FINAL EXAMINATION

TORTS

HOUSE OF RUSSELL

INSTRUCTIONS:

1. **DEADLINE:** This is a 75-hour examination. You may begin the exam at any time after you receive the exam via email around 12 pm (noon) on Wednesday, December 4, 2019. You must submit your answers by 3 pm on Saturday, December 7, 2019. **If you turn in your answers after 3 pm on December 7, then you will receive an F for your Torts grade. NO EXCUSES.**

2. **EXAM NUMBER:** Please put your exam number on each page. The easiest way to do this is to put the exam number in a header on each page. **Do not put your name anywhere on the exam.** Consider naming the file Torts-Russell-[Exam Number]. Emailing a copy of your exam answer to yourself is a good way to get time-stamped evidence that you finished on time.

3. **TURNING IN YOUR ANSWER:** Turn in your answer by uploading the file to the registrar's online exam portal using the instructions below.

   A. Go to the Law Registrar's online exam portal. (https://www.exam4.com/org/600)
   B. Select "Torts-Russell" under the Available Takehome Exams section (the class will appear in the upper right corner of the webpage – in this section – starting at 12:00 pm December 4.)
   C. Enter your exam ID and select "Continue"
   D. Follow the prompts and upload your answers into the online portal by the final deadline.

DO NOT SEND A COPY OF YOUR ANSWER TO PROFESSOR RUSSELL; YOU VIOLATE THE HONOR CODE IF YOU SEND A COPY OF YOUR ANSWER TO

PROFESSOR RUSSELL. If you have technical problems turning in your answer, please contact the registrar. **Do NOT contact Professor Russell with difficulties related to exam submission.**

4. **OPEN-BOOK:** This is an open-book, take-home examination. Your answer must be of your own composition. You may work on this examination wherever you wish, and you may consult any written material that you wish. However, you violate the Honor Code if you discuss, show, or distribute this examination or your answers to anyone at all before the exam ends at 3 pm on Saturday, December 7, 2019. Be cautious, for example, about posting anything on Facebook, Twitter, or Instagram that anyone might think is a request for assistance. Once the exam starts, you may not discuss it with anyone at all before the examination ends at 3 pm on Saturday, December 7, 2019.

5. **LENGTH:** This examination consists of one question. You may use no more than 2,500 words to answer the question. Reducing your answers to this word limit will be one of the challenges of this examination. **Include the word count at the end of your answer.**

6. **SPACING:** Please double-space your answers. Avoid miniature fonts, okay?

7. **HOW TO ANSWER:** In answering, use judgment and common sense. Be organized. Emphasize the issues that are most important. Do not spend too much time on easy or trivial issues at the expense of harder ones. If you do not know relevant facts or relevant legal doctrine, indicate what you do not know and why you need to know it. You must connect your knowledge of law with the facts before you. Avoid wasting time with lengthy and abstract summaries of general legal doctrine. Discuss all plausible lines of analysis. Do not ignore lines of analysis simply because you think that a court would resolve an ambiguous question one way rather than another.

8. **JURISDICTION:** The laws of the 51st state of the union, which is called Newstate, apply to all the issues in this examination. This state has adopted the Uniform

Commercial Code, which matters only in Contracts exams. The 51st state is NOT Colorado.

9. **CONCISION:** Quality, not quantity, is your goal. You have a lot of time to write and edit your answer. You will earn a better grade by being thorough and concise. Well-organized answers will be the best answers that earn the highest grades.

10. **EXPERTISE:** Please note that sometimes House of Russell exams deal with subject matter about which some of you may have expertise or outside knowledge. You have to accept the exam's presentation as true. For example, if the exam indicates that lava is 1,500 degrees Fahrenheit, but you happen to know that lava is much hotter, then you should put aside your superior knowledge and accept the lava as being the temperature that the exam says it is. Typically, House of Russell exams try to simplify some issues by mashing down the science just a bit.

11. **KEEP A COPY:** You should feel free, of course, to keep a copy of the exam. Please keep your answer also.

12. **CHEATING:** If, in preparing for this examination you have violated the Honor Code, or if, during this examination, you violate the Honor Code, the best course of action is for you to report to the Dean of Students immediately after this examination ends.

13. **SAMPLE ANSWERS:** After he completes the grading, Professor Russell will issue a memo that includes high-scoring sample answers for your review. Do not ask to review your exam until you have reviewed the sample answers and exam memo. You can never argue your way to a higher grade.

14. **GOOD LUCK:** Good luck with this and all your exams and have a great break.

Snow on Snow on Snow

The big snow came to Newcity—Newstate's capital city—on Tuesday of Thanksgiving week in 2019. Although the previous weekend had been warm enough for bicycling, jogging, and volleyball in the park, the temperature dropped precipitously during the day on Monday with the first wave of snow hitting at 5 pm—just half an inch. The powerful snow re-started at 10 pm with an inch of snow falling each hour. By Tuesday morning, 12 inches had fallen. All of Newstate was blanketed. Schools, universities, and businesses shut down for the day.

Boomer Snow Removal Company has a contract with the owner of Medium Building to remove snow from the Medium Building property. Medium Building is a 20-year-old, seven-story building with 40 offices of different sizes. The offices include financial planners, lawyers, doctors, accountants, physical therapists, psychotherapists, and various other small businesses including startups. One floor of the building includes only tarot readers and other psychics. The building's owner likes to have a floor of psychics in order to prevent karmic catastrophes.

The snow continued into the early afternoon on Tuesday. When a lot of snow falls, as during Thanksgiving week, the contract between the owner of Medium Building and Boomer Snow Removal Company (BSRC) calls for two employees with two trucks at the building site. Consistent with its contract, BSRC sent two employees to the Medium Building in the late afternoon on Tuesday after the snowfall ended. One BSRC employee drove a pickup truck with a snowplow blade attached to the front end of the truck. The other employee drove a large front loader. Most snowstorms are smaller than this one. For most snowstorms, the loader is

unnecessary because the pickup driver can plow the lot and sidewalks by simply pushing the snow to the perimeter of the property or, sometimes, by pushing all the snow to one corner of the property.

The front loader is an impressive piece of construction equipment. The front loader has a large, wide scoop or bucket in front that holds more than eight cubic yards of snow. After the snowplow driver pushes snow into piles, the loader operator drives the loader toward and into piles of snow in order to fill the front scoop or bucket. The operator then lifts the bucket, drives the loader to the snow dump zone, and then dumps the snow. The truck is large enough so that the operator of the front loader can dump the contents onto a pile 14 feet high. This allows the operator to create massive piles of snow.

The businesses in the building operate according to roughly typical Monday through Friday working hours. A few offices open as early as 7 a.m. but most open at 8:30 or 9:00 a.m. Most of the offices close by 5 p.m. with a few staying open until 6 p.m. By 6 p.m., the building is typically empty of people who worked in the offices—except, of course, for the lawyers—especially the younger ones. Although the lawyers only meet with their clients during working hours, the lawyers often work well into the night and sometimes through the night.

The building has above-ground, outdoor parking in lots that surround the building. The lots tend to be full during the work day with the cars of employees and also the cars of clients

who visit the various offices. There are some rows of parking for clients and customers near the northeast corner of the building. Parking is in short supply in the Medium Building lots, and sometimes employees who arrive late have to find parking on nearby Newcity streets.

Given the tight supply of parking spaces, the owner of the Medium Building works to keep drivers who are not employees or clients of the building's businesses out of the parking lots for his building. The owner of the Medium Building issues everyone a parking pass, which drivers must affix to their rear windows. Over the past few years, tenants from a new, nearby apartment building often parked their cars in the Medium Building lots and left the cars overnight or even for days, which exacerbated the Medium Building parking problem and aggravated Medium Building tenants and their customers. In response, the owner of the Medium Building put up signs that read "Parking for customers and employees of the Medium Building. No parking after hours or on weekends." The owner of the Medium Building asked employees who left their cars in the surface lots after hours to log into a site to record their license plate number, make, model, and color of car.

The two BSRC employees arrived before dusk on Tuesday. The front loader operator was a woman named Frona. Tom drove the truck with the snow plow attached to the front.

Sunset on Tuesday was at 4:37 p.m. The owner of the Medium Building had announced on Monday afternoon that due to the winter storm forecast, the building would be closed and locked all day on Tuesday. All of the employees of the businesses—including even the

lawyers—had stayed away from work, although most of the lawyers worked from home anyway.

When Tom and Frona arrived to clear the snow, they saw that the parking lot was empty except for one car parked in the far northeast corner of the parking lot. The lot slopes generally from northeast to southwest, which means that the lot's lowest point is in the southwest and the highest point is in the northeast. The building is roughly in the middle of the property; the site design is uninspired. The principal entrance to the lot is near the southwest corner, and so the northeast corner of the lot is the one farthest from the entrance. For this reason, the owner of the Medium Building specified in the snow removal contract that after heavy snowfalls of more than eight inches, the snow removal company was to use the front loader to create a giant pile of snow in the northeast corner of the parking lot. As giant piles of snow thaw, they tend to look dirty and ugly because of the debris that the plows pick up from the parking surfaces, and the owner of the building—who had spent many a winter and spring in Minneapolis looking at nasty, thawing piles of snow—did not want to have a big ugly pile of snow close to the entrance to the parking lots.

Tom and Frona consulted with each other as to what, if anything, they should do about the car in corner of the parking lot. They talked using their mobile phones. The car was already covered with snow, and neither saw tire tracks leading into the parking space. They both knew that there were "no parking" signs. Using an app on her phone, Frona could look at the list of cars that owners had logged in to the site to indicate they would be parking in the lot after normal business hours. There was no car listed.

Frona called her boss, Chip Boomer, who liked to be called by his last name only. Frona explained the situation: someone had left a car in the northeast corner of the parking lot where she was supposed to use the loader to pile the snow. Mr. Boomer chuckled a little, and then said, "F--- them. Bury the car. Most likely," Boomer continued, "the car belongs to one of the millennials who lives in the apartment building. They know better than to park in the lot. There are signs, and the building owner has sent letters to the apartment building's managers with warnings that the tenants should not park in the lot. What's it take for these people to learn a lesson?" Frona said "OK, Boomer," got off the phone with her boss, and then called Tom and told him "Boomer says to bury the millennial's car." They then got to work, with Tom pushing the snow to near the northeast corner of the lot so that Frona could pick it up with the front loader and dump it all onto the car in the corner.

Tom thought of himself as something of a creative. He had a special Spotify list with songs about snow to which he listened while plowing. He listened to old songs--Dean Martin singing "Let it snow! Let it snow! Let it snow!" He listened to two different songs with the same title: "Black Ice." AC/DC recorded one; Goodie Mob the other. He listened to a lot of carols. His favorite was a version of "Bleak Midwinter" that Shawn Colvin had recorded.

> In the bleak midwinter
> Stormy winds may blow
> Earth stood hard as iron
> Water like a stone
> Snow had fallen, snow on snow
> Snow on snow on snow
> In the bleak midwinter
> Long, long ago.

Tom felt that the music helped him to be thorough and exact in his plowing. His goal was to clear the snow efficiently—and perfectly—like a Zamboni driver reconditioning ice between periods of a hockey game.

Tom plowed the snow toward the northeast corner of the parking lot. He was able to push the snow to near the corner more quickly than Frona was able to pick up and dump the snow in the corner. This was no fault on Frona's part; her job took more maneuvering and was exacting in a different way. After Frona dumped two or three bucket loads of snow onto the car in the northeast corner, the car was no longer visible at all. She did not count but she probably dumped at least another ten loads onto the corner. The storm was a mighty one.

After Tom finished plowing the snow to the corner of the lot so that Frona could consolidate it into a giant pile in the northeast corner, Tom worked on the sidewalks. Exacting as he is, Tom hates to use a snow shovel. He likes to work from inside the truck. When he first took the job, he shoveled walkways by hand, but having worked for the company for more than ten years, Tom has learned to use the truck and its plow blade in place of a shovel whenever possible. The Medium Building has a long sidewalk that runs for about one-half block along Evans Boulevard. The street begins right where the sidewalk ended. That is, there is no parking strip, median, or grassy area between the sidewalk and the street. At the edge of the sidewalk, there is a curb, and then the street: sidewalk, curb, Evans Boulevard. On the parking lot side of the sidewalk is a narrow lawn.

Rather than shoveling the sidewalk by hand and throwing the snow onto the lawn, Tom developed a more efficient technique, which Boomer had approved. He drives his truck down the sidewalk and uses his plow to push the snow onto Evans Boulevard. Usually with a single pass, he clears the entire sidewalk. Because of the joints in the concrete sidewalk, he has to drive more slowly than on the asphalt parking lot. Boomer estimates that having Tom clear the sidewalks this way rather than shoveling saves 60 minutes of Tom's time on the Medium Building job.

The snow that Tom pushed onto Evans Boulevard joined the snow that Newcity failed to clear from the city street. For unclear reasons, Newcity skimps on snow removal. Skimped is an understatement. Although Newcity Department of Public Works officials knew along with everyone else in Newstate that the storm was coming on Tuesday, Newcity did not apply any type of de-icer to the roads in advance of the storm. The Department of Public Works applied no sand, either. During the snowfall itself, no Newcity plows were on the streets. After the storm ended on Tuesday evening, the Department of Public Works plows began to move snow but only on the interstates and on city streets that were also state highways. Evans Boulevard was not one of these streets, and no one from Newcity plowed Evans Boulevard on either Tuesday or Wednesday.

Newstate tourism officials claim that the sun shines 310 days a year in Newstate, and Newcity officials seem to rely, above all, on the sun to clear the roadways of snow. By contrast, the nearby city of Northern Newstate, known as NoNew, has the following Mission Statement:

> *First snowflake on the pavement, second snowflake in the back of the snowplow.*
>
> As a community, we all know snow. And we know you depend on us to get the job done. After all, snow removal operations are critical for safe transportation and the economic health of our city. Our snow fighters are prepared 24 hours/day, 7 days a week, and have earned NoNew a national reputation for snowfighting methods, technology, and deicing material storage. Snow fighters tackle snow and ice on Priority Routes, which will be maintained except under extreme conditions.

The approach of Newcity's Department of Public Works is entirely different. Ten years ago, the Department's director had met with her staff and decided to save money for the city by cutting the snow removal budget. The director, Ms. Letemfall, told her staff that big snowfalls were relatively infrequent, but sun was abundant. Most people who live in Newcity, she explained, had health insurance and also auto insurance, so that if they crashed in cars, some form of insurance would cover them. Consequently, she said that the Department of Public Works would de-emphasize snow removal after snowstorms. She estimated that the savings to the department's budget would be $3.4 million dollars annually. When one of her managers asked about potential liability via lawsuits, Ms. Letemfall—who still heads the department—explained that an injured person could overcome the Newstate Governmental Immunity Act only if Newcity had already received notice of the icy condition before the time of the injury, which during her 25 years at the department had never, ever happened.

There were at least two ways to see that, consistent with Ms. Letemfall's policy, Newcity had not plowed the street. First, snowplows push snow toward the curb. A snowplow in the curb lane of Evans Boulevard, which has two lanes of traffic in each direction—pushes snow toward and over the curb onto the sidewalk. There was no snow pushed onto the sidewalk that Tom had

plowed on Tuesday evening. Second, on Wednesday and on Thanksgiving Day, the street adjacent to the Medium Building property looked and was snowier than the blocks of Evans Boulevard before and after the Medium Building property. Wednesday had warmed up a bit, and as the temperature climbed above freezing, some of the snow on Evans Boulevard began to melt. The blocks before and after the Medium Building property became partially clear of snow as the sun and traffic worked to melt the snow. But next to the Medium Building sidewalk, the roadway remained snow-covered—particularly in the curb lane. The snow in the lanes of travel melted a bit during the day and, when the temperature dropped back below freezing before sunset, the snow and slush on the roadway re-froze into a bumpy, rutted mess that was substantially worse than the roadway before and after the Medium Building property.

The first injury near the Medium Building property happened on Wednesday, the day before Thanksgiving. On Wednesday night, Paul Motorist crashed his 1991 Miata while driving along Evans Boulevard immediately adjacent to the Medium Building property. Many think of the Miata as exclusively a three-season car not just because this sporty Japanese car is a convertible but also because rear-wheel-drive vehicles are generally weak on ice and snow and because the relatively small tire size of the Miata's tires can limit the car's ability to grip the roads.

However, the idea that the Miata is unsuitable for winter driving is a misconception. Mr. Motorist loved his Miata, and he outfitted the car with Bridgestone Blizzak snow tires—the very best snow tires on the market. He also weighted down the rear end of the vehicle by piling 300

pounds of sandbags into the trunk. Very rarely did Mr. Motorist feel the rear end of his beloved Miata slip while driving.

On the Wednesday before Thanksgiving, Mr. Motorist crashed the Miata. He was driving along Evans Boulevard to the east of the Medium Building property at about 7:30 p.m. The road surface was snowy, but the Blizzaks kept a good grip. The speed limit was 30 m.p.h., he was doing just about 35 m.p.h. He took a look at his phone to check on his fantasy football league; he was checking to see if anyone had dropped a good wide receiver whom he might pick up in order to strengthen his own team. When he looked up, he saw that an oncoming car had slid across the center line and was headed right toward him. This happened on the road immediately adjacent to the Medium Building property. There, the road surface was suddenly much icier, more rutted, more uneven. He tried to swerve right and thinks he might have been able to avoid the oncoming car, but the rutted road surface bucked the light Miata so that his car started to spin clockwise. The oncoming car—now mostly in his lane—slammed into the left rear side of the Miata, which jerked the car back counter-clockwise. The Miata then slid laterally across the icy road surface, ran onto the sidewalk, and the front, right side of the Miata slammed into a light pole. The airbag deployed and hit him in the face—good thing, too, because he was not wearing his seatbelt. Intense pain invaded his left leg, which turned out to be broken below the knee. As he sat in his totaled car, crushed up against the light pole, he stared at the clean sidewalk and the adjacent lawn and surmised with remarkable lucidity that Newcity had not plowed and that someone had put the snow from the sidewalk into the street. An ambulance took him off to the hospital, where orthopedic specialists set and casted his leg. The Miata is a total loss.

The second injury—at least of the ones we know about so far—happened in Medium Building's parking lot on Saturday morning. Ms. Betty Office is the officer manager for Dr. Saul Bones, an orthopedic surgeon. Dr. Bones does all of his surgery at the Newcity Hospital, which is a private facility, and sees his patients for follow-up at his office in the Medium Building. Dr. Bones has office hours Monday through Saturday, with just a half day on Saturday. A kindly doctor, he knows that his patients with jobs often have trouble getting to his office during the work week, so he has for years seen patients for half a day or so on Saturday morning.

Ms. Office arrived at 7:00 a.m. on Saturday morning to get things set up for Dr. Bones' first patient at 8:00 a.m. She parked, as was her habit, on the north side of the building near the spaces set aside for customers. When she got out of her car, she looked up to the northeast corner of the lot and saw, for the first time, the giant snow pile. She saw, too, that the snow pile had melted—presumably during the daytime since Tuesday night—and that the melted water had run downhill from the corner spreading out like a river delta or a fan as the liquid rolled downhill toward the customer parking spaces. At 7:00 in the morning, the water was glistening ice as the temperature had gone below freezing overnight and, indeed, was only 22 degrees at 7:00 a.m. The ice—a sloping, spreading skating rink on top of the asphalt—reached the customer parking spaces.

Mr. Calvin Unlucky fell on the ice in the customer parking spaces. He was coming for a follow-up visit with Dr. Bones, who had surgically repaired his broken humerus and torn rotator

cuff two weeks before Thanksgiving. A few weeks before Thanksgiving—on November 4—Mr. Unlucky had been rear-ended in his car while he was stopped at a stop sign. He had no fault whatsoever for this collision. The insured, seventeen-year-old boy who rear-ended him had been looking at his phone while driving and then crashed into the rear-end of Mr. Unlucky's car. The crash broke Mr. Unlucky's right arm, tore his rotator cuff, and has damaged disks in his spine, and left him with pain in his upper back and lower neck. The surgery to repair his right arm and rotator cuff had gone well; Dr. Bones was pleased with the result, and until the fall on the ice, Mr. Unlucky was pleased with his recovery.

When he fell on the ice, Mr. Unlucky fell first onto his right hip and then onto his shoulder. The pain was excruciating. He could feel the fracturing of his hip. After breaking his hip, he fell onto his right shoulder, which was also intensely painful. He then slid downhill about 12 feet until his shoulder collided with the curb. The pain was substantially worse than the recent car crash and the worst that Mr. Unlucky had experienced in his 64 years of life.

Mr. Unlucky lay on the ice on his back and looked at the blue sky. He wondered at his fate. He thought about karma. He wondered whether there was such a thing as past lives and wondered whether some misbehavior in a past life had led to his current predicament. After about five minutes lying on the ice, a young lawyer who had worked all night long in the building saw Mr. Unlucky as he lay on the ice. She remembered her Torts class, she thought about the duty to rescue, but, nonetheless, she rushed toward him and commenced a rescue. She asked if he was okay, checked to ensure that he was not bleeding, and called 9-1-1. She also

called Dr. Bones' office after Mr. Unlucky said he was on his way there for an office visit. An ambulance arrived within 7 minutes. Dr. Bones, horrified, had also come down to assist.

The ambulance transported him to Newcity Hospital, where he required additional rounds of surgery. He had broken his pelvis in six places, which required an orthopedic surgeon for repair. Although he felt upset with Dr. Bones, he nonetheless chose to have him provide his care. In a 6-hour operation, Dr. Bones repaired Mr. Unlucky's pelvis. The fall had damaged the original surgical site, and Dr. Bones determined that Mr. Unlucky required replacement of his shoulder joint with an artificial joint. That surgery will happen later this month.

Not until the early afternoon on Saturday—a few hours after Mr. Unlucky's fall—did the pile of snow in the northeast corner of the lot melt enough to expose the car. Everyone who saw the exposed bumper thought it was hilarious.

Not until Monday did anyone discover the body in the buried car.

Pat Nickell had been reading in their car on Tuesday afternoon. Pat, who during life chose "they" as a pronoun for themself, was reading James Joyce's Dubliners, a set of short stories that Joyce published in 1914.

Pending an autopsy, the coroner believes Pat's death was due to asphyxiation. As with an avalanche victim, the snow covered the car and sealed the car from all fresh air. A heart attack is

also a possibility. The coroner believes that the noise from Frona's dumping of the snow onto the car likely awakened Pat. They had no cell phone in the car. The weight of the snow prevented them from opening the doors or windows, and even so, opening the windows would simply have flooded the interior of the car with snow. Pending further testing, the coroner wonders whether Pat tried to start the engine and back the car up. There is no way to know if they honked the horn, but Frona would not have been likely to hear the horn anyway.

The coroner does know, however, that Pat awakened at some point. The coroner thinks they likely awakened when Frona dumped the snow on the car with sufficient force to scuff the paint and dent the body in places. Pat had reached the last page of the final short story in Joyce's Dubliners. The book was propped open on the passenger seat to the last page of the final story, ironically titled "The Dead." The final paragraph of the story reads:

> Yes, the newspapers were right: snow was general all over Ireland. It was falling softly upon the Bog of Allen and, further westwards, softly falling into the dark mutinous Shannon waves. It was falling too upon every part of the lonely churchyard where Michael Furey lay buried. It lay thickly drifted on the crooked crosses and headstones, on the spears of the little gate, on the barren thorns. His soul swooned slowly as he heard the snow falling faintly through the universe and faintly falling, like the descent of their last end, upon all the living and the dead.

Beneath the final paragraph, Pat had written in pen "Goodbye to my child Shannon. I fell asleep, and now the snow is taking me. I cannot escape. I despaired but am now at peace. Pat."

The Newcity police contacted Shannon, Pat's 45-year-old child. Shannon had been frantic since Wednesday, because Shannon talked every day with Pat on their landline. Emotionally, Pat and their child Shannon were close. Also, Pat sent Shannon a $5,000 check

every month. Shannon let the police know that Pat and their spouse, Bari, had not talked in more than 25 years. The police later confirmed that Bari and Pat never formally divorced.

YOUR JOB: You are an attorney for the General Insurance Company, which has issued a commercial general liability insurance policy for the Boomer Snow Removal Company with coverage limits of $5,000,000. Your job is to assess the liability of Boomer Snow Removal Company for the injuries to Mr. Motorist and Mr. Unlucky and for the death of Pat Nickell. Your analysis should include a complete discussion of likely claimants and the possible responsibility of other persons, entities, or insurance companies for these injuries and deaths. Unfortunately, the insurance policy is not yet available for your review. However, if you suspect that the insurance policy may exclude any claims, you should say so, but you should nonetheless analyze fully the potential liability of Boomer Snow Removal Company whether or not there may be coverage under the policy. There are no product liability issues. You should not analyze criminal law or contract law issues.

Appendices

The costs of medical services to date for Mr. Unlucky and Mr. Motorist are included in the first two Appendices. Appendix 3 includes some statutes that may be relevant.

Appendix 1

Mr. Calvin Unlucky
Date of Injury: November 4 & 30, 2019

Medical Billing

TAB #	PROVIDER	BILLING AMOUNT
1.	Newcity Ambulance 2 x	$3,575.00
2.	Newcity Hospital	$125,768.00
3.	Apria Healthcare of Newstate	$3,040.00
4.	Bones Orthopedics	$85,693.00
5.	Metro Pathologists	$3,575.00
6.	Newcity Anesthesia	$32,890.00
7.	Apex Emergency Group PC	$789.00
8.	Surgical Specialists of Newstate	$3,203.90
9.	Apex Pathology	$185.00
10.	Newstate Imaging Associates	$2,144.00
11.	Newstate Trauma Anesthesia	$3,203.90
12.	Safeway Pharmacy	$126.00
13.		
14.		
15.		
16.		
	TOTAL	

NOTES:

Appendix 2

Mr. Paul Motorist
Date of Injury: November 27, 2019

Medical Billing

TAB #	PROVIDER	BILLING AMOUNT
1.	Newcity Hospital	$16,060.62
2.	Newcity Ambulance	$1,975.00
3.	Newcity Family Medicine	$805.00
4.	Peak Orthopedic and Spine	$32,082.00
5.	Newcity Emergency Group	$12,356.00
6.	Newcity Images	$7,675.00
7.	Newcity Labs	$875.00
8.	Newcity Wellness	$210.00
9.		
	TOTAL	

Appendix 3: Statutes

Statute 1. When action survives death.

If any person entitled to bring any action dies before the expiration of the time limited therefor and if the cause of action does by law survive, the action may be commenced by the personal representative of the deceased person at any time within one year after the date of death and not afterwards.

Statute 2. Wrongful Death

(1) Whenever the death of a person, injuries resulting in death, or death shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death, and although the death was caused under circumstances that constitute a felony.

(2) Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased. Within 30 days after the commencement of an action, the personal representative shall serve a copy of the complaint and notice upon the person or persons who may be entitled to damages under subsection (3) in the manner and method provided in the rules applicable to probate court proceedings.

(3) the person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased:

(A) The deceased's spouse, children, descendants, parents, grandparents, brothers, and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.

(B) The children of the deceased's spouse.

(C) Those persons who are devisees under the will of the deceased, except those whose relationship with the decedent violated Newstate law, including beneficiaries of a trust under the will, those persons who are designated in the will as persons who may be entitled to damages

under this section, and the beneficiaries of a living trust of the deceased if there is a devise to that trust in the will of the deceased.

(4) In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. If a spouse and one or more children survive the deceased, they shall share equally any damages recovered.

Statute 3. Damages recoverable when comparative fault is established

(1) In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including comparative fault and assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion that the culpable conduct attributable to the claimant or decedent bears to the culpable conduct that caused the damages.

(2) In any action based on tort or any other legal theory seeking damages for personal injury, property damage, or wrongful death, recovery shall be predicated upon principles of comparative fault and the liability of each person, including plaintiffs, defendants and nonparties who proximately caused the damages, shall be allocated to each applicable person in direct proportion to that person's percentage of fault.

(3) The total of the percentages of fault allocated by the trier of fact with respect to a particular incident or injury must equal either zero percent or one hundred percent.

Statute 4. Liability to be several; amount of judgment; allocation of damages.

(1) In any action for damages, the liability of each defendant for compensatory damages shall be several only and may not be joint. Each defendant shall be liable only for the amount of compensatory damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against each defendant for his or her share of that amount.

(2) However, joint liability may be imposed on two or more defendants who consciously conspire and deliberately pursue a common plan or design to commit a tortious act or omission. Any person held jointly liable under this section shall have a right of contribution from other defendants who or that acted in concert.

(3) To determine the amount of judgment to be entered against each defendant, the court, with regard to each defendant, shall multiply the total amount of compensatory damages recoverable by the plaintiff by the percentage of each defendant's fault and that amount shall be the maximum recoverable against that defendant.

Statute 5. Premises liability. Actions against landowners

(1) As used in this section:

(A) "Invitee" means a person who enters or remains on the land of another to transact business in which the parties are mutually interested or who enters or remains on such land in response to the landowner's express or implied representation that the public is requested, expected, or intended to enter or remain.

(B) "Licensee" means a person who enters or remains on the land of another for the licensee's own convenience or to advance his own interests, pursuant to the landowner's permission or consent. "Licensee" includes a social guest.

(C) "Trespasser" means a person who enters or remains on the land of another without the landowner's consent.

(2) For the purposes of this section, "landowner" includes, without limitation, an authorized agent or a person in possession of real property and a person legally responsible for the condition of real property.

(3) In any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, the landowner shall be liable only as follows:

(A) A trespasser may recover only for damages willfully or deliberately caused by the landowner.

(B) A licensee may recover only for damages caused:

(I) By the landowner's failure to exercise reasonable care with respect to dangers created by the landowner of which the landowner actually knew; or

(II) By the landowner's unreasonable failure to warn of dangers not created by the landowner that are not ordinarily present on property of the type involved and of which the landowner actually knew.

(C) An invitee may recover for damages caused by the landowner's failure to exercise reasonable care to protect against dangers of which he actually knew or should have known.

(4) The circumstances under which a licensee may recover include all of the circumstances under which a trespasser could recover and that the circumstances under which an invitee may recover include all of the circumstances under which a trespasser or a licensee could recover.

(5) In any action to which this section applies, the judge shall determine whether the plaintiff is a trespasser, a licensee, or an invitee, in accordance with the definitions set forth in subsection (5) of this section. If two or more landowners are parties defendant to the action, the judge shall determine the application of this section to each such landowner. The issues of liability and damages in any such action shall be determined by the jury or, if there is no jury, by the judge.

(6) A landowner owes a duty of reasonable care under the circumstances with regard to activities conducted on the land.

Statute 6. Immunity of Governmental Entity or Employee

A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from the following:

(1) The natural condition of unimproved property.

(2) The condition of a reservoir, dam, canal, conduit, drain, or similar structure when used by a person for a purpose that is not foreseeable.

(3) The temporary condition of a public thoroughfare or extreme sport area that results from weather.

(4) The performance of a discretionary function; however, the provision of medical or optical care shall be considered as a ministerial act.

(5) The act or omission of anyone other than the governmental entity or the governmental entity's employee.

Statute 7. General limitation of actions - one year.

(1) The following civil actions, regardless of the theory upon which suit is brought, or against whom suit is brought, shall be commenced within one year after the cause of action accrues, and not thereafter:

(A) The following tort actions: Assault, battery, false imprisonment, false arrest, libel, and slander;

(B) All actions for escape of prisoners;

(C) All actions against sheriffs, coroners, police officers, firefighters, national guardsmen, or any other law enforcement authority;

(D) All actions for any penalty or forfeiture of any penal statutes;

(E) All actions for negligence, fraud, willful misrepresentation, deceit, or conversion of trust funds.

Statute 8. General limitation of actions - two years.

(1) The following civil actions, regardless of the theory upon which suit is brought, or against whom suit is brought, shall be commenced within two years after the cause of action accrues, and not thereafter:

(A) Tort actions, including but not limited to actions for negligence, trespass, malicious abuse of process, malicious prosecution, outrageous conduct, interference with relationships, and tortious breach of contract.

(B) All actions for strict liability, absolute liability, or failure to instruct or warn.

(C) All actions, regardless of the theory asserted, against any veterinarian.

(D) All actions for wrongful death.

(E) All actions against any public or governmental entity or any employee of a public or governmental entity for which insurance coverage is provided.

(F) All actions against any public or governmental entity or any employee of a public or governmental entity.

(G) All other actions of every kind for which no other period of limitation is provided.

Statute 9. General limitation of actions - three years.

(1) Except as provided in section (2), the following actions shall be commenced within 3 years or be barred:

(A) An action to recover damages for injuries to the person, including an action to recover damages for injuries to the person caused or sustained by or arising from an accident involving a motor vehicle.

(B) An action brought to recover damages for death caused by the wrongful act, neglect, or default of another.

(2) An action brought to recover damages for death caused by the wrongful act, neglect, or default of another and arising from an accident involving a motor vehicle shall be commenced within 2 years after the cause of action accrues or be barred.

Statute 10. Action for wrongful taking of personal property.

(1) An action to recover damages for the wrongful taking, conversion, or detention of personal property shall be commenced within 6 years after the cause of action accrues or be barred. The cause of action accrues at the time the wrongful taking or conversion occurs, or the wrongful detention begins.

Statute 11. Limitation of actions against architects, contractors, builders or builder vendors, engineers, inspectors, and others.

(1)(A) Notwithstanding any statutory provision to the contrary, all actions against any architect, contractor, builder or builder vendor, engineer, or inspector performing or furnishing the design,

planning, supervision, inspection, construction, or observation of construction of any improvement to real property shall be brought within two years after the claim for relief arises, and not thereafter, but in no case shall such an action be brought more than six years after the substantial completion of the improvement to the real property.

(B) A claim for relief arises under this section at the time the claimant or the claimant's predecessor in interest discovers or in the exercise of reasonable diligence should have discovered the physical manifestations of a defect in the improvement that ultimately causes the injury.

(C) Such actions shall include any and all actions in tort, contract, indemnity, or contribution, or other actions for the recovery of damages for:

(I) Any deficiency in the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property; or

(II) Injury to real or personal property caused by any such deficiency; or

(III) Injury to or wrongful death of a person caused by any such deficiency.

Statute 12. Action for damages for injury to property.

(1) Except as provided in section (2) and in any other case where a different period is expressly prescribed, an action, not arising on contract, to recover damages for an injury to real or personal property shall be commenced within 6 years after the cause of action accrues or be barred.

(2) An action, not arising on contract, to recover damages for an injury to real or personal property that are caused or sustained by, or that arise from, an accident involving a motor vehicle shall be commenced within 3 years after the cause of action accrues or be barred.

Statute 13. Obstructing highway--penalty

No person or corporation shall erect any fence, house, or other structure, or dig pits or holes in or upon any highway, or place thereon or cause or allow to be placed thereon any stones, timber, or trees or any obstruction whatsoever. No person or corporation shall tear down, burn, or otherwise damage any bridge of any highway, or cause wastewater or the water from any ditch, road, drain, flume, agricultural crop sprinkler system, or other source to flow or fall upon any road or

highway so as to damage the same or to cause a hazard to vehicular traffic. Any person or corporation so offending is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than ten dollars nor more than three hundred dollars. Each day such condition is allowed to continue upon any highway shall be deemed a separate offense.

Statute 14. Right-of-way use.

(1) Except for the actions of the road authorities, their agents, employees, contractors, and utilities in carrying out their duties imposed by law or contract, and except as herein provided, it shall be unlawful to:

(A) dig any holes in any highway, except to locate markers placed to identify sectional corner positions and private boundary corners;

(B) plow or perform any other detrimental operation within the road right-of-way except in the preparation of the land for planting permanent vegetative cover;

(C) erect a fence on the right-of-way of a trunk highway, county state-aid highway, county highway, or town road, except to erect a lane fence to the ends of a livestock pass;

(D) remove any earth, gravel, or rock from any highway; or

(E) obstruct any highway or deposit snow or ice thereon.

(2) Any violation of this section is a misdemeanor.

Statute 15. Materials left in highway.

It shall be unlawful for any highway superintendent or any other person to leave any materials in the traveled portion of any highway not closed to public travel in piles or rows after sunset without placing within one hour after sunset upon such piles or at the end of such rows a lighted lantern containing sufficient oil or fuel to keep the same burning until daylight. Any person violating any of the provisions of this section shall be liable to a fine of not less than $10 nor more than $100.

Statute 16. Miscellaneous prohibited or restricted acts

(1) Driving on sidewalk. The operator of a vehicle may not drive upon any sidewalk area except

at a permanent or temporarily established driveway unless permitted to do so by the local authorities.

(2) Racing. No operator of a motor vehicle shall participate in any race or speed or endurance contest upon any highway.

(3) Missiles, circulars, or pamphlets. No person shall throw any missile, circular, or pamphlet at the occupants of any vehicle or throw or place any missile, circular, or pamphlet in or on any vehicle, whether or not the vehicle is occupied. This subsection does not apply to any person who places on a vehicle educational material relating to the parking privileges of physically disabled persons if the person has a good faith belief that the vehicle is violating state or local law on parking for motor vehicles used by the physically disabled.

(4) Placing injurious substance on highway. No person shall place or cause to be placed upon a highway any foreign substance which is or may be injurious to any vehicle or part thereof.

(5) Spilling loads of waste or foreign matter. The operator of every vehicle transporting waste or foreign matter on the highways of this state shall provide adequate facilities to prevent such waste or foreign matter from spilling on or along the highways.

(6) Transporting persons in buildings. No person may operate a vehicle transporting a building on a highway if any person is in the building.

(7) Alighting from or boarding moving vehicle. No person shall alight from or board any vehicle when such vehicle is in motion.

(8) Clinging to moving vehicle. No person riding upon a motor bicycle, moped, or motorcycle may attach the same or himself or herself to any other moving vehicle upon a highway except when the motor bicycle, moped, or motorcycle is incapacitated and being towed. A tow device attached to a towed motor bicycle, moped, or motorcycle shall be attached so that an operator of the towed vehicle may release the tow device at any time.

(9) Towing sleds, etc. No person shall operate any vehicle or combination of vehicles upon a highway when such vehicle or combination of vehicles is towing any toboggan, sled, skis, bicycle, skates, or toy vehicle bearing any person.

(10) Driving on bicycle lane or bicycle way. No operator of a motor vehicle may drive upon a bicycle lane or bicycle way except to enter a driveway, to merge into a bicycle lane before turning at an intersection, or to enter or leave a parking space located adjacent to the bicycle lane or bicycle way. Persons operating a motor vehicle upon a bicycle lane or bicycle way shall yield the right-of-way to all bicycles, electric scooters, and electric personal assistive mobility devices within the bicycle lane or bicycle way.

(11) Opening motor vehicle door on highway.

(A) No person may open any door of a motor vehicle located on a highway without first taking due precaution to ensure that his or her act will not interfere with the movement of traffic or endanger any other person or vehicle.

(B) The operator of a motor vehicle located on a highway may not permit any person under 16 years of age to open any door of the motor vehicle without the operator first taking due precaution to ensure that opening the door will not interfere with the movement of traffic or endanger any other person or vehicle.

End of Appendix 3
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END OF EXAM

MEMO

To: Fall 2019 Torts students (and future Torts students)

From: Professor Thomas D. Russell

Re: Fall 2019 Torts Final Exam—"Snow on Snow on Snow"

Date: February 10, 2020

This was the first of your exams during your first semester of law school.

This memo serves three principal purposes. The first is to review some of the substance of the fall Torts exam with an emphasis on issues that distinguished lower and higher grades. Second, this memo offers a guide to students who would like to improve their exam skills in the future and suggests ways that students could rewrite their fall answers for practice. (I am happy to review re-written exams.) Third, I want this memo to be useful to future students and teaching assistants (AAPs).

This memo does not review the easiest aspects of the exam. I presume that students understand that deviation from the Duty, Standard of Care, Breach of the Standard of Care, Cause in Fact, Proximate Cause, Damages | Defenses outline earns the student a grade on the low end of the curve. Note, too, that this memo is not at all a "model answer" but rather a guide for how to write a model answer.

Two Overviews: Landowner Duties and the Role of Defense Counsel

One of the reasons that students have 75 hours to write the answer to House of Russell exams is because this period of time gives students the opportunity to reflect on the best ways to organize the answer. For this exam, two structures were most important. The first structure was organization of the exam with the varying duties of the landowners in mind. The second structure

stemmed from stepping into the role of the insurance defense lawyer. Ideally, during the second day, these two points of view would have come into focus while organizing and writing. This focus should have enhanced organizational clarity.

The best overall organizational structure for this exam derives from the various duty issues that the different injured parties face. The analysis begins with the premises liability statute. Statute 5 is a lightly modified version of Colorado's premises liability act. The statute defines the duties of defendants toward those injured on the Medium Building property by conditions and activities. Most students failed to consider the statute sufficiently; some students ignored the statute entirely.

The duties vary among the injured parties. Mr. Unlucky, an invitee, is injured because of condition on the property, although one might argue that an activity led to the injury. Mx. Nickell dies because of an activity, and so whether they are a known trespasser or, arguably, an invitee does not matter. Mr. Motorist is injured *off the property* due to a condition created due to a mixture of activities and conditions.

Your job was to think like an insurance defense lawyer, and your organization and analysis should have reflected this role. The best answers did so in a thoroughgoing way. The insurance defense lawyer wants to minimize the amount of money that the insurance company pays. Because the insurer will not defeat liability entirely in this exam, the job becomes pushing liability onto the claimants themselves, onto other defendants, and onto immune nonparties like Newcity. Students who took seriously the role of insurance defense lawyer wrote much stronger answers than those who simply listed potential claims without a sense of how the list of claims might serve the interests of the insurer.

Mr. Unlucky's Claim

The most straightforward and best starting point for the answer is Calvin Unlucky, who falls on the sheet of ice in the parking lot. Statute 5(2) specifies that "`landowner' includes, without limitation, an authorized agent or a person in possession of real property and a person legally responsible for the condition of real property." Many students disregarded the statute when analyzing the duties of these two defendants; some applied the statute to the building owner but not to the snow removal company. Medium Building Owner is a landowner and so is Boomer Snow Removal Company under this statute and under Colorado law, as we saw in class when we read *Wycoff*. An additional analytic route to the duty of the snow removal company is the concept of non-delegable duty, which we discussed on several occasions. Because Boomer Snow Removal was the insured, the defense lawyer's goal would be to push liability onto Medium Builder Owner if possible.

The problem offered the opportunity to conclude that neither Dr. Bones nor his office manager owed a duty to Mr. Unlucky. Dr. Bones is not a landowner under Statute 5(2). There's no suggestion in the problem that Dr. Bones or his office assistant were "legally responsible for the condition of real property." Once Mr. Unlucky made it to Dr. Bones' office, he would be an invitee with regard to Dr. Bones, so that if a lamp fell on him or he slipped and fell in the examination room, then the doctor would have duties toward him as an invitee. Out in the parking lot, though, Dr. Bones has no duty toward his patient.

Identification of the absence of duty toward Mr. Unlucky allowed you to demonstrate your understanding of the difference between cause-in-fact and duty. Although Dr. Bones' office manager might have called Mr. Unlucky to warn him about the hazardous condition and thereby prevented the injury, neither she nor the doctor had a duty to the patient while he was outside

their office on the building property. Many students presumed that because the office manager might have prevented the injury, Dr. Bones was negligent. This conclusion ignores the difference between negligence and strict liability. Causation alone is insufficient to establish liability, and there is no negligence without a duty. These are fundamental principles of the course.

Once within the proper duty framework, the analysis of Mr. Unlucky's injuries was straightforward within the checklist analysis of Duty, Standard of Care, Breach of the Standard of Care, Cause in Fact, Proximate Cause, Damages | Defenses. With regard to damages, further sorting between higher and lower scoring answers took place with regard to Mr. Unlucky's previous injuries. He had earlier been injured in a car crash for which Dr. Bones treated him. Because the list of costs in the appendix includes costs from treatment for the earlier accident and the new injury, students should have noted that the building removal company and Boomer would be on the hook only for the later injuries.

Some students argued that the 17-year-old driver who caused the first injury should be on the hook for everything. For proximate cause, that's a stretch but not a ridiculous one. I think a supervisor at the insurance company would appreciate the argument.

Mx. Nickell's Death

Considering the various duties of the insured to those injured, the best organization would next consider Mx. Nickell. Mx. Nickell was also injured *on* the property.

As above, both Medium Building Owner and Boomer Snow Removal Company were landowners under the statute. Again, many students ignored the statute for one or both defendants. Section 5(6) specifies that "A landowner owes a duty of reasonable care under the circumstances with regard to activities conducted on the land." Although the Colorado Premises Liability Statute lumps conditions and activities together, most states treat activities under the

reasonably prudent person standard as does 5(6). Therefore, whether Mx. Nickell was a known trespasser or an invitee who was there during usual business hours--perhaps to see a business owner--does not really matter.

Throughout the exam, Boomer Snow Removal Company will be responsible for the actions of its employees via respondeat superior. Too many students seemed not to understand that while the plaintiffs would name Tom and Frona, the only real reason to do so was to attach liability to the company and therefore the insurer. Put differently, many answers listed lawsuits that might be filed against everyone—good!—but without considering how those suits fit together. Simplistic listing of a bunch of possible lawsuits is not high-level analysis.

There were two routes to liability. The most straightforward was negligence. As we talked about frequently in class—especially during the "Who's been injured since the last class?" segments—piling snow in the high end of a parking lot is unreasonable. The snow always melts, and the water typically refreezes. I based my thoughts about the parking lot on the parking lot at my wife's office where snow from the December storm was still melting and refreezing a month later. The negligence analysis proceeds straightforwardly with regard to both landowners.

Oddly, some students felt that Boomer Snow Removal Company might be off the hook entirely because it was just "following orders" under the contract. There's no immunity from liability when a contract calls for a defendant to act negligently. The defendant should say "I ain't doing that." Indeed, as they agree on a negligent course of action, they participate in what Colorado and other states call a "civil conspiracy," which yields joint and several liability. This is precisely the opposite of the no-liability position that some students argued for Boomer Snow Removal Company.

The second route to liability allowed students to show off their knowledge of intentional

torts. Tom and Frona, acting at Boomer's direction, buried the car intentionally. Burying the car damaged the car, which was trespass to chattel. Trespass to chattel and false imprisonment are among those intentional torts between which intent transfers. The intention to be trespassing against a chattel thus transfers to the intentional tort of false imprisonment. Recall that in class a clever student offered a creative example of transferred intent with an attempted battery or assault using a Murphy bed that results in false imprisonment; the exam offers another example of intent transferred to false imprisonment. False imprisonment killed Mx. Nickell—either through suffocation or, maybe, by causing a heart attack.

Many students ignored intentional torts and thereby earned lower grades. The details of the exam included loud clues pointing toward the intentional tort claims. Additionally, as a practical matter, the content of the course splits into negligence and intentional torts, and, to date, my exams always include an intentional tort component. That is, an important exam skill is to look for issues of a type that the course content dictates ought to be included. A Contracts exam, for example, is going to include issues that touch upon Article 2 of the UCC. A Criminal Law exam will involve some discussion of *mens rea*.

The narrative also included sufficient detail to make clear that Mx. Nickell was conscious of his predicament and suffered. Their consciousness of confinement has relevance to the false imprisonment claim, but the suffering is more important. By not killing them instantly when Frona dumped the snow on the car, I gave you an opportunity to analyze the difference between a survival claim and a wrongful death action. Statutes 1 and 2. There were also issues as to who could make and gain from a claim in circumstances of marriage, estrangement, and children.

Finally, the intentional tort angle allowed students to show off their understanding of policy exclusions. The insurance defense lawyer would be gleeful if the claimant made an

intentional tort claim, because the insurer would not have a duty to indemnify and perhaps no duty to defend. An intentional tort claim might take the building owner off the hook. Even so, making an intentional tort claim along with a punitive damages claim might make sense depending on how Boomer's assets compare to his insurance coverage. Never assume that a defendant has no assets; instead, discuss the different options depending on whether or not the defendant has assets sufficient to pay an intentional tort and, perhaps, a punitive damages claim.

Mr. Motorist

Mr. Motorist is injured *off* the property. Therefore, his claim is not a premises liability claim but instead is akin to having a tree or boulder from the property fall onto his head while he's driving along.

Two parts of this problem played a big role in separating higher grades from lower—negligence *per se* and causation. Analysis of the Newstate comparative fault statute and the role of nonparties also played smaller roles in determining grades.

By plowing snow from the property into the street, Tom was negligent. For no cost at all, he might have pushed the snow toward the building's lawn rather than into the street. He would not need to have shoveled by hand; he could have driven the other direction or maybe changed the direction of his plow blade.

Tom also breached many statutory duties. This part of the exam gave you an opportunity to show that you understood that negligence *per se* requires the existence of a statute, violation of the statute, an injury against which the statute protects, and inclusion of the claimant within the class of persons whom the statute protects. Too many students suggested to me that they had never attended class, listened to the podcasts, or read any of the assignments by answering that because Tom violated Statute 16(1) by driving on the sidewalk he was negligent *per se*. Stronger

answers pointed out that Mr. Motorist was not a pedestrian and therefore not within the class of persons whom 16(1) protected. Many students too readily concluded that Evans Boulevard could not fit with the statutory definition of "highway." One smart student used Black's Law Dictionary to show that highway might mean any street.

Causation was the second important area in this part of the exam that distinguished stronger answers from weaker ones. Tom plowed the snow into the street. In the street, the snow mixed with the snow that was already on the street. Identifying the flakes that Tom plowed into the street is not possible. The but-for test fails. Therefore, for causation, the argument has to fall back on the substantial factor test.

A third area that distinguished answers in this section of the exam was the analysis of the comparative fault statute. Newstate is a pure comparative fault jurisdiction. Many students ignored this analysis. Oddly, some claimed that Newstate was some version of a modified comparative fault jurisdiction, which suggested they did not read the statutory appendix.

A final area that separated higher and lower grades on this problem was the treatment of Newcity. Like the City of Denver, Newcity enjoys immunity for its negligent failure to remove snow. That does not mean, though, that you ignore the city as a defendant. Instead, the insurer would be very happy to have the city as a very negligent non-party onto which the city could push liability. In class, I described this as trying a case to an empty chair. Statute 3(2) specifically notes that "the liability of each person, including plaintiffs, defendants and **nonparties** who proximately caused the damages, shall be allocated to each applicable person in direct proportion to that person's percentage of fault." Apart from Newcity, the other parties who would share in the fault were the oncoming motorist (likely) and Mr. Motorist himself.

Recurring Bad Practices that Lead to Lower Grades

Introductions. Many students wrote introductions to their exams. These introductions tended to cover general legal principles. Often these introductions were quite long. During the semester, I said many times that students should not write introductions. If any point is so important, the student should include this point within the analysis in connection with facts. Perhaps an introduction is useful with an early draft of the answer. But keeping the introduction in the final draft always makes the answer weaker and wastes words.

Appending Additional Claims/Points. A considerable number of students added additional claims or analytic points at the end of the exam following their analysis of the problem. As with the points made in introductions, those points always needed to be included where relevant in the preceding analysis. For example, some answers added another claim against the oncoming motorist at the end of the exam, even though they had started their analysis with Motorist's claims. The answer would be stronger if the additional claim were inserted into a better spot in the analysis. Again, this is among the reasons for 75 hours to answer.

Repetition: There were two different problems with regard to repetition. First, many students will describe the standard of care when identifying why there is a duty. Then, the student will restate the standard of care and describe its breach in the section that should be limited to the standard of care. Next, in the breach section, the student restates the breach. All of this weakens the analysis and wastes words.

The second form of repetition comes with failure to aggregate plaintiffs or defendants in an organized way. As I emphasized during exam preparation Q&A, if plaintiffs or defendants are similarly situated, then grouping them together for analytic purposes will strengthen the analysis.

No Facts: Too often, answers failed to attach facts to analysis. Here is a simple example.

If a defendant is active, then per *Heaven v. Pender* there is a duty. In answers, writing "when active, there's a duty" is insufficient without noting how the defendant was active—plowing snow, driving, or walking, for example. Similarly, just writing "medical bills" in a chart as a component for past economic loss fails to include any facts in the category medical bills. That's why there was a list of bills in the appendix, and that is why analysis of Unlucky's injuries required students to separate the costs of his previous injury from those of the fall he took in the parking lot.

Duty to Rescue: A number of students tried to build their analysis of the injury claims around the duty to rescue. The duty-to-rescue issue is not all that important to tort law generally; the question comes up rarely and typically only in odd situations. When someone runs over another person negligently with a car, a duty to rescue does arise, but our analysis of the claim proceeds based on the misfeasance not the nonfeasance. The exam did include one reasonable rescue of Mr. Unlucky, but nothing at all turned on this episode.

Grade Distribution

Consistent with faculty policy, the median grade was a B and the mean was 2.98. By law school policy, grades are final. This means there is no opportunity to argue or bargain for a higher grade. The table to the right includes the distribution of grades.

Grade	Count
A	**4**
A-	**10**
B+	**11**
B	**18**
B-	**27**
C+	**6**
C	**0**
C-	**1**
D+	**0**
D	**0**
D-	**0**
F	**1**
TOTAL	**78**