

TORTS
Mr. Martin
Spring 2016

Student ID No. _____

FINAL EXAMINATION
THIS IS A CLOSED BOOK EXAMINATION

This is a closed book examination. Nothing other than a writing instrument is allowed on your person or at or near your desk. Cell phones must be powered off and put away. It is a disciplinary violation to have a cell phone on or near your person.

Questions will be weighted in accordance with the amount of time suggested for each question. All questions are to be answered in one or more blue books, except that the multiple-choice questions are to be answered on the bubble sheet which is distributed with this exam.

Please write legibly in your blue book, begin each question on a new page, and leave a margin on the left-hand side of the page.

Use only your student identification number to identify your blue book or blue books, your bubble sheet, and this white examination paper. If you use more than one blue book, identify each one ("No. 1 of 2," "No. 2 of 2," etc.), make sure that your student ID number is on each one, and insert all others into the first blue book when you turn them in.

In any question you may assume, if relevant and unless the question tells you otherwise, 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.

ALL BLUE BOOKS AND THIS WHITE EXAMINATION PAPER MUST BE RETURNED AT THE END OF THE EXAMINATION. LABEL ANY SCRAP BLUE BOOK WITH THE WORD 'SCRAP.'

QUESTION ONE
TWENTY MULTIPLE CHOICE QUESTIONS
(suggested time: one hour)

When you have determined your answer to each of the following questions, mark the answer with a No. 2 pencil in the appropriate block of the bubble sheet.

QUESTION I-1.

A four-year-old child sustained serious injuries when a playmate pushed him from between two parked cars into the street, where he was struck by a car. The child, by his representative, sued the driver of the car, the playmate's parents, and his own parents. At trial, the child's total injuries were determined to be \$100,000. The playmate's parents were determined to be 20% at fault because they had failed to adequately supervise him. The court had adopted the pure comparative negligence doctrine, with joint and several liability, in place of the common-law rules relating to plaintiff's fault. In addition, the common-law doctrines relating to intra-family liability have been abrogated.

How much, if anything, is the child's representative entitled to recover from the driver?

- (A) \$30,000.
- (B) \$50,000.
- (C) \$100,000.
- (D) Nothing.

QUESTION I-2.

A landowner who owned a large tract of land in the mountains sought to protect a herd of wild deer that frequented the area. Although the landowner had posted signs that said, "No Hunting—No Trespassing," hunters frequently intruded to kill the deer. Recently, the landowner built an eight-foot chain-link fence, topped by three strands of barbed wire, across a gully on her land that provided the only access to the area frequented by the deer.

A wildlife photographer asked the landowner for permission to enter the property to photograph the deer. Because the landowner feared that any publicity would encourage further intrusions, she denied the photographer's request. Frustrated, the photographer attempted to climb the fence. He became entangled in the barbed wire and suffered extensive lacerations. The wounds became infected and ultimately caused his death. The photographer's personal representative brought an action against the landowner.

Will the plaintiff prevail?

- (A) Yes, because the landowner may not use deadly force to protect her land from intrusion.
- (B) Yes, because the landowner had no property interest in the deer that entitled her to use force to protect them.
- (C) No, because the photographer entered the landowner's land after the landowner had refused him permission to do so.
- (D) No, because the potential for harm created by the presence of the barbed wire was open and obvious.

QUESTION I-3.

A hiker sustained a head injury when he was struck by a limb that fell from a tree. At the time of his injury, the hiker was walking through a forest on private property without the property owner's knowledge or permission. It was determined that the limb fell because the tree was infested with termites.

In an action by the hiker against the property owner to recover for his head injury, will the hiker prevail?

- (A) No, because the property owner could not foresee that anyone would be injured.
- (B) No, because the property owner breached no duty to the hiker, who was a trespasser.
- (C) Yes, because the property owner had a duty to prevent the trees on his property from becoming dangerous.
- (D) Yes, because the property owner is liable for hidden dangers on his property.

QUESTION I-4.

A cigarette maker created and published a magazine advertisement that featured a model dressed as a race-car driver standing in front of a distinctive race car. In fact, the car looked almost exactly like the very unusually marked one driven by a famous and popular driver. The driver in the ad was not identified, and his face was not shown in the advertisement. The cigarette maker moved to dismiss the complaint.

Will the cigarette maker's motion to dismiss the complaint be granted?

- (A) No, because there are sufficient indicia of the driver's identity to support a verdict of liability.
- (B) Yes, because the driver is a public figure.
- (C) Yes, because there was no mention of the driver's name in the ad.
- (D) Yes, because the driver did not claim any emotional or dignitary loss.

QUESTION I-5.

A consumer bought an electric kitchen blender from the manufacturer. Soon after the purchase, the consumer was using the blender in an appropriate way when the blender jar shattered, throwing a piece of glass into the consumer's eye.

The consumer brought an action against the manufacturer based solely on strict product liability. The consumer's expert testified that the blender was defectively designed. However, because the blender jar was destroyed in the accident, the expert could not determine whether the accident was caused by the design defect or a manufacturing defect. The manufacturer's expert testified that the blender was not defective.

If, at the conclusion of the evidence, both parties move for directed verdicts, how should the trial judge rule?

- (A) Direct a verdict for the manufacturer, because the consumer's expert was unable to specify the nature of the defect.

- (B) Direct a verdict for the manufacturer, because the consumer's action was brought solely on a strict liability theory.
- (C) Direct a verdict for the consumer, because the blender was new when the jar shattered.
- (D) Deny both motions and send the case to the jury, because a jury reasonably could conclude that the harm probably was caused by a defect present in the product when it was sold.

QUESTION I-6.

As a shopper was leaving a supermarket, an automatic door that should have opened outward opened inward, striking and breaking the shopper's nose. The owner of the building had installed the automatic door. The lease, pursuant to which the supermarket leased the building, provided that the supermarket was responsible for all maintenance of the premises.

The shopper sued the supermarket. At trial, neither the shopper nor the supermarket offered any testimony, expert or otherwise, as to why the door had opened inward. At the conclusion of the proofs, both the shopper and the supermarket moved for judgment.

How should the trial judge rule?

- (A) Grant judgment for the shopper, because it is undisputed that the door malfunctioned.
- (B) Grant judgment for the supermarket, because the shopper failed to join the owner of the building as a defendant.
- (C) Grant judgment for the supermarket, because the shopper failed to offer proof of the supermarket's negligence.
- (D) Submit the case to the jury, because on these facts negligence may be inferred.

QUESTION I-7.

In an action by a man against a pharmacy, the man offered only the following evidence:

The man took a clearly written prescription to a pharmacy. The pharmacy's employee filled the prescription by providing pills with 30 milligrams of the active ingredient instead of 20 milligrams, as was

prescribed. Shortly after taking the pills as directed, the man, who had no previous history of heart problems, suffered a heart attack. Overdoses of the active ingredient had previously been associated with heart problems.

Does the man have a valid claim against the pharmacy?

- (A) No, because pharmacies are not strictly liable for injuries caused by incorrectly filled prescriptions.
- (B) No, because the man offered no specific proof as to the pharmacy's negligence.
- (C) Yes, because a jury could reasonably conclude that the man would not have suffered a heart attack had the pharmacy provided the correct dosage.
- (D) Yes, because by providing the 30-milligram pills rather than the 20-milligram pills, the pharmacy sold the man a defective product.

QUESTION I-8.

A man rented a car from a car rental agency. Unbeknownst to the rental agency, the car had a bomb hidden in it at the time of the rental. The bomb exploded an hour later, injuring the man.

Immediately prior to renting the car to the man, the rental agency had carefully inspected the car to be sure it was in sound operating condition. The rental agency did not inspect for hidden explosive devices, but such an inspection for explosives would have revealed the bomb.

There had been no previous incidents of persons hiding bombs in rental cars.

In a negligence action by the man against the car rental agency, is the man likely to prevail?

- (A) No, because the rental agency could not have reasonably foreseen the likelihood of someone placing a bomb in the car it was about to rent to the man.
- (B) No, because the rental agency did not hide the bomb in the car.
- (C) Yes, because an inspection for explosive devices would have revealed the bomb.

- (D) Yes, because the bomb made the car abnormally dangerous.

QUESTION I-9.

A customer pledged a stock certificate to a bank as security for a loan. A year later, when the customer fully repaid the loan, the bank refused the customer's demand to return the stock certificate because the officer dealing with the loan had the mistaken belief that there was still a balance due. No one at the bank reviewed the records until two months later, at which time the error was discovered. The bank then offered to return the stock certificate. However, the customer refused to accept it.

At the time the customer pledged the certificate, the shares were worth \$10,000; at the time the customer repaid the loan, the shares were worth \$20,000; and at the time the bank offered to return the certificate, the shares were worth \$5,000.

If the customer brings an action against the bank based on conversion, how much, if anything, should the customer recover?

- (A) Nothing, because the bank lawfully came into possession of the certificate.
- (B) \$5,000, because that was the value of the shares when the customer refused to accept the certificate back.
- (C) \$10,000, because that was the value of the shares when the bank came into possession of the certificate.
- (D) \$20,000, because that was the value of the shares when the customer was entitled to the return of the certificate.

QUESTION I-10.

A hotel employed a carefully selected independent contractor to rebuild its swimming pool. The hotel continued to operate while the pool was being rebuilt. The contract between the hotel and the contractor required the contractor to indemnify the hotel for any liability arising from the contractor's negligent acts. A guest of the hotel fell into the excavation, which the contractor had negligently left unguarded.

In an action by the guest against the hotel to recover for his injuries, what would be the most likely outcome?

- (A) Liability, because the hotel had a nondelegable duty to the guest to keep a safe premises.
- (B) Liability, because the contract between the hotel and the contractor required the contractor to indemnify the hotel for any liability arising from the contractor's negligent acts.
- (C) No liability, because the contractor was the actively negligent party.
- (D) No liability, because the hotel exercised reasonable care in employing the contractor.

Question I-11.

A farmer kept antiques in an uninhabited farmhouse on his property. The farmhouse had been broken into several times in the past, and some of the farmer's goods had been stolen. Instead of posting "No Trespassing" signs, the farmer decided to install an alarm system to deter intruders.

While the farmer was in the farmhouse installing the alarm system, he heard a window open in the adjoining room. The farmer crept very quietly to the door of the room, threw the door open, and found an intruder, a young child. The farmer immediately struck the child, a 10-year-old girl, very hard in the face, breaking her nose.

In an action on behalf of the child against the farmer to recover for the injury to her nose, is the child likely to prevail?

- (A) No, because the farmer did not use deadly force.
- (B) No, because the farmer had probable cause to believe that the child was a thief.
- (C) Yes, because the farmer should have posted a "No Trespassing" sign.
- (D) Yes, because the farmer used excessive force.

Question I-12.

A schizophrenic patient who was institutionalized in a psychiatric facility pushed a nurse down a stairwell at the facility. The nurse, a paid employee of the facility who was trained to care for schizophrenic patients, was injured. The patient is an indigent whose care is paid for by the government.

The jurisdiction generally follows the rule that a person with a mental deficiency is held to the standard of a reasonable person. In a negligence action brought by the nurse against the patient, the patient's lawyer will argue that the patient should not be held responsible for the nurse's injury.

Which of the following facts will be LEAST helpful to the patient's lawyer's argument?

- (A) The nurse was a professional caregiver.
- (B) The nurse was trained to care for patients with schizophrenia.
- (C) At the time she pushed the nurse, the patient thought she was being attacked by an elephant.
- (D) The patient is an indigent whose care is paid for by the government.

Question 1-13.

A mother and her six-year-old child were on a walk when the mother stopped to talk with an elderly neighbor. Because the child resented having his mother's attention diverted by the neighbor, the child angrily threw himself against the neighbor and knocked her to the ground. The neighbor suffered a broken wrist as a result of the fall.

In an action for battery by the neighbor against the child, what is the strongest argument for liability?

- (A) The child intended to throw himself against the neighbor.
- (B) The child was old enough to appreciate that causing a fall could inflict serious injury.
- (C) The child was old enough to appreciate the riskiness of his conduct.
- (D) The child was not justified in his anger.

Question I-14.

A man tied his dog to a bike rack in front of a store and left the dog there while he went to inside to shop. The dog was usually friendly and placid.

A five-year-old child started to tease the dog by pulling gently on its ears and tail. When the man emerged from the store and saw what the child was doing to the dog, he became extremely upset.

Does the man have a viable claim against the child for trespass to chattels?

- (A) No, because the child did not injure the dog.
- (B) No, because the child was too young to form the requisite intent.
- (C) Yes, because the child touched the dog without the man's consent.
- (D) Yes, because the child's acts caused the man extreme distress.

Question I-15.

Unaware that a lawyer was in the county courthouse library late on a Friday afternoon, when it was unusual for anyone to be using the library, a clerk locked the library door and left. The lawyer found herself locked in when she tried to leave the library at 7 p.m. It was midnight before the lawyer's family could find out where she was and get her out. The lawyer was very annoyed by her detention but was not otherwise harmed by it.

Does the lawyer have a viable claim for false imprisonment against the clerk?

- (A) No, because it was unusual for anyone to be using the library late on a Friday afternoon.
- (B) No, because the clerk did not intend to confine the lawyer.
- (C) Yes, because the clerk should have checked to make sure no one was in the library before the clerk locked the door.
- (D) Yes, because the lawyer was aware of being confined.

Question I-16.

A boater, caught in a sudden storm and reasonably fearing that her boat would capsize, drove the boat up to a pier, exited the boat, and tied the boat to the pier. The pier was clearly marked with "NO TRESPASSING" signs. The owner of the pier ran up to the boater and told her that the boat could not remain tied to the pier. The boater offered to pay the owner for the

use of the pier. Regardless, over the boater's protest, the owner untied the boat and pushed it away from the pier. The boat was lost at sea.

Is the boater likely to prevail in an action against the owner to recover the value of the boat?

- (A) No, because the owner told the boater that she could not tie the boat to the pier.
- (B) No, because there was a possibility that the boat would not be damaged by the storm.
- (C) Yes, because the boater offered to pay the owner for the use of the pier.
- (D) Yes, because the boater was privileged to enter the owner's property to save her boat.

Question I-17.

A mother purchased an expensive television from an appliance store for her adult son. Two years after the purchase, a fire started in the son's living room in the middle of the night. The fire department concluded that the fire had started in the television. No other facts are known.

The son sued the appliance store for negligence. The store has moved for summary judgement.

Should the court grant the store's motion?

- (A) No, because televisions do not catch fire in the absence of negligence.
- (B) No, because the store sold the television.
- (C) Yes, because the son is not in privity with the store.
- (D) Yes, because there is no evidence of negligence on the part of the store.

Question I-18.

Upon the recommendation of her child's pediatrician, a mother purchased a vaporizer for her child, who had been suffering from respiratory congestion. The vaporizer consisted of a gallon-size glass jar, which held water to be heated until it became steam, and a metal heating unit into which

the jar fit. The jar was covered by a plastic cap with an opening to allow the steam to escape. At the time the vaporizer was manufactured and sold, there was no safer alternative design.

The booklet that accompanied the vaporizer read: “This product is safe, spillproof, and practically foolproof. It shuts off automatically when the water is gone.” The booklet had picture of a vaporizer sending steam over a baby’s crib.

The mother used the vaporizer whenever the child was suffering from congestion. She placed the vaporizer on the floor near the child’s bed.

One night, the child got out of bed to get a drink of water and tripped over the cord of the vaporizer as she crossed the room. The top of the vaporizer separated from the base, and boiling water from the jar spilled on the child when the vaporizer tipped over. The child suffered serious burns as a consequence.

The child’s representative brought an action for damages against the manufacturer of the vaporizer. The manufacturer moved to dismiss after the representative presented the evidence above.

Should the manufacturer’s motion be granted?

- (A) No, because a jury could find that the manufacturer expressly represented that the vaporizer was spillproof.
- (B) No, because the vaporizer caused a serious injury to the child.
- (C) Yes, because it should have been obvious to the mother that the water in the jar would become boiling hot.
- (D) Yes, because there was no safer alternative design.

Question I-19.

A woman signed up for a bowling class. Before allowing the woman to bowl, the instructor required her to sign a waiver explicitly stating that she assumed all risk of injuries that she might suffer in connection with the class, including injuries due to negligence or any other fault. After she signed the waiver, the woman was injured when the instructor negligently dropped a bowling ball on the woman’s foot.

The woman brought a negligence action against the instructor. The instructor has filed a motion for summary judgment based on the waiver.

What is the woman's best argument in opposition to the instructor's motion?

- (A) Bowling in an inherently dangerous activity.
- (B) In circumstances like these, it is against public policy to enforce agreements that insulate people from the consequences of their own negligence.
- (C) It was unreasonable to require the woman to sign the waiver before she was allowed to bowl.
- (D) When she signed the form, the woman could not foresee that the instructor would drop a bowling ball on her foot.

Question I-20.

Toxic materials being transported by truck from a manufacturer's plant to a warehouse leaked from the truck onto the street a few miles from the plant. A driver lost control of his car when he hit the puddle of spilled toxic materials on the street, and he was injured when his car hit a stop sign.

In an action for damages by the driver against the manufacturer based on strict liability, is the driver likely to prevail?

- (A) No, because the driver's loss of control was an intervening cause.
- (B) No, because the driver's injury did not result from the toxicity of the materials.
- (C) Yes, because the manufacturer is strictly liable for leaks of its toxic materials.
- (D) Yes, because the leak occurred near the manufacturer's plant.

QUESTION TWO
REVERSE MULTIPLE CHOICE QUESTIONS
(suggested time: fifteen minutes)

Together with the following two multiple choice questions you are given the correct or best answer. In your blue book, explain why this correct or best answer is the best answer to the question and why the other answers are wrong or else not so good as the answer that is identified as correct or best. Be sure to discuss all of the possible question answers (“A,” “B,” “C” and “D”) in both of the following questions.

Question II-1.

An eight-year-old boy rode his bicycle down his driveway into a busy highway. A motorist had to stop her car suddenly to avoid colliding with the bike. Because of the sudden stop, the motorist’s two-year-old daughter, who was sitting on the seat without any restraint, was thrown into the dashboard and injured. Had the daughter been properly restrained in a baby car seat, as required by a state safety statute of which her mother was aware, she would not have been injured.

In an action brought on the daughter’s behalf against the boy’s parents to recover for the daughter’s injuries, the daughter will

- (A) not prevail, because parents are not vicariously liable for the negligent acts of their children.
- (B) not prevail, because the daughter’s injury was attributable to her mother’s knowing violation of a safety statute.
- (C) prevail, if the boy’s parents knew that he sometimes drove into the highway, and they took no steps to prevent it.
- (D) prevail, if the boy’s riding into the highway was negligent and the proximate cause of the daughter’s injuries.

The correct answer is “C.” In your blue book, explain why answer “C” is correct and why answers “A,” “B” and “D” are not correct.

Question II-2.

A consumer became physically ill after drinking part of a bottle of soda that contained a large decomposed snail. The consumer sued the store

from which she bought the soda to recover damages for her injuries. The parties agreed that the snail was put into the bottle during the bottling process, over which the store had no control. The parties also agreed that the snail would have been visible in the bottle before the consumer opened it.

Will the consumer prevail in her action against the store?

- (A) No, because the consumer could have seen the snail in the bottle.
- (B) No, because the store was not responsible for the bottling process.
- (C) Yes, because the consumer was injured by a defective product sold to her by the store.
- (D) Yes, because the store had exclusive control over the bottle before selling it to the consumer.

The correct answer is “C.” In your blue book, explain why answer “C” is correct and why answers “A,” “B” and “D” are not correct.

QUESTION THREE
CASE BRIEF
(suggested time: fifteen minutes)

Printed on the next page 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.

SEE NEXT PAGE FOR Yania v. Bigan.

YANIA v. BIGAN
155 A.2d 343 (Pa. 1959)

Yania, the operator of a coal strip-mining operation, and Ross went upon Bigan's property to discuss a business matter with Bigan. While there, Bigan asked them to help him start a pump. Ross and Bigan entered the mining cut in the ground and stood where the pump was located. Yania stood at the top of one of the cut's side walls and jumped from the side wall — a height of 16 to 18 feet — into the 8 to 10 feet of water and was drowned.

Yania's widow instituted wrongful death and survival actions against Bigan contending Bigan was responsible for Yania's death. A demurrer was filed and the trial court sustained it. Plaintiff appealed. [Plaintiff initially contended] 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 deducible 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 of Torts § 314. Cf. Restatement of Torts § 322. The language of this Court in *Brown v. French*, 104 Pa. 604, 607, 608, is apt: "* * * That his undertaking was an exceedingly reckless and dangerous one, the event proves, but there was no one to blame for it but himself. He had the right to try the experiment, obviously dangerous as it was, but then also upon him rested the consequences of that experiment, and upon no one else; he may have been, and probably was, ignorant of the risk which he was taking upon himself, or knowing it, and trusting to his own skill, he may have regarded it as easily superable. But in either case, the result of his ignorance, or of his mistake, must rest with himself and cannot be charged to the defendants." 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. * * * Order affirmed.

QUESTION FOUR

(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 percent 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 percent 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 percent 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 days of blood screening which reported that, of 22 blood donors told that they were HIV positive, seven committed suicide.

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.

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.

QUESTION FIVE

(suggested time: forty-five minutes)

In Gardner v. National Bulk Carriers, Inc., 310 F.2d 284 (4th Cir. 1962, en banc), Gardner was a seaman aboard the S.S. Bulkcrude, a vessel owned by National Bulk Carriers. Bulkcrude was traversing the Gulf of Mexico en route from New York to Corpus Christi, Texas, at 11:30 P.M. when seaman Gardner was called to stand watch. When he could not be found, the master ordered a search of the vessel. The search, which lasted an hour, was unsuccessful. Inquiry disclosed that Gardner was last seen about 6:00 P.M. that evening.

At 12:30 A.M. the master notified the Coast Guard by radio of the loss of Gardner, but the master took no further steps to find the missing seaman. Bulkcrude, which had maintained course and speed during the night, continued on to Corpus Christi. Gardner's body was never found.

Gardner's widow and administratrix sued National Bulk Carriers in federal court under the Jones Act, a federal statute which allows seamen to recover for injuries or death caused by the negligence of a ship's owner or master.³ She claimed that the master of Bulkcrude was negligent in failing to reverse course to conduct a search for Gardner.

The defendant responded that any search for Gardner would have been futile because at 12:30 A.M. the ship had travelled more than 100 miles from its position at 6:00 P.M. and there was no way of knowing where and when Gardner went overboard. The District Court, sitting as factfinder, found for the defendant. The United States Court of Appeals for the Fourth Circuit reversed, however (one judge dissenting).

What arguments, do you think, persuaded the district judge that the master of Bulkcrude was not negligent? (In maritime law there is recognized a duty upon the ship and its master to reverse course and search for a seaman who has fallen overboard).

What arguments, do you think, persuaded the Court of Appeals to reverse the District Court?

END OF EXAMINATION

**REMEMBER, ALL BLUE BOOKS MUST BE TURNED IN.
THIS INCLUDES BLUE BOOKS THAT ARE ENTIRELY
UNUSED, AND ALSO BLUE BOOKS USED AS SCRAP.
LABEL ANY SCRAP BLUE BOOK WITH THE WORD, "SCRAP."**

**REMEMBER, THIS WHITE EXAM PAPER MUST BE TURNED IN
ALONG WITH YOUR BLUE BOOK OR BLUE BOOKS.**

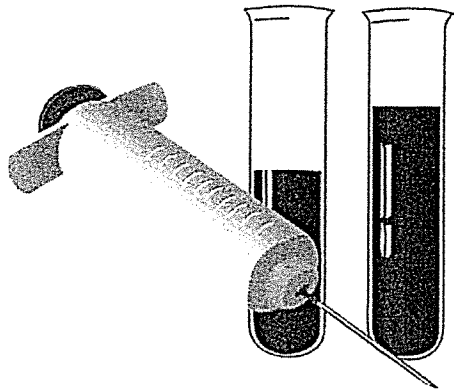
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³ Seamen do not have coverage under state workers' compensation laws. Instead, injuries to and deaths of seamen are covered by the federal Jones Act which requires proof of negligence on the part of the seaman's employer.

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False Positive Paradox

The Doctor's Diagnosis



A patient begins displaying symptoms of an extremely rare, terminal disease: only 0.1% of the population has it; the disease means certain death. The patient, seeking a diagnosis and treatment, goes to the doctor to have a test done. The doctor runs a test and it comes out positive.

"This test is 99% accurate!" Your doctor says, "If it is positive, then it is almost certain you have the disease."

Distraught, the patient arranges his will and says goodbye to his family. Yet months pass and he shows no more symptoms and does not die. Confused, he goes to the doctor and they realize that he had a false positive.

"This test is 99% accurate!" says the Doctor, "Your false positive was so improbable!"

But is it really?

If a test is 99% accurate, then if you tested 100 people with the illness, 99 people will get an accurate diagnosis. The accuracy metric represents $P(\text{Test Positive} \mid \text{Diseased})$. If you are taking the test, what you care about is $P(\text{Diseased} \mid \text{Test Positive})$ - the likelihood that your positive result is a true positive.

In fact, for some circumstances, a positive result may be *more likely* to be a false positive than a true positive. How can this be?

Let's Do Some Calculations

In the fields below, enter in the percent incidence - the percentate of the population which has the condition. In the above example, this is 0.1%. Then, enter in your test accuracy and our sample population.

Percent Incidence:

%

Test accuracy:

%

Population:

Number of people who	Have Disease	Do Not Have Disease	Total
Test Positive	99	999	1,098
Test Negative	1	98,901	98,902

Total	100	99,900	100,000
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With our inputs, we have about $0.1\% \times 100,000 = 100$ people with this disease in our population. If we run our test on these people, a test that is 99% accurate will give us 99 true positives and 1 false negatives.

However, in our population, there are also 99,900 people who do not have the disease. If we were to apply the same test to these people, then $99\% \times 99,900 = 98,901$ would correctly test negative. *However*, 999 of the non-diseased population will test positive, and here we will have false positives.

As a result, if we were to test everyone in this population, we would get $999 + 99 = 1,098$ positive results, but only 9% will be true positives. *Even if* you took this test and got a positive result, it is actually 91% likely that you *do not* have the disease.

What happened?

In specific situations when some condition has a very low occurrence rate in a population (in our example, the disease was very rare) then it is very possible when testing for the condition to get *more* false positives than true positives, despite how 'accurate' the test is purported to be. It is a fallacy to think that if your test is 99% accurate, your individual result is 99% accurate.

In our situation, since the disease was so rare, even if we tested positive, it was still unlikely that we actually had the disease.

The false positive paradox is a common issue in not only medicine, but many other fields such as criminology and biology. In fact, many surveys have revealed that medical professionals do not completely understand this paradox.

TORTS
Mr. Martin
May 11, 2015

Exam ID no. _____

**FINAL EXAMINATION
THIS IS A CLOSED BOOK EXAMINATION**

This is a closed book examination. Nothing other than a writing instrument is allowed on your person or at or near your desk. Cell phones must be powered off and put away. It is a disciplinary violation to have a cell phone on or near your person.

Questions will be weighted in accordance with the amount of time suggested for each question. All questions are to be answered in one or more blue books, except that the multiple-choice questions are to be answered on the Scantron card which is distributed with this exam.

Please write legibly in your bluebook, begin each question on a new page, and leave a margin on the left-hand side of the page.

Use only your examination identification number to identify your blue book or blue books, your Scantron card, and this white examination paper. 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 45678959. If you use more than one blue book, identify each one ("No. 1 of 2," "No. 2 of 2," etc.), make sure that your exam ID number is on each one, and insert all others into the first blue book when you turn them in.

In any question you may assume, if relevant and unless the question tells you otherwise, 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.

ALL BLUE BOOKS AND THIS WHITE EXAMINATION PAPER MUST BE RETURNED AT THE END OF THE EXAMINATION. LABEL ANY SCRAP BLUE BOOK WITH THE WORD 'SCRAP.'

QUESTION ONE
TWENTY MULTIPLE CHOICE QUESTIONS
(suggested time: one hour)

When you have determined your answer to each of the following questions, mark the answer with a No. 2 pencil in the appropriate block of the Scantron card.

QUESTION I-1.

A homeowner was using a six-foot stepladder to clean the furnace in his home. The homeowner broke his arm when he slipped and fell from the ladder. The furnace had no warnings or instructions on how it was to be cleaned.

In a suit by the homeowner against the manufacturer of the furnace to recover for his injury, is the homeowner likely to prevail?

- (A) No, because the danger of falling from a ladder is obvious.
- (B) No, because the homeowner should have hired a professional to clean the furnace.
- (C) Yes, because the furnace did not have a ladder attached to it for cleaning purposes.
- (D) Yes, because the lack of warnings of instructions for how to clean the furnace made the furnace defective.

QUESTION I-2.

When a tire of a motorist's car suffered a blowout, the car rolled over and the motorist was badly injured. Vehicles made by the manufacturer of the motorist's car have been found to be negligently designed, making them dangerously prone to rolling over when they suffer blowouts. A truck driver who was driving behind the motorist when the accident occurred stopped to help. Rescue vehicles promptly arrived, and the truck driver walked along the side of the road to return to his truck. As he approached his truck, he was struck and injured by a speeding car. The truck driver has sued the manufacturer of the injured motorist's car.

Is the truck driver likely to prevail in a suit against the car manufacturer?

- (A) No, because the car manufacturer's negligence was not the proximate cause of the truck driver's injuries.
- (B) No, because the truck driver assumed the risk of injury when he undertook to help the motorist.
- (C) Yes, because it is foreseeable that injuries can result from rollovers.
- (D) Yes, because the car manufacturer's negligence caused the dangerous situation that invited the rescue by the truck driver.

QUESTION I-3.

A gas company built a large refining facility that conformed to zoning requirements on land near a landowner's property. The landowner had his own home and a mini-golf business on his property.

In a nuisance action against the gas company, the landowner established that the refinery emitted fumes that made many people feel quite sick when they were outside on his property for longer than a few minutes. The landowner's mini-golf business had greatly declined as a consequence, and the value of his property had gone down markedly.

Is the landowner likely to prevail?

- (A) No, because the landowner has offered no evidence demonstrating that the gas company was negligent.
- (B) No, because the refinery conforms to the zoning requirements.
- (C) Yes, because the refinery has substantially and unreasonably interfered with the landowner's use and enjoyment of his property.
- (D) Yes, because the value of the landowner's property has declined.

QUESTION I-4.

A mining company that operated a copper mine in a remote location kept dynamite in a storage facility at the mine. The storage facility was designed and operated in conformity with state-of-the-art safety standards. In the jurisdiction, the storage of dynamite is deemed an abnormally dangerous activity.

Dynamite that was stored in the mining company's storage facility and that had been manufactured by an explosives manufacturer exploded due to an unknown cause. The explosion injured a state employee who was at the mine performing a safety audit. The employee brought an action in strict liability against the mining company.

What would be the mining company's best defense?

- (A) The mine was in remote location.
- (B) The mining company did not manufacture the dynamite.
- (C) The state employee assumed the risk of injury inherent in the job.
- (D) The storage facility conformed to state-of-the-art safety standards.

QUESTION I-5.

A driver negligently ran into a pedestrian who was walking along a road. The pedestrian sustained an injury to his knee, causing it to buckle from time to time. Several months later, the pedestrian sustained an injury to his shoulder when his knee buckled, causing him to fall down a flight of stairs. The pedestrian then brought an action against the driver for the injuries to his knee and shoulder.

In his action against the driver, for which of his injuries may the pedestrian recover damages?

- (A) For the injuries to his knee and shoulder, because the driver takes the victim as he finds him.
- (B) For the injuries to his knee and shoulder, if the jury finds that the pedestrian's fall down a flight of stairs was a normal consequence of his original injury.
- (C) For the injury to his knee only, because the injury to the pedestrian's shoulder is separable.
- (D) For the injury to his knee only, if the jury finds that the driver could not have foreseen that his negligent driving would cause the pedestrian to fall down a flight of stairs.

QUESTION I-6.

A driver was traveling along a highway during an unusually heavy rainstorm when the roadway began to flood. To protect his car from water damage, the driver pulled his car up a steep, unmarked driveway abutting the highway that led to a homeowner's residence. The driver left his car parked in the driveway and walked home, intending to return when the floodwater had subsided. Shortly after the driver started to walk home, the homeowner carefully rolled the car back down his driveway and parked it on the highway shoulder. The floodwater continued to rise and caused damage to the driver's car.

If the driver sues the homeowner to recover for damage to the car, is the driver likely to prevail?

- (A) Yes, because the driver was privileged to park his car on the homeowner's property.
- (B) Yes, because there were no "no trespassing" signs posted.
- (C) No, because the driver intentionally drove his car onto the homeowner's property.
- (D) No, because the homeowner was privileged to remove the car from his property.

QUESTION I-7.

A hotel employed a carefully selected independent contractor to rebuild its swimming pool. The hotel continued to operate while the pool was being rebuilt. The contract between the hotel and the contractor required the contractor to indemnify the hotel for any liability arising from the contractor's negligent acts. A guest of the hotel fell into the excavation, which the contractor had negligently left unguarded.

In an action by the guest against the hotel to recover for his injuries, what would be the most likely income?

- (A) Liability, because the hotel had a nondelegable duty to the guest to keep a safe premises.
- (B) Liability, because the contract between the hotel and the contractor required the contractor to indemnify the hotel for any liability arising from the contractor's negligent acts.

- (C) No liability, because the contractor was the actively negligent party.
- (D) No liability, because the hotel exercised reasonable care in employing the contractor.

QUESTION I-8.

An elderly neighbor hired a 17-year-old boy with a reputation for reckless driving to drive the neighbor on errands once a week. One day the teenager, driving the neighbor's car, took the neighbor to the grocery store. While the neighbor was in the store, the teenager drove out of the parking lot and headed for a party on the other side of town.

While on his way to the party, the teenager negligently turned in front of a moving car and caused a collision. The other driver was injured in the collision.

The injured driver has brought an action for damages against the neighbor, based on negligent entrustment, and against the teenager.

The jury has found that the injured driver's damages were \$100,000, that the injured driver was 10% at fault, that the teenager was 60% at fault, and that the neighbor was 30% at fault for entrusting his car to the teenager.

Based on these damage and responsibility amounts, what is the maximum that the injured driver could recover from the neighbor?

- (A) \$100,000.
- (B) \$90,000.
- (C) \$60,000.
- (D) \$30,000.

QUESTION I-9.

Owner brought his television set to Repairer for repair. Repairer repaired, but did not deal in, television sets. Repairer sold the set to Buyer. Buyer believed that Repairer owned the set.

If Owner asserts a conversion claim against Repairer and Buyer, Owner will prevail against

- (A) Repairer but not Buyer, because Buyer was a good faith purchaser.
- (B) Both Repairer and Buyer, because each exercised dominion over the television set.
- (C) Buyer but not Repairer, because Repairer no longer has possession of the television set.
- (D) Buyer but not Repairer, because Repairer had lawful possession of the television set.

QUESTION I-10.

Craig brought a medical malpractice suit against Howard, a board-certified physician. At trial, Craig's entire evidence consisted of the following: (1) Craig first went to Howard because of severe abdominal pains and bloody diarrhea; (2) After several examinations, Howard recommended corrective surgery on Craig's large intestine; (3) After adequate advice from Howard, Craig gave informed consent to the surgery which Howard had recommended, and the surgery was performed; (4) Starting almost immediately after the surgery, and to the present day, Craig continues to have severe abdominal pains and bloody diarrhea.

After establishing these facts, Craig rested. Howard moved for a directed verdict. Which of the following statements is most correct?

- (A) Howard's motion should be denied because whether Howard failed to exercise the standard of care of a practitioner in his specialty is a jury question.
- (B) Howard's motion should be denied because the facts present a case of *res ipsa loquitur*.
- (C) Howard's motion should be granted if the judge determines that Howard will most likely prevail at trial.
- (D) Howard's motion should be granted because Craig introduced insufficient evidence to support a claim of medical malpractice.

Question I-11.

Paine and Duncan were playing tennis. Duncan became highly irritated because every time Duncan prepared to serve, Paine started talking loudly. Paine's loud talk distracted Duncan from his game, and Duncan

usually faulted on his serves. Duncan told Paine to “cut it out,” but Paine persisted in the behavior.

To get Paine to cease and desist, Duncan swung his tennis racquet toward Paine’s head. Duncan intended only to frighten Paine, knowing that the racquet would miss Paine’s head by several inches. However, Duncan slipped as he swung the racquet and it flew out of his hand as he lost his balance. The racquet flew through the air and struck Paine in the head.

Has Paine grounds for a battery action against Duncan?

- (A) Yes, if Duncan intended to create a reasonable apprehension in Paine.
- (B) Yes, because the racquet struck Paine.
- (C) No, because Duncan did not intend the racquet to strike Paine.
- (D) No, but only if Duncan can prove that the owner of the tennis court did not maintain the court property and this caused Duncan to slip.

Questions I-12 and I-13 are based on the following fact situation:

While Driver’s car was being repaired, Driver arranged to borrow a car from his friend Lender. Lender had an extra car which he had not used for some time. When Driver picked up the car, Lender forgot to warn Driver that the brake fluid needed to be refilled. Lender telephoned Driver’s wife, Rider, and warned her about the brake fluid problem. Rider, however, forgot to tell Driver.

Shortly thereafter Driver was driving Rider to work in the borrowed car at a reasonable rate of speed and within the posted speed limit. As he approached an intersection, another car driven by Reckless ran through the red light and into the intersection. Driver applied the brakes in a timely manner but the brakes failed and the two cars collided. If the proper amount of brake fluid had been in the brake system, Driver could have stopped in time to avoid the collision. Driver and Rider were injured.

Question I-12.

If the jurisdiction has not modified the common law contributory negligence doctrine and Driver asserts a claim against Reckless, Driver will

- (A) Recover only a portion of his damages, because Rider was also at fault.
- (B) Recover the full amount of his damages, because Driver himself was not at fault.
- (C) Not recover, because Driver had the last clear chance to avoid the accident.
- (D) Not recover, because Rider was negligent in not telling Driver about the brakes and Rider's negligence would be imputed to Driver.

Question 1-13.

If the jurisdiction has adopted "pure" comparative negligence and Rider asserts a claim against Reckless, Rider will

- (A) Recover in full for her injury, because Driver who was driving the car in which she was riding was not himself at fault.
- (B) Recover a portion of her damages, based on the respective degrees of her negligence and that of Reckless.
- (C) Not recover because Driver had the last clear chance to avoid the accident.
- (D) Not recover because Rider was primarily at fault for the collision.

Question I-14.

Doophous gave his sixteen-year-old son a .22 caliber target pistol for his birthday. The boy was permitted to keep the pistol and ammunition in his dresser drawer. One weekend the boy took the loaded gun out onto the street where Doophous lived and shot Peewee, a ten-year-old neighbor, after the two of them argued about sneakers. Peewee brought an action to recover for his personal injuries against Doophous. Who should prevail?

- (A) Peewee, because Doophous's son was old enough to form the mental state sufficient to commit the tort of battery.
- (B) Peewee, unless Doophous can show that he was unaware of his son's character trait for violence.
- (C) Doophous, unless Peewee can prove that Doophous was negligent in giving the pistol to his son.

- (D) Doophous, because Doophous is not vicariously liable for an intentional tort committed by his son.

Question I-15.

Stonewing decided to take his privately owned single propeller airplane up for a ride one brisk April morning. After he had been up for about an hour, gale force winds arose and Stonewing had trouble keeping control of his plane. Just as he rounded a hill he saw a huge black storm cloud approaching. The winds almost knocked him into the side of the hill. An experienced pilot, Stonewing knew that he would crash if he did not land soon.

Just ahead lay Beefsteak's tomato field. Stonewing prepared for a rough landing and began his descent. Stonewing survived, but Beefsteak's tomato crop did not. Beefsteak sues Stonewing for damages. He will most likely collect:

- (A) Nothing, because the landing was caused by an emergency.
- (B) Nothing, unless he can prove that Stonewing was negligent.
- (C) Damages for trespass and for the loss of the tomato crop.
- (D) Damages only for the loss of the tomato crop.

Question I-16.

While on a hiking trip during the late fall, Page arrived toward the end of the day at a clearing where several similar cabins were located, none of which was occupied. One of the cabins belonged to Levin, Page's friend, who had given Page permission to use it. Page entered one of the cabins believing it to be Levin's, and prepared to spend the night. In fact the cabin was owned, not by Levin, but by Dwyer.

When the night turned cold, Page started a fire in the stove. Unknown to Page, there was a defect in the stove that allowed carbon monoxide fumes to escape into the cabin. During the night the fumes caused serious injury to Page.

If Page asserts a claim against Dwyer for her injury, will Page recover?

- (A) Yes, if Dwyer knew that the stove was defective.
- (B) Yes, if Dwyer could have discovered the defect in the stove by reasonable inspection.
- (C) No, because Dwyer had no reason to anticipate Page's presence in the cabin.
- (D) No, because Page was negligent.

Question I-17.

Martha is the wife of the president of a small but very prestigious college located in Boston, Massachusetts, and is herself an instructor at the college. While doing research for an article profiling Martha's husband, a reporter for a Boston newspaper discovers and reveals in a published news story that Martha falsified her academic credentials when she applied for a position with the college, before she married the president. The story states that she had attended the state university of a Midwestern state, not the London School of Economics as her resume had claimed, and that her credentials were not properly verified because the president, a former U. S. Secretary of State, had been courting Martha at the time she applied for her position as instructor.

As a result of the news story, Martha is widely ridiculed in the media and subject to numerous jokes and innuendo among her colleagues. She asserts a cause of action against the newspaper for defamation. The deposition of the reporter who wrote the story reveals that he obtained his information from a member of the State Department, and that Martha's attendance at the Midwestern state university was verified by telephone with its registrar. Will Martha prevail at trial?

- (A) Yes, if the story printed by the newspaper was false.
- (B) Yes, because the story revealed facts about her private affairs not generally known to the public.
- (C) No, because the newspaper did not publish the story with knowledge that it was false or with reckless disregard for its truth or falsity.
- (D) No, if the newspaper was not negligent.

Question I-18.

A man sued his neighbor for defamation based on the following facts:

The neighbor told a friend that the man had set fire to a house in the neighborhood. The friend, who knew the man well, did not believe the neighbor's allegation, which was in fact false. The friend told the man about the neighbor's allegation. The man was very upset by the allegation, but neither the man nor the neighbor nor the friend communicated the allegation to anyone else.

Should the man prevail in his lawsuit?

- (A) No, because the friend did not believe what the neighbor had said.
- (B) No, because the man cannot prove that he suffered pecuniary loss.
- (C) Yes, because the man was very upset at hearing what the neighbor had said.
- (D) Yes, because the neighbor communicated to the friend the false accusation that the man had committed a serious crime.

Question I-19.

A 14-year-old teenager of low intelligence received her parents' permission to drive their car. She had had very little experience driving a car and did not have a driver's license. Although she did the best she could, she lost control of the car and hit a pedestrian.

The pedestrian has brought a negligence action against the teenager.

Is the pedestrian likely to prevail?

- (A) No, because only the teenager's parents are subject to liability.
- (B) No, because the teenager was acting reasonably for a 14-year-old of low intelligence and little driving experience.
- (C) Yes, because the teenager was engaging in an adult activity.
- (D) Yes, because the teenager was not old enough to obtain a driver's license.

Question I-20.

A company manufactured metal stamping presses that were usually sold with an installed safety device that made it impossible for a press to close on a worker's hands. The company strongly recommended that its presses be purchased with the safety device installed, but would sell a press without the safety device at a slightly reduced price.

Rejecting the company's advice, a worker's employer purchased a stamping press without the safety device. The press closed on the worker's hand, crushing it.

In an action brought by the worker against the company, will the worker prevail?

- (A) Yes, because the company's press was the cause in fact of the worker's injury.
- (B) Yes, because the company sold the press to the worker's employer without an installed safety device.
- (C) No, because the failure of the worker's employer to purchase the press with a safety device was a superseding intervening cause of the worker's injury.
- (D) No, because the company strongly recommended that the worker's employer purchase the press with the safety device.

QUESTION TWO FIVE MULTIPLE CHOICE QUESTIONS WITH ANSWERS

(suggested time: forty minutes)

Together with the following five multiple choice questions you are given the correct or best answer. In your blue book, explain why this correct or best answer is the best answer to the question and why the other answers are wrong or else not so good as the answer that is identified as correct or best. Be sure to discuss all of the possible question answers ("A," "B," "C" and "D") in each of the following questions.

Question II-1.

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 negligently operating the tractor on a hill when 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. The jurisdiction has not adopted a comparative fault rule in strict liability cases.

In this suit, the result should be for the

- (A) plaintiff, because the defendant sold a defective product that injured the plaintiff.
- (B) plaintiff, if the defendant failed to inspect the tractor for defects prior to sale.
- (C) defendant, because he should not be considered a "seller" for purposes of strict liability in tort.
- (D) defendant, because the accident was caused in part by the new owner's negligence.

The correct answer is "C." In your blue book, explain why answer "C" is correct and why answers "A," "B" and "D" are not correct.

Question II-2.

A patron ate a spicy dinner at a restaurant on Sunday night. He enjoyed the food and noticed nothing unusual about the dinner.

Later that evening, the patron had an upset stomach. He slept well through the night, went to work the next day, and ate three meals. His stomach discomfort persisted, and by Tuesday morning he was too ill to go to work.

Eventually, the patron consulted his doctor, who found that the patron was infected with a bacterium that can be contracted from contaminated food. Food can be contaminated when those who prepare it do not adequately wash their hands.

The patron sued the restaurant for damages. He introduced testimony from a health department official that various health code violations had been found at the restaurant both before and after the patron's dinner, but that none of the restaurant's employees had signs of bacterial infection when they were tested one month after the incident.

The restaurant's best argument in response to the patron's suit would be that

- (A) No one else who ate at the restaurant on Sunday complained about stomach discomfort.
- (B) The restaurant instructs its employees to wash their hands carefully and is not responsible if any employee fails to follow these instructions.
- (C) The patron has failed to establish that the restaurant's food caused his illness.
- (D) The patron assumed the risk of an upset stomach by choosing to eat spicy food.

The best answer is "C." In your blue book, explain why answer "C" is the best response and why answers "A," "B" and "D" are not the best response.

Question II-3.

The owner of a car left her car at the neighborhood garage to have repair work done. After completing the repairs, the mechanic took the car out for a test drive and was involved in an accident that caused damages to a bystander.

A statute imposes liability on the owner of an automobile for injuries to a third party that are caused by the negligence of any person driving the automobile with the owner's consent. The statute applies to situations of this kind, even if the owner did not specifically authorize the mechanic to test-drive the car.

The bystander sued the car owner and the mechanic jointly for damages arising from the accident. In that action, the car owner cross-claims to recover from mechanic the amount of any payment the car owner may be required to make to the bystander. The trier of fact has determined

that the accident was caused solely by negligent driving on the mechanic's part, and that the bystander's damages were \$100,000.

In this action, the proper outcome will be that

- (A) The bystander should have judgment for \$50,000 each against the car owner and the mechanic; the car owner should recover nothing from the mechanic.
- (B) The bystander should have judgment for \$100,000 against the mechanic only.
- (C) The bystander should have judgment for \$100,000 against the car owner and the mechanic jointly, and the car owner should have judgment against the mechanic for 50 percent of any amount collected from the car owner by the bystander.
- (D) The bystander should have judgment for \$100,000 against the car owner and the mechanic jointly, and the car owner should have judgment against the mechanic for any amount collected from the car owner by the bystander.

The correct answer is "D." In your blue book, explain why answer "D" is correct and why answers "A," "B" and "C" are not correct.

Question II-4.

As a salesman approached the grounds on which a house was situated, he saw a sign that said, "No salesmen. Trespassers will be prosecuted. Proceed at your own risk." Although the salesman had not been invited to enter, he ignored the sign and drove up the driveway toward the house. As he rounded a curve, a powerful explosive charged buried in the driveway exploded, and the salesman was injured.

Can the salesman recover damages from homeowner for his injuries?

- (A) Yes, if the homeowner was responsible for the explosive charge under the driveway.
- (B) Yes, unless the homeowner, when he planted the charge, intended only to deter, not to harm, a possible intruder.
- (C) No, because the salesman ignored the sign, which warned him against proceeding further.

- (D) No, if the homeowner reasonably feared that intruders would come and harm him or his family.

The correct answer is “A.” In your blue book, explain why answer “A” is correct and why answers “B,” “C” and “D” are not correct.

Question II-5.

A mother rushed her eight-year-old daughter to the emergency room at the local hospital after her daughter fell off her bicycle and hit her head on a sharp rock. The wound caused by the fall was extensive and bloody.

The mother was permitted to remain in the treatment room and held her daughter’s hand while the emergency room physician cleaned and sutured the wound. During the procedure, the mother said that she was feeling faint and stood up to leave the room. While leaving the room, the mother fainted and, in falling, struck her head on a metal fixture that protruded from the emergency room wall. She sustained a serious injury as a consequence.

If the mother sues the hospital to recover damages for her injury, will she prevail?

- (A) Yes, because the mother was a public invitee of the hospital’s.
- (B) Yes, unless the fixture was an obvious, commonly used, and essential part of the hospital’s equipment.
- (C) No, unless the hospital’s personnel failed to take reasonable steps to anticipate and prevent the mother’s injury.
- (D) No, because the hospital’s personnel owed the mother no affirmative duty of care.

The correct answer is “C.” In your blue book, explain why answer “C” is correct and why answers “A,” “B” and “D” are not correct.

QUESTION THREE
CASE BRIEF
(suggested time: fifteen minutes)

Printed on the next page is a well-known Massachusetts case found in another Torts casebook. In your blue book, write a case brief for this case.

Smith v. Rapid Transit Inc.

317 Mass. 469, 58 N.E.2d 754 (1945)

SPALDING, J. The decisive question in this case is whether there was evidence for the jury that the plaintiff was injured by a bus of the defendant that was operated by one of its employees in the course of his employment. If there was, the defendant concedes that the evidence warranted the submission to the jury of the question of the operator's negligence in the management of the bus. The case is here on the plaintiff's exception to the direction of a verdict for the defendant.

These facts could have been found: While the plaintiff at about 1:00 A.M. on February 6, 1941, was driving an automobile on Main Street, Winthrop, in an easterly direction toward Winthrop Highlands, she observed a bus coming toward her which she described as a "great big, long, wide affair." The bus, which was proceeding at about forty miles an hour, "forced her to turn to the right," and her automobile collided with a "parked car." The plaintiff was coming from Dorchester. The department of public utilities had issued a certificate of public convenience or necessity to the defendant for three routes in Winthrop, one of which included Main Street, and this was in effect in February, 1941. "There was another bus line in operation in Winthrop at that time but not on Main Street." According to the defendant's time-table, buses were scheduled to leave Winthrop Highlands for Maverick Square via Main Street at 12:10 A.M., 12:45 A.M., 1:15 A.M., and 2:15 A.M. The running time for this trip at that time of night was thirty minutes.

The direction of a verdict for the defendant was right. The ownership of the bus was a matter of conjecture. While the defendant had the sole franchise for operating a bus line on Main Street, Winthrop, this did not preclude private or chartered buses from using this street; the bus in question could very well have been one operated by someone other than the defendant. It was said in *Sargent v. Massachusetts Accident Co.*, 307 Mass. 246, at page 250, that it is "not enough that mathematically the chances somewhat favor a proposition to be proved; for example, the fact that colored automobiles made in the current year outnumber black ones would not warrant a finding that an undescribed automobile of the current year is colored and not black, nor would the fact that only a minority of men die of cancer warrant a finding that a particular man did not die of cancer." The most that can be said of the evidence in the instant case is that perhaps the mathematical chances somewhat favor the proposition that a bus of the defendant caused the accident. This was not enough. A "proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." *Sargent v. Massachusetts Accident Co.*, 307 Mass. 246, at page 250.

Exceptions overruled.

QUESTION FOUR
ESSAY QUESTION No. 1
(suggested time: thirty minutes)

Assistant District Attorney Terry Stopps visited the law office of Philander S. Podsnap on January 10, 2015 to discuss a case. While Stopps and Podsnap were in the midst of discussions a paralegal in Podsnap's law firm, Tim Woodenstone, attempted to enter Podsnap's office without knocking or announcing his entry. Terry pushed the door closed, thereby pushing Tim back into the hallway. Moments later, Tim re-entered the office. Terry rebuked Tim for his rude conduct. Seeing that Podsnap was not going to do anything about it, Terry left Podsnap's office.

Tim sued Terry for battery, false imprisonment, and intentional infliction of emotional distress. After answering the complaint, Terry moved for summary judgment.¹ Terry's motion asserts that "As a matter of law, no battery, no false imprisonment, and no intentional infliction of emotional distress occurred on January 10, 2015." Terry supported her motion with an affidavit which stated in part as follows:

Attorney Podsnap and I had settled into a serious discussion about the case and had established a good rapport when the door to his office suddenly swung open without a knock. An unidentified individual carrying some papers then strode in unannounced. I had not been told that anyone would be entering attorney Podsnap's office during the private meeting. I subsequently learned that this individual was Mr. Woodenstone.

Tim Woodenstone responded to Terry's affidavit with a counter-affidavit stating in part:

¹ A motion for summary judgment is a pre-trial motion. In tort cases it is almost always a defendant's weapon. A defendant's motion for summary judgment asserts that, on the record as it stands, plaintiff will not be able to produce evidence sufficient to carry the burden of production on one or more elements of plaintiff's case. In other words, if the case were to go to trial on the present record, plaintiff would suffer a directed verdict at the close of plaintiff's case.

I am a born-again Christian and cultivate holiness in my life. As a result I am very sensitive to evil spirits and am greatly disturbed by the demonic. However, in Christ there is victory.

On January 10, 2015, Assistant District Attorney Terry Stopps visited the ministry where I was working at the office of attorney P. S. Podsnap.

That morning I entered the office of Mr. Podsnap to give him certain papers that had been requested. Mr. Podsnap was speaking with ADA Stopps at that time. As I began to enter, ADA Stopps threw her body weight against the door and forced me out into the hall. I had not said a word to her. At the same time she snarled at me, "You get out of here." This was very shocking and frightening to me. In all the time I have been working for Mr. Podsnap I have never been physically assaulted or spoken to in a harsh or brutal manner. My blood pressure began to rise, my heartbeat accelerated, and I felt waves of fear in the pit of my stomach. My hands began to shake and my body to tremble. I reentered the office, whereupon ADA Stopps began a half-demented tirade against me and stormed out into the hall. I looked at Mr. Podsnap in wonder.

How should the judge decide Terry's motion for summary judgement?
Why?

ESSAY QUESTION No. 2
(suggested time: thirty minutes)

You are a lawyer in a law firm that is representing a new client, Niagara Pump Co. ("Niagara") in a tort case. These are the facts in the record to date.

On the night of September 4, 2014, a fire occurred in a chemical factory. A pump manufactured by Niagara caught fire and ignited the surrounding area. This particular pump had caught on fire twice before.

Lisa Tanktops (“Lisa”), a trainee employee at the factory, had just finished her shift and was about to leave the plant when the fire erupted. She and her supervisor, Russian T. Ball (“Ball”), were directed to assist in fighting the fire, and did so.

Approximately two hours later the fire was extinguished. However, there appeared to be a problem with a nearby nitrogen purge valve. Ball was instructed to isolate and close the valve. There is some evidence that this was considered an emergency situation at the time. Lisa asked if she could accompany Ball and was allowed to do so. To get to the nitrogen purge valve, Lisa followed Ball over an above-ground pipe rack which was approximately two and one-half feet high, rather than going around it. This was not the safer route, but was the shorter one.

Upon reaching the valve, Ball and Lisa were notified that it was not, after all, necessary to isolate and close it. Instead of returning by the route around the pipe rack, Ball chose to walk across it. Lisa followed. She slipped off the pipe rack and broke both legs. There is evidence that the pipe rack was wet because of the fire and that Ball and Lisa were still wearing firefighters’ hip boots and other firefighting gear when the injury occurred.

Lisa has sued several defendants including Niagara. Her claim against Niagara alleges that Niagara negligently designed and manufactured the pump and that the pump was the proximate cause of her injuries. But for the pump fire, she asserts, she would never have walked over the pipe rack which was wet with water or firefighting foam.

Your law school classmate, Anne Bonney, is Niagara’s in-house general counsel. She was responsible for retaining you to represent Niagara in this case. She has asked you about the possibility of winning the case on a motion for summary judgment.

Summary judgment will deliver an inexpensive and decisive victory to Niagara. You would, of course, like to deliver this victory. On the other hand, as a matter of good client relations, you worry about making a motion for summary judgment if it will be denied because in that event Niagara might lose confidence in you.

Evaluate the likelihood of success for Niagara if you were to file a motion for summary judgment. Evaluate the risks and benefits if you file the motion and it is denied by the Court.

END OF EXAMINATION

**REMEMBER, ALL BLUE BOOKS MUST BE TURNED IN.
THIS INCLUDES BLUE BOOKS THAT ARE ENTIRELY
UNUSED, AND ALSO BLUE BOOKS USED AS SCRAP.
LABEL ANY SCRAP BLUE BOOK WITH THE WORD, "SCRAP."**

**REMEMBER, THIS WHITE EXAM PAPER MUST BE TURNED IN
ALONG WITH YOUR BLUE BOOK OR BLUE BOOKS.**

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 is 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

**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 9, 2011

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, 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.).

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 "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. _____, and
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 deducible 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, Murphy 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 Murphy Bedd.

"Well, for sure, she isn't the lawyer that she was a year ago," said Herb.

Later in the day Murphy 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.

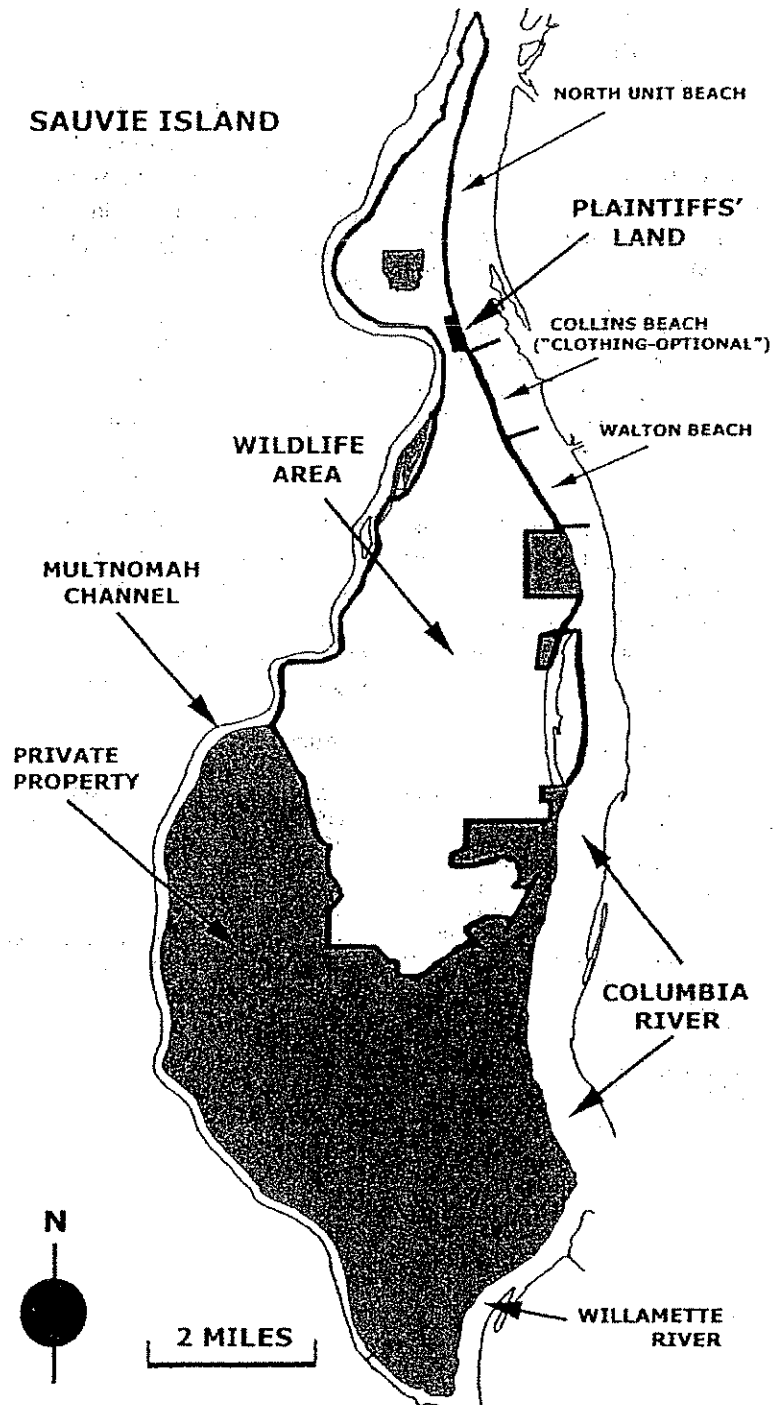
In June, 2001, the Ogles arrived at their property in a recreational vehicle (“RV”) in which they planned to live for the summer while they relaxed on the beach and made plans to build their house. The day after they arrived, they were shocked to find nude sunbathers on the beach in front of their property. 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.
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