Final Examination
Torts, Professor Leslie Griffin
University of Alabama School of Law
December 9, 2004
1:30 to 5:30 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 may not discuss the exam's contents with any student in this class who has not yet taken it. You are bound by the School of Law's Honor Code.

Write your examination number in the blank on the top of this page. If you are handwriting your examination, write your examination number on the cover of each of your bluebooks. If you are using the computer, write your examination number on each diskette and at the beginning of your response to each question. At the end of the exam, you MUST turn in the examination along with your answers. Please do not write your name, social security number or any other information that provides me with your identity.

You have four hours to take this exam. This exam is seven pages long, with five questions. Question I is worth 40 points. Question II is worth 20 points. Question III is worth 10 points. Question IV is worth 20 points. Question V is worth 10 points. I recommend that you spend 90 minutes on Question I, 45 minutes on Question II, 15 minutes on Question III, 60 minutes on Question IV and 15 minutes on Question V. You have an extra 15 minutes to use at your discretion.

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.

If you write your exam, use ONE SIDE of a page only, and SKIP LINES. If you type, DOUBLE SPACE, and leave wide margins.
Question I (40 points, 90 minutes)

Fans poured into the streets of Boston after the Boston Red Sox won the World Series. The crowd, estimated by the city at 3.2 million people, was the largest ever in Boston, according to Mayor. One fan, Pamela, a junior at Waldo College, was killed when she was hit in the eye by a pepper gas pellet during the raucous street celebrations near the Red Sox’s stadium, Fenway Park. Pamela was shot by police using pellet guns to subdue the crowd of rowdy baseball fans. The pellet guns are similar to paintball guns, and fire plastic balls full of pepper gas. The guns are meant to help police control large groups without causing injury. Pamela was hit in the eye by the plastic ball, which was supposed to break up on impact and release a small cloud of disabling gas. Two other students also suffered injuries near Fenway Park that evening, with one cut above the lip by a pellet and another with pellet fragments that penetrated his skull.

The manufacturer of the guns, CrowdGun Company, trained 29 Boston officers to use the weapons, according to the company’s Manager of law enforcement sales, marketing, and training. Manager said officers are repeatedly told never to target a person's neck or head. The gun is not supposed to be aimed above chest level, according to instructions in the manual that is packaged with each gun.

The Boston Globe reported that two of the officers who fired pepper balls into the crowd were not trained to use the weapons. The Globe quoted two anonymous sources as saying Deputy fired at a group of students who were climbing the girders behind Fenway Park's left field wall. Deputy, who was not trained to use the guns, then handed his weapon to Patrolman, who refused to fire it because he also had not been trained. Deputy handed another gun to Police Recruit, who also said he was not trained to use it but fired into the crowd anyway. Another Officer who fired into the crowd was trained to use the guns.

Pamela’s shooting is only the latest reminder that crowd control has re-emerged as one of the toughest challenges for the police nationwide. The problem of crowd control had largely disappeared decades ago, until the World Trade Organization meeting in Seattle in 1999, when 35,000 protesters were drawn to the talks and the police sprayed tear gas and rubber pellets at many demonstrators. "The W.T.O. demonstrations were a real groundbreaker; it really woke up the police," said Seattle's current police Chief Washington. Dealing with crowds has forced the police to search for new and effective ways to maintain order. "Dealing with these kinds of crowds, particularly if people have been drinking, is such a no-win situation," Chief Washington said. "It is very difficult for police chiefs to manage the competing priorities in these situations, allowing people to exercise their First Amendment rights while protecting public safety." A result is that many police forces now devote much more time to planning and training for demonstrations, and have invested heavily in what are termed less-than-lethal weapons.

Several other cities also own the Crowd-Gun Company pellet-spray guns but have not used them. The Seattle police are equipped with Taser stun guns that fire an electric
shock. But Chief Washington said they would not be useful in dealing with large numbers of demonstrators packed tightly together or hiding behind one another. Tasers are more effective in dealing with individuals suffering from mental illness who are threatening an officer. For large crowds, "by far the best tool is having a large number of officers you can deploy," Chief Washington said. He has used officers on bicycles to move ahead of demonstrators or to form blocking cordons. "Especially with sports demonstrations, I just don't see effective tools except for a large number of officers."

The trouble is that except for New York, no city has the deep reserves of police officers needed for crowd-control duty. While New York has 36,000 police officers, Boston has only about 2,200 and Miami and Seattle only 1,100.

Demonstrators traveled to Miami during a 2002 meeting of the Free Trade Association of the Americas. The demonstrators, some of whom had protested at the World Trade Organization in Seattle, started hurling bottles and setting fire to cars on the fourth day of the event. The Miami police then made a decisive move on the crowd, trying to clear them back six or eight blocks. The Miami officers fired pepper balls from a less high-powered version of the weapon used in Boston. The Miami police Chief Florida concluded "It was clear the guns were not working." Because he didn't understand why the guns didn't work, after the demonstration was over he went out in a parking lot and let himself be shot by a pepper ball. Chief Florida said: "I felt a stinging in my chest. It hurt. But as far as releasing pepper spray, I didn't smell anything. So I decided the weapon was a waste of time." The Miami police are now trying out another technology, a liquefied form of pepper spray that can be fired at demonstrators up to 20 feet away like a squirt gun.

Pamela's parents ask you to determine what lawsuits are available to them. What lawsuits may they bring? Will they win or lose? In answering the question, you should use general tort law and not only the law of Massachusetts.
**Question II (20 points, 45 minutes)**

Holly wanted to have children more than anything in the world and was thinking about children when she met Wally. Holly and Wally began their relationship in June, 1996. Then in their late thirties, both had been divorced. Holly recently had started her own company and Wally was a director of a management consulting firm. Wally had four children from his previous marriage; Holly had none. In a discussion in July, 1996, about the future of their relationship, Holly expressed her desire to have a family, and Wally responded that a fortune teller had told him he would have six children. He told Holly that she should not worry about having children and that everything she wanted in life would be taken care of.

Feeling assured, Holly chose to remain in and work on the relationship with Wally. Wally and Holly became sexually intimate in September, 1996. About three months later, Wally, noting that Holly appeared to have put on weight, asked whether he had gotten her in trouble. Holly said no, but that she hoped she would be pregnant soon. In February, 1997, Wally and Holly had a long conversation about how much they love children. Then, two months later, out of the blue, Wally told Holly that he had had a vasectomy in 1993 because he did not want to have more children.

Holly was distraught when she heard this news. Wally’s disclosure emotionally devastated her, and she suffered a major depressive disorder. She incurred medical expenses over $200,000 for psychiatric counseling and medication, and she lost over $500,000 in revenues for her company due to the time she spent away from work being healed.

**Holly asks you to advise her on all the possible tort lawsuits she could bring against Wally. First, you should identify a comprehensive list of the tort lawsuits she should consider. Then analyze each lawsuit so you can let her know whether she would win or lose.**
Question III (10 points, 15 minutes)

A. (5 points)

1. There has been an accident in which A has suffered damages of $40,000 and has brought suit against B, C, and D. A trial has established that the relative shares of fault are A—40%; B—30%; C—10%; and D—20%. Assume all parties are solvent. **How many dollars does A receive from the defendants B, C and D under a pure comparative negligence statute?**

2. C has also been hurt and has sustained damages of $25,000. **How many dollars will C receive from A, B and D?**

B. (5 points) Take the case where P suffers loss of $10,000, and P is 10% at fault. D is also 10% at fault. A (an absent or insolvent defendant) is 80% at fault. **How much does P get from D?**

   a. **under classic joint and several liability?**

   b. **under several liability?**

   c. **under the Uniform Comparative Fault Act?**
Question IV (20 points, 60 minutes)

The journal Business Insurance reports (11/8/2004) that "President Bush's re-election and the exit of several anti-tort reform lawmakers from the Senate could help push civil justice reform closer to reality in the next Congress. Pro-tort reform forces also grew slightly in the House, where a pro-reform bipartisan majority had already passed medical malpractice reform measures only to see them die in the Senate. Those reforms, plus changing the nature of the system by which victims of asbestos-related diseases receive compensation, may face brighter prospects. Reform of the current system of compensating victims of asbestos-related disease through litigation rather than some other nonadversarial system may have also gotten a boost as a result of the election.

"Meanwhile, the changes in legislative makeup will probably not have a significant impact on the outcome of two other issues of interest to risk managers and insurers: the extension of the Terrorism Risk Insurance Act [TRIA] and the question of federal vs. state insurance regulation. TRIA, a measure that provides a federal backstop to help insurers meet losses stemming from future catastrophic terrorist attacks, is slated to expire at the end of 2005. And, if anything, any drive for a greater federal role in regulating insurance may slow down because of the election, say observers. ‘Republicans support the devolution of power to the states. There is more reticence on the Republican side to seek a federal regulator rather than state regulation,’ according to one leading expert."

You are a congressional aide in the new Congress. Your boss, Representative Reformer, asks you to write a memo identifying the most important reforms that should be made to the U.S. tort system. Representative does not want to be surprised by proposals from other members of Congress. Therefore, your memo must be comprehensive in identifying all the important options for tort reform. After you identify all these options you must advocate for the ones that you think are most important and explain to the Representative what legislation can enact these reforms.
Question V (10 points, 15 minutes)

Peter and two friends went out to dinner in celebration of a friend's birthday and then went to the Nightclub to end their evening. Peter got up from his table a few times in order to place money on the stage for the Nightclub's singer. Each time, Security Guard walked over to Peter and told him to stop leaving his seat. On Peter's fourth trip to the stage, the Guard finally asked Peter to leave the club. Peter said he wouldn't leave without his friends, and asked to see Manager. Guard then grabbed Peter by the arms and shook him hard. Manager walked over to the two, and Manager told Peter that he had to leave the club because of the fight with Guard.

Peter started to leave. Guard followed Peter out of the building and attacked him with a metal flashlight. No one at the club helped Peter, so he had to stagger to a telephone and call 911. Peter's nose was broken in two places and he lost several teeth. He was treated at the scene by paramedics, and then taken to a hospital.

Peter sued for assault and battery and negligent supervision and won a jury verdict against Guard for battery and against Nightclub under respondeat superior and negligence. The jury awarded economic damages of $32,400.00 as well as non-economic damages of $115,000 for the battery and $315,000 for the negligent supervision. Punitive damages of $5,000 were awarded against Guard, and $1,000,000 against Nightclub.

Testimony at trial established the value of Nightclub at approximately $2,354,000, with net income of $640,000 in 2000, $550,000 in 2001, and $372,000 in 2002.

Defendants appeal the award of damages. On what grounds will they base their appeal? Will they win or lose?

Congratulations on finishing your first semester of law school. Enjoy the holidays and rest up before second semester starts.
There were 100 total points on this exam. The grades ranged from 52-91. I awarded letter grades consistent with the recommended law school grading curve. The point totals corresponded to the following letter grades. The number in parentheses is the number of students who received that grade.

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For Question I, a good answer had to address a lot of issues. You had to decide if you could sue the city for its negligence, or use respondeat superior, as well as if any lawsuit against the city would be dismissed because of governmental immunity. To use respondeat superior, you had to write about the negligence of the employee/shooters. Those numerous shooters should have raised questions about proximate cause, and you needed to mention the *Summers v. Tice* case. Many of you also mentioned *Ybarra* if you were using res ipsa loquitur.

Crowd-Gun Company should have been sued in both negligence and strict liability. Here it was not enough to mention the SPL tests; you had to apply them, using the facts of the question to complete your analysis. Causation was also an issue for these lawsuits, as you should have discussed the heating blocks case and whether the training of these police officers broke the chain of causation.

For Question II, students who lost the most points did so because they did not identify enough torts. You needed to discuss negligent misrepresentation and fraud; negligence and intentional infliction of emotional distress; and battery. Your answer was not complete if you did not discuss the courts’ reluctance to allow lawsuits based on personal relationships, on which we spent a whole day of class discussion.

Question III was lifted from the handouts we did in class and that were posted on TWEN:

*III(a)(1):* B gets $12,000; C gets $4,000; D gets $8,000.

*III(a)(2):* A gets $10,000 (no setoff); B gets $7,500; and C gets $5,000.

*III(b):*
  - (a) $9,000
  - (b) $1,000
  - (c) $5,000

Question IV was the policy question. The biggest error here was that many students did not address the specific issues mentioned in the question, especially the points about the terrorism risk insurance act and the federal and state regulation. At a
minimum, you should have discussed caps on damages, the collateral source rule, and contingent fees. But then you should have discussed the 9/11 fund and all the lessons about tort reform that we discussed when we studied the fund. Asbestos was in the question so you should have talked about the precedents set by the big asbestos cases.

In Question V, most of you mentioned the BMW factors, namely ratio, reprehensibility and comparable sanctions. But you had to APPLY those factors to the facts of the question and not just list the factors. You also should have raised questions about the amount of non-economic damages and whether Nightclub should have had punitive damages assigned against it in the first place.

Student Model Answers are also posted on TWEN.

You may pick up your exams in the Registrar’s office. I am happy to answer questions about your exams and grades after you have looked over your exam, the model answers, and this memo. You can reach me at lgriffin@uh.edu or (713) 743-1543.
1) **Question I**

Lawsuits could be brought against the police officers who were present at the time of the incident. Also, through vicarious liability, the police department could be brought into the suit. The idea of respondeat superior, or vicarious liability, allows an employer to be held liable for its employees' actions. For this to occur, the employee's conduct must be within his/her duties as an employee (crowd control and the use of these weapons was sanctioned and required by the police department as an employer). The conduct must also be within the spatial and temporal boundaries of employment (the officers were on duty and within the spatial boundaries of employment, which would be the municipality of Boston). Finally, the employee must be acting to further his employer's interest (the police department was interested in crowd control, and the acts and conduct of the officers must be said to have been in furtherance of this interest). The conditions required for vicarious liability are met.

The first major issue to deal with in regards to the officers and the department is whether or not the police officers and the police department have governmental immunity. Governments, although at one time immune to most suits, are now liable for conduct if it is discretionary (as opposed to ministerial, in which the conduct is governed with a compulsory result). However, discretionary conduct is not always open to liability. If the discretionary conduct involves policy consideration, and if the discretionary conduct is conduct in which the legislature intends to shield from liability, no suit can be brought arising from said discretionary conduct. The conduct in the situation at hand did involve policy considerations, as evidenced by the police chief's statement that these situations involve the balancing of the exercise of 1st Amendment rights.
against the protection of public safety. The officers and department will argue that this is the type of conduct the legislature intended to shield, because it goes against public policy to hold officers liable in this type of situation. They will argue that by imposing liability, it will make police officers hesitate, which could be disastrous in a crowd control situation. It might also make them hesitant to use force to control crowds for fear of liability. However, because the purpose of the conduct was to control crowds in a non-lethal way, and because the conduct resulted in the death of one in the crowd and the injuries of others, it is not the type of conduct that the legislature is seeking to shield from liability. It would go against public policy to shield this from liability because we want police officers to be trained in the weapons they use and because we want police officers to use due care when using said weapons, as to avoid as much harm as possible, and only inflict injury when it is absolutely necessary. The issue of governmental immunity should not preempt the suit.

The suit against the officers and the department will rely on negligence. The first avenue of bringing a suit would be res ipsa loquitur. For res ipsa loquitur to apply, three conditions must be met: (1) the injury in question could not have occurred without negligence being present, (2) the instrument of injury must have been in control of the defendant(s), and (3) the conduct on the part of the injured must have been involuntary. The department and officers were trying to obtain crowd control and chose the specific weapon used in this case for the primary reason that it is designed to be non-lethal. Obviously, if a particular weapon is designed to be non-lethal, death as a result of the weapon’s use can only be obtained if negligence was present. This satisfies the first criteria. The weapon was issued by the department, and the officers were equipped with the weapon. There is no evidence that anyone outside the realm of the police department and police officers (i.e. civilians) had access to or used these weapons. Therefore, the defendant was in control of said instrument. Finally, Pamela was not voluntarily struck in the
eye and killed by the projectile fired from the weapon. Her involvement participating in the
crowd in the streets may have been voluntary, but this is not the conduct looked at to determine
voluntariness with regards to the injured’s conduct. She was not voluntarily hit in the eye.
Therefore, the third element is satisfied, and res ipsa loquitur should apply. The defendants
may argue that, because it is unknown that which officer was responsible for shooting Pamela,
no suit should be allowed, even under res ipsa, because it cannot be proved who actually
caused the death. However, this does not matter because, according to a case in which the
plaintiff was injured while unconscious and being operated on, it has been held that the
defendants are in the best position to identify who was in control of the instrument causing
injury at the time of said injury. In that case, the defendants argued that, because the man was
unconscious and could not identify who actually injured him, no suit should be allowed. The court
refused this, saying it was better to require defendants to prove either that it was not them or
that it was someone else, as opposed to leaving the plaintiff without recourse. It would have
been impossible for that plaintiff to identify the actual wrongdoer, much as it would be
impossible for Pamela to identify specifically who was responsible for her injury, because she is
now deceased. Therefore, the requirements of res ipsa are met. Res ipsa would establish a
prima facie case for Pamela’s parents. However, res ipsa cannot be used if negligence can be
proven. The problem is, in this case, without knowing exactly who shot Pamela, negligence
might be difficult to prove. The court would likely allow a res ipsa claim.

Without res ipsa, the plaintiffs (Pamela’s parents in most claims, and Pamela if a survival claim
is allowed) must establish the four elements of negligence: duty, breach of duty, causation, and
injury. The officers owed a duty to the citizens that they would use ordinary care in the use of
their weapons in crowd control. The court may even impose a higher duty than ordinary,
considering the officers, some of which were untrained, were using weapons that could be
dangerous if used improperly. Assuming Pamela was on a street in Boston (not on private property), her status would not make a difference in the care owed to her by the officers. They owed a duty not to act negligently to the people in the street that night. Next, breach of duty would need to be established. By certain officers firing the weapons without training, the officers acted negligently. Although it cannot be said with certainty which officer actually shot Pamela, the fact that she was hit in the eye, and the fact that officers are repeatedly told by the manufacturer never to target a person’s neck or head and instructions packaged with each gun state that the gun is not supposed to be aimed above chest level, someone was obviously negligent. By untrained officers firing guns, and because the injury of Pamela was the result of misuse of the product, negligence is certainly present. Assuming an untrained officer shot Pamela, negligence is easily established, both on the department and the officer responsible.

The department was negligent in not training every officer that could be called on to help out in a crowd control situation. The officer was negligent because he/she did not know how to properly use the weapon and yet still fired it. The risk that an injury could result from misuse of a gun, even one designed to be non-lethal, was great. Deputy was negligent by (1) firing the gun even though he was untrained, and (2) handing out the weapon to other officers who were untrained. Deputy could be named specifically in the suit if (1) he was the officer that fired the shot into Pamela’s eye or (2) if he handed out the gun to an untrained officer who used the gun to fire a shot into Pamela’s eye. Assuming a trained officer shot Pamela, he is still negligent because, by being trained, he either (1) knew that he was supposed to avoid targeting above the chest and ignored that instruction or (2) should have known that he was not to target above the chest area. Either way, the officer was at a minimum negligent.

The real problem with a negligence claim (as opposed to a res ipsa claim) will come in causation. This is because the identity of the actual officer responsible for shooting Pamela is
unknown (this is assumed, because the fact pattern does not list who actually shot Pamela). There must be cause in fact (but for causation) and legal cause (proximate cause). This is difficult because the product was defective. But for the officer firing above the chest, Pamela would not have died. This is true. Cause in fact is satisfied. However, proximate cause is much more difficult. For proximate cause, the type of harm and the victim must be foreseeable. The manner in which the harm occurs does not. This poses a problem. The officers will argue that, because the gun was deemed a non-lethal gun, death is not a foreseeable type of harm. However, the extent of the harm does not necessarily have to be foreseeable. Injury from a weapon (gun) that fires a projectile is foreseeable if misused. It is foreseeable that firing above the chest could result in injury to the face or head. Death as a result of this harm does not have to be foreseeable. Also, because of the directions given at training, as well as instructions packaged with the gun mandate that the weapon is never to be targeted above the chest, it should be foreseeable that serious injury could occur. Even if this is deemed a dangerous condition case, in which a particular foreseeability test is used, the victim was likely particularly foreseeable because by firing into a crowd, especially if directed solely at Pamela, victims in the area are of a particularly foreseeable group. Assuming the projectile was fired at Pamela, the victim was foreseeable. Even if the projectile was not targeted specifically at Pamela, the fact that there was a large crowd present makes any victim in the general area that the projectile was fired into a foreseeable victim. Therefore, proximate cause is satisfied.

The final element in a negligence case is injury. The type of injury required for specific claims varies. A survival claim could be brought by Pamela's estate. Pamela's estate can recover for pain and suffering before death. The facts do not stipulate whether Pamela's death was immediate. If the death was immediate, there is no pain and suffering. However, if Pamela did not die instantly, and was instead aware after the projectile hit her in the eye, then pain and
suffering damages are recoverable. Assuming she did not die instantly and suffered even a little pain before death, pain and suffering damages are recoverable. However, if death was instant, then pain and suffering damages are not recoverable and a survival claim will likely not be allowed (recovery for death alone is not actionable under survival claims). A wrongful death cause of action should be brought by Pamela's parents. The injury required is that there is a death, which is satisfied. In this case it must be proved that, through defendant(s)'s negligence, the death occurred. This will be satisfied.

The defendants may have a defense. First they will claim a comparative negligence, or plaintiff's fault, defense. By claiming this, they will argue that by joining a raucous crowd, and by not dispersing (assuming she was not trying to disperse and knew that the police wanted them to), she was comparatively negligent in putting herself in that situation. A better defense would be implied assumption of the risk. They will argue that by placing herself among a racous crowd that police were trying to control, Pamela assumed the risk of being hit with pepper spray. In some jurisdictions, this defense may fall under comparative negligence. However, this was secondary assumption of the risk (as opposed to primary) because defendant's negligence of shooting above the chest, and possibly being untrained, contributed to the injury. Therefore, the case would not be dismissed, and instead comparative fault would be assessed. Under implied assumption of the risk in jurisdictions without primary and secondary, it is unlikely that the court would find that by celebrating in the street, the risk of death from a pepper spray pellet was assumed. In jurisdictions with comparative negligence, or assumption of the risk based on comparative negligence, a jury would likely assign percentages of fault to Pamela and the defendants.

A better and more profitable suit would be against the manufacturer, CrowdGun (CG), in a strict
products liability case. Injuries to a third party who did not purchase the product are not barred from suit if the defect contributed to the injury. First, warranty suit would be brought, claiming an implied warranty of fitness for a purpose was breached. Fitness for a purpose means that it is implied that the product will work for a particular purpose (i.e. in this situation, non-lethal crowd control). This would be a good suit to bring because the product was marketed as non-lethal, and in fact it caused a death. However, the problem with this becomes the intervening act of a human being. Because the product was misused by an intervening act, the company has a defense, and would state that if the product had been used as designed and according to the instructions, it would have been non-lethal. A better cause of action might be a design defect claim (assuming from the facts that the plastic ball, designed to break apart on impact, did not break apart). A consumer expectations test would be best for Pamela's parents, claiming that a consumer of the product would not expect it to kill someone, as it is designed to be non-lethal. CG will likely want a risk utility test, stating that it is designed to release pepper spray, and is effective in that regard if used properly. A reasonable alternative design test might be useful in showing that a squirt gun like pepper spray gun is being used in some places. The problem is that the gun has not been tested in a real situation, and a weaker pepper spray pellet gun used in other places has not worked for crowd control. Again, a defense of misuse by an intervening act of a human is a defense, and likely a good defense. The best suit against CG is one for defective warnings/instructions. Like the case of the fireman and nurse, the company trained what it thought to be the end users in the use of the blocks. Because the fireman failed to tell the nurse to cover the blocks with something, which the court found to be a gross intervening act of another human, the actions of the fireman were found to supercede any defective warning the company might be responsible for. The company failed to print the directions on the blocks themselves, and instead only included the warning in the packaging. The court ruled that if it was foreseeable that someone might use the blocks out of the package (not being
trained and not finding the warning), then the company would be strictly liable. This applies in
the situation at hand. The instructions were given during training, and the instructions were
packaged with the guns. However, because these guns are designed for use against rioting
and crowd control, it is (or should be) foreseeable that the guns would not be pulled out of their
packages in the middle of the riot. Therefore, it is foreseeable that the warnings in the
packages may not reach the end user. It should also be foreseeable that untrained officers
would be called on to use the weapons in the case of crowd control. It should be argued that, by
printing the warning on the gun itself, which would likely not be expensive, the warning would
have been more effective. The warnings/instructions as they were were ineffective. CG may
argue that a warning would not have been heeded even if on the gun in the middle of a crowd
control situation. However, there is a heeding presumption, which presumes that the user would
have heeded a warning, had it been present. It would then be up to CG to prove that the
officers would not have heeded it. The warning need not be encyclopedic, just needed to warn
against targeting above the chest. This is likely the best suit, besides negligence against the
officers. The family might also try a battery suit against the officer, stating that the officer need
intend only the contact, and not the injury. Because the product was designed for targeting only
below the chest, and because Pamela was hit in the face, this would be inappropriate touching,
and the parents might have a case, albeit a weak one.

The family would definitely want to pursue punitive damages. I believe the conduct was very
likely, if not definitely, more than negligence. Also, I believe a jury could find it shocking and
outrageous that officers would fire a weapon without proper training. I believe the parents would
very likely receive punitive damages.
1)  

**Question I**

Pamela's parents can bring suit against the Boston Police for negligence and negligence through respondeat superior, individual suits against the officers, Deputy for negligence, negligent entrustment, assault, and battery, and Recruit for negligence, assault and battery.

They can also bring suit against Crowd Gun for negligent entrustment and strict products liability for manufacturing defect, design defect, and defective instructions/warnings.

They can also bring a survival action, a wrongful death, and loss of consortium suit against Boston Police and Crowd Gun.

Parents strongest suits appear to be for strict products liability against Crowd Gun.

First, they can bring a suit for a manufacturing defect because the *actual pellet* that was supposed to break up on contact did not and was clearly defective. Macpherson established that manufacturers owe a duty to eventual users and this was further extended to third parties in the case where the bystander was hit by the defective car. This case stated they may even be more entitled to relief because they have not chance for inspection. The element are easy
to prove in this case, Crowd Gun made the pellets, they were defective, it caused death to Pamela by not breaking up on impact like it was supposed to. This suit is likely to succeed because it is a prima facie case of manufacturing defect. CG may argue that human intervention broke the chain of causation because pellets were fired above the waist but as the dissent argued in McLaughlin v Mine Safety, this wrongdoing is pretty foreseeable.

Second, Parents can bring a suit for a design defect against CG for defective design of the gun. The parent would probably like to use the CE test as laid out in the Barker case because the product clearly failed to measure up to safety expectations of an ordinary consumer in that it used too much force to propel the pellets. However this test is not ideal because a consumer has few expectations about how pellet pepper spray gun should work. They could also argue defective design under Risk Utility as set out in Barker. This balancing test weighs the benefits of a product versus its risks as in the case of Soule v GM. Their best case for Design defect probably lies with the RAD test set out in the Third Restatement. The facts indicate at least three alternative designs that would have been safer. The Taser guns used by the Seattle police, the less high powered version used by Miami and the liquified pepper spray used by Miami. First, the taser guns would comparison would probably not be adequate because CG could argue that they are not actually similar products and you must compare like products under the RAD test eg you can't compare Volkswagen Vanagon to another van that is more crashworthy because they serve different purpose. Second the less high powered versions. CG also has a strong argument against this alternative because the facts indicate that they are not very effective and that is one consideration when using the RAD test, whether the proposed alternative would render the product less effective or defeat its purpose. As for the liquified pepper spray, this appears to be a strong alternative technology that eliminates the danger of flying projectile and would probably present the strongest test for the Parents. This
suit for design defect is likely to succeed. Still, CG could argue as in Camacho v Honda that the Police should have bought another product with more safety features if safety was their main concern that their product met its specific purpose.

There is also a case for instructions/warning defect against CG. The instructions only said the gun is not supposed to be aimed above the chest level. Parents could point out that it did not specify any danger and was therefore inadequate. CG could argue relying on Hood v Ryobi that encyclopedic warning is not necessary and too much warning can dilute effectiveness. However this case is easily distinguished from Ryobi where there were at least six explicit warnings of danger whereas here there is simply an instruction not to aim above the chest. Also, CG can not claim failure to warn because of state of art (as in Vasallo) because there were clearly other technologies available (liquefied version). CG could also claim that failure to warn was not causation because Boston did not properly train police however as discussed earlier per McHugh, this type of wrongdoing was foreseeable and the learned intermediary doctrine does not apply. Therefore, parents will likely win their case for negligent warning.

CG might be able to argue that there is not defect and claim a defense of product misuse on the part of the policemen.

Additionally, Parents should bring suit against the Boston Police under respondeat superior for the negligent actions of two officers, Deputy and Recruit. An employer can be sued if the three factors of Christenson v Swenson are met 1. about the employers business 2. within temporal and spatial confines of the job and 3. furthering the employer's interest. Police
controlling a crowd are certainly about the employees business and furthering their interest by attempting to bring order in the streets which is a main objective of any police department. The officers were on duty (temporal) and work the whole city of Boston which suffices for spatial confines.

Deputy owed a duty of due care to citizens to guard against unreasonable harm (Cardozo in Blackwell). He breached this duty disregarding a risk he should have been aware of and firing a gun (which could cause foreseeable harm) he was not trained to use at a group of students. The facts do not provide enough information to determine whose shots caused P's injuries but her injury is obvious. If causation can be shown there is a prima facie case for negligence against Deputy. He may have a defense of defense of property (they were trying to climb into Fenway) but as the spring gun case illustrated deadly force is never justified in defense of property unless a criminal is committing a violent felony or endangering life.

There is also a suit against deputy for negligent entrustment for handing the gun to Recruit who he knew was not trained to use it. As in the Grandma buying her grandson a car when she knew he was a drug user and not licensed case, Deputy knew that the entrustee was likely to cause harm because he was not trained. This suit will likely fail for causation problems

Recruit can also be sued for breaching his duty of due care by firing the gun into the crowd. However this is again complicated because it is not clear whose pellet actually hit Pamela. This suit will likely fail.

The problem of causation for the Parents may be helped by using the doctrine of Res Ipsa Loquitur set out in Byrne v Boadle, the matter speaks for itself, someone would not have died if there was not some negligence. This case meets the two requirements of McDougald, the instrumentality was in exclusive control of defendants and there was not negligence on part of P that caused her to get shot. However, the parents will have to rely on the liberalization of
RIL as set out in Ybarra. In that case it was not clear which doctor or nurse caused injury or how the court applied RIL anyway because that knowledge was exclusively available to them and not the victim, as in this case. The case also set out the principles of constructive control and viewed the workers as instrumentalities themselves. In that case the individuals were all sued and in a later case a judge held that you must find at least one D guilty. That approach could be used here but the stronger case is one of respondeat superior through with this same rationale of RIL. Since the goal of tort law is to compensate victim and not have innocents bear the cost of negligence this approach will likely succeed through respondeat superior against the Boston Police.

The parents could also use the approach of Summers v Tice, alternative liability where the D's were held jointly and severally liable even though it could not be determined who actually fired the injurious shot. Again there, as in Pamela's case, this information is in the exclusive control of the potential tortfeasors and not the victim so this approach may work. The two officers, or the officers who fired in Pamela's direction could be held jointly and severally liable. However, the lack of information in the fact pattern makes this difficult to determine and more information would be needed to identify more specific actions.

Also, The Boston Police Dept owes a general duty of care to the public to properly train their officers and to have enough officers available to do the job properly. They breached this duty by not training officers to use the pepper guns and by having inadequate police forces to control the crowd. Pamela's injury is obvious, death. They had notice of the problems of crowd control from their experiences of Seattle and Miami who used different means to control the crowds. However, causation might be difficult to prove with this action. The rules of proximate cause require that the type of harm be foreseeable (Wagon Mound) and that the victim be foreseeable (Palsgraff). The type of harm may not have been foreseeable and the specific victim
among a crowd of 3 million is also difficult to prove. Thus this lawsuit is relatively weak and would require a stretch of the rules of tort law.

Some potential defenses available to the Boston police and individual officers are self defense, comparative/contributory negligence and assumption of the risk.

Any officers charged with negligence for firing their guns could argue they were in danger as in the case of the Denver storeowner who shot a policeman during a riot. However this threat is not evident from the facts.

Comparative or contributory negligence are also possible since Pamela was participating in the activity and was not dispersing per the commands of the police. More facts are needed to establish this defense.

They could also argue Assumption of the Risk. If they argue primary implied assumption of the risk they could say that P willingly participated in an activity with inherent risks (rioting in the streets) and therefore she was owed no duty (like recreational sports cases). They could also argue secondary implied assumption of the risk in that the police created a dangerous situation (firing pellets into a crowd) and she knowingly confronted it. As in the South Carolina stairway case, this AOR could be fit into the doctrine of comparative negligence and could be compared with the negligence of the Boston police.

Pamela's parents might also be able to bring suits for intentional torts of Assault and Battery. For battery they must prove intentional harmful bodily contact. This could easily be proved with the act of shooting the balls which were intended to contact rioters (there is no
need to prove intent to injury per Garrat v Dailey) and her injury of death which was clearly caused by this unwanted contact. However, it is unclear whether such a suit can be brought by someone who is dead. (we never studied such a case). If so it is likely to succeed.

In the case of assault, more facts are needed, particularly whether P saw the pellet coming at her and caused an apprehension of bodily injury. She might not have saw it coming.

through

neg against CG?
Holly has several possible tort suits available to her. She can sue Wally for battery, fraud, negligent misrepresentation, and intentional infliction of emotional distress. However, while this is a very upsetting situation, it is most likely that the courts will not allow her to proceed to the jury on any of these questions.

Battery

First, Holly may be able to sue Wally for battery based on the idea of unconsented touching. This requires that Wally knowingly acted with substantial certainty cause offensive contact. Sexual intimacy would be prima facie evidence of the volitional act. However, Holly would be forced to argue that she did not consent to touched with "unproductive" bodily fluid. She may say that she wanted to get pregnant and thought that was the touching that was occurring. However, Wally's basic defense that Molly consented to their sexual activities will ensure that he is not held liable for that claim.

Fraud

Holly will attempt to show that Wally intentionally misrepresented the facts to her. He will claim that he knowingly gave false statements and that she justifiably relied on those statement to her detriment. According to the facts, she did justifiably rely on his statements as her boyfriend (doesn't say if they are married or not) and there is substantial evidence for her detriment ($200,000 in counseling for a major depressive disorder and $500,000 in lost revenues). However, this suit will hinge on whether or not there was actually evidence of fraudulent
statements. Holly will claim that Wally's statements such as she will have "everything she wanted", their discussions about loving children and how a psychic told Wally he would have 6 kids, and Wally's statement to her when she had put on a little weight. She will claim that these statements reasonably implied to her that Wally was able and wanted to have more kids with her. Furthermore, she will also claim that he knowingly omitted for fraudulent purposes that he had a vasectomy.

Wally, on the other hand, will argue that his statements were, in fact, not fraudulent b/c they were not false. He will claim that there is no evidence that he was ever told her that he wanted her to get pregnant or her to have children. His statements about the psychic and about loving children he would say were simply for the stated purpose only, not to demonstrate to her that he wanted kids. He will also state that the fact that he never told her that he had a vasectomy was not for the purpose to causing a detriment and not to mislead her. He will simply claim (based on the facts that exist) that it was never asked, so he never told. Most likely, this claim will also fail based on the lack of evidence that Wally made false statements, since evidence demonstrates that his statements may be misleading, but they are not false.

Negligent Misrepresentation

Holly may claim that Wally negligently misrepresented the facts. She will claim that he had a duty to inform her that he would be unable to get her pregnant and he breached that duty, causing her detriment. Under this claim, Holly will say that her known desire to have children and his responses to their discussions was a verbal committment to her of his honesty, and that he knowingly omitted the fact of his vasectomy. She will also claim a duty based on their special relationship and her reliance on him. She will claim that his omission of his abilities and
his misleading statements breached his duty of due care to provide truthful and total information to her. This omission caused her injuries. Wally, on the other hand, will argue that he did not have a duty of full disclosure. First, he will argue that there is no duty based on special relationships because the court should not get involved in matters of the heart for public policy reasons. Second, he will argue that he made no verbal commitment to telling her everything by giving partial information about his abilities and never truly misrepresented the facts. Again, most likely, the court will not accept this suit. Mainly, for public policy reasons that the court in the past has not believed that it should get involved in matters of the heart. Second, because while Wally's comments again may have been misleading and may have omitted information, there is no proof based on the facts at hand that he ever completely misrepresented the facts.

Intentional infliction of emotional distress

Holly can also sue based on intentional infliction of emotional distress. This requires (from Womack) that the conduct that causes the severe emotional distress be intentional or reckless and outrageous. Holly will argue that Wally intentionally omitted from informing her that he had a vasectomy. That omission, based on his knowledge of her desire to have kids and get pregnant, was outrageous and caused her emotional distress. The severity of the emotional distress is mentioned above with her condition and cost of care. This issue will hinge on the issue of whether or not the behavior was outrageous enough to mandate the court's involvement. Wally will argue based on past precedent that it is clearly not. He will point to cases with similar facts that have been rejected by the courts. Those cases includes ones in which the wife lied to the husband about whether or not the child was his. In these cases, the courts have held that outrageous std to be extremely high and do not easily allow cases to proceed based on it. Again, teh court will most likely dismiss this case on the basis that the
conduct, while deplorable, was not outrageous.

In short, Wally's conduct in no way should be applauded or condoned. However, the courts have tried to make it a policy to remain out of matters of the heart, especially in cases where the couple is unmarried. The conduct must be incredibly outrageous and extremely detrimental for one to be held liable in a situation such as this. This is also provided by the legislature in many states on the basis of Heart Balm statutes, that claim that strictly emotional damages should not be actionable in court within families. There are issues of judicial economy and the need to reduce the burden on the courts and the fact that the court does not want to begin to regulate home life. As a result, while the damages are severe, this case will not proceed.
MEMORANDUM TO REPRESENTATIVE REFORMER

Re: Tort reform options

This new Congress may provide unprecedented and numerous viable options in the
field of tort reform. Given the loss of several tort reform opponents in the Senate to possibly
even the balance and the addition of more tort reform proponents in the already tort-reform
friendly House, there are definite possible avenues of tort reform that could be pursued in this
session. This memo will address the wide variety of options that have been discussed in the
field and provide analysis on which will be the most viable for passage.

First, the major area on which tort reform has already been discussed by the media is in
the realm of expanding non-adversarial avenues to collect damages outside of the tort system.
These options would provide administrative alternatives to the traditional tort suit system. While
it has been discussed in its application to asbestos cases, it could feasibly be applied to other
areas as well in which duties have clearly been accepted in the court system. This
administrative system would most likely closely resemble the current workers compensation
system. In this case, if a worker is found to have a debilitating injury that he suffers during the
scope of his employment (generally requiring that he be on the job and either performing a task
he is hired to perform or working to serve his employer), he will receive compensation through
worker's comp w/o filing suit. He generally relinquishes his ability to file suit for negligence in
cases once he files for workers comp. In these cases, an administrative board will determine
based on a set formula how much money he will receive and for how long. It generally is strictly
bases on economic losses. It is a no-fault, administrative system that does not require any
adversarial actions with the employer.

This is an extremely effective system. On the one hand, it allows workers to be compensated w/o the need for adversarial actions against their employer, which can be detrimental to relationships in certain cases. Furthermore, it restricts the sometimes abnormal amounts of recovery that juries will provide, since the only guidelines for juries in most cases is to not created damages that shock the conscience. This broad std has allowed tremendous discrepancy over what damages are allowed to exist and the amts that are received as damages. In addition, it removes the option of punitive damages that can be given in situations of malice or bad faith. Furthermore, it provides an avenue for recovery in cases of comparative negligence by the injured and the assumption of the risk defense (that the worker/other injured party assumed the risk).

However, any additional implementation of an administrative system reduces the impact and influence of our current fault-based system. Given that the injury can be caused with or without negligence in many cases, this could reduce the deterrent effect that a fault-based system will have on industry to perform with reasonable care. Generally, we prefer to assign damages based on which person or party was at fault/caused the damages. By only giving damages based on the injury, this system does not examine causation, which could possibly be from a negligent tortfeasor, and would provide limited deterrence to perform with reasonable care. As a result, it would not be advisable to spread an administrative recovery system beyond a limited and foreseeable group of people. Any suggest to do so must be examined extensively for the costs and detrimental effect on the fault-based system. Ending the fault-based system, would, in effect, create a form of social insurance, in which all damages could be paid for by a 3rd party insurer. While this may sound good at first glance, if expanded too much, would destroy
the current fault based system, reducing all deterrence from negligent acts and not letting damages be covered by those who are at fault. This would be in opposition to our current capitalist economic ideas of less gov't intervention, since insurance companies could become spread too thin and require additional gov't aid.

Another similar administrative system has been created called the 9/11 Victim's Compensation Fund. However, this fund is slightly different b/c it also covers non-economic damages (such as loss of consortium b/t a husband and a wife) and can be addressed by a survivor of someone killed in the attacks, not just hte person injured. It also does not strictly follow the Collateral Source Rule, which states that damages do not take into account collateral sources of recovery. In other words, injured parties may lose the ability to get some compensation if they have insurance. Charities and the amt that was already paid in premiums to the insurance companies generally will not reduce the amt of compensation from the fund. However, it should be noted that this system applies to a limited number of people and will expire after a certain time. Furthermore, it has been implemented partially for the protection of the owners of the WTC and the airline industry, along with having a significant symbolic reason. Given the symbolism of 9/11, this system should not be applied without a close analysis of the need. In addition, it may not, in fact, bar recovery in tort; therefore, lessening the need and impact of an administrative system.

The creation of a no-fault administrative system can be effective when applied properly to a specific group, as is seen by workers comp. While it should be supported in most situations, close attention must be paid to the broadness of its reach.

Second, another option for tort reform would be to take actions to specifically protect
industries, such as airlines or insurance. This can come in the form of legislative immunities. In other words, Congress could pass legislation either capping the limits of recovery per person against certain industries or preempting any suits through granting immunity to certain types of claims. For political reasons, this version of tort reform cannot be supported. First, by isolating an industry, representatives will hold themselves open to attacks that they played favorites with industries and acting arbitrarily. While certain industries may be in danger on the basis of torts, the political backlash would be devastating.

Third, broad statutory caps could be applied to overall torts or to specific types of claims or damages. In other words, Congress could say that the statutory maximum damage allowed for punitive damages would be $100,000 per plaintiff. It could also cap total compensatory damages or limit the possible amount that one can be given for pain and suffering as well. This could be effective in preventing some of the seemingly outrageous awards; however, these events occur extremely rarely. Furthermore, there are claims in which the compensatory damages could be significantly higher than the statutory cap, which would be unfair to the plaintiff since it would not allow full recovery. This should be supported if there is some way to ensure that true compensatory damages (medical costs and lost wages) could be covered.

Fourth, statutory caps could be placed on attorney's fees. For instance, Congress could cap the percentage of the recovery that plaintiff attorneys can charge their clients. That is the method currently in use in CA. However, while it may be effective in certain situations by ensuring that a minimal portion of the recovery actually goes to the injured party, however, it would appear that this method has been small in its overall impact on the amount of damages given. Juries are not supposed to consider or infer how much money would go to the attorney; they are only supposed to award damages on the basis of past and future pain and suffering,
lost wages, and medical expenses. The impact of this legislation may have a major impact of ensuring that plaintiff's lawyers don't get as rich as they may otherwise off a large verdict; however, it would have very little impact on the overall system. Furthermore, plaintiff attorney may begin charging hourly rates in addition to the end percentage to offset this legislation. If this practice was not prevented as well, the legislation would be useless and perhaps even more detrimental to the injured party. Given this requirement to also limit the ability of plaintiff's lawyers to additionally charge by the hour, if it were the Representative's desire to reduce the amount of money obtained by plaintiff's attorney, then it should be given extensive consideration. If it is done with the hope of reducing overall damages, it should not be supported.

Fifth, there are other possible systems that could be offered, but it is unlikely. Other options include having periodic payments that are reassessed to make sure that people are only getting the amounts that they really need. This could reduce damages and costs if someone gets better faster than expected. However, the reassessment would destroy any incentive to work hard to recover faster and would leave some plaintiff's w/o money if a company goes out of business. This is not a viable option and should not be supported.

Finally, teh practice of the collateral source rule could be ended. Courts could allow juries to examine possible insurance agreements or other gifts that the party is receiving when considering the amount of damages to make sure that the plaintiff does not recieve a windfall and collect from two sources. This could significantly reduce the cost of torts; however, this too could be detrimental to society as we know it. It could reduce teh incentives to buy insurance for other purposes and may create further harms. This rule should not be supported b/c people should be incentized to buy insurance.
In short, the options for tort reform, while they may seem endless, generally address the need for trial itself and the damages that result from that trial. Representative Reformer was be extremely careful in supporting tort reform plans. Negative votes should be given to plans that end the Collateral Source Rule and immunizing certain industries. On the other hand, if the desire for reform is to ensure that more money is going to the plaintiff, then limits of attorneys fees should be supported. If, instead, the desire is to limit overall damages, then specific statutory caps should be supported if they are deemed to be high enough. The most viable option, however, will be the expansion of an administrative, no-fault system. Assuming that its subject is specific enough, the duty is evident, and it will ensure that it will limit tort suits, then it should be supported. Under teh current Congress, this seems to be the least radical, but most effective manner to address tort reform.
Tort reform can be achieved either by modifying our current system, or perhaps by conjuring a new system. I will begin by discussing the reform method, and then I will move on to the alternatives to our system. Finally, I will make my recommendations for the proper course of action.

There are four common problems identified in our current Torts system. The first is the contingency fee system. Many do not approve of lawyers getting such large chunks of awards given by juries to plaintiffs. However, one should note that without such a system, many valid claims will never get to court, because the plaintiff cannot afford to pay an attorney up front. Secondly, many would like to cap pain and suffering damages, especially in medical malpractice cases. The main reason being that high damage awards cause insurance rates, and subsequently medical bills, to skyrocket. It also supposedly leads to a mass doctor exodus from small towns. The contrary position notes that sometimes doctors do awful things, and it is unfair to cap awards for everyone, when such awards may be occasionally justified. A third bone of contention arises when one discusses punitive damages. Many feel that they should be limited or altogether eliminated, since they act as criminal sanctions in disguise, and potentially violate the due process clause of the constitution. However, it should be noted that juries sometimes award punitive damages to "make up" for things they could not give in the compensatory damages (i.e. attorney fees). Fourth, many feel that the collateral source rule should be eliminated, or at least altered, to prevent double recovery. The contrary position notes public policy concerns in not discouraging gifts, or giving defendants a free ticket off when they get lucky enough to injure someone who has a rich uncle, or insurance. There are other, lesser discussed, problems with our Tort system as well. The appeals process is lengthy, and can often delay when Plaintiffs receive their judgment.
Some, as opposed to altering our Torts system, would prefer to abolish it altogether. Workman's Compensation is often given as an example of an alternative model. There, one does not have to prove fault. Rather, one simply has to prove that the injury happened, and that it happened while you were at work. It's a strict liability system, where all the payouts come from a third party insurer (insurance paid for by the employer). Similar to this option, some desire a 'auto no fault' system, where everyone is required to have insurance, and that insurance pays for any injuries that occur. This, however, is obviously a 'first party' system, wherein you have to have your own insurance. The good thing about either a Third party or a First party system is that one does not have to spend time proving fault. The problems lie largely in implementation and feasibility.

One alternative seems like a hybrid of both our current system, and a "no-fault" system, that being the system set up by the Special Master after 9/11. He left the Torts system in place, for those that wanted to utilize it. However, there was a '9/11 fund' which was available to the families of victims as well. One could draw out of this fund based on a formula (with relatively quick payouts), but in order to do so, you had to give up your negligence suits.

Recommendations

I cannot in good faith recommend altering our fault-based system in favor of a 'no fault' system. An 'auto no fault' system seems completely implausible, as many people simply cannot afford insurance. In order for the system to be effective, everyone must have insurance. It is not like car insurance, where one can theoretically say that if you do not have insurance, you should not have a car. In an auto no-fault system, one would have to have insurance to walk around. This just is not plausible. Additionally, there are also problems with regard to deterrence. I suspect the prospect of being taken to court (in addition to the monetary loss) acts
as a bigger deterrent than just straightforward economic loss due to higher insurance premiums.

As for going to something like a third party system, the problem there is that there is not one universal employer in which to insure us all. It would have to come from the government, which would mean it would be paid for from tax-payer dollars. While this is great in terms of cost-spreading, the general consensus (to which I agree) seems to be that wrong-doers should have to pay for harms they cause. Granted, if the wrongdoer is a business, they will likely increase costs to mitigate the losses from law suits, which is still passes the payment on the tax payers. However, what about an individual tortfeasor who, for example, negligently or recklessly causes a car accident. Do we really want to 'spread' his costs to everyone else? Some might say that this is what the insurance company does, but the biggest penalty usually goes to the tortfeasor himself, in terms of a law suit and also greatly increased premiums.

Altering our current system seems to be the best option. With regarding to the contingency fee system, I would recommend not abolishing it, but limiting it. Abolishing it will, as I said, cause valid claims to go unpaid, as people who cannot afford to pay an attorney up front will be left out in the cold. It is important to note that attorney's who take on these cases are taking on an 'all or nothing' situation. Sure, victory means 40% of the damages, but a loss means nothing. In fact, it means less than nothing, as the attorney has assuredly spent quite a bit of money (and time) during the trial and build-up to the trial. My recommendation would be to cap contingency fees at a particular percentage. 30% sounds reasonable, but there is a need to research in order to come up with the actual number. Further, attorney and court fees should not be included in this percentage. Thus, it would be 30% + attorney and court fees. This way there is no doubt as to how much the attorney is recieving as "profit." I would also recommend a sliding scale starting at a particular number. For example, $1 million. Again, this is just for the sake of example. More research is needed to determine what the number should be in actuality.
Regardless, once the $1 million mark is obtained, the attorney's percentage of the damages in excess of $1 million would begin to go down as the amount went up. This would give a since of control over the amount attorney's can get, and perhaps give the jury a better feel over how much in damages the plaintiff will actually see.

At this time, I would advise against capping pain and suffering damages. While there are cases of excessive damages, there does not seem to be any way to cap these 'bad' cases while leaving room for full damages in legitimate cases. Plaintiffs must have an opportunity to fully recover from any medical malpractice damages. While sensitive to the concerns (noted above) of those who wish to cap such damages, it is not feasible at this time.

The collateral source rule should, also, not be abolished. It is important to encourage the public policy of both gift-giving and people buying insurance. Gift-giving should be considered just that, a gift. It should not be considered as compensatory damage replacement. Gift-giving is an impulse we would like to encourage. As for insurance, we should require express subrogation in every insurance contract, double recovery is that great of a concern. Even if legislating such a mandate would be difficult, an insurer can still include a subrogation clause at it's whim. Abrogating this rule would also give defendants a free pass if someone happened to give their victim a gift. Our no-fault system values highly deterrence, and I recommend we keep it that way by maintaining the collateral source rule. Additionally, as I recommend keeping the collateral source rule as a rule of damages. Of course, I also recommend keeping it as a rule of evidence (preventing defendant's from mentioning a collateral source to the jury).

As to punitive damages, I do believe they are criminal damages in disguise. However, I would not recommend abolishing them. Rather, I would recommend that they be paid to the state. As paid to the plaintiff, they represent an undeserved windfall. Punitive damages are meant to punish and deter the defendant. This can just as easily be accomplished by payment of money to the state as it can to the victim. Further, by paying it to the state, the state can put
the money to use in the proper areas. For example, a drunk driver's punitive damages could be used to increase public awareness of DUI laws. In contrast, punitive damages going to the plaintiff will be used as her whim. As we have already established that the money is wholly undeserved, this is not a desirable result. Note that the same due process limitations (as noted by the Supreme Court of the US) would apply. Further, a jury's vengeful impulse will perhaps be tempered a bit when the money does not go to the victim, but to the state.

As to the 9/11 Special Master, I would advise against adopting any kind of general 'victims fund,' because, again, deterrence will be greatly hurt by doing so. Additionally, the cost will be, again, with the tax payers.

In conclusion, I recommend keeping our current system, with modifications to the contingency fee system, and the way punitive damages are paid out.
Guard will appeal based on the argument that the non-economic damages were too high, given their relation to the economic damages. Economic damages include medical expenses and lost earnings (and earning capacity), these compensatory damages operate on the "legal fiction" of making the defendant whole. Non-economic damages include pain and suffering both at the time of the incident and ongoing (these sometimes include loss of enjoyment of life, but Peter's injuries aren't so severe as to suggest such a recovery). It seems here that the jury awarded a little over three times pain and suffering damages as economic damages, which does seem a little high given the extent of Peter's injuries. We have seen in negligence cases that a non-economic award which was three-times that of the economic award was upheld on appeal [see the case where the woman was dragged by the bus]. Also, the punitive damages awarded Peter against Guard are relatively small, and given Guard's intentional act (battery) will also likely stand. Courts are generally reluctant to overturn jury awards, although it is within their power to do so either through remittitur or by ordering a new damages trial, and it seems likely that the Guard will not succeed on his damages appeal given the nature of Peter's injuries and the extent of his award for Guard's battery.

Nightclub will appeal the award of both the negligent supervision damages and the punitive damages. It is hard to assess if the negligent supervision damages are excessive, as we know little of Peter's injuries. Given that these damages are legitimate, Nightclub may have a legitimate appeal against the punitive award. First, punitive damages are intended to deter and punish the defendant's behavior, and as such are generally not allowed in simple negligence cases. If the court felt that the deterrence benefits or the actions of Nightclub were
sufficiently reprehensible as to merit punitive damages without reckless or intentional conduct, this hurdle may have been passed at trial. Secondly, the amount of punitive damages may be challenged as excessive. Evidence of a defendant's worth is admissible at trial for the determination of punitive damages (as punitive damages punish and deter on a relative basis), thus the admission of Nightclub's net worth and income was properly introduced. However, it seems that a million dollars is a significant portion of Nightclub's assets, and as punitive damages are generally not covered by insurance, such an award may run Nightclub out of business. This is a result the court will probably try to avoid (Nightclub might even be a socially important resource), especially given the fact the Peter appears to have recovered fully already.

Finally, the ratio of the punitive award against Nightclub may also excessive. In State Farm the Supreme Court set out three factors (reprehensibility, comparison to actual harm, and the level of other civil punishments) for determining punitive damages. While there is some question as to what reprehensibility is to be evaluated, it would appear here that, barring evidence of other similar incidents, the negligent acts of Nightclub were probably not sufficiently reprehensible so as to justify a million dollar punitive award. There also doesn't appear to be any civil penalties Nightclub might otherwise incur. The ratio of punitive to actual damages was suggested in BMW to be unsupportable when above a single digit ratio. Here it would appear that, if the punitive award is compared to the economic damages, the ratio is well above single digits. However, if it is compared to the negligent supervision award, it would probably stand. In any event, Nightclub's punitive damages will likely be at least reduced, if not eliminated.

Nightclub and Guard may also have an argument that Peter is recovering twice for the same injuries. This is also hard to determine without additional info, but seems to be a very valid argument, and Peter only was awarded $32,000 for economic damages, but was given over $300,000 for negligent supervision. Courts are careful to prevent duplicative recovery, and will probably look closely at Peter's injuries and his recovery, most likely finding that there is at least
some overlap between the separate damage awards. If Peter's expenses were paid from another source, however, a collateral source rule would bar any related lowering of damages in the interest of avoiding a windfall for the defendants.