

FINAL EXAM

Instructions

DO NOT GO BEYOND THIS PAGE UNTIL THE EXAM ACTUALLY BEGINS.

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.

This exam will last 2 HOURS. Before turning in your answer, REREAD each question to be sure you haven't missed anything.

Please confine your analysis to the issues that were covered during the course; assume that other issues will be dealt with by someone other than yourself.

**DOUBLE-SPACE** your answers in the blue-book.

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.

You are welcome to use abbreviations, but indicate what they are, *e.g.*, "Andropov (A) would sue Brezhnev (B). B may be liable to A because ... ."

Plan on spending at least 10 minutes at the end PROOFREADING your answers. You may not write ANOTHER WORD after time is called.

Each question has been assigned a point total, and the exam as a whole has a point total of 100. 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: DO NOT DO THINGS THAT TEND TO IDENTIFY YOURSELF.**

DOUBLE SPACE!

GOOD LUCK!

DOUBLE SPACE!

Question 1 (80 points)

On February 8, 1996, Patricia Wagatsuma left her four-year-old son Wayne Robert ("Wayne") and her two other minor children, Kelly Jones ("Kelly"), aged 12, and Sandy, aged 20 months, at the residence of Linda Penn ("Penn") and Wallace Patch ("Patch") in Nicetown, Anystate, while Patricia went on an errand. (Patricia and Penn disagree whether the two younger children were left in Kelly Jones' care, or whether Patricia had hired Penn to care for all three children.) When she returned to the residence, Patricia came upon Wayne's lifeless body floating face down in the pool which was attached to the residence. An autopsy confirmed that Wayne had drowned.

The swimming pool was manufactured by Doughboy Recreational, Inc. Patch, who was the owner of the premises and Penn's landlord, purchased the pool in California in 1987 from one of Defendant's distributors, brought the pool to Anystate, and installed it on the property. The above ground pool was approximately four feet deep and was surrounded at its top by a wooden deck which connected the pool to the house. The deck, in turn, was partly surrounded by a fence with a gate that prevented access to the pool from the ground. However, there was no fence or gate between the pool area and the residence. Thus, the pool was directly accessible from the residence by crossing over the deck.

Suit has been filed against Doughboy by your employer, the law firm that represents Patricia. Some discovery has been conducted in the case. Depositions were taken of Patch, Penn, Patricia, and Kelly. In addition, Patricia has responded to Defendant's interrogatories. Defendant's evidence indicates that, although Patch always had a fence and gate to prevent access to the pool from the ground, he chose not to install a gate limiting access to the pool from the residence. Additionally, Patricia's deposition testimony indicates that Patricia, a former lifeguard and swimming instructor, had been teaching Wayne to swim but that he could not yet do so. Penn's and Kelly's depositions indicate that neither of them saw Wayne enter the pool or knew how he died.

Patricia has obtained affidavits from George F. Lawniczak, Jr., Ph.D. ("Dr. Lawniczak") and David S. Smith, Ph.D. ("Dr. Smith"). Dr. Lawniczak's resumé, attached to the affidavit, establishes his rather extensive experience in "aquatic safety." Dr. Lawniczak also attached excerpts and articles from a number of trade journals and other publications, and from the national safety council, dealing with swimming pools and drownings. Some of the attachments contain statistical data and other information on the incidence of children drowning in swimming pools. The essence of Dr. Lawniczak's affidavit is that the statistics and data indicate that all swimming pools should be equipped with safety devices to prevent such drownings. Such safety devices should include, inter alia, "safety fencing, a safety ladder, a pool alarm and a safety pool cover," for use on the pool. Dr. Lawniczak opines that if Patch's pool had been so equipped, Wayne might not have drowned.

Dr. Smith's affidavit similarly asserts that he is an aquatic safety expert. Dr. Smith avers that, based on his knowledge of the subject of drownings, special care must be taken to protect children from drowning in swimming pools. Dr. Smith advocates constant supervision of children around swimming pools and instruction for all pool owners on pool safety. Dr. Smith also states that information on safety devices should have been provided to Patch and that if the

devices had been installed, Wayne's death could have been prevented.

Patricia also has an affidavit from Patch in which Patch averred that when he bought the pool from Defendant's distributor in Santa Cruz, California, he was not provided with any safety equipment or safety system; he was not informed that such equipment was available; he was aware of some kinds of safety equipment; he did not recall that Defendant supplied him with any literature relating to the safe operation of the pool with regard to children; and he did not receive any information or warnings about safety from Defendant after he bought the pool.

Patricia's evidence indicates that (1) the incidence of child drownings in swimming pools was well known; (2) pool safety devices were available at the time Patch bought the pool from Defendant; (3) Defendant knew about such devices but neither offered them to Patch nor informed him of their availability; and (4) Patricia's experts were of the opinion that if such devices had been installed on the pool, Wayne's death could have been prevented.

Doughboy has now brought a summary judgment motion; this occurred in the process of on-going negotiations between your firm and Doughboy for a possible settlement. Please analyze the strengths and weaknesses of the case and whether you think Patricia is likely to prevail.

#### Question 2 (20 points)

You work as a legislative aide in the United States Senate for Senator Monroe, who is on the Health and Welfare Committee. A bill is being proposed in Congress that follows up on recently concluded negotiations between the attorneys general in the United States and the tobacco manufacturers. According to the negotiated deal, the tobacco companies would establish a benefit fund, at roughly \$300 billion, which would provide for no-fault payments to persons injured by tobacco smoke. As part of the proposed legislation, all existing state law and federal tort remedies would be preempted.

Senator Monroe has another aide whose job it is to worry about the political fall-out. The sole question you should address is whether or not this would be good public policy. Please analyze the strengths and weaknesses of the proposed legislation.