

PART TWO -ISSUE SPOTTER QUESTION
(ONE HOUR)

INSTRUCTIONS:

1. Part Two consists of one issue spotter. It counts for one third of your grade.
2. Be sure that your examination number appears on all bluebooks which you use.
3. Please do not use pencil to write the examination.
4. Write your answer in the bluebooks provided. Write on only one side of each sheet of paper in the bluebook.
5. Leave a margin on the left-hand side of each page for me to use in grading.
6. Do not take the bluebooks or the examination copy out of the room in which you are writing.
7. Do not assume facts not given, and do not change the facts.
For example, do not assume the existence of statutes unless they are referred to in the question. However, if you are convinced that a question cannot be answered completely without making certain assumptions, please state clearly the nature of any assumptions on which you are relying
8. Discuss each issue fairly raised by a fact pattern, even if your conclusion on one issue within the fact pattern seems to make discussion of another issue unnecessary. For example, if you conclude that a plaintiff cannot succeed because he cannot prove an essential element of the tort at issue, it would nevertheless be prudent to discuss the merits of any defenses which might be raised against that plaintiff.
9. In answering the question, please discuss each issue raised by the question separately. Complete in full your discussion of one issue before discussing another issue.
10. Write legibly. If I cannot read it, it will not get points.

ISSUE SPOTTER QUESTION

Dennis Rome purchases an in-ground swimming pool, manufactured by Bunco, from Major Store a local discount store. The pool is made of vinyl and requires some construction. Dennis employs Andrew Construction to dig a hole, connect up the water and install the electrical heating system Bunco provides with the pool. Andrew Construction follows the installation procedures recommended by Bunco exactly, except that Andrew Construction installs the electrical heating system only 1 inch below the vinyl floor instead of the 2 to 3 inches below the floor recommended by Bunco. Andrew construction never mentions this change to Dennis. The pool as constructed is 20 foot long and varies in depth from 4 to 6 foot. As recommended by Sunco, at the 6 foot end a warning is painted on the pool floor in large red letters, which reads "DO NOT DIVE - SHALLOW WATER". There is no such warning at the 4 foot end, however in compliance with federal regulations issued by the Consumer Products Safety Division, Sunco's "Owner's Manual" which comes with the pool warns that "diving anywhere in the pool is often deadly due to its shallowness", and gives statistics on the number of deaths which occur each year from diving into

shallow pools. The Manual does not state that brain damage can result and the federal regulations do not require such a statement. Dennis reads the Manual, but does not mention its warning to anyone. The Manual contains no warning on wearing foot wear in the pool, and none is required by federal regulations. Dennis is delighted with his new pool and invites his next door neighbors Fred and June over for a pool party. The following tragic incidents occur. Dennis' fifteen year old son Scott, who had swum in the pool earlier that day, decides to show off. He does a spectacular dive into the pool at the 4 foot end. Unfortunately his head hits the pool floor and he suffers severe head injuries. Fred hurries to aid Scott and jumps into the pool wearing his metal spiked track shoes. The spikes rip through the vinyl floor of the pool and make contact with the electrical heating system. Fred is instantaneously electrocuted. An ambulance is called and Fred and Scott are rushed to the hospital. Both survive, but Scott has serious brain damage and Fred is a paraplegic.

While everyone is at the hospital, eight year old Amy curiously spies the pool from a neighboring park where her parents have left her playing alone. Amy crawls under a fence Dennis had constructed around his property (because children keep wandering in from the park) and falls into the pool and is drowned.

Who can Fred, Scott, and Amy's parents sue and on what theories? (Presume you are in a State which adopts the majority position on all issues; and which has a Wrongful Death (Benefit of the Survivors) Statute which lists parents as eligible survivors.

Discuss all available defenses including both assumption of the risk and comparative fault. (Do not discuss damages.)

PART THREE - POLICY QUESTION (ONE HOUR)

INSTRUCTIONS:

- 1 -Part Three consists of TWO POLICY QUESTIONS. YOU CAN ANSWER EITHER QUESTION, NOT BOTH. This section counts for one third of your grade.
2. Comply with the instructions set out for Part Two set out above.
3. When you are finished with the examination, please place your bluebooks on the instructor's table at the front of the room. If you use more than one bluebook, place one inside the other and number each bluebook. Sign the sheet provided indicating you have turned in your examination.

POLICY QUESTION

ANSWER QUESTION ONE OR QUESTION TWO.

QUESTION ONE

New York Times 376 U.S. 254 (1964), is the starting point for all modern discussion concerning the American law of defamation. The case revolutionized the law of defamation by holding for the first time that the traditional tort rules governing the law of libel were subject to the overriding constraints of the First Amendment. In the years since the historical 1964 decision

in the New York Times case, courts from the Supreme Court down have repeatedly been put to the test of working out the full ramifications of the Times ruling.

Rodney A. Smolla, v. Defamation, Sac 2.01 (1991 ad.).

Discuss how New York Times and its progeny have altered the traditional common law rules of libel and explain if you agree with these changes. (Include in your discussion an explanation of the traditional common law rules of libel, the ruling in New York Times, the current state of libel law as affected by the First Amendment, and the pros and cons of these changes.)

-OR-

QUESTION TWO

one commentator has argued that:

Strict liability is a blemish on the face of tort law and should be confined to its traditional common law categories. The willingness of twentieth century courts to extend strict- liability to new areas has destroyed tort law - transforming it from a system that focuses on fault to a judicially administered insurance system for consumers.

Do you agree? (Include in your discussion an explanation of what strict liability is, the areas where common law traditionally imposed strict liability, the new areas where courts have applied strict liability, and the advisability of this expansion).