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**TORTS FINAL EXAMINATION
PROFESSOR MONTOYA**

SPRING 2001

EXAM NO. _____

INSTRUCTIONS

1. Enter your examination number in the space provided above and on all blue books used for the exam.
2. Please write legibly. I will not struggle to decode illegible writing.
3. Typists: Answer each of the questions requiring short answers under numbered paragraphs corresponding to the number of the particular question.
4. You are to turn in your outlines and all notes at the end of the exam period. In other words, you are to leave everything you used for the exam in the exam room.
5. You will have one hour to work with your firm on the excerpt from the essay question. Then you will have an additional four hours to write the exam. Please notice that I have divided the exam into three parts: the short answers are worth 40% of the exam grade, the first essay question is worth 20%, and the second essay question is worth 40%.

Good luck.

PART I: ESSAY QUESTIONS (90 MINUTES)

This portion is worth 60% of the exam grade.

Anne and Abraham Armijo turned on the television and prepared for work. Anne and Abe listened intently when the AM Newscaster spoke of cancellations and road closures. A dense fog had settled over Roosevelt County and Anne was not looking forward to the 18-mile drive to Clovis for work. Abe verified that U.S. 70 was open and Anne headed for her job as a Head-Start teacher in Clovis. The fog was dense, but it did not slow Anne down too much.

Brent Boone had left Muleshoe, Texas with one goal in mind – keeping his job. Boone had been an 18-wheel truck driver for Peanut Express only a short time and had already been told that he had to trim his driving time or face termination. Boone realized that he could take NM Highway 202 and trim a full 30-minutes off his time by eliminating a drive through Clovis. Boone knew Highway 202 was a straight shot between Muleshoe and U.S. 70 as he had traveled this road before. Boone knew he would have to make his delivery of liquid carbon dioxide to Roswell with time to spare today. The fog that had settled over Eastern New Mexico and West Texas created poor visibility, but did not slow Boone down.

Anne traveled north on U.S. 70. As she approached Blackwater Draw Museum and the intersection of U.S. 70 and Highway 202, the fog became more dense and visibility was dramatically reduced. Boone also noted the same phenomenon as he traveled east on Highway 202. Anne slowed to approximately 45 miles per hour. Boone began slowing slightly because he knew the turn off to U.S. 70 had to be approaching. Boone did not see the stop sign at the intersection and pulled out into the path of northbound U.S. 70 traffic. Anne's 1992 Buick LeSabre slammed into the side of Boone's tanker truck killing her instantly.

Boone's tanker, manufactured by Tru-Container, the makers of the canisters that haul nuclear waste to the WIPP site in Carlsbad, was supposed to withstand an impact at 50 miles per hour without rupturing. Tru-Container had told Peanut Express that design tests supported this claim. The tanker did not withstand the impact with Anne's car and began spewing 5000 gallons of liquid carbon dioxide, which had been pressurized and stored for transport at 109 degrees below Fahrenheit. Instantly, the dense fog thickened as the carbon dioxide hit the atmosphere, reducing visibility to zero.

Carlyn Chavez was also headed to Clovis where she worked as an instructor at the Clovis Community College's cosmetology school. Carlyn always played her favorite Country and Western CD's on the way to work. As she glanced down to adjust the CD player, she rear-ended Anne's car that was stuck under Boone's tanker. The collision deployed the airbag on Carlyn's 1998 Pontiac Grand Am, but the force of the airbag broke both her wrists. White powder used to keep the plastic air bags from deteriorating dissipated into the air inside the car. Carlyn, seeing the powder and thinking it was smoke, feared her car was on fire and desperately tried to get out. Her left arm was severely broken causing her to be unable to open the car door. "I've got to get out."

Carlyn thought to herself. "I refuse to die in a fire!" She reached over and with her right hand was able to get the door open enough to push herself out. As Carlyn fell to the ground, the liquid carbon dioxide, which had spewed onto the roadway, immediately froze her legs and arms, causing burns to her skin.

The carbon dioxide continued to combine with the moisture in the fog to further impair visibility. Some 14 other drivers were involved in chain reaction accidents on either side of the mangled wreckage of Anne, Boone, and Carlyn's vehicles. None of the other accidents involved Anne, Boone or Carlyn's vehicles.

Ambulance crews from Portales and Clovis arrived and began to treat the injured. Paramedics transported ten injured people to High Plains County Hospital in Clovis. Boone was uninjured. Carlyn was transported to High Plains Hospital in Clovis. Emergency room physician Dr. Gilda Gladstone treated Carlyn's burns. Dr. Gladstone determined that Carlyn's burns were first and second degree and covered approximately 40% of her body. "This hospital is not equipped to treat burns of this severity," Dr. Gladstone told Carlyn's fiancé Harry Hidalgo. "We will have to send Carlyn to Lubbock to the burn unit at Texas Tech University Medical Center in Lubbock," she said. Due to the high volume of emergency room traffic, Dr. Gladstone neglected to give Carlyn enough fluids to ward off infection.

The fog continued to be so dense that the Air-Life helicopter was unable to take off from Lubbock to retrieve Carlyn. Consequently, a Clovis Ambulance transported Carlyn to Lubbock. The drive usually only lasted 90 minutes, but due to the fog the trip took 2 hours.

As doctors in Texas struggled to save her arms and legs from amputation, Carlyn lapsed into a coma. Texas Tech doctors told Harry that Carlyn's condition worsened because of an infection she contracted. The infection, doctors surmised, was probably due to Dr. Gladstone's failure to provide an adequate level of fluids for Carlyn. Harry stayed by Carlyn's side for four days until she came out of the coma. During this time, he played their favorite Country and Western songs for her and talked to her about how they met at a two-step dance contest. The two were known in the area for their fancy dancing every Friday night.

Carlyn now has extensive muscle and nerve damage to both legs and her left arm. While doctors were able to save them from amputation, she may never be able to walk again. Moreover, the nerve damage in her left arm is so severe doctors say she will only have 40% usage.

Question One: (Worth 20% of exam grade.) Abe has sued Peanut Express, among others, for negligence. Peanut Express moves for Summary Judgment alleging that Boone was acting outside the scope of his employment. You are Peanut Express' attorney. What are your arguments in support of the motion for Summary Judgment, how

will for Abe's attorney oppose the motion and are you likely to prevail? Explain why or why not?

Question Two: (Worth 40% of exam grade.) Please prepare a memo identifying potential defendants and analyzing the tort claims available to any and all plaintiffs. Identify the types of damages that might be awarded by a jury, any defenses or policy arguments available to any defendants and proof problems the parties are likely to face. If you conclude that there might be several tortfeasors and /or comparative fault issues, give the best estimate with a brief rationale as to what percentage of fault a jury might assess against each litigant. Disregard any contract-based claims. To shorten your research, I have attached some statutes that may be pertinent.

41-4-4. Granting immunity from tort liability; authorizing exceptions.

A. A governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by Sections 41-4-5 through 41-4-12 NMSA 1978. Waiver of this immunity shall be limited to and governed by the provisions of Sections 41-4-13 through 41-4-25 NMSA 1978.

B. Unless an insurance carrier provides a defense, a governmental entity shall provide a defense, including costs and attorneys' fees, for any public employee when liability is sought for:

(1) any tort alleged to have been committed by the public employee while acting within the scope of his duty; or

(2) any violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico when alleged to have been committed by the public employee while acting within the scope of his duty.

C. A governmental entity shall pay any award for punitive or exemplary damages awarded against a public employee under the substantive law of a jurisdiction other than New Mexico, including but not limited to other states, territories and possessions and the United States of America, if the public employee was acting within the scope of his duty.

D. A governmental entity shall pay any settlement or any final judgment entered against a public employee for:

(1) any tort that was committed by the public employee while acting within the scope of his duty; or

(2) a violation of property rights or any rights, privileges or immunities secured by the constitution and laws of the United States or the constitution and laws of New Mexico that occurred while the public employee was acting within the scope of his duty.

E. A governmental entity shall have the right to recover from a public employee the amount expended by the public entity to provide a defense and pay a settlement agreed to by the public employee or to pay a final judgment if it is shown that, while acting within the scope of his duty, the public employee acted fraudulently or with actual intentional malice causing the bodily injury, wrongful death or property damage resulting in the settlement or final judgment.

F. Nothing in Subsections B, C and D of this section shall be construed as a waiver of the immunity from liability granted by Subsection A of this section or as a waiver of the state's immunity from suit in federal court under the eleventh amendment to the United States constitution.

G. The duty to defend as provided in Subsection B of this section shall continue after employment with the governmental entity has been terminated if the occurrence for which damages are sought happened while the public employee was acting within the scope of duty while the public employee was in the employ of the governmental entity.

H. The duty to pay any settlement or any final judgment entered against a public employee as provided in this section shall continue after employment with the governmental entity has terminated if the occurrence for which liability has been imposed happened while the public employee was acting within the scope of his duty while in the employ of the governmental entity.

I. A jointly operated public school, community center or athletic facility that is used or maintained pursuant to a joint powers agreement shall be deemed to be used or maintained

by a single governmental entity for the purposes of and subject to the maximum liability provisions of Section 41-4-19 NMSA 1978.

J. For purposes of this section, a "jointly operated public school, community center or athletic facility" includes a school, school yard, school ground, school building, gymnasium, athletic field, building, community center or sports complex that is owned or leased by a governmental entity and operated or used jointly or in conjunction with another governmental entity for operations, events or programs that include sports or athletic events or activities, child-care or youth programs, after-school or before-school activities or summer or vacation programs at the facility.

41-4-19. Maximum liability.

A. In any action for damages against a governmental entity or a public employee while acting within the scope of his duties as provided in the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978], the liability shall not exceed:

(1) the sum of one hundred thousand dollars (\$100,000) for damage to or destruction of property arising out of a single occurrence; and

(2) the sum of three hundred thousand dollars (\$300,000) for all past and future medical and medically-related expenses arising out of a single occurrence; and

(3) the sum of four hundred thousand dollars (\$400,000) to any person for any number of claims arising out of a single occurrence for all damages other than property damage and medical and medically-related expenses as permitted under the Tort Claims Act; or

(4) the sum of seven hundred fifty thousand dollars (\$750,000) for all claims other than medical or medically-related expenses arising out of a single occurrence.

B. No judgment against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act shall include an award for exemplary or punitive damages or for interest prior to judgment.

PART II: SHORT ANSWERS (90 MINUTES)
This portion is worth 40% of the exam grade.

Exam No. _____

INSTRUCTIONS

- 1. ENTER YOUR EXAM NUMBER IN THE SPACE PROVIDED ABOVE AND ON ALL BLUE BOOKS USED FOR THE EXAM.**
2. You should allocate approximately 90 minutes for this portion of the exam.
- 3. NOTE: You are to write the answers to all of the following 18 questions** directly on the lines provided in the exam. Use the reverse side when necessary. Write legibly. I will not struggle to decode illegible writing.
- 4. Typists:** Answer each of the questions requiring short answers under numbered paragraphs corresponding to the number of the particular question.
5. You are not to leave the examination areas with any of the examination materials nor to divulge the questions to others outside of this tort section because I anticipate using these questions in the future.

1. The plaintiff, who had earlier been involved in an accident and had suffered whiplash, was riding the bus to work. A four-year-old boy who had boarded the bus with his father engaged the emergency brake, bringing the bus to a sudden halt and causing additional injury to the plaintiff. At trial, the jury returned a verdict for \$14,000, finding the child 80% negligent, his father 10% and the bus company 10%. The defendants, father and son, filed a motion for Judgment NOV. How should the trial court rule?

2. The defendant drove her car at a high rate of speed on a busy four-lane highway. As she turned into a gas station, she collided with plaintiff's car, injuring the plaintiff and killing the passenger. Witnesses testified that "defendant emerged from her car, upset and screaming about the condition of her car. When the police approached her, she was laughing but her laughter ended when she was informed that someone in the other car had died. She explained that she was in a hurry to reach the gas station because she was low on gas." The jury found the plaintiff 10% negligent and the defendant 90% and awarded the plaintiff \$75,000 in compensatory damages and \$25,000 in punitive damages. What is the amount of the judgment for the plaintiff? Explain your answer.

3. Roberts, a 75-year-old man, was injured when knocked down by Burson, a blind 25-year-old man who operated a concession stand in a U.S. Post Office. Burson claimed that Roberts was negligent in walking to the bathroom without his cane even though he had it with him in the concession stand. The defendant filed a motion to dismiss. How should the court rule and why.

4. Hinson drove her car to the Havers' house, where she pulled over and parked on the left hand side of the street, in front of the Haver residence. Accompanied by a small girl, Mrs. Haver approached and chatted for a few minutes. Mrs. Hinson drove off, after looking in all directions. She heard a thud after driving a few feet. She stopped and found she had hit the child. The Havers' attorney finds a statute prohibiting parking on the wrong side of the street and argues that Hinson was negligent per se. What arguments are available to Hinson?

7. The goals of the tort system have evolved over time. Explain.

8. Using the *Polemis*, *Palsgraf* and *McClenahan* cases, write a paragraph that might appear in a torts law hornbook, explaining the legal propositions these cases illustrate.

9. Assume that the plaintiff has been awarded a judgment of \$10,000 against the defendants, PNM and Jolene Sanchez. The jury has found PNM 80% negligent and Jolene 20% negligent. Explain each of the defendants' liability under 1) a pure comparative fault system and 2) a several liability system in a jurisdiction that allows contribution. Assume that Jolene Sanchez is not insolvent nor immune from judgment.

10. Defendant rented space in the plaintiff's warehouse in which the electrical wiring was quite old. The defendant's space was completely separate and defendant had the only keys. A fire started in the area rented by the defendant and burned the entire warehouse. Plaintiff sued for the destruction of its warehouse and based its claim on the *res ipsa loquitor* doctrine. The judge refused to give an instruction on the doctrine. The Plaintiff appealed. What result?

11. Use the facts from a case that we studied and describe how the Navajo concept of *Nalyeeh* might result in a more or less just outcome (from your perspective) for the parties.

12. Plaintiff Hammerstein about 70 years of age and diabetic was a frequent guest at defendant's hotel. Although it was known to the hotel clerk that the plaintiff could not use stairs in his condition, he was given a room on the fourth floor because there was an elevator. During the night, a fire alarm sounded and Mr. Hammerstein walked down to the lobby. In the morning, he noticed a blister on his ankle that developed into gangrene because of his diabetes. At trial, the hotel filed a motion for summary judgment alleging that the injury was outside of the scope of liability. How should the judge rule?

13. The Plaintiff Gladon attended a baseball game with his friends and consumed five 16 ounce beers. He was separated from his friends. He purchased a ticket and traveled alone on the rapid transit train operated by the defendant RTA. When he exited, he was chased and attacked by two unidentified males. He was left lying on the tracks. An RTA train was unable to stop and struck Gladon causing him serious and permanent injuries. Gladon sued RTA alleging negligence in the operation of the train. RTA moved for a directed verdict alleging that Gladon was a trespasser. How should the court rule and why?

14. Sgt. Trujillo received a radio call reporting a purse snatching at the tribe's casino. After identifying one Kevin Gaines as matching the description, he pursued the suspect with the car's lights flashing and the siren sounding. Attempting to avoid capture, the suspect ran a red light on tribal land and collided with another car, seriously injuring the driver. The driver sued Gaines and Trujillo. The tribe's attorney files a motion to dismiss. What is the legal basis for the motion and what is the likely result.

15. A nurse's aide at a residential care facility slapped a patient suffering from Alzheimer's disease. An investigation revealed that the aide was intoxicated and that he had a criminal record for aggravated battery. The patient sued the facility and the aide. The facility moved to dismiss. What result?

16. The defendant will often prevail in cases with scope of liability issues if s/he can persuade the judge that the plaintiff's injury is the result of a "concatenation of highly unusual results." True or false. Explain.

17. State the issue in the *MacPherson v. Buick* case in the format used for briefing cases in this course.

18. Plaintiff Dorothy Folz was driving her husband and their young son when the Defendant negligently crossed into her lane and collided with the Folz vehicle. After Mrs. Folz removed herself from the wreckage, she witnessed her husband take his last breath. Then as she unsuccessfully tried to remove their son Steven from his car seat, she heard him screaming for his dad. Steven suffered a severed spinal cord and also died. Mrs. Folz suffered multiple injuries. She was shaken and pale, and complained of a headache and backache. She remained in the hospital for 48 hours but after being released, was again admitted with a fractured rib and an intestinal tract ailment that could have been induced by stress. You have been hired to represent Mrs. Folz. Briefly explain your advice to her about the possible difficulties in bringing an NIED claim.

