

FINAL EXAM SAMPLE ANSWER

MULTIPLE CHOICE

1.

- (a) is **correct**. Samantha clearly suffered apprehension, and if June was substantially certain that this would occur, it satisfies the intent requirement.
- (b) is *incorrect*; it is not enough that the victim reasonably suffer apprehension; there has to be either an intent to cause such apprehension, or the defendant just be substantially certain that it would occur.
- (c) is *incorrect*. It is enough if the plaintiff experiences apprehension; the level of emotional trauma need not be "substantial."
- (d) is *incorrect*; motive is not the same as intent. One can have a good motive but still incur liability if the intent element is met.

2.

- (a) is *incorrect*; there needs to be a showing that the defendant *intended* to confine the plaintiff(s), and that such confinement did occur.
- (b) is *incorrect*; the intent element is present, but there was never any confinement.
- (c) is **correct**; unless Mike and Tom were confined within limited boundaries, there is no false imprisonment
- (d) is *incorrect*; as long as the plaintiffs are aware of their imprisonment, they do not have to establish a particular quantum of damages.

3.

- (a) is **correct**; all the driver wanted to do was get his driver's license back, but if that resulted in an offensive contact--and if the driver knew it was substantially certain to occur--then that satisfies the intent requirement.
- (b) is *incorrect*; one needn't establish harm in order to show a battery, if the battery consists of offensive contact.
- (c) is *incorrect* for the reasons stated in the explanation of answer (a).
- (d) is *incorrect*; Bill's awareness that his behavior is annoying doesn't affect whether or not the driver's conduct constitutes a battery.

4.

- (a) is *incorrect*; there must be all three elements of the tort of outrage
- (b) is *incorrect*; he must suffer severe emotional distress;
- (c) is *incorrect*; the conduct must also be outrageous
- (d) is **correct**; George and Jill clearly intended to cause emotional distress, so if the other two elements are met, the tort of outrage is made out.

5.

- (a) is *correct*. The facts state the Bill was trying to scare Jill and George, but if the driver was scared, that would be a case of "transferred intent."
- (b) is *incorrect*; unless the driver actually thought it was a gun, he wouldn't experience apprehension.
- (c) is *incorrect*; one can assault another even if the threat turns out to be illusory.
- (d) is *incorrect*; see answer (a) with respect to transferred intent

#### QUESTION 1

The facts for this question are based on *Goolsby v. Family Foods, Inc.*, 2004 WL 253493, 2004-Ohio-631, (Ohio App. 8 Dist., Feb 12, 2004), in which the court granted summary judgment to the defendants based on the plaintiff's failure to supply evidence of a defect in the lighter.

Goolsby ("G") has a potential product liability claim against Pushlite, but she has several difficulties in establishing her case.

One problem is that we don't really know what caused the lighter to spray butane. It could be that the lighter had been damaged by mistreatment, either before or after purchase. On the other hand, the lighter could have been damaged because it was mismanufactured. It will be very helpful if we are able to obtain the actual lighter and can have it evaluated to be prepared to justify whatever claim we are making.

#### Claim v. Pushlite

In order to recover from Pushlite, G would have to establish that the lighter was *defective*, and that this defect was present when it left the manufacturer's hands. There are three basic types of defects: manufacturing, design, and warning. The easiest case to prove (from a legal standpoint) would be a manufacturing defect. That is, that the lighter failed to conform to the specifications. For example, perhaps a piece of the mechanism was missing, or the plastic was insufficiently fused together, causing the butane to leak out. All jurisdictions recognize that a manufacturing defect generates *strict liability*; that is, G would not have to show that Pushlite was negligent, only that it was in fact "out of spec."

Perhaps the lighter did conform to the manufacturer's specifications; it still might have a *design defect*; one of our arguments would be that, even if the lighter was damaged through normal wear and tear (including getting stuck in a car door or underneath a chair leg), the danger of spraying butane makes this design unreasonably dangerous. To determine whether the product has a design defect, most jurisdictions use some form of a risk-utility test. (We would prefer a consumer expectations test, under which we could simply say that a lighter that sprays butane into someone's face is not in accord with the consumer's expectations, but the consumer expectations test is in disfavor these days.) In order to show that the product does not meet a risk-utility test, we would compare the product to some better design. For example, perhaps the plastic components could be made to withstand more abuse, or there would be some safety mechanism that would prevent the butane from spraying in this way. On the other hand, disposable lighters are supposed to be cheap, and decreasing the risk might substantially decrease the utility of the product. In our favor, however, it is worth mentioning that if the butane had caught fire (instead of merely spraying her face), the damages would have been catastrophic. Thus, we might be able to show that this design rendered the product unreasonably dangerous.

In a similar vein, we might want to show that the lighter had a *warning defect*; even if it is too expensive to design a lighter that will withstand abuse and still not spray butane, the user should at least be warned about the danger of turning on the spray of fuel while it's near the user's face. We don't know what warnings were included with the lighter; maybe they addressed this issue. We also don't know whether G would have behaved any differently if there had been a warning; would she have read the warning? Would a better warning have prevented her injury?

#### Claim v. Family Foods / Snipes

Under the Restatement (2d) of Torts, § 402A, almost universally adopted after its promulgation, a "seller" is liable for any defect in the product. Family Foods actually sold the lighter, so technically they could also be a target. However, many jurisdictions have adopted "retailer relief" that forces the plaintiff to sue the manufacturer as the first line of attack; the retailer is available as a defendant only if the manufacturer can't be held accountable, or if the retailer committed some independent act of negligence, such as damaging the lighter or selling the lighter after becoming aware that it had a defect.

Also, Snipes' role in the accident doesn't appear to generate any liability, since she simply purchased the lighter and gave it to G. It is conceivable that Snipes knew about a problem with the lighter and failed to tell G about it, but that possibility seems far-fetched, particularly since the lighter was a gift. Consequently, I wouldn't see any reason to consider her as a potential defendant.

#### Contributory Fault and Assumption of Risk

In Linden there are special statutory provisions for product liability law. For cases other than product liability cases, a plaintiff's fault does not bar recovery so long as the plaintiff is not more negligent than the combined fault of the defendants (the so-called 50% modified comparative negligence rule). In products cases this is modified by excluding "express and implied assumption of risk" from the definition of contributory fault. (§ 2315.41) If the plaintiff's express or implied assumption of risk is found to be a proximate cause of the plaintiff's harm, then the claim is barred. (§ 2315.42) It's hard to know how broadly "express or implied assumption of risk" will be interpreted. (Here again, we need to know more about how the accident happened.) If G actually knew something was wrong with the lighter (for example, that it had been bent, or that the case was cracked), and proceeded to use the lighter anyway, the defendant would undoubtedly argue that this was an implied assumption of risk and ought to bar any recovery. On G's behalf we would argue that assumption of risk should be interpreted more narrowly. To begin with, there was obviously no *express* assumption of risk; that would require G to have given written or oral consent to the risk involved. And if the defendant tried to say it was an *implied* assumption of risk, we would rely on those cases that describe implied assumption of risk as the same as express assumption of risk except with a different way of conveying assent (in express assumption of risk there is a written or oral manifestation of consent, whereas with implied assumption of risk there is merely behavior consistent with consent). Also, we would argue that assumption of risk is the voluntary assumption of a *known* risk, and here there is no showing that G was even aware of the risk that butane would spray her face. We would argue that, even if G used the lighter after becoming aware that it had some kind of crack or flaw in it, it would be no different from ordinary contributory negligence, and should not be considered implied assumption of risk. In any event, whether because the judge permits the jury to call this an implied assumption of risk, or because the jury finds G more than 50% at fault, the claim could be barred; but it seems unlikely.

### Joint and Several Liability

Our hope would be to make Pushlite primarily responsible. It would be bad for us if it turned out that Snipes, for example, was responsible for some harm to the lighter, and that she was assigned a share of fault. She probably couldn't pay her share of fault. Linden's joint and several liability rules make defendants jointly and severally liable for *economic damages* (wage loss, medical expenses) if their fault is greater than 50%. On the other hand, defendants are only severally liable for noneconomic loss. Since most of G's damages are noneconomic, we want to avoid a situation in which someone other than Pushlite is found at fault.

### QUESTION 2

The facts for this question were based upon *Mauter v. Toledo Hosp., Inc.*, 59 Ohio App.3d 90, 571 N.E.2d 470 (1989), in which the court affirmed a summary judgment in favor of the hospital, ruling that the hospital did not have a duty to protect the decedent from the risk of harm from estranged husband.

I would anticipate that the State of Linden could be sued by Brenda Andrews' Estate, alleging that we were negligent in failing to protect Brenda Andrews, and/or restrain Mike Andrews. We have a variety of arguments as to why this claim should fail, but liability remains a possibility.

### Sovereign Immunity

Any claim against a governmental entity requires an initial analysis of whether the sovereign has waived its sovereign immunity. Linden has a broad legislative waiver of sovereign immunity, retaining immunity only for the exercise of a "discretionary function" (LC § 2743.02(D)). As an initial matter, we could argue that the security officers' decision to leave Andrews and take care of the patient in the psychiatric wing was the exercise of a discretionary function, but I doubt this would be persuasive. Most courts interpret "discretionary function" to prevent interference by the courts with the policymaking authority of a coordinate branch of government. Here the decision to leave Andrews (or at least not to follow him on the monitor) doesn't really rise to the level of policymaking. It was an exercise of "discretion," but so is the decision to make a left turn or to replace a worn tire. So I doubt that it will prevent the imposition of liability.

### Duty of Care

Our next argument would be that the state (in the person of the hospital and its personnel) didn't owe Brenda Andrews a duty of care, which would in turn mean that we could not be held liable for a breach of such a duty. We would point out that she was killed by her estranged husband, and the claim against us is essentially a complaint about our nonfeasance, rather than a complaint that we actually caused the injury in this case. The court might very well agree with us on this point. There may be some merit to this. The plaintiff would probably argue one of two theories to justify imposing a duty of care upon the state hospital.

The first is to claim that we had a "special relationship" with Mike / Brenda, and/or that there was some kind of "justifiable reliance" upon our initial effort to deal with Mike Edwards. The plaintiff is likely to argue that, if Mike Edwards had gotten in his car and driven in an intoxicated condition, there would be some logic in saying that we started a "rescue" and then negligently failed to follow through. Regardless of the merits of this argument, the point is that Mike Edwards did not

drive out of the parking garage, but instead committed an intentional tort, indeed the most serious felony of aggravated murder. Unlike those cases (like *Tarasoff*) where the risk posed by the dangerous person was obvious to the defendant, here the risk posed by Mike Edwards was not only concealed, it was almost inconceivable. Moreover, in terms of "justifiable reliance," there might conceivably have been some reliance by Mike Edwards, but it would be next to impossible for Brenda Edwards' estate to claim that Brenda Edwards in some way relied upon hospital security in terms of their dealing with Mike Edwards.

The second and more plausible argument as to why we owed Brenda a duty of care is that she was an invitee on our property. She was there taking a nursing class, and if she had slipped on the carpet there is no question that she would be considered an invitee. Visitors to land are classified according to their status at the time they are injured. Invitees are owed a duty of reasonable care, and I suspect a court would say that we owed a duty of reasonable care to Brenda. On the other hand, on behalf of the state I would argue that Brenda was not injured by a condition of the premises (e.g., a darkened stairway where she fell or was mugged.) The fact that Michael Andrews used the parking lot to track her down is a fortuity, and her injury had nothing to do with whether the premises were reasonably safe.

Nonetheless, the court might say that lack of security is a condition of the premises analogous to poor lighting in a parking lot or carelessness in handling room keys at a motel, and that Brenda had a right to expect reasonable care. Whether we delivered it or not -- whether we acted reasonably -- would be a question of fact for the jury. If that happened, we could expect that the plaintiff would try to show we were negligent by using the standard of reasonable care, as informed by expert testimony, industry custom, internal policies.

#### Comparative Fault / Joint and Several Liability

The good news for us is in the allocation of fault among joint tortfeasors. Before getting to that, I should dispose of the question of whether we should assert contributory fault as a defense. In this jurisdiction the plaintiff's contributory fault operates as a damage-reducing factor, but I wouldn't even assert a contributory fault claim, because there is no conceivable set of facts suggesting that Brenda failed to use reasonable care to prevent her own murder. (Don't go there, girlfriend!)

Turning to the joint and several liability. Linden for the most part uses several liability. The only time it imposes joint liability is for intentional torts (§ 2307.22(A)(3)) and for economic losses caused by defendants more than 50% at fault (§ 2307.22(A)(1)). Neither would apply here. In any event, noneconomic damages are always subject to several liability only (§ 2307.22(C)). Moreover, the jury would be asked to compare the fault of Mike Andrews, the murderer, to the fault of security guards who, even if they didn't do as good a job in keeping track of a drunk visitor as they should have, will not look very culpable. I would be confident that our share of the economic and noneconomic loss would be small and Mike Andrews' share of liability would be huge. (While some jurisdictions might reject a purported comparison of intentional torts and ordinary negligence, the statute in Linden seems to contemplate just such a thing.) I would thus take a very tough negotiating posture; not only is the prospect of our liability slim, but even if we were found liable, it would not be for a substantial portion of the total damages suffered by the plaintiff.

## Spring 2004 Checklist

### QUESTION 1

- |   |  |
|---|--|
| <input type="checkbox"/> <b>Overview</b>  | <input type="checkbox"/> Potential defense: <b>contributory fault</b>          |
| <input type="checkbox"/> Claim v. <b>Pushlite</b>   | <input type="checkbox"/> <b>Separate rule</b> for prod. liab. claims           |
| <input type="checkbox"/>  | <input type="checkbox"/> <b>Contributory negligence</b> distinguished          |
| <input type="checkbox"/> Was the product <b>defective</b> ?                               | <input type="checkbox"/> Linden uses <b>modified</b> comparative fault (50%)   |
| <input type="checkbox"/> Three different kinds of <b>defects</b>                          | <input type="checkbox"/> Express/ implied assumption of risk <b>bars</b> claim |
| <input type="checkbox"/> Was there a <b>manufacturing</b> defect                          | <input type="checkbox"/> Certainly no <b>express</b> A o R                     |
| <input type="checkbox"/> Failure to conform to <b>prod. spec's</b>                        | <input type="checkbox"/> <b>Implied</b> is different only in method of assent  |
| <input type="checkbox"/> If so, <b>strict</b> liability                                   | <input type="checkbox"/> Did G <b>know</b> of risk she supposedly assumed?     |
| <input type="checkbox"/> Was there a <b>design</b> defect?                                | <input type="checkbox"/> Assumption of risk that merely <b>merges</b> w/ CN    |
| <input type="checkbox"/> Design defect b/c <b>susceptible</b> to damage?                  | <input type="checkbox"/> Bar seems <b>unlikely</b>                             |
| <input type="checkbox"/> What about a <b>warning</b> defect                               | <input type="checkbox"/>   |
| <input type="checkbox"/> Were there warnings <b>with</b> the product?                     | <input type="checkbox"/> <b>Joint and several</b> liability                    |
| <input type="checkbox"/> Would warning have made a <b>difference</b> ?                    | <input type="checkbox"/> Def's severally liable for <b>noneconomic</b> harm    |
| <input type="checkbox"/>  | <input type="checkbox"/> Joint liability for <b>economic</b> harm if > 50%     |
| <input type="checkbox"/> Separate liability for <b>Family Foods</b> ?                     | <input type="checkbox"/>   |
| <input type="checkbox"/> Did Family Foods commit <b>independent negligence</b> ?          | <input type="checkbox"/>   |
| <input type="checkbox"/> No liability for <b>Snipes</b> if she had no knowledge of defect | <input type="checkbox"/>   |
| <input type="checkbox"/>  | <input type="checkbox"/>   |
| <input type="checkbox"/>  | <input type="checkbox"/>   |
| <input type="checkbox"/>  | <input type="checkbox"/>   |

### QUESTION 2

- |  |   |
|--|---|
| <input type="checkbox"/> <b>Overview</b>                           | <input type="checkbox"/> No basis for <b>Contributory</b> Fault                         |
| <input type="checkbox"/> <b>Governmental</b> liability             | <input type="checkbox"/> Joint and Several <b>Liability</b> Rules                       |
| <input type="checkbox"/> Sovereign <b>immunity</b>                 | <input type="checkbox"/> Defendants <b>severally</b> liable for <b>noneconomic</b> harm |
| <input type="checkbox"/> Statutory <b>waiver</b> : complete        | <input type="checkbox"/> Joint liability for <b>economic</b> harm if > 50%              |
| <input type="checkbox"/> <b>Discretionary function</b> ?           | <input type="checkbox"/> <b>Mike's</b> share of fault to be calculated                  |
| <input type="checkbox"/> No real <b>policy-making</b> involved     | <input type="checkbox"/>  |
| <input type="checkbox"/>   | <input type="checkbox"/>  |
| <input type="checkbox"/> Was a <b>Duty</b> Owed?                   | <input type="checkbox"/>  |
| <input type="checkbox"/> Did LSUH fail to <b>rescue</b> ?          | <input type="checkbox"/>  |
| <input type="checkbox"/> <b>Premises</b> Liability Theory?         | <input type="checkbox"/>  |
| <input type="checkbox"/> If so, Brenda was an <b>invitee</b>       | <input type="checkbox"/>  |
| <input type="checkbox"/> Therefore, owed duty of <b>reas. care</b> | <input type="checkbox"/>  |
| <input type="checkbox"/> Would a jury find LSUH <b>negligent</b> ? | <input type="checkbox"/>  |

Exam # \_\_\_\_\_