

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. Plan on spending at least 20 MINUTES reading the questions and outlining 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.

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 (65 points)**

On July 28, 2002, Dr. Phillip Reynolds, his wife Lucy Reynolds, and their three-year-old son Dillon visited Surplus Sales, a "warehouse" discount store. The nature of Surplus Sales's business is that customers will view items in one of Surplus Sales's warehouses, help themselves to such items as they may desire, and transport such items to the checkout area of the facility.

Phillip was looking at mirrors that were on display. The display consisted of multiple mirrors stacked vertically, one against the other and leaning at a slight angle against a two-by-four support post. Each mirror weighed thirty pounds. After he viewed the mirror in the front of the stack, he stood it upright in order to view the mirror behind it, and kept doing so as he got deeper and deeper into the stack. As Dr. Reynolds reached for and erected another group of mirrors, the bottom of these mirrors slipped and crashed against the other group of mirrors Dr. Reynolds was already steadying. The force of the crash caused the group of mirrors Dr. Reynolds was steadying to fall over onto Dr. Reynolds and Dillon, who was standing at Dr. Reynolds's feet. Dr. Reynolds sustained injuries to his back, knees and hand. Dillon, while under the mirrors, stopped breathing and lost consciousness. Mrs. Reynolds tried to remove the stack of mirrors and was unable to. She summoned the owner, D.S. Jones, who along with two other men removed Dillon and Dr. Reynolds from beneath the stack of mirrors.

Once Dillon was pulled from beneath the mirrors, Mrs. Reynolds successfully resuscitated him and he was taken to the hospital where he received emergency medical attention. At one point, Dillon lost kidney function for approximately twenty-four hours, but kidney function was ultimately restored. Both Dr. and Mrs. Reynolds sustained multiple lacerations as a result of the accident.

You work for a personal injury law firm that received a phone call from Dr. Reynolds describing the previous events. A partner in the law firm has calculated that, if liability were imposed on any defendant, the damages assessed by the jury would be in the following amounts:

Dr. Reynolds: \$300,000

Mrs. Reynolds: \$200,000

Dillon Reynolds: \$500,000

Please provide an assessment of the Reynolds' prospects for a tort recovery.

**QUESTION 2 (70 points)**

On May 17, 2003, Jack Walker complained to his co-workers about abdominal and chest pains. Walker persuaded a fellow employee to take him to the emergency room of the Linden State Hospital, where he was examined by the nursing staff and by Dr. Simon Lee. At that time Lee was a second-year medical resident specializing in internal medicine. Walker was examined and a history was taken. Walker's vital signs were measured; an intravenous injection was given, and blood samples, a chest x-ray and an EKG (electrocardiogram) were obtained. Walker was also connected to a cardiac monitor. He was observed for several hours. Walker was then released from the emergency room and was then taken to his mother's house. Later that evening Walker died from a perforated ulcer and peritonitis.

You work for the state attorney general, who has received a demand letter from Judith Krenz, an attorney representing Mr. Walker's estate. In her letter Krenz states that she has consulted a specialist in internal medicine who faults the Hospital's treatment of Walker in the following respects: (1) negligently hemolyzing Mr. Walker's blood specimen,<sup>1</sup> (2) recording an erroneous blood pressure of zero for Mr. Walker at the time of admission, (3) failing to take Mr. Walker's blood pressure at the time of admission, (4) failing to obtain and test a non-hemolyzed blood specimen, and (5) failing to properly monitor fluid therapy administration. The letter further analyzes Linden's wrongful death statute and claims that the beneficiaries of the estate would be entitled to a total of \$1.2 million in damages.

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1. Hemolysis is the breakdown of red blood cells.

Your supervising attorney in the office is preparing a response to Krenz, and would like your analysis of the State's exposure. Ignoring any flaws in Krenz's characterization of the wrongful death statute or how it would apply to this case, how would you respond to the other issues in the case?

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SELECTED STATUTES OF THE STATE OF LINDEN

LINDEN STATUTES AND CODES ANNOTATED  
CIVIL PRACTICE AND REMEDIES CODE  
TITLE 5. GOVERNMENTAL LIABILITY  
CHAPTER 101. TORT CLAIMS  
SUBCHAPTER B. TORT LIABILITY OF GOVERNMENTAL UNITS

**§ 101.021. Governmental Liability**

A governmental unit in the state is liable for:

- (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
  - (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
  - (B) the employee would be personally liable to the claimant according to Linden law; and
- (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Linden law.

**§ 101.022. Duty Owed: Premise and Special Defects**

(a) If a claim arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property, unless the claimant pays for the use of the premises.

(b) The limitation of duty in this section does not apply to the duty to warn of special defects such as excavations or obstructions on highways, roads, or streets or to the duty to warn of the absence, condition, or malfunction of traffic signs, signals, or warning devices.

**§ 101.023. Limitation on Amount of Liability**

(a) Liability of the state government under this chapter is limited to money damages in a maximum amount of \$250,000 for each person and \$500,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property.

(b) Except as provided by Subsection (c), liability of a unit of local government under this chapter is limited to money damages in a maximum amount of \$100,000 for each person and \$300,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property.

(c) Liability of a municipality under this chapter is limited to money damages in a maximum amount of \$250,000 for each person and \$500,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property.

(d) Except as provided by § 78.001, liability of an emergency service organization under this chapter is limited to money damages in a maximum amount of \$100,000 for each person and \$300,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property.

**§ 101.024. Exemplary Damages**

This chapter does not authorize exemplary damages.

**§ 101.025. Waiver of Governmental Immunity; Permission to Sue**

(a) Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter.

(b) A person having a claim under this chapter may sue a governmental unit for damages allowed by this chapter.

**§ 101.026. Individual's Immunity Preserved**

To the extent an employee has individual immunity from a tort claim for damages, it is not affected by this chapter.

If a claimant's injury or death arises from an employee's conduct while in the course and scope of employment, then a determination that such conduct is subject to sovereign immunity also shields the employee from any personal liability from injury so caused.

**§ 101.027. Liability Insurance**

(a) Each governmental unit other than a unit of state government may purchase insurance policies protecting the unit and the unit's employees against claims under this chapter. A unit of state government may purchase such a policy only to the extent that the unit is authorized or required to do so under other law.

(b) The policies may relinquish to the insurer the right to investigate, defend, compromise, and settle any claim under this chapter to which the insurance coverage extends.

(c) This state or a political subdivision of the state may not require an employee to purchase liability insurance as a condition of employment if the state or the political subdivision is insured by a liability insurance policy.

**§ 101.029. Liability for Certain Conduct of State Prison Inmates**

(a) The Department of Criminal Justice is liable for property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an inmate or state jail defendant housed in a facility operated by the department if:

- (1) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment;
- (2) the inmate or defendant would be personally liable to the claimant for the property damage, personal injury, or death according to Linden law were the inmate or defendant a private person acting in similar circumstances; and
- (3) the act, omission, or negligence was committed by the inmate or defendant acting in the course and scope of a task or activity that:
  - (A) the inmate or defendant performed at the request of an employee of the department; and
  - (B) the inmate or defendant performed under the control or supervision of the department.

(b) A claimant may not name the inmate or state jail defendant whose act or omission gave rise to the claim as a codefendant in an action brought under this section.

(c) A judgment in an action or a settlement of a claim against the Department of Criminal Justice under this section bars any action involving the same subject matter by the claimant against the inmate or state jail defendant whose act or omission gave rise to the claim. A judgment in an action or a settlement of a claim against an inmate or state jail defendant bars any action involving

the same subject matter by the claimant against the Department of Criminal Justice under this section.

(d) This section does not apply to property damage, personal injury, or death sustained by an inmate or state jail defendant.

CHAPTER 101. TORT CLAIMS  
SUBCHAPTER C. EXCLUSIONS AND EXCEPTIONS

**§ 101.052. Legislative**

This chapter does not apply to a claim based on an act or omission of the legislature or a member of the legislature acting in his official capacity or to the legislative functions of a governmental unit.

**§ 101.053. Judicial**

(a) This chapter does not apply to a claim based on an act or omission of a court of this state or any member of a court of this state acting in his official capacity or to a judicial function of a governmental unit. "Official capacity" means all duties of office and includes administrative decisions or actions.

(b) This chapter does not apply to a claim based on an act or omission of an employee in the execution of a lawful order of any court.

**§ 101.055. Certain Governmental Functions**

This chapter does not apply to a claim arising:

- (1) in connection with the assessment or collection of taxes by a governmental unit;
- (2) from the action of an employee while responding to an emergency call or reacting to an emergency situation if the action is in compliance with the laws and ordinances applicable to emergency action, or in the absence of such a law or ordinance, if the action is not taken with conscious indifference or reckless disregard for the safety of others; or
- (3) from the failure to provide or the method of providing police or fire protection.

**§ 101.060. Traffic and Road Control Devices**

- (a) This chapter does not apply to a claim arising from:
  - (1) the failure of a governmental unit initially to place a traffic or road sign, signal, or warning device if the failure is a result of discretionary action of the governmental unit;
  - (2) the absence, condition, or malfunction of a traffic or road sign, signal, or warning device unless the absence, condition, or malfunction is not corrected by the responsible governmental unit within a reasonable time after notice; or
  - (3) the removal or destruction of a traffic or road sign, signal, or warning device by a third person unless the governmental unit fails to correct the removal or destruction within a reasonable time after actual notice.
- (b) The signs, signals, and warning devices referred to in this section are those used in connection with hazards normally connected with the use of the roadway.
- (c) This section does not apply to the duty to warn of special defects such as excavations or roadway obstructions.

LINDEN STATUTES AND CODES ANNOTATED  
CIVIL PRACTICE AND REMEDIES CODE  
TITLE 2. TRIAL, JUDGMENT, AND APPEAL  
SUBTITLE C. JUDGMENTS  
CHAPTER 33. PROPORTIONATE RESPONSIBILITY  
SUBCHAPTER A. PROPORTIONATE RESPONSIBILITY

**§ 33.001. Proportionate Responsibility**

In an action to which this chapter applies, a claimant may not recover damages if his percentage of responsibility is greater than 50 percent.

**§ 33.002. Applicability**

(a) This chapter applies to:

- (1) any cause of action based on tort in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought; or
- (2) any action brought under the Deceptive Trade Practices-Consumer Protection Act in which a defendant, settling person, or responsible third party is found responsible for a percentage of the harm for which relief is sought.

(b) (Repealed)

(c) This chapter does not apply to:

- (1) an action to collect workers' compensation benefits under the workers' compensation laws of this state or actions against an employer for exemplary damages arising out of the death of an employee;
- (2) a claim for exemplary damages included in an action to which this chapter otherwise applies; or
- (3) a cause of action for damages arising from the manufacture of methamphetamine as described by Chapter 99.

**§ 33.003. Determination of Percentage of Responsibility**

(a) The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following persons with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these:

- (1) each claimant;
- (2) each defendant;
- (3) each settling person; and
- (4) each responsible third party who has been designated under Section 33.004.

(b) This section does not allow a submission to the jury of a question regarding conduct by any person without sufficient evidence to support the submission.

**§ 33.004. Designation of Responsible Third Party**

(a) A defendant may seek to designate a person as a responsible third party by filing a motion for leave to designate that person as a responsible third party. The motion must be filed on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date.

(b) Nothing in this section affects the third-party practice as previously recognized in the rules and statutes of this state with regard to the assertion by a defendant of rights to contribution or indemnity. Nothing in this section affects the filing of cross-claims or counterclaims.

(c) Repealed

(d) Repealed

(e) If a person is designated under this section as a responsible third party, a claimant is not barred by limitations from seeking to join that person, even though such joinder would otherwise be barred by limitations, if the claimant seeks to join that person not later than 60 days after that person is designated as a responsible third party.

(f) A court shall grant leave to designate the named person as a responsible third party unless another party files an objection to the motion for leave on or before the 15th day after the date the motion is served.

(g) If an objection to the motion for leave is timely filed, the court shall grant leave to designate the person as a responsible third party unless the objecting party establishes:

- (1) the defendant did not plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirement of the Linden Rules of Civil Procedure; and
- (2) after having been granted leave to replead, the defendant failed to plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirements of the Linden Rules of Civil Procedure.

(h) By granting a motion for leave to designate a person as a responsible third party, the person named in the motion is designated as a responsible third party for purposes of this chapter without further action by the court or any party.

(i) The filing or granting of a motion for leave to designate a person as a responsible third party or a finding of fault against the person:

- (1) does not by itself impose liability on the person; and
- (2) may not be used in any other proceeding, on the basis of res judicata, collateral estoppel, or any other legal theory, to impose liability on the person.

(j) Notwithstanding any other provision of this section, if, not later than 60 days after the filing of the defendant's original answer, the defendant alleges in an answer filed with the court that an unknown person committed a criminal act that was a cause of the loss or injury that is the subject of the lawsuit, the court shall grant a motion for leave to designate the unknown person as a responsible third party if:

- (1) the court determines that the defendant has pleaded facts sufficient for the court to determine that there is a reasonable probability that the act of the unknown person was criminal;
- (2) the defendant has stated in the answer all identifying characteristics of the unknown person, known at the time of the answer; and
- (3) the allegation satisfies the pleading requirements of the Linden Rules of Civil Procedure.

(k) An unknown person designated as a responsible third party under Subsection (j) is denominated as "Jane Doe" or "John Doe" until the person's identity is known.

(l) After adequate time for discovery, a party may move to strike the designation of a responsible third party on the ground that there is no evidence that the designated person is responsible for any portion of the claimant's alleged injury or damage. The court shall grant the motion to strike unless a defendant produces sufficient evidence to raise a genuine issue of fact regarding the designated person's responsibility for the claimant's injury or damage.

### § 33.011. Definitions

In this chapter:

(1) "Claimant" means a person seeking recovery of damages, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff. In an action in which a party seeks recovery

of damages for injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes:

- (A) the person who was injured, was harmed, or died or whose property was damaged; and
- (B) any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of that person or for the damage to the property of that person.

(2) "Defendant" includes any person from whom, at the time of the submission of the case to the trier of fact, a claimant seeks recovery of damages.

(3) "Liable defendant" means a defendant against whom a judgment can be entered for at least a portion of the damages awarded to the claimant.

(4) "Percentage of responsibility" means that percentage, stated in whole numbers, attributed by the trier of fact to each claimant, each defendant, each settling person, or each responsible third party with respect to causing or contributing to cause in any way, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity violative of the applicable legal standard, or by any combination of the foregoing, the personal injury, property damage, death, or other harm for which recovery of damages is sought.

(5) "Settling person" means a person who has, at any time, paid or promised to pay money or anything of monetary value to a claimant in consideration of potential liability with respect to the personal injury, property damage, death, or other harm for which recovery of damages is sought.

(6) "Responsible third party" means any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these. The term "responsible third party" does not include a seller eligible for indemnity under Section 82.002.

### **§ 33.012. Amount of Recovery**

(a) If the claimant is not barred from recovery under Section 33.001, the court shall reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the claimant's percentage of responsibility.

(b) If the claimant has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to each settling person's percentage of responsibility.

(c) Notwithstanding Subsection (b), if the claimant in a health care liability claim filed under Chapter 74 has settled with one or more persons, the court shall further reduce the amount of damages to be recovered by the claimant with respect to a cause of action by an amount equal to one of the following, as elected by the defendant:

- (1) the sum of the dollar amounts of all settlements; or
- (2) a percentage equal to each settling person's percentage of responsibility as found by the trier of fact.

(d) This section shall not apply to benefits paid by or on behalf of an employer to an employee pursuant to workers' compensation insurance coverage, as defined in Section 401.011(44), Labor Code, in effect at the time of the act, event, or occurrence made the basis of claimant's suit.

(e) An election made under Subsection (c) shall be made by any defendant filing a written election before the issues of the action are submitted to the trier of fact and when made, shall be binding on all defendants. If no defendant makes this election or if conflicting elections are made, all defendants are considered to have elected Subsection (c)(1).

### **§ 33.013. Amount of Liability**

(a) Except as provided in Subsection (b), a liable defendant is liable to a claimant only for the percentage of the damages found by the trier of fact equal to that defendant's percentage of

responsibility with respect to the personal injury, property damage, death, or other harm for which the damages are allowed.

(b) Notwithstanding Subsection (a), each liable defendant is, in addition to his liability under Subsection (a), jointly and severally liable for the damages recoverable by the claimant under Section 33.012 with respect to a cause of action if:

- (1) the percentage of responsibility attributed to the defendant with respect to a cause of action is greater than 50 percent; or
- (2) the defendant, with the specific intent to do harm to others, acted in concert with another person to engage in the conduct described in the following provisions of the Penal Code and in so doing proximately caused the damages legally recoverable by the claimant:
  - (A) Section 19.02 (murder);
  - (B) Section 19.03 (capital murder);
  - (C) Section 20.04 (aggravated kidnapping);
  - (D) Section 22.02 (aggravated assault);
  - (E) Section 22.011 (sexual assault);
  - (F) Section 22.021 (aggravated sexual assault);
  - (G) Section 22.04 (injury to a child, elderly individual, or disabled individual);
  - (H) Section 32.21 (forgery);
  - (I) Section 32.43 (commercial bribery);
  - (J) Section 32.45 (misapplication of fiduciary property or property of financial institution);
  - (K) Section 32.46 (securing execution of document by deception);
  - (L) Section 32.47 (fraudulent destruction, removal, or concealment of writing);
 or
  - (M) conduct described in Chapter 31 the punishment level for which is a felony of the third degree or higher.
- (c) (Repealed)
- (d) This section does not create a cause of action.
- (e) Notwithstanding anything to the contrary stated in the provisions of the Penal Code listed in Subsection (b)(2), that subsection applies only if the claimant proves the defendant acted or failed to act with specific intent to do harm. A defendant acts with specific intent to do harm with respect to the nature of the defendant's conduct and the result of the person's conduct when it is the person's conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.
- (f) The jury may not be made aware through voir dire, introduction into evidence, instruction, or any other means that the conduct to which Subsection (b)(2) refers is defined by the Penal Code.

### § 33.014. (Repealed)

### § 33.015. Contribution

(a) If a defendant who is jointly and severally liable under Section 33.013 pays a percentage of the damages for which the defendant is jointly and severally liable greater than his percentage of responsibility, that defendant has a right of contribution for the overpayment against each other liable defendant to the extent that the other liable defendant has not paid the percentage of the damages found by the trier of fact equal to that other defendant's percentage of responsibility.

(b) As among themselves, each of the defendants who is jointly and severally liable under Section 33.013 is liable for the damages recoverable by the claimant under Section 33.012 in proportion to his respective percentage of responsibility. If a defendant who is jointly and severally liable pays a larger proportion of those damages than is required by his percentage of responsibility, that defendant has a right of contribution for the overpayment against each other defendant with

whom he is jointly and severally liable under Section 33.013 to the extent that the other defendant has not paid the proportion of those damages required by that other defendant's percentage of responsibility.

(c) If for any reason a liable defendant does not pay or contribute the portion of the damages required by his percentage of responsibility, the amount of the damages not paid or contributed by that defendant shall be paid or contributed by the remaining defendants who are jointly and severally liable for those damages. The additional amount to be paid or contributed by each of the defendants who is jointly and severally liable for those damages shall be in proportion to his respective percentage of responsibility.

(d) No defendant has a right of contribution against any settling person.

### **§ 33.016. Claim Against Contribution Defendant**

(a) In this section, "contribution defendant" means any defendant, counterdefendant, or third-party defendant from whom any party seeks contribution with respect to any portion of damages for which that party may be liable, but from whom the claimant seeks no relief at the time of submission.

(b) Each liable defendant is entitled to contribution from each person who is not a settling person and who is liable to the claimant for a percentage of responsibility but from whom the claimant seeks no relief at the time of submission. A party may assert this contribution right against any such person as a contribution defendant in the claimant's action.

(c) The trier of fact shall determine as a separate issue or finding of fact the percentage of responsibility with respect to each contribution defendant and these findings shall be solely for purposes of this section and Section 33.015 and not as a part of the percentages of responsibility determined under Section 33.003. Only the percentage of responsibility of each defendant and contribution defendant shall be included in this determination.

(d) As among liable defendants, including each defendant who is jointly and severally liable under Section 33.013, each contribution defendant's percentage of responsibility is to be included for all purposes of Section 33.015. The amount to be contributed by each contribution defendant pursuant to Section 33.015 shall be in proportion to his respective percentage of responsibility relative to the sum of percentages of responsibility of all liable defendants and liable contribution defendants.

### **§ 33.017. Preservation of Existing Rights of Indemnity**

Nothing in this chapter shall be construed to affect any rights of indemnity granted by any statute, by contract, or by common law. To the extent of any conflict between this chapter and any right to indemnification granted by statute, contract, or common law, those rights of indemnification shall prevail over the provisions of this chapter.