Final Examination  
Law 206-3A Torts, Professor Leslie Griffin  
George Washington University Law School  
December 12, 2006  
2 to 5:00 p.m.

THESE EXAMINATION QUESTIONS MUST BE RETURNED AT THE END OF  
THE EXAM.

This examination is CLOSED BOOK, CLOSED NOTES. You may not consult any materials, or communicate with any other person.

At the end of the exam, you MUST turn in the examination along with your answers. Please do not write your name, social security number or any other information that provides me with your identity.

If you are handwriting your examination, write your examination number on the cover of each of your bluebooks. Number your bluebooks by indicating the book number and total of books (e.g., 1/5, 2/5, 3/5, 4/5, 5/5). If you are handwriting, please do not use pencil. If you write your exam, use ONE SIDE of a page only, and SKIP LINES.

This exam is SIX pages long, with TWO questions worth 85 total points. You have THREE HOURS to complete the exam. The exam will count for 85% of your final grade. Question I is worth 30 points, and you should spend ONE HOUR on it. Question II is worth 55 points, and you should spend TWO HOURS on it.

Your job is to analyze the facts in each question. Do not make up facts or fight the facts given. If you need more information to resolve a difficult question, state what information you would need and how it would affect your answer. Read carefully. Think before you write. Accurate reading of the question is essential. Good organization, clear statement and avoidance of irrelevancies all count in your favor.

Good luck on the exam and enjoy the holidays.
Question I (30 points, 60 minutes)

Harry suffered a heart attack when he was thirty years old. After that he suffered recurring heart pain and minor heart attacks. Eventually his Family Doctor diagnosed a problem with Harry’s heart valve and recommended that Harry schedule an appointment with cardiothoracic Surgeon Stuart. Surgeon Stuart is the most famous heart surgeon in the city. He works in a well-known clinic that bears his name, the Stuart Heart Surgery Clinic. Stuart does not perform surgery at the Clinic, but has operating privileges at a hospital, Hartford Hospital, which is two blocks away from the Clinic. Stuart operates at Hartford Hospital three days a week. Stuart bills patients directly for his services as a surgeon, and Hartford Hospital bills patients for all the connected expenses of the surgery, including the use of the hospital and the fees of the medical assistants to surgery, such as nurses and anesthesiologists.

Harry made his appointment with Stuart at the Clinic, where Stuart recommended that Harry receive a heart valve transplant. In response to Harry’s questions, Stuart told Harry that he would find a heart valve for Harry and do the surgery at Hartford Hospital. Stuart told Harry that there are always some risks with any surgery, and that the main risk of this particular surgery was that Harry’s immune system would reject the heart valve because Harry’s blood would be incompatible with the donor’s heart valve. Stuart said that the surgery is successful 95% of the time. If there were some incompatibility between the donor’s valve and Harry’s blood, Stuart explained that he and his operating team would remove the first heart valve and replace it with another one in a second surgery. Stuart explained to Harry that Stuart would recognize the incompatibility because Harry would turn very pale and lose consciousness within ten hours of the surgery.

After Harry agreed to the surgery, Stuart’s Secretary followed the Clinic’s usual procedures for scheduling a heart valve replacement. She called over to Hartford and spoke to the Operating Room Clerk, who agreed to reserve the operating room, to line up Hartford staff to assist Stuart, and to contact NewLife, Inc., about the heart valve.

NewLife, Inc., is engaged in the business of obtaining, from human cadavers, tissues, including heart valve tissues, and then processing them and forwarding them for implantation as transplants. In other words, NewLife is a tissue bank that processes, preserves, stores and distributes human tissue for use in medical procedures. It receives valves from cadavers from a national network of organ procurement organizations. In the company’s advertisements, NewLife’s CEO describes their business procedure as involving the steps of processing, inspection, dissection, disinfection in an antimicrobial cocktail, packaging and cryopreservation (i.e., freezing). After the processing, which takes two days, the preserved tissues are stored in sub-zero freezers and then distributed to medical providers for implantation and transplantation for a fee. Since 1986 New Life has distributed about 43,000 heart valves and maintains an inventory of about 750 valves. Usually 146 days elapse between procurement and distribution. All of the heart valves that NewLife sells are made of human tissue.
Upon receiving the telephone call from Operating Room Clerk, NewLife shipped a heart valve to Hartford Hospital, where it was signed for by Operating Room Clerk, who placed it in the Operating Room, which contains a freezer (although not a sub-zero freezer). The heart valve sat untouched in the Operating Room for two days, until Stuart arrived at the Hospital and removed it for Harry’s surgery.

Stuart and the Hartford Hospital team, with whom he had performed this surgery over 100 times in the past, followed their usual procedures for Harry’s heart surgery. They cut into his chest and implanted the heart valve into his chest. Then they sent Harry off to the intensive care unit (ICU), where he was watched carefully by the ICU nursing staff as well as by his wife, Wilma, who was allowed to sit next to his bed in the ICU. (Under ICU rules, spouses and adult children are the only visitors permitted to sit with ICU patients.) Harry and Wilma are the parents of ten-year-old twins.

Two hours after he entered the ICU, Harry bolted upright in his bed and gasped to Wilma that “he was very warm, could she get him some water and some ice.” Wilma noticed that his face was bright red and felt very warm when she placed her hand on his forehead. She alerted the ICU staff, who confirmed that Harry was suffering from a fever. The staff alerted Surgeon Stuart, who returned to Hospital, where he prescribed antibiotics to bring Harry’s temperature down. Harry remained conscious and kept complaining to Stuart and Wilma of feeling both heat and chills. Suddenly Harry gasped, leaned his head back on the pillow, and died.

An autopsy revealed that the valve was infected with a fungus that caused Harry’s death.

A State statute provides that:

The implied warranties of merchantability and fitness shall not be applicable to a contract for the sale of human blood, blood plasma, or other human tissue or organs from a blood bank or reservoir of such other tissues or organs. Such blood, blood plasma, and the components, derivatives or fractions thereof, or tissue or organs shall not be considered commodities subject to sale or barter, but shall be considered as medical services.

Wilma visits your Law Office to ask what lawsuits she should file on behalf of herself and her children. Explain what lawsuits you recommend. Will she win or lose? Why? Be sure to explain your reasoning and the arguments of both plaintiffs and defendants.

After the case is over, a state legislator contacts your office to ask if State law should be amended or revised. What do you recommend?
Question II (55 points, 2 hours)

City had an elevated roadway that led from the suburbs into the City. The roadway was always congested, and it was old and unattractive, with big steel girders, an eyesore in the minds of many City residents. City officials wanted a better alternative for their city, and hired a private designing firm, Roadmaps, to suggest a different system of roads. Roadmaps wrote up blueprints for a network of tunnels that would travel under the City instead of overhead. The new tunnels were expected to eliminate traffic congestion, reduce air pollution and bring new economic development to City. Where the elevated roadway had been, City would now have gardens and parks, and the congested traffic would be hidden underground.

City officials admired Roadmaps’ blueprints, and hired Roadmaps to oversee construction of the new system of tunnels. Roadmaps hired Contracting Company to begin the construction. Contracting Company began work on the tunnels, first by purchasing concrete blocks from Block Company, which makes concrete blocks in a variety of weights and sizes. Contracting Company purchased numerous 3,500 pound concrete blocks for the ceilings of the tunnels. Block Company also sells bolts and superglue that can be used to hold the concrete blocks in place; it charges $10 per bolt and $20 per container of superglue. In order to save the City money, however, Contracting Company bought the glue and bolts from Glue Company, which charges $5 per bolt and $10 per container of glue. When Neighboring City built its tunnel three years ago, it used a similar system of bolts and superglue while mounting ceiling panels that weighed 2,000 pounds.

Contractors took the large concrete blocks, drilled holes through the blocks so the bolts could fit through them, put glue around the bolts, and then bolted the large blocks into place. Scattered among the ceiling blocks were lights as well as ventilation ducts that allowed the air to circulate out of the tunnel. It was difficult for the construction workers to work with the large blocks and the superglue. About twenty-five times during construction, bolts fell down from the ceiling, sometimes hitting the construction workers on their hardhats. The workers would joke about the falling bolts and say “that superglue doesn’t seem so super!”

Throughout the project, individual contractors were responsible for quality control on the portions of tunnel they were building. Such a division of responsibility is common on large infrastructure projects, several construction experts said.

Roadmaps had promised the City that the construction would be finished in two years, but the project dragged out over four years. City officials were furious with Roadmaps for taking so long, and repeatedly asked them to push harder to get the project finished. After the project was completed in 2003, Roadmaps sent City a memo recommending that the bolts be inspected every year, but City officials did the inspections ever eighteen months. Of the three tunnels that Roadmaps constructed for the City—Tunnels A, B and C—Tunnel B was last inspected in January 2006, and Tunnels A and C in June 2006.
When it rains, water drips through the ceilings into the tunnels. In 2004, a leak gushed water into Tunnel A. Driver Dan was on his way to work one morning, and his car was flooded by the leak. The car had to be towed because its engine flooded, and Dan missed a day’s work making sure that his car was removed from the tunnel and taken care of.

Mary has commuted from suburbs to City for the last twenty years. She used to travel over the raised highway, but has used the tunnel system since it opened three years ago. One morning in April 2006, on her way to work, she drove into Tunnel B. As she reached the midpoint of the tunnel, 10 bolts suddenly popped out of the ceiling, releasing several of the 3,500 pound blocks. The ceiling blocks dropped onto Mary’s car, trapping her in the car and in the tunnel. Emergency workers reached her twenty minutes later, but she had already died from the force of the impact.

When City investigators examined the accident scene, they discovered that the superglue on some of the bolts showed signs of premature aging, suggesting that the glue had not been mixed correctly. When they examined ceiling blocks that were still in place, they noticed that hundreds of the bolts were loose. City investigators are now conducting forensic tests on the tunnel’s superglue and concrete by suspending heavy weights from superglued bolts to see if they give way.

Many areas of the tunnels’ ventilation system leak, because there are gaps, between the ceiling panels and the lighting fixtures, that render the ventilation system incapable of drawing vehicle exhaust and carbon monoxide out of the tunnel. Therefore some sections of the tunnel have much higher readings of carbon monoxide levels than others.

Harry drove through Tunnel C one night, on the way home during rush hour. Because of the heavy traffic, Harry’s car was stopped in Tunnel C for 45 minutes. Harry had his windows open because his air conditioning wasn’t working. Harry felt himself getting dizzy and light-headed after he had been sitting in the tunnel for about 30 minutes. He tried to focus by turning up the music on his radio and taking deep breaths. Right after the traffic started moving again and Harry put his foot on the gas pedal, he fainted forward into the steering wheel and crashed into the car in front of him, which was driven by Viola Victim. Harry fractured his skull when his head hit the steering wheel, and Viola broke her leg from the impact of Harry’s car on hers. Blood tests conducted at the hospital show that Harry fainted due to a high level of carbon monoxide in his system. When City investigators examined Tunnel C, however, some 24 hours after Harry’s accident, they determined that the levels of carbon monoxide in Tunnel C were normal.

After Harry’s accident, City ordered all three tunnels to be closed. With the closure of the tunnels, City has lost use of the tunnels for its residents and toll revenue of $1 million. Moreover, City statistics show that fewer residents and tourists have visited the City since the tunnels were closed. Although in 2005, tourism revenues were $3
million per month, in the six months that the tunnels have been closed, the revenues have been only $2 million per month.

Under its contract with the City, Roadmaps’ liability is capped at $1 million, unless it or its agents was grossly negligent.

A memo that surfaced last month, written by a project supervisor who worked for Roadmaps, said that Roadmaps and Contracting Company were warned years ago that bolts holding the ceiling panels in place might not last. But Roadmaps claimed that the memo was a fake.

Identify and analyze the torts lawsuits that City, Dan, Mary, Harry and Viola have available to them. Be sure to identify all available defendants. Will the plaintiffs win or lose their cases? Why? Be sure to explain your reasoning and the arguments of both plaintiffs and defendants.
Your grades in this course were based on 15 points from the midterm examination and 85 points from the final examination and were awarded according to the mandatory GW grading curve for first year courses. The letter grades were awarded according to the following point totals for the semester:

- 85-100  A   3
- 81-84   A-  5
- 75-80   B+ 10
- 70-74   B  10
- 66-69   B-  3
- 60-65   C+  1
- Below 60 C  1

You may pick up your exams from Katie Nguyen, whose desk is outside the mailroom on the 5th floor of Burns. You are welcome to keep your exams and to e-mail me at lgriffin@uh.edu with any questions about your answers. Please read through this memo and your exam before you contact me with questions.

Most of you spotted the basic issues in Question I. You needed to consider a lawsuit against Surgeon Stuart for 1) informed consent (was it adequate to inform Harry of the risks listed, or was there reason to inform Harry of the type of injury that he actually suffered?); 2) medical malpractice (in any of the surgery preparation procedures or in the surgery itself and the use of the heart valve) and 3) strict liability (was Harry in the chain of distribution for the heart valve product, or should any lawsuit against a doctor be covered by negligence only?). This chain of distribution issue should also have considered for Secretary and Operating Room Clerk. Whether Hospital could or could not be sued under respondeat superior was also an important part of the answer.

The biggest mistake that students made—and one that cost many points for some of you--was one of omission. YOU HAD TO DISCUSS SUING NEWLIFE FOR STRICT PRODUCTS LIABILITY. The statute does not say anything about strict liability; it talks about warranty. Therefore an SPL suit must be considered and you should have spent a lot of time arguing all your products liability tests for the heart valve. There was also a causation issue in the case against NewLife: did leaving the valve sitting in the room break the chain of causation? You also should have considered if NewLife was negligent in any way, including in the way it distributed the valves.

You also had to argue whether strict products liability is appropriate for a product such as a human heart valve—that was the policy question—and thus whether it would be a good idea to transform the warranty statute into a statute barring strict products liability lawsuits as well. But you should not have refused to talk about SPL because of a statute about warranty. As a matter of common sense and exam skills, it was very risky not to
talk about something so important, a products claim against a product manufacturer, and to dismiss the lawsuit without even any discussion of your products liability tests.

For Wilma you needed to argue about emotional distress and loss of consortium, and in the ED lawsuit discuss the facts of what she could see in the hospital as Harry died.

Question II gave you the opportunity to discuss almost every issue we learned throughout the semester! For all the defendants, namely Roadmaps, Contracting Company, Block, Glue, and City, it was important to consider if they could be sued in negligence or as part of the chain in strict products liability. Don’t forget all that case law about who can be sued in SPL. There were lots of facts to use for negligence and strict liability: the size of the blocks, the glue, the pricing, the falling bolts, the non-super super glue, glue that wasn’t mixed correctly, and the mysterious memo. Whether a negligence or strict liability lawsuit was more appropriate should have been resolved by reliance on Indiana Harbor.

For City’s lawsuit, it was important to raise the question of City’s contributory or comparative negligence in its management of the project (by pushing for the construction to end, by failing to inspect (note and use the important dates of the inspections)). You also needed to address the question whether City had suffered purely economic loss that should not be recovered in tort. And, what would happen with the million dollar cap and the gross negligence standard?

For Dan, you should ask if he had an injury that was compensable in tort—a damaged car and his lost day at work. A more interesting and creative question about Dan, in addition to the lawsuits that he shared with City and the other plaintiffs, was whether the flooding was cause to use a Rylands traditional strict liability analysis. Gushing water? Remember cases by their facts!

Mary had a more straightforward wrongful death, negligence, and strict products liability lawsuit to bring. You could raise the issue of res ipsa—something is falling through the air—but you would have to explain that if you can prove negligence, which seems likely here, res ipsa is unnecessary.

Harry’s case is straightforward too—unless there was an abnormally dangerous or ultrahazardous activity connected to the construction of the ventilation system? Or to the construction of the whole tunnel system? Harry should have reminded you of Hammontree; you should have asked about the nature of his unconsciousness and whether he was comparatively negligent in continuing to drive. For Viola’s lawsuit, whenever a car rearends another car you should immediately think of res ipsa.

I enjoyed meeting all of you and having you as students in my class this semester. Please do not hesitate to contact me with questions about your exams or if you need letters of recommendation or other help or advice. Best wishes for successful careers in the legal profession.