
FINAL EXAMINATION

Limited open-book. Two hours.

Write your exam number here: _____

All exam materials (including this booklet and your response) must be turned in at the end of the period. You will not receive credit unless you return this booklet with your exam number written above. Do not turn the page until instructed to begin.

Notes and Instructions

1. Assume that today's date is December 11, 2009.
2. You may write anywhere on the examination materials – e.g., for use as scratch paper. Only answers and material recorded in the proper places, however, will be graded.
3. Your goal is to show your mastery of the material presented in the Torts I course and your skills in analyzing legal problems. It is upon these bases that you will be graded.
4. Do not dwell on intentional torts or strict liability, to the extent you choose to mention them at all.
5. During the exam: You may not consult with anyone – necessary communications with the proctors being the exception. You may not view, attempt to view, or use information obtained from viewing materials other than your own.
6. After the exam: You may discuss the exam with anyone, except that you may not communicate regarding the exam with any enrolled member of the class who has not yet taken the exam, and you must take reasonable precautions to prevent disclosure of exam information to the same.
7. Unless expressly stated otherwise, assume that the facts recited herein occur within one or more hypothetical states within the United States. Base your exam answer on the general state of the common law and typical statutory law in the United States, including all rules, procedures, and cases as presented in class, as well as, where appropriate, the theory and history discussed in class. It is appropriate, if you wish, to note differences between minority and majority approaches in your answer, as well as statutory or other differences among jurisdictions.
8. Note all issues you see. More difficult issues will require more analysis. Spend your time accordingly.
9. Organization counts.
10. Be complete, but avoid redundancy. Specifically, do not repeat the exact same analysis with substituted parties. For instance, computer users should be very careful with the cut-and-paste function; it is probably best not to use it at all. Instead, to the extent called for, it is appropriate to incorporate analysis by reference to another portion of your exam answer.
11. Feel free to use abbreviations, but only if the meaning is entirely clear.
12. **Bluebooks:** Make sure your handwriting is legible. I cannot grade what I cannot read. Skip lines and write on only on one side of the page
13. This exam is "limited open book." The only materials to which you may refer during the exam, other than this exam booklet, scratch paper provided as part of the exam administration, and any special references specifically authorized by the Dean of Students office, are: (a) the authorized copy of the Fall 2009 Torts Wypadki, which will be distributed to you in the exam session, (b) a "reference sheet," consisting of a single 8.5-inch-by-11-inch sheet of paper, upon which anything may be written and/or printed, including on both sides, front and back, and (c) sticky tabs labeled with subject headings to insert into the wypadki, if you so choose. You may not consult or access any other piece of paper, including, but not limited to, a copy of the wypadki that you have printed out yourself. No materials may be shared during the exam.
14. Do not write your name on any part of the exam response or identify yourself in any way, other than to use your examination I.D. number appropriately. Self-identification on the exam will, at a minimum, result in a lower grade, and may result in disciplinary action.
15. Good luck!

“Adventures in Housesitting”

THE FRANDSEN FAMILY PULLED UP TO 95 Torrington Drive in Prairie Lakes, Texlahoma. While Dave, the dad, and Millie, the mom, started pulling luggage out of the minivan, 7-year-old Billy took the house key and ran with his 2-year-old sister Sally to the front door.

Dave’s sister, Hannah Hustead, had left Texlahoma and was spending a month away on business, taking her husband and baby boy with her. The Frandsen family would be housesitting. It was a win-win. Hannah didn’t have to worry about her house, and the Frandsens didn’t have to spend December in the windy, frozen wilds of northern Minnekota. In fact, the day they arrived in Prairie View it was 72 degrees with a sky full of pure, cloudless sunshine. A gentle breeze seemed to be beckoning them toward the house. It would be like living in a luxury hotel. Hannah’s mini-mansion had six bedrooms, seven baths, a pool, a tennis court, and a huge game room in the basement.

Dave and Millie looked at each other and smiled.

The smile left Millie’s face when she felt something strange. She looked down to see Sally throwing up on her flip flop.

“Mom! Dad! The bathroom is gross!” Billy shouted.

Mille and Dave walked toward the house, but they took only two steps before the wind shifted and the smell hit them. As they went inside, it was clear that the bathroom on the first floor, next to the guest room, was harboring something foul. Millie gagged, and Dave ventured on alone. Holding his nose, Dave pushed the door open and peered inside. He saw the problem. It looked like what it smelled like: Raw sewage. The bathtub was full to the brim.

Dave called Hannah, broke the news, and got the name of Hannah’s plumber, Pamela Pavlozak. Even though it was a Saturday, Pamela said she was happy to come over and take a look at the situation. She was there within 15 minutes and went immediately to work. After a good deal of pumping, probing, and snaking, Pamela emerged from the bathroom and came up to Dave holding something Dave did not want to touch.

“Check it out,” Pamela said. “Don’t worry, I rinsed it under warm water. It’s a tree root. Willow tree, actually. There’s a shared sewer line under the house, and there was a knotted mass of these willow tree roots in the pipe. That backed the sewage up into the tub. The shared sewer line starts at the house on the south side of you, that’s where Steve Stapleton lives. Kind of a weird guy. You can blame him, because that was his sewage that you got in here. The line runs from Steve’s place, under your house, and then under the house of your neighbor to the north, Nick Nabben. Now, he’s got the only willow trees in the neighborhood. Super nice guy. But I reckon everybody in Prairie View knows you can’t plant a willow tree next to a sewer line. Nick probably doesn’t understand, being from Vermont. So, you might want to let him know. But it’s fixed for now. Anyway, while I was rinsing off this tree root in the bathroom sink, I noticed that the drain pipe under the sink was leaking slightly. So I took out the leaky pipe.” Pamela opened the sink cabinet to show Dave and then closed it. “Unfortunately, I don’t have a replacement on the truck. I’ll bring one by later today. Just make sure you don’t use the sink in the meantime. The cabinet should be okay. There was just a little bit of dampness in there.”

“Well, we may not be here later today,” Dave said, trying not to breathe through his nose. He handed Pamela a house key. “Here, just let yourself in when you have the replacement part, and then lock up when you leave, if you don’t mind.”

"Alright. Will do. I've opened up all the windows and I'm setting up some high-powered fans to get rid of the smell. In the meantime, if you're uncomfortable here, I can recommend the ComfortMax Hotel," said Pamela.

The Frandsens headed straight over.

LATE THAT NIGHT, high school seniors Wendy Wanless and her best friend Vivian Vermeer were sneaking around the neighborhood looking for some place to drink a bottle of whiskey that Wendy had nicked from her father. Seeing the windows open at Hannah's house, and knowing that Hannah was out of town, Wendy and Vivian went to the side of the house, slid up one of the window screens, and crawled up and inside. They plopped on the sofa and opened the bottle. After a couple of hours, the two young women were quite intoxicated.

"We should get out of here," Vivian said. "But we should leave some sort of a thank-you note. Something that won't give away who we are."

Wendy enthusiastically agreed, and the two came up with the idea of using a bathroom mirror to write a message that would appear only when the room was steamed up. Using some knowledge Wendy had gleaned from a film in science class, they made a solution of dish soap and water. Then they went into the first-floor bathroom next to the guest room and used a Q-tip to make several hearts on the bathroom mirror.

"Let's test it!" Vivian said. They turned the tap on to run the hot water and left the bathroom, closing the door. Then they went into the living room and did some more drinking. They then completely lost track of time, but when remembered the bathroom, they came in and were delighted to see a flutter of ghostly hearts through the warm mist.

"Oooh! That's sweet!" Wendy said. "I like that. Ummm, well, we really should go now before someone finds us. Besides, something kind of smells bad in here, doesn't it?"

Vivian and Wendy turned off the faucet and let themselves out the way they came in.

ON SUNDAY MORNING, Dave and Millie decided they should treat themselves to a romantic brunch before heading back to Hannah's house. But what could they do with the kids? The only drop-in daycare they could find that was open was Junior Jungle. Their slogan was, "Where kids can go wild." Junior Jungle it was.

Millie and Dave dropped went to a recommended lakeside inn and had a delightful meal. (The french toast was exquisite.) They retrieved the kids a few hours later. Both Billy and Sally were hauled themselves into the minivan with exhausted effort.

"You guys look beat," Millie said. "You must have played hard."

"I not tired," Sally said with a yawn.

"We did a lot of jumping and swinging," Billy said.

As soon as they got back to Hannah's house, Billy and Sally were ready for a big nap. Excellent, Millie thought, as she tucked them in. First a kid-free brunch, and now some peace and quiet while they took a nap. This was shaping up to be a wonderfully relaxing day. But walking back downstairs, Millie felt a twinge of guilt. Or, maybe it wasn't guilt. Why would she feel guilty? But Millie definitely felt a twinge of something. Could it be anxiety? What was there to be stressed out about? Nothing that Millie could think of, but her stomach was suddenly in knots. Then Millie's head began to swim. Walking into the first-floor bathroom – the one by the guest room – she had a sudden dawn of understanding. She had felt this twinge before: Food poisoning.



Lou's at the Lake

Romantic Sunday Brunch Menu

Strawberry Peach Stuffed French Toast
Crème Brûlée French Toast with Drunken Berries
Gingerbread Waffle with Apple Compote

A Selection of Fresh Fruit

Mimosas
Bloody Mary
Fresh-Squeezed Orange Juice
Coffee

Chocolate-Covered Strawberries
Grilled Amaretto Peaches
Brandied Pear Shortcake with Raspberry Mascarpone
Fresh Strawberries with Coconut Crème Anglaise

Prix Fixe \$45

At Lou's our food is so good because it is so fresh, and because our suppliers are so special. All of our produce is organic and is grown locally. Our eggs come from just two suppliers – Abbingdale Acres and Easington Estates – and to ensure freshness, we use only the eggs we received the same morning. We are proud that Lou's has been voted Prairie View's most romantic brunch for the past five years. We know your experience will be exquisite.



Our not-so-romantic lawyers made us add this:

BY EATING AT LOU'S YOU AGREE TO ASSUME THE ALL RISK OF DOING SO, AND YOU WAIVE ALL CLAIMS, INCLUDING FOR GROSS NEGLIGENCE AND RECKLESSNESS, AGAINST LOU'S AND LOU'S SUPPLIERS.

Feeling chills, Millie started a hot bath. Then waves of nausea washed over her. She braced herself, putting a hand on either side of the sink and leaning over it. Though she tried to hold herself perfectly still, she felt like she was slowly sinking and drifting forward. It was strange – she just couldn't stop the sensation of movement. And then, with a lurch, the sink, the cabinet, and the floor all gave way. Millie fell, along with half the bathroom, into the basement.

Millie found herself in the game room, sitting in a surreal soup of debris and water ringed with vintage arcade games, their soaked particle-board housing bulging and splitting. For just a moment, Millie thought she saw hearts appear in large shards of the bathroom mirror. Then leaned back against a Q*bert machine and passed out.

WHEN MILLE CAME TO, it was night, and she was in McLennan County Medical Center.

"Hello Ms. Frandsen, I'm Doctor Donald Dregnan. You are having a bad bout of food poisoning."

"When will I be better?" Millie asked.

"Unfortunately, it will be three to four days before you are feeling well enough to go home," Dr. Dregnan said. "We ran some tests, and you have a strain of Staphmonelda parafrineus, a kind of bacteria found only in eggs that have been improperly stored without refrigeration for a period of days. Have you eaten any eggs or anything containing eggs in the past 24 hours?"

"The only egg-containing thing I've had in a week is brunch: french toast at Lou's at the Lake," Millie said.

"I see," said Dr. Dregnan. "We'll call the public health department and let them know. In the meantime, get some rest. I will call your husband and let him know that you are awake. He took your kids home to sleep."

FIG. 1: The menu at Lou's at the Lake, where Mille and Dave Frandsen ate brunch.

UNFORTUNATELY, THE KIDS were not asleep. Billy was playing a hand-held video game, and Sally was watching cartoons on Hannah's incredible 65-inch plasma-screen high-def television. Meanwhile, Dave was surfing the internet looking for information on food poisoning and trying to make sure that the doctors at McClennan Medical Center had a good reputation.

Then Dave heard a sickening crash. He looked up to see Sally holding a golf club over her head in front of the cracked and sputtering plasma TV that she had just destroyed.

"Smack'em!" Sally shouted exuberantly.

Billy came running in to see what was happening.

"Oh, shudders," Billy said. "Sally must have been playing Smack'em. It's a game they taught us at Junior Jungle. You swing a golf club at cartoon characters on a big TV. Only they have a plastic golf club and there's a big clear shield in front of the TV."

"Give me the golf club, honey," Dave said calmly.

Sally did as she was asked. "You play?" she offered.

Dave put his head in his hands. Hannah had said the first-floor was baby-proofed. "Where did you find this golf club, sweetie?"

"There!" Sally pointed under the sofa.

Dave, dumbstruck, stared into space.

"What wrong Daddy?" Sally asked. "You sad?"



FIG. 2: A simulated view of *Jungle Junction* on Hannah's plasma TV, seconds before disaster.

MILLIE'S TIME IN THE HOSPITAL was agonizing. She experienced constant dizziness, nausea, and a horrible feeling of itchiness between her ears and in the back of her mouth. After four days, Millie was finally fully recovered, and Dr. Dregnan discharged her. Later, Millie relayed the whole story to her college friend, Indee Iannuzzi, who is now an internist.

"You should have called me, Millie," Indee said. "There's a new treatment for Staphmonelda parafrineus poisoning. It's a two-drug therapy using moxigloxamycin and trexamethasol. I guess very few physicians know about it yet – both of the drugs are quite new. But I think it's reasonable to expect physicians to educate themselves about cutting-edge treatments like this. You could have left the hospital the same day with no symptoms."

"I would never want to bother my friends for free advice," Millie said.

"You should! C'mon, Millie. That's what friends are for," Indee said. "Hey, did the health department ever find out where the Staphmonelda parafrineus came from?"

"No," said Millie. "They said they were closing the case without making a finding. Oh, and you know what else? That plumber, Pamela – she never came back. Can you believe it?"

"Listen, Millie, I just got a page," Indee said, "Sorry. I've got to go. But next time you're sick, you really should call me, okay?"

"Sure," said Millie. She hung up the phone. Then Millie thought about it for a second. Maybe she really shouldn't be afraid to ask her friends for helpful advice now and then. She did wish she knew more about the legal aspects of everything that just happened. Come to think of it, Millie has a friend in law school: You.

Your phone rings. It's Millie. She tells you the whole story of everything that's happened since she got to Texlahoma.

"I'm definitely not looking to sue anyone," Millie begins. "And I would never sue anyone in my own family, and I know you're still a law student. But just out of curiosity, are there any claims here? And could anyone sue us? If this all went to court, what would happen?"

You explain to Millie that you aren't a lawyer, and that you can't be her lawyer, but you are happy to think through the situation with her.

QUESTION

Analyze the parties' claims and liabilities, answering Millie's inquiry.

Please organize your response, to the extent it is reasonable to do so, in chronological order. That is, analyze colorable liability in the order in which it accrues (i.e., when there is a present injury that might appear to be the basis for a lawsuit.)

A few things to keep in mind in writing your answer:

- Avoid needless repetition. (See item no. 10 in the notes and instructions.) Do not repeat the exact same analysis with substituted parties. Computer users should generally avoid the cut-and-paste function. Incorporate analysis by reference to another portion of your exam answer to the extent appropriate.
- Keep in mind the subject matter of the Torts I course. Do not dwell on intentional torts or strict liability (to the extent you wish to say anything about them at all).

CREDITS: All photography and other content by Eric E. Johnson, except: Jungle Junction screen, by Spider Eye Productions.