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FINAL EXAM SAMPLE ANSWER

QUESTION 1

> The facts for this question were based upon *Plainview Motels, Inc. v. Reynolds*, 127 S.W.3d 21 (Tex.App. 2003), in which the court sustained a jury verdict in favor of the father, and held that the parental immunity doctrine prevented apportionment of fault to the father.

I would consider bringing a claim against Surplus Sales ("SS") on behalf of all three Reynolds family members. Each case is a little bit different.

Phillip's Case v. SS

Premises Liability. The most obvious case is a premises liability claim against SS for negligently stacking the mirrors. In a premises liability claim the first issue is what the plaintiff's status is, in order to determine the nature of the duty that is owed. Phillip would be considered an *invitee*, because he was at SS as a business customer. As such he is owed a duty of reasonable care. Thus, he would be required to show that SS was negligent in stacking the mirrors. This might require the presentation of expert testimony, or perhaps the jury could make that determination on the basis of their own experience. Given the seriousness of the injuries and the likelihood of what happened, this seems like a relatively strong case.

Comparative Fault. The bad news is that Phillip would be subject to the defense of contributory negligence. Every person is expected to use reasonable care for his or her own safety, and the failure to do so can result in the reduction (in some cases, even elimination) of the plaintiff's right to recover. In this case a jury would probably find that Phillip's handling of the mirrors was negligent. A big unknown is how the jury would allocate relative fault as between Phillip and SS. If the jury assigned 50% or less of the fault to Phillip, he would recover minus his percentage of fault. On the other hand, if he were assigned more than 50% of the fault, he is barred from recovery (LSCA § 33.001). I don't think that there would be any application of assumption of risk, since, even if Phillip were negligent, I don't think that he *voluntarily* assumed a *known* risk; if the defendant tried to argue assumption of risk it seems likely that the court would consider this *merged* with the doctrine of contributory negligence and left for the jury to assign.

Lucy's Case v. SS

Premises Liability. Lucy would make the same liability claim as Phillip. She is also an invitee, since she was there pursuant to a business purpose. Her injuries resulted from SS's negligence in stacking the mirrors. (It is not clear whether she was hurt by the fall of the mirrors themselves, or in the process of trying to rescue her husband and child. In either case, rescuers are considered foreseeable victims; as Cardozo put it, "Danger invites rescue.")

Comparative Fault. Lucy is not subject to contributory negligence, since nothing in the facts suggests that her injuries resulted from a lack of reasonable care on her part. However, her husband's negligence could significantly reduce her recovery. Linden's statutes require a defendant to pay only its percentage of fault if the negligence of that defendant is not > 50%. Thus, if the jury found that Phillip was at least 50% at fault, that would not only affect Phillip's recovery (perhaps bar it if the jury found that he was >50% at fault), but it would also limit Lucy's recovery from SS to SS's share of comparative fault. Thus, supposing that the jury found SS

40% at fault and Phillip 60% at fault, Lucy could only recover 40% of her damages from SS. On the other hand, if the jury found Phillip 40% at fault and SS 60% at fault, then Lucy could recover (in theory) 100% of her damages from SS (LSCA §§33.013(b)(1)). On the other hand, even if that were true, and Lucy received a full recovery from SS, SS could turn around and sue Phillip for contribution based on his share of fault (§ 33.015(a)). Thus, in the hypothetical that Phillip is found 40% liable, he would have to pay that amount either to Lucy or to SS.

Dillon's Claim v. SS

Premises Liability. Dillon would also claim to be an invitee, and would likely be so under the logic of the laundry case (*Hostick v. Hall*). On the other hand, it is conceivable that the "warehouse" has certain restrictions on children such that Dillon isn't an invitee. I don't think that's likely, but I would anticipate some objection to giving Dillon invitee status. Assuming he is an invitee, his claim against SS would look like Phillip's and Lucy's.

Comparative Fault. Here the analysis has an additional wrinkle. SS would undoubtedly claim that Phillip was at fault in causing the injury to Dillon, and should be made an additional defendant, or at least a "responsible third party" under the statute (explained below). Phillip would claim parental immunity. Most states use a test of parental immunity that depends upon whether or not the parent was engaged in a parental function. SS could argue that Phillip's negligence in handling the mirrors wasn't parental—that this case doesn't come down to "bad parenting," but rather "bad mirror stacking"; Phillip was negligent in caring for himself and those around him, and it just happened that his child was also a victim of his own negligence. To put it another way, his duty to Dillon was a duty owed to the world, not just to Dillon because of the parental relationship. This issue could go either way. However, it may be that Phillip's negligence consisted in failing to keep Dillon in safe place while he handled the mirrors; to that extent it probably would be a parental function and would make P immune.

It is conceivable that there would be a dual aspect to Phillip's negligence—that which falls under parental immunity and that which does not. Even as to that portion of the liability that is found to fall within parental immunity, Phillip could be designated by SS as a "Responsible Third Party" pursuant to LSCA § 33.004, and SS would ask that he be assigned a percentage of fault. If, after the allocation of fault, SS is found 50% at fault or less, they would only liable to Dillon for their own percentage of fault. (§33.013(a)). Any portion that is found to fall outside of parental immunity would be treated the same way as Lucy's claim against Phillip.

Product Liability Against Mirror Manufacturer ("MM")?

I don't see any likelihood that our clients (or for that matter, SS) would benefit from a product liability claim. To succeed in such a claim, the plaintiff would have to show that the mirrors were defective. A manufacturer is strictly liable for manufacturing flaws (there is no evidence of one in this case), and liable either the design of the product or the warnings that accompanied it were defective. Again, there is no evidence of either a design or warning defect. The question is whether a reasonable person would change the design to reduce the risk of injuries from negligent stacking, and that seems far from a reasonable expectation. Similarly, it would be hard to persuade a jury that a reasonable person would have attached a warning about the danger of heavy mirrors falling on someone; it's along the same lines as warning someone about falling off a ladder. I would not recommend pursuing such a claim on our clients' behalf, and I doubt that SS would seek such a claim as part of the allocation of comparative fault.

Statute of Limitations

Lucy's and Phillip's Claims. This accident occurred in July 2002. Most jurisdictions have either a 2-year or 3-year statute of limitations (depending on the type of claim). If this jurisdiction had a two-year statute of limitations with respect to either the premises liability or product liability claim, then such claim would be barred. On the other hand, if there is a 3-year statute for either claim, then it must be filed by July 28 or else be barred.

Dillon. Most jurisdictions toll the statute of limitations for a minor until the age of majority. Thus, Dillon's claims would be viable even if his parents' claims were barred.

Settlement

In this jurisdiction a settlement with a defendant reduces the claim by the amount of the settling party's percentage of fault (§ 33.012(b)). Thus, if Dillon or Lucy tried to settle his or her claim against Phillip, the percentage of fault would be deducted from the recovery against either SS or MM.

QUESTION 2

The facts for this question are based on *Broussard v. Tyler County Hosp.*, 831 S.W.2d 584 (Tex.App. 1992), in which the court reversed a summary judgment in favor of the state, holding that it was a question of fact whether or not the decedent's injuries resulted from the "use of personal property" so as to qualify under the Texas sovereign immunity statute.

I would be concerned about a tort claim for medical malpractice, but there are a number of defenses that could protect us.

Sovereign Immunity

Use of Personal Property. Linden limits tort claims against the state in a variety of ways. First, no claim can be brought unless it arises from the use of a motor vehicle, or from the "condition or use of tangible personal or real property." This is an unusual way of phrasing the waiver of sovereign immunity. There must be a use of "personal property" that caused the injury. In this case the hospital personnel used various items of "personal property" -- the cardiac monitor and the EKG machine, for example -- but unless the use of those machines resulted in Walker's death, the sovereign immunity statute doesn't waive immunity. For example, if Dr. Lee made a mistake while palpating Walker ("W")'s back, that wouldn't qualify because it isn't the *use* of personal property.

Financial Limits. Assuming that Krenz could show that the negligent use of some piece of equipment caused W's death, and thus the case qualified for the waiver of sovereign immunity, there are still financial limits that are imposed. LSCA § 101.023 limits liability to $250K per person and $500K per occurrence. It is unclear whether each beneficiary under the estate would constitute a separate person, thus permitting a $500K maximum, or whether the estate would be considered a single person, limiting the recovery to $250K. A final possibility is that the "emergency service organization" provision of the statute (§101.023(d)), which imposes even smaller caps (100K/300K in place of 250K/500K) would apply to the emergency room. Further research into the statute(s) would obviously be required.

No personal liability. The statute treats the state as the defendant; no state employee acting in the course and scope of employment, which would include all the medical personnel here, would be considered personally liable (§ 101.026).

Medical Malpractice Standard

Assuming W's estate qualified for a recovery, it would still have to show that Lee et al. committed medical malpractice. Most states follow a standard that holds a health care provider ("HCP") liable if the patient's injury resulted from a failure of the HCP to observe the standard of care applicable to a HCP of a similar type under similar circumstances. One wrinkle in this case is to determine what standard to apply to Lee. He is specializing in internal medicine, but it's not clear from the facts whether he is a specialist, or only held to the standard of a general practitioner. If he can be held to the higher standard, then it would be easier for Krenz to show that Lee's failure to diagnose W's condition failed to meet the standard of care. The care provided by the hospital nurses would also be subject to review to determine what nurses are expected to do in those circumstances. It would also be relevant to know whether the emergency room was located in an urban area or in a rural area with fewer medical resources.

It will be critical to send the case file to competent experts for review to determine the likelihood that a persuasive case could be made that the state medical personnel who treated W negligently caused his death.

I don't see any potential for a claim based on failure to obtain informed consent from the patient; not only is there no evidence of that kind of a claim, but the sovereign immunity statute doesn't seem to contemplate merely verbal failures (as distinguished from negligent use of personal property).

Also, I see no potential for a product liability claim. Even if there were problems with the equipment, it is not likely that they would reduce our liability to a significant extent. If we were found liable, we would be paying only a fraction of the plaintiff's damages to begin with, and the comparative fault issues do not seem to be particularly significant.

Statute of Limitations?

The injuries occurred almost two years ago; depending on whether the statute of limitations for medical malpractice claims is two or three years, the deadline for filing the claim may either be up in a couple of weeks or in about a year. We should monitor this situation to see if the plaintiff's lawyer misses any filing deadlines.

Torts II (DeWolf) Spring 2005 Checklist

QUESTION 1

- ☐ **Overview**
- ☐ P's Claim v. **Surplus Sales**
- ☐ **Premises** Liability
- ☐ What is Plaintiffs' **Status**?
- ☐ **Phillip** definitely an invitee
- ☐ Invitees owed a **duty of RC**
- ☐ Was SS **negligent** in stacking mirrors?
- ☐
- ☐ **Comparative** Fault Issues
- ☐ Phillip's **Contributory** Negligence
- ☐ Linden uses **modified** comp. neg.
- ☐ Limit is **50%**
- ☐ **Assumption** of Risk?
- ☐ Probably **merge** with contributory
- ☐
- ☐ Claim of **Lucy** v. SS
- ☐ **No contributory** neg. for Lucy
- ☐ What is **Phillip's share** of fault?
- ☐ If SS's share isn't >50%, **no J&SL**
- ☐ Even if J&SL, Phillip's share subject to SS's right of **contribution**
- ☐
- ☐
- ☐
- ☐ **Dillon**'s Claim v. SS
- ☐ Status undoubtedly that of an **invitee**
- ☐ Does SS **restrict** children?
- ☐ Phillip: additional **defendant**
- ☐ Is there parental **immunity?**
- ☐ No immunity for "bad **mirror stacking**"
- ☐ **Supervising Dillon** was a parental function
- ☐ If immune, **"responsible 3d party"** gets %age
- ☐ If no immunity, Phillip **must pay** (see Lucy)
- ☐
- ☐ **Product liability** claim v. MM
- ☐ Must establish that product was **defective**
- ☐ No evidence of **manufacturing** defect
- ☐ Redesign or additional warning not **reasonable**
- ☐
- ☐ Statute of **Limitations**
- ☐ **2 or 3** years for adults?
- ☐ Statute is **tolled** for Dillon
- ☐
- ☐ **Settling** parties reduce by %age share
- ☐
- ☐
- ☐
- ☐
- ☐

QUESTION 2

- ☐ **Overview**
- ☐ Sovereign **Immunity**
- ☐ **Characterization** of statute (narrow)
- ☐ No injury from motor **vehicle**
- ☐ Did injury arise from **"use"** of personal property?
- ☐ If not, **no** claim v. State
- ☐
- ☐ Financial **Limits**
- ☐ Maximum $**250K**/person; **500K**/occurrence
- ☐ Are estate beneficiaries separate **persons**?
- ☐ Would "**emergency service**" limit apply?
- ☐
- ☐
- ☐
- ☐
- ☐
- ☐

- ☐ Medical **malpractice** claims
- ☐ Relevant **standard** of care for physicians
- ☐ Only **Experts** can say whether we were neg.
- ☐ Is Dr. Lee a **specialist**?
- ☐ **Nurses** held to the reasonable nurse standard
- ☐ No obvious **informed consent** issue
- ☐ Consent would still require **use** of property
- ☐
- ☐ No apparent **comparative fault** issues
- ☐
- ☐ **Product liability** potential?
- ☐ If liable, **our %age** likely > $250K / $500K
- ☐
- ☐ Statute of **Limitations**?
- ☐
- ☐
- ☐

Exam # _____