MIDTERM EXAM

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

INSTRUCTIONS

Exam Format

This exam is 16 pages including the instructions. Please make sure that you have all the pages.

This exam has three parts and two appendices.

Part I consists of four short answer questions. Part II consists of a fact pattern and two related essay questions. Part III consists of a fact pattern and two related essay questions. The three parts are equally weighted at one-third of your total grade.

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 three equally weighted parts, simple arithmetic and common sense may lead you to spend eighty minutes 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 the exam is 15,000 characters with spaces. This amounts to approximately 7.5 typed, double-spaced pages with 1" margins, Times New Roman, 12-point font. 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. There are no character limits for individual answers, only a character limit for your exam responses as a whole.

If you are writing your answers by hand, limit your answers to 3 bluebooks, writing on every other line, only on the front of each page. There are no limits for individual answers, only a bluebook limit for your exam responses as a whole.

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. As some answers will require more analysis than others, you are not encouraged to make the length of your answers strictly proportionate to the weight of the question.

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.

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.

PART I: SHORT ANSWER QUESTIONS

1. State law requires that grocery stores put up "Caution: Slippery When Wet!" signs immediately upon mopping areas of the store where customers are allowed to walk. A Bristol Farms supermarket employee was mopping the produce aisle and forgot to put up a "Caution: Slippery When Wet!" sign. A customer walking down the aisle slipped and fell. The customer decided to sue Bristol Farms for negligence and has retained you as counsel. What is your strongest theory for why the grocery store did not exercise reasonable care?

2. A ninety-year-old man named Philip Swanson was sued for negligence after getting into a car accident with another driver, Marco Sanchez. In the accident, Swanson's truck struck the rear fender of the car driving in front of him on the highway. At trial, the defendant requested that the court give a jury instruction that "the defendant acted negligently only if they failed to act as a reasonably prudent elderly person would have acted under similar circumstances." Over the plaintiff's objection, the court gave this instruction to the jury; the jury returned a verdict for the defendant; and the plaintiff now appeals, arguing that the instruction was an incorrect statement of law. As an intermediate appellate court hearing this appeal, how would you rule and why?

3. Penelope, an eight-year-old girl, was shopping at Target with her mother, Deanna Robbins. Robbins allowed Penelope to push the shopping cart around the store. Another customer, Melody Beasley, saw Penelope pushing the shopping cart quickly to gain speed, putting her feet on the bottom rung of the cart, and yelling, "Whee!" as she coasted down the aisles. Beasley smiled at the sight of the child enjoying herself and was unconcerned about the child's actions until — a few minutes later —Penelope crashed the cart into Beasley, breaking her leg in two places. Beasley sued Penelope for negligence; the case went to trial; and a jury returned a verdict finding the defendant not liable. Assuming that the plaintiff had proven the duty, causation, and harm elements of a negligence cause of action, what would be the most compelling reason why the jury did not find that the defendant had breached a duty of care?

4. Kenneth Moon visited his dentist, Barb Strong, to have a tooth removed. After the operation, Moon discovered that Strong had removed two of his teeth. Strong explained to Moon that she initially removed the wrong tooth, realized her mistake, and then removed the correct tooth as well. Moon sued Strong for negligence. At trial, he introduced evidence that Strong was supposed to remove one tooth and that she removed a different tooth. At the close of the plaintiff's case, Strong submitted a motion for judgment as a matter of law (also called a "directed verdict" in some jurisdictions). In the motion, Strong argues that medical malpractices cases turn on the question of custom and require expert testimony; therefore, because the plaintiff produced no expert witnesses and introduced no evidence related to customary medical practices, the plaintiff failed to make a prima facie case of negligence and the defendant is entitled to judgment as a matter of law. As a trial court judge, how do you rule on the motion and why?

PART II: ESSAY QUESTIONS #1 AND #2

You are a junior attorney working at a plaintiff-side personal injury firm in the state of Loyola. A partner at the firm is seeking your help with a case. The facts of the case and your work assignment are detailed below.

Our client, Remi Smith, was recently injured during a hike in the mountains.

Smith has been a longtime fan of a self-help guru, Weston Watkins. For the past few years, Watkins has been promoting "The Watkins Method," a lifestyle practice that involves sleeping with crystals under your pillow at night, engaging in deep breathing exercises, taking daily ice baths, maintaining a strict legume-centered diet, and making charitable donations to Weston Watkins. According to Watkins's promotional literature, "After as little as three days of heartfelt, genuine practice of the Watkins Method, your experience of negative emotions and negative bodily sensations can drop away forever. The Watkins Method can transform you into the superhuman you always knew you were. You can be happy all of the time, endure any environmental conditions, and consciously direct your immune system to fight off disease." To promote the method and prove his ability to endure extreme conditions, Watkins has engaged in a series of publicity stunts that include climbing frozen mountains wearing only a loincloth; going without sleep, food, or water for days on end; and reading law school casebooks cover-to-cover.

For the last year, Smith has been listening to Weston Watkins's podcast. On the podcast, Watkins promotes his method and answers reader's questions. She originally listened for free, but for the last six months has been paying a $10 a month subscription fee to listen ad-free and access bonus content. At the same time that she started paying for the subscription, she also started to practice the Watkins Method in a more diligent way, buying a set of crystals (from the Watkins online store) to keep under her pillow, taking daily ice baths, practicing breathing exercises multiple times a week, and maintaining a strict legume-based diet.

A month ago, Smith paid $100 to attend a one-day "Watkins Method Retreat" at the Loyola Convention Center, where Watkins led a packed audience through the various Watkins Method techniques. At the close of the day, Watkins told the crowd, "If you practice what I've taught you today, you will transcend humanity and take the next step in our cosmic evolution. Nothing can stop you, not the icy peaks of mountains, not the deprivation of food and water, not a weighty tome of inscrutable legal concepts."

At the retreat, Smith befriended another attendee, Jason Patel. Patel was also an ardent Watkins Method practitioner and had been practicing the method for about a year. Invigorated by the retreat experience, Smith suggested that they make plans to put their practice to the test. They agreed to hike up a local mountain, Posner Peak, while practicing the Watkins breathing techniques. At this time of year, the temperatures at the Peak are below freezing. Hikers must endure violent winds, ice, and snow. Experienced hikers could expect to reach the Posner summit and return to base camp in about two days. To prove their superhuman capabilities, Smith and Patel chose to hike up the mountain wearing only swimsuits and without bringing any food or water. Neither Smith nor Patel had ever been hiking before.

The hike got off to a bad start. An hour into the trek, while navigating a narrow cliffside pass, Smith slipped, fell about fifteen feet onto a flat ledge below, suffered minor scrapes and bruises, and broke both of her legs. “Help me!” she cried out to Patel, “I can’t move my legs. I’m hurt real bad.” Patel looked down at her and said, “I think you fell because you weren’t breathing correctly. Try taking longer in-breaths. Boy, I wonder how you’re ever going to get up this mountain now.” Patel left her behind and continued his ascent.

As Smith was on an exposed ledge on the side of a cliff in subzero temperatures wearing only a bathing suit, she soon began experiencing symptoms of hypothermia.

An hour later, another hiker, Leia Yang, who was descending the mountain noticed Smith on the ledge below. Yang asked Smith if she was okay and tossed down a spare scarf. Smith wrapped the scarf around her (now-purple) fingers, and asked Yang if she would call someone for help. Yang replied that she wished she could but her cellphone was running kind of low on battery and she was in the middle of a really good podcast on the safety features of electric trolley lines at the turn of the twentieth century. Yang inserted her headphones into her ears and kept hiking down the mountain.

A half hour later, another hiker came across Smith and called the local authorities, who rescued Smith and brought her to a nearby hospital. As a result of her injuries, Smith had to have both legs and four fingers amputated. For a few months after her injury she was quite despondent. Other than the Watkins Method, her favorite hobbies had been dancing and playing guitar. She won’t ever play guitar again, and her dancing will be limited to the skill she eventually develops using prosthetic limbs. The surgeries have been quite painful, and she has had extended hospital stays. Three months after the injury, her attitude began to improve dramatically, and she credits the Watkins Method for helping her let go of negative emotions and negative physical sensations.

The story of Smith’s injury has gained attention in the news, and a number of people have since come forward with allegations against Weston Watkins. A few days earlier, another attendee of the Watkins retreat at the Loyola convention center suffered serious medical complications after going days without food or water to test his superhuman abilities. Two people in Oregon who had attended a different Watkins retreat died of hypothermia after attempting to climb a local mountain wearing only their underwear. Women in New York, Virginia, and Colorado have accused Watkins of sexual assault, which is both an intentional tort and a criminal act in each state.

Our firm is pursuing three different negligence claims on Smith’s behalf: against Watkins, against Patel, and against Yang. We’re early in the litigation process, and we’d like you to think through two potential issues ahead.

Question 1: Existence of a Duty

We anticipate that each of these defendants will move for summary judgment on the grounds that they did not owe a duty of care to the plaintiff. Please write a short memo analyzing whether each defendant owed our client a duty of care. Be sure to include the most compelling reasons for each side and your prediction for how a trial court will rule on each defendant's motion for summary judgment. For this memo, we don't need you to analyze whether the defendants exercised reasonable care or otherwise breached their duty to the plaintiff. Confine your analysis to whether each defendant owed the plaintiff a duty of care.

Note that when it comes to affirmative duties, Loyola only recognizes the classic common law exceptions. Even though I wish we were litigating this case in a state like California that uses the *Rowland* factors, they're not applicable here.

Question 2: Noneconomic Damages & Punitive Damages

I know that I'm getting ahead of myself here thinking about damages, but between you and me this Watkins guy is a real piece of garbage. If we can survive summary judgment and I get the chance to parade his antics in front of a jury, I have no doubt that we'll win the case. I want to know what kind of damages we should be trying to secure.

Please write a short memo analyzing the possibility of securing noneconomic damages and punitive damages. I know that we would be able to get the standard economic compensatory damages (lost wages, medical bills, and so on), so don't spend your time analyzing that. Some questions that your memo should resolve include: Can we get this charlatan to pay up for all the emotional hardship he put Smith through? What could be considered? Can we recover these damages even though we didn't file a claim for negligent infliction of emotional distress? Can we also get punitive damages? Assuming that the recent allegations against Watkins are true, can we make him pay up for all the other harm he has caused? At this point in time, I don't want you to try to figure out any raw numbers. I just want a better idea of what kind of damages we could get and whether there are any limits on the amount we can recover or issues we need to figure out.

Note that in the state of Loyola, there's no statutory law on punitive damages and there's no governing state case law on either punitive damages or noneconomic damages. Our court may find other states' case law and legal reasoning persuasive.

Because we have other junior attorneys analyzing issues of contributory and comparative negligence, factual causation, and proximate cause, there is no need for you to address those issues within either of your memos.

PART III: ESSAY QUESTIONS #3 AND #4

You are a junior attorney working at a law firm that is defending a grocery store that has been sued for negligence in the state of Loyola. A partner at the firm is seeking your help with a case. The facts of the case and your work assignment are detailed below.

The plaintiff, Macdonald Miller, recently bought a package of ground beef from our client, Ralph's, a local grocery store chain. After returning from the store, Miller formed the beef into patties that he cooked on his stove to make hamburgers for his family. When biting into a hamburger, Miller broke his tooth on a bone fragment that was approximately one tenth of inch in size.

He is now suing Ralph's for negligence. As is allowed in the state of Loyola, he plans to advance both a res ipsa loquitur case and a negligence case. With regard to res ipsa loquitur, the state of Loyola is a "presumption" jurisdiction, not an "inference" jurisdiction. The case is still at the early stages of litigation, and we'd like your help in strategizing our arguments going forward.

Here is some additional information about Loyola state law, Ralph's meat-grinding processes, industry practices, and regulations that may be worth knowing:

In the state of Loyola, under the doctrine of *respondeat superior*, Ralph's can be held liable for the negligent actions of its employees while those employees are doing their jobs. So for this case, you can consider any negligent action of a Ralph's employee to be a negligent action of Ralph's itself.

Here's how Ralph's meat processing process proceeds. Ralph's receives prepackaged ground beef in four-pound rolls from a meat supplier. An employee at Ralph's removes the meat from the packages, regrinds it, and repackages it for sale. In the typical regrinding process, the meat handler breaks the ground beef into handful-size pieces, visually inspects them, and places them in a grinder. The meat is reground into a "mush," and then machine-compacted through a steel plate perforated by holes up to a tenth of an inch in diameter. The ground beef emerges in the tubular, spaghetti-like strands that consumers all know and love. Although the grinding of the meat is handled by an automated machine, the meat handler stands by to observe the operation from start to finish. The grinder is never left unattended. The reground meat is packaged in styrofoam and sealed in plastic wrap for sale.

The meat grinding machines that Ralph's uses are standard to the grocery industry and can be found in grocery stores across the nation. Some grocery stores grind their meat from whole parts, while other grocery stores regrind meat that has already been ground. Some slaughter-houses process their ground beef through hard-particle removal machines to remove any traces of bone fragments. Ralph's does not receive its ground meat from a slaughterhouse that uses a hard-particle removal machine. Because hard-particle removal machines are bulky and expensive, most grocery stores and butcher shops do not have them. Of the 10,000 grocery stores in the state of Loyola, 100 Whole Foods premium grocery stores have hard-particle removal machines.

The Fair Labor Standards Act prohibits workers under the age of 18, in non-agricultural occupations, from operating powered equipment considered hazardous, including food slicers and meat grinders. Ralph's had a fourteen-year-old worker operating the meat grinder when Miller's ground beef was ground and packaged.

The United States Department of Agriculture has instructed its inspectors at meat processing plants that no spinal cord or bone tissue is to be allowed in ground beef. The department has also ruled that meat products produced by automatic grinding machines can be labeled as "meat" as long as they do not contain more than 0.15% calcium. The standard allows for trace amounts of bone, although the department's ruling specifies that bones should not be purposefully ground or pulverized by the machines.

Question 3: Res ipsa loquitur

The plaintiff intends to present a res ipsa loquitur case to the jury. We'd like to convince the trial court that the plaintiff should not be allowed to do so.

Please write a short memo that *persuasively* argues that, given the facts of the case, the doctrine of res ipsa loquitur does not apply as a matter of law. Don't write an objective memo that evenhandedly considers both sides. Argue for our client's position. We should be able to present your argument to the court verbatim. Be sure to present our best arguments and address any serious counterarguments.

Question 4: Negligence

To prove a negligence case, the plaintiff must identify the specific way that the defendant did not exercise reasonable care. We haven't yet learned what the plaintiff will argue, but in these kinds of cases plaintiffs often present the jury with a variety of ways that the defendant could have acted differently and thereby exercised reasonable care.

Please write a short memo that *persuasively* argues that Ralph's actual behavior met the standard of reasonable care. 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.

Because we have other junior attorneys analyzing issues of contributory and comparative negligence, factual causation, and proximate cause, there is no need for you to address those issues within either of your memos.

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

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.

Rules of Tort Law

“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."

END OF EXAM