Torts Fall 2023 Report

Prof. Pi

Contents

1 Exam

1.1 Common Mistakes

There were several common mistakes, which I noticed recurring in several exam answers, upon which I wanted to remark to clarify any misconceptions. Only a small minority of students fell victim to any of these points, however the errors were sufficiently serious and occurred often enough that I feel they are worth mentioning.

- The elements of negligence (i.e., duty, breach, causation, and harm) are *not* factors. For example, even if you can prove a super strong claim of causation, that can't *compensate* for the absence of breach.

  Some students made arguments like, "Defendant will counterargue that there was no breach, and he will probably prevail. However, Plaintiff will counterargue that there was lots and lots of causation." No dice. The elements of negligence are *elements*. That means they must all independently be present, or else the rule is not instantiated.

- A "battery" is an intentional unwanted touching of another person. That the victim be a *person* is an element of the offense. You cannot "batter" property. Now, that gets modified slightly by the (very weird) precedent, *Godard v.*

Herzog. However even under *Godard*, the ultimate victim must still be a *person* (even if intent could be "transferred" from a dog).

- The term "judgment-proof" does not denote a *legal* status. It is a manner of saying that even if the plaintiff wins in court, he's never going to get his money (because the tortfeasor doesn't have it). Think of it as a slang term. It doesn't have any official significance. A defendant would never *argue* that they are judgment-proof. It wouldn't make sense. A judgment-proof defendant can still be found liable. He is only "judgment-proof" insofar as he'll never actually be able to pay the damages. It doesn't relieve him of liability. In other words, he'll end up owing the money to the victim until the day he dies. It doesn't mean he doesn't owe the money. It means he can't pay it.

  Imagine that Smith is indigent, and Smith negligently causes $1 million damage to Jones. The court will say that Smith owes Jones $1 million. It's true that Smith is "judgment-proof," because he can never pay the $1 million damages. However, that doesn't mean he's *not* liable. Of course, he *is* liable! It's just a practical impossibility that he can ever pay what he's liable to pay, because he doesn't have the money. As far as the law is concerned, he owes the money. The law doesn't care that he can't pay it (Jones will care).

  Put it another way. Saying that a defendant is "judgment-proof" is equivalent to telling the plaintiff that he's "shit out of luck." The plaintiff *is* owed the money. He's entitled to damages. However, he's never going to see the money because the defendant simply doesn't have it. You can try to garnish his wages, but you're probably never going to get much of it.

  Another analogy: suppose you get a $ 1 million loan from the bank. You spend all the money throwing wild parties and traveling the world. Now you have no more money. You have $0. Does that mean you don't owe the bank the $1 million you borrowed? Of course not. You still owe the money. You just can't pay it. You're "debt-proof," because you don't have the money to pay the bank. That doesn't mean you don't owe it. It just means that you can't pay it (and therefore *won't* pay it). Legally, you still do owe the money.

- There was a lot of confusion about superseding and intervening events. Suppose you have three events, A, B, and C. Let's suppose that A occurs at 1:00, B occurs at 2:00, and C occurs at 3:00. B is an "intervening event" between A and C because it occurs *in between* A and C (i.e., it occurs *after* A and *before* C).

No matter what A, B, and C are, it can *never* be the case that A is an intervening event between B and C, because A occurs *before both*. And C cannot be an intervening event between A and B, because C occurs *after both*. An event can only be "intervening" in relation to other events if it happens *before* one and *after* the other.

Next, a "superseding" event is a special kind of intervening event which breaks the causal chain. In other words, B could be "superseding" if it made C an unforeseeable consequence of A. All superseding events are intervening events, but not all intervening events are superseding events.

Many students wrote, for example, that Basefook's attracting the wolves was a "superseding event," relieving Northrop Grumman of liability to the laundromat. This is clearly wrong because Basefook's attracting the wolves did not occur "in between." Basefook's attracting the wolves happened before Grumman's drone's escape flight and any damage that it caused, therefore it cannot be an intervening event. Since it can't be an intervening event, it is definitely not a superseding event.

- Strict liability for the harm caused by animals (either domesticated or feral) only applies to animals that the defendant *owns*. Even if Basefook were responsible for attracting the wolves, there is no plausible reading of the facts whereby you could conclude that the wolves were Basefook's *property*. They didn't own the wolves. So the doctrine relating to animals simply does not apply.

- Many students struggled to establish the "duty" element for Basefook's liability to fairgoers (relating either to the wolves or the meteor). Many students tried to get to "duty" through the fairgoers status as "invitees." However, they were invitees of the fair organizers (T.O.R.T.)—not Basefook. Basefook did not possess the fairgrounds. The fair organizers did. Also, the fairgoers were clearly "invitees" and not "licensees." Many students wasted valuable time speculating about this. The event was clearly open to the public. That makes them invitees and not licensees.

  The duty that Basefook had was simply that they were engaged in an activity which created a risk of harm. Ultimately, that risk was most likely unforeseeable, so I think probably there was no duty, but the source of the duty (if there was one) would be from the riskiness of the activity. It would not arise from property (although the duty of the *fair organizers* would arise from property).

There was also a pretty strong duty arising from the duty to rescue—i.e., the duty to be non-negligent in rescue—which related specifically to the meteor projection. I'll talk about that more in the next section.

- Insults and vague threats are not "assault." Assault has elements. An assault occurs when the defendant intentionally causes the plaintiff a reasonable apprehension of offensive or harmful physical contact. Telling someone, "I'm gonna kick your ass," is not an assault. It doesn't become an "assault" until the defendant winds up to take the first punch.

  So even if you interpreted Suckerberg's remarks about "raining hellfire" down on some hapless employee literally (I think it's clear he was talking figuratively), it would not plausibly constitute "assault" by any stretch of the imagination. The elements are simply not present.

- In general, many students burned a lot of time talking about *facts* rather than the *law*. For example, whether attracting wolves was "foreseeable." Students got points for recognizing the foreseeability was an issue. Basefook would argue that it was unforeseeable, the victims would argue that it was foreseeable. If they connected this either to duty or proximate causation, then they got a point. However, students who went on for pages and pages speculating about whether wolves inhabit New Hampshire (they don't), or whether Basefook undertook efforts to uncover their prevalence in the region (this information is not provided in the prompt) were simply wasting time.

  Whether the arrival of the wolves was in fact foreseeable is a question for the jury. It's not a *legal* question. I explicitly warned you not to waste time getting bogged down with the facts. I told you to identify the legal issue, provide the argument, and move on. Arguing, counterarguing, and counter-counterarguing about the *facts* did not get you more than the one point you already received for identifying the legally significant argument.

- Many students conflated contributory/comparative negligence with joint/several liability. The difference is that contributory/comparative negligence relates to when the *victim's* negligence played some part in causing the harm. Whereas joint/several liability relates to when multiple injurers (who are *not* the victim) played some part in causing the harm.

  For example, if you thought that T.O.R.T. and Basefook were *both* responsible for the harm caused by the wolves, then the correct doctrine to invoke would *joint* liability or *joint and several* liability. If you thought that the fairgoers

and Basefook were *both* responsible for the harm caused by the wolves, then the correct doctrine to invoke would be contributory negligence or comparative negligence (the precedent *Huygens v. Leibniz* establishes that *comparative negligence* is the liability regime in New Hampshire).

- Many of you tried dutifully to phrase as much of your answer in "if-then" constructions as possible. Although most students understood the point of this, several did not. My preference for "if-then" constructions is not some sort of arbitrary linguistic fetish. The point of an "if-then" formulation is to make clear what the *rule* is. The sentences you were supposed to put into "if-then" form are the sentences expressing *legal rules*.

  You aren't making anything clearer when you state *premises* or *conclusions* in the form of "if-then." When you use an "if-then" formulation, it is because you're trying to make clear what the *legal rule* is. For example, some students would write things like, "If wolves see sheep, then they will attack." Perhaps this is true, but that's not a *legal* rule. It would play no role whatsoever in a legal argument. It might be a *biological* rule that a zoologist might find interesting, but it has nothing to do with liability. Work it out. So if the premise that "the wolves did see sheep," were true, then what would be the conclusion? The conclusion would be, "they will attack." That has nothing to do with liability or an element of negligence.

- Finally, many students' answers suffered from *ex post facto* reasoning. For example, I think any reasonable court would realistically find that the attack of the wolves was unforeseeable. In reality, people hold outdoor events in New Hampshire all the time. It would be absurd to hire security to patrol the perimeter for wolves. Even if you didn't know that wolves don't inhabit New Hampshire, clearly no one does in fact go around fearing random attacks from wild animals in towns—even small towns like Tilton—in New Hampshire.

  However, many students formulated arguments of the form: (1) If wolves do in fact attack the simulated sheep, then it was foreseeable; (2) The wolves attacked the simulated sheep; (3) Therefore, it was foreseeable. Premise (1) is simply false. Now, this argument would be sound if you replaced the word "foreseeable" with "possible." Obviously the fact that something happens implies that it was *possible* that it would happen. However, that doesn't make it *foreseeable*. Unforeseeable stuff happens all the time. The fact that an event occurs does not automatically mean that it could have been foreseen.

1.2 Major Issues

In this section, I'll run through some of the major issues that you should have spotted. Of course, simply spotting the issue was not sufficient to earn a full point. You'd have to give arguments and counterarguments to get a point. However, it may be instructive just to highlight which issues were actually relevant (i.e., where there were points to be had).

Note that this list is not intended to be exhaustive. There were many, many issues implicated by the fact pattern, and some students were quite creative in formulating counterintuitive (but legally plausible) arguments. The points mentioned here are simply what I considered to be the *main* issues where there were significant opportunities for argumentation.

- Park owner's liability.
  - In general, the unnamed owners of the private park would not be liable for most of the harms. They rented the space out to T.O.R.T. for the fair, so T.O.R.T. was the *possessor*—not the park owners. The fact that I did not give the name of the park owners in the prompt should have tipped you off that they wouldn't be relevant.

    The one claim that you could potentially have made against them is that the Grumman drone's escape from the fairgrounds implicated strict liability under the *Rylands* rule. But even with this argument, I think it works better with T.O.R.T. as the injurer rather than the park owners. I did award points if you thought the park owners would be liable under the *Rylands* rule though.
  - Other claims of liability against the park owners would almost surely be blocked because of foreseeability and superseding events. Those arguments were generally so implausible as not to count for any points.
- Basefook's liability.
  - There is a plausible negligence claim against Basefook for attracting the wolves. The critical issue is foreseeability. The arrival of the wolves was almost certainly unforeseeable, and the absence of foreseeability would block both the *duty* element (*Palsgraff*) and also the *proximate cause* element (*Wagon Mound*). Ultimately, it didn't really matter whether you thought it was foreseeable or not (that's a fact question)—you'd get a point for making an argument on the issue for either the plaintiff or the defendant.

- There is a plausible claim for IIED or assault for the meteor simulation. The problematic element here is "intent." Ordinarily, this would be fatal for the plaintiffs' claims, however *Godard* allows for "transferred intent" from animals. There are many "Level 2" arguments that could be made here, distinguishing *Godard* from *Wright v. Pei*, and working out whether *Godard* should be interpreted to apply to a circumstance where the intent to harm *any* animals (which were *not* the property of the victims) ought to "transfer." I'd estimate that a half dozen or so exams really went deep into the "Level 2" arguments, and they hit a treasure trove of points for this. One or two students made some good "Level 3" arguments to resolve the problem.
- There is a colorable argument for battery. Although the meteor was simulated and therefore did not make physical contact with the fairgoers, it did trigger a stampede, which did involve unwanted and harmful bodily contact. Again, the "intent" element is an issue. Moreover, it was not Basefook which did the contacting. The way to get points for battery would be to tie it to *Scott v. Shepherd* (the squib case), *Huygens v. Leibniz*, *Godard v. Herzog*, and *Wright v. Pei*. This is the way to try to repair the missing intent element.
- There's also a plausible claim of negligence for the meteor simulation. On the duty element, there is a reasonably strong argument that Basefook's duty arose from the attempted rescue from the wolves. The argument is that their attempt to rescue was conducted negligently and made the problem worse. The fact that the wolves ultimately did relatively little harm ($100,000 in medical costs) and the stampede caused relatively great harm ($2 million in medical costs) strongly indicates that Basefook exacerbated the harm.
- There was a foreseeability issue relating to the stampede. Many students noted the peculiarity of the panic, given that the fairgoers ought to have known that the screen was a simulation. Their behavior being quite unreasonable, there is a strong argument that it was unforeseeable that the meteor simulation would cause a stampede. However, there is also a decent counterargument available that their unreasonable response was foreseeable despite the unreasonableness. On this point, *Scott v. Shepherd* (the squib case), *Leibniz v. Huygens*, *Godard v. Herzog*, and *Wright v. Pei* would have been useful in formulating a "Level 2" discussion.
- There is also a colorable argument that the fairgoers, by stampeding away

from the image of a meteor which they should have known to be a simulation, were comparatively negligent. This would not have relieved Basefook of liability entirely, but could have mitigated it. *Huygens v. Leibniz* would have been helpful here.

  - Any other possible claims of liability were almost certainly foreclosed due to foreseeability and superseding events.

- Lockheed's liability.

  - Boeing may try to argue conversion because their drone was completely destroyed by Lockheed's napalm cannon. However, conversion is an intentional tort, and Lockheed did not *intend* to destroy Boeing's drone.
  - Note that there is an issue relating to the identity of the "defendant." The Lockheed drone was operated by an army officer. Since he's not an employee of Lockheed, *respondeat* would not apply. There isn't really any vicarious liability issue here. It's a red herring, since the army officer didn't *intend* to destroy Boeing's drone either.
  - The best claim that Boeing has against Lockheed is that the faulty wiring was a *manufacturing defect*, triggering strict liability. The analysis is pretty straightforward, and Lockheed would surely be liable.
  - Lockheed's best counterargument is that Boeing was comparatively negligent. Boeing was comparatively negligent due to "defective marketing." They failed to warn the operator to disengage the self-defense protocol on their own drone, and therefore they should bear some share of the cost.
  - There is also a colorable argument that operating the Lockheed drone was an "abnormally dangerous activity," triggering strict liability. There were also good counterarguments against this along the lines of *Miller v. Civil Constructors*.
  - Another source of liability—which surprisingly few students remarked upon—is negligence for having the drone be *armed* in the first place. This wasn't a combat deployment. It's fine that the drone was *capable* of spraying napalm—that's a sensible aspect of its design as a military instrument. However, why would they load the drone with live ordinance for a technology fair exhibition in a small New England town? Of course, this would also apply to Boeing's comparative negligence loading its drone with live missiles.

  - Northrop Gumman could also claim that Lockheed is liable to them, but the decision of the navy pilot operating their drone to engage the autonomous escape protocol probably supersedes, blocking liability.

- Grumman's liability.

  - Since the Grumman drone was operating autonomously when it caused all the harms that could be attributed to it, all the claims against Grumman will arise from a theory of "design defect." This is a quasi-negligence rule, where we compare the existing design against alternative designs.
  - Bert could argue that Grumman programming its autonomous escape protocol to fly low was a design defect. The counterargument is that an alternative design (i.e., flying higher) would make the drone detectable to enemy radar in a combat situation. An alternative design would therefore be unfeasible.
  - A better argument for Bert is trespass. The problematic element here is "intent." While Grumman certainly did not intend for the drone to trespass on Bert's airspace, Bert could plausibly argue that they knew it would likely enter the land of another, analogizing to *Pegg v. Gray*. Grumman will argue that *Malouf* is applicable. There were many "Level 2" arguments available at this point, although it went largely untapped (I can't recall any students actually pursuing this line of arguments).
  - Grumman can also argue that it was unforeseeable that someone would be on their roof, blocking the proximate cause element. Bert would claim that someone setting up Christmas decorations on their roof in December is foreseeable.
  - Grumman can also argue that Bert was comparatively negligent because he was not using any safety gear while up on his roof. To get full points for this, you'd have to argue that Bert's failure to use any precautions constituted negligence.
  - Grumman can similarly argue that Bert *assumed the risk* of falling from his roof.
  - The laundromat will also argue that Grumman is liable to them due to the design defect. Specifically, the inability to detect objects smaller than six inches, which caused its collision with the power lines, resulting in the electrical outage. Here, the argument that there was a design defect is much stronger.

  - Grumman will counter argue no duty to prevent pure economic harms. Almost all students got this point. However, very few students noticed that the Grumman drone was also responsible for the obstruction on the road, which caused the ambulance to dent the laundromat's front door. Since the Grumman drone was the cause of both harms, it was *not* a pure economic harm (the dent to the door was a physical harm to property). Grumman would here counterargue that it was not the cause of the dent because the actions of the ambulance driver supersede.
  - Another counterargument that the laundromat might try is that the loss of business was foreseeable, an exception to the pure economic harms doctrine. Here, the question reduces to whether the specific harm was foreseeable (*Doughty v. Turner*) or whether some unspecified sort of harm was foreseeable (*United Novelty v. Daniels*, "fire rat").

- Tod Kaczynski's liability.
  - Clearly, Tod committed a *trespass to chattels* against Basefook. It was not a *conversion*, because the fact pattern specifically states that the Reality 2.0 screen would be repairable. There is no question that he intended to damage the screen, nor whether he was the cause. I did give fractional points (generally 0.8 points) to students who called it a "conversion."
  - Tod's best argument is that by destroying the Reality 2.0 screen, he conferred a benefit to Basefook, because allowing the meteor simulation to continue could plausibly have caused more damage. Since the stampede ceased immediately upon destruction of the screen, it was a direct consequence of the trespass that Basefook was not liable for greater harms to other fairgoers. Restatement §920. So Tod's liability of $3 million should be offset by the reduction in Basefook's liability to other fairgoers.

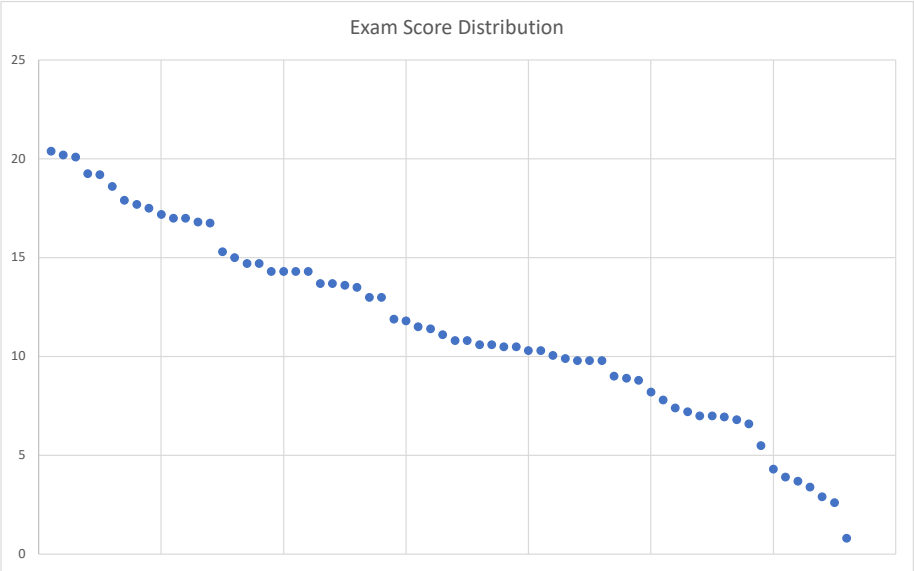
2 Statistics

In this section, I'll provide a breakdown of the points distribution and how final exam scores translated to final grades.

- Exam Score
  - The highest scoring exam earned 20.4 points.
  - The average exam score for the class was 11.56 points.

  - The standard deviation was 4.822 points.

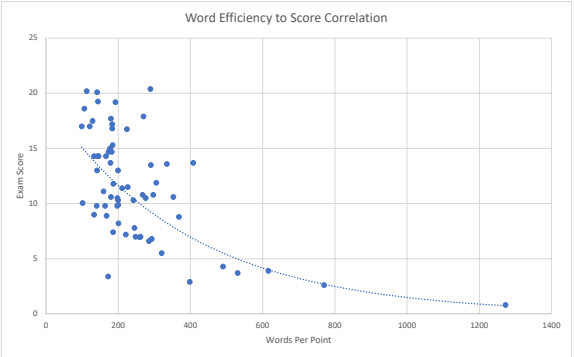
- The exam score distribution is given in the following graph:

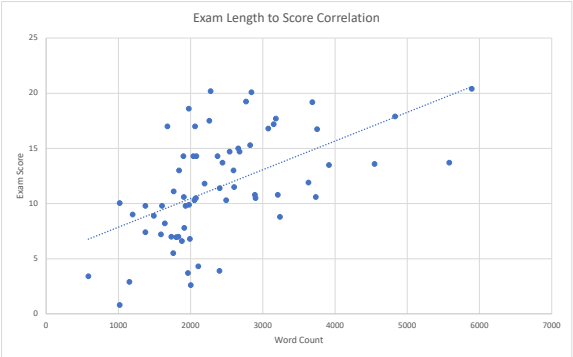


- Exam Length
  - The longest exam was 5,784 words.
  - The shortest exam was 585 words.
  - The average exam length was 2,423 words.
- Efficiency
  - The most "efficient" exam was 98 words per point.[1]
  - The least "efficient" exam was 1,272 words per point.
  - The average exam spent 251 words per point.
- As you will see from the following scatter plots, exam score was highly correlated with both word count and efficiency.[2]

[1] I define "efficiency" in this context as the total word count divided by the number of points earned on an exam.

[2] If you have difficulty viewing the graphs, you should be able to zoom in as arbitrarily close as you would like without loss of resolution.

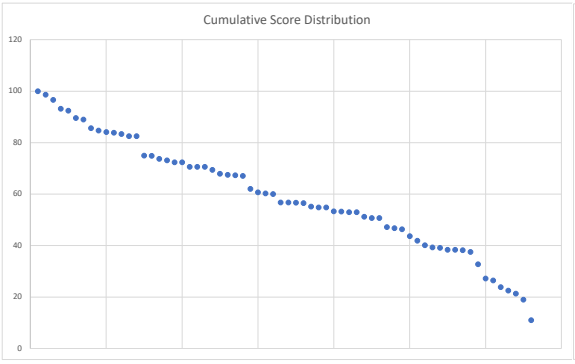


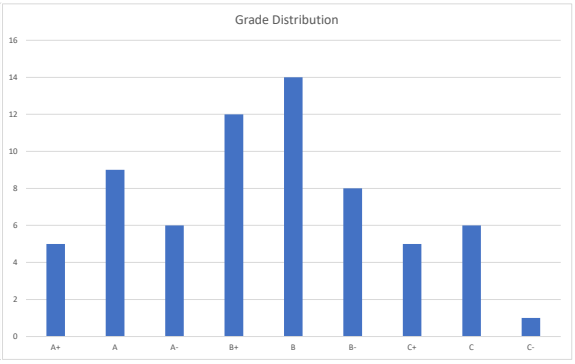


- Cumulative Score
  - The average cumulative score for the class was 59.37 points.
  - The standard deviation was 21.52 points.
  - Given exam score x and participation score y,[3] a student's cumulative final score is given by the formula:

$$S = \frac{90 \times x}{20.4} + y$$

  - The cumulative score distribution and grade distribution are given in the following graphs:[4]





[3]Participation was scored in the range $[0, 10]$.

[4]If you have difficulty viewing the graphs, you should be able to zoom in as arbitrarily close as you would like without loss of resolution.

- The cumulative score to grade conversion was:

Grade	S
$A+$	> 92.1957
A	81.433–92.1957
$A-$	70.671–81.433
$B+$	59.91–70.671
B	49.148–59.91
$B-$	38.386–49.148
$C+$	27.624–38.386
C	16.862–27.624
$C-$	6.100–16.862

- The grade mean for the course was 3.1562.[5]

[5]The law school requires that the average grade for large lecture courses be less than 3.16.