TORTS FALL 2006
EXAM MEMO

To: Students in Fall 2006 torts
Re: the exam

What follows is not a sample answer by any means, but my explanation of the kinds of things I was looking for, given plenty of time and advance knowledge of the questions. Everyone got some of this, no one got it all, and some of you had theories/ideas that I have missed. In general, those who did not do well either missed a big part of a question, or wrote out rules but didn't apply them to the concrete facts at hand. Example: "V was a but-for cause of M's injuries." Why? Sez who? You have to explain why the rule applies here.

Annual pet bugaboo (YET AGAIN!) it's = it is or it has. The possessive is its. It's annoying to judges to read a brief when its grammar is incorrect. In a related vein, you don't need an apostrophe when pluralizing, only when it's possessive. Please.
First runner-up: principal = main. Principles = one of those things lawyers should have when they counsel or represent clients.

So, here goes:

Q. 1: As one person noted, this really happened in Chicago. In a pre-trial settlement, the manufacturer and the general contractor each agreed to pay $26 million, and the owner/manager of the building contributed $8.64 million. The summary reads:"After the incident, the city determined defendants should have followed the manufacturer's instructions and lashed the scaffold to either the roof or the base of the building when severe weather was forecast. ..Defendants blamed each other for the incident….Chicago passed laws in the wake of the incident requiring that all scaffold operators on buildings 40 feet and higher take a safety course and that scaffolds be secured during bad weather and when work is not in progress."

People had different ways of imagining the relationships among the three defendants (scaffold operator, building manager, and manufacturer), and their relative degree of responsibility. I was thinking that the operator was in charge of most decision-making around putting up and taking down the scaffold, but some of you imagined him (or her) as a simple employee of the building owners/managers, and not required to work on Saturdays. I went with whichever view you seemed to be working from. I also gave credit for people considering whether the operator was an employee or an independent contractor for purposes of vicarious liability; a few people concluded that even if he was a contractor there still might be a non-delegable duty on the building owner/manager to ensure the safety of those below the scaffold.

Assuming the operator was the main person responsible for the scaffolding, they would have a general duty to exercise reasonable care in their conduct in light of foreseeable risks. You might use the weather report to argue the risks here were foreseeable,

although the fact that the winds were stronger than normal (2nd strongest ever) would cut the other way (you could also have considered this issue under scope of liability). Similarly, D might argue these were unforeseeable plaintiffs (as in Palsgraf) while P might reply that something falling off a skyscraper has a pretty wide radius of foreseeable harm (again you could consider under scope).

Standard of care: RPP, although you could argue RPP+ because if they work with scaffolds they presumably have superior knowledge about their risks, attributes, etc. Not professionals: scaffold operating is not considered a "profession" like engineering or law. Breach could be established any number of ways:

Statute: most of you recognized the ambiguity of the statute. P will argue that it says the scaffold must be adequately secured, and if it fell it wasn't, and the purpose of the requirement is to protect anyone who might be harmed by a falling scaffold from precisely the type of harm that occurred. The Ds will point to the fact that it's an OSHA (Occupational…) statute, refers to workers and exits and entrances, etc. to argue the class to be protected is those working on the scaffold and the harm is harm to them, not to those below, and that therefore the statute does not apply. I didn't care which way you concluded, so long as you recognized the problem. If the statute does apply, it creates negligence per se (because we're in CA) unless excused. Possible excuses: emergency, no time to comply once it started dangling, etc. None of them work particularly well.

Res ipsa: since it's not really clear exactly what went wrong up there, you could argue that scaffolds, like barrels of flour, don't come falling out of the sky without someone being negligent. The first element is therefore satisfied. However, the control element is more complicated: did any of the defendants exercise exclusive control or even a right of control? Arguably the operator did, since he put the thing up and could have taken it down (or you might have thought the building manager was in charge of this). If you can't show control by any one defendant, can you use an Ybarra-type argument that they're all part of a single enterprise? Maybe, although that case hasn't been applied outside the medical context. You could argue the defendants have better access to information, and the plaintiffs are certainly not at fault.

The plaintiffs can also argue along B<PL lines. They might argue that the operator had at least constructive notice that the weather was going to become bad, if not actual notice. Some untaken precautions might include taking down the scaffold upon hearing the weather report (or for weekends, just in case), securing the scaffold better, or listening to weather reports or assuring better communication between the operator, building manager and a work crew over the weekend. You would have to analyze each of these separately, in terms of its cost, effectiveness (for example, even with better communication it is unclear what a work crew could have done once the winds kicked up without putting themselves in mortal danger), utility, etc.

Causation should be tied to the specific breaches you discussed above. Whatever you thought was the breach, even if the defendant had done it right (i.e. better secured the

scaffold) would it have mattered? Some breaches work better than others: obviously if he had taken the thing down it would not have fallen, whereas securing it better might not have made any difference given the strength of the winds.

Scope of liability could have several components. You could argue the plaintiffs are unforeseeable because they are too far away: a falling scaffold might hit people right below the building, but not three blocks away. On the other hand, with (foreseeable) strong winds and the height of the building, debris was likely to fly pretty far. You could argue that the storm was a freak of nature/act of God, that even though the weather forecast had been for winds, it was completely unforeseeable that they would have been this strong, and that the scaffold would have held in "ordinary" winds. You could point to the other defendants' acts as unforeseeable and egregious such that "shifting" liability is merited. Or not.

Not really much in the way of defenses. Plaintiffs were just driving, and even though it was windy that probably doesn't mean it was so windy they shouldn't have been out in it.

Ps v. building manager: the building manager had actual knowledge of the risk of harm, at least once the tenants called to tell him there was a dangling scaffold outside their window. Some of you tried to use landowner categories, but quickly got bollixed up since the plaintiffs aren't on the land. You don't need it: a general duty of care towards foreseeable others will do.

Some of you used the above breaches here. There was one additional grounds for breach: not closing off the surrounding streets, either directly or by calling in public security and asking them to do it. Plaintiffs would argue this would have been relatively inexpensive, especially on a weekend, and would have avoided the harm: defendants will point to the potential for chaos in mid-town, and will argue it would have been ineffective. This last point will merge with the issue of causation.

On causation, Ds will argue that even if they had closed the streets surrounding the building they would not have protected the Ps, who were 3 blocks away. They would argue that protecting the Ps would have required closing down the entire city center, which would be difficult, costly, and unlikely to be accomplished during the short time period between notice of the dangling scaffold and the harm to Ps.

Scope of liability arguments will be similar to those above, and will go back to the idea that those 3 blocks away are unforeseeable.

Ps v. manufacturer: this could be either a negligence or a strict products liability suit. In negligence, Ps might argue that the manufacturer was unreasonable in replacing the larger wheels with smaller ones, or in testing the scaffold to make sure the smaller wheels would hold up under the stress of being in a windy environment on top of a building. The defendant might argue that it is customary to do so in order to achieve greater maneuverability, and that it is safer to use the smaller wheels overall. It's not clear how a custom-based argument will play out when the product was custom-built.\

Under strict products liability, the manufacturer is clearly a seller of the good. One could argue it's a manufacturing defect, since there's only one like it, but more likely the argument would be one of design defect. In CA, one of two tests is used, depending on the characteristics of the product and the type of alleged defect. Ps might try to argue for a consumer expectations instruction, in that most consumers don't expect a scaffold to fall, especially one specifically designed to be used on tall buildings where high winds are foreseeable. But then again very few consumers actually use a scaffold at all, much less have expectations about it. Ds could also argue that the defect is open and obvious, indeed, the wheels were specifically made smaller to make the scaffold move more easily. Under a risk-utility test, the argument will be over the relative safety of the smaller wheels for maneuvering the thing around, vs. the risks of smaller wheels in terms of stability and hanging on. Ds might well argue that it has to be maneuvered around all the time, while high winds are a rare occurrence, so on balance the small-wheel design is preferable. Or not.

The causation argument would be whether even the larger wheels would have kept the scaffold from falling given the winds. Scope would run along lines similar to above.

There's a possibility of a warning defect in that perhaps there should have been something saying "secure or remove during high wind events" but maybe that's too obvious.

In addition to the wrongful death suit, the moms would have their own suits for loss of consortium and for the broken leg. Both mothers would also be able to recover for negligent infliction of emotional distress, under either a direct or a bystander theory (P's mom wouldn't need this theory if could get pain and suffering for broken leg, but for distress beyond that would need to argue NIED. Under a direct theory, both were in the zone of danger as the scaffolding almost fell on them, it's a near-miss. Under a bystander theory, in CA Thing is the applicable case, and they must meet all the requirements: close relative, contemporaneous sensory perception, near to scene, serious emotional harm ("traumatized"). They do meet all these requirements.

Hanna will sue all three defendants for her physical and emotional injuries. Defendants will argue that she is an unforeseeable plaintiff and her acts constituted voluntary acts not related to their negligence. She will argue that she is a rescuer, and as such "danger invites rescue" and she is a foreseeable plaintiff to whom they owed a duty of care. While she cannot recover for her emotional harm as a bystander (Thing is a bar, in that she's not a close relative) she could recover under a direct theory, as being in the zone of danger.

Q. 2

There were two things you needed to do here: evaluate the claim for negligence/strict products liability, and then, on the basis of your evaluation, decide whether or not to take the offer on the table from JLF. Note JLF = Jack Lambersky Foods, so when the problem discusses the Lamberskys it's the same defendant. A few of you read it differently, and I tried to go with your reading. This too is taken from an actual case, in Pennsylvania.

In terms of evaluating the case, a negligence case would have a clearly established duty of a manufacturer to foreseeable consumers, here Mr. Perez the turkey-obsessed plaintiff. Breach could either be res ipsa again (turkey isn't contaminated with deadly bacteria without someone's negligence, the CDC/FSIS report says there's no downstream contamination so it has to be the manufacturers, no contributory/comparative fault by the P) except that it's not clear which manufacturer is in control of the contaminated turkey so this might not work. You could argue a failure to adequately inspect, clean, etc., or suppose there's a statute on food safety that's been violated (although I didn't give you any evidence of one). Under negligence, you could not generally introduce PPC's change in practices, and the defendants will argue that as soon as they had knowledge of the problem they recalled their products, and that therefore they acted reasonably.

Under strict products liability, in contrast, the evidence of post-death changes in practice would be admissible. Here you'd have to prove that the defendants were sellers of turkey (easy enough) and that there was a defect. Since no other packages tested positive, it was probably a manufacturing defect.

The big, big problem here is causation. There are problems both establishing that RTE turkey from one of the defendants caused the harm, and then establishing which one of the defendants was more likely than not the cause (either but-for or substantial factor). The first problem required you to think about how general causation is established. We have the CDC/FSIS study published in a peer-reviewed journal, the fact that no downstream contamination was found, the closeness of the period between P's illness and when contamination was found, the lack of any new incidents, and the scientific evidence that Lm can cause the disease that killed Mr. P, and that Lm is found in turkey. We can use inferences from these facts to show that MLTN Lm in his turkey is what killed him. However, that doesn't rule out other kinds of poultry: perhaps it was the Butterball, or the turkey at his brother's, or the cafeteria special. P will use the statements that he didn't eat in the cafeteria but took sandwiches from home the week before falling ill to infer that MLTN it was RTE turkey in a sandwich that did him in.

The evidence will be tested according to Daubert and its progeny for its scientific validity. It's a little unclear whether it would be admissible: the CDC is clearly a reputable source, they used epidemiological data, the article publishing the study was subject to peer review, but the study is still not complete, sample sizes are very small, other manufacturers were not tested, and since there's been no further outbreak it's not clear how replicable the data is or what its error rates are.

From here Ps will have to decide how to proceed. If - and only if - they posit that P died because he ate several different varieties of turkey at once and the combination of at least PPC and JLF turkey together killed him, they can use a simple theory of joint and several liability against all, or at least those two manufacturers. From the facts, however, it seems more likely that he ate one kind of turkey that was infected (whatever was in his fridge at the time), not multiple kinds. If this is true then simple J&S liability will not work. It was important to recognize that under basic rules of causation Ps cannot make out a prima facie case on causation.

There are two possible alternatives, but both are narrowly construed and can only be used when all the elements required are present - it's not automatic by any means, and you needed to recognize that. One, alternative liability à la Summers v. Tice, requires that all defendants be before the court, all be negligent, and the negligence of only one have caused the harm (some courts add a disparity of info requirement). As P, you'd have to argue that all the scientific evidence points to only two possible Ds - PCC and JLF - and that there's no evidence against any other, so all Ds would be before the court. The Ds will argue that the studies are incomplete and that therefore there may well be other turkey-makers who should be before the court and aren't, and that there's a good possibility he ate turkey that wasn't either PCC or JLF, either instead of or in addition to theirs. In the actual case, the Pennsylvania court allowed Ps to proceed on an alternative liability theory against just the two companies.

You might try to avoid this problem by suing under a market share theory and bringing in the other three defendants, which together with PCC's 40% and JLF's 10% will give you 90% of the market. For market share liability to work, you need to show that at least a substantial portion of the market is before the court, and the court will then assign liability in accordance with each defendant's market share, on the theory that over time the market share will correspond to each defendant's contribution to the harm. For this to work, you need to have a fungible product (RTE turkey seems fairly functionally indistinguishable and the Ps certainly thought it was fungible since Mrs. P bought whatever was on sale), a signature injury helps (here there's the correlation between Lm contamination and the deaths), a definite time period (also satisfied). You also need all the defendants to be negligent, and there's a question about that. The defendants not named in the CDC/FSIS study will certainly try to exculpate themselves, which if allowed will leave you back with only PCC and JLF.

All these considerations need to flow into your analysis of your bargaining position in two ways. First, what are your chances of success? Seems a pretty easy case on breach, and pretty hard though possible on causation - I wanted to see some discussion of this. Second, how does settling with JLF affect the possibilities of getting money from PCC, who is both the deep pocket and the party with the nasty lawyers who may tie you up in litigation forever? Several of you recognized that PCC was where the big money is at (and at 40% of the market, also a good bet that they were the actual cause, even though you can't prove it MLTN) but you just assumed PCC would want to negotiate, which was not the question. The strategy issue depends on your theory of causation: if it's

alternative liability, once you remove JLF you don't have all defendants before the court, so your case against PCC may collapse. If it's market share liability, once you remove JLF do you still have a substantial share of the market? They are admittedly a small player, but you run the risk of the court dismissing if the other manufacturers can prove themselves out on the basis of lack of evidence. These risks argue against settlement.

Your causation theory also influences whether you think $700,000 is an acceptable amount. If you proceed on a market share theory, in CA at least we're talking about several liability only, so even if you won against JLF you would have to win a total of more than $7 million for their 10% market share to come out to more than what's on the table. Under alternative liability they would be held jointly and severally liable unless they could prove themselves out, so this would not be an issue.

I also wanted to see some thinking through of the numbers, and some thinking about pros and cons. On the numbers, if Raymond made $60K a year, and had about 20 more working years in him that's $1.2 million, plus health benefits, predictable raises, loss of consortium, medical expenses, etc. Many of you came up with figures in the $2-4 million range. The family will need money for college for at least one and probably two kids, and even though the house is paid off they have little in savings and Mrs. P's job has no benefits and doesn't pay enough to support them. They could use the money sooner, when it might pay for retraining or more education for Mrs. P. These facts argue in favor of settlement. So does JLF's precarious financial situation: they can't afford any more than the insurance policy limits since they're on the verge of going under, and if you take them to trial they may go bankrupt and you'll get much less (So telling me about all the extra things you'd ask them to pay for was not helpful if you didn't recognize their financial constraints). And finally, given that they're trying to "go organic" and seem genuinely remorseful, Mrs. P might think that Ray would have been supportive of their business and not want to sink them (unlike PCC).

You could have come up with some possibilities for integrative bargaining, given these constraints. An apology, donations to environmental causes, scholarships or jobs for the kids, etc. were all possibilities. You could have thought about structuring a settlement to take an additional amount later if the new business plan is successful, in the form of stock options or future payments. You could have asked JLF to contribute to further research on the cause of the outbreak, with the idea of nailing PCC if new evidence points to them as MLTN the source. I was open to lots of possibilities, but only within the constraints given by the problem.

Q. 3

This one was also derived from real cases involving anti-depressants and adolescents. I'll take each potential defendant separately.

SS v. Shrink:

Duty: most of you settled on the doctor-patient relationship as the source of duty. This works as far as it goes, but the doctor is going to argue that the relationship doesn't encompass administrative work not tied to diagnosis and treatment, and posit this as a limit on duty. Some of you saw this, and argued in addition that the doc had voluntarily assumed a duty to ensure that SS got her Utilex by prescribing it and going through the initial authorizations, thereby creating reasonable reliance that the drug was going to continue to be forthcoming, and leaving P worse off when it wasn't. You used the analogy of the company that posts a crossing guard, who cannot then withdraw him even though there may have been no duty to post him in the first place. A few of you even tried to use Tarasoff, perhaps because both cases involve psychiatrists, but quickly realized that there's no third party - but perhaps there's a duty to warn the parents about the danger that SS would harm herself if she went off the drug. He knows of the danger arising from sudden withdrawal (or is it just that he should know?) and she's an identifiable victim.

Breach: the definition of the standard of care has to follow from your duty analysis. If duty is based on a doctor-patient relationship, then the standard of care has to be that of a professional, i.e. the standard is that of a psychiatrist of average skill, training and experience, and what other psychiatrists do is determinative of breach. So it did you no good to evaluate the D's actions in terms of burdens and benefits unless you tied it into what expert witnesses (based on a national rule for specialists) would testify. You could argue that this is the kind of breach that's really not about medical malpractice at all but simple negligence, and that you don't need experts to testify about administrative procedures, but once you start talking about the effects of withdrawal on SS's state of mind and the like you're straying into territory that will need expert opinion. The experts will argue about whether most shrinks go to these kinds of hearing, whether they deal with HMOs like MegaHealth in a different way, and whether D is right in arguing that most shrinks wouldn't take the time away from other patients to do this. You might also try to argue that if SS (and family) were unaware of the serious potential side effects of stopping Utilex all of a sudden, that constitutes a lack of informed consent. The question under the professional rule would be whether most docs tell, and under the patient rule whether a reasonable patient would find the info material. I realize you have no information on what is actually customary, but you needed to note that that's what you're looking for.

Causation and scope: the question would be whether the harm would have befallen SS even if Shrink had gone to the hearing or otherwise facilitated her getting her meds. SS would argue that if she had gotten the meds, she would not have been depressed, would not have told her classmates (including Adam) of her suicidal tendencies, and thus Adam would have had no reason to believe he needed to take a prop knife away from her. She will argue that through this chain of events Shrink is a but-for cause or a substantial factor in the harm that befell her. Shrink will argue that because she had been depressed before starting the treatment, there is no reason to think Adam wouldn't have assumed what he did in any case. Re scope, Shrink will argue that Adam is an independent intervening (or superceding) cause: who would think this bizarre series of events would take place? He will argue that the type of harm to be expected is suicide, not knife

wounds from a prop knife struggled over by a concerned friend; she will argue that suicidal people hurt themselves many different ways including with knives, and that the exact manner of harm is irrelevant. He will also argue that Adam's intervention is so extraordinary and egregious that the entire burden of responsibility should shift to him.

There is a weak argument that SS is comparatively at fault for not trying other ways to get her meds (find new shrink, storm MH's office, whatever) and for walking around with a knife when seriously depressed and not thinking clearly, giving rise to foreseeable concern by her friends. In any case, she would be held to the standard of care of a 16-year old of similar intelligence and experience. In some jurisdictions, her mental state would be taken into account for comparative fault purposes, even if it would not be if she were the defendant.

SS v. MegaHealth (MH): As a managed care organization (aka HMO) they have a duty of reasonable care to SS based on her status as an insurance customer who has contracted with them for services. The problem, however, is again whether their duty extends to providing her with Utilex even when their procedures have not been complied with. You could again argue voluntary assumption here, since they started giving her the meds, and should have knowledge of the dangers of stopping them suddenly, although they might argue there's not enough data to make that clear. You could also argue duty on the basis of a Rowlands-type policy analysis: they are clearly causally connected to the harm since if they had more easily authorized the drug none of this would have happened, they can spread the cost among all their patients, they are morally blameworthy for making a young girl with problems and her doctor have to jump through so many hoops that it's predictable the doc won't do it, they have access to info re how crucial this is for her sanity, we want HMOs not to be able to in effect deny coverage in order to save money on expensive drugs at the expense of those who have paid them to be covered by their services, etc.

There's also a problem with breach: here the standard of care would be RP or RP+ due to their special knowledge of the area. SS will argue that they breached because they made the preauthorization process so onerous that no doctor would be successfully able to navigate it, much less a patient. It would have cost little to have a single written authorization on file, to call the doctor themselves to confirm his continued authorization, to allow other medical personnel (i.e. office manager) to do so, etc. She could also argue that the phone system, with so many levels, unhelpful operators (call 911…) and a propensity to disconnect, is so user unfriendly as to be unreasonable. They will counter that given the novel and potentially lethal nature of Utilex they need to make sure it is only dispensed under strict control, that they require these procedures for other such drugs, and that the dangers of allowing random minors (or even their parents) to get easy access to such drugs outweigh the burdens on SS and her doctor. One might look to the customary practices of other HMOs to determine how burdensome the procedures really are.

Causation and scope arguments will be similar, with the addition that under scope, MH will point the finger at Shrink's refusal to go to the hearing as an intervening/superceding

cause, while SS will argue it's dependent on the very unreasonable practices that made them negligent in the first place.

SS v. Adam: you could have argued this as either negligence or an intentional tort.

As negligence, he would have a general duty of care, breached when he ran at her rather than simply asking her what she was doing. As a minor, he will be judged against the standard of a child of like age, intelligence and experience (a reasonable 16-year old boy? You're kidding!) - there's no indication there's an adult activity involved. He might argue it was an emergency and he acted accordingly, but surely, she will argue, he had the 15-20 seconds necessary to reflect before rushing her. Causation would be straightforward, although I suppose he could argue she was likely to hurt herself anyway if suicidal even without his intervention; scope would revolve around the foreseeability of her carrying a prop that looked like a knife, etc.

As intentional torts, SS will argue for assault and battery. Assault requires apprehension of imminent harmful/offensive contact, which arguably happened when A ran at SS to try and take the knife away. Surely she apprehended the contact and perceived it as harmful, since she fought back, but he could argue a reasonable person would not have done so. He can also argue he didn't have the requisite intent, although she could argue he knew to a substantial certainty she would think he was going to take the knife away.

Battery is intentional harmful or offensive contact. Even if A only touched the knife that would be enough to constitute contact. The issue here too will be intent: A will argue he was trying to help, not be harmful or offensive; she will argue she obviously perceived the contact as offensive since she fought back, and he didn't need to intend the harm the occurred, just a harmful/offensive contact. He will argue defense of others in response, but usually this refers to a third party and in any case a reasonable mistake may not be sufficient to allow this defense. He could argue necessity, in that he felt this was the least restrictive way to avoid an imminent greater harm. He could also claim that by fighting back and biting him she had consented to the scuffle (unlikely). He could also counterclaim against her for his injuries; she could then argue self-defense.

Finally, as to the allocation of percentages. I wanted specific numbers, not a simple affirmation that if all defendants were found liable they would share in the damages. People were all over the map on this: some of you thought Adam was 100% at fault, while others found him blameless, and the same with the Dr. and MH. I didn't much care where you came out (the lesson of Wassell) so long as you justified why you thought so.