Student I.D. # 7_____

E X A M I N A T I O N C H E C K L I S T

Course/Section ID Torts/LAWK-1001 (D1)

Professor Colin Doyle

Date of Examination May 4, 2023

Examination Testing Time ___4___**Hours**

MATERIALS ALLOWED AT YOUR DESK

No Materials Allowed (Closed Book Examination). Scratch paper attached to exam.

SHORT-ANSWER ESSAY EXAMINATION

___4___ Total Short-Answer Questions

ESSAY EXAMINATION

___3___ Total Essay Questions

Limited to ___1____ bluebook for each part, writing on every other line, only on the front of each page.

Limited to _5,000_ characters for each part (this number includes spaces and appears just above the typing area).

ALL MATERIALS ARE TO BE TURNED IN

ALL DISTRIBUTED EXAM MATERIAL WILL BE COLLECTED AT THE END OF THE EXAM.

SPECIAL INSTRUCTIONS

If an ambiguity arises during an essay or short-answer essay examination, describe it in your answer.

FINAL EXAM

Torts (Fall 2022 to Spring 2023) | Professor Colin Doyle

INSTRUCTIONS

Exam Format

This exam is 21 pages including the instructions. Please make sure that you have all the pages.

This exam has four parts and two appendices.

Part I consists of four short answer questions. Part II consists of a fact pattern and an essay question. Part III consists of a fact pattern and an essay question. Part IV consists of a fact pattern and an essay question. The four parts are equally weighted at 25% of your total grade.

On the Examplify software, enter your answers to Part I under Question 101, your answers to Part II under Question 102, your answers to Part III under Question 103, and your answers to part IV under Question 104.

The appendices included in this exam packet are identical to the appendices on our course website. Appendix A is a list of cases discussed in-depth during class. Appendix B is a list of legal rules that you are not expected to have memorized.

Given that you have four hours to complete this exam and four equally weighted parts, simple arithmetic and common sense may lead you to spend one hour on each part. But your mileage may vary. Four hours should be ample time to complete this exam. Whether and how you use the four hours is up to you.

If you are using a computer to type your answers, the character limit for each of the four parts of the exam is 5,000 characters. Let's spell this out so that no one is mistaken about the character limits. Part I (Question 101) has a character limit of 5,000 characters. Part II (Question 102) has a character limit of 5,000 characters. Part III (Question 103) has a character limit of 5,000 characters. Part IV (Question 104) has a character limit of 5,000 characters. You can track the length of your answer with Examplify's on-screen character count tool. Make sure that you are tracking the characters with spaces count, not the word count. The character limits apply to each part of the exam individually.

If you are writing your answers by hand, limit your answers to one bluebook per part, writing on every other line, only on the front of each page. Part I, Part II, Part III, and Part IV each have a bluebook limit of one bluebook.

Do not exceed the character or bluebook limits. Failure to comply with these limits will result in a severe loss of points.

The purpose of the character limit is to encourage you to organize your answers and write clearly. You should spend a fair amount of time thinking and taking notes before starting to write your exam responses. A shorter answer that is focused and organized

is much better than a longer answer that is disorganized and unfocused. You do not need to reach the character limit to perform well on this exam.

You can use contractions but do not use abbreviations unless those abbreviations are supplied in the fact pattern. Refer to plaintiffs and defendants by their last names or as plaintiff or defendant. You may abbreviate "intentional infliction of emotional distress" and "negligent infliction of emotional distress" as IIED and NIED. If you use abbreviations that are not permitted, during grading those abbreviated words will be replaced with the full version of the word for determining the character count.

The events in the exam take place in the fictional state of Loyola. Unless otherwise specified, the cases we have read from other states are persuasive, not binding, authority. Like all other states in the union, the state of Loyola is bound by Supreme Court precedent on issues of constitutional law that apply to the states.

For every question on the exam, Loyola follows the same jurisdictional rules. Page four of the exam lists out all the jurisdictional rules that are settled law in the state of Loyola. Not every rule will be relevant to every question. If a jurisdictional rule is not included on that list, you may assume that there is no governing precedent on that issue in the state of Loyola.

If you believe that you need to know facts that the questions do not provide, please state the assumptions explicitly and proceed to answer the question. But please read the questions carefully. Do not waste your time and character count by addressing issues that are not raised by the facts specified in the question.

Reliance on materials not covered by the course — including cases, other legal authorities, law review articles, treatises, and hornbooks — will not be credited when evaluating your answers.

Confidentiality

This exam is confidential. You may not share or discuss the exam — including its contents or your answers — with anyone at any time after you receive the exam, or after the other person has received the exam, until the final grades for the course are posted. In answering the questions on this exam, you may not ask others for help or use artificial intelligence for help. Violation of these rules constitutes prohibited conduct under Section 11.1 of the JD Handbook and similar rules in Handbooks for Graduate Programs.

Exam Questions

Any questions about the exam that arise during the exam must be directed to the proctor in the exam room. After the exam, any questions about the exam must be directed to Office of the Registrar, not the professor. The Office of the Registrar may be contacted in person at the office located in Founders Hall, Room 105, by phone at 213-736-1130, by email at registrar@lls.edu, or by chat on the Office of the Registrar's website at https://www.lls.edu/academics/officeoftheregistrar/.

You are not permitted to contact the professor concerning any exam-related questions on the day of the exam or for the remaining exam period until final grades are posted, because it is important to preserve anonymity during the exam administration process.

Anonymity

Use your 7-digit LLS ID Number on this exam. Do not include your name and do not make any remarks that will jeopardize your anonymity or anyone else's anonymity on the exam before the exam grades are posted.

Student ID # 7_____

STOP!

DO NOT READ

BEYOND THIS PAGE

UNTIL INSTRUCTED TO DO SO

Jurisdictional Rules

For every question on the exam, Loyola follows the same jurisdictional rules. This page lists out all the jurisdictional rules that are settled law in the state of Loyola. Not every rule will be relevant to every question. If a jurisdictional rule is not included on that list, you may assume that there is no governing precedent on that issue in the state of Loyola.

Duty

For affirmative duties, Loyola only recognizes the classic common law exceptions. Loyola is not a state like California that uses the *Rowland* factors.

Res Ipsa Loquitur

With regard to res ipsa loquitur, the state of Loyola is an "inference" jurisdiction, not an "presumption" jurisdiction.

Causation

Loyola uses a "but-for" test for factual causation.

Comparative Responsibility

Loyola has a "no greater than" comparative negligence regime. After adopting a comparative responsibility scheme, Loyola eliminated the "last clear chance" rule.

Assumption of Risk

Assumption of risk is allowed as an affirmative defense. When determining whether a liability waiver is against public policy, Loyola uses a totality of the circumstances test.

Strict Liability

Across various cases, Loyola courts have found that strict liability applies by relying on either *Rylands v. Fletcher* or the Second Restatement.

Products Liability

Loyola is a modern jurisdiction where strict liability — not negligence — governs products liability litigation, and a plaintiff must prove either a manufacturing defect, design defect, or failure to warn. Privity is not allowed as a defense in products liability cases.

Damages

Damages are apportioned based on comparative responsibility. Loyola is a several liability jurisdiction. There's no statutory law on punitive damages and there's no governing state case law on either punitive damages or noneconomic damages.

Part I (Question 101) Short Answer Questions

Question 1

You are an attorney at a small firm representing a defendant, Mathilda Fischer, who has been sued for intentional infliction of emotional distress. In your client interview with Fischer, she says that her life's ambition is to be Virginia Carlson's worst nightmare. Fischer's now ex-husband had an extramarital affair with Carlson, and Fischer has decided that she will exact her revenge in every legal way possible. Carlson serves as the Loyola City Public Works Director, in charge of sewers and water runoff in Loyola City. After recent storm surges, the Public Works Department has come under scrutiny for its maintenance of the water cleanliness of Loyola City beaches. Fischer put up posters on every telephone pole in Loyola City that featured a photoshopped picture of Carlson looking angry, wearing yellow pee-stained pants, and exclaiming in a giant comic-strip balloon "Who wet my pants?" Text at the bottom of the poster asks, "Will Virginia Carlson ever take responsibility for her messes?" Because of the attention that the posters received, including being featured on late night comedy television shows, Carlson is now too anxious and depressed to show her face in public.

Carlson has sued Fischer for intentional infliction of emotional distress. Your co-counsel is very concerned that your team will lose this case because every time he describes the facts of the case to anyone, they spontaneously interrupt to say, "Outrageous!" She can't see how your team can possibly win the case. What do you say to convince her otherwise?

Question 2

Pablo Gomez runs a convenient store where Ivan Sharp broke his leg in a slip and fall accident. An ambulance drove Sharp from the store to a local hospital where Sharp was treated for his injuries. When lifting Sharp into the ambulance the emergency medical technician, Emma Torres, did not support Sharp's leg properly and accidentally injured his ankle. At the hospital, Sharp received separate treatment for the broken leg and the ankle injury.

Sharp sued both Gomez and Torres for negligence. A jury found that Gomez and Sharp were each 50% at fault for the slip-and-fall accident and that Gomez and Torres were each 50% at fault for the ankle injury when Sharp was loaded onto the ambulance. Gomez is insolvent and cannot pay damages. When apportioning damages, the trial court ordered Torres to pay 25% of the total damages, given that the plaintiff, Sharp, was 25% responsible and that the other defendant, Gomez, was 50% responsible but was insolvent.

As an appellate court reviewing the damages award, do you reverse or uphold the trial court apportionment of damages? Why?

Question 3

Sasha Weiss, an owner of a chimpanzee sanctuary in Loyola had all the necessary permits, followed all regulations for the safe keeping of wild animals, and followed the best safety practices in the industry. One day, a chimpanzee stole the keys from a security guard at the sanctuary, managed to unlock its cage, and escaped the sanctuary. Before being apprehended by authorities, the chimpanzee broke into a nearby home and attacked the people inside. The injured people are now suing the owner of the chimpanzee sanctuary for damages.

You are the attorney representing Weiss, the sanctuary owner. Weiss wants to fight the case and thinks that she should prevail because she did nothing wrong. How do you advise her on this point?

Question 4

Most grocery stores in Loyola have automated devices on their shopping carts that lock the wheels of the shopping cart if the cart is taken beyond a certain distance of the grocery store. Hilltop grocery store has not installed these devices on their shopping carts. Recently, an unattended shopping cart at Hilltop grocery store rolled downhill from the store parking lot, traveled a quarter mile down the road, jumped the curb, and crashed into a pedestrian, Dorothy Wang, causing personal injuries.

You are a junior attorney at a plaintiff-side firm representing Wang in her negligence suit against Hilltop grocery store. A partner at the firm is confident that questions of duty, causation, and harm will be resolved in your client's favor. The partner wants to know whether there is a realistic chance that you might lose on the element of breach. What do you tell the partner?

Part II (Question 102) Essay Question

Coach Dan Moss was in charge of the Burns High School cross-country running team. During an after-school practice session, Coach Moss led the team on a run through the town of Burns, following a predetermined route that included two busy intersections. At one intersection, a crosswalk signal was present to help pedestrians safely cross the road. Coach Moss and the majority of the team reached the intersection when the signal indicated "walk." Coach Moss, traveling in front of the team in an electric golf cart, told the team to cross the street before the light turned, and the group began to do so. But Rosanna Scott, the slowest member of the team who was lagging behind the others, did not make it to the intersection until the signal had changed to "stop." Scott, eager to catch up with her teammates, decided to cross the street despite the "stop" signal.

At the same time, a driver, Safwan Ayad, approached the intersection. Ayad saw that he had a green light and that the "stop" signal for pedestrians was on. Ayad's car entered the intersection — driving one mile over the posted speed limit of 30 miles per hour — and struck Scott as she stepped out into traffic, causing her serious injuries.

Scott's family contacted your firm, seeking representation in suing both Ayad and Moss for negligence. A partner at the firm wants you to write a persuasive memo that presents the strongest negligence case that the plaintiff has against each defendant. Don't write an objective memo that evenhandedly considers both sides. Argue for our client's position. Be sure to present our best arguments and address any serious counterarguments.

Format your memo in the following way:

1) Present a prime facie case of negligence against Ayad. Argue why any affirmative defenses that Ayad may assert will not defeat Scott's claim. Be sure to spell out the impact that these defenses could have on the outcome of the litigation.

2) Present a prima facie case of negligence against Moss. Argue why any affirmative defenses that Moss may assert will not defeat Scott's claim. Be sure to spell out the impact that these defenses could have on the outcome of the litigation.

Part III (Question 103) Essay Question

TreadOnMe is a well-known manufacturer of treadmills for home use. TreadOnMe's new model, the "Legs Miserable Unlimited" or "LMU" for short, comes with a built-in safety feature that is supposed to stop the treadmill belt immediately when a user falls or trips. The safety feature is activated by a small plastic clip attached to the user's clothing and connected by a string to a magnet on the handlebar of the treadmill. If a person falls, the safety clip pulls the string, removing the magnet from the handlebar. Without the magnet attached, the treadmill will stop running.

Liam Levy, a customer who recently purchased the treadmill for home use, suffered a severe injury after falling on the treadmill. Before using the treadmill, Levy had noticed the plastic safety clip attached to the handlebar. But because Levy had not read the user's manual and had not read the warning labels affixed to the treadmill, Levy did not know why the clip existed and was unaware that he was supposed to clip the plastic safety clip to his clothing to activate the safety feature.

In any event, Levy preferred to run in the nude and therefore had no clothing to secure the safety clip to. While running on the treadmill at its highest rate of speed and without holding onto the treadmill's handlebar, Levy fell. The safety feature failed to activate; the treadmill continued running; and Levy was flung from the treadmill across his small living room and into a large cactus. The impact of being catapulted naked into the spines of a cactus resulted in severe personal injury requiring multiple rounds of surgery.

After the incident, Levy later discovered that the safety mechanism on his treadmill was broken and that his treadmill could continue to run even when the magnet was not secured to the handlebar. Accordingly, even if Levy had worn clothing and attached the safety clip to this clothing, his fall would not have activated the safety feature to stop the treadmill.

Levy is now suing TreadOnMe for products liability, alleging a manufacturing defect in the plastic clip and a design defect in the safety feature. On the design defect claim, Levy plans to argue that a reasonable alternative design would be a safety clip that attaches to a wristband wrapped around the user's wrist while running on the treadmill. Levy is not pursuing a claim for failure to warn as the treadmill is covered in warning labels and the instruction manual extensively documents the safety feature, instructs the user on the proper use of the safety clip, and includes instructions on inspecting the clip for potential defects before using the treadmill.

You are a junior attorney at the firm representing TreadOnMe. A partner has asked you to write an objective memo analyzing the strength of each of Levy's claims and any defenses TreadOnMe might be able to raise.

Format your memo in the following way:

1) Manufacturing defect claim

2) Design defect claim

3) Affirmative defenses

Part IV (Question 104) Essay Question

You are a wise Loyola trial judge with experience managing medical malpractice cases. Policymakers in Loyola are considering establishing a specialized "health court" system to handle medical malpractice cases. You have been asked to advise the group that oversees the drafting of the proposal.

The proposal is currently in the earliest stages of development and a rough draft of the key provisions have been cobbled together for experts in the field to consider. Here are some features of the current plan:

- The plan would remove medical malpractice cases from generalized courts and place them in specialized health courts.
- In these courts, the standard of "negligence" will be replaced with the standard of "avoidability." Existing somewhere between strict liability and negligence, the "avoidability" standard would allow plaintiffs to recover for injuries that resulted from a medical professional's failure to follow best practices.
- An expert body will develop and periodically update decision aids for health court judges. These decision aids would identify certain injuries that would not typically occur if a doctor followed best practices. If a plaintiff's injury matches one listed in the decision aid, the plaintiff would be adjudged presumptively eligible for compensation.
- When allocating compensation, the plaintiff's economic losses will be compensable in full, but the collateral source rule will not apply in these courts. Noneconomic damages will be awarded according to a predetermined formula tied to injury severity.

You have been asked to speak at a roundtable discussion of the current plan. Along with other guests — including judges, attorneys, and medical professionals — you are expected to share a few brief remarks on the plan's strengths, weaknesses, and your most important suggestions for revision.

Appendix A: List of Cases

This list includes cases discussed in-depth during class. It is not an exhaustive list of all cases. You are welcome and encouraged to reference cases discussed in the casebook that are not included in this list. You will not receive credit for referencing cases that were neither discussed in class nor included in the casebook. The cases are listed chronologically in the order that we discussed them in class.

Seffert v. Los Angeles Transit Lines

McDougald v. Garber

Mathias v. Accor Economy Lodging, Inc.

State Farm v. Campbell

BMW v. Gore

Adams v. Bullock

Braun v. Buffalo Gen. El. Co.

United States v. Carroll Towing Co.

Bethel v. New York City Transit Authority

Baltimore & Ohio Railroad Co. v. Goodman

Pokora v. Wabash Railway Co.

Trimarco v. Klein

Martin v. Herzog

Tedla v. Ellman

Negri v. Stop and Shop, Inc.

Gordon v. Museum of Natural History

Byrne v. Boadle

McDougald v. Perry

Ybarra v. Spangard

Sheeley v. Memorial Hospital

Matthies v. Mostromonaco

Harper v. Herman

Farwell v. Keaton

Randi W. v. Muroc Joint Unified School District

Tarasoff v. Regents of the University of California

Strauss v. Belle Realty

Reynolds v. Hicks

Carter v. Kinney

Heins v. Webster County

Riss v. City of New York
Lauer v. City of New York
Falzone v. Busch
Gammon v. Osteopathic Hospital of Maine
Johnson v. Jamaica Hospital
Stubbs v. City of Rochester
Zuchowicz v. United States
Summers v. Tice
Hymowitz v. Eli Lilly & Co.
Benn v. Thomas
Torres v. El Paso Electric Co.
Palsgraf v. Long Island Railroad Co.
Butterfield v. Forrester
Davies v. Mann
Wassell v. Adams
Hanks v. Powder Ridge Restaurant Corp.
Murphy v. Steeplechase
Lamson v. American Axe & Tool
Davenport v. Cotton Hope
Fletcher v. Rylands
Rylands v. Fletcher
Indiana Harbor Belt v. American Cyanamid
MacPherson v. Buick Motor Co.
Escola v. Coca Cola
Cronin v. J.B.E. Olson
Barker v. Lull Engineering
Soule v. General Motors
Hood v. Ryobi American Corp.
Centocor v. Hamilton
General Motors Corp. v. Sanchez
Garratt v. Dailey
Picard v. Barry Pontiac-Buick, Inc.
Wishnatsky v. Huey
Lopez v. Winchell's Donut House
Womach v. Eldridge

Hustler Magazine v. Farwell

Snyder v. Phelps

Hart v. Geysel

Courvoisier v. Raymond

Katko v. Briney

Ploof v. Putnam

Vincent v. Lake Erie Transport Co.

Frost v. Porter Leasing Corp.

Pavia v. State Farm

Appendix B: Legal Rules

This list includes legal rules covered in class that you are not expected to have memorized. You should commit to memory any legal rules covered in class or in the casebook that are not listed below.

Do not use this list to predict the legal rules that you will be tested on during the exam. That would be a big mistake, as the many of the most important rules are *not* included in the list because you are expected to have them memorized.

Keep in mind that the midterm exam will not address every topic covered in class. Therefore, only some of these rules will be relevant to answering the exam questions.

Rules of Civil Procedure

Motion to Dismiss

A motion to dismiss is a formal request for a court to dismiss a case. A defendant may file a motion to dismiss for failure to state a claim upon which relief can be granted. With this motion, the defendant contends that even if all the factual allegations in a plaintiff's complaint are true, they are insufficient to establish a cause of action. A trial court should grant this motion if the plaintiff has not asserted a plausible claim for relief based on well-pleaded facts.

Summary Judgment

Summary judgment is a judgment entered by a court for one party and against another party without a full trial. In civil cases, either party may make a pre-trial motion for summary judgment. Rule 56 of the Federal Rules of Civil Procedure governs summary judgment for federal courts. Under Rule 56, in order to succeed in a motion for summary judgment, a movant must show 1) that there is no genuine dispute as to any material fact, and 2) that the movant is entitled to judgment as a matter of law. "Material fact" refers to any facts that could allow a fact-finder to decide against the movant. Many states have similar pre-trial motions. If the motion is granted, there will be no trial. The judge will immediately enter judgment for the movant.

Directed Verdict

A directed verdict is a ruling entered by a trial judge after determining that there is no legally sufficient evidentiary basis for a reasonable jury to reach a different conclusion. Directed verdicts have been largely replaced by judgment as a matter of law. In federal court, motions for a directed verdict are governed by Rule 50 of the Federal Rules of Civil Procedure. A court should grant this motion if no reasonable jury could have legally sufficient evidence to find for a party on a particular issue.

Excessive Verdict

An excessive verdict is a verdict that shocks the conscience because it appears to stem from factors extraneous the judicial proceedings. For instance, the jury may have been prejudiced against the defendant or overly swayed by emotionally draining evidence. Most verdicts are deemed excessive because the money damages awarded far exceed

the compensation given in similar cases; the typical result is a judge-ordered decrease of the award.

Remittitur

Remittitur is a trial court order in response to an excessive damage award or verdict by a jury which gives the plaintiff the option to accept a reduced damage award or conviction, or the court may order a new trial. Latin for "to send back, to remit." The purpose of remittitur is to give a trial court the ability, with the plaintiff's consent, to correct an inequitable damage award or verdict without having to order a new trial.

Additur

Additur is a procedure by which a court increases the amount of damages awarded by the jury. A party may move for additur, or the court may *sua sponte* order additur, if the jury awards an inadequate amount of damages. The purpose of additur is to allow the court to assess and increase the jury award having to order a new trial. The Supreme Court held in *Dimick v. Schiedt* that additur violates the Seventh Amendment and so is not permissible in federal courts. Many state courts allow additur, however, when the defendant agrees to the increased award on the condition that the court deny plaintiff's motion for a new trial.

Punitive Damages

In *BMW of North America, Inc. v. Gore* the Supreme Court instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

As an example of state law governing punitive damages, under California Civil Code § 3294, "where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to actual damages, may recover damages for the sake of example and by way of punishing the defendant."

These terms are defined as follows:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

Duty and Breach

"Common carriers . . . must keep pace with science, art, and modern improvement." *Treadwell v. Whittier*, 80 Cal. 574, 600 (Ca. 1889).

Common carriers must use the best precautions in practical use "known to any company exercising the utmost care and diligence in keeping abreast with modern improvement in . . . such precautions." *Valente v. Sierra Ry.*, 151 Cal. 534, 543 (Ca. 1907).

To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it. *Negri v. Stop & Shop* 480 N.E.2d 740 (Ny. 1985).

In *Killings v. Enterprise Leasing Co.*, 9 So. 3d 1216 (Ala. 2008), the court recognized a third-party negligent spoliation claim, conditioned on: 1) actual knowledge of "pending or potential litigation" on the part of the spoliator; 2) a voluntary undertaking, agreement, or specific request establishing a duty; and 3) evidence that the missing evidence was vital to the underlying claim.

Generally, a special relationship giving rise to a duty to warn is only found on the part of common carriers, innkeepers, possessors of land who hold it open to the public, and persons who have custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection. Restatement (Second) of Torts § 314A (1965).

Section 324 of the Second Restatement provides that one who, being under no duty to do so, takes charge of another who is helpless is subject to liability caused by "(a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge, or (b) the actor's discontinuing his aid or protection, if by so doing he leaves the other in a worse position than when the actor took charge of him." Restatement (Second) of Torts § 324 (1965). The Restatement expresses no opinion as to whether "an actor who has taken charge of a helpless person may be subject to liability for harm resulting from his discontinuance of the aid or protection, where by doing so he leaves the other in no worse position than when the actor took charge of him." The Third Restatement requires an actor to exercise reasonable care in discontinuing aid for someone who reasonably appears to be in imminent peril. Restatement (Third) Torts: Liability for Physical and Emotional Harm § 43.

Section 311 of the Restatement Second of Torts, involving negligent conduct, provides that: "(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results (a) to the other, or (b) to such third persons as the actor should reasonably expect to be put in peril by the action taken. (2) Such negligence may consist of failure to exercise reasonable care (a) in ascertaining the accuracy of the information, or (b) in the manner in which it is communicated."

Rowland v. Christian, 443 P.2d 561 (Cal. 1968), enumerates a number of considerations that have been taken into account by courts in various contexts to determine whether a departure from the general rule of not imposing an affirmative duty is appropriate. "[T]he major [considerations] are the foreseeability of harm to the plaintiff,

the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." The foreseeability of a particular kind of harm plays a very significant role in this calculus, but a court's task—in determining 'duty'—is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party."

For specific policy reasons thought to be important, courts sometimes determine that no duty exists, thereby withdrawing the possibility of the defendant being held liable for the harm, even if negligent. Courts properly do this, according to the Third Restatement, when they articulate "categorical, bright-line rules of law applicable to a general class of cases." Restatement (Third) Torts: Liability for Physical and Emotional Harm § 7(b).

Carter v. Kinney, 896 S.W.2d 926 (Mo. 1995), traces the historical rules of premises liability, "Historically, premises liability cases recognize three broad classes of plaintiffs: trespassers, licensees and invitees. All entrants to land are trespassers until the possessor of the land gives them permission to enter. All persons who enter a premises with permission are licensees until the possessor has an interest in the visit such that the visitor 'has reason to believe that the premises have been made safe to receive him.' That makes the visitor an invitee. The possessor's intention in offering the invitation determines the status of the visitor and establishes the duty of care the possessor owes the visitor. Generally, the possessor owes a trespasser no duty of care; the possessor owes a licensee the duty to make safe dangers of which the possessor is aware; and the possessor owes invitees the duty to exercise reasonable care to protect them against both known dangers and those that would be revealed by inspection. The exceptions to these general rules are myriad."

Section 332 of the Restatement Second extends invitee status to a person who is "invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public."

Section 333 of the Restatement Second states the duty owed to trespassers, "Except as stated in §§ 334–339, a possessor of land is not liable to trespassers for physical harm caused by his failure to exercise reasonable care (a) to put the land in a condition reasonably safe for their reception, or (b) to carry on his activities so as not to endanger them." The listed exceptions create obligations to warn, for example, when the possessor knows that persons "constantly intrude upon a limited area" of the land and may encounter a hidden danger, or when the possessor fails to exercise reasonable care for the safety of a known trespasser. Generally, though, the duty is simply not to willfully or wantonly harm trespassers.

Section 342 of the Restatement Second provides that an occupier is subject to liability to invitees if the occupier "(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger,

or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger."

Section 339 of the Restatement Second provides rules governing child trespassers, "A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children."

In *Cuffy v. City of New York*, 505 N.E.2d 937 (N.Y. 1987), the court stated the general rule that there is no tort duty to provide police protection, but recognized an exception in cases of "special relationship"—the elements of which were held to be, "1) an assumption by the municipality through promises or action, of an affirmative duty to act on behalf of the party who was injured; 2) knowledge on the part of the municipality's agents that inaction could lead to harm; 3) some form of direct contact between the municipality's agents and the injured party; and 4) that party's justifiable reliance on the municipality's undertaking."

Section 47 of the Third Restatement provides for liability when negligently inflicted serious emotional harm "occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm," but also specifies that "an actor who negligently injures another's pet is not liable for emotional harm suffered by the pet's owner."

Causation

"For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." Restatement (Second) of Torts § 876 (1965).

Defenses to Negligence

In *Tunkl v. Regents of the University of California*, 383 P.2d 441 (Cal. 1963), the court concluded that exculpatory agreements violate public policy if they affect the public interest adversely; [ ]; and identified six factors (Tunkl factors) relevant to this determination: "[1] [The agreement] concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to

perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents."

Strict Liability

"[T]he true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape." *Fletcher v. Rylands*, 1 LR Exch. 265 (1866).

"[I]f the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land,—and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril." *Rylands v. Fletcher*, 3 LRE & I. App. 330 (HL) (1868).

"In determining whether an activity is abnormally dangerous, the following factors are to be considered: (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes." Restatement (Second) of Torts § 520 (1977).

"An activity is abnormally dangerous if: (1) the activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; and (2) the activity is not one of common usage." Restatement (Third) Torts: Liability for Physical and Emotional Harm § 20 (2010).

"A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product: (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product; (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe; (c) is defective because of inadequate

instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe." Restatement (Third) of Torts: Products Liability § 2 (1998).

"[W]hen a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks." Restatement (Third) of Torts: Products Liability § 2 cmt. 1 (1998).

"A reasonable warning not only conveys a fair indication of the dangers involved, but also warns with the degree of intensity required by the nature of the risk. [ ] Among the criteria for determining the adequacy of a warning are: 1. the warning must adequately indicate the scope of the danger; 2. the warning must reasonably communicate the extent or seriousness of the harm that could result from misuse of the [product]; 3. the physical aspects of the warning must be adequate to alert a reasonably prudent person to the danger; 4. a simple directive warning may be inadequate when it fails to indicate the consequences that might result from failure to follow it and, . . . 5. the means to convey the warning must be adequate." *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 429 (Tenn. 1994).

"Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability." Restatement (Second) of Torts § 402A cmt. n (1965).

"When the defendant claims that the plaintiff failed to discover a defect, there must be evidence that the plaintiff's conduct in failing to discover a defect did, in fact, fail to meet a standard of reasonable care. In general, a plaintiff has no reason to expect that a new product contains a defect and would have little reason to be on guard to discover it." Restatement (Third) of Torts: Products Liability § 17 (1998).

Intentional Torts

"An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results." Restatement (Second) of Torts § 13 (1965).

"An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) an offensive contact with the person of the other directly or indirectly results." Restatement (Second) of Torts § 18 (1965).

"An actor is subject to liability to another for assault if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) the other is thereby put in such imminent apprehension." Restatement (Second) of Torts § 21 (1965).

"An actor is subject to liability to another for false imprisonment if (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and (b) his act directly or indirectly results in such a confinement of the other, and (c) the other is conscious of the confinement or is harmed by it." Restatement (Second) of Torts § 35 (1965).

"One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Restatement (Second) of Torts § 46 (1965).

Section 2 of the Third Restatement provides the following approach to recklessness, usually considered to be synonymous with willful or wanton misconduct: "A person acts recklessly in engaging in conduct if: (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk."

"An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him." Restatement (Second) of Torts § 63 (1965).

"(1) Subject to the statement in Subsection (3), an actor is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm, when he reasonably believes that (a) the other is about to inflict upon him an intentional contact or other bodily harm, and that (b) he is thereby put in peril of death or serious bodily harm or ravishment, which can safely be prevented only by the immediate use of such force. (2) The privilege stated in Subsection (1) exists although the actor correctly or reasonably believes that he can safely avoid the necessity of so defending himself by (a) retreating if he is attacked within his dwelling place, which is not also the dwelling place of the other, or (b) permitting the other to intrude upon or dispossess him of his dwelling place, or (c) abandoning an attempt to effect a lawful arrest. (3) The privilege stated in Subsection (1) does not exist if the actor correctly or reasonably believes that he can with complete safety avoid the necessity of so defending himself by (a) retreating if attacked in any place other than his dwelling place, or in a place which is also the dwelling of the other, or (b) relinquishing the exercise of any right or privilege other than his privilege to prevent intrusion upon or dispossession of his dwelling place or to effect a lawful arrest." Restatement (Second) of Torts § 65 (1965).

"An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to prevent or terminate another's intrusion upon the actor's land or chattels, if (a) the intrusion is not privileged or the other intentionally or negligently causes the actor to believe that it is not privileged, and (b) the actor reasonably believes that the intrusion can be prevented or terminated only by the force used, and (c) the actor has first requested the other to desist and the other has disregarded the

request, or the actor reasonably believes that a request will be useless or that substantial harm will be done before it can be made." Restatement (Second) of Torts § 77 (1965).

"The intentional infliction upon another of a harmful or offensive contact or other bodily harm by a means which is intended or likely to cause death or serious bodily harm, for the purpose of preventing or terminating the other's intrusion upon the actor's possession of land or chattels, is privileged if, but only if, the actor reasonably believes that the intruder, unless expelled or excluded, is likely to cause death or serious bodily harm to the actor or to a third person whom the actor is privileged to protect." Restatement (Second) of Torts § 79 (1965).

END OF EXAM

Student I.D. # 7_____