Final Examination
Torts, Professor Leslie Griffin
University of Houston Law Center
May 6, 2010
6 to 10 p.m.

THESE EXAMINATION QUESTIONS MUST BE RETURNED AT THE END OF
THE EXAM.

This examination is CLOSED BOOK, NO NOTES. You may not consult any
other materials or communicate with any other person. You are bound by the Law
Center’s Honor Code. Don’t forget that it is a violation of the Honor Code to discuss
the exam’s contents with any student in this class who has not yet taken it. I
recommend that you not talk about the contents of the exam until finals period is over.

Write your student exam number in the blank on the right side of the top of this
page. If you are handwriting your examination, write your examination number on the
cover of each of your bluebooks. Number your bluebooks by indicating the book number
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At the end of the exam, you MUST turn in this copy of the examination. Please do
not write your name, social security number or any other information that provides me
with your identity.

This exam is SIX pages long, with THREE questions. Question I is worth 40
points. Question II is worth 30 points. Question III is worth 30 points. I recommend that
you spend 75 minutes on Question I, 60 minutes on Question II, and 60 minutes on
Question III.

Your job is to analyze the facts in each question. Do not make up facts or fight the
facts given. If you need more information to resolve a difficult question, state what
information you would need and how it would affect your answer. Read carefully. Think
before you write. Accurate reading of the question is essential. Good organization, clear
statement and avoidance of irrelevancies all count in your favor.

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the PLEDGE blank below, you are representing that you have or will comply with these
requirements. If for any reason you cannot truthfully make that pledge, notify me as soon
as possible. Sign your number and not your name.

PLEDGE: ____________________________________
Question I (40 points, 75 minutes)

Polly drives a cute little red car made by the Doyoda Auto Company. She bought the car from Doyoda because they have a reputation for making good compact cars with excellent gas mileage and a commitment to customer safety. Polly purchased her Doyoda Dreus Model 300 in 2007 for $20,000. The Dreus is Doyoda’s most fuel-efficient automobile and is reputed to be better for the environment than any other car on the market. Polly really wanted a blue car but the Dreus models were in great demand when she bought hers so the salesman persuaded her to settle for the red. Sales of the Dreus were high in 2007 because Doyoda advertised the fuel-efficient nature of the automobile with green ads claiming: “Guaranteed Safe for the Environment.” (The Dreus is not available in the color green.)

In 2008, Doyoda began to receive numerous complaints that the accelerators in the Dreus and other Doyoda models were getting stuck, making it difficult if not impossible to stop the vehicles. In one case, a driver was killed when his car did not stop. Unsure of what the problem was, Doyoda announced a recall of floor mats on the grounds that the floor mats were getting stuck to the gas pedals and causing the problem of acceleration. As the floor mat recall was announced, Doyoda scientists continued to investigate the accelerator problems. They focused more and more on the electronic throttle control system (ETC), which seemed a possible source of the problem. The ETC controls the car’s acceleration. It costs Doyoda $3 to replace floor mats and $3000 to repair the ETC per vehicle.

When the ETC was first introduced by Doyoda in 1998, vehicles using it also had a mechanical throttle as a failsafe or backup in the event the ETC failed. Since 2004, the cars have contained the ETC only and no mechanical throttle.

The system is not designed so that application of the brakes will automatically disengage the accelerator. Doyoda is now considering a software design that would cause the accelerator to disengage whenever the brakes are engaged.

Doyoda reported to the National Highway Traffic Safety Administration (NHTSA) in 2008 that the floor mats were the cause of the acceleration problem and continued to recall the floor mats. The NHTSA issued a warning to Doyoda drivers that they should remove the driver’s side mats from their cars. NHTSA also warned drivers that “a stuck accelerator may result in very high vehicle speeds and a crash, which could cause serious injury or death.”

In 2009 Doyoda received reports that 25 of the cars with the new mats had accelerator problems. They then decided to recall the accelerator pedals (gas pedals), which can be replaced at a cost of $5 per pedal.

There are 7000 Dreus Model 300 cars in the United States. From its sales of all car models from 2007-2010, Doyoda made $20 million in profits.
One morning in March 2010, Polly drove out in her sporty red car onto the highway to drive home to Houston. Polly’s car contains the new floor mats because she responded to the mats recall in 2008. As she approached downtown traveling south she slowed down in response to traffic. As she hit the brake, the car jolted and started accelerating. She kept hitting the brake but the car did not stop. She saw the traffic stopped ahead of her and panicked. She noticed that there was not much traffic coming toward her in the northbound lane. She crossed into the emptier northbound lanes to avoid the southbound traffic, where she sadly hit Betsy, who was driving the only car heading north that morning. Betsy’s car was destroyed and she broke her arm. Polly smashed into her Dreus’s steering wheel, and was hospitalized with severe head and chest injuries. Polly spent a month in the hospital and missed a month of work. She now has regular headaches.

Identify and analyze the possible tort suits available to Polly and Betsy. Will they win these lawsuits? Why or why not?
Question II (30 points, 60 minutes)

Tim is 13 years old. He lives at home with his parents, Bob and Jane, who own a dirt bike that they keep stored at their neighbors’ garage. Bob and Jane bought the bike so Tim can go riding on dirt bike trails. The bike is a miniature electric bike that carries riders up to 150 pounds, can travel over ten miles on a single charge, and can reach speeds as high as 14 miles per hour.

The neighbors, the Miller family, have a back yard that is next to a wooded area with dirt trails. Tim is a friend of Matt Miller, and they frequently ride their bikes together. Tim knows the access code to the Millers’ garage. The ignition keys are kept with the dirt bikes in the garage.

One night, because Bob and Jane were at a party, Tim spent the night at his friend Harry Hanson’s house. Harry went to bed early and Tim was bored. Without telling his parents or the Hansons, he went over to the Millers’ house about 10 p.m. and took his dirt bike from the garage. It was dark in the woods and hard to see the dirt trails. Tim’s dirt bike has no lights or reflectors. Tim cruised down the driveway and onto the street because the street has lighting.

Tim drove out of the neighborhood roads and onto Main Street. Mary and her Mom were driving home along Main Street. Mary has her driver’s permit and was practicing driving at night. Suddenly she saw Tim cut in front of her, picking up the dark bike in the glare of her headlights. Mary swerved to avoid hitting Tim and ran her car into a light pole and then into the neighborhood bikeshop, which is owned by the Hammer family. Mary’s Mom, in the passenger seat, suffered a concussion. Mary remembers bumping her head on the steering wheel but she doesn’t have any bruises or headaches. Tim didn’t notice Mary’s car accident and kept driving until midnight, when he returned to the Hanson house and snuck back in through an open window.

Tim is too young to have a driver’s license, which is required by state law for anyone who operates a motorized vehicle on the roads. State law also requires lights on any motorized vehicles on state roads.

Mary has not been able to sleep since she was in the accident and has delayed getting her driver’s license because she is now afraid to drive. She remembers that her Mom was almost hurt seriously when she was at the wheel and is afraid to drive again.

Fifteen of the Hammers’ bikes were wrecked by the collision. The Hammers had to close their store for two weeks while the shop was repaired. The damaged bikes were worth $7,500 and the Hammers estimate they lost another $5,000 in bike sales. Because Mary’s car hit a light pole, the electricity in the neighborhood was off for two weeks. The Starbucks next door to the Hammers’ bike shop lost an estimated $1,500 in sales during those two weeks.

Identify and analyze all the available torts suits in this set of facts. Who will win and who will lose? Why?
Marine Lance Corporal Matthew A. Smith was killed in Iraq in the line of duty. Shortly thereafter, two United States Marines came to the home of Albert Smith and told him that his son had died. As Matthew had lived in Westview, and graduated from Westview High School, St. John's Catholic Church in Westview was selected as the site for his funeral. Obituary notices were placed in local newspapers providing notice of the time and location of the funeral.

Rev. Fred founded The Church in 1955. For fifty-five years, he has been the only pastor of the church, which has approximately sixty or seventy members, fifty of whom are his children, grandchildren, or in-laws. There are approximately ten to twenty members of the church who are not related to Fred by blood or marriage. The members of The Church practice a “fire and brimstone” fundamentalist religious faith. Among their religious beliefs is that God hates homosexuality and hates and punishes America for its tolerance of homosexuality, particularly in the United States military. Members of the church have increasingly picketed funerals to assert these beliefs. They have also established a website identified as www.godhatesfags.com in order to publicize their religious viewpoint.

The Church’s picketing efforts gained increased attention when they began to picket funerals of soldiers killed in recent years. Members of The Church prepare signs at an on-site sign shop at their Church to take with them in their travels. They also utilize an on-site production facility to produce videos displayed on the church’s website. When Fred and church members learned of Matthew’s funeral, they issued a news release announcing that they intended to travel across country to Westview and picket the funeral:

GOD HATES AMERICA & IS KILLING OUR TROOPS IN HIS WRATH.

Military funerals have become pagan orgies of idolatrous blasphemy, where they pray to the dunghill gods of Sodom & play taps to a fallen fool.

This message to be preached in respectful, lawful proximity to the memorial of Sgt. Matthew A. Smith who was a fag.

Fri., Apr. 30, at 10:15 a.m.
St. John’s Catholic Church
Westview, STATE

Rev. Fred notified Westview police that church members intended to picket the funeral. They stood across the street from St. John’s and followed the funeral procession to the cemetery. They carried signs which expressed general messages such as “God Hates the USA,” “America is doomed,” “Pope in hell,” and “Fag troops.” The signs also carried more specific messages, to wit: “You're going to hell,” “God hates you,” “Semper
“fi fags,” and “Thank God for dead soldiers.” Fred says it is his Church’s duty to deliver the message whether the Smiths want to hear it or not.

After returning home, Fred published an “epic” on the church's website, www.godhatesfags.com. In “The Burden of Marine Lance Cpl. Matthew Smith” Fred wrote that Albert Smith and his ex-wife “taught Matthew to defy his creator,” “raised him for the devil,” and “taught him that God was a liar.” In the aftermath of his son's funeral Smith learned that there was reference to his son on the Internet after running a search on Google. Through the use of that search engine, he read the “epic” on the church's website.

Identify and analyze Albert’s possible tort claims against Fred. Will Albert win or lose? Do not discuss any arguments associated with Church’s religious freedom.
Exam Memo, Torts, Spring 2010

Professor Griffin

Your letter grades in this course were based on the following point totals from the final examination and were awarded according to the mandatory UH grading curve for first year courses, which requires that the class average fall between 2.9 and 3.1. The class average was 3.06. The number in parentheses is the number of students that received each letter grade. The exams varied greatly in quality.

80-100 A (3)
75-79 A- (4)
70-74 B+ (9)
60-69 B (19)
50-59 C+ (9)

For Question I, it was important to recognize that both Polly and Betsy could sue Doyoda in strict products liability and negligence. It was essential that you spell out all the elements of those lawsuits. Betsy is a bystander under SPL and is probably foreseeable in a negligence lawsuit, so you needed to include her in both lawsuits. It was important to use all the SPL tests (unreasonably dangerous, consumer expectations, risk/utility, reasonable alternative design) in proving the defective product. Most important, you had to use the facts from the question. Too many of you wrote outlines or lists of elements and never incorporated all the facts from the exam that either 1) demonstrated D was negligent or 2) proved a product defect.

Question II was difficult for many of you. If you had stayed with tort basics, you would have had an easier time answering the question. The best way to start was to ask: which people in the question have an injury? Those people (not Tim) make your best plaintiffs. I gave you a mix of everything we learned in torts: Mary (emotional distress/physical impact/zone of danger), Mom (physical injury), Hammer (property damage), Starbucks (pure economic loss). With those injuries in mind, look for defendants. There was the negligent Tim, either negligent per se or by being held to an adult activity standard for driving. NOW WHO ELSE MIGHT HAVE BEEN NEGLIGENT? The other people named in the question: Tim’s parents (Bob and Jane), the Millers and the Hansons. They and Tim (not Mary and Mom) are the source of the problem as there is no evidence that Mary or Mom did anything negligent. Once you try to reach all those defendants, of course, proximate cause becomes a key issue. The Hansons were a long shot, but Tim was in their care so you needed to discuss them. The Millers’ conduct matched the “keys in the ignition” cases and contained possible landowner/trespasser issues. And for the parents, Bob and Jane. I gave you the question because we spent a whole evening doing problems connected with family immunity. Take a look at CB p. 226, n. 8: family immunity is relevant in third-party suits. So you needed to discuss your Broadbent
caselaw. If you had started with the big picture: who was injured and who was possibly liable—you were on your way to seeing the whole.

Question III was right out of our last night of class. If you read the question carefully, it asked you only about Albert, NOT MATTHEW. You had to talk about defamation, intrusion and IIED. If the first element of a defamation lawsuit is a defamatory statement, you must explain why the statement is defamatory and not just assert that it is. There are always two sides to a lawsuit, so Fred should have raised the constitutional defenses, especially *Gertz*. It was wrong to declare at the start that this was a common law suit. You are always supposed to ARGUE BOTH SIDES. IIED has an element requiring OUTRAGEOUS conduct. And intrusion should have been 10 easy points as we had just discussed that topic the night before.


The best student answers are pasted below. Please be sure to read them over and compare them to your exam before making an appointment to ask me about your grade.
I. Polly & Betty v. Doyoda

Polly can bring a products liability & negligence claim against Doyoda.

A. Products Liability

Polly & Betty should bring a products liability claim against D. Betty can recover b/c she is a 3rd person injured by the car's defect.

For PL, D manufactured & supplied the P's car. P bought the car directly from D who is the manufacturer of the car.

P's car was defective, because in 2010 while she was driving she hit the brakes, attempting to slow down, b/c of traffic, but instead the car started to accelerate. She kept hitting the brakes, but the car didn't stop. Unlike Welge (where jar shattered as when top was screwed on), this is not a manufacturing defect (1 in a million that comes off the line), but rather is a design defect.

For Design defect, P could use the consumer expectations test b/c every driver reasonably expects that when the brakes are applied that the car will slow down not speed up. Also she said that she bought the car b/c D had a "commitment to customer safety," so she
wouldn't expect her car to be so unsafe.

Also the Reasonable Alternative Design test could be applied, b/c prior Doyoda cars had a mechanical failsafe in the event that the ETC (what caused the car to accelerate) failed. Also D had designed a new system that would cause the system to disengage whenever the brakes were applied. Plus it would be easy to compare P's car to the technology in other similar cars by different manufacturer's.

If the risk utility test is applied obviously the risks of car accidents that can lead to death heavily outweigh D's expense of $3000 to replace the ETC.

P could also argue that D failed to adequately warn of the dangers regarding the accelerator. Though in 2008 they issued a warning "that a stuck accelerator" may result in high speeds & crash, D attributes this warning to the driver side mats that cause the accelerator pedal to stick. Since P had responded to the recall in 2008, she could have reasonably assumed that there was no more risks. D never issued any additional warnings stating that it might be due to the ETC. This is not a adequate warning.

P can argue with reasonable certainty (Stubbs-typhoid from contaminated water which overruled Wolf(dead body at bottom of stairs-have to exclude all other possible causes))that but for her car's defect, she would not have collided with Betsy b/c she would never have been in the opposite lane to mitigate damage, b/c she
would have been able to stop properly. If P couldn't prove but for she could use the substantial factor test in Zuchowitz (where the dr prescribed too much medicine & plaintiff developed PPH disease). P's car defects are a substantial factor which is evidenced by other similar accidents. The defect increased her likelihood of having an accident & an accident is what happened. Proximate cause is also satisfied b/c this type of harm (car accident) is foreseeable from the car's defect (Wagonmound-type of harm must be foreseeable; molten rag fell into oil causing fire in wharf). Whether the defect is the direct cause (which P should argue) or indirect cause, D is still liable b/c the intervening factor of P trying to avoid cars & mitigate harm is foreseeable in this situation (she is unable to stop the car).

D cannot successfully argue that the defect isn't the cause b/c they aware of so many other similar incidents. D will argue that P assumed the risk. That she knew of the defect b/c she responded to the 2008 recall & continued to drive the car, but that probably won't be successful either. They could argue heeding presumption (that if she was warned, she would have heeded the warning) but not successfully either. D may also argue that they didn't warn specifically of the ETC b/c they didn't have knowledge, but that isn't so since it says their scientists had examined the ETC & developed new software to disengage it.

D will try to argue that they are not liable to Betty b/c P's neg. by crossing into the other lane was what caused her injuries not the
car's defect, but this argument wont be successful. D may also argue that the car was 3yrs old, P didnt maintain the car properly (like change the brakes, etc) & that is what caused her to be unable to stop, but this too probably wont succeed b/c there are some many similar incidents where cars wont stop & accelerate. D could also argue that a defect didnt cause the accident b/c the defects didnt appear till the 08 models b/c thats when they started receiving the complaints, but the fact that D recalled her yr model car defeats this.

P & B will be able to bring a successful products liability claim against D. P will be able to recover general damages like pain & suffering, future losses & specific damages like medical expenses (hospitalized w/ severe head & chest injuries), lost income (b/c she missed a month of work), possible even emotional distress b/c she has continued headaches.

Both should also be able to recover punitive damages b/c it seems that D's behavior was reckless by not addressing the real issue w/ the ETC sooner. They had constructive notice in 2008 when they started receiving complaints & D's scientists continued to examine the ETC b/c they believed it was the possible cause, but in 2010 they still hadnt recalled all the vehicles. P & B could argue that it was greed b/c they continue to recall nominal things like the pedal (which they know is not the cause but only costs $5) b/c it cost D $3000 per car to replace the ETC which is the actual problem. The punitive dmgs will have to be a single digit ratio to actual
dmgs awarded. Punitive dmgs are awarded as a deterrent & based on the defendant's wealth. The jury could decide that they want to send a message to D to fix their cars & stop putting people at risk. If the judge finds that the dmgs shock the conscience, he could order a new trial or remittur which is a conditional new trial unless plaintiff agrees to a reduction in dmgs.

B will also be able to recover pain & suffering, med expenses (b/c she broke her arm), property damage expenses, possibly lost income (if she was hospitalized or had to miss work due to her injuries) or future income is she has ongoing issues w/ her arm & cant work.

B. Negligence

P & B may also be able to bring a successful neg. suit against D as well b/c D has a duty to its customers, but a products liability suit is easier for P & B to argue b/c fault isnt necessity to prevail.

P who is the owner of the car is a foreseeable plaintiff, b/c its foreseeable that she could be injured if the car has defects. 3rd parties are also foreseeable in regards to cars driven w/ defects b/c of the likelihood of a crash.

P & B could use industry custom to establish their std of care. They will need experts from the industry to testify that when a car company has knowledge of such defects that have already caused a
death what the proper action taken should be. Also under innocent causation, If D isn't liable for the actual risk since it created it, D has a duty to warn or eliminate the risks. They had constructive notice & more than likely actual notice since they started getting complaints in 2008 & one person died in accident due to the defect, then in 2009 25 cars w/ the new mats had accelerator problems. D breach their duty b/c they didn't remedy the risk or adequately warn. (Simonsen-hit pole, knocked it over, & drove off; then plaintiff hit pole; ct held he had duty to warn or remedy)

P & B will be able show causation (discussed above)

II. B v. P (neg.)

Betty can also bring a neg. claim against P b/c she violated a statute by driving into the opposite lane & b/c she continued to neg. drive a defective car but P has a valid argument (according to Tedla-2 junk collectors hit by car walking wrong side of road which violated statute; ct held that if it is reasonable to violate the statute b/c it would be more safe then there is no negligence) that she was reasonably trying to mitigate the harm b/c of the traffic in her lane & since she couldn't stop it was safer to cross where Betty was the only car. Also the ultimate cause for the accident is the defect b/c w/o the defect P wouldn't need to cross the line. Also P cant be held strictly liable for the accident (according to the case where the brakes failed after she took her car to the reputable mechanic or where the man had an unforeseen seizure & wrecked into store). P can argue that she responded to D's recall, so there was
no negligence on her part & that she wasnt aware that the car was
defective when she was driving that day.

**Question 1:**

**Tort suits available to Polly and Betsy.**

**Suit 1: Polly v. Doyoda (strict products liability)**

Polly's best suit against Doyoda would be on a strict products
liability claim on a design defect basis. Alternatively, Polly
could also bring a negligence suit against Doyoda (discussed
below). For P to prevail on a SPL suit, she must prove the 4
elements – 1) D supplied the product to P, 2) the product was
defective, 3) causation, and 4) damages.

**Element 1: D did supply the product to P.** Although the facts do not
indicate whether or not P bought directly from D or from an
authorized dealer, it does not matter. Like the Buick case, where
the wheel fell off the car, even with an intervening retailed the
original manufacturer is still liable for defects in the car. The
idea is that the manufacturer knows that the end user of the product
is the driver of the car (not the retailer). Further cases support
that retailers and distributors do not absolve the original
manufacturer of liability. The facts here clearly indicate that D
supplied the product to P.
**Element 2: The product was defective.** There are three ways that a product can be defective - 1) manufacturing defect, 2) design defect, and 3) warnings/instruction defect.

Polly could argue for manufacturing defect, but the basic premise of a manufacturing defect suit (like the Planters case) is that the product that caused harm is one in a million. Because Doyoda knows of at least 25 cars with accelerator problems, out of 7000 cars in the US, this is more than the "one in a million" case. This seems to point to a bigger issue.

Polly's best case is to argue a design defect. There are 4 ways Polly can establish a design defect - 1) defective condition unreasonably dangerous, 2) consumer expectations (CE) test, 3) risk-utility balancing test, and 4) reasonable alternative design (RAD). Option 1 has been disfavored because it uses the word "unreasonably," which "rings of negligence." (Cronin case). Most courts do not use this approach. Test 2, the CE test, is whether or not the product performed as a reasonable consumer would expect it to based on their ordinary knowledge (experts are not allowed to testify). Polly would have a strong argument under the CE principle. Although cars are technically complex, everyone understands that a car goes when you push the gas pedal and stops when you push the brakes. Polly was pushing the brakes when the car began to accellerate on it's own. The regular consumer would understand that this is not what a car usually does and that
something is defective with the design. Test 3, the risk-utility balancing test, is where we balance the utility of the product against the risk that the design causes. Polly would have to show that the product as designed has excessive preventable risk. This is not a strong argument for Polly. Although experts are allowed in risk-utility cases, the technical nature of explaining electronic throttle controls and their usage may confuse the jurors. This would open up the doors to experts and technical discussions.

Polly's best case is to argue the RAD. P would have to show that there is a reasonable alternative design available that would not cost a significant amount nor drastically change the operation of the product, but would solve the design flaw. P often looks to the rest of industry to find the RAD. Although this can be difficult, Polly can show that prior to 2004 D had both the ETC and a mechanical throttle for backup. Most damaging to D is that they have been considering a software design that would disengage the accelerator when the brakes are applied, presumably D has already recognized a flaw in the design and is actively trying to correct it. P could show that a RAD existed in the form of a mechanical backup or in the software design. Under RAD, or alternatively under CE, Polly can show that a design defect existed.

**Element 3: P's injuries were caused by D.** For causation, P must show 2 things - 1) cause-in-fact, and 2) scope of liability. For item 1, also called but-for, P must show that but for the product defect, Ps injuries would not have occurred. P was slowing down while approaching traffic. Presumably, if the car had done as
expected, P would have come to a complete stop or avoided the traffic. Because the car did not slow down, but rather accelerated, P was forced to veer off the road. It was because she had to veer (and then hit B) that P suffered head and chest injuries. As for item 2, scope of liability, P must show that the harm she suffered was within the risk of the activities. Extent and manner of the injuries need not be foreseeable, but type and victim must be foreseeable. P's injuries, a head and chest injury, are foreseeable types of injuries that would be caused by a car not performing as expected. D did not have to anticipate that the ETC or pedal would stick and cause the acceleration. P would like the older Polemis direct test, which states that any injury caused directly by the conduct is foreseeable. The car was defectively designed, causing the car to accelerate out of control, causing P to swerve and hit B, leading to Ps injuries. Under either the old Polemis or the regular type test, P has a good case. Finally, the victim, P, is foreseeable. P is the end user of the car, the driver of the purchased auto. This should not be a problem for P.

**Element 4: P was injured and can claim damages.** P's injuries are clear, she suffered head and chest injuries. P can recover medical expenses (from the hospitalization and future medical expenses), lost wages (from missing a month of work), and pain and suffering. Medical expenses and lost wages would need to be proved specifically, meaning she would show her hospital bills and proof of her salary. P can claim general damages for pain and suffering. Because Ds conduct was not likely reckless or wanton, P will not
likely recover punitive damages. However, the court could rule that Ds conduct was reckless and hold them liable for punitive damages on a deterrence theory. If the court wants to deter the behavior and encourage the D to fix the problem, punitive damages may be useful and they may find the conduct reckless. Ps damages are likely insignificant to D. When awarding punitive damages, under Gore, the court would consider the degree of reprehensibility, difference between the award and the actual damages suffered, and difference between the award and any civil liabilities imposed in similar cases.

D will try to argue the risk-utility balancing test because they can call in experts and show numbers on how safe the ETC is. D could also attempt to use industry custom to further their case and attempt to impress on the jurors how safe the product was. Compliance with custom is not persuasive, but could also be used to show the jury that a RAD did not exist. If it had, then the rest of the industry would probably be using it as well. D could also argue that any "RAD" would significantly impact the cost of the car, which would then force D to raise car prices and ultimately hurt people like P. The court is unlikely to support D's argument. Since the goal of torts is to deter behavior, the court will want to hold D liable to entice them to make a safer product.

D will also argue that P was contributorily negligence because she violated a statue by driving on the wrong side of the road. In a traditional contributory negligence jurisdiction, the court would
probably reject this argument because it would allow D to escape liability. In a comparative negligence jurisdiction, even if the court agreed with D it would not matter. The court would assign P some degree of fault and then reduce her award by that amount. It is unlikely that P will be assigned greater than 50% fault (which would throw her case out in a modified comparative scheme).

Finally, D could try to argue implied (secondary) assumption of the risk when P continued to drive the car despite the reports of uncontrolled acceleration. This would mean that D did have a duty to P, but P assumed the inherent risk anyway. If P unreasonably assumed the risk, the case ends. If P made a reasonable assumption, then the suit is not barred. Given that P complied with the prior recalls and believed they had fixed the problem, and presumably P does not have other cars waiting in the garage that she can drive at her whim, this is a poor argument.

D will argue against any punitive damages award on the grounds that they were not reckless. They initiated recalls, continued to work on the problem, and even reported the incident to the NHTSA. This appears to show lack of recklessness. D would also argue that the cost to replace all of the ETCs would have been significant and would have cost more than their profits ($21M to replace all vehicles versus $20M in profits) and to initiate a replacement without absolutely knowledge that the ETC was the problem is unreasonable.

The court should rule in favor of P on her SPL suit.
Suit 2: Polly v. Doyoda (negligence)

Alternatively, P can sue Doyoda in a negligence lawsuit. For P to prevail, she must prove the 4 elements of a negligence suit - 1) duty, 2) breach, 3) causation, and 4) injury.

Duty: As a commercial manufacturer of vehicles, Doyoda owes a duty to the foreseeable users of these vehicles. This would certainly include P, who purchased the car directly from Doyoda. Since Doyoda invested significant money into advertising the car, they were attempting to entice people like P to purchase their vehicle. Thus, not only is P foreseeable, P was exactly the type of person that Doyoda was trying to get to purchase their car. Like the Buick case, where the manufacturer was responsible for the car despite the injured party having purchased the car from a retailer, whether or not P bought the car directly from D or from a retailer of D's is irrelevant.

Breach: D breached it's duty to P when the car failed to perform as expected. P will argue that D breached it's duty by negligently failing to fix the acceleration problem. Doyoda had received numerous complaints in 2008 about stuck accelerators, and instead of recalling the vehicles, D took the cheaper option and replaced floor mats - even though they began working on an alternative software design. In 2009 they were on notice that 25 cars with the new mats
still had accelerator problems. D again replaced mechanical pieces for $5 instead of fixing the ETC for $3000.

Causation: As described in the previous lawsuit, P can show both cause-in-fact and scope of liability.

Injury: As described above, P can show her injuries and sue for damages.

D will strongly argue a non-foreseeable intervening wrongdoer, P herself. D will argue that when P veered and crossed the road, her act of driving on the wrong side of the road was not foreseeable. P's injuries were obtained not from the acceleration of the car, but from her accident with B. The court will likely throw this argument out, because P was acting as a reasonable person would given the emergency circumstances. P's car began to accelerate out of control. Rather than face sure injury by running into the traffic ahead of her, P tried to avoid injury by veering onto the clear other side of the road. The court will want to hold D liable for the underlying negligent behavior.

P also has a good argument for a negligence lawsuit, especially in the face of all the other complaints about stuck accelerators. The court is likely to rule in Ps favor.

Suit 3: Betsy v. Polly
B could try to sue P on a negligence theory. B could claim that P had a duty to operate her car safely, and that she breached that duty when she veered across the lanes and into the other side of the road. B would argue that P violated a statute (driving on the wrong side of the road) and that should be negligence per se. B would argue that but for P veering into her lane she would not have been injured, and also that it is foreseeable that by veering into another lane you would hit a driver going in the opposite direction. B would sue P for her damaged car and for her broken arm.

P would argue that violation of a statute is negligence per se UNLESS there is a good reason (like the junk collectors in Tedla). P will argue that she only violated the statute because her car was out of control and she had no other option, that the other side of the road was empty. Alternatively, P could argue that she is not liable for negligence, but that she can be held liable under private necessity. P veered because she had no choice (necessity), so she is not liable in negligence but is still responsible for paying for the damages caused by her necessity - the injuries to B.

I think the court is unlikely to rule in Bs favor on the negligence claim because P was accelerating out of control, but the court may still award damages on a private necessity claim.

**Suit 4: Betsy v. Doyoda**

SPL suits have been extended to include bystanders. B can recover
against D for a SPL claim.

Under the same analysis as above, B can show D supplied the product and that it was defective.

B must show that D's defective product caused her injuries. This will be B's hardest argument, because of the intervening actions by P. However, B will argue that P was acting as a reasonable person would in the emergency circumstances, and but for the uncontrolled accelleration, P would not have swerved and hit B. B could also argue the substantial factor test and say that the uncontrolled acceleration increased the chances of hitting another driver on the road, and B was another driver who was hit.

B would really like the Polemis direct test. Alternatively, B will like Andrew's dissent in Palsgraf by saying that because D owed and breached a duty to P, D is liable to any victim affected by the breach. D will argue that B was not a foreseeable victim under Cardozo's view in Palsgraf, by saying that B was not in the zone of danger of the uncontrolled accelleration. B was the sole driver on the road. However, this is a weak argument that seems to be about manner. If a car experienced uncontrolled accelleration, it is foreseeable that the driver would veer or lose control and hit another driver. Hence, B is likely to recover.

B's injuries are her damaged car and her broken arm. B is likely to recover for medical expenses, the damaged car, and pain and
suffering. B may be able to show lost wages if her job requires both arms. Because Ds conduct is not really reckless/wanton, B is not likely to gen punitive damages.

Suit 5: Polly v. Doyoda (negligence)

Student should have used same negligence lawsuit as above but argued that Betsy was foreseeable.
Question II

Mary v. Tim (negligence / negligent infliction of emotion distress)

Mary will bring a suit against Tim for negligent infliction of emotional distress. To recover on a negligence claim, Mary must show 1) duty, 2) breach, 3) causation, and 4) injury.

**Duty:** Persons owe a general duty of due care not to negligently injure other people. Further, as the driver of a dirt bike, Tim owes a duty to the other drivers on the road not to negligently operate his bike.

**Breach:** Although Tim was a child, the courts have held that a child who engages in adult activities is held to the standard of care of an adult. Thus, Tim is required to behave as a reasonable adult driver on the road at night. Tim breached this duty when he drove without lights. As in the Herzog case, the car who was hit by the buggy driving without lights was able to recover. Violation of the statute (drive with lights) was negligence per se. The argument that Tim does not have a drivers license is not conclusive, since courts have held that driving without a license does not necessarily constitute negligence. Because Tim drove without lights, Tim breached his duty.

**Causation:** Mary must show both cause in fact (but-for) and proximate causation. As previously discussed, Mary can claim that but for Tim's driving without lights, she would have seen him in time and
been able to stop. Because Tim had no lights, she had to swerve to avoid him and so she hit the pole and bikeshop. Since extent and manner need not be foreseeable, the fact that Mary hit the bikeshop is not an issue. Type and victim must be foreseeable. That there would be another driver on the road at night around 10 pm is certainly foreseeable. It is also likely foreseeable that driving without lights would cause you to run another vehicle off the road. Mary will have a strong case for causation.

**Injury:** Because extent need not be foreseeable, Tim can be held liable for damages. Mary may be able to show pain and suffering from the time she served to avoid Tim and when she hit her head on the steering wheel. Mary didn't appear to have any medical expenses or lost wages. The facts don't indicate if Mary's car was damaged, although presumably it was. Mary could recover for the damage to her car and can show this via repair bills. Tim's conduct does not seem reckless or wanton, so punitive damages are unlikely.

A regular negligence claim doesn't work so well for Mary, because the facts indicate no physical damages. Since Mary's damages are mostly emotional Mary should bring a negligent infliction of emotional distress claim.

Mary must show that she suffered severe emotional distress from her fear of imminent bodily harm caused by Tim's actions. Mary can certainly show imminent bodily harm (zone of danger) because she swerved to avoid Tim. Mary will have to show that her symptoms were
caused by the fear she felt from the accident. The facts indicate she is afraid to drive and remembers how her Mom was almost hurt seriously. Usually physical manifestations of the fear are necessary for a court to award damages (like in *Falzone*). Mary should focus on her lack of sleep as a physical manifestation. Because Mary is a young driver who was previously likely very anxious to get her driver's license (like all teenagers) delaying that big event could be enough evidence to convince a jury that she suffered severe emotional distress. This suit will probably prevail.

**Mary's Mom v. Tim (negligence)**

Mary's Mom could also sue Tim, if she could show damages. Tim's duty is owed to people on the road, drivers and passengers, so the same duty and breach apply. Being in the same car, Mom could show she would not have suffered a concussion if it weren't for Tim's negligent driving. However, the facts do not indicate if Mom had any damages to recover for. Mom could also try for emotional distress, being that she feared for her safety while they were swerving out of Tim's path, but this is probably a weak argument. Tim could try to argue that Mary is an unforeseeable intervening wrongdoer, but I think this would fail on the "unforeseeable" aspect. Mary was another driver on the road, and another driver should be expected.

Each P could sue Bob and Jane for negligent entrustment, like in the
case where the woman and car dealer were sued after helping her nephews get a car despite his poor driving record. Bob and Jane bought the bike for Tim to ride on the dirt roads, but one could argue that it was foreseeable that Tim would take the bike out on the roads. As parents, Bob and Jane have a duty because they are the parents. Ps will argue that B and J were negligent in their duties as parents.

Ps will argue that B and J should follow the reasonable parent standard, which says that parents must act as a reasonable parent would given similar circumstances. They breached that duty because a reasonable parent would not allow a 13 year old to drive a dirt bike. Ps could also argue that under the Goller standard, parental immunity is only for if you are acting in a parental capacity over things like food, shelter, medical, etc. Driving a dirt bike is not the type of immunity contemplated by the Goller standard.

B and J will counter by saying that it is reasonable to allow a 13 year old to drive a miniature electric bike that cannot travel over 14 mph. B and J will further argue the New York standard, that they have parental immunity for negligent supervision. Finally, B and J could attack the Goller standard because it does include an "other" provision, and they could interpret that as means of transportation. The Miller's have a house right next to a wooded area, which means Tim could take the bike without ever having to be on a road. Riding around in the woods at 14 mph is not likely to cause injury to anyone else. B and J will say they stored the bike and the Miller's
house specifically to keep Tim from taking the bike on the roads. Further, the facts are silent, but B and J may argue that they had no idea nor could have know that Tim had the code to the Miller's garage. Because the Courts are reluctant to get involved in family suits, and T intentionally took the bike out without telling anyone, any suit against the parents is weak.

Each P could also sue the Miller's for negligence. Ps would argue that the Miller's were negligent because they left the ignition keys with the dirt bikes. Because dirt bikes can be dangerous, you could argue it is negligent to leave the keys right along side the dirt bikes. However, the Millers could counter because Tim is an intervening wrongdoer. There are no facts to suggest that the Miller's knew that Tim had the access code to their garage, and the Miller's were unaware that he had taken the bike. A suit against the Miller's for negligence is likely to fail.

Ps against the Hanson's:
Ps could argue that the Hanson's picked up a duty when they let Tim spend the night at his house. Ps would argue a special relationship on the grounds that Hanson was acting as a substitute parent who had control over T and T was in a position of dependence. However, because this was for only one night, and because Hanson was just down the street, this claim is not likely to succeed. A deep responsibility is associated with control, or substitute parent. Surely if Tim had needed medical attention, Hanson's would not have taken him to the hospital or made large decisions for him. There is
not enough control given to the Hanson's for a one-night stay to hold him responsible for Tim sneaking out of the house after Hanson went to bed.

**Hammers v. Tim (negligence)**

Once established that Tim had a duty and he breached it (see lawsuit under Mary), Tim is liable for the damages that are foreseeable as a result of this breach. H argues that his shop would not have been damaged but for Tim being on the road without lights. Because extent need not be foreseeable, Hammers could recover his damages from Tim. Although T will argue M is an intervening wrongdoer, this is likely to fail because M (another driver on the road) is foreseeable. H would definitely argue the Polemis direct test, that T is liable for all damages that directly flow from his negligent behavior.

T could make an argument that M should be held contributorily negligent, and in a comparative negligence state that means H would recover from both T and M. However, as discussed above, M will probably not be considered contributorily negligent and so T will be held solely liable.

In this manner, under the negligence standard, H could recover both the property damage worth $7500 and the bike sales of $5000 if he could provide specific evidence to prove them. H would argue that the lost bike sales of $5000 are lost wages and are recoverable. It
has been discussed that punitive damages are unlikely.

**Hammers v. Mary (private necessity):**

Alternatively, H could recover from M on the grounds of private necessity. Mary was reacting as a reasonable person would given the emergency circumstances of the imminent crash with Tim. Mary, to avoid bodily harm, swerved and crashed into the Hammers store. The doctrine of private necessity says that Mary is liable for the damages caused by her use of the Hammers' land/store, even if she caused them out of necessity. The court is likely to find that Mary crashed out of necessity and Hammers will be able to recover for the property damage caused. Hammers will recover the $7500 in damaged bikes, but not the purely economic harm under the private necessity suit.

**Starbucks:** Starbucks will not recover any damages for the $1500 loss in sales during the two week power outage. The court generally do not award damages for purely economic loss. Starbucks is just like the Madison Ave cases, where the Court did not award damages for purely economic loss.
Question III

Albert has possible tort claims against Fred for defamation, intentional infliction of emotional distress, and possibly intrusion. For this discussion Fred = Fred and the members of his church.

Albert v. Fred (Defamation)

Albert has a good case for defamation. The common law elements for defamation are (1) Defamatory statement (2) Of and Concerning the Plaintiff (3) Publication and (4) Damages. Albert can point to several statements that defame his son in the press release issued by Fred, including a statement that names his son specifically and states "who was a fag" and calls the subject of the funeral a "fallen fool".

However, Albert may not be able to recover for the defamation of his deceased son and these statements may better constitute an intentional infliction of emotional distress claim.

Albert may claim defamation against himself for the publication of defamatory remarks on the church's website. Specifically, the comment that Albert Smith and his ex-wife "taught Matthew to defy his creator", "raised him for the devil" and "taught him that God was a liar". Since Albert was specifically named, it satisfies the "of and concerning the plaintiff" element.
When deciding if the statements are defamatory, the court must look at the entire document and read the statements for context. A defamatory statement is one that harms the reputation of the plaintiff, lowers him in the estimation of others, and deters 3rd parties from associating with him. A reasonable reader standard is used by the court. It is enough that the statement is considered defamatory by a respected and substantial minority. Albert will argue that these statements would all be considered defamatory to Christian and other god-fearing peoples and should prevail.

Albert can show with ease that the statements were published on the website since he found them using the Google search engine. It is likely that others would read the remarks since a Google search of Albert's name would reveal the documents.

Albert is unlikely to be able to plead any special damages. Luckily, the defamatory statements were published in written form and so he does not need to plead special damages and can rely upon presumed general damages to his reputation under the common law.

Fred may have one principal defense to Albert's defamation claim. Fred's speech may be protected under the 1st Amendment because it speaks on a matter of public concern - the soldiers deployed overseas in Iraq. However, Albert will counter with the fact that the defamatory statements do not discuss activities of soldiers but only his religious teachings to his son. In such a case, the common law standard would apply as discussed above (Greenmoss). However,
if the court reads the document as a whole, it might decide that the overall content suggests a matter of public concern. If this is the case, constitutional protection under the Gertz standard for speech concerning private individuals on a matter of public concern will be triggered.

Application of the Gertz standard would add two more elements to the common law standard (5) Fault - negligence standard and (6) Falsity. Further, Albert's damages would be limited to actual damages unless he can prove actual malice (NY Times malice).

Albert would have to prove that Fred was negligent in publishing the "epic". He might do this by showing that he did not check his facts or behave as a reasonable and prudent editor - although this standard seeming applies to the media. For this reason, Albert may argue that the Vermont Supreme Court standard that Gertz does not apply to non-media entities is the better standard and prevail on this point.

Albert would also have to prove the falsity of the statements. Which may be costly and difficult.

More importantly, the Gertz standard would not allow Albert to recover presumed damages and he would have to plead actual damages or prove actual malice. Albert could prove actual malice by showing that Fred "knew that the statements were false or showed knowing and reckless disregard for the truth of the statements. If he can prove
Albert v. Fred (Intentional Infliction of Emotional Distress)

Albert has a case for intentional infliction of emotional distress. Albert must prove (1) Intent - that Fred acted with substantial certainty to inflict emotional distress; (2) Act - that Fred's conduct was outrageous and extreme so as to offend accepted standards of moral decency. Causation - that "but for" Fred's conduct, the emotional distress would not have occurred and (4) Severe emotional distress resulted from Fred's conduct.

Albert will argue that Fred intentionally acted with substantial certainty since he issued a press release and notified police that they intended to picket the funeral in advance. Further, his son's funeral was particularly targeted and Fred traveled across the country to specifically attend. Further, Albert may point to the fact that Fred said it was the Church's duty to deliver the message whether the Smiths wanted to hear it or not - indicating the intent to cause emotional distress.

Albert will specifically argue that the signs that Fred carried at the funeral containing the messages "You're going to hell", "God hates you", "Semper fi fags", and "Thank God for dead soldiers" was
outrageous and extreme so as to offend accepted standards of moral decency. Further, the press release called his son "a fallen fool" and "a fag".

Albert will argue that since there were no other instigators of the picket or known attendess, the emotional distress would not have occurred "but for" the conduct of Fred. Albert will argue that, although Fred was across the street, the signs were clearly visible to all funeral goers.

Albert will then have to argue that severe emotional distress occurred in order to prevail but there are no facts presented to support this. However, given Fred's conduct and the fact that it occurred at a funeral for his deceased son, Albert will probably prevail in a jury trial on this issue.

Albert v. Google (Defamation, Intentional Infliction of Emotional Distress)

Albert may try to sue Google for defamation and intentional infliction of emotional distress for the publishing of the church's content on their website. However, any tort claim will fail because Congress has passed a statute giving immunity to internet websites for any torts arising from the content submitted by 3rd parties. Albert will not prevail since the content found on Google's website
only arose from the church's publishing to the internet. Congress passed this statute in order to foster the free transmission of ideas on the internet and to encourage voluntary sensorship of content.

Albert v. Fred (Intrusion)

Albert may also have a claim for the privacy tort of intrusion. The elements of intrusion are (1) Intrusion into a private place, conversation, or matter and (2) in a manner that greatly offends a reasonable person.

Albert may argue that Fred intruded into the funeral itself. Further, Fred traveled across the country to do so. This claim will probably fail however, because Fred remained across the street and did not intrude into the funeral proper. Albert may argue that Fred intruded into the private matter of a funeral since he was clearly in sight of the funeral goers. Further, Albert may argue that this intrusion was in a manner that greatly offends a reasonable person due to the outrageous sings carried by Fred's followers. This second element is likely to prevail. The battleground will be whether Albert can convince the court of the first element. This suit will probably fail.