

TORTS I
Fall 1995
December 15, 1995

PROFESSOR DEWOLF

MID-TERM 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—Fall '95—MIDTERM 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. 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 ... !

In answering the questions, please DO NOT DISCUSS ANY of the following ISSUES:

- Contributory negligence on the part of any plaintiff;
- Comparative fault as between defendants;
- Claims against governmental bodies;
- Any affirmative claims or defenses that would be raised by any defendant.

In other words, you should concentrate on the evaluation of the prima facie case that would be presented by your client(s) (if you represent plaintiff(s)) or against your client(s) (if you represent the defendant(s)).

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 Anxiety, 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!

MERRY CHRISTMAS! HAPPY HOLIDAYS! GOOD LUCK!!!

QUESTION 1 (50 points)

Eric Stewart was seriously injured on May 4, 1994, when, on duty as Chief of Police of Emerado, he was shot twice in the head by Dale Densmore while investigating an altercation involving Densmore. According to Densmore, he and a companion, Devin Johnson, began drinking at Johnny's Bar in Emerado at about 5:30 p.m. on May 4, and during that time, Johnny's Bar served him between 15 and 20 mixed drinks. Densmore and Johnson subsequently went to Larimore and stopped at two more bars, the Red Dog and Larimore Improvement Association ("LIA"). According to Densmore, LIA served him one mixed drink, but Red Dog did not serve him any drinks. Densmore and Johnson ultimately returned to Johnny's Bar, where they were served additional drinks. An altercation ensued and, as Densmore was leaving, he brandished a gun. An employee at Johnny's Bar called the police, and Stewart confronted Densmore outside the bar. After a brief pursuit and struggle, Densmore shot Stewart twice in the head. Densmore subsequently pled guilty to attempted murder. He is now serving a life sentence in the state penitentiary.

Devin Johnson states that Densmore was drinking and visiting with Mr. Pete Vageline in the Red Dog Saloon in Larimore and that he only 'walked through' the Larimore Improvement Association Bar. Other witnesses, namely Pete Vageline, Valerie McMahan and Dale Densmore, have indicated that Dale Densmore was visiting and drinking with Mr. Vageline in the Larimore Improvement Association Bar and he only 'walked through' the Red Dog Saloon.

Eric Stewart's wife Jennifer has come to your office to ask about the prospects for a tort recovery for the injuries sustained in the shooting. She tells you that Johnny's Bar is in financial difficulty and she was told (although the information is not necessarily reliable) that they have no insurance. Please describe your recommendations.

QUESTION 2 (85 points)

You are a member of the legal staff at WasteCollect, a private contractor which collects all of the garbage in LargeCity, Anxiety. Your boss just dumped on your desk a copy of the following newspaper article. She would like you to report as quickly as possible on your analysis of the potential tort claims that might be made against your employer/client as a result of this incident. In preparation for negotiations with other interested parties, she would like an assessment of what claims would likely be made and how damages would be calculated.

2 Children Die as Trash Truck Rod Rips School Bus

Two schoolchildren died Wednesday morning when a school bus was rammed near downtown LargeCity by a malfunctioning rod protruding from a WasteCollect trash truck, only hours after the truck had been cited for mechanical problems.

The dead children were identified as Francisco Mata and Brian Serrano, both 8-year-old third-graders. Two other children were injured in the accident, one critically, in what school officials called the first fatal bus accident in the LargeCity district's history.

The accident—at the busy, fog-blanketed intersection of Temple and Alvarado streets—happened about 7:30 a.m. when a powerful hydraulic piston burst through the housing of the trash truck and extended into oncoming lanes, smashing through the bus's windows, Highway Patrol investigators said.

"It sounded like a big bomb—like two pieces of metal colliding," said Paul Gulrajani, who heard the crash at a nearby minimarket. "I heard kids crying and screaming."

High-ranking WasteCollect officials confirmed that the truck had been reported Tuesday night as having mechanical problems, but that the problem did not get fixed overnight because, in one official's words, "the service department was too busy." The truck was allowed back on the road because the driver assigned to it Wednesday morning apparently had no knowledge of the problem.

Officials could not describe the specific nature of the problem and refused to make the truck's maintenance record available.

Randall C. Bacon, general manager of the WasteCollect Department of General Services, said the driver who used truck No. 070 on Tuesday reported at the end of his shift that he heard a loud noise in the trash compactor and wrote down a notation about the hydraulic ram on a problem report.

The truck was taken out Wednesday by a different driver who was unaware of the problem because mechanics failed to put the truck on a "hold" list of vehicles in need of repairs, officials said.

"The truck should have been held out of service until it was fixed," Bacon said. "We do keep detailed maintenance records on all of our vehicles and certainly on trash trucks, which are high-maintenance vehicles. They are inspected basically every evening after they're used."

"We have just not had this kind of mechanical failure on trash trucks at all, certainly nothing this drastic," he said.

Witnesses and WasteCollect officials differed in their descriptions of events. Although Roland Silva of the city Bureau of Sanitation said the piston burst from the truck and struck the bus before WasteCollect driver, Kenneth Wayne Fox, could react, at least two witnesses said the 12-foot piston was protruding into traffic for as much as three blocks.

Everardo Sanchez Garcia, 46, who was driving east in front of the bus, said he saw the piston approaching and swerved his van to avoid it.

"There was a lot of fog," he said. "I was crossing the intersection . . . (and) I saw he had a mechanical arm sticking out. I said, 'It's going to hit my van.'"

Sanchez said he honked his horn and swerved into the right lane, then saw the arm rake the bus behind him. He heard children screaming and went back to help them, he said. He entered the bus to find two or three children sprawled on the floor.

"There was a lot of blood," he said.

Although Sanchez said the chrome piston was difficult to see in the fog, CHP investigators discounted poor visibility as a cause for the accident. Sanchez said the truck driver appeared to be glancing to his right, as if looking for a way to pull over, when the piston hit the bus.

Jose Chavez, 8, a third-grader at Glen Eden School, was sitting in the back of the bus at the time of the accident.

"Suddenly everything was moving and there was glass all over the place," he said. "I thought the bus was going to explode. I was shaking in fear. When I looked down I saw the three boys there on the floor." Another witness, Claudio Caballero, 33, said he was driving his 7-year-old son and 8-year-old daughter to school after they had missed boarding the bus minutes earlier. He had passed the bus when he noticed the hazard ahead.

"I told my kids to duck," Caballero said, noting that his car was too low to be hit. "It barely passed over us."

Firefighter David Chavez, who was among the first emergency workers on the scene, said he entered the front door of the bus as trembling, crying children were still scrambling off. Upon seeing the point of impact, he rushed out to retrieve sheets to cover the bodies.

"We go to all these shootings with gangbangers, accidents with drunk drivers, but these were innocent little kids that didn't know what was coming," Chavez said. "It was the worst accident I've ever seen. It hits us hard. It hits close to home."

As firefighters set up a sidewalk triage, Chavez said, he and other emergency crewmen moved quickly to begin examining the children. When they realized most were not injured, firefighters began comforting the children, holding their hands, plucking glass from their hair and talking to them about their school.

"They were all in shock, a few were crying," Chavez said. "These kids acted better than most adults at an accident scene. They listened to instructions, they did what they were told. We tried to soothe them, tried to make conversation. But it was hard on all of us."

The uninjured children were taken to Rosemont Avenue School, where they received crisis counseling and sat or played in the auditorium until anxious parents picked them up. One father, Jose Panameno, learned that his 6-year-old son, Jose Brian Panameno, had been involved in the accident when his brother-in-law called. Panameno called the school district and was told his son was all right, but left the West LargeCity delicatessen where he works to pick him up and be sure.

"What goes through your mind at times like this is the worst," Panameno said after a tearful reunion. "I thought my son might be dead."

For other parents, the news was far different. The parents of one of the boys who died sobbed uncontrollably as they were driven home from the hospital by police escort. Another couple, more composed, moved somberly through a throng of reporters and photographers and drove away in their own car without comment.

The mechanical failure caused the 12-foot-long piston to punch a hole in the driver's side of the truck and strike the bus, which carried 48 students. The piston hit the bus at window height, shattering glass nearly the full length of the bus, according to witnesses and Highway Patrol investigators. At one point, the piston apparently punched its way inside the bus, causing head injuries to the students.

The bus, bound for Glen Eden Elementary School in Montecito Heights, was preparing to make a left turn onto Alvarado Street toward the Woodstock Freeway when the trash truck brushed past it in the opposite direction, highway patrol officers said.

Two other students, 8-year-old Mario Garay and 11-year-old Rigoberto Aguilar, were taken to Children's Hospital, where Mario was in critical condition Wednesday night with head wounds, but expected to recover. Rigoberto suffered only minor injuries, doctors said, and was treated and released.

Officials described the incident as the first bus fatalities in the sprawling LargeCity Unified School District, which has been busing students since the 1920s. The district buses 70,000 of its 646,000 students every day, many of them from overcrowded mid-city schools to other schools where classroom space is available.

Last year, the district recorded 729 accidents involving school buses, but only 28 of those caused injuries to students. In all, 58 students were hurt in those accidents, none seriously.

Wednesday's tragedy occurred midway through a routine morning commute for students who are picked up at four crowded mid-city campuses—Ramona, Cahuenga, Alexandria Avenue and Rosemont Avenue elementary schools—and driven to Glen Eden, near the Woodstock Freeway a few miles north of downtown.

The bus had just left Rosemont, its final pickup point on the hour-long circuit, when it was hit by the trash truck, officials said.

The accident focused new attention on not only the vastness of the district's busing program, but also the maintenance of WasteCollect's high-tech trash trucks. The reliability of the trucks had been questioned in the past by sanitation officials.

The truck, one of about 390 similarly designed vehicles in the WasteCollect fleet, was delivered to WasteCollect in October, 1993. It compresses the trash inside by means of twin hydraulic pistons that drive a metal plate.

"Those pistons broke loose from the ram and busted out of the side walls (of the truck) on both sides," said Silva, of the city's Bureau of Sanitation. "We've never had any kind of mechanical error like this," Silva said, describing the protrusion of the piston into the path of the bus as a "freakish thing . . . like a missile coming out of a launching pad."

The driver-side piston, which struck the bus, ripped a hole about a foot in diameter through the exterior of the trash truck, while the right piston tore a hole about nine inches across, Silva said.

As a result of the accident, all of the trash trucks with similar hydraulic pistons—about half of WasteCollect's fleet—were to be inspected Wednesday night. WasteCollect officials warned that trash collection could be briefly delayed because of the inspection program.

The injuries to Mario Garay, the child in critical condition, included a skull fracture on the left side of his head, but no apparent blood clots or brain damage, doctors said. Mario will not require surgery.

"He is able to tell us his name," said Dr. Mary Letournean, the hospital's director of emergency medicine, who noted that the ability to verbalize after a traumatic head injury is a good sign that the boy will recover.

CIVIL PRACTICE AND REMEDIES CODE
TITLE 5. ALCOHOLIC BEVERAGES
CHAPTER 5. GENERAL PROVISIONS

§ 5.001. Claim for relief for fault resulting from intoxication

Every spouse, child, parent, guardian, employer, or other person who is injured by any obviously intoxicated person has a claim for relief for fault against any person who knowingly disposes, sells, barter, or gives away alcoholic beverages to a person under twenty-one years of age, an incompetent, or an obviously intoxicated person, and if death ensues, the survivors of the decedent are entitled to damages. No claim for relief pursuant to this section may be had on behalf of the intoxicated person nor on behalf of the intoxicated person's state or personal representatives; nor may a claim for relief be had on behalf of an adult passenger in an automobile driven by an intoxicated person or on behalf of the passenger's estate or personal representatives.

TITLE 4. LIABILITY IN TORT
CHAPTER 71. WRONGFUL DEATH; SURVIVAL; INJURIES OCCURRING OUT OF STATE
SUBCHAPTER A. WRONGFUL DEATH

§ 71.001. Definitions

In this subchapter:

(1) "Corporation" means a municipal, private, public, or quasi-public corporation other than a county or a common or independent school district.

(2) "Person" means an individual, association of individuals, joint-stock company, or corporation or a trustee or receiver of an individual, association of individuals, joint-stock company, or corporation.

§ 71.002. Cause of Action

(a) An action for actual damages arising from an injury that causes an individual's death may be brought if liability exists under this section.

(b) A person is liable for damages arising from an injury that causes an individual's death if the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfulness, or default.

(c) A person is liable for damages arising from an injury that causes an individual's death if:

(1) the person is a proprietor, owner, charterer, or hirer of an industrial or public utility plant or of a railroad, street railway, steamboat, stagecoach, or other vehicle for the transportation of goods or passengers; and

(2) the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfulness, or default.

(d) A person is liable for damages arising from an injury that causes an individual's death if:

(1) the person is a receiver, trustee, or other person in charge of or in control of a railroad, street railway, steamboat, stagecoach, or other vehicle for the transportation of goods or passengers, of an industrial or public utility plant, or of other machinery; and

(2) the injury was caused by:

(A) the person's wrongful act, neglect, carelessness, unskillfulness, or default;

(B) the person's servant's or agent's wrongful act, neglect, carelessness, unfitness, unskillfulness, or default; or

(C) a bad or unsafe condition of the railroad, street railway, or other machinery under the person's control or operation.

(e) A person is liable for damages arising from an injury that causes an individual's death if:

(1) the person is a receiver, trustee, or other person in charge of or in control of a railroad, street railway, steamboat, stagecoach, or other vehicle for the transportation of goods or passengers, of an industrial or public utility plant, or of other machinery; and

(2) the action could have been brought against the owner of the railroad, street railway, or other machinery if he had been acting as operator.

§ 71.003. Application

(a) This subchapter applies only if the individual injured would have been entitled to bring an action for the injury if he had lived.

(b) This subchapter applies whether the injury occurs inside or outside this state.

§ 71.004. Benefitting From and Bringing Action

(a) An action to recover damages as provided by this subchapter is for the exclusive benefit of the surviving spouse, children, and parents of the deceased.

(b) The surviving spouse, children, and parents of the deceased may bring the action or one or more of those individuals may bring the action for the benefit of all.

(c) If none of the individuals entitled to bring an action have begun the action within three calendar months after the death of the injured individual, his executor or administrator shall bring and prosecute the action unless requested not to by all those individuals.

§ 71.005. Evidence Relating to Marital Status

In an action under this subchapter, evidence of the actual ceremonial remarriage of the surviving spouse is admissible, if it is true, but the defense is prohibited from directly or indirectly mentioning or alluding to a common-law marriage, an extramarital relationship, or the marital prospects of the surviving spouse.

§ 71.006. Effect of Felonious Act

An action under this subchapter is not precluded because the death is caused by a felonious act or because there may be a criminal proceeding in relation to the felony.

§ 71.007. Ineffective Agreement

An agreement between the owner of a railroad, street railway, steamboat, stagecoach, or other vehicle for the transportation of goods or passengers, of an industrial or public utility plant, or of other machinery and an individual, corporation, trustee, receiver, lessee, joint-stock association, or other entity in control of or operating the vehicle, plant, or other machinery does not release the owner or the entity controlling or operating the vehicle, plant, or other machinery from liability provided by this subchapter.

§ 71.008. Death of Defendant

(a) If a defendant dies while an action under this subchapter is pending or if the individual against whom the action may have been instituted dies before the action is begun, the executor or administrator of the estate may be made a defendant, and the action may be prosecuted as though the defendant or individual were alive.

(b) A judgment in favor of the plaintiff shall be paid in due course of administration.

§ 71.009. Exemplary Damages

When the death is caused by the wilful act or omission or gross negligence of the defendant, exemplary as well as actual damages may be recovered.

§ 71.010. Award and Apportionment of Damages

(a) The jury may award damages in an amount proportionate to the injury resulting from the death.

(b) The damages awarded shall be divided, in shares as found by the jury in its verdict, among the individuals who are entitled to recover and who are alive at that time.

§ 71.011. Damages not Subject to Debts

Damages recovered in an action under this subchapter are not subject to the debts of the deceased.

§ 71.021. Survival of Cause of Action

(a) A cause of action for personal injury to the health, reputation, or person of an injured person does not abate because of the death of the injured person or because of the death of a person liable for the injury.

(b) A personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person. The action survives against the liable person and the person's legal representatives.

(c) The suit may be instituted and prosecuted as if the liable person were alive.

§ 71.031. Act or Omission out of State

(a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:

(1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;

(2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and

(3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.

(b) All matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.

(c) The court shall apply the rules of substantive law that are appropriate under the facts of the case.