

TORTS I EXAMINATION
PROFESSOR GILLES
December, 2009

1. *This examination consists of **three parts**:*
 - *Part One is 20 multiple choice questions (suggested time 50 minutes)*
 - *Part Two is a fact pattern followed by one **short** essay question - Question 1 (limit 2 ½ pages – 3,900 characters including spaces)(suggested time 35 minutes).*
 - *Part Three is a second fact pattern followed by one **long** essay question - Question 2 (limit 10 pages -15,000 characters including spaces)(suggested time – 1 hour and 50 minutes).*

The time limits roughly reflect the points allocated to each question.

2. *You will have **3 hours and 15 minutes** to complete the exam.*
3. *You must obey the page limits given for each question. A page is one side, writing on every line. Only write on the lines. Do not write in the margin. Of course if you cross out several lines, you may use an equivalent amount of space. Likewise, if you only write on every other line, you may double the page limit. I will not read beyond the assigned page limit. You do not need to use all the pages to write a good answer.*
4. *Make sure that you put your final examination number on your bluebook(s); on this examination; and on the outside of your exam envelope. You must place everything back in the envelope and turn it in (that is, your copy of the examination, your bluebook(s,) and your scrap paper).*
5. *This is a closed book examination. You may not use any materials during the exam.*
6. *You are bound by the Honor Code.*

EXAM NO. _____

Good luck.

Part Three: Long Essay Question WHOLESOME FACT PATTERN

(Suggested time 1 hour and 50 minutes)

Dolly is the owner and manager of Wholesome Eatery, a small organic restaurant in Anytown, Simpsonia that features fresh seafood, free range poultry, non-endangered game meats, and certified organic produce. Dolly runs the restaurant on a shoestring (there is only her, the cook and a high school kid as a waitress/cashier).

All meats served at Dolly's are fresh, never frozen and are free of MSG, preservatives, glutens and artificial coloring. Dolly purchases her beef from the Newman's Organic Ranch, and then either she or the cook grinds up the meat in a grinder, and then forms the meat into patties. Because she adds no preservatives to the beef, Dolly has only 12 hours to grind and patty the meat before it must be cooked or risk spoliation. To ensure she is able to process the meat in a speedy fashion, Dolly set the grinder to "medium coarseness" and removed the optional fine screen through which the meat was pressed (hereinafter the "speedy process").

During her first year in operation, the "speedy process" seemed to work well. It was so efficient and quick, that Dolly lost little organic beef to spoiling. However customers began to express dissatisfaction with their organic beef patties: about eight guests per month complained about grizzle and chewy fat in their burger patties, and at least one per month complained of small chips of bone in the meat. Then one customer choked on a hard fatty deposit in her burger and had to be assisted by another customer before coughing up the lump of fat.

Dolly, of course, "comped" the complaining customers' meals, but because she had heard many stories while she was in culinary school about naturally-occurring substances in food causing choking deaths and other injuries, she was concerned about the safety of her customers. Dolly called her friend **Fran** who had graduated from culinary school with Dolly and, just like Dolly, had been running a similar organic restaurant in a neighboring town for about a year. Fran stated that she (and most other organic restaurateurs in town she knew) used a different method (the "slow process") to grind her meat. Fran set the grinder to "fine" and used the fine screen. Fran reported that she had had no complaints of lumps or chips in the patties: "I don't think anything can get through that fine grinder and the screen," Fran reported. However, Fran reported that the slower process posed its own problems. Fran warned Dolly: "grinding this way takes twice the amount of time, so you better make sure to get extra staff to deal with it." Fran also noted, "because the process is so slow that you are going to see a lot more spoilage in the organic beef. I have to throw away 10% more beef than you, and, in my second month in business, I had one day when six people got food poisoning because of spoiled beef. After that scare, I only serve the burgers well done – just to be safe."

Before Fran hangs up she has one parting comment: "Did you realize that state law requires all organic restaurants to pay a \$250.00 license fee every year just to do business?" she asks. "I know," said Dolly, "but I just can't afford that so I've been operating without a license – I don't think the state will ever find out."

Dolly thought long and hard about whether she should change her meat processing practices to

the “slow process,” but after thinking about what Fran had said, Dolly decided to stick with the “speedy process,” and hoped the customer complaints would subside.

Patrick Muncher had a flat tire on his way home from work. By the time he finally got it fixed he was too tired to go home and cook, so he stopped at Wholesome Eatery for a very late dinner. He ordered an organic beef burger and a diet coke. Halfway through the burger he bit into a “hard substance” in his hamburger. After he chewed his food carefully he felt with his tongue and recovered a piece of beef bone along with his broken tooth. He then spoke to the high-school kid who worked the cash register, and showed her the piece of bone that had broken his tooth.

"Wow, bummer!" said the girl. "Does it hurt?"

"Yes, it does." said Patrick. "I'm in agony. Where is your manager?"

"Well, like, Dolly's gone home already," said the girl. "You can call her tomorrow after 9 a.m."

Although Patrick was exhausted from having worked an 18-hour shift at work, the pain from the broken tooth was too much for him to bear, so he went immediately to a 24-hour emergency dental clinic to have his tooth fixed. As a new patient, Patrick was required to fill out standard medical disclosure papers before being seen by the dentist, Dr. Driscoll. Patrick was in extraordinary pain, and as he stared down at the medical forms in front of him, his vision was blurred as his head throbbed in agony from the broken tooth. Desperate to get the ball rolling on his appointment, he hurriedly filled out the forms and handed them back to the receptionist. In his haste, he checked “no” in response to a question regarding medicinal allergies, despite the fact that Patrick was aware of his allergy to tretacaine, a common ingredient in many anesthetics. Tretacaine is extremely safe and fewer than 1 in 100,000 people are allergic to it.

As the treatment commenced, Dr. Driscoll administered a standard anesthetic containing tretacaine and began working on the tooth. However, in the middle of the procedure Patrick stopped breathing. Dr. Driscoll “freaked out,” and admits that she malpracticed in her efforts to resuscitate him (she failed to take the steps a professional dentist would take when faced with a patient who had stopped breathing). Patrick finally began breathing again, but has suffered severe brain damage.

In addition to your general knowledge of tort law, research by an associate reveals the following information about the law in Simpsonia, which information MAY or MAY NOT be relevant to the instant matter:

❖ Simpsonia:

1. has abolished all forms of Assumption of the Risk and adopted the following statute as to plaintiff's fault:

The contributory fault of a person does not bar the person as plaintiff from recovering damages that have resulted from the tortious conduct of one or more other persons, if the contributory fault of the plaintiff was not greater than the combined tortious conduct of all other persons from whom the plaintiff seeks recovery in this action and of all other persons from whom the plaintiff does not seek recovery in this action.

2. has a licensing statute, which Dolly and Fran discussed, which reads in its entirety:

“Any organic restaurant existing in the State of Simpsonia shall register with the Department of Commerce and shall pay a yearly fee of \$250.00 for the privilege of doing business in this state. Failure to register is a misdemeanor.”

3. where applicable, follows the traditional common law “category” approach and the Restatement (Second) of Torts.

Question 2: (Limit 10 pages, 15,000 characters):

Patrick sues **Dolly** alleging that Dolly is liable for his **brain damage injuries** because Dolly negligently used the “speedy process” (and not the “slow process”) to grind the beef consumed by Patrick. Please discuss the issues raised by this negligence claim, including any defense. Even if you conclude that one element of the tort is not present, it would nonetheless be prudent to discuss the other elements. Do not address whether Dr. Driscoll is liable to Patrick (although your discussion of Dolly’s liability may refer to the malpractice of Dr. Driscoll).

The end