

FINAL 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 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 and can be read from front to back. 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 ... !'

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

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 Grace, 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 (100 points)

Walter James was exposed to benzene-containing petroleum products and other chemical substances during his twenty-six years of employment with Bessemer Processing Company, Inc. (Bessemer). He died of stomach and liver cancer in 1997. James worked for twenty-six years with Bessemer at its Newark facility, performing various jobs as a general laborer. Bessemer is engaged in the reconditioning of used and empty fifty-five-gallon drums for further use by the oil industry. "Open head" drums were sent to Bessemer by Shell Oil Co. The "open head" drums, which had removable tops and which contained stickier and more viscous residues, were sent to Bessemer because Bessemer was best equipped to remove the residue by incineration and blasting.

The drum reconditioning process first involved emptying of residue from the drums. Although, pursuant to federal environmental regulations, the "empty" drums sent by the oil producers were to have no more than one inch of residue, Bessemer employees report that most drums contained as much as four to five gallons of waste material when received at the Bessemer plant. After the drums were "uncapped," the residue was dumped into a "slop hole" which collected beneath a conveyor. During the process, waste material spilled onto the clothing of the workers. Bessemer workers emptied the residue pit twice a month by use of shovels and buckets. James was often involved in the pit cleaning operation.

The uncapped drums were turned upside down and placed in a drag chain conveyor transporting them to a "tunnel incinerator" where the drums' residue was burned and charred by high temperature flames. According to James' co-employees, the fumes from this burning process were "strong and foul" and permeated the incinerator area. The drums were then blasted to remove all of the charred material. This process released dust and fumes into the air to which the Bessemer workers were exposed. After the reconditioning process was completed, the drums were transported back to Shell.

During his twenty-six years with Bessemer, James functioned as a "utility man" and "did some of everything that needed to be done," switching from position to position as the operation required. In October 1996, James was diagnosed as having stomach cancer. He died on February 8, 1997; the cause of death was "carcinoma with metastasis to the liver and peritoneum." He was fifty-two years of age at the time of his death.

Bessemer closed down in 1996 because of a lack of business.

An expert in toxicology, Dr. Myron Mehlman, states that decades-old epidemiological studies had revealed a causative link between death from cancer and exposure to benzene and polycyclic aromatic hydrocarbons (PAHs) found in gasoline and petroleum products. He cites several studies dating back to 1928, including a 1948 report from the American Petroleum Institute, indicating that exposure to benzene was a serious health concern. He is confident that James' cancer was caused by exposure to benzene at the workplace.

Explicit warnings concerning the health dangers of residues contained in empty drums were not given to Bessemer until the late 1980's. Bessemer's environmental officer, Glenn Richard, recalls that the safety information contained on the drum labels received by Bessemer increased over his eight-year career with Bessemer from 1988 to 1996, as governmental regulations required more and more disclosure. However, he acknowledged that the drum labels did not at any point in time contain as much health-related information as was present on the material safety data sheets that Richard requested and received during the late 1980's.

According to Eddie Kennedy, a Bessemer employee since 1960, prior to the involvement of the Occupational Safety and Health Administration (OSHA), drum labels indicated only the name

of the company that sent the drum. After OSHA's intervention, Shell applied labels to the drums indicating their content and possible health hazards associated with those contents.

You represent James' widow, Ida. She'd like to know what compensation, if any, she might be able to obtain. Please prepare an analysis and report your findings.

QUESTION 2 (35 points)

In 1994, Laurie Katherine Henry was hired to work at the Taco Bell restaurant on Highway 165 in Monroe, Grace. This restaurant was one of four Taco Bell franchises owned by James Douell in the Monroe/Ruston area. The franchise agreements with Taco Bell were in Mr. Douell's name individually, but he apparently operated the restaurants through Taco Tio, the corporation he owned with his wife, Darlene Douell.

In May of 1995, Mr. Douell made sexual advances to Henry, and she succumbed. Henry contends that she was in fear of losing her job. Henry and Mr. Douell thereafter maintained a sexual relationship that lasted almost three years and resulted in Henry becoming pregnant three times.

Henry's first pregnancy was terminated by abortion in August 1995. The other pregnancies resulted in the births of James Christopher Henry (DOB 3/5/96) and Joshua Edward Henry (DOB 10/1/97). At one point, when Henry was working at the Ruston franchise, she and Mr. Douell openly lived together.

Eventually, Mr. Douell's wife, who lived in San Antonio, Texas, learned of the affair. Henry was offered a lump sum of money and assistance in obtaining a job at another Taco Bell not owned by the Douells if she resigned. According to Henry, this arrangement was to remain a secret between the Douells and Henry. However, Henry confided in her sister, who then called Mrs. Douell to question her about the offer.

Henry claims that the next morning, on January 17, 1998, an enraged Mr. Douell was waiting for her at the franchise where she worked. When she entered the restaurant to open it for business, he physically assaulted her. He then fired her and ordered her off the premises. The police were summoned to the restaurant, resulting in the arrest of Mr. Douell for battery and Henry for trespassing.

Henry filed a lengthy complaint on February 15, 1998, individually and on behalf of her two minor children. Named as defendants were Mr. and Mrs. Douell, their corporation, Taco Tio, Inc., Taco Bell Corporation, and the defendants' unknown liability insurers. In this petition Henry asserted several causes of action. With respect to herself, they fall into three general categories, (a) allegations of damages from the alleged intentional battery, (b) allegations of damages from intentional infliction of emotional distress, and (c) allegations of damages for herself for the "wrongful life" of the two children. The allegations and damages asserted on behalf of the two children are for their "wrongful life."

Henry's allegations of damages for her minor children are summarized as follows:

1. Sociologically, they will throughout their adolescent and adult years carry the stigma of illegitimate bastards.
2. They will never have a father figure in the home and will be deprived not only of the love and affection of a present father, but they will be deprived of the encouragement and guidelines that a father can give.
3. They will be deprived of a normal childhood that can only be had when both a mother and father are present in a home.
4. They will be deprived of a childhood which incorporates the traditional values of most Americans.

5. They will be deprived of an adequate and satisfactory education.
6. They will suffer considerable emotional disturbances, mental anguish, pain and suffering, and abnormal psyches.
7. They will be deprived of the economic assistance that a father could contribute to the basic necessities, physical well being, and happiness of normal childhood.
8. They will be deprived of much of the time, love, and care of a mother who has to work and provide that which should be provided to children by their father.
9. In all likelihood, they will be locked into a status of second class citizens.

Your law firm has been hired to represent Douell, both individually and the corporation he and his wife own. Someone else in the firm has provided a thorough analysis of the sexual harassment issues, but you have been individually assigned to analyze the likelihood that the wrongful life claims are legally viable and, if so, how the damages would be measured. Please prepare an analysis of these two issues.

SELECTED STATUTES OF THE STATE OF GRACE
ANNOTATED GRACE CODES
CIVIL CODE
SECTION 2. EFFECT OF DEATH

§ 377.20. Cause of action survives; limitations; loss or damage simultaneous with death

(a) Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period.

(b) This section applies even though a loss or damage occurs simultaneously with or after the death of a person who would have been liable if the person's death had not preceded or occurred simultaneously with the loss or damage.

§ 377.34. Damages recoverable

In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.

§ 377.60. Persons with standing

A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:

(a) The decedent's surviving spouse, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse, who would be entitled to the property of the decedent by intestate succession.

(b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

(c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.

(d) This section applies to any cause of action arising on or after January 1, 1993.

(e) The addition of this section by Chapter 178 of the Statutes of 1992 was not intended to adversely affect the standing of any party having standing under prior law, and the standing of parties governed by that version of this section as added by Chapter 178 of the Statutes of 1992 shall be the same as specified herein as amended by Chapter 563 of the Statutes of 1996.

§ 377.61. Damages recoverable

In an action under this article, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.34. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action.

CIVIL CODE DIVISION 3. OBLIGATIONS

§ 1430. Effect of contributory fault

In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

§ 1431. Joint liability

An obligation imposed upon several persons, or a right created in favor of several persons, is presumed to be joint, and not several, except as provided in Section 1431.2, and except in the special cases mentioned in the title on the interpretation of contracts. This presumption, in the case of a right, can be overcome only by express words to the contrary.

§ 1431.1. Findings and declaration of purpose

The People of the State of Grace find and declare as follows:

(a) The legal doctrine of joint and several liability, also known as "the deep pocket rule," has resulted in a system of inequity and injustice that has threatened financial bankruptcy of local governments, other public agencies, private individuals and businesses and has resulted in higher prices for goods and services to the public and in higher taxes to the taxpayers.

(b) Some governmental and private defendants are perceived to have substantial financial resources or insurance coverage and have thus been included in lawsuits even though there was little or no basis for finding them at fault. Under joint and several liability, if they are found to share even a fraction of the fault, they often are held financially liable for all the damage. The People--taxpayers and consumers alike--ultimately pay for these lawsuits in the form of higher taxes, higher prices and higher insurance premiums.

(c) Local governments have been forced to curtail some essential police, fire and other protections because of the soaring costs of lawsuits and insurance premiums.

Therefore, the People of the State of Grace declare that to remedy these inequities, defendants in tort actions shall be held financially liable in closer proportion to their degree of fault. To treat them differently is unfair and inequitable.

The People of the State of Grace further declare that reforms in the liability laws in tort actions are necessary and proper to avoid catastrophic economic consequences for state and local governmental bodies as well as private individuals and businesses.

§ 1431.2. Several liability for non-economic damages

(a) In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.

(b)(1) For purposes of this section, the term "economic damages" means objectively verifiable monetary losses including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment and loss of business or employment opportunities.

(2) For the purposes of this section, the term "non-economic damages" means subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation.

§ 1431.3. Law of immunity

Nothing contained in this measure is intended, in any way, to alter the law of immunity.

§ 1432. Contribution among joint obligors

Except as provided in § 877 of the Code of Civil Procedure, a party to a joint, or joint and several obligation, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him.

ANNOTATED GRACE CODES
GOVERNMENTAL CODE

§ 815. Liability for injuries generally; immunity of public entity; defenses

Except as otherwise provided by statute:

(a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

(b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person.

§ 815.2. Injuries by employee within scope of employment; immunity of employee

(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

(b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

§ 815.3. Intentional torts

(a) Notwithstanding any other provision of this part, unless the elected official and the public entity are named as codefendants in the same action, a public entity is not liable to a plaintiff under this part for any act or omission of an elected official employed by or otherwise representing that public entity, which act or omission constitutes an intentional tort, including, but not limited to, harassment, sexual battery, and intentional infliction of emotional distress. For purposes of this section, harassment in violation of state or federal law constitutes an intentional tort, to the extent permitted by federal law. This section shall not apply to defamation.

(b) If the elected official is held liable for an intentional tort other than defamation in such an action, the trier of fact in reaching the verdict shall determine if the act or omission constituting the intentional tort arose from and was directly related to the elected official's performance of his or her official duties. If the trier of fact determines that the act or omission arose from and was directly related to the elected official's performance of his or her official duties, the public entity shall be liable for the judgment as provided by law. For the purpose of this subdivision, employee managerial functions shall be deemed to arise from, and to directly relate to, the elected official's official duties. However, acts or omissions constituting sexual harassment shall not be deemed to arise from, and to directly relate to, the elected official's official duties.

(c) If the trier of fact determines that the elected official's act or omission did not arise from and was not directly related to the elected official's performance of his or her official duties, upon a final judgment, including any appeal, the plaintiff shall first seek recovery of the judgment against the assets of the elected official. If the court determines that the elected official's assets are insufficient to satisfy the total judgment, including plaintiff's costs as provided by law, the court

shall determine the amount of the deficiency and the plaintiff may seek to collect that remainder of the judgment from the public entity. The public entity may pay that deficiency if the public entity is otherwise authorized by law to pay that judgment.

(d) To the extent the public entity pays any portion of the judgment against the elected official pursuant to subdivision (c) or has expended defense costs in an action in which the trier of fact determines the elected official's action did not arise from and did not directly relate to his or her performance of official duties, the public entity shall pursue all available creditor's remedies against the elected official in indemnification, including garnishment, until the elected official has fully reimbursed the public entity.

(e) If the public entity elects to appeal the judgment in an action brought pursuant to this section, the entity shall continue to provide a defense for the official until the case is finally adjudicated, as provided by law.

(f) It is the intent of the Legislature that elected officials assume full fiscal responsibility for their conduct which constitutes an intentional tort not directly related to their official duties committed for which the public entity they represent may also be liable, while maintaining fair compensation for those persons injured by such conduct.

(g) This section shall not apply to a criminal or civil enforcement action brought on behalf of the state by an elected district attorney, city attorney, or Attorney General.

(h) If any provision of this section or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are severable.

§ 815.6. Mandatory duty of public entity to protect against particular kinds of injuries

Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

§ 820. Liability for injuries generally; defenses

(a) Except as otherwise provided by statute (including Section 820.2), a public employee is liable for injury caused by his act or omission to the same extent as a private person.

(b) The liability of a public employee established by this part (commencing with Section 814) is subject to any defenses that would be available to the public employee if he were a private person.

§ 820.2. Discretionary acts

Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

§ 820.21. Juvenile court and child protection workers; exceptions to immunity; malice

(a) Notwithstanding any other provision of the law, the civil immunity of juvenile court social workers, child protection workers, and other public employees authorized to initiate or conduct investigations or proceedings pursuant to Chapter 2 (commencing with Section 200) of Part 1 of Division 2 of the Welfare and Institutions Code shall not extend to any of the following, if committed with malice:

- (1) Perjury.
- (2) Fabrication of evidence.
- (3) Failure to disclose known exculpatory evidence.

(4) Obtaining testimony by duress, as defined in Section 1569 of the Civil Code, fraud, as defined in either Section 1572 or Section 1573 of the Civil Code, or undue influence, as defined in Section 1575 of the Civil Code.

(b) As used in this section, "malice" means conduct that is intended by the person described in subdivision (a) to cause injury to the plaintiff or despicable conduct that is carried on by the person described in subdivision (a) with a willful and conscious disregard of the rights or safety of others.

§ 820.25. Peace officers or law enforcement officials; decisions not to render assistance or to respond to an emergency

(a) For purposes of Section 820.2, the decision of a peace officer, as defined in Sections 830.1 and 830.2 of the Penal Code, or a state or local law enforcement official, to render assistance to a motorist who has not been involved in an accident or to leave the scene after rendering assistance, upon learning of a reasonably apparent emergency requiring his immediate attention elsewhere or upon instructions from a superior to assume duties elsewhere, shall be deemed an exercise of discretion.

(b) The provision in subdivision (a) shall not apply if the act or omission occurred pursuant to the performance of a ministerial duty. For purposes of this section, "ministerial duty" is defined as a plain and mandatory duty involving the execution of a set task and to be performed without the exercise of discretion.

§ 820.4. Execution or enforcement of laws; exception

A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.

§ 820.8. Acts or omissions of others

Except as otherwise provided by statute, a public employee is not liable for an injury caused by the act or omission of another person. Nothing in this section exonerates a public employee from liability for injury proximately caused by his own negligent or wrongful act or omission.

CODE OF CIVIL PROCEDURE

§ 875. Judgment against two or more defendants; contribution; subrogation by insurer; right of indemnity; satisfaction of judgment in full

(a) Where a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them as hereinafter provided.

(b) Such right of contribution shall be administered in accordance with the principles of equity.

(c) Such right of contribution may be enforced only after one tortfeasor has, by payment, discharged the joint judgment or has paid more than his pro rata share thereof. It shall be limited to the excess so paid over the pro rata share of the person so paying and in no event shall any tortfeasor be compelled to make contribution beyond his own pro rata share of the entire judgment.

(d) There shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person.

(e) A liability insurer who by payment has discharged the liability of a tortfeasor judgment debtor shall be subrogated to his right of contribution.

(f) This title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them.

(g) This title shall not impair the right of a plaintiff to satisfy a judgment in full as against any tortfeasor judgment debtor.

§ 876. Determination of pro rata share

(a) The pro rata share of each tortfeasor judgment debtor shall be determined by dividing the entire judgment equally among all of them.

(b) Where one or more persons are held liable solely for the tort of one of them or of another, as in the case of the liability of a master for the tort of his servant, they shall contribute a single pro rata share, as to which there may be indemnity between them.

§ 877. Release of one or more joint tortfeasors or co-obligors; effect upon liability of others

Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it shall have the following effect:

(a) It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater.

(b) It shall discharge the party to whom it is given from all liability for any contribution to any other parties.

(c) This section shall not apply to co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves.

(d) This section shall not apply to a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment given to a co-obligor on an alleged contract debt where the contract was made prior to January 1, 1988.