

TORTS EXAMINATION
Professor Gilles
April 2000

1. *You have **3 hours** to complete this examination.*
2. *This examination consists of one main fact pattern followed by four questions (some with subparts).*
3. *You may **ONLY** use the following number of pages (writing on **EVERY LINE**). A “page” is **ONE SIDE** of each leaf of a blue book:*

Question 1a - use only 2 pages
Question 1b - use only 4 pages
Question 2 - use only 3 pages
Question 3a - use only ½ page
Question 3b - use only 1 page
Question 3c - use only 1 page
Question 4 - use only 2 pages

You must obey the page limits given for each question. I will not read beyond the assigned page limit.

4. ***Answer the question asked.** Points will **NOT** be given for the “right” answer given in response to the wrong question.*
5. *Make sure that you put your examination number on your blue book and on this examination: exam no. _____*
6. *This is a closed book examination.*
7. *Hand in your copy of the examination with your bluebook.*

Good luck.

FACT PATTERN:

[This fact pattern is set in the fictional, but beautiful, State of Scotia.]

John has been feeling sick for weeks – he is depressed, he cannot eat, he is missing work on a regular basis, and he does not have the energy to pursue his favorite hobby (home renovation). He consults Doctor Bolik, a general practitioner.¹ John explains his symptoms and asks Bolik to treat him. John comments, “What’s up doctor? I want to know everything about my condition and any treatment.” Bolik thoroughly examines John and concludes that he is suffering from severe clinical depression. Bolik prescribes Rozap, a new anti-depressant on the market.

Rozap was introduced in 1995 by the drug company, ZAP. ZAP is a multi-billion dollar drug company and is the leading manufacturer of depression drugs in the United States. ZAP has a “publicity department” with a yearly advertising budget of 4 million dollars. It also offers a hot line providing background information to reporters who want to write about ZAP products.

Rozap has been a stunning success for ZAP. The prescription drug Rozap is the most effective drug on the market for curing severe depression and has a very high success rate. ZAP’s television ads note the prevalence of severe depression in the United States (approximately 3000 suicides per year were attributed to severe depression from 1990 to 1994). The ZAP advertisements then switch to a picture of a smiling woman surrounded by a happy family, while a soothing voice states, “Depressed? Ask your doctor about Rozap. For you, it could be the first step back to a happy normal life.”

As the literature sent to all doctors explains, Rozap is unique because it alters the brain’s chemical balance. However this means it has side effects. ZAP conducted thorough testing of Rozap, both before and after its release (the 1994-98 study). This study revealed the following:

1. The drug is addictive. Because of its impact on chemicals in the brain, Rozap gives the user an immediate “happy feeling” after it is taken. Most users immediately crave more tablets and 10 % of Rozap users surveyed admitted have taken more tablets than prescribed on one or more occasion within the last year.

2. Nationwide, suicides linked to depression dropped to 1,500 per year in each year following the drug’s introduction.²

3. If more than 10 tablets were taken within a 48-hour period a small percentage of users (those who possessed abnormally high levels of serotonin in their brains) suffered some temporary delusions. Since the drug’s introduction in 1995, only ten cases of delusion have been reported and none resulted in serious harm to the patient or bystanders.

¹ It is not malpractice for a general practitioner to treat depression.

² The closest product that competes with Rozap is Hapi drug, which is half the price and has none of the side effects of ZAP (because it does not affect the chemical balance of the brain). However it has proven far less effective and clinical studies project that it would cause the 1990-1994 suicide rate (of 3,000 per year) only to drop to 2,700 per year.

ZAP notified all doctors of both the addictiveness of Rozap and its potential to cause delusions, sending them copies of the 1994-98 study results. ZAP's instructions to doctors stated in bold lettering: "**Patients must be expressly informed of the addictive nature of Rozap, and warned of possibility of delusion as a side effect.**" ZAP did not include these warnings on the TV ads. or the drug packaging – and was not required to do so by state regulations on drug warnings.

The medical profession however has split on how to handle this drug. The National Society of Psychiatrists recommends informing all patients of the danger of the addiction and delusion. In contrast, the American Association of General Practitioners has not taken a position, and general practitioners nationwide take differing positions. About 54% warn of the dangers of using the drug, but about 46% of general practitioners (reasoning that depressed patients are unlikely to heed warnings) do not warn patients of these dangers.

Doctor Bolik does not to inform John of the dangers of using Rozap. Bolik's only comment is "this will make you feel better in no time at all." Bolik writes a prescription for one tablet a day and asks John to check back within 2 weeks. John gets the prescription filled at a local pharmacist and takes the drug as prescribed (one a day) and feels much better. He resumes his favorite hobby of home repair and rips up several uneven floorboards in the hall, intending to replace them. But by Day 3 he feels depressed again. He stops working on the floor and simply stares at the TV for hours on end. He sees the Rozap advertisement and decides to take "a few" extra tablets. By midnight he has taken 10 tablets within a 12-hour period.

John begins to suffer delusions (caused by Rozap). Believing that he is under attack from aliens, he begins to blare loud music and turns on every light, under the delusion that light and music scare aliens. He also finds his gun, loads it, and hides in the kitchen awaiting attack.

John's neighbor, Sellig, is relaxing at home. But responding to the loud music and lights, he comes over to John's house to check up on John. He and John were acquaintances and Sellig has a key to the John's house so he can look after it while John is out of town. He rings the doorbell and shouts John's name, but getting no response he uses the key to open the door. John, seeing Sellig enter and believing him to be an alien, turns the gun on himself and commits suicide. Sellig runs forward but in his haste he does not see the missing floorboards, and falls breaking his leg in two places.

Sellig crawls down the driveway and waves to a passing motorist, Shlab. Shlab slows down, opens the window and asks what is wrong. Sellig pleads with her to take him to the hospital or to call for help. Shlab, however, is already late for her torts exam, so she simply shouts "I'll try" and drives off. She never summons help. Three hours later another motorist takes Sellig to the hospital.

This incident catches the media's attention. Several TV stations run stories on the dangers of Rozap. An outraged Doctor Bolik, faced with questions from several reporters, releases the following written statement to the media: "ZAP never warned me of the dangers of this drug: they are responsible for this harm. They lied to me and lied to the public." Within 12 hours ZAP representatives appear on the nightly TV shows pointing out that ZAP did warn doctors of the dangers. A few days later, Bolik checks his voluminous files and finds, to his surprise, that he was wrong - ZAP had sent him the 1994-98 study warning of side effects.

QUESTIONS:

Question 1. John's estate files a products liability suit against ZAP. The suit contains two claims: one for a design defect and one for an informational/warning defect. You clerk for Judge Judy who has been assigned the case. She asks you to address the following issues.

Question 1(a): Can John's estate prove that the drug was defectively designed ?

- Note: Scotia has not yet decided what approach to take to the issue of products liability for prescription drugs, but the Court is considering adopting a standard risk /utility analysis; the position taken by California; or that proposed in the 3rd Restatement. (It would be wise to discuss all of these approaches)
- Only discuss the issue raised by the question. Do not discuss other elements of a products liability case or defenses.

(Limit of 2 pages)

Question 1(b): Can John's estate state a products liability claim against ZAP based on an informational/warning defect?

- Discuss all the elements of such a claim.
- Presume that the only defense is comparative fault (decreasing plaintiff's recovery by the % of his fault), and those which are not true defenses but rather the negation of elements of the plaintiff's claim.

(Limit of 4 pages)

Question 2. John's estate files suit against Dr. Bolik for negligence.

- Only discuss duty and breach.
- You should presume that the State of Scotia adopts a professional standard in informed consent cases and uses a national standard of care.

(Limit of 3 pages)

Question 3. Consider Sellig:

Question 3(a) Can Sellig state a claim for negligence against Shlab?

- Only discuss duty.

(Limit of 1/2 page)

Question 3(b) Can Sellig state a claim for negligence against John's estate?

- Only discuss duty and breach
- Presume that Scotia follows California (in Rowland v. Christian, abolishing the status of the entrant as the test for determining the duties owed by the landowner).

(Limit of 1 page)

Question 3(c): In what way, if any, would your answer to 3(b) change if Scotia instead followed the traditional common law approach to determining a landowner's duty according to the status of the entrant?

(Limit of 1 page)

Question 4. Can ZAP state a claim for libel against Dr. Bolik?

- You may assume that corporations are treated the same as natural persons for the purposes of libel and the First Amendment.

(Limit of 2 pages)