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**Exam No.**

**510-003 Torts  
Fall Semester 2004**

**UNM School of Law  
Final Examination  
Three Credits**

**Professor Schwartz  
Thursday, December 16, 2004  
1:30 – 3:30 p.m. (2 hours)**

### **Examination Format**

1. **Laptop** computer users: Start the Secureexam program entering your examination number, course name, professor's name, & date of examination. Click "proceed" to enter the program. Type START in the next window that is displayed but do NOT press the enter key until the proctor says to begin the exam.
2. **Bluebooks** for writing: write on every-other line and only on the front page of each sheet. On the front of bluebook record the class name, professor's name, & date of exam. Make sure to number each bluebook in order. **DO NOT WRITE YOUR NAME ON BLUEBOOKS.**

Go to the exam check-in table at the conclusion of the exam & fill out an examination receipt.

### **Professor's Instructions**

This examination consists of two questions, which you must complete within two hours. The first question, which has eight subparts, is worth 60 points; you should spend about 95 or 100 minutes working on it. Make sure that you respond to all eight subparts. The second question is worth 15 points; you should spend about 20-25 minutes on it. Assume that the events described in the first question occurred in New Mexico. We strongly urge you to read the entire question before you begin preparing your answer for that question.

This is a closed book examination; you may not have the class materials or any notes or outlines with you.

There is ample time to organize your answers to these answers. Please read each question carefully before you begin writing. You will be given credit for good organization, careful writing and creativity.

**Good luck, and have fun**

## Examination

### QUESTION 1 (60 points; 95-100 minutes)

Fourteen year old Kid Rent (“Kid”) had been acting out by missing school, fighting with his peers, and engaging in other similar behavior for several months when he started threatening his parents with stealing their car so that he could drive to “freedom” some place far away – perhaps, he suggested, Alaska. His parents, Fred and Alice Rent (“the Rents”), who also suspected that he was often highly intoxicated, decided to force him to see Dr. Harry Shrink, a psychiatrist specializing in treating adolescents, to see if their relationship with their son and his behavior could be improved by therapy. Although initially Kid was not willing to talk very openly with Dr. Shrink, he soon opened up – the first time he had ever done so with an adult – and he admitted to his increasingly heavy drug use. He also told Dr. Shrink that his father regularly beat him, often leaving serious bruises. When Dr. Shrink told Kid that he would be obliged to report his case to the state authorities as one of suspected child abuse, Kid protested and said that any such report would effectively end his relationship with his parents, and also his relationship with the psychiatrist. He begged Dr. Shrink not to report it.

Although New Mexico law requires that “every person . . . who . . . has a reasonable suspicion that a child is an abused or neglected child shall report the matter immediately” to a state or tribal social services agency or a law enforcement agency, Dr. Shrink decided that he would be able to help Kid and his parents only if he could gain their trust, and he decided that he could not gain their trust if he reported them. Ultimately, he decided that the best thing he could do for the family was not to report his suspicion, but, rather, to try to work with Kid and the Rents. In his expert judgment, he believed that Kid had been physically abused by his parents, but that his mental and physical well being would be undermined by instituting a state investigation, which would be the result of his report to the state.

Kid met with Dr. Shrink every week for a month before his anger with his parents again became piqued. One evening, shortly after his meeting with Dr. Shrink, Kid started screaming at his parents and told them he was leaving. He grabbed the keys to the family car, which was parked in front of the house, ran out to the car, turned on the ignition, and placed his foot on the accelerator. When he reached the stop sign at the first corner he realized that he had no idea how to stop the car, and he sped into the intersection at a speed far in excess of the posted speed limit. Unfortunately, his car collided with a motorcycle driven by Roxy Rider, a forty year old experienced motorcycle driver who was, in fact, driving very carefully despite the fact that she had consumed four mixed drinks during the previous hour.

Kid’s car spun to a stop without any damage to car or driver, but Rider, who was not wearing a helmet, was thrown twenty feet into a retaining wall. While New Mexico once required adult motorcyclists to wear helmets, the statute doing so was repealed several years ago. A passing motorist who witnessed the accident called for an ambulance, which arrived promptly and transported Rider to the emergency department at Albuquerque General Hospital. Rider was bleeding profusely from a head injury and her left leg was crushed. A neurosurgeon determined that Rider would require immediate brain surgery to remove a part of the skull that was crushed into brain tissue. She was rushed by hospital personnel to the wrong operating room where an orthopedic surgeon, Dr. Messup, misidentified the patient as the victim of a different automobile accident and cut off her otherwise healthy right leg. When the mistake was discovered an hour after the first surgery, Rider was returned to the operating room, where the brain surgery was carefully and successfully performed. Unfortunately, the delay in obtaining this surgery resulted in continuous bleeding into her brain, and this contributed to the loss of a great deal of brain tissue and functional ability.

Although Rider never fully recovered, her guardian and conservator brought an action on her behalf against Kid, the Rents, and Dr. Shrink to recover damages for the results of her brain injury and her

unnecessarily amputated leg. She would have sued Dr. Messup and the Albuquerque General Hospital, too, but by the time the action was filed Dr. Messup had died, dissolute and penniless, and the Albuquerque General Hospital had declared bankruptcy and the building had been purchased as a distribution center by a large toy manufacturer.

You have just been hired as a law clerk by the lawyer representing Roxy Rider in this litigation. Your employer has asked you for a memorandum to discuss several issues that are likely to come up in the course of this litigation. Please write a memorandum briefly discussing each of the following issues:

- (1) What is Rider's best argument in response to the Rents' likely motion to dismiss based on their claim that they owed no duty to Rider? (10 pts.)
- (2) What is Rider's best argument in response to the Shrink's likely motion to dismiss based on their claim that he owed no duty to Rider? (6 pts.)
- (3) Assume for purposes of this subpart only that the court finds that Shrink owes a duty to Rider. What is the best argument available to Rider to show that Shrink breached his duty by failing to exercise reasonable care? (8 pts.)  
What will be Rider's best argument in response to Kid's expected request for a jury instruction that he should be held only to the standard of a seriously emotionally disturbed child who does not know how to drive, not the standard of a competent adult? (8 pts.)  
What arguments can we expect the defendants (Kid, the Rents and Dr. Shrink) to make that they are not the actual or proximate causes of any injury, and what are the best responses that Rider can make to these arguments? (12 pts.)  
What arguments, if any, are available to Rider to get the damages that resulted from the amputation of the wrong leg, and from the delay in the brain surgery, from Kid, the Rents and Dr. Shrink? (5 pts.)  
Will Rider be liable for any part of her own damages because she is comparatively negligent? (6 pts.)  
If Rider's action is successful, what allocation of liability among all of the tortfeasors ultimately would be best for Rider? (5 pts.)

## **QUESTION 2 (15 points; 20-25 minutes)**

Read the following statement and explain why it is right OR wrong (your choice). You will not be graded on your choice of answer, but only on how you defend that choice.

The purpose of tort law should be to assure the society that improper conduct will not be tolerated in law. Thus, any wrongful conduct that is not otherwise actionable under contract law, criminal law, or some other area of law, must be actionable in tort. Tort law is the most flexible of any branch of the legal tree. In deciding whether a complaint states a claim in tort, the judge must ask only whether this would be a better, more respectful, more civilized society if such an action were recognized. If the answer is "yes," the complaint states a claim.