

FINAL EXAM

**Instructions**

DO NOT GO BEYOND THIS PAGE UNTIL THE EXAM ACTUALLY BEGINS.  
THIS IS A CLOSED BOOK EXAM!

While waiting for the exam to begin, be sure that you have written your EXAM NUMBER on each bluebook AND ON THE MULTIPLE CHOICE ANSWER SHEET, that you have read these instructions, and that you are otherwise ready to begin. For each of the questions, START A NEW BLUEBOOK.

(1) MULTIPLE CHOICE/TRUE-FALSE. *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) ESSAYS: You will have two essay questions.

POINTS are assigned based upon the rough number of minutes it should take to complete each section. The division is as follows:

Multiple Choice/True False:	50 points;
Question 1:	50 points
Question 2:	<u>45 points</u>
TOTAL	145 points

DOUBLE-SPACE your answers in the bluebook.

PLEASE IGNORE issues relating to legal causation; assume that any but-for cause of an injury is also a proximate cause of that injury.

A STATUTORY APPENDIX is provided that gives the law of this jurisdiction, the State of Grace, on some issues. If no law is specified on the point you are interested in, please comment on the possible alternatives.

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!!!

## MULTIPLE CHOICE

## FACTS FOR QUESTIONS 1-5

In 1985 Irvin Femur's wife, Debbie, died in Poster Falls, a town located in Crouton Bay County, Grace. She died of a gunshot wound to the chest. Her death occurred in the home where Irvin and Debbie lived with their children. Irvin told the investigating officers that Debbie had shot herself because she was upset about family matters. Although there was some suspicion that Irvin was responsible for Debbie's death, he was not prosecuted.

In 1993 Ronald Rankin published an article about the prosecutor of Crouton Bay County in a free tabloid newspaper he occasionally distributed in northern Grace. The article charged the prosecutor with being inept, indifferent or incompetent. Among other things the article called for a coroner's inquest into Debbie's death. The article contained this comment on the handling of the case:

One case, however, which will not disappear for lack of prosecution concerns the death of a 23 year old mother of two, Debbie Femur in Poster Falls on Saturday, January 11, 1985. Mrs. Femur was shot in the chest at point blank range with a .44 Magnum revolver, at about midnight. The Poster Falls police responded to the call and Detective Randy Bohn conducted the investigation. At about 1:30 A.M., Walker and his staff investigator Merv Stalder [now Crouton Bay County Sheriff] arrived. Stalder interviewed the husband of the victim and observed the scene. The husband stated that his wife shot herself. Walker and Stalder left the scene at approximately 2 A.M., with Walker telling Det. Bohn that they would be in touch with him on Monday and decide where the autopsy would be conducted. When Bohn, continuing his investigation, contacted the victim's family on Sunday afternoon, he was informed that an autopsy had already been performed that morning at 10 A.M. On Wednesday, Bohn was informed by the family that the body had been released and cremated. The evidence collected by the Poster Falls Police Department and by Det. Bohn indicating that the victim did not shoot herself--and which I have personally viewed--is overwhelming. It contains photographs indicating that it was impossible for the victim to have held the gun in the position needed to shoot herself; a laboratory chemical test by the FBI which found no antimony barium from the gun discharge on the hand swabs taken of the victim; lint on the gun indicating it had been wiped clean of fingerprints; a severe wound to the victim's mouth, which Stalder's report confirmed appeared to have come from a blow; and boxes of the victim's clothing and personal effects which had been packed indicating an intent to leave home.... and more. The thoroughness of the Poster Falls police investigation is irrefutable. Bohn, who is now assistant police chief in Poster Falls, has personally taken the files of the case to the prosecutor's office at least once a year since the incident. He states that each time the files are presented, the current deputy prosecutor has agreed to the merit of the case. Each time the deputy has said he would discuss the case with Walker; each time nothing further was done.

Rankin read the police reports, but he admitted that in reaching the conclusions that led to the

statements made in the article he relied on statements made to him by the investigating officer that went beyond the reports. He also admitted that he did not read everything in the police file, including a polygraph examination of Femur that concluded that Femur was telling the truth when he said he did not shoot his wife. Rankin also admitted that he had read the FBI report concerning the testing to determine whether Debbie or Irvin had fired the gun. This report stated that it could not be determined whether Debbie or Irvin had discharged the firearm, but that this did not preclude the possibility that either of them could have discharged the gun. Rankin did not include in the article that the test was negative as to Irvin as well as Debbie or that the test was not conclusive.

1. Based on the facts described, can FEMUR prevail in an action for defamation?
  - a. No, because the article does not address him by name.
  - b. No, because the article did not address a matter of public concern.
  - c. Yes, but only if he can show that Rankin's motive was to injure him.
  - d. Yes, but he can only recover compensatory damages, unless he can show malice.
  
2. The statement LEAST likely to support his defamation claim would be:
  - a. "Mrs. Femur was shot in the chest at point blank range with a .44 Magnum revolver, at about midnight."
  - b. "The evidence collected by the Poster Falls Police Department and by Det. Bohn indicating that the victim did not shoot herself--and which I have personally viewed--is overwhelming."
  - c. "He [Bohn] states that each time the files are presented, the current deputy prosecutor has agreed to the merit of the case."
  - d. "Each time the deputy [prosecutor] has said he would discuss the case with Walker; each time nothing further was done."
  
3. Would Rankin be shielded from liability because of a privilege to provide a report of an official proceeding?
  - a. No, because the events underlying the report did not occur in the recent past.
  - b. No, if his report was made in bad faith.
  - c. Yes, regardless of his motives in reporting.
  - d. Yes, even if he went beyond the literal text of the official reports and offered his own evaluation of them.
  
4. Which of the following statements most accurately describes the constitutional privilege available to Rankin?
  - a. If Femur did not thrust himself into this particular public controversy, then Rankin would be liable for any false statements to the extent that they caused actual injury to Femur's reputation.
  - b. Rankin would not be answerable for any false statements so long as he did not exhibit reckless disregard as to their probable falsity.

- c. Rankin would be liable for any statements that caused actual injury, made with malice, regardless of whether they were true or false.
  - d. Rankin could be liable to any public official who was injured by a false statement, if Rankin did not use reasonable care in making the statement, but the official would be unable to recover punitive damages.
5. Suppose Femur filed an action claiming the tort of outrage. Which of the following would be MOST supportive of Rankin's motion for summary judgment on the outrage claim?
- a. A sworn affidavit signed by Rankin stating that he did not intend to injure Femur, but instead was attempting to call attention to inadequate performance of public duties by county officials.
  - b. An opinion poll showing that 60% of the people in the community already believed that Femur was responsible for his wife's death.
  - c. An interrogatory addressed to Femur asking "Please state the nature and extent of any physical injury suffered as a result of this incident?" Answer: "None."
  - d. An affidavit from Femur's neighbor stating that she had observed Femur going to work every day, that Femur had not displayed any significant emotional harm as a result of the incident, and that Femur had commented a week after the publication that "Rankin is a jerk and everybody knows that."

#### FACTS FOR QUESTIONS 6-10

Brian Roberts, a 3-year-old boy, lived in a rural area next to property owned by the Mesquite County. A wastewater treatment plant was constructed on the site in 1983 by Davis Construction Co., based upon blueprints and specifications supplied by Mesquite County. The plans were approved by the Grace State Department of Environmental Regulation, subject to the following proviso: "The treatment plant should be fenced to keep out unauthorized personnel." No fence was ever constructed, and the plans and specifications did not provide for one. On May 1, 1983, an employee of the Department of Environmental Regulation inspected the treatment plant and failed to point out the lack of a fence. Return visits every two years also failed to generate any warning concerning the lack of a fence. On July 3, 1993, Brian wandered onto the property and climbed to the top of a sewage treatment tank. He fell into the tank and drowned. The vehicle entrance to the property contained a sign saying "Authorized Personnel Only." Roberts' mother Janice was aware of the presence of the sign. A wrongful death claim was filed on March 1, 1994 by Roberts' estate against various parties, including Mesquite County, Davis Construction Co., and the State of Grace.

6. Was Brian a trespasser?
- a. Yes, even if he was too young to know that he did not have permission to be there.
  - b. Yes, because his mother knew that the area was restricted to authorized personnel.
  - c. No, unless some evidence shows that he was aware of the fact that he had no permission to be on the property.
  - d. No, because children of that age are incapable of contributory negligence.

7. Could one of the defendants name Janice as a third-party defendant?
- Yes, if her behavior was a contributing feature to causing the accident.
  - Yes, but her liability would be limited to the percentage share of fault assessed by the jury.
  - No, unless there was some evidence that she knew that her child had a tendency to play in that area.
  - No, because parents are immune from claims based upon negligent supervision of their children.
8. Could Davis Construction Co. be held liable for the injury?
- No, because the statute of limitations has run.
  - No, because the statute of repose would bar such a claim.
  - Yes, assuming that the statute of limitations for negligence claims is at least three years.
  - Yes, unless Janice did not file the claim within a reasonable period after she discovered that she had a claim.
9. Could Mesquite County be found liable for the injury?
- Yes, but only for their proportionate share of fault.
  - Yes, but only if the sewage treatment tank is found to be an artificial condition.
  - No, because "attractive nuisance" claims are not applicable to public entities.
  - No, if the jury finds that the average person would not be attracted by a sewage treatment tank.
10. Could the Grace State Board of Health be found liable?
- No, because of sovereign immunity.
  - No, because the state did not create the risk in the first place.
  - Yes, if they failed to use reasonable care in reviewing the plans.
  - Yes, if Brian or his mother reasonably relied upon the state to exercise reasonable care on their behalf.

## ESSAYS

### QUESTION 1 (50 points)

On January 7, 1992, Cory Mathis, who was then six years old, visited a bookmobile owned and operated by the Office of Special Programs, a subdivision of the Grace Department of Education ("DOE"). The bookmobile was parked on a four-lane roadway away from any marked crosswalks. Upon leaving, Cory crossed in front of the bookmobile and was struck by a passing vehicle driven by Henry Perry, travelling in the lane next to the curb lane where the

bookmobile was parked. He was dragged for a considerable distance by the car that hit him and suffered catastrophic injuries from which he will never completely recover. Perry was driving 5 miles above the speed limit, but witnesses reported to the investigating police officer that Cory "darted out" in front of Perry and that Perry had no opportunity to avoid the collision. Perry reports having seen the van shortly before the collision, but did not recognize it as a bookmobile. Perry's insurance policy has a coverage limit of \$25,000 and he has no other assets.

The bookmobile was purchased from the Morrison Co. pursuant to a contract with the DOE. The contract grew out of an announcement by DOE that it was seeking bids for a bookmobile, and listed certain specifications for the bookmobile. The specifications called for certain signs and labels on the vehicle, a heavy-duty floor, extended step platforms, and a grab handle attached to the vehicle's exterior. However, the specifications did not include a request for the placement of either safety warning signs or lights other than those already on the vehicle at the time of sale. Morrison was the low-bidder for the contract. Morrison purchased a new van directly from the Gohred Motor Company, installed the items listed in the specifications, and delivered it to DOE, which reviewed it for compliance with the specifications and then made payment to Morrison.

You work for the State Attorney General's office. Please evaluate this case in anticipation of a settlement conference scheduled with a lawyer representing Cory.

QUESTION 2 (45 points)

On September 8, 1992, Dr. A.C. Madsen, a surgeon, performed an elective tonsillectomy on Mrs. Granado. The evening before her surgery Dr. Herman Barnett, an anesthesiologist, saw Mrs. Granado. (Dr. Barnett is now deceased.) During that conference Mrs. Granado signed a standard consent form used by the hospital entitled "Authorization for Surgeon to Operate." The form stated that she certified that Dr. A.C. Madsen had explained the necessity, advantages and possible complications of the tonsillectomy to her and she authorized him to perform the surgery "under any anesthetic deemed advisable." During the surgery Dr. Mary P. Delfino, the anesthesiologist, administered the anesthetic Halothane to Mrs. Granado. The patient was discharged from the hospital on September 10th but was readmitted one week later, complaining of symptoms indicating a urinary tract infection. In the hospital she became progressively more jaundiced and mentally confused, lapsing into a coma a few days before her death on September 25, 1992. The autopsy reported the cause of death as "massive liver damage ... representing an idiosyncratic reaction to the recent Halothane anesthesia."

Delfino has admitted that she did not advise the patient of the risk of liver damage from Halothane. That risk was variously estimated by expert testimony to be between one incidence in 3,000 to one in 40,000. After considerable effort you have located an expert, Dr. Prince, who will testify that in his professional opinion a patient such as Mrs. Granado should be advised of such risk. Prince was a board certified psychiatrist and a biochemist. He was not an anesthesiologist and had never practiced anesthesiology. His only participation in an anesthetic procedure was the administration of ether in 1967 as an intern.

You have also reviewed a summary of proposed expert testimony from two anesthesiologists, Drs. Smith and Talbott, who are listed as expert witnesses on behalf of the hospital. Both Smith and Talbott were practicing anesthesiology in 1992 and had administered Halothane many thousands of times. Smith testified that the risks of injury from Halothane was less than that with other anesthetics available in 1992. Unless a patient specifically inquired, it

was not standard practice to discuss those risks. Presenting a chronicle of all possible injuries was more likely to create anxiety than to provide real help to the patient. Talbott stated that Halothane was the preferred anesthetic in 1992; it was not standard practice of prudent anesthesiologists to discuss with patients the risks of liver damage related to Halothane, and it was standard practice for anesthesiologists practicing in a group to have one member of the anesthesiology team visit the patient the night before surgery to take the patient's medical history, to tell the patient who would administer the anesthetic and to explain the procedure. Dr. Delfino has also been deposed, and in her deposition she stated that it was standard practice among anesthesiologists practicing in Houston to work as a team and that it was not standard practice to advise a patient of the risk of an adverse reaction occurring less than one percent of the time. Finally, the medical records include a hospital form, signed by Mrs. Granado, in which she consented to the use of "any anesthetic deemed advisable."

You have been assigned by your law firm to review this case and evaluate it in preparation for a meeting with Mrs. Granado's husband. Please exclude any evaluation of damages and focus on the likelihood, as you see it, that liability could be imposed upon one or more persons.

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CONSTITUTION OF THE STATE OF GRACE  
ARTICLE I. BILL OF RIGHTS  
SECTION II. ORIGIN AND STRUCTURE OF GOVERNMENT

**Paragraph IX Sovereign immunity and waiver thereof; claims against the state and its departments, agencies, officers, and employees.**

(a) The General Assembly may waive the state's sovereign immunity from suit by enacting a State Tort Claims Act, in which the General Assembly may provide by law for procedures for the making, handling, and disposition of actions or claims against the state and its departments, agencies, officers, and employees, upon such terms and subject to such conditions and limitations as the General Assembly may provide.

(b) The General Assembly may also provide by law for the processing and disposition of claims against the state which do not exceed such maximum amount as provided therein.

(c) The state's defense of sovereign immunity is hereby waived as to any action ex contractu for the breach of any written contract now existing or hereafter entered into by the state or its departments and agencies.

(d) Except as specifically provided by the General Assembly in a State Tort Claims Act, all officers and employees of the state or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by the negligent performance of, or negligent failure to perform, their ministerial functions and may be liable for injuries and damages if they act with actual malice or with actual intent to cause injury in the performance of their official functions. Except as provided in this subparagraph, officers and employees of the state or its departments and agencies shall not be subject to suit or liability, and no judgment shall be entered against them, for the performance or nonperformance of their official functions. The provisions of this subparagraph shall not be waived.

(e) Except as specifically provided in this Paragraph, sovereign immunity extends to the state and all of its departments and agencies. The sovereign immunity of the state and its departments and agencies can only be waived by an Act of the General Assembly which specifically provides that sovereign immunity is thereby waived and the extent of such waiver.

(f) No waiver of sovereign immunity under this Paragraph shall be construed as a waiver of any immunity provided to the state or its departments, agencies, officers, or employees by the United States Constitution.

GRACE REVISED CODE  
TITLE 50. STATE GOVERNMENT  
CHAPTER 21. WAIVER OF SOVEREIGN IMMUNITY  
ARTICLE 2. STATE TORT CLAIMS

**50-21-20 Short title.**

This article shall be known and may be cited as "The Grace Tort Claims Act."

**50-21-21 Legislative intent.**

(a) The General Assembly recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity. On the other hand, the General Assembly recognizes that, while private entrepreneurs voluntarily choose the ambit of their activity and can thereby exert some control over their exposure to liability, state government does not have the same flexibility. In acting for the public good and in responding to public need, state government must provide a broad range of services and perform a broad range of functions throughout the entire state, regardless of how much exposure to liability may be involved. The exposure of the state treasury to tort liability must therefore be limited. State government should not have the duty to do everything that might be done. Consequently, it is declared to be the public policy of this state that the state shall only be liable in tort actions within the limitations of this article and in accordance with the fair and uniform principles established in this article.

(b) The General Assembly also recognizes that the proper functioning of state government requires that state officers and employees be free to act and to make decisions, in good faith, without fear of thereby exposing themselves to lawsuits and without fear of the loss of their personal assets. Consequently, it is declared to be the public policy of this state that state officers and employees shall not be subject to lawsuit or liability arising from the performance or nonperformance of their official duties or functions.

(c) All of the provisions of this article should be construed with a view to carry out this expression of the intent of the General Assembly.

**50-21-22 Definitions.**

As used in this article, the term:

(1) "Claim" means any demand against the State of Grace for money only on account of loss caused by the tort of any state officer or employee committed while acting within the scope of his

or her official duties or employment.

(2) "Discretionary function or duty" means a function or duty requiring a state officer or employee to exercise his or her policy judgment in choosing among alternate courses of action based upon a consideration of social, political, or economic factors.

(3) "Loss" means personal injury; disease; death; damage to tangible property, including lost wages and economic loss to the person who suffered the injury, disease, or death; pain and suffering; mental anguish; and any other element of actual damages recoverable in actions for negligence.

(4) "Person" means a natural person, corporation, firm, partnership, association, or other such entity.

(5) "State" means the State of Grace and any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities, and institutions, but does not include counties, municipalities, school districts, other units of local government, hospital authorities, or housing and other local authorities.

(6) "State government entity" means a state office, agency, authority, department, commission, board, division, instrumentality, or institution.

(7) "State officer or employee" means any officer, employee, or agent of the state, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of the state in any official capacity, whether with or without compensation, but the term does not include an independent contractor doing business with the state.

#### **50-21-23 Limited waiver of sovereign immunity.**

(a) The state waives its sovereign immunity for the torts of state officers and employees while acting within the scope of their official duties or employment and shall be liable for such torts in the same manner as a private individual or entity would be liable under like circumstances; provided, however, that the state's sovereign immunity is waived subject to all exceptions and limitations set forth in this article. The state shall have no liability for losses resulting from conduct on the part of state officers or employees which was not within the scope of their official duties or employment.

(b) The state waives its sovereign immunity only to the extent and in the manner provided in this article and only with respect to actions brought in the courts of the State of Grace. The state does not waive any immunity with respect to actions brought in the courts of the United States.

#### **50-21-24 Exceptions to state liability.**

The state shall have no liability for losses resulting from:

(1) An act or omission by a state officer or employee exercising due care in the execution of a statute, regulation, rule, or ordinance, whether or not such statute, regulation, rule, or ordinance is valid;

(2) The exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved is abused;

(3) The assessment or collection of any tax or the detention of any goods or merchandise by any law enforcement officer;

(4) Legislative, judicial, quasi-judicial, or prosecutorial action or inaction;

(5) Administrative action or inaction of a legislative, quasi-legislative, judicial, or quasi-judicial nature;

(6) Civil disturbance, riot, insurrection, or rebellion or the failure to provide, or the method of providing, law enforcement, police, or fire protection;

(7) Assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, or interference with contractual rights;

(8) Inspection powers or functions, including failure to make an inspection or making an inadequate or negligent inspection of any property other than property owned by the state to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety;

(9) Licensing powers or functions, including, but not limited to, the issuance, denial, suspension, or revocation of or the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization;

(10) The plan or design for construction of or improvement to highways, roads, streets, bridges, or other public works where such plan or design is prepared in substantial compliance with generally accepted engineering or design standards in effect at the time of preparation of the plan or design;

(11) Financing regulatory activities, including, but not limited to, examinations, inspections, audits, or other financial oversight activities; or

(12) Activities of the Grace National Guard when engaged in state or federal training or duty, but this exception does not apply to vehicular accidents.

**50-21-25 Immunity of state officers or employees for acts within scope of official duties or employment; officer or employee not named in action against state; settlement or judgment bars further action.**

(a) This article constitutes the exclusive remedy for any tort committed by a state officer or employee. A state officer or employee who commits a tort while acting within the scope of his or her official duties or employment is not subject to lawsuit or liability therefor. However, nothing in this article shall be construed to give a state officer or employee immunity from suit and liability if it is proved that the officer's or employee's conduct was not within the scope of his or her official duties or employment.

(b) A person bringing an action against the state under the provisions of this article must name as a party defendant only the state government entity for which the state officer or employee was acting and shall not name the state officer or employee individually. In the event that the state officer or employee is individually named for an act or omission for which the state is liable under this article, the state government entity for which the state officer or employee was acting must be substituted as the party defendant.

(c) A settlement or judgment in an action or a settlement of a claim under this article constitutes a complete bar to any further action by the claimant against a state officer or employee or the state by reason of the same occurrence.

**50-21-26 Notice of claim against state; time for commencement of action.**

(a) No person, firm, or corporation having a tort claim against the state under this article shall

bring any action against the state upon such claim without first giving notice of the claim as follows:

(1) Notice of a claim shall be given in writing within 12 months of the date the loss was discovered or should have been discovered; provided, however, for tort claims and causes of action which accrued between January 1, 1991, and July 1, 1992, notice of claim shall be given in writing within 12 months after July 1, 1992;

(2) Notice of a claim shall be given in writing and shall be mailed by certified mail, return receipt requested, or delivered personally to and a receipt obtained from the Risk Management Division of the Department of Administrative Services. In addition, a copy shall be delivered personally to or mailed by first-class mail to the state government entity, the act or omissions of which are asserted as the basis of the claim. Each state government entity may designate an office or officer within that state government entity to whom a notice of claim is to be delivered or mailed;

(3) No action against the state under this article shall be commenced and the courts shall have no jurisdiction thereof unless and until a written notice of claim has been timely presented to the state as provided in this subsection;

(4) Any complaint filed pursuant to this article must have a copy of the notice of claim presented to the Department of Administrative Services together with the certified mail receipt or receipt for other delivery attached as exhibits. If failure to attach such exhibits to the complaint is not cured within 30 days after the state raises such issue by motion, then the complaint shall be dismissed without prejudice; and

(5) A notice of claim under this Code section shall state, to the extent of the claimant's knowledge and belief and as may be practicable under the circumstances, the following:

(A) The name of the state government entity, the acts or omissions of which are asserted as the basis of the claim;

(B) The time of the transaction or occurrence out of which the loss arose;

(C) The place of the transaction or occurrence;

(D) The nature of the loss suffered;

(E) The amount of the loss claimed; and

(F) The acts or omissions which caused the loss.

(b) No action may be commenced under this article following presentation of a notice of claim until either the Department of Administrative Services has denied the claim or more than 90 days have elapsed after the presentation of the notice of claim without action by the Department of Administrative Services, whichever occurs first.

#### **50-21-27 Retroactive operation; limitations of actions; applicability of other related statutes.**

(a) It is the specific intent of the General Assembly that this article shall operate retroactively so as to apply to tort claims or causes of action which accrued on or after January 1, 1991. A tort claim or cause of action shall be deemed to have accrued on the date the loss was or should have been discovered. This article shall not apply to tort claims or causes of action which accrued prior to January 1, 1991.

(b) For tort claims and causes of action which accrued between January 1, 1991, and July 1, 1992, any tort action brought pursuant to this article is forever barred unless it is commenced within two years after July 1, 1992.

(c) For tort claims and causes of action which accrue on or after July 1, 1992, any tort action brought pursuant to this article is forever barred unless it is commenced within two years after the date the loss was or should have been discovered.

(d) Statutes of ultimate repose and abrogation, as provided for elsewhere in this Code, shall apply to claims and actions brought pursuant to this article.

(e) All provisions relating to the tolling of limitations of actions, as provided elsewhere in this Code, shall apply to causes of action brought pursuant to this article.

**50-21-28 Venue of actions.**

All tort actions against the state under this article shall be brought in the state or superior court of the county wherein the loss occurred; provided, however, that, in any case in which an officer or employee of the state may be included as a defendant in his individual capacity, the action may be brought in the county of residence of such officer or employee. All actions against the state for losses sustained in any other state shall be brought in the county of residence of any officer or employee residing in this state upon whose actions or omissions the claim against the state is based.

**50-21-29 Trial of actions; limitations on amounts of damages.**

(a) Trial of tort actions against the state under this article shall be conducted by a judge with a jury; provided, however, the parties may agree that the same be tried by a judge without a jury.

(b) In any action or claim for damages brought under the provisions of this article, no person shall recover a sum exceeding \$1 million because of loss arising from a single occurrence, regardless of the number of state government entities involved; and the state's aggregate liability per occurrence shall not exceed \$3 million. The existence of these caps on liability shall not be disclosed or suggested to the jury during the trial of any action brought under this article.

TITLE 51. TORTS

CHAPTER 12. DAMAGES  
ARTICLE 1. GENERAL PROVISIONS

**51-12-11 Mitigation of damages required; exception.**

When a person is injured by the negligence of another, he must mitigate his damages as far as is practicable by the use of ordinary care and diligence. However, this duty to mitigate does not apply in cases of positive and continuous torts.

ARTICLE 2. JOINT TORT-FEASORS

**51-12-30 Procurer of wrong as joint wrongdoer; how action brought against joint wrongdoer.**

In all cases, a person who maliciously procures an injury to be done to another, whether an actionable wrong or a breach of contract, is a joint wrongdoer and may be subject to an action either alone or jointly with the person who actually committed the injury.

**51-12-31 Recovery against joint trespassers.**

Except as provided in Code Section 51-12-33, where an action is brought jointly against several trespassers, the plaintiff may recover damages for the greatest injury done by any of the defendants against all of them. In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally.

**51-12-32 Right of contribution among joint trespassers; effect of settlement.**

(a) Except as provided in Code Section 51-12-33, where a tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if an action had been brought against them jointly. Without the necessity of being charged by action or judgment, the right of a joint trespasser to contribution from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.

(b) If judgment is entered jointly against several trespassers and is paid off by one of them, the others shall be liable to him for contribution.

(c) Without the necessity of being charged by an action or judgment, the right of indemnity, express or implied, from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.

**51-12-33 Apportionment of award according to degree of fault; individual liability.**

(a) Where an action is brought against more than one person for injury to person or property and the plaintiff is himself to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, may apportion its award of damages among the persons who are liable and whose degree of fault is greater than that of the injured party according to the degree of fault of each person. Damages, if apportioned by the trier of fact as provided in this Code section, shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

(b) Subsection (a) of this Code section shall not affect venue provisions regarding joint actions.

(c) This Code section shall apply only to causes of action arising on or after July 1, 1987.

**CHAPTER 13. LIMITATION OF ACTIONS****51-13-2 Actions or claims arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property—Accrual and limitation of actions or claims.**

All claims or causes of action arising from construction, alteration, repair, design, planning, survey, engineering, etc., of improvements upon real property shall accrue, and the applicable statute of limitation shall begin to run only during the period within six years after substantial completion

of construction. Any cause of action which has not accrued within six years after such substantial completion of construction shall be barred.

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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.

EXAM NUMBER \_\_\_\_\_

MULTIPLE CHOICE ANSWER SHEET

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TEAR THIS OFF AND PUT IT IN YOUR BLUEBOOK!