

LAW 201, Torts

Instructor in Charge: Professor Schwartz
Time Allowed: 3 hours and 30 minutes
Open Book

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.: Legal Profession_knowledge_Exam #) 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 instructor's name on each bluebook. Number your bluebooks to indicate their order, and state the total number of bluebooks that you are submitting (1 of 6, 2 of 6, etc.) Please write only on every other line of the page.

SPECIAL INSTRUCTIONS:

1. This is an open book examination. You may use your casebook, TORTS STORIES, class handouts, any notes you have prepared, and outlines that you prepared. You may use handouts, notes and outlines only in hard copy. You may not view electronically stored versions of these materials, and you may not cut-and-paste from them. You may not consult or otherwise use commercial outlines during the exam. You may not access the internet during the exam.
2. There are 2 questions on 7 pages. Please be sure that your copy of the exam contains all 7 pages.
3. In addition to demonstrated knowledge of the subject matter, the instructor will consider responsiveness, logical organization, and clarity in evaluating your answers.
4. The instructor has tried to include all necessary facts and instructions in the questions. If, however, you discover that a material fact or instruction is omitted or ambiguous, assume that fact or instruction and state that you have done so.
5. This examination consists of two questions. Each is worth the same amount of credit. Please allot your time accordingly. Analyze the questions and organize your answers before writing.
6. You will be given a 10-minute and a 1-minute warning. When time is called, please stop typing/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 must be turned in to the person in charge, or if you finish early, must be taken to Exam Headquarters (Room 123).

Good luck. Have a great break between semesters!

Question One

On July 13, 2006, two gruesome accidents occurred at the Waterman Resort Hotel in the city of Ocean View, in the state of Waterman. Located on beautiful Lummerland Bay, the Waterman Resort Hotel is a luxury resort with towering palm trees and a lush 44-acre site. Please identify the tort claims that various parties can bring. Evaluate the strengths and weaknesses of these claims.

The first incident occurred when 22-year-old Mark Smith, a hotel guest, drowned in the hotel's indoor swimming pool. Smith and a co-worker Brian Berman were staying in the hotel at the expense of their out-of-town employer. They were in Ocean View on business.

Smith had left their shared hotel room that afternoon shortly after 2:00 p.m. to go swimming in the pool. Berman remained in the room making business phone calls. Berman followed Smith to the pool between 30 and 40 minutes later. At first, he was unable to locate Smith, and called for and looked for him around the pool area and in the bathrooms adjacent to the pool. He observed Smith's clothing, shoes, glasses, and a towel located near the pool. He then discovered Smith face down at the bottom of the deep end, which was between seven and nine feet deep.

Berman grabbed a nearby "shepherd's crook," a rescue device located near the pool, and attempted to pull Smith from the water onto the edge of the pool. A shepherd's crook is also known as a "life hook"; this device consists of a long pole with a metal crooked hook with blunt ends. The "crook" is attached to the pole. (At the end of this question, there is an illustration with examples of a shepherd's crook).

As Berman hooked Smith with the device, which was manufactured by the Nomos Company, the crook broke off, and Smith sank back into the water. At that time Berman observed that Smith's face was blue. It is not clear whether the shepherd's crook broke because of inexperienced use of it by Berman, deterioration of the steel within its plastic sheath or other defect, or some other factor.

Berman did not observe any physical signs that Smith was alive at that time. Rather than dive into the pool, however, and attempt further rescue, Berman rushed to the front desk of the hotel, which was located a few minutes away, and a hotel employee summoned emergency assistance.

Emergency personnel arrived three minutes after the call by the front desk

clerk. They attempted to resuscitate Smith, who showed no pulse or signs of breathing. Smith was taken to a hospital's emergency room by ambulance, and arrived there ten minutes after the emergency personnel arrived at the hotel. At the hospital, emergency room personnel continued to attempt resuscitation, but Smith was pronounced dead there.

Precisely how Smith initially got into distress in the pool, how he drowned, and how long he was at the bottom of the pool, remain unclear. Police interviews after the accident are full of speculation as to how and where Smith entered the pool and whether he actually swam, dove into, or merely walked or perhaps floated into the deep end from the three-foot-deep shallow end.

Testimony and expert opinions based on the medical record evidence indicate that Smith had eaten prior to swimming, he had poor eyesight and had removed his glasses prior to entering the pool, and that he was not a good swimmer. The medical evidence demonstrates that he suffered no injury to his head or neck from diving into the pool.

From the time that Smith entered the pool to the time that he left it, there was no lifeguard present at the pool. There was a lifeguard elsewhere in the hotel; this lifeguard, Frank Gola, was on a break, however, at the time of the accident. According to the terms of his contract with the hotel, Gola was permitted to take an hour off from 2:00 to 3:00 PM. Pursuant to hotel policy, the lifeguard had hung up a sign stating that "Lifeguard is on break until 3:00 PM." There is some evidence that the one hour break, and the hanging up of such a sign, are standard practices at resort hotels in Waterman state.

The second incident occurred later that day at approximately 9:00 P.M., when Trudi Beth Rule, another hotel guest, was struck by an automobile on hotel property, pinned up against a brick wall, and killed when the wall collapsed on her.

At the time, two guests of the hotel were attempting to "clutch-start" an automobile in the circular drive in front of the east wing of the hotel. A clutch start involves trying to start a car with a low battery by having someone outside the car roll it forward, while the driver turns the ignition on, puts the car in first gear, and pushes the clutch in. When the car has attained some speed, the driver brings the clutch up very quickly while at the same time giving the car gas. If all these steps are executed correctly, and the battery is not too low, the car will start.

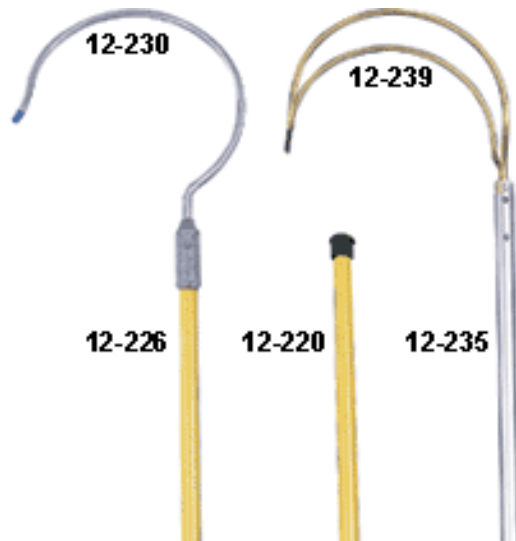
Thus, one guest was pushing the car while the other guest was in the car behind the wheel. Suddenly, the guest behind the wheel lost control of the car.

The automobile left the circular driveway, lurched over a three-inch curb onto a grassy area, and travelled some thirty-three feet across the front lawn parallel to the east wing of the hotel. The automobile collided with an elevated walkway leading out of the front door of the east wing, jumped onto the walkway, and struck Rule as she walked out the front door of the hotel's east wing.

The automobile continued forward, pinning Rule against a high brick wall that supported a concrete canopy at the entrance to the hotel. Because the wall was constructed without adequate supports required by the applicable building code, the entire wall came off, fell in a single piece, and crushed her to death.

Dr. Joseph Roth, the County Medical Examiner, averred by affidavit that in his opinion Rule would not have died merely from the automobile impact; in his opinion, she died as a result of the brick wall falling intact and in one piece upon her.

Illustration A – “Shepherd’s Crook”



Question Two

Instructions

You have been appointed to be the chair of the steering committee of a new American Law Institute (ALI) project to draft a Restatement (Fourth) of Torts. The ALI has asked the steering committee to evaluate the following two scenarios in hopes of improving existing tort law. Please analyze the scenarios on the basis of existing tort law as represented in EPSTEIN, CASES AND MATERIALS ON TORTS and TORT STORIES (RABIN & SUGARMAN, EDITORS). Please discuss each scenario under a separate header.

Please be sure, as well, to address both of the following:

- **Doctrine.** What is the potential result and alternative result (i.e., what might the dissent argue) in each of the scenarios? What cases discussed this semester help in your analysis?
- **Reform.** Given your analysis of the scenarios, do you have advice regarding reform of tort law for the American Law Institute? Are there outcomes that you have identified that you find problematic? If so, why are these outcomes problematic?

Scenarios

(A) Suzanne Small was an experienced equestrian. Her horse Cactus was trained to work with cattle. She was injured when Cactus collided with an unmarked gray steel “guy wire” on a utility pole owned and maintained by a utility company. A “guy wire” is a tensioned cable that adds stability to structures, such as antennas, ship masts, tents, and utility poles. One end of the cable is fixed to the structure, and the other is anchored to the ground. Suzanne seeks damages from the utility.

Cactus was trained to pursue a calf and if “given its head” would do that instinctively. “Given its head” means that the rider provides slack in the reins so the horse can decide where to go. Suzanne testified that she saw a calf while riding and gave Cactus some slack in the rein and said to him, “Let’s go get him.” Suzanne and Cactus took off as the calf began darting in different directions. The horse followed the calf, and when the calf darted under the unmarked “guy wire,” the horse followed and the accident occurred.

(B) Acme Enterprises, Inc. organized and conducted the Acme basketball tournament. The tournament was held outdoors in Mission Bay, Waterman. Spectators were charged no admission fee and were free to move about and

watch the various games in progress. Acme Enterprises also sold alcoholic beverages to the adults who were watching the games.

On July 5, 2007, Lenny Alfono attended the tournament as a spectator. He purchased numerous alcoholic beverages at various Acme stands. According to some witnesses, he was “visibly intoxicated.” According to others, he seemed “happy but not drunk.” At approximately 4:30 PM, a thunderstorm struck the area. During this storm, the winds were in excess of forty-five miles an hour. Lenny, while running for shelter, was struck by a falling tree limb and severely injured. He is now paralyzed. Acme Enterprises made no effort to warn spectators of the approaching storm.