

Torts I  
Final Exam Fall 1998

This key provides the skeleton of the answers. You did not have to use the same wording, as long as you conveyed the idea. There was some partial credit. You could miss part of several questions and still do fairly well. The questions were worth these points:

1) (5)	8) (10)	15) (15)	22) (5)
2) (5)	9) (5)	16) (5)	23) (5)
3) (5)	10) (5)	17) (5)	24) (5)
4) (5)	11) (5)	18) (5)	25) (15)
5) (5)	12) (5)	19) (5)	26) (15)
6) (5)	13) (5)	20) (5)	
7) (5)	14) (5)	21) (5)	

1. Doug hates Mary and her little dog too. He takes a shot at Mary with his shotgun, but being a lousy shot, he kills her dog instead. What would his defenses be if Mary sues him for conversion for destroying her chattel?

- 1) Did not intend to shoot the dog, shot it by mistake.
- 2) No transferred intent in conversion, so no intent toward the dog, which is an element of conversion.

2. When Jane does not take her medicine, she is crazy. Last week she quit taking her medicine because it makes her feel bad. While out driving in her car, she hallucinated that a pedestrian, Tom, was really a vicious dog about to attack a little girl. She ran Tom down to save the little girl. Tom sues her for battery. What are her defenses?

- 1) Defense of others.
- 2) No intent toward Tom because she thought he was a dog.
- 3) No notice that she will hallucinate when she is off her medicine – sudden seizure.

3. Same facts as question 2: What is Tom's prima facie case against Jane for negligence?

Duty: behave as a reasonable person

Breach: standard – take your medicine, do not run down people in your car.

Causation: failing to take her medicine made her crazy so she hit him.

4. Sam is admitted to the hospital for severe abdominal pain. Surgeon Betty thinks he has appendicitis and tells Sam that he needs to have his appendix out as soon as possible. She does not tell him of any of the risks of the surgery, just that it needed to be done quickly. Sam has a stroke during surgery and is left paralyzed. Expert testimony establishes that this is a rare but unpreventable complication of the surgery. What is Sam's prima facie case for failure of informed consent and what difficult fact does he have to convince the jury of?

A reasonable physician would have informed him of the risk of paralysis.

The risk that he was not informed of occurred.

He has to convince the jury that had he been informed of the risk he would not have consented to the surgery, even at the risk of death.

5. Same facts as question 4: what does plaintiff have to have an expert testify to in a state that uses the reasonable person standard for informed consent? What does the expert need to testify to in a community standard state? Which is Missouri?

- 1) Reasonable patient – expert must testify that the risk is related to the medical treatment, how frequently it occurs, and how severe it is.
- 2) Community standard – that the reasonable physician in the same circumstances would have informed the patient of the risk.
- 3) Missouri is community standard.

6. Explain the legal issue in the T.J. Hooper case, how the court resolved it, and why it is an important issue in managed care (HMO) medical malpractice cases.

- 1) Can something be standard of care if the industry does not use it?
- 2) If reasonable people would use it, it is not defense that the industry does not use it.
- 3) Managed care is now the dominate health care delivery system. Do they set the standard for medical care, or can the courts apply standards from non-managed care docs because they are what the court believes a reasonable physician should use.

7. What are the facts of the flaming rat case, what legal issue did it pose, and how did the court resolve it?

- 1) Plaintiff is working with gasoline near a fire. Rat gets in the gas, is set on fire by the heater, and sets plaintiff on fire.
- 2) Should the court focus on the bizarre facts – flaming rat – or on the link between fire and gasoline, which is very common?
- 3) The court found that the important issue was whether the type of injury, not the specific mechanism, was foreseeable.

8. Plaintiff is injured when a jar of Acme pickles explodes as he takes it off the grocery store shelf. He wants to sue Acme using only *res ipsa loquitur*. Using the elements of *res ipsa loquitur* from the Restatement, what does plaintiff need to prove to recover? Be specific as to the elements and how they related to the facts to be proven.

- 1) "the event is of a kind which ordinarily does not occur in the absence of negligence" – plaintiff must show that there is no non-negligent reason for pickle jars to explode.
- 2) "other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence" – plaintiff must show that the pickle jar was not mishandled after leaving Acme's hands.
- 3) "the indicated negligence is within the scope of the defendant's duty to the plaintiff" – plaintiff must show that Acme had a duty to not to use dangerous pickle jars.

9. Explain the Brown Banana Peel test.

The more brown and dirty the peel, the longer it has been on the floor. This shows that the store had time to notice it and pick it up, which defeats its defense that it did not have an opportunity to cure the problem before plaintiff was injured.

10. What are examples of schools of practice and of medical specialties and what is their legal significance as regards testimony in medical negligence cases?

Schools of medicine are different theories of treatment – chiropractors, dentists, M.D.s. Medical specialties are divisions of practice within a school of practice. You cannot have testimony across schools of practice, only within them. (Hint – podiatrists are not M.D.s – they are their own school.)

11. What is the locality rule and how does it apply to medical specialists?

It says that the expert in a medical malpractice case must come from the same locality as the defendant. Since specialists are certified nationally, the locality rule is not applied to them.

12. What duty did the court impose in *Tarasoff* and how is it modified by the *County of Alameda* case?

*Tarasoff* requires a psychiatrist to warn a third party if the psychiatrist believes that a patient poses a risk to the third party. *County of Alameda* says that you only have to warn if there is an identified victim.

13. Your client was mugged in the common areas of a hotel. What would you have to show to hold the landlord liable?

That there was a duty to your client, i.e., that he was an licensee. That there were previous attacks that should have put the landlord on notice. That the landlord did not take appropriate precautions, based on the risks he knew or should have known.

14. What is the difference between wrongful birth and wrongful life?

Wrongful birth is brought by the parents for the injuries to a baby based on not being warned of the potential birth defects. Wrongful life is brought by the child and is a claim that plaintiff would have been better off to not have been born.

15. Explain, with examples, Comment K and Comment I products, how they differ, and what manufacturers of them have to do to avoid liability.

Comment K are unavoidably unsafe products, beneficial products that pose risks even correctly used. Prescription and over the counter drugs are the classic example. The manufacturer has to warn either the physician or the user of the risks and how to best avoid them.

Comment I products are products that will harm you even when used correctly. Whiskey and tobacco are the classic examples. People are assumed to know the risks of these products. The manufacturer must assure that the customer gets what he/she is expecting, i.e., pure product. The manufacturer must warn if new risks are discovered or if there are risks that are not commonly known, such as fetal alcoholism syndrome.

16. When are employers vicariously liable for the actions of their employees?

When the employee injures a third party while in the course and scope of employment or while furthering the employer's interests.

17. What are the tests to determine if someone is an employee?

- 1) payment
- 2) control the details of their work
- 3) special skills or licensing
- 4) set their own schedule
- 5) have their own tools
- 6) type of supervision

18. When can employers be directly, as opposed to vicariously, liable for the actions of their employees?

When there is negligent hiring or supervision of the employee, or when the employee is carrying out negligent instructions by the employer.

19. Doctor Doug does not diagnose Fred's cancer in a timely manner, reducing the chance Fred will survive from 40% to 10%. What is this called and what effect does it have on the damages in the case?

- 1) lost chance
- 2) reduces the damages to 30% of the total damages attributable to Fred's death.

20. What is implied primary assumption of risk?

When the plaintiff assumes well-known incidental risks. The defendant has no duty to protect the plaintiff against these risks. Usual risks of sports.

21. What is implied secondary assumption of risk?

Implied secondary assumption of risk (reasonable or unreasonable) occurs when the defendant owes a duty of care to the plaintiff but the plaintiff knowingly proceeds to encounter a known risk imposed by the defendant's breach of duty.

22. What is the federal tort claims act?

This law allows persons who have been injured by federal employees or officers to sue the federal government for torts. The law that is used to determine liability and damages is the law of the state where the injury occurred.

23. What type of defect did the Shopsmith have?

The answer was unclear from the materials presented in class so this question was not counted toward the final score.

24. In the polio case we read in class, what was the legal basis for the government's claim that plaintiff's case should be dismissed? What did the court find the government did that would subject it to liability?

- 1) the government claimed discretionary function immunity.
- 2) the government released a batch of vaccine without proper testing as specified in the government's own regulations.

25. "I do not like violence, but sometimes it just comes with the job," said Sam to Merv, the gunshop owner.

"I need a gun I can rely on, a mean one that will make'm think twice."

Sam liked Merv. He could always deliver at a good price. You just didn't want to worry too much about where the guns came from.

"I've got just what you need," croaked Merv.

"This is a special model, new and never been fired. Only a few others like it. It has a silencer built-in, and most of the parts are boron fiber so it does not show-up on x-ray. Winchester made them to test a new design, but never released them for general sale. One of their engineers kept them for souvenirs, and they just sort of showed up here one day."

"Looks like a show stopper. I'll take it," said Sam fatefully.

Through bad luck, Sam has just lost his best chance for a big time paying client. Putting aside his pride, he accepts a job from Worldwide Importers. Sam has resisted working for Worldwide because he is not sure what it does, but it involves the movement of large sums of money. Worldwide moves this money very informally. As they explain it, using an armored car only draws attention to their business. They prefer the security of a low profile operation.

The job looked simple enough. The courier would pick up the money from Worldwide and deliver it to the captain of a ship in harbor. Sam would go along, just in case.

Things went smoothly until they got on board. They saw the body just as they entered the captain's cabin.

Pulling his gun, Sam hustled the courier out of the cabin. They had just reached the gangplank when Sam was jumped from behind. Pulling himself free, he clubbed the thug with his gun.

As they started to run down the gangplank, they were confronted with four gorillas. Sam faced them down with his pistol. Just as they were about to clear the gangplank, the barrel fell off the gun.

The next thing Sam saw was the faces of two garbage men gazing down on him in the dumpster. The money was gone, the courier was dead, and Sam was seriously, but not permanently, injured.

Using the elements of 402a, what is Sam's prima facie case against Winchester? Assume that Sam is only claiming damages for being beat up and tossed in the dumpster. Make sure you are clear about what the elements are.

(these two questions are centered around the special nature of this gun)

- 1) the gun is a product

- 2) Winchester manufactured the gun
- 3) Winchester is a product seller
- 4) Winchester put the gun in the stream of commerce
- 5) Gun was in the same condition as when manufactured because it had not been fired.
- 6) the gun was defective in that the barrel was not strong enough to stay attached during expected use
- 7) Sam was injured because barrel fell off causing him to be attacked by thugs
- 8) Winchester should have marked the gun as experimental, or, better, destroyed it.

26. Using your answer from 25, what are Winchester's defenses to each element of the case?

- 1) the gun is special test model, not a product manufactured for sale
- 2) the gun was never put in the stream of commerce, it was stolen by an employee
- 3) the gun seller knew that the gun was not manufactured for sale and thus assumed the liability for selling against the manufacturer's wishes
- 4) there is no evidence that the gun is in substantially the same condition as when it was manufactured
- 5) the gun was used in an unforeseeable manner when it was used as a club
- 6) plaintiff's injuries were not foreseeable because they arose from a beating, not a misfire by the gun.