

UNIVERSITY OF OKLAHOMA COLLEGE OF LAW

Torts

Fall 2020

Prof. Eric E. Johnson

FINAL EXAMINATION

GENERAL INSTRUCTIONS:

1. You can print out the PDF exam booklet and mark on it as a means of helping you analyze the questions and hypothetical facts.
2. Sharing this exam or any portion thereof is prohibited.
3. After the exam: Communicate nothing about the exam, including even vague impressions or characterizations, to any member of the class who has not yet taken it.
4. Your goal is to show your mastery of the material presented in the course and your skills in analyzing legal problems. This is what you will be graded on.
5. Unless otherwise provided, base your legal analysis on the general common law and typical statutory law in the United States, including all rules, procedures, and cases from the course, plus any hypothetical laws presented in the facts.
6. Some specifics regarding multiple choice questions (1/8 of the exam grade):
 - a. I strongly recommend you limit yourself to 30 minutes to ensure you leave adequate time for the essay portion.
 - b. You must answer the questions within the Canvas webpage to receive credit.
 - c. There are 13 questions. Each question will be worth one point. The exception would be if I end up throwing out a question because of error or irregularity. In such a case, the affected question would be worth no points.
 - d. There will be no penalty for incorrect answers. So if you don't know the answer to a question or are running out of time, you should guess.
7. Some specifics regarding the essay (7/8 of the exam grade):
 - a. Organization counts. Read all questions before answering any of them - that way you can be sure to put all of your material in the right places.
 - b. Within the confines of the questions you are asked, note all issues you see. More difficult issues will require more analysis. Spend your time accordingly. As appropriate, you may, if you wish, note differences between minority and majority approaches in your answer, as well as statutory or other differences among jurisdictions.
 - c. Clarity counts. Clearly label each question separately in your answer. Be aware that there are no points to be won or lost for spelling, grammar, or stylistic aspects of writing - so long as I can understand what you are saying. Feel free to use abbreviations, but only if the meaning is entirely clear.
8. The bulk of the instructions for this exam are those previously disclosed in Section 2 ("Parameters") of the Exam Prospectus. For convenience and emphasis, I include that text below. Certain portions of the text where I disclosed what I *planned* to do, are omitted and replaced with *****, as that material is now superseded by instructions above.

**[BEGINNING OF REPRINTED MATERIAL
FROM EXAM PROSPECTUS §2:]**

A. Obeying Exam Requirements and Instructions: A failure to follow exam requirements and instructions is an academic misconduct issue, and violations will presumptively be treated as such, even if inadvertent. (See §6-6 of the Syllabus.) This applies to the requirements set out below, those set out in the Syllabus, and any instructions on the exam itself.

B. General Format and Time Considerations

The exam will be administered through Canvas.

The exam will consist of Part I (multiple-choice questions) and Part II (essay). Details are below.

You will have a total of four hours to complete the exam.

You must comply with the instructions of the College of Law's administration and staff with regard to when you can or must begin and when you can or must end.

C. Part I of the Exam:

Part I of the exam, worth one eighth of the total exam grade, will consist of ***** multiple-choice questions. I strongly recommended that you complete Part I first and that you spend no more than 30 minutes on it. *****

D. Part II of the Exam, in General:

Part II of the exam, worth seven eighths of the total exam grade, will require a written response. I recommended that you do Part II second and that you spend 3.5 hours on it. This part of the exam will consist of multiple open-ended questions calling for written, essay-style responses to a hypothetical fact pattern.

There is no length limit (e.g., word limit or page limit).

You will provide your answers to all questions in a single document you upload. (See below for mandatory formatting requirements.)

E. To Help You In Prepping Your Answer for Part II:

***** **I strongly urge you not to copy and paste material from the exam booklet into your exam response!** (I will already know what's in the exam booklet because I will have written it. If you need to refer to material in the exam booklet, just refer to it. There's no need to quote it.)

In recent years – before the pandemic – I divided the Part II essay portion into two periods: a “reading/outlining period” of 30 minutes and an “exam writing period” consisting of the remainder of the time for the essay section. Because of the constraints imposed by the circumstances of the pandemic, I will not be enforcing a similar division of time on the essay portion of the exam. Nevertheless, I urge you to impose upon yourself an initial 30 minute reading/outlining period during which you refrain from beginning to write

your response and instead limit yourself to reading the exam booklet (that is, the facts and the questions), taking notes, referencing your outlines or books as needed, and outlining your response on scratch paper. I believe your doing this will make your response better.

F. Formatting Requirements for Your Part II Response:

You will upload your essay response either as a PDF or DOCX.

Mandatory formatting requirements: The document **must** be 8.5-inch-by-11-inch in size in portrait orientation with line spacing set to **single-spaced** with the only font used being **12-point font**, and with the **margins set to 1 inch** all around. Put your exam number in a paragraph by itself at the very beginning of the document and in a paragraph by itself at the very end. If your exam response does not meet these minimal mandatory formatting requirements, points will be taken off.

Strong recommendations for formatting: The document **should** use only Arial, Helvetica, or a similar sans-serif font and have paragraphs where the first line is set to indent by 0.5" and there is 6 points of space after each paragraph. The document header should consist only of your exam number and the document footer should have only the page number or, preferably, say "Page X of Y" where X is the page number and Y is the total number of pages.

I have posted to the class webpage an exam response template that I urge you to use if possible.¹ (When you use it, replace "000" with your exam number.)

Do not disregard the formatting requirements or recommendations! These format requirements are so that all responses will look alike and be similarly readable. My intent is not to add to your burden in writing your response, but in the legal world, courts require documents to be formatted certain ways. So it seems to me to be reasonable to require the exam responses to be set out in a certain format to facilitate fair grading.

G. Anonymity and Identification:

Use your exam number. (Your examination identification number, of course, means your examination number for this semester – not one from a prior semester.) As set forth above, the exam number, on a line by itself, must be the first thing and the last thing in the body of your essay response.

Each exam will be "blind graded," so that I will not know the identity of the student as I am grading her or his exam. **You may not waive anonymity. Do not include your name in your exam response, and do not write your name on any exam materials.** Self-identification on the exam or otherwise compromising anonymity will presumptively result in both a deduction from your exam grade and a referral for disciplinary action.

¹ The direct URL is:

http://ericejohnson.com/docs/Essay_exam_response_template.docx

H. Allowed and Not Allowed:

There will be no difference between what is allowed and not allowed for Part I and Part II of the exam. The whole exam will be conducted on what might be called an open-book basis, more or less. Here's the specific rules:

(i) You may access any print sources you like for which you have your own copy, but you may not share print sources with anyone else, including other students.

(ii) You may access any of your own electronic documents for which you have a locally stored copy.

(iii) You may access my own website at ericejohnson.com and any materials thereon. But note that while I do not foresee any web hosting problems with ericejohnson.com, I cannot guarantee service during and through the exam period. Thus, I recommend having locally stored copies of any documents from ericejohnson.com that you consider essential.

(iv) You may use scratch paper. You may also use a digital device to take notes – i.e., to serve as virtual scrap paper – but whatever notes you make must be locally stored and may not be stored online or made accessible to anyone else.

(v) You may use a timer, such as a kitchen timer, a timer app on your phone or computer, a countdown function on your watch, etc. And, if it ends up being helpful, you may use a calculator, including a calculator app on your computer or phone.

(vi) You are prohibited from communicating with anyone during the exam period. You may not communicate with anyone – whether in person, on the phone, via text, or via any platform (e.g., Twitter, GroupMe, Discord, Facebook, Snapchat, Zoom, or anything). So, among other things, you are prohibited from collaborating with or asking for help from any fellow student or any non-law-student for any purpose, including, for instance, helping you figure out what something means, proofreading your essay response, or helping to let you know when you are running out of time. The only exception is that you can have entirely non-substantive communications with people along the lines of sharing physical space. So, you can yell, "Get out of the bathroom already, I'm taking an exam!" or "Can you please take the crying baby outside, I'm trying to take an exam!" If you need technical support (e.g., "This stupid thing won't upload, can you help me?"), you can communicate with staff at OU for that purpose. If you use another person who is not OU staff for technical support, such a roommate, sibling, etc., then you must disclose that communication immediately following the conclusion of the exam to a member of the OU staff who is helping to administer exams. If disclosure is prompt and if it is determined no substantive help was given, then this will not be considered a rule violation. Under no circumstances may you communicate with another member of your section – even to help with tech support issues.

(vii) You are prohibited from accessing any internet or online sources at all – with the exception of the OU Canvas site you are using to take the exam and any materials available on my own website at ericejohnson.com (see above). This means, for instance, that you may not access or search for anything using Google, Westlaw, Lexis, Quimbee, government websites, library websites, etc. And, of course, you cannot make or receive any communications via social media.

**[END OF REPRINTED MATERIAL FROM
EXAM PROSPECTUS §2]**

MULTIPLE-CHOICE PORTION

1. Which of the following situations is least likely to give rise to strict liability?
 - (A) “Gretalynn,” a goat in the Farm Friends Corral at the Farapolis City Petting Zoo kicks three-year-old Amelia Asadu, sending her to the hospital with broken ribs. The Farapolis City Petting Zoo is owned and operated by the Parks & Recreation Department of the City of Farapolis. Gretalynn, who’d always had a friendly disposition, is a pure-bred Thatherton, a breed raised for centuries in Karelia for its rich wool.
 - (B) “Bessie,” a milk-producing pure-bred Brown Swiss cow owned by a dairy farmer, wandered into the vegetable patch of Bradford Brantley, a retiree living on three acres of land on the rich soil of the Delta region of Arkassippi. Bessie trampled and ruined several of the vegetable plants. It’s farm country, and it’s a fence-in jurisdiction.
 - (C) “Charlie,” a giant 150-year-old-plus tortoise, lives with Carla Claihsfahl in the rolling foothills of Convasta County, Wyorado. Carla is only the latest of Charlie’s many owners and caretakers. He was originally taken in by a sea captain who found him on a shoal off the coast of Namibia back in 1866. One day Charlie wandered away from Carla’s yard and into the garden of Carla’s neighbors. The neighbors had no fence around their garden, and Charlie munched on lettuce being grown in their garden. Arid and sparsely populated, Convasta County is ranch country, and it is a fence-out jurisdiction.
 - (D) Hexetron Agri-Dynamics Inc. was testing its new nuclear-powered cropdusting airplane, the Dragon Duster 3000. Unfortunately, on its second test flight, the plane fell out of the sky and crashed into Frannie Frelzer’s farm, spewing hundreds of gallons of herbicide and radioactive contamination all over Frelzer’s pumpkin patch. It looks like she’ll have to call up Pokey Oaks Elementary School and tell them that the field trip for this autumn is off.
 - (E) Enormo Entertainment is filming the latest installment of its wildly successful motion-picture franchise about a group of tough young lawyers who drive fast cars and make bad arguments: *Speedy and Spurious 7*. To create a signature stunt sequence, Enormo Entertainment evacuated part of downtown Nashlanta on a Sunday. At the corner of State Street and Park Boulevard the film crew rigged hundreds of pounds of pyrotechnics to explode when, according to the plan, a stunt performer jackknifed a tractor-trailer into a sailboat in the middle of the intersection. Unfortunately, after the director called “Action!”, the stunt driver of the tractor-trailer timed his braking wrong and landed the truck in the middle of a building lobby. The pyrotechnics, knocked off their platforms, were propelled into a restaurant, where they exploded. The property damage will run into the millions. Fortunately, however, no person suffered any bodily injuries. Even more fortunately, the spectacular destruction was caught on film from 18 different camera positions.

2. Thalia and Sebastian were extremely intoxicated – drunk on vodka and high on marijuana – when they squeezed together into the driver’s seat of Thalia’s car to drive jointly down a rural road. They were driving more than 50 miles an hour over the speed limit when they went through a red light and impacted a vehicle carrying Veronica and Peabody. Sebastian was essentially unhurt. Thalia suffered a severed artery in the crash and died from her injuries at the scene. Veronica, a highly paid business executive who supported a wife and a newborn baby, sustained massive trauma to her chest and abdomen. After four pain-filled weeks in a hospital’s intensive care unit, Veronica died from the injuries she sustained in the crash. Peabody required surgery because of the injuries he received in the crash, but he will survive. Which of the following is most clearly not correct?
- (A) Because of survival statutes, Veronica’s claims for pain and suffering, medical care, and any lost wages will survive her death and be recoverable by her estate.
 - (B) Because of survival statutes, Thalia’s liability will survive her death, and Peabody will be able to recover against her estate.
 - (C) If Peabody obtains a verdict for money damages against Sebastian, and a court enters judgment on that verdict, Peabody will not actually be able to get any money or otherwise satisfy the judgment against Sebastian until he brings a contribution action, during the pendency of which Sebastian can appeal the original judgment.
 - (D) Even if jointly operating the vehicle was Thalia’s idea, and even if she was the one who put her foot on the gas and was the sufficient cause of the vehicle going through the red light and impacting the vehicle carrying Peabody, Peabody will still be able to recover against Sebastian because the two were engaged in a joint enterprise that tortuously injured Peabody.
 - (E) Veronica’s wife and minor child will have a wrongful death cause of action against Sebastian.

3. Dr. Donald Dregnan recommended to his patient, Pierre Pierpont, a hepatic artery bypass graft surgery. Even though Pierpont had no outward symptoms of liver disease, and despite the fact that he had only some indicators of mild decrease in liver function from a single blood test, Dregnan nevertheless told Pierpont that surgery was by far the best course, since it would greatly improve his liver function.

According to medical experts, the medical standard of care is to not recommend or perform hepatic artery bypass graft surgery for mild decrease in liver function. Moreover, according to medical experts, the medical standard of care is not to even diagnose mild decrease in liver function on the basis of the indicators Dregnan perceived from the single blood test. The medical standard of care is to order follow-up tests. But, to put it bluntly, Dregnan is not a very good doctor.

When Pierpont asked Dregnan about the risks of hepatic artery bypass graft, Dregnan simply said there was nothing worth worrying about. In fact, however, like most major surgeries, hepatic artery bypass graft surgery carries risks of infection and thrombosis (blood clot), either of which can be disabling or fatal. Most surgeons consider the disclosure of these risks important, as do most patients. And Pierpont, for his part, would not have agreed to the surgery had he been told of the risks. But not having been given the information, Pierpont agreed to undergo the surgery.

Putting aside the fact that the surgery was not medically necessary, Dregnan performed it competently. Unfortunately for Pierpont, a thrombosis resulted and caused an arterial embolism that led to tissue death in the quadriceps muscle of the left thigh. Thankfully, the muscle damage was minor, and Pierpont has suffered no noticeable disability in walking or in moving his leg lasting beyond a week.

From among professional negligence, medical battery, and informed consent actions, what causes of action are likely to be ones for which Dr. Dregnan will be held liable?

- (A) professional negligence, medical battery, and informed consent
- (B) professional negligence and informed consent, but not medical battery
- (C) professional negligence, but not medical battery or informed consent
- (D) informed consent, but not professional negligence or medical battery
- (E) not any of professional negligence, medical battery, or informed consent

4. Roger, a professional photographer and member of the paparazzi, took a brilliantly clear photograph of A-list celebrity movie star Stanton Struvik looking fabulous and smiling in the direction of the camera as he was exiting a Moonbucks Coffee shop with a 20-ounce latte. Roger is eager to monetize the photo – it’s one of the few recent photos of Stanton Struvik in which he is not wearing sunglasses. Note the following:
- I. The publication of the photo in a full-page magazine ad for Moonbucks Coffee
 - II. The publication of the photo to illustrate a magazine article about how Stanton Struvik has been spending his time since his high-profile divorce
 - III. The sale of stainless-steel insulated travel-ready beverage containers, where the exterior of the body of the container has the photo as a wrap-around graphic

Which are uses of the photo for which Stanton Struvik would likely win a lawsuit on the basis of the right of publicity?

- (A) I and II, but not III
- (B) I and III, but not II
- (C) II, but not I or III
- (D) I, II, and III
- (E) Not any of I, II, or III

NOTE THE FOLLOWING FACTS FOR QUESTIONS 5 AND 6:

Regarding Irsia, a banking executive, and Sybil, a management consultant: Pacific Millennium Bank was on the verge of hiring its next CEO. After several rounds of interviews, all the members of the board were in agreement to hire Irsia for \$15 million in annual compensation. Irsia, who was then executive vice president of Atlantic Century Bank making \$2 million a year, would have accepted the offer had it been made. But at the board meeting where the decision was about to be finalized, the board heard a report from Sybil, a management consultant who had been hired by Pacific Millennium Bank to create a vision for the future of the company. Sybil concluded, on the basis of her extensive research and analysis, that Pacific Millennium Bank should move aggressively to develop overseas markets. Because Irsia had no experience with overseas markets, Sybil recommended Pacific Millennium Bank not hire her to be CEO. Sybil knew that her advice would almost certainly cause the board not to hire Irsia, and indeed, after hearing Sybil’s report, the board voted narrowly not to extend the offer to Irsia.

Regarding Aiesla, a 17-year-old actor, and Rana, her roommate: Aiesla was invited along with dozens of other young actors to audition for a starring role in a new Steven Spielberg film. The role paid \$750,000, and Aiesla’s talent agent, like just about every other film-industry talent agent, figured that the part would launch a whole career for whomever got it. But Aiesla never made it to the audition because her roommate Rana, motivated by jealousy, managed to prevent her from doing so. Rana did this first by pretending to have a medical emergency, thus delaying Aiesla

from leaving the apartment they shared. And when Aiesla finally did leave and start to drive toward the audition, Aiesla's car broke down because of a chemical additive Rana had added to the gas tank.

Regarding Excalliance Express, a shipping services company, and Maitlan, an independent-contractor truck driver: SaeroAerospace was a long-time customer of Excalliance Express, hiring them several times a year for the past 15 years for specialized transport services. The business, worth millions annually, had every indication of continuing. One day, SaeroAerospace hired Excalliance to transport a machine press from one of its facilities to another several hundred miles away. Excalliance sought to hire Maitlan to drive the truck hauling the machine press. Maitlan agreed because he saw the job an opportunity to pressure Excalliance into paying up on money it owed him. Maitlan began driving the truck, as agreed, but instead of driving to the agreed destination at the agreed time, Maitlan called up Excalliance Express and informed them he was refusing to deliver the machine press on time because Excalliance had not paid him for a number of past jobs. "I knew right from the start this would screw up your relationship with SaeroAerospace," Maitlan said. "So now that I have your attention, pay me the money you owe me." As a result of the delayed delivery, SaeroAerospace never hired Excalliance again.

Regarding Lukas, a seller of farm equipment, and Shobena, an attorney: Shobena advised her client, Jon, to refuse to sign a contract with Lukas for the sale of a combine harvester. Jon would have signed the contract but for the advice of Shobena, and had he signed, Lukas would have cleared \$32,000 in profit. Shobena advised Jon against signing the contract because she felt it left him inadequately legally protected.

Regarding Ulfred, an investor, and Tobias, a real estate developer: Tobias invited Ulfred to participate as an investor in a joint venture to develop a new shopping mall in suburban Baltidelphia. Tobias and Ulfred signed an agreement creating the joint venture, but then Tobias found out that Ulfred had once flirted with Tobias's wife. Angry at this revelation, Tobias sought revenge by deliberately breaching the joint venture agreement, which caused Ulfred a loss of several hundred thousand dollars.

5. Who among the following has the best chance of ultimately succeeding with a claim of intentional economic interference against the party indicated? (Note that succeeding with a claim includes overcoming any applicable defenses.)
- (A) Irsia against Sybil
 - (B) Aiesla against Rana
 - (C) Excalliance Express against Maitlan
 - (D) Lukas against Shobena
 - (E) Ulfred against Tobias

6. Who among the following has the best chance of ultimately succeeding with a claim of fraud against the party indicated? (Note that succeeding with a claim includes overcoming any applicable defenses.)
- (A) Irsia against Sybil
 - (B) Aiesla against Rana
 - (C) Excalliance Express against Maitlan
 - (D) Lukas against Shobena
 - (E) Ulfred against Tobias



7. Legendary trial attorney Theodore Ericsson is drafting his closing argument in the case of *Lornayo v. Hexetron*. He is planning on asking the jury for \$5 billion in punitive damages. He is considering including the following:
- I. "Hexetron last year had revenues of \$80 billion. To punish them, you'll need to award an amount that's going to make them stand up and take notice. And for a company that pulls in \$80 billion a year, it's going to take a lot to make them notice."
 - II. "What Hexetron did in this case was heinous. It was callous. It was shocking. It was far worse than negligence. They were reckless and indifferent to the human suffering they knew they would inflict. And because of that, they deserve more than mere liability for the damages they've caused - that is, more than compensatory damages. They deserve to be punished."
 - III. "In making an award of punitive damages, you are the voice of the community. You, the jury, are the voice of conscience. Your award should reflect the condemnation that must be brought down on the behavior and lack of scruples exhibited by Hexetron in this case. And it should make them change their behavior so they'll never do this again."

Which of the statements would be proper for Ericsson to include in arguing for punitive damages?

- (A) I, but not II or III
- (B) II, but not I or III
- (C) III, but not I or II
- (D) I, II and III
- (E) Not any of I, II, or III

NOTE THE FOLLOWING FACTS FOR QUESTIONS 8 AND 9:

Sally lives in a small, dismal-looking apartment building on a narrow lot between two large oil refineries, one operated by Octan Oil, the other by Clampett-Ewing Petroleum. The refineries combine to surround the apartment building with an acrid fog 24 hours a day. After several years of living in her apartment, Sally gets very sick. An internist determines Sally has suffered severe liver disease caused by Sally's exposure to volatile organic compounds (VOCs) released by the refineries.

Hoping to interest a personal-injury attorney in her case, Sally starts doing some research. She finds out that living in very close proximity to a discharge of 80,000 tons per year of VOC emissions is sufficient to cause liver disease in humans.

Next, Sally turns to trying to find out how much pollution is discharged by the refineries. She finds two reports on the subject reaching contradictory conclusions. A report by the environmental-activist Clear Blue Coalition says that the Octan refinery emits 100,000 tons of VOCs annually and that the Clampett-Ewing refinery emits 50,000 tons per year. The other report, prepared by Freeman Engineering Group at the direction of managers of the two refineries, found that the Octan facility emits 70,000 tons of VOCs on a yearly basis while the Clampett-Ewing facility emits 35,000 tons annually.

8. Assuming the report of the Clear Blue Coalition to be correct, which of the following statements most accurately describes the provable causation of Sally's disease for the purposes of a tort claim?
- (A) Octan, but not Clampett-Ewing, caused Sally's disease.
 - (B) Clampett-Ewing, but not Octan, caused Sally's disease.
 - (C) Both Clampett-Ewing and Octan caused Sally's disease.
 - (D) Neither Clampett-Ewing nor Octan is deemed a cause of Sally's disease because neither is a sufficient cause.
 - (E) Neither Clampett-Ewing nor Octan is deemed a cause of Sally's disease because neither is a necessary cause.
9. Assuming the report of the Freeman Engineering Group to be correct, which of the following statements most accurately describes the provable causation of Sally's disease for the purposes of a tort claim?
- (A) Octan, but not Clampett-Ewing, caused Sally's disease.
 - (B) Clampett-Ewing, but not Octan, caused Sally's disease.
 - (C) Both Clampett-Ewing and Octan caused Sally's disease.
 - (D) Neither Clampett-Ewing nor Octan is deemed a cause of Sally's disease because neither is a sufficient cause.
 - (E) Neither Clampett-Ewing nor Octan is deemed a cause of Sally's disease because neither is a necessary cause.



10. Which of the following is an example of a statute providing for pure comparative negligence?
- (A) “Contributory negligence shall not bar recovery in any action by any person or the person’s legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person or in the case of more than one person, the aggregate negligence of such persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made.”
 - (B) “In any and all actions brought to recover damages for injuries to a person or a person’s property caused by the negligence of another, the fact that the plaintiff may have been contributorily negligent shall not bar recovery when the contributory negligence of the plaintiff was slight compared to the negligence of the defendant. But in such a case, damages shall be reduced in proportion to the amount of plaintiff’s contributory negligence.”
 - (C) “If the plaintiff by ordinary care could have avoided the consequences to the plaintiff caused by the defendant’s negligence, that plaintiff is not entitled to recover. In other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained.”
 - (D) “Contributory negligence does not bar recovery in an action by any claimant to recover damages for death or personal injury or damage to property where the fault that may be attributed to the claimant was not more than the combined fault of all persons, including but not limited to all defendants; yet damages allowed will be diminished in the proportion to the fault percentage determined to be attributed to the claimant.”
 - (E) “In all actions for personal injuries, property injuries, or for injuries resulting in death, the fact that the person injured may have been guilty of contributory negligence does not bar recovery therefor, but damages shall be reduced in proportion to the amount of negligence attributable by the jury or factfinder to the person injured.”

11. You're hanging out at a coffee shop in Portattle, Washegon near the courthouse. Some friendly attorneys invite you over to their table. As they down cups of the latest local microroast, they regale you with stories about cases they've taken to trial locally.

Fiona said she once won a \$1 million verdict in a personal injury negligence case where, per the special verdict form, all the damages were non-pecuniary damages for pain and suffering, and the verdict was upheld on appeal even though the jury awarded zero pecuniary damages.

Glen said he once won a \$1.5 million verdict in a personal-injury negligence case brought by a bank employee against her employer bank for an on-the-job injury that happened when she got her foot slammed by the vault door. The award was increased to \$1.9 million on remittitur. And that was upheld on appeal.

Holly said she once won a \$2 million verdict in lawsuit over an intrusion-type privacy tort claim, and because she and her plaintiff prevailed in the case, the court applied the American Rule and awarded \$300,000 in attorneys fees.

What can you say about the truthfulness of the stories told by the lawyers?

- (A) Fiona may have been telling the truth, but the stories told by Glen and Holly can't be right and, thus, seem clearly to be false.
- (B) Glen may have been telling the truth, but the stories told by Fiona and Holly can't be right and, thus, seem clearly to be false.
- (C) Holly may have been telling the truth, but the stories told by Fiona and Glen can't be right and, thus, seem clearly to be false.
- (D) Fiona and Glen may have been telling the truth, but the story told by Holly can't be right and, thus, seems clearly to be false.
- (E) Fiona, Glen, and Holly all may have been telling the truth. Their stories are all plausible on their face.

12. Under which of the following factual scenarios does express assumption of the risk have the best prospects of being upheld to bar recovery by an injured plaintiff?
- (A) Iceplanes Unlimited offers regular once-a-week air service to three different small towns at very high elevations that all lie north of the Arctic Circle. With no runways in these towns, pilots must land on treeless stretches of the snow-covered mountain slopes. Avalanches are a constant danger, as are winds that can suddenly deprive the plane of the lift needed to become airborne. To fly with Iceplanes Unlimited, a customer must sign an assumption of risk agreement that outlines these and other risks inherent in the operation.
 - (B) George's Fishing Hole is a roadside attraction off Interstate 70. Billboards advertise that folks are guaranteed to catch a fish within five minutes in George's well-stocked ponds. To fish at George's Fishing Hole, visitors must sign an assumption of risk agreement explaining the various minor risks visitors face. Any fish they catch must be thrown back.
 - (C) Big Basket Food Mart is the grocery store in the small town of Palo Woods, Calizona. On the way into the store there is a sign that says: "Grocery shopping is an inherently dangerous activity. Shoppers may be injured or killed. If you do not wish to be subjected to this risk, do not shop here. By entering, you agree to assume all risk of injury, death and property damage, caused by the ordinary (but not gross or willful) negligence of Big Basket Food Mart."
 - (D) Northern Virtucky Memorial Hospital is a non-profit medical center. During their pre-op evaluation, surgery patients are required to sign papers assuming all risk for surgery and waiving "all claims whatsoever" against the hospital.
 - (E) Carossee Bus Lines has an assumption of risk agreement that every passenger signs in the process of buying a ticket. Carossee is a common carrier.

13. Wilden brought his niece Anneliese to Jump Jungle, an indoor trampoline park that is wholly owned and operated by the City of Baltidelphia as a unit of the Baltidelphia Parks and Recreation Department. In order to buy a pass and for Anneliese to be able to jump, Wilden signed a binding contract by which he agreed to “indemnify and hold harmless Jump Jungle and its owners, operators, employees, staff, and affiliates against any and all claims brought by [Anneliese] relating to injuries sustained in the usage of Jump Jungle equipment and/or facilities, including as a result of the negligence of Jump Jungle staff.” Anneliese suffered a broken arm in the course of using Jump Jungle equipment because of the negligence of some of Jump Jungle’s staff. Does Anneliese has a good claim for negligence against Jump Jungle?
- (A) Probably yes.
 - (B) No, because Jump Jungle has immunity; but not because of indemnification.
 - (C) No, because Wilden signed the indemnification agreement, transferring liability for Anneliese’s claim to him, such that Anneliese can successfully sue Wilden; but not because of immunity.
 - (D) No, because Wilden signed the indemnification agreement, extinguishing Anneliese’s claim; but not because of immunity.
 - (E) No, for at least two reasons: because Wilden indemnified Jump Jungle, and because Jump Jungle has immunity.

ESSAY PORTION

Your Kiwi Cousins

THE FIRST SEMESTER OF LAW SCHOOL IS ALMOST OVER. And the pandemic has certainly made things hard for everyone. Or, almost everyone. Not so much for you. That's because you were smart enough to accept an invitation from your cousins to spend the semester in Welland, New Zealand.

Lucky you! Thanks to its isolated island geography and science-based tracking, tracing, and quarantining programs, New Zealand has largely dodged the impact of covid. Plus, it's one of the most beautiful places on earth, and the cost of living is even reasonable. So while most people you know back in the States are having one of the worst years ever, you've spent the last few months safely attending your online law classes before heading out to a nearly normal life of restaurants, bars, and sporting events with your awesomely fun cousins Amaia Akeau, Bodhi Branson, and Cooper Clarke. The hardest part about the arrangement has been the time zone difference (getting up to attend class at 4 a.m.!). But other than that, it's been fantastic. And since New Zealand is a common law jurisdiction like the United States, you're counting on what you've learned in your American law school classes to help you score a part-time paid internship at a New Zealand law firm during the upcoming Southern Hemisphere summer.

On the other hand, after last weekend, you are starting to wonder if things have taken a permanent unlucky turn.

It had originally shaped up to be the best weekend ever. Two friends of the cousins were getting married – on an alpine glacier no less! Bodhi would be a best man. Cooper was officiating. And Amaia was deejaying the reception. You didn't have an official roll to play. But on Friday night you'd be helping Amaia her set up her mobile deejay equipment. Then on Saturday you'd go to the wedding as a guest. After that, on Sunday night, you'd planned to have dinner on a sightseeing trolley with your cousins.

None of it went according to plan.

AMAIA ALREADY OWNED TURNTABLES, a mixing console, and big powered speakers. She also had a decent collection of lights. But for the wedding, Amaia wanted to take the lighting up several notches. She had her eye on a new lighting appliance called the Disco Dazzlemaster. It was a computer-controlled lighting unit consisting of a light-studded globe held by rotating arms that allowed the globe to be spun and twisted in all manner of ways. The whole thing weighed just over 7 kilograms (15 pounds). It looked like glammed-up alien super weapon encrusted with multi-colored jewels – and that was before it was turned on.

On Friday afternoon, you rode in Amaia's pickup truck to Sonorous Sounds, a store in downtown Welland stocked with musical instruments, professional sound system equipment, and deejay lighting. Happily, they had a Disco Dazzlemaster already assembled behind the counter in the showroom. Amaia paid for it and you were off to the reception venue, a winery out in the "wop wops," as Amaia said – Kiwi-speak for *out in the middle of nowhere*.

You and Amaia set up the speakers, equipment table, and lighting truss, and laid-out and taped down all the cabling. Once everything else had been correctly set up, Amaia climbed a ladder and – correctly and securely – attached the Dazzlemaster to the lighting truss. Then she came down and turned on the power to test it. Immediately, the machine sprang to life, twisting and turning while emitting uncountable rays of rainbow luminescence. It was a whirling, gyrating galaxy of joyful light. Standing underneath it, Amaia gazed up in wonder. “It’s the most beautiful thing ever!” she exclaimed.

Then, *SNAP!* The Dazzlemaster’s globe came crashing down from the truss, right where Amaia was standing. It hit the floor with a sickening crack. Looking up, you saw the machine’s arms gyrating emptily. Looking back to Amaia, you saw her face screwed up in agony.

“It hit my arm,” she groaned. “I think I broke it.”

“Yeah, it’s broken for sure,” you responded, “but I think the floor broke the Dazzlemaster more than your arm did.”

“No,” she said wincingly, “I’m saying my arm is broken.” And then you saw it. Her whole forearm was rendered into a new, unnatural shape. You gingerly helped Amaia back to her truck and drove to the nearest hospital. There, doctors reduced (i.e., set) her fracture, put her arm in a cast, and gave her much needed pain medication.

When Cooper arrived at the hospital to check on Amaia, you suggested that he should take up the task of figuring out what had gone wrong – since he was a master’s student in mechanical engineering.

It would be late on Monday when Cooper gave his report.

Based on Cooper’s inspection of the remains of the Dazzlemaster, and based on his conversations with the manager at Sonorous Sounds, Cooper figured out that when the Dazzlemaster was sold to Amaia, it was missing two bolts that were used to bear most of the load where the globe was attached to the arms. One bolt was missing because the employee at Sonorous Sounds, who had assembled the Dazzlemaster from the box before putting it in the showroom, didn’t think the bolt was needed. So he omitted it. The manager thought the other bolt might have been missing because a ne’er-do-well customer named Rhonda Ridgley had, he believed, been going around removing bolts and other parts from products in the showroom. As Cooper relayed this story, you immediately suspected that the manager was trying to deflect blame. How could a customer manage to get back behind the counter to where the Disco Dazzlemaster was and fiddle with it to remove a bolt – all without being stopped by someone? It seemed improbable to you.

As to whether the lack of one bolt was enough to precipitate the collapse or whether it took two missing bolts for the globe to fall, Cooper said that at the present time he couldn’t be sure which was the case.

ON SATURDAY, IT WAS UP INTO THE MOUNTAINS in a caravan of all-wheel-drive vehicles. The destination was Volja Glacier. The two grooms were both outdoorsy guys who craved doing something unique for their wedding – so they dreamed up the plan of getting married on a glacier. To identify a location for the ceremony and to guide the wedding party and guests on the big day, the grooms hired mountaineer

and glacier guide Garm Gjesdal. Garm, who hailed from Norway, had recently earned a glacier guide certification from New Zealand's national mountain guides association. The certification meant that Garm had been trained in the safe guiding of hiking parties on glaciers.

The Volja Glacier is an alpine glacier – one that begins and ends high up in the mountains. It happens to sit on private land owned by Kiwi tycoon Frankie Fuemana. Volja Glacier terminates in a small valley where its snout (i.e., its front end or downhill-most end point) can be viewed from a nearby rocky overlook. This is why Garm picked it as the wedding location. The majority of guests gathered at the overlook to watch, while the grooms, the wedding party, and some intrepid guests – you included – were guided by Garm onto the glacier.

With instructions from the grooms to go as close to the edge of the snout as would be safe – in order to be more visible to guests on the overlook and to make for better pictures – Garm took the group within 3 meters (10 feet) of the edge, where they stood about 10 meters (33 feet) above the gravelly terrain below.

Glaciers are rivers of ice. To human eyes they generally seem to be standing still. But glaciers are always slowly flowing downhill as their icy mass is relentlessly drawn by gravity. Glaciers occur naturally. They start with accumulations of massive amounts of snow in areas where surface temperatures inhibit melting. The snow accumulates until the weight compresses the layers underneath into hard ice, which is often blue in color when viewed close up. The ice then flows at a slow pace – a *glacial* pace – downhill. At the snout, where the glacier ends, pieces break off. If it's a tidewater glacier, which terminates in a body of water, the big broken off pieces become icebergs. On an alpine glacier, like Volja Glacier, the pieces tumble down onto the rock-strewn terrain in front of the glacier where they eventually melt away.

As he was to say later – after the ceremony, when he was blubbing apologetically – Garm really shouldn't have led the group so close to the glacier's edge. He knew from his training that it was unstable and particularly hazardous right near the edge. He also knew, from scouting it out a couple of days beforehand, that there were cracks and crevasses in the area that had since been covered up by a fresh snowfall. Yet he led the group to so close to the edge of the glacier because, he thought, the risk would pay off in making for great photos and great view – and, most importantly, lots of five-star ratings for Garm's glacier guiding service.

The ceremony was lovely. There was, of course, a best-efforts attempt by Cooper, as officiant, to make thoughtful remarks about how a glacier symbolically represents a loving, committed relationship. (Not easy.) That was followed by vows, I-dos, a kiss, and then a sharp crack – followed by a thunderous rumble.

In that first instant, you couldn't understand what was happening. But within a second you realized it: The portion of ice that everyone was standing on was detaching from the glacier. The guests and wedding party went from standing on what felt like solid ground to surfing on a fast moving mass crumbling ice. Within seconds, everyone was sprawled across a terrain of loose rocks and pebbles, surrounded by freshly cleaved chunks of blue ice.

It could have been much worse. No one was overcome or buried by the ice. Instead, everyone unwittingly rode on top of the jumble of ice mass as it collapsed into the valley floor. There was, however, one person who was seriously injured.

Bodhi, the best man, was howling in pain. The reason was plain: His leg was bent at a sickening angle. Bodhi's femur (thigh bone) had broken clean through.

Instantly, dozens of people were jabbing at cell phones and announcing aloud what everyone already knew: No cell phone coverage.

"Garm, do you have a satellite phone?" you asked. "We've got to call for help. I think Bodhi has to be helicoptered out of here to a hospital."

"Unfortunately, I do not," Garm said. "I know I should probably have one. All the other professional glacier guides I know have them. They're not that expensive when you consider how important they would be in an emergency. But to be honest I didn't know how long I would be working here since my temporary work visa expired last month. Yeah, I'm not even allowed to be working in New Zealand! And I know I said we had permission to be here. But we actually don't. This is private land and the owner has no idea we're here. That's why it's so pristine and why there's nothing in eye's view that's not a part of nature. I wanted the wedding to be as beautiful as possible – and then this happens! Now they're going to kick me out of New Zealand for sure!"

"How bizarre," you said with raised eyebrows. Then you turned to your friends. "Let's figure out how to help Bodhi."

As Garm uselessly continued his whimpering, self-loathing confessional, you and other members of the group set about fashioning a splint and a makeshift stretcher so that you could carry Bodhi back to the vehicles. You rode with Bodhi back down the mountain and tried to comfort him. Every bump and jostle on the rough road elicited from Bodhi a fresh squeak of pain.

NEARING THE HOSPITAL, Bodhi began to deteriorate badly. Something was clearly very wrong with him, and you and others in the truck were worried he was going to die. His lips began turning blue, and when the truck pulled up to the emergency department, Bodhi was unconscious. Hospital staff whisked him away and began treating him.

It turned out that Bodhi had suffered a pulmonary embolism – a blood clot that travelled into his lungs, where it began depriving him of oxygen. As a doctor explained, the leg fracture damaged a vein in Bodhi's thigh, which caused the clot to form. It travelled from there to his lungs.

According to doctors, if Garm had been carrying a satellite phone and been able to call for help at the glacier, Bodhi would have been brought by helicopter to the hospital fast enough that treatment would have prevented the occurrence of the pulmonary embolism. As it was, the doctors were able to dissolve the embolism with a tissue plasminogen activator delivered through a tiny catheter that was inserted surgically. All of this happened before Bodhi regained consciousness. As it was, thanks to the quick work of doctors and nurses, Bodhi only sustained minor additional injury due to the pulmonary embolism – mostly some lung tissue damage. Happily, doctors said that in time they expected Bodhi to make a full recovery.

That didn't stop you from being mad at Garm. On your phone, you looked up information on temporary work visas, and you found a government site that said immigration regulations provided that to get a temporary work visa in New Zealand,

visa applicants had to demonstrate good moral character, not pose a security risk, and not threaten New Zealand's international reputation. You showed it to Amaia.

"Hmmm," she said. "I think Garm is exactly the kind of person who's not supposed to be working here."

Later, at the reception, which got off to a late start, Amaia did her best with one working arm to spin some cheerful, danceable music.

THE NEXT DAY, SUNDAY, was when you and your cousins planned to ride the Twickham Trolley Tour around Welland, a city that oozes colonial charm. Granted, it was kind of a touristy thing to do – but it was a touristy thing none of you had done before. And you had coupons. Unfortunately, because of Amaia's and Bodhi's injuries, it was down to you and Cooper.

The Twickham Trolley Tour promised riders a round-trip sightseeing tour of the city on a vintage trolley while being feed a three-course meal. The trip started out great. But then you met your waiter. He was, according to his nametag, Quinn Quigley, hailing from Australia. For reasons you couldn't entirely understand, he seemed to take an instant dislike to you and Cooper.

It started when Quinn scolded you for using the word "champagne" in a way that he considered incorrect for Australian sparkling wine. Then, when you asked about something you didn't understand on the menu, Quinn thought you were making fun of him. When you tried to smooth over the awkward moment with a little joke that you intended to be self-deprecating, it backfired and just made Quinn angrier. Things escalated completely out of control when Quinn came to your table while Cooper was boasting about New Zealand's national rugby team, the All Blacks, calling them the best team ever after their recent 43-5 beat down of the Australian national team, the Wallabies.

"I guess you're an idiot, since the Wallabies won the following week, 24-22," Quinn said.

"I think that's uncalled for, saying I'm an idiot," Cooper responded.

"I only called you an idiot because I thought it would be rude to call you what you actually are, which is a shit-eating maggot," Quinn retorted.

"Whoa, look, I'm sorry mate," Cooper tried to de-escalate. "Me and my cuz are just trying to have a fun night out."

"Maybe I'm in a bad mood because when I come by your table," Quinn said loudly, so the diners all around could hear, "I hear you talking to your friend about how you're planning to cheat on your exams to get certified as a mechanical engineer."

This was totally untrue, by the way. You and Cooper were only talking about how the exams were tough to pass.

"Or more likely," Quinn continued, "I'm in a bad mood because I just got a positive covid test. And the last thing I need is to deal with a nasty garbage-faced customer like you."

Cooper couldn't help but glance down suspiciously at his food.

"Afraid I coughed on your food, eh? Why should I do that when your face is right in front of me." And with that, Quinn leaned in and coughed within inches of Cooper's face. With Cooper backlit by a passing street light, you could see the little

droplets connect with his forehead, eyes, and cheeks. “Now you’re going to be in quarantine for 14 days, you piece of human scum,” Quinn said, “and if I’m lucky, you’ll die.”

Cooper’s eyes went wide with panic. As you happened to know, Cooper has some underlying medical conditions, including diabetes, and he’s been told that he’s at risk for severe complications should he catch covid. You could tell from looking at him that Cooper was in serious distress. He turned to you. “Wow, cuz,” he said quietly with a look of wide-eyed terror. “That may be it. I might die now.”

Then, before anything else could happen, the manager of the Twickham Trolley came over and intervened. He fired Quinn on the spot and ordered him off the trolley. The police were called. Quinn was arrested – which was good. But Cooper was told he was not free to leave either – which was bad. Cooper was immediately escorted back to his apartment where he was told by police that he was legally required to remain in his apartment in quarantine – under penalty of criminal prosecution – because of his potential exposure to the covid virus.

The next day, public health investigators were able to determine that Quinn had never tested positive for covid and was never infectious. On that basis, the police told Cooper he was free to leave his apartment.

A COUPLE OF DAYS LATER, YOU ARE KEEPING BODHI COMPANY as he convalesces at home.

“You should really think about hiring a lawyer and suing,” you say. “Amaia too. And Cooper. I’ve been learning tort law, and I think there are a lot of claims you guys have.”

“Yeah naw,” Bodhi says, using Kiwi-speak for *no thanks*. “Back in the 1970s, New Zealand passed a law creating a government-run no-fault accident compensation scheme, and that ended up legislating away most of what you learned in your American tort course.”

“WHAT!?!” you exclaim incredulously. “You’ve got to be kidding me!! All this time, throughout all of this, all I could think about was who would have a tort claim against whom!!”

“Well cuz,” Bodhi says. “Tell me all about it. I’ve got nothing but time to listen. What would happen under your American tort law?”

ESSAY QUESTIONS

Provide analysis for the following. For all questions: **Omit all discussion of remedies. Omit analysis and discussion of vicarious liability, including respondeat superior. Omit any discussion of affirmative defenses based on the plaintiff's negligence (contributory negligence and comparative negligence) and assumption of risk.** Heed the call of each question and don't provide discussion not asked for.

In your response, please label the portions of your response in correspondence to the questions below. For example, write "1" on a line by itself or "QUESTION 1" to mark your answer to Question 1.

- 1. Discuss prospects for recovery on the part of Amaia against Sonorous Sounds for her broken arm.** Because at this point it is unclear whether it took one missing bolt or two for the globe component to fall, consider both possibilities: Do the alternative views of the facts affect the analysis? And if so, how? Also, because you don't trust Sonorous Sound's allegation that customer Rhonda Ridgley tampered with the Dazzlemaster, consider separately how that allegation, if proven true, would affect the analysis of Amaia's claims against Sonorous Sounds.
- 2. Discuss prospects for recovery on the part of Amaia against Rhonda Ridgley for negligence for Amaia's broken arm, assuming that Rhonda Ridgley really did remove one of the bolts from the Disco Dazzlemaster.** Again, because at this point it is unclear whether it took one missing bolt or two for the globe component to fall, consider both possibilities. Limit your discussion to a claim for negligence and do not discuss other possible claims against Rhonda.
- 3. Discuss prospects for recovery on the part of Bodhi Branson against Garm Gjesdal for Bodhi's broken leg.** Within your discussion, consider whether it matters that Garm's visa had expired.
- 4. Discuss prospects for recovery on the part of Bodhi Branson against Frankie Fuemana, owner of the land where the wedding ceremony took place, for Bodhi's broken leg.**
- 5. Discuss whether Frankie Fuemana could win a trespass to land claim against the grooms.**
- 6. Very briefly, in no more than two or three sentences, opine as to whether Bodhi Branson could win a battery claim against the doctors for the procedure involving the surgically inserted catheter that occurred while Bodhi was unconscious, and give the reasoning for your conclusion.** (I'm not looking for a full going-through-all-the-elements analysis. Start with a yes, no, or maybe, and say why. Keep it concise and cut to the chase.)
- 7. Discuss prospects for recovery on the part of Cooper Clarke against Quinn Quigley for any personal intentional torts and defamation.** Do not discuss privacy torts (including public disclosure, intrusion, and false light), and do not discuss intentional torts against property (i.e., trespass to land, trespass to chattels, conversion).

8. Very briefly, in no more than two or three sentences, would Cooper Clarke have been in the clear to do something to Quinn – like knock him down or push him away – to prevent being coughed on after Quinn said “your face is right in front of me” and started to lean in? Or would that have made Cooper liable in tort?

Important: Limit your discussion to the questions posed. Also: Please do not repeat the exact same analysis when discussing a different party or answering a different question. Instead, I strongly encourage you to incorporate previously stated analysis by reference. If analysis of an issue is similar to but not exactly the same as what you have written previously, then you might refer to your prior analysis and go on to discuss any differences. Note that the questions are not separately weighted; instead, they will be lumped together for assessment. So divide your time among the questions according to what requires the most discussion and analysis. Plan ahead to put information where it belongs. And correspondingly: Do not expect that each question calls for an equal share of your time or words. Consider that any given question might be appropriately answered with substantial brevity or might require in-depth treatment.

Here are some suggested abbreviations for your answer:

AA Amaia Akeau
BB Bodhi Branson
CC Cooper Clarke
DD Disco Dazzlemaster
FF Frankie Fuemana
GG Garm Gjesdal
QQ Quinn Quigley
RR Rhonda Ridgley
SS Sonorous Sounds
TT Twickham Trolley Tour