

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 3 HOURS. Outline your answers first, and then REREAD each question to be sure you haven't missed anything.

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 140. 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!

QUESTION 1 (120 points)

In May 1966, Rheem Manufacturing Co. manufactured a type of residential gas-fired water heater called the "Fury" which was distributed by Rheem and installed by others in late 1966 in a welding shop at 4845 South Western Avenue in Chicago. At that time, the heater was placed in the washroom near a sink.

In 1979, Richard Witasek purchased the building and converted it to an automobile repair garage. Witasek hired Antonio Carrizales as a helper-apprentice in 1988. On April 16, 1989, Carrizales assisted in the removal of a leaking gas tank from an automobile in the shop. While attempting to pour the remaining gasoline from the tank into a bucket, Carrizales slipped and fell on his hands into the bucket, splashing gasoline into his eyes and on his face, hands, arms, upper torso and clothing. He immediately went into the washroom to rinse his eyes at the sink. Before Carrizales could turn on the water, the flammable vapors from his gasoline-soaked clothes were ignited by the flame in the hot water heater and Carrizales suffered severe burns and disfigurement.

You work for Rheem's legal department. A summons and complaint was just forwarded to you from Carrizales' attorney. In addition, your file reveals the following:

- (1) John Streisel recently retired as head of product engineering at Rheem. Prior to his employment at Rheem (which began in 1974), the flame of his personal water heater (not manufactured by Rheem) ignited a small flash fire of gasoline fumes while he was using gasoline to wash car parts in his basement.
- (2) Rheem had included with the heater a small plate affixed to its base of Witasek's heater noting that it was a gas-fired device and containing instructions for pilot lighting. Carrizales has testified that although he had previously lit the pilot light on other water heaters, he had no knowledge of the workings of this particular heater, had no occasion to read the information on the plate and was not aware that the flame was continuous.
- (3) In 1975 the American National Standard Institute ("ANSI")¹ promulgated standards for gas water heaters requiring use of an 18-inch stand upon which the hot water heater might be placed so that the flame of the pilot light would be above the floor level to which the heavier-than-air vapors would descend. Rheem changed their design in 1976 to conform to this standard, despite the fact that it added 5% to the cost of each water heater. The Consumer Product Safety Commission required such a stand on all gas water heaters manufactured after 1981.
- (4) An expert from OSHA investigating the accident determined that, because the pilot light was so close to the floor, the fumes were concentrated enough to ignite; an elevated tank would not have caused such an accident.

You have been asked to prepare a memo advising Rheem on the potential settlement

1. ANSI is a non-profit group that tests a wide variety of materials used in industry and construction, from PVC pipe to steel girders.

value of this case. Assume for purposes of analysis that lost wages, medical expenses, and pain and suffering would be assessed at \$1 million. Assume further that a "product liability reform statute"—whose contents you are not sure of—applies to this case.

QUESTION 2 (20 points)

You are an advisor to a presidential candidate. Your candidate is very interested in product liability reform—she's not quite sure what to think of it—and has asked you for some advice. Specifically, she has come across an article, from which the following excerpt was taken, and she would like your comments. What would you tell her?

Predicting the future is an ultrahazardous activity. Especially if one eschews the terms of the fortune teller and speaks in unambiguous language, one invites disaster. Yet to remain tentative at a time when I believe that clear prediction is in order would be intellectually dishonest. What follows, therefore, is more than a retrospective of the conclusions that I have reached on the pages of this and other law reviews. It is my statement as to where the world of products liability is now and where it inevitably must be in the foreseeable future. I am somewhat emboldened in this endeavor because five years ago I tried my hand at prognostication in an endnote to my products liability casebook. Gamblers are notorious for expecting dumb luck to continue. Nonetheless, in the face of the law of small numbers, I engage in some star gazing.

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Almost a half-century ago, Mr. Justice Traynor, concurring in a famous products liability decision, suggested that strict liability apply in manufacturing defect cases. He argued that the law should confess to what already had become a reality. *Res ipsa loquitur* effectively had made proof of negligence, in cases where defect was established, a mirage. Traynor, of course, was correct. And he was correct again almost twenty years later when he placed the right to a defect-free product squarely within the parameters of tort law. From that point on, products liability law has been in a tither because courts have sought to transplant the concept of strict liability from manufacturing defects to generic defects—that is, design defects and failures to warn. Traynor himself was at least partially responsible for this confusion. After a quarter-century of experience, we now know that strict liability has almost no meaning in defining defectiveness in generically dangerous product cases. It provides no standard for measuring liability. Only risk-utility balancing can serve as a workable standard for defining defect. Admittedly, some courts still pay allegiance to other tests, and some foolishly insist on making distinctions without a difference. But nothing is to be gained by hedging on this issue. Risk-utility, without doubt, will emerge victorious as the liability standard in generic defect cases. And we might as well acknowledge that once risk-utility becomes the operative theory in generic litigation, negligence will reign supreme.