TORTS
Mr. Martin
March 12, 2004
Social security no.:____________________

MIDTERM EXAMINATION

This is an open book examination. You may use any materials which you have brought with you whether prepared by you or by others. Questions will be weighted equally and you should spend equal amounts of time on each question. Please write legibly, leave a margin on the left-hand side of the page, and start each question on a new page. Use only your social security number to identify your blue book. If you use more than one blue book, make sure that your social security number is on each one and number the blue books ("No. 1 of 2," "No. 2 of 2," etc.).

If you are taking this examination at 9:00 A.M., you must enter your social security number in the space above and turn in this white examination paper along with your blue book. This is a temporary measure for examination security purposes only, and this white examination paper will be returned to you.
QUESTION ONE

Rick Ruffian, a teenager who should have been in school that day, entered a Massachusetts Bay Transportation Authority (MBTA) subway station and jumped a turnstile without paying the fare. He ran toward a train and entered it just as the doors were closing. The train was already crowded and Ruffian's entry caused him to collide heavily with two persons on the train, Granny and Frannie. Granny, who was elderly and had very brittle bones because of a hereditary condition, suffered a broken pelvis. Frannie was carrying a box of delicate crystal goblets, two of which were shattered by the impact.

Danny (who was standing next to Granny) saw Ruffian coming and, thinking that he would be hit hard by Ruffian, suffered a momentary fainting spell.

Polly Copper, a policewoman on her way to work, saw what happened to Granny and Frannie and immediately came to their aid by shoving Ruffian against the door. This action caused the hydraulic system controlling all of the doors of the train to jam. When the train reached the next station, it was impossible to let people out. Fifteen minutes elapsed before MBTA transit workers succeeded in opening the doors from the outside. Polly then arrested Ruffian and took him to the police station.

What intentional torts, if any, have been committed? By whom? Why?
QUESTION TWO

Edward entered Andover High School in September, 1998, and graduated in June, 2002. Notwithstanding the receipt of a diploma, he lacks the ability to comprehend written English on a level sufficient to enable him to complete applications for employment.

Edward sued the Andover School Committee for educational malpractice. His complaint alleged that the School Committee through its employees:

1. Gave Edward passing grades in subjects that he had failed so that Edward would continue to be eligible to play football;

2. Failed to evaluate Edward’s mental ability using appropriate testing techniques; and

3. Failed to develop remedial programs for Edward and other similarly underperforming students.

Edward seeks damages in the amount of $5,000,000.

Assume that the allegations of Edward’s complaint are true and that Edward can prove them. Also assume that the School Committee is liable for the acts and omissions of its employees. What, additionally, will Edward have to prove in order to make out a prima facie case of educational malpractice?
QUESTION THREE

Chapter 121 of the Consolidated Laws of the state of Catatonia (one of the United States) is entitled "Deadly Weapons." Section 4 of chapter 121 provides as follows:

Sellers of Deadly Weapons

Any person engaged in the retail sale of deadly weapons shall keep and maintain in his place of business at all times a book which shall be furnished to him by the State Tax Department. In this book he shall enter the date of sale, the name and address of the purchaser of any deadly weapon, the number and kind of deadly weapons so purchased, the age of the purchaser, and the names and addresses of two residents of the county wherein the sale is made who shall appear in person and positively identify the purchaser before the sale shall be made.

In April of 2003 Rex Robber purchased a .22 calibre rifle and ammunition from a Sears, Roebuck store in Velvelville, Catatonia. Six weeks later Robber, armed with this rifle and ammunition, robbed a bank in Velvelville. In the course of the robbery Robber shot and wounded Virgil Victim, an off-duty police officer who was employed as a guard at the bank. Robber has been convicted of these crimes and is in prison. Victim now sues Sears, Roebuck for his injuries.

Pre-trial discovery has established the following facts which you may treat as undisputed:

1. Robber had at the time a record of four felony convictions including one for armed robbery.

2. As a convicted felon, Robber was prohibited by Catatonia law from purchasing the rifle and ammunition.
3. Two residents of the county in which Velvelville is located did not appear to confirm Robber's identity at the time of his purchase of the rifle and ammunition. Instead, Robber was asked to produce his Catatonia driver's license from which the store recorded the identifying information.

4. At the time of the sale, Robber also completed a Federal Firearms Transaction Report, Form 4473. Although Robber had a criminal record, he stated in Form 4473 that he had never been convicted of a felony.

5. The rifle and ammunition are within the scope of the definition of "deadly weapon" in Chapter 121 of the Catatonia Consolidated Laws.

On Sears, Roebuck's motion, the trial judge granted summary judgment to Sears, Roebuck.¹ Virgil Victim appeals. What are the arguments that Victim will make to the appellate court in seeking to reverse the grant of summary judgment?

¹ A motion for summary judgment is a pre-trial motion. In a tort case the motion for summary judgment is almost always a defendant's weapon. The defendant asks the court to grant judgment for the defendant because, after an adequate opportunity for pre-trial discovery, the plaintiff has not shown evidence that will enable him or her to survive a motion for a directed verdict at trial.
TORTS
Mr. Martin
March 22, 2004

MIDTERM EXAMINATION
COMPLETE ANSWERS

Question One

As a teenager, Ruffian presumably does not lack capacity to commit intentional torts, though he might attempt to show the contrary.

Ruffian trespassed on the real property of the MBTA when he jumped the turnstile because he was entering without the permission that is granted to those who pay the fare.

All remaining tortious conduct by Ruffian could be analyzed as negligence. However, since the question is about intentional torts, no more will be said about negligence.

Granny and Frannie were victims of battery by Ruffian, if collision by Ruffian exceeded the normal bounds of physical contact and jostling that people expect on a crowded subway car. Evidently it did, in view of the consequences. If so, and if he had the necessary intent for an intentional tort, Ruffian is liable for all Granny's injuries, however unforeseeable, in accordance with the "thin skull" rule. As to intent, if Ruffian knew with substantial certainty that he would collide with somebody when he pushed the train door, then he had the necessary intent.

Ruffian converted Frannie's goblets when he caused them to be dropped and destroyed. Because the goblets are totally destroyed the tort is conversion (not trespass to chattels) and Ruffian must pay their full value.

Ruffian assaulted Danny if Danny reasonably believed that he was about to become the victim of a battery by Ruffian, and if Ruffian had the necessary intent. (See the note about Ruffian's intent, above). Because Ruffian's conduct was not directed at Danny for the purpose of causing emotional distress, and because Ruffian's conduct probably wouldn't be considered "extreme and outrageous," Danny probably doesn't have a claim for intentional infliction of emotional distress.

Polly Copper committed battery upon Ruffian when she shoved him against the subway car door, and false imprisonment if she prevented him from moving freely. Even if she can defend her conduct as privileged, she would lose this defense if she used excessive force. Polly Copper probably falsely arrested Ruffian.
because the question does not say anything about a misdemeanor committed in her presence nor about probable cause to believe that Ruffian had committed a felony.

All of the passengers on the subway car have claims for false imprisonment against Ruffian and Polly Copper. Their intent to commit the torts of battery is transferred to the false imprisonment that occurred.

Finally, and similarly by transferred intent, the MBTA has claims against Ruffian and Polly Copper for trespass to chattels, namely damage to the subway car door hydraulic system.

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[This question appeared on a recent Massachusetts bar examination].

**Question Two**

Educational malpractice is a form of negligence. Therefore Edward must prove all of the elements of a negligence case, namely duty, breach, cause in fact, proximate cause and damages.

1. **Duty.** Unquestionably the School Committee has a duty to Edward. However, the characterization of this duty is important. Is it the School Committee's duty "to educate each student," or only "to offer instruction to each student?"

2. **Breach.** Breach will be determined in accordance with the professional standard of care, namely did the School Committee act towards Edward in accordance with the practices of the usual qualified school committee in Massachusetts. A standard of care will also be derived from the increasingly important body of federal and state statute law on the subject of elementary and secondary education, particularly in connection with so-called "left behind" and special needs students. As in any professional negligence case, expert testimony will be required in order to prove the element of breach.

3. **Cause in fact.** Proof by the "but for" test (i.e. Edward would have learned to read and write but for the negligence of the School Committee) will be difficult because most people understand that educational attainment is multi-causal. Edward would have to

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1. "School Committee" is the Massachusetts name for what is usually called (outside New England) the "School Board," the elected body that supervises public education within its geographical district.
exclude other causes such as: he was lazy, skipped school, didn't do homework, etc. Proof by the "substantial factor" test would be much easier for Edward (i.e. was the School Committee's breach of duty a substantial factor in causing Edward to fail to learn to read and write?). [This is a good example of how the "substantial factor" test of causation significantly lowers the bar for plaintiffs in a complex case].

**Proximate cause.** If the School Committee was in breach of duty, the result (Edward's illiteracy) is certainly within the risk created by the breach. However, pragmatic concerns may limit the courts' willingness to find a proximate causal connection between substandard performance by public educational authorities and substandard educational attainments by their students. These pragmatic concerns include fear of a flood of lawsuits (is every failing student a potential plaintiff?), reluctance to set standards in an area of public life governed by the other branches of government, and the fear that damage awards will divert resources and thus worsen rather than improve the overall problem.

**Damages.** As in any tort case, damages must be proved with reasonable certainty. Edward will try to relate his damages to lost income over a lifetime. The School Committee will argue that damages, if awarded at all, should be limited to the cost of tuition at remedial programs.

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[There is a note on educational malpractice at pp. 169-170 of your casebook].

**Question Three**

Sears, Roebuck ("Sears") has unquestionably violated a statute. Although reference to the State Tax Commission suggests that the statute may have a tax collection purpose, it is a fair inference that any statute affecting or controlling the sale or use of firearms has a public safety purpose as well. Therefore this is a case to be analyzed under the doctrine called negligence *per se*. If Sears was (at least arguably) negligent *per se*, then this is evidence sufficient to prevail against a motion for directed verdict at trial. Accordingly, Victim will argue, because the negligence *per se* doctrine is applicable summary judgment was wrongly granted and the case should be remanded for trial.

Negligence *per se* is to be invoked where there is a violation of a statute which has a public safety purpose, where the harm that occurs is that which the legislature was trying to prevent, where the victim is within the class of people that the legislature was trying to protect, and where there is a proximate causal connection between the violation and the harm.
In passing the two-witnesses statute, Victim will argue, the legislature was trying to assure more positive identification of persons who purchase deadly weapons. The underlying purpose of this and all similar gun-control measures is to prevent dangerous weapons from coming into the hands of people who are likely to misuse them (which people, according to another Catatonia law, include convicted felons). Thus the harm that occurred--use of a firearm by a previously convicted felon to commit another crime--was precisely that which the legislature was trying to prevent.

Victim will argue that the class of people intended by the legislature to be protected is the general public, any one of whom may become a victim of firearms-related crime. Victim is a member of the general public.

Cause in fact exists because the rifle and ammunition sold by Sears were the same ones used by Robber when he shot Victim. As to proximate causation, some courts hold that proximate cause is established as a matter of law when the requirements of the negligence per se rule are met. All that Victim needs to do to win on appeal, however, is to convince the appellate court that on these facts a jury could find a proximate causal connection between Sears's violation and victim's injury.

The negligence per se rule amounts to imposing strict liability on Sears for the acts of a third party criminal over whom Sears has no control. In effect, Sears is being made the liability insurer for a felon. Some people find this unfair. However, the old proximate cause rule that a third party's criminal act cuts off the chain of causation (thus excusing any act of negligence previous in time) has been greatly eroded in the modern caselaw.

Against this perceived unfairness also must be balanced the beneficial deterrent effect of strict liability. When it comes to firearms, there is much to be said for requiring strict obedience to existing laws even though there may be debate over whether new and additional laws are needed. Finally, from a risk-utility perspective, the cost to retailers of compliance with the two-witness law is minimal while the potential harm arising from violation is great.

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[This question was derived from Hetherton v. Sears, Roebuck & Co., 593 F.2d 526 (3rd Cir. 1979) (applying Delaware law).]

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2 Your instructor was, however, surprised to find how few were these people among those who answered this exam question.