

TORTS EXAMINATION  
Section B (Day)  
PROFESSOR GILLES  
MAY 1997

1. This examination consists of two parts. Each part is worth half [50%] of your grade. Part One consists of 30 multiple choice examination questions. Part Two consists of one long fact pattern followed by two questions [Question A is worth approximately 40% and Question B is worth approximately 10% of the total grade].

2. Do not take the examination apart. Return it in its entirety at the end of the examination.

3. Make sure that you put your examination number in the space provided below and on the scranton card.

4. Good luck.

EXAMINATION NUMBER:

Torts Examination  
May 97

PART TWO - ESSAY QUESTION

1. Part Two consists of one long fact pattern followed by two questions. Part Two counts for one half [50%] of your grade. Of that 50%, Question A is worth approximately 40% and Question B is worth approximately 10%.

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.

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 severed, he was partly eviscerated by a gash in the stomach, and suffered a severe blow to the back of his head.

When help arrived, Eric was flown to the local hospital. Eric was rushed into the operating room and operated on by Doctor McDonald who negligently failed to spot the head injury. Eric died from a massive brain hemorrhage caused by the undiagnosed head wound. If the head blow had not been missed, Eric would have had a 10% chance of survival.

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 drivers 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 easily incorporated (the cost was about \$60.00 per boat), the practice of designing boats with a kill switch feature spread rapidly and in 1977 all boats manufactured in the United States (including all 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 Boadand 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 TWO questions based on the facts above. It may be advisable to review both questions at the outset since points will not be given for a correct answer given in response to the wrong question.

A: Assess the strengths and weaknesses of a wrongful death claim by plaintiff, the estate of Eric, based in products liability for a defective DESIGN against SUPERFLOAT. Do not address any other types of defect (ie. warning or manufacture) and do not address any other theories (ie.

contract or negligence). Your answer should include a discussion of 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. On proximate cause issues Capital has adopted a "direct causation" approach. On all other issues you may presume that Capital follows the majority approach.

B: Plaintiff, Eric's estate, also files suit against Doctor McDonald. McDonald admits that he was negligent ( i.e. that he breached his duty of professional care) but he argues that plaintiff's claim should be dismissed on the ground that Doctor McDonald was not the cause in fact of Eric's death.

The State of Capital usually follows a "but for" test for cause in fact, but is considering adopting a "Loss of Chance" or a "Relaxed Causation (substantial factor)" test in medical malpractice cases.

Explain what, if anything, the plaintiff can recover under each theory ? (Discuss only the cause in fact issue).