

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 (100 points)

On June 28, 1992, John Paul "Butch" Prestage lost his lower leg in a combine manufactured by Sperry-New Holland. At the time of the accident, Butch worked for his father, Edgar "Red" Prestage, Sr. Red farmed land owned by his sister and employed Butch to, among other things, operate a used Model 985 combine manufactured by Sperry-New Holland in 1969. Red purchased the combine (used) from Greenwood Ford Tractor Sales, Inc. in 1978.

Butch operated the combine more than anyone else in his family and used the combine on the day of the accident to harvest wheat. Under normal operation of the combine, after wheat is collected, a threshing mechanism is engaged to separate the wheat heads from the straw. After the threshing of the wheat takes place, the wheat heads are dumped into a grain tank which empties into a truck. At the bottom of the grain tank, a discharge auger churns to facilitate the wheat's movement. This discharge auger looks similar to a horizontal screw which, when turning, moves the wheat from one end of the tank to the other. There is a V-shaped guard covering this spinning auger which can be adjusted to compensate for different types of grains. Wheat is not a very fluid grain, especially when damp, and requires as much space as possible to flow properly. As designed, the maximum distance the auger guard could separate from the tank bottom is 4 inches and the minimum space is 2 inches.

In addition to the discharge auger in the tank bottom, a leveling auger spins at the top and dispenses the grain throughout the tank. This auger has a guard over the top of it and needs to be operated only while the combine is harvesting wheat. It does not need to be operated when the wheat is simply being threshed.

On the day of the accident Butch had finished harvesting wheat and had begun threshing it. He left the leveling auger on, however, as was the custom on the farm, to check for loose belts, ball bearings, etc. which might need to be replaced. As Butch walked to the back of the combine, he noticed that the grain tank had clogged. To unclog the tank, Butch climbed a ladder on the back of the combine to a flat section of the machine which overlooked the grain tank. The wheat heads and straw had clogged in the discharge auger, and Butch, as was the custom on the farm, looked for a long stick he kept to free the debris. Usually, Butch would be in the cab when the discharge auger jammed and he would only need to step out of the cab, grab the stick in front of him and jab the debris until it came free. Because Butch had been checking the rear of the machine for repairs and climbed up the back of the combine, however, he had to lean across the tank and rest on the leveling auger guard to reach his stick. Butch was wearing an untucked pullover jersey which became tangled on a bolt on the leveling auger. The auger wound his shirt up and pulled him into the tank. He hypothesized that the shirt tightened around his neck because he passed out upon entering the tank and awoke to find his foot and leg under the guard and mangled by the discharge auger. After a few minutes, Butch freed himself and got to the combine cab. From there, he drove to his truck, changed vehicles, drove to his parents' home nearby and was immediately taken to the hospital by his mother. Butch's left leg needed amputation below the knee.

Butch knows an engineer, Gary Robinson, who used to work for a company that made farm machinery. Robinson would testify that Sperry could have put a grate in the bottom of the tank at a minimal cost which would have prevented Butch's injury. However, Robinson concedes that no manufacturer used a grate of this type during the time period that the combine

was designed and manufactured. The John Deere Co. conducted field experiments with a grate, but it was never put into production.

The following warnings were in the operator's manual and/or on the combine:

- Remember a careful operator is the best insurance against an accident.
- Extreme care should be taken in keeping the hands and clothing away from moving parts.
- Stop machine to adjust and oil.
- When mechanism becomes clogged, disconnect power before clearing.
- Keep hands, feet and clothing away from power driver parts.

Although Butch acknowledged that he had seen the owner's manual and may have read those warnings, he didn't remember any of them. Besides, the custom of combine operators was to use a stick to free a clogged auger. It was helpful to keep the machinery running while this operation was being carried out, because the motion of the auger (once the clog was loosened up) would aid in clearing the clog.

Butch has come to see your law firm, where you were just hired as a new associate. Assume for purposes of analysis that Butch's damages would be set at \$1 million (including economic and non-economic damages). Since you recently took a course in product liability law your employers would like your thoughts on whether there is a sufficient likelihood of recovery to warrant taking the case. What would you tell them?

#### QUESTION 2 (40 points)

You are a law clerk at the Evergreen State Supreme Court. The judge for whom you clerk has been assigned by the Chief Justice to write the opinion in a case involving product liability issues. The case is *Glittenberg et al. v. Doughboy Recreational Industries et al.* It is a consolidated case comprising several personal injury suits brought against manufacturers of above-ground swimming pools. Some of the pools included a warning in the owner's manual concerning the danger of diving into the pool, but none of the pools placed a permanent warning label on the pool itself so that it could be seen by anyone who was about to dive in. All of the plaintiffs suffered paraplegia or quadriplegia from striking the bottom of the pool after diving in. In each case the trial court granted summary judgment in favor of the manufacturer, but in some of the cases the intermediate court of appeals reversed and remanded the case for trial. Now the cases are consolidated, presenting the state supreme court with a single issue: is there a triable issue with respect to whether a pool could be found unreasonably dangerous because it lacked a permanent, visible warning of the danger of diving in?

Your judge is struggling with the policy implications of the court's decision. Please draft a short memo giving your recommendation, but in doing so please summarize the advantages and disadvantages of the outcome you suggest.