

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 and "TORTS—SUMMER '91—FINAL EXAM" 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 Arcadia, 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 (60 points)

On July 28, 1989, an airplane crash occurred at the Junction Municipal Airport, located in Junction, Arcadia, elevation 780 feet above sea level. The airport had a control tower, operated by a single air traffic controller employed by the State of Arcadia, who was equipped with only binoculars and a radio. Air traffic in and out of Junction averaged approximately 15 take-offs or landings daily. On July 28, 1989, at 4:30 p.m., during a heavy rainstorm, Leonard Lee was piloting an Air Commander 450, a twin-engine turboprop airplane, on approach to the Junction Municipal Airport. Lee's only passenger was Monica Mueller. About 3 miles from the airport, Lee was maintaining an air speed of 150 knots. The throttle was at a third of engine power, and the plane was descending at an altitude of 2200 feet (1420 feet above ground level) when a sudden downdraft dropped the plane approximately 500 feet. Fearing that he was getting too close to the ground, Lee pulled back sharply on the controls, causing the nose of the plane to tilt upward 30 degrees. This in turn caused the plane to lose airspeed. Before he could recover, the "stall" horn on the plane sounded, indicating that the plane was not traveling fast enough to provide lift to the wings. Lee pushed the throttle control to the maximum, but the sudden infusion of fuel caused one of the engines to lose all power. Lee panicked, and tried to right the plane. By this time the plane was almost to the ground, and Lee pulled the flight controls all the way back, causing a complete stall. The rear portion of the plane hit the ground, and the plane broke up on impact. Both Lee and Mueller were seriously hurt, suffering massive internal injuries and serious burns.

You have been asked by Monica's family (she is still in serious condition in the hospital) to pursue the possibility of a tort action on her behalf. In the course of your discussions with the agencies investigating the crash, you discover that either of two things would have prevented the crash: (1) Lee, an experienced but amateur pilot, could have picked up airspeed more slowly and recovered from the sudden loss in elevation in time to land the plane safely; or (2) better weather facilities, such as weather radar, could have allowed the air traffic controller to assess the severity of the weather and report it in advance to Lee. In addition to these two factors, knowledgeable parties stated that the loss of power from a sudden infusion of fuel should not have happened. No evidence of bad fuel or poor workmanship in servicing the plane has surfaced. You have further discovered that Lee is only covered by a \$50,000 insurance policy, and any personal assets will be consumed by his medical care. Lee's insurance carrier has suggested that they might be willing to offer the full \$50,000 policy in settlement of the claim.

Please analyze Monica's legal position and recommend a litigation strategy.

QUESTION 2 (45 points)

Henry Hopkins was a real estate developer who had many friends in the town of Junction, Arcadia. Business was generally good, but he was nervous about the effects of a growing environmental movement that seemed to frown upon his skill at turning farmland into tract housing. In order to keep the lines of communication open, he scheduled a barbecue at the clubhouse of one of his developments, Ferndale. (Residents of Ferndale had privileges to use the clubhouse and its facilities, which included a swimming pool.) Hopkins invited members of the Junction City Council, the business editor of the local newspaper, mortgage bankers he regularly did business with, and local realtors. To make the occasion festive he hired Great Escape, a hot-air balloon company, to take a few of the guests and float over the area. About 5 p.m. Frances Foster and her son, Bill, who lived in Ferndale, showed up at the clubhouse in swimming attire. Hopkins' assistant was about to explain that the clubhouse had been reserved for a private party and wasn't available for swimming, when Hopkins intervened, recognizing Frances, and invited them in. Bill, aged 10, had brought a two-person raft made of sturdy vinyl, designed for recreational boating in calm waters. It had two air compartments to provide flotation surrounding the floor of the boat. The floor was approximately 12 inches below the top of the sides of the boat, allowing one (or two, with some scrunching of appendages) to sit in the boat. Bill played with the boat, diving from it into the water, flipping it over, etc., while Frances watched. Frances got engaged in conversation with a mortgage banker she knew, and walked over to get a drink from the bar Henry had set up. While she was doing so Bill flipped the raft over and played with diving underneath it. Because of the high sides of the boat, when it was turned upside down there was an air pocket formed underneath the boat that was approximately two feet wide, eight inches high, and three feet long. Bill liked being able to pretend he was an underwater diver, and would go to the bottom of the pool and then surface quickly. On one dive he just reached the air pocket underneath the boat as his air was giving out. He hadn't thought about it, but the air pocket had been gradually depleted of any oxygen, and as he breathed the stale air he became lightheaded and quickly passed out. Several minutes went by before anyone noticed that Bill was motionless in the water. Frances shrieked, and an ambulance was called. Bill was partially revived on the way to the hospital, but suffered serious brain damage as a result of the deprivation of oxygen.

You represent Hopkins. What kinds of tort liability can you anticipate? What litigation strategy would you pursue?

QUESTION 3 (30 points)

In May 1979 Rosabeth Reynolds, then 15, went to see her obstetrician/gynecologist, Dr. Peterson, for treatment of abdominal pain. After examining her Peterson concluded that she had an ovarian cyst. Peterson then scheduled her for an operation to remove the cyst. The operation was successful, but during the course of the procedure Peterson noticed that she had abnormalities that he thought could cause birth defects in her offspring. He did not tell her this at the time, but made a note in her medical chart. After recovering from her surgery Rosabeth experienced no further difficulties and stopped seeing Dr. Peterson when she went away to college.

In May 1989 Rosabeth went to see her new obstetrician/gynecologist, Dr. Smith, who obtained her medical records from Dr. Peterson. Unfortunately, he missed the notation about the abnormalities. He examined her and asked if she had any questions. She said she was thinking about starting a family, and Smith said he didn't think there would be any problems from her previous cyst removal. Consequently, Rosabeth got pregnant in December of 1989 and in September of 1990 gave birth to a girl with severe birth defects.

Rosabeth has come to you for advice concerning whether or not she has any legal remedy for her situation. What would you tell her?

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## SELECTED STATUTES FROM THE STATE OF ARCADIA

### SUBTITLE 5. CIVIL PROCEDURE GENERALLY CHAPTER 61. PARTIES

#### SUBCHAPTER 2. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT

##### **§ 16-61-201. "Joint tortfeasors" defined.**

For the purpose of this subchapter the term "joint tortfeasors" means two (2) or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.

##### **§ 16-61-202. Right of contribution—Accrual—Pro rata share.**

- (1) The right of contribution exists among joint tortfeasors.
- (2) A joint tortfeasor is not entitled to a money judgment for contribution until he has by payment discharged the common liability or has paid more than his pro rata share thereof.
- (3) A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.

(4) When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares solely for the purpose of

**§ 16-61-203. Judgment against one tortfeasor.**

Nothing in this subchapter shall be construed to effect the several joint tortfeasors' common law liability to have judgment recovered and payment made from them individually by the injured person for the whole injury; but the recovery of a judgment by the injured person against one (1) joint tortfeasor does not discharge the other joint tortfeasor.

**§ 16-61-204. Release—Effect on injured person's claim.**

A release by the injured person of one (1) joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.

**§ 16-61-205. Release—Effect on right of contribution.**

A release by the injured person of one (1) joint tortfeasor does not relieve him from liability to make contribution to another joint tortfeasor unless the release is given before the right of the other tortfeasor to secure a money judgment for contribution has accrued, and provides for a reduction, to the extent of the pro rata share of the released tortfeasor, of the injured person's damages recoverable against all the other tortfeasors.

**§ 16-61-206. Indemnity.**

This subchapter does not impair any right of indemnity under existing law.

ARCADIA CODE OF 1987 ANNOTATED  
SUBTITLE 5. CIVIL PROCEDURE GENERALLY  
CHAPTER 64. TRIAL AND VERDICT

**§ 16-64-122. Comparative fault.**

(a) In all actions for damages for personal injuries or wrongful death or injury to property in which recovery is predicated upon fault, liability shall be determined by comparing the fault

chargeable to a claiming party with the fault chargeable to the party or parties from whom the claiming party seeks to recover damages.

(b)(1) If the fault chargeable to a party claiming damages is of a lesser degree than the fault chargeable to the party or parties from whom the claiming party seeks to recover damages, then the claiming party is entitled to recover the amount of his damages after they have been diminished in proportion to the degree of his own fault.

(2) If the fault chargeable to a party claiming damages is equal to or greater in degree than any fault chargeable to the party or parties from whom the claiming party seeks to recover damages, then the claiming party is not entitled to recover such damages.

(c) The word "fault" as used in this section includes any act, omission, conduct, risk assumed, breach of warranty, or breach of any legal duty which is a proximate cause of any damages sustained by any party.

ARCADIA CODE OF 1987 ANNOTATED  
Constitution of 1874  
ARTICLE 5. Legislative Department

**§ 20. Sovereign Immunity—State not made defendant.**

The State of Arcadia shall never be made defendant in any of her courts.

**§ 21-9-301. Tort liability—Immunity declared.**

It is declared to be the public policy of the State of Arcadia that all counties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the state shall be immune from liability for damages. No tort action shall lie against any such political subdivision because of the acts of their agents and employees.

**RESTATEMENT (2D) OF TORTS**

**§8A. Intent**

The word "intent" is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.

**§13. Battery: Harmful Contact**

An actor is subject to liability to another for battery if

- (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- (b) a harmful contact with the person of the other directly or indirectly results

**§15. What Constitutes Bodily Harm**

Bodily harm is any physical impairment of the condition of another's body, or physical pain or illness.

**§18. Battery: Offensive Contact**

(1) An actor is subject to liability to another for battery if

- (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- (b) an offensive contact with the person of the other directly or indirectly results.

(2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for a mere offensive contact with the other's person although the act involves an unreasonable risk of inflicting it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

**§21. Assault**

(1) An actor is subject to liability to another for assault if

- (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- (b) the other is thereby put in such imminent apprehension.

(2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for an apprehension caused thereby although the act involves an unreasonable risk of causing it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

**§35. False Imprisonment**

(1) An actor is subject to liability to another for false imprisonment if

- (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and
- (b) his act directly or indirectly results in such a confinement of the other, and
- (c) the other is conscious of the confinement or is harmed by it.

(2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for a merely transitory or otherwise harmless confinement, although the act involves an unreasonable risk of imposing it and therefore would be negligent or reckless if the risk threatened bodily harm.

**§36. What Constitutes Confinement**

(1) To make the actor liable for false imprisonment, the other's confinement within the boundaries fixed by the actor must be complete.

(2) The confinement is complete although there is a reasonable means of escape, unless the other knows of it.

(3) The actor does not become liable for false imprisonment by intentionally preventing another from going in a particular direction in which he has a right or privilege to go.

**§ 46. Outrageous Conduct Causing Severe Emotional Distress**

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

- (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
- (b) to any other person who is present at the time, if such distress results in bodily harm.

**§63. Self-Defense by Force Not Threatening Death or Serious Bodily Harm**

(1) An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him.

(2) Self-defense is privileged under the conditions stated in Subsection (1), although the actor correctly or reasonably believes that he can avoid the necessity of so defending himself,

- (a) by retreating or otherwise giving up a right or privilege, or
- (b) by complying with a command with which the actor is under no duty to comply or which the other is not privileged to enforce by the means threatened.

**§65. Self-Defense by Force Threatening Death or Serious Bodily Harm**

(1) Subject to the statement in Subsection (3), an actor is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm, when he reasonably believes that

- (a) the other is about to inflict upon him an intentional contact or other bodily harm, and that
- (b) he is thereby put in peril of death or serious bodily harm or ravishment, which can be safely be prevented only by the immediate use of such force.

(2) The privilege stated in Subsection (1) exists although the actor correctly or reasonably believes that he can safely avoid the necessity of so defending himself by

- (a) retreating if he is attacked within his dwelling place, which is not also the dwelling place of the other, or
- (b) permitting the other to intrude upon or dispossess him of his dwelling place, or
- (c) abandoning an attempt to effect a lawful arrest.

(3) The privilege stated in Subsection (1) does not exist if the actor correctly or reasonably believes that he can with complete safety avoid the necessity of so defending himself by

- (a) retreating if attacked in any place other than his dwelling place, or in a place which is also the dwelling of the other, or
- (b) relinquishing the exercise of any right or privilege other than his privilege to prevent intrusion upon or dispossession of his dwelling place or to effect a lawful arrest.