

Exam Ticker Number _____

Torts Section 2B
Jonathan Klick
The Armageddon
December 16, 2009
9:30-1:30

This final exam consists of four questions. Each question will be given equal weight in determining your final grade (subject to your decision for #4).

This is an open book and open note exam. You may use your casebook, class notes, casebook supplements, commercial outlines, commercial supplements, lucky charms, and any other printed or written materials you believe will be helpful in completing your answers.

You will be given four hours to complete this exam, and you may allocate your time among the questions as you see fit. There is no answer sheet for this exam. You may write as long or as short an answer as you believe is necessary to completely answer the test questions.

If you perceive an ambiguity or error in any test question, please proceed to answer it, noting the ambiguity/error and making any reasonable assumptions you believe are necessary to answer the question. Please state these assumptions in your answer and provide your justification for the assumption.

Good luck and have a nice break.

1. Lyon Irons, the most successful golfer in history, is married to Nanny Swedegren. One evening, Nanny catches Lyon sending romantic messages to fellow golfer Jon Dally. When she confronts Lyon about this, he admits to having been involved in a long term affair with Dally. Nanny flies into a rage and leaves the home. After getting a call from Lyon, Dally rushes over to the Irons/Swedegren residence to comfort Lyon. The two men spend the next two hours drinking Pabst Blue Ribbon beer while reflecting on their respective careers. Dally notes how Lyon really hit a stride in the 2005-2007 period, earning \$10 million in each of those years for his golf tournament wins (an earnings mark that was unprecedented in golf history), whereas he previously never made more than \$5 million in a year. Dally asks him what the problem has been since 2007, since Lyon has reverted to his \$5 million annual average. Lyon responds that he thinks he's worked out his recent problems and hopes to be back in prime condition for the 2010 season but notes that "the competition just keeps getting tougher and tougher." Lyon compliments Dally on his recently improved performance which included total winnings of \$2 million last year, but Dally laments that "it's already been blown on the slots in Vegas."

Nanny then returns to the house with a handgun she just purchased from Al's Gun Barn in Orlando. Despite the existence of a federal requirement that gun retailers perform a background check on anyone wishing to purchase a handgun, Al sold the gun to Nanny without running the check because the relevant computer system was down. Instead, he asked Nanny if she had any criminal record or had previously been diagnosed with a mental illness (the two things the background check looks into). Nanny truthfully answered "no" and adds with a smirk, "not yet anyway."

Nanny confronts Lyon about his infidelity and says that she should shoot him that very night. Lyon responds saying, "Do it. Put me out of my misery. I hate my life. I hate golfing. I hate being in all of those stupid Noleade commercials." Dally pleads with Nanny to put the gun down, saying "Lyon doesn't mean any of that; it's the beer talking. We both polished off a case of pounders while you were gone. Let's all just sleep this off and talk about it in the morning."

Before Dally is finished talking, Nanny raises the gun and aims it at Lyon's feet, when Dally charges her yelling, "No!" In the ensuing mayhem, Nanny's gun goes off, with the bullet tearing through Dally's body and then shattering Lyon's shoulder. This leaves Dally permanently paralyzed and leaves Lyon unable to play golf at any level unless he undertakes rigorous physical therapy that has the potential to allow him to rejoin the PGA tour, even though it is very unlikely he will ever again win a championship.

In speaking to the police about the event, Nanny states that she only planned to shoot at the floor in front of Lyon to scare him. Because of this, and other technical issues, Nanny avoids criminal prosecution.

Once the sordid tale goes public, all of Lyon's commercial endorsements, which have averaged \$100 million per year for the past five years, dry up. He does receive an offer to be the spokesman for an internet "cheating" website (which helps individuals arrange affairs) for \$10 million per year.

Assume that Nanny is independently wealthy (i.e., she has assets that are not jointly held with Lyon), so there is no issue with her being judgment proof. Also assume that Nanny and Lyon receive a divorce immediately after the shooting.

1.a Outline any tort claims Lyon has arising from the details above. Include a detailed analysis of how damages might be determined. Make sure to include a discussion of the likely defenses offered.

1.b Outline any tort claims Dally has arising from the details above. Include a detailed analysis of how damages might be determined. Make sure to include a discussion of the likely defenses offered.

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2. Bryan Eastbrook needs only 200 more yards to become the Philadelphia Eagles all-time yardage leader. However, in an early season game against the Washington Redskins, Eastbrook is knocked out with a concussion when he takes a knee to the head. The knee to the head came during an illegal hit from Redskins linebacker Nasty McMean. McMean has a long history of dirty hits, and the league suspends him for two games for his hit on Eastbrook.

In the ensuing weeks, Eastbrook's coaches keep him out of practice and games pending clearance from the team's doctors. During the period, Eastbrook is examined by the nation's top neurologist at the University of Pennsylvania who suggests that Eastbrook retire from professional football to avoid long term neurological damage which includes a heightened risk of developing Parkinson's disease. Also during this time, the U.S. Senate holds hearings reviewing the incidence of concussions in the NFL as well as evidence that former NFL players suffering multiple concussions exhibit a significantly higher incidence of early-onset dementia as well as a host of other neurological impairments.

As the season progresses, the Eagles surprisingly find themselves in playoff contention, and the coaches suggest to the team doctors that having Eastbrook on the roster would be very helpful to the team. The next day, team doctors give Eastbrook clearance to play. Eastbrook notes to team officials that it's odd that the opinion of the team's doctors diverges so sharply from that of the UPenn doctor. Team officials respond that league rules give Eastbrook the option of following the recommendations of independent doctors, but also point out to him that the remaining \$30 million on his contract is not guaranteed, noting that if Eastbrook chooses not to play after receiving clearance from team doctors, the team is likely to drop him from its roster without pay. Eastbrook worries that another team will not sign him if he chooses not to play after receiving clearance, and he really wants to set the Eagles yardage record. Eastbrook suits up for the next game against the San Diego Chargers. During a second half run, Eastbrook receives a relatively weak hit to the head, leading to another concussion. The UPenn neurologist suggests that the fact that the second concussion resulted from a relatively minor hit implies that Eastbrook was not yet ready to play again. Further, after examining him, the neurologist declares that Eastbrook now exhibits brain damage that is

similar to other multiple concussion retired NFL players who eventually developed early onset dementia, Parkinson's disease, and other neurological disorders.

The Eagles retain Eastbrook on their roster through the end of the season, paying him \$6 million for the season. Team doctors do not clear him for action again that season, leading the team to cut him before the start of the following season. No other team is willing to sign Eastbrook.

Assume, for the purposes of this question, that workers' compensation statutes do not apply to the NFL.

2.a Eastbrook asks you for legal advice regarding any potential claims he has. Make sure to cover the likely defenses that will be raised against those claims.

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3. Viscusi finds that when juries are presented with evidence that defendants explicitly valued the legal costs associated with deaths arising from the defendants actions (e.g., Ford calculated the number of people who were likely to die in collisions resulting from the design of its Pinto and the associated legal judgments and compared those costs to the additional sales it was likely to make by using the lower cost design as compared to a relatively safer higher cost design), there is a higher likelihood that punitive damages will be awarded. Discuss both the positives and the negatives of the use of juries in the U.S. civil litigation system in light of this finding.

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4. Choose one question above (1, 2, or 3) to count double **or** choose to have each question count equally (i.e., each is worth 1/3 of your grade). Please clearly indicate your choice or you will automatically lose 25 percent of the possible points on the exam.