

Student Exam Number _____

Final Examination
Torts, Professor Leslie Griffin
University of Houston Law Center
December 6, 2005
9:00 a.m to 1:30 p.m.

THESE EXAMINATION QUESTIONS MUST BE RETURNED AT THE END OF THE EXAM.

This examination is **CLOSED BOOK, NO NOTES**. You may not consult any other materials or communicate with any other person. You are bound by the Law Center's Honor Code. **Don't forget that it is a violation of the Honor Code to discuss the exam's contents with any student in this class who has not yet taken it.** I recommend that you not talk about the contents of the exam until finals period is over.

Write your student exam number in the blank on the right side of the top of this page. If you are handwriting your examination, write your examination number on the cover of *each* of your bluebooks. Number your bluebooks by indicating the book number and total of books (e.g., 1/5, 2/5, 3/5, 4/5, 5/5). If you are using the computer, write your examination number on *each diskette* and at the beginning of your response to *each question*. If you are handwriting, please *do not use pencil*. At the end of the exam, you MUST turn in the examination along with your answers. Please do not write your name, social security number or any other information that provides me with your identity.

This exam is six pages long, with THREE questions. Question I is worth 50 points. Question II is worth 25 points. Question III is worth 25 points. I recommend that you spend 120 minutes on Question I, 60 minutes on Question II, and 60 minutes on Question III. You have an extra 30 minutes to use at your discretion.

Your job is to analyze the facts in each question. Do not make up facts or fight the facts given. If you need more information to resolve a difficult question, state what information you would need and how it would affect your answer. Read carefully. Think before you write. Accurate reading of the question is essential. Good organization, clear statement and avoidance of irrelevancies all count in your favor.

If you write your exam, use ONE SIDE of a page only, and SKIP LINES. You may not use pencil.

Honor Code. It is a violation to use ANY aid in connection with this examination; to fail to report any such conduct on the part of any other student that you observe; to retain, copy, or otherwise memorialize any portion of the examination; or to discuss its contents with any student in this class who has not yet taken it. By placing your exam number in the PLEDGE blank below, you are representing that you have or will comply with these requirements. If for any reason you cannot truthfully make that pledge, notify me as soon as possible. **Sign your number and not your name.**

PLEDGE: _____

Question I (50 points, 120 minutes)

Paul works for the Emory Company, which manufactures concrete blocks. When he started work at Emory in 2002, he signed an Emory's Employee Safety Indoctrination form. This form was designed to certify that the employee had received detailed instructions on his specific job and general precautions outlined in the employer's safety handbook. Paul also received booklets about Emory's workers' compensation system.

Paul suffered injuries to his left hand after intentionally inserting his left hand inside the chain rail of the delivery conveyor (while it was moving) of the Lion LG-4, a landscaping concrete block manufacturing machine, to perform an adjustment. Paul attempted to perform an adjustment at the machine's pinchpoint without turning off the power. Suddenly and without warning, his hand and/or arm became caught in the machine causing severe and permanent injuries, including a traumatic crush injury to his left arm with nerve damage. If Paul had turned off the power to perform the adjustment, line production would have halted for up to twenty minutes.

The LG-4's operating manual contains no instructions on how to perform the adjustment. Paul, however, followed what he considered to be the usual practice that he had seen performed by fellow employees. However, when making the adjustment. Paul's wrench inadvertently slipped, causing his arm to be caught by a chain and pulled into a gear pulley.

Lion Company manufactures the LG-4. Emory Company purchased the machine from Jones Company, which sells a wide variety of industrial equipment.

The area of Emory Company in which Paul's accident occurred is guarded both by location and by two physical barriers - the control panel, and a yellow safety chain, which must be removed by authorized personnel in order to enter the area. In addition, only authorized personnel were permitted to enter the area to perform maintenance, adjustments and/or repairs and only when proper lockout/tagout procedures were followed and the machine's power was turned off. Paul asserts that the area of the machine where he was injured while attempting to perform an adjustment was unguarded by any human personnel.

Turning off the power to all machinery before performing any maintenance, adjustment and/or repair is a strict requirement mandated by the Occupational Health and Safety Administration (OSHA), by Lion and by Emory. It is described in the Lion Handling Line and Operation Manual, the Emory Safety Indoctrination form (which Paul reviewed and consented to at the initiation of his employment at Emory) and various warning labels located throughout the machine. The Employee Safety Indoctrination form certifies in its second paragraph that Paul had received detailed instructions in machine safety, including that "servicing/cleaning of equipment is to be performed only when lockout/tagout procedures are followed."

Emory investigated the accident and prepared an accident report that cited Paul for an unsafe practice (not following proper lockout/tagout procedure before performing an adjustment), taking an unsafe position and failing to follow oral instructions (Paul was instructed and trained numerous times throughout his employment at Emory to turn the power off of all machinery before performing maintenance, adjustments and/or repairs). Emory personnel stated that the need for chain rail adjustments was something which was noticed gradually and that such adjustments were usually performed during the evening, nonproduction hours which were reserved for any maintenance, adjustments and/or repairs that were required.

Lion designed and manufactured "safety covers" to enclose moving parts on the LG-4, but did not provide a safety cover for the location that injured Paul.

Paul argues that the adjustment he attempted to perform would otherwise involve halting production for up to 20 minutes, which would result in a loss of productivity that would affect his take-home pay.

Paul asks you, his lawyer, whether he can collect any money for his injuries and how he might do so. Explain Paul's options.

After you have reviewed Paul's options, assume for this part of the question only that all possible defendants would be held liable for Paul's injuries. Analyze how you think liability should be apportioned among them.

Question II (25 points, 60 minutes)

Pamela is 75 years old. She was at the end of the counter in the produce department of CheapFoodStore when she suddenly slid. She remembered seeing two grapes on the floor when she fell. She was certain she slipped on a grape because a grape was on her heel when she landed. She stated that she did not know how the grapes came to be on the floor or how long they were on the floor; however, she assumed that the grapes came from the counter because the grapes were being sold in woven plastic bags with holes in them. She stated that the floor was dark and dirty and that there were no mats on the floor around the area where she fell.

Pamela is prepared to testify to the following:

"I had seen produce items on the floor of the store in the produce section. Friends and relatives of mine have seen loose grapes on the floor in the produce section and they have seen them since the date of my fall. I learned all of this after my fall because friends and relatives expressed concern because they knew that I slipped on loose grapes on the floor."

"At the time of my fall, the grapes were displayed in woven mesh plastic bags with holes in them. This was a dangerous condition in that individual grapes could fall through the holes onto the floor of the store. I know from my experience as a shopper, and watching other customers, that customers normally lift produce items for inspection before buying. I know that people will inspect the grapes to see if they are fresh and not bruised or overripe. I believe that in this inspection process it would be easy for grapes to fall onto the floor."

"At the time of my fall, the grapes were positioned for display on a counter slanted up where loose grapes could easily fall onto the floor. The grapes were positioned in the direct path of shoppers who were pushing shopping carts. It would be hard for shoppers to see any small grapes that had fallen onto the floor."

"There were no protection mats in the aisles of the produce section. These were added after I fell. If protection mats had been on the aisle when I stepped on the loose grapes on the floor, I would have not slipped and fallen and hurt myself so badly. Even if I had slipped and fallen, a mat would have cushioned my fall."

"At the time I fell, the area of the floor where the grapes had fallen was slick and very dirty. It would have been very hard for any person to have noticed small grapes on the floor. The grapes on the floor were light green in color and hard to see. The floor was very dirty. After the fall, my pants were very dirty from the fall, and it was obvious that the dirt came from the floor."

The affidavit of Sam, assistant store director, noted that it was store policy to keep the floors clean at all times. Sam stated that he was in the produce area of the store within an hour prior to Pamela's fall, pursuant to the store's policy requiring hourly inspections, and that the grape was not on the floor at that time. Sam concluded that the grape on which Pamela slipped could not have been on the floor for more than a matter of minutes.

Sam's affidavit also states that CheapFoodStore buys its grapes from GrapeSupplier. The grapes are placed into the mesh bags by GrapeSupplier and arrive at CheapFoodStore in those plastic bags.

Pamela brings a tort lawsuit against both CheapFoodStore and GrapeSupplier. Identify and analyze the causes of action that she will bring.

Both CheapFoodStore and GrapeSupplier move for summary judgment. Should Pamela's lawsuits survive these motions? Why or why not?

Question III (25 points, 60 minutes)

The Smith family owns property along or near a creek called Bay Branch, which is a tributary of Pleasant Creek. For many years, Colonel Motors Company has owned and operated an aluminum casting facility called the Foundry upstream of Bay Branch and Pleasant Creek. Discharge from the Motors Company flows into the waters of the creeks and then flows up against the Smiths' property.

The Smiths claim that over a period of years since 1965, Colonel Motors has polluted Smiths' property, including the surface water and ground water, with polychlorinated biphenyls ("PCBs"). They allege that soil samples from their properties show abnormally high levels of PCBs. They allege that their wells for drinking water were contaminated by the PCBs released by Colonel Motors. They also allege that they have been exposed to PCBs discharged into the air and borne by winds and dust onto their property and into the air they have breathed.

No member of the Smith family alleges that he or she is currently suffering any specific illness or adverse physical effects resulting from exposure to PCBs.

PCBs are persistent and highly toxic carcinogens that accumulate in the body. Exposure to PCBs above background levels in the environment can greatly increase a person's risk for a number of serious and even life-threatening diseases. Exposure to PCBs does not typically result in immediate manifestation of disease or injury. Instead, cumulative harmful effects can include immune suppression, liver damage, thyroid disease, prostate cancer, non-Hodgkin's lymphoma, pancreatic cancer, diabetes, and reproductive disorders.

Centers for Disease Control studies show that there is a 20 percent chance that individuals exposed to PCBs will suffer liver damage, a 35 percent chance that individuals exposed to PCBs will suffer thyroid disease, a 52 percent chance that individuals exposed to PCBs will suffer prostate cancer, and a 90 percent chance that individuals exposed to PCBs will suffer non-Hodgkin's lymphoma.

Discuss the lawsuits that the Smiths may bring against Colonel Motors. Will they win or lose their claims? Why or why not?

Torts Exam Memo
Fall 2005
Professor Griffin

I awarded grades for your torts exams based on the following point totals:

Above 85	A	4
80-84	A-	6
78	B+	2
65-75	B	22
60-64	B-	7
55	C+	2
50	C	1

These grades produced a class average of 3.09. The Law Center grading curve requires an average between 2.9 and 3.1.

On Question I, most of you discussed the strict products liability lawsuit against Lion, but some of you lost points for forgetting to sue Jones. The most serious problem with the answers was the failure to grapple with workers' compensation. Participation in the workers' comp system usually means that an employee loses his ability to sue for negligence. A more serious omission was a failure to deal in depth with the second set of questions. You had to address the issue of how to integrate workers comp into the compensation scheme. If you did not address whether Lions and Jones should reimburse Emory and other issues connected to workers' comp, you lost 15 points.

Question II was straightforward. You should have discussed constructive notice, mode of operations and the business practice rule, and all the cases connected to those rules. Most of you sued GrapeSupplier for strict products liability, but you also needed to address whether CheapFoodStore was in the strict products liability chain.

Question III gave you the opportunity to talk about facts and not just to recite rules. You had to talk about the Smiths and their specific chances of acquiring the diseases listed. Facts are there to be analyzed, not ignored. You had to talk about the percentages of illness and the members of the Smith family. **IT IS NEVER ENOUGH TO WRITE AN ESSAY ABOUT THE LAW.** You had to talk about Rylands, which is not the same thing as the abnormally dangerous and ultrahazardous tests. This was not a loss of a chance question; it was a probability of future recovery question, so you needed to **APPLY** (not just mention) the New Jersey, Pennsylvania and Connecticut tests.

It was a mistake to go back and add batteries and misrepresentations everywhere, thinking that the exam had to include intentional torts!

