

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. 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 Evergreen, 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 (55 points)

On January 8, 1997, Annie Collins was severely injured in a one vehicle collision on Route 4 near Barnesville, Georgia. Michael Collins, her father, loaned the car, a 1982 GMC Van, to Daniel Thomas, Annie's boyfriend. Thomas was driving the van at 70 mph when he encountered a low spot in the asphalt surface of Route 4. The low spot had accumulated a considerable amount of water and the van "hydroplaned"—that is, the van's tires lost contact with the surface of the road—and the rear end of the van began swerving to the right. Thomas was unable to regain control, and the van struck a tree, causing serious injury to Annie.

Annie, now aged 19, has come to your office to see whether she has any potential tort claims that could allow her to recover for her injuries. You have discovered the following information:

- (1) A highway expert, Ronald Numbers, is prepared to testify that the section of the road of Route 4 was negligently designed and/or resurfaced. According to Numbers, reasonable highway design and maintenance will insure that the surface of the road does not vary more than 3½ inches, and the variation in the portion which caused Annie's injury was 6 inches.
- (2) An automotive expert, Nadine Railes, is prepared to testify that the recommended wheel size for the van—235

QUESTION 2 (80 points)

On the evening of July 25, 1994, Matt Morgan was playing cards with his parents, Jerry and Marlene Morgan, and sister, Marla Morgan. Matt excused himself from the table, went upstairs, and obtained a gun. He came back downstairs and shot and killed his parents and seriously injured his sister. During the previous year, Matt had been examined by or received counseling from various mental health professionals who were either employed by or served as consultants to the Columbia Family Counseling Center ("CFCC"), a mental health clinic operated by the State Department of Social and Health Services.

During his senior year of high school, Matt began to have difficulties at school, work, and home. His grades and attendance at school had fallen, and he was required to attend summer school. He had problems keeping jobs, and became disrespectful and verbally abusive toward his parents, to the point where his parents had grown afraid of him. These problems continued after high school until January 1993, when Matt was removed from his parents' home in Lancaster, Columbia, by police after wanting to fight his father.

Matt then drifted, homeless, until he presented himself at the Emergency Room at Columbia State University Hospital in Lincoln City, Columbia, on March 26, 1993. There, he was diagnosed as suffering from schizophreniform disorder and transported to C.A.T.C.H. Emergency Evaluation Center ("EEC"), a mental health facility operated by the State of Columbia. Matt was further evaluated at C.A.T.C.H. EEC between March 26, 1993 and March 29, 1993. It was noted that Matt had "recent drifting, travel and homelessness," and "[n]eeded to be put out of [his] parents' home by police." Various symptoms were noted suggestive of either schizophreniform disorder or schizophrenia, including Matt's belief that the government was affecting his body and the air waves, such that he was unable to watch television or listen to tapes or the radio, delusions of persecution and ideas of reference and thought broadcasting. Matt was prescribed Navane, an antipsychotic or neuroleptic drug, and on March 29, 1993, was admitted to the C.A.T.C.H. Respite.

At the C.A.T.C.H. Respite, Matt came under the care of Miles C. Ladenheim, M.D., who, at that time, was in his third year of psychiatric residency. Dr. Ladenheim first saw Matt on April 2, 1993, at which time he rendered a primary diagnosis of "schizophreniform disorder, rule out schizophrenia, chronic paranoid type." The essential features of schizophreniform disorder are identical to those of schizophrenia, with the exception that the duration is less than six months. Once the signs and symptoms persist for a continuous period of six months, the diagnosis becomes schizophrenia. Schizophrenia is an inability to recognize reality in some way, marked by delusions and perceptual distortions. There is no cure for schizophrenia, but the symptoms can be controlled by medication such as Navane. It was Dr. Ladenheim's opinion that "it was only going to be a matter of time before the six-month period elapsed, and he [Matt] would likely then have schizophrenia."

Dr. Ladenheim determined that Matt had developed a fixed paranoid delusional system involving his family, the government, unspecified industry and others, including the delusion that he had a "big lawsuit case in both Columbia and Florida, suing his family, aunts, uncles, and some other people," and somatic delusions regarding his legs. Dr. Ladenheim also noted that Matt had an unformed paranoid ideation, ideas of reference from the television and feelings of thought control by others. He noted that Matt also "had feelings of thought manipulation, meaning his thoughts were being manipulated by outside forces or people, and thought withdrawal, meaning that people were able to take thoughts out of his head, and thought reading, meaning that people were able to read his thoughts." Dr. Ladenheim also made a note on April 30, 1993, that prior to leaving Columbia, Matt was becoming increasingly agitated at home and was put out of his parents' home after threatening them.

Matt's art therapist at the Respite noted that Matt had an increased feeling of stress when feelings of anger were discussed. After referring to a particular example of anger in a drawing of a gun made by Matt on or about April 20, 1993, she stated that "[t]his, coupled with aggressive line quality, indicates possible anger toward self and others."

During his twelve-week admission at the Respite, Matt was treated with intensive therapy, Navane, and other medications to aid in sleeping and to offset the potential side effects of the Navane. Eventually, Matt's paranoia regarding his family decreased and he developed improved insight into his mental illness. Dr. Ladenheim explained that Matt's illness could be controlled by medication, and Matt agreed that the medication was helping him and that his symptoms of mental illness may have contributed to his conflicts, especially with his father. Matt began to make contacts with his family and they expressed a willingness to help him. It was Dr. Ladenheim's opinion that Matt should return to his parents' home, but that the treatments and medication must continue in order for Matt to safely return to Columbia. Accordingly, the staff at the Respite contacted CFCC, and Matt was picked up by his parents on June 22, 1993.

Matt initially presented himself to CFCC on July 16, 1993. After an intake evaluation was conducted by Ronald Gussett, Ph.D., Matt was referred for consultation with Harold T. Brown, M.D., a consultant contract psychiatrist to CFCC. Dr. Brown first saw Matt at CFCC on July 19, 1993. From his thirty-minute evaluation of Matt, Dr. Brown noted that Matt was "recently discharged from a mental health unit of some sort in Lincoln City, Columbia, on Elavil and Navane. He is out of medication. He comes to the mental health clinic for his medication, continued care and help in completing a Social Security Disability form." Dr. Brown also noted that "[h]is [Matt's] experience in Lincoln City sounds like some sort of acute atypical psychosis. He does not present indicators of thought disorder or schizophrenia at this point."

Dr. Brown did not make any final determination as to Matt's condition at that time, but did make a notation to "rule out malingering" because of a discrepancy between Matt's complaint that his legs are of different lengths and Dr. Brown's observation that Matt's gait and movements were normal, "and that there was a disability form in the works somewhere." Dr. Brown testified that he sees "a lot of people that show up with SSI in mind with a history very similar to Mr. Morgan's. And I think to give it to someone who doesn't qualify for it is a real disservice to them." However, Dr. Brown thought it wise to defer his diagnosis, continue the medication, obtain Matt's records from Lincoln City, and schedule another appointment for a month later.

On August 16, 1993, Matt kept his scheduled appointment with Dr. Brown. Dr. Brown was now in possession of the C.A.T.C.H. records, but it is clear from his testimony that he never read them and never attempted to contact Dr. Ladenheim. Instead, during this fifteen-minute session, Dr. Brown began to focus more on there being "a strong factor of malingering here or at least overstating symptoms to gain the SSI," and reduced Matt's Navane medication by half.

The next and last time Dr. Brown saw Matt was for fifteen minutes on October 11, 1993. Dr. Brown noted as follows:

"We discussed his migration from Lancaster to Florida to Lincoln City and back to Lancaster. He now chooses to view it as his extended vacation. No further insight as to just what happened to get him into the mental hospital in Lincoln City or why they may have prescribed neuroleptic [medication] for him.

"We discussed a plan to further taper the Navane. He is now taking only one 10 milligram capsule a day for the last five to six weeks. When this present supply is gone, he is to take a 5 milligram capsule once a day for a month and then discontinue. He will continue with Dr. Gussett in psychotherapy as Dr. Gussett and he both deem it useful.

"He is referred to job counselor, Nancy Lambert, for what help this may be in finding employment.

"Diagnosis for the record will be that of atypical psychosis, not further specified, in remission."

Dr. Brown testified that "[t]he diagnosis of atypical psychosis is kind of a waste basket diagnosis when you think there's been a psychotic episode, but the information is not sufficient to make a clear specific diagnosis. And I didn't feel the information that I had or my observations of Matt were sufficient to make a specific diagnosis at that time."

According to Dr. Brown, he had no "line of authority or control" at CFCC. The "style of practice" there did not allow him to "do the supportive cycle therapy, the verbal communication treatment modalities." He felt, therefore, that the responsibility of monitoring Matt's condition after October 11, 1993, fell on CFCC. He assumed that if "the counselor notices something going bad, they'll refer [the patient] back to me, something that they think medication will help with." Otherwise, Dr. Brown would not follow up on a patient's progress, even though he had terminated the patient's medication.

Between October 1993 and January 1994, Matt continued psychotherapy and vocational counseling at CFCC. He received psychotherapy from Dr. Gussett and vocational counseling from Nancy J. Lambert, LPC. During this time, however, Matt's medication ran out and his mother informed Lambert that Matt's condition was beginning to deteriorate. Mrs. Morgan reported that Matt was pacing, that he was quiet, withdrawn and moody, that his eating habits had changed, that he was becoming sick like he was before being hospitalized, and that he was regressing and needed to go back on medication. Mrs. Morgan also reported that Matt had made a deposit on the purchase of a gun.

Lambert, however, "thought that she [Marlene] was somewhat of an overprotective and controlling mother," "that she was worrisome, * * * seemed to be overly involved and overly concerned with Matt * * * and also * * * I had some question as to whether maybe she exaggerated." When Matt failed to appear for an appointment scheduled with Dr. Gussett in January 1994, Dr. Gussett and Lambert decided that Matt would continue to see only Lambert.

After January, Lambert continued as Matt's vocational counselor, and Matt's condition deteriorated further. He again became verbally abusive toward his parents, called them names, insulted them, and wanted to fight his father. On one occasion, Matt was getting ready to punch his father in the back of the head, but his father turned around in time to avoid it. Matt would throw food away after indicating he was hungry, saying it wasn't fit to eat, complained of his legs hurting when nothing was wrong with them, talked to himself, and was observed telling someone to be quiet when no one was in the room with him. On one occasion he began striking a telephone pole repeatedly with a baseball bat. His parents were again becoming afraid of him. He began to lose a lot of weight, complained of an aerial attack on his head, and exhibited signs of paranoia. His parents felt threatened by him.

Mrs. Morgan contacted Lambert several times during May 1994 to report these symptoms. Lambert scheduled Matt for an appointment with Dr. Brown, but Matt, by now apparently resistant to taking medication and therapy, failed to keep the appointment. Also, in a phone conversation on May 29, Matt's employer reported to Lambert that Matt was too weak to push a lawnmower, was on the verge of passing out, and did not seem to be totally in touch with reality.

On May 30, 1994, Lambert conducted an emergency assessment, and apparently concluded that Matt was not a candidate for involuntary hospitalization. This assessment and the decision were made entirely by Lambert without the assistance of a psychiatrist.

On June 14, Mrs. Morgan sent a letter to CFCC seeking further help regarding her son's deteriorating condition. She specifically stated that she was concerned that Matt may become violent. Matt was again evaluated for involuntary hospitalization on July 3 and again it was determined that he did not satisfy the requirements for hospitalization. This time the assessment was conducted by Lambert and William C. Reid, a licensed social worker. This was the last time Matt was seen at CFCC.

At the time of this assessment and the one conducted on May 30, CFCC had an unwritten policy that it would not initiate involuntary hospitalization proceedings, but would become involved only after such proceedings were initiated by the family of the patient. However, Matt's parents had attempted to initiate involuntary commitment proceedings, but the probate court informed them that it would need Lambert's approval.

On July 20, 1994, Mr. and Mrs. Morgan sent a letter to L. Patrick McGovern, Ph.D., a psychologist employed by CFCC at the time, again asking for help. Dr. McGovern reviewed Matt's chart, spoke briefly with Lambert and Reid, and concluded that Matt could not be hospitalized or given medication against his will. Dr. McGovern then spoke with Matt's parents on July 23 and July 25 and informed them of his conclusion. The last entry in Matt's chart at CFCC was made by Barbara K. Sharp, a licensed social worker employed by CFCC who, after speaking with Dr. McGovern on July 25, noted that "it is apparent that Matt is losing weight and decompensating. CFCC is unable to assist since he refuses medication or psychiatric care." It was that evening that Matt shot his parents and sister.

In June 1995, Matt Morgan was found not guilty by reason of insanity of two counts of aggravated murder with specification, one count of felonious assault with specification, and one count of attempted murder with specification.

You represent Marla Morgan. Please evaluate the potential claims that she might pursue for the injuries she has suffered. Assume that her brother has no assets and no insurance coverage.

SELECTED STATUTES OF THE STATE OF EVERGREEN

EVERGREEN STATUTES ANNOTATED
TITLE 50. STATE GOVERNMENT
CHAPTER 21. WAIVER OF SOVEREIGN IMMUNITY
Article 2. STATE TORT CLAIMS

§ 50-21-20 Short title

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

§ 50-21-21 Legislative intent

(a) The General Assembly recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity. On the other hand, the General Assembly recognizes that, while private entrepreneurs voluntarily choose the ambit of their activity and can thereby exert some control over their exposure to liability, state government does not have the same flexibility. In acting for the public good and in responding to public need, state government must provide a broad range of services and perform a broad range of functions throughout the entire state, regardless of how much exposure to liability may be involved. The exposure of

the state treasury to tort liability must therefore be limited. State government should not have the duty to do everything that might be done. Consequently, it is declared to be the public policy of this state that the state shall only be liable in tort actions within the limitations of this article and in accordance with the fair and uniform principles established in this article.

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

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

> 50-21-22 Definitions.

As used in this article, the term:

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

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

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

(3.1) "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

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

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

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

(7) "State officer or employee" means an officer or employee of the state, elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of the state in any official capacity, whether with or without compensation, but the term does not include an independent contractor doing business with the state. The term state officer or employee also includes any natural person who is a member of a board, commission, committee, task force, or similar body established to perform specific tasks or advisory functions, with or without compensation, for the state or a state government entity, and any natural person who is a volunteer participating as a volunteer, with or without compensation, in a structured volunteer program organized, controlled, and directed by a state government entity for the purposes of carrying out the functions of the state entity. An employee shall also include foster parents and foster children. The term shall not include a corporation whether for profit or not for profit, or any private firm, business proprietorship, company, trust, partnership, association, or other such private entity.

§ 50-21-23 Limited waiver of sovereign immunity

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

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

§ 50-21-24 Exceptions to state liability

The state shall have no liability for losses resulting from:

- (1) An act or omission by a state officer or employee exercising due care in the execution of a statute, regulation, rule, or ordinance, whether or not such statute, regulation, rule, or ordinance is valid;
- (2) The exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved is abused;
- (3) The assessment or collection of any tax or the detention of any goods or merchandise by any law enforcement officer;
- (4) Legislative, judicial, quasi-judicial, or prosecutorial action or inaction;
- (5) Administrative action or inaction of a legislative, quasi-legislative, judicial, or quasi-judicial nature;
- (6) Civil disturbance, riot, insurrection, or rebellion or the failure to provide, or the method of providing, law enforcement, police, or fire protection;
- (7) Assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, or interference with contractual rights;
- (8) Inspection powers or functions, including failure to make an inspection or making an inadequate or negligent inspection of any property other than property owned by the state to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety;
- (9) Licensing powers or functions, including, but not limited to, the issuance, denial, suspension, or revocation of or the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization;
- (10) The plan or design for construction of or improvement to highways, roads, streets, bridges, or other public works where such plan or design is prepared in substantial compliance with generally accepted engineering or design standards in effect at the time of preparation of the plan or design;
- (11) Financing regulatory activities, including, but not limited to, examinations, inspections, audits, or other financial oversight activities;
- (12) Activities of the Evergreen National Guard when engaged in state or federal training or duty, but this exception does not apply to vehicular accidents; or
- (13) Any failure or malfunction occurring before December 31, 2005, which is caused directly or indirectly by the failure of computer software or any device containing a computer processor to accurately or properly recognize, calculate, display, sort, or otherwise process dates or times, if the failure or malfunction causing the loss was unforeseeable or if the failure or malfunction causing the loss was foreseeable but the plan or design or both for identifying and preventing the failure or malfunction was prepared in substantial compliance with generally accepted computer and information system design standards in effect at the time of the preparation of the plan or design.

TITLE 51. TORTS
CHAPTER 12. DAMAGES
ARTICLE 1. COMPARATIVE FAULT

§ 51-12-1 Consent and contributory negligence as defenses; comparative negligence as affecting amount of recovery

No person shall recover damages from a defendant for injury to himself or his property where the same is done by his consent or is caused by his own negligence, provided that if the complainant and the defendant are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of fault attributable to him.

TITLE 51. TORTS
CHAPTER 12. DAMAGES
ARTICLE 2. JOINT TORT-FEASORS

§ 51-12-31 Recovery against joint tortfeasors

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

§ 51-12-32 Right of contribution among joint tortfeasors; effect of settlement

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

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

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

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

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

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

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