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Exam Number _____

UNM School of Law
Semester II, 2002-03
Tuesday, May 6, 2003

Professor M. E. Occhialino
Four Hours
1:30 p.m. – 5:30 p.m.

510 Torts Final Examination

INSTRUCTIONS

1. This is a closed book exam. Bring no materials into the exam.
2. Be sure to place your Examination Number on the outside of each bluebook and on this Examination.
3. This is a two-question examination. Question One has four subparts. Answer Question Two in a separate bluebook. Please do NOT answer each subpart of Question One in a separate bluebook.
4. The suggested times for answering the questions add up to only 215 of the 240 minutes allocated for the exam. I suggest that you use the additional 25 minutes at the beginning of the exam period to familiarize yourself with the fact pattern presented in Question One. The suggested time for answering each question and subpart reflects the relative value of each answer for grading purposes.
5. This examination counts for $\frac{3}{4}$ of your final grade. Your mid term examination counts of $\frac{1}{4}$ of your final grade.
6. *** Write your essay response only on every other line of the bluebook and only on one side of a page. Please write as neatly as possible under the circumstances.

QUESTION ONE
Suggested Time: 140 Minutes

MEMO

To: Associate
From: Partner

We represent Ben and Rachael Carrington, and their son, two-year-old Robert (Bobby), who was attacked and badly mauled by a dog in the yard of their house while his mother was inside answering the telephone. The Carringtons live in Webster, New Mexico, a small township just outside of Lordsburg, New Mexico. Information from the Carrington File is contained below.

FILE NO. 2003-135

CARRINGTON

No one actually saw the attack take place. Mrs. Carrington, who was in the kitchen, heard a bark, arrived at the scene seconds afterward and saw a German shepherd dog running from the yard. Mrs. Carrington cannot identify the attacker. DNA testing is not well developed in identifying dogs, and no one thought to take DNA samples, so DNA testing will not resolve the issue.

There is an ordinance in Webster requiring dogs to be leashed at all times when not on the owner's property and providing a fine of up to \$100 for any violation. Lordsburg does not have a leash ordinance.

The Carrington family lives in a rural farming area in Webster, four miles south of the southern boundary of Lordsburg. Mr. Carrington is an architect, with an office in Lordsburg. The area within Webster has been thoroughly checked, and five German shepherds have been discovered to have been living in Webster, each within a four mile radius of the Carrington home. All are approximately the same size and color, and all wear collars. Two are known to have bitten humans before. The names of the owners of these dogs, together with the dogs' names and approximate distance of the residence of each from the Carrington house, are included in the Table. In addition, the animal control center in Lordsburg estimates that there are about 15 German Shepherds living within the city of Lordsburg.

TABLE

<i>Owner's Name</i>	<i>Dog</i>	<i>Distance from Carrington home</i>
Ralph Wilson	Chief	3 Miles
	King Henry	3 Miles
	Dolly	3 Miles
Henry Jarvis	Butch	2 Miles
Larry Carson	Queenie	½ Mile

SUMMARY OF INTERVIEWS

Mrs. Carrington—At noon on March 22, 2003, Mrs. Carrington answered the telephone at home. Bobby was in his playpen in the side yard. The Carringtons have no pets. Mrs. Carrington could not see Robert from inside the house. She heard a dog growl and then heard Bobby cry out. She ran through the kitchen and down the back steps. She ran around the side of the house in time to see a German shepherd dog disappear into a corn field across from the Carrington house. The playpen was tipped over and Bobby was on the ground, unconscious and severely mauled. She picked Bobby up, put him in her car, and drove him to the Lordsburg City Hospital. Shortly after Mrs. Carrington took Bobby to the emergency room, she became extremely distraught. She spent that night at the hospital under sedation and was released from the hospital two days later. She still suffers from nervousness, sleeplessness, frequent nausea, and has lost weight because of what happened to Bobby.

Mrs. Carrington is certain it was a German shepherd that she saw enter the corn field. She says the dog may have been limping but she cannot be sure, nor can she tell whether it had a collar on or not. She has viewed the five most-suspect dogs, and cannot positively identify nor exclude any one of them as the dog she saw on March 22. She is certain that the dogs owned by Carson and Jarvis have visited the Carrington house during the year prior to the incident, but she had not seen any dog near the house on the day in question. She does not know whether the Wilson dogs had ever come by the Carrington house.

Mr. Carrington — A hospital employee called him from the Lordsburg City Hospital shortly after one o'clock in the afternoon of March 22, and he rushed to the hospital from his office to be with his son and wife. He arrived in time to see Bobby receiving emergency medical treatment prior to undergoing surgery. At 7:30 p.m. surgery was completed. Mr. Carrington then went home and went out into the yard where he washed the blood from the playpen and mattress and unsuccessfully sought clues as to the identity of the dog that bit Bobby.

Because he rushed to the hospital to be with his son and wife, Mr. Carrington was unable to attend a meeting at which he was to make a presentation to Ted Turner to design a \$20 million home on a Turner-owned ranch located outside of Lordsburg. Mr. Turner wrote Mr. Carrington and told him that the contract would have been given to Carrington if he had shown up for the presentation but that Turner decided to give the business to a rival when Carrington failed to appear. Mr. Carrington's attempts to explain to Turner what happened were met with the response "Too bad—so sad—you lose." Mr. Carrington can demonstrate that he lost a profit of approximately \$125,000 because he did not land the contract and because he has not been able to find alternative business, despite his best efforts to do so.

Dr. Edmund Costa—Dr. Costa is the surgeon who treated Bobby's injuries. He described the injuries as severe, and he is certain that there will be significant disfigurement even after extensive plastic surgery. He explained that in his judgment the injuries were inflicted by the repeated bites of a fairly large dog. He can neither tell if Bobby was bitten by more than one dog, nor identify the breed of dog from the nature of Bobby's wounds.

When Mr. and Mrs. Carrington were at the hospital waiting for Bobby to come out of surgery, they both were terribly frightened that Bobby might suffer from rabies—a horrible disease that sometimes accompanies a dog bite. When Dr. Costa came out surgery, he explained

to both of them that there was a small (1-2%) chance that Bobby would suffer from rabies and that if anti-rabies shots were given to Bobby, the chances would diminish to one-in-a-thousand. The Carringtons authorized the rabies shots. Dr. Costa ordered the hospital to administer the rabies shots. Through the negligence of hospital personnel, the hospital failed to administer the rabies shots. The Carringtons learned of this mistake ten days after the rabies shots were to have begun. They were in a complete panic as a result of learning of the error and for the next four days they suffered greatly increased fear for Bobby and emotional distress because of the increased chance that Bobby would suffer from rabies. Fortunately, four days later, on the fourteenth day after Bobby was bitten, the doctors were able to state definitively that Bobby had not suffered from rabies despite the failure to received the anti-rabies shots.

Ralph Wilson—He lives in Webster approximately three miles from the Carringtons. His three German shepherds normally do not run loose, but he reports that unknown persons entered his yard on the night before Bobby was bitten and they stole some power tools from his tool shed. Despite a sign that says “Dogs inside: Please lock gate after entering and leaving,” the thieves left the gate unlatched, allowing his German shepherds to escape. Thus, he cannot account for their whereabouts on the day and at the time of the accident but insists that all three were at the house by 5:00 p.m. when he returned from work on the day that Bobby was bitten. He admitted that one of his dogs, King Henry, had once bitten the mail carrier but insists that the mail carrier provoked the attack. He was very uncooperative at the interview and refused to discuss the matter further.

Harry Jarvis—Mr. Jarvis lives two miles from the Carringtons. The Jarvis German shepherd runs loose, despite the leash ordinance. Mr. Jarvis states that he does not believe that the government has the right to compel that dogs be leashed and so he ignores the leash law. Mr. Jarvis had arrived home from the veterinarian with his dog at 10 o'clock in the morning on March 22. The dog had a cut on its foot that had almost healed, and Mr. Jarvis had taken it to the vet for a final checkup. Upon arriving home, Mr. Jarvis turned the dog loose and observed it walk slowly with a limp. After the dog walked 100 feet or so, he lay down and went to sleep. Mr. Jarvis does not know where the dog went after that, but he doesn't believe that it would have traveled very far on the injured foot. Jarvis then went into Lordsburg where he remained until almost four o'clock, and his dog was in the backyard when he arrived home. Jarvis noticed nothing about the dog to suggest he had attacked Bobby.

Larry Carson—Mr. Carson lives on a dairy farm approximately 1/2 mile from the Carringtons. His dog, Queenie, once bit a child who came to the Carson home to visit. Thereafter, Carson always kept Queenie on a long leash in his open back yard, but on March 1, Carson bought an “electric fence” that sets up a fenceless electric current around a defined perimeter and is supposed to send a slight electric charge into the dog if she seeks to go outside of the confined area. There is a battery-operated back up system for the “electric fence” if the power goes off. On March 1, Carson bought Wal-mart house brand batteries at the Lordsburg Wal-mart store and installed them in the fence's backup system. He did not notice that the batteries clearly were marked “Good Until December 1, 2001” when he purchased them or when he installed them. On the morning of March 22, Carson made sure that Queenie was inside the electric fence area and turned the fence “On” when he left to care for his cattle. At 10:00 a.m. that morning there was a storm and lightening knocked out the power source. The back up system did not work because the batteries were out of date. Queenie thus could have gotten out of the yard, though Queenie was at home at 5:00 p.m. when Carson returned home.

Other Neighbors—Questioning of everyone known to live or work within the area surrounding the Carrington home demonstrated that no one remembers having seen any German shepherds other than the five in question for several weeks around the date of the attack on the Carrington boy. Tom Planer, a neighbor of Mr. Jarvis was angry that Jarvis did not leash his dog and complained several times in March to the Webster police about Jarvis' dog running loose, including one call at 11:00 a.m. on March 22 reporting that the Jarvis dog was in Planer's garden.

The Webster Police—The Webster police department is obligated by town ordinance to pick up and impound unleashed dogs. Phone logs demonstrate that Planer did call the police on March 22 at 11:00 a.m. to complain about a loose dog in his garden. A tape of the phone conversation reveals that the police officer stated that impounding dogs was not a priority and the police would try to find time to deal with it later. When later asked why the leash ordinance is not more uniformly or rigorously enforced, Police Chief Fagen explained that the police department is small and overworked, and that it was customary to overlook violations of the leash law because the police had more important things to do. Chief Fagen said that this practice is typical of almost all rural communities in the state. Police records do not show that the police ever responded to Mr. Planer's phone call-complaint.

Dr. James Thomas—Dr. Thomas is the veterinarian who treated Jarvis's dog on March 22. He said the dog was irritable on that date due to the foot injury but was physically capable of going to the Carrington house on March 22. Dr. Thomas said that if the dog did so, he would have been more likely, once there, to attack a pestering child because of that soreness. Dr. Thomas said that he informed Jarvis that the dog was more likely than normal to be irritable and to attack a person because of the foot injury.

Jack Fagen, Chief of Police, Webster Township—Chief Fagen received a call from Mr. Carrington on the afternoon of March 22, and went right over with a deputy. The Chief found no evidence that would be usable in attempting to identify the attacker. Whenever there is an instance of a dog biting a person, an attempt is made to locate the dog to determine if it has rabies. Where there is no positive identification, all dogs within the area of the attack generally fitting the description are apprehended for observation. All five dogs residing within four miles of the Carrington home were apprehended on March 23 and were checked out for rabies. None showed any outward signs of having been involved in the attack. None carried rabies. All were released ten days later.

Other associates are working on different aspects of the case. I want you to answer the following questions, explaining your reasoning fully.

Question One—Suggested Time: 40 minutes

I know there are causation problems lurking in this case. For this question, though, ignore those problems. I want to know whether, apart from those problems, the Carringtons can successfully pursue claims against Wilson, Jarvis and Carson. In answering, please address both strict liability and negligence theories, listing the elements of the plaintiff's prima facie case as to each claim (apart from causation in fact and proximate causation) and

explaining fully whether and how plaintiffs are likely to be able to establish each element and any problems that will arise in doing so.

Question Two—Suggested Time: 40 minutes

Even I can see that there is a problem of proving causation in this case, though I'm too far removed from law school to figure out exactly what the problem is or how to solve it. Please explain to me whom I should join as defendants in order to assure full recovery for Bobby Carrington. In responding, please address the cause-in-fact problems if any, and the principles and workings of several liability as well as joint and several liability. For this question, you may assume that each defendant you identify owed a duty and breached a duty to the Carringtons, thus allowing you to focus on the questions of causation and apportionment of responsibility.

Question Three—Suggested Time: 30 minutes

Assume that one or more of the dog owners will be liable for the injuries to Bobby Carrington. A) Can Mrs. Carrington successfully recover for her emotional distress at hearing the cries of Bobby, seeing him injured, watching his painful recovery from his surgery and fearing that he might suffer from rabies? Explain fully. B) Assuming that she can recover from one or more of the dog owners for fear of Bobby getting rabies, please explain the potential impact on her recovery against the dog owners of the fact that she learned ten days after Bobby was hurt that the hospital negligently failed to provide the rabies shots that the doctors suggested and that the Carringtons had authorized.

Question Four—Suggested time: 30 minutes

Assuming that one or more dog owners will be liable to Bobby Carrington: A) Can Mr. Carrington establish that one or more of those tortfeasors owed a duty to Mr. Carrington, and; 2) Assuming a duty was owed and breached, can he recover damages from the tortfeasor(s) for the loss of profits from the Ted Turner job that he would have secured had he gone to the meeting with Mr. Turner?

Appendix to Question One

New Mexico UJI 13-506. LIABILITY OF DOG OWNER

An owner of a dog is liable for damages proximately caused by the dog if the owner knew, or should have known, that the dog was vicious or had a tendency or natural inclination to be vicious.

[The owner of such a dog is not liable to the person injured, if the injured person had knowledge of the propensities of the dog and wantonly excited it or voluntarily and unnecessarily put himself in the way of the dog.]

End of Question One

QUESTION TWO
Suggested Time: Seventy-Five Minutes

Memorandum

To: Chris Clerk
From: Justice Tapia, New Mexico Supreme Court

Last Wednesday the Court heard oral argument in Paine v. Hi-Stress Inc. The litigation involves an accident that occurred when Daniels, an employee of Hi-Stress Inc., negligently lost control of the company truck she was driving while making deliveries on behalf of her employer. The truck rammed into the rear of an auto legally parked in front of Buchanan Middle School.

Paul Paine was in the auto, waiting for his 8 year old daughter, Paula, and 10 year old Pamela Prinz to get out of class. Pamela had been an abused child, removed from her original home and placed in the Paine home three years ago. The Paine family recently hired an attorney to begin the process of adopting Paula, but no legal proceedings had yet begun.

The collision caused Paul to suffer a broken back and internal injuries. He lived, was conscious and suffered excruciating pain for twelve days before he died from causes related to the collision.

Pamela saw the Hi-Stress truck strike Paul's car, knew that Paul was in it and ran to the car crying "Dad are you hurt?"

Paula had not yet left the school building when the accident occurred. She heard a crash, went outside to see what had happened and approached the crash site. Just as she got there, she saw an ambulance arrive and recognized that the injured person in the car was her father.

Paul's wife, Patience, was notified at work of what happened, rushed to the hospital and spent almost all of the next twelve days at her husband's bedside.

The collision and Paul's death led to litigation against Daniels and Hi-Stress, Inc.

The personal representative of Paul sued for wrongful death as well as for twelve days of Paul's pain and suffering before he died. The PR asked for damages for the loss of Paul's enjoyment life independent of the losses suffered by statutory beneficiaries.

Patience sued for loss of consortium

Paula and Pamela sued for negligent infliction of mental distress and also for loss of guidance and counseling.

At the trial court, Hi-Stress and Daniels made timely and appropriate motions to strike so much of the complaint as asked for damages for: 1) pain and suffering; 2) loss of enjoyment of life; 3) loss of consortium; 4) negligent infliction of emotional distress and; 4) loss of guidance and counseling. The trial court denied the motions, with the exception of striking Pamela's claim for NIED, correctly citing precedents from this Court to support its rulings. The jury awarded \$10 million to the PR for the value of Paul's life, \$5 million for Paul's pain and suffering, \$5 million to Patience for loss of consortium, \$5 million to Paula for NIED and \$3 million to Paula for loss of guidance and counseling. The trial court denied motions for new trial or remittitur. The court of appeals affirmed. This court granted certiorari.

I have read the draft proposed opinion authored by Justice Marat. It is a perfectly acceptable, standard opinion affirming the judgment, citing our precedents allowing each claim for the damages recovered and reciting the usual litany that the amount of the damages is for the jury, with the trial judge serving an oversight role and the court of appeals serving a second oversight role as to whether damages are excessive.

I tentatively have decided to write a dissenting opinion calling for the abolition of all damages for pain and suffering, emotional distress, consortium, loss of enjoyment of life, NIED and loss of guidance and counseling. I also plan to write in dicta that IIED should likewise be abolished.

You know my views. In general my reasoning is that non-pecuniary harm, especially for something so amorphous as emotional or physical pain is simply wrong as a matter of policy and is impractical. It is wrong because it places too great a burden on defendants to pay exorbitant damage awards usually way out of balance with the measure of their wrongful conduct (and sometimes absent any wrongful conduct, as in the case of strict products liability). It is impractical because there is no rational way to measure damages if these harms are recognized as legal injuries and the present system of vague instructions, unprincipled new trial/remittitur review of verdicts and standardless appellate review of trial court rulings on new trial motions is a farce.

Before I go off on my own in this dissent, I need your input. Please do the following: 1) Present for me the best case for affirming the judgment below, following existing precedents; 2) Point out what others might perceive to be the critical flaws in my reasoning, explaining why they might perceive that I am wrong; 3) Explain to me how my proposed dissenting opinion should deal with the issue of whether such a substantial change in New Mexico law is best left to the legislature. Finally, because I value your wisdom as well as your technical ability, 4) Please finish with a statement of what your personal views are on these issues and what you would do if you were a Justice of the Supreme Court instead of a Clerk to a Justice.

Thank you.

**End of Question Two
End of Examination**