INSTRUCTIONS:

The examination consists of three essay questions, all of which you should answer. The essays are of equal weight for grading. You should devote an hour to each question. YOU HAVE THREE AND A HALF HOURS TOTAL.

If you believe you need to know more information about a case in order to resolve an issue raised by the facts given, tell me what you need to know and how it would affect your legal analysis. But do not add facts to create new issues. Be sure to address all issues raised by the facts even if you think a single issue is dispositive of the case;

Read carefully, and think before you write. Accurate reading is essential. Good organization, clear statement, and avoidance of irrelevancies and filler all count in your favor.

The examination is closed book. You may not consult any materials or another person.

If you write your exam, use one side of a page only, and skip lines. If you type, double or triple space, and leave wide margins.

GOOD LUCK! Have a good holiday.
Question I (One Hour)

Wanda Shea lives in Ireland, where her doctor diagnosed a brain tumor and recommended that she go to America for treatment. The doctor sent Wanda’s medical records, including CAT scans showing a suspected tumor in the left portion of her brain, to Dr. Smith at an American hospital. Dr. Smith was about to leave for vacation, so he instructed Secretary to give a folder containing the medical information to Surgeon for review.

Surgeon was in surgery at the time, so Secretary left the folder on Surgeon’s chair with a handwritten note asking him to call Dr. Smith with his recommendations. When Surgeon left the operating room, Secretary told him that she had left films of a patient from Ireland for him to review.

Surgeon assumed that Secretary was describing another Irish patient, a man with the last name Shea who had been referred to him for treatment of a tumor on the right side of the brain. Surgeon put Wanda’s folder on the floor next to his desk without reading it, but did review films. But the films were of the Irish man.

The next day, Surgeon and his team attended a weekly conference to discuss prospective cases. But in discussing Wanda’s case, Surgeon believed he was talking about the man’s case.

When Wanda arrived at the hospital, Surgeon greeted her with the name of the Irish man, stating in the presence of other hospital workers that he would remove a tumor from her right brain. The referring Irish doctor, who accompanied Wanda to America, questioned Surgeon about the location of the tumor, but then fell silent.

Except for seeing Wanda in the admitting office, Surgeon did not examine her before surgery the next day. Usually the surgeon or his assistants bring the films to the operating room. All members of the team said that films were in the operating room when they arrived and no one could recall who brought them there. Although hospital workers identified Wanda in the operating room no one there matched the films against the patient’s name.
When Surgeon opened the right side of Wanda’s brain, there was no tumor. Surgeon discovered the error when he saw her films in his office after the surgery. He informed her family and offered to do a second operation on the left side. Wanda refused and went to another hospital for the original treatment—surgery on the left side tumor.

Wanda’s son says she has been in a listless and disconnected state since the surgery. She sleeps long hours and is unable to read or conduct meaningful conversations.

What tort suits does Wanda have available to her?
Elmer went to the emergency room of the hospital complaining of headaches, muscle aches, fever and chills. He was admitted to the hospital under the care and treatment of Dr. Daniel. Dr. Daniel diagnosed the later stages of Rocky Mountain Spotted Fever and prescribed medication. Elmer’s condition rapidly deteriorated, and he died the next day. An autopsy confirmed that the cause of death was Rocky Mountain Spotted Fever. Dr. Daniel communicated with Elmer’s wife, Jenny, during Elmer’s treatment, but he never advised her of the risks of exposure to Rocky Mountain Spotted Fever, or that the disease was the cause of Elmer’s death.

Two weeks later, Jenny came to the emergency room with headaches, muscle aches, fever and chills. She died of Rocky Mountain Spotted Fever. She was never Dr. Daniel’s patient.

Elmer’s and Jenny’s son William brings a negligence suit against Dr. Daniel for the economic loss and emotional distress of his mother’s death.

Peter went to his Doctor and said that he did not feel well. Doctor sent Peter home with flu medicine. Peter’s wife Molly was in perfect health and cared for Peter during his illness. Peter had tuberculosis, but Doctor negligently failed to make the correct diagnosis. Ten months later, Peter’s wife Molly gave birth to their child, Sally, who was born severely handicapped. Molly now has tuberculosis. Assume for this question that there is a 45% chance that women who have tuberculosis will bear children who have the handicaps that Sally has.

Molly brings a lawsuit against Doctor for her economic and emotional harm based upon his failure to warn her of Peter’s tuberculosis, and a wrongful birth suit demanding economic and emotional damages for Sally.

What SHOULD the results of these lawsuits be? (This is the policy question.)
Question Three (One Hour)

Professor teaches music at the University of Idaho, a state school. Professor and Karen have long been acquainted because of their mutual interest in music, specifically, the piano. Karen was a social guest at Professor’s home. One morning Karen was seated at a counter writing a resume for inclusion in the University’s department newsletter. Unanticipated by Karen, Professor walked up behind her and touched her back with both of his hands in a movement later described as one a pianist would make in striking and lifting the fingers from a keyboard. The resulting contact generated unexpectedly harmful injuries. Karen suffered thoracic outlet syndrome on the right side of her body, requiring the removal of the first rib on the right side. She also experienced scarring of the brachial plexus nerve which necessitated the severing of the scalenus anterior muscles.

In his deposition, Professor stated that he touched Karen’s back to demonstrate the sensation of this particular movement by a pianist. Professor explained that he has occasionally used this contact method in teaching his piano students. Karen said in her deposition that Professor’s act took her by surprise.

The Idaho Tort Claims Act provides in §6-903(a) that “Except as otherwise provided in this act, every governmental entity is subject to liability for money damages arising out of its negligent or otherwise wrongful acts or omissions and those of its employees acting within the course and scope of their employment or duties.” Section 6-904 states that “A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent shall not be liable for any act which arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contract rights.”

Professor’s homeowner’s policy excludes “bodily injury...caused intentionally.”

What tort suits does Karen have available to her?
Torts Midterm
Professor Griffin

The grades on the torts exam ranged from 31 to 82. I have written the total number of points on the last page of your exam. Letter grades were assigned as follows:

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<thead>
<tr>
<th>Points</th>
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<tr>
<td>80-82</td>
<td>A</td>
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<td>70-79</td>
<td>B</td>
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<td>60-69</td>
<td>C</td>
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<td>48-59</td>
<td>D</td>
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<td>31-47</td>
<td>F</td>
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For your final grade in the spring, I will combine the points from both exams and then assign letter grades. At that time I will use + and - to distinguish among the grades.

Student model answers will be on reserve in the library.

All three questions were taken from real events or cases. A similar mistake in brain surgery took place at Memorial Sloan-Kettering in Manhattan. For question one, many of you missed the possible battery by the surgeon and the questions about the patient's informed consent. You also forgot that res ipsa is one means of proving negligence.

In the Rocky Mountain Spotted Fever case, a Tennessee court ruled that the doctor-patient relationship with the husband obliged the physician to inform the wife about the foreseeable risks emanating from his patient's illness. In the tuberculosis case, a New York court ruled that there was no duty to warn in the absence of a doctor-patient relationship. Judges must limit the legal consequences of wrongful acts to a "controllable degree." For the second question, many of you forgot to mention emotional distress. You should have talked about the emotional distress cases here. Most of you mentioned Tarasoff but it was better to talk about Molien. Some of you forgot to talk about the purposes of tort law!

Believe it or not, the odd case of the piano player is an actual Idaho case. The University was granted summary judgment on the battery claim under the Tort Claims Act. In question three, the insurance policy is there to remind you to talk about intent. You should interpret the provisions of the policy. Look at the Baldinger case on p. 801, n. 9.