Torts I

University of North Dakota School of Law
Fall 2007

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ILLUSTRATIVE EXAM RESPONSE

The following pages comprise an illustrative student response to Part 2 of the Fall 2007 final examination in Torts I. This material is an amalgamation of portions of two actual response – one student wrote the subpart A portion, and a different student wrote the subpart B, C, & D portion. Each of the two portions received the highest scoring for that respective portion on the Fall 2007 exam. Thus, this material constitutes an example of a very successful attempt to answer the question posed by the exam. A note of caution, however: This material should not be viewed as comprising a "model" or "ideal" response. Neither portion re-printed here exhausts the possibilities of the hypothetical facts. (Note, for example, that the author of the B, C, & D portion declined to provide any answer for subpart D.) Moreover, statements of the law and certain portions of the analysis may be wrong or incomplete. Even more importantly, you should keep in mind that these essays do not indicate the only successful way to attack the exam. Many different iterations of style and substance would do just as well. Therefore, if you would have done something differently, your instincts are not necessarily wrong. That being said, these answers are, obviously, deserving of high praise, and I congratulate the authors.

EEJ

1)

Subpart A:

Vicky (V) vs. McShakey (S)

NEGLIGENCE: As a driver, S owed V a duty of reasonable care. S had a duty to exercise ordinary care when leaving the parking lot and entering a street, ensuring that no pedestrians or other vehicles were approaching. V was a foreseeable plaintiff because the standard of care imposed upon drivers inlcudes the class of persons V belonged to (pedestrians). S breached his duty to V when 1) he got behind the wheel intoxicated (evidenced by the numerous drinks he had at teh bar prior to getting into his car) and 2) he failed to exercise ordinary care while trying to leave the parking lot. Because a reasonable person would have carefully looked at each direction to avoid hitting a pedestrian or running into another vehicle, S breached his duty to V when he hit her. It is safe to assume that neither a driver leaving a parking lot or a jogger on the street would be travelling at a very high speed, which shows that has S exericed the care that a reasonably prudent person under similar cisrumstance would have, S would most likely not have hit V. S's negligent driving was both the-but-for cause and the proximate cause for V's injuries because had it not been for his actions V would not have been injured and because V was a foreseeable plaintiff and the harm caused to her was the foreseeable consequence of S's negligence. S is also the proximate cause for V's subsequent injuries, which she suffered as result of the accident, including the internal bleeding, hospitalization, and the possibility of permanent brain and kidney damages because medical treatment resulting from an injury is always foreseeable. Therefore, S

will be liable for all damages including V's incurred injuries up to this point plus any future medical care those injuries may require. V's compensatory damages will most likely also inlcude lost income, pain and suffering, and any future lost wages if the medical intern's predication of permanent brain and kidney damages proves to be accurate. In addition, because S was intoxicated when he hit her, V has a viable claim for punitive damages. S, however, will not be responsible for the surgecial sponge found in V, as it was already there.

S has several defenses available to him. First, he might use contributory negligence in showing that V was negligent in not stopping and looking both ways when crossing the exit of a parking lot. S could assert that because a jogger exercising reasonable care would have been more careful when knowing that cars might be coming, V was neglgient and therefore her actions contributed to her injuries. However, it is difficult to say whether such defense would work becuase the diagram shows that there was no exit into the street at the place where S was trying to exit. If S is successful with his defense, V will be barred from recovery in a contributory negligence regime or in a partical comparative negligence regime if her fault is found to be 50% or higher (depends on the jurisdiction) or her damages might be reduced by her percentage of fault. It seems very unlikely that even if S shows that V's negligence contributed to her injuries, that a reasonable jury will find V to have a higher percentage of fault than S given that S was intoxicated. S can also use the duty to mitigate rule and claim that because V did not seek medical attention right after the accident, he should not be responisble for the severity of her injuries caused by the delayed hospitalization. V's defense to that would be that because she operated under the belief that medical assistance was given to her (M saying that she was a doctor and giving her advice on

how to proceed), V did not violte her duty to mitigate.

NEGLIGENCE PER SE: In addition, becuase all states have safety statutes prohibiting drinking and driving, V has a valid claim against S for negligence per se. The numerous drinks S consumed at the bar will very likely render him intoxicated and incapable of driving in an unexcused violation of the safety statute. Becuase V as a pedestrian belongs to the class of plaintiffs the statute is designed to protect and because the injuries caused by S are the type of injuries the statute wants to avoid, S wil probably be found liable for negligence per se.

V vs. the bar (B)

As a licensed liqour establishment, the bar had a duty to protect third persons from injuries caused by the negligence of intoxicated customers. The bartended served numerous drinks to S and as someone with experience in the industry he should not only have noticed that S had consumed enough liquor to be intoxicated, but also that his hands went from shaking to steady after several drinks, which is usually an indicator that the person has a drinking a problem. Because the bartender (using the respondeat superior doctrine) continued to serve S more dinks when he should have known that S was intoxicated, the bar would be responsible to V for her injuries caused by S's negligent driving.

V vs. Meribeth (M)

BATTERY: V might have a plausible claim for battery against M for having M hold her eyes open with her thumb and forefinger, while shining a light into them, because although M had the

intent to help, if her touching was deemed offensive according to a reasonable person standard under similar circumstance, M would have committed a battery (the intent to harm is not necessary as long as there was intent to commit the act). In addition, it is obvious that V did not consent to the touching because she yelled for M to stop.

NEGLIGENCE: As a bystander M owed no affirmative duty to rescue to V until she voluntarily undertook that duty by getting out of the car, holding V's eyes open, asking her to wiggle her toes, and giving her "medical" advice on how to proceed treating her injuries. Once M began rendering assistance to V she was under the duty to exercise reasonable care in doing so. It is safe to assume that M failed to exercise ordinary care because a reasonably prudent person would most likely have adviced V, as someone who just got hit by a car, to get to a hospital and make sure that she was OK. M's reassurance, as a doctor, that V was fine actually and proximately caused V's injuries, making M liable for the damages incurred by V as a result of M's negligence in rendering assistance to V.

If the accident occured in a state with a Good Samiritan statute, M might attempt to escape liability as a medical professional. Even if as an intern she is considered a phusician, Good Samaritan statute only prevent from ordinary negligence and not from gross negligence. M will most likely not be able to use the statute as a defense becuase 1) she was intoxicated and 2) as evidenced by Austin's statement about V at the hospital, the majority of physicians would suspect that in a car-vs-pedestrian accident there would be internal bleeding and tha aspirin contibutes to it. Therefore by telling V that she was fine and should go home and take an aspirin, M's actions

were most likely grossly negligent since the custom among physicians shows that they were inappropriate. Even though M is just an intern, she would be held to the same standard as either physicians in the local community or nationwide--experience is not relevant.

V vs. Dr. Ned Nielsen (N)

MALPRACTICE AND RES IPSA (RIL) V would also be able to bring suit against N for the surgical sponge found in her body from her abdominal surgery. V will be able to use RIL and shift the burden of proof to N becuase in the absence of direct evidence as to how the sponge got into her stomach, she only needs to show that such a thing does not usually occur w/o negligence; that N or the surgeical staff was most likely the one that committed the act (exclusive control in such situation is not vital, see Ybarra) and that it was not due to any voluntary action or contribution on the part of V. N will then have the burden of showing that his actions were not the but-for-cause for V's injuries. However, V's case would most likely be given to the jury to determine whether V is entitled to damages. Becuase the surgery was three years ago, depending on the jurisdiction, V might not be able to bring the suit if the statute of limiations and repose bar the claim.

Subpart B: Piers Palmquist's prospects

Piers v. Janitor (P v. J)

P may have a claim against J for neglience in failing to place the wet floor sign where J had just mopped. Since J created the risk of falling, J had a duty to warn others of the risk. The lack of a warning sign actually and proximately caused P's injuries because P did not use care when walking on the floor likely because he did not realize it was wet. There may be an issue with actual causation because P may still have fallen "but for" the sign being there. The sign was not the "but for" cause. The wet floor was the "but for" cause. Even with the sign there, the floor was slippery and could have caused anyone to fall even if they were walking with caution. "But for" the wet floor P would not have fallen or have broken his arm. The wet floor problem may link liability more to the hospital for failing to provide equiptment to J that ensures the floor is dry. The hospital would also be liable for J's negligent failure to put up the wet floor sign because of respondeat superior.

Piers v. Landattle Grace Hospital (P v. L)

L may be liable for the wet floor. Patients would probably be considered to be invitees because hospitals are now usually considered to be businesses. L had a duty to warn or make safe any known, concealed, or dangerous condition. Therefore, L had a duty to make sure that the signs were placed on the wet floor because the wet floor was a known dangers condition. J told the chief of medicine that a quick-drying floor cleaner is now being used in hospitals. J said it would prevent people from slipping and falling. The hospital was aware that people have been slipping often on the granite floors. In fact five people had fallen in only that month. The fact that L knew about this issue and had not taken steps to fix it may impact the amount of damages given to someone who has slipped and fallen. This quick drying floor cleaner seems to be somewhat of an industry custom. Industry custom is not determinative, but it may aid the jury in a determination of breach of duty. Custom is determinative in medical malpractice cases. This is not a medical malpractice cause, so custom will not be determinative. Even if this floor cleaner is not really a custom, L could still breach a duty of care. In The T.J. Hooper, it was not industry custom to require tugs to carry radios, but the court determined that it was reasonable for them to carry radios, and it was the standard of care even if it wasn't industry custom. Here, the standard of care may be determined to be that the hospital owed people there a duty to keep the floors dry or warn them of the wet floors. If they could not warn them of the wet floors, then they should assume the burden of the cost of the quick-drying floor cleaner. Using the BPL analysis from Carroll Towing, the burden of the hospital to buy the floor cleaner probably would be less than the injuries to at least five people enough multiplied by the probability that injuries will occur. There is a major issue with public policy here in how the hospital is treating people who come

there. They just treat the injured people and allow the insurance to pay for it. If the person doesn't have insurance, they ship them to another hospital. Though this is standard practice in many hospitals, the courts should punish the hospital with punitive damages because it is not in the society's best interest to allow hospitals to do this to patients who are basically "paying customers." The hospital breached a duty of care by not ensuring that people in the hospital were warned. An issue here is that P may be a licensee since he was coming there for his own benefit to sell pharacuticals, but the hospital would still have to warn him of known dangers. A wet-floor would be known. He should have been warned. The actual cause of the accident was the wet floor which may not have been prevented with just a sign; therefore, a court may determine that it was reasonable for the hospital to use quick-drying floor cleaner. Since the hospital did not use this cleaner, the hospital may be liable for P's injuries.

Subpart C: Imogen Ignasiak's prospects

Imogen v. Detrick (I v. D)

D may be liable for I for medical malpractice. First, he did not properly inform her. A doctor is required to disclose the benefits of the treatment, the alternatives to the treatment, the risks of the treatment, and the nature of the treatment. D did not disclose the risk of major loss of brain function. He only disclosed the effects of anesthesia that didn't even apply to Imogen because she would be awake during the procedure. D seemed to be using the doctor's point of view from Kaplan which focuses on what information a reasonable doctor should impart to the patient. However, even if D's disclosure is viewed under this standard, it is clear that other doctors including Dr. C would disclose the risk of loss of brain function. No matter if one using

the majority view which looks at the information disclosed that comports with the prevailing medical standard in the community or with the minority which just looks at disclosures that would be made by a reasonable medical professional, it seems that most doctors would have disclosed this major loss of brain function. Imogen will easily be able to prove lack of disclosure according to the prudent patient standard from Canterbury because that standard looks at what information a patient should know to make the right decision. While D thought that the surgery was in Imogen's best interest, D did not tell her enough for her to make her own decision of what is in her best interest. This is crucial to the prudent patient standard. Because D should have disclosed the risk of loss of brain function and didn't, Imogen will be able to prove that there was not a proper disclosure to her.

She must also be able to prove that the treatment resulted in injury which it did to both her brain function and her heart. She will also have to prove that if the disclosure had be made, she would have foregone the treatment. The court can either take an objective view which considers the view point of a reasonable patient in the same circumstances, or the court can take a subjective view chich considers the point of view of this particular plaintiff. Since there was only a 30% chance that the tumor would lead to a life-threatening condition, a reasonable patient in those same circumstances may have foregone the treatment. However, a reasonable patient who knows they could die without warning may want the surgery dispite the risks because they would rather try to fix the problem than die suddenly. Under the objective standard, it is likely that reasonable patient would have the surgery because most people do not want to risk a sudden death with no warning; however, the jury would have to decide if the 30% chance of a life-threatening condition would cause a reasonable patient to have a potentially damaging surgery.

Under the subjective standard, if Imogen was an intellectual person, perhaps a legal scholar, who used her brain function for income and D was aware of this, Imogen may be able to recover because this risk was particularly relevant to her. In reality, brain function is important to most reasonable people, so it could be likely that a reasonable person would forego the surgery because of that risk.

Second, D was negligent in how he performed Imogen's surgery. He was performing surgery with shakey hands and while under the influence of alcohol. He owed a duty to Imogen to perform the surgery as well as an ordinary neurosurgeon would do. Obviously there is always room for error because not all doctors perform every surgery perfect (which is why doctors pay a lot of money for huge amounts of malpractice insurance). However, there is a difference between making a mistake on a surgery because the surgery is so tricky and making a mistake because the doctor was performing a surgery drunk. Being drunk while performing a surgery is obviously negligent. He also put the patient in further peril by making mistakes in the surgery and then just leaving. He caused damage to her and then did not assist her. His lack of assistance in fixing the problems that Dr. Ned said a neurosurgeon would have been able to fix with less brain damage was also negligent. Perhaps, D did do Imogen a favor by deciding to stop cutting up her brain, but regardless of whether or not it would have caused further damage, he should have found another doctor who was specialized enough to fix the problems he started. He really should have not performed the surgery at all. Therefore, Imogen should be compensated for the damage done by D and the subsequent malpractice of C.

Imogen v. Ned (I v. N)

Ned may also be liable as D's assistant. N should have realized that D was intoxicated and prevented him from continuing with the surgery. After D left, N should not have left the brian surgery to a resident on her first day at the hospital. He should have found a neurosurgeon to do the work on Imogen's brain. He also cracked open Imogen's chest without her consent. Therefore, N may be liable for lack of informed consent, but Imogen was not conscious, and a reasonable patient would have consented to surgery to keep her heart beating. It is likely that N's actions did not constituted lack of informed consent. They also could have been a battery because she did not consent to the surgery. It is unclear at this point if she was awake in order to ask her. If she was, N actions may have consituted a harmful or offensive touching if Imogen did not want to have her chest cut open.

Imogen v. Cray (I v. C)

C may be liable to Imogen for not telling anyone that she knew D was drunk and should not do the surgery. She also knew he had shaky hands and should have spoken about this. Because C did not disclose this information, Imogen suffered a more severe loss of brain function than she would have had C disclosed the information and another doctor done the surgery. While it is impossible to know how the surgery would have turned out with another doctor, it is reasonable to assume that a sober doctor would have performed better than a negligent one. While C may not have had an affirmative duty to disclose this information, Imogen was a patient assigned to her which constitutes a relationship between them. C should have acted to protect her patient from an intoxicated surgeon slicing open her brain. She noticed not only his shakey hands but that he was slurring words during surgery. Both her and Ned

should have stopped him from continuing with the surgery when they could tell there was a problem. C ended up performing the surgery which may also be considered negligent because she didn't know how to perform brain surgery; however, Ned and D are mostly liable for this because they seemed to give her no other choice but to try and help the patient. However, she may be liable for malpractice because she did not perform the surgery as an ordinary neurosurgeon would. The problem would be whether she is held to this standard or not because she is not a neurosurgeon but merely an intern.

END OF EXAM