

TORTS I
Summer 1995
July 7, 1995

PROFESSOR DEWOLF

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 the first four digits of your SOCIAL SECURITY NUMBER and "TORTS—SUMMER '95—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 West 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!

GOOD LUCK!!!

QUESTION 1 (45 points)

On October 3, 1992, Bohdan Wysocki, aged 62, entered Loyola University Hospital for treatment of phlebitis. He was given the prescription drug heparin, a generic coagulant, which is manufactured by eight different companies in the world, five of which are located in the United States: Parke Davis, Eli Lilly, Pfizer, Upjohn Company and Wyeth Laboratories. Their respective market shares of the United States companies are as follows:

Parke Davis	.....	20%
Eli Lilly	.....	15%
Pfizer	.....	15%
Upjohn	.....	10%
Wyeth Laboratories	.....	5%
(foreign manufacturers	.....	<u>35%</u>)
TOTAL	.....	100%

None of the foreign companies is subject to suit in the United States.

Once it entered Wysocki's bloodstream, the heparin caused the formation of arterial emboli, which impaired his blood circulation. This in turn led to a cardiovascular "accident," leading to amputation of his right leg below the knee, paralysis of his right arm, mental disorientation, and loss of speech, memory and self-control. As a result of Wysocki's injuries he became totally disabled and died in early 1995. His widow Frieda has come to your law firm and wants to know whether she should sue to attempt to recover for her injuries. Your investigation reveals the following:

1. You have located a medical expert, Dr. Kildare, who will testify that heparin carried with it a risk of injury that should have been disclosed to the physicians treating Mr. Wysocki. None of the manufacturers, either domestic or foreign, provided such a warning.
2. Dr. Kildare is of the opinion that neither the hospital nor the physicians who treated Mr. Wysocki violated the standard of reasonable care.
3. The hospital records do not reflect which manufacturer actually produced the drug that was given to Mr. Wysocki. However, all of the drugs used by the hospital were purchased from three manufacturers, Pfizer, Upjohn, and Wyeth. They were purchased in roughly equal quantities during the time period immediately preceding Mr. Wysocki's admission to the hospital.

QUESTION 2 (90 points)

On June 30, 1994, the Hawkins Construction Company was engaged in constructing the Arthur C. Storz Expressway. Jerome Franks, a summer employee of Hawkins, was using a large bulldozer as part of the construction project. At the end of the day Franks parked the bulldozer on the edge of a pond. Sometime during the evening of June 30 an unknown person climbed aboard the bulldozer, started it, put it into forward operation, and then abandoned it. The bulldozer struck a natural gas pipeline belonging to North York Public Service Company (NYPSCO). There was an explosion and fire that destroyed the bulldozer and set fire to fields that destroyed several warehouses and outbuildings owned by Reese Farms, Inc.

Reese would like to know what options it has for recovery of the cost of its buildings. Please prepare a memo with your advice.

WEST YORK STATUTES ANNOTATED
TITLE 2A. ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE
SUBTITLE 6. SPECIFIC CIVIL ACTIONS
CHAPTER 15. SURVIVAL OF ACTIONS

§ 52-555. Actions for injuries resulting in death

In any action surviving to or brought by an executor or administrator for injuries resulting in death, whether instantaneous or otherwise, such executor or administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses, provided no action shall be brought to recover such damages and disbursements but within two years from the date of death, and except that no such action may be brought more than five years from the date of the act or omission complained of.

TITLE 14. MOTOR VEHICLES
SUBTITLE 3. RULES OF THE ROAD

§ 14-50. Unattended motor vehicle.

No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the ignition, effectively setting the brake thereon and, when standing upon any grade, turning the front wheels to the curb or side of the highway.

§ 14-218a. Traveling unreasonably fast

(a) No person shall operate a motor vehicle upon any public highway of the state, or road of any specially chartered municipal association or any district organized under the provisions of chapter 105, a purpose of which is the construction and maintenance of roads and sidewalks, or on any parking area as defined in section 14-212, or upon a private road on which a speed limit has been established in accordance with this subsection, or upon any school property, at a rate of speed greater than is reasonable, having regard to the width, traffic and use of highway, road or parking area, the intersection of streets and weather conditions. The State Traffic Commission may determine speed limits which are reasonable and safe on any state highway, bridge or parkway built or maintained by the state, and differing limits may be established for different types of vehicles, and may erect or cause to be erected signs indicating such speed limits. The traffic authority of any town, city or borough may establish speed limits on streets, highways and bridges or in any parking area for ten cars or more or on any private road wholly within the municipality under its jurisdiction; provided such limit on streets, highways, bridges and parking areas for ten cars or more shall become effective only after application for approval thereof has been submitted in writing to the State Traffic Commission and a certificate of such approval has been forwarded by the commission to the traffic authority; and provided such signs giving notice of such speed limits shall have been erected as the State Traffic Commission directs, provided the erection of such signs on any private road shall be at the expense of the owner of such road. The presence of such signs adjacent to or on the highway or parking area for ten cars or more shall be prima facie evidence that they have been so placed under the direction of and with the approval of the State Traffic Commission. Approval of such speed limits may be revoked by said commission at any time if it deems such revocation to be in the interest of public safety and welfare, and thereupon such speed limits shall cease to be effective and any signs that have been erected shall be removed. Any speed in excess of such limits, other than speeding as provided for in section 14-219, shall be prima facie evidence that such speed is not reasonable, but the fact that the speed of a vehicle is lower than such limits shall not relieve the operator from the duty to decrease speed when a special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.

(b) Any person who operates a motor vehicle at a greater rate of speed than is reasonable, other than speeding, as provided for in section 14-219, shall commit the infraction of traveling unreasonably fast.

§ 14-219. Speeding

(a) No person shall operate any motor vehicle (1) upon any highway, road or any parking area for ten cars or more, at such a rate of speed as to endanger the life of any occupant of such motor vehicle, but not the life of any other person than such an occupant; or (2) at a rate of speed greater than fifty-five miles per hour upon any highway.

(b) Any person who operates a motor vehicle (1) on a multiple lane, limited access highway at a rate of speed greater than fifty-five miles per hour but not greater than seventy miles per hour or (2) on any other highway at a rate of speed greater than fifty-five miles per hour but not greater than sixty miles per hour, shall commit an infraction, provided any such person operating a truck, as defined in section 14-260n, shall have committed a violation and shall be fined not less than one hundred dollars nor more than one hundred fifty dollars.

(c) Any person who violates any provision of subdivision (1) of subsection (a) of this section or who operates a motor vehicle (1) on a multiple lane, limited access highway at a rate of speed greater than seventy miles per hour but not greater than eighty-five miles per hour or (2) on any other highway at a rate of speed greater than sixty miles per hour but not greater than eighty-five

miles per hour shall be fined not less than one hundred dollars nor more than one hundred fifty dollars, provided any such person operating a truck, as defined in section 14-260n, shall be fined not less than one hundred fifty dollars nor more than two hundred dollars.

(d) No person shall be subject to prosecution for a violation of both subsection (a) of this section and subsection (a) of section 14-222 because of the same offense. (e) Notwithstanding any provision of the general statutes to the contrary, any person who violates subdivision (1) of subsection (a) of this section, subdivision (1) of subsection (b) of this section while operating a truck, as defined in section 14-260n, or subdivision (1) of subsection (c) of this section while operating a motor vehicle or a truck, as defined in section 14-260n, shall follow the procedures set forth in section 51-164n.

§ 14-222. Reckless driving

(a) No person shall operate any motor vehicle upon any public highway of the state, or any road of any specially chartered municipal association or of any district organized under the provisions of chapter 105, a purpose of which is the construction and maintenance of roads and sidewalks, or in any parking area for ten cars or more or upon any private road on which a speed limit has been established in accordance with the provisions of section 14-218a or upon any school property recklessly, having regard to the width, traffic and use of such highway, road, school property or parking area, the intersection of streets and the weather conditions. The operation of a motor vehicle upon any such highway, road or parking area for ten cars or more at such a rate of speed as to endanger the life of any person other than the operator of such motor vehicle, or the operation, downgrade, upon any highway, of any motor vehicle with a commercial registration with the clutch or gears disengaged, or the operation knowingly of a motor vehicle with defective mechanism, shall constitute a violation of the provisions of this section. The operation of a motor vehicle upon any such highway, road or parking area for ten cars or more at a rate of speed greater than eighty-five miles per hour shall constitute a violation of the provisions of this section.

(b) Any person who violates any provision of this section shall be fined not less than one hundred dollars nor more than three hundred dollars or imprisoned not more than thirty days or be both fined and imprisoned for the first offense and for each subsequent offense shall be fined not more than six hundred dollars or imprisoned not more than one year or be both fined and imprisoned.

§ 14-227a. Operation while under the influence of liquor or drug or while impaired by liquor

(a) Operation while under the influence. No person shall operate a motor vehicle while under the influence of intoxicating liquor or any drug or both. A person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor or any drug or both if he operates a motor vehicle on a public highway of this state or on any road of a district organized under the provisions of chapter 105, a purpose of which is the construction and maintenance of roads and sidewalks, or on any private road on which a speed limit has been established in accordance with the provisions of section 14-218a, or in any parking area for ten or more cars or on any school property (1) while under the influence of intoxicating liquor or any drug or both or (2) while the ratio of alcohol in the blood of such person is ten-hundredths of one per cent or more of alcohol, by weight.

(b) Operation while impaired. No person shall operate a motor vehicle on a public highway of this state or on any road of a district organized under the provisions of chapter 105, a purpose of which is the construction and maintenance of roads and sidewalks, or on any private road on which a speed limit has been established in accordance with the provisions of section 14-218a, or in any parking area for ten or more cars or on any school property while his ability to operate such motor vehicle is impaired by the consumption of intoxicating liquor. A person shall be deemed impaired when at the time of the alleged offense the ratio of alcohol in the blood of such person was more than seven-hundredths of one per cent of alcohol, by weight, but less than ten-hundredths of one per cent of alcohol, by weight.

(c) Admissibility of chemical analysis. Except as provided in subsection (d) of this section, in any criminal prosecution for violation of subsection (a) or (b) of this section, evidence respecting the amount of alcohol or drug in the defendant's blood or urine at the time of the alleged offense, as shown by a chemical analysis of the defendant's breath, blood or urine shall be admissible and competent provided: (1) The defendant was afforded a reasonable opportunity to telephone an attorney prior to the performance of the test and consented to the taking of the test upon which such analysis is made; (2) a true copy of the report of the test result was mailed to or personally delivered to the defendant within twenty-four hours or by the end of the next regular business day, after such result was known, whichever is later; (3) the test was performed by or at the direction of a police officer according to methods and with equipment approved by the department of public health and addiction services and was performed by a person certified or recertified for such purpose by said department or recertified by persons certified as instructors by the commissioner of public health and addiction services. If a blood test is taken, it shall be on a blood sample taken by a person licensed to practice medicine and surgery in this state, a phlebotomist, a qualified laboratory technician, an emergency medical technician II or a registered nurse; (4) the device used for such test was checked for accuracy immediately before and after such test was performed by a person certified by the department of public health and addiction services; (5) an additional chemical test of the same type was performed at least thirty minutes after the initial test was performed, provided however the results of the initial test shall not be inadmissible under this subsection if reasonable efforts were made to have such additional test performed in accordance with the conditions set forth in this subsection and such additional test was not performed or was not performed within a reasonable time, or the results of such additional test are not admissible for failure to meet a condition set forth in this subsection; and (6) evidence is presented that the test was commenced within two hours of operation. In any prosecution under this section it shall be a rebuttable presumption that the results of such chemical analysis establish the ratio of alcohol in the blood of the defendant at the time of the alleged offense, except that if the results of the additional test indicate that the ratio of alcohol in the blood of such defendant is twelve-hundredths of one per cent or less of alcohol, by weight, and is higher than the results of the first test, evidence shall be presented that demonstrates that the test results and the analysis thereof accurately indicate the blood alcohol content at the time of the alleged offense.

(d) Evidence of blood alcohol content. In any prosecution for a violation of subdivision (1) of subsection (a) of this section, reliable evidence respecting the amount of alcohol or drugs in the defendant's blood or urine at the time of the alleged offense, as shown by a chemical analysis of the defendant's blood, breath or urine, otherwise admissible under subsection (c) of this section, shall be admissible only at the request of the defendant.

(e) Certification of methods and types of chemical tests. The commissioner of public health and addiction services shall ascertain the reliability of each method and type of device offered for chemical testing purposes of blood, of breath and of urine and certify those methods and types which he finds suitable for use in testing blood, in testing breath and in testing urine in this state. He shall adopt regulations governing the conduct of chemical tests, the operation and use of chemical test devices and the training, certification and annual recertification of operators of such devices as he finds necessary to protect the health and safety of persons who submit to chemical tests and to insure reasonable accuracy in testing results. Such regulations shall not require recertification of a police officer solely because such officer terminates his employment with the law enforcement agency for which certification was originally issued and commences employment with another such agency.

(f) Evidence of refusal to submit to test. In any criminal prosecution for a violation of subsection (a) or (b) of this section, evidence that the defendant refused to submit to a blood, breath or urine test requested in accordance with section 14-227b shall be admissible provided the requirements of subsection (b) of said section have been satisfied. If a case involving a violation of subsection (a) of this section is tried to a jury, the court shall instruct the jury as to any inference that may or may not be drawn from the defendant's refusal to submit to a blood, breath or urine test.

(g) Reduction, nolle or dismissal prohibited. If a person is charged with a violation of the provisions of subsection (a) of this section, the charge may not be reduced, nolle or dismissed unless the prosecuting authority states in open court his reasons for the reduction, nolle or dismissal.

(h) Penalties for operation while under the influence. Any person who violates any provision of subsection (a) of this section shall: (1) For conviction of a first violation, (A) be fined not less than five hundred dollars nor more than one thousand dollars and (B) be (i) imprisoned not more than six months, forty-eight consecutive hours of which may not be suspended or reduced in any manner or (ii) imprisoned not more than six months, with the execution of such sentence of imprisonment suspended entirely and a period of probation imposed requiring as a condition of such probation that such person perform one hundred hours of community service, as defined in section 14-227e, and (C) have his motor vehicle operator's license or nonresident operating privilege suspended for one year; (2) for conviction of a second violation within five years after a prior conviction for the same offense, be fined not less than five hundred dollars nor more than two thousand dollars and imprisoned not more than one year, ten consecutive days of which may not be suspended or reduced in any manner, and have his motor vehicle operator's license or nonresident operating privilege suspended for two years; (3) for conviction of a third violation within five years after a prior conviction for the same offense, be fined not less than one thousand dollars nor more than four thousand dollars and imprisoned not more than two years, one hundred twenty consecutive days of which may not be suspended or reduced in any manner, and have his motor vehicle operator's license or nonresident operating privilege suspended for three years; and (4) for conviction of a fourth and subsequent violation within five years after a prior conviction for the same offense, be fined not less than two thousand dollars nor more than eight thousand dollars and imprisoned not more than three years, one year of which may not be suspended or reduced in any manner, and have his motor vehicle operator's license or nonresident operating privilege permanently revoked upon such fourth offense. For purposes of the imposition of penalties for a second, third or fourth and subsequent offense pursuant to this subsection, a conviction under the provisions of subsection (a) of section 14-227a in effect on October 1, 1981, or as amended thereafter, a conviction under the provisions of either subdivision (1) or (2) of subsection (a) of this

section or a conviction under the provisions of section 53a-56b or 53a-60d shall constitute a prior conviction for the same offense.

(i) Penalties for operation while impaired. Any person who violates subsection (b) of this section shall have committed an infraction.

(j) Suspension of operator's license. (1) The suspension of a motor vehicle operator's license or nonresident operating privilege imposed under subsection (h) of this section shall take effect immediately upon the expiration of any period in which an appeal of any conviction under subsection (a) of this section may be taken; provided if an appeal is taken, the suspension shall be stayed during the pendency of such appeal. If the suspension takes effect, the defendant shall immediately send his motor vehicle operator's license or nonresident operating privilege to the department of motor vehicles. (2) The motor vehicle operator's license or nonresident operating privilege of a person found guilty under subsection (a) of this section who is under eighteen years of age shall be suspended for the period of time set forth in subsection (h) of this section, or until such person attains the age of eighteen years, whichever period is longer. (3) The motor vehicle operator's license or nonresident operating privilege of a person found guilty under subsection (a) of this section who, at the time of the offense, was operating a motor vehicle in accordance with a special operator's permit issued pursuant to section 14-37a shall be suspended for twice the period of time set forth in subsection (h) of this section.

(k) Participation in alcohol education and treatment program. In addition to any fine or sentence imposed pursuant to the provisions of subsection (h) of this section, the court may order such person to participate in an alcohol education and treatment program.

(l) Seizure and admissibility of chemical analysis of blood sample of injured operator. Notwithstanding the provisions of subsection (c) of this section, evidence respecting the amount of alcohol or drug in the blood of an operator of a motor vehicle involved in an accident who has suffered or allegedly suffered physical injury in such accident, which evidence is derived from a chemical analysis of a blood sample taken from such person after such accident at the scene of the accident, while en route to a hospital or at a hospital, shall be competent evidence to establish probable cause for the arrest by warrant of such person for a violation of subsection (a) of this section and shall be admissible and competent in any subsequent prosecution thereof if: (1) The blood sample was taken for the diagnosis and treatment of such injury; (2) the blood sample was taken by a person licensed to practice medicine in this state, a resident physician or intern in any hospital in this state, a phlebotomist, a qualified laboratory technician, an emergency medical technician II or a registered nurse; (3) a police officer has demonstrated to the satisfaction of a judge of the superior court that such officer has reason to believe that such person was operating a motor vehicle while under the influence of intoxicating liquor or drug or both and that the chemical analysis of such blood sample constitutes evidence of the commission of the offense of operating a motor vehicle while under the influence of intoxicating liquor or drug or both in violation of subsection (a) of this section; and (4) such judge has issued a search warrant in accordance with section 54-33a authorizing the seizure of the chemical analysis of such blood sample.

(m) "Phlebotomist" defined. For the purpose of this section, "phlebotomist" means a staff member of a hospital, licensed under chapter 368v, who performs venipunctures to obtain blood samples as ordered by a licensed physician and is under the jurisdiction of the chief of pathology.

§ 14-295. Double or treble damages for persons injured as a result of certain traffic violations

In any civil action to recover damages resulting from personal injury, wrongful death or damage to property, the trier of fact may award double or treble damages if the injured party has specifically pleaded that another party has deliberately or with reckless disregard operated a motor vehicle in violation of section 14-218a, 14-219, 14-222, or 14-227a, and that such violation was a substantial factor in causing such injury, death or damage to property.