

Exam No. \_\_\_\_\_

**Torts**  
**Professor Simon**  
**Final Exam**  
**Fall 2006**

**INSTRUCTIONS**

This is an open book exam. You may bring in any written or published materials you deem helpful.

The total time for the exam is 3 hours. I have divided the time in proportion to the points for each question to give you some rough guidance on allocation.

This exam is worth 85% of the final grade (317 points). The remaining 15% of the grade is based on the mid-term.

Brevity, a precise analysis will be rewarded; rambling answers will not. Thus, please organize your answers carefully.

Please put your answers in the bluebooks and make sure your exam number is on each. Write only on **one side** of the page and use ink. Although given my own penmanship, I am clearly not the one to ask this, please try to write legibly. I can't give credit for that which I am unable to read.

If you find yourself running out of time, you might try, at least, to outline your answer. You may receive some credit for this effort.

Good luck and thank you for a semester I enjoyed greatly.

Question 1 (37 points- 25 minutes)

## **FACTS**

Jim Jones was walking home at 1:00 a.m. on Saturday, November 1, 2006, following his shift as a waiter at the Chowdah House in Portsmouth, Anystate. Just before he arrived at his house, Carol Smith jumped from the bushes brandishing a handgun and demanded money. She was clearly jumpy and appeared to be high on drugs. When Jim reached for his wallet, Carol shot him. He remains in the Intensive Care Unit at Portsmouth Hospital in critical condition.

Carol, who is 44 years old, was arrested later that day. Jim's wallet was found on her person. She turned out to be a career criminal and lifetime drug addict, who had served prison time for a number of crimes, including robbery, assault with a deadly weapon and statutory rape (due to an affair with a high school boy). During interrogation, she confessed to the crime.

She told the police she had purchased the handgun that she used in the crime in August 2006. She bought it at a gun show in Portsmouth for \$75. The seller, Abe Shaw, was the former owner of Valley Guns, a Portsmouth gun store. Carol told the police that Abe did not run any type of background check or ask her any questions.

Valley Guns had its license to sell firearms revoked in August 2005 by the Federal Bureau of Alcohol, Tobacco, and Firearms (ATF). The basis for the revocation was that Valley had been illegally selling guns over the last 10 years without doing proper background checks. The ATF, in what critics have called an unusual interpretation of its own regulations, allowed Abe to purchase Valley's inventory "for his own collection." Abe has since been selling these guns exclusively at gun shows.

Jim was 25 at the time of the shooting. He lives with his wife, Audrey and their infant son. The family does not have any health insurance. Audrey has come to our firm for help suing those responsible for the shooting. Unless otherwise specified in the question, you are to assume that there are no state or federal statutes or regulations limiting the tort liability of sellers or manufacturers of guns.

### **Question 1 (37 points- 25 minutes)**

Assume, for purposes of this question only, Audrey reveals that Abe was a long time friend of Carol's. Abe, thus, knew of her criminal past, and also had observed over the summer months her worsening drug habit making her increasingly desperate.

Prior to getting married and pregnant, Audrey completed one year of law school. She is outraged and hopes to seek punitive damages against Abe in this case. She recalls this is possible in battery actions. Still having her research skills, Audrey provides you with two additional pieces of information. First, she found a case from the Supreme Court of Anystate holding that in appropriate circumstances, a person can commit battery through the conduct of a third person.

Her research on the Internet revealed the following from a report from the Brady Center to Prevent Handgun Violence:

*Illegal guns are a serious problem in America. Over the last ten years, there have been more than 3.7 million violent crimes committed with firearms in this country, an average of about 100 violent gun crimes every day. Almost 60% of the nation's guns traced to crime came from only about 1% of dealers that supply the majority of America's crime guns.*

*Corrupt gun dealers are the source of the largest number of guns diverted to the illegal market. Rogue dealers frequently have hundreds of guns "disappear" from their stores - firearms that have left the stores' inventories without a record of sale. While most dealers have few guns unaccounted for, corrupt dealers frequently sell guns "off the books" at gun shows and have high numbers of missing guns. For example, in 2005, AFT examined 3,083 gun dealers and found 12,274 "missing" firearms. Yet 95% of these "missing" guns came from just 97 dealers. Valley Guns, one of these dealers, had hundreds of guns "missing" from its inventory, and has been one of the top 40 retail sources of crime guns in the nation.*

The senior partner assigned to this file is intrigued by Audrey's request, but has some concerns about viability of the theory. Knowing that you were a Torts superstar in one of the nation's premier Torts programs, she wants you to determine if we can plead and prove the intent element of this claim. She asks you to (a) discuss in detail how we might go about meeting the applicable intent test; and (b) provide your opinion on the strength of this claim and your recommendation as to whether we should pursue it.

**Question 2 (80 points- 44 minutes)**

Audrey also wants to sue, Abe, the gun seller, for negligence. Assume for this question (in direct contrast to question 1) that Abe and Carol had never met before the sale. Abe admits that Carol looked “down on her luck” and “sketchy” and that she negotiated aggressively, almost to the point of begging, to get the price of the gun down from the \$175 that Abe initially wanted. The senior partner requests you to: (a) Draft a memo analyzing only the duty and scope of liability elements of this claim; (b) If there are additional facts we need, please identify them and specify why they are relevant; (c) Provide your opinion on the strength of our case on these two elements.

**Question 3 (120 points- 67 minutes)**

Audrey also wants to pursue a product liability case against the manufacturer of the gun that was used in the shooting. The company is known as Acme Guns and Ammunition. She tells you that she believes the dangers in gun distribution are compounded by the industry’s failure to equip guns with feasible safety features such as integral locks that would “personalize” guns and prevent their unauthorized use. While manufacturers long denied it was possible to design guns with this kind of technology, Audrey’s research has shown that several lawsuits have prompted at least one manufacturer to begin making and selling guns with these safety features. She asserts that this technology has been known and available to the industry for many years and that industry engineers admitted in depositions in those prior cases that these locks could have been included in guns. The experts disagree about the cost of the devices. Estimates range from a cost of only a few dollars to over \$50 per gun.

A recent case from the Supreme Court of Anystate held that:

We have adopted the doctrine of strict liability of manufacturers for product defects in section 402A(1) of the Restatement (Second) of Torts, which states: “One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer....” (*citations omitted*). “A design defect occurs when the

product is manufactured in conformity with the intended design but the design itself poses unreasonable dangers to consumers.”

For a product to be unreasonably dangerous, it “must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.” The jury determines whether a product is unreasonably dangerous by using a risk-utility balancing test. Under this approach, “a product is defective as designed if the magnitude of the dangers outweighs the utility of the product.” However, proof of an alternative design is neither a controlling factor nor an essential element that must be proved in every case.” *Id.* Rather the circumstances of each case dictate which factors may be relevant. *Id.*

The senior partner request you to: (a) Draft a memo analyzing the elements of this claim, except for the scope of liability element (which another clerk is covering); (b) If there are additional facts we need, please identify them and specify why they are relevant; (c) Provide your opinion on the strength of our case on these elements.

**Question 4 (80 points- 44 minutes)**

Assume the U.S. Congress has proposed (but not yet enacted) a bill to protect manufacturers of firearms. The law would bar “any civil action or proceeding brought by a person against a manufacturer or seller of firearms for damages, punitive damages, injunctive or declaratory relief or other penalties, resulting from the criminal or unlawful misuse of a firearm by the person or a third party but shall not include:

- a. An action in which the manufacturer or seller of a firearm knowingly violated a state or federal statute applicable to the sale or marketing of the product and the violation was a proximate cause of the harm for which relief is sought; or
- b. Any case in which the manufacturer or seller aided, abetted or conspired with any other person to sell a firearm knowing that the buyer was prohibited from possessing a firearm or ammunition; or
- c. An action for breach of contract or warranty in connection with the purchase of the firearm.

The Congressional findings on which this act is based include:

- a. Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.
- b. The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the undermining and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States.
- c. The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States.

For this question only, ignore all the facts in the fact pattern, which present the case of a "rogue" gun seller. You should view the above statute from the broader perspective of an industry with both good and bad actors.

Assume you are home for the holidays and one of your college friends, who is in a Ph.D. program and is studying gun violence, asks you to help him understand the proposed law. Specifically, he wants to know whether you believe Congress to be correct or incorrect in its findings. Write him a letter analyzing thoroughly what you believe to be the most significant Congressional finding. Be sure to explain why you think Congress was correct or incorrect on this finding.