

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 '93—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 Turmoil, 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 (70 points)

Courtland Lucas, a minor child, was injured on May 18, 1983, when he fell from a second-story window at his family home, located in St. Peters, Turmoil. His father, David Lucas, has come to your law firm to find out whether or not he has a claim against anyone, and what to expect if suit is filed.

On the day of the accident, David and Courtland were on the second floor of the house, using binoculars to look out the window. David turned away to adjust the binoculars and turned back only in time to see Courtland's foot and ankle as he fell from the window. David stated that he never saw Courtland touching the window screen, but that Courtland had told him that Courtland had put his forehead against the screen before falling. David did not describe the screen.

The facts concerning the screen are as follows: R.G. McKelvey Building Company built the house and installed the screen in 1975. The screen was designed and manufactured by Metal Industries, Inc., and sold to McKelvey by the distributor, Kaplan Lumber. Another window in the same house had a screen on it that was manufactured by Pennco, Inc., and bore a warning embossed in the window screen frame: "Insect screens are intended to provide reasonable insect control, and are not intended to provide security or provide for the retention of objects." Keith Vidal, an expert hired by the window manufacturer, investigated the incident and stated that screens are designed to keep insects out and are "not designed to keep children in." He also stated that while he had not examined the actual screen, it appeared that "we had an undersized screen placed in this window . . . As a result of the undersized [screen], I think we had a condition that led to the injuries sustained by the boy." He further stated that he understood that there was no warning on the screen in question, but produced a picture of a screen taken from another window in the house. This screen, manufactured by Pennco, Inc., bore the following warning on the bottom of the screen frame: "[I]nsect screens are intended to provide reasonable insect control, and are not intended to provide security or provide for the retention of objects . . ."

The local construction code applicable in St. Peters mandated that residential window screens be capable of easy removal without the use of tools or excessive force.

David Lucas has approached your law firm asking for advice on whether or not his son would have any kind of a tort claim. What would you tell him?

QUESTION 2 (65 points)

On February 4, 1993, Mariano Rodriguez was an innocent passerby during a shootout between Turmoil State Police officers and one Ramon Flores. The incident began when a group pursued Mr. Flores south on Jerome Avenue, throwing bottles and garbage cans at him. A crowd was attracted by the commotion and at some point Flores drew a gun and began firing at his assailants. One of these individuals, Lazar Arioza, was wounded by Flores.

Officer Joglar has stated that he was in civilian clothes, on anti-crime detail, at the time of the incident. When he arrived at the intersection of Burnside and Jerome Avenues, he saw a crowd of 50 to 75 people watching something. Joglar heard shots fired. He left the car and ran toward the shots, with his radio in one hand, his shield around his neck, and his off-duty gun in the other hand, a .38-caliber revolver. Joglar saw Arioza lying in the middle of the street. He saw Flores, a few feet away from Arioza, put something in his belt, possibly a gun, and start walking away. After walking just three to four feet, Flores returned to Arioza, and pulled a gun.

Upon seeing the gun, Joglar yelled "police" and transmitted the information over his radio. Flores fired a shot at Joglar. Joglar took cover and so did Flores. The two exchanged shots until they ran out of bullets.

After Joglar had fired all his bullets, he heard shots fired from further down the street, to his right and to the southwest of his position. When the shooting stopped, Flores fled. Officer Joglar chased Flores (joined in the chase by Officer Charles Young, whose participation is described below). Flores was apprehended by other officers without further incident.

Officer Charles Young was in a statue store working on a robbery investigation. He was in plainclothes and carried his off-duty .38 caliber revolver. Young heard shots, exited the store, and then saw the crowd to his left. He took out his gun but did not display his shield. Young saw Flores walking at a rapid pace away from the crowd, going southbound on Jerome Avenue. He decided to follow Flores and walked in the same direction on the opposite (west) side of the street. Flores went almost 100 feet toward 179th Street before he turned to walk back, and Young, who had crossed the street and gotten ahead of Flores, followed him back. Flores stopped near the Post Office, brought up his gun, and started firing at Joglar. Young stated that he yelled "police" only because Joglar was an officer. Young stated that he took no action earlier to apprehend Flores because he thought Flores might have been an undercover police officer.

As soon as Young yelled "police," Flores turned and they exchanged several shots, with Young crouched behind a car.

Isabello Nieves, a postal carrier, has provided a description of events consistent with Joglar's account. Nieves saw Flores shoot Arioza while standing in the middle of the street and immediately saw Joglar approach, with his badge around his neck, and yell "police officer, stop."

Prior to the incident, plaintiff, Mariano Rodriguez, had been in a hardware store, on the west side of Jerome Avenue. He crossed the street to the east side. He recalled seeing a lot of people "screaming and yelling and running," but heard no shots and saw no one with a gun at any time. He

ran straight across the street toward the statue store. He was shot and he felt a burning pain upon approaching the west sidewalk.

Captain Karpel was assigned to investigate the incident. He was never told that Young had followed Flores. He was told that when Young first got out on the sidewalk, he went toward the crowd and the area of the shooting. Karpel states that Young, Joglar and Flores were all using .38 caliber guns.

You work for the State Attorney General's office and have been asked to prepare a memo analyzing the potential exposure of the state for Rodriguez' injuries if he should bring an action. Assume for purposes of analysis that his damages (if he could recover them) would be assessed at \$1,000,000. What would you tell them?

TURMOIL REVISED STATUTES ANNOTATED
COURT OF CLAIMS ACT

§ 8. Waiver of immunity from liability

The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article. Nothing herein contained shall be construed to affect, alter or repeal any provision of the worker's compensation law.

§ 8-b. Claims for unjust conviction and imprisonment

1. The legislature finds and declares that innocent persons who have been wrongly convicted of crimes and subsequently imprisoned have been frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law and that such persons should have an available avenue of redress over and above the existing tort remedies to seek compensation for damages. The legislature intends by enactment of the provisions of this section that those innocent persons who can demonstrate by clear and convincing evidence that they were unjustly convicted and imprisoned be able to recover damages against the state. In light of the substantial burden of proof that must be carried by such persons, it is the intent of the legislature that the court, in exercising its discretion as permitted by law regarding the weight and admissibility of evidence submitted pursuant to this section, shall, in the interest of justice, give due consideration to difficulties of proof caused by the passage of time, the death or unavailability of witnesses, the destruction of evidence or other factors not caused by such persons or those acting on their behalf.

2. Any person convicted and subsequently imprisoned for one or more felonies or misdemeanors against the state which he did not commit may, under the conditions hereinafter provided, present a claim for damages against the state.

3. In order to present the claim for unjust conviction and imprisonment, claimant must establish by documentary evidence that:

(a) he has been convicted of one or more felonies or misdemeanors against the state and subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence; and

(b) (i) he has been pardoned upon the ground of innocence of the crime or crimes for which he was sentenced and which are the grounds for the complaint; or (ii) his judgment of conviction was reversed or vacated, and the accusatory instrument dismissed or, if a new trial was ordered, either he was found not guilty at the new trial or he was not retried and the accusatory instrument dismissed; provided that the judgement of conviction was reversed or vacated, and the accusatory instrument was dismissed, on any of the following grounds: (A) paragraph (a), (b), (c), (e) or (g) of subdivision one of § 440.10 of the criminal procedure law; or (B) subdivision one (where based upon grounds set forth in item (A) hereof), two, three (where the count dismissed was the sole basis for the imprisonment complained of) or five of § 470.20 of the criminal procedure law; or (C) comparable provisions of the former code of criminal procedure or subsequent law; or (D) the statute, or application thereof, on which the accusatory instrument was based violated the constitution of the United States or the State of Turmoil; and

(c) his claim is not time-barred by the provisions of subdivision seven of this section.

4. The claim shall state facts in sufficient detail to permit the court to find that claimant is likely to succeed at trial in proving that (a) he did not commit any of the acts charged in the accusatory instrument or his acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor against the state, and (b) he did not by his own conduct cause or bring about his conviction. The claim shall be verified by the claimant. If the court finds after reading the claim that claimant is not likely to succeed at trial, it shall dismiss the claim, either on its own motion or on the motion of the state.

5. In order to obtain a judgment in his favor, claimant must prove by clear and convincing evidence that:

(a) he has been convicted of one or more felonies or misdemeanors against the state and subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence; and

(b) (i) he has been pardoned upon the ground of innocence of the crime or crimes for which he was sentenced and which are the grounds for the complaint; or (ii) his judgment of conviction was reversed or vacated, and the accusatory instrument dismissed or, if a new trial was ordered, either he was found not guilty at the new trial or he was not retried and the accusatory instrument dismissed; provided that the judgement of conviction was reversed or vacated, and the accusatory instrument was dismissed, on any of the following grounds: (A) paragraph (a), (b), (c), (e) or (g) of subdivision one of § 440.10 of the criminal procedure law; or (B) subdivision one (where based upon grounds set forth in item (A) hereof), two, three (where the count dismissed was the sole basis for the imprisonment complained of) or five of § 470.20 of the criminal procedure law; or (C) comparable provisions of the former code of criminal procedure or subsequent law; or (D) the statute, or application thereof, on which the accusatory instrument was based violated the constitution of the United States or the State of Turmoil; and

(c) he did not commit any of the acts charged in the accusatory instrument or his acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor against the state; and

(d) he did not by his own conduct cause or bring about his conviction.

6. If the court finds that the claimant is entitled to a judgment, it shall award damages in such sum of money as the court determines will fairly and reasonably compensate him.

7. Any person claiming compensation under this section based on a pardon that was granted before the effective date of this section or the dismissal of an accusatory instrument that occurred before the effective date of this section shall file his claim within two years after the effective date of this section. Any person claiming compensation under this section based on a pardon that was granted on or after the effective date of this section or the dismissal of an accusatory instrument that occurred on or after the effective date of this section shall file his claim within two years after the pardon or dismissal.

§ 9. Jurisdiction and powers of the court

The court shall have jurisdiction:

1. To hear and determine all matters now pending in the said court of claims.
2. To hear and determine a claim of any person, corporation or municipality against the state for the appropriation of any real or personal property or any interest therein, for the breach of contract, express or implied, or for the torts of its officers or employees while acting as such officers or employees, providing the claimant complies with the limitations of this article. For the purposes of this act only, a real property tax lien shall be deemed to be an interest in real property.
 - 2-a. To hear and determine a claim of any person, corporation or municipality, against the state for the torts of members of the organized militia and the employees in the division of military and naval affairs of the executive department, providing that the claim is encompassed by the waiver of immunity and assumption of liability contained in § 8-a of this chapter, and providing, further, that the claimant complies with the limitations of this article.
3. To hear and determine any claim in favor of the state against the claimant, or against his assignor at the time of the assignment.
 - 3-a. To hear and determine the claim for damages against the state for unjust conviction and imprisonment pursuant to § 8-b of this article.
4. To render judgment in favor of the claimant or the state for such sum as should be paid by or to the state.
5. To order two or more claims growing out of the same set of facts to be tried or heard together, with or without consolidation, whenever it can be done without prejudice to a substantial right.
6. To order the interpleader of other parties known or unknown whenever necessary for a complete determination of the claim or counterclaim.
7. To provide for the perpetuation of testimony.
8. To open defaults; to vacate, amend, correct, or modify any process, claim, order or judgment, in furtherance of justice for any error in form or substance; before entry of judgment, to reopen a trial and permit submission of further evidence; to grant a new trial upon any grounds for which a new trial may be granted in the supreme court.
9. To establish rules for the government of the court and the regulation of practice therein and to prescribe the forms of procedure before it, in furtherance of the provisions of this act and not inconsistent with law, and except as otherwise provided by this act or by rules of this court or the civil practice law and rules, the practice shall be the same as in the supreme court.
 - 9-a. To make a declaratory judgment as defined in § 3001 of the civil practice law and rules with respect to any controversy involving the obligation of an insurer to indemnify or defend a defendant in any action pending in the court of claims, provided that the court shall have no jurisdiction to enter a judgment against an insurer pursuant to this subdivision either: (i) for money

damages; or, (ii) if the insurer would otherwise have a right to a jury trial of the controversy with respect to which the declaratory judgment is sought.

10. To provide for the regular or special sessions of the court, for such terms and at such places as it may determine and to prepare the calendar of cases therefor.

11. The court and the judges shall have all of the powers necessary to carry out properly the jurisdiction granted and the duties imposed by this act.

12. To hear and determine special proceedings for the distribution of moneys deposited pursuant to subdivision (E) of § 304 of the eminent domain procedure law.

§ 10. Time of filing claims and notices of intention to file claims

No judgment shall be granted in favor of any claimant unless such claimant shall have complied with the provisions of this section applicable to his claim.

1. A claim for the appropriation by the state of lands, or any right, title or interest in or to lands shall be filed within three years after the accrual of such claim, or where title is vested by the filing of a description and map in the office of the county clerk or register, then within three years after personal service of a copy of such description and map and notice of filing thereof or if personal service cannot be made within the state, then within three years after the filing of the description and map and the recording of notice of filing thereof.

2. A claim by an executor or administrator of a decedent who left him or her surviving a husband, wife or next of kin, for damages for a wrongful act, neglect or default, on the part of the state by which the decedent's death was caused, shall be filed within ninety days after the appointment of such executor or administrator, unless the claimant shall within such time file a written notice of intention to file a claim therefor in which event the claim shall be filed within two years after the death of the decedent. In any event such claim shall be filed within two years after the death of the decedent.

3. A claim to recover damages for injuries to property or for personal injury caused by the negligence or unintentional tort of an officer or employee of the state while acting as such officer or employee, shall be filed within ninety days after the accrual of such claim unless the claimant shall within such time file a written notice of intention to file a claim therefor, in which event the claim shall be filed within two years after the accrual of such claim.

3-a. A claim to recover damages for injuries to property or for personal injuries caused by the negligence or unintentional tort of a member of the organized militia or of an employee in the division of military and naval affairs of the executive department, shall be filed within ninety days after the accrual of such claim, unless the claimant shall within such time file a written notice of intention to file a claim therefor, in which event the claim shall be filed within two years after the accrual of such claim.

3-b. A claim to recover damages for injuries to property or for personal injuries caused by the intentional tort of an officer or employee of the state while acting as such officer or employee, or of a member of the organized militia or of an employee in the division of military and naval affairs of the executive department, shall be filed within ninety days after the accrual of such claim, unless the claimant shall within such time file a written notice of intention to file a claim therefor, in which event the claim shall be filed within one year after the accrual of such claim.

4. A claim for breach of contract, express or implied, and any other claim not otherwise provided for by this section, over which jurisdiction has been conferred upon the court of claims, shall be filed within six months after the accrual of such claim, unless the claimant shall within such

time file a written notice of intention to file a claim therefor in which event the claim shall be filed within two years after such accrual.

5. If the claimant shall be under legal disability, the claim may be presented within two years after such disability is removed.

6. A claimant who fails to file a claim or notice of intention, as provided in the foregoing subdivisions, within the time limited therein for filing the claim or notice of intention, may, nevertheless, in the discretion of the court, be permitted to file such claim at any time before an action asserting a like claim against a citizen of the state would be barred under the provisions of article two of the civil practice law and rules. For the purpose of this subdivision, a claim against the state arising under subdivision one of this section shall be deemed an action upon an implied contractual obligation. The application for such permission shall be made returnable at any regular or special session of the court and may be heard and determined by any judge thereof. The claim proposed to be filed, containing all of the information set forth in § 11 of this act, shall accompany such application. In determining whether to permit the filing of a claim pursuant to this subdivision, the court shall consider, among other factors, whether the delay in filing the claim was excusable; whether the state had notice of the essential facts constituting the claim; whether the state had an opportunity to investigate the circumstances underlying the claim; whether the claim appears to be meritorious; whether the failure to file a timely claim or notice of intention resulted in substantial prejudice to the state; and whether the claimant has any other available remedy.

7. For the purposes of subdivision three of this section, a claim against the state which would be governed by § 214-c of the civil practice law and rules if it were asserted against a citizen of the state shall be deemed to have accrued on the date of discovery of the injury by the claimant or on the date when through the exercise of reasonable diligence the injury should have been discovered by the claimant, whichever is earlier.

§ 12. Conditions of judgment

1. In no case shall any liability be implied against the state. No judgment shall be granted on any claim against the state except upon such legal evidence as would establish liability against an individual or corporation in a court of law or equity.

2. No judgment shall be awarded to any claimant on any claim which, as between citizens of the state, would be barred by lapse of time.

3. Claims shall be heard and judgments thereon rendered by one judge, provided, however, that the presiding judge may order any claim or claims to be heard or determined by more than one judge, but not more than three judges, in which event the judgments thereon shall be rendered upon the concurrence of two judges. All intermediate applications and motions may be heard and determined by one judge.

4. Before any judgment shall be rendered for appropriation of land, the value of which exceeds five thousand dollars the judge rendering or one of the judges concurring in the judgment shall view the premises affected thereby.

5. No liability shall be imposed upon the state for alleged errors or omissions in the performance of a discretionary function.

ARTICLE 14-A--DAMAGE ACTIONS:
EFFECT OF CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK

§ 1411. Damages recoverable when contributory negligence or assumption of risk is established

In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

§ 1412. Burden of pleading; burden of proof

Culpable conduct claimed in diminution of damages, in accordance with § 1411, shall be an affirmative defense to be pleaded and proved by the party asserting the defense.

CHAPTER 24-A OF THE CONSOLIDATED LAWS
ARTICLE 15--MODIFICATION AND DISCHARGE OF OBLIGATIONS
TITLE 1. DISCHARGE OF JOINT OBLIGORS

§ 15-108. Release or covenant not to sue

(a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.

(b) Release of tortfeasor. A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.

(c) Waiver of contribution. A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person.

CIVIL PRACTICE LAW AND RULES
CHAPTER EIGHT OF THE CONSOLIDATED LAWS
ARTICLE 16--LIMITED LIABILITY OF PERSONS JOINTLY LIABLE

§ 1601. Limited liability of persons jointly liable

1. Notwithstanding any other provision of law, when a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an action involving two or more

tortfeasors jointly liable or in a claim against the state and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss; provided, however that the culpable conduct of any person not a party to the action shall not be considered in determining any equitable share herein if the claimant proves that with due diligence he was unable to obtain jurisdiction over such person in said action (or in a claim against the state, in a court of this state).

2. Nothing in this section shall be construed to affect or impair any right of a tortfeasor under section 15-108 of the general obligations law.

§ 1602. Application

The limitations set forth in this article shall:

1. apply to any claim for contribution or indemnification, but shall not include:

(a) a claim for indemnification if, prior to the accident or occurrence on which the claim is based, the claimant and the tortfeasor had entered into a written contract in which the tortfeasor had expressly agreed to indemnify the claimant for the type of loss suffered; or

(b) a claim for indemnification by a public employee, including indemnification pursuant to section fifty-k of the general municipal law or section seventeen or eighteen of the public officers law.

2. not be construed to impair, alter, limit, modify, enlarge, abrogate or restrict (i) the limitations set forth in section twenty-a of the court of claims act; (ii) any immunity or right of indemnification available to or conferred upon any defendant for any negligent or wrongful act or omission; (iii) any right on the part of any defendant to plead and prove an affirmative defense as to culpable conduct attributable to a claimant or decedent which is claimed by such defendant in the diminution of damages in any action; and (iv) any liability arising by reason of a non-delegable duty or by reason of the doctrine of respondeat superior.

3. not apply to administrative proceedings.

4. not apply to claims under the workers' compensation law or to a claim against a defendant where such defendant has impleaded a third party against whom the claimant is barred from asserting a cause of action because of the applicability of the workers' compensation law, to the extent of the equitable share of said third party.

5. not apply to actions requiring proof of intent.

6. not apply to any person held liable by reason of his use, operation, or ownership of a motor vehicle or motorcycle, as those terms are defined respectively in sections three hundred eleven and one hundred twenty-five of the vehicle and traffic law.

7. not apply to any person held liable for causing claimant's injury by having acted with reckless disregard for the safety of others.

8. not apply to any person held liable by reason of the applicability of article ten of the labor law.

9. not apply to any person held liable for causing claimant's injury by having unlawfully released into the environment a substance hazardous to public health, safety or the environment, a substance acutely hazardous to public health, safety or the environment or a hazardous waste, as defined in articles thirty-seven and twenty-seven of the environmental conservation law and in violation of article seventy-one of such law; provided, however, that nothing herein shall require

that the violation of said article by such person has resulted in a criminal conviction or administrative adjudication of liability.

10. not apply to any person held liable in a product liability action where the manufacturer of the product is not a party to the action and the claimant establishes by a preponderance of the evidence that jurisdiction over the manufacturer could not with due diligence be obtained and that if the manufacturer were a party to the action, liability for claimant's injury would have been imposed upon said manufacturer by reason of the doctrine of strict liability, to the extent of the equitable share of such manufacturer.

11. not apply to any parties found to have acted knowingly or intentionally, and in concert, to cause the acts or failures upon which liability is based; provided, however, that nothing in this subdivision shall be construed to create, impair, alter, limit, modify, enlarge, abrogate, or restrict any theory of liability upon which said parties may be held liable to the claimant.

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.