

TORTS I
Fall 1996
December 14, 1996

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 your EXAM NUMBER and "TORTS—Fall '96—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, you are responsible for Chapters 1 and 2 of the casebook. 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 Readiness, 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 (50 points)

1. Anthony J. Beasock suffered permanent disfiguring injuries when a truck tire exploded as he attempted to inflate it. Beasock was attempting to mount a 16-inch truck tire on a 16.5-inch rim; he was filling up the tire with a service station air pump at the time the tire exploded. The 16-inch tire in question was manufactured by The General Tire and Rubber Company (General Tire) in 1993 and was later recapped by Johnny Antonelli Tire Company, Inc. in 1994. On the day Beasock was injured, his employer had manually mounted the tire on a 16.5-inch rim, manufactured by Kelsey-Hayes Company in 1992, and this uninflated tire-rim assembly was taken by Beasock to a gas station for inflation.

2. General Tire and Kelsey-Hayes Company are members of the Tire and Rim Association ("TRA"). TRA is an Ohio not-for-profit corporation located at Fairlawn, Ohio. It was founded in 1903 and incorporated in its present form in 1933. It has three employees, J.F. Pacuit, who is its executive vice president, and two staff members, a bookkeeper/secretary and a clerk/typist.

The primary function of TRA is to promote dimensional standards within the automotive industry for tires and rims to allow interchangeability among the various manufacturers' products. The 1933 Articles of Incorporation state that its purpose is to "promote the interests of the Automotive Industry as relating to tires, rims, wheels and their component parts; to establish sound engineering standards for the guidance of the tire, rim and wheel industries; to provide inspection for the maintenance of such standards among the members of the Association; and to do everything necessary, suitable and proper, including cooperation with all branches of the Automotive Industry, for the accomplishment of any of the aforesaid objects...." The association's purposes are also similarly set forth in its Constitution and Regulations.

All manufacturers of tires, rims and related components are eligible for TRA membership, and in 1980 its membership consisted of 43 domestic and 83 foreign manufacturers.

Since 1923 all TRA standards have been published annually in the TRA yearbook. The yearbook contains primarily dimensional standards for tires, rims and associated parts as well as recommended pressures and load ratings for tires. The dimensional standards include rim contours or cross sections of the rims which graphically display the shape of the rim in addition to its various dimensions.

TRA has some 12 to 15 committees and subcommittees, all of which are involved with the contents of the yearbook and the TRA Engineering Design Information (EDI). Both General Tire and Kelsey-Hayes, in addition to having representatives on the Board of Trustees of TRA, also have representatives on the Standards and Technical Advisory Committees, as well as the Passenger Car, Truck-Bus, Off-the-Road, Agricultural and Industrial, Tire and Rim Standards Subcommittees. The EDI, published by TRA since 1969, is a supplement to the yearbook and is revised quarterly. It contains standards for new tires and rims or so-called design guide status standards. Eventually, should the appropriate committees and subcommittees believe these proposed standards are acceptable, their status would change to a TRA standard and would be published in the yearbook.

A manufacturer would submit the dimensional specifications for publication in the EDI, where they would remain until the appropriate committee or subcommittee regarded the standards as acceptable, at which time they would become published in the yearbook. It remains the practice that the manufacturer seeking to have its design dimensional specifications become TRA approved proposes the specifications to TRA. Section 1 of Article XI of TRA's constitution provides that proposals for specifications may be brought when one member company is interested in manufacturing an item, and shall be brought before the Association when two or more member companies are interested.

TRA does not establish standards for the materials used in the manufacture of tires and rims; it does not mandate or monitor the use of its standards by any manufacturer; it does not inspect manufacturers' operations; it does not specify any service or maintenance procedures; it does not have the power or authority to prevent any manufacturer from designing, manufacturing or selling a rim or tire of any particular size or design; it does not undertake to develop or promulgate safety measures or otherwise warn the public or industry as to potential hazards resulting from a tire and rim mismatch; and it does not interface with the consuming public. TRA merely performs a service to the automobile industry, it claims, by publishing tire and rim standards to facilitate interchangeability of products within the industry, but such standards are advisory only and adherence to them and their use is entirely within the control and discretion of each manufacturer. The yearbook itself contains disclaimers which essentially incorporate the foregoing.

The standards promulgated by TRA have a significant influence upon dimensional standards within the tire and rim industry and they have become the standards of industry. In addition, it appears that TRA was aware of the mismatch problem as early as 1971, prior to the manufacture of the tire and rim involved here. Although the problem was discussed at various meetings of TRA's board of trustees and committees, no action was taken by it.

3. TRA carries no insurance, and its only assets are files, filing cabinets, and limited office equipment of negligible value.

4. You have an expert who is prepared to testify that a 16-inch tire can be mounted without difficulty on a 16.5-inch rim and that when inflation of this mismatched combination is attempted, the tire bead will not seat against the rim flange but instead will break with explosive force. Although the diameter of a 16.5-inch rim immediately inside the flange is approximately one-half inch greater than the same portion of a 16-inch rim, the overall diameter of the 16.5-inch rim is in fact slightly smaller than the overall diameter of a 16-inch rim. Thus, the effort required to slip a 16-inch tire onto a 16.5-inch rim is equivalent to the effort required to slip it onto its corresponding 16-inch rim.

5. You have been asked to advise Anthony J. Beasock on the prospects for obtaining compensation for his injuries. Assume that he is unable to sue his employer because of worker's compensation statutes, and that, if he could establish liability, his damages would be assessed at \$1,000,000. Please analyze his situation and advise accordingly.

QUESTION 2 (85 points)

In June of 1994 Susan and George Huber were making the final arrangements for a two-week trip they were planning to take to Florida. Part of their plans included finding a "housesitter" who would stay in their house, located at 13060 Sylvan Avenue, Lindstrom, Readiness, while they were gone. They contacted Tonia Dee Stomberg, who agreed to stay in their house, water the plants, and take care of the Hubers' dog and cat. The Hubers' dog, a six-month-old golden retriever, Lassie, had a tendency to be frisky but never attacked or bit anyone, nor did she show any propensity to do so. However, George Huber had on one occasion had the experience that Lassie, having been placed in the back seat, attempted to get into the front seat. As a result of this behavior, George usually restrained the dog in the back seat of the two vehicles he had by putting a seatbelt through the collar when traveling with the dog.

On the night of July 6, 1994, Tonia Dee Stomberg was driving her Toyota Camry south on state highway 96. Stomberg had put Lassie in the back seat. While Stomberg was driving, Lassie attempted to get into the front seat by climbing between the seats and was "bugging her." He put his head in Stomberg's face. While attempting to get the dog settled, the distraction caused by the dog resulted in Stomberg's running off the road into a ditch. Stomberg looked up, and found that she was going off the road and could not stop. She saw a boy lying in the ditch near the road. Stomberg was unable to avoid a collision with him and the car drove over him. The boy, Chazdon Lewellin, later died of his injuries.

Bill and Elizabeth Lewellin, the parents of Chazdon, have come to your office to ask for your opinion as to whether or not a tort claim could be filed to obtain compensation for the loss of their son. Assume for purposes of this question that the damages, if recoverable, would be assessed at \$1,000,000. How would you advise them?

GENERAL STATUTES OF READINESS
POLICE REGULATIONS
CHAPTER 347. DOGS AND CATS

§ 347.01. Owner's liability; penalty

(a) Owners or keepers of any dog or dogs, that kill, wound, or worry any domestic animal or animals, shall be jointly and severally liable to the owner of such animal or animals for all damages done by such dog or dogs, without proving notice to or knowledge by any such owner or keeper of such dog or dogs, that any or either of them was mischievous or disposed to kill or worry any domestic animal.

(b) The owner of any dog that kills or pursues domestic livestock is guilty of a petty misdemeanor.

§ 347.02. Keeping after notice; penalty

Every person who shall keep or harbor a dog which has bitten any domestic animal, after having notice of such fact, shall pay a fine of \$5 for every day the person keeps, harbors, or permits such dog to remain on the person's premises thereafter.

§ 347.03. Dogs may be killed

Any owner or caretaker may kill any dog found chasing, injuring, or worrying sheep or other livestock or poultry owned by or in care of such owner or caretaker, on lands or premises owned or controlled by the owner or caretaker, and any owner or caretaker of sheep may kill any dog found on the owner's or caretaker's premises where sheep are kept, not under human restraint or control.

§ 347.04. Public nuisance

Any dog that habitually worries, chases, or molests teams or persons traveling peaceably on the public road is a public nuisance. Upon complaint in writing to a county or municipal judge containing a description of the dog, including the name of the dog and its owner, or stating that the name or names are not known, and alleging that the dog is a public nuisance, the judge shall issue a summons, if the owner is known, commanding the owner to appear before the judge at a specified time, not less than six nor more than ten days from the date of the summons, to answer the complaint. The summons shall be served not less than six days before the day of the hearing in the same manner as other county or municipal court summonses.

§ 347.05. Owner not known

If it appears from the complaint that the owner is not known, ten days' posted notice, containing a description of the dog as given in the complaint, and stating that a complaint has been made, and the time and place of hearing on it, shall be given in the town where the judge presides.

§ 347.06. Hearing; judgment; execution

The judge shall hear the evidence in the case. Upon finding that the dog is a public nuisance, the judge shall enter judgment accordingly, and shall order the constable to kill and dispose of the dog.

§ 347.07. Costs

Costs in the first instance shall be paid by the complainant, but if the dog is adjudged a nuisance, and the owner is known, judgment shall be entered against the owner therefor.

§ 347.08. County board may license [omitted]

§ 347.14. Unlicensed dogs

Subdivision 1. Seizure; impoundment; presumption. Any person may seize, impound, or restrain any unlicensed dog which the person may find running at large. The fact that a dog is

without a license attached to a collar shall be presumptive evidence that the dog is unlicensed. The sheriff and sheriff's deputies, any marshal or constable or other police officer shall seize, impound or restrain any dog for which no license has been issued and for which one is required. Any officer who shall seize, restrain, impound, or kill any dog found in any place without a license, as required under sections 347.09 to 347.20, upon delivery of such dog or carcass and the proper disposal of the carcass and after making a report to the town or city treasurer of the town or city in which the dog was seized or killed, showing that the dog did not have a license, shall receive therefor a payment of \$2, the same to be made from any funds in the town or city treasury not otherwise appropriated.

The county auditor shall reimburse the town for any expense incurred under section 347.10 and shall charge such expense to the dog license fund.

Subd. 2. Prohibitions; limitations; regulations. It shall be unlawful for any person to harbor or permit to remain about the person's premises any dog for which no license exists and for which one is required. Any person who shall have seized or impounded a dog with or without license under this section shall deliver such dog to the humane officer of the town or city, if such officer exists; or, if there be no such officer, to the constable, statutory city marshal, or the town or city police officer. The officer to whom the dog is delivered shall, without delay, notify the owner, personally or through the United States mail, if such owner be known to the officer or can be ascertained with reasonable effort, but if the owner be unknown or cannot be ascertained, then the officer shall post written notice in three public places in the officer's town, giving a description of the dog, stating where it is impounded and the conditions for its release. If, after five days, the owner does not claim the dog the officer shall dispose of the dog in a proper and humane manner.

Subd. 3. Penalties. Any person who shall violate any of the provisions of sections 347.08 to 347.21 shall be liable to a penalty of not less than \$5 nor more than \$50 for such violation.

§ 347.15. Persons damaged, claims filed

Subdivision 1. Presentation and investigation. The owner of any domestic animals, including poultry and game birds, attacked, chased, worried, injured, or killed by a dog or dogs may, within ten days after the owner shall have knowledge or notice thereof, file a written claim for damages with the clerk of the town or city in which the damage occurred. The form of such claim may be prescribed by the county auditor. Upon presentation of such claim the supervisors of the town, the board of trustees of the statutory city, or the council of the city, or a committee appointed for that purpose by the supervisors, the board of trustees or the council, shall promptly investigate the claim and may subpoena witnesses, administer oaths, and take testimony relative thereto and shall, within 30 days after the filing of the claim, make, certify, and return to the county auditor the claim, a report of the investigation, the testimony taken, and the amount of damages, if any, suffered by the owner of the animals.

Subd. 2. Form; proof; allowances; appeal. The form of the report and certification shall be prescribed by the county auditor and shall be subscribed by the supervisors, board, or committee making the same. The county auditor shall lay before the county board, at its first meeting following the receipt of the claim, all claims so filed and reported and the same shall be acted upon and determined by the county board as other claims are determined and acted upon, and the county board shall equalize the values and claims between and within the various towns of the county. The amount of damages filed and reported to the county auditor shall be prima facie proof of the actual damages sustained, but evidence may be taken before the county board relative to the claims as in

other cases, and appeals from the action of the county board shall lie as in other cases. On appeal from the action of the county board, the trial shall be by the court without a jury.

Subd. 3. Payment. Such claims shall be solely against the dog license fund and shall create no other liability on the part of the county.

Subd. 4. Limitation of amount. The amount allowed by the county board upon any such claim shall in no case exceed \$100 for each horse, mule, or bovine; \$15 for each sheep or goat; \$30 for each swine; or \$3 for each fowl. When the claimant shall furnish conclusive evidence as to the ownership of the dog or dogs doing the damage the claimant shall be paid the full amount of the claim submitted.

Subd. 5. Distribution. Distribution of the dog license fund among claimants for loss of animals by dogs within the license year shall be made at the close of the license year.

§ 347.16. Claims, hearings, notice

No claim shall be allowed by the county board at less than the amount so certified and reported, unless the claimant shall first be notified that such action is contemplated and shall have been given a reasonable opportunity to be heard and to offer further evidence in support of the claim.

§ 347.17. Any person may kill dogs in certain cases

Any person may kill any dog that the person knows is affected with the disease known as hydrophobia, or that may suddenly attack while the person is peacefully walking or riding and while being out of the enclosure of its owner or keeper, and may kill any dog found killing, wounding, or worrying any horses, cattle, sheep, lambs, or other domestic animals.

§ 347.18. Tags; restrictions, prohibitions

No person, except the owner or the owner's authorized agent, shall remove any license tag from a dog collar or remove any collar with a license attached thereto from any dog. No person shall keep or harbor a dog wearing a fictitious, altered, or invalid license tag, or a license tag not issued in connection with the licensing or keeping of the dog wearing the same. No license or license tag issued for one dog shall be transferable to another dog.

§ 347.19. Failure to obtain license

Every town or city clerk shall notify the county attorney of the clerk's county of every refusal or failure of an owner to obtain a license for keeping a dog, and it shall be the duty of the county attorney to institute proceedings against such owner and against every owner within the county who has violated any of the provisions of sections 347.08 to 347.21.

§ 347.20 Exemptions

Dogs brought into this state temporarily for a period not to exceed 30 days shall be exempt from the provisions of sections 347.08 to 347.21.

§ 347.21. Interpretation

Sections 347.08 to 347.21 are supplemental to all other laws relating to dogs not expressly referred to therein, and to all laws relating to taxation of dogs as personal property, and shall not be construed as to modify, repeal, or in anywise affect any part or provision of any such laws not expressly repealed therein or to prevent municipalities from prohibiting, licensing, or regulating the running at large of dogs within their respective limits by law or ordinance now or hereafter provided.

§ 347.22. Damages, owner liable

If a dog, without provocation, attacks or injures any person who is acting peaceably in any place where the person may lawfully be, the owner of the dog is liable in damages to the person so attacked or injured to the full amount of the injury sustained. The term "owner" includes any person harboring or keeping a dog but the owner shall be primarily liable. The term "dog" includes both male and female of the canine species.