SANTA CLARA UNIVERSITY
SCHOOL OF LAW

FINAL EXAMINATION

Torts
Professor Leslie Griffin
3 Questions

May 15, 1997
Spring, 1997
3 1/2 Hours

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 should answer. THE QUESTIONS DIFFER IN POINT VALUE.
Question One is worth 30 points; Question Two is worth 30 points;
Question Three is worth 40 points. I recommend that you spend 60
minutes on question one, 60 minutes on question two, and 75 minutes
on question three.

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. 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 another 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 goodbye. Over the next two years, I expect
you to be prepared to answer questions every day in every class.

2 HOUR LIMIT

GRIFFIN
QUESTION I (60 minutes; 30 points)

The "Auto Choice Reform Act of 1997" has been introduced in the Senate. Senator Reformer described the bill this way in a long speech on the floor of the Senate: "Very simply, the Auto Choice Reform Act offers consumers the choice of opting out of the pain and suffering litigation lottery. The consumers who make this choice will achieve a substantial savings on automobile insurance premiums."

"What is Auto Choice? What it does is to allow drivers to decide how they want to be insured. In establishing the choice mechanism, the bill unbundles economic and noneconomic losses and allows the driver to choose whether to be covered for noneconomic losses—that is, pain and suffering losses."

"In other words, if a driver wants to be covered for pain and suffering, he stays in the current State system. If he wants to opt out of the pain and suffering regime, he chooses the personal protection system."

"A consumer will be able to choose one of two insurance systems. The first choice is the TORT MAINTENANCE SYSTEM [TMS]. Drivers who wish to stay in their current system would choose this system and be able to sue and be sued for pain and suffering. These drivers would essentially buy the same type of insurance that they currently carry—and would recover, or fail to recover, in the same way that they do today. The only change for tort drivers would be that, in the event that they are hit by a personal protection driver, the tort driver would recover both economic and noneconomic damages from his own insurance policy. This supplemental first-party policy for tort drivers will be called tort maintenance coverage."

"The second choice is the PERSONAL PROTECTION SYSTEM [PPS]. Consumers choosing this system would be guaranteed prompt recovery of their economic losses, up to the levels of their own insurance policy. These drivers would give up recovery of pain and suffering damages in exchange for being immune from pain and suffering lawsuits. Personal protection drivers would achieve substantially reduced premiums because the personal protection system would dramatically reduce: first, pain and suffering damages, second, fraud, and third, the bulk of attorney fees."

"Under both insurance systems—tort maintenance and personal protection—the injured party whose economic losses exceed his own coverage will have the right to sue the responsible party for the excess. Moreover, tort drivers will retain the right to sue each other for both economic and noneconomic loss. Critics who say the right to sue is abolished by this bill are plain wrong."

You work for Senator Uncertain, who has not decided how to vote on this reform. Indeed, she is a bit confused by the whole proposal. She asks you to explain to her: What features of our current tort system have led Senator Reformer to propose this
legislation? What are the advantages and disadvantages of this
Auto Choice Reform Act? How should she vote (to leave things as
they are, or to add the PPS to current coverage)? Why?

QUESTION II (60 minutes; 30 points)

Lawyer represented Petunia in litigation (against
Contaminator) arising out of environmental contamination of 34
acres of real property owned by Petunia. Petunia and Lawyer
entered into a written fee agreement whereby Lawyer was to be paid
$75 per hour for his services in addition to 20 percent of any
recovery that Petunia might obtain.

While the environmental law suit was pending, Attorney
contacted Lawyer and told Lawyer that she (Attorney) was counsel
for Bank, and that Bank had extended a loan in the amount of
$1,450,000 to Petunia. Attorney asked Lawyer about the status and
settlement value of the pending environmental action and
specifically asked Lawyer about his fee arrangement with Petunia.
Attorney did not tell Lawyer that Petunia, in connection with her
bank loan, had granted Bank a lien against her share of any
judgment or settlement proceeds obtained in the environmental
litigation against Contaminator. After speaking to Lawyer,
Attorney then filed a lien in court against any settlement proceeds
Petunia might recover.

A month later, Petunia settled her case with Contaminator
for $750,000. Because of the Bank’s lien, the settlement money had
to be held by the court in a special account. Lawyer did not get
his fees for seven months and had to spend $110,000 in fees and
costs to recover his money.

When Lawyer and Attorney met before Judge to determine
how the money should be distributed, Attorney told Judge that
Lawyer was a perfect example of poor lawyering. "If Lawyer is not
smart enough to figure out that I would file a lien, then Lawyer
should not be practicing law," said Attorney. The next day, when
Petunia expressed sympathy about Lawyer’s plight, Attorney told
Petunia and Petunia’s husband that "Lawyer was well-known in the
legal community. You’re lucky you got a settlement at all with
that loser-lawyer," concluded Attorney.

Lawyer now wants to sue Attorney in tort. What lawsuits
will Lawyer bring? Will his claims survive Attorney’s motions for
summary judgment?
Torts, page four

Question III (75 minutes, 40 points)

For years, doctors have made use of a medical device called a defibrillator to help people who have heart attacks. The defibrillator delivers an electric shock to restart the heart. If a person has a heart attack and a doctor with a defibrillator is nearby, the patient has a 75 to 80 percent chance of survival.

However, new studies show that many people do not survive heart attacks. By the time an ambulance is able to bring a defibrillator to the attack victim, it is too late. Ambulances usually take 16 minutes to arrive, and the patient needs the defibrillator within 6 minutes of heart attack to have that chance of survival. Cardiologists now estimate that a half or more of the 350,000 people who die of cardiac arrest in the United States each year could have been saved by quicker access to defibrillators.

Faced with these statistics, Heart-Control, a company that manufactures defibrillators, decides to manufacture a new type of defibrillator. The old model was available only to doctors and hospitals. The old machine was very complicated, and doctors had to be specially trained to use it. The new model will be distributed to numerous locations, including restaurants, offices and schools. The new machine can be used by almost anyone. The new machine can give simple voice instructions, analyze heart rhythms, and decide whether a shock is needed.

The Health Club Manager purchased a new machine from Heart-Control, which had sent him a flyer describing the machine. The flyer stated in bold letters: THIS IS A DO-IT-YOURSELF RESUSCITATOR. ANYONE CAN USE THIS MACHINE TO HELP HEART ATTACK VICTIMS. WHEN YOU OPEN THE LID OF THIS MACHINE, A VOICE WILL TELL YOU HOW TO USE IT. THIS MACHINE WILL DETERMINE IF A PERSON NEEDS THE ELECTRIC SHOCK AND WILL NOT GIVE A SHOCK TO A PATIENT WHO DOES NOT NEED IT.

Harry was working out at the gym when he started to suffer a heart attack. Nearby (also working out) was Doctor, who was on his break from the hospital. Doctor rushed over to help Harry. The Health Club Manager ran over with the new defibrillator in hand. Doctor is an experienced cardiologist, who knows when heart patients need to have a shock administered. He decided immediately that Harry's heart attack was severe, and that Harry needed immediate shocking if he were to survive. However, the new machine did not "decide" that Harry needed shocking. When Doctor placed the electrodes on Harry's chest, the machine would not provide any shocks. The Voice kept repeating the directions and saying that no shock was needed. Doctor tried several times to get the machine to administer the shock, but he could not override the mechanism that said a shock was not needed.

Harry died from the heart attack. No one called an ambulance.

What tort suits are available to those who sue on Harry's behalf?

END OF EXAMINATION