TORTS
Mr. Martin
May 7, 2012 Exam identification No.__________________

FINAL 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 in accordance with the amount of time suggested for each question. Question One consists of ten multiple-choice questions which are to be answered in the blanks provided on this white examination paper. Questions Two, Three, Four, and Five are to be answered in blue books. Please write legibly and leave a margin on the left-hand side of the page in your blue book or blue books.

Use only your examination identification number to identify this examination paper and your blue book or blue books. Your exam ID number is the last six digits of your social security number followed by the numerals “59.” Thus, if your social security number is 123-45-6789, your exam ID number will be 456789-59. If you use more than one blue book, please be sure that your exam ID number is on each one and number the blue books (“No. 1 of 2,” “No. 2 of 2,” etc.).

This white examination paper and all blue books must be turned in at the end of the examination. This includes blue books which are entirely blank and also blue books which have been used as scrap paper. Label any scrap blue book with the word, “SCRAP.”

In any question you may assume, if relevant, that events take place in a jurisdiction which has adopted modified comparative negligence but retains the common-law rules of joint and several liability, contribution, and indemnity.
QUESTION ONE
TEN MULTIPLE-CHOICE QUESTIONS

(Suggested time: thirty minutes)

In the spaces provided below, insert your answers to the ten multiple-choice questions found in Question One.

1. _____________
2. _____________
3. _____________
4. _____________
5. _____________
6. _____________
7. _____________
8. _____________
9. _____________
10. _____________

1. Blackballer was out in his small sailboat in the channel between Metropolis and the offshore island of Camelot when he negligently caused his boat to become swamped and to sink. Blackballer was thrown into the ocean but was held afloat by his flotation jacket. About thirty minutes later, Conner came along in his yacht, on his way to a party on Camelot. He saw Blackballer in the water and hove to long enough to determine that Blackballer was not injured. “Someone else is bound to come along and I’m late for my party. I’ll advise the Coast Guard when I reach Camelot,” said Connor as he sailed away without picking up Blackballer. About an hour later, Connor reached Camelot and notified the authorities of Blackballer’s position. When the Coast
Guard reached Blackballer, they discovered that he had been run over and severely injured by Turner’s powerful ocean racing boat. Turner had seen Blackballer in time to avoid him but was sufficiently intoxicated so that he was unable to steer the boat aside quickly enough.

Blackballer brought an appropriate action against Connor to recover for the injuries he suffered in the water. What result?

(A) Judgment for Connor, because he did not leave Blackballer in greater peril than he found him.

(B) Judgment for Connor, because Blackballer was responsible for his own predicament due to his own negligence.

(C) Judgment for Blackballer, because Connor incurred a duty to rescue Blackballer by stopping and investigating Blackballer’s situation.

(D) Judgment for Blackballer, if a reasonable person would have picked Blackballer up under the same circumstances.

2. Newt owned an outdoor firing range on the outskirts of Metropolis. While Newt was on vacation, Metropolis hosted the fifth annual Blackwater Veterans of America Convention. Several of the participants stopped by Newt’s firing range and rented and fired automatic weapons, which were legal in the jurisdiction. The BVA members were not content to fire at the silhouette targets on the firing range, but blasted away at passing birds and at the tops of nearby trees. The firing range staff took the weapons away from anyone shooting at other than a firing range target. The next day, more mercenaries came to the range and, in the course of firing their rented automatic weapons, shot and killed a valuable bull, owned by Anderson, which was kept in an adjacent field. The mercenaries promptly disappeared. If Anderson brings an action against Newt for damages resulting from destruction of the bull, Anderson should

(A) not recover, because Newt was unaware that customers
of his firing range were shooting at anything other than firing range targets.

(B) not recover, if the firing range staff exercised due care in trying to prevent shooting at other than firing range targets.

(C) recover, because landowners are strictly liable for injuries to property on adjacent lands caused by activities conducted on their property.

(D) recover, because the mercenary who actually shot the bull cannot be located.

3. The City of Metropolis installed several hundred new public restrooms on its sidewalks. Each restroom was a self-contained unit; insertion of a quarter opened the locked door. The units were self-sanitizing; when activated, powerful jets of hot water and disinfectant cleansed the interior. The cleaning cycle could only be activated by a switch contained in a locked recess in the rear of the unit; only specially designated municipal employees carried the key to the recess. These employees patrolled the various units, inspecting them for damage and, after insuring that no one was inside, unlocking the cleaning switch and activating the cleansing cycle. John brought an action against the City of Metropolis for personal injuries. At trial, the above facts concerning the public restrooms were established. John introduced additional proof that he had deposited a quarter and entered one of the units early one weekday morning when no one was in sight on the city sidewalk, that while he was inside the cleansing cycle was activated, causing him severe injury, that after his screams attracted a passing police officer who pulled him from the unit, the recess containing the activation switch was locked, and that subsequent tests established that the unit was functioning properly. Should John recover for his injuries suffered in the public restroom?

(A) No, because John failed to introduce any evidence of negligence on the part of the city.

(B) No, because John was a licensee and there was no evidence that the public restroom unit had malfunctioned.
(C) Yes, because the city is strictly liable for operating what amounted to an ultrahazardous activity.

(D) Yes, because an employee of the city must have negligently activated the cleansing cycle of the unit without checking to see if anyone was inside.

Questions 4-5 are based on the following fact situation:

Exon got lost on his way to make a gasoline delivery to the Middletown Gas Station, and parked his gasoline truck on a residential street next to Vicky’s home. Exon knocked at several doors in the neighborhood until he found someone home who would let him use the telephone. He called the gas station and got directions. However, while Exon was on the phone, de Faulto came speeding along the street and negligently rammed Exon’s truck. Saved by his driver’s side airbag, de Faulto scrambled from the wreckage before it exploded. Fire crews responded promptly, but Vicky’s house was totally destroyed by the fire. A large portion of the asphalt road was also consumed by fire or badly damaged. A city penal ordinance prohibited vehicles over two and one-half tons in weight from entering that neighborhood, and Exon had seen and disregarded the signs warning of this ordinance. Exon’s truck weighed three tons when empty.

4. Vicky brought an action against Exon to recover for the destruction of her home. What result is most likely?

(A) Judgment for Exon, because his parking his truck next to Vicky’s home was not a negligent act.

(B) Judgment for Exon, because the city ordinance was penal in nature, and thus could not be the basis for a private recovery of damages.

(C) Judgment for Vicky, because Exon committed negligence per se when he violated the vehicle weight ordinance.

(D) Judgment for Vicky, because Exon’s parking his truck next to her home was a contributing cause of her injury.

5. The City of Middletown brought an appropriate action against de Faulto to recover damages to the roadway resulting from the collision with
Exon’s tanker. Which of the following most accurately characterizes de Faulto’s negligence in the context of this action?

(A) It is neither an actual nor a proximate cause of the city’s damages.

(B) It is both the actual cause and a proximate cause of the damage to city property.

(C) It is an actual cause of the city’s damages, but not the proximate cause, because Exon violated the vehicle weight ordinance.

(D) It is not an actual cause of the city’s damages, because the explosion of Exon’s gasoline truck was the actual cause; but it a proximate cause because the collision prompted the explosion.

6. Dorothy was riding her bicycle along a public road when a violent storm came up. She hurried toward her home but saw a funnel cloud approaching from that direction. She immediately turned off the road and took cover in a picnic shelter that she had seen through the trees. Although the tornado passed a few hundred yards away, the shelter remained intact and Dorothy was uninjured. Unfortunately, however, a new cement floor had recently been poured for the shelter. Dorothy’s footprints and tire tracks left permanent impressions in the cement, requiring the owner of the shelter, Putnam Pavilions, Inc., to repour the entire floor.

What will be the result if Putnam sues Dorothy for the damages to the floor?

(A) Putnam will not prevail because Dorothy had a privilege to enter the shelter.

(B) Putnam will prevail but will only recover nominal damages because of Dorothy’s privilege.

(C) Putnam will not prevail because Dorothy’s entry onto Putnam’s property was caused by an act of God.
(D) Putnam will recover for the damage to the floor because Dorothy’s entry onto Putnam’s property was for her own benefit.

7. Pauline sought psychiatric treatment from Donald, a psychiatrist. During his treatment, which consisted of hour-long analysis sessions twice a week, Donald, unknown to Pauline, videotaped her. No sound recording was made of the sessions, but Donald was conducting a study on “body language” and planned to use the videotapes in these experiments. Pauline learned that Donald had been videotaping their analysis sessions and brought an action against him for battery.

If Pauline does not prevail as to this theory, it will probably be because:

(A) She did not suffer any injury as the result of Donald’s actions.

(B) Donald had an implied consent to take the actions he did as part of the patient/physician privilege.

(C) She did not suffer an offensive touching.

(D) Donald intended that his actions would foster medical research.

Questions 8-9 are based on the following fact situation:

Driscoll purchased a new Revco model ST motorcycle. One week later, Driscoll was driving the motorcycle along a residential street. Although he had been driving the motorcycle all week, he still was not proficient at steering it. He saw Carson, a classmate from school, walking along the sidewalk. Since Driscoll had never liked Carson, he decided to try to scare Carson by swerving onto the sidewalk at a driveway and swerving back onto the street at the next driveway just before the area of the sidewalk on which Carson was walking. As Driscoll attempted to swerve off the sidewalk back onto the street, the motorcycle’s front tire blew, causing Carson to lose control of the steering. He attempted to apply the brakes, but due to his inexperience he hit the accelerator by mistake. The motorcycle struck and seriously injured Carson. Two days before the accident, Driscoll had received a letter from Revco warning him of a potential defect in the
front tire of all Revco Model ST motorcycles which would cause the front tire to suddenly blow out. The letter asked Driscoll to bring the motorcycle to any Revco dealership so the front tire could be inspected for the possible defect and corrected if necessary. Driscoll read the letter but had not yet taken the motorcycle to a Revco dealership.

8. If Carson asserts a claim against Driscoll for battery, who is most likely to prevail?

(A) Carson, because Driscoll intended to frighten Carson.

(B) Carson, unless Driscoll’s negligence in hitting the accelerator was the proximate cause of the accident.

(C) Driscoll, because Driscoll did not intend to inflict bodily harm on Carson.

(D) Driscoll, because the injury was proximately caused by the defective front tire.

9. If Carson asserts a claim against Revco, who is most likely to prevail?

(A) Carson, unless Driscoll had unreasonably delayed in responding to Revco’s notice.

(B) Carson, if the front tire was defective when Revco sold the motorcycle.

(C) Revco, unless Carson can establish that Revco negligently designed or manufactured the front tire.

(D) Revco, because Driscoll intentionally drove the motorcycle at Carson.

10. Packy Farms, Inc., has used vehicular application systems to attack insect pests, to control fungus, and to apply fertilizer to its several hundred acres of Thompson seedless grapes for the eleven years it has been in operation. The Nancy Reagan School for Girls, a private home for unwed
mothers, has been built on the formerly agricultural land adjacent to Packy Farms' operations.

Packy's chief executive officer was approached by a local aerial spraying outfit and shown that he could cut application time by a factor of ten and cost by one-half if he switched from vehicular to aerial spraying. Packy Farms immediately entered into a contract for aerial application of insecticide, and began seeking buyers for its several vehicular sprayers. When the aerial spraying began, Packy's foreman discovered that for the first time Packy was experiencing appreciable drift of the insecticide, a portion of which wafted onto the Nancy Reagan School for Girls. The school was quickly evacuated, and just as quickly filed an action seeking to have the aerial spraying enjoined as a nuisance. What will be the probable outcome of this litigation?

(A) The school will lose, if Packy's aerial spraying is in conformity with the general practices in the industry.

(B) The school will lose, since one landowner may not maintain an action for nuisance.

(C) The school will lose, because maintenance of vehicular application systems will greatly increase Packy's costs of operation.

(D) The school will lose, unless it can show that the drift of insecticide unreasonably interfered with the use and enjoyment of its property.

QUESTION TWO
(suggested time: fifteen minutes)

The well-known case of Vosburg v. Putney, reproduced from another Torts casebook, is distributed separately and printed on contrasting color paper.

In your blue book, write a case brief for Vosburg v. Putney.
QUESTION THREE
(suggested time: forty-five minutes)

One of the highlights of the summer in Foulhaven used to be the annual Cops v. Robbers charity baseball game. The Cops team came from the state police. The Robbers team were inmates of Foulhaven State Prison. The game was always played at Foulhaven Stadium which is owned by the Foulhaven Fowls minor league baseball team.

In 2011 the game lived up to its reputation for excitement. In the first inning the Robbers leadoff batter, Scaldus Kaldis, slid into second base with his cleats high. He lacerated the thigh of Meter Malaguti who played shortstop for the Cops. Malaguti had to be taken to the hospital and did not return to police work for twenty-six weeks, although he was paid 100% of his usual pay for this time being considered “injured on duty.”

In the second inning Dye Sullivan, batting for the Cops, hit a foul ball into the stands behind first base. Rose Luise, a fan, tried to catch the ball. It hit her in the face causing a serious eye injury, the surgical treatment of which was unsuccessful resulting in the loss of her vision in that eye. The surgeon’s bill and medical expenses were more than $15,000. Later, Ms. Luise explained that she had never been to a baseball game before, hadn’t played the game as a child, and didn’t know how hard the ball was.

In the third inning Trooper Coyne, the Cops captain, was pitching. He intentionally hit Kill Patrick, the Robbers batter, with a pitch. Patrick charged the mound, bat in hand, and was deterred from attacking Coyne only when the latter drew his Smith & Wesson semi-automatic service sidearm and pointed it at Patrick.

The Cops were batting in the fifth inning. These were two out and two men on base. The umpire called a strike on Cop Pola. Pola called the umpire a “blind bastard” and several other things. Fury Perry, the Robbers catcher, heard Pola.

At this point the Cops led by a score of six to four. In the sixth inning the Robbers loaded the bases with one out. Con Rudnick, the next Robbers batter, hit a long fly ball over the head of Cop Ani in left field. Ani, backpedaling furiously, tripped over a loose plug of turf in the outfield, fell, and was injured. Con Rudnick had hit an inside-the-park home run.
After the four Robbers crossed home plate they kept right on running into the stands where they put on sweatsuits which Con’s girlfriend had brought in a shopping bag for this purpose. They then vanished into the crowd.

The Cops called off the game. In an attempt to find the four Robbers, Trooper Coyne ordered all exits to Foulhaven Stadium closed. The entire crowd, twenty thousand people, had to file one by one through a single gate to be scrutinized by Cops. This took three hours. The four Robbers, however, escaped from the stadium through a window having first stolen the gate receipts. It is believed that there will not be a Cops v. Robbers game in 2012.

What torts? What defenses?

**QUESTION FOUR**

*(suggested time: forty-five minutes)*

Vortex Recreational Systems, Inc., ("Vortex") is incorporated in the state of Cumberland where it operates a manufacturing and distribution center in the city of Wells. Vortex specializes in the fabrication and sale of recreational prosthetic attachments that provide amputees the opportunity to participate in recreational activities. Vortex’s attachments are designed to fasten onto any standard prosthetic limb and give the user the functionality of a natural limb needed for a specific activity. To date, Vortex has developed attachments for basketball, baseball, golf, tennis, swimming, canoeing and rafting.

Vortex primarily markets its attachments towards military amputees who were injured during combat. The company was founded in 2009 by two former U.S. Marines, Miguel Jimenez and Sean Thompson, who served together on two tours in Iraq between 2005 and 2008. Jimenez and Thompson were part of a combat patrol unit with the daily mission of securing roads for military transport. They know firsthand the devastating toll that improvised explosive devices (IEDs) have had on U.S. soldiers during the wars overseas in Iraq and Afghanistan.

Jimenez and Thompson completed their military service in February of 2008. Jimenez moved to Thompson’s home state of Cumberland in
March to begin working with Thompson on their new business concept with the mission of “A Company That Serves Those That Have Served Us.” They started designing recreational prosthetic attachments during the fall of 2008 and released Vortex’s first attachment for baseball in July 2009.

The product at issue in this case is Vortex’s “Splash Rower” attachment. The Splash Rower attachment is designed to fit a standard prosthetic arm and it gives the user the ability to grasp an oar or paddle required for canoeing or rafting. The Splash Rower is comprised of two interlocking parts. Part A latches onto the shaft of the oar/paddle similarly to a clinched fist and can be tightened using the top tightening screw. Part B has two opened cylindrical ends. One end screws onto any standard prosthetic limb and the other end is where Part A locks into Part B. The two ends of Part B are connected by an adjustable elbow that allows the attachment to be angled to give the user a varying range of motion. Parts A and B are locked into place by securely fastening Part A’s pegs into the peg holes of Part B. Parts A and B can be unlocked by pressing the pegs inward and pulling Part A upwards out of Part B.

The Splash Rower attachment is manufactured almost entirely out of graphite composite materials. Vortex considered stainless steel as a suitable material for its Splash Rower attachment, but ultimately decided that only graphite would provide the flexibility needed to create a natural rowing motion. Vortex also identified a materials wholesaler in Wells that sold graphite materials for twenty percent less than stainless steel materials.

In October of 2010, concerned about the strength of graphite, Vortex reached out to the local ROTC program at Cumberland Tech University (“CTU”) in search of an intern who would assist the company with materials testing. After interviewing several cadets, Vortex selected senior cadet Michael Robinson. Robinson was an engineering student at CTU studying to be a combat engineer officer in the Marine Corps following graduation. Vortex was able to set up a partnership with the CTU Engineering Department allowing Robinson to conduct materials testing for Vortex in CTU’s Research and Development Center. Robinson would be paid $15 per hour by Vortex as a co-op. Vortex would also purchase any supplies and equipment needed to conduct its testing, and any permanently installed equipment would be donated to the school for future student research. Vortex viewed the partnership as an excellent opportunity to foster the company’s engagement in the Wells community.
Robinson spent a total of sixty work hours spread over four weeks conducting materials testing for Vortex's Splash Rower. Thirty-five hours were spent planning, designing and constructing the test area. The purpose of Robinson's research was to compare the strength of graphite versus the strength of stainless steel against currents of water. Robinson's test area consisted of a motorized lap pool and a bolted-down wooden stand on each side of the pool. A standard prosthetic arm was attached to each stand.

The motorized lap pool could be set to three speeds in miles per hour (mph): 3 mph (low); 7 mph (medium); and 10 mph (high). Low speed yielded .08 tons of force on the submerged paddle. Medium speed yielded .42 tons of force. High speed yielded .86 tons of force.

Robinson tested a total of sixty Splash Rowers – thirty made of stainless steel and thirty made of graphite. Ten graphite Splash Rowers and ten stainless steel Splash Rowers were tested at each speed. For each test run, Robinson installed a test Vortex Splash Rower on the appropriate prosthetic arm and fastened the test Splash Rower to the shaft of a standard paddle that was submerged in the pool. Robinson would test each Splash Rower for a total of twenty minutes – ten minutes with the water flowing against the submerged paddle and ten minutes with the water flowing from behind the submerged paddle.

After each test run, Robinson logged whether the Splash Rower: (1) remained attached with no physical change; (2) remained attached with a cracked or bent shape; or (3) snapped apart. All thirty stainless steel Splash Rowers remained attached with no physical change at all three speeds. Of the thirty graphite Splash Rowers, Robinson noted that two bent slightly at high speed. None of the test Splash Rowers snapped apart during the testing.

Based on the results of Robinson's testing, Vortex decided that graphite was a safe and reliable material for manufacturing the Splash Rower. Vortex began manufacturing and selling the Splash Rower in December of 2010. One Splash Rower is regularly priced at seven hundred and fifty dollars. Vortex sold over one thousand Splash Rowers in 2011.

Jennifer Bates is a twenty-four year old woman who resides in the suburban town of Old Haven located twenty miles south of Wells. Bates is
employed as a cashier at a small clothing retail store in Old Haven. Bates lost her left forearm in a car accident in February 2009. Bates’s doctors were forced to amputate the left forearm to save the upper portion of her left arm. Bates was fitted for a prosthetic arm in June 2004 and completed six months of rehabilitative training at the Wells Medical Rehabilitation Center in order to adjust to using the prosthetic arm for ordinary daily functions.

Bates first learned about Vortex from one of the customers at her job in April 2011. The customer was a military amputee who had just recovered from injuries sustained while serving in Iraq during the prior year. Bates discussed with the customer the challenges of adjusting to using a prosthetic limb, and the customer mentioned to Bates that he had received a brochure from Vortex regarding new products for military amputees called recreational attachments. Bates became very interested and called Vortex to request a catalog, which Vortex mailed to Bates’s residence.

Bates purchased a Vortex Splash Rower in June 2011. The Splash Rower was delivered to her home in a colorful camouflage package inscribed with Vortex’s company slogan: “A Company That Serves Those That Have Served Us.” Inside the package Bates found a bubble-wrapped Splash Rower and a brochure with information on other Vortex Products. The words “FOR RECREATIONAL USE ONLY” were written in bold red letters underneath the company’s slogan on the package.

Bates had an interest in water sports as a young girl and kayaked twice with a couple of friends over the summer before her accident, but had not been inside a kayak since. Bates decided that she would try kayaking again using Vortex’s Splash Rower. For this purpose, Bates purchased a new one-person kayak, a double-ended paddle, and a life jacket from a local sporting goods store.

On the morning of June 22, 2011, a friend assisted Bates with unloading her kayak into the Cumberland River at a river bank located northwest of Wells. After a weekend of thunderstorms and heavy rains, June had become the rainiest month in Cumberland in the past year, but the weather that morning was clear and sunny. The Cumberland River stretches the length of the entire state and flows north to south along the western edge of Wells. Bates planned on a twenty-mile route that would finish southwest of Wells where Bates’s friend would meet her to pick her up. Bates’s friend held the kayak against the bank while Bates positioned herself inside the
kayak and attached the Splash Rower between her prosthetic limb and the paddle. Bates’s friend pushed the kayak off the bank and Bates steered her way downstream.

Five miles into her route, Bates approached a narrow passage. Bates began to struggle with maneuvering the kayak around exposed rocks and floating branches. The kayak continued to pick up speed as Bates made her way further downstream. Bates dunked her paddle deep into the water, alternating from one side of the kayak to the other, in an attempt to slow the kayak through the passage. Suddenly, the Splash Rower snapped causing Bates to lose her paddle. The kayak spun around vigorously until it flipped over. Bates was ejected from the kayak. The current pulled Bates beneath the surface and her body was smashed against rocks before her life jacket floated her body to the surface. Bates remained conscious, but could not move her legs to swim.

A fisherman pulled Bates from the water another mile downstream and took Bates to the hospital. Bates was later informed by her doctors that she suffered a severe spinal cord injury as a result of her body’s collision with the underwater rocks and that she would be paralyzed from the waist down for the rest of her life.

What will be the principal issues in Bates v. Vortex Recreational Systems, Inc.?

QUESTION FIVE
(Suggested time: forty-five minutes)

All of Boston is atwitter over Hannibal Hardball’s plan to install a riverboat gambling casino in the Charles River, to be anchored just offshore from the Hatch Shell where the Boston Pops Orchestra plays its famous outdoor concerts. The proponents of the casino are Hardball who is a well-known local sportsman and owner of the Boston Blue Stockings professional women’s rugby team, and four partners who are alleged to be distantly descended from a tribe of Native Americans that might once have inhabited Massachusetts.

Opposing the casino is the unlikely alliance of Henry Cabbage Cod, president of the Boston Society for the Suppression of Vice, and Back Bay real estate kingpin, Harry Overreach.
Overreach hired a private detective, Peiping Thom, to dig up every bit of dirt that he could find about Hardball. Illegally accessing Massachusetts criminal history information ("CORI"), Thom learned that Hardball was once indicted for, but not convicted of, possession of cocaine with intent to distribute. Also Hardball paid a $100,000 fine in the 1990's after pleading guilty to furnishing false information to a bank in connection with a real estate financing scheme that went sour. Finally, two of Hardball's partners have been in trouble with the law because of bad alcohol problems, but not Hardball who is a teetotaler. Overreach shared all this information with Cod.

One evening Cod and Overreach were invited to appear on Badmouth’s radio talk show on station WPMS to express their opposition to the casino. Cod said, “I can’t understand why the City Council will have anything to do with this bunch of drunks, crooks and drug dealers,” undoubtedly referring to Hardball and his partners.

**Badmouth**: Are you sure you mean that—‘drug dealers’?

**Cod**: You bet your life.

**Overreach**: He means that gambling is just like a drug. Once you’re hooked, you can never get that monkey off your back.

**Badmouth** [to Cod]: You meant, gambling is a bad habit, like drugs?

**Cod**: I meant what I said.

Hardball was greatly disturbed by this outburst, although he was unable to identify any monetary loss from it. Hardball told all of the contractors and suppliers with whom he was doing business that he would cut them off if they did or continued to do any business with Overreach. Some of these contractors and suppliers were tenants at will in Overreach’s buildings. They terminated their tenancies. Others whose leases were due to expire give Overreach notice that they would vacate at the end of their terms and not renew.
Identify (a) Hardball’s rights against Overreach, (b) Hardball’s rights against Cod, (c) Hardball’s rights against WPMS, (d) Overreach’s rights against Hardball. In each case, discuss the possible defenses.

END OF EXAMINATION

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QUESTION ONE
(suggested time: thirty minutes)

This Question One consists of ten short-answer questions. Write your answers directly on this examination paper in the blanks provided.

1. The elements of the tort claim called "negligence" are:

   1. ____________________________________________,
   2. ____________________________________________,
   3. (a) ____________________________________________,
   3. (b) ____________________________________________, and
   4. ____________________________________________.

2. The elements of the tort claim called "intentional infliction of emotional distress" are:

   1. ____________________________________________,
   2. ____________________________________________,
   3. ____________________________________________, and
   4. ____________________________________________.

3. The elements of the tort claim called "battery" are:

   1. ____________________________________________, and
   2. ____________________________________________.
4. The elements of the tort claim called "strict liability for defective product" are:

1. 

2. 

3. 

4. 

5. 

5. The warden of State Prison prohibits photographing the face of any prisoner without the prisoner's consent. Photographer, a news photographer, wanted to photograph Mobster, a notorious organized crime figure incarcerated at State Prison. To circumvent the warden's prohibition, Photographer flew over the prison yard and photographed Mobster. Prisoner, who was imprisoned for a technical violation of a regulatory statute, happened to be standing beside Mobster when the photograph was taken.

   When the picture appeared in the press, Prisoner suffered severe emotional distress because he believed that his business associates and friends would think he was consorting with gangsters. Prisoner suffered no physical harm as a result of his emotional distress. Prisoner brought an action against Photographer for intentional or reckless infliction of emotional distress. The element of Prisoner's IIED claim that is missing, or in doubt, is:
6. Because of a farmer’s default on his loan, the bank foreclosed on the farm and equipment that secured the loan. Among the items sold at the resulting auction was a new tractor recently delivered to the farmer by the retailer. Shortly after purchasing the tractor at the auction, the new owner was operating the tractor on a hill where it rolled over due to a defect in the tractor’s design. He was injured as a result. The new owner sued the auctioneer, alleging strict liability in tort for product defect. The element of the new owner’s claim of strict liability for product defect that is missing, or in doubt, is:

7. A passenger departed on an ocean liner knowing that it would be a rough voyage due to storms that were predicted. The ocean liner was not equipped with the type of lifeboat required by an applicable statute. The passenger was swept overboard and drowned in a storm so heavy that even a lifeboat which conformed to the statute could not have been launched.

The passenger’s representative brought an action against the operator of the ocean liner. The element of the passenger’s representative’s claim that is missing, or in doubt, is:

8. A smoker and a nonsmoker were seated at adjoining tables in a small restaurant. The smoker’s table was in the smoking section, and the nonsmoker’s table was in the nonsmoking section. When the smoker lit a cigar, the nonsmoker politely requested that he not smoke, explaining that she had a severe allergy to tobacco smoke. The smoker took a deep drag and blew smoke directly into the nonsmoker’s face.

The nonsmoker brought a battery action against the smoker. The element of the nonsmoker’s battery action that is missing, or in doubt, is:
9. A customer fell and injured himself when he slipped on a banana peel while shopping at a grocer's store. The banana peel was fresh and clean except for a mark made by the heel of the customer's shoe. In an action brought by the customer against the grocer, these are the only facts in evidence. The element of the customer's claim that is missing, or in doubt, is:

10. Diggers Construction Company was engaged in blasting operations to clear the way for a new road. Diggers erected adequate barriers and posted adequate warning signs in the vicinity of the blasting. Although Paul read and understood the signs, he entered the area to walk his dog. As a result of the blasting, Paul was hit by a piece of rock and sustained head injuries. The jurisdiction follows the American rule of strict liability for blasting injuries to persons and property.

In an action by Paul against Diggers to recover damages for his injuries, what will be Diggers's best defense?

QUESTION TWO
(suggested time: fifteen minutes)

Printed below is the well-known case of Yania v. Bigan, reproduced from another Torts casebook.

In your blue book, write a case brief for Yania v. Bigan.

Yania v. Bigan
Supreme Court of Pennsylvania, 1959.
397 Pa. 316, 155 A.2d 343.

JONES, Justice. A bizarre and most unusual circumstance provides the background of this appeal.

On September 25, 1957 John E. Bigan was engaged in a coal strip-mining operation in Shade Township, Somerset County. On the property
being stripped were large cuts or trenches created by Bigan when he removed the earthen overburden for the purpose of removing the coal underneath. One cut contained water 8 to 10 feet in depth with side walls or embankments 16 to 18 feet in height; at this cut Bigan had installed a pump to remove the water.

At approximately 4 p.m. on that date, Joseph F. Yania, the operator of another coal strip-mining operation, and one Boyd M. Ross went upon Bigan's property for the purpose of discussing a business matter with Bigan, and, while there, were asked by Bigan to aid him in starting the pump. Ross and Bigan entered the cut and stood at the point where the pump was located. Yania stood at the top of one of the cut's side walls and then jumped from the side wall—a height of 16 to 18 feet—into the water and was drowned.

Yania's widow, in her own right and on behalf of her three children, instituted wrongful death and survival actions against Bigan contending Bigan was responsible for Yania's death. * * *

The complaint avers negligence in the following manner: (1) "The death by drowning of . . . [Yania] was caused entirely by the acts of [Bigan] . . . in urging, enticing, taunting and inveigling [Yania] to jump into the water, which [Bigan] knew or ought to have known was of a depth of 8 to 10 feet and dangerous to the life of anyone who would jump therein" * * *

(3) "After [Yania] was in the water, a highly dangerous position, having been induced and inveigled therein by [Bigan], [Bigan] failed and neglected to take reasonable steps and action to protect or assist [Yania], or extradite [Yania] from the dangerous position in which [Bigan] had placed him." Summarized, Bigan stands charged with * negligence * by failing to go to Yania's rescue after he had jumped into the water. * *

Appellant initially contends that Yania's descent from the high embankment into the water and the resulting death were caused "entirely" by the spoken words and blandishments of Bigan delivered at a distance from Yania. The complaint does not allege that Yania slipped or that he was pushed or that Bigan made any physical impact upon Yania. On the contrary, the only inference deductible from the facts alleged in the complaint is that Bigan, by the employment of cajolery and inveiglement, caused such a mental impact on Yania that the latter was deprived of his volition and freedom of choice and placed under a compulsion to jump into the water. Had Yania been a child of tender years or a person mentally deficient then it is conceivable that taunting and enticement could constitute actionable negligence if it resulted in harm. However, to contend that such conduct directed to an adult in full possession of all his mental faculties constitutes actionable negligence is not only without precedent but completely without merit. * * *

Lastly, it is urged that Bigan failed to take the necessary steps to rescue Yania from the water. The mere fact that Bigan saw Yania in a position of peril in the water imposed upon him no legal, although a moral, obligation or duty to go to his rescue unless Bigan was legally responsible, in whole or in part, for placing Yania in the perilous position. Restatement,
Torts, § 314. Cf. Restatement, Torts, § 322. * * * The complaint does not aver any facts which impose upon Bigan legal responsibility for placing Yania in the dangerous position in the water and, absent such legal responsibility, the law imposes on Bigan no duty of rescue.

Recognizing that the deceased Yania is entitled to the benefit of the presumption that he was exercising due care and extending to appellant the benefit of every well pleaded fact in this complaint and the fair inferences arising therefrom, yet we can reach but one conclusion: that Yania, a reasonable and prudent adult in full possession of all his mental faculties, undertook to perform an act which he knew or should have known was attended with more or less peril and it was the performance of that act and not any conduct upon Bigan’s part which caused his unfortunate death.

Order affirmed.

QUESTION THREE
(suggested time: forty-five minutes)

Herb Ox and Bill Bucks, lawyers and partners in the firm of Ox and Bucks, were having a cup of coffee together at the courthouse. Their casual conversation turned to a local criminal defense lawyer, Sally Forth, and they were joined by another local lawyer, Murph Bedd. All three lawyers sometimes referred criminal cases to Sally.

Herb was saying that, “Sally goes to the restroom during court breaks and does a few lines to keep herself feeling good.”

“In fact,” said Bill, “I hear they have coke parties at her office at the end of the day.” Bill added, “They say that some of those parties turn into sexual free-for-alls. Everybody get naked and nobody can tell the lawyers from the clients.”

“All that seems out of character for Sally,” interjected Murph Bedd.

“Well, for sure, she isn’t the lawyer that she was a year ago,” said Herb.

Later in the day Murph Bedd used e-mail to tell Sally, whom he considered a personal friend as well as a colleague, about the rumors. Sally was upset.
Murphy Bedd's law partner, Bob Breakfast, routinely monitored e-mail sent and received by everybody in the firm of Bedd and Breakfast. When Bob saw Murphy's message, he posted the following unsigned notice on the miscellaneous bulletin board of the computer service that he used: "Don't call 485-2300 for criminal defense legal services. One of the attorneys in that office has a nose problem." Bob was also a criminal defense lawyer. He hoped to divert some of Sally's lucrative criminal retainer business to himself.

Sally had recently been appointed to represent an indigent criminal defendant in a high-profile murder case involving a cocaine deal that went bad. Nosey Parker, a reporter for the alternative newspaper Bad Times, wrote a story about the pending murder case which included a statement that several prominent lawyers believe that Sally Forth, counsel for the defendant, had a cocaine problem that affected her work. Ricky Trafficks, a big cocaine dealer who paid Sally $10,000 a month as a retainer, changed lawyers and engaged Bob Breakfast on the same terms.

What claims does Sally have? against which defendants? Explain the likelihood of success on her claims. What defenses will be raised? Estimate the likelihood that these defenses will succeed.

QUESTION FOUR
(suggested time: forty-five minutes)

The story told in this question comes from the state of Oregon, specifically from Sauvie Island, Oregon, which consists of approximately 27 square miles of land and lakes located at the confluence of the Willamette and Columbia rivers, about ten miles northwest of downtown Portland, Oregon. While the southern half of the island is privately owned, the northern half of the island consists almost entirely of the 12,000 acre Sauvie Island Wildlife Area ("wildlife area") which is owned by the State of Oregon through its Oregon Department of Fish and Wildlife ("ODFW"). On the entire northern half of the island there are only three privately owned beachfront parcels. One of them, ten acres in extent, is owned by the Ogle family, plaintiffs in this question.

Since the 1970's, beach areas on the eastern shore of Sauvie Island have been used for nude sunbathing. As the use gained popularity in the 1980's, use by nude
sunbathers spread along the length of the island’s beaches, including Collins Beach which is adjacent to the Ogles’s property. (You might want to consult the sketch map which is printed on p.11 of this examination).

The Ogles’s predecessor in title was Ryan T. Boland. In the late 1990’s Boland negotiated with ODFW about the state’s possible purchase of his land for inclusion in the wildlife area. When these negotiations were unsuccessful, Boland applied to the Columbia County Planning Commission for a conditional use permit that would allow a house to be built on his property. ODFW formally opposed the application, citing the incompatibility of private housing with the wildlife area, and the likelihood that livestock and dogs from the privately owned parcel would escape from the parcel to spoil habitat, invade food crops, and harass or kill wildlife. ODFW also noted that public hunting was permitted during open seasons in the wildlife area, predicting that the occupants of any house to be built on the site would be troubled by trespassers which ODFW was unable to control. ODFW did not mention the nude sunbathing on Collins Beach, although ODFW was well aware of it.

Over ODFW’s objection, the Columbia County Planning Commission approved Boland’s application. Instead of building on the parcel, however, Boland offered it (much enhanced in value by reason of the Commission’s approval) for sale on a national website featuring rural and vacation property. Thereafter, in late 1999, the Ogle family (then living in Alaska) contacted Boland about the property. Boland replied enclosing a copy of the approved conditional use permit and a copy of ODFW’s letter expressing its unsuccessful objection. The Ogles were concerned about ODFW’s letter and asked Boland about the popularity of the beach and the potential problem of trespassers. Boland suggested that, although the beach was popular in the summer months, a fence would keep trespassers out. Boland did not mention nudity to the Ogles, much less describe the nature and extent of use of the adjacent beach and wildlife area by nude adults.

In the winter of 2000-2001 the Ogles flew to Oregon to visit the property with Boland. During that visit, and while on the property and beach adjacent to the property, the Ogles did not see any nude people, or any signs which might indicate that nude activity was permitted on the beach, or any other evidence of such use. The Ogles bought the property from Boland.
In June, 2001, the Ogles arrived at their property in a recreational vehicle (“RV”) in which they planned to live for the summer while they relaxed on the beach and made plans to build their house. The day after they arrived, they were shocked to find nude sunbathers on the beach in front of their property. In the weeks that followed, large numbers of beach users—both clothed and unclothed—crossed the Ogles’s property, parked on and around their property, and walked along the road leading to their property in various states of dress and undress. The Ogles spent much of that first summer asking beach users to wear clothing while in front of their property, posting “no trespassing” signs, and cautioning people not to cross their land or block their driveway.

Despite their efforts, the problems did not abate. Over the next decade the Ogles and their guests, their friends, their children, and their grandchildren saw thousands of nude adults on and around their property. The Ogles and their guests also witnessed many instances of explicit sexual conduct. Specifically, they saw adults engaging in sexual intercourse, oral sex, the touching of genitals and breasts, men masturbating individually and in groups, men walking on the beach and on the road with erections, and individuals photographing others’ genitals. These incidents occurred more than a dozen times each year—totaling more than a hundred times over the decade.

The Ogles attempted a variety of means to eliminate these problems. The response by beach users was uncooperative and sometimes hostile. Most nude people that the Ogles encountered on their property, the beach, or the road refused to put on clothing. Their property and the signs that they posted were repeatedly vandalized. One nudist told the Ogles that the beach users were organized and militant, and threatened the Ogles if they continued to try to keep nude beach users off their property. The Ogles complained to ODFW, but the agency was unresponsive.

In the spring of this year the Ogles, as plaintiffs, sued the State of Oregon for creating a private nuisance. The Ogles seek an injunction against the use of Collins Beach and adjacent lands (including their own) by nude persons.

Discuss the rights of the Ogles. Discuss the State of Oregon’s defenses. For the purposes of this question, consider the State of Oregon to be the same as a private landowner except that the state, as sovereign, has the power to assert the rights and interests of the public.
QUESTION FIVE
(suggested time: forty-five minutes)

Marian joined a church called the Full Bible Church which adheres to literal interpretations of the Christian Bible. Some years later, a leader of the church called an Elder privately confronted Marian with rumors that she was having sexual relations with a man to whom she was not married. Marian admitted to transgressing the church’s prohibition against fornication. The Elder told her that she had become subject to the disciplinary procedure set forth in the New Testament book of Matthew, 18:15-17:

[I]f thy brother shall trespass against thee, go and tell him his fault between thee and him alone. . . . But if he will not hear thee, then take with thee one or two more, that in the mouths of two or three witnesses every word may be established. And if he shall neglect to hear them, tell it unto the church; but if he neglect to hear the church, let him be unto thee as a heathen man and a publican.

Marian was familiar with the church’s disciplinary procedure and had witnessed it being carried out on an earlier occasion during her church membership.

Three Elders asked Marian to come to a meeting at the church to discuss her continuing relationship with her companion. Marian went to the meeting. The Elders instructed her to stop seeing her companion.

The Elders also told Marian that she would have to appear before the church and repent of her fornication sin. If she refused to do so, the Elders told her, the members of the church would “withdraw fellowship” from her.

If a member of the church refuses to repent, the Elders will read aloud those scriptures which have been violated. The congregation then withdraws its fellowship from the wayward member by refusing to acknowledge that person’s presence. This process serves a dual purpose: it causes the transgressor to feel lonely and thus desire repentance and a return to fellowship with the other church members, and it ensures that the church and the remaining members continue to be free of sin.
Marian attempted without success to dissuade the Elders from divulging her private life to the congregation. Finally, Marian stated that she withdrew her membership from the church. The Elders told her that this was not doctrinally possible and could not halt the disciplinary sanction from being carried out against her. The Full Bible Church believes that all of its members are a family; one can be born into a family but can never truly withdraw from it.

Marian was publicly identified as a fornicatrix and the scriptures she had violated were read aloud to the congregation. Faithful to their scriptural command, the members of the church thereafter shunned Marian.

Part A.

Discuss Marian’s possible claims against the Elders and the Full Bible Church. Discuss the possible defenses.

Part B.

What values are being served or disserved if the tort legal system allows Marian to recover on her claim or claims?

(Part A and Part B of this question will be weighted equally).

END OF EXAMINATION

REMEMBER, ALL BLUE BOOKS MUST BE TURNED IN.
THIS INCLUDES BLUE BOOKS THAT ARE ENTIRELY BLANK,
AS WELL AS BLUE BOOKS USED FOR SCRAP PAPER.

LABEL ANY SCRAP BLUE BOOK WITH THE WORD, "SCRAP."
TORTS
Mr. Martin
May 10, 2010

Exam identification No. ____________________

FINAL 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 in accordance with the amount of time suggested for each question. Question One consists of ten short-answer questions which are to be answered in the blanks provided on this white examination paper. Questions Two, Three, and Four are to be answered in blue books. Please write legibly and leave a margin on the left-hand side of the page in your blue book or blue books.

Use only your examination identification number to identify this examination paper and your blue book or blue books. Your exam ID number is the last six digits of your social security number followed by the numerals “59.” Thus, if your social security number is 123-45-6789, your exam ID number will be 456789-59. If you use more than one blue book, please be sure that your exam ID number is on each one and number the blue books (“No. 1 of 2,” “No. 2 of 2,” etc.).

All blue books must be turned in at the end of the examination. This includes blue books which are entirely blank and also blue books which have been used as scrap paper. Label any scrap blue book with the word, “SCRAP.”

In any question you may assume, if relevant, that events take place in a jurisdiction which has adopted modified comparative negligence but retains the common-law rules of joint and several liability, contribution, and indemnity.
QUESTION ONE
(suggested time: thirty minutes)

This Question One consists of ten short-answer questions. Write your answers directly on this examination paper in the blanks provided.

1. What is a tort?

2. The elements of the tort claim called “negligence” are:
   1. ______________________________,
   2. ______________________________,
   3. (a) ______________________________,
   3. (b) ______________________________, and
   4. ______________________________.

3. The elements of the tort claim called “misrepresentation” are:
   1. ______________________________,
   2. ______________________________,
   3. ______________________________,
4. The elements of the tort claim called “false imprisonment” are:

1. 

2. 

3. 

4. 

5. Tim Woodenstone and Penny Saver were professors at an obscure law school located in an unattractive city in upstate New York. They attended a rural academic retreat in the Adirondacks where they stayed in cabins. Tim invited some colleagues to his cabin on the night before he was to present an innovative paper which he had published. He was especially excited about the presentation because Dean Philander S. Podsnap of Big Apple University Law School would be present to size him up for a possible job offer. After all of the guests had left except Penny, Tim proposed that they should finish off the evening by having sex. Penny refused, called Tim a “lascivious worm,” and stalked out, slamming the cabin door behind her.

The next morning, as Tim was getting ready to leave his cabin, he found that the door would not open. Penny’s slam of the door had jammed its latch. There was no phone on which to call for help. Locked in his cabin, Tim missed his presentation and the opportunity to impress Dean Podsnap.

Tim sued Penny for false imprisonment. The element of Tim’s false imprisonment claim that is missing or in doubt is:
6. Passer was driving his pickup truck along a lonely road on a very cold night. Passenger saw Tom, a stranger, lying in a field by the side of the road and apparently injured. Passer stopped his truck, alighted and, upon examining Tom, concluded that Tom was intoxicated and in danger of suffering from exposure to the cold. However, Passer returned to his truck and drove away without making any effort to help Tom. Tom remained lying at the same place and was later injured when struck by a car driven by Traveler who, drowsy and inattentive, had veered off the road. Tom sued Passer and Traveler for his injuries. The element that is missing from Tom’s claim against Passer is:

7. Carver is a chemical engineer. She has no interest in or connection to Chemco. Carver noticed that Chemco’s most recent publicly issued financial statements listed, as part of Chemco’s assets, a large inventory of rarium dioxide. This asset was listed at its cost of $100,000, but Carver knew that rarium was in short supply and that the current market value of Chemco’s rarium inventory was in excess of $1,000,000. There was no current public quotation for the price of Chemco stock. The book value of Chemco stock, according to the statement, was $5 per share. Its actual value was $30 per share.

Knowing these facts Carver offered to purchase from Page at $6 a share the 1,000 shares of Chemco stock owned by Page. Page and Carver had not previously met. Page sold the stock to Carver at $6. Carver resold it to a third party $28 per share. Page sued Carver for misrepresentation. The element of Page’s misrepresentation claim that is missing is:

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**Short-answer questions 8 through 10 are based on the following fact situation:**

Edward entered Palsgraf High School in September, 2005, and graduated in June, 2009. Notwithstanding the receipt of a diploma he lacks the ability to communicate in written English on a level sufficient to enable him to complete applications for employment.
Edward sues the Palsgraf School Board for educational malpractice. His complaint alleges that the School Board, by its employees:

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

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

c. Failed to develop remedial programs for Edward and other similarly under-performing students.

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

Assume that the factual allegations in Edward’s complaint are true and that Edward can prove them. Also assume that the School Board is liable for the acts and omissions of its employees. Identify three elements that Edward will additionally have to prove in order to recover.

8. 

9. 

10. 

QUESTION TWO
(suggested time: forty-five minutes)

Plaintiff Palmoil complained in Massachusetts Superior Court against his former employer and superiors, the defendants Megashops Department Stores Company ("Megashops"), Gregson, and Lestrade, alleging false imprisonment and defamation arising from their conduct on July 10, 2008. Palmoil, an accountant, was employed in the accounts payable section of Megashops, a regional chain of department stores. Following discovery of accounting irregularities in connection with a major backlog of unpaid vendor invoices, Gregson and Lestrade decided to conduct an investigation and audit of the accounts payable section with the aid of two outside auditors. On July 9, numerous employees of the accounts payable section were summoned to Lestrade's office, as was Palmoil on July 10.

On the morning of July 10, 2008, Lestrade interviewed Palmoil as to the alleged accounting irregularities and then directed Palmoil to the office of Mr. Moriarty, Megashops's comptroller. Lestrade instructed a Megashops security guard, Keepoff, "Don't let him use the phone or leave." Keepoff positioned himself in a chair just inches from the open door. When Palmoil asked to use the restroom, Keepoff escorted him there and stood beside him as he used the facilities. When Palmoil was thirsty, Keepoff followed directly behind him to the cafeteria where Palmoil purchased a beverage. At least twice, Gregson's secretary led Palmoil, escorted by Keepoff, through the accounts payable offices to other offices for interrogation. On each of these trips, they passed many of Palmoil's co-workers who observed them together. On other occasions throughout the day, co-workers observed Palmoil being held under guard in various offices and conference rooms. Finally, at the end of the day, Keepoff escorted Palmoil back to Moriarty's office where Palmoil
was suspended pending the completion of the investigation. Palmoil was escorted from the building, and his employment subsequently terminated.

Although Keepoff was not armed and wore no badge, he was wearing the black shoes, black trousers, white shirt with necktie, and the blazer, that Megashops prescribed for all of its security employees. Palmoil testified that he was embarrassed and humiliated by the defendants because his co-workers stared at him in the company of Keepoff. None of the co-workers testified.

The trial in *Palmoil v. Megashops* was nonjury. The above facts appear in evidence. At the conclusion of the trial the judge asked both parties to submit proposed Findings of Fact and Rulings of Law for her consideration.

The defendants submitted the following requested findings and rulings, among others:

1. There was no evidence that Palmoil was detained against his will.
2. There was no evidence that Palmoil was detained by force or threat of force.
3. The defendants had a conditional privilege to detain Palmoil while the investigation was ongoing, and Palmoil failed to carry his burden of establishing that the defendants exceeded their conditional privilege.
4. No Massachusetts case holds that defamation can occur in the absence of written or spoken communication by the defendant to one or more third persons.
5. There can be no liability for defamation in the absence of evidence that one or more third persons understood the communication to be defamatory.
6. There is no evidence that the defendants' conduct was perceived as defamatory by those witnessing it.
The plaintiff submitted the following requested findings and rulings, among others:

(1) Employees in plaintiff’s office were aware that an investigation of financial wrongdoing was occurring on July 9 and 10, given that many people had been summoned to defendant Lestrade’s office and questioned.

(2) Plaintiff’s co-workers were aware that plaintiff was being held under guard throughout the day, given that they would recognize Keepoff as a security guard when Keepoff escorted plaintiff to the restroom, to the cafeteria, and from one office to another, and they witnessed plaintiff being held in offices and other locations.

(3) Plaintiff’s co-workers could have reasonably inferred that he was being accused by his superiors of criminal wrongdoing in the circumstances.

(4) Even if plaintiff’s conduct warranted termination, it was not criminal, and thus any imputation of crime was false.

(5) It was unreasonable, unnecessary, and malicious for the defendants to hold P for so long, to keep him under guard, and to allow his co-workers to witness him being so closely guarded for so long, and therefore the defendants forfeited any conditional privilege that they may have had to detain plaintiff.

(6) No Massachusetts case holds that the communication on which an action for defamation can be based must have taken place by means of words in written or oral expression.

(7) Cases in other states hold that defendant’s conduct, without words, may be defamatory if such conduct conveys a defamatory meaning to one or more third persons [citing cases from Maryland, Pennsylvania and Wisconsin].

You are the judge. Decide the case. Explain your decision. If you decide for the plaintiff, award damages in a sum certain. Explain your award.

The false imprisonment issues count as one third of this question. The defamation issues count as the remaining two thirds.
QUESTION THREE
(suggested time: forty-five minutes)

The Supreme Court of the state of Catatonia has before it, as a matter of first impression, the standard by which the liability of a commercial contractor for aerial fireworks displays should be judged, when a spectator is injured by an aerial shell gone astray. Should that standard be (1) negligence, or (2) strict liability for product defect, or (3) strict liability for abnormally dangerous activity?

The defendant in the case is Big Bang Pyrotechnics, Inc. ("Big Bang"). Big Bang contracted to procure fireworks, to provide pyrotechnic operators, and to display the fireworks at the Catatonia State Fair on July 4, 2008. All operators of the fireworks display were Big Bang employees acting within the scope of their employment duties.

Aerial fireworks are launched into the sky from above-ground tubes called mortars. During the fireworks display at the State Fair one of the five-inch mortars was knocked into a horizontal position. From this position an aerial shell was ignited and discharged. The shell flew 500 feet in a trajectory parallel to the earth and exploded among spectators. The plaintiffs, Ken Collards and Gail Kale, suffered severe burns and eye injuries. Ken permanently lost 40% of the sight in both eyes. As a result, he cannot hold a driver’s license and has lost his job as a long-distance truck driver.

The parties agree that Big Bang was properly licensed to conduct the fireworks display.

There is a Catatonia statute which provides as follows:

The applicant for a permit to conduct a public display of fireworks shall include with the application evidence of a bond issued by an authorized surety company. The bond shall be in the amount of one
million dollars and shall be conditioned upon the applicant’s payment of all damages to persons or property resulting from or caused by such public display of fireworks, or any negligence on the part of the applicant or its agents, servants, employees or subcontractors in the presentation of the display.

The parties agree that Big Bang filed the bond required by the above statute. All facts up to this point are undisputed.

The parties are in conflict, however, as to their explanations for the cause of the improper horizontal discharge of the aerial shell. Big Bang argues that the accident was caused by a five-inch shell detonating in its mortar without ever leaving the ground, on account of a manufacturing defect. Big Bang asserts that this detonation caused another mortar tube to be knocked over, ignited, and shot off horizontally. Big Bang procures its fireworks from multiple sources and cannot identify the manufacturer of the defective shell.

In contrast, the plaintiffs argue that the misdirected shell resulted because Big Bang’s employees improperly set up the display, although they have no direct evidence of this. The plaintiffs also claim that Big Bang was negligent in locating the mortar battery in unsafe proximity to the spectator area. The plaintiffs further note that, because all of the evidence exploded, there is no means of proving the cause of the misfire.

Collards and Kale brought suit against Big Bang, framing their complaint in three counts based respectively on negligence, strict liability for product defect, and strict liability for abnormally dangerous activity. There is no Catatonia case law on the subject of liability for injuries caused by commercial fireworks displays. The trial judge reported the above facts to the Catatonia Supreme Court, taking advantage of a Catatonia rule of court which allows dispositive but undecided questions of law to
be reported in advance of a trial to the Catatonia Supreme Court for decision. (The rationale for this rule is to avoid the possible waste of a trial, and need for a retrial, if the trial judge’s unguided ruling is later reversed on appeal).

The Catatonia Supreme Court has received the parties’ briefs and heard oral argument on the following question: “Shall the liability of a commercial presenter of fireworks displays, for injury to a spectator, be based on negligence, or on strict liability for product defect, or on strict liability for abnormally dangerous activity?”

How should the Supreme Court decide this question? Why, in your opinion?

Please note: there is no “right” answer to this question. The few actual appellate cases in the United States on this subject have come to different conclusions. You should write your answer based on your understanding of negligence versus strict liability, on analogies to cases that you have read, and on considerations of public policy (identifying those considerations) which you believe to be important. Be sure to explain how the answer to the question posed by the Supreme Court might or will affect the outcome of Collards and Kale v. Big Bang Pyrotechnics, Inc., which is before the trial judge.

QUESTION FOUR
(suggested time: one hour)
(The three parts of this question will be weighted equally)

You are a lawyer in a small city in Massachusetts, where the tort statute of limitations is three years. In March of 2007 you were consulted by Robert Stafford.

On Monday morning, January 15, 2007, Mr. Stafford went outside to chop wood on the farm where he and his wife Pauline had lived since their marriage in 1972. Pauline stayed inside. She typed some business letters for her husband. Then
she apparently began preparing lunch, placing frozen beef liver in a saucer to thaw. Then she hanged herself. Mr. Stafford found his wife’s body at about 11:00 A.M.

Mr. Stafford told you that in 2006 his wife was surgically treated for lung cancer. Prior to the surgery she had a CAT scan to determine if the cancer had metastasized to her brain. Dr. Dudley, a neurologist, read and interpreted the CAT scan. It was negative. Dr. Dudley reported this to Dr. Lively, the surgeon, who met with Robert and Pauline Stafford and told them that Pauline did not have a brain tumor.

Dr. Dudley charged $345 for reading and interpreting the CAT scan. Since Pauline was covered by Medicare, Dr. Dudley submitted the charge to the Medicare fiscal intermediary for payment on HCFA form 1500.

Box 23A of HCFA form 1500 is titled “Diagnosis or Nature of Illness of Injury.” In this box Dr. Dudley wrote “brain tumor.” Although the CAT scan had ruled out a brain tumor, the Medicare fiscal intermediary would not pay for a “Rule Out” entry in box 23A in the case of a negative CAT scan. Thus, the form could not be submitted with the words, “R/O brain tumor,” in box 23A. (“R/O” is the well-known medical abbreviation for “Rule Out”). After Pauline’s death Dr. Dudley told Mr. Stafford that, in the past, whenever he submitted a “R/O” diagnosis on form 1500 his application for payment was rejected. When that happened he used to have his secretary white-out the abbreviation “R/O” and resubmit the application, whereupon it would be paid. Eventually he got tired of this runaround and started entering in box 23A only the condition ruled out, omitting the abbreviation “R/O.”

Medicare paid its portion of the $345 charge and sent a copy of HCFA form 1500 to the Staffords with the words “brain tumor” inserted in box 23A. It arrived at the Staffords’ farm on Saturday, January 13, 2007.
Mr. Stafford told you that his wife became withdrawn after reading the form. She stopped talking. When Mr. Stafford tried to talk to her, she did not reply. She did say that she was “going to call the doctor on Monday and get him to tell me the truth about the brain tumor.” She went to bed just after supper, something she had never done before. On Sunday, January 14, she did not get out of bed. On Monday morning at breakfast they had no conversation, and after breakfast Mr. Stafford went outside to chop wood.

At your office conference, Mr. Stafford told you that he believed his wife killed herself because she concluded that she had a brain tumor after reading HFCA form 1500. He asked you if there was any way to sue Dr. Dudley for negligently entering the words “brain tumor” on that form when his wife had no brain tumor.

You told Mr. Stafford that, as a matter of law, there is no such thing as “causing” the suicide of another. This ancient common-law rule may be related to the Christian view of suicide as a sin: the decedent, as a wrongdoer, is the last human wrongdoer in any possible chain of events and is therefore the proximate cause of his or her own death. The rule had been abrogated in a number of states, but not in Massachusetts.

You did not charge Mr. Stafford for this conference. You remember feeling, as Mr. Stafford went away, a little bit of gratitude for the common-law rule. If it were not for the common-law rule, you would have been obliged to tell Mr. Stafford that you didn’t want the case because it would be a mighty difficult case to win. You don’t like to disappoint people in this manner.

PART A

Apart from the common-law rule, why would this be a difficult case to win?
PART B

On Sunday, May 2, 2010, Mr. Stafford read in the Boston Sunday Globe that the Supreme Judicial Court of Massachusetts had abolished the common-law rule that no person can be liable for the suicide of another. He called your office on Monday, May 3, and left a message with your secretary asking if he could now sue Dr. Dudley for the wrongful death of his wife.

What issues does this telephone message raise? In particular, what will you tell Mr. Stafford about the statute of limitations?

PART C

Assume that you told Mr. Stafford on Wednesday, May 5, 2010, that any medical malpractice action against Dr. Dudley would now be barred by the statute of limitations. Could Mr. Stafford have a legal malpractice claim against you? Why or why not?

END OF EXAMINATION
TORTS
Mr. Martin
May 11, 2009

Examination identification no. __________________________

FINAL 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 in accordance with the amount of time suggested for each question. Question One consists of ten short-answer questions which are to be answered in the blanks provided on this white examination paper. Questions Two, Three, Four and Five are to be answered in a blue book or blue books. Please write legibly and leave a margin on the left-hand side of the page in your blue book or blue books.

Use only your examination identification number to identify this examination paper and your blue book or blue books. (Your exam ID number is the last six digits of your social security number followed by the number 59. Therefore, if your social security number is 123-45-6789, your exam ID number will be 456789-59). If you use more than one blue book, please be sure that your exam ID number is on each one and number the blue books ("No. 1 of 2," "No. 2 of 2," etc.).

All blue books must be turned in at the end of the examination. This includes blue books which are entirely blank and also blue books which have been used as scrap paper. Label any scrap blue book with the word, "SCRAP."
QUESTION ONE
(suggested time: thirty minutes)

This Question One consists of ten short-answer questions. Write your answers directly on this examination paper in the blanks provided.

Question 1. The elements of the tort claim called “assault” are:

1. ____________________________________________,
2. ____________________________________________, and
3. ____________________________________________

Question 2. The elements of the tort claim called “negligence” are:

1. ____________________________________________
2. ____________________________________________,
3(a). ________________________________________
3(b). ________________________________________, and
4. __________________________________________.
Question 3. The elements of the tort claim called “private nuisance” are:

1. 

2. 

3. ________________________, and

4. ________________________.

Question 4. Pat sustained personal injuries in a three-car collision caused by the concurrent negligence of the three drivers: Pat, Dana and Drew. In Pat’s action for damages against Dana and Drew, the jury apportioned the negligence 30% to Pat, 30% to Dana, and 40% to Drew. Pat’s total damages were $100,000.

Assume for the purposes of this question only that the jurisdiction maintains a system of pure comparative negligence with joint and several liability among multiple tortfeasors. If Pat chooses to execute against Dana alone, what is the most that she can collect?

Questions 5-6. Questions 5 and 6 are based on the following fact situation:

In 2007 Utility completed construction of a new plant for the generation of electricity. The plant burns lignite, a low grade coal which is available in large quantities.

Although the plant was constructed in accordance with the best technology, the plant emits a substantial quantity of invisible fumes. The only way Utility can reduce the fumes is by the use of scrubbing equipment that would cost $500,000,000 to install and would increase the retail price of electricity by 50 per cent while reducing the volume of fumes by only 20 per cent. Because of the expense of such equipment and its relative ineffectiveness, no other generating plant burning lignite uses such equipment.
The plant is located in a sparsely populated rural area. Farmer owns a farm adjacent to the plant, where he has lived and farmed for 40 years. The prevailing winds carry fumes from Utility's plant over Farmer's land. Because of the fumes, his 2008 crop was less than half his average crop over the five years immediately preceding the construction of the plant. His farm has lost value accordingly. No other farm in the area has been similarly affected.

**Question 5.** If Farmer asserts a claim based on private nuisance against Utility, will Farmer prevail? Answer “Yes” or “No” and explain.

YES _______  NO _______

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

**Question 6.** If Farmer asserts a claim based on negligence against Utility for damages, will Farmer prevail? Answer “Yes” or “No” and explain.

YES _______  NO _______

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

**Question 7.** When Denton heard that his neighbor, Prout, intended to sell his house to a minority purchaser, Denton told Prout that Prout and his family would meet with “accidents” if he did so. Prout then called the prospective purchaser and told him that he was taking the house off the market.
Prout sued Denton for assault. The element of Prout’s assault claim that is missing is:

Question 8. Si was in the act of siphoning gasoline from Homeowner’s car in Homeowner’s garage without Homeowner’s permission when the gasoline exploded and a fire followed. Neighbor, seeing the fire, grabbed his garden hose and put out the fire, saving Si’s life and Homeowner’s garage. In doing so, Neighbor was badly burned.

If Neighbor asserts a claim against Si for personal injuries, will Neighbor prevail? Answer “Yes” or “No” and explain.

YES ______ NO ______

Question 9. Pauline sought psychiatric treatment from Dr. Donald, a psychiatrist. During treatment, which consisted of hour-long analysis sessions twice a week, Donald, unknown to Pauline, videotaped her. No sound recording was made of the sessions, but Donald is conducting a study on body language and plans to use the videotapes in his research. Pauline learned that Donald had been videotaping their analysis sessions and brought an action against him on a claim of invasion of privacy.

Under which branch of the invasion of privacy tort is Pauline claiming?
Question 10. In the common law of torts, what is wrong with a plaintiff's complaint which alleges, without more, that the defendant's dog bit the plaintiff?

QUESTION TWO
(suggested time: fifteen minutes)

Printed below is a copy of Leichtman v. WLW Jacor Communications, Inc., taken from another Torts casebook. In your blue book, write a case brief for Leichtman v. WLW Jacor Communications, Inc.

LEICHTMAN v. WLW JACOR COMMUNICATIONS, INC.
634 N.E.2d 697 (Ohio App. 1994)

PER CURIAM. * * *

In his complaint, Leichtman claims to be “a nationally known” antismoking advocate. Leichtman alleges that, on the date of the Great American Smokeout, he was invited to appear on the WLW Bill Cunningham radio talk show to discuss the harmful effects of smoking and breathing secondary smoke. He also alleges that, while he was in the studio, Furman, another WLW talk-show host, lit a cigar and repeatedly blew smoke in Leichtman's face “for the purpose of causing physical discomfort, humiliation and distress.” * * *

Leichtman contends that Furman's intentional act constituted a battery. * * *

In determining if a person is liable for a battery, the Supreme Court has adopted the rule that “[c]ontact which is offensive to a reasonable sense of personal dignity is offensive contact.” Love v. Port Clinton (1988), 37 Ohio St. 3d 98, 99, 524 N.E.2d 166, 167. It has defined “offensive” to mean “disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insultingness.” State v. Phipps (1979), 58 Ohio St. 2d 271, 274, 389 N.E.2d 1128, 1131. Furthermore, tobacco smoke, as “particulate matter,” has the physical properties capable of making contact.
As alleged in Leichtman’s complaint, when Furman intentionally blew cigar smoke in Leichtman’s face, under Ohio common law, he committed a battery. No matter how trivial the incident, a battery is actionable even if damages are only one dollar. 

_Lacey v. Laird_ (1956), 166 Ohio St. 12, 139 N.E.2d 25. The rationale is explained by Roscoe Pound in his essay “Liability”: “[I]n civilized society men must be able to assume that others will do them no intentional injury—that others will commit no intentioned aggressions upon them.” Pound, An Introduction to the Philosophy of Law 169 (1922).

Other jurisdictions also have concluded that a person can commit a battery by intentionally directing tobacco smoke at another. _Richardson v. Hennly_ (1993), 209 Ga. App. 868, 871, 434 S.E.2d 772, 774-775. We do not, however, adopt or lend credence to the theory of a “smoker’s battery,” which imposes liability if there is substantial certainty that exhaled smoke will predictably contact a nonsmoker. _Ezra, Smoker Battery: An Antidote to Second-Hand Smoke_, 63 S. Cal. L. Rev. 1061, 1090 (1990). Also, whether the “substantial certainty” prong of intent from the Restatement of Torts translates to liability for secondary smoke via the intentional tort doctrine in employment cases as defined by the Supreme Court in _Fyffe v. Jeno’s, Inc._ (1991), 59 Ohio St. 3d 115, 570 N.E.2d 1108, need not be decided here because Leichtman’s claim for battery is based exclusively on Furman’s commission of a deliberate act. 

Neither Cunningham nor WLW is entitled to judgment on the battery claim under Civ. R. 12(B)(6). Concerning Cunningham, at common law, one who is present and encourages or incites commission of a battery by words can be equally liable as a principal. _Bell v. Miller_ (1831), 5 Ohio 250; 6 Ohio Jurisprudence 3d (1978) 121-122, Assault, Section 20. Leichtman’s complaint states, “At Defendant Cunningham’s urging, Defendant Furman repeatedly blew cigar smoke in Plaintiff’s face.”

With regard to WLW, an employer is not legally responsible for the intentional torts of its employees that do not facilitate or promote its business. _Osborne v. Lyles_ (1992), 63 Ohio St. 3d 326, 329-330, 587 N.E.2d 825, 828-829. However, whether an employer is liable under the doctrine of respondeat superior because its employee is acting within the scope of employment is ordinarily a question of fact. _Id. at 330, 587 N.E.2d at 825_. Accordingly, Leichtman’s claim for battery with the allegations against the three defendants in the second count of the complaint is sufficient to withstand a motion to dismiss under Civ. R. 12(B)(6).

We affirm the trial court’s judgment as to the first and third counts of the complaint, but we reverse that portion of the trial court’s order that dismissed the battery claim in the second count of the complaint. This case is remanded for further proceedings consistent with law on that claim only.

GO ON TO THE NEXT PAGE
QUESTION THREE  
(suggested time: forty-five minutes)

Section 402A of the Restatement, Torts, 2d., printed below, became the fountainhead of modern American product liability law even though, at the time of adoption of the Second Restatement (1967), there was only a handful of decided cases on the subject of strict liability for defective products. In the absence of caselaw Section 402A could define the parameters of strict liability for defective products only in the most general terms.

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

As new claims began to be brought under s. 402A of the Second Restatement, American state courts had first to decide whether to adopt the doctrine of strict liability for defective products at all. If they adopted it, they then had to decide a myriad of issues that are not explicitly addressed in s. 402A. For example, should the liability of the “seller” of a product extend to a defendant who is a lessor of the product? To a defendant who acted as a broker in the sale of the product? To the supplier of a defective component in a product assembled by another, where the defective component causes injury?
Not only did these issues arise under s. 402A, but they arose separately in all of the fifty-plus American jurisdictions. Courts in one American state are, of course, not bound by the decisions of courts in another state. For this reason (and also because some states passed their own product liability legislation), the decisional law under s. 402A is far from uniform from state to state.

One issue that continues to divide American courts is whether the seller of a used product should be deemed a “seller” under s. 402A and therefore subject to strict liability.

In 1987 the Supreme Court of the state of Catatonia held that s. 402A of the Second Restatement was to be the product liability law of Catatonia. That court, however, has not until now had before it the question of strict liability for the seller of a used product.

Nelson, age fourteen, injured his hand while hunting pigeons on his family’s farm with a twenty-gauge single-shot shotgun. After Nelson observed a pigeon to fly into a barn, he placed a shell in the chamber, entered the barn, and began climbing a ladder with the gun in his hand to reach the loft. The shotgun was uncocked. When Nelson approached the loft, he reached up and placed the shotgun in a leaning position on a board at the side of the ladder. As he continued climbing, the shotgun slipped and fell butt-first to the floor of the barn and discharged, wounding Nelson in the hand. Nelson suffered serious injuries and will never regain full use of his hand.

The shotgun was manufactured by Open Arms, Inc., sometime during the 1990's. It was purchased, used, for $140 by Nelson’s father for Nelson’s use from Bob’s True Value Hardware Store (“Bob’s”).

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1 Open Arms is known for its slogan “Arms open to all Americans,” and its catchy jungle:

“Guns make us equal,
Guns make us free.
Here’s to guns
And liberty.”
Nelson’s father saw to it that his son received adequate instruction in firearms safety, and allowed Nelson to use the shotgun unsupervised.

Robert, the proprietor of Bob’s True Value Hardware Store, took the shotgun in trade from a third party in 2007. He visually inspected it at that time but found no apparent defects. The shotgun appeared to be in good condition. It remained in Robert’s possession until it was purchased by Nelson’s father on March 7, 2008. No alterations, changes or modifications of any type were made to the shotgun while in Robert’s possession. At no time was Robert ever informed by Open Arms by notice of alert, recall or warning, or by report of the previous owner, that there was a defect in the shotgun.

Catatonia is a rural state where firearm ownership is commonplace. It is lawful there for a fourteen-year-old to engage in unsupervised use of a firearm. It is also lawful under state law for Robert to be in the business of selling, trading and reselling new and used firearms. Robert had the necessary federal firearm dealer’s license.

Nelson’s father sued Open Arms on strict liability grounds, alleging that the shotgun was defective and unreasonably dangerous due to a design defect that caused the shotgun to fire when dropped on its butt. In response to Open Arms’s motion for summary judgment, Nelson’s father produced an affidavit from a firearms expert who stated that his examination of the weapon revealed that the shotgun would fire every time it was dropped on its butt from a distance as little as ten inches, despite the fact that the weapon was not cocked and was set in a safety mode. The expert concluded that the shotgun was unreasonably dangerous, was defective in design, and was in the same condition as when originally manufactured.

On the basis of this affidavit Open Arms’s motion for summary judgment was denied. Soon thereafter, however, Open Arms entered liquidation proceedings in federal bankruptcy court. It now appears that the bankrupt estate will have no funds with which to pay any judgment against it that might be rendered against it on Nelson’s behalf.

For this reason Nelson’s father amended his complaint to include Bob’s as a defendant. The same strict liability claim is asserted against Bob’s as was asserted against Open Arms.

Bob’s initially moved to dismiss the complaint as to it. Citing cases from some
other states, Bob’s argued that a seller of used goods is not a “seller” subject to strict liability. Nelson’s father countered with a memorandum citing cases from still other states which hold that a seller of used goods is a seller subject to strict liability. With no precedent to bind it, the trial court ruled that the words in s. 402A, “[o]ne who sells any product in a defective condition...” do not differentiate between sellers of new products and sellers of used products. Therefore, said the trial court, Bob’s motion to dismiss was denied.

Bob’s appeals to the Catatonia Supreme Court. How should the Court decide? You should consider (as the Supreme Court will consider) the law, issues of public policy, and the practical consequences of the decision.

QUESTION FOUR
(suggested time: forty-five minutes)

On the recommendation of a friend, a young woman named Pam Cherrystone consulted Dr. Seymour Glimm, a staff psychiatrist employed by a for-profit corporation called North Suburban Mental Wellness Clinic (“Mental Wellness”). Pam told Dr. Glimm that she was despondent over the breakup of her engagement with her longtime boyfriend. She told him that she had once before attempted suicide and was fearful of what she might do to herself. She complained of a lot of non-specific somatic pain. Dr. Glimm recommended that Pam begin taking an antidepressant medication, gave her a prescription for Lexipro, and suggested that she come back in two weeks. In the meantime, if she found herself having suicidal thoughts, she should go to the nearest hospital emergency room.

Two weeks later Pam returned. She told Dr. Glimm that the Lexipro helped, if only marginally. She still hoped that he would prescribe medication for her somatic aches and pains which she described as “bone pain.” Dr. Glimm suggested that she begin weekly psychotherapy visits with him as an adjunct to drug therapy. Pam agreed.

In the weeks that followed Pam told Dr. Glimm much about herself, centering on the relationship she had with her ex-boyfriend. Although it was he who called off the engagement, she blamed herself. She thought of herself as sexually inhibited and perceived that the boyfriend did not want to enter into marriage with her for this reason. She asked Dr. Glimm if there was any such thing as treatment for sexual inhibition.
As a matter of fact, said Dr. Glimm, I am an expert in the treatment of sexual inhibition.

Dr. Glimm pointed to the analytic couch in his office and suggested that Pam should disrobe entirely at the beginning of each psychotherapy session and lie on the couch over which, Pam noted, there was a mirror on the ceiling. Pam thought this peculiar but Dr. Glimm explained that the beginning of sexual inhibition treatment is for the patient to get comfortable with her own body. At the next session, Pam complied. She reminded Dr. Glimm that she still hoped he would prescribe something for her bone pain. Dr. Glimm gave her a prescription for Percodan, a synthetic narcotic.

A week later, Pam told Dr. Glimm that Percodan not only relieved her pain but worked better than Lexipro on her depressed mood. In fact she felt great. She also felt ready to proceed to the next step in sexual inhibition treatment. Before long Dr. Glimm and Pam were engaging in sexual intercourse on the analytic couch at every session. At no time did Pam resist or refuse to participate in sexual activity. Dr. Glimm continued to prescribe Percodan for her.

Pam felt herself falling in love with Dr. Glimm, but she wasn’t sure about his feelings for her. To test him, she told him that she was pregnant. This was a lie. She asked him for money for an abortion. He refused, saying that adults must confront the consequences of their own sexual behaviors. At this rebuff, Pam was devastated. She decided that Dr. Glimm had some consequences to confront, too.

Pam consulted a lawyer, Sam Sharkskin. Sharkskin told her that she was the victim of a well-known form of psychotherapist sexual abuse for which many patients in the United States had sued and recovered damages. Sam advised Pam to get a confession from Dr. Glimm. At her next session, following Sam’s advice, Pam did not disrobe. Instead she confronted Dr. Glimm, accusing him of psychotherapist sexual abuse. She demanded the return of all of the $8,000 that she had paid for psychotherapy. Dr. Glimm said that he didn’t have $8,000. Pam went away satisfied anyway, because she was wearing a concealed tape recorder and Dr. Glimm had not denied sexual activity.

Sam prepared and filed a complaint in court seeking damages for battery, misrepresentation, and medical malpractice. As defendants, he named Dr. Glimm and the doctor’s employer, Mental Wellness.
Part A.
(twenty per cent of this question)

What defenses and/or counterclaims, if any, does Dr. Glimm have to this complaint? Discuss them.

Part B.
(forty per cent of this question)

What defenses and/or counterclaims does Mental Wellness have to this complaint? Discuss them.

Part C.
(forty per cent of this question)

Dr. Glimm referred the complaint to his medical malpractice insurer and demanded that it furnish him legal representation and indemnify him for any damages that might be awarded against him, in accordance with the malpractice insurance policy. The insurance company disclaimed coverage, saying that the policy only covered medical negligence whereas Dr. Glimm was being sued for intentional tortious conduct.

On the assumption that Dr. Glimm will implead the insurance company as a third-party defendant in order to litigate the issue of coverage, assess the insurance company’s position.

QUESTION FIVE
(suggested time: forty-five minutes)

In October, 1999, thirteen-year-old Christopher Beamon, a seventh grader in Ponder, Texas, was ordered detained by the county juvenile judge, Darlene A. Whitten, after he wrote a graphic Holloween horror story depicting the shooting deaths of a teacher and two students. He was released after five days while the county district attorney, Bruce Isaaks, considered delinquency charges. This incident occurred approximately six months after two students at Columbine High School in Colorado murdered twelve students and a teacher before taking their own lives. The Beamon case received national publicity, mostly critical of Judge Whitten and District Attorney Isaaks for perceived overreaction.
On November 11, 1999, the Dallas Observer, a tabloid alternative weekly comparable to the Boston Phoenix or New York’s Village Voice, published an article in both its hard copy and on-line editions in the section labeled “News,” reporting that “In the second homework-related arrest in as many weeks, Denton County juvenile court judge [Whitten] jailed a Ponder student for suspicion of making a terrorist threat. . . .”

The November 11 article, written by staff writer Rose Farley, was entitled “Stop the Madness.” The article reported that Cindy Bradley, “a diminutive six-year-old” was arrested during “story time” in her class at Ponder elementary school for writing a book report about “cannibalism, fanaticism and disorderly conduct” in Maurice Sendak’s award-winning classic children’s book, Where the Wild Things Are. Adjacent to the article was a picture of a smiling child holding a stuffed animal and bearing the caption, “Do they make handcuffs this small? Be afraid of this little girl.”

The Dallas Observer article described Cindy as appearing subdued when she stood before Judge Whitten “dressed in blue jeans, a Pokemon T-shirt, handcuffs and ankle shackles.” Judge Whitten was quoted as chastising Cindy from the bench:

“Any implication of violence in a school situation, even when it was just contained in a first-grader’s book report, is reason enough for panic and overreaction,” Whitten said from the bench. “It’s time for you to grow up, young lady, and it’s time for us to stop treating kids like children.”

Judge Whitten was said to have ordered Bradley detained for ten days at juvenile detention center while prosecutors contemplated whether to file charges. Cindy was placed in ankle shackles “after authorities reviewed her disciplinary record, which included reprimands for spraying a boy with pineapple juice and sitting on her feet.” The article noted that Isaaks had not yet decided whether to prosecute Cindy and quoted him as saying, “We’ve considered having her certified to stand trial as an adult, but even in Texas there are some limits.” The article claimed that school representatives would soon join local faith-based organizations, including “the God Fearing Opponents of Freedom (GOOF)” in asking publishers to review content guidelines for children’s books.
The article asserts that, although he had not read the book, then-governor George W. Bush “was appalled that such material could find its way into the hands of a Texas schoolchild. The book clearly has deviant, violent sexual overtones. Parents must understand that zero tolerance means just that. We won’t tolerate anything.”

It is undisputed that, apart from the references to Christopher Beamon’s detention, the “Stop the Madness” article was completely made up. It was conceived and authored by Farley and ultimately published after editing and approval by Patrick Williams, the managing editor of the newspaper, and by Julie Lyons, its editor in chief. The six-year-old girl identified as Cindy Bradley was actually the daughter of a Dallas Observer staff member.

After publication of the Madness article, complaints about Isaaks and Whitten were received and posted on the paper’s website, accusing these officials of incompetence and demanding their removal from office based on their conduct as described in the article.

District Attorney Isaaks and Judge Whitten demanded an apology, requested a retraction, and threatened to sue. In response, the Buzz column in the Observer’s next edition explained that the piece was a satire:

Buzz hates being one of those guys, commonly known as “losers” or “dateless,” who laboriously explains jokes. Unfortunately some people-- commonly known as “clueless” or “Judge Darlene Whitten--did not get, or did not appreciate, the joke behind the news story “Stop the Madness” that appeared in last week’s Dallas Observer.

Here’s a clue for our cerebrally challenged readers who thought the story was real: it wasn’t. It was a joke. We made it up. Not even Judge Whitten, we hope, would throw a six-year-old girl in the slammer for writing a book report. Not yet, anyway.

Unsatisfied by this response, Judge Whitten and District Attorney Isaaks sued the Dallas Observer, Farley, Lyons and Bradley for defamation, alleging that the article could be understood by the reasonable reader as making false statements of fact about them and that the statements were made with actual malice. They alleged that the article was libelous because it accused them of conduct amounting to official
oppression, false arrest, false imprisonment, civil rights violations, child abuse, and assault.

What are the principal issues in *Whitten and Isaaks v. Dallas Observer*, et al?

END OF EXAMINATION
FINAL 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 in accordance with the amount of time suggested for each question. Question One consists of ten short-answer questions which are to be answered in the blanks provided on this white examination paper. Questions Two, Three, Four and Five are to be answered in blue books. Please write legibly and leave a margin on the left-hand side of the page in your blue book or blue books.

Use only your social security number to identify this examination paper and your blue book or blue books. If you use more than one blue book, please be sure that your social security number is on each one and number the blue books ("No. 1 of 2," "No. 2 of 2," etc.).

All blue books must be turned in at the end of the examination. This includes blue books which are entirely blank and also blue books which have been used as scrap paper. Label any scrap blue book with the word, "SCRAP."

In any question you may assume, if relevant, that events take place in a jurisdiction which has adopted modified comparative negligence but retains the common-law rules of joint and several liability, contribution, and indemnity.
QUESTION ONE

(suggested time: thirty minutes)

This Question One consists of ten short-answer questions. Write your answers directly on this examination paper in the blanks provided.

1. The elements of the tort claim called "battery" are:
   1. ___________________________, and
   2. ___________________________.

2. The elements of the tort claim called "assault" are:
   1. ___________________________,
   2. ___________________________, and
   3. ___________________________.

3. The elements of the tort claim called "false imprisonment" are:
   1. ___________________________,
   2. ___________________________,
   3. ___________________________, and
   4. ___________________________.
4. The elements of the tort claim called “conversion” are:

1. ____________________________________________,

2. ____________________________________________,

3. ____________________________________________, and

4. ____________________________________________.

5. The elements of the tort claim called “strict liability for defective product” are:

1. ____________________________________________

2. ____________________________________________

3. ____________________________________________,

4. ____________________________________________, and

5. ____________________________________________

6. Desperate for money, Peaches pawned her fur coat at Dogberry’s Pawn Shop for $500. Before repaying the loan, Peaches demanded return of the coat so that she could wear it to a party. Dogberry refused to return the coat.

   Peaches sued Dogberry for conversion of the coat. The element of Peaches’s conversion claim that is missing is:
7. Pocket, a bank vice-president, took kickbacks to approve certain loans that later proved worthless. Upon learning of the kickbacks Dudd, the bank's president, fired Pocket telling him, "If you are not out of this bank in ten minutes, I will have the guards throw you out by force." Pocket left at once.

Pocket sued Dudd for assault. The element of Pocket's assault claim that is missing is:

8. Plaintiff, a jockey, was seriously injured in a race when another jockey, Daring, cut too sharply in front of her without adequate clearance. The two horses collided, causing Plaintiff to fall to the ground and sustain injury. The State Racetrack Commission ruled that, by cutting too sharply, Daring committed a foul in violation of racetrack rules requiring adequate clearance for crossing lanes. Plaintiff sues Daring for damages. One count of Plaintiff's action is based on battery. The element of Plaintiff's battery claim that is missing or in doubt is:

9. Well after midnight, the night manager of the Notell Hotel got a call from the Naked City Police Department informing her that Pushkin, a hotel guest, was a terrorist. The caller asked the manager to detain Pushkin for a few hours until the police could secure an arrest warrant. The manager agreed. Assuming Pushkin to be in his room and asleep, she locked the door with a deadbolt that prevented the door from being opened from the inside. Two hours later she discovered that she had locked the door to Patterson's room instead of Pushkin's. Patterson slept through these events but when he found out that he had been locked in his room he was furious. Patterson sued the Notell Hotel for false imprisonment.

The element of Patterson's false imprisonment claim that is missing is:
10. Bank foreclosed on Farmer's land and farm machinery. The land and machinery were sold at auction by Auctioneer. Countryman bought a John Deere tractor at the auction.

Soon thereafter Countryman was injured by reason of a defect in the tractor that existed at the time of the sale. Countryman sued Auctioneer on a claim of strict liability for defective product. The element of Countryman's strict liability claim that is missing is:

QUESTION TWO
(suggested time: fifteen minutes)

Printed below is a case taken from another Torts casebook. In your blue book, write a case brief for Read v. Tacoma Ry. and Power Co.

**REED v. TACOMA Ry. & POWER CO.**
201 P. 783 (Wash. 1921)

BRIDGES, J. *** [T]here was a verdict for the defendant [based on a finding of contributory negligence on the part of the plaintiff], and the plaintiff has appealed from a judgment dismissing the action. *** The appellant complains of the following instruction given by the court to the jury:

You are further instructed that if the plaintiff's daughter thought she had time to drive upon the tracks of the defendant and off of them again before the car of the defendant would reach her, and did not have sufficient time so to do, then it was an error in judgment on the part of the plaintiff's daughter, and the plaintiffs cannot recover, and your verdict must be for the defendants.

This instruction does not correctly state the law. Error of judgment is not necessarily negligence. The correct test in cases of this character is, did the person act as a reasonably prudent person would have acted under similar circumstances? The mere fact that one errs in judgment is not conclusive proof that he did not act as a reasonably prudent person would have acted under like circumstances. The driver of the automobile admitted that, in the emergency, she thought she would be safer in making an effort to get across ahead of the street car. It will not do to say that simply because her judgment proved to be bad she did not act as a reasonably prudent person would have acted under the circumstances. One may be mistaken as to the best course to pursue without being guilty of negligence as a matter of law. Mistaken judgment is not necessarily negligence. ***

For the error pointed out the judgment is reversed and the cause remanded for a new trial.
QUESTION THREE
(suggested time: forty-five minutes)

Page Turner was an undergraduate at Millard Filmore State College located in a rural area in upstate New York. Because the college was forty miles from the nearest hospital, it maintained a student health center capable of treating emergencies. A local doctor, Dr. Doolittle, was on call twenty-four hours a day for emergency cases.

During Page’s sophomore year, several dormitory break-ins and sexual assaults upon female students occurred on the campus. Page had not herself been a victim but she was outraged by the college’s apparent failure to tighten up campus security. Page wrote to the school newspaper complaining. In partial response, the college president issued a press release stating that the college’s current financial situation made it impossible to hire more security personnel.

The college did, however, arrange a self-defense course at its gym. Page enrolled in the course. The college hired Seamus Blueflash to conduct the classes. Blueflash was a state police officer for fifteen years until he suffered disabling injuries in a high-speed crash while chasing a fleeing felon, and was forced to retire. Blueflash has disturbing flashbacks to the chase and the accident. Because of neurological damage, he also suffers from blackouts especially when under stress. For this reason Blueflash does not own a car, although he still has a driver’s license.

During the first class the students worked in pairs. After receiving instruction from Blueflash, they practiced on one another. Page’s partner was Al Falfa, a husky 200-pound farm boy. The first exercise was a hip throw. The person executing the hip throw grasps the partner by the shoulders and turns quickly. By throwing the person grasped over the hip, he or she loses balance and falls. Page threw Al down to the floor. He landed where two of the mats had come apart, and was still. Page was heard by other students to say, “That’ll teach him.”

Blueflash feared that Al was seriously injured. He and another student attempted to carry Al to the emergency medical center. They soon staggered under Al’s weight. Blueflash saw Page’s Honda outside the gym with the keys left in it. He put Al in the back seat and drove towards the emergency medical center. Unfortunately, the tension caused Blueflash to black out and lose his way. By the
time he recovered and reached the emergency medical center he was so flustered that he rammed the college president’s Mercedes. Both the Honda and the Mercedes were badly damaged.

Before Blueflash left the gym he asked Lucy Tanktop, one of the more advanced students, to take the mat and substitute for him. Lucy was a first-degree black belt, qualified to conduct classes with the approval of a yudansha or black belt instructor. Lucy asked Page to assist her in demonstrating the osotogari, a leg throw in which one leg is used to sweep the opponent’s leg out from under her. Page fell on her arm, breaking it.

Lucy called 911. An ambulance rushed Page to the emergency medical center where she arrived just after the unconscious Al. Dr. Doolittle was paged. Unfortunately he was playing poker and had turned off his pager in order to concentrate on his poker game. Only after a series of frantic phone calls was Dr. Doolittle finally located.

In the meantime Page and Al, on gurneys, were wheeled into a treatment room. In serious pain and concerned that her treatment would be further delayed, Page reached over to Al’s gurney and switched charts with him. When Dr. Doolittle arrived, Page was first treated. Afterwards it was found that Al had suffered a subdural hematoma. A medical expert has given Al’s family an opinion that, if Al had been treated more promptly, he would have been less likely to have suffered the permanent brain damage with which he is afflicted.

What torts?

What tort defenses?
QUESTION FOUR  
(suggested time: forty-five minutes)

Cathy and Bob Smith visit your office. They tell you that their one-month-old baby girl, Sandy, suffocated and died six months ago while she was in the care of Cathy’s mother. The Smiths recently read the following story in their local newspaper, leading them to believe that the cushion given to them by a friend may have been the cause of Sandy’s death.

A foam pellet cushion believed to be responsible for 19 infant deaths in recent years is being recalled by manufacturers under pressure from the federal Consumer Product Safety Commission. The pillow-sized cushions, which are filled with foam pellets that mold to a child’s body, are believed to have caused the infants to suffocate. The cushions were developed for one-to-seven month old babies to assist them in partially sitting up since the pellets in the cushion will conform to the babies’ actual size and shape and the angle of the sitting position to provide adequate support.

Seventeen of the deaths have occurred in the last three years. Investigators for the Commission believe that the deaths were linked to the cushion’s beanbag-like construction. They theorized that an infant moving in his or her sleep would shift the pellets to one end, tilting the baby’s torso upwards and thus putting pressure on the throat.

Commission officials said that they had reached agreements with 9 of the 10 cushion manufacturers to voluntarily recall the products. These 9 manufacturers represent about 87 per cent of an estimated market of 950,000 cushions. According to Commission statistics, 9 infant deaths, the largest number, were related to a single cushion produced by Acme Bed Fashions, Inc. Acme also produced the greatest number of cushions, accounting for about 50 per cent of the baby cushion market.

The cushions are covered with a quilted fabric that comes in different prints. The cushion prices ranged from $9 to $40. All of the cushions carried warning labels advising parents as follows: “Do not
leave child unattended on the cushion.” Each warning label preceded
the description of the cushion’s contents on the label, and the warning’s
print size was twice as large as the contents description. One end of the
label was sewn onto the end seam of the cushion in a flap-type
attachment, as is customary with new pillows.

Some officials in the cushion industry have suggested that the deaths were
caus ed by Sudden Infant Death Syndrome (“SIDS”). SIDS causes a stoppage of
breath. Its cause is unknown. According to the American Academy of Pediatrics,
recent studies support a link between the stomach-down or prone sleeping position
and an increased risk of SIDS, but the relationship between SIDS and any particular
sleeping position has not been proven.

The Smiths tell you that Sandy apparently fell asleep in the living room while
lying face down on the cushion. Her grandmother carried the cushion, with Sandy
on it, to her crib. When the grandmother went to check on Sandy about 20 minutes
later, she found that Sandy was not breathing. She called 911. Unfortunately, it was
too late. Sandy could not be revived.

The Smiths say that they read the warning label including the warning. Cathy
said that she later tore off the label and discarded it because it was mostly a contents
label which always got in the way. The cushion was covered with a fancy pillow
case. They always removed the cushion when leaving Sandy unattended. The Smiths
say that they advised Cathy’s mother to remove the pillow whenever Sandy was left
unattended, but that the grandmother apparently forgot this advice.

The cushion was thrown away after Sandy’s death. The Smiths do not recall
the name of the manufacturer on the label. The friend knows which retailer she
bought the cushion from, but the retailer says that he sold cushions from several of
the manufacturers. The purchase was a cash transaction without any records to
identify the pillow brand.

Analyze the Smiths’s product liability claim. Determine what further
investigation is necessary and analyze the critical issues based on the alternatives that
the investigation might disclose.
QUESTION FIVE
(suggested time: forty-five minutes)

Yesterday you received a telephone call from Elizabeth Greene, one of your clients. Ms. Greene runs Cherrypicker’s Best Friend, Inc. ("CBF"), a company that conducts medical examinations on individuals applying for life insurance. Upon the request of an insurer, CBF arranges for one of its contract physicians to examine the applicant. The exam includes a full physical exam, complete blood tests and a detailed medical and family history. Some insurance companies pay CBF for the testing; others require the applicant to cover its cost.

Ms. Greene is concerned that a small number of applicants are testing positive for the HIV virus. Under current company policy, CBF does not inform insurance applicants of the outcome of the tests. Applicants are required to sign a written consent form which states that the results of the tests are confidential and are the property of the insurance company seeking the tests.¹ She says that most insurers, upon receiving a problematic medical report, simply deny the application for life insurance without informing the applicant of the reasons for denial.

Ms. Greene asks you about the legal implications of her company’s non-disclosure policy. She notes that such individuals, if uninformed of their HIV-positive status, may delay seeking medical treatments that can prolong the onset of full-blown AIDS. Moreover, such individuals may continue to engage in sexual practices that expose others to HIV infection. Because of the detailed family history that constitutes part of CBF’s medical exam, Ms. Greene says that it is often possible to identify by name the third parties—typically spouses— that are at risk of being infected by the applicant.

Ms. Greene asks you for advice about her company’s disclosure policy.

¹. Assume that this is taking place in a jurisdiction other than Massachusetts. It is illegal in Massachusetts to test a person for HIV without that person’s written informed consent. G. L. c. 111, s. 70F. Whether insurance companies are paying any attention to this Massachusetts statute is unknown.
Part A.
(twenty per cent of this question)

Does the company's present non-disclosure policy expose it to any risks of legal liability? If so, what are those risks? If not, why not?

Part B.
(thirty per cent of this question)

If CBF were to adopt a policy of disclosing HIV-positive test results to the insurance applicants, would it be exposed to any risks of legal liability? If so, what would be those risks? If not, why not?

If CBF were to adopt a policy of disclosing the applicant's HIV-positive test results to known sexual partners of the insurance applicants, would it be exposed to any risks of legal liability? If so, what would be those risks? If not, why not?

Part C.
(thirty per cent of this question)

Ms. Greene tells you that, although the HIV tests in use today are highly accurate, they are not perfect. The maker of the test used by CBF claims that it is 99.9% accurate. At that rate, the test will fail to identify one in every thousand HIV-positive test subjects. More worrisomely, for every thousand test-takers correctly identified, the test will incorrectly identify (as HIV-positive) quite a few more than one test-takers who are not in fact HIV positive. (These are called "false positives"). This seemingly imbalanced large error rate is the result of a well-known statistical phenomenon called the prevalence of false positives in low-incidence activity.\(^2\) There is no way to tell false positives from true positives.

Disclosure of HIV-positive status can be a life-shattering event to the individual concerned. Ms. Greene is aware of a clinic in from Florida in the early

\(^2\) The prevalence of false positives in low-incidence activity is explained in an addendum to this examination, which you need not read unless you are interested and have the time.
days of blood screening which reported that, of 22 blood donors told that they were HIV positive, seven committed suicide.

Inevitably, says Ms. Greene, if her company discloses HIV test results to the insurance applicants and/or to their sexual partners, some disclosures will be false positives.

If CBF were to adopt a policy of disclosing HIV-positive test results to the insurance applicants, and disclosed a false positive result, would the company be exposed to any risks of legal liability? If so, what would be those risks? If not, why not?

If CBF were to adopt a policy of disclosing an applicant’s HIV-positive test results to the known sexual partner of the applicant, and disclosed a false positive result, would the company be exposed to any risks of legal liability? If so, what would be those risks? If not, why not?

Part D.
(twenty percent of this question)

Given your conclusions to Parts A through C of this question, advise Ms. Greene of the course of action or non-action that you recommend for her company in connection with disclosure of HIV-positive test results, and explain why you make this recommendation.
Semi-Daily Journal
Brad DeLong’s Thoughts of the Moment on Economics, and on Other Topics as Well
DeLong’s Home Page

One Hundred Interesting Mathematical Calculations, Number 9: False Positives

Suppose that we have a test for a disease that is 98% accurate: if one has the disease, the test comes back "yes" 98% of the time (and "no" 2% of the time), and if one does not have the disease, the test comes back "no" 98% of the time (and "yes" 2% of the time). Suppose further that 0.5% of people—one out of every two hundred—actually has the disease.

Your test comes back "yes." How worried should you be? How likely is it that you have the disease?

Suppose just for ease of calculation that we have a population of 10000, of whom 50—one in every two hundred—have the disease. On average, the fifty who have cancer will contribute 49 "yes" tests and one "no" test. On average, the 9950 who do not have cancer will contribute 9751 "no" tests and 199 "yes" tests.

If you test "no" you can be very happy indeed: there is only one chance in 9752 that you are the unlucky guy who had the disease and yet tested negative.

If you test "yes" you are less happy. But there are 248 "yes" tests, and only 49 of those people have the disease. The chances that you are disease-free are 80.24 percent.

This is the so-called false positive problem: it shows itself wherever you have an imperfect signal of an unlikely event, and it leads to situations in which most of your positive signals are false positives: fake signals, not real indicators of the problem or the event at all.

From John Allen Paulos’s Innumeracy.

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