

**TORTS EXAMINATION**  
**PROFESSORS KOBIL & GILLES**  
**December 1999**

1. *This examination consists of two parts. Part One consists of a fact pattern followed by three questions that together are worth about 40% of your grade. Part Two consists of a fact pattern followed by one long essay question that is worth about 60% of your grade.*
2. *You must obey the page limits given for each question. The page limits roughly correspond to the number of points allocated to each question. **I will not read beyond the assigned page limit.** Write on only one side of the page.*
3. *Make sure that you put your examination number on your blue book.*
4. *This is a closed book examination. **You may not use any materials during the exam.***
5. ***You must turn in your copy of this examination and your answers.***
6. *You will have 3 hours and 15 minutes to complete the exam.*

*Good luck.*

## **PART ONE -- SHORT ANSWER QUESTIONS**

### INSTRUCTIONS:

1. *The fact pattern is followed by three short questions. Together they count for approximately 40% of your grade.*
2. *It is advisable to read ALL the questions following a fact pattern before answering because points will NOT be given for the right answer given in response to the wrong question.*
3. *Thoroughly discuss all the issues fairly raised by the question. For instance, even if you conclude that one element of a tort is not present, it would nonetheless be prudent to discuss the other elements.*
4. *Write on only ONE side of the page. You may ONLY use the following number of pages, writing on EVERY LINE (You may double the page limit if you write on EVERY OTHER line):*

*Question 1 - use only 4 pages*

*Question 2 - use only 2 pages*

*Question 3 - use only 2 pages*

***I will not read beyond the assigned page limit. You do NOT need to use all the space to write a good answer.***

### SNOWY FACT PATTERN:

It had been snowing heavily. Dan (aged 8) and his classmate Susan (aged 8) had been engaged in repeated snowball fights for most of the day. Dan starts the present fight, by throwing a small soft snowball that hits Susan on the leg. In defense she creeps up to a few feet behind Dan and throws a large, solidly packed snowball at him. Dan sees it coming, but laughs realizing that it will miss. However, a small shard of ice detaches from the snowball and hits Dan in the eye. He is not seriously hurt, but is so startled that he falls over and sprains an ankle.

The rest of the snowball sails out in the street and squashes against the window of a passing car, driven by Steve, who appears out of nowhere. Steve is startled (he did not see the snowball coming), loses control of his vehicle and ends up stuck in a snow bank. He suffers no physical injury, but is irate.

Steve, who is a large man, grabs Dan (erroneously believing he threw the snowball). “You breached the peace you brat! Sit in there until the police come,” growls Steve. “OK!” says the obviously terrified Dan. Steve gets in and locks the doors in the back of the car to keep Dan contained (the doors lack “child-proof” locks and Dan could unlock the door easily by lifting the latch near the door handle). Once in the car, Dan begins protesting his innocence and crying pathetically that he wants to go home. After a few minutes, Steve calms down and tells Dan to leave after giving him a stern warning.

Steve cannot free his car from the snow bank (a typical “Sport Utility” vehicle, the car is useless in snow). He waits for help, but after 30 minutes he is freezing cold and decides to walk along the road to seek help. A few minutes later a City snowplow comes along the street and finds Steve’s car is partly blocking the roadway. Concluding the auto poses a danger to highway safety, the snow plow driver pushes the car much deeper into the bank, completely crushing its front end and causing it to be engulfed by snow. Steve is unable to free his car for two weeks – when the snow melts. He has run up a \$600 rental bill in the meantime, and his car (which was worth \$20,000) is a total loss.

QUESTIONS:

**Question 1.** What intentional tort claims can be stated against Susan? Any defenses? Discuss. (Limit of four pages).

**Question 2.** Can Dan state a claim for false imprisonment against Steve? Any defenses? Discuss. (Limit of two pages).

**Question 3.** What intentional tort claims can Steve state against the City for plowing in his car? Any defenses? Discuss. (Limit of two pages).

## PART TWO-- LONG ESSAY QUESTION

### INSTRUCTIONS:

1. *The fact pattern is followed by one long essay question. It counts for approximately 60% of your grade.*
2. *You may ONLY use 12 pages, writing on every line, but only on one side of the page. (You may double the page limit if you write on EVERY OTHER line). **I will not read beyond the assigned page limit. You do NOT need to use all the space to write a good answer.***
3. *Thoroughly discuss all the issues fairly raised by the question. For instance, even if you conclude there is no breach of duty, it would nonetheless be prudent to discuss causation.*
4. *In answering this question you may cross reference (rather than repeating in full) any analysis of an issue for one defendant which remains the same for a second defendant.*

OLYMPEAN FACT PATTERN:

Zeus's ("**Zeus**" or "**Z**") and Hera's ("**Hera**" or "**H**") happy marriage was a myth. Although they were an attractive couple, possessed of a palatial home in the State of Olympus, neither was faithful to the other. Hera knew that Zeus had engaged in numerous affairs and in retaliation, Hera had slept with several of their neighbors. Nevertheless, they were able to keep up appearances until the time that Zeus met Aphrodite ("**Aphrodite**" or "**A**").

Aphrodite was a beautiful, amorous woman who was quickly beguiled by Zeus into having a sexual liaison. Zeus told her that he was unmarried, although she was aware of his reputation as a womanizer. When the affair began, Aphrodite knew that she had recently been infected with the human immunodeficiency virus (HIV).<sup>1</sup> However, Aphrodite was undergoing treatment for the infection and appeared to be otherwise in excellent health, so she decided not to tell Zeus about her illness. At first, Aphrodite demanded that Zeus use condoms during all sexual contact because she knew that condoms would prevent the transmission of HIV. (Condoms were rarely used in Olympus, in part because of the State's historic disapproval of birth-control devices of any sort—condoms had only become legal to purchase in the 1970's). However, she eventually gave in to Zeus' repeated requests for unprotected sex.

Tragically, Zeus was soon diagnosed as having contracted HIV from Aphrodite. Zeus, while handsome, was also stupid (he had the I.Q. of a 10 year old). He did not understand the repeated warning given to him by his doctor about the high risk of transmitting HIV through unprotected sex. He did not tell Hera of his infection, but continued to have sexual intercourse with her on a regular basis. As had been their custom throughout marriage, Zeus and Hera did not use condoms during sex.

But truth will out. This web of deceit unraveled when Aphrodite learned that Zeus was married to Hera and had been sleeping with both women during the six months that he had been involved with Aphrodite. Aphrodite visited Hera and informed her of all that had happened.

Furious, Hera banished Zeus from her bed and their home. She immediately visited Doctor Dionysus ("**Dionysus**" or "**D**") and asked him to test her for HIV. Dr. Dionysus took a sample of Hera's blood. Unfortunately, when Dr. Dionysus tested the blood sample, he misread the results and informed Hera that she was not infected with HIV. This was not true. In fact, Hera had been infected with HIV by Zeus, though she did not learn of this fact until one year later when she had a physical after she had begun feeling tired and run down. By this time her HIV had progressed to full-blown AIDS.

Dr. Dionysus has admitted that his mistaken diagnosis breached his duty of care. However Dr.

<sup>1</sup> HIV is a retrovirus that attacks the human immune system. HIV typically spreads via genital fluids or blood transmitted from one person to another. AIDS ("Acquired Immune Deficiency Syndrome") is in turn the condition that eventually results from an immune system gravely impaired by HIV. Medical studies have indicated that most people who carry the virus will progress to AIDS. AIDS patients by definition are profoundly immunocompromised: that is they are prone to any number of diseases and opportunistic infections that a healthy person might otherwise resist. AIDS is invariably fatal.

Dionysus has denied liability based on a paragraph in a contract which Hera signed as a condition to obtaining treatment. Labeled "Release," the paragraph states that Dr. Dionysus is "released from liability for all risks of treatment and testing."

Owing to the year's delay in correct diagnosis, Hera is precluded from using a group of medications that probably would have prevented the emergence of AIDS. Doctor Io ("Io" or "I"), informed Hera that if she had been promptly diagnosed as having HIV, she would have had about a 25 % chance of survival and cure. However now, she has no chance to survive. It is certain that she will endure excruciating pain for the rest of her life (this would have been avoided if Dionysus had properly diagnosed the disease).

You are aware of the following concerning the law of Olympus, in addition to your general knowledge of tort law:

1. Olympus by statute has adopted a pure comparative fault system and abolished all forms of implied assumption of the risk;
2. The Supreme Court of Olympus in recent decisions has adopted the "Scope of the Risk" [also known as the "Foreseeability"] approach to Proximate Cause. [NOTE: this is NOT the "Modern" approach].
3. The Court has also traditionally followed a "but for" test, but has hinted that it may adopt what is known as the "Loss of Chance" doctrine in medical malpractice cases;
4. Several years before these events occurred, Olympus enacted the following criminal statute(§33 of the Criminal Code):

(a) Any person who exposes another to the human immunodeficiency virus (HIV) by engaging in unprotected sexual activity when the infected person knows at the time of the unprotected sex that he or she is infected with HIV, has not disclosed his or her HIV-positive status, is guilty of a felony punishable by imprisonment in the state prison for three to five years.

(b) "Unprotected sexual activity" means sexual activity without the use of a condom.

(c) This statute shall not apply to any consensual sexual activity that occurs between individuals who are lawfully married to one another.

**PLEASE DISCUSS THE NEGLIGENCE CLAIMS THAT CAN BE ASSERTED BY HERA AGAINST ZEUS, APHRODITE, AND DR. DIONYSUS AS THE RESULT OF THESE EVENTS, AND CONSIDER WHAT, IF ANY, DEFENSES ARE AVAILABLE. (Do not address any intentional torts issues!)**