Three independent sets of facts are set forth below. After reading each carefully, please answer the question(s) that follow (in bold italics). Suggested time allotment for each question is provided at the beginning of each question.

1. (10 mins.) In a Senior Classic tennis tournament, Jimmy Connors finds himself trailing John McEnroe. As McEnroe continues to widen his lead by coming to the net, Connors decides that his best strategy is to aim every ball directly at McEnroe. Hitting one's shots at another player does not violate any specific rule of tennis, but is considered a breach of etiquette. Further, the head referee has the discretion to penalize a player for "unsportsmanlike conduct."

Connors' brazen strategy proves successful. McEnroe, his reaction time somewhat slowed by age, is pelted repeatedly by Connors' sizzling shots. After McEnroe is struck for the fifth time, the head referee issues a warning against Connors. Undaunted, Connors strikes McEnroe again, this time forfeiting a point. After that, Connors apparently abandons his strategy, and, for a time, returns to hitting more traditional shots.

About fifteen minutes after the barrage has ceased, the match reaches a final-set tie-breaker. Holding a one-point lead, Connors receives McEnroe's serve and, his vaunted return of serve still intact, rifles the ball right back across the net. McEnroe, who was rushing toward the net to put away a volley, is struck in the head with the ball, and rendered unconscious. He suffers a mild concussion. The head referee penalizes Connors by awarding the victory to McEnroe.

Will McEnroe prevail in an action for battery against Connors? Discuss the claim and any defense(s) that might apply.

2. (20-25 mins.) Antigone and Creon have been friends for twenty years. Creon is also Antigone's financial advisor, and has steered her investments, with good success, during that entire period.

Recently, Creon has poured most of his life savings into a fledgling company that provides translation services over the Internet. The company is called "Unilang." Creon believes that the company has great promise, but Unilang is having difficulty finding sufficient investors to make the project work. Additionally, Creon is nervous about having committed so much of his life's savings in a single venture. Therefore, one day while he and Antigone are at lunch, Creon enthusiastically describes the venture to her, and strongly suggests she "get in on the ground floor." Creon's description of Unilang is accurate, and he is careful to provide a balanced picture of merits and risks to Antigone, as he would with any other venture. He does not disclose his own financial stake, however. Never before has he had a personal financial interest in any of the companies he's recommended to Antigone.
(continued on next page)

Antigone does not always follow Creon's advice. She always asks plenty of questions before investing, and this time is no exception. Based on Creon's description, and on what she considers to be satisfactory answers to her questions, Antigone decides to invest $10,000 in Unilang. She remains ignorant of Creon's own stake in the venture, although she could have requested corporate documents that would have revealed that stake.

For reasons that are no one's fault, the venture does not succeed, so that both Creon and Antigone lose their entire investments.

Does Antigone have a claim against Creon for fraud? Please discuss the strengths and weaknesses of such a claim.

3. (45 mins.) Growling and snapping, a black bear is chasing Goldi Locks through the forest. After several minutes of this chase, Locks is exhausted and believes herself in imminent danger of being attacked by the bear. Just then, she spots a cabin in a clearing. She begins banging on the door, yelling: "Help! Let me in! I'm being chased by a bear."

Woods Man is in the cabin. Reclusive by nature, Man makes his living as a lumberjack. He works alone, and has little contact with others. Hearing Locks' cry, Man does not get up from his chair to investigate. Instead, he calls out: "Go away! Leave me alone!"

Her plea rebuffed, Locks attempts to open the door. But it is locked. Seeing that the bear has just emerged into the clearing, and is now some 20 yards away, Locks, a martial arts expert, kicks down the door and enters the cabin. She then says to Man: "What kind of person are you? I'm about to be killed by a giant black bear, and you tell me to go away. Do you have a shotgun?"

"I do," replies Man, "but I'm sure not gonna let a CIA agent like you use it!" Man then runs into a corner and stands between Locks and his shotgun, which is hanging on the wall. Seeing the gun, Locks races towards it. She attempts to shove Man out of the way, but he resists, and strikes her. She then flips him over her head, and grabs the gun. Man then tackles her, driving her head into the floor. Just then, a fierce growl is heard as the bear appears at the cabin's window. Dazed, Locks staggers to her feet. Man reaches for the gun. Locks moves the gun out of his reach, and then fires a single bullet at him. She strikes him in the right arm, causing him to howl with pain, and then drop to the floor, unconscious. Locks then turns and fires on the bear, killing it.

Locks then begins to panic. The cabin has no phone. She wants to run for help, but she knows of no "civilization" less than two miles away, and she fears that Man may regain consciousness and pursue her. So she breaks one of his legs, then strides briskly away.

Please discuss all intentional tort claims that Locks and Man might have against each other. Be sure to include a full discussion of all defenses, as well.

Suggested Approaches to Questions on Torts Midterm: Fall, 1996

1. Battery is the intentional, unauthorized touching of another. Ordinarily, deliberately striking another with a tennis ball would be unauthorized. Here, at least the first six (of 7) strikes were deliberate.

As to the first five, the facts state that Connors "aim[s] every ball directly at McEnroe."

As to the sixth, Connors seems deliberate, too, since the facts say that he was "undaunted" by the warning, and "strikes Mc again."

The possible defense here would be consent -- one who plays a particular sport consents to all risks that inhere in that sport, even those involving intentional conduct.

Is intentionally striking another player within the scope of the consent? There is no rule against it, but that is not the only indicium of the scope of permissible conduct. It is a breach of tennis etiquette, and the referee's discretion to penalize it as such suggests strongly that it does exceed the scope of consent.

Connors will argue that he's simply employing good tennis strategy, and point to the absence of a specific rule. He'll say that his actions were just "part of the game."

This position becomes harder to defend after the warning, because that warning can be construed as the referee's official position that the contact is impermissible. So he might be liable for an offensive battery for that contact.

(Since the facts do not specify any injury, this would be an offensive battery only, presumably.)

The final "strike" would probably be treated the same as the sixth one (after the warning), and therefore arguably a no-consent case, except that the facts aren't clear as to whether that contact was intentional. The facts state only that Connors "rifles the ball...back across the net," which is what you'd expect him to do. So it's not clear that he intended to hit McEnroe.

If he did so intend, McEnroe recovers for all injuries under a harmful battery theory, even if Connors could not have predicted the severity of the harm he caused.

On the other hand, if there's no intent, the prima facie case collapses, as to this final strike.

2. "One who fraudulently makes a misrepresentation of fact..." Since Creon presented "a balanced picture of merits and risks" of the venture about which he was advising her, the only question is whether he had a duty to disclose his financial stake in Unilang.

The general rule is that one has no duty to disclose, since the buyer should be on notice that the seller is attempting to look out for his own financial interests. But that changes where there's a fiduciary relationship between the parties. Given the long-standing rel'ship between Creon and Antigone, he might well have a duty to disclose his financial stake in the venture to her.

He might also be liable, even if the court didn't think this was a fiduciary relationship, because the undisclosed stake *could* be considered "a fact basic to the transaction," thereby compelling disclosure in at least some states.

The next question is whether this fact is material: Would a reasonable person attach importance to it? Well, maybe. She'd argue yes; not that she would necessarily have made a different decision, but that it would have assumed significance in the decision-making process. He'd say not, esp. since he was investing his own money in it, too.

Was his misrep. through non-disclosure "for the purpose of inducing another to act in reliance on it..."? The facts don't say. It could just have been an omission -- in which case no scienter, either -- but this seems very unlikely. His omission seems deliberate, and for the purpose of inducing her to rely on his independence, and thereby to be at least likelier to invest.

It doesn't matter that he "believes the company has great promise," so that he seems to have her best interests at heart. That's for her to decide, NOT him.

Is he "liable for pecuniary loss caused to [her]"? Hard to say. She might have gone ahead and invested even if he had made the disclosure she' claiming was required. It's important to note that she was satisified that the company was a sound investment on the merits, and was did not always follow his advice. He'd claim she was a sophisticated investor who would have known "better" that no place any emphasis on his share.

She'd counter by saying that she would have been more vigilant, asked more questions, even declined to invest, had she known of his stake, because now he's no longer the same distinterested third party she's used to dealing with.

Whatever the result above won't change because of her failure to do further investigation. A plaintiff in a fraud action can't be contributorily negligent, and there's no duty to investigate. The only issue would be on her justified reliance, as to which see above.

3. Locks would first sue Man for breach of his duty, arising from necessity, to let her in while she's being pursued by a bear. He could argue that he didn't know that she was really being chased, but it might be held that he had a duty at least to investigate, which the facts stated he did not do. What further duty he might then have had -- to let her in, or not -- is avoided here, since she did break in, anyway.

His suit against her in connection with these first facts would be for trespass to land. She intended to come onto his land, and did so, and is liable for any damage she causes. Her defense of *necessity* is that, because of the peril confronting her, she had the right to seek refuge in his home, and even to use force to do so, if needed: and it *was* needed here because of the bear. BUT one who acts under a situation of necessity must pay for any damage she actually causes. So here, no "technical trespass," but liability would still attach for the destruction of the door.

Once in, she seeks the gun to kill the bear. Whether or not her privilege of necessity would extend this far, allowing her to use the gun, might depend on whether a reasonable person in Man's position would believe Locks needed the gun for the stated purpose, and whether he feared for his own safety if he gave her the gun. If so, she probably doesn't enjoy the privilege.

In any case, he can't probably can't claim insanity in connection with these events. The facts suggest this possibility, since he thought she was a CIA agent, without any basis for such a claim.

Where the issue is his possible battery -- in striking her -- the only Q would be whether he could form the requisite intent to make contact. It seems he could.

[Students note: This next issue is negligence, which we hadn't covered, and therefore should NOT have been part of your answer. I include a discussion because you might find it useful.]

[If the issue is negligence, in not recognizing the duty brought about by necessity, the first issue would be whether the insanity disables him from either appreciating his duty to Locks OR from conforming his conduct to that duty. Hard to say here; simply thinking people are CIA agents may have little effect on his ability to make other rational choices. More facts are needed.

IF the insanity does interfere with his abilities, ask: permanent or temporary. The facts give us no guidance. If it's permanent, insanity has no effect on the standard of reasonable care that otherwise applies. So we're back to whether he acted reasonably.

But if it's temporary insanity, and came without warning, *some* courts would allow this to count as excusing the defendant from conforming his conduct to that of an ordinarily reasonable person. In that case, he might not be liable for his failure to recognize the necessity situation in which Locks was operating.]

Man would next sue Locks for assault and battery.

On the assault claim, he'd argue that he apprehended a harmful or offensive conduct as she raced toward him, as he stood between her and the gun. The intent is easy here; it's at least substantially certain, from her perspective, that he would apprehend imminent contact, and likely that she specifically intended it (to get him to move).

On battery, the contact is strongly implied by the statement "[s]he attempts to shove Man out of the way..." And her intent to do so is clear.

The defense, again, would be necessity: that she needed the gun. See discussion above. Force can be used.
At this point, since she hasn't injured him, no liability, assuming she has the necessity defense -- by now working overtime.

In fact, she could sue him for battery for resisting, and striking her. If she is operating under the necessity privilege, he isn't allowed to resist. He intended contact, and made it.

Insanity defense is unlikely, for reasons developed above.

Self-defense, or defense of property, likely won't work, if she has necessity. If not, of course, it would work, because then she becomes the aggressor, and would be unjustified in her actions. And he appears to be using only enough force to prevent her from getting the gun.

If it's defense of property, of course, he can only use non-deadly force.

But he probably has a reasonable fear for his own safety, too, which is where the self-defense would come in. Then ask: Did he use reasonable force? Probably, but more facts are needed to answer this question.

NEXT, she "flips him over her head, and grabs the gun."
This would be a battery if she doesn't have the necessity defense. In that case, she doesn't enjoy the privilege of self-defense, either, because he would be acting properly in defending himself and his property...
unless he exceeded the force reasonable to defend.

She then claims battery when he "drives her head into the floor." By this time it's difficult to tell who's entitled to do what to whom. Assuming no necessity (see above), the question is whether he acts reasonably in self-defense or defense of property in so doing. This is more force than before, but might well be reasonable under the by-now extreme circumstances.

He grabs for the gun. This could be an assault, for intending an apprehension of contact of something closely ass'd with her person. Again, the issue would be whether he had the right to do this. Necessity or not, he probably does, because of what seems a reasonable fear for his own safety. He's just trying to use self-defense.

Does she have the right to fire at him? It's clearly a battery -- intent and contact obviously est'd -- but does she have a defense.

Necessity wouldn't work, probably, because it doesn't justify this level of force.

What about self-defense? She's using force that can cause death or serious bodily injury at that point, so she can only use such force if she reasonably fears the same from him. By this point, the answer might well be that she does.

Assault, too, but only if he had a moment to anticipate the shot.

Finally, her "decision" to break his leg is a battery, too. This might well be considered serious bodily injury; it's at least close to that line. So the question is whether she reasonably feared for her own safety to the point where this was her only perceived option.

Recall that reasonableness is assessed under the circumstances, which here are extreme. So her conduct, which usually would be a "no brainer" for negligence is maybe closer to the line. Did she really think he could run after her with a broken arm, find her, and do damage? She could also hide or take the gun, but she doesn't know whether he might have another gun around, and no time to check.

No assault because he's unconscious, and therefore unaware of the imminency of contact.

[Had enough?]