

Place on Reserve

Examination Nu

Fall 1992

TORTS I

Fall Semester
1992 Final Examination

Professor Francis J. Conte

December 3, 1992
2:00 - 5:00 p.m.

This examination consists of three hypothetical fact situations that are followed by several questions. You have three hours to complete the examination. Please read each hypothetical carefully and answer the questions asked. Please also remember to use the facts in your analyses.

I have included point awards and time allocations for each question for your guidance. You, however, must be the judge of your own use of time. Good luck!

I.
(40 points; 70 minutes)

Colonel Motors Proving Grounds and Development Center located outside of Retreat, Wishagain is used by the large motor vehicle manufacturer to test large vehicles and weapons systems. One Saturday morning, February 1990 while testing new tanks during the Desert Shield and Storm Operations, a new highly mobile Pow Pow Desert Fox Tank (the Pow Pow) became immobilized in the outer northwest reaches of the proving ground. Along with a number of other Pow Pows, it was going through live ammunition testing maneuvers. After the Pow Pow was immobilized, its crew took from the Pow Pow all the ammunition from its ammunition storage and other important items. The crew then abandoned the Pow Pow at about 8:30 a.m.. When the Pow Pow crew returned to their offices, they reported the immobilization, but the company's tank recovery vehicle had just been called out to the other end of the proving ground ten miles away. It would be almost nine hours before the tank recovery vehicle would be able to pick up the abandoned tank.

In the meantime, Pawny Hatfield and Skeets McCoy, both 15 years of age, were messing around in the neighborhood of the northwest corner of the proving ground. The proving ground was enclosed by a 15 foot high barbed-wire topped fence, and was adjacent to a seldom-used wooded area, not owned by the company. There was a corner of the wooded area where teenagers sometimes gathered at night or weekends to smoke, drink beer and fool around. While the bottom of the fence was generally not penetrable, near the gathering place there was an area where a gully passed from the proving ground to the wooded area. There the ground below the fence had been eroded by the elements. It had been this way for some time. On this Saturday, about 4:00 p.m., Skeets and Pawney saw the abandoned tank. They found the space under the fence, slid under it and went out to the tank. Skeets and Pawney found a number of items at the site including a helmet and parts of the tank. Pawny managed to open a loading chamber in one of the Pow Pow's guns, and removed a round of live ammunition around six inches long and 1 1/2 inches in diameter.

The boys then took their Pow Pow materials back to the wooded gathering area, where they encountered several other teenagers. One of them, Art Foustnecker, traded his Hawkeye Deerknife to Pawny for the round of ammunition. Later that evening Art was running home with his friend Kilby Haffenraffer. Art tripped. The round of ammunition, which Art was carrying in his jacket pocket, flew up in the air, and hit the ground in front of Kilby. It exploded. Kilby was severely injured. As a result of Kilby's injuries, he is now blind and a paraplegic.

Art and Pawny and their families have very little income or property nor prospects of either. Kilby's parents and Kilby come to you, now an Associate with Moyer, Douglas and Wright. They would like you to seek to obtain appropriate relief from Colonel Motors Company. In your preliminary investigation of the facts, you find the above facts, and you find that just before the tank was immobilized, the crew was firing at "target" tanks two miles away. At that time their ammunition count showed that all projectiles had been fired just when the tank's engine broke down. However, although it was triggered, the last missile did not actually fire and remained in the chamber where it was eventually found by Pawny. You also find that the recovery vehicle crew returned to the main offices at 1:00 p.m. After completing their work at the south end of the proving ground, they had lunch and went to recover a vehicle at the east end about 3:30 p.m. After the east end recovery, the recovery crew returned to the office, had coffee, and returned to the field where they reached the immobilized tank in the northwest corner about 5:15 p.m. Although the recovery crew had a busy day, they followed routine procedures in their efforts this day.

After your thorough review and legal research, what claim or claims against Colonel Motors Co. on behalf of Kilby Haffenraffer would you assert?

- (2) What legal principles would likely be applicable to the claim or claims that you would assert?

What contentions from Colonel Motors attorneys would you most likely expect to encounter?

Applying the facts to the applicable legal principles, and demonstrating the court's likely reasoning, what would the outcome likely be if this matter were brought before the Wishigan Court of Common Pleas?

Examination continues next page

II

30 points; 50 minutes)

Maggie McIntee drove down to the Friendly Dalmatian Bus Station to leave her parents off after their Thanksgiving visit to Maggie and her family. The Bus Station is in a downtown area that is a transition area between the commercial area of downtown Nighttown, Ohigo and an upscale urban residential area. The immediate area of the bus station is rather dark and surrounded by parking areas and a parking garage.

After seeing her parents off on the 9:30 p.m. bus to Reeveland, Maggie walked back through the station. She was approached by a seedy looking male in his thirties just before she reached the door to the street. He asked her if she had any change. She shook her head and half smiled in an apprehensive attempt at friendly acknowledgement. She proceeded through the station's double doors to the sidewalk. She turned left. The seedy male accosted her again at the corner of the station and a small closed parking lot about 20 feet from the station's door. He bumped up against her. "I just need a few bucks," he said. She tried to move away. He grabbed her. "How about a kiss?" he said as he slammed her into the wall of the station in the parking lot. She started to scream. He covered her mouth, slammed her head against the wall, punched and kicked her several times, tore at her clothes, and sexually assaulted Maggie. After a couple minutes, she crumpled over sobbing. The seedy male ran away.

Maggie suffered serious physical and emotional injuries. Later, through her attorney Sybil Van Dammer, she filed a negligence claim in the Montgomery County Common Pleas Court for damages against Dalmatian Bus Company.

Through discovery, it is learned that there have been regular complaints about panhandling in the Dalmatian Bus Station. There have also been several complaints about solicitation for sex by prostitutes in the vicinity of the station. There have been no reported violent crimes in the station in the eight years since Dalmatian has run the station. There are occasional violent crimes in the general neighborhood, though no more than usual for this kind of neighborhood in the city. Due to difficult economic times, Dalmatian has had to reduce its station security force from three full-time officers to one full-time officer and one part-time officer. The full-time officer was not on duty the night of the incident. The part-time officer had called in sick, and so no security officer was on duty at the time of the incident other than normal station personnel. Station security personnel normally do ask panhandlers to leave the station when they discover that they are accosting passengers.

You are the law clerk to Judge Ebenezer Erb at the Common Pleas Court. He asks you

(1) to set forth the legal principles that will likely apply to the claim asserted by Maggie against Dalmatian;

(2) to determine the likely contention or contentions that Dalmatian will make; and

(3) to analyze the case in terms of the facts and legal principles.

Examination continues next page

III.
(40 points; 70 minutes)

Salvatore Scopitulo of Brooklyn, West Virginia was having ear problems. He had been having off and on pains in his ear. His wife, Giuseppina, also said he was going deaf. Whenever she yelled at him to do something, he would keep doing whatever he was doing. She would shout, "Eh, Sal, whaddya deaf or what?" Sal also suffered from headaches that follow his ear pain episodes.

So Sal went to Dr. Angelo Aggravati, a Brooklyn physician and ear specialist. Dr. Aggravati diagnosed Sal as having a case of domestic noispainitis. In accordance with routine medical standards for noispainitis, Dr. Aggravati cleaned Sal's ears and surgically modified his eardrums, a painful procedure. As a result of Dr. Aggravati's surgery, however, Sal's ears would bleed periodically thereafter. Also, his pain and headaches persisted.

Subsequently, Sal went to the Reeveland Clinic in Reeveland, Ohigo, a major metropolitan area. Sal's doctor there, Dr. Box, told Sal that his symptoms, ear pain, followed by headaches and gradual loss of hearing were three of the four major symptoms of echotox, a serious hearing disease that causes permanent hearing loss. The fourth usual symptom, not present in 2-3% of cases, is ringing in the ears. A diagnostic test for echotox, the echotest, is an inexpensive test given to people at Reeveland Clinic whenever at least three of the four symptoms of echotox are present. The echotest has 90% validity when the three symptoms are present.

After Dr. Box tested Sal for echotox, he was found to have echotox, and to have lost all hearing in his right ear permanently and about 50% of his hearing in his left ear. Dr. Box then administered non-invasive medical treatments, through which the echotox was cured, but Sal's hearing losses, 100% in the right ear and 50% in the left ear, remained as a result of the previously undiagnosed echotox.

Later Sal comes to you, an attorney, and asks you whether or not he can obtain any relief for injuries due to Dr. Aggravati's actions and failures. In your investigation, you find that it is not the custom of ear specialists in West Virginia or the neighboring states of Kantuckie and Ninessee to administer echotests when only three symptoms of echotox are present, since the three symptoms are also symptoms of several other much more common afflictions. However, the most progressive medical practice views in major medical centers are that echotests, should be given whenever any three of the four symptoms of echotox are present.

Assuming you are unable to negotiate a reasonable settlement, (1) what claim or claims would it be reasonable to assert against Dr. Aggravati? (2) What legal principles are likely to be applicable to the claim or claims? (3) What contentions would Dr. Aggravati's attorney make? (4) How do you think a state court in West Virginia will analyze this case in terms of the facts and legal principles that are applicable.

END OF EXAMINATION