

TORTS EXAMINATION
PROFESSOR GILLES
December 1998

1. *This examination consists of two parts. Each part is worth approximately half of your grade. Part One consists of a fact pattern followed by three questions. Part Two consists of a fact pattern followed by one long essay question.*
2. *You must obey the page limits given for 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.*
5. *You may keep your copy of this examination.*

Good luck.

PART ONE -- SHORT ANSWER QUESTIONS

INSTRUCTIONS:

1. *The fact pattern is followed by three short questions. Together they count for approximately half 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):*
 - Question 1 - use only 2 pages*
 - Question 2 - use only 6 pages*
 - Question 3 - use only 3 pages*

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

FACT PATTERN:

Hirsch and Kravitz attended law school together and each excelled in different areas (property and criminal law respectively). They became firm friends and were famous for playing elaborate practical jokes on each other - hiding the car keys the morning of an examination, leaving fake phone messages from the Dean, placing buckets of cold water on top of doors etc. Neither took offense at these pranks and indeed they expressly agreed that such practical jokes were really fun and that they would continue to play such jokes for the rest of their lives.

Upon graduation Hirsch and Kravitz set up in practice together. They rented the ground floor of an old bank building in German Village (the ground floor contained two offices, a small entry room, and a large walk-in vault where they stored legal papers and other valuables).

One evening Kravitz was working late in his office on a brief. He thought Hirsch had already gone home. Kravitz was late for a date so he hurried to lock up before leaving. As he rushed out of his office, he noticed that the door of the vault was open. This was unusual because

they always kept it shut unless it was in use. Without checking inside, he slammed the door of the vault. As he ran out of the building he thought he heard a muffled cry, but he decided he did not have time to investigate, and left for the evening.

Hirsch was in fact in the vault searching for a document. When Kravitz slammed the door Hirsch let out a shout (the cry Kravitz ignored). Realizing he was trapped Hirsch looked around for means of escape. He saw some old tools lying on a shelf at the back of the vault where he had dumped a lot of junk from his apartment. He thought the tools were his. He attempted to pry open the vault's lock but without success. In the process Hirsch broke all the tools -- each tool shattered into a myriad of pieces. The tools in fact belonged to Ferriell (an old buddy of Kravitz's). They were antique bicycling tools (which once belonged to the Wright brothers) and had been valued at over \$50,000.

Just as Hirsch was about to give up, he noticed an old faded post-it note stuck to the wall to the right of the vault door. It read, "To exit, turn green knob to 33-66-33." Hirsch located the green knob (which he had never noticed before), followed the instructions, and the vault door sprang open.

Hirsch was completely unharmed but a little annoyed as he had spent an hour in the vault. He decided to get back at Kravitz with another elaborate prank. Hirsch took a tape recorder and a toy gun into Kravitz's office. He placed them behind the door with the barrel of the gun partially visible. He then rigged the tape recorder so that whenever the door to Kravitz's office was opened the recorder would play "I'm going to kill you if you touch that vault again. Die, die, die you scum." This was followed by the noise of gunfire. "That'll teach Kravitz," muttered Hirsch as he left for the night.

A few minutes later, Bahls, a renowned but aging burglar, breaks into the premises. Bahls opens the door to Kravitz's darkened office. The tape recorder is triggered. Bahls is terrified. He sees the "gun" barrel and as the noise of the "gunfire" erupts he drops to the floor dead from a heart attack.

A few days later, hearing of the bizarre burglary Ferriell hurries to offices of Hirsch and Kravitz, fearing that his antique tools have been stolen. Hirsch shows him into the vault and points to the shattered pieces of the tools still lying on the floor. "You mean these old things?" asks Hirsch. Ferriell (who has had a sad history of mental instability ever since he was hit by a car in his youth) becomes completely irrational. Believing that Hirsch is an on-coming car, Ferriell strikes out at Hirsch with his fists. Ferriell misses Hirsch's body but knocks the file folder that Hirsch had been holding to the ground. Ferriell flees the building leaving Hirsch somewhat startled, but unharmed.

QUESTIONS:

Question 1. Can Hirsch state a claim of false imprisonment against Kravitz? Any defenses? Discuss. (Limit of two pages).

Question 2. Can Bahls' estate state a claim of assault against Hirsch? Any defenses? Discuss. (Limit of six pages).

Question 3. What intentional tort claims can be made by and against Ferriell? Any defenses? Discuss. (Limit of three pages).

PART TWO-- LONG ESSAY QUESTION

INSTRUCTIONS:

1. *The fact pattern is followed by one long essay question. It counts for approximately one half of your grade.*
2. *The fact pattern is loosely based on a incident at the 1997 Macy's Thanksgiving Day Parade. I have added and changed key facts. Use my facts not those of the real incident.*
3. *You may ONLY use 12 pages (writing on every line, but only on one side of the page). I will not read beyond the assigned page limit. You do NOT need to use all the space to write a good answer.*
4. *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.*

FACT PATTERN:

Ms. Piggy is a resident of New Yorkia (a fictional state). In November 1997 she decided to attend the famous Macy's Thanksgiving Day Parade in New Yorkia City.

Every year, an estimated 1 million people throng the streets to watch the parade, with a television audience of many times that number. The parade was started over 70 years ago and is organized and run by Macy's Department Store ("Macy's"). In the 1920's the parade featured floats, professional bands and live animals borrowed from the Central Park Zoo. Large balloons were first added to the parade in 1927 – Felix the Cat was the first such balloon. Now approximately 25 to 30 giant balloons form a central part of the parade.

In keeping with tradition, even today all the parade participants are volunteers. They serve as the clowns, float escorts and balloon handlers. All of the balloon handlers are extensively trained and have the risks of serving in the parade explained to them. In particular, the balloon handlers are told that they need to be very physically fit and that previous handlers have suffered injuries such as sore feet and arms, and even sprained or broken bones, from guiding the balloons over the 2 ½ mile route.

Ms. Piggy arrived early and got a prime-viewing site – the intersection of Central Park West and 72nd street (only a few blocks from the start of the parade). She stood in the front row, about 30 feet from one of the decorative iron lampposts that New Yorkia City had newly installed along the street. These iron lampposts were installed in 1995 to replace previous concrete lampposts. The iron lampposts were more attractive, cheaper, but less sturdy. The City reasoned that it had to replace about 500 lampposts a year due to car/lamppost collisions. Since

the iron lampposts cost \$100,000 less each, the City could save an estimated \$5,000,000 a year if it switched to iron lampposts. However, the iron lampposts are more likely to fall (because they are less sturdy), and since their installation the number of pedestrian hit and killed by falling lampposts (after car/lamppost collisions) has increased from 1 to 3 per year.

From the start of the 1997 parade, the Macy's balloon handlers had problems with the large balloons. The day was very windy and three of the balloons (Flying Fish, Aladdin and the Pink Panther) were damaged as the procession was being readied – two went flat when they were caught in gusts of wind and blown into a traffic light and a tree; another developed a tear when several of the retaining ropes ripped out as a cross wind caught the balloon).

However when Macy's checked with the National Weather Center it was advised that currently the winds in New Yorkia City were 35 m.p.h., with gusts up to 40 m.p.h. The Weather Center projected that the winds would remain at that strength throughout the entire day. The practice in the balloon parade industry was only to cancel the use of balloons if the winds were 40 m.p.h. with gusts of 45 m.p.h., so Macy's parade officials decided to continue with the parade, but to add extra handlers to increase the control of the balloons.

As the parade got under way one of the first giant balloons, the "Cat in the Hat" (a Dr. Seuss character, which had been in the parade every year for over thirty years) entered the intersection of Central Park West and 72nd streets. At that point a gust of wind, later estimated to be about 45 m.p.h., blew out of the side street and side swiped the balloon. As the handlers tried to control it, the balloon skewed into an iron lamppost. The retaining ropes on the balloon wrapped around the lamppost. With a second gust of wind the balloon began to move again, pulling at the lamppost. The lamppost broke apart and a 3-foot section, which was entangled in the retaining ropes, was carried 30 feet in the air before it broke free and plunged to the ground. It hit Ms. Piggy who was killed instantaneously.

One further tragic incident occurs. Mr. Mickey, one of the balloon handlers, without any regard for his own safety, bravely throws himself on top of the six foot high paw of the "Cat in the Hat" balloon. This slows down the balloon, allowing other workers to regain control. Mickey's actions are credited with saving many other spectators, but unfortunately in the process Mickey is thrown to the ground and his leg is broken.

While most people would suffer no long-term consequences from such an injury, the doctors treating Mickey discover that he suffers from a rare bone disease. Despite the best of medical care he can never recover the full use of his leg and after 2 months of treatment he is released from hospital. Five months later, he is going down to the basement to find an old photograph. The stairs are well lit, well built and well maintained, but despite using utmost care, Mickey trips. He is unable to steady himself because of his bad leg, and falls to his death.

In an interview a spokesperson for Macy's expresses the company's regret at the tragic

incidents: “since the first parade in 1924 we have never had any such serious injuries or deaths. We have run this parade in all kinds of weather – rain, snow and wind. The parade has only been cancelled three times, from 1942 through 1944 because of World War II.” In response to questions from the media, Macy’s spokesperson admits that in 1993 winds of 40 m.p.h. combined with rain caused a Sonic the Hedgehog balloon to crash into a concrete lamppost and deflate. The lamppost held up, but part of the balloon fell causing minor injuries (cuts and bruises) to an off-duty police officer and a 10 year old girl.

QUESTION 4:

Consider the above fact pattern: what negligence claims can be made out and what defenses are available? (Do not address any intentional tort issues).

Note: the question is set in the fictional, but beautiful State of New Yorkia. New Yorkia by statute has adopted a pure comparative fault system and abolished all forms of assumption of the risk (both express and implied).

New Yorkia has a criminal statute which makes it a misdemeanor for “any person to mount, ride or otherwise climb upon” a balloon during a parade. The statute was enacted after a series of incidents where college students were injured when they ran from the crowd and attempted to scale the balloons – apparently as part of a fraternity initiation right at New Yorkia University.

Do NOT presume the existence of any other statutes. You should know that the Supreme Court of New Yorkia has recently adopted a Foreseeability (also known as Scope of the Risk) approach to proximate cause. Moreover the Court adopts the Restatement’s approach to questions where we have studied it.

THE END