

FALL 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 and can be read from front to back. 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 ... '.

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

The exam covers the subjects covered in Chapters 1-3 of the casebook. Do not address any issues beyond that point, such as contributory fault, governmental liability, the liability of defendants to one another, or other issues.

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!
GOOD LUCK!!!

DOUBLE SPACE!

QUESTION 1 (80 points)

On the evening of May 21, 2004, Steven Driscoll, aged 34, began drinking at a bar known as the Shadows, where he consumed six mixed drinks over a period of four hours, and ate a hamburger, potato chips and popcorn. Sometime between 10:00 pm and 10:30 pm Driscoll received a call from a business acquaintance, Charlie Green, who asked to meet him at the Pub. Green (aged 45) was the sales manager of a printing company, and Driscoll was employed by a municipal bond issuer that occasionally utilized the services of Green's employer. At the time he arrived at the Pub, Green had not had anything to drink. Green ordered a pitcher of beer, and drank most of the beer, although Driscoll had between one and two glasses. On the night of May 21, the Pub was almost full, and the normal crew of three waitresses was on hand. The Pub checked ID of anyone who appeared thirty or younger. None of the waitresses has any recollection of serving Green or Driscoll, but Green has stated that Driscoll did not appear intoxicated at the time he drank the beer.

At about midnight Driscoll left the Pub and began driving south Route 44. At the same time, Sarah Craig was a pedestrian on the west shoulder of Route 272 near its intersection with Route 44 in Norfolk, Linden. Driscoll's vehicle drifted from the roadway to the shoulder, and before he could correct it, his vehicle struck Sarah Craig. Within a few minutes of the collision, Valerie P. Craig, the mother of Sarah Craig, and Samuel Craig, the brother of Sarah Craig, arrived at the scene of the accident and observed Sarah Craig lying unconscious at the side of the road, bleeding from a head wound. Valerie Craig called 911 and paramedics arrived on the scene within 10 minutes. While she was waiting, Valerie held a folded handkerchief to the temple of Sarah to prevent further blood loss. As soon as the paramedics arrived they placed Sarah on a gurney and placed her in the ambulance for transport to the Good Samaritan Hospital. En route to the hospital, Craig's pulse was no longer detectable, and by the time she arrived at the hospital she was pronounced dead.

Following the accident, a breathalyzer test was administered and Driscoll's blood alcohol content was determined to be .11%, which is .03% above the legal limit. Driscoll had previously lost his license to drive as a result of a conviction for driving under the influence, and he was uninsured at the time of the accident.

You work for a law firm that represents the Pub. Another associate in the office has been assigned the task of assessing the potential damages from the wrongful death case brought on behalf of Sarah Craig. Your assignment is to analyze the liability that the Pub could face for tort claims, aside from wrongful death, that could be brought by Valerie Craig and/or Samuel Craig.

QUESTION 2 (55 points)

On July 18, 2003, Dwayne Nelson was released from prison. On July 24, 2003, after ingesting a large amount of cocaine, Dwayne stood in the middle of a busy intersection in Springfield, Linden, and fired a loaded gun into the air and at passing motorists. Security officers from the Xomox Corporation, located nearby, were alerted by employees who could observe Nelson from the Xomox building, and after calling 911 the security officers headed toward the intersection to see what they could do about Nelson. One of the security officers was able to approach Dwayne and was able to subdue him. Dwayne was handcuffed with his hands behind his back and placed on the ground. He then began thrashing about, and the security officers laid the still-handcuffed Dwayne face-down on the ground, and executed a

"total appendage restraint procedure" ("TARP").¹ By the time the officers finished, Dwayne was unconscious. When they rolled him over, he was no longer breathing and the paramedics who came to the scene were unable to revive him. The entire episode was captured on videotape.

An autopsy was performed on Dwayne. The medical examiner who conducted the autopsy noted that Nelson had an enlarged heart, and concluded that Dwayne's sudden death resulted from "ischemic heart disease" due to "congenital aberrant right coronary artery origin," with a contributing factor of cocaine use, and that "restraint procedures did not play a significant or contributory role in his death." On the other hand, Dr. John Cooper, a forensic pathologist hired by the family of Dwayne Nelson, concluded that Dwayne "died as a result of positional asphyxia": Following are excerpts from his report:

For one thing he is face down in ... a prone position [and, as the videotape shows,] his face is against the ground. And at one point one of the officers has a knee on his head.... So there is probably some small element[] in this case of actual obstruction of the airways.... [T]hat is not the main problem here. [¶] The main problem ... is that the chest has to expand or we can't breathe. And there [are] several elements of chest expansion. And in this case, there is a big need for breathing because the subject is very agitated, worked up, and he is burning a lot of energy. [¶] ... The diaphragm--when we breathe in, the diaphragm moves down ... to create kind of a vacuum and the air comes into the lungs. But when we are excited and we are working and fighting for air, then we also use what are known as the intercostal muscles which are the muscles between the ribs. So between the diaphragm and the costal muscles, we create this bigger space that air's being flow[n] into and flown out to.

In this kind of mechanical asphyxia, the problem is, first of all, the prone position makes it a little bit difficult, and then you've got some degree of weight of the officers [with] at least one of them ... kneeling on his chest [*sic*] and that compromises the ability of the chest to expand by action of the intercostal muscles. We are also dealing with a fairly large person with ... quite a bit of contents [in] his abdominal cavity which tend to, if you are in a prone position, tends to push the diaphragm up and not allow the diaphragm to come down. [¶] ...

Being forced down in a prone position pushes ... all contents up further against the diaphragm. So this is really our main problem, and this is the primary problem in that the chest can't expand diaphragmatically and it can't expand with intercostal muscle action. Finally, then we have the hands behind, and then we are bringing the legs up locking and tying them to the hands in this hog-tying procedure which, by immobilizing the shoulders in this way, it just accentuates these other elements of the chest not being able to expand. [¶] And that is why the hog-tying procedure is so dangerous because it really locks in that fixedness of the chest cavity. And so this is what positional asphyxia is...."

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"Tarping is commonly called hog-tie where they tie their wrists and ankles together to restrain them," that is, "when you utilize a leather strip with hooks on it to secure their wrists and ankles."

When his deposition was taken, Dr. Cooper testified that Dwayne had a mildly enlarged heart, but disagreed with the opinion expressed in the autopsy report that Dwayne had died as the result of that coronary anomaly ("I don't think it really played a factor"). Dr. Cooper also testified that Dwayne had an artery anomaly, but opined that it "didn't play a factor" in causing his death. As Dr. Cooper put it, "we have a known cause of death. It is asphyxia.... [¶] ... It is the equivalent to having a situation where somebody is being strangled by somebody and then they die, and the autopsy shows they have coronary artery disease and then concluding that they died of coronary artery disease. [¶] Well, in fact, they were being strangled at the time they died." Finally, Dr. Cooper testified that Dwayne was intoxicated by cocaine at the time of his arrest, but opined that the cocaine did not contribute to the cause of death.

You work for the corporate counsel employed by Xomox. Your office has received a letter from a lawyer representing Mr. and Mrs. Nelson demanding \$500,000 to settle their claim against Xomox Corporation. Background investigation reveals the following: Dwayne was born in 1957, in Chicago. In 1969, when Dwayne was about 12 years old, Mr. and Mrs. Nelson separated. In 1970, Mrs. Nelson and Dwayne moved to Tennessee. When he was 18, Dwayne left Mrs. Nelson's home and ended up in California. Dwayne did not see either of his parents at any time during the 20 years preceding his death. Indeed, at the time of Dwayne's death in 1998, neither Mr. nor Mrs. Nelson knew his address or telephone number. They did not know he had been incarcerated for substantial periods of time, did not know about his medical problems, did not know about his drug addiction, could not name any of his friends, and did not receive any financial support from him. Dwayne's prison records show that he had at various times over a period of eight or ten years told prison employees that he had one, or sometimes two, or sometimes three children. However, other prison records to show that Dwayne had at other times told various prison officials that he never married and did not have any children.

After consulting with security experts, your superiors have concluded that the security officers' restraint procedures were probably negligent. They would like you to analyze, assuming a jury would find that Xomox was negligent in restraining Nelson, how they should respond to the settlement demand. Please provide your legal analysis.

SELECTED STATUTES OF THE STATE OF LINDEN
ANNOTATED LINDEN CODES
CODE OF CIVIL PROCEDURE
PART 2. OF CIVIL ACTIONS
TITLE 3. OF THE PARTIES TO CIVIL ACTIONS
CHAPTER 4. EFFECT OF DEATH
ARTICLE 3. DECEDENT'S CAUSE OF ACTION

§ 377.30. Surviving cause of action; person to whom passes; commencement of action

A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest, subject to Chapter 1 (commencing with Section 7000) of Part 1 of Division 7 of the Probate Code, and an action may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest.

§ 377.34. Damages recoverable

In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.

CHAPTER 4. EFFECT OF DEATH
ARTICLE 6. WRONGFUL DEATH

§ 377.60. Persons with standing

A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:

- (a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the parents of the decedent.
- (b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.
- (c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.
- (d) This section applies to any cause of action arising on or after January 1, 1993.
- (e) The addition of this section by Chapter 178 of the Statutes of 1992 was not intended to adversely affect the standing of any party having standing under prior law, and the standing of parties governed by that version of this section as added by Chapter 178 of the Statutes of 1992 shall be the same as specified herein as amended by Chapter 563 of the Statutes of 1996.
- (f) For the purpose of this section, "domestic partners" has the meaning provided in § 297 of the Family Code.

§ 377.61. Damages recoverable

In an action under this article, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under § 377.34. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action.

ANNOTATED LINDEN CODES
TITLE 30. INTOXICATING LIQUORS
CHAPTER 545. LIQUOR CONTROL ACT
ARTICLE 7. PROHIBITED ACTS, PENALTIES AND PROCEDURE

§ 30.102. Dram Shop Act; liquor seller liable for damage by intoxicated person

If any person, by such person or such person's agent, sells any alcoholic liquor to an intoxicated person, and such purchaser, in consequence of such intoxication, thereafter injures the person or property of another, such seller shall pay just damages to the person injured, up to the amount of two hundred fifty thousand dollars, or to persons injured in consequence of such intoxication up to an aggregate amount of two hundred fifty thousand dollars, to be recovered in an action under this section.