

MEMORANDUM

TO: Fall 2016 Torts Class
FROM: Professor Thaddeus Pope
DATE: October 29, 2016
RE: Midterm Exam Feedback

This memorandum is one source of feedback on the October 8, 2016 midterm exam. Please also review the exam itself, your exam answers, your exam scoring, and the model answers.

I am happy to review the exam and/or your individual exam answers with anyone who schedules an appointment to review the exam. Please first review my scoring and notes on your exam, the feedback memo, model answers, and your own notes. If you still have questions about your exam, please email those to me in advance of our meeting so that I can be sufficiently prepared to ensure a productive and efficient meeting.

As indicated on the syllabus, the October 8, 2016 midterm exam counts for 75 of the 300 total points in the course, 25% of your letter grade. I have awarded all exams a raw score from zero to 75. The raw score is meaningful only relative to the raw score of the other students in the class. The raw score will be added to the midterm and quiz scores. That total is converted to a scaled score, based on the class curve. Note that December's final exam is cumulative and will also include intentional torts. But it is likely to focus primarily on negligence.

Multiple Choice Questions

| 15 questions, worth 1 point each. The parenthetical number indicates how many exams gave the correct answer. | | |
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| 1. B (20) | 6. C (18) | 11. C (19) |
| 2. D (5) | 7. C (12) | 12. D (18) |
| 3. B (1) | 8. A (17) | 13. D (12) |
| 4. C (9) | 9. D (16) | 14. A (18) |
| 5. D (8) | 10. B (12) | 15. A (4) |

- B is correct, because it properly states the reason that House could be held liable.**
A is incorrect, because there was consent to the procedure.
C is incorrect, because House does not have to intend harm to the other party to be liable for a nonconsensual contact. It is sufficient to intend a contact he knows will be offensive.
D is incorrect, because we don't know whether Ivanka would have wanted the tattoo removed.

2. **D is correct, because even if it is improbable that a person of reasonable sensibility would not be frightened; that would defeat the assault claim if it were true.**
 A is incorrect, because we cannot say from these facts whether Stallone’s conduct was justified or not.
 B is incorrect, because Stallone did not actually use deadly force.
 C is incorrect, because Stallone’s intent could be transferred from the customer to Jennifer.
3. **B is the best answer, because if the shopkeeper is behaving unreasonably, then the shopkeeper loses the defense of detaining suspected shoplifters.**
 A is incorrect, because a shopkeeper can be justified in detaining a suspect even if mistaken.
 C is incorrect, because the justification can be lost if the defendant acts unreasonably.
 D is incorrect for the same reason.
4. **C is correct, because severe emotional distress is a required element. The “if” clause in this answer choice negates a necessary element of the tort.**
 A is incorrect, because the facts would bear the opposite conclusion, and this is only one element in the claim.
 B is incorrect, because that is only one element in the claim.
 D is incorrect, because it resolves a factual issue that is subject to conflicting interpretation.
5. **D is the best answer. The “if” clause negates a necessary element.**
 A is incorrect, because it assumes a fact that may not be present.
 B is incorrect, because even a harm to one’s dignity is compensable.
 C is incorrect, because intention goes to the act committed, not the intent to commit harm.
6. **C is correct. There cannot be liability without a necessary element of the tort.**
 A is incorrect, because false imprisonment requires intent rather than just reckless conduct. Only IIED (of the intentional torts) allows a mental state of mere recklessness.
 B is incorrect, because there need not be actual physical harm if the imprisonment is against the plaintiff’s will. These are alternative not cumulative requirements.
 D is incorrect, because if the plaintiff is unaware of a reasonable means of escape, the plaintiff is under no duty to exercise it.
7. **C is correct.**
 A is incorrect, because assault requires apprehension of imminent harmful or offensive contact.
 B is incorrect, for the same reason.
 D is incorrect, because if he experienced fear of harmful or offensive contact, then he could recover.
8. **A is the best answer, because it points to Mary Faith’s distress being caused by Marshall’s conduct.**
 B is incorrect, because even if a reasonable person (or Mary Faith herself) experienced severe emotional distress, unless Marshall caused it (rather than the underlying trauma) Marshall is not liable.
 C is incorrect, because merely reckless conduct may satisfy the standard.
 D is incorrect because even factually accurate comments may constitute outrageous conduct if the other elements of the tort are met.

9. **D is the correct answer.**
A is incorrect, because from Phil's perspective the injury was not substantially certain to occur.
B is incorrect. Phil might be negligent, but it doesn't satisfy the test for battery.
C is only partially correct, because if it were substantially certain to occur, he might still be liable.
10. **B is the correct answer.**
A is incorrect; unless there is actual intent (or substantial certainty), the elements aren't met.
C is incorrect, because Johns' negligence is not a defense to an intentional tort.
D is incorrect, because even if Hopkins thought she was part of the movie set, she could be liable under a theory of transferred intent.
11. **C is the best answer.**
A is incorrect, because the intent required for false imprisonment is lacking.
B is similarly incorrect.
D is incorrect because severe emotional distress is insufficient for false imprisonment because intent must be established.
12. **D is the correct answer.**
A is incorrect, because the facts do not support a finding that the conduct was outrageous.
B is incorrect because there was no threat of imminent harmful or offensive contact.
C is incorrect, because the defendant might still be reckless even if he's drunk.
13. **D is the correct answer.**
A is incorrect, because battery requires that the defendant intend to cause either harmful or offensive contact with the person of the other, or to cause apprehension of such contact. Brunette did not intend to cause either (she only intended to play a practical joke).
B is incorrect for the same reason.
C and D are both incorrect, because they are combinations of A and B.
14. **A is correct, because false imprisonment requires that the defendant intend to cause confinement**
B is incorrect, because awareness of confinement is sufficient to create liability
C and D are both incorrect, because they are combinations of A and B.
15. **A is correct, because even if the contact is offensive because of abnormal sensitivity on the part of the plaintiff, there is liability if the defendant knew of such heightened sensitivity and intended for the contact to occur**
B is incorrect, because it is the opposite of A
C and D are both incorrect, because they are combinations of A and B.

Essay Question 1 of 2

Note: This question was adapted from the February 2011 Multistate Essay Exam.

| Gigi v. Morse - Battery | | |
|--|-----------|--|
| Intent – Morse “frisked” Gigi and knew with substantial certainty that this contact would be offensive. | 4 | |
| HOC – Morse “frisked” Gigi. This is contact a reasonable person would find offensive. Gigi obviously found it offensive by her jumping and swearing. | 4 | |
| On the other hand, in today’s security conscious environment (e.g. TSA procedures), perhaps people increasingly expect this type of contact. | 2 | |
| Privilege: consent | | |
| Gigi saw the sign and still proceeded. She even expressly acknowledged to her friend that she might get touched. | 3 | |
| On the other hand, it is not clear that Gigi saw or read the sign. There was no express consent. The basis for inferring consent is weaker than in the Cunard line case. | 3 | |
| Gigi v. Lewis – Battery | | |
| Intent - Lewis knew that the stun would be harmful or at least offensive (even if he did not know it would quite “as” harmful as it turned out). Indeed, this was Lewis’ purpose to contact her in such a way to stop her belligerence. | 4 | |
| HOC – The stun gun hurt Gigi, constituting a harmful contact. | 4 | |
| Privilege: defense of others – The entire point of the security checkpoint is public safety. | | |
| The beep and the belligerent behavior arguably gave Lewis a reasonable belief that action was necessary. | 3 | |
| The amount of force was proportional to the threat. | 3 | |
| Gigi v. Mitchell Hamline - Vicarious | | |
| Vicarious liability - If Gigi can establish liability against either Morse or Lewis, then MHSL would be vicariously liable since Morse and Lewis are MHSL employees acting within the scope of their employment. | 5 | |
| TOTAL | 35 | |

Some students argued assault, FI, and IIED. Those are not frivolous claims. But they are less obviously implicated by these facts. It is still best practice to err on the side of including and assessing claims that might be implicated.

Essay Question 2 of 2

Note: This question was adapted from the June 2011 California 1st year bar exam.

| Trespass to land | | |
|---|-----------|--|
| Intent – VZ knew the siren sound would invade Trump’s land. | 3 | |
| Intrusion | | |
| The sound did invade Trump’s land. Nominal damages are sufficient. | 2 | |
| But is “sound” a physical invasion? | 2 | |
| Privilege: Public necessity – this was as “emergency alert siren” to protect the entire community. On the other hand, there was not an actual emergency. | 3 | |
| Battery | | |
| Intent – VZ knew that the sound from its siren would cause an offensive contact with Trump, because he wrote them a letter and told them that. | 3 | |
| Furthermore, the very purpose of a siren is to alarm cause an offensive contact with those who hear it. | 1 | |
| HOC – The sound from the VZ siren did reach Trump’s ears and caused him to spill his coffee. This would be an offensive contact to a reasonable person | 3 | |
| In addition, the contact between the siren sound and Trump’s ears was itself an offensive contact, if sound itself qualifies as “contact.” | 1 | |
| Trespass to Chattel (coffee) | | |
| Intent – VZ knew that its sound was harming Trump’s chattel, because he wrote them a letter and told them that. | 1 | |
| Impair – VZ caused Trump to spill his coffee (chattel). | 1 | |
| TOTAL | 20 | |

Some students argued nuisance. That is an appropriate claim. But it was not directly targeted in course materials. Similarly, some students argued negligence against Best Bye. But that was specifically excluded from the scope of the midterm exam.