

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 '93—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.

(1) MULTIPLE CHOICE. Please select the *best* answer. Some answers may give a wrong reason for an otherwise correct result. Make sure that you read all the answers thoroughly and select the one that comes closest to a correct statement of the law.

(2) ESSAY. Spend the amount of time corresponding to the number of points for the essay.

When you have finished, be sure to include your multiple choice answer sheet and put the two together 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 Evergreen, 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!

MERRY CHRISTMAS!

QUESTION 1 (85 points)

Forrest Feldstein owned a large, ramshackle Victorian house. He had inherited the house from his father in 1958, but had rented it out for years to college students who put up with the drafty, creaky old house because the rent was so cheap. In 1988 the economy improved and tourism in the area began to increase. Feldstein decided to turn the house into a "bed and breakfast" place where he would cater to Yuppies who wanted to get away for a weekend. Forrest knew that it would be quite costly to repair the house to bring it up to building code standards, but he calculated the rate of return and figured he could make a profit. He went to the bank and arranged to borrow \$110,000 and then began interviewing contractors about the cost of renovation. Most of the repairs were pretty straightforward, albeit time-consuming. However, one item that kept coming up as a big concern was the replacement of the heating system. The old oil-fired furnace was on its last legs, and the suggestion was to run hot-water radiators throughout the building. The furnace and its octopus-like tangle of ducts would be taken out of the basement and replaced with a compact, efficient gas furnace that would heat hot water and circulate it through the building. (Summers in this location were cool enough so that air conditioning really wasn't needed.)

Based on his approval of her presentation, Feldstein hired Debbie Druse as his general contractor, and Debbie in turn hired Erin Easton as a subcontractor to remove all of the old fixtures in preparation for the remodeling and new construction. To save money, Feldstein wanted as much work done while the tenants were still in the building, so Easton was directed to start by taking out the old furnace. The furnace was so huge that Easton wasn't sure how they ever got the thing into the basement. He decided the best plan was to disassemble it and all the piping and then take it out piece by piece. Pasha Polensky, one of the tenants, had an apartment immediately above the basement. Pasha, a 23-year-old artist, was home during the day working on her drawings. When Easton began sawing away on the old furnace, Pasha complained to him about both the noise and the dust. Easton apologized, but told her she should talk to Feldstein. When she did, Feldstein offered to cut Pasha's rent in half for the time period that the basement work was going on. Pasha agreed.

Easton spent a long time sawing up the duct-work that had been "glued" together with cement, and removing the insulation from the furnace. Finally the furnace itself was taken out and disposed of. Pasha's whole apartment was covered with a fine layer of dust from the work. Not being particularly tidy herself, she really didn't care. Feldstein eventually made everyone move out of the apartment and remodeled it. Just as it was being completed, Pasha checked in to a hospital for treatment of her recurrent respiratory problems. The doctors discovered that she had lung cancer. Not being a smoker, Pasha was puzzled, as were her doctors. Pasha died two months later. The autopsy revealed the presence of asbestos fibers, which were traced to the furnace-removal project. Pasha's only surviving relative, her mother, Mary Monroe, has come to your office to see if any legal action could be taken. What would you tell her?

MULTIPLE CHOICE

(Total: 50 points)

FACTS FOR MULTIPLE CHOICE QUESTIONS

We Manage Waste, Inc. ("WMW"), a company specializing in waste disposal, operated a landfill from 1970 to 1985 in Orange, Evergreen, that was used for the deposit of waste materials. Household garbage and industrial refuse were deposited in the landfill. Part of the waste stream deposited in the landfill included waste products from dry cleaning establishments that contained the residue of solvents used in the dry cleaning process. Six different dry cleaning companies have been identified as having arranged for delivery of dry cleaning waste products to the landfill. In 1988 traces of the solvents were detected in the drinking water used in Mandarin Quarter, in the Northeast Quadrant of the City of Orange. The solvents had leached out of the landfill and into the Orange Aquifer, and found their way into the well water used in Mandarin. On December 20, 1988 a health emergency was declared in Mandarin and the Department of Environmental Protection ordered WMW to instruct Mandarin residents to discontinue the use of well water entirely. From then until July 1990 water for household use was provided by various improvisations. At first, the residents carried their water from tankers placed in various locations within the Mandarin area. Later, WMW employees delivered to the residents plastic-lined water containers. Finally, the residents received containers with spigots; these were filled periodically with water pumped through a hose from a water truck. By July 1990 the City of Orange constructed a public water supply system for the Orange residents. In the meantime, WMW has gone into bankruptcy.

You represent the insurance carrier for one of the six dry cleaning companies, Cleaner by the Hour. Three of the other companies are now out of business and one is in bankruptcy. The other dry cleaning company is part of a national chain. There are numerous potential plaintiffs, but you have been asked to analyze the claim of Gregg and Gina Gillespie, who have a daughter, Henrietta, who was born with birth defects. Gina became pregnant and gave birth to Henrietta while she was living in Mandarin. A doctor is prepared to testify that Gina's exposure to the dry cleaning solvents may have caused Henrietta's birth defects.

1. What are the plaintiffs likely to argue as a basis for liability on the part of CBH?
 - a. That CBH created a nuisance.
 - b. That CBH was engaged in an abnormally dangerous activity.
 - c. Both (a) and (b).
 - d. Neither (a) nor (b).
2. Suppose plaintiffs argue that CBH was negligent in depositing the dry cleaning waste in the landfill. Which of the following, if proven, would be the best defense to a claim of negligence:
 - a. CBH didn't know that its product was dangerous.
 - b. CBH met the standard of care exercised by other dry cleaning establishments
 - c. CBH used reasonable care once it learned its products were hazardous
 - d. The cost of preventing the injury greatly exceeded the probability of harm to potential victims, multiplied by the magnitude of such harm.
3. Suppose CBH had written a policy manual that called for incineration of the dry cleaning waste rather than disposal in a landfill. Would the policy manual be admissible at trial?
 - a. Yes, but only to show that alternate measures of disposal were feasible.
 - b. Yes, if CBH denied that it was in control of the instrumentality.
 - c. Yes, in order to show that CBH had failed to use reasonable care.
 - d. No, it wouldn't be admissible.
4. In addition to showing that CBH's depositing of the waste material was a legal cause of Henrietta's injury, which of the following would have to be proven at trial?
 - a. That, but for CBH's contribution to the landfill, Henrietta would not have been injured.
 - b. That Henrietta lost a chance of recovery because of CBH's breach of duty
 - c. That CBH's breach of duty was a substantial factor in causing Henrietta's problems.
 - d. That CBH's breach of duty increased the risk of an injury.
5. Suppose the plaintiffs wanted to argue that the doctrine of enterprise liability should apply to this case. Which of the following would best support that argument:
 - a. The plaintiffs don't know which tortfeasor actually caused her injury.
 - b. The plaintiffs can name a substantial share of the establishments that contributed dry cleaning waste to the landfill
 - c. Henrietta would not have been injured but for her mother's exposure to dry cleaning waste
 - d. The dry cleaning industry was aware of the risks posed by deposit of dry cleaning waste into municipal landfills.
6. Are Gregg and Gina likely to file an action for wrongful birth?
 - a. Yes, to recover their own damages caused by the birth of their daughter
 - b. Yes, unless the wrongful life damages are duplicative.
 - c. No, because Henrietta would have been born even if the defendants had not been negligent.
 - d. No, because most jurisdictions do not allow wrongful birth recoveries.
7. Would Henrietta be able to sue for wrongful life damages?
 - a. Yes, but not for pain and suffering damages

- b. Yes, but only for damages up to age 18
 - c. No, unless this jurisdiction used the Restatement approach for offsetting benefit
 - d. No, because wrongful life wouldn't apply to this case.
8. Suppose (for purposes of THIS QUESTION ONLY) that in the course of investigation it is learned that WMW was aware of the dangers posed by dry cleaning waste, but continued to accept it into the waste stream anyway. Would WMW become a superseding tortfeasor?
- a. Yes, if they broke the chain of causation between CBH and the plaintiffs
 - b. Yes, because WMW's conduct was more culpable.
 - c. No, unless it was more probable than not that WMW's negligence actually caused the injury.
 - d. No, because WMW's negligence was only a "mere chance."
9. Suppose Henrietta's older brother Larry, aged 6, drank the well water as a child, but medical tests haven't shown any ill effects from drinking it. Larry has heard other kids at school talk about the risk of cancer and has become quite worried. The school principal has asked the Gillespie's to take Larry to a counselor because of his continuing obsession with cancer. Could Larry recover damages for emotional distress?
- a. Yes, if his emotional trauma has a guarantee of genuineness.
 - b. Yes, if he lost a chance for emotional stability as a result of the contamination.
 - c. No, unless there is a physical manifestation of his emotional distress.
 - d. No, because he wasn't in the "zone of danger."
10. Could any of the plaintiffs recover punitive damages against CBH?
- a. Yes, so long as their injuries are serious;
 - b. Yes, if economic damages alone won't provide full compensation;
 - c. No, because most jurisdictions don't permit punitive damages where causation is uncertain;
 - d. No, unless CBH's behavior displayed a deliberate disregard of the plaintiffs' safety.

EVERGREEN STATUTES ANNOTATED (SELECTED SECTIONS)

JUDICIAL PROCEDURE, DISTRICT COURT

CHAPTER 549. COSTS, DISBURSEMENTS

549.20. Punitive damages

Subdivision 1. (a) Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.

(b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

(1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or

(2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Subd. 2. Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if:

(a) the principal authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal deliberately disregarded a high probability that the agent was unfit, or

(c) the agent was employed in a managerial capacity with authority to establish policy and make planning level decisions for the principal and was acting in the scope of that employment, or

(d) the principal or a managerial agent of the principal, described in clause (c), ratified or approved the act while knowing of its character and probable consequences.

Subd. 3. Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Subd. 4. Separate proceeding. In a civil action in which punitive damages are sought, the trier of fact shall, if requested by any of the parties, first determine whether compensatory damages are to be awarded. Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages is not admissible in that proceeding. After a determination has been made, the trier of fact shall, in a separate proceeding, determine whether and in what amount punitive damages will be awarded.

Subd. 5. Judicial review. The court shall specifically review the punitive damages award in light of the factors set forth in subdivision 3 and shall make specific findings with respect to them. The appellate court, if any, also shall review the award in light of the factors set forth in that subdivision. Nothing in this section may be construed to restrict either court's authority to limit punitive damages.

COMPENSATORY AND COLLECTION REMEDIES CHAPTER 573. PERSONAL REPRESENTATIVES, HEIRS; ACTIONS

§ 573.02. Action for death by wrongful act

Subdivision 1. When death is caused by the wrongful act or omission of any person or corporation, the trustee appointed as provided in subdivision 3 may maintain an action therefor if the decedent might have maintained an action, had the decedent lived, for an injury caused by the wrongful act or omission. An action to recover damages for a death caused by an intentional act constituting murder may be commenced at any time after the death of the decedent. Any other action under this section may be commenced within three years after the date of death provided that the action must be commenced within six years after the act or omission. The recovery in the action

is the amount the jury deems fair and just in reference to the pecuniary loss resulting from the death, and shall be for the exclusive benefit of the surviving spouse and next of kin, proportionate to the pecuniary loss severally suffered by the death. The court then determines the proportionate pecuniary loss of the persons entitled to the recovery and orders distribution accordingly. Funeral expenses and any demand for the support of the decedent allowed by the court having jurisdiction of the action, are first deducted and paid. Punitive damages may be awarded as provided in section 549.20.

If an action for the injury was commenced by the decedent and not finally determined while living, it may be continued by the trustee for recovery of damages for the exclusive benefit of the surviving spouse and next of kin, proportionate to the pecuniary loss severally suffered by the death. The court on motion shall make an order allowing the continuance and directing pleadings to be made and issues framed as in actions begun under this section.

Subd. 2. When injury is caused to a person by the wrongful act or omission of any person or corporation and the person thereafter dies from a cause unrelated to those injuries, the trustee appointed in subdivision 3 may maintain an action for special damages arising out of such injury if the decedent might have maintained an action therefor had the decedent lived.

Subd. 3. Upon written petition by the surviving spouse or one of the next of kin, the court having jurisdiction of an action falling within the provisions of subdivisions 1 or 2, shall appoint a suitable and competent person as trustee to commence or continue such action and obtain recovery of damages therein. The trustee, before commencing duties shall file a consent and oath. Before receiving any money, the trustee shall file a bond as security therefor in such form and with such sureties as the court may require.

Subd. 4. This section shall not apply to any death or cause of action arising prior to its enactment, nor to any action or proceeding now pending in any court of the state of Evergreen, except this section shall apply to any death or cause of action arising prior to its enactment which resulted from an intentional act constituting murder, and to any such action or proceeding now pending in any court of the state of Evergreen with respect to issues on which a final judgment has not been entered.

Enacted July 1, 1972.

MULTIPLE CHOICE ANSWER SHEET

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____

TEAR THIS OFF AND PUT IT IN YOUR BLUEBOOK!