

TORTS I EXAMINATION
PROFESSOR GILLES
December, 2006

1. *This examination consists of **three essay questions**. The first fact pattern is followed by **one** essay question - Question 1 (limit three-and-one-half pages). The second fact pattern is followed by **two** essay questions - Question 2 (limit two pages) and Question 3 (limit eight pages). The page limits roughly reflect the points allocated to each question.*
2. *You will have **3 hours and 30 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.*
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.

‘PLEASED TO TORT YOU’ FACT PATTERN

(Question 1)

Borat Sagdiyev (“**Borat**” or “**B**”), recently emigrated to Magellan, Ohio, from his ancestral home, a small village located in the Altay Mountains of Kazakhstan. Upon arriving in Magellan on his first day in America, a jet-lagged Borat walked along Narrow Street hoping to meet some “friendly Americans” who could help him find a place to live. Dressed in an unfashionable grey-suit, carrying several plastic bags with his belongings, the mustachioed immigrant decided to approach the most prosperous-looking person he could find and enlist his help.

As fate would have it, a wealthy televangelist, Rod Cilantro (“**Cilantro**” or “**C**”), was walking toward Borat. Spying Cilantro’s expensive clothing and white shoes, Borat decided to introduce himself. (Though Borat had seldom conversed in English, he was confident about his communication skills because he had studied the language at home for many years using several old cassette tapes he had found in the village library).

As Cilantro approached, Borat walked directly up to him and said, “My name a Borat. I like a-you—pleased to meet a-you.” With that, Borat leaned close to Cilantro and attempted to greet him in the traditional Kazakhstan manner by kissing him on both cheeks. Cilantro was shocked by the intimacy of the greeting, and before Borat’s lips could touch his cheek, Cilantro abruptly stepped backwards. Unfortunately, his step caused him to fall into an open sewer that a city worker had exposed by neglecting to replace a manhole cover after performing repair work. “Wow, Wow, Wee, Waa!” a startled Borat exclaimed as Cilantro disappeared into the hole that Borat had not previously observed. Borat ran away toward Low Street muttering something about capture by “secret police.”

Cilantro found himself about eight-feet below sidewalk level in a maintenance chamber that was five feet wide. He was miraculously unhurt, but the chamber was unlit so he never saw the metal step ladder leading out of the sewer. He began shouting for help, and within three minutes, Sellig and Bilko, two passing law professors, graciously helped him out of the sewer. Cilantro emerged, shaken but completely unscathed.

Surprisingly, despite these events, Borat has managed to become successful in his beloved “U. S. and A.” He recently married a celebrity actress and has become rather wealthy. Cilantro has contacted you about suing Borat for his “tortious conduct.”

Question 1 (Limit three-and-one-half pages). Please discuss whether Cilantro can state any intentional tort claim(s) against Borat, and indicate the likelihood of success. Do not discuss defenses. Do not discuss negligence or the liability of any other parties.

“ENLIGHTENING” FACT PATTERN
(Questions 2 and 3)

It was December in Springfield. As Marge drove down the street she saw that all other houses were brightly decorated with holiday lights, and realized that Homer, despite all Marge’s nagging, had not yet put up the lights on their house. When Marge got home, she confronted Homer and said, “I’m going to my sisters’ house and those light better be up when I get home at 7:00p.m.” Homer dejectedly watched Marge drive off: it was bowling night and he hated to miss it just to put up the lights. Suddenly he noticed a flier attached to the mail box, offering the services of “Handyman Barney – I charge rock bottom prices.” (What Homer didn’t know was that Barney’s prices were low because he had never bothered to obtain a license as required by the City).

Homer called the cell phone number, and spoke to Barney. “You’ve got to come now--it’s an emergency,” begged Homer. “Please. Please. Please! Those lights have to go up tonight.” Barney quoted a price of only \$25.00 to put up the lights, and promised to come right over. Barney indicated that no one needed to be home while he installed the lights: “Just leave out the lights, I’ll bring my ladder, and I’ll crawl all over your roof.” Homer happily agreed, warned Barney that part of the roof “needed some work,” and then headed off to bowling.

Barney arrived drunk (he had been at Moe’s tavern downing Duff Beer when he got Homer’s call). He pulled his ladder off his truck and began to put up the lights Homer had left out. Barney worked his way from the front of the house to the side, attaching the strings of lights to the edge of the slate roof. When he got to the side of the house where the roof was about 30 foot high, Barney realized that his ladder was too short. He decided to climb on the roof and attach the lights from there. As Barney walked along the roof, his drunkenness caused him to trip and he fell heavily on the edge of roof. The roof (weakened by rot) collapsed underneath him and he fell, headfirst, to the ground.

This was the section of the roof that “needed some work.” Marge had noticed some loose slates that summer, but when Homer and Marge got an estimate to repair the roof it was for \$1,500. The contractor had warned them that about 20-30 slates were loose and could fall, and that rainwater was getting underneath and would start to rot the wood. However, since money was always tight and the orthodontist had recommended costly braces for Lisa, Homer and Marge decided to wait to have the roof fixed. They warned the kids not to play at the side of the house in case the heavy slates started falling.

When Marge returned from visiting her sisters, Barney was lying on the ground. Miraculously, although he was surrounded with wood and heavy slates from the roof, none had hit him. He appeared a little dazed from the fall, but soon sat up, rubbed his head, and muttered: “I’m O.K., except for this headache.” Marge insisted on calling 9-1-1 and Barney was rushed to Springfield hospital.

At the hospital, the admitting physician noticed that Barney’s speech was slurred, and ordered an MRI to check for brain damage. In fact, Barney was fine and his slurred speech was due to his drunken condition. Radiologist Nick, a nationally certified specialist, handed Barney a form. The

form contained the following provision:

EXEMPTION FROM LIABILITY. I exempt and release the Hospital, its employees and agents (including its physicians, radiologists, and nurses) from any and all liability for personal injury to me (including my death) arising during the course of my operation, treatment, or other procedure, including personal injuries or death arising from medical negligence or malpractice.

In addition, the form asked if Barney had various conditions, including whether Barney had a pacemaker. Although Barney had a pacemaker, Barney (still too drunk to understand) just checked “no” in all the boxes, signed the bottom of the form, and handed it back to Nick, commenting: “Let’s get going with this procedure.”

Nick began the MRI, but half way through the procedure an alarm sounded. Barney’s pacemaker had failed (because of the MRI) and he had died from a heart attack. The whole town turned out for Barney’s extravagant funeral (which included an open bar at his wake).

Doctor Julia Hibbert, an expert in the field of radiology, will testify that nationwide, most radiologists before starting an MRI orally ask the patient each question on the form, confirming that the patient understood the question and had answered correctly. However, she will also testify that a considerable number of respected radiologists across the nation follow the practice of Radiologist Nick (that is, to have the patient complete a form and only talk with the patient if the patient asks questions). She will also testify that nationwide studies have indicated that the latter practice saves about \$ ½ million per year (in efficiency savings of radiologists’ time), but may result in about 1,000 unnecessary deaths every year.

In addition to your general knowledge of tort law, research by an associate reveals the following:

❖ The Supreme Court of Springfield:

1. adopts the “Risk Rule” approach to proximate cause that we studied in class;
2. follows the traditional approach of predicating a landowner’s liability on the status of the entrant on the land;
3. applies a professional standard to medical malpractice claims;
4. does not recognize implied assumption of the risk, but does recognize express assumption of the risk;
5. adopts a pure comparative fault system;
6. only recognizes a survival action for the estate, and not a wrongful death action;

7. applies the majority approach on all other matters.
- ❖ Several years before these events occurred, Mayor Quimby and the City Council of Springfield had been concerned by a growing number of complaints from citizens about incompetent handymen, and by a growing number of injuries to handymen. The City enacted the following ordinance:
- Licensing of Handymen Ordinance
- 1.1 All those engaged in handyman work must obtain a license from the City. The license will be granted upon payment of \$20 and obtaining a passing score on the Handyman Exam.
 - 1.2 All handymen must be sober and drug free while on the job.
 - Any violation of these sections is a criminal misdemeanor punishable by a fine of \$2,000.

NOTE: *It is advisable to answer the questions in the order presented. You may reference your answer to question 2, as you address question 3.*

Question 2 (Limit two pages).

Barney's estate ("B") sues Radiologist Nick ("N") for medical malpractice. Nick files a motion for summary judgment arguing that:

1. Barney's claim is barred by express assumption of the risk; AND
2. Nick did not breach the relevant standard of care.

Should this motion be granted? Do not discuss any other issues and do not discuss the *Daubert* rule.

Question 3 (Limit eight pages).

Barney's estate ("B") sues Homer and Marge Simpson (the "**Simpsons**" or "**S**") for negligence alleging that the Simpsons should have fixed the roof.

Please discuss the issues raised by this negligence claim, including any defenses. 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 discuss joint and several liability or proportionate share apportionment.

THE END