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. If there are sub-parts within a question, each sub-part will be weighted equally. 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

Cheer up, folks. The baseball season is just around the corner.

Part A.

On September 16, 1975, the Baltimore Orioles were facing the Boston Red Sox at Fenway Park. Ross Grimsley was a pitcher employed by the Orioles. Some spectators, including David Manning, were seated behind a wire mesh fence in seats located in right field. In order to be ready to pitch if called upon, Grimsley had been warming up in the bullpen during the first three innings of play. The bullpen was (and is) located near the right field seats.

Spectators in the right field seats continuously heckled Grimsley. On several occasions immediately following heckling, Grimsley turned and looked directly at the hecklers, not just into the stands.

At the end of the third inning Grimsley, after his catcher had left his catching position and was walking over to the bench, faced the seats and wound up as though to pitch in the direction of the plate towards which he had been throwing. However, the ball travelled from Grimsley's hand at an angle of 90 degrees to the path from the pitcher's mound to the plate, and directly towards the hecklers in the seats. The ball passed through the wire mesh fence and hit the plaintiff, Manning, causing injury.

Is there evidence on which a jury could find Grimsley liable to Manning for battery? Explain.

NOTE: This is a true story reported in Manning v. Grimsley, 643 F.2d 20 (1st Cir. 1981).
Part B.

In the seventh and deciding game of the 2005 World Series the New York Mets were playing the Red Sox at Fenway Park. At the end of ten innings the game remained tied at 4-4. In the first half of the eleventh inning the Mets scored a run to lead, 5-4.

In the bottom of the eleventh inning the Mets brought on Pedro Martinez (remember him?) as relief pitcher. Uncharacteristically, Pedro walked the first Red Sox batter. The Red Sox then sent to the plate pinch hitter Ed "Whiney" McSwiney. McSwiney drilled Pedro’s first pitch into the center field bleachers for the game-and series-winning home run.

Dan Fan in the bleachers saw the ball heading right towards him. He took off his $80 Eddie Bauer sport hat and used it to catch the ball. However, the ball tore the hat from his grip. Instantly there was a scrum as dozens of fans dove to recover the ball. The quickest was Annette Fanette who recovered both ball and hat. She stashed the ball in her purse, put the hat on her head, and disappeared into the deliriously celebrating crowd. McSwiney has publicly offered $10,000 for the return of the ball.

Has Annette converted Dan’s property? Explain.

Part C.

Assume that the answer to Part "B" is "yes," regardless of your actual answer. What are Dan’s damages? Explain.

NOTE: This is not a true story, but see Popov v. Hayashi, 2002 WL 31833731 (Cal.Super. 2002).
QUESTION TWO

Paladin Enterprises, a publisher in Oregon, publishes do-it-yourself instructions for criminals and terrorists including a book called *Hit Man: A Technical Manual for Independent Contractors* ("Hit Man"). *Hit Man* explains in detail how to contract for, commit, and get away with murder, from negotiation of the contract (solicit business through a personal acquaintance whom you trust, and get all expense money up front) to disposing of the body ("The corpse should be weighted with the standard concrete blocks, but it must be wrapped from head to toe with heavy chain as well to keep the body from separating and floating in chunks to the surface"). Approximately 13,000 copies of *Hit Man* were sold during the years 1983-1999.

James Perry ordered a copy of *Hit Man* from Paladin Press and also another book entitled *How to Make Disposable Silencers*. Prepped by the instructions in *Hit Man*, Perry murdered Mildred Horn, her eight-year-old quadriplegic son Trevor, and Trevor's nurse Janice Saunders, by shooting Mildred Horn and Janice Saunders through their eyes and by strangling Trevor Horn.

Perry's crime was not one of vengeance, and he did not know any of his victims. Nor did he commit the murders in the course of another offense. Perry acted instead as a contract killer, a "hit man," hired by Mildred Horn's ex-husband Lawerence Horn to murder his ex-wife and son in order that he, Lawrence, would collect the $2 million that his son had received for the medical malpractice
accident that left him paralyzed for life. At the time of the murders this money was held in trust for Trevor and, under the terms of the trust instrument, the trust money was to be distributed tax-free to Lawrence in the event of Trevor’s and Mildred’s death.

Perry and Lawrence were convicted of the murders. At Lawrence’s trial, Perry (who had already been convicted) freely testified that in committing the murders he had followed countless of Hit Man’s 130 pages of detailed factual instructions on how to murder and how to become a professional killer.

The estates of Mildred Horn, Trevor Horn and Janice Saunders now sue Paladin Enterprises for negligently publishing Hit Man. What will the estates have to prove in order to recover?

**QUESTION THREE**

At the close of a jury trial, after all of the evidence has been introduced and either (depending on the jurisdiction) before or after the lawyers’ closing arguments, the trial judge instructs the jury as to the principles of law that they are to observe even while coming to their own conclusions about the facts.

A party to litigation is entitled to an accurate instruction on the law about any issue that has been raised by that party’s evidence, so long as the party (by counsel) requests such an instruction. The trial judge’s refusal to give an instruction, or inaccurate statement of the law while doing so, is often the basis of a losing party’s appeal. Consequently lawyers prepare their requests for jury instructions with great care, typically even
before the trial begins, and the judge discusses with the lawyers the requests, and the judge's proposed formulations, at often-lengthy lobby conferences out of hearing of the jury.

To reduce the likelihood of judicial error, many American jurisdictions draw up and publish model jury instructions which cover issues that repetitively arise in trials. These are sometimes called "pattern instructions."

A pattern instruction often sought by defendants in medical malpractice cases is the "honest judgment" or "bona fide error" instruction illustrated in a Virginia case:

The Court instructs the jury that if an Emergency Room physician in making his diagnosis and in rendering treatment brings to his patient that degree of care, skill and knowledge which is possessed by the average member of his profession in the same line of practice... and under like or similar circumstances, he is not liable for damages resulting from his honest mistake or a bona fide error in judgment. You are instructed that the law requires a physician to base any professional decision that he may make on skillful and careful study and consideration of the case, but when the decision depends on an exercise of judgment, the law requires only that the judgment be made in good faith, and in accordance with accepted medical standards of practice...

A more abbreviated formulation of this instruction is found in a case from the state of Washington:

A physician or surgeon is not liable for a honest error of judgment if, in arriving at that judgment, the physician or surgeon exercised reasonable care and skill, within the standard of care he was obliged to follow.

This instruction, or one in comparable words, has been given to juries for more than 100 years in at least 29 American jurisdictions. Some state courts in recent years have expressed dissatisfaction with the instruction or have repudiated it
altogether. Other state courts, however, have affirmed that they will continue to use it. Based on your study of Torts and especially of professional malpractice, (a) what problems and (b) what merits do you see in this jury instruction?