

**FINAL EXAMINATION  
TORTS II  
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SPRING 2007**

1. You have three (3) hours for this examination.
2. This is a **closed** book examination.
3. This examination contains two parts: essays **and** objective questions. The total amount of points for the examination is 90 points
  - a) **Part I** consists of two 60-minute essay questions, each of which counts for 30 points for a total of 60 points. You will have the first two hours of the exam time for this Part. You must begin with the essay section. You must also answer both questions. Although you are free to allot the first two hours in any manner for these two questions, I recommend one hour per question. These essay questions are to be answered in the bluebooks provided, using every other line on one side of each page. **Please return this section of the exam, including the questions, your answers and your notes to the envelope once you are done answering the essays.** Once you have placed the essay section in the envelope, you may not go back to it. **NOTE:** You will not have access to Part I during the final hour of the exam. Now you may remove the Multiple Choice section.
  - b) **Part II** consists of 30 multiple choice questions, each counting for 1 point each for a total of 30 points, to be answered in the final hour of the exam period. Select the best answer for each question. Correct multiple choice answers are to be marked on the separate "ParSCORE TEST FORM" using pen or pencil and following the instructions on that form. 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.
4. Write your exam number on your exam envelope. Put your student exam # at the top of this page, each page of questions, each blue book, and the "ParSCORE TEST FORM." **Do not** use your name, student ID number or Social Security Number on any exam materials.
5. At the conclusion of the exam, all examination papers -- including the Part II ParScore Test Form, bluebooks for Part I, the examination questions, these Instructions, and all notes -- must be placed back in the exam envelope at the end of the examination. Failure to return all materials will result, among other sanctions, in a failing grade of "F" for the course. **Do not** seal the envelope.
6. Relax and have confidence in your abilities.

**GOOD LUCK!**

**PART I**  
**ESSAY #1**  
(Suggested time: One hour)

Diversified Industries manufactures portable, outdoor charcoal barbecue grills. It also manufactures an entire line of accessories for its charcoal grills. The accessories include insulated barbecue mitts, grill cleaning scrapers, and stainless steel skewer, tongs and other turning tools. Grill users are eager to purchase accessories priced under \$10 and, in fact, Diversified makes more profits on its accessories than it does on the grills themselves.

In response to a recent consumer survey, Diversified's Engineering Department developed an elongated fire lighter with the trademarked name Dependable Flames. The lighter is similar in concept to a portable butane cigarette lighter, such as BIC, but is much longer so that one "flicks" or turns a rotating hammer against a flint on the bottom of the lighter, and the top of the lighter some 8 inches away ignites the butane stored inside the handle. Unlike a cigarette lighter where the flame continues as long as one holds down a mechanism directly near the rotating hammer, the Dependable Flames lighter stays lit until the user presses an "off" button located near the rotating hammer. Thus, the elongated neck allows grillers to keep a flame burning while moving it around the charcoal, and to keep the flame away from the hand of the person holding the lighter.

The Engineering Department was obviously aware that any flaming product would pose a potential hazard. Therefore, the department considered adding one of two existing technologies to the design of the lighter: (1) a manual switch at the base of the handle that would make it impossible for the rotating hammer to rotate, thus causing the lighter not to ignite in the first place; or (2) an automatic timing device that would extinguish the flame after 10 seconds of use.

The Legal Department contacted the Consumer Federation of America, which informed them that records show that an average of 140 people in America are killed each year as a result of fires attributed to accidents with lighters.

The Marketing and Research Department researched similar products, including cigarette lighters, and conducted test groups using prototypes of the Dependable Flames lighter equipped with a manual switch. The department reported that most people who used the manual switch later forgot the switch was activated and therefore assumed the lighter did not work. However, when the switch was on, 90% of children under the age of 8 could not figure out that the lighter could be ignited by moving the manual switch to off, thus bringing the lighter close to "child proofing." Because the automatic timing device was a new technology, most of the "testing" consisted of theoretical articles in professional journals and a few internet "blogs" by engineers and chemists.

The Finance Department reported that equipping the lighter with a switch would increase manufacturing costs to \$2.78 per unit, thus after advertising, transportation and other expenses, still allow Diversified to sell the lighters for \$10. However, the profit Diversified would make at the price of \$10 would only be 24% of what it would make if it sold the lighters without a

manual switch. On the other hand, the automatic timing device would increase manufacturing costs to \$7.82 per unit, meaning that if Diversified sold lighters for \$10 each the company would lose money. Furthermore, pricing the lighter over \$10 would run the risk of consumer resistance to purchasing it in the first place. To make a profit comparable to that it would make if it installed the manual switch, Diversified would have to price the lighters at \$17.

Diversified decided to market the Dependable Flames lighter with neither the switch nor the timing device. The lighters are packaged with brightly colored cardboard containing the name of the product and both a pictorial and narrative explanation of how to operate the rotating hammer to ignite the flame and the “off” button to extinguish it. The packaging also indicates how to refill the Dependable Flames once the fuel is exhausted. It also contains the following language:

**This Diversified product has been designed and manufactured to give you complete satisfaction. If for any reason you are not satisfied with the performance of this product, Diversified will replace it at no cost to you.**

Since its introduction, Diversified has sold 51,885 Dependable Flames lighters on its internet site directly to consumers.

Penny purchased a Dependable Flames lighter and has used it to start charcoal fires in her Diversified grill for the past several months. Last month she was grilling outside on her concrete patio. She lit the charcoal fire using her Dependable Flames lighter and pressed the button to extinguish the flame. At that moment her dog, Rover, came over to her and started barking. Penny knew that Rover wanted to play “fetch.” Penny looked around for a tennis ball or a stick to throw but found nothing, except the Dependable Flames she had in her hand.

Penny threw the lighter towards the back yard fence. Rover ran after the lighter, caught it in mid-air before it hit the fence, and raced back with it to Penny. She took the lighter from his mouth and threw it again. He ran, caught and returned again. She threw it a third time, but heard the telephone ringing inside her house and so went to answer it. Rover caught the lighter and ran to where Penny had been standing. Rover released the lighter from between his teeth and sniffed at the object. He hit it in such a way with his paw that he turned the rotating hammer and the Dependable Flames ignited. Surprised at the fire, Rover hit it with his paw and ran away. Unfortunately, the flaming lighter then rolled off the concrete patio and into a patch of dried grass. The grass broke into flames. The flames quickly spread to Penny’s house, temporarily trapping her inside. Before she was rescued, she suffered burns and had to be hospitalized. (Rover was not harmed.)

Based on the foregoing facts, please discuss what tort causes of action Penny can reasonably allege against Diversified concerning the Dependable Flames lighter, and what defenses, if any, are available to it?

**END OF ESSAY #1**

**PART I**  
**ESSAY #2**  
(Suggested time: One hour)

A defamatory statement is often defined as a false statement that harms, or tends to harm, an individual's reputation in the community. Thus, traditional slander or libel per se creates civil liability to state falsely that an individual is a murderer, has a sexually-transmitted disease, or is dishonest in their occupation because the community automatically abhors one who fits into those categories.

Yet, as this definition indicates, the interest in reputation is an interest in the opinion which others may have of the plaintiff. Harm to reputation is defined more by its effect on "others" in the community rather than its effect on the individual plaintiff. Therefore, to determine whether a statement is defamatory, the judge (or occasionally the jury) must first select the community in whose esteem the plaintiff has been diminished.

The United States is a pluralistic society; there is no longer, if there ever was, a homogeneous community whose norms provide the benchmark for determining what statements are defamatory. A statement that is defamatory in the eyes of one segment of the community may provoke approval and increased respect in some quarters, and in another would only result in indifference. Thus, the current rules requiring a "considerable and respectable" community to be offended really advances social policy goals (of protecting those who are "respectable") rather instead of seeing if plaintiff's worth has been diminished in the eyes of any group at all.

What should constitute the "community" for purposes of determining the "loss of position in the community" standard for defamation? Should it be proven by empirical evidence taken by professional pollsters? Should it be geographically defined or limited? Should it be a group of the plaintiff's peers, even if that group is "wrong-thinking," or would any group be appropriate?

Consider the following observations from various legal scholars concerning the definition of "community" in defamation:

*#1 - Walter Probert:*

The concept of "community" is a myth. A plaintiff does not sue simply because his reputation has been hurt. Defamatory communications also inflict a host of psychic injuries, ranging from mere hurt feelings to anxieties worthy of psychiatric concern. As a practical matter, the bulk of the money paid out in damage awards in defamation suits is to compensate for psychic injury, rather than to compensate for an objectively verifiable damage to one's community standing.

*#2 - Justice Holmes in Peck v. Tribune Co., 214 U.S. 185 (1909):*

An unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number and will lead an appreciable fraction of that number to regard

the plaintiff with contempt is enough to do her practical harm. Thus if a doctor were represented as advertising a medical product, the fact that it would affect his standing with others of his profession might make the representation actionable, although advertising is not dishonest and even seems to be regarded by many with pride. Therefore, plaintiff must only show that the alleged defamation hurt her standing with a considerable and respectable class in the community.

*#3 - Daniel More:*

Applying a “right-thinking” person standard or a “considerable and respectable” standard appears to relate to the work of objective or factual reality, but, in fact, serves to mask a subjective, normative evaluation. The failure of judges to apply actual community norms results in imposition of their own value judgments in determining the relevant community segment. If the statement lowers the plaintiff in the eyes of a relatively few recipients, but if their opinion is highly important to plaintiff, then the defamation action should not be denied on the basis of the small size of the index group, or indeed, on whether that group’s values mirror the values of the judge or of a larger community.

*#4 - Lyrissa Lidsky:*

Courts often envision “the community” as they wish it to be rather than the community as it is. It is much nicer to envision a community in which racism is unthinkable, in which neither criminals nor the poor nor those with differing political or religious beliefs, or sexual orientation are shunned – in short, in which people do not hold irrational and sometimes invidious prejudices. More fundamentally, it is much easier to simply deny the existence of communities whose values one does not like or to brand such communities as simply too antisocial to be acknowledged. The process denotes those who do not share the rules of civility as somehow marginal or deviant. This then exemplifies an insidious form of “assimilationist law” because they place the force of the state behind the cultural perspective of a particular, dominant group.

Use the foregoing dialogue and your understanding of the purposes of tort law as a starting point. Based on the above, and using examples as necessary, please analyze and discuss how you believe “community” should be defined for purposes of defamation law.

**END OF ESSAY #2**

**END OF PART I**

**END OF EXAM**