Memo

To: Torts Students

From: Tom Russell

Date: 9/30/2002

Re: Fall Quiz

This memo reviews the Fall Torts quiz.

The quiz results are posted on the web.

Please note that the policy of the law faculty is that grades do NOT change except in cases of computational error. This means that if we made an error in adding up your points, your score will change. However, you cannot argue your way into getting more points for an answer that was not correct. Indeed, attempting to do so will breed ill will and create incentives for me to return to a previous practice of putting all weight on two grades exams for which I provide no feedback.

Please keep in mind two things about your results on this quiz.

First, this quiz counts for a mere 5 percent of your yearly grade.

Second, this quiz tested one particular and rather narrow form of legal skill using multiple choice questions that are like the ones that you will face on the Multi-State portion of the bar exam. However well you did on this quiz is not necessarily correlated to how well you will do in the course and even more dimly correlated with how well you will do in practice. If I felt that this quiz correlated well with your performance in the course, then I would base my grades on this quiz alone and save myself a lot of grading time. But, there is much more to learning torts than learning how to manipulate a few narrow rules.

Even so, if your score was 50 or less, then I am a bit concerned though not yet alarmed. I want you to devote some attention to making sure that you comprehend and are able to manipulate the legal rules that we cover in the cases. There are some computer exercises available through CALI that may help.

Quiz scores ranged from 35 to 100. The mean score on the quiz was 74.1 and the median score was 75.

Below, you will find explanations for the 20 questions and answers on the quiz.

Professor Russell's Fall Torts Quiz

You have 60 minutes to complete the quiz.
Each question is worth 5 points.
There are 20 questions.
For each question, pick the best answer.
Record your answer on the Answer Sheet.

1. Colorado's Pattern Jury Instructions specify that:

> 9:7 CHILDREN--STANDARD OF CARE--NEGLIGENCE (INCLUDING COMPARATIVE NEGLIGENCE CASES)
>
> A child (seven years of age or older at the time of an occurrence) is under a duty to use that degree of care which children of similar age, experience and intelligence would ordinarily use under the same or similar circumstances to protect (themselves) (others) from (bodily injury) (death) (property damage).

How does this instruction differ from the instruction that would apply to an adult defendant?

A. The instruction is objective. [Incorrect because the instruction for an adult defendant is objective as well.]
B. The instruction is subjective. [Incorrect because while this instruction has some subjective elements, the instruction is more accurately characterized as a mixture of subjective and objective elements. This standard is somewhat more subjective than the adult standard, but this is not the best answer.]
C. The instruction takes circumstances into account. [Incorrect because the standard of care for adults also takes circumstances into account.]
D. The instruction takes the intelligence of the defendant into account. [Correct, because the adult standard does not take the intelligence of the defendant into account.]
E. The instruction takes the experience of the defendant into account. [Incorrect because the adult standard of care can take the experience of the defendant into account using the "under the circumstance" clause of the standard.]

2. Colorado's Pattern Jury Instructions specify that:

> At the time of the occurrence in question in this case, the following (statute[s]) (ordinance[s]) of the [name of municipal corporation], State of Colorado) (was) (were) in effect: (insert quotation of applicable statute[s] or ordinance[s]). A violation of (this) (these) (statute[s]) (ordinance[s]) constitutes negligence. If you find such a violation, you may only consider it if you also find that it was a cause of the claimed (injuries) (damages) (losses).

Colorado is:

A. A jurisdiction in which jurors may regard a statutory violation as some evidence of negligence. [Incorrect, because the instruction states that "A violation . . . constitutes negligence. The instruction does not say that the jurors may regard a statutory violation as only some evidence of negligence. See Chapter 4, lines 648 ff. for detailed explanation of the differing types of jurisdictions.]
B. A jurisdiction in which jurors must regard a statutory violation as some evidence of negligence. [Incorrect, because the instruction states that "A violation . . . constitutes negligence. The instruction does not say that the jurors should regard a statutory violation as only some evidence of negligence. See Chapter 4, lines 648 ff. for detailed explanation of the differing types of jurisdictions.]
C. A negligence *per se* jurisdiction. [Correct. The instruction says that a violation is negligence.]
D. A jurisdiction in which evidence of a statutory violation establishes a prima facie case of negligence. . [Incorrect. The instruction says that a violation is negligence and not merely that in showing the violation, the plaintiff has done enough to get the jury to consider whether the violation was negligence.]
E. A jurisdiction that has rejected the doctrine of negligence *per se*. [Incorrect. This jurisdiction has embraced the doctrine.]

3. Dinorah, an adult woman, had an epileptic seizure while driving and crashed into a pastry shop. She had no history of seizures to that point in her life. If a legal system imposed liability on Dinorah for the property damage that she caused, we would describe that legal system as one based on:

A. Unfairness [Incorrect. Strict Liability *might* be regarded as unfair by some; even so, this is not the best answer.]
B. Negligence [Incorrect, because a requirement of negligence would mean a showing of fault, which this jurisdiction does not require.]
C. Gross Negligence [Incorrect, because this jurisdiction does not even require negligence, let alone gross negligence.]
D. Strict Liability [Correct. Dinorah is liable without regard to her having been at fault. That's what strict liability means.]
E. Recklessness [Incorrect, because this jurisdiction does not even require negligence, let alone recklessness.]

4. Debbie was driving on a road with two lanes of travel in both directions. She was driving at the speed limit in the right hand lane. In front of her, a car darted into the highway from a driveway. At her current rate of speed, Debbie would surely have collided with the car entering the highway if Debbie did not move her own car over to the left lane. Debbie made this lane change without using her turn signal; unfortunately the car entering from the driveway also moved into the left lane. Debbie slammed into that car, killing its occupant, Pam.

If Pam's estate files a wrongful death claim alleging negligence *per se* because Debbie violated the law when she failed to use a turn signal, then Debbie's best argument against the negligence *per se* claim will be that:

A. Pam entered the highway negligently. [Incorrect. Pam's comparative negligence does not address whether Debbie was negligent *per se*, even though it may relate to later apportionment of damages.]
B. Debbie's failure was not a cause of the accident. Incorrect. This is not the best answer, even though Debbie will want to argue that her violation was not a cause. This will be a difficult fact question.]
C. Pam was not within the class of persons protected by the statute. [Incorrect, because Pam, as another driver, *was* within the class protected by the statute.]
D. Pam's harm was not within the type of harm protected against by the statute. [Incorrect, because the type of harm that Pam suffered *was* the type of harm protected by the statute.].
E. Debbie acted under emergency conditions. [This is the best answer for attacking the negligence *per se* claim. Though there was a violation, the violation was excused. One of your fellow students brought this up in class.]

5. If the standard of care is "reasonable care under the circumstances," then doesn't the handling of very dangerous substances like gasoline require a different and higher standard of care?

A. No, because the greater likelihood of harm coupled with the likely extent of harm involved in handing gasoline means that the burden of precaution will also be higher. [Incorrect, but only because all of the statements are true, which makes E the best answer.]
B. No, because the standard of care is sufficiently flexible to take into account more dangerous substances. [Incorrect, but only because all of the statements are true, which makes E the best answer.]
C. No, because what is reasonable is related to the nature of the substance being handled. [Incorrect, but only because all of the statements are true, which makes E the best answer.]
D. No, because the phrase "under the circumstances" has the effect of elevating the care that must be taken with very dangerous substances. [Incorrect, but only because all of the statements are true, which makes E the best answer.]
E. All of the above.

6. If the standard of care is "reasonable care under the circumstances," when will the phrase "under the circumstances" include the characteristics of the defendant herself?

A. When the defendant possesses unusual skill or training. [Correct. Superior skill of the defendant can come in through the "under the circumstances" clause. See: Chapter 3 at lines 1125 ff.]
B. When the defendant is not very smart. [Incorrect. Under the objective standard, one does not consider the intelligence of the plaintiff.]
C. When the defendant is mentally ill. [Incorrect. The defendant is held to a higher objective standard.]
D. When the standard is an objective one. [Incorrect. Bringing in the characteristics of the defendant conflicts with the objective standard.]
E. When the plaintiff argues *res ipsa loquitur*. [Incorrect. This makes no sense.]

7. "A reasonable person of like age, intelligence, and experience under like circumstances" refers to:

A. The objective standard of care.
B. The subjective standard of care.
C. The negligence standard of care.
D. The child standard of care. [Correct. The child standard of care includes consideration of the intelligence of the child.]
E. Circumstantial evidence.

8. The likelihood of having to pay money for a tort judgment is very low. This means that a potential tortfeasor who is rational will not pay more to prevent harm than the tortfeasor would expect to pay in settlement and judgments. As a result,

A. Plaintiffs win larger judgments than they otherwise should. [Incorrect. Makes no sense is this context.]
B. Doctors practice defensive medicine. [Incorrect. If they really understood the data, doctors might practice *less* defensive medicine.]
C. Insurance companies raise their premiums. . [Incorrect. If insurance companies really understood the data, they might *lower* their premiums.]
D. Society must absorb the cost of more injuries. [Correct. As I discussed in class, when tortfeasors pay out little money through claims, settlements, and judgments, then they do not have an incentive to take precautions against injury. This means that society must bear the cost.]
E. Courts experience floods of litigation. [Incorrect. More negligence behavior *might* generate more litigation, but D remains a better answer.]

9. Why might a plaintiff's lawyer plead that a defendant was reckless rather than negligent?

A. In order to circumvent an immunity for negligence. [Correct. This is what the plaintiff's lawyer did in *Sandler v. Commonwealth*, see Ch. 3 at line 1124.
B. In order to avoid punitive damages. [Incorrect. Showing recklessness would make punitive damages *more* likely not *less* likely.]
C. In order to establish a higher standard of care. [Incorrect. Showing recklessness would not help establish a higher standard of care.]
D. In order to make sure that an insurance policy covered the damages. [Incorrect. Recklessness would be more likely to void coverage.]
E. In order to avoid having to argue negligence *per se*. [Incorrect. Makes no sense.]

10. A plaintiff smartly pleads a case both as negligence *per se* and also as an ordinary cause of action for negligence. The plaintiff's lawyer offers evidence that the defendant more likely than not violated a statute; that the type of harm the plaintiff suffered was the type against which the statute was supposed to protect; and that the plaintiff was within the class intended to be protected by the statute. The plaintiff's lawyer also offered evidence that a reasonable jury might use to find duty, cause in fact, proximate cause, and damages. Regarding the negligence cause of action, however, the plaintiff's lawyer offered no evidence that the defendant failed to act reasonably under the circumstances. The defendant's attorney presented no case. In a jurisdiction that treats evidence of negligence *per se* as establishing *prima facie* evidence of duty and breach, will the defendant's motion for a directed verdict be successful?

A. Yes, because the plaintiff failed to offer evidence to support the negligence cause of action. [Incorrect, the negligence cause of action is a separate from the negligence *per se* cause of action.]
B. Yes, because the plaintiff failed to show that the defendant had not acted reasonably under the circumstances. [Incorrect, because this relates to the negligence claim.]
C. Both A & B. [Incorrect, because both A & B are wrong.]
D. No, because the plaintiff has established the elements of a negligence *per se* cause of action. [Correct. The plaintiff's attorney has proven all of the elements: Duty of Care; Breach of that Duty; Cause in fact, Proximate Cause, and Damages.
E. No, because the defendant must present evidence in order to win the case. [Incorrect. If the plaintiff fails to offer enough evidence for each element, then the Defendant need not present a case at all but can instead more for a directed verdict.]

11. Modern discovery rules

A. Limit the need for and use of *res ipsa loquitur*. [Correct. As we discussed in class, modern discovery rules overcome much of the problem of access to information.]
B. Have increased the use of *res ipsa loquitur*. [Incorrect. The opposite is true; use of *res ipsa* is declining.]
C. Have made it more difficult to show that certain injuries usually result from negligence. [Incorrect. Modern discovery rules have likely had the opposite effect.]
D. Have diminished reliance on expert witnesses. [Incorrect. Not only is this irrelevant, but it's probably false as well.]
E. Do not permit the use of *res ipsa loquitur* evidence. [Incorrect. *Res ipsa* lives on.]

12. D argues that because she grew up in a warm, snowless climate, she cannot be held at fault for skidding on Denver's icy streets and crashing into P's car. It was, D explains, her first time driving on snow and ice. Her argument will

A. Fail, because P was blameless. [Incorrect. This does not respond to D's claim.]
B. Fail, because P probably was also negligent. [Incorrect. This does not respond to D's claim.]
C. Fail, because she should have been more careful. [Incorrect. This does not respond to D's claim about her newness to Denver. If D should have been more careful, then she was probably negligent, which undercuts her argument that she did not know any better.]
D. Fail, because she is expected to rise to the level of her new community. [Correct. She cannot use not knowing how to drive in a new climate as an excuse. See *Understanding Torts*, p. 55, n18.
E. Succeed. [Incorrect. This is a losing argument for her to make.]

13. Paul broke his leg when he fell down on a wet sidewalk outside a Denver house. The sidewalk would not have been wet if Danny, the owner of the house, had turned off his sprinkler system as required by an emergency ordinance that the Denver City Council had passed in response to the worst drought in 100 years. If Paul sues, will Paul be able to use Danny's violation of the Denver ordinance to show negligence *per se*?

A. Yes, because if Danny had not violated the ordinance, then Paul would not have fallen and been injured. [Incorrect. Although the violation was a cause in fact of Paul's injury, that's not enough to show negligence *per se*.
B. Yes, because Danny, as a citizen of Denver, was within the class of persons whom the Denver City Council intended to protect by the ordinance. [Incorrect. The ordinance is to conserve water not protect pedestrians.]
C. Yes, because a reasonable person would adjust a sprinkler system so that the sidewalk would not become wet while the sprinkler operated. [Incorrect. Maybe it was negligence to let the sidewalk get wet, but this claim does not address the negligence *per se* issue.]
D. No, because the ordinance was an emergency ordinance and not a permanent part of Denver's ordinances. [Incorrect. The ordinance was a valid statute.]
E. No. [Correct. Because Danny's harm was not the harm against which the statute protected nor was he in the protected class, violation of the statute does not establish negligence per se.]

14. Douglas, an adult, is not as smart as most people. He is also blind. If he injures someone, then:

A. He'll be held to the standard of a reasonable person with the same mental and physical abilities. [Incorrect. His intelligence will not be taken into account.]
B. He'll be held to the standard of a reasonable blind person. [Correct. The standard takes his physical disability into account but not his relative lack of intelligence.]
C. He'll be held to the standard of a reasonable person. [Incorrect. The standard of care will take into account his disability.]
D. He'll be held to the standard of a person of similar intelligence. [Incorrect. The standard of care will not take into account his lack of intelligence because he is an adult.]
E. He'll be held to the standard of an objective person. [Incorrect. This has no meaning.]
F.

15. A jury instruction specifies that:

> In determining whether or not the defendant, (name), was negligent, the law presumes (, and you must find,) the defendant was negligent if you find that:
> 1. the plaintiff, (name), had injuries caused by the (insert appropriate description of instrumentality);
> 2. such injuries would not have occurred unless someone was negligent in (insert one or more appropriate descriptions, e.g., "using", "handling", "operating", "manufacturing", "repairing", "maintaining", etc.) the (insert appropriate description of instrumentality); and
> 3. at the time and in the way such negligence probably occurred, it was more likely the negligence of the defendant (or someone for whom the defendant was legally responsible) than the negligence of anyone else that caused the plaintiff's injuries.
> (You must consider this presumption together with all the other evidence in the case in determining whether or not the defendant was negligent.)

This instruction concerns:

A. Negligence *per se*. [Incorrect. See Question 2 for Colorado's Negligence *per se* instruction.]
B. *Post hoc, ergo propter hoc*. [Incorrect. This Latin phrase means, "after a thing, therefore because of the thing." This phrase points to a fallacy of logic, but has nothing to do with this instruction.]
C. Res ipsa loquitur. [Correct. This is the *res ipsa* instruction.]
D. Strict liability. [Incorrect. Although some would argue that *res ipsa* approaches strict liability, C is the best answer.]
E. *Illegitimis non carborundum*. [Incorrect. This is made-up Latin that is supposed to mean, roughly, Don't let the bastards wear you down.]

16. In what way might proof of a custom be related to the Learned Hand's B < PL formula?

A. If a practice is customary, then the probability of harm must be low. [Incorrect. People engage in all sorts of potentially harmful customs. Consider driving on the freeway, for example.]
B. If a practice is customary, then the magnitude of the likely loss must be low. [Incorrect. People engage in all sorts of potentially harmful customs. Consider driving on the freeway, for example.]
C. Both A & B. [Incorrect. If both are incorrect, then together they are still not correct.]
D. Proof of the custom could show that the burden of precaution was manageably low. [Correct. See chapter 4, line 798 ff.]
E. Proof of the custom could show that the cost of settling cases was typically lower than the burden of precaution. [Incorrect. Proof of the custom would not show us anything about the cost of settling.]

17. Which of the following would not help the defendant in a case in which the plaintiff alleged negligence *per se*?

A. Proof that the defendant did not violate a statute. [Incorrect. This would help the defendant.]
B. Proof that the plaintiff was not within the class of persons intended to be protected by the statute. [Incorrect. This would help the defendant by showing that negligence *per se* should not apply.]
C. Proof that the defendant had a good reason for breaking the law. [Incorrect. This would help the defendant by showing that the violation was excused.]
D. Proof that the defendant did not know about the statute. [Correct. This would not help the defendant.]
E. Proof that the violation of the statute was causally related to the injury. . [Incorrect. While this would often hurt the defendant, the answer to that question is murkier and more fact-intensive than for Answer D, which is clearcut. D is therefore a better answer.]

18. Which of the following is the best justification for the existence of the doctrine of *res ipsa loquitur*?

A. Proving all of the elements of negligence is very difficult. [Incorrect. *Res ipsa* is not a shortcut for lazy plaintiff's attorneys.]
B. Problems of proof are difficult when the defendant has exclusive information concerning the causes of the injury. [Correct. This is the best justification. See *Understanding Torts,* p. 90.]
C. Proving causation is difficult when plaintiffs are unconscious. [Incorrect. While this statement is true and helps to support the existence of the doctrine in some circumstances, B is a more complete and better answer.]
D. Injuries are typically due to negligence. [Incorrect. This statement may not be true. If it is, it does not justify the existence of *res ipsa*. Note, though, that one of the prongs of *res ipsa* is a requirement that the plaintiff's injury be of the sort that is more often than not due to negligence.]
E. Defendants usually have exclusive control over the causes of injury. [Incorrect. This is not true.]

19. Paula is injured when Delilah crashes into her with a bicycle. Delilah acted negligently if:

A. She caused Paula's injury. [Incorrect. This would be strict liability not negligence.]
B. She rode her bicycle without a light. [Incorrect. What if it were the daytime?]
C. She behaved unreasonably under the circumstances. [Correct. This is tautological. If she behaved unreasonably under the circumstances, then she was negligent. That's what negligence is!]
D. She could have been more careful. [Incorrect. Even non-negligent people could be more careful.]
E. She did not check the condition of her tires before riding. [Incorrect. Not checking the condition of one's tires is not negligence.]

20. While driving on I-70, Pamela's right front tire blows out. She is injured and sues Firestone, the maker of the tire. If her lawyer relies solely on *res ipsa loquitur* to prove Firestone's breach of the standard of care, will Pamela's case survive the defendant's motion for a directed verdict?

A. Yes, because tires do not blow out unless there is negligence. [Incorrect. Tires blow out for all sorts of reasons. Plus, even if there were negligence, how do we know it was Firestone's? Maybe Pamela over- or under-inflated her tires.]
B. Yes, because Firestone made the tire. [Incorrect. *Res ipsa* requires a showing of exclusive control.]
C. Yes, because Firestone has exclusive access to information about the tire's use. [Incorrect. Others have likely worked on the tire and Pamela has used it, too.]
D. No, because Pamela is not within the class of persons intended to be protected by *res ipsa loquitur*. [Incorrect. A silly mixture of negligence *per se* requirements with *res ipsa*.]
E. No, because the tire was not under Firestone's exclusive control. [Correct. This essential condition for the use of *res ipsa* is not met here.]