

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 '94—MIDTERM EXAM" on EACH bluebook, that you have read these instructions, and that you are otherwise ready to begin.

**IMPORTANT:** This exam will last THREE HOURS. You should plan on spending AT LEAST 20 minutes reading the questions carefully and outlining your answers on a separate sheet of paper. Before writing your answers, REREAD each question to be sure you haven't missed anything.

DOUBLE-SPACE your answers in the bluebook.

Use SEPARATE BLUEBOOKS for EACH QUESTION. Label each bluebook according to each question and, if necessary, book number, *e.g.*, "Question 1, Book 1"; "Question 1, Book 2"; "Question 2"; etc. When you are finished, turn to the back cover of the first bluebook, and place the second, third, fourth, etc. bluebook in order inside the end of the first bluebook, so the whole makes a single package. Then put it in the box at the front.

You are welcome to use abbreviations, but indicate what they are, *e.g.*, `Andropov ("A") would be sued by Brezhnev ("B"), alleging that A would be liable to B ... !

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

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

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

Plan on spending at least 15 minutes at the end PROOFREADING your answers. You may not write ANOTHER WORD after time is called.

A STATUTORY APPENDIX is provided that gives the law of this jurisdiction, the State of North York, 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! HAPPY HOLIDAYS! GOOD LUCK!!!

**QUESTION 1 (60 points)**

Erbrich Products Co., Inc., operates a small manufacturing plant on the near northeast side of Indianapolis. Erbrich has operated from the same location since about 1922. Throughout this time, Erbrich has maintained substantially the same operating hours, usually between 7:00 a.m. and 5:00 p.m. Erbrich manufactures such products as mustard, vinegar, bluing, ammonia, and liquid bleach.

Erbrich began the manufacture of bleach in 1932. At that time, Erbrich's plant was situated in a light industrial area. Some of the proximate businesses included a cement factory, a concrete curb manufacturer, a brick company, a coal yard, and a lumber yard. These businesses were congregated around a railroad track which serviced the various enterprises. There were no municipal utilities, public sewers, or public transportation for the area. It was not until the late 1930's and early 1940's that the area began to develop as a mixed residential/industrial neighborhood.

Erbrich has used the same basic methods to manufacture bleach since 1932. The process entails the introduction of chlorine gas into a solution of caustic soda and water. Erbrich carefully monitors the use of chlorine gas during the manufacturing process. The flow of gas is controlled by both automatic and manual valves.

At about noon on October 12, 1994, an excessive amount of raw chlorine gas escaped and was released through the plant's ventilation system into the outside air. The incident occurred after the completion of the bleach making process for the day. The cause was unknown. Prior to that date, there had never been such an occurrence.

As a result of the chlorine gas escaping into the atmosphere, many of the nearby neighbors were injured. Some of the physical injuries included eye and nasal passage irritation, nausea, headaches, and vomiting. Also, several neighbors apparently were overcome by chlorine fumes. Alleged damages to property included burned out grass and gardens.

You have been hired as a new member of Erbrich's in-house counsel. Management is divided on the question of whether to begin an aggressive program of making settlement offers to the neighbors or whether there is a reasonable likelihood that a successful legal defense could prevent the imposition of any liability. Please provide an analysis of the potential claims that could be brought against your company and the likelihood that those claims would succeed.

**QUESTION 2 (75 points)**

On August 25, 1978, at approximately 7:30 p.m., James P. Fleege (then 14 years old and just beginning his freshman year and high school) and John DeJean, Fleege's classmate and friend, decided to go swimming. They went to classmate Bob Haney's home, whose residence overlooks the Missouri River. The boys went down to the Missouri River and jumped off a neighbor's houseboat into the river until the neighbor told them to stay off the boat.

The boys, with Bob Haney in the lead, then floated downstream with the current, although Fleege and DeJean made one quick trip to shore. Bob Haney, who was farther out from shore than Fleege and DeJean, passed a dock belonging to the Azure Resort and Country Club, without incident.

As Fleege and DeJean approached the Azure dock, Fleege was a little bit ahead of DeJean and was about five or six feet from the dock. DeJean has stated what happened next: "Jim was out in front of me, and I felt bad electricity, you know, worse, you know, worse electricity than I ever felt. So I yelled at them guys to get the heck out of the water. And I turned around and went back around the west side of the dock and I walked up there." DeJean says that after he got out of the water, he saw Fleege, who was holding his chest, take two steps on the east side of the dock and then fall down on the dock.

At that point, DeJean and Haney attempted to revive Fleege using cardiopulmonary resuscitation and mouth-to-mouth resuscitation. Haney then went for help and returned with a neighbor, who helped with the resuscitation efforts. Fleege's lips, chest and back were blue but he did not vomit until sometime after Haney went to get the neighbor. Fleege was taken to a nearby hospital, where he died a short time later.

Two pathologists have studied the cause of Fleege's death. The evidence was that prior to this incident Fleege was in good health and had participated in athletics. The pathologists' opinions and conclusions were conflicting but both agreed that the findings of the autopsy would neither require nor exclude the conclusion that Fleege's death was the result of electrocution.

The electrical submerged pump in question is used to pump river water up a high bank onto Azure's substantial lawn. Although the watering system had been in use for about four or five years, a new motor had been put on the system approximately one week before Fleege's death. According to the written warning, the motor is intended for operation in a well and is not to be used in a swimming pool. There is evidence that people used the area around Azure's dock for boating, swimming and water skiing.

The submerged pump was attached to a motor, which sat in a cradle in the water. Three wires emerged from the motor and led to a plug on the dock. There were two areas of splices on each of the three wires. One set of splices was near the pump motor and the second set of splices on each of the three wires was seven feet down from the plug.

An investigator believes that several of these splices were improper and of poor quality not sufficient to withstand a water environment. He also found other evidence of improper or poor installation. Nevertheless, a number of tests conducted subsequent to Fleege's death found no electricity in the area of Azure's dock.

James was survived by his mother, Nancy Fleege. She has come to your office asking if you have any recommendations for attempting to secure compensation for Fleege's death. Please prepare a memo with your recommendation.

GENERAL STATUTES OF NORTH YORK  
CHAPTER 28A. ADMINISTRATION OF DECEDENTS' ESTATES.  
ARTICLE 18. ACTIONS AND PROCEEDINGS.

**§ 28A-18-1 Survival of actions to and against personal representative.**

(a) Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as provided in subsection (b) hereof, shall survive to and against the personal representative or collector of his estate.

(b) The following rights of action in favor of a decedent do not survive:

- (1) Causes of action for libel and for slander, except slander of title;
- (2) Causes of action for false imprisonment;
- (3) Causes of action where the relief sought could not be enjoyed, or granting it would be nugatory after death.

**§ 28A-18-2 Death by wrongful act of another; recovery not assets.**

(a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The personal representative or collector of the decedent who pursues an action under this section may pay from the assets of the estate the reasonable and necessary expenses, not including attorneys' fees, incurred in pursuing the action. At the termination of the action, any amount recovered shall be applied first to the reimbursement of the estate for the expenses incurred in pursuing the action, then to the payment of attorneys' fees, and shall then be distributed as provided in this section. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding four thousand five hundred dollars (\$4,500) incident to the injury resulting in death, except that the amount applied for hospital and medical expenses shall not exceed fifty percent (50%) of the amount of damages recovered after deducting attorneys' fees. All claims filed for such services shall be approved by the clerk of the superior court and any party adversely affected by any decision of said clerk as to said claim may appeal to the superior court in term time, but shall be disposed of as provided in the Intestate Succession Act.

(b) Damages recoverable for death by wrongful act include:

- (1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;
- (2) Compensation for pain and suffering of the decedent;
- (3) The reasonable funeral expenses of the decedent;
- (4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:

- a. Net income of the decedent,
  - b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,
  - c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;
- (5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;
- (6) Nominal damages when the jury so finds.
- (c) All evidence which reasonably tends to establish any of the elements of damages included in subsection (b), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act.
- (d) In all actions brought under this section the dying declarations of the deceased shall be admissible as provided for in G.S. 8-51.1.

**§ 28A-18-3 To sue or defend in representative capacity.**

All actions and proceedings brought by or against personal representatives or collectors upon any cause of action or right to which the estate of the decedent is the real party in interest, must be brought by or against them in their representative capacity.

**§ 28A-18-4 Service on or appearance of one binds all.**

In actions against personal representatives or collectors, they are all to be considered as one person, representing the decedent; and if the summons is served on one or more, but not all, the plaintiff may proceed against those served, and if he recovers, judgment may be entered against all.

**§ 28A-18-5 When creditors may sue on claim; execution in such action.**

An action may be brought by a creditor against the personal representative or collector on a demand at any time after it is due, but no execution shall issue against the personal representative or collector on a judgment therein against him without leave of the court, upon notice of 20 days and upon proof that the defendant has refused to pay such judgment or its ratable part, and such judgment shall be a lien on the property of the estate of the decedent only from the time of such leave granted.

**§ 28A-18-6 Service by publication on executor without bond.**

Whenever process may issue against an executor who has not given bond, and the same cannot be served upon him by reason of his absence or concealment, service of such process may be made by publication in the manner prescribed in other civil actions.

**§ 28A-18-7 Execution by successor in office.**

Any personal representative or collector may have execution issued on any judgment recovered by any person who preceded him in the administration of the estate, or by the decedent, in the same cases and the same manner as the original plaintiff might have done.

**§ 28A-18-8 Action to continue, though letters revoked.**

In case the letters of a personal representative or collector are revoked, pending an action to which he is a party, the adverse party may, notwithstanding, continue the action against him in order to charge him personally. If such party does not elect so to do, within six months after notice of such revocation, the action may be continued against the successor of the personal representative or collector in the administration of the estate, in the same manner as in case of death.