

Exam No. \_\_\_\_\_

**TORTS  
FINAL EXAM**

**PROFESSOR SIMON**

**FALL 2005**

**INSTRUCTIONS**

This is an open book exam. You may bring in any written or published materials you deem helpful.

The total time for the exam is 3 hours. This should be enough time to complete the exam. Given the amount of time, please organize your answers carefully.

This question is worth 2/3 of the final exam grade (150 points). The remaining 1/3 (75 points) of the exam will be awarded based on the take-home question you were given. Be sure to include the typed answer in your bluebook when you finish the in-class portion of the exam.

Brevity, a precise analysis will be rewarded; rambling answers will not.

Please put your answers in the bluebooks and make sure your exam number is on each. Write only on **one side** of the page and use ink. Although given my own penmanship, I am clearly not the one to ask this, please try to write legibly. I can't give credit for that which I am unable to read.

If you find yourself running out of time, you might try, at least, to outline your answer. You may receive some credit for this effort.

Good luck and thank you for a semester I enjoyed greatly.

**Facts**

Despite their near extinction at the turn of the century, the American buffalo is making a comeback. Buffalo are being raised for their hides and for meat. Elvis Abbott owns a farm thirty miles from the town of Columbia, Anystate. In a small pasture on the farm, he had four large buffalo, two male and two female.

The pasture was separated from an interstate highway by an electric fence designed to keep horses and cattle from leaving a pasture area. The company that sold Abbott the fence, when informed of the proposed fencing of buffalo, told Abbott that the fence was the best they had. Neither Abbott, the fence seller, nor the fence manufacturer had prior

dealings with buffalo. Buffalo, unlike cattle, are difficult to train, extremely powerful, and not docile.

One dark, stormy evening in August 2005 a clash of thunder frightened the four buffalo and they began to charge around the pasture. One headed straight for the electrical fence, and the others followed. The first buffalo to hit the fence and was electrocuted, but the mass of his body caused the fence to collapse, and the other three buffalo escaped onto the interstate highway.

Mary Roberts was driving down the highway at 75 miles an hour, twenty miles over the speed limit, when her car smashed into one of the buffalo. The impact caused the car to go off the road and strike a tree; Mary was instantly killed.

Moments later, a second buffalo was struck by a school bus carrying high school students to a concert. The school bus was driving 60 miles an hour, five miles over the speed limit. The driver managed to maintain control of the bus and drove off the road close to the area where the buffalo had crossed through the fence. The students exited the bus, and several saw the electrocuted buffalo as it lay on a live wire, its body steaming and glowing from the electricity. Several of the students were severely traumatized by the incident. Several other students, dazed by the accident, wandered around near where the bus had gone off the road.

Sarah Jenkins, a physician and trauma specialist, was on her way to a meeting when she noticed the accident. Eager to render assistance, she pulled off the road in front of the bus. Dr. Jenkins jumped out of her car and began to render assistance to dazed and injured students.

Moments after Dr. Jenkins left her car, her car phone rang. She was being called by a patient, Margaret Jones, who lived in a rural area only a few miles away from where the buffalo accident had occurred and who was experiencing extreme chest pains. Dr. Jenkins had advised this patient to call her should such pains occur, since Dr. Jenkins suspected the patient had some form of heart disease. The phone rang and rang, but in the commotion Dr. Jenkins never heard it ringing, and the patient died of a heart attack while waiting for Dr. Jenkins to answer the phone. Had Dr. Jenkins come to the phone, she could have advised the patient to take a nitroglycerine pill, which Dr. Jenkins knew the patient had in the patient's medicine cabinet in the patient's home.

Dr. Jenkins observed one of the students, Becky Smith, who appeared to have been severely traumatized by seeing the fried buffalo. In order to avoid more serious shock, she administered an experimental drug, Glazeline, a powerful sedative designed to calm people who are experiencing extreme shock. Dr. Jenkins secured no consent to administer the drug but felt the administration of the drug was essential to saving the patient's sanity. Tragically, the student had an allergic reaction to the drug and died.

There is a reasonable basis to believe that had there not been heavy rain, lightning, and fog on the night of the accident, none of the above events would have occurred.

The fence that Abbott had selected to contain the buffalo was considered sufficient for the control of bovine livestock such as cattle. Fence makers have the technical capacity to make more powerful fences, although a fence sufficient to withstand a charging buffalo would cost a tremendous amount of money.

Question 1 (70 points; recommended time- 80 minutes)

The family of Margaret Jones wants to file a wrongful death suit against Dr. Jenkins for her medical malpractice. They come to your firm. The senior partner with whom you have been working invites you to sit in on the interview. After the interview, he asks you to write a detailed memo analyzing the case. Be sure to include an analysis of the prima facia case, the likely defenses (either to the prima facia case or affirmative defenses) and other necessary defendants, if any. If your assessment of the case depends on facts not provided, please identify those facts and how you might discover them, and explain the impact of those facts on the chances of success. The partner also wants you to conclude your memo with your recommendation as to whether the firm should take this case. Explain in detail your reasoning for your choice.

Question 2 (30 points; recommended time-36 minutes)

Assume for purposes of this question **only** that the accident happened on August 25, 2003 (rather than 2005). The family of Becky Smith has filed a wrongful death action based on battery against Doctor Jenkins. The plaintiff alleges that Dr. Jenkins caused a harmful and offensive touching by injecting Becky with the drug. You are now in the firm representing Dr. Jenkins (ignore the obvious ethical violation for simultaneously representing Dr. Jenkins in Question 2 and suing her on behalf of a patient in Question 1). The senior partner has asked you to read the following statutes and to draft a Motion to Dismiss the claim based on the below statutes only. You are to identify and analyze the theories you would use in your motion.

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§ 508:4 Personal Actions.

1. Except as otherwise provided by law, all personal actions, except actions for slander or libel, may be brought only within 3 years of the act or omission complained of, except that when the injury and its causal relationship to the act or omission were not discovered and could not reasonably have been discovered at the time of the act or omission, the action shall be commenced within 3 years of the time the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the injury and its causal relationship to the act or omission complained of.

II. Personal actions for slander or libel, unless otherwise provided by law, may be brought only within 3 years of the time the cause of action accrued.

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§ 507-C: 4 Statute of Limitations.

Notwithstanding any other provision of law, all actions for medical injury shall be commenced within 2 years of the act, omission or failure complained of, except that where the action is based upon discovery of a foreign object in the body of the injured person which is not discovered and could not reasonably have been discovered within such 2-year period, the action may be commenced within 2 years of the date of discovery or of the date of discovery of facts which would reasonably lead to discovery, whichever is earlier. This section applies to all persons regardless of minority or other legal disability, except that a minor under the age of 8 years at the time of the act, omission or failure complained of shall in any event have until his tenth birthday in which to commence an action.

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§ 507-C: 2 Burden of Proof.

I. Where the plaintiff claims that a medical care provider failed to supply adequate information to obtain the informed consent of the injured person the plaintiff shall have the burden of proving by affirmative evidence, consisting of expert testimony of a competent witness or witnesses that the medical care provider did not supply that type of information regarding the treatment, procedure or surgery as would customarily have been given to a patient in the position of the injured person or other persons authorized to give consent for such a patient by other medical care providers with similar training and experience at the time of the treatment, procedure or surgery.

II. In any action for medical injury, the doctrine of res ipsa loquitur shall not apply.

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Question 3 (50 points; recommended time- 64 minutes)

The family of Mary Roberts has brought a wrongful death action against Fence Manufacturer based on faulty design of the fence. A recent case from the Supreme Court of Anystate has adopted the 3<sup>rd</sup> Restatement of Torts for all design and warning cases and has retained § 402A of the Second Restatement for manufacturing defects. You represent the defendant. Identify and analyze fully those elements of plaintiff's claim that you believe are the weak and on which we should focus our defense. Discuss also any possible affirmative defenses. Confine your analysis to these parties and do not discuss any joinder or intervention issues.