

TORTS  
FALL SEMESTER, 1997  
FINAL EXAMINATION

PROFESSOR STRASSER  
DEC. 11, 1997  
IN CLASS

### INSTRUCTIONS

1. THIS IS A 3-HOUR, OPEN-BOOK EXAM. YOU ARE WELCOME TO LOOK AT YOUR NOTES, YOUR OUTLINES, AND YOUR TEXT, BUT YOU ARE NOT PERMITTED TO MAKE USE OF ANY COMMERCIAL MATERIALS (EXCEPT AS NOTED ABOVE). FAILURE TO ABIDE BY THESE RULES IS AN HONOR CODE VIOLATION.

2. BEGIN EACH ANSWER IN A NEW BLUE BOOK. NUMBER EACH BLUE BOOK, E.G., ON THE FIRST, #1 OF 3, ON THE SECOND, #2 OF 3, AND ON THE THIRD, #3 OF 3. YOU SHOULD BE ABLE TO DO THIS EXAM USING ONLY TWO BLUE BOOKS BUT YOU ARE WELCOME TO USE MORE IF YOU SO DESIRE.

3. The questions are of EQUAL WEIGHT.

4. AMBIGUITIES: If you find the facts given to be insufficient to answer a question, state any additional factual assumptions you deem necessary and answer the questions as though your assumptions were part of it. DO NOT MAKE THE MISTAKE OF CHANGING THE QUESTION BY CHANGING THE FACTS.

5. IDENTIFICATION: Write your exam number on the FRONT COVER OF EACH BLUE BOOK.

6. Take time to organize your answers, which should be concise and to the point. READ THE ENTIRE EXAM BEFORE BEGINNING YOUR ANSWER. You should discuss ALL RELEVANT ISSUES even if one issue might dispose of the case. This exam requires you to do ISSUE-SPOTTING and ANALYSIS.

7. REPETITION. When I grade these, I will look at Question One in ALL of the exams and then look at Question Two in ALL of the exams. Merely because you have said something in Question One does not mean that you will get credit for it in Question Two should the same point be relevant in both questions. DO NOT CROSS-REFERENCE. (I don't want my judgment of how you are doing in Question Two to be affected by my judgment of how well you did on Question One.)

8. CITATION When citing to a case we discussed in class, it will suffice to use the name of the case, e.g., the Pokor Case or the Pals Case.

9. If dates are offered in the questions below, they are just there to facilitate the sequencing of events.

10. You need not turn in the copy of the exam. You are welcome to frame, recycle, or otherwise dispose of it as you see fit.

11. WRITE LEGIBLY. IF I CANNOT UNDERSTAND WHAT IS WRITTEN, I CANNOT GIVE CREDIT FOR THE ANSWER.

### QUESTION 1

On Mar. 10, 1997, Jenny Jones was supposed to be taking care of Alvin Ames, a 10 1/2-year-old who was known to slip out of the house and get into trouble unless the person taking care of him was careful. Jenny was a substitute babysitter. Although Mr. and Mrs. Ames knew that she was not very responsible, they didn't really have a choice, since their list of possible sitters had been exhausted and there was no one else for them to call.

Jenny agreed to babysit. She said that she understood that she would have to be very careful and that Alvin would try to slip out of the house unless watched. Unfortunately, there was a fascinating segment on the Vicki Lake show that day -- Miss Manners would talk about the proper etiquette at holiday family dinners where the ex-husband was now married to his former mother-in-law. Jenny didn't notice when Alvin walked by her and then out the door.

Alvin walked down the street, crossed a few streets with heavy traffic, boarded a bus, and went downtown. He went into the famous Uplifter building, the corporate headquarters of Uplifter Corp., the nation's largest manufacturer of elevators and the nation's second largest elevator service corporation. Alvin wanted to go to the top floor and look out over the city. He knew that the Observation Deck was open to the public from 10:00 a. m. to 7:00 p.m. Monday through Friday.

Alvin got into one of the elevators. He noticed a sign saying:

Pursuant to Capitania Health and Safety Code 198.06, THESE ELEVATORS MAY NOT BE OPERATED BY CHILDREN UNLESS ACCOMPANIED BY AN ADULT.  
CAUTION: DANGER!

He also saw the yearly inspection certificate which certified that the elevator had passed inspection. The certificate was dated March 3, 1997.

Alvin pushed the button to go to the top floor. He went straight to the top and walked out to look at the City of Capitania. He had a wonderful view. He could see large ships unloading cargo at the Port of Capitania, business people scurrying along the sidewalk to catch a bus or the subway, etc. He must have spent at least an hour looking over the city. Finally, he had had enough. He was starting to get hungry and thought that it must be time to go home for dinner.

Alvin entered one of the elevator cars and pushed the button for the ground floor. Somehow, the car got stuck between the eleventh and the tenth floors. Alvin panicked. He pushed the alarm button, but the car did not move. He tried to open up the door. He was able to open it a little,

enough to get his arm through the door. Suddenly, the car started moving again. Alvin, who had been unable to withdraw his arm back into the car in time, was fortunate, although his arm was broken in three places he might have suffered much worse injuries. When the car eventually took him to the ground floor, security guards were waiting there for him, having noted that the alarm bell had been pressed. When they heard Alvin's screams and saw his arm, they called an ambulance, which arrived shortly.

After Miss Manners had finished discussing who should sit next to whom at the family table and whether the children of the first marriage should call their grandmother's husband, "Dad," "Granddad," or "Hey," Jenny decided to see how Alvin was doing. She panicked when she couldn't find him. She got in her car and drove down various neighborhood streets. When she couldn't find him anywhere, she decided to go have a drink to figure out how to tell Alvin's parents that she had lost him.

Jenny went to Bob's Bar. It was Happy Hour and she hadn't eaten since breakfast. However, she wasn't particularly hungry and thought that a scotch on the rocks might clear her head. Bob served her a large drink, explaining that at Happy Hour all drinks were doubles. After finishing the first, Jenny started slurring her words. After her second, she knocked a bowl of peanuts off the bar and nearly fell off the stool. After she had finished her third, she suddenly remembered that Alvin had just been discussing how much fun it would be to go up to the top of the Uplifter Building. She got in her car and hurriedly drove in that direction.

She was quite near the building. Cars had been giving her a lot of room, since she was swerving all over the road. As she approached the Uplifter Building, she crossed a double yellow line and hit an ambulance, which was approaching in the opposite direction. Fortunately, no one died in the crash. However, the ambulance driver and the patient (who happened to be Alvin) suffered serious although not permanent injuries. Jenny had a variety of broken bones and internal injuries.

When Mr. and Mrs. Ames arrived home from work at 7: 00, there was a message awaiting them on their answering machine. They were informed that Alvin had suffered serious but not life-threatening injuries and that he could be found in Children's Hospital. They rushed to the Hospital where they were greatly distressed to see their child in such pain.

A detective hired by Mr. and Mrs. Ames has discovered that Uplifter both made and serviced the elevator in which the accident had taken place. The detective further discovered that, contrary to city policy, the inspection certificate had been issued without an inspector's ever having looked at the elevator.

Discuss all relevant issues. Capitanía is a comparative negligence state in which the plaintiff will be awarded damages only if plaintiff's fault does not exceed the aggregation of the faults of the defendants. Capitanía has completely abolished the defense of assumption of risk.

## QUESTION 2

Snow Heaven Ski Lodge is a popular winter resort in Capesota. At the resort, there are

beginner, intermediate, and expert ski slopes, as well as skating and tobogganing areas. At the beginning of ski season, Bob Beginner purchased a season pass and signed a form that provided in relevant part:

#### RELEASE FROM LIABILITY AND CONDITIONS OF USE

I accept and understand that Alpine Skiing is a hazardous sport with many dangers and risks and that injuries are a common and ordinary occurrence of the sport. As a condition of being permitted to use the ski area premises, I freely accept and voluntarily assume the risks of injury or property damage and release Snow Heaven Ski Resort, Ltd., its employees and agents from any and all liability for personal injury or property damage resulting from negligence, conditions of the premises, operations of the ski area, actions or omissions of employees or agents of the ski area or from my participation in skiing at the area, accepting myself the full responsibility for any and all such damage or injury of any kind that may result.

Bob had bought skis from a small shop in his home-town. He still had the receipt, which indicated both the price and that Zeno's Ski Shop was supplied by only two ski manufacturers, Ultima and Veryfine. However, the reasons that Zeno's was able to offer such very low prices were that:

1. Zeno had a very small profit margin, and
2. The skis sold were identical (except for varying lengths), i.e., they had no markings which would distinguish them so that one would be unable to tell whether one had bought Ultima or Veryfine skis.

Regrettably, Zeno's Ski Shop is no longer operational. Zeno has left no forwarding address and is believed to be living somewhere in Alaska.

One day, Bob became confused about which ski lift to take, notwithstanding the clear signs indicating which lift was for experts and which for beginners. He took one of the lifts and found himself at the top of an expert slope. He started down the slope and was actually quite exhilarated by the speed that he was able to attain when, suddenly, his ski bindings released and he fell. Although the pylon supporting the ski lift had been visible for several hundred yards and the run was quite wide at the point at which the tower bisected the slope, he nonetheless slid into it with sufficient force to break his leg, notwithstanding the protective padding which had been placed on the pylon. Over the years, several skiers had collided with the pylon, but no one had ever suffered any broken bones.

Ed Expert, who was skiing on the slope at the same time, saw the whole thing. He came over to Bob to see if there was anything that he could do to help. He went over to a tree and was able to tie some branches together to form a "ski stretcher" so that he could drag Bob down the hill to get help. Regrettably, the ski stretcher didn't work very well, so Ed took Bob to the side of the slope (to prevent his being run over by other skiers) and placed him under a tree. He then promised to get help.

Ed went to the bottom of the slope to look for someone to help. Regrettably, he didn't see

anyone. However, he did hear of a sudden vacancy in the list of people who were going to be competing in a race that day -- the winner would receive \$100,000 and the right to compete in the National Championships. Ed raced over to the appropriate area to sign up for the race and, in the excitement caused by this great opportunity, forgot about Bob.

After winning the race, Ed remembered that Bob might still be waiting to be rescued. He told William Worker, one of the individuals working for the Lodge, about Bob's plight. William explained that he would send out a party as soon as he could, although there had been several emergency calls that day. Eventually, after helping some other individuals in distress, the search party found Bob. Fortunately, Bob survived this ordeal, although because of the severity of the break and complications caused by frostbite, it was necessary to amputate the leg.

Not surprisingly, Snow Heaven was quite upset about the great publicity given to this incident. Their attendance that season was at best 25% of what it would have been if past years were any guide. Further, because this was an especially good year for ski resorts in the area, it seems reasonable to expect that Snow Heaven would have had an unusually good year had it not been for this bad publicity. No other reasonable explanations can be offered for this significant decrease in attendance.

Bob is suing Snow Heaven, Ultima Corp., and Veryfine Corp. to help compensate him for his losses. Bob argues that he did not knowingly and voluntarily assume the risk of going into a pylon as a result of his bindings releasing while he was traveling at a great rate of speed on an expert slope. He also argues that although there have been no other reports of defective bindings produced by either company, it is clear that Ultima and Veryfine are responsible for the defective ski bindings and that each should have the burden of proving, if possible, who in fact did produce these bindings. Bob had been prepared to argue that Ed had contributed to his injuries by failing either to bring him to safety or to report his injury immediately. However, Ed Expert reached a settlement with Bob Beginner, which is why Bob is not suing Ed.

Snow Heaven plans on suing Ed Expert to help recover some of the revenue losses. Ed managed to win the National Championships and has earned enough in endorsement monies to be able to pay substantial amounts. In addition, Snow Heaven is planning on suing Arthur Attorney. Apparently, Arthur had addressed the very issue of liability for injuries to skiers in a memo to his client, Sun Valley Ski Resort, Inc., and had suggested that there would be no liability because the skier would have assumed the risk as a matter of law. The president of Sun Valley told the president of Snow Heaven about that opinion and Snow Heaven argues that Arthur should be liable for his faulty legal opinion should Snow Heaven be required to pay damages to Bob.

The following parties have moved for summary judgment: Snow Heaven, Ultima Corp., Veryfine Corp., Ed Expert (against Snow Heaven), and Arthur Attorney.

You have been asked by the judge to write a memo discussing all relevant legal issues. Capesota is a comparative negligence state in which plaintiff will be awarded damages only if plaintiff's fault does not exceed the aggregation of the faults of the defendants. Capesota follows the Uniform Act with respect to how settlements should be treated for purposes of determining

the remaining defendants' liability. Although Capesota accepts Express Assumption of Risk as a complete defense, the Capesota Supreme Court has not yet addressed whether it should be a defense in the skiing context.