

EXAM # _____

TORTS I
FALL 2007

PROFESSOR DEWOLF
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FALL EXAM

Instructions

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

THIS IS A CLOSED BOOK EXAM! This exam contains TWO questions and 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.

Bluebook Users: DOUBLE-SPACE your answers in the bluebook. Make sure you write your exam number on the cover of each 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.

Examsoft Users: Follow the proctor's instructions.

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, 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.

The exams will be COLLECTED but a copy will be posted on the web.

REMEMBER THE HONOR CODE! Don't identify yourself.

MERRY CHRISTMAS!!!

QUESTION 1 (70 points)

Louis Achter lived on his family's farm in Calumet County, Linden, all of his life. In 1974, when his mother decided it was time to move into a nursing home, he purchased the farm from her.

Because of the increasing use of farm machinery running on gasoline, Achter decided to purchase and install a gasoline storage tank. When he learned that most farms of comparable size had an underground storage tank ("UST"), Achter purchased a tank and installed it underground. In 1978, after refilling the UST and noticing a decreasing gas level, Achter discovered that gasoline was leaking from the tank. Achter then had the remaining gasoline pumped out of the tank and placed in a new above-ground tank. The old tank remained buried. Achter continued to live on the property after the leak. His family and livestock also subsequently relied on drinking water from one of several wells situated on the property.

John Daun, also a farmer, purchased the 124-acre farm from Achter in early 1985. Daun then subdivided the land to create a "farmette." In December 1985 Daun made a gift of the small parcel, which contained the farm buildings, three wells and the UST, to his daughter and son-in-law, Julie and Gordon Grube, who planned to make extensive renovations.

Three years later, in the course of properly abandoning what was previously thought to be a dry well, the Grubes discovered groundwater gasoline contamination. The Grubes reported the contamination to the Linden Department of Natural Resources ("DNR"). The DNR investigated the contamination and then responded by notifying the Grubes on October 3, 1988, and, later, Achter, of their potential responsibility for the remediation costs of cleaning up the gasoline contamination.

In the meantime, the Grubes' 18-month-old Stacy has been diagnosed with a potentially fatal form of leukemia. Julie and Gordon now believe that it might be a result of the gasoline contamination.

Pretend, for purposes of this exercise, that it is the year 1988. Julie and Gordon have come to your office to ask what types of tort compensation would be available to them. Please provide your analysis.

QUESTION 2 (65 points)

Julie Olson, her two children and her boyfriend, Arturo Perez, lived together in a home owned by Olson. Domestic violence was a recurring problem in the relationship; although Olson had never seen Perez fight or act violently towards other people, she has stated that he "was violent towards [her] in the past." Olson also allowed Perez to store a sawed-off shotgun in the bedroom closet of her home. At no time did she ask Perez to remove the weapon from her home.

On the evening of September 18, 2006, Olson and Perez held a party at the Olson home. James and Annette Stuart, who were friends of Olson and Perez, attended the party. At the same time, Michael Becker and some of his friends were socializing at several taverns in the area. Becker and his friends did not know Olson, Perez or their friends. At about two o'clock in the morning on September 19, Becker and a friend, James Willems, were standing next to Willems' truck which was parked outside of a tavern located approximately one and a half blocks from Olson's home. Annette and Olson, who had decided to take a walk around the block, passed by Becker and Willems. When Annette and Olson returned to Olson's home, Annette told her husband, James, that Becker and Willems had made sexual comments to her.

James, who was on the porch of Olson's home with Perez, then began to yell profanities at

Becker and Willems, who were still standing next to Willems' truck. Becker and Willems then approached the Olson residence, and Perez went inside the house. Becker, Willems and James then had a short verbal confrontation, and afterwards, James went inside the house as Becker and Willems left Olson's property. Willems then got into his truck, while Becker started to walk back to the tavern. As Willems started to drive away, however, Perez ran up to the truck and hit it twice with "what appeared to be a BB gun." Willems then returned to the tavern to tell his friends about what happened and brought them back to the Olson residence.

Becker, Willems and two other men then returned to the Olson residence. As they walked onto Olson's property, Perez and James came out of the house. After a short verbal confrontation, Perez brandished a shotgun and shot Becker in the armpit as he turned to run away. Becker died a short time later. All of the parties involved had consumed varying amounts of alcohol prior to the shooting. Perez later pleaded guilty to involuntary manslaughter and is serving a five to seven year prison sentence.

From the start of the first confrontation, Olson remained inside the house. Although Olson did watch Perez go into the bedroom and retrieve the shotgun, she did not ask Perez to put the shotgun away nor did she call the police. When Becker and his friends returned to Olson's house, Olson left the house, got into her car and then drove away after hearing a gunshot.

An insurance company has hired you to analyze the potential tort exposure that Olson might face arising from the death of Becker. In addition to the facts recited above, you have learned the following: Becker was 56 years old at the time of his death. He married and divorced twice, and one of the marriages produced his only child, a daughter, Ariel Pinkston, now 35. Ariel was married once but the marriage was dissolved and she has no children. For four years prior to his death, Becker had been employed as a part-time dishwasher at a coffee shop. He also received money each month for a disability arising from a back injury.

Please provide your analysis of Olson's potential tort exposure.

SELECTED STATUTES OF THE STATE OF LINDEN ANNOTATED LINDEN CODES

Environmental Regulation (Ch. 285 to 299)

Chapter 292. Remedial Action

Subchapter II. Remedial Action

§ 292.11. Hazardous substance spills

(1) **Notice of discharge.** (a) A person who possesses or controls a hazardous substance or who causes the discharge of a hazardous substance shall notify the Department of Natural Resources immediately of any discharge not exempted under sub. (9).

(b) Notification received under this section or information obtained in a notification received under this section may not be used against the person making such a notification in any criminal proceedings.

(c) The Department shall designate a 24-hour statewide toll free or collect telephone number whereby notice of any hazardous discharge may be made.

(d) The Department shall report notifications that it receives under this subsection related to discharges of agricultural chemicals to the Department of agriculture, trade and consumer protection. The Department shall report notifications under this paragraph according to a memorandum of understanding between the Department and the Department of Agriculture, Trade and Consumer Protection.

(e) The Department shall report notifications that it receives under this subsection related to discharges from petroleum storage tanks, as defined in § 101.144(1)(bm), to the Department of Commerce.

* * *

(9) Exemptions. (a) Any person holding a valid permit under ch. 283 is exempted from the reporting and penalty requirements of this section with respect to substances discharged within the limits authorized by the permit.

(b) Law enforcement officers or members of a fire department using hazardous substances in carrying out their responsibility to protect public health, safety and welfare are exempted from the penalty requirements of this section, but shall report to the Department any discharges of a hazardous substance occurring within the performance of their duties.

(c) Any person discharging in conformity with a permit or program approved under chs. 281, 285 or 289 to 299 is exempted from the reporting and penalty requirements of this section.

Miscellaneous Actions, Proceedings and Procedure (Ch. 895 to 900)
Chapter 895. Damages, Liability, and
Miscellaneous Provisions Regarding Actions in Courts
Subchapter I. Damages, Recovery, and Miscellaneous Provisions

§ 895.02. Measure of damages against personal representative

When any action described in § 895.01(1) shall be prosecuted to judgment against the personal representative, the plaintiff shall be entitled to recover only for the value of the goods taken, including any unjust enrichment of the defendant, or for the damages actually sustained, without any vindictive or exemplary damages or damages for alleged outrage to the feelings of the injured party.

§ 895.03. Recovery for death by wrongful act

Whenever the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state.

§ 895.031. Recovery from estate of wrongdoer

If the death of a person is caused by a wrongful act or omission committed in this state that, if death had not ensued, would have entitled the injured party to maintain an action and recover

damages and the wrongdoer dies prior to the time of the death of the injured person, the wrongdoer shall be liable for damages notwithstanding either death. Any right of action against a deceased wrongdoer under this section shall be enforced by bringing an action against the deceased wrongdoer's personal representative.

§ 895.04. Plaintiff in wrongful death action

(1) An action for wrongful death may be brought by the personal representative of the deceased person or by the person to whom the amount recovered belongs.

(2) If the deceased leaves surviving a spouse, and minor children under 18 years of age with whose support the deceased was legally charged, the court before whom the action is pending, or if no action is pending, any court of record, in recognition of the duty and responsibility of a parent to support minor children, shall determine the amount, if any, to be set aside for the protection of such children after considering the age of such children, the amount involved, the capacity and integrity of the surviving spouse, and any other facts or information it may have or receive, and such amount may be impressed by creation of an appropriate lien in favor of such children or otherwise protected as circumstances may warrant, but such amount shall not be in excess of 50% of the net amount received after deduction of costs of collection. If there are no such surviving minor children, the amount recovered shall belong and be paid to the spouse of the deceased; if no spouse survives, to the deceased's lineal heirs; if no lineal heirs survive, to the deceased's brothers and sisters. If any such relative dies before judgment in the action, the relative next in order shall be entitled to recover for the wrongful death. A surviving nonresident alien spouse and minor children shall be entitled to the benefits of this section. If the amount allocated to any child under this subsection is less than \$10,000, § 807.10 may be applied. Every settlement in wrongful death cases in which the deceased leaves minor children under 18 years of age shall be void unless approved by a court of record authorized to act hereunder.

(3) If separate actions are brought for the same wrongful death, they shall be consolidated on motion of any party. Unless such consolidation is so effected that a single judgment may be entered protecting all defendants and so that satisfaction of such judgment shall extinguish all liability for the wrongful death, no action shall be permitted to proceed except that of the personal representative.

(4) Judgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action. Additional damages not to exceed \$500,000 per occurrence in the case of a deceased minor, or \$350,000 per occurrence in the case of a deceased adult, for loss of society and companionship may be awarded to the spouse, children or parents of the deceased, or to the siblings of the deceased, if the siblings were minors at the time of the death.

(5) If the personal representative brings the action, the personal representative may also recover the reasonable cost of medical expenses, funeral expenses, including the reasonable cost of a cemetery lot, grave marker and care of the lot. If a relative brings the action, the relative may recover such medical expenses, funeral expenses, including the cost of a cemetery lot, grave marker and care of the lot, on behalf of himself or herself or of any person who has paid or assumed liability for such expenses.

(6) Where the wrongful death of a person creates a cause of action in favor of the decedent's estate and also a cause of action in favor of a spouse or relatives as provided in this section, such spouse or relatives may waive and satisfy the estate's cause of action in connection with or as part of a settlement and discharge of the cause of action of the spouse or relatives.

(7) Damages found by a jury in excess of the maximum amount specified in sub. (4) shall be reduced by the court to such maximum.

Crimes (Ch. 938 to 951)
Chapter 941. Crimes Against Public Health and Safety
Subchapter III. Weapons

§ 941.28. Possession of short-barreled shotgun or short-barreled rifle

(1) In this section:

(a) "Rifle" means a firearm designed or redesigned, made or remade, and intended to be fired from the shoulder or hip and designed or redesigned and made or remade to use the energy of a propellant in a metallic cartridge to fire through a rifled barrel a single projectile for each pull of the trigger.

(b) "Short-barreled rifle" means a rifle having one or more barrels having a length of less than 16 inches measured from closed breech or bolt face to muzzle or a rifle having an overall length of less than 26 inches.

(c) "Short-barreled shotgun" means a shotgun having one or more barrels having a length of less than 18 inches measured from closed breech or bolt face to muzzle or a shotgun having an overall length of less than 26 inches.

(d) "Shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder or hip and designed or redesigned and made or remade to use the energy of a propellant in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

(2) No person may sell or offer to sell, transport, purchase, possess or go armed with a short-barreled shotgun or short-barreled rifle.

(3) Any person violating this section is guilty of a Class H felony.

(4) This section does not apply to the sale, purchase, possession, use or transportation of a short-barreled shotgun or short-barreled rifle to or by any armed forces or national guard personnel in line of duty, any peace officer of the United States or of any political subdivision of the United States or any person who has complied with the licensing and registration requirements under 26 USC §§ 5801 to 5872. This section does not apply to the manufacture of short-barreled shotguns or short-barreled rifles for any person or group authorized to possess these weapons. The restriction on transportation contained in this section does not apply to common carriers. This section shall not apply to any firearm that may be lawfully possessed under federal law, or any firearm that could have been lawfully registered at the time of the enactment of the national firearms act of 1968.

(5) Any firearm seized under this section is presumed to be contraband.