

MID-TERM 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—FALL '92—MIDTERM 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 ... !

In answering the questions, please DO NOT DISCUSS ANY of the following ISSUES:

- Contributory negligence on the part of any plaintiff;
- Comparative fault as between defendants;
- Claims against governmental bodies;
- Any affirmative claims or defenses that would be raised by any defendant.

In other words, you should concentrate on the evaluation of the *prima facie* case that would be presented by your client(s) (if you represent plaintiff(s)) or against your client(s) (if you represent the defendant(s)).

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 (80 points)

On November 5, 1992, Perry Peace, a licensed pharmacist and owner of Peace Drug Store in Canton, received a telephone call from John January. January, a regular customer of Peace, requested some strychnine. He stated that he needed the strychnine for the purpose of killing wolves. January told Peace that he had been having problems with wolves attacking his cattle while they were calving. Peace advised January that he didn't have the poison in stock, but told January he could contact Tyndale area farm and ranch stores or a particular pharmacy in Tyndale and procure the strychnine. Later the same day January called Peace back and reported that he had been unable to secure the strychnine. Peace concluded that January wanted the strychnine "immediately" to prevent further loss of livestock. Peace, in order to accommodate his customer January, called Slade's Drug at their Tyndale wholesale warehouse and arranged with Sam Scott (Slade's division manager) for January to go to the warehouse and pick up a quantity of the poison. The poison was delivered to January in person but the cost was charged to the account of a Grand Saline pharmacy owned by Peace.

January then took the strychnine to his home and used it to poison his wife Wendy. She died after three days of fruitless medical intervention. Wendy was survived by her two children, Bill and Betty, aged 10 and 12 respectively. Your firm represents the two children. The senior partner of your firm would like you to write a memo analyzing whether Bill and Betty have tort claims that could lead to compensation. For your information, John January has plead guilty to murder. He is judgment-proof and is covered by no insurance. You have determined that Peace was not licensed to distribute pesticides and that strychnine is a "restricted-use" pesticide. You have not yet determined whether Slade's has a license to distribute pesticides.

Please analyze the prospects of successful litigation for Bill and Betty.

QUESTION 2 (55 points)

In October 1975 Dr. Larrie Rinck informed Judith Walker that she was pregnant and Mrs. Walker, who was a nurse, informed Dr. Rinck that she had Rh negative blood. (When an Rh negative woman is pregnant with an Rh positive child, her blood develops antibodies which do not affect the present pregnancy, but can cause damage to later-conceived Rh positive fetuses. An injection of RhoGAM during the first pregnancy can prevent the formation of these antibodies. However, if the injection is not given in a timely manner and the mother's body manufactures the antibodies, no medical treatment is known which can reverse or destroy the antibodies. RhoGAM is a trademark of a preparation of Rh immune globulin. It is used to prevent the formation of antibodies in Rh negative women who have received Rh positive blood.) Dr. Rinck ordered blood tests from Lake Ridge Laboratory, Inc. Those tests erroneously reported that Mrs. Walker had Rh positive blood. Consequently, at the time of the birth of her first child in June 1976, no RhoGAM injections were given to Mrs. Walker. In fact, Mrs. Walker had Rh negative blood and the child had Rh positive blood and, thus, Mrs. Walker was exposed to the formation of potentially harmful

antibodies. In 1979, Mrs. Walker again became pregnant but had a miscarriage. Although the Laboratory's error was discovered at that time, no RhoGAM was given to her because she had already formed the antibodies following the birth of her first child; once formed, the administration of RhoGAM does nothing to remove the antibodies. In 1980, she became pregnant again and, in May 1981, gave birth to Nathan, who had Rh positive blood. Nathan alleged that he suffered anemia and respiratory problems as a result of the defendants' negligence in improperly interpreting his mother's blood type and in failing to administer RhoGAM following the birth of his older sibling. In 1984, Mrs. Walker became pregnant and, in February 1985, delivered Kathy and Jennifer. Kathy has Rh positive blood and alleges that the defendants' negligence caused her to have hearing impairments, motor skill deficiencies and possible mental retardation. Jennifer has Rh negative blood and alleges that the defendants' negligence has caused her to suffer asthma.

You represent Lake Ridge. Ignore any statute of limitations issues. Please analyze what tort exposure, if any, Lake Ridge faces for claims brought by Nathan, Kathy or Jennifer.

LINDEN STATUTES ANNOTATED (SELECTED SECTIONS)
CIVIL PRACTICE AND REMEDIES CODE
TITLE 4. LIABILITY IN TORT
CHAPTER 71. WRONGFUL DEATH; SURVIVAL
SUBCHAPTER A. WRONGFUL DEATH

§ 71.001. Definitions

In this subchapter:

(1) "Corporation" means a municipal, private, public, or quasi-public corporation other than a county or a common or independent school district.

(2) "Person" means an individual, association of individuals, joint-stock company, or corporation or a trustee or receiver of an individual, association of individuals, joint-stock company, or corporation.

§ 71.002. Cause of Action

(a) An action for actual damages arising from an injury that causes an individual's death may be brought if liability exists under this section.

(b) A person is liable for damages arising from an injury that causes an individual's death if the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfulness, or default.

§ 71.003. Application

This subchapter applies only if the individual injured would have been entitled to bring an action for the injury if he had lived.

§ 71.004. Benefitting From and Bringing Action

(a) An action to recover damages as provided by this subchapter is for the exclusive benefit of the surviving spouse, children, and parents of the deceased.

(b) The surviving spouse, children, and parents of the deceased may bring the action or one or more of those individuals may bring the action for the benefit of all.

(c) If none of the individuals entitled to bring an action have begun the action within three calendar months after the death of the injured individual, his executor or administrator shall bring and prosecute the action unless requested not to by all those individuals.

§ 71.005. Evidence Relating to Marital Status

In an action under this subchapter, evidence of the actual ceremonial remarriage of the surviving spouse is admissible, if it is true, but the defense is prohibited from directly or indirectly mentioning or alluding to a common-law marriage, an extramarital relationship, or the marital prospects of the surviving spouse.

§ 71.006. Effect of Felonious Act

An action under this subchapter is not precluded because the death is caused by a felonious act or because there may be a criminal proceeding in relation to the felony.

§ 71.007. Ineffective Agreement

An agreement between the owner of a railroad, street railway, steamboat, stagecoach, or other vehicle for the transportation of goods or passengers, of an industrial or public utility plant, or of other machinery and an individual, corporation, trustee, receiver, lessee, joint-stock association, or other entity in control of or operating the vehicle, plant, or other machinery does not release the owner or the entity controlling or operating the vehicle, plant, or other machinery from liability provided by this subchapter.

§ 71.008. Death of Defendant

(a) If a defendant dies while an action under this subchapter is pending or if the individual against whom the action may have been instituted dies before the action is begun, the executor or administrator of the estate may be made a defendant, and the action may be prosecuted as though the defendant or individual were alive.

(b) A judgment in favor of the plaintiff shall be paid in due course of administration.

§ 71.009. Exemplary Damages

When the death is caused by the wilful act or omission or gross negligence of the defendant, exemplary as well as actual damages may be recovered.

§ 71.010. Award and Apportionment of Damages

(a) The jury may award damages in an amount proportionate to the injury resulting from the death.

(b) The damages awarded shall be divided, in shares as found by the jury in its verdict, among the individuals who are entitled to recover and who are alive at that time.

TITLE 4. LIABILITY IN TORT
CHAPTER 73. DAMAGES; MISCELLANEOUS

§ 73.001 Failure to abort; negligence action; damages

No person shall maintain a cause of action or receive an award of damages on his behalf based on the claim that but for the negligent conduct of another he would have been aborted.

AGRICULTURE CODE
TITLE 5. PRODUCTION, PROCESSING, AND SALE
OF HORTICULTURAL PRODUCTS
SUBTITLE B. HORTICULTURE DISEASES AND PESTS
CHAPTER 76. PESTICIDE REGULATION
SUBCHAPTER D. LICENSING OF DEALERS

§ 76.071. License Required

(a) A person may not distribute in this state a restricted-use or state-limited-use pesticide without a valid current pesticide dealer license issued by the department.

(b) Except as otherwise provided by this section, a pesticide dealer must obtain a license for each location in the state that is used for distribution. If the person does not have a place of business in this state, the person may obtain one license for all out-of-state locations, but shall file as a condition to licensing a designation of an agent for service of process as provided by Section 76.042(d) of this code.

(c) A person must apply for a pesticide dealer license on forms prescribed by the department.

CHAPTER 76. PESTICIDE REGULATION
SUBCHAPTER E. USE AND APPLICATION

§ 76.105. License Required

(a) A person may not use a restricted-use or state-limited-use pesticide unless the person is:
(1) licensed as a commercial applicator, noncommercial applicator, or private applicator and authorized by the license to use the restricted-use or state-limited-use pesticide in the license use categories covering the proposed pesticide use;

(2) an individual acting under the direct supervision of a licensed applicator; or

(3) a certified private applicator as defined in Section 76.112(j) of this code.

(b) An individual is under the direct supervision of a licensed noncommercial or a licensed private applicator if the individual is acting under the instructions and control of a licensed noncommercial or a licensed private applicator who is responsible for the actions of the individual and who is available if and when needed. The licensed noncommercial or licensed private applicator is not required to be physically present at the time and place of the pesticide application.

(c) An individual is under the direct supervision of a licensed commercial applicator if the individual is acting under the instructions and control of a licensed commercial applicator who is

responsible for the actions of the individual and who is continuously physically present at the time and place of the pesticide application.

(d) A licensed applicator is responsible for assuring that the person working under the licensee's direct supervision is knowledgeable of the label requirements and rules and regulations governing the use of the particular pesticides being used by the individual. A licensed applicator satisfies the requirements of this subsection if the person working under the licensee's direct supervision attends a program conducted by the department that is designed to make the person knowledgeable of the label requirements and rules and regulations governing the use of pesticides.

(e) A person who is authorized under this chapter to use restricted-use or state-limited-use pesticides shall comply with all applicable federal and state rules, regulations, and court orders regarding the use of restricted-use or state-limited-use pesticides.

(f) The other provisions of this section notwithstanding, the department may adopt rules or establish programs that the U.S. Environmental Protection Agency or another federal agency requires as a condition for receiving:

- (1) approval to authorize use of certain restricted-use or state-limited-use pesticides;
- (2) federal funding for licensing or certification of pesticide applicators;
- (3) federal funding for pesticide law enforcement efforts; or
- (4) other federal funding related to pesticide risk reduction.

(g) The other provisions of this chapter notwithstanding, if the U.S. Environmental Protection Agency or another federal agency imposes on the state standards for certification of commercial, noncommercial, or private pesticide applicators, the department may adopt by rule the federal standards for each classification of applicators for which the federal standards are imposed.

CHAPTER 76. PESTICIDE REGULATION

SUBCHAPTER I. PENALTIES

§ 76.201. Offenses

(a) A person commits an offense if the person distributes within this state or delivers for transportation or transports in intrastate commerce or between points within this state through a point outside this state, any of the following:

- (1) a pesticide that has not been registered as provided by this chapter;
- (2) a pesticide that has a claim, a direction for its use, or labeling that differs from the representations made in connection with its registration;
- (3) a pesticide that is not in the registrant's or manufacturer's unbroken immediate container and that is not labeled with the information and in the manner required by Section 76.021 of this code;
- (4) a pesticide:
 - (A) that is of strength or purity that falls below the professed standard or quality expressed on its labeling or under which it is sold;
 - (B) for which a substance has been substituted wholly or in part;
 - (C) of which a valuable constituent has been wholly or in part abstracted; or
 - (D) in which a contaminant is present in an amount that is determined by the department to be a hazard;
- (5) a pesticide or device that is misbranded; or
- (6) a pesticide in a container that is unsafe due to damage;

- (b) A person commits an offense if the person:
- (1) detaches, alters, defaces, or destroys, wholly or in part, any label or labeling provided for by this chapter or a rule adopted under this chapter;
 - (2) adds any substance to or takes any substance from a pesticide in a manner that may defeat the purpose of this chapter or a rule adopted under this chapter;
 - (3) uses or causes to be used a pesticide contrary to its labeling or to a rule of the department limiting the use of the pesticide;
 - (4) handles, transports, stores, displays, or distributes a pesticide in a manner that violates a provision of this chapter or a rule adopted by the department under this chapter; or
 - (5) disposes of, discards, or stores a pesticide or pesticide container in a manner that the person knows or should know is likely to cause injury to man, vegetation, crops, livestock, wildlife, or pollinating insects.
- (c) A person other than a person to whom the pesticide is registered commits an offense if the person uses for the person's advantage or reveals, other than to a properly designated state or federal official or employee, a physician, or in emergency to a pharmacist or other qualified person for the preparation of an antidote, any information relating to pesticide formulas, trade secrets, or commercial or financial information acquired under this chapter and marked as privileged or confidential by the registrant.
- (d) A person commits an offense if the person:
- (1) commits an act for which a certified applicator's license may be suspended, modified, or revoked under Section 76.116 of this code; or
 - (2) violates any other provision of this chapter.
- (e) A person commits an offense if the person knowingly or intentionally uses, causes to be used, handles, stores, or disposes of a pesticide in a manner that causes injury to man, vegetation, crops, livestock, wildlife, or pollinating insects.