

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 and "TORTS—SUMMER '94—FINAL EXAM" 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, reading in sequence. 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 Flux, 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)

Dana Beach, a twenty-year-old student at the University of Flux, enrolled in a freshman-level field biology class during the spring quarter of 1992. The class, taught by a tenured professor, Orlando Cuellar, required students to attend three one-day field trips and three weekend field trips.

Before the first trip, Cuellar instructed his students that they must follow his directions during class time, but were free to pursue personal interests when the day's work was completed. Students were urged to drop the class if the field trips posed any physical or other problems for them. Beach had lived away from home for three years, and although she lacked camping experience, she enjoyed athletics and had no trouble keeping up with the physical demands of the trips.

Prior to the final outing, Beach had attended all of the field trips and experienced only one minor problem. On a field trip to Lake Powell, she fell asleep in the bushes near the camp after drinking some wine. Cuellar and several students later found her and returned her to the camp. Beach informed Cuellar that the incident was unusual.

The final trip of the quarter took place over the Memorial Day weekend in the Deep Creek mountains of Flux. Beach arrived at the campsite late Friday afternoon with Cuellar's teaching assistant. Before dinner, Cuellar took all of the students on a hike to orient them to their surroundings. The hike included the area in which Beach's fall later occurred, an area of high rocks off which Beach and several other students rappelled on Saturday.

On Sunday, the students attended a lamb roast given by a local rancher after completing their field work. Beach stated that she had one mixed drink and three or four glasses of home-brewed beer while at the lamb roast. Cuellar assumed most people at the lamb roast were drinking alcohol and he had several beers. After the lamb roast, Beach returned to camp in a university van driven by Cuellar. While in the back of the van, Beach drank some whiskey.

Beach tells you that when the van reached the campsite, she did not act inebriated or in any way impaired, but appeared to be well-oriented and alert. She had no trouble getting out of the van and headed for her tent, just across the stream from the van and one hundred twenty-five feet from the center of the camp. On the way, however, she became disoriented. When no one responded to her call for assistance, she decided to retrace her route. Beach had no memory of anything else that happened that night.

Beach's tentmate noticed her absence at six o'clock the next morning. Because Beach was usually one of the last to turn in at night, she had not been missed the previous evening. A search began, and about six hours later, she was found unconscious in a crevice near the rocky area where she had rappelled the previous day. As a result of injuries sustained in her fall, Beach is a quadriplegic with some limited use of her arms.

Beach has just come to your office to meet with your senior partner regarding the prospects for a tort recovery based upon the above facts. Your senior partner wants a memo from you

containing your analysis of the prospects for success if the firm should take the case. Please analyze accordingly.

QUESTION 2 (80 points)

On January 18, 1994, Renold L. Beals, Jr., suffered personal injuries when he fell from a roof of the Kingston Farm Service building in Kingston, Flux, owned and operated by Johnny Walker. At the time of his injury, Beals had been a millwright for about ten years and had been working for the same employer for about four years. All of his work as a millwright had involved grain elevators, silos and other farm structures. Beals had worked at Walker's Kingston Farm Service elevator previously. Normally, Beals worked with his own tools and tools provided by his employer. The employer also provided scaffolding, where needed, and rope, safety harnesses and chains were standard equipment. The millwrights would generally decide what needed to be done on the job and the method of doing it without supervision from their employer.

On January 17, 1994, Walker telephoned Beals's employer to arrange for repair of a broken "leg" on his grain elevator. Walker explained that he thought the problem was with the "reducer gear." The employer contacted Beals and another millwright, John Wilson, and told them to make the repairs the next day. Ordinarily, when millwrights were called in to make repairs on a grain elevator, they brought their own equipment and were not supervised or directed by the elevator operator, who would attempt to define the problem and would be billed for the job.

On the morning of January 18, 1994, Beals and Wilson picked up the needed parts in Saginaw and drove to Walker's place of business. The temperature was near freezing, and there was a hazy sky and a fine misty rain. When they arrived at Kingston Farm Service, Wilson went to the office to speak with Walker about the kind of repair needed. Walker explained that he thought that the problem was with the reducer, which was in the headhouse at the top of the grain elevator.

There were two ways of getting to the headhouse, a man-lift and an outside ladder. The man-lift was a manually operated one-man lift inside the grain elevator, which was the only inside access to the headhouse. Routine maintenance and repair in the headhouse area did not require more than one person and Walker had never before had a breakdown in the grain elevator requiring two people.

After the initial contact with the millwrights, Walker gave no further instructions and left the premises to keep an appointment. Beals and Wilson decided that the repair required two men and, since the lift only carried one, looked for a second means of access to the headhouse. Beals initially looked for an inside ladder adjacent to the lift. In his experience such ladders existed in all other grain elevators that he had worked on. This elevator did not have one, and Beals asked one of Walker's employees how a second person could reach the headhouse. The employee pointed out an outside ladder leading from a lower roof to the headhouse and a portable ladder that could be used to get from the ground to the lower roof.

Wilson went up in the interior lift, and Beals decided to use the outside route. Beals leaned the portable ladder against the building to reach the lower roof. He climbed the ladder and felt the roof for ice and wetness before climbing onto it and found none. He got on the roof and started toward the second ladder. The roof peaked a few feet before the ladder to the headhouse, and Beals did not feel the roof on the other side of the peak but it looked like the rest of the roof. Without stopping, he stepped over the peak and slipped on a "glare of ice" and slid down the roof and over the edge, landing on railroad tracks below. During the climb, he had not used a safety line or belt or roof cleats.

Beals struck the railroad tracks with his left elbow and face, causing a cut lip, broken tooth and broken glasses. He also felt pain in his right foot, later determined to be a comminuted fracture. Following his fall from Walker's warehouse roof, and the resultant injury to his foot, Beals was taken to the emergency room at Branford hospital where emergency treatment was performed on his foot, including x-rays, examination by a doctor and the application of a plaster splint and bandages. Upon Beals' request, he was transferred to a hospital nearer his home. It was there that Dr. Frank Williamson first saw the plaintiff. Based upon the x-rays of the transferring hospital and the symptoms presented, Williamson diagnosed the injury as a severely comminuted fracture of the os calcis (heel bone broken into multiple pieces). Treatment based upon the diagnosis was ordered by Williamson.

As complications developed in plaintiff's injured foot, Williamson was taken off the case and plaintiff was referred to Dr. Kildare, an orthopedic surgeon. Kildare told Beals that he was suffering from a seriously comminuted fracture of the heel bone with extensive soft tissue injury. Treatment consistent with this diagnosis was commenced. Kildare has stated that Williamson's treatment was correct but was a more conservative approach than the one Kildare took. Kildare has written a letter quoting the opinion of two other physicians who believe that, although Williamson's treatment would have been appropriate for the injury if the diagnosis had been as Williamson declared it to be, it was inadequate to deal with plaintiff's true condition: fractured dislocation of the heel bone. Beals continues to suffer from the injury to his foot.

You represent Williamson. Beals' lawyer has sent a letter that offers to settle with Williamson for \$40,000. You expect that the damages to his foot would be worth approximately \$200,000 if the case went to a jury. Please provide your recommendation as to whether or not Williamson should accept or reject the offer.

§ 63-30-1 Short title.

This act shall be known and may be cited as the "Flux Governmental Immunity Act."

§ 63-30-2 Definitions.

As used in this chapter:

(1) "Claim" means any claim or cause of action for money or damages against a governmental entity or against an employee.

(2) (a) "Employee" includes a governmental entity's officers, employees, servants, trustees, commissioners, members of a governing body, members of a board, members of a commission, or members of an advisory body, officers and employees in accordance with Section 67-5b-104, student teachers certificated in accordance with Section 53A-6-101, educational aides, students engaged in providing services to members of the public in the course of an approved medical, nursing, or other professional health care clinical training program, volunteers, and tutors, but does not include an independent contractor.

(b) "Employee" includes all of the positions identified in Subsection (2)(a), whether or not the individual holding that position receives compensation.

(3) "Governmental entity" means the state and its political subdivisions as defined in this chapter.

(4) (a) "Governmental function" means any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.

(b) A "governmental function" may be performed by any department, agency, employee, agent, or officer of a governmental entity.

(5) "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, or estate, that would be actionable if inflicted by a private person or his agent.

(6) "Personal injury" means an injury of any kind other than property damage.

(7) "Political subdivision" means any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, or other governmental subdivision or public corporation.

(8) "Property damage" means injury to, or loss of, any right, title, estate, or interest in real or personal property.

(9) "State" means the state of Flux, and includes any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality of the state.

§ 63-30-3 Immunity of governmental entities from suit.

(1) Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from

an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

(2) (a) For the purposes of this chapter only, the following state medical programs and services performed at a state-owned university hospital are unique or essential to the core of governmental activity in this state and are considered to be governmental functions:

(i) care of a patient referred by another hospital or physician because of the high risk nature of the patient's medical condition;

(ii) high risk care or procedures available in Flux only at a state-owned university hospital or provided in Flux only by physicians employed at a state-owned university acting in the scope of their employment;

(iii) care of patients who cannot receive appropriate medical care or treatment at another medical facility in Flux; and

(iv) any other service or procedure performed at a state-owned university hospital or by physicians employed at a state-owned university acting in the scope of their employment that a court finds is unique or essential to the core of governmental activity in this state.

(b) If any claim under this subsection exceeds the limits established in Section 63-30-34, the claimant may submit the excess claim to the Board of Examiners and the Legislature under Title 63, Chapter 6.

(3) The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions, and governmental entities and their officers and employees are immune from suit for any injury or damage resulting from those activities.

(4) Officers and employees of a Children's Justice Center are immune from suit for any injury which results from their joint intergovernmental functions at a center created in Title 62A, Chapter 4.

§ 63-30-4 Act provisions not construed as admission or denial of liability -- Effect of waiver of immunity -- Exclusive remedy -- Joinder of employee -- Limitations on personal liability.

(1) (a) Nothing contained in this chapter, unless specifically provided, may be construed as an admission or denial of liability or responsibility by or for governmental entities or their employees.

(b) If immunity from suit is waived by this chapter, consent to be sued is granted, and liability of the entity shall be determined as if the entity were a private person.

(c) No cause of action or basis of liability is created by any waiver of immunity in this chapter, nor may any provision of this chapter be construed as imposing strict liability or absolute liability.

(2) Nothing in this chapter may be construed as adversely affecting any immunity from suit that a governmental entity or employee may otherwise assert under state or federal law.

(3) (a) Except as provided in Subsection (b), an action under this chapter against a governmental entity or its employee for an injury caused by an act or omission that occurs during the performance of the employee's duties, within the scope of employment, or under color of authority is a plaintiff's exclusive remedy.

(b) A plaintiff may not bring or pursue any other civil action or proceeding based upon the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless:

- (i) the employee acted or failed to act through fraud or malice; or
- (ii) the injury or damage resulted from the conditions set forth in Subsection 63-30-36(3)(c).

(4) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice.

§ 63-30-10 Waiver of immunity for injury caused by negligent act or omission of employee -- Exceptions.

Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of:

- (1) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;
- (2) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights;
- (3) the issuance, denial, suspension, or revocation of or by the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization;
- (4) a failure to make an inspection or by making an inadequate or negligent inspection;
- (5) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;
- (6) a misrepresentation by an employee whether or not it is negligent or intentional;
- (7) or results from riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances;
- (8) or in connection with the collection of and assessment of taxes;
- (9) the activities of the Flux National Guard;
- (10) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;
- (11) any natural condition on publicly owned or controlled lands, any condition existing in connection with an abandoned mine or mining operation, or any activity authorized by the Board of State Lands and Forestry;
- (12) research or implementation of cloud management or seeding for the clearing of fog;
- (13) the management of flood waters, earthquakes, or natural disasters;
- (14) the construction, repair, or operation of flood or storm systems;
- (15) the operation of an emergency vehicle, while being driven in accordance with the requirements of Section 41-6-14;
- (16) a latent dangerous or latent defective condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them;

- (17) a latent dangerous or latent defective condition of any public building, structure, dam, reservoir, or other public improvement; or
- (18) the activities of:
 - (a) providing emergency medical assistance;
 - (b) fighting fire;
 - (c) regulating, mitigating, or handling hazardous materials or hazardous wastes;
 - (d) emergency evacuations; or
 - (e) intervening during dam emergencies.

§ 63-30-11 Claim for injury -- Notice -- Contents -- Service -- Legal disability.

(1) A claim arises when the statute of limitations that would apply if the claim were against a private person begins to run.

(2) Any person having a claim for injury against a governmental entity, or against an employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority shall file a written notice of claim with the entity before maintaining an action, regardless of whether or not the function giving rise to the claim is characterized as governmental.

(3) (a) The notice of claim shall set forth:

- (i) a brief statement of the facts;
- (ii) the nature of the claim asserted; and
- (iii) the damages incurred by the claimant so far as they are known.

(b) The notice of claim shall be:

- (i) signed by the person making the claim or that person's agent, attorney, parent, or legal guardian; and
- (ii) directed and delivered to the responsible governmental entity according to the requirements of Section 63-30-12 or 63-30-13.

(4) (a) If the claimant is under the age of majority, or mentally incompetent and without a legal guardian at the time the claim arises, the claimant may apply to the court to extend the time for service of notice of claim.

(b) (i) After hearing and notice to the governmental entity, the court may extend the time for service of notice of claim.

(ii) The court may not grant an extension that exceeds the applicable statute of limitations.

(c) In determining whether or not to grant an extension, the court shall consider whether the delay in serving the notice of claim will substantially prejudice the governmental entity in maintaining its defense on the merits.

§ 63-30-12 Claim against state or its employee -- Time for filing notice.

A claim against the state, or against its employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the attorney general and the agency concerned within one year after the claim arises, or before the expiration of any extension of time granted under Section 63-30-11, regardless of whether or not the function giving rise to the claim is characterized as governmental.

§ 63-30-13 Claim against political subdivision or its employee -- Time for filing notice.

A claim against a political subdivision, or against its employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the governing body of the political subdivision within one year after the claim arises, or before the expiration of any extension of time granted under Section 63-30-11, regardless of whether or not the function giving rise to the claim is characterized as governmental.

TITLE 78. JUDICIAL CODE
PART III. Procedure
CHAPTER 27. MISCELLANEOUS PROVISIONS

§ 78-27-32 Release or settlement of personal injury claim -- When voidable.

(1) Any release of liability or settlement agreement entered into within a period of fifteen days from the date of an occurrence causing physical injury to any person, or entered into prior to the initial discharge of this person from any hospital or sanitarium in which the injured person is confined as a result of the injuries sustained in the occurrence, is voidable by the injured person, as provided in this act.

(2) Notice of cancellation of the release or settlement agreement, together with any payment or other consideration received in connection with this release or agreement shall be mailed or delivered to the party to whom the release or settlement agreement was given, by the later of the following dates:

(a) within fifteen days from the date of the occurrence causing the injuries which are subject of the settlement agreement or liability release; or

(b) within fifteen days after the date of the injured person's discharge from the hospital or sanitarium in which this person has been confined continuously since the date of the occurrence causing the injury.

§ 78-27-37 Definitions.

As used in Sections 78-27-37 through 78-27-43:

(1) "Defendant" means a person, other than a person immune from suit as defined in Subsection (3), who is claimed to be liable because of fault to any person seeking recovery.

(2) "Fault" means any actionable breach of legal duty, act, or omission proximately causing or contributing to injury or damages sustained by a person seeking recovery, including negligence in all its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification or abuse of a product.

(3) "Person immune from suit" means:

(a) an employer immune from suit under Title 35, Chapter 1 or 2; and

(b) a governmental entity or governmental employee immune from suit pursuant to Title 63, Chapter 30, Governmental Immunity Act.

(4) "Person seeking recovery" means any person seeking damages or reimbursement on its own behalf, or on behalf of another for whom it is authorized to act as legal representative.

§ 78-27-38 Comparative negligence.

(1) The fault of a person seeking recovery shall not alone bar recovery by that person.

(2) A person seeking recovery may recover from any defendant or group of defendants whose fault, combined with the fault of persons immune from suit, exceeds the fault of the person seeking recovery prior to any reallocation of fault made under Subsection 78-27-39(2).

(3) No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant under Section 78-27-39.

(4) (a) In determining the proportionate fault attributable to each defendant, the fact finder may, and when requested by a party shall, consider the conduct of any person who contributed to the alleged injury regardless of whether the person is a person immune from suit or a defendant in the action and may allocate fault to each person seeking recovery, to each defendant, and to any person immune from suit who contributed to the alleged injury.

(b) Any fault allocated to a person immune from suit is considered only to accurately determine the fault of the person seeking recovery and a defendant and may not subject the person immune from suit to any liability, based on the allocation of fault, in this or any other action.

§ 78-27-39 Separate special verdicts on total damages and proportion of fault.

(1) The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery, to each defendant, and to any person immune from suit who contributed to the alleged injury.

(2) (a) If the combined percentage or proportion of fault attributed to all persons immune from suit is less than 40%, the trial court shall reduce that percentage or proportion of fault to zero and reallocate that percentage or proportion of fault to the other parties in proportion to the percentage or proportion of fault initially attributed to each party by the fact finder. After this reallocation, cumulative fault shall equal 100% with the persons immune from suit being allocated no fault.

(b) If the combined percentage or proportion of fault attributed to all persons immune from suit is 40% or more, that percentage or proportion of fault attributed to persons immune from suit may not be reduced under Subsection (2)(a).

(c) (i) The jury may not be advised of the effect of any reallocation under Subsection (2).

(ii) The jury may be advised that fault attributed to persons immune from suit may reduce the award of the person seeking recovery.

(3) A person immune from suit may not be held liable, based on the allocation of fault, in this or any other action.

§ 78-27-40 Amount of liability limited to proportion of fault -- No contribution.

(1) Subject to Section 78-27-38, the maximum amount for which a defendant may be liable to any person seeking recovery is that percentage or proportion of the damages equivalent to the percentage or proportion of fault attributed to that defendant.

(2) A defendant is not entitled to contribution from any other person.

(3) A defendant or person seeking recovery may not bring a civil action against any person immune from suit to recover damages resulting from the allocation of fault under Section 78-27-38.

78-27-41 Joinder of defendants.

(1) A person seeking recovery, or any defendant who is a party to the litigation, may join as a defendant, in accordance with the Flux Rules of Civil Procedure, any person other than a person immune from suit who may have caused or contributed to the injury or damage for which recovery is sought, for the purpose of having determined their respective proportions of fault.

(2) A person immune from suit may not be named as a defendant, but fault may be allocated to a person immune from suit solely for the purpose of accurately determining the fault of the person seeking recovery and a defendant. A person immune from suit is not subject to any liability, based on the allocation of fault, in this or any other action.

(3) (a) A person immune from suit may intervene as a party under Rule 24, Flux Rules of Civil Procedure, regardless of whether or not money damages are sought.

(b) A person immune from suit who intervenes in an action may not be held liable for any fault allocated to that person under Section 78-27-38.

78-27-42 Release to one defendant does not discharge other defendants.

A release given by a person seeking recovery to one or more defendants does not discharge any other defendant unless the release so provides.

§ 78-27-43 Effect on immunity, exclusive remedy, indemnity, contribution.

Nothing in Sections 78-27-37 through 78-27-42 affects or impairs any common law or statutory immunity from liability, including, but not limited to, governmental immunity as provided in Title 63, Chapter 30, and the exclusive remedy provisions of Title 35, Chapter 1. Nothing in Sections 78-27-37 through 78-27-42 affects or impairs any right to indemnity or contribution arising from statute, contract, or agreement.

§ 78-27-44 Personal injury judgments -- Interest authorized.

(1) In all actions brought to recover damages for personal injuries sustained by any person, resulting from or occasioned by the tort of any other person, corporation, association, or partnership, whether by negligence or willful intent of that other person, corporation, association, or partnership, and whether that injury shall have resulted fatally or otherwise, the plaintiff in the complaint may claim interest on the special damages actually incurred from the date of the occurrence of the act giving rise to the cause of action.

(2) It is the duty of the court, in entering judgment for plaintiff in that action, to add to the amount of special damages actually incurred that are assessed by the verdict of the jury, or found

by the court, interest on that amount calculated at the legal rate, as defined in Section 15-1-1, from the date of the occurrence of the act giving rise to the cause of action to the date of entering the judgment, and to include it in that judgment.

(3) As used in this section, "special damages actually incurred" does not include damages for future medical expenses, loss of future wages, or loss of future earning capacity.

RESTATEMENT (2D) OF TORTS

§8A. Intent

The word "intent" is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.

§13. Battery: Harmful Contact

An actor is subject to liability to another for battery if

- (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- (b) a harmful contact with the person of the other directly or indirectly results

§15. What Constitutes Bodily Harm

Bodily harm is any physical impairment of the condition of another's body, or physical pain or illness.

§18. Battery: Offensive Contact

(1) An actor is subject to liability to another for battery if

- (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- (b) an offensive contact with the person of the other directly or indirectly results.

(2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for a mere offensive contact with the other's person although the act involves an unreasonable risk of inflicting it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

§21. Assault

(1) An actor is subject to liability to another for assault if

- (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
- (b) the other is thereby put in such imminent apprehension.

(2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for an apprehension caused thereby although the act involves an unreasonable risk of causing it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

§35. False Imprisonment

(1) An actor is subject to liability to another for false imprisonment if

- (a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and
- (b) his act directly or indirectly results in such a confinement of the other, and
- (c) the other is conscious of the confinement or is harmed by it.

(2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for a merely transitory or otherwise harmless confinement, although the act involves an unreasonable risk of imposing it and therefore would be negligent or reckless if the risk threatened bodily harm.

§36. What Constitutes Confinement

(1) To make the actor liable for false imprisonment, the other's confinement within the boundaries fixed by the actor must be complete.

(2) The confinement is complete although there is a reasonable means of escape, unless the other knows of it.

(3) The actor does not become liable for false imprisonment by intentionally preventing another from going in a particular direction in which he has a right or privilege to go.

§ 46. Outrageous Conduct Causing Severe Emotional Distress

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

§63. Self-Defense by Force Not Threatening Death or Serious Bodily Harm

(1) An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him.

(2) Self-defense is privileged under the conditions stated in Subsection (1), although the actor correctly or reasonably believes that he can avoid the necessity of so defending himself,

(a) by retreating or otherwise giving up a right or privilege, or

(b) by complying with a command with which the actor is under no duty to comply or which the other is not privileged to enforce by the means threatened.

§65. Self-Defense by Force Threatening Death or Serious Bodily Harm

(1) Subject to the statement in Subsection (3), an actor is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm, when he reasonably believes that

(a) the other is about to inflict upon him an intentional contact or other bodily harm, and that

(b) he is thereby put in peril of death or serious bodily harm or ravishment, which can be safely be prevented only by the immediate use of such force.

(2) The privilege stated in Subsection (1) exists although the actor correctly or reasonably believes that he can safely avoid the necessity of so defending himself by

(a) retreating if he is attacked within his dwelling place, which is not also the dwelling place of the other, or

(b) permitting the other to intrude upon or dispossess him of his dwelling place, or

(c) abandoning an attempt to effect a lawful arrest.

(3) The privilege stated in Subsection (1) does not exist if the actor correctly or reasonably believes that he can with complete safety avoid the necessity of so defending himself by

(a) retreating if attacked in any place other than his dwelling place, or in a place which is also the dwelling of the other, or

- (b) relinquishing the exercise of any right or privilege other than his privilege to prevent intrusion upon or dispossession of his dwelling place or to effect a lawful arrest.