

TORTS 201, Section 3

Instructor in Charge: Professor Bamberger

**Time Allowed: 3 ½ Hours**

Closed Book, except for both sides of a single 8½ x 14 page prepared by student.

LAPTOP USERS: Create a header in a new Word document that includes your exam number, course name, instructor name, and semester. Title the document with the course name, instructor name, and your exam number (e.g.: Torts\_Bamberger\_0001) and save it to your hard drive. Be sure to format your document with page numbers and double-spacing.

WRITERS: Place your exam label or clearly print your exam number on the cover of all bluebooks. Write the course name and the professor's name on each bluebook. Number each bluebook, and state the total number of bluebooks that you are submitting ("1 of 4", "2 of 4" etc.). **Please, where possible, write only on one side of the page, and skip every other line.**

**SPECIAL INSTRUCTIONS (READ VERY CAREFULLY)**

1. This is a modified closed-book examination. You **may not** consult **any** materials – paper, electronic or other – **except** for both sides of a single 8 ½ x 14 page, prepared by you, that you may have brought to the exam.
2. **There are 3 Questions on 4 pages.** Be sure your copy of the exam contains all 4 pages.
3. **One hour has been allotted for each Question. Additionally, I have allotted an extra 30 minutes that you may allocate as you wish.**
4. Breathe deeply. Read each Question carefully to be sure what it is asking. Try to stay within the time allotted for each question. The Questions will be weighted roughly equally.

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You will be given a 10-minute and a 1-minute warning. When time is called, please stop writing promptly and turn in your copy of this exam and your answers. Please do NOT leave your exam or bluebook or typed answers on the desk. All copies of this exam and bluebooks or typed answers must be turned in to the person in charge, or if you finish early, must be taken to Exam Headquarters (Room 123).

GOOD LUCK!!

## QUESTION 1

Since 1960, Oldco, a metals refiner, deposited toxic waste material at a landfill it owned in a remote area that would later be settled as the Town of Prosser. The landfill was lined with Stor-it, a material provided and installed by Toxix, Inc. that was widely believed to be a top-of-the line product that would last over a century. In 1995 the landfill became full, and was thereafter maintained by Oldco as an inactive dumpsite. In 2000, it was discovered that Stor-It was an inadequate landfill containment method in that it degraded after as little as 20 years, and that some of the waste material in Prosser was escaping into the surrounding subsoil. Effective remedial measures would have been very costly, and Oldco did not undertake them.

Toxic waste from the site entered the subsurface groundwater and found its way into wells used by Prosser. After numerous complaints by residents over a span of many years that the town's drinking water had begun to taste like chemicals, special testing of water from the wells revealed the presence of cancer-causing chemicals, and the wells were shut down. Studies showed that the carcinogens came from the Oldco site, and had probably been present in Prosser's water for years.

Milton and Winifred Popper were residents of Prosser, and operators of the town car wash. When they realized they had been drinking contaminated water, they consulted medical authorities. The doctors informed them that Winifred, a Prosser native, already had cancerous cells in her body. They also informed her, as a long-term smoker, that smoking made one particularly susceptible to the kind of cancer with which she had been diagnosed. Milton, a relative newcomer to Prosser, had not already developed cancer but had been exposed to an increased risk of contracting it in the future. He probably would never get cancer because of the carcinogens, but he might.

Since they received this medical news, Milton has suffered emotional distress owing to an acute fear of cancer. Winifred, although she is expected to live, has already undergone lengthy treatments, and cannot work or perform many household functions. The car wash has been shut down for lack of water. And they both continue to experience feelings of anxiety, humiliation, anger, stress, and depression.

- **The Poppers have sued Oldco, Toxix and Prosser. Assess the possible claims of liability that each might bring against each other, and analyze the strength or weakness of their claims in light of the doctrines and policies we have discussed in class, and the types of damages each might receive.**
- **Assuming Oldco, Toxix and Prosser have each, in turn, sued the other defendants for contribution, consider briefly how their claims might come out.**

## END OF QUESTION 1

## **QUESTION 2**

In your first assignment as a law firm associate, the managing partner, Mollie Pritchett, brings you aboard a case against the Howitzer Hospital by your client Polly Patient, who permanently lost movement in her legs during spinal surgery when a resident fell asleep while operating, and collapsed on her. The resident was on a fewer-than-eighty-hour per week work schedule, but was eighteen hours into his second 20-hour shift.

Other associates have been assigned to analyze *respondeat superior* claims (*i.e.*, don't discuss them). The managing partner asks you to explore the direct liability claim against Howitzer. In particular, she would like you to analyze the importance of the following facts to the case.

According to a rule that was adopted three years ago by the US Department of Health and Human Services pursuant to congressional authority, doctors training in the United States are forbidden from working more than eighty hours a week, and from working round-the-clock shifts more than twice a week.

But a new study by the Brigham and Women's Hospital in Boston suggests the rules aren't strict enough to prevent serious harm to patients, including fatal mistakes. The Brigham study is based both on (1) self-reported data by residents as to their amount of work, sleep and medical errors, and (2) other data contained in hospital records of hours and medical errors, and retrieved from sensors attached to residents measuring brainwaves indicating sleepiness and sleep.

The study indicates that when doctors work up to the levels permissible by rule the rate of human error, including fatal error, increases significantly. In the words of one study participant: "Sure, adrenalin keeps you going, especially during surgery. But when you're on your second all-night shift, you just can't shake the cloudy feeling of exhaustion behind your eyes; everything just moves a little slower."

The study also demonstrated that the records and sensor data (the second type of data used) revealed that the self-perceptions provided by study participants underestimated the instances of impairment caused by sleep and exhaustion.

### **Assignment:**

Please prepare a memorandum discussing how these facts might or might not support a direct liability claim against the Hospital.

Be sure to include discussion of the following somewhere in the memo, although you may organize it as you see fit:

- How you might frame a case based on these facts, including (a) the way the firm would bring the facts into play in a case at trial; and (b) the doctrines that might support a claim based on these facts. Be sure to discuss possible variations in the law that might play out across jurisdictions, and the strength and weaknesses of your case accordingly.
- The various policies, themes, and debates that would be raised by basing a case on these set of facts and the related doctrines you have discussed. Make reference, when appropriate, to relevant or analogous contexts in which these policies, themes or debates have played out throughout the course.

## **END OF QUESTION 2**

### **QUESTION 3**

“Despite the claims of judges and scholars, whether tort liability is imposed in a particular context is not determined by a mumbo-jumbo notion of foreseeability. Rather, the question is governed by whether courts believe they can impose legal responsibility while avoiding the specter of widespread tort liability.”

**Discuss what you think of this assertion, in both positive and normative terms. (i.e., do you agree with its description? and is it/would it be desirable in light of tort goals?)**

You may organize the essay as you prefer, but be sure to make specific reference to (1) specific causation and duty doctrines; (2) the drawing of the line between tort and contract; (3) the choice among different liability regimes (e.g., negligence vs. strict liability); (4) the choice between rules and standards; and (5) doctrines that take into account the nature of the defendant. Discuss other doctrines, issues, policies and themes from the course, as you see fit.

**END OF EXAM**