2020 Torts Exam for AEGS [redacted]

Cover Page

Question 1

Answer to Question 1

I will not cheat.

Answer to Question 1

Question 2

Answer to Question 2

Learning.

Answer to Question 2

Question 3

Answer to Question 3

1. **Understanding tort rules and the contexts in which they operate:** *Palsgraf v. Long Island Rail Road* establishes some of the most fundamental principles of tort law (like foreseeability) and shows the context of how they operate.
2. **Appreciate the systemic and individual consequences of these rules:** *The Saginaw* demonstrated the power of rules in tort law, both in how they can apply to the unjust outcome of an individual case, as well as the potential for a biased court to perpetuate systemic inequalities.
3. **Formulate, defend, challenge, extend, limit, distinguish, and apply case holdings:** *Langley v. Boyter,* its subsequent quashing, and SC's ultimate adoption of modified comparative fault. Chief Judge Sanders formulates the history of SC's negligence laws, challenging and defending where appropriate, and attempts to limit contributory negligence.
4. **Identify and analyze potential tort claims and defenses:** *Wassel v. Adams* still haunts me, and shows the potential for affirmative defenses (like plaintiff conduct) to produce wholly unjust outcomes in context of negligence claims where an otherwise obvious prima facie case of negligence would likely succeed.
5. **Navigate uncertainty, ambiguity, and inconsistency:** *WTC Bombing v. Port Authority* illustrated the uncertainty and ambiguity in tort law when a potential tortfeasor's actions maay be subject to various immunities (governmental in this case). It was unclear and highly debatable whether the Port Authorities actions were discretionary or ministerial, and therefore whether governmental immunity applied.
6. **Read, listen, think, write, talk, and behave like a competent lawyer:** The *Gadson v. ECO Services* saga provides a great lesson in precision of language. The court's misattribution of the elements of negligent entrustment to its holding demonstrates the importance of accuracy and precision in communications as a competent lawyer. Even worse, this came out of our Supreme Court.

Answer to Question 3

Question 4

Answer to Question 4

My affirmative theory of trustworthiness combines the wisdom of crowds with experts in a field (and heavily relies on *The Wisdom of Crowds* book by James Surowiecki). Recognizing that individuals cannot reasonably expect to be experts on all subjects, I believe we must rely on experts in their respective fields. But how do we know which experts to rely on? My answer, informed by Surowiecki's book, is to rely on as many as possible given a few modest prerequisites. Generally, crowds on average reach reasonable answers in the presence of five factors:

1. Diversity of opinion
2. Independence
3. Decentralization
4. Aggregation
5. Trust

Admittedly, there is a balancing act required in avoiding group-think or mob mentality. There are many examples of alleged crowd wisdom failing (stock market bubbles, lobbying groups, oligopolies, etc.), but in most cases you will find an absence of one of these factors. My approach is also somewhat similar to "studies of studies" that are sometimes found in academia. Recognizing that I have my own biases, I like to rely on the wisdom of crowds of experts rather than cherry picking individual studies and research that resonate with me personally.

Most concerning for me, however, is the ongoing distrust of experts (violating the fifth element of wise crowds). Increasing political polarization of scientific issues is weakening our trust in otherwise valuable institutions, and may eventually undermine our ability to translate this wisdom of crowds into actionable intelligence that yields tangible benefits for society.

Answer to Question 4

Question 5

Answer to Question 5

With universal insurance covering both pecuniary and nonpecuniary losses, I expect affirmative defenses in tort would no longer be as critical to defendants facing tort claims. Likely, we would see a massive reduction in negligence claims since this would limit financial incentives to pursue litigation against tortfeasors. Plaintiffs would also be able to be made whole without their own conduct being called into question, which often devolves into flagrant victim blaming. Since the universal coverage would not cover punitive damages, however, negligence claims based on recklessness would likely survive the change. Indeed, tort law *should* focus on these more. If the objective of making victims whole is otherwise satisfied by universal insurance, tort law is now free to solely focus on its other goal of promoting safety (which would occur through punitive damages against the worst of reckless/intentional tortfeasors).

Answer to Question 5

Question 6

Answer to Question 6

I believe partial settlements will reduce the total potential liability for economic damages (by the amount settled) for non-settling defendants under joint and several liability. As long as the settlement is made in good faith, it will preclude other named non-settling defendants from seeking contribution. While this is potentially unfair to other joint tortfeasors, I actually like that the system encourages early settlements to victims by incentivizing tortfeasors to "cut a deal." Victims of torts likely need help sooner rather than later due to medical bills, lost earnings, etc. – and an early settlement may also provide the monetary lifeline necessary to continue litigation against the non-settling parties.

Answer to Question 6

Question 7

Answer to Question 7

A.

a. Negligence claim by Lindqvist (L) against Nordin (N) (probably won't succeed unless N knew of N's illness)
   i. Duty: N owes Lindqvist a general duty of reasonable care.
   ii. Breach: There's probably not one, unless N knowingly went out in public while sick, but that is not in the fact pattern. Given that N was jogging, it's probably safe to assume that N was unaware of the illness. N was wearing a mask to protect others, in compliance with the local ordinance.
   iii. Cause-in-fact: N is likely a substantial factor causing Lindqvist to contract SARS-CoV-2.
   iv. Scope of Liability: If N were sick, it's foreseeable that a passerby could also become ill. N will maintain that L and Allinder did not observe social distancing and could not reasonably foresee violations of health guidelines, but danger invites rescue. However, CPR in this case was unnecessary. Nordin will also maintain that Lindqvist assumed the risk of transmission, however Lindqvist cannot assume an unknown risk. Nordin will also point to Lindqvists' unreasonable conduct of unnecessary CPR and non-mask wearing (which may not be relevant since CPR cannot be performed with a mask). Since CPR was unnecessary, L should have been wearing a mask which would have limited chance of N infecting – gives rise to comparative negligence).
   v. Damages: Medical care, incidentals, litigation expenses, lost services, lost wages, loss of consortium, pain and suffering, loss of enjoyment.

b. N battery claim against L
   i. L intended to cause contact with N
   ii. L did cause contact with N.
   iii. Contact was offensive (unnecessary CPR would probably offend most people).

B.

a. Negligence claim by L against N (same analysis as above), except may be named a joint tortfeasor with A. Causation must focus on substantial factor. Let the potential tortfeasors figure out fault.

b. Negligence claim by L against A
   i. Duty: A owes L a general duty of reasonable care as a reasonable surgeon (L met A during an attempted rescue). Normally A would have no duty to L, however A incurs duty by assisting in rescue – or may even be interpreted as rescuing L.
   ii. Breach: A as a trained medical professional should have identified that CPR was not necessary, and that known that L would be unnecessarily exposed to risk of infection. Also, A is likely regularly tested or should be, and therefore should have known of own infection.
   iii. Cause-in-fact: A is likely a substantial factor causing L to contract SARS-CoV-2.

iv. Scope of Liability: A's negligence foreseeably increased L's likelihood of infection. Indeed it may even be reckless since A likely knew of the risk and disregarded.
v. Damages: See section (A)(a)(v) + potential punitive damages due to recklessness.

c. N battery claim against L (same as (A))

C.

a. N negligence claim against L
   i. Duty: a general duty of reasonable care
   ii. Breach: Unnecessarily providing CPR
   iii. Cause-in-fact: L likely a substantial factor causing N to contract SARS-CoV-2.
   iv. Scope of Liability: Foreseeable that unnecessary oral contact during a pandemic poses a risk of infection.
   v. Damages: See section (A)(a)(v)
b. N negligence claim against A
   i. Duty: a general duty of reasonable care of reasonable surgeon.
   ii. Breach: Allowing/not informing L of non-necessity of providing CPR
   iii. Cause-in-fact: N likely a substantial factor causing N to contract SARS-CoV-2.
   iv. Scope of Liability: Negligently providing medical care or allowing others to do so creates a foreseeable risk of harm.
   v. Damages: See section (A)(a)(v) + potential punitive damages due to recklessness
c. N battery claim against L
   i. L intended to cause contact with N
   ii. L did cause contact with N.
   iii. Contact was harmful (exposure to virus).
d. N battery claim against L (same as (A))

D.

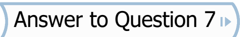
a. N negligence claim against A
   i. Duty: a general duty of reasonable care of reasonable surgeon.
   ii. Breach: Not informing L CPR was unnecessary, leading to L removing N's mask. Also, A is likely regularly tested or should be, and therefore should have known of own infection.
   iii. Cause-in-fact: L likely a substantial factor causing N to contract SARS-CoV-2.
   iv. Scope of Liability: Negligently providing medical care or allowing others to do so creates a foreseeable risk of harm. Allowing unnecessary removal of mask during a pandemic creates foreseeable risk of harm.
   v. Damages: See section (A)(a)(v) + potential punitive damages due to recklessness
b. N battery claim against L (same as (A))

E.

a. N negligence claim against L (see (C)(a))
b. N negligence claim against A (see (B)(b))
c. N battery claim against L (same as (A))

F. A

a. Allinder voluntarily assumed risk. Knew of pandemic, and knew of non-necessity of L's conduct. A may have claim against L



Question 8

Answer to Question 8

Case: Bernson v. Juhlin, SC, (Beatty) (2002?)

Relevance: Degrees of negligence, recklessness.

Type of Court: Supreme Court

State's Law: SC

Facts: Bernson entered into contract for exterior work on Juhlin's home. While Bernson was working, Bernson maintains that Juhlin refused to deactivate automatic sprinklers that were interfering with the work. Bernson claims to have deactivated sprinkler system several times, after which Juhlin locked the controls. Juhlin denies ever being asked to turn off the sprinklers, but confirms instructing the crew to not turn off the sprinklers.

Bernson subsequently fell off a wet ladder while working on the home after the sprinklers again came on. According to Bernson, Juhlin refused to call an ambulance at Bernson's request. Juhlin denies knowledge of the fall or ambulance.

Veracity: Facts around sprinkler system are in dispute, but D acknowledges specifically instructing P not to interfere with sprinklers.

Parties: Bernson (Plaintiff Appellant)

Juhlin (Defendant Respondent)

Claims: Negligence.

Proc. History: Trial court refused jury instruction on heightened negligence (recklessness, willfulness, and wantonness). Jury rendered judgment for defendant: 75% fault for P, 25% fault for D. P asked for JNOV and new trial based on erroneous jury charge, verdict form, and juror bias. Requests were denied and P appeals. SC modified comparative negligence barred P recovery.

<u>Issues:</u>

Issue #1: **Can reckless conduct be compared with simple negligence following the adoption of comparative negligence in SC? (Issue of first impression)**

Holdings: Comparative negligence allows the comparison of ordinary negligence with heightened forms of misconduct such as recklessness, willfulness, and wantonness.

Specific Rules: Divergence in opinion among courts considering the question (see supporting/weakening below).

Application: Former rules that P's ordinary negligence is not a defense to reckless conduct were meant to lessen harsh consequences under the all or nothing approach of contributory negligence. Since the contributory negligence doctrine was abandoned in favor of comparative negligence in SC, we have no need for the old rule.

Decision #1: Bernson's jury instruction request was unnecessary since recklessness can be compared to negligence.

Overall Decision: Reversed and remanded. Supreme Court rejects Bernson's requested jury instructions regarding "heightened negligence" since Bernson's requests are effectively already present In SC's comparative negligence system, but reverses on grounds that trial court did not instruct jury on assumption of risk. This potentially allowed for the jury to be confused. SC did not need to consider other issues of charge, verdict form, and bias due to reversal and remand on other issues.

Concurrences: Toal, C.J., Pleicones, Kittredge, and Hearn, JJ.

Dissents: None

No Participation: N/a

Who is pleased: Both parties pleased and displeased. Bernson got the new trial, but denied requested prohibition comparing negligence with recklessness.

Citations Relevant to Holdings:

Supporting: Stockman v. Marlowe, 271 S.C. 334, 247 S.E.2d 340 (1978) ". . . although recklessness, willfulness, and wantonness are technically distinct from ordinary negligence, they are so "inextricably connected and interwoven to the extent that 'negligence' in its broadest sense is often said to encompass conduct of the former variety." Id.

Weaver v. Lentz, 348 S.C. 672, 561 S.E.2d 360 (Ct. App. 2002), ". . . the Court of Appeals found 'no error' where the trial court reduced the plaintiff's award for actual damages in a wrongful death action based on the decedent's percentage of negligence, even though the plaintiff had been awarded punitive damages." Id.

Weakening:

Answer to Question 8

Question 9

Answer to Question 9

A. Narrowly: Hedlund's recklessness falls short of intentionality and does not preclude a claim against Sundberg for Sundberg's negligence.
B. Broadly: While Hedlund's recklessness does not excuse Sundberg's negligence, the two can be directly compared. Under modified comparative negligence, the comparison may render Hedlund unable to collect if Hedlund's recklessness outweighs Sundberg's negligence in causing the accident.

Answer to Question 9

Question 10

Answer to Question 10

Under the new fact pattern, Bernson will likely not be able to prevail in a claim against Juhlin unless Juhlin resides in a jurisdiction that has rejected the status trichotomy in favor of a general duty of reasonable care owed to all entrants of land.

Subject to the traditional status trichotomy of premises liability, Bernson would be a trespasser after the termination of employment (status of invitee ends with employment, and presence after the business relationship has ended constitutes trespass unless Bernson was invited back by Juhlin). Generally, as a trespasser, the only duty Juhlin owed to Bernson was to not willfully harm Bernson. Unless Bernson had been by several times before and was a known tresspassor, or Bernson can demonstrate the Juhlin willfully activated the sprinklers in Bernson's presence to create risk of harm, Bernson's negligence claim against Juhlin based on premises liability will most likely fail.

If, however, Juhlin resided in one of the minority areas observing a general duty of reasonable care to all entrants of land, Bernson may be able to prove negligence – although it will still be challenging. If Bernson's presence on the ladder was known to Juhlin, Juhlin was likely negligent since Bernson had previously warned of the dangers posed by the sprinklers to people on ladders. If Bernson's presence and use of the ladder was unknown to Juhlin, however, Juhlin likely was not negligent in simply operating the sprinklers. Juhlin will maintain that it's not foreseeable that unauthorized entrants to the land will attempt to scale ladders in the presence of sprinklers. Indeed, it would probably be unreasonable to expect Juhlin to never water the lawn for fear of unauthorized entrants on ladders.

Juhlin may also argue Bernson impliedly assumed the risk of climbing the ladder, but this will be up for debate. On the one hand, Bernson was aware of Juhlin's previous sprinkler use, and indeed continued to use the ladder after sprinklers came on in other parts of the yard. On the other hand, Bernson may not have been aware of the sprinklers in the particular part of the yard where the ladder was later being used – and Bernson could not have voluntarily assumed a risk Bernson was unaware of.

Bernson also likely has a viable claim against Ladco under negligence for informational defects. While the ladder would likely have been reasonably safe to use indoors, the warning against using it outdoors was conveyed in a negligent manner that failed to reasonably communicate the danger.

Duty: Ladco owes a duty of reasonable care to users of its product.

Breach: Ladco breached its duty by warning against outdoor use of the ladder via a sticker that would fall off during the specific outdoor use (wet conditions) the sticker was attempting to warn about.

Cause-in-fact: Ladco's negligent informatonal defect was a substantial factor in Bernson's fall.

Scope-of-Liability: It is painfully foreseeable that a warning label that fails in precisely the conditions it is meant to warn about could cause Bernson's (or other customers') injury.

Damages: Medical care, incidentals, litigation expenses, lost services, lost wages, loss of consortium, pain and suffering, loss of enjoyment. Answer to Question 10

Question 11

Answer to Question 11

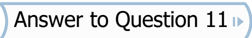
Boss,

This will be a challenging case for the firm. We will not likely be able to succeed in claims against foreign nations for numerous procedural and substantive reasons, but there may be a negligence case against the employer that can survive WCA immunity based on the employer's recklessness (who I will assume for the purposes of this analysis is the US Department of State). I'm cautiously optimistic that we will be able to show that the State Department intentionally engaged in conduct knowing that it was substantially certain to cause serious injury to its employees.

1. Duty: Since employee-employer is a special relationship, the State Department owes a duty of reasonable care to the employees of its embassies abroad.
2. Breach: The State Department was aware of the risks posed to its employees abroad as documented in the exhibit. This particular ailment had been observed and documented for several years, however, the State Department behaved unreasonably and breached its duty of care by continuing to send employees to work in dangerous embassies without precautions.
    a. Untaken precautions likely include:
        i. Limiting individual employee time abroad in high risk locales
        ii. Immediate evacuation upon the onset of symptoms
        iii. Anti-microwave safety precautions
        iv. Committing greater assets to researching the neurological condition
3. Cause-in-fact: This is the heart of the matter, and probably where we can expect the greatest resistance. While we probably cannot succeed in showing a but-for cause, the substantial factor test will prove far more useful. I do not expect a Res Ipsa approach to succeed since the State Department will maintain that it was not in exclusive control of the instrumentalities of the harm, but it should not be difficult to show that the plaintiff's employment was a substantial factor in causing the harm since cases of similar injury appear to be limited to US officials abroad.
4. Scope of Liability: The dangers of sending the employees abroad was not only foreseeable, it was actually being actively documented and researched. The State Department consciously chose to disregard the risk to its employees' health. This should satisfy the substantial certainty requirement since similar injuries were already happening, yet the State Department continued to persist in its actions.
5. Damages: While no specific facts are given, this could include medical care, incidentals, litigation expenses, lost services, lost wages, loss of consortium, pain and suffering, loss of enjoyment.

The government may attempt to invoke immunity, but I think we can succeed by framing the issue of its negligence in ministerial rather than discretionary terms. We're not claiming the government was negligent in allocating resources towards operating in high risk places. Rather, we should focus on the government being negligent in its ministerial decisions of *how* to operate in high risk places given its particular knowledge of the associated risks.

The State Department may also invoke implied assumption of risk, but this will definitely fail if the plaintiff was unaware of the risk, and will probably fail otherwise due to policy reasons. I expect courts will desire to hold employers liable for the injuries of their employees incurred during the scope of their duties.



Question 12

Answer to Question 12

CA Prop. 22 will have wide-ranging impacts to tort law in the state, primarily impacting claims by passengers of ride sharing services. Where previously a passenger may seek to hold the ride share service liable via the doctrine of respondeat superior, passengers will now be forced to limit their claims against their actual drivers. This is meaningful because drivers likely have limited assets against which passengers can recover, and many drivers may effectively be judgment proof. The change will also place increased importance on the drivers carrying adequate insurance to compensate passengers for potential injuries.

Answer to Question 12

Question 13

Answer to Question 13

While we traditionally think of duty in terms of action (inaction generally only applies to special relationships), the distinction between action and inaction is most relevant to breach. A duty may require either (example: to not cause harm, or to provide assistance), but to know whether a defendant breached this duty requires an examination of the defendant's conduct. Examples include:

1. Inaction: Did D breach a duty owed to P by not acting? (Lifeguard failing to rescue a swimmer)
2. Action: Did D breach duty owed to P to not cause harm by acting unreasonably? (Driver injuring a pedestrian)

Answer to Question 13

Question 14

Answer to Question 14

The Nobel Committee (NC) likely has viable claims against the FBI for intentional interference with contract or prospective economic relations.

For intentional inference, NC and Dr. King had a valid economic expectancy, and FBI clearly knew and intended to interfere by discouraging Dr. King's travel. The interference was almost certainly improper since I expect it falls outside the scope of the FBI's mission, but the challenge will be to show that the interference actually occurred and any resulting damages.

Misuse of legal processes would be attractive, but the FBI did not institute criminal or legal proceedings against Dr. King (unless surveillance would qualify).

Answer to Question 14

Question 15

Answer to Question 15

In summary judgment, the judge views all evidence in the light most favorable to the non-moving party, and if there is no genuine issue of material fact, renders judgment. While Hurtig's belief appears at odds with Blome's evidence, it is not. Hurtig may well have believed the light green, but Hurtig can hold this belief while Blome's material evidence conclusively demonstrates otherwise. There is ultimately no genuine issue of material fact, and therefore summary judgment in favor of Blome is appropriate.

Answer to Question 15

Question 16

Answer to Question 16

1. Medical care:
   a. Do you have health insurance (subrogation purposes)
   b. Did you require emergency psychiatric care immediately following the accident?
   c. Have you required ongoing psychiatric care, how often, and at what cost per visit?
   d. If so, how long do your caregivers expect ongoing psychiatric care to remain necessary?
   e. How often does your ongoing caregiver visit, and what is the cost per visit?
   f. How much would full time care cost?
2. Incidentals:
   a. What was/would be the cost of a ride home (since Agnes was the driver)?
   b. Did you have dry cleaning bills for the blood on your clothes?
3. Litigation Expenses:
   a. How much does it cost you to attend meetings with me? (Time and mileage)
4. Lost Services
   a. What kind of work did Agnes do around the house, and how much will it cost to replace her services for the remainder of your life expectancy?
5. Lost Wages
   a. Were you doing any work prior to the accident, and have you been able to continue doing the same quality and quantity?
   b. Were you forced to take bereavement, FMLA, or other leave?
6. Loss of Consortium
   a. What kind of activities did you and Agnes enjoy doing together, and how often?

Answer to Question 16

Question 17

Answer to Question 17

Assuming the damages are indivisible, C may choose to recover full damages from A of $1,600,000 ($2,000,000 x 80%) since A was at least 50% at fault for the accident.

C may also choose to recover full damages of $1,600,000 ($2,000,000 x 80%) from B under SC's modified joint and several liability since B's conduct involved drugs or alcohol. C will also owe B $400 ($2,000 x 20%), for a net judgment of $1,599,600.

If either A or B pays more than their proportionate share to C, however, they may seek contribution from the other for the amount paid in excess of their percent fault.

If SC were still under contributory negligence, C's claim would not have been barred if the 20% negligence was purely due to lack of seatbelt wear (under SC statute).

Answer to Question 17