of the damage to Fog's reputation is a result of the fact that he publicized the contents of the statement by writing to the editor. However, the better view would be to hold Ruth liable for that republication of the defamatory utterance, for it was foreseeable that the content of the statement would have to be revealed as part of any effort by Fog to invoke self help.

#### The University

It is uncertain whether an action for defamation can be successfully maintained against the university. There is no showing that any agent of the university uttered the defamatory charge, and therefore liability would have to rest upon an omission, rather than an affirmative act. The best case for liability would be to argue that the failure to remove the graffiti was negligence, for a reasonable person would have done so. It could then be argued that the negligent publication which resulted from the omission was accompanied by evidence showing that the school was negligent, reckless, or knowing of the statement's falsity -- assuming that facts can be adduced to show that the university was aware of the graffiti and of Fog's protestation of innocence. There are a few decisions which have held that the failure to remove graffiti from a public facility can give rise to liability, but others are to the contrary. To the extent that the remedy (repainting or washing a small area) was simple and inexpensive, the maintenance worker's strike will probably not play a significant role in the analysis -- unless the university can prove that it was legally obliged not to use other workers to perform maintenance functions during the strike, which is probably not the case.

#### Liz

Although Liz urged the creation of the list there is no reason to conclude that she did anything more than encourage truthful utterances. She cannot be held liable for defamation.

Also, no action would lie against her for aiding and abetting public disclosure of true private facts, for the statement at issue bears on the fitness of a campus/community leader and thus is one in which there is legitimate public interest. Moreover, in such an action, Liz might argue the existence of a qualified privilege in view of the fact that (a) other efforts to address violence and discrimination had been abandoned and (b) the statement was published only to persons (women) whose interests might be in danger.

#### Ruth

The strongest suit for defamation would be one against Ruth, and the key issue would be whether the statement was false. If so, it is likely that we can establish actual malice, since Ruth was in a position where she virtually had to know the truth or falsity of the statement. If somehow Ruth is found to be only negligent as to the falsity of the charge, she might be able to invoke a qualified privilege to defeat the action. The statement was published only to

a limited audience for the purpose of enabling those persons to protect themselves. Ruth's motives appear to be good -- although further evidence may show otherwise. Under the restatement view, negligence as to falsity does not defeat a qualified privilege.

Although the scribbling at issue contained some subjective language, it should not be regarded as a statement of pure opinion and thus constitutionally protected. The statement charges Fog with a specific act of wrongdoing and asserts a fact. It is possible to verify, one way or the other, whether a rape took place on the 29th of August in the basement of the Chemistry Building.

#### Farah

A repeater may be held liable for defamation even where the repeater states that she does not believe the statement, provided the repeater acts with the requisite degree of fault as to falsity. Inasmuch as Farah "knew" that the statement was untrue, there is proof of actual malice, assuming that "knew" here means that Farah was "substantially certain" that the statement was false. If actual malice is present, then it is impossible for Farah to assert a qualified privilege despite the fact that she appears to have acted in good faith in inquiring from other women whether the charge was true. Of course, any action against Farah would have to be predicated on her statements to other women, not on her statement to Fog, the plaintiff. If Farah acted in good faith in publishing the statement, it may be assumed that a jury would be unlikely to subject her to a large judgment.

#### Mental Distress and False Light

The constitutional limitations applicable to defamation will probably also be applied to actions for Intentional or Reckless Infliction of Severe Mental Distress or False Light Invasion of Privacy, each of which permit recovery of damages for harm to reputation. (See Falwell v. Flynt.) Therefore, there would appear to be little advantage, if any, in asserting those causes of actions.

[The essay question was based on, and some of the language was taken from, an article on Brown University in a November 1990 issue of Newsweek.]

To: Enid Feg,

From: [REDACTED]

Subj: Possible legal Action

Student answer to December 1990  
Torts I exam. Contains better  
than average analysis.

Based on the facts provided, it is most likely that a cause of action will lie for defamation in regard to the inclusion of your name on the list in question.

Defamation consists of the publication of a defamatory statement to a third party who understands. In some cases fault as to falsity must be shown and, at least in some cases, actual damage. A defamatory statement is one which ~~is~~ would tend to lower the <sup>standings of the</sup> person referred to in the eyes of a substantial portion of the community. ("Community" excludes clearly anti-social groups.)

The publication in this case is likely because it is written and has thus taken on a characteristic of some permanence. Were it oral or consisted of some transitory gesture it would more properly be labeled slander.

We must show that the statement refers to you. I would not anticipate much difficulty in this given your unusual name, but ~~that~~ we must take care to be sure on that point.

Another issue of small difficulty is showing that the statement was made to a third party who understands. Here, the language is clear and unequivocal and we have evidence that a significant number of people have directly or indirectly seen the statement.

It will be necessary to categorize your status in the community in order to determine what with level of fault as to falsity we must show the defendant(s) acted. If it is decided that you are a public figure, we will probably have to show that the statement was made with actual malice: that is, with knowledge of falsity or reckless disregard for the truth. A public figure is one who has thrust himself into the limelight. In this case, your leadership position in

campus and community environmental programs may lead to you being classified as such.

If you are a classified as a private person and that it may be possible to get the standard of proof ~~beyond~~ on fault as to falsity lowered to negligence or even removed entirely.

If the statement is classified as a matter of public concern and you are classified as a public figure, we will have to show actual malice. If you are classified as a private figure and the matter is of public concern, depending on the law of this jurisdiction, the level of fault can be as low as negligence (if it is negligence, no punitive damage will be available).

No matter what your status, if the matter is shown to be of private concern the showing of fault as to falsity is questionable, we may not have to show anything.

It seems quite possible, even likely, that



While his did create the defamatory statement, I think we may be able to show she acted recklessly in urging women to anonymously add other men to the list. One definition of recklessness is a casual indifference to a substantial risk of harm. Her actions are somewhat similar to those of a publisher who encourages writers to speak of an subject and demonstrates reckless disregard for the truth in printing them.

Given the untruthful ~~goal~~ nature of the statement Ruth seems to meet all the elements for defamation, including actual malice (knowledge of falsity or reckless disregard for the truth). I would say that even as a public figure on a matter of public concern, you will be able to make a prima facie case. (I am assuming you will have no trouble showing that statement refers to you.)

Frank's ~~negligible~~ liability is questionable. No matter what her good faith intentions might

While Liz did create the defamatory statement, I think we may be able to show she acted recklessly in urging women to anonymously add other men to the list. One definition of recklessness is a ~~casual~~ indifference to a substantial risk of harm. Her actions are somewhat similar to those of a publisher who encourages writers to speak ~~of~~ on a subject and demonstrates reckless disregard for the truth in printing them.

Given the untruthful ~~quali~~ nature of the statement, Ruth seems to meet all the elements for defamation, including actual malice (~~knowledge~~ of falsity, or reckless disregard for the truth). I would say that even as a public figure on a matter of public concern, you will be able to make a prima facie case. (I am assuming you will have no trouble proving that statement refers to you.)

Farah's ~~several~~ liability is questionable. No matter what her good faith inkations might

While Liz did create the defamatory statement, I think we may be able to show she acted recklessly in urging women to anonymously add other men to the list. One definition of recklessness is a ~~casual~~ indifference to a substantial risk of harm. Her actions are somewhat similar to those of a publisher who encourages writers to speak ~~of~~ on a subject and demonstrates reckless disregard for the truth in printing them.

Given the untruthful ~~quality~~ nature of the statement, Ruth seems to meet all the elements for defamation, including actual malice (knowledge of falsity, or reckless disregard for the truth). I would say that even as a public figure on a matter of public concern, you will be able to make a prima facie case. (I am assuming you will have no trouble proving that statement refers to you.)

Farah's ~~separability~~ liability is questionable. No matter what her good faith intentions might

have been she did repeat the defamatory statements to ~~some~~ other students. As such she can be held liable unless she is granted some qualified privilege to repeat the statements.

An absolute privilege would bar any action against her. But such a privilege would only apply to judicial proceedings, legislative hearings & proceedings, and other extremely limited circumstances. This privilege is granted in the public interest of unfettered speech in such circumstances.

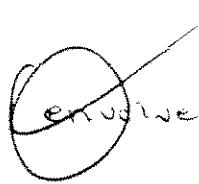
A qualified privilege is very difficult to narrowly define, but may be granted depending on a variety of factors to be weighed in determining if the privilege would be in the interest of the public good/justice.

Factors include the actor's good faith, the relationship between the publisher and recipient, past behavior, criminal activities, and the like. In this case, Farah's conduct might reasonably be found to be privileged. In any

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event, your own view as to her behavior may cause you to choose to not seek any action.

Fog's



involvement in campus organizations

and the fact that he is a leader on campus

probably classifies him as a public figure.

Under the test established in New York Times

v. Sullivan Fog will have to prove that

the defamatory statements were made

with "actual malice"; that is knowledge

of falsity or reckless disregard for truth.

If he can establish actual malice in any

of his claims, then he will be entitled

to punitive and presumed damages as well

as compensatory damages.

In his claim against Ruth, there is no problem proving that her statement was defamatory. It was embarrassing and lowered him in the esteem of others. The fact that the graffiti was read by others also satisfies the requirement of publication to a third person who understands. The problem with Fog's claim against Ruth is that if the stmt is true then Ruth is completely barred from <sup>any</sup> liability. IF the stmt is false, ~~Fog will only~~ we ~~would need to know whether the stmt~~ be able to recover if he shows that ~~is true or not to~~

Roth's ~~publication~~ was with actual

Malice. Fog could also file a claim

against Roth for False Light - Invasion

of Privacy, but here again truth is

an absolute bar to recovery. Fog could

also file a claim against ~~Roth~~ <sup>Ruth</sup> for

Publication of a True Private Fact. This

claim could also be defeated if it

can be shown that if Fog is a

rapist, that is a fact that the

public has a right to know (newsworthy).

~~Fog~~ would probably have a

difficult time winning a claim of

Defamation against ~~the~~ L.E. Her remark

on the wall is not defamatory in nature.

It does not mention any specific names

and ~~this~~ does not refer to ~~Fay~~ specifically (Collusion).

It does not give any surrounding facts

concerning Fay (indictment) and does not

make any defamatory remarks referring to

~~Him~~ (~~innocent~~). Because a defamation ~~claim~~

would probably not hold up against L.E., Fay

would probably also be unsuccessful in a

False Light - Invasion of Privacy claim against her.

Fay could also file a defamation claim against Farah. ~~He~~ He would not be successful if she only told him about the graffiti because the defamatory statement has to be communicated to a third person who understands. If however, in Farah's attempt to find out who was responsible for writing the remarks, <sup>she</sup> communicated the defamatory stmt to others she could be held liable for defamation because she knew the stmt was untrue (scienter). Fay would then be able to collect compensatory and punitive

damages from her. Fog may also be

succesful in a False Light - Invasion of

Privacy claim against Farah as long

as the communication of the stat was

to more than just a single third person

and the stat was also considered to be

highly objectionable ~~to~~ a reasonable person. Again, the

requirement of scienter is shown because Farah knows

the stat is false. ~~so~~ Fog will probably

~~only~~ have to show actual damages which

include humiliation as well as pecuniary losses.

Fog may also have a defamation

claim against the University. This

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again will be based if the stnts

are true. If the stnts are false,

then the University's failure to ~~to~~ paint

over the ~~the~~ Graffiti could be

actionable defamation. It appears, though,

that the University intends to ~~cover~~<sup>paint</sup> of

over the Graffiti as soon as possible.

This willingness to remedy the situation

might be enough to bar them from liability

assuming that the stnts are false and

Fox has proved Scienter.

## Choice (F).

I believe it would be unwise to either legislatively or judicially adopt Mr. Huber's proposal. The goal in tort law is to compensate the victim; a total bar to an action for damages would not do that. The law has been that a manufacturer of an unsafe product is strictly liable for damages caused by the defective product. This encourages the manufacturer to put on the market only those products that are safe, thereby deterring future accidents. Their ability to insure against losses also enables them to spread the cost of the loss over a wide range of people and lessen the burden on them. By making the manufacturer ~~not~~ liable, we are also basing liability on fault. In this way an innocent victim harmed by a defective product is compensated for his/her losses. With the advent of comparative fault, if the user of the

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product misuses it or is in some other way partly liable for his/her injuries, the manufacturer's portion of the damages will be offset by the plaintiff's percentage of fault.

In this way we are basing liability in proportion to fault.

Mr. Huber seems to be concerned with fostering economic growth.

His position might also encourage the ~~representation~~ introduction into the market place of more experimental products (especially in the pharmaceutical market). If the manufacturers know they are immune from suit and need only meet minimum guidelines, they will be more willing to put novel drugs on the market.

I believe these goals can be achieved without going to the extreme that Mr. Huber has proposed.

There are several reasons why Mr. Huber's ~~the~~ proposal is not satisfactory. Firstly, governmental

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agencies are too constrained by their budgets. How can we expect these federal agencies to do exhaustive research without the money to do it? Not only that, but the federal agencies do not pay competitive salaries in relation to the private sector, and therefore do not employ the "best" people. \*1 - go to page 9, please.

Secondly, employees of federal agencies are subject to lobbying by the industries. Victims do not have such strong allies to persuade these employees. Sometimes government workers leave the government job only to become one of these lobbyist. Through friendships and knowledge of the agencies' machinations. These lobbyists may taint decisions made by the agency. Also, the more contact an agency employee has with the lobbyist, the more sympathetic the agency employee may become to the lobbyists.

viewpoints. Since the victims of unsafe products have no lobbying force to counter this, I believe it is unfair to let a federal agency set a standard and not hold a manufacturer liable for its unsafe product.

The third problem involved in Mr. Huber's proposal is that of changing political climates. As the leadership in the federal government changes so does the government's policy objectives. How can any sort of predictability as to the standards required be obtained this way? One administration may be greatly concerned with fostering economic growth and will instruct the agencies to set standards that allow more not-so-safe products on the market. The next administration may do just the opposite. Not only that, but personnel changes occur from one administration to the next causing policy shifts within the agencies. These personnel have little

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of any accountability to the public. They are not elected and are not often seen in the public eye. Any complaints by a victim of an unsafe product will probably be lost in the bureaucratic maze of red tape and passing the buck. Why should the agency care? Even if the victims could sue the government for damages (so sovereign immunity), the loss would only be spread to taxpayers - it wouldn't affect their ability to "stay in business." A manufacturer, on the other hand, does worry about staying in business. If he produces a defective product and is sued over and over, it will begin to affect his bottom line. Insurance companies will either raise their rates to cover him prohibitively high or consumers will become aware of the risky product and refuse to buy it. The manufacturers expenses will increase due to high

insurance (thereby increasing the cost of the product), and his sales will decrease due to unfavorable publicity and increased product price. It is just these sort of negative impacts upon manufacturers that ~~helps~~ helps to insure they put out a safe product (deterrence of future accidents). With immunity from liability as Mr. Huber proposes, this important policy will not be encouraged.

What really bothers me about Mr. Huber's proposal is that these agencies will only be setting minimum standards. Because of budgetary constraints, lack of superior personnel, lack of accountability and lobbying efforts, these agencies are not in the best position to determine what the best standard for safety should be. A manufacturer exposed to liability, is in the better position and has more incentive to place a truly safe product on the market.

Instead of a total bar to suits for damages against the manufacturer, a compromise solution may be to use any federally promulgated safety guidelines as evidence in determining whether ~~or~~ or not the manufacturer was negligent. Evidence that the manufacturer did not adhere to the guidelines will be negligence per se. Evidence that the manufacturer did adhere could establish a rebuttable presumption of no ~~negligence~~ negligence. The plaintiff might then show that the standard itself was unreasonable or there was superior knowledge on the part of the  $\Delta$ . This then, would not make the manufacturers strictly liable but would impose on them the duty of reasonable care.

This rule, however, may have a negative impact on the courts. Plaintiffs will sue and because there would not be strict liability,

would incur a great deal of time and money spent in the discovery process. Manufacturers won't necessarily be encouraged to settle out of court if they did comply with the agency standard. It's may settle for less than full compensation under this approach.

While these policies are important considerations in developing test law, Mr. Hulce's proposal neglects the most fundamental policies: the compensation of victims and the deterrence of future accidents. If the manufacturers are going to make a profit from a product, they should also have to bear the losses caused by the products defects. They should not be allowed to shirk their responsibilities by saying all they did was follow the rules. Following the rules is not enough when the rules themselves are inadequate.

\*1. Federal agencies also take a long time to approve of items. This will slow new and innovative products from reaching the market place. The profit motive of manufacturers will speed up the introduction of products and as long as they are liable for the products damage, they will insure its safety.

# 5206

This issue addresses the classic American educational problem "Why Can't Johnny Read?" The public tends to blame the deficiencies of our students on our teachers. Indeed, the teachers of America do have a duty to properly educate the students. The duty for each individual in the teaching profession is that by holding themselves out as a teacher (licensed as such in most states) the teacher impliedly represents that she has the requisite degree of learning, skill, and ability which ordinary teachers in good standing in their community normally possess. They also represent that they will exert their best judgment, and exercise reasonable and ordinary care and diligence in the use of their skills. If the particular teacher holds themselves out as a linguistics expert, they imply that they can be held to the standard of care of an expert in their field, which would make their duty to the student even greater. This duty of educating the children of our country is not one which teachers should take lightly since their success or failure at their task could shape the students' adult life and ability to support themselves in an ever-increasing competitiveness for jobs. Should the educational institutions bear a responsibility as well? Under the Master-Servant Doctrine of strict liability, the institution can not be held liable for negligent hiring of an unqualified teacher. However, under the doctrine of respondeat superior, the school can be held liable for the negligence of the teacher if her conduct was within the realm of her duties. Such negligence in this case might very well be that of omission in failing to provide students with the requisite tools for literacy.

Whether or not a breach has been committed would depend on pertinent facts such as the willingness of the student to participate and learn, or the involvement of the parents. Surely, any student who is preparing to graduate recognizes that his/her skills are insufficient, and if they don't, parents should share the burden of being responsible for the lack of progress on the students part. Before liability is imposed on teachers for breaching their duty, some consideration should be made as to whether or not the student was an incorrigible who would not have been able to learn from even the most competent of teachers. Additionally, parents should be held contributorily negligent for failing to exercise their parental control and assist the teacher in working with the student.

(2)

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who refuses to learn. Students are tested on a regular basis, so there's ample opportunity for all concerned to determine when adjustments are needed to facilitate the student's learning process. The teacher and the institution keep such test results on file, so they have actual or constructive knowledge, and parents are typically required to provide documentation to the school (signed report card) that they are aware of their child's progress or lack thereof. All parties in seems to me must be comparatively at fault when the student graduates unable to read and write. It can't be said that "but for" the negligence of the teacher, Little Johnny would be able to read. Likewise, while it might be foreseeable that negligent teaching would result in a student's insufficient education, it's also foreseeable that if a student doesn't want to learn and their parents don't care, they probably won't learn.

The policies to consider indetermining whether to impose such liability are as follows: 1) Does this imposition of liability on teachers for students deficiencies really base liability on fault? As discussed supra, many parties are to blame and this solution tends to find a convenient scapegoat.

2) How could the court possibly determine the proportionality of which party was how much at fault? It would seem that to attempt to impose this liability would create more problems than it solves. To hold all parties equally might not truly reflect liability proportionate to fault and yet trying to establish meaningful ratios would be next to impossible because each party involved has their own view of why the problem

exists and it will invariably not be their fault to their way of thinking.

4) Imposing this liability on educators and/or institutions might have a deterrence effect in that it will force those parties to take a closer look at their policies and re-examine their effectiveness. However, such liability could also have the deleterious effect of discouraging excellent potential teachers from entering the teaching field for fear that they'll be sued and suffer financial ruin and/or professional ostracism because they were given an unteachable student to teach.

5) Schools in today's economy are already facing soaring costs and having great difficulty raising the funds necessary to provide a good quality education. This policy could serve to further drain the precious resources the schools are struggling to hold onto. Private schools could foreseeably have to shut down for lack of funds to pay the ever-increasing insurance costs. Public schools would be forced to request more tax increases to cover their increased insurance costs. 6) In view of the frequency of this problem occurring, insurance companies might refuse to cover this kind of liability altogether, which further exacerbates the financial strain on schools and teachers.

7) While proponents of this measure might suggest that this liability would force teachers to utilize their resources, i.e., teaching skills on slow-learners or uncooperative students, letting the teacher absorb all of the blame prevents the student from being placed in the position of having to utilize all

of their resources as well as parents who tend to think that teachers acting in loco parentis are responsible for rearing their children for them.

The most manageable and practical solution to this problem is not to clog the courthouse with more litigation, but to lobby the legislature to impose new laws stating that a high school diploma may not be received until the graduating student has proven basic literacy skills. This forces specific performance of a sort on our teachers and institutions to make sure they teach the student properly or he'll stay there in school until they do. It also forces the student and his parents to get involved in the students academic progress and fosters predictability both in terms of what students can expect if they don't get an education and what employers can expect when they hire someone who has a high school diploma. By allowing this process to go through the legislature, the judiciary will have exhibited its respect for co-equal branches, and can rely on them to set forth practicable guidelines for administering the program, which is, after all, the legislature's function.

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. 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 useful, 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.

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Select and address from ONE of the following six choices labeled (A) through (F):

Choices (A) through (B): With reference to its history and legal application, and its value and limitations as an instrument of public policy, discuss the role in the law of negligence played by:

Choice A: Duty.

Choice B: Foreseeability.

Choices C and D: From a legal and public policy perspective, discuss the manner and extent to which the law of negligence seeks to promote:

Choice C: Individual Responsibility.

Choice D: Economic Progress.

Choice E: From a legal and public policy perspective, discuss the relationship, if any, between the "eggshell skull" rule and the "seatbelt defense."

Choice F: From a legal and public policy perspective, discuss the changes in tort doctrine caused by the adoption of comparative negligence and comparative responsibility.

[END OF EXAM]

Approximate time: one hour.

Essay Question Choice A:

To review the history of Duty, we'll begin with the period just prior to the industrial revolution when the responsibility one had for another was clearly defined by special writs. These writs based a duty to observe reasonable limits of conduct within special relationships individuals had with each other such as master/servant contexts. If the obligation was not legally spelled out within one of these specific writs, no duty of care existed. While this arrangement may have suited a more innocent and rural environment when individuals lived their whole lives in relatively protected and predictable confines, the Industrial Revolution changed that way of life and thinking for all times.

With the infancy of modern technology, the growth and expansion of the new machine took precedent over more traditional value systems and the overriding concern was for economic growth. To foster economic growth, businessmen could not be concerned with negligent conduct or the resulting harm because it would hamper their progress with small details like safety in the workplace and liability for injuries to the employees and consumers alike. To facilitate this economic growth, duty obligations were established by contractual agreements. One only had a duty of care to those with whom he was in privity with. This greatly restricted the limits of liability because anyone beyond the scope of the original contract was not in privity and, therefore, not protected. Tort law was evolving trying to create a duty of care to individuals based on their close connection with one another in the absence of contract but even in the 1800's, when a mail coach driver was injured in an accident resulting from faulty maintenance of the mail coach, his recovery was denied because he did not have privity with the coach repair company, only the coach company and the repair company were in privity and he was outside the scope of the contract.

In the early 1900's, in MacPherson v. Buick, the closed contract theory of duty was cautiously expanded when recovery was allowed by the purchaser of a car from the manufacturer despite the presence of the dealer as a middleman.

Although the negligence was not caused solely by the manufacturer, the defective wooden wheel, made by a parts manufacturer, was deemed to have been installed without proper inspection, thereby providing a basis for the negligence action against Buick. Buick tried to avoid liability by using the Contract excuse, that the manufacturer only was in privity with the dealer and not the consumer, but the court held that the duty of care extended to the purchaser.

J. Cardozo continued to link the concept of duty beyond the restricting confines of contract theory to the more reasonable and protective approach of foreseeability. In Palsgraf, he clearly enunciated the standard that remains today as the law, "the risk to be perceived, defines the duty to be obeyed." Even though, individuals may at one time have been able to rely on the mutual consent form of contract law coupled with good faith dealings, with the growth of industry, the only contracts available to purchasers were ones of adhesion and not for their protection at all. Commercial enterprises were finding new and blatant ways to limit duty of care as to practically make the concept non-existent.

In 1960, the court in Henningsen, provided a larger measure of protection for purchasers when it held that the implied warranty of merchantability was extended to the ultimate consumer, not just to original purchaser. Once a manufacturer loses a defective product into the stream of commerce, the duty of that negligence extends further to the protection of individuals that in the past would not have been compensated for their injuries, in spite of another's negligent acts. Although tracing the progression of duty logically through products' liability, these examples only are intended to reveal the evolution of the concept in all areas of tort law. See Palsgraf. The courts have felt the need to expand the definition of duty from its narrowly early days with the special writs to the modern concept for several different reasons.

It seemed unfair that innocent victims of another's negligent conduct were denied recovery with reliance on privity of contract. This was even more the case, when a wealthy corporation or manufacturer was involved since they could most reliably determine or remedy the negligence, they could insure their products' safety and let the insurance company spread the loss to all its policy holders, thereby spreading the costs broadly to many instead of making an innocent victim shoulder all the burden of an injury suffered through no fault of his.<sup>38</sup> While manufacturers and other big businesses were insulated from liability for any responsibility to either consumers or employees, there was no deterrence to avoid similar injuries or try to improve product safety. It is fair that large companies accept their duty to protect foreseeable victims and provide a fair rate of return for their shareholders as well as compensating innocent victims who have relied on their care in the production of the articles in use.

Now, duty is owed to those persons who are foreseeable victims of another's unreasonable conduct. It is predictable that if one does not exhibit a reasonable standard of care towards others, he will be breaching that duty of care and will be held accountable for that breach. Because the injured party who has been placed at risk of this unreasonable harm can now recover for his injuries, the cost of the injuries suffered are no longer placed on one who is blameless, but on the one who blameworthy. This seems not only an equitable solution but will hopefully serve as a deterrence against future careless conduct as well.

### A. Duty

As the concept of duty has progressively evolved from the bedrock of "No Duty," it has become increasingly difficult to conceive of duty ~~without~~ and its ~~considering~~ close future in tort law without also considering foreseeability.

The Common Law tradition of "No duty" was borne from a fundamental conviction in rugged individualism and laissez faire. It ~~gained~~ particular strength—and poignant harshness—during the late 19<sup>th</sup> Century Industrial Revolution when industry wanted unrestrained growth and workers ~~and~~ (and city dwellers) were exposed to previously unknown risks.

In denying relief to an impoverished commuter, <sup>in Palsgraf</sup> Judge Cardozo defined the level of duty in terms of the risk which is reasonably foreseen. However, it was Judge Andrew's dissent which has special significance