

FINAL EXAM

Instructions

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

THIS IS A CLOSED BOOK EXAM! While you are waiting for the exam to begin, be sure that you have written your EXAM NUMBER on EACH bluebook, that you have read these instructions, and that you are otherwise ready to begin.

IMPORTANT: This exam will last THREE HOURS. You should plan on spending AT LEAST 20 minutes reading the questions carefully and outlining your answers on a separate sheet of paper. Before writing your answers, REREAD each question to be sure you haven't missed anything.

DOUBLE-SPACE your answers in the bluebook.

Use SEPARATE BLUEBOOKS for EACH QUESTION. Label each bluebook according to each question and, if necessary, book number, e.g., "Question 1, Book 1"; "Question 1, Book 2"; "Question 2"; etc. When you are finished, turn to the back cover of the first bluebook, and place the second, third, fourth, etc. bluebook in order inside the end of the first bluebook, so the whole makes a single package. Then put it in the box at the front.

You are welcome to use abbreviations, but indicate what they are, e.g., 'Andropov ("A") would be sued by Brezhnev ("B"), alleging that A would be liable to B ... !'

PLEASE IGNORE issues relating to legal causation; assume that any but-for cause of an injury is also a proximate cause of that injury.

Plan on spending at least 15 minutes at the end PROOFREADING your answers. You may not write ANOTHER WORD after time is called.

A STATUTORY APPENDIX is provided that gives the law of this jurisdiction, the State of Linden, on some issues. If no law is specified on the point you are interested in, please comment on the possible alternatives.

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.

You may KEEP your copy of the exam questions if you wish.

REMEMBER THE HONOR CODE! Don't identify yourself.

DOUBLE SPACE!

DOUBLE SPACE!

DOUBLE SPACE!

GOOD LUCK!!!

QUESTION 1 (85 points)

Joe Bertagnolli was employed as an underground miner at General Chemical Corporation's trona¹ mine in Sweetwater County, Linden. On November 13, 2000, Bertagnolli was instructed by his section foreman and direct supervisor, John Westbrook, to shovel ore rubble in the west end of the shuttle belt area of the mine also known as the 702 area. Bertagnolli had worked at the mine for about two years but had never before worked in the shuttle belt area.

The shuttle belt moves raw ore from the level of the mine on which mining occurs to lower levels where other equipment moves it to the surface. It resembles an open rail car with a long, continuous belt on top and travels up and down a track approximately forty to fifty feet in length by means of a steel cable attached to both ends of the car. The cable makes a large loop around several pulley wheels called "sheave wheels." The cable and sheave wheels are approximately twelve inches above the track. The cable runs through an electric motor called a "tugger" which can pull the shuttle belt in either direction on the rail track. An operator controls the movements of the shuttle belt from a level of the mine below where the shuttle belt is located. By maneuvering the shuttle belt back and forth, the operator aligns it over bins which receive ore from the bottom of the shuttle belt and then transfer the ore to a set of feeders that move it to another series of belts and on to the surface. In the east end, workers are protected from the movements of the steel cable by a series of steel walkway plates positioned over the cable. There is also a steel guardrail in the east end to keep workers away from the shuttle belt and its moving parts. On the west end, however, the steel cable is exposed, the sheave wheels are unguarded, no steel plates are in place over the cables, and there is very little clearance between the shuttle belt and the walls of the mine. Workers in the west end are unprotected from the dangers presented by the shuttle belt and its moving parts.

When Bertagnolli was instructed to shovel the shuttle belt area clean, he and Westbrook were standing in the west end. Bertagnolli asked whether he was expected to do the work while the shuttle belt was operating, and Westbrook responded in the affirmative. Bertagnolli then requested the belt be "locked out" so it could not be turned on while he was in harm's way. Westbrook left to discuss the matter with Bill Louderback, the shift supervisor. The supervisors came back together, and Louderback advised Bertagnolli the belt would not be locked out. Bertagnolli stated he would not work in the area unless the belt was locked out, and Louderback told him, if he did not do the job, he could be fired. Bertagnolli asked that the union steward be contacted to resolve the matter. Louderback instructed Westbrook to notify the union steward, and then they both left the area. Bertagnolli, believing he could be fired for refusing to work, started to shovel the ore debris in the west end of the shuttle belt area while he waited for the union steward to arrive.

John "Bud" Dolce, one of Bertagnolli's crew mates, walked by the shuttle belt area a couple of hours later. He called to Bertagnolli and told him he was shoveling in "an unsafe area that needed to be locked out." Bertagnolli told Dolce he had been ordered by Louderback to do this job and he had requested a union steward. About an hour or so later, while Bertagnolli was working approximately five feet behind the rail car, the car started to travel back towards him, and the cable beneath his feet began to move. He threw his shovel to the left and tripped when he stepped back to grab his wheelbarrow. He stuck his right foot behind him to catch his balance, and his boot caught in the pinch point between one of the steel cables and the sheave wheel. The wheel completely severed the back portion of Bertagnolli's right foot. Over the following two years, Bertagnolli

1. Trona is a mineral, $\text{Na}_3(\text{HCO}_3)(\text{CO}_3)\cdot 2\text{H}_2\text{O}$, hydrated sodium bicarbonate carbonate, which is used in glass container manufacture.

underwent eleven surgeries to repair his foot. In the end, these efforts were unsuccessful, and in October of 2002 his right leg was amputated just below the knee.

You are a lawyer with a personal injury firm. Joe has made an appointment to see you. Extensive interviews have been conducted by your legal assistant, and a memo containing the following information was prepared for your review:

- The shuttle belt was purchased by General Chemical from Applied Electronics Corporation ("AEC"), located in St. Charles, Iowa. After General Chemical made inquiries with AEC and described what they needed, AEC sent a bid to General Chemical for the "car," the sheave wheels, the cable, and the electrical motor, for a total of \$243,000. General Chemical accepted the bid and the items were delivered in 1986. General Chemical then constructed the rail track and installed the equipment. It has been used almost continuously since 1986.
- In June 1992 AEC sent a package of materials to its customers, including General Chemical, that described its latest products and services but also contained a page entitled "Safety Update." On this page AEC recommended "lock-out" procedures whenever employees were working in or around the equipment.
- The eleven surgeries were performed by a doctor with the Linden State Hospital. Before the amputation, Bertagnolli made an appointment with another doctor to get a "second opinion." The second doctor reviewed Bertagnolli's medical records and advised him that he had received excellent care and that the severity of his original injury made it impossible to save his right foot.

Assume for purposes of your analysis that a jury would award damages of \$1,000,000 if liability were established. Please prepare an analysis of the prospects for Bertagnolli to receive tort compensation for his injuries.

QUESTION 2 (50 points)

On March 22, 2001, Richard Hoppal was driving a 1998 Dodge Caravan westbound on Linden Highway 34 in Albany County, Linden (also known as Sybille Canyon Road). Decedent Jean Hoppal and Michelle Hoppal, Anita Hoppal and Greg Hoppal were passengers in the vehicle. Ahead of the Hoppals on this highway, and traveling in the same direction, Ernest Romero, acting within the scope and course of his employment with the Linden State Highway Department, was operating a state snowplow plowing snow from the road.

As the two vehicles proceeded westbound, the Hoppal van began to pass the snowplow in an authorized passing zone. To allow additional room for Hoppal to pass, Mr. Romero pulled the snowplow toward the right shoulder. The snowplow's blade, still engaged with the road, dug into the asphalt, causing the snowplow to rotate and flip over onto its side into the traffic lane of the passing Hoppal van. The van collided with the snowplow, causing Jean Hoppal's death and serious injuries to the driver and the other passengers.

You represent the State of Linden. Please evaluate its potential liability. Assume that, if a jury were to assess the damages for each plaintiff, they would find that the plaintiffs suffered damages in the following amounts:

Estate of Jean Hoppel: \$600,000

Richard Hoppal: \$400,000

Michelle, Anita, and Greg Hoppal: \$200,000 each.

SELECTED STATUTES OF THE STATE OF LINDEN

LINDEN STATUTES

LEGISLATURE

TITLE 1. Code of Civil Procedure

Chapter 1. General Provisions as to Civil Actions

§ 1-1-109 Comparative fault.

(a) As used in this section:

(i) "Actor" means a person or other entity, including the claimant, whose fault is determined to be a proximate cause of the death, injury or damage, whether or not the actor is a party to the litigation;

(ii) "Claimant" means a natural person, including the personal representative of a deceased person, or any legal entity, including corporations, limited liability companies, partnerships or unincorporated associations, and includes a third party plaintiff and a counterclaiming defendant;

(iii) "Defendant" means a party to the litigation against whom a claim for damages is asserted, and includes third party defendants. Where there is a counterclaim, the claimant against whom the counterclaim is asserted is also a defendant;

(iv) "Fault" includes acts or omissions, determined to be a proximate cause of death or injury to person or property, that are in any measure negligent, or that subject an actor to strict tort or strict products liability, and includes breach of warranty, assumption of risk and misuse or alteration of a product;

(v) "Injury to person or property," in addition to bodily injury, includes, without limitation, loss of enjoyment of life, emotional distress, pain and suffering, disfigurement, physical or mental disability, loss of earnings or income, damage to reputation, loss of consortium, loss of profits and all other such claims and causes of action arising out of the fault of an actor;

(vi) "Wrongful death" means that cause of action authorized by Linden statute to recover money damages when the death of a person is caused by the fault of an actor such as would have entitled the party injured to maintain an action to recover damages if death had not ensued.

(b) Contributory fault shall not bar a recovery in an action by any claimant or the claimant's legal representative to recover damages for wrongful death or injury to person or property, if the contributory fault of the claimant is not more than fifty percent (50%) of the total fault of all actors. Any damages allowed shall be diminished in proportion to the amount of fault attributed to the claimant.

(c) Whether or not the claimant is free of fault, the court shall:

(i) If a jury trial:

(A) Direct the jury to determine the total amount of damages sustained by the claimant without regard to the percentage of fault attributed to the claimant, and the percentage of fault attributable to each actor; and

(B) Inform the jury of the consequences of its determination of the percentage of fault.

(ii) If a trial before the court without jury, make special findings of fact, determining the total amount of damages sustained by the claimant without regard to the percentage of fault attributed to the claimant, and the percentage of fault attributable to each actor.

(d) The court shall reduce the amount of damages determined under subsection (c) of this section in proportion to the percentage of fault attributed to the claimant and enter judgment against each defendant in the amount determined under subsection (e) of this section.

(e) Each defendant is liable only to the extent of that defendant's proportion of the total fault determined under paragraph (c)(i) or (ii) of this section.

Chapter 39. Government Claims

§ 1-39-104 Granting immunity from tort liability; liability on contracts; exceptions.

(a) A governmental entity and its public employees while acting within the scope of duties are granted immunity from liability for any tort except as provided by L.S. § 1-39-105 through § 1-39-112 and limited by L.S. § 1-39-120 and L.S. § 1-39-121. Any immunity in actions based on a contract entered into by a governmental entity is waived except to the extent provided by the contract if the contract was within the powers granted to the entity and was properly executed and except as provided in L.S. § 1-39-121. The claims procedures of L.S. § 1-39-113 apply to contractual claims against governmental entities.

(b) When liability is alleged against any public employee, if the governmental entity determines he was acting within the scope of his duty, whether or not alleged to have been committed maliciously or fraudulently, the governmental entity shall provide a defense at its expense.

(c) A governmental entity shall assume and pay a judgment entered under this act against any of its public employees, provided:

(i) The act or omission upon which the claim is based has been determined by a court or jury to be within the public employee's scope of duties;

(ii) The payment for the judgment shall not exceed the limits provided by L.S. § 1-39-118; and

(iii) All appropriate appeals from the judgment have been exhausted or the time has expired when appeals may be taken.

(d) A governmental entity shall assume and pay settlements of claims under this act against its public employees in accordance with L.S. § 1-39-115, § 1-41-106 or § 1-42-107.

§ 1-39-105 Liability; operation of motor vehicles, aircraft and watercraft.

A governmental entity is liable for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of any motor vehicle, aircraft or watercraft.

§ 1-39-106 Liability; buildings, recreation areas and public parks.

A governmental entity is liable for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, recreation area or public park.

§ 1-39-107 Liability; airports.

(a) A governmental entity is liable for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of airports.

(b) The liability imposed pursuant to subsection (a) of this section does not include liability for damages due to the existence of any condition arising out of compliance with any federal or state law or regulation governing the use and operation of airports.

§ 1-39-108 Liability; public utilities.

(a) A governmental entity is liable for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of public utilities and services including gas, electricity, water, solid or liquid waste collection or disposal, heating and ground transportation.

(b) The liability imposed pursuant to subsection (a) of this section does not include liability for damages resulting from bodily injury, wrongful death or property damage caused by a failure to provide an adequate supply of gas, water, electricity or services as described in subsection (a) of this section.

§ 1-39-109 Liability; medical facilities.

A governmental entity is liable for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation of any public hospital or in providing public outpatient health care.

§ 1-39-110 Liability; health care providers.

(a) A governmental entity is liable for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of health care providers who are employees of the governmental entity, including contract physicians who are providing a service for state institutions, while acting within the scope of their duties.

(b) Notwithstanding L.S. § 1-39-118(a), for claims under this section against a physician employed by the state of Linden based upon an act, error or omission occurring on or after May 1, 1988, the liability of the state shall not exceed the sum of one million dollars (\$1,000,000.00) to any claimant for any number of claims arising out of a single transaction or occurrence nor exceed the sum of one million dollars (\$1,000,000.00) for all claims of all claimants arising out of a single transaction or occurrence.

§ 1-39-112 Liability; peace officers.

A governmental entity is liable for damages resulting from tortious conduct of peace officers while acting within the scope of their duties.

§ 1-39-117 Jurisdiction; appeals; venue; trial by jury; liability insurance.

(a) Original and exclusive jurisdiction for any claim under this act shall be in the district courts of Linden. Appeals may be taken as provided by law.

(b) Venue for any claim against the state or its public employees pursuant to this act shall be in the county in which the public employee resides or the cause of action arose or in Laramie county. Venue for all other claims pursuant to this act shall be in the county in which the defendant resides or in which the principal office of the governmental entity is located.

(c) The right to a trial by jury is preserved.

(d) If a governmental entity has elected to purchase liability insurance under this act, the court, in a trial without a jury, may be advised of the insurance.

§ 1-39-118 Maximum liability; insurance authorized.

(a) Except as provided in subsection (b) of this section, in any action under this act, the liability of the governmental entity, including a public employee while acting within the scope of his duties, shall not exceed:

(i) The sum of two hundred fifty thousand dollars (\$250,000.00) to any claimant for any number of claims arising out of a single transaction or occurrence; or

(ii) The sum of five hundred thousand dollars (\$500,000.00) for all claims of all claimants arising out of a single transaction or occurrence.

(b) A governmental entity is authorized to purchase liability insurance coverage covering any acts or risks including all or any portion of the risks provided under this act. Purchase of liability insurance coverage shall extend the governmental entity's liability as follows:

(i) If a governmental entity has insurance coverage either exceeding the limits of liability as stated in this section or covering liability which is not authorized by this act, the governmental entity's liability is extended to the coverage;

(ii) Notwithstanding paragraph (i) of this subsection, if a governmental entity acquires coverage in an amount greater than the limits specified in this section for the purpose of protecting itself against potential losses under a federal law and if the purpose of the coverage is stated as a part of or by an amendment to the insurance policy, the increased limits shall be applicable only to claims brought under the federal law.

(c) In addition to the procurement of insurance under subsection (b) of this section a local governmental entity may:

(i) Establish a self-insurance fund against the liability of the governmental entity and its officers and employees;

(ii) Join with other governmental entities, by joint powers agreements under L.S. § 16-1-102 through § 16-1-108, or otherwise, to pool funds and establish a self-insurance fund or jointly purchase insurance coverage. Pooled funds may be deposited with the state treasurer for disbursement as participating governmental entities direct or may be deposited as provided by the terms of the joint powers agreement;

(iii) Repealed by Laws 1981, ch. 142, S 2.

(iv) Pay the judgment or settlement, with interest thereon, in not to exceed ten (10) annual installments in cases of undue hardship and levy not to exceed one (1) mill per year on the assessed value of the governmental entity for such purpose;

(v) Enter into contracts with the general services division of the department of administration and information for the payment of assessments by the local government in such amounts as determined by the division to be sufficient, on an actuarially sound basis, to cover:

(A) The potential liability, or any portion of potential liability, of the local government and its public employees as provided by this act;

(B) Costs of administration;

(C) Payment by the division of claims against the local government and its public employees acting within the scope of their duties which have been settled or reduced to final judgment.

(d) No judgment against a governmental entity shall include an award for exemplary or punitive damages, for interest prior to judgments or for attorney's fees.

(e) Except as hereafter provided, no judgment authorized by this act may be enforced by execution or attachment of property of a governmental entity but shall be paid only as authorized by this section and L.S. § 1-39-113. A judgment authorized by this act may be enforced by execution or attachment of the property of a governmental entity to the extent coverage of the liability has not been obtained under subsection (b) or (c) of this section or L.S. § 1-39-115 unless the judgment is otherwise satisfied by the governmental entity.

(f) The liability imposed by L.S. § 1-39-105 through § 1-39-112 may include liability for property damage in an amount less than five hundred dollars (\$500.00) in cases in which no personal injury or death resulted, but only under the following conditions:

(i) A property damage claim may be paid at the discretion of the governmental entity:

(A) In the case of the state, the director of the department of administration and information or an employee designated in writing by the director shall decide whether the claim will be paid;

(B) In the case of a local governmental entity, the local governmental entity shall appoint an official who shall decide whether the claim will be paid.

(ii) The decision of whether the property damage claim will be paid shall be based on finding that:

(A) The act was performed by an employee of the state or the local governmental entity;

(B) The act occurred while the employee was acting within the scope of his employment duties;

(C) The employee acted negligently by breaching a duty or by failing to act like a reasonable person; and

(D) The negligent act proximately caused the property damage at issue.

(iii) Property damage claims against the state shall be paid from the self-insurance account created by L.S. § 1-41-103 except that claims against the department of transportation may be paid from nonrestricted highway funds. Property damage claims against a local governmental entity shall be paid only to the extent the local governing body has appropriated monies for that purpose. There is no obligation on the state legislature or the local governing body to make any appropriation for payment of property damage claims;

(iv) If the director of the department of administration and information or the local government official determines there may be insufficient monies to pay all of the claims made during the year, then the director or official may delay paying the claims until close of the year at which time available monies shall be prorated among those entitled to payment at an amount less than one hundred percent (100%);

(v) The decisions of the director of the department of administration and information or of the local government official are final and are not subject to administrative or judicial review.

§ 1-39-120 Exclusions from waiver of immunity.

(a) The liability imposed by L.S. § 1-39-106 through § 1-39-112 does not include liability for damages caused by:

- (i) A defect in the plan or design of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area;
- (ii) The failure to construct or reconstruct any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area; or
- (iii) The maintenance, including maintenance to compensate for weather conditions, of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area.