

TORTS EXAMINATION
Section M (EVENING)
PROFESSOR GILLES
MAY 1997

1. This examination consists of one long fact pattern followed by 5 questions. The relative values of the questions are :

- Question A - 50%
- Question B - 5%
- Question C - 15%
- Question D - 15%
- Question E - 15%

2. Write your answer ONLY in the space provided. If you write elsewhere it WILL BE IGNORED.

- 3. Organize and think through your answer before you begin to write.
- 4. Do not take the examination apart. Return it in its entirety at the end of the examination.
- 5. Make sure that you put your examination number in the space provided below.
- 4. Good luck.

EXAMINATION NUMBER:

Eric, a fifty year old male, was an experienced boater. In fact, prior to his retirement he had professionally raced power boats from 1966 to 1985, and in 1968 won the U.S. Professional Power Boat Racing Championship.

In 1996, Eric purchased a boat for recreational use from Boatland (a boat retailer) . He thoroughly inspected the entire boat prior to purchasing it. The boat was originally manufactured by Superfloat in 1973. It had received a "total refit" by Boatland in 1995 before resale to Eric. The refit consisted of a paint job, new fixtures (such as handles, windscreen, mirrors etc), and the addition of a canopy, new rear seats, and what Boatland called its "safety package" (consisting of an emergency flare kit, a first aid kit and new life jackets). The refit did not include any changes to the engine, the steering mechanism or the propeller.

Boatland has now gone out of business.

On a bright sunny day a few months after purchasing the boat, Eric took his boat out to bird watch - a hobby he had taken up since his retirement. Eric was watching the sky looking for birds and failed to keep an adequate watch on the water. (This violates a Capital criminal statute which makes it a misdemeanor to drive a boat without keeping an adequate lookout). The boat hit a log and Eric was thrown into the water. The boat circled back and ran over Eric as he lay in the

water. Eric was severely injured by the propeller. His arm was partially severed and he was partially eviscerated by a gash in the stomach.

Eric's plight was first noticed by Fred a passing boater. Fred however decided not to get involved and sailed on. However Martin, Eric's foster brother, was fishing on the shore. He saw the entire incident and dived in to rescue Eric. Unfortunately the rescue did not go well. When Martin first reached Eric he grabbed Eric's partially severed right arm which came off in Martin's hand. Once Martin managed to get a grip on Eric's bloody body, he tried to swim back to shore. However, Martin was not trained in life saving and as he pulled Eric ashore he negligently allowed Eric's head to fall below the waves causing further injury to Eric. Martin called the coast guard and when they arrived, Eric was rushed to the local hospital in Canton, in the State of Capital. Martin was also taken to hospital as he was in severe shock from witnessing the arm incident. He was covered in blood and could not stop shaking.

Eric was rushed into the operating room and operated on by Doctor McDonald. Eric died five hours later from the wounds he had received from being hit by the propeller. Martin was treated and released but continues to suffer nightmares every night where he relives the incident.

An examination of the boat reveals that it did not have a kill switch. A kill switch is a device which automatically cuts off the engine if the driver is thrown from the boat. Kill switches are a relatively simple concept - the absence of a driver's hand on the wheel breaks an electrical connection which cuts off the engine. Kill switches were first adopted by professional power boat racers in the 1960's - they required no new technology and any competent mechanic could design one. By 1969 the practice of rigging boats to include a kill switch had spread, and several boating books described how any boat owner could add a kill switch to a boat.

However it was not until 1975 that a patent was taken out on a boat designed to include a kill switch, and until 1976 no boat manufacturer in the United States included a kill switch in their boats. However given that the kill switches in no way impaired the performance of the boat and that they were easily incorporated (the cost was about \$60.00 per boat), the practice of designing boats with a kill switch feature spread rapidly and by 1977 all boats manufactured in the United States (including all new Superfloat boats) contained a kill switch. In addition, by 1977 there were several "do-it -yourself" kits on the market (mainly sold in boat retail stores) which allowed boat owners or boat retailers to add kill switches to any older boat. Indeed such a kit was available at Boatland, but Boatland chose not to incorporate it during the re-fit of Eric's boat.

Eric's accident is fairly unusual. In 1996, although there were 5 million boat owners in the United States and about 50,000 boat accidents a year, only 50 persons were injured that year by the boat circling back (as occurred in Eric's case). However of those 50 accidents, 25 led to death. This number has declined drastically - for instance, in 1972 there were 5,000 circle back accidents (2,500 of which were fatal).

Answer the following FIVE questions based on the facts above. It may be advisable to review all the questions at the outset since points will not be given for a correct answer given in response to the wrong question.

QUESTION A:

Write a memo assessing the strengths and weaknesses of a wrongful death claim by plaintiff, the estate of Eric, based in products liability for defective DESIGN against SUPERFLOAT.

Another attorney is also working on this case. She is writing a memo addressing causation; other types of defect (i.e. warning or manufacture); and other theories of recovery (i.e. contract or negligence). Your answer should NOT include a discussion of any of these issues.

Rather your answer should address whether plaintiff has a products liability claim for a defective DESIGN against SUPERFLOAT, and any possible DEFENSES.

Your research shows that the applicable law is that of the State of Capital. In design defect cases the Capital Tort Reform Act provides that a design defect can only be shown if a plaintiff bears the burden of proving a defect under the risk/utility test. Capital has not adopted contributory or comparative negligence as a defense in product liability suits.

QUESTION B: Plaintiff, Eric's estate, also files suit against Fred and against Martin. What duties if any were owed to Eric by Fred and Martin? Were these duties breached? (NOTE: You need not discuss causation, damages or affirmative defenses in this answer - simply assess if either defendant owed a duty and if the duty was breached.)

QUESTION C: Plaintiff, Eric's estate, also files suit against Doctor McDonald. Presume for the purposes of this question alone that during the surgery Doctor McDonald leaves a clamp inside Eric's stomach and also mis-prescribes the amount of pain killer Eric is to receive (Doctor McDonald prescribes 10 times the manufacturer's recommended maximum dosage). Presume that both acts are the cause in fact and proximate cause of Eric's death.

Plaintiff, Eric's estate, sues for malpractice. Plaintiff asks you to advise it on whether defendant Doctor McDonald breached the duty of care, if any, which he owed to Eric, and on whether plaintiff needs to retain a medical expert to testify (and if so what kind of expert).

Your research shows that the State of Capital adopts the "Locality Rule" in medical malpractice cases; and on all other issues it takes the majority approach. (NOTE: You need not discuss causation, damages or affirmative defenses in this answer).

QUESTION D: Martin also files suit against Superfloat seeking damages for his emotional distress. He continues to be upset by the incident, although the only manifestation of his distress are his continuing nightmares.

Martin was Eric's foster brother. Eric's parents took Martin into their home as a foster child when he was twelve and Eric was fifteen. Martin left the home at 18, but for those intervening six years he and Eric were inseparable.

Since he left Eric and Martin have stayed in touch, but their contacts have become less and less frequent. They try to get together at least twice a year and on the day of the incident they were spending a weekend together fishing and boating. Martin will testify that he and Eric felt like "brothers."

Discuss the merits of Martin's claim. You need not discuss causation, damages or affirmative defenses in this answer - simply assess if the defendant owed a duty and if it breached this duty. The State of Capital has not decided what position to adopt with regard to such claims.

QUESTION E: Following the incident, the famous TV show, Forty Minutes, does a segment entitled "Death on the Water," which includes a report on Superfloat and its owner Sam Super, and is critical of their failure to incorporate kill switches. The report is designed to alert the public on the dangers of boats without kill switches.

The report includes a statement by Martin that "Sam Super is a murderer - he deliberately delayed installing the kill switch until a year after every other boat manufacturer in the business had put them in - just to make an extra buck." Super Sam files suit for defamation against Forty Minutes and Martin. Presuming that Super Sam is a private figure and that the statement is false (Superfloat was the second company to start installing kill switches), can Sam Super recover for defamation? He wants to get both actual and punitive damages. Advise him on the strength and weaknesses of his defamation claim.