

# WIDENER UNIVERSITY SCHOOL OF LAW

## TORTS

## FINAL EXAM

Professor Pope

Fall 2009

### GENERAL INSTRUCTIONS:

1. **Read Instructions:** You may read these instructions (the first three pages of this exam packet) *before* the official time begins.
2. **Honor Code:** While you are taking this exam, you may not discuss it with anyone.
3. **Competence:** Accepting this examination is a certification that you are capable of completing the examination. Once you have accepted the examination, you will be held responsible for completing the examination.
4. **Exam Packet:** This exam consists of **nineteen pages**, including this cover page. Please make sure that your exam is complete.
5. **Identification:** Write your exam number in the space provided in the upper-right hand corner of this page. Write your exam number on the cover of each Bluebook (or your ExamSoft file) that you use for Parts Two and Three. Write your exam number (and fill in the corresponding ovals) on the Scantron form.
6. **Anonymity:** The exams are graded anonymously. Do *not* put your name or anything else that may identify you (except for your student number) on the exam.
7. **Timing:** This exam must be completed within four hours.
8. **Scoring:** There are 240 points on the exam, approximately one point per minute.
9. **Open Book:** This is an OPEN book exam. You may use *any* written materials, including, but not limited to: the casebook, other required and recommended materials, any handouts from class, PowerPoint slides, class notes, and your own personal or group outlines. You may not use a computer other than in its ExamSoft mode.
10. **Format:** The exam consists of three parts which count toward your grade in proportion to the amount of time allocated.

**PART ONE** comprises 25 multiple choice questions worth three points each, for a *combined* total of 75 points. The suggested total completion time is **75 minutes**.

**PART TWO** comprises two short essay questions worth 45 points each. The suggested total completion time is **90 minutes**.

**PART THREE** comprises one long essay question worth seventy-five points. The suggested completion time is **75 minutes**.

- 11 **Grading:** All exams will receive a raw score from zero to 240. The raw score is meaningful only relative to the raw score of the other students in the class. The raw score will be converted into a scaled score, based on the class curve. For example, if the highest raw score in the class were 200 of 240, then that student would typically receive an "A." I will post an explanatory memo and/or a model answer to TWEN a few weeks after the exam.
- 12 **Special Instructions:** Instructions specific to each exam section are printed immediately below.

### **SPECIAL INSTRUCTIONS FOR PART ONE:**

1. **Format:** This Part contains 25 multiple choice questions, worth three points each, for a combined total of 75 points. This part has a suggested completion time of 75 minutes. Please note that the questions vary in both length and complexity. You might answer some in 30 seconds and others in three minutes.
2. **Identification:** Write your Student ID *both* on the first page of this exam booklet. *and* on the Scantron form. Identify the course on the Scantron form. Fill in the corresponding ovals.
3. **Fill the Oval on the Scantron:** For each question, *fill in* the oval on the Scantron corresponding to the best answer choice.
4. **Ambiguity:** If (and only if) you believe the question is ambiguous, such that there is not one obviously best answer, neatly explain why in a separately marked section of your Bluebook or ExamSoft file. Your objection must (i) identify the ambiguity or problem in the question and (ii) reveal what your answer would be for all possible resolutions of the ambiguity. I do *not* expect this to be necessary.

### **SPECIAL INSTRUCTIONS FOR PARTS TWO AND THREE:**

1. **Submission:** Write your *essay* answers in your Bluebook examination booklets or ExamSoft file. I *will not* read any material which appears only on scrap paper.

2. **Legibility:** Write legibly. I will do my best to read your handwriting, but must disregard (and not give you points for) writing that is too small to read or otherwise illegible.
3. **Outlining Your Answer:** I strongly encourage you to use one-fourth of the allotted time per question to outline your answers on scrap paper *before* beginning to write in your exam booklet or ExamSoft file.

Do this because you will be graded not only on the substance of your answer but also on its clarity and conciseness. In other words, organization, precision, and brevity count. If you run out of insightful things to say about the issues raised by the exam question, stop writing until you think of something. Tedious repetition, regurgitations of law unrelated to the facts, or rambling about irrelevant issues *will* negatively affect your grade.

4. **Answer Format:** This is important. *Use headings and subheadings.* Use short single-idea paragraphs (leaving a blank line between paragraphs).
5. **Answer Content:** Address *all* relevant issues that arise from the fact pattern and that are responsive to the “call” of the question. Do not just summarize all the facts or all the legal principles relevant to an issue. Instead, *apply* the law you see relevant to the facts you see relevant. Take the issues that you identify and organize them into a coherent structure. Then, within that structure, examine issues and argue for a conclusion.
6. **Citing Cases:** You are welcome but not required to cite cases. While it is sometimes helpful to the reader and a way to economize on words, do not cite case names as a substitute for stating the law. For example, do *not* write: “Plaintiff should be able to recover under *A v. B.*” Why? What is the rule in that case? What are the facts in the instant case that satisfy that rule?
7. **Cross-Referencing:** You may reference your own previous analysis (*e.g.* B’s battery claim against C is identical to A’s, above, because \_\_.” But be very clear and precise what you are referencing. As in contract interpretation, ambiguity is construed against the drafter.
8. **Balanced Argument:** Facts rarely perfectly fit rules of law. So, recognize the key weaknesses in your position and make the argument on the other side.
9. **Additional Facts:** If you think that an exam question fairly raises an issue but cannot be answered without additional facts, state clearly those facts (implied by, suggested by, or at least consistent with the fact pattern) that you believe to be necessary to answer the question.

**STOP !**

**STOP !**

**DO NOT TURN THIS  
PAGE UNTIL THE  
PROCTOR SIGNALS**

# PART ONE

**25 questions worth three points each = 75 points**  
**Suggested Time = 75 minutes**

1. While driving at a speed in excess of the statutory limit, Neil negligently collided with another car, and the disabled vehicles blocked two of the highway's three northbound lanes. When Lessandra approached the scene two minutes later, she slowed her car to see if she could help those involved in the collision. As she slowed, Lessandra was rear-ended by a vehicle driven by Cam. Lessandra, who sustained damage to her car and was seriously injured, brought an action against Neil to recover damages.

If Neil moves to dismiss the action for failure to state a claim upon which relief may be granted, should the motion be granted?

- A. Yes, because it was Cam, not Neil, who collided with Lessandra's car and caused Lessandra's injuries.
  - B. Yes, because Neil owed no duty to Lessandra, an unforeseeable plaintiff.
  - C. No, because a jury could find that Lessandra's injury arose from a risk that was a continuing consequence of Neil's negligence.
  - D. No, because Neil was driving in excess of the statutory limit when he negligently caused the first accident.
2. Lawyers McKenzie and Brackman are the members of the law partnership of McKenzie-Brackman in a small town that has only one other lawyer in it. McKenzie and Brackman do a substantial amount of personal injury work. Client was severely and permanently injured in an automobile collision when struck by an automobile driven by Motorist. Client employed the McKenzie-Brackman firm to represent her in obtaining damages for her injuries. At the time Client employed McKenzie-Brackman, the statute of limitations had six weeks to run on her claim. The complaint was prepared but not filed. McKenzie and Brackman each thought that the other would file the complaint. The statute of limitations ran on Client's claim against Motorist. Client has filed suit against McKenzie-Brackman for negligence. That case is on trial with a jury in a court of general jurisdiction.

In addition to proving that McKenzie and Brackman were negligent, Client must establish, as a minimum, that she

- A. Would have, but for her lawyers' negligence, recovered from Motorist.
- B. Had a good faith claim against Motorist that was lost by her lawyers' negligence.
- C. Was severely and permanently injured when struck by Motorist's automobile.
- D. Did not negligently contribute to the failure to have the complaint filed

3. Larry owns his home in Wilmington. On the lawn in front of his home and within six feet of the public sidewalk there was a large tree. The roots of the tree caused the sidewalk to buckle severely and become dangerous. An ordinance of Wilmington requires adjacent landowners to keep sidewalks in safe condition. Larry engaged Contractor to repair the sidewalk, leaving it to Contractor to decide how the repair should be made. Contractor dug up the sidewalk, cut back the roots of the tree, and laid a new sidewalk. Two days after Larry had paid Contractor the agreed price of the repair, the tree fell over onto the street and damaged a parked car belonging to Reina. Reina has asserted claims against Larry and Contractor, and both defendants admit that cutting the roots caused the tree to fall.

In the claim of Reina against Contractor, the best defense of Contractor is that

- A. The tree was on the property of Larry.
  - B. He repaired the sidewalk at the direction of Larry.
  - C. He could not reasonably foresee that the tree would fall.
  - D. He was relieved of liability when Larry paid for the repair.
4. Alex West owns the Bates Hotel. When the International Law Student Association came to town for its convention, its members rented 400 of the 500 rooms, and the hotel opened its convention facilities to them. Law students are a rowdy group, and during their convention they littered both the inside and the outside of the hotel with debris and bottles. The hotel manager knew that objects were being thrown out the hotel windows. At his direction, hotel employees patrolled the hallways telling the guests to refrain from such conduct. West was out of town and was not aware of the problems which were occurring.

During the convention, as Peri walked past the Bates Hotel on the sidewalk, he was hit and injured by an ashtray thrown out of a window in the hotel. Peri sued West for damages for his injuries.

Will Peri prevail in his claim against West?

- A. Yes, because this blatant sort of injury constitutes negligence per se.
- B. Yes, if the person who threw the ashtray cannot be identified.
- C. No, because West had no personal knowledge of the conduct of the hotel guests.
- D. No, if the trier of fact determines that the hotel employees had taken reasonable precautions to prevent such an injury.

**Both Questions 5 and 6 are based on the following:**

Quinn, an eight-year-old boy, ran out into the street to recover his soccer ball. Denise applied her brakes, but they suddenly failed, and she hit and injured Quinn. Denise saw Quinn in time to have avoided hitting him if her brakes had worked properly. Two days previously, Denise had taken her car to the Subaru dealer to have her brakes inspected. Subaru inspected the brakes and told her that the brakes were in perfect working order.

5. On Quinn's claim against Denise, Denise's best defense is that
  - A. Her conduct was not the cause in fact of the harm.
  - B. She used reasonable care in the maintenance of her brakes.
  - C. She could not reasonably foresee Quinn's presence in the street.
  - D. She did not act willfully and wantonly.
  
6. On Quinn's claim against Subaru, will Quinn prevail?
  - A. Yes, if Subaru was negligent in inspecting Denise's brakes.
  - B. No, because Quinn was an unforeseeable plaintiff.
  - C. No, because Denise's conduct was an independent and superseding cause.

**Both Questions 7 and 8 are based on the following:**

Section 12A of the Delaware Vehicle Code makes it illegal to cross a street in a central business district other than at a designated crosswalk. Section 12B of the Code prohibits parking any motor vehicle so that it blocks any part of a designated crosswalk.

Clayton wanted to cross Rodney Street in the central business district of Wilmington, Delaware, but a truck parked by Tony Trucker was blocking the designated crosswalk. Clayton stepped out into Rodney Street and carefully walked around the back of the truck. Clayton was struck by a motor vehicle negligently operated by Driver.

7. If Clayton asserts a claim against Driver, Clayton's failure to be in the crosswalk will have which of the following effects?
  - A. It is not relevant in determining the right of Clayton.
  - B. It may be considered by the trier of fact on the issue of Driver's liability.
  - C. It will bar Clayton's recovery unless Driver saw Clayton in time to avoid the impact.
  - D. It will bar Clayton's recovery as a matter of law.

8. If Clayton asserts a claim against Tony Trucker, the most likely result is that Clayton will
- A. Prevail, because Trucker's violation of a state statute makes him automatically liable for all injuries caused thereby.
  - B. Prevail, because the probable purpose of Section 2 of the Vehicle Code of State was to safeguard pedestrians in using crosswalks.
  - C. Not prevail, because Clayton assumed the risk of injury when he crossed the street outside the crosswalk.
  - D. Not prevail, because Driver's conduct was the actual cause of Clayton's harm.

9. Korman Residential owns and operates a 7-story apartment building containing 88 apartments, 85 of which are rented. Declan has brought an action against Korman alleging that while he was walking along a public sidewalk adjacent to Korman's apartment building, a flowerpot fell from above and struck him on the shoulder, causing extensive injuries. The action is to recover damages for those injuries.

If Declan proves the foregoing facts and offers no other evidence explaining the accident, will his claim survive a motion for directed verdict offered by the defense?

- A. Yes, because Declan was injured by an artificial condition of the premises while using an adjacent public way.
  - B. Yes, because such an accident does not ordinarily happen in the absence of negligence.
  - C. No, if Korman is in no better position than Declan to explain the accident.
  - D. No, because there is no basis for a reasonable inference that Korman was negligent.
10. Jim Rockford and Thomas Magnum were both private investigators who worked in downtown Wilmington, Delaware. Both Rockford and Magnum were late for work on Thursday morning. As such, they each were traveling at an excessive rate of speed toward their respective places of business. Rockford was traveling down Route 202, only seven blocks from his office, at a speed of sixty-five miles per hour. The posted speed was forty-five miles per hour.

As Rockford approached the intersection of Route 202 and Brandywine Avenue, Magnum also approached the same intersection. Magnum was traveling east on Brandywine to get to work that morning. Magnum was also speeding and witnesses estimated his speed to be somewhere between forty and fifty miles per hour. The posted speed on Brandywine Avenue was thirty miles per hour.

The two cars collided at the intersection of Route 202 and Brandywine. Magnum's Ferrari hit Rockford's Chevrolet Impala causing Rockford to swerve out of control into Enrico's taco stand parked at the side of the road. Both Enrico and his merchandise suffered extensive injuries. The jury found that the accident was caused due to the

inattentiveness of both drivers, with Rockford 40% negligent and Magnum 60% negligent.

If the jurisdiction follows the doctrine of "pure" comparative negligence, and Magnum suffered \$10,000 in damages, what will Magnum recover in a suit against Rockford?

- A. \$10,000
- B. \$6,000
- C. \$4,000
- D. Nothing

11. When Karen visited Sproul Courts for her tennis lesson, she brought her two-year-old son, William, along and left him in a nursery provided by Sproul for the convenience of its customers. The children in the nursery were normally supervised by four attendants, but at this particular time, as Karen knew, there was only one attendant present to care for about 27 children of assorted ages. About 20 minutes later, while the attendant was looking the other way, William suddenly started to cry. The attendant found him lying on his back, picked him up, and called his mother. It was later discovered that William had suffered a skull fracture.

If a claim is asserted against Sproul on William's behalf, will William prevail?

- A. Yes, because Sproul owed the child the highest degree of care.
- B. Yes, because a two-year-old is incapable of contributory negligence.
- C. No, unless Sproul or his employees failed to exercise reasonable care to assure William's safety.

12. PECO is the sole distributor of electrical power in Philadelphia. The Company owns and maintains all of the electric poles and equipment in Philadelphia. PECO has complied with the National Electrical Safety Code, which establishes minimum requirements for the installation and maintenance of power poles. The Code has been approved by the federal and state governments.

PECO has had to replace insulators on its poles repeatedly because unknown persons repeatedly shoot at and destroy them. This causes the power lines to then fall onto the ground. On one of these occasions, Suri, Tom's five-year-old daughter, wandered out of Tom's yard, intentionally touched a downed wire, and was seriously burned.

If a claim on Suri's behalf is asserted against PECO, the probable result is that Suri will

- A. Recover if PECO could have taken reasonable steps to prevent the lines from falling when the insulators were destroyed.
- C. Not recover unless PECO failed to exercise reasonable care to stop the destruction of the insulators.
- D. Not recover, because the destruction of the insulators was intentional.

13. Doctor, a licensed physician, resided in her own home. The street in front of the home had a gradual slope. Doctor's garage was on the street level, with a driveway entrance from the street.

At two in the morning, Doctor received an emergency call. She dressed and went to the garage to get her car and found a car parked in front of her driveway. That car was occupied by Maxwell, who, while intoxicated, had driven to that place and now was in a drunken stupor in the front seat. Unable to rouse Maxwell, Doctor pushed him into the passenger's side of the front seat and got in on the driver's side. Doctor released the brake and coasted the car down the street, planning to pull into a parking space that was open. When Doctor attempted to stop the car, the brakes failed to work, and the car crashed into the wall of Shaq's home, damaging Shaq's home and Maxwell's car and injuring Doctor and Maxwell.

Subsequent examination of the car disclosed that the brake linings were badly worn. A state statute prohibits the operation of a motor vehicle unless the brakes are capable of stopping the vehicle within specified distances at specified speeds. The brakes on Maxwell's car were incapable of stopping the vehicle within the limits required by the statute. Another state statute makes it a criminal offense to be intoxicated while driving a motor vehicle.

If Maxwell asserts a claim against Doctor for his injuries, Maxwell will probably

- A. Recover, because Doctor was negligent as a matter of law.
- B. Recover, because Doctor had no right to move the car.
- C. Not recover, because his brakes were defective.
- D. Not recover, because he was in a drunken stupor when injured.

14. Dave is an eight-year-old boy who has a well-deserved reputation for bullying younger and smaller children. His parents have encouraged him to be aggressive and tough. Dave, for no reason, knocked down, kicked, and severely injured Tianyi, a four-year-old girl. A claim for relief has been asserted by Tianyi's parents for their medical and hospital costs and for Tianyi's injuries.

If the claim is asserted against Dave, the most likely result is that Dave will be

- A. Liable, because he intentionally harmed Tianyi.
  - B. Liable, because, as an eight-year-old, he should have known that his conduct was wrongful.
  - C. Not liable, because a child under ten is not liable in tort.
  - D. Not liable, because he is presumed to be under his parents' control and they have the sole responsibility.
15. Jen hated Brad, her former husband, for divorcing her and marrying Angelina a short time thereafter. About a month after Brad married Angelina, Jen secretly entered Brad and Angelina's rented apartment during their absence by using a master key. Jen placed a microphone behind the nightstand in the bedroom of the apartment, drilled a hole in the nearby wall, and poked the wires from the microphone through the hole into the space in the wall, with the result that the microphone appeared to be connected to wires going into the adjoining apartment. Actually the microphone was not connected to anything. Jen fully anticipated that Brad would discover the microphone in a few days and would be upset by the thought that someone had been listening to her conversations with Angelina in their bedroom.

Shortly thereafter, Angelina noticed the wires behind the nightstand and discovered the hidden microphone. She then called Brad and showed her the microphone and wires. Brad fainted and, in falling, struck his head on the nightstand and suffered a mild concussion. The next day Angelina telephoned Jen and accused her of planting the microphone. Jen laughingly admitted it. Because of his concern about Brad and his anger at Jen, Angelina is emotionally upset and unable to go to work.

If Brad asserts a claim against Jen based on infliction of mental distress, the fact that Angelina was the person who showed him the microphone will

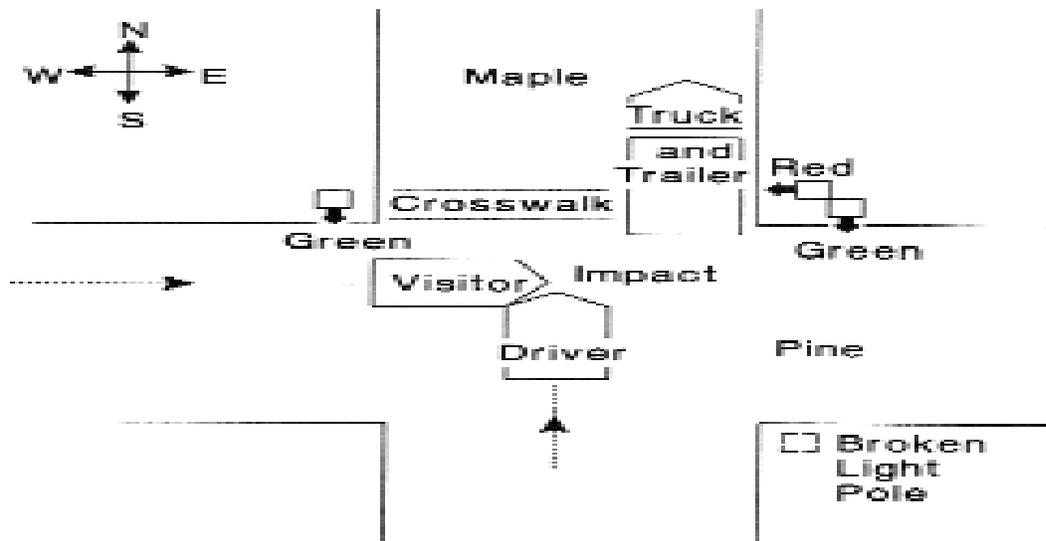
- A. Relieve Jen of liability, because Angelina was careless in so doing.
- B. Relieve Jen of liability, because Angelina's conduct was the immediate cause of Brad's harm.
- C. Not relieve Jen of liability, because Jen's goal was achieved.
- D. Not relieve Jen of liability, because the conduct of a third person is irrelevant in emotional distress cases.

**Both Questions 16 and 17 are based both on the following fact situation and the diagram below.**

In Wilmington, Delaware, Maple Street is a local public thoroughfare, designated as a one-way street for northbound traffic. Pine Street is a public thoroughfare, designated as a one-way street for eastbound traffic. Maple and Pine Streets intersect at right angles. The intersection is controlled by traffic lights. There are two sets of lights for traffic on Maple Street, one at the northeast corner and one at the northwest corner. There are two sets of lights for traffic on Pine Street, one at the northeast corner and one at the southeast corner.

Trucker was making a delivery to the Whole Foods Market on the east side of Maple Street, just north of its intersection with Pine Street. There being insufficient space for his truck and enclosed trailer, he parked it with the rear of the trailer extending entirely across the crosswalk on the north side of the intersection. The height of the trailer was such that it entirely obscured the traffic light on the northeast corner from the view of traffic moving east on Pine Street. Unknown to Trucker, the traffic light at the southeast corner was not functioning, because a collision 96 hours earlier had knocked down the pole from which the light was suspended.

Visitor, on his first trip to Wilmington, was driving east on Pine Street. Not seeing any traffic light or pole, he entered the intersection at a time when the light was red for eastbound traffic and green for northbound traffic. Driver, proceeding north on Maple Street and seeing the green light, entered the intersection without looking for any cross traffic and struck Visitor's car. Driver received personal injuries, and Visitor's car was damaged severely as a result of the impact. Delaware statutes make it a misdemeanor: (1) to park a motor vehicle so that any part projects into a crosswalk and (2) to enter an intersection contrary to a traffic signal.



16. If Driver asserts a claim against Trucker and establishes that Trucker was negligent, the likely result is that Trucker's negligence is
- A. A legal (proximate) but not an actual (factual) cause of Driver's injuries.
  - B. An actual but not a legal cause of Driver's injuries.
  - C. Both an actual and a legal cause of Driver's injuries
  - D. Neither an actual nor a legal cause of Driver's injuries.

17. If Driver asserts a claim against Wilmington, the theory on which he has the best chance of prevailing is that Wilmington
- A. Committed a battery.
  - B. Was negligent in not replacing the broken pole within 72 hours.
  - C. Has an absolute duty to maintain installed traffic signals in good operating order.
  - D. Created a dangerous trap by not promptly replacing the broken pole.

**Both Questions 18 and 19 are based on the following fact situation.**

Brendan was in the act of siphoning gasoline from Goff's car in Goff's garage and without his consent when the gasoline exploded and a fire followed. Rescuer, seeing the fire, grabbed a fire extinguisher from his car and put out the fire, saving Brendan's life and Goff's car, and Goff's garage. In doing so, Rescuer was badly burned.

18. If Rescuer asserts a claim against Brendan for personal injuries, Rescuer will
- A. Prevail, because he saved Brendan's life.
  - B. Prevail, because Brendan was at fault in causing the fire.
  - C. Not prevail, because Rescuer's action was not a foreseeable consequence of Brendan's conduct.
19. If Rescuer asserts a claim against Goff for personal injuries, Rescuer will
- A. Prevail, because he saved Goff's property.
  - B. Prevail, because he acted reasonably in an emergency.
  - C. Not prevail, because Goff was not at fault.
  - D. Not prevail, because Rescuer knowingly assumed the risk.

**Questions 20, 21, and 22 are based on the following:**

An Wilmington, Delaware ordinance makes it unlawful to park a motor vehicle in the law school Dean's parking space. At 1:50 p.m., Finn, not wanting to be late (again) for *Torts* class, and finding no other space available, parked his car in the Dean's space. Finn then hurried into Polishook. Lilly, to whom Finn had given a ride to campus, was still packing up her books in the passenger seat, when Jack (who had just driven onto campus himself) swerved to avoid what he mistakenly thought was a groundhog in the parking lot driving lane and sideswiped Finn's car. Finn's car was turned over on top of a Widener University statute of Chief Justice Rehnquist. Finn's car was severely damaged and Lilly was badly injured.

20. If Lilly asserts a claim against Finn, the most likely result is that Lilly will
- A. Recover, because Finn's action was negligence per se.
  - B. Recover, because Finn's action was a continuing wrong which contributed to Lilly's injuries.
  - C. Not recover, because a reasonably prudent person could not foresee injury to Lilly as a result of Finn's action.
  - D. Not recover, because a violation of a city ordinance does not give rise to a civil cause of action.
21. If Finn asserts a claim against Jack for damage to Finn's automobile, the most likely result is that Finn will
- A. Recover, because the purpose of the ordinance is to provide the Dean a convenient place to park.
  - B. Recover, because Jack's negligence was later in time than Finn's act of parking.
  - C. Not recover, because Finn was contributorily negligent as a matter of law.
  - D. Not recover, because Finn's action in parking unlawfully was a continuing wrong.
22. If Widener University asserts a claim against Jack for the damage to the Rehnquist statue and Jack was negligent in swerving his car, his negligence is
- A. A cause in fact and a legal cause of Widener's harm.
  - B. A cause in fact, but not a legal cause, of Widener's harm because Finn parked illegally.
  - C. A legal cause, but not a cause in fact, of Widener's harm because Finn's car struck the Rehnquist statue.
  - D. Neither a legal cause nor a cause in fact of Widener's harm.

**Questions 23, 24, and 25 are based on the following fact situation.**

Kermit arranged to borrow his friend Rolf's car to drive for one day while Kermit's car was being repaired. Rolf knew that the brakes on his car were faulty and might fail in an emergency. Rolf forgot to tell Kermit about the brakes when Kermit picked up the car, but Rolf did soon telephone Miss Piggy, Kermit's wife, and told her about them. Piggy, however, forgot to tell Kermit.

Kermit was driving Rolf's car at a reasonable rate of speed and within the posted speed limit, with Piggy as a passenger. Another car, driven by Fozzy, crossed in front of Kermit at an intersection and in violation of the traffic signal. Kermit tried to stop, but the brakes failed, and the two cars collided. If the brakes had been in proper working order, Kermit could have stopped in time to avoid the collision. Kermit and

Piggy were both injured.

23. If this jurisdiction still follows (like DC, VA, MD, NC) contributory negligence and Piggy asserts a claim against Fozzy, Piggy will
- A. Recover in full for her injuries, because Kermit, who was driving the car in which she was riding, was not himself at fault.
  - B. Recover a proportion of her damages based on the respective degrees of her negligence and that of Fozzy.
  - C. Not recover, because but for the failure of the brakes the collision would not have occurred.
  - D. Not recover, because she was negligent and her negligence continued until the moment of impact.
24. If the jurisdiction has adopted “pure” comparative negligence and Piggy asserts a claim against Fozzy, Piggy will
- A. Recover in full for her injuries, because Kermit, who was driving the car in which she was riding, was not himself at fault.
  - B. Recover a proportion of her damages based on the respective degrees of her negligence and that of Fozzy.
  - C. Not recover, because but for the failure of the brakes the collision would not have occurred.
  - D. Not recover, because she was negligent and her negligence continued until the moment of impact.
25. If Kermit asserts a claim against Rolf, will Kermit prevail?
- A. Yes, in negligence, because Rolf knew the brakes were faulty and failed to tell Kermit.
  - B. No, because Rolf was a gratuitous lender (not charging to borrow the car), and thus his duty of care was slight.
  - C. No, because the failure of Piggy to tell Kermit about the brakes was the cause in fact of Kermit’s harm.

----- **END OF PART ONE** -----

# PART TWO

**2 short essay questions worth 45 points each**

**Suggested cumulative time = 90 minutes**

## **Short Essay 1**

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Three friends – Scalia, Breyer, and Ginsburg – went hiking in a state park in Delaware. During the hike, the friends became lost and wandered onto Southfork, a 200-acre parcel of wooded land owned by J.R. Uwing, a private individual. There was no fence, sign, or other marking to indicate that the hikers were entering private land.

Shortly after the hikers entered Southfork, Scalia fell into a deep hole in the ground and severely injured his head. The hole was part of an abandoned well that had become overgrown with brush and hidden from sight. Breyer and Ginsburg were unable to raise Scalia from the bottom of the hole. Breyer ran off to seek help while Ginsburg remained with Scalia.

While looking for help, Breyer came upon a sign that read “Private Land. Keep Off.” Breyer disregarded the sign and continued on his way, soon coming upon the residence of J.R. Breyer told J.R. about Scalia’s accident. But J.R. refused Breyer’s request to use J.R.’s telephone to call for help. Instead, J.R. ordered Breyer to leave Southfork Ranch immediately, and directed Breyer to a path off the property. The path led Breyer to a wooden bridge located on Southfork. While crossing the bridge, which had not been maintained for several years, Breyer fell through some rotten boards and broke his leg.

When Breyer did not return to the scene of Scalia’s accident, Ginsburg decided to seek help herself. Ginsburg left Scalia, choosing a different path from the one Breyer had taken. As she ran, Ginsburg discarded her lighted cigarette in some brush. The smoldering cigarette eventually started a fire that destroyed 50 acres of timber on Southfork.

After leaving Southfork Ranch, Ginsburg found a telephone and called for help. When medical personnel reached Scalia, they found him dead from his injuries. It was later determined that Scalia’s life could have been saved if help had arrived sooner.

**J.R. has retained you to advise him regarding any potential causes of action that he might have against Scalia, Breyer, and Ginsburg. Identify/discuss the causes of action that J.R. may file and identify/discuss the defenses that Scalia, Breyer, and Ginsburg would raise to J.R.’s causes of action.**

## Short Essay 2

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Bobby Bowbyn, a 20-year-old college student was injured in a college football game on the campus of a local university. Bobby suffered a chipped vertebra after another participant in the game stepped on his back while going after a pass. Bobby has experienced severe back pain as a result. Prior to the accident, Bobby worked part-time as a waiter at the Olive Garden. After his injury he found that he was unable to stand for periods of more than 20 minutes at a time and therefore had to stop working as a waiter.

In searching for a way to alleviate his back pain, Bobby consulted with an orthopedic surgeon, Dr. Peter Benton. Dr. Benton recommended surgery to remove the chipped bone piece that he detected on his x-ray. Dr. Benton explained to Bobby that there was a 97% success rate in this operation, but that in very rare cases the operation might result in damage to the nerves near the injured vertebra, which could result in numbness or even, in one or two reported cases, paralysis. Bobby became one of the unfortunate few who suffered nerve damage as a result of this surgery, though luckily nothing as severe as paralysis.

Since the surgery Bobby has experienced a loss of feeling in his right hand, which is his dominant hand. Bobby can carry out gross motor manipulations with this hand but can no longer write or type using this hand. His back pain has greatly diminished, however, and he has been able to return to work as a waiter, though he cannot work as many hours as he did before the accident.

After the operation Bobby discovered that Dr. Benton had filmed the surgery that he conducted on Bobby's back in order to make a training tape for a medical school course that Dr. Benton teaches in orthopedic surgery. Bobby's previous personal injury lawyer hired a medical expert to review this tape. The expert opined that the tape reveals no obvious evidence of deviations from standard medical practice other than the fact that Dr. Benton appears to have performed the operation at an unusually slow rate, with frequent pauses to allow close-up shots of the surgery.

**Bobby has asked you to represent him. Before you agree, you must identify and evaluate his claims (to see if it makes economic sense for you to take this on and invest your own time and resources). Assess Bobby's claims against Dr. Benton.**

----- END OF PART TWO -----

# PART THREE

**1 long essay question worth 75 points**

**Suggested time = 75 minutes**

On a clear, dark night in Wilmington, Delaware, Plaintiff was driving his vehicle on a state road at the speed limit. He suddenly came upon a disabled dump truck stopped in his lane. Plaintiff applied his brakes. Although Plaintiff was able to avoid colliding with the dump truck, his vehicle was struck from behind by Driver. Plaintiff's vehicle was equipped with an operational seatbelt but Plaintiff was not wearing it at the time of the collision.

The next car on the scene was driven by Helper, who was able to avoid colliding with any of the other vehicles. Helper observed that Plaintiff was unconscious and that Plaintiff's gas tank was leaking. Helper pulled Plaintiff from the wreckage of his car and administered first aid to him. An ambulance was called and Plaintiff was taken to the hospital. Plaintiff was admitted to the hospital and 12 days later Dr. Mangalik performed surgery to relieve pressure on Plaintiff's brain. Plaintiff is now suffering from loss of equilibrium and partial paralysis, both of which appear to be permanent.

An investigation revealed that the dump truck was owned and operated by Trucker, who was walking to the nearest phone to get help when the accident occurred. Trucker did not have any markers with him, at the time, to place on the roadway to warn approaching drivers.

Plaintiff states that he recalls seeing Driver's vehicle in his mirror prior to the accident and that Driver was following too closely for the conditions, in Plaintiff's opinion. Plaintiff's current treating physician is Dr. Goodill who has given an opinion that Plaintiff's injuries were aggravated when Helper provided first aid to Plaintiff. Dr. Goodill believes that Dr. Mangalik provided substandard care in performing the operation and that this is also a factor in Plaintiff's injuries.

**You have been retained by Plaintiff to bring an action to recover damages for his injuries. Discuss Plaintiff's potential causes of action against Trucker, Driver, Helper, and Dr. Mangalik, and the defenses that will likely be asserted. Use the statutory appendix (on the next page) for this question as appropriate.**

**STATUTORY APPENDIX** (use for this question only)

**10 Del. Code § 8119**

No action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of 2 years from the date upon which it is claimed that such alleged injuries were sustained.

**10 Del. Code § 8132**

In all actions brought to recover damages for negligence which results in death or injury to person or property, the fact that the plaintiff may have been contributorily negligent shall not bar a recovery by the plaintiff or the plaintiff's legal representative where such negligence was not greater than the negligence of the defendant or the combined negligence of all defendants against whom recovery is sought, but any damages awarded shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

**21 Del. Code § 4357**

(a) No person shall operate any truck upon the highways of this State during the period when lighted lamps must be displayed on vehicles, unless there shall be carried in such vehicle at least 3 flares, or 3 red electric lanterns or 3 portable red emergency reflectors capable of being distinguished at a distance of not less than 600 feet under normal atmospheric conditions at night.

(b) Whenever any vehicle described in subsection (a) of this section or its lighting equipment is disabled during the period when lighted lamps must be displayed and such vehicle cannot immediately be removed from the main traveled portion of a highway, the driver or other person in charge of such vehicle shall cause flares, lanterns or reflectors to be lighted and placed upon the highway, 1 at a distance of approximately 100 feet in advance of such vehicle, 1 at a distance of approximately 100 feet to the rear of the vehicle and the third upon the roadway alongside of the vehicle.

**21 Del. Code § 4802**

The driver of a motor vehicle operated on a street or highway in this State shall wear a properly adjusted and fastened seat belt which meets the applicable federal motor vehicle safety standards.

----- **END OF PART THREE** -----