

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—SPRING '92—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, reading in sequence. 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 Euphoria, 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 (55 points)

Tommy Tirrell was an "oiler," a trainee in charge of maintaining a backhoe, and was working laying a gas line from Lambertville to Mead. Tirrell, along with two of his fellow employees at Ace Construction Company—an operating engineer (Louis O'Rourke), and the driver of the tractor-trailer (Jim Morris)—were directed by their supervisor, Benjamin Bradley, to go to a site on Highway 31 near Wingo, where an area of the pavement had settled. The backhoe to be operated by O'Rourke and maintained by Tirrell had been placed on a flatbed trailer and was driven by Morris to the site. O'Rourke and Tirrell drove their own cars and parked in a nearby lot. O'Rourke and Tirrell were talking to the foreman, Reggie Rifkin, in the center of the southbound lane which had been closed to traffic, when Morris started to back up the rig from where it had been parked at the curb. O'Rourke, who had not heard the tractor-trailer backing up, saw the movement out of the corner of his eye, but by then it was so close that it brushed his arm and knocked the foreman out of the way. He tried to grab Tirrell, who was also knocked to the ground. The trailer's back wheels slowly rolled over Tirrell's chest. O'Rourke called out to the driver who stopped, leaving Tirrell between the two sets of tires. Tirrell was dead at the scene.

You have investigated this case in preparation for a meeting with Tirrell's widow, Samantha. You have discovered the following:

(1) The flat-bed trailer was designed to carry a backhoe and measured approximately 45 feet in length. O'Rourke estimated that it had moved two or three trailer lengths when it struck Tirrell. Although the tractor (where the driver sits, and which "tows" the trailer behind it) contained large sideview mirrors, the driver was unable to see the space immediately behind the trailer.

(2) There was no signalman observing the truck as it backed up, although O'Rourke knew that it was the practice to have someone watching—even the backhoe was moving by itself—to make sure no one got in the way. Ironically, as an operator's helper, Tirrell would perform this function when the backhoe was operated.

(3) A thorough investigation of the tractor and trailer has revealed that both were properly maintained.

(4) You have a damages expert who has calculated the probable damages that could be recovered in this case. Assume for purposes of analysis that if liability could be proved Samantha would recover \$2 million.

What would you tell Samantha about her prospects for recovering \$2 million?

QUESTION 2 (40 points)

Rebecca Foard was concerned about her weight. She went to see her physician, Dr. Baker, in nearby Warren, Euphoria. Dr. Baker referred her to the Euphoria State University Medical Center, where she was seen by Dr. Wayne Jarman, a professor of surgery and director of the university's obesity clinic. Foard and Jarman discussed the possibility of Foard undergoing gastric reduction surgery, a procedure which causes weight loss by limiting the amount of food a person can

consume at one time. Gastric reduction surgery involves creating a small one-ounce pouch in the stomach with a staple gun. Jarman gave Foard a booklet on the procedure and the risks involved in the surgery and asked her to take it home and read it. Foard decided to have the surgery and signed a consent form on 12 August 1982 stating she completely understood the nature and consequences of the surgery.

Two days following the first surgery, which occurred on 13 August 1988, Foard developed a fever and went into shock. Jarman performed a second operation on 17 August 1988 and discovered a perforation near the staple line which in Jarman's opinion was the cause of her illness. Concurrent with the second operation, Jarman discovered Foard had kidney failure and thereafter transferred Foard to Baptist Hospital because Jarman anticipated Foard might need a dialysis machine which was not then available at Iredell Memorial Hospital.

During the second operation, a nurse notified Jarman that the needle count was incorrect. The wound was still open and Jarman inspected the abdomen but did not find a needle. Jarman and the nurses also searched the immediate area but no needle was found. After the wound was closed, an x-ray was taken which failed to show a needle inside Foard.

Following her discharge from the hospital after the second surgery, Foard began gaining weight. Foard continued to see Jarman at his office until which time Jarman did an upper gastrointestinal x-ray series. This procedure showed that the staple line had become disrupted and that there was no longer a functioning pouch present.

Foard is now threatening to sue, but has suggested that if the case could be settled quickly she would "live and let live." You have been asked to analyze this case in preparation for making a settlement offer. Jarman has obtained an affidavit from a qualified expert stating that in his professional opinion Jarman did not violate the standard of reasonable professional skill in his handling of the case.

Please provide your advice and supporting analysis.

QUESTION 3 (40 points)

James Dickens, aged 31, shared sex, alcohol and marijuana with Ann Puryear, a seventeen year old high school student. Three days later Earl Puryear, Ann's father, lured Dickens into rural Johnston County, Euphoria. Upon Dickens' arrival Earl Puryear, after identifying himself, called out to Ann Puryear who emerged from beside a nearby building and, crying, stated that she "didn't want to see that SOB." Ann Puryear then left the scene. Thereafter Earl Puryear pointed a pistol between Dickens' eyes and shouted "Ya'll come on out." Four men wearing ski masks and armed with nightsticks then approached from behind Dickens and told Dickens to sit down. They handcuffed Dickens to a piece of farm machinery and then sat around in a circle. Earl Puryear, while brandishing a knife and cutting Dickens' hair, threatened Dickens with castration. During four or five interruptions of the hair cutting, Earl Puryear and the others, within Dickens' hearing,

discussed and took votes on whether Dickens should be killed or castrated. Finally, after some two hours, when Dickens was completely bald, the men had a final conference. Puryear then took the handcuffs off. He told Dickens to go home, pull his telephone off the wall, pack his clothes, and leave the state of Euphoria; otherwise he would be killed. Dickens was then set free.

Dickens has come to your law firm for advice on whether he can recover for his injuries. He reports that as a result of Puryear's acts he has suffered "severe and permanent mental and emotional distress, and physical injury to his nerves and nervous system." He also reports that he is unable to sleep, afraid to go out in the dark, afraid to meet strangers, afraid he may be killed, suffering from chronic diarrhea, unable effectively to perform his job, and that he has lost \$1000 per month income.

The county prosecutor has entered into a complex plea agreement settling any potential criminal liability of Earl Puryear, Ann Puryear, or Dickens. Dickens' potential civil liability to Ann or Earl Puryear was disclaimed, but the question of Earl Puryear's civil liability to Dickens remains. Puryear owns a large farm with a net worth of about \$100,000.

One problem with this case is that more than a year has passed since the incident and there may be statute of limitations problems. Please analyze the strength of the various intentional tort theories in preparation for an analysis (by another lawyer in your firm) of whether the statute of limitations would apply to any or all of them.

GENERAL STATUTES, STATE OF EUPHORIA (Excerpts)

CHAPTER 1A. COMPARATIVE NEGLIGENCE

§ 1A-1. Contributory negligence; elimination as bar to recovery; comparative negligence to determine damages

Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought or was not greater than the combined negligence of the persons against whom recovery is sought. Any damages sustained shall be diminished by the percentage sustained of negligence attributable to the person recovering.

CHAPTER 1B. CONTRIBUTION.

ARTICLE 1. UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT.

§ 1B-1. Right to contribution.

(a) Except as otherwise provided in this Article, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tortfeasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(c) There is no right of contribution in favor of any tortfeasor who has intentionally caused or contributed to the injury or wrongful death.

(d) A tortfeasor who enters into a settlement with a claimant is not entitled to recover contribution from another tortfeasor whose liability for the injury or wrongful death has not been extinguished nor in respect to any amount paid in a settlement which is in excess of what was reasonable.

(e) A liability insurer, who by payment has discharged in full or in part the liability of a tortfeasor and has thereby discharged in full its obligation as insurer, succeeds to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's pro rata share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

(f) This Article does not impair any right of indemnity under existing law. Where one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

(g) This Article shall not apply to breaches of trust or of other fiduciary obligation.

(h) The provisions of this Article shall apply to tort claims against the State. However, in such cases, the same rules governing liability and the limits of liability shall apply to the State and its agencies as in cases heard before the Industrial Commission. The State's share in such cases shall not exceed the pro rata share based upon the maximum amount of liability under the Tort Claims Act, G.S. § 143-291.

(i) The provisions of this Article shall apply to the injury or death of an employee of any common carrier by rail which is subject to the provisions of Chapter 2 of Title 45 of the United States Code (45 U.S.C. § 51 et seq.) or G.S. § 62-242 where such injury or death is caused by the joint or concurring negligence of such common carrier by rail and any other person or persons. In any such instance, the following will apply:

(1) Where liability is imposed or sought to be imposed only on such common carrier by rail, the railroad is entitled to contribution from any other such person or persons;

(2) Where liability is imposed or sought to be imposed only on a person or persons other than a common carrier by rail, such other person or persons are entitled to contribution from the railroad;

(3) Where liability is imposed or sought to be imposed on both a common carrier by rail and any other person or persons, damages shall be determined as provided in Chapter 2 of Title 45 of the United States Code (45 U.S.C. § 51 et seq.) or G.S. § 62-242 whichever controls the claim.

§ 1B-2. Pro rata shares.

In determining the pro rata shares of tortfeasors in the entire liability

(1) Their relative degree of fault shall not be considered;

- (2) If equity requires, the collective liability of some as a group shall constitute a single share; and
- (3) Principles of equity applicable to contribution generally shall apply.

§ 1B-3. Enforcement.

(a) Whether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action.

(b) Where a judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

(c) If there is a judgment for the injury or wrongful death against the tortfeasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after final judgment is entered in the trial court in conformity with the decisions of the appellate court.

(d) If there is no judgment for the injury or wrongful death against the tortfeasor seeking contribution, his right of contribution is barred unless he has either

(1) Discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment,

(2) Agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution, or

(3) While action is pending against him, joined the other tortfeasors as third-party defendants for the purpose of contribution.

(e) The recovery of judgment against one tortfeasor for the injury or wrongful death does not of itself discharge the other tortfeasors from liability to the claimant. The satisfaction of the judgment discharges the other tortfeasors from liability to the claimant for the same injury or wrongful death, but does not impair any right of contribution. Provided, however, that a consent judgment in a civil action brought on behalf of a minor, or other person under disability, for the sole purpose of obtaining court approval of a settlement between the injured minor or other person under disability and one of two or more tortfeasors, shall not be deemed to be a judgment as that term is used herein, but shall be treated as a release or covenant not to sue as those terms are used in G.S. § 1B-4 unless the judgment shall specifically provide otherwise.

(f) The judgment of the court in determining the liability of the several defendants to the claimant for the same injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

§ 1B-4. Release or covenant not to sue.

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

(1) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide; but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and,

(2) It discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

§ 1B-5. Uniformity of interpretation.

This Article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it.

§ 1B-6. Short title.

This Article may be cited as the Uniform Contribution Among Tortfeasors Act.

§ 1B-7. Payment of judgment by one of several.

(a) In all cases in the courts of this State wherein judgment has been, or may hereafter be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint tortfeasors, and the same has not been paid by all the judgment debtors by each paying his pro rata share thereof, if one or more of the judgment debtors shall pay the judgment creditor, either before or after execution has been issued, the full amount due on said judgment, and shall have entered on the judgment docket in the manner hereinafter set out a notation of the preservation of the right of contribution, such notation shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his pro rata share thereof to the extent of his liability thereunder in law and equity. Such judgment may be enforced by execution or otherwise in behalf of the judgment debtor or debtors who have so preserved the judgment.

(b) The entry on the judgment docket shall be made in the same manner as other cancellations of judgment, and shall recite that the same has been satisfied, released and discharged, together with all costs and interest, as to the paying judgment debtor, naming him, but that the lien of the judgment is preserved as to the other judgment debtors for the purpose of contribution. No entry of cancellation as to such other judgment debtors shall be made upon the judgment docket or judgment index by virtue of such payment.

(c) If the judgment debtors disagree as to their pro rata shares of the liability, on the grounds that any judgment debtor is insolvent or is a nonresident of the State and cannot be forced under the execution of the court to contribute to the payment of the judgment, or upon other grounds in law and equity, their shares may be determined upon motion in the cause and notice to all parties to the action. Issues of fact arising therein shall be tried by jury as in other civil actions.

CHAPTER 97. WORKERS' COMPENSATION ACT.
ARTICLE 1. WORKERS' COMPENSATION ACT.

§ 97-10.1. Other rights and remedies against employer excluded.

If the employee at the time of the injury was within the course and scope of employment, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of

kin, or representative as against the employer at common law or otherwise on account of such injury or death.

CHAPTER 143. STATE DEPARTMENTS, INSTITUTIONS, AND COMMISSIONS.
ARTICLE 31. TORT CLAIMS AGAINST STATE DEPARTMENTS AND AGENCIES.

§ 143-291. Industrial Commission constituted a court to hear and determine claims; damages;

(a) The Euphoria Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State, or employees thereof. The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of Euphoria, if a private person would be liable to the claimant in accordance with the laws of Euphoria. If the Commission finds that there was such negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, which was the proximate cause of the injury and that contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted does not bar the claim, the Commission shall determine the amount of damages which the claimant is entitled to be paid, including medical and other expenses, and by appropriate order direct the payment of such damages by the department, institution or agency concerned, but in no event shall the amount of damages awarded exceed the sum of one hundred thousand dollars (\$100,000) cumulatively to all claimants on account of injury and damage to any one person. The fact that a claim may be brought under more than one Article under this Chapter shall not increase the foregoing maximum liability of the State.

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

- (ae) 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.