

Final Examination**Torts II (LS I)****Professor Joseph Lavitt****Spring 2008**

1. **You have three (3.0) hours to complete this examination.**
2. **This examination is closed book.** You may not refer to any books, notes or reference materials. You may not make any contact with any source inside or outside the classroom, by phone, internet connection, or otherwise, and you may not confer with each other during the examination.
3. **This exam consists of two sections.**
 - Section One** consists of twenty (20) multiple-choice questions, scored at 5 points each. Section One is worth a possible total of **100 points**. Answer each multiple-choice question by marking on the separate “ParSCORE TEST FORM” the one most correct response to each question. If you change your answer, place a clear X through the wrong answer and mark the correct answer. A machine will score the exam and any ambiguities will be counted as a wrong answer.
 - Section Two** consists of two hypothetical fact situations, followed by essay questions. Each hypothetical will be worth **100 points**. Section Two is worth a possible total of **200 points**.
4. **You may allocate your time as you wish.** It is recommended that you allocate **one hour** to Section One. It is recommended that you allocate **two hours** to Section Two.
5. The same proper names are used in different hypothetical fact situations, e.g., Able, Baker, Charlie, and Dana. These hypothetical parties play different roles, and have different identities and attributes in each of the different hypothetical fact situations. Thus, for example, the actor named “Able” in one hypothetical fact situation should not be understood to be the same person as the actor named “Able” described in another.
6. The hypothetical fact situations set forth in Section Two raises numerous issues. Respond as fully as possible within the time allowed, being mindful of your time to make sure you will be able to fully respond. Explain fully the grounds that support your response. A response which is unsupported by a thorough discussion justifying the response will not receive full credit. Read, think and analyze before you begin to write. Be as clear and concise as possible. Points will not be earned for rhetorical flourishes.

7. If you write your essay responses in the blue books provided, please write clearly and write on every other line and every other page to permit instructor comments.
8. Write your exam number on your exam envelope. Write your student exam # at the top of this page, and each page which follows. Do not use your name, student ID number or Social Security Number on any exam materials.
9. At the conclusion of the examination, return all exam materials to the exam envelope and submit it to the proctor. Do not seal the envelope. Students who do not return all exam materials at the end of the exam may not be graded.

Section Two—Hypothetical One

Able resides in Novato, California. On May 22, 2007, Able purchased, at the local Priceco store, a four-wheeled, ride-on lawn mower (the “mower”), manufactured by Sorrow & Payne, Inc. (“SPI”). The mower came equipped with a seat for the operator and a gasoline-fueled motor — making it possible to sit while mowing Able’s spacious lawn — a real benefit to Able.

The mower’s grass cutting mechanism consisted of a “cutter unit” — a very sharp rotating cutting blade, guarded by a round metal cover. The cutter unit was located between the rear wheels of the mower, behind and below the operator’s seat. The mower was equipped with a shift lever, to drive forward or in reverse, and a speed control, to go fast or slow. The mower was also equipped with a “cutter on/cutter off” switch, to allow the operator to turn the cutting blade off when driving the mower over areas not intended to be mowed.

At the time of purchase of the mower, Able received and read an “Owner’s/Operator’s Manual” which, in addition to describing maintenance and service procedures, contained an extensive list of safety precautions. These precautions included: “Keep hands and feet clear of the cutter unit,” and “Instruct individuals to stay away from the mower while it is in operation.”

On June 15, 2007, while Able was using the mower to mow Able’s front lawn, Able was approached by Able’s neighbor Dana. Dana asked Able to give Dana a ride on the mower. Able agreed to do so. Dana sat alongside Able, on the edge of the operator’s seat. (The operator’s seat was designed to provide a place to sit for one person.) Able began driving the mower forward.

Able hit a bump. Dana slipped off the seat of the mower, and fell on the lawn. By the time Able reacted, the mower had traveled approximately five feet ahead of where Dana fell.

Able looked over Able’s shoulder, shifted the tractor into reverse, and began to move rearward to pick up Dana. In reverse, the mower was designed by SPI to travel in the “fast” speed setting. (Consumer studies conducted by SPI during the mower design phase showed that operators sometimes chose to mow in reverse, but most often used the reverse function solely to change the position of the mower, and thus preferred a faster speed when backing up the mower.)

While backing up, Able looked forward briefly. During that brief time, while Able was looking ahead, the mower moved backward about four feet. Able heard a noise.

Able turned around to look for Dana, and saw that Dana's right foot was underneath the mower. Dana was screaming. Able turned the cutter off, and drove forward. Able jumped off the mower, and briefly examined Dana. Dana's right foot was so severely injured that amputation was necessary.

After the accident, Able discovered that the model of SPI ride-on lawn mower that Able purchased lacked a "no-mow-in-reverse" (NMIR) safety feature to prevent back-over injuries. Able paid \$899 for the mower. At the time of Able's purchase, the NMIR feature was available on other ride-on lawn mowers made by SPI and offered for sale at Priceco for about \$100 more than the model purchased by Able. Able was unaware of the availability and the function of the NMIR feature at the time Able purchased the mower, however. Although Able spoke with a Priceco employee about the most appropriate model for Able's needs before Able purchased the mower, the Priceco employee never mentioned the NMIR option. Able chose the model Able purchased simply because that model was the least expensive SPI ride-on lawn mower offered for sale at Priceco at the time of Able's purchase.

After the accident, and after discovering that the model of mower Able purchased lacked a NMIR safety feature, Able went to Priceco to confront the same employee at the Priceco store that Able spoke with before buying the mower. Able told the employee about the accident involving Dana. The Priceco employee responded, "You know, sir, SPI had to come up with the NMIR feature because of reports that so many people were getting hurt in back-overs. Dim-wits don't seem to understand that the mower is still cutting when in reverse if you don't turn off the cutter. You should have been more careful, sir, or paid the extra \$100 for a better model."

Fully, completely and objectively discuss each tort (i.e., tort cause of action) which may be alleged by Dana against SPI arising out of the injury described above. With respect to each tort you discuss, be sure to address whether each of the elements of each tort you discuss can be established, and identify and objectively evaluate the appropriate privileges or defenses which may be asserted in response to each such alleged tort.

Section Two—Hypothetical Two

Vickie Lynn Marshall, who was more widely known as Anna Nicole Smith ("Smith"), was a model and actress who gained pervasive celebrity in part because of her marriage to the late J. Howard Marshall and the litigation that ensued over his enormous estate. On February 8, 2007, Smith died suddenly and unexpectedly in Florida. She was survived by a daughter, Dannielynn, who was born in the Bahamas. Dannielynn was the subject of widely publicized judicial proceedings to determine, among other things, the identity of her biological father. Howard K. Stern, Smith's longtime lawyer, friend and companion, believed he was Dannielynn's father (Smith had listed him on Dannielynn's birth certificate as her father) until DNA testing determined that Larry Birkhead was actually Dannielynn's biological father.

Smith's mother, Virgie Arthur, was a participant in the paternity proceedings, as well as certain widely publicized judicial proceedings involving, among other issues, a battle over Smith's body and where it would be buried. On June 21, 2007, John O'Quinn, attorney for Virgie Arthur, was interviewed for the nationally-televised Fox News show

"On the Record with Greta Van Susteren." The following is a verbatim transcript of a portion of that interview:

GRETA VAN SUSTEREN, HOST: All right. You represent Virgie, the grandmother of the baby...

O'QUINN: True. ...

VAN SUSTEREN: It certainly seems like she doesn't have much fondness for Howard K. Stern.

O'QUINN: No. She believes Howard K. Stern murdered her daughter.

VAN SUSTEREN: Strong word.

O'QUINN: That's what she said ... in court. He killed her.

VAN SUSTEREN: What's the basis for that, for the — for being there, sort of complicit that Anna Nicole took drugs or providing her drugs? I mean, what's her theory?

O'QUINN: He handled all the drugs. We've talked to the maid who kept the place. She gave us a list of the drugs. That's where I got the list. And he wanted to keep total control over her by keeping her doped up. He had total control over her. It was all a technique, a Machiavellian, sinister technique.

VAN SUSTEREN: Now, wait a second, John. You and I are both lawyers. I mean, the fact is that, with all due respect to your client, she hasn't seen her daughter in about 10 years, so she really doesn't know what the interaction between Howard K. Stern is. We can all have our sort of suspicions, but in terms of evidence of murder, that's a different level.

O'QUINN: She sat in the courtroom, like we all [did]. She has her own judgment about what she ... heard. Everybody has a judgment by now about what they've heard.

VAN SUSTEREN: And you agree with that judgment, murder?

O'QUINN: You better believe it. Why does a man ask for a will four days before a person dies?

On April 8, 2008, Stern appeared on "On the Record with Greta Van Susteren." The following is a verbatim transcript of a portion of the interview:

GRETA VAN SUSTEREN, HOST: Tonight, it is the interview you have been waiting for. Howard K. Stern is here.

He was Anna Nicole Smith's lawyer and companion. He has not been a big fan of this show. In fact, he has never sat down with us before. And now Howard K. Stern sits down and goes "On the Record" for the entire hour. ...

Howard, you and I have spoken, and I told you that ... I want to give you an opportunity to—you know, to whack us where you thought we should be whacked and to let you say your piece about us. ...

HOWARD K. STERN: Well, Greta, night after night for months, you had people on your show with obvious agendas, and you let them make wild accusations, including accusing me of murdering Anna ..., when nothing could have been further from the truth. I would give my life for [hers]. I'd trade places right now. And anyone who actually knows me or knew ... us would say that. ... I think you did this for ratings. I think you did it for sensationalism. The charge was led by ... John O'Quinn. But you, Geraldo and basically everybody else at FOX wasn't far behind. And I think it's sad if that's what news has become.

Fully, completely and objectively discuss each tort (i.e., tort cause of action) which may be alleged by Howard K. Stern against John O'Quinn based on the incidents described above. With respect to each tort you discuss, be sure to address whether each of the elements of each tort you discuss can be established, and identify and objectively evaluate the appropriate privileges or defenses which may be asserted in response to each such alleged tort.

End Hypothetical Two

End of Exam