

TORTS EXAMINATION
PROFESSOR GILLES
Spring 2004

1. This examination consists of two parts. The total points available on this exam are 140 points. Part One consists of 25 multiple choice questions and is worth 75 points. Part Two consists of one long essay question (maximum 7 page answer) and is worth 65 points.
2. You have 2 hours and 20 minutes to take the exam. In addition, at the end of the examination there will be a 5 minute “objection period” During this 5 minute period, if you think that a multiple choice question is inherently misleading or contains an internal inconsistency, you may so state below [under “Objections”]. Identify the question by number and give your reason. If I agree with you, I will discard the question for the entire class. Even if you feel that a question should be discarded, answer it anyway. You may NOT change an answer or write anything other than an objection during the 5 minute objection period.
3. Make sure that you put your examination number in the space provided below, on your answer book, and on the scantron card. Make sure that the name of the class (“Torts, Gilles, Spring 2004”) appears on your answer book and the scantron card.
4. At the conclusion of the exam, you must turn in this examination, the answer book and the scantron sheet.

Good luck.

EXAMINATION NUMBER: _____

Objections:

PART ONE - MULTIPLE CHOICE

PART TWO - ESSAY QUESTION

INSTRUCTIONS:

1. *Part Two consists of one long essay question. Part Two counts for 65 points.*
2. *The page limit is 7 pages (a “page” is one side, writing on every line). Anything you write in excess of 7 pages will be ignored. Do not write in the margin.*
3. *Think, organize and then write. Space is limited. Answer the question asked.*

FACT PATTERN

In June 2003, in response to repeated requests from Bart, Homer gave his son a scooter (a “Demon Rider” designed and manufactured by Scoots Company (“Scoots”) for use by children which retailed for \$30). Homer purchased the scooter at a yard sale from his neighbor, Ned Flanders. Flanders’ son had received the scooter as a Christmas gift two years previously in December 2000, but Flanders had immediately confiscated the scooter (not even opening the box), concerned that the “evil name” would corrupt his child.

As soon as Bart received the scooter from Homer, he ripped open the box, grabbed the scooter and completely ignored the instruction booklet which came with the scooter. Bart ran to the top of the steepest hill in town. From his daredevil exploits in the past, Bart knew that he might crash and be injured if he went too fast, but nevertheless he jumped on the scooter and took off.

Bart sped down hill, reaching 10 miles an hour, when he saw Snake’s car approaching on the wrong side of the road. Bart tried to activate the plastic brake on the back of the scooter, but the brake snapped off. As a result of the brake failure, Bart collided with Snake. Bart suffered life threatening injuries: he broke every bone in his body. In addition, he suffered extensive economic loss when, as a result of the scarring on his face, Bart lost a \$5 million contract to work as a child model.

Bart sues Scoots and Flanders on a products liability theory, alleging a design defect in the scooter’s brake.

In December 1990, the U.S. Consumer Protection Agency issued a safety regulation which required scooters to have brakes, but permitted plastic or metal brakes. In 1999, when Scoots initially designed the Demon Rider scooter, it studied the use of a plastic versus a metal brake. At that time Scoots elected to use plastic brakes, because they were cheaper (\$1 less than the metal brakes) and the plastic

brakes were easier for children to use (they required less pressure, making it easier for kids to activate the plastic brake than the metal brake). In its 1999 testing, Scoots discovered that the plastic brake (unlike the metal brake) did snap off, but only when applied at speeds over 9 miles an hour. Since, Scoots did not intend for children to use the scooter at speeds over 5 miles an hour, Scoots added a warning stating, “*DANGER! DANGER! The brake on this scooter will snap off and you will be injured if applied at speeds over 5 miles an hour*” to the front of the instruction booklet.

The Demon Rider is immensely popular and over 400,000 were sold in the four years between its introduction in 1999 and 2003. In that time there were a total of 400 complaints of brakes snapping off when the scooter was used at high speeds, but in all these incidents the children simply fell off and suffered only cuts, bruises and occasional broken arms.

In September 2003, in response to Bart’s tragic accident (the first to involve any serious injuries or involve a scooter/automobile collision), Scoots changed the design of the brake, electing to make the brakes out of a new plastic – Xexon – which has 10 times the strength of all prior plastics. Xexon was invented in 1995 by NASA as part of a top secret government program, but was only declassified and made commercially available to manufacturers in late 2002. Using Xexon to make the brakes decreases price, has all the advantages of a plastic brake, and the Xexon brake will never break off.

QUESTION:

Bart sues (a) Scoots and (b) Flanders on a products liability theory, alleging a DESIGN DEFECT in the scooter. Discuss these claims and the defense indicated below.

Important: Bart does not sue Snake or Homer and you should not discuss their liability, although you may mention them in discussing the liability of Scoots and Flanders. Also you should only discuss a claim for a design defect based in torts products liability. Do not discuss any other possible types of defect.

Your research reveals that the State of Capital (in which this accident occurred) follows the majority position on all issues, except that:

- Capital has recently enacted the *Elimination of Frivolous Product Liability Lawsuits Act* which makes only one change to the majority common law position: it abolishes the consumer expectation test in design defect cases.
- Capital has adopted only a “scope of the risk” approach (and not an “intervening cause” approach) to proximate cause.
- The only affirmative defense recognized in Capital is Assumption of the Risk.

THE END