

FINAL EXAM

Instructions

DO NOT GO BEYOND THIS PAGE UNTIL THE EXAM ACTUALLY BEGINS.

THIS IS A CLOSED BOOK EXAM.

Follow the instructions from the proctor.

This exam will last 3 HOURS. Before turning in your answer, REREAD each question to be sure you haven't missed anything.

If you use blue books, **DOUBLE-SPACE** your answers.

You are welcome to use abbreviations, but indicate what they are, *e.g.*, "Andropov (A) would sue Brezhnev (B). B may be liable to A because ... ."

Plan on spending at least 10 minutes at the end **PROOFREADING** your answers. You may not write **ANOTHER WORD** after time is called.

Each question has been assigned a point total, and the exam as a whole has a point total of 135. Spend the amount of time on each question reflecting its relative worth. Assume each question stands alone; do not cross-reference material from your answer to another question.

**REMEMBER THE HONOR CODE: DO NOT DO THINGS THAT TEND TO IDENTIFY YOURSELF.**

GOOD LUCK!

**Question 1 (70 points)**

At approximately 5:30 p.m. on September 23, 2009, Jeffrey Smith, an experienced off-road all-terrain-vehicle (“ATV”) user, was operating a 1997 Yamaha Big-Bear 350 ATV on a trail located near Cherry Run Road, Burrell Township, Armstrong County, when he had an accident. Mr. Smith, who was wearing a helmet and gloves, was climbing a portion of the trail that climbed a steep hill. Some of his riding companions, including his daughter and her friend, had preceded him over the hill and were beyond his line of sight. Mr. Smith became concerned that if he traveled over the hill, he may collide with someone. He started to carefully and slowly back his ATV down the hill while keeping it in first gear. As Mr. Smith neared the bottom of the hill, his right foot slipped and struck the right-rear fender of the ATV. The fender collapsed, and Mr. Smith's right leg became trapped between the ATV's frame and its rear wheel. As a result, the vehicle rolled backwards over Mr. Smith's body, struck him in the face, and caused severe injuries that required comprehensive facial surgery, stitches, and splints.”<sup>1</sup> Mr. Smith became physically disabled and disfigured and suffers from double vision, seizures, depression, anxiety, and sleep disorders.

Your law firm represents Smith. At an intake interview he described his actions and thought process during the relevant time frame. He was ascending a hill behind his traveling companions when he reached a point where he could not see over the crest. Mr. Smith explained, “I was afraid that I'd have to give [the ATV] a little too much gas to crest the hill and that I would be airborne. If, in fact, one of the kids [were] up there and looked over to see where I was at or for that matter one of the adults, but I was worried about the children mainly, I was fearful I may crest the hill and go in the air and have one of them in front of me.” Mr. Smith concluded that going over the hill was not a safe option.

Mr. Smith stopped the ATV and positioned himself so that he could descend safely. He placed the vehicle in drive in first gear because he did not believe that he could back down slowly enough in reverse. Since it was engaged in first gear when Mr. Smith applied gas to the vehicle, the wheels would move backwards very slowly. He had descended hills in this manner on “many occasions.” He remained standing on the foot pegs and leaning forward.

When Mr. Smith had nearly reached the bottom of the hill, the following occurred: “It [was] just like one moment I was standing up, the next moment my leg was sucked into the wheel, stuck between the fender and the tire, getting burned by the muffler and the [ATV] rolled backwards, head over heels.” Mr. Smith explained that the vehicle started to flip backwards for the following reason: “Whenever the fender gave way, it lodged my foot between the fender top, the muffler and the internal portion of the wheel and the top of the tread. It had to have stopped everything when my leg got stuck in the there. And I'm assuming that that instantaneous stop and the fact that it sucked me down to the right and threw my weight over to the right-hand side, you know, a rapid jerk, I lost ... not only my balance, but my center of gravity, I lost everything. I lost my ability to control the

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<sup>1</sup> Mr. Smith states that his helmet did not cover his face. The helmet did have a plastic shield that was designed to prevent dust particles and insects from striking the user's face, but Mr. Smith was not utilizing the shield at the time of the accident because the area where he was riding was not dusty. As a result, Mr. Smith's face was unprotected when the ATV flipped over and the vehicle's handlebars struck him in the head.

rearward motion; I lost everything momentarily.” Mr. Smith stated that he later saw the detached fender and that the bolt that secured the right rear fender to the frame of the ATV had broken through the plastic fender.

When asked if he had ingested any drugs or alcohol on the day of the accident, Mr. Smith stated that he drank one twelve-ounce beer sometime before 4:00 p.m. He also was ingesting approximately 120 milligrams of the painkiller OxyContin under prescription on a daily basis due to a degenerative spinal condition that caused chronic neck and back pain. He stated that he was permitted to drink alcohol while using OxyContin but was “cautioned to use extreme care.” His blood alcohol content had been tested on the day of the accident, and it was .021%, which is approximately seventy-five percent below the legal limit. Mr. Smith stated that he was not feeling any effects from the OxyContin.

When Smith purchased the ATV it was accompanied by a booklet titled, “Yamaha tips for the ATV rider” (“tips booklet”). Among other things the booklet expressly warned that operators should not use drugs or alcohol or allow the vehicle to roll backwards on a hill.

Your law firm has found an expert, Dr. Robert Wright, who is familiar with the Yamaha Big-Bear 350. He has concluded that: (1) the fenders on the ATV at issue were flexible and did not adequately protect the operator's feet and legs from the tires, which was problematic because the tires had a “deep tread pattern” that could “grab shoes, clothing, and other objects;” and (2) the ATV's weight distribution and center of gravity was “totally inappropriate for a machine of this configuration” and made the vehicle “prone to forward and rearward pitch or flip-overs.”

Please prepare a report on the prospects for a tort recovery for Mr. Smith. Ignore any potential for a class action.

## **Question 2 (65 points)**

Samuel E. Powers was a sixteen-year veteran of the Maricopa County Sheriff's Office (“MCSO”), where he worked as a deputy sheriff. On July 16, 2009, he participated in a training and certification course offered by the MCSO that was a prerequisite to being certified to carry the Advanced Taser M-26 (“M-26”), manufactured by Taser International, Inc. (“Taser”). Taser manufactures and sells conducted energy weapons, including the M-26, which employs electro-muscular disruption (EMD) technology to stimulate a person's motor nerves, causing an involuntary muscle contraction. Earlier electric weapon devices affected only the sensory nervous system and relied primarily on pain compliance, which can be overcome by the recipient through focus or when he or she is under the effects of drugs or alcohol. The M-26, however, is designed to affect the sensory and motor nervous systems, overriding the central nervous system and causing uncontrollable muscle contractions that make it physically impossible for a person exposed to the M-26 to not respond to its effects.

During the course, Powers received training materials prepared by Taser and viewed a PowerPoint Presentation regarding the M-26. The materials described the M-26 as a “less-lethal” weapon and represented that the M-26 had been (1) tested on animals and found to have no effect on heart rhythms and (2) deployed on more than 3000 persons with no long-term effects. The materials warned, however, that short-term injuries could result from a fall associated with exposure

to the M-26, noting that the most significant injuries to date had been “cuts, bruises and abrasions.” In addition, as part of the training course, Powers viewed several videos showing individuals being exposed to the M-26.

As part of the course and as a prerequisite for certification to carry the M-26, the MCSO required all officers to be exposed to the electrical force of the M-26. Powers agreed to be exposed to the M-26 and was struck by the device. As a result of his exposure to the M-26, Powers allegedly suffered a compression fracture of his T-7 spinal disc.

Powers' physician, Dr. Terry McLean, discovered while treating Powers for this injury that Powers had severe osteoporosis, a quantitative loss of bone mass that weakens the bones. As a result of his osteoporosis and his physician's orders restricting him to light duty, Powers was unable to continue to work as a deputy sheriff and resigned from the MCSO in June 2010.

You represent Taser. Taser reports that this is the first time a user has claimed that the muscle contractions caused by the M-26 resulted directly in a bone fracture, as distinguished from injuries resulting from a fall resulting from the M-26.

Please prepare a memo analyzing the product liability claim that Powers might bring against Taser.