SANTA CLARA UNIVERSITY
SCHOOL OF LAW

FINAL EXAMINATION

Torts
Professor Leslie Griffin
3 Questions

April 28, 1995
Spring, 1995
3 Hours

3 Questions

THE REVISED EXAMINATION RULES ISSUED IN JULY, 1994 APPLY TO THIS EXAMINATION.

INSTRUCTIONS

The examination is CLOSED BOOK. You may not consult any materials or another person.

The examination consists of three essay questions, all of which you should answer. The essays are of equal weight for grading. You should devote an hour to each question.

If you believe you need to know more information about a case in order to resolve an issue raised by the facts given, tell me what you need to know and how it would affect your legal analysis. But do not add facts to create new issues. Be sure to address all issues raised by the facts even if you think a single issue is dispositive of the case.

Read carefully. Think before you write. Accurate reading of the question is essential. Good organization, clear statement and avoidance of irrelevancies and filler 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.

Good luck, and enjoy a well-earned vacation. See you in the fall.
QUESTION I (60 minutes)

John Kile, a businessman from Colorado, went on vacation to Las Vegas. While there, Kile went to a pawnshop. Kile admired the array of guns displayed in the pawnshop, and spent several hours there discussing the qualities of those guns with the salesman.

Kile eventually purchased a rapid-fire pistol known as the TEC-DC9, which is manufactured by a Florida gun company, Gunstar. The TEC-DC9 is usually described as an "assault-style weapon." It can fire 32 to 50 bullets without reloading. Before purchasing the weapon, Kile looked at Gunstar's advertisements, which state that the TEC-DC9's finish has "excellent resistance to fingerprints" and is "tough as your toughest customer."

When Kile returned home, he decided that the trigger on the gun did not work very well. The trigger, was too stiff and difficult to move. He took the gun to the local gun repair store, where the mechanic fixed the faulty trigger.

Two months later, Kile went to San Francisco for a convention. While there, he walked into a law firm, where he killed seven people, wounded six others, and then killed himself with the TEC-DC9.

Four years ago, California passed a law that bans numerous assault-style weapons, including the TEC-DC9. No other state law bans the TEC-DC9.

The survivors of the shooting and the relatives of the victims want to file any tort suits available to them. What are their options? What arguments will their lawyers make? Will they succeed in these lawsuits?

Do not address any constitutional issues.
QUESTION II (60 minutes)

The following letter appeared in the Los Angeles Times:

If the "tort reforms" of House Speaker Newt Gingrich and his band of merry men become law, we can at least all hope that our mothers, brothers, sons and daughters are not hospitalized next month, next year or ever. Hope they never fall victim to the negligent acts of "professionals", never are maimed by defective products promoted for profit by corporations.

Reality: $250,000 will not go far for the lifetime care of the paralyzed or brain-injured. So if a loved one is victimized, after the $250,000 is gone, after your insurance runs out, after you sell or over-mortgage your house, hope at least for state welfare care. That will be all that's left -- maybe.

A tort is a civil wrong. So what Gingrich and his men are doing through "tort reform" is rewarding the wrongdoers and their insurance companies. Nothing more, nothing less.

Raymond Paul Johnson
Attorney, Los Angeles

Comment on this letter.
QUESTION III (60 minutes)

WPXI is a television station broadcasting from New York City, to a viewing area consisting of Eastern New York State, Connecticut and New Jersey. KOSOR is a New York corporation owned by Beverly Kosor, and employing a registered fictitious name, Maids to Order, which is in the business of providing cleaning services. Kosor has a contract with the New York law firm, Baker & Thomas, to provide weekly cleaning services. Maids to Order also clean homes.

In November, WPXI aired an announcement referring to a news feature which it was to broadcast on the following night's newscast. The phrase "Maid to Order" was used in the announcement, in conjunction with images of women dressed in sexually revealing clothing who appeared to be preparing to clean a house. The voice in the announcement stated: "Find out what you order when you order these maids."

After the announcement, Kosor contacted WPXI and requested that they either not air the news feature or not refer to her business in the feature. WPXI went ahead with its feature as planned, introducing the story with the title "Maid to Order." The news story did not identify Kosor or any of her employees by name. It did discuss another cleaning company, the Cleaning Crew. After watching the feature, the senior partner at Baker & Thomas decided to give his home and office cleaning work to the Cleaning Crew.

Kosor comes to you and asks you to identify the tort suits that may be available to her. Will she win or lose?
Survivors & Relatives (Ps) v. Gunstar (GS)

Ps have numerous causes of action against GS, the manufacturer of the TEC-9. Including strict liability (SL), products, defective design and warning, ultra hazardous SL, negligence, and implied warranty.

---

**SL: Manufacturing defect**

First issue is if Ps may sue in SL at all, as they are "bystanders" - they did not purchase the gun. Elmore told us "bystanders" have even more justification to sue in SL because they didn't have a chance to inspect the product or get the product's benefit, yet they are injured by it.

---

**Manufacturing**

Ps may claim there was a manufacturing defect in the trigger mechanism - it was "faulty."

The cause of action here will fail on causation; the trigger defect was fixed and there is no indication the trigger stiffness or looseness had a causal effect on the people killed.

---

**Design Defect - SL**

There are various ways a defect may be shown. Rest. 402A calls for defective that is also "unreas. dangerous." Jxs that wish to make SL a "big deal" reject the "unreas. dang." language
as ringing of negligence. Under 402A, GS could defeat the claim by a "balancing" argument reminiscent of negligence.

In Cal. the Barker test is used, which rejects the "unreas. dang." test. To show defect the P must show either 1) product did not function safely as the consumer would expect under foreseeable use OR 2) P proving prox. cause, the Burden shifts to D to prove the Benefit of the product outweighs its Risks.

Ds may argue successfully that these Ps had no expectations, because they were not the Consumers. Ps will argue prong #1 should protect them anyway - they as bystanders did not expect a gun to gun them down. Ds will prevail and Ps will have to rely on prong 2.

First Ps will have to show prox. cause. This may be difficult, as GS will argue the famous line, "Guns don't kill people, people kill people." Ps best argument is an Andrews construction, that GS is responsible for all foreseeable damage, and the Tech-9's "assault-style" status makes the Ps foreseeable victims. The gun was also marketed for criminals ("fingerprints," "tough customer") making it more foreseeable be used on humans.

If P prevails on the prox. cause issue, D will have burden of showing benefit of gun greater than Risk. GS may use the Ortho/Wade factors to do this - the Tech-9 has great utility for the general public for protection, and that while GS could feasibly alter the gun to make it more safe, it would be changing the product Type by doing so. GS will argue, as a type of gun, it should only be compared to other assault type guns.
P may have the better argument here. GS could easily make the gun safer by making it single-fire - not the 32-50 bullets w/out reloading. This change in the products feature would allow the gun to do the benefit GS claims - protect the public, but reduce the danger.

Like the Crashworthy doctrine of design to protect against others' negligence, Ps will say GS must also design to protect against the negligence of criminal gunmen - especially when they market the gun to those criminals.

This is, in any event, a Jury question - one of community standards. In JXs that don't shift the burden to D, or require both prongs to be proven the D - GStar, will likely prevail.

Causation

There is still a causation issue, of even if the gun had of been designed non-defectively - i.e. not an assault gun, - would the criminal have killed, injured the people anyway. Certainly he would not have had the time to injure/kill so many.

Defenses to Strict Liability Product

Ds may claim unreasonable use/misuse but ps didn't use the product. This question is really one of prox. cause, analyzed supra.

Ps vs. GStar - Negli. Design

Ps will say Gs had a duty to provide a safe product and breached that duty w/ the assault style gun. Under McPherson, the Ps will have a duty owed to them, even as non-purchasers.
The Negligence issue will involve the same Carroll Towing analysis as Barter prong 2. It is a Jury Question.

Here also Ps' claim may fail on prox. cause.

Ultra Hazardous SL v. GS

This may be Ps best cause of Action. Under a Ryland's construction Ps may bring the cause of action, even as bystanders.

The case will turn on the Rest. 2nd factors for Ultra-Hazardous. Ps will argue that such an assault gun, 32-50 bullets, and finger print resistant, is inappropriate to the area, especially in Cal. where they have been outlawed. Also such a gun is not common, especially in the area of a law firm in SF.

The case may turn on comment(f.) of the Rest. Does the gun's value to the community outweigh its potential harm? This will involve the same "balancing" arguments supra under Barker 2, and under negligence - Carroll Towing.

P may prevail here, too, as the gun was illegal in Cal. it was marketed to Criminals and a jury may find assault guns are not needed to protect the community.

Ps v. GS = failure to Warn - Strict Liability Product Defect

Ps will have to prove GS had a duty to WARN. One has a duty if the danger of the product is non-obvious. Under
Intrinsic Risk Construction, the manufacturer has a duty to warn all those come in contact with the Product.

GS may then defeat the claim here, by saying the dangers of an assault are patently obvious, and that any duty to WARN was only to the gunman. This is a question for the Judge.

If the Judge decides there was a duty to provide a warning with the gun, a jury may consider if GS may be held liable for not warning the gunman or the victims.

The two prong test of Barker may be used here also. Under the Risk-benefit prong a Jury might find that the Salesman had the opportunity to warn the gunman - the effort of doing so would have been little and the benefit great. The warning case against GS however, is non-sensical as clear no warning to the gunman would change his psychotic behavior.

**WARRANTY SL**

Ps may sue the Pawn Shop on the cause of action of implied Fitness for use. Privity however will bar their claim, as they did not buy the gun.

**Ps vs. The Pawn Shop**

Ps could bring All of the same causes of action against the Pawnshop. However, strict liability may not be valid against the pawnshop. The pawnshop is a service not the seller of goods. Courts don't want to "chill" the financial service such shops provide by holding them SL.
Ps v. Gunman

He's dead, and probably insolvent. Suits against GS are the way to go.
The tort reform Newt Gingrich proposes offers to do certain things that will supposedly "fix" the tort system and make it more fair and reasonable. One of the reforms before Congress, "The Common Sense Legal Reforms Act of 1995," proposes to award attorneys fees in diversity suits, put an "honesty" requirement on experts, and in the products liability area, make the seller liable only if negligent, make the seller liable as a manufacturer if the mfg. is not subject to service of process, cap punitive damages to $250,000 or three times the compensatory damages, and have several liability only for nonpecuniary damages. Other reforms before Congress (Hyde proposal and Bliley proposal) would place punitive damage-caps in all tort areas, impose 15 year statutes of repose in products liability areas, and impose an FDA defense. The letter to the Los Angeles Times primarily is complaining about the $250,000 cap, which is to be imposed on punitive damages, and that this award will not cover all of your injuries. What he is complaining about is that this "reform" is rewarding wrongdoers. While Mr. Johnson does have a point that certain wrongdoers may be rewarded, he is being too narrow minded by focusing on the $250,000 limit and then complaining about Gingrich's tort reform as a whole. The criticism of tort reform is better placed in the products liability area (which the letter mentions in passing in the first paragraph). Other Reform measures, however, are
necessary, and the "reform" is not as bleak as Mr. Johnson portrays it to be.

The tort system has a main goal, and that is to compensate victims who have been wronged. But in performing and making a structure to meet this goal, there are also other interests to consider. Although a victim may want to be compensated, a person who causes harm should not be liable for all injuries that result from his conduct, if these results are not foreseeable. Also wrongdoers should not compensate those harmed if their wrongdoing does not cause harm to others. Other interests to look at are efficiency and fairness.

Thus, with these concerns in mind, American courts set out in the 1800s to develop a system that resolves disputes not based on any contractual agreement. They set out to decide how to compensate unintended injuries. In Brown v. Kendall, Shaw developed the fault principle and cases following, such as Carroll Towing and Vaughan v. Menlove set out to develop standards and rules defining fault, reasonable conduct and negligence. The idea was to develop a tort system, grounded in the common law, based on ideas of foreseeability, reasonableness, and cost efficiency (B<PL=neg).

As this common law system developed, negligence principles were primarily used to determine who would be compensated and by whom. Different rules were set up such as special rules for doctors, mis vs. nonfeasance, rules for bystanders, and rescuers, in order to define for people when they would be liable and when they would have to compensate others. The tort
system can be characterized as a common law system designed to compensate those wronged....but not too much.

Courts also developed areas of tort law that included strict liability and intentional torts, in order to make it easier for some wronged people to sue in certain situations.

Despite the positive looking nature of this system, there are many problems and many issues that need to be looked at and dealt with. Mr. Johnson's letter assumes that all of these reforms are wrong, but fails to recognize the problems inherent in the tort system and some of the positive reforms of the past and present that have attempted to deal with these problems.

One of the big problems has come in the area of damages. Although, as stated previously, the tort system intends to compensate victims, it has also developed rules so that victims would not be compensated too much. Over the years we have all witnessed huge jury awards that sometimes shock the senses. True, it is fair to compensate "our mothers, brothers, sons and daughters," but certain amounts may be too much. There may have been huge awards in the compensatory and punitive damages areas although courts have tried to limit these damages (i.e. - McDougald - nonpecuniary damages awarded only if conscious), other reforms are necessary. It is paramount, then, to look at certain areas of reform - past and present - in order to reveal the positive impact they have had or will have. This analysis will show, thus refuting Mr. Johnson, that not all areas of tort reform/abolition are bad.
In the 1970s-1980s there were various types of reforms. The 1970s focused on medical malpractice (i.e. - California's MICRA), the early 1980s focused on product liability, and the late 1980s focused on damages and insurance.

The big areas of reform were pain and suffering, collateral source rule, and contingent fees. As to pain and suffering, Jaffe argues that there is no economic utility to them - cases like Kwasny, however have felt differently. In order to reform this area, most proposals want to cap these types of damages. Although Mr. Johnson may not agree, a fair cap may help in tort goal of not compensating victims too much.

The collateral source rule (CSR), which keeps evidence of payments from a collateral source out of trial has also been a target of reform - proposals are to have CSR and no subrogation (Frost), have no CSR and no subrogation (Fleming article) or to have CSR and subrogation, where the D is the primary payer. Proposals have also focused on putting rigid percentage limits on contingent fees.

Less central areas of reform have included joint and several liability, punitive damages, time limits, and types of payments. In general, these reforms have focused on still maintaining the goal of compensating the victim, but also imposing rules so that the victim, and his/her lawyer are not unjustly enriched at the expense of defendants. Mr. Johnson has not realized that some of these positive reforms are included in Gingrich's plan, and that victims will be compensated...but not too much.
Other people have focused on tort alternative. Three options are: procedural changes (court ordered arbitration), and substantive, both first party and third party insurance type systems.

Workers Compensation is a type of tort alternative that makes an employer strictly liable for injuries that arise "out of" and "in the course of" employment. Thus, this is a form of third party insurance, which will always pay. The result is broader liability, less damage awards, and less administrative costs.

Another alternative is a first party type of compensation - auto no fault in this system. You are paid by your first party insurance when there is an accident. Some states have adopted these plans, which vary from add on statutes to mixed statutes. In this system, some types of torts suits are barred, unless a plaintiff reaches damages above a statutory threshold limit, beyond which, they can sue in court.

These reforms have been extremely beneficial. Although awards may be lower, administrative costs are lowered, people are virtually assured of compensation, and already overly burdened courts are relieved of certain controversies.

Other countries, such as New Zealand, have gone beyond these types of reforms to impose a system that abolishes tort law altogether. The U.S.A. is nowhere close to imposing such a system, but it is interesting to note that other countries have been finding problems in their tort systems as well.
In 1995, people, other than Congress have been clamoring for change. Arguing that corporate defendants are funding a lottery for plaintiffs and their lawyers, Mobil has argued to limit punitive damages and have several liability. In an article in the New York Times, a columnist has argued that federal statutes on warnings for cigarettes should be repealed so that cigarette companies will not enjoy its "Teflon like protection" from lawsuits.

In addition to the people, Congress has acted; under its "Contract With America" to reform the tort system. As stated earlier, some of these reforms embody proposals of the past, that seek to bring fairness to this compensatory scheme (i.e. contingent fee reforms, punitive damages caps, and joint and several liability reforms). These reforms are very fair, and as Mobil stated, is making sure that all defendants are not funding a lottery for plaintiffs and their attorneys. Mr. Johnson has failed to recognize that these reforms are not altering the substantive law of the tort system, but are making sure that plaintiffs get the fair amount that they are entitled to receive. Defendants will still be liable when they commit a civil wrong, but they will not and should not be obligated to pay for damages over and above what the plaintiff deserves and what the defendant himself or herself caused.

Where I do agree with Mr. Johnson, is his complaint about reform in the products liability area. The Democrats, particularly Ralph Nader, have a valid argument that the Republicans have been selling out to their corporate allies.
The Republicans argue that product costs will go down; however, with this reform, as elaborated on in the beginning of this essay, years of common law development will be destroyed. Cases like Escola, Barker, and Camacho set out to make it easier for plaintiffs to sue in these areas because of the problems of proof that are experienced in a negligence suit. Although from the reforms now in front of Congress, the seller, not the manufacturer, must be negligent to be liable, this type of reform is still cutting back on years of cases that sought to protect consumers in areas where they enjoy little protection in the first place.

While Mr. Johnson's critique of certain areas of tort reform may have some validity, his argument is flawed in that he groups all reforms together and labels them as "rewarding the wrongdoers," when some reform is not rewarding the wrongdoers, but making sure that they do not pay more than their fair share. Not all reforms are wrong. It is important to look at the purposes of the tort system and figure out what reforms are consistent with these purposes and goals.
Spring 1995 Exam QUESTION 3

It would appear Kosor (K) may have causes of action (c/a) for defamation, invasion of privacy and economic harm.

Defamation

Common Law

Under common law, to succeed in a defamation c/a plaintiff must show a defamatory statement, of and concerning plaintiff (P), publication and damages. Plaintiff must also allege falsity.

A threshold question for the judge is whether the words reasonably bear the meaning claimed by P and if so, the case goes to the jury to determine if the statement is defamatory.

Here there are some problems w/ the prima facie case.

Defamatory statement: The RZT 559 define a defamatory statement as one that would lower K's reputation in the eyes of the public or cause others to avoid having contact. Additionally some states may require hatred, ridicule or scorn (Romaine).

Here the statements could arguably be viewed as slander per se - imputing unchastity in a woman. An issue to be resolved is whether this jurisdiction views TV broadcasts as libel (Matherson and RZT 561) or as slander (CA. Civil Code 46). Assuming it's slander, then arguing slander per say (or libel) may relieve K from proving damages.
Of and Concerning: Here K will have problems. She will have to argue colloquium and/or innuendo to show that her business was the defamatory victim. The term Maid to Order was used in the show, but it is also a slang term and also another firm was mentioned.

Publication: This requires negligent or intentional publication to a 3d party who understood the defamatory meaning. Here, this element appears to be met.

Damages: As discussed above, what damages K must show depends on the jurisdiction. Generally no special (pecuniary) damages are required for libel or slander per se. Jurisdictions, like CA, that distinguish libel per quod (not apparent on its face) would require special damages proven with particularity to obtain general damages (reputational harm). Here K will argue that she lost Baker and Thomas' business and can show pecuniary losses so she (her company) would be eligible for general damages as well.

It is tough to say whether K can maintain either a personal or corporate defamation action (corporations can be defamation plaintiffs under RZT 561).

Additionally there is a First Amendment (1A) question here because the statement was made by the media as part of a news story. The first amendment is applied to the states through the 14th Amendment.
If constitutional questions exist, K must prove falsity and also fault. Here the statements are arguably either facts or opinions based on underlying undisclosed facts. Therefore these could be tested under the true-false test of Milkovich. There is no loose, figurative or hyperbolic language apparent, so the statement is unlikely to be mere opinion (Milkovich). False statements of facts or false opinions are not given first Amendment protection (Milkovich).

Assuming these statements are false, the next question is whether K is a public figure or private (clearly not a public official under Rosenblatt). Under the Gertz test, K is probably not of such fame or notoriety to be an unlimited public figure. Further she didn't inject herself into the controversy to influence the outcome. Finally, the three-prong Waldbaum limited purpose public figure test fails so K is a private figure.

As a private figure, the appropriate fault standard K must prove is either the Gertz or Dun & Bradstreet (D&B) standard depending on whether the matter is of public concern. The Milkovich "context, form and content" test is not useful. Presumably the TV station, WPXI, will be able to show this to be a matter of public interest for defamation purposes. Based on this assumption, K will have to use Gertz, which allows the state to determine the level of fault necessary for actual damages (pecuniary and some reputational harm) — usually states use negligence here. For K to get punitive damages under Gertz
she would have to show **actual malice** (known falsity or reckless disregard for truth).

It would appear that K could prevail under negligence if she can prove her of and concerning element. Because she contacted the station and asked that "they either not air the news features or not refer to her business in the feature" she may be able to show actual malice based on the reckless disregard standard of *St. Amant* and possibly purposeful avoidance of truth (**Harte-Hanks**).

K's major defamation problem appears to be of and concerning, but because she brought the issue to WPXI's attention she may succeed.

**Invasion of Privacy K v. WPXI**

**False Light Privacy (RZT 652E)**

The elements for this tort are D's publication of facts about P, putting P in a false light in the eyes of the public, damages, actual malice if newsworthy. (**Hill**)

Here K will argue **reputational harm** and also **privacy issues** based on WPIXs conduct. The "facts" revealed were false and cause the public to view K as holding beliefs she doesn't hold (possibly or implying actions she didn't take - wrongful behavior.

Because the station will argue newsworthy K will have to show actual malice (**Hill**) but as discussed under defamation, this is possible. Further K can show loss of business.
Appropriation - Right to Publicity

K may try to argue for right to publicity. Her company's name was used in an unauthorized manner for the business and commercial advantage of WPIX and K suffered damages. If K (and Maids to Order) are viewed as a private person for privacy purposes, she will be entitled to the reasonable value of the use of the name. She would probably not want to argue she was a celebrity.

K may argue a c/a for unfair competition as part of appropriation.

Economic Harm

Intentional interference w/ K or prospective economic advantage (PEA).

1) interference w/ an existing K or PEA
2) intent - WPIX must know of the existing K w/ Baker and Thomas (B&T) and actively induce to breach. This element is not likely to be met.
3) causation - but for the broadcast B&T would have stayed
4) damages - loss of K

Similar results under PEA but more likely to succeed. WPIX can't argue fair competition because they have nothing to gain (Tuttle). The interference w/ K c/a will likely fail, PEA claim is more likely to succeed.

Disparagement (RZT 623A)
This c/a is allowed if the following elements are met:
1) publication - met
2) w/ malice (knowing falsity, careless disregard for truth and intent or substantial certainty harm will occur) probably met here.
3) false allegations concerning P's products or property - here the services would be viewed as products.
4) special damages - likely to be met - supra
This c/a is likely to succeed.

IIED
Under Womack (now VA statute) elements:
1) wrongdoers conduct intentional or reckless
2) conduct outrageous or intolerable - offend decency and morality
3) causal connection
4) severe emotional distress
The first three of these elements are likely to be met because WPIX imputed Maid to Order carried on illegal/immoral activities and K asked them to stop these inferred allegations. There are no facts to support any ED.

K may also claim negligent interference w/ PEA. According to Peoples Express, there is a duty to avoid risk of economic harm to a foreseeable group of identifiable plaintiffs. Here WPIX's actions cause economic harm to K. She will argue that she was particularly identifiable so WPIX breached their duty and
caused her specific harm. She may succeed in this claim but WPIX will argue lack of foreseeability.

K may also try a strict negligence claim but because her losses are arguably purely economic, she is unlikely to prevail.