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

Santa Clara University
School of Law

Torts
Professor Griffin
Three Essays

November 30, 1999
Fall 1999
3 ½ Hours

CLOSED BOOK

THE EXAMINATION RULES AS STATED IN THE CURRENT STUDENT HANDBOOK GOVERN THIS EXAMINATION

INSTRUCTIONS

The examination consists of three essay questions, all of which you must answer. You should devote one hour to each question. Each question is worth 1/3 of your grade. You have an extra half hour to use for organization.

If you believe you need to know more information 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. Think before you write. Accurate reading of the question 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 any other person.

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

Good luck, and have a good holiday. I look forward to seeing you in the new millenium.
Question I (60 Minutes)

Sam is a student at the University. He wanted to become a member of the Fraternity (Frat). On November 3, during Frat’s “pledge sneak,” four or five active Frat members met Sam in the basement of Frat Hall, a University building on the University campus. Sam attempted to run, was tackled by the active members, and was then handcuffed to a radiator. While handcuffed to the radiator, Sam was given shot glasses of liquor and cans of beer by Frat’s officers and active members. Over the course of approximately 2 1/2 hours, Sam consumed 15 shots of brandy and whiskey and 3 to 6 cans of beer. Sam became severely intoxicated and could no longer provide for his own welfare and safety. After becoming ill due to his intoxication, Sam was taken to a restroom on the third floor of the Frat house by his captors and handcuffed to a pipe. Sam broke loose from the handcuffs while unattended in the restroom and attempted to escape by exiting out the third-floor restroom window and sliding down a drainpipe. Sam fell from the third-floor window to the ground below and suffered severe injuries.

Frat Hall is subject to the University Student Code of Conduct (Code). The use of any alcoholic beverage in a student housing unit is a violation of the Code. Conduct that is unreasonably dangerous to the health or safety of other persons, or oneself, is also a violation of the Code, as is hazing.

It is routine for fraternities on the University campus to participate in pledge sneak events. These fraternities are supposed to complete a form disclosing whether a pledge sneak event is planned and the details of that event, and to file the form with the University. Frat did not file a pledge sneak form. University is aware that students do not always file forms on time. University is also aware of at least two hazing incidents involving other fraternities. On September 23, for example, there was an incident at another Frat House (FRAT-2) in which the house members grabbed and physically removed other students from a building.

Discuss Sam’s tort suit against the University, taking care to argue both sides. Will Sam win or lose?
On July 29, Pamela was waiting in line at an American Eagle check-in counter in the airport for a return flight to San Jose. Her friend Fred had accompanied her to the check-in counter. Fred attempted to load Pamela’s luggage onto the weigh-in scale adjacent to the check-in counter. In doing so, he grabbed onto an ashtray built into the countertop to gain some leverage in lifting the luggage. The countertop was attached by a hinge to the vertical front facing of the counter. When Fred pulled on the ashtray, the countertop came loose, and pivoted up and forward on its hinge. A metal signpost and sign were attached to the countertop, and this signpost and sign also pivoted forward with the countertop. As this was happening, Pamela was looking down at her ticket. The signpost and/or sign struck Pamela on the top of her head, opening up a two-inch long wound.

Although she did not lose consciousness or fall to the floor, Pamela was taken to the hospital, where she received four stitches. The doctor forgot to use antibiotics and to wash his hands, so the stitches became infected. After the accident, Pamela experienced the usual neck pains, headaches, and forgetfulness of post-concussion syndrome as well as permanent swelling from the infection.

Pamela files a negligence complaint against American Airlines, which actually owned, operated, and maintained the check-in counter of American Eagle. American Airlines files a motion for summary judgment on the grounds of insufficiency of the evidence. What result?
Question III (60 Minutes)

Many citizens of State X are angry about the harms that children inflict on others. In response, Plaintiffs’ Lawyers in State X advocate that parents should be held strictly liable for their children’s negligence. In their view, if Plaintiff proves that the child is negligent (under the reasonable child standard), then their parents should be strictly liable for the damages.

Plaintiffs’ Lawyers bring a test case in strict liability against defendant Parents who gave their son a hunting rifle for his birthday. Son negligently shot his best friend while they were out trying to shoot ducks, causing the best friend to be seriously injured.

Judge is puzzled by this lawsuit and asks you, his law clerk, to assess its merits and tell him what his ruling should be. Of course, Judge will expect you to discuss the relevant case law and policy arguments.
The grades on this exam ranged from 25 to 93 points. Because of your performance on the practice exam, I made these exam questions very straightforward. If you read the question carefully and thought about it, you should have been able to focus in on one or two very specific issues. Many of you addressed issues that the questions did not ask for. Remember, answer the question asked.

I have made copies of the best student answers so that you will see what students managed to write under exam pressure.

Question One

Read the question. It asks you about the tort suit against UNIVERSITY. Many of you wrote about possible tort liability of FRAT and the FRAT students. Many of you wrote about vicarious liability, even though University is not the employer of students. Moreover, vicarious liability is for negligence, not intentional torts. You should have focused on whether University had a duty toward Sam that tort protects. Then you should have come up with the best argument about that duty.

Sam’s best argument is that the University owed him a duty as a landowner to an invitee for those actions that were reasonably foreseeable to the proprietor. Students are the University’s invitees. You could also talk about a landlord’s duty to protect tenants against foreseeable criminal acts of third persons.

Remember that breach (negligence) is a factual question. Therefore you need to show how the facts prove a breach. It is not sufficient to assert that there was a breach.

Do you remember that proximate cause cases always involve bizarre facts? That’s why I gave you all these bizarre facts. You should have argued about these facts and whether they were foreseeable. Then you should have discussed whether FRAT was an intervening cause.

The stipulated facts show that the University was aware of prior hazing instances. The record reflects that the University had notice that pledge sneaks could lead to hazing. Thus, the University could have foreseen various forms of student hazing on its property, even though FRAT failed to disclose the pledge sneak event. As such, the University owes a landowner-invitee duty to students to take reasonable steps to protect against foreseeable acts of hazing, including student abduction on the University’s property, and the harm that naturally flows therefrom.

Question Two

READ THE QUESTION, which includes a huge hint: “insufficiency of the evidence.” Lawyers don’t get to make up evidence. They must prove their case. The question offered no evidence, for example, suggesting that the ticket counter had been improperly designed, installed, maintained, or operated.

If you don’t have the facts to support negligence, you don’t make them up. This question should have screamed RES IPSA at you. As soon as you read “insufficiency of the evidence” you should have remembered that res ipsa gives you a presumption or an inference of negligence. Many of you noticed that you didn’t have any evidence of negligence: that’s why you should have considered res ipsa.

If you thought of res ipsa, you had to do a good job arguing how the facts meet the three conditions. Remember, in tort law you must argue the facts, not just state the rule.
Plaintiff has to rely on the fact of an unexpected occurrence, arguing that the counter top would not have fallen over and struck her unless American had violated its duty of care. The fact of an unexplained occurrence cannot establish an inference or presumption of negligence unless the conditions of res ipsa loquitur are satisfied:

1. the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence;
2. it must be caused by an agency or instrumentality within the exclusive control of defendant; and
3. it must not be due to any voluntary action on the part of plaintiff.

A reasonable jury could have concluded that the accident was of a kind which "ordinarily does not occur in the absence of someone's negligence," and that the accident was "caused by an ... instrumentality within the exclusive control of the defendant."

The res ipsa loquitur requirement that the accident not be caused by any "voluntary action" on the part of the plaintiff posed a more difficult challenge. American would argue that a res ipsa loquitur inference was unreasonable because the evidence indicates that Fred took the "voluntary action" of pulling on the counter-top. However, the test is not whether the plaintiff took any voluntary action, but whether that voluntary action can be blamed for the accident. Fred and P were blameless, having done nothing more than attempt to use the instrumentality in the ordinary manner.

I put in that AA "owned, operated and maintained" the check-in counter so that you would think of Service Merchandise, "non-delegable duty" and res ipsa.

There is no reason to miss the medical aggravation rule, one of the few straightforward tort doctrines that we have.

In causation you could also discuss whether Fred was an intervening cause. But it was most important to do a good job on res ipsa.

**Question Three**

This was the policy question. You should follow the directions and write a memo to the judge. You have to tell the judge what to do, not just tell her what the two sides say.

The question does not ask you to make up facts about the test case. The question does not ask you to decide if giving people guns is ultrahazardous or abnormally dangerous. It asks whether strict liability should be extended to new circumstances. You could not get a passing answer if you did not discuss why tort law prefers negligence to strict liability (Indiana and Hammontree). You also needed to discuss negligent entrustment and negligent supervision.

A policy question asks you to think about what the law should be, not to summarize the law as it is.