

ESSAY QUESTION ONE

Sue Everyone was a female law student who was six months pregnant. Because she was late for her Torts examination, she drove her new automobile the wrong direction on a one way street. Just before reaching the end of the street, she struck a pothole in the road and a rock was thrown into her windshield. The State of Federal, where the incident occurred, had contracted with Palsgraf Corporation to repair this particular road.

The rock caused the windshield to shatter because it had not been manufactured according to the design specifications. As a result, the windshield had certain stress points which would shatter upon minimal contact. The windshield was designed and manufactured by Waterford Corporation and installed as factory equipment on all automobiles manufactured by Stealth Corporation and delivered to High Dollar Motors, the dealer who sold Sue her automobile.

The shattering windshield struck Sue in the mouth and injured her tooth. As a result, Sue consulted with Dr. Mark E. DeSodd, a dentist who treated her injuries. During his treatment, Dr. DeSodd was using a new tool on Sue's tooth which required assembly in the office. Due to a misprint in the enclosed instructions, Dr. DeSodd's assistant assembled the tip of the tool with the end facing backward. Dr. DeSodd was in a hurry to get to the bank and did not check the tool prior to using it. As a result, the tip became dislodged and fell into Sue's throat and she was forced to swallow it. Dr. DeSodd told Sue, "Don't worry. Just eat roughage and it will pass naturally."

Later that day, Sue experienced abdominal cramps. The cramps became so severe that she went to the emergency room at St. Timothy the Incredibly Humble Conqueror Hospital. After being admitted, she was taken to the operating room and underwent emergency surgery by Dr. Luce Sphincter, chief of gastro-intestinal surgery, for removal of the tip of the instrument. Due to a congenital condition which could not have been diagnosed prior to the surgery, Sue had a reaction to the anesthesia and died. It was determined by medical evidence that the fetus was not capable of surviving outside the mother's womb.

DISCUSS THE RIGHTS AND LIABILITIES OF ALL THE PARTIES.

ESSAY QUESTION TWO

Aykroyd owned a facility that manufactured explosives. The land adjacent to the facility was vacant at the time facility was built. Private homes abutted the vacant land and several acres remained undeveloped between the explosives facility and the private homes. A year after Aykroyd's facility was built, Belushi opened a country club and private golf course on the property located between the facility and private homes. Within six months, Belushi had sold all available memberships and the country club/golf course began to thrive financially.

Bachrach was a member of the country club and frequently played on the private golf course. One day, Bachrach was feeling depressed and consulted with Warwick, an evangelist who engaged in "psychic healing" by placing her hands on a person's head and predicting the future. Bachrach had heard that Warwick was clairvoyant and could see into the future. As Warwick placed her hands on Bachrach's head, she appeared to go into a trance. Suddenly she awoke and told Bachrach that she had a vision that raindrops kept falling on her head and that anyone who had a heart, and who knew the way to San Jose, could see that what the world needed now was love, sweet love. Bachrach asked what it meant. Warwick replied, "If you give me \$50,000.00 tomorrow, you will live to be one hundred years old."

Bachrach, who had just turned seventy-five years old, believed Warwick and gave her the money the next day. The following week, Bachrach was playing golf at the private course when a loud explosion occurred at Aykroyd's facility. The explosion startled Bachrach so badly that he hit his shot directly at one of the homes located adjacent to the golf course, which was owned by Frasier. Frasier was relaxing at his swimming pool at the time and was struck by Bachrach's golf ball, which had deflected off a tree before it struck Frasier, bounced off his head and knocked a straw hat off the head of Frasier's social guest, Bulldog. Although the ball did not strike Bulldog himself, Bulldog became startled and fell from his beach chair, which resulted in Bulldog breaking his arm.

Bachrach began to run but was struck by flying debris. After paramedics arrived, Bachrach was transported to the Stoic Heathen General Hospital. After examination, Bachrach was told by his physician, Dr. O. K. Bendova, that the wounds he suffered from the flying debris were not serious at all. Dr. Bendova then informed Bachrach that he wanted to run some further tests. Bachrach consented to the testing. Upon completion of the tests, Dr. Bendova told Bachrach that he had a terminal illness and would probably not live longer than one year.

At trial, Frasier offered uncontested evidence that golf balls from the Club's links regularly traversed onto his property two to three times a day.

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ESSAY QUESTION THREE

Sue M. Tillithertz was a third-year law student who became extremely distressed and experienced chest pains after her final examination. She immediately drove to the office of her long-time physician, Dr. Izzy Schemia. Sue was told that Dr. Schemia was out seeing other patients at Agnostic General Hospital and she would have to wait. The office manager, Bill M. Quick, had Sue sit in the waiting area. Before Dr. Schemia returned, Quick told Sue that her health insurance had lapsed because of non-payment of premiums, and that Dr. Schemia would not treat her. Although Sue insisted that she had indeed paid the premiums, and therefore an administrative mistake had occurred, Sue was escorted from Dr. Schemia's office to the street without receiving treatment.

Sue became very distraught when she left Dr. Schemia's office. In her haste to see Dr. Schemia, Sue had parked her automobile next door in a private parking lot. A sign said the lot was reserved for customers of Chez Ptomaine, a trendy, upscale restaurant, but the sign had been hidden by a tree branch. Just as Sue reached the parking lot, she saw her car being towed away. As Sue saw her car being towed, she grew angry, the pain in her chest intensified and she stumbled through the entrance to Chez Ptomaine before collapsing. Dr. Schemia was sitting at a table near the entrance having lunch, and although he looked up and recognized Sue as she fell to the floor, he continued to savor his shrimp and scallops sauteed in olive oil with artichokes, capers, orange zest and garlic, tossed with fettucine, and a glass of Taittinger, '57, chilled to 11 degrees centigrade. As Dr. Schemia ignored Sue and signalled the waiter for another glass of champagne, the restaurant manager called an ambulance, which arrived shortly and took Sue to St. Timothy the Benevolent Hospital.

At St. Timothy's, Sue was seen by Dr. Claude E. Cator, a cardiac surgeon, who told Sue that she had a condition called mitral valve insufficiency, which meant that the proper amount of blood could not be pumped through her heart. Dr. Cator told Sue that she needed surgery to replace her faulty mitral valve with a mechanical valve manufactured by Sweet Heart, Inc., a medical device corporation. Dr. Cator thoroughly explained the risks of the surgery to Sue, but did not tell her that one (1) out of every one hundred thousand (100,000) patients rejected the carbon material that coated the valve, and the rejection of the carbon coating caused the patient's immune system to shut down. Dr. Cator did not tell Sue of this risk because he considered it minimal and was afraid it would upset Sue and aggravate her condition.

Sue decided to have the surgery. When it was completed, Dr. Cator left the operating suite and was returning to his office when he saw Swifty, a sales representative from Sweet Heart, Inc. Dr. Cator had known Swifty for several years and it was Swifty that had first presented the Sweet Heart mechanical valve to Dr. Cator. At that time, Swifty had told Dr. Cator that it was the state-of-the-art heart valve and that research had not uncovered any adverse reactions in patients who had the valve implanted. From that time, Dr. Cator had not used any other company's valve, although there were several other valves from other manufacturers available.

When Swifty saw Dr. Cator, he rushed over and told Cator that he had just resigned from Sweet Heart, Inc., because Sweet Heart was being investigated by the Food and Drug Administration. The investigation was started after the carbon coating used on Sweet Heart valves began flaking after implant and pieces of the coating material were being dislodged into the blood stream, posing a high risk of stroke to any patient with one of the implanted Sweet Heart valves. Swifty further told Dr. Cator that Sweet Heart had known of this potential problem for over two weeks, when it had been notified by the company that supplied the carbon coating material, Heart Break, Inc., but had decided not to take any action because it was afraid of adverse publicity and having to recall the valves. Swifty had just found out about the problem from a friend of his who worked in manufacturing, and Swifty had then confronted the company president, G. Olden Parachute, demanding that a recall of the valves be started. When Parachute told Swifty that Sweet Heart, Inc. would neither notify doctors who implanted the carbon-coated devices, nor recall the valves, Swifty resigned in protest and was now telling his former customers about the carbon coating risk to patients.

After leaving Swifty, Cator arrived at his office and found a letter which had been sent by first class mail from Sweet Heart, Inc. Contained in the letter was confirmation of what Swifty had told Dr. Cator, plus a recommendation that every patient be notified to have their implanted valves replaced. As soon as Dr. Cator finished reading the letter, his beeper went off and he was instructed to call the recovery room. He was then told by the supervisor in recovery that Sue appeared to be having a stroke and he was to come immediately. When Dr. Cator arrived in recovery, Sue was comatose and has remained the same since that date. Her condition is not expected to change. The evidence has disclosed that a large chunk of carbon dislodged from her implanted valve and settled in her brain, causing the stroke.

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**MASSACHUSETTS SCHOOL OF LAW
TORTS
CLOSED BOOK FINAL EXAMINATION
MAY 14, 2001
PROFESSOR TIMOTHY CAGLE**

DO NOT OPEN THE TEST BOOKLET UNTIL TOLD TO DO SO.

WRITE YOUR SOCIAL SECURITY NUMBER _____

This is a three hour examination. Your success on the essay part of this examination will depend on your careful analysis of the questions and the structure of your answers. There will be no credit given for extended "treatises" on the areas of the law presented by these questions, and you should, therefore, avoid any rambling discourses. However, you should discuss with adequate particularity the issues and the applicable law for each question.

Questions will be weighed as follows:

MULTISTATE QUESTIONS (1-20)	20 %
ESSAY	
QUESTION ONE	40 %
QUESTION TWO	40 %

No materials of any type are to be used in this examination. Nor are you to discuss this examination with students from the other sections unless all examinations have been completed by all sections. Nor should you discuss this examination with a student who has not taken this exam during its regularly scheduled time because of an excused absence. Infractions of the above will subject any students involved to disciplinary action which shall include expulsion from MSL.

You are NOT to assume that the law of any particular jurisdiction applies, unless instructed otherwise. Therefore, your answers should be phrased in terms of general tort principles.

INSTRUCTIONS:

1. MULTIPLE CHOICE (1-20)

- A. READ EACH QUESTION THOROUGHLY AND CHOOSE THE BEST ANSWER**
- B. ON THE FIRST PAGE OF YOUR BLUEBOOK, WRITE THE NUMBERS 1 THROUGH 20.**
- C. ANSWER EACH QUESTION BY LISTING THE LETTER OF YOUR CHOICE NEXT TO THE NUMBER OF THE QUESTION IN YOUR BLUEBOOK.**
- D. NO CREDIT WILL BE GIVEN FOR MULTIPLE ANSWERS.**

2. ESSAY QUESTIONS

- A. WRITE LEGIBLY**
- B. PEN IS PREFERRED**

3. WHEN FINISHED, CHECK TO MAKE SURE YOUR SOCIAL SECURITY NUMBER IS ON THIS TEST BOOKLET AND YOUR BLUE BOOK.

4. PLACE THE EXAM INSIDE YOUR BLUE BOOK AND HAND IN BOTH.

Brooks was an assistant to District Attorney Dunn. Brooks approached several wealthy business men and women without Dunn's knowledge and pressured them to make illegal campaign contributions to Dunn's upcoming re-election campaign. Brooks wrote several letters requesting the funds, and had Dunn sign the letters without reading them, because Brooks mixed the letters in with several other pieces of correspondence. Before the letters were sent, Dunn discovered what Brooks had done and fired him.

That evening, after being told he was fired, Brooks returned to Dunn's office and used duplicates of his keys which he had turned in. Brooks then removed copies of the letters he had kept and turned the copies over to Tritt, a reporter for the local newspaper. Tritt knew that Brooks had been dismissed and Brooks told Tritt the District Attorney fired him because Brooks found out about the campaign violations and Brooks knew he had to make them public. Without verifying Brooks' story, Tritt wrote the story and it was printed in the newspaper. After the story broke, the police launched an investigation of District Attorney Dunn.

1. In a defamation action by District Attorney Dunn against the newspaper and Tritt for publication of the story, which of the following is the most accurate statement about the defendants' liability?
 - a. A qualified privilege of fair comment existed since the defendants were reporting on a matter of public interest.
 - b. Since the District Attorney was a public figure, he has the burden of proof to show malice on the part of the defendants.
 - c. The defendants would not be liable because, under the First Amendment right to freedom of the press, the newspaper was privileged to publish the story.
 - d. The defendants would be relieved of any liability for defamation since an absolute privilege existed, regardless of the malice requirement.
2. If the District Attorney brings suit in defamation against Brooks for turning over the copies of the letters in question to Tritt, the District Attorney will most likely:
 - a. recover on the basis of libel per se, since Brooks was aware of the false statements in the letters
 - b. recover on the basis of libel, since the letters were defamatory on their face
 - c. recover on the basis of slander, even though Brooks did not have a malicious intent or improper motive for turning the letters over to Tritt
 - d. not recover

Brokaw, a physician, sent a letter to the Board of Registration in Medicine. In the letter, Brokaw charged that Walters, a rival physician, had been a prostitute while attending medical school. Brokaw's information was based on a rumor he had heard at a medical meeting.

Brokaw also sent copies of the letter to three hundred local physicians. Although Brokaw honestly believe the charges against Walters to be true, the accusation was in fact false. As a result of Brokaw's letter, Walters' income was sharply reduced because other physicians stopped sending her referral patients. The local medical association treats such letters as confidential pending an investigation of the charges.

3. If Walters asserts a claim against Brokaw for defamation, can Brokaw successfully defend?
 - a. No, because Brokaw sent copies of the letter to the local physicians.
 - b. No, because Brokaw put his charges in writing.
 - c. Yes, unless Brokaw acted with malice
 - d. Yes, because Brokaw honestly believed the information to be true

While relaxing at pool side at his home one Sunday afternoon, Frazier was struck by a golf ball driven by Niles, a 14 year old boy, who was playing the 9th hole at the Nervosa Country Club. The country club bordered Frazier's property. The fairway for the 9th hole was 75 feet wide and 457 yards long, with a dogleg in an easterly direction. Between the fairway and Frazier's property was a "rough" area, which contained brush and low lying trees.

As Niles was approaching the green, he hit a towering shot which deflected off a tree, struck Frazier, bounced off his head and knocked a straw hat off the head of Frazier's social guest, Bulldog. Although the ball did not strike Bulldog himself, Bulldog became startled and fell from his beach chair, which resulted in Bulldog breaking his arm.

At trial, Frazier offered uncontested evidence that golf balls from the Club's links regularly traversed onto his property two to three times a day.

4. Which of the following would be Frazier's proper cause of action against Niles as a result of the golf ball hitting Frazier's head?
 - a. assault but not battery
 - b. battery but not assault
 - c. assault and battery
 - d. neither assault nor battery since Niles did not intentionally cause Frazier to be struck

5. If Bulldog initiates a suit against Niles to recover damages for his broken arm, Bulldog will:
- a. not recover
 - b. recover for assault only
 - c. recover for battery only
 - d. recover for assault and battery

Gingrich, an independent research chemist, was transporting in his car a load of foam rubber from his home to his laboratory. A freezing rain was falling and a thin film of ice covered the road. On his way, Gingrich stopped by the Waxman Company to pick up a quantity of highly flammable petroleum derivatives that he also needed in his work. These were sold in ordinary glass gallon jugs.

Shortly after putting the jugs in the trunk of his car, Gingrich swerved to avoid hitting a station wagon that was crossing an intersection at a right angle to him. The driver of the station wagon, Conyers, had applied the brakes in time to stop under ordinary circumstances, but his wheels had struck an icy patch and he had skidded into the intersection. As a result of the swerve, Gingrich's car rode up on the sidewalk and overturned, pinning Armev, a pedestrian, under the car and causing Armev multiple injuries. The jugs in the trunk were broken by the impact, and the chemicals spilled out and caught fire. Both Gingrich and Armev were severely burned. Armev died a few hours after being taken to a hospital.

6. In a claim for wrongful death by Armev's administrator against Gingrich, the most likely result is that the plaintiff will
- a. not recover, because Conyers' conduct constituted an intervening, superceding cause
 - b. not recover, because there is no evidence that Gingrich failed to exercise due care
 - c. recover, because Gingrich's negligence was the legal cause of Armev's death
 - d. recover, because Gingrich would be strictly liable.

On March 29, 1988, Chloe underwent abdominal surgery at Agnostic General Hospital, the surgery being performed by Dr. Anna Stamosis, one of the hospital staff surgeons. Chloe was last seen for follow up by Dr. Stamosis on May 30, 1988.

In early April, 1990, it was discovered that a metallic forceps and a non-absorbent sponge were present in Chloe's abdomen. The applicable statute of limitations is ten years.

7. In a tort action by Chloe against Agnostic General Hospital, Chloe will rely principally on the doctrine of

- a. comparative negligence
- b. respondeat superior
- c. sine qua non
- d. res ipsa loquitur

8. In an action filed by Chloe on May 1, 1998, to recover for medical malpractice against Agnostic General Hospital, the court will most likely hold the defendant:

- a. liable, since the statute of limitations is tolled until the patient discovers the foreign object in his/her body
- b. liable, even though Chloe did not exhibit due diligence in discovering the articles earlier
- c. not liable, because the 10 year statute of limitations had run
- d. not liable, because the surgeon's negligence cannot be imputed to the hospital

Birmingham was driving his car when he entered an intersection and collided with a fire engine. The cause of the accident was Birmingham's negligence. As a result, the fire engine was delayed in reaching Bulger's house, which was engulfed in flames. Bulger's house was located eight blocks from the intersection.

9. If Bulger asserts a claim against Birmingham, Bulger will recover

- a. that part of his loss that would have been prevented if the collision had not occurred
- b. the value of his house before the fire
- c. nothing if Birmingham had nothing to do with causing the fire
- d. nothing, because Birmingham's conduct did not create an apparent danger to Bulger

Julie had a bad back. Julie's doctor suggested that a series of vigorous massages by a trained physical therapist might help relieve her pain. Outside of her doctor's office, Julie met Lance, who convinced Julie that he was a licensed physical therapist. In truth, Lance's sister, Kay, was the only physical therapist in his family and Lance had only watched Kay treat one or two people.

Julie and Lance made a date for the first treatment to be in six days. Three days prior to the scheduled treatment, Kay called Julie and told her that Lance had been bragging about fooling Julie into thinking that he was a physical therapist and getting her to schedule a treatment. Upon learning this from Kay, Julie became quite upset, to the point where she was afraid to leave her home and confront people.

10. If Julie sues Lance on an assault theory, the most likely result is that Julie will
 - a. recover, because Lance intended to put her in fear of an immediate touching
 - b. recover, because her apprehension was reasonable
 - c. not recover, because Julie had consented to the treatment
 - d. not recover, because Julie learned of Lance's deception before the date for the treatment
11. If Julie had not learned that Lance was a fraud, and the treatment had taken place, Julie could
 - a. recover damages for battery
 - b. recover damages for fraud and misrepresentation
 - c. not recover damages for battery because she consented to the treatment
 - d. not recover damages at all unless she suffered physical injury

Santino owned a hardware store that sold power lawn mowers for both personal and commercial use and took in old mowers as trade-ins on new models. The old mowers were then reconditioned and sold by Santino as "Reconditioned Mowers". Fredo, the owner of a landscaping business, informed Santino that he wanted to buy a reconditioned riding lawn mower to use in his landscaping business. However, he requested that a special blade be installed in place of the existing one and Santino complied. The new blade was manufactured by Hagen Corporation which inspected each blade before shipment. The lawn mower had been manufactured by Brasi Corporation.

The week after Fredo bought the lawn mower, it was being used by one of his employees, Fontaine. Fontaine had gotten off the mower to remove a rock in his pathway. After removing the rock, Fontaine decided to take a break and shut off the mower as he was standing beside it. As the mower shut down, a bearing gave way and the blade flew out from under the mower, striking Fontaine and severely injuring his foot.

12. If Fontaine asserts a claim based on strict liability in tort against Brasi Corporation, Fontaine will probably

- a. recover, if the bearing that came loose was a part of the mower when it was new
- b. recover, because Brasi Corporation was in the business of manufacturing dangerous products
- c. not recover, because Fontaine was not the buyer of the lawn mower
- d. not recover, because the lawn mower had been rebuilt by Santino

13. If Fredo asserts a claim based on strict liability in tort against Santino for loss of business because of the injury to Fontaine, Fredo probably will

- a. not recover, because economic loss from injury to an employee is not within the scope of Santino's duty
- b. not recover, because Santino was not the manufacturer of the lawn mower
- c. recover, because Santino knew the lawn mower was to be used in Fredo's landscaping business
- d. recover, because the reconditioned lawn mower was the direct cause of Fredo's loss of business

14. If Fontaine asserts a claim based on strict liability in tort against Santino, Fontaine probably will

- a. not recover, unless Fredo told Santino that Fontaine would use the lawn mower
- b. not recover, if Fontaine failed to notice that the bearing was coming loose
- c. recover, unless Fontaine knew that the shaft was coming loose
- d. recover, unless Santino used all possible care in reconditioning the lawn mower

15. If Fontaine asserts a claim against Santino, the theory on which Fontaine is most likely to prevail is

- a. strict liability in tort
- b. express warranty
- c. negligence, relying on *res ipsa loquitur*
- d. negligence, relying on the sale of an inherently dangerous product

16. If Fontaine asserts a claim based on strict liability in tort against Hagen Corporation, the defense most likely to prevail is

- a. Fontaine did not purchase the lawn mower blade
- b. the blade was being put to an improper use
- c. Fontaine was contributorily negligent in standing next to the lawn mower while it was running
- d. Hagen Corporation used every available means to inspect the blade for defect

Gerald was eating in a restaurant when he began to choke on a piece of food that had lodged in his throat. O. K. Bendova, a physician who was sitting at a nearby table, did not wish to become involved and did not render any assistance, although prompt medical attention would have been effective in removing the obstruction from Gerald's throat. Because of the failure to obtain prompt medical attention, Gerald suffered severe brain injury from lack of oxygen.

17. If Gerald asserts a claim against Dr. Bendova for his injuries, Gerald will probably:

- a. prevail, if the jurisdiction relieves physicians of malpractice liability for emergency aid
- b. prevail, if a reasonably prudent person with Dr. Bendova's experience, training and knowledge would have assisted Gerald
- c. not prevail, unless Dr. Bendova knew that Gerald was substantially certain to sustain serious injury
- d. not prevail, because Dr. Bendova was not responsible for Gerald's injury

Aykroyd owns a facility that manufactures explosives. The facility was constructed for Aykroyd by Radnerco, a firm that specializes in the construction of such facilities. After the facility had been in use for five years, an explosion in the facility started a large fire that blanketed the surrounding countryside with a high concentration of oily smoke and soot.

Belushi owns a large truck farm near the facility. His entire lettuce and tomato crops were destroyed by the smoke. Murray, who lives near the facility, inhaled a large amount of the smoke and thereafter became obsessed by the fear that the inhalation would destroy his health and ultimately caused his death.

18. If Belushi asserts a claim against Aykroyd for the loss of his lettuce and tomato crops and is unable to show any negligence on the part of Aykroyd, will Belushi prevail?

- a. Yes, because the intrusion of the smoke onto Belushi's farm amounted to a trespass
- b. Yes, because the operation of the manufacturing facility was an abnormally dangerous activity
- c. No, if the explosion was caused by internal corrosion that reasonable inspection procedures would not have disclosed
- d. No, if the explosion was caused by negligent construction on the part of Radnerco

19. If Belushi asserts a claim against Radnerco for the loss of his lettuce and tomato crops, will Belushi prevail?

- a. No, if Radnerco did not design the manufacturing facility
- b. No, because Radnerco was an independent contractor
- c. Yes, because the operation of the manufacturing facility was an abnormally dangerous activity
- d. Yes, if the explosion resulted from a defect of which Radnerco was aware

20. Contract damages are viewed, by any reasonable person who has good taste, as:

- a. wimpy
- b. produced by a polyester-derivative substance
- c. mealy-mouthed, pathetic, and downright embarrassing
- d. all of the above

ESSAY QUESTION ONE

Clemenza owned a fuel oil supply company. He received a call from Tessio for 500 gallons of fuel oil to be delivered to Tessio's home at 127 Main Street. The clerk who took the order from Tessio recorded Tessio's address as 172 Main Street.

Clemenza's delivery truck was dispatched to 172 Main Street where the driver pumped 500 gallons of fuel oil into the basement of the home there through the fuel line opening on the outside of the house. The house had recently been converted to natural gas heat by the Barzini Gas Company and employees of Barzini Gas Company had negligently failed to remove the fuel line from which they had disconnected the oil storage tank. As a result, the oil flooded the basement of the property at 172 Main, which was owned by Sollozzo. The oil began to seep out of the basement and migrated to the property next door at 174 Main Street, which was owned by Tattaglia. Tattaglia was on vacation in the Bahamas, sleeping next to the fishes, and was not scheduled to return until the following day.

The following morning, Sollozzo saw the oil next to Tattaglia's patio. Sollozzo went down to his basement and discovered the error in delivery. Unfortunately, Sollozzo had to leave with his friend, McCluskey, for a business meeting at Louie's Restaurant in the Bronx, a nice family place where everyone minded their own business. Sollozzo decided to write Tattaglia a note, warning him of the oil surrounding the patio in Tattaglia's back yard. Sollozzo then stuck the note in Tattaglia's front door, but a gust of wind blew the note away. Tattaglia returned later that evening and, as the sun set, Tattaglia went out to the patio to light his charcoal grill to prepare dinner. In the twilight, Tattaglia could not see the oil surrounding the patio. Tattaglia struck a match and lighted the grill. Thinking the match was extinguished, Tattaglia threw the still-burning match into the oil-soaked ground. An explosion occurred which severely burned Tattaglia.

At the sound of the explosion, Tattaglia's wife, Lucy, ran to the back door where she saw Tattaglia on fire. Lucy went into shock and was taken with her husband to St. Timothy The Refused Offeror Hospital where Tattaglia was treated for his burns and Lucy required psychiatric care. Lucy was treated by Fanucci, a psychiatrist, who saw her for over six months. After one month of treatment, Fanucci told Lucy that her depression stemmed from the fact that she had lost her self esteem as a woman after she had heard a neighbor, Corleone, make a remark about her husband.

Several weeks prior, at a dinner party for the five families from the neighborhood and out of town guests from as far as California and Kansas City, Corleone had stopped a fight between Tattaglia and Corleone's oldest son, Santino, before any blows were struck. After the incident, Lucy had heard Corleone say to a large group of people, "Tattaglia is a pimp. He could have never outfought Santino." Fanucci then prescribed sexual intercourse with himself twice a week in order for Lucy regain her self-esteem. Lucy complied until she left Fanucci's care several months later, when she discovered that Fanucci was really an ex-Contracts professor, masquerading as a psychiatrist, and had no medical training.

While hospitalized, Tattaglia's wounds became infected and he died. Upon learning of his death, Lucy became so despondent that she could not speak and is now institutionalized with severe depression.

YOU ARE CONSULTED BY TATTAGLIA'S EXECUTOR. DISCUSS THE RIGHTS AND LIABILITIES OF ALL THE PARTIES.

ESSAY QUESTION TWO

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Sue became very distraught when she left Dr. Schemia's office. In her haste to see Dr. Schemia, Sue had parked her automobile next door in a private parking lot. A sign said the lot was reserved for customers of Chez Ptomaine, a trendy, upscale restaurant, but the sign had been hidden by a tree branch. Just as Sue reached the parking lot, she saw her car being towed away. As Sue saw her car being towed, she grew angry, the pain in her chest intensified and she stumbled through the entrance to Chez Ptomaine before collapsing. Dr. Schemia was sitting at a table near the entrance having lunch, and although he looked up and recognized Sue as she fell to the floor, he continued to savor his shrimp and scallops sauteed in olive oil with artichokes, capers, orange zest and garlic, tossed with fettucine, and a glass of Taittinger, '57, chilled to 11 degrees centigrade. As Dr. Schemia ignored Sue and signalled the waiter for another glass of champagne, the restaurant manager called an ambulance, which arrived shortly and took Sue to St. Timothy the Benevolent Hospital.

At St. Timothy's, Sue was seen by Dr. Claude E. Cator, a cardiac surgeon, who told Sue that she had a condition called mitral valve insufficiency, which meant that the proper amount of blood could not be pumped through her heart. Dr. Cator told Sue that she needed surgery to replace her faulty mitral valve with a mechanical valve manufactured by Sweet Heart, Inc., a medical device corporation. Dr. Cator thoroughly explained the risks of the surgery to Sue, but did not tell her that one (1) out of every one hundred thousand (100,000) patients rejected the carbon material that coated the valve, and the rejection of the carbon coating caused the patient's immune system to shut down. Dr. Cator did not tell Sue of this risk because he considered it minimal and was afraid it would upset Sue and aggravate her condition.

Sue decided to have the surgery. When it was completed, Dr. Cator left the operating suite and was returning to his office when he saw Swifty, a sales representative from Sweet Heart, Inc. Dr. Cator had known Swifty for several years and it was Swifty that had first presented the Sweet Heart mechanical valve to Dr. Cator. At that time, Swifty had told Dr. Cator that it was the state-of-the-art heart valve and that research had not uncovered any adverse reactions in patients who had the valve implanted. From that time, Dr. Cator had not used any other company's valve, although there were several other valves from other manufacturers available.

When Swifty saw Dr. Cator, he rushed over and told Cator that he had just resigned from Sweet Heart, Inc., because Sweet Heart was being investigated by the Food and Drug Administration. The investigation was started after the carbon coating used on Sweet Heart valves began flaking after implant and pieces of the coating material were being dislodged into the blood stream, posing a high risk of stroke to any patient with one of the implanted Sweet Heart valves. Swifty further told Dr. Cator that Sweet Heart had known of this potential problem for over two weeks, when it had been notified by the company that supplied the carbon coating material, Heart Break, Inc., but had decided not to take any action because it was afraid of adverse publicity and having to recall the valves. Swifty had just found out about the problem from a friend of his who worked in manufacturing, and Swifty had then confronted the company president, G. Olden Parachute, demanding that a recall of the valves be started. When Parachute told Swifty that Sweet Heart, Inc. would neither notify doctors who implanted the carbon-coated devices, nor recall the valves, Swifty resigned in protest and was now telling his former customers about the carbon coating risk to patients.

After leaving Swifty, Cator arrived at his office and found a letter which had been sent by first class mail from Sweet Heart, Inc. Contained in the letter was confirmation of what Swifty had told Dr. Cator, plus a recommendation that every patient be notified to have their implanted valves replaced. As soon as Dr. Cator finished reading the letter, his beeper went off and he was instructed to call the recovery room. He was then told by the supervisor in recovery that Sue appeared to be having a stroke and he was to come immediately. When Dr. Cator arrived in recovery, Sue was comatose and has remained the same since that date. Her condition is not expected to change. The evidence has disclosed that a large chunk of carbon dislodged from her implanted valve and settled in her brain, causing the stroke.

DISCUSS THE RIGHTS AND LIABILITIES OF ALL THE PARTIES.

**MASSACHUSETTS SCHOOL OF LAW
TORTS
CLOSED BOOK FINAL EXAMINATION
MAY 12, 2003
PROFESSOR TIMOTHY CAGLE**

DO NOT OPEN THE TEST BOOKLET UNTIL TOLD TO DO SO.

WRITE YOUR SOCIAL SECURITY NUMBER _____

This is a three hour examination. Your success on the essay part of this examination will depend on your careful analysis of the questions and the structure of your answers. There will be no credit given for extended "treatises" on the areas of the law presented by these questions, and you should, therefore, avoid any rambling discourses. However, you should discuss with adequate particularity the issues and the applicable law for each question.

The suggested time for each question is one hour. Questions will be weighed as follows:

ESSAY QUESTION ONE	33 1/3 %
ESSAY QUESTION TWO	33 1/3 %
ESSAY QUESTION THREE	33 1/3 %

No materials of any type are to be used in this examination. Nor are you to discuss this examination with students from the other sections unless all examinations have been completed by all sections. Nor should you discuss this examination with a student who has not taken this exam during its regularly scheduled time because of an excused absence. Infractions of the above will subject any students involved to disciplinary action which shall include expulsion from MSL.

You are **NOT** to assume that the law of any particular jurisdiction applies, unless instructed otherwise. Therefore, your answers should be phrased in terms of general tort principles.

WHEN FINISHED, YOU WILL HAND IN ALL BLUEBOOKS AND THIS EXAMINATION.