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FINAL EXAM SAMPLE ANSWER

MULTIPLE CHOICE

1. Either answer (a) or (b) is acceptable (the unfortunate wording of the question makes either answer okay). The question could be understood as asking "Which of the following must the plaintiff *at a minimum* prove to establish liability?" then it is certainly true that (a) Donny must have intended to touch Polly. It is also true that (b) Donny must know of her infection; otherwise, his behavior would not be a battery, because it is not something that a reasonable person would find harmful or offensive.

Answer (c) is incorrect because it is not necessary to show that Donny intended to inflict pain; it would be enough if it were *substantially certain* that pain would be inflicted. For the same reason, (d) is insufficient; also, one doesn't have to prove a bad motive to establish an intentional tort.

2. (a) is incorrect, because the ex- didn't touch her; (b) is incorrect because there is no threat of *imminent* bodily harm; (c) is incorrect because ex- made no effort to restrain her within fixed boundaries. Therefore (d) is the correct answer.

3. (a) is correct, because that would defeat a claim by Polly that she would have a fear of imminent bodily harm. (b) is correct because he could know that she would be frightened, which would constitute assault. (c) is incorrect, because Polly's fear (and Donny's substantial certainty, if not intent, that such fear would result) is determinative. (d) is incorrect for the same reason as (c).

QUESTION 2

> Some of the facts for this question were based upon *McCarty v. City of Minneapolis*, 654 N.W.2d 353 (Minn.App. 2002), in which the court, under an earlier version of the Minnesota statute, affirmed a judgment limiting the recovery against the product manufacturers based upon a finding that the driver was 87.5% at fault.

On behalf of Erin and her father (and possibly other relatives), I would consider filing suit against General Motors ("GMC") as well as Federal Signal Corporation ("FSC") based on product liability, and against the State of Linden ("LSP") for the negligence of Sawina.

Claim v. FSC

I would begin the claim against FSC, since it appears their device interfered with the safety feature of the GMC van and therefore caused the accident. A product manufacturer is liable for injuries resulting from a *defect* in the product. Defects are categorized in three ways: first, *manufacturing* defects arise when the product that causes the injury deviates from the specifications for that product. Here it does not appear that this particular flasher was more likely to cause interference (but if that were the case, it would result in strict liability for the manufacturer). Instead, it appears that the *design* of the flasher did not account for the potential to interfere with the interlock system. In evaluating whether a product is defective, some jurisdictions use a simple negligence test; that is, the question would be whether a reasonable person in FSC's position would have exercised greater care to avoid this kind of injury. Since it is an after-market product and the variation of interactions with each individual vehicle might make it difficult to anticipate this kind of result, the manufacturer might not be found to be negligent. On the other hand, some jurisdictions impose *strict liability* for design defects. Under this standard, the question is not whether the manufacturer was negligent, but rather whether the product is unreasonably dangerous, taking into account not only what was known at the time about the product, but what we now know. This is called an "imputed knowledge" test. A strict liability test would be very helpful to the plaintiff in this case, because now that we know about the potential of the product for interference, a reasonable person would at least have warned about this, and probably would have changed the design to avoid this risk.

A related claim would be an argument that the flasher had a *warning* defect; that is, the design itself did not need to be changed, but a reasonable person would have warned the purchaser about the risk that use of the flasher could interfere with other safety features on the vehicle. Whether this claim would be subject to strict liability or a negligence test would probably be resolved under the same standard as would be applied to the design defect claim. Because there is continuing debate over the desirability of a strict liability or negligence standard for design and warning claims, it is hard to predict what standard the court would employ.

Claim v. GMC

We should also consider a suit against GMC on terms similar to the one against FSC: we would argue that the police van had either a design or warning defect. One preliminary question would be whether could successfully argue that they didn't owe a duty of care because the interlock system didn't actually *cause* the accident; it merely *failed to prevent* one resulting from driver error. I don't think such an argument would take long to reject; because the police van actually caused the accident, GMC had a duty to make a reasonably safe product.

As far as the standard for establishing a product defect, it would be similar to the analysis of the claim against FSC. The difference is that GMC would have a much more difficult time anticipating the disabling effect of FSC's flasher on its interlock system. Here the difference between the strict liability test and the negligence test would be even more dramatic; a reasonable person probably couldn't have anticipated this effect, but in light of 20-20 hindsight, it is possible to say that the *product* is unreasonably dangerous because of its failure as a result of the flasher. Moreover, the *warning* claim would be particularly strong (assuming a strict liability rule) because it would be very easy to warn the customer about the risk of interference from after-installed products.

Claim v. LSP

Suing the State of Linden requires an analysis of the sovereign immunity statute. Unless a state has waived sovereign immunity (by statute or by judicial decision), most tort claims are barred. Here the State of Linden has adopted a broad waiver of immunity (§ 3.736(1)): the state agrees to pay compensation when a state employee acts in a way that would give rise to liability if committed by a private person. Since Sawina appears to have been negligent in hitting the accelerator rather than the brake, the liability of a private person in such a situation seems to be clear. Moreover, although Linden's waiver of sovereign immunity is subject to a long list of exceptions (§ 3.736(3)), none of them appear to apply. However, there are *financial* limits spelled out in § 3.736(4) which could severely limit the ability to recover against the state (discussed below). Also, there is a requirement that notice of a claim be filed with the state within 180 days (§ 3.736(5)). Whether this would bar the claim, or might be subject to a tolling provision based upon EL's status as a minor is uncertain.

Bystander / Consortium Claims and Parental Supervision

We don't know much about how the accident happened. I am assuming that Erin was simply a spectator who was caught by surprise by the police van. There is no suggestion that she was in any way at fault. Moreover, even if she failed to do something that would have avoided the injury, her conduct would be judged by the standard of a reasonably prudent 7-year-old, and I can't imagine an assignment of fault to her. On the other hand, I am also assuming that she was accompanied by a parent, possibly her father. If the parent failed to exercise reasonable care to protect her (again, it seems far-fetched to suggest that someone should anticipate a police van careening out of control), that would be subject to parental immunity, but might be considered in calculating comparative fault.

Also, assuming a parent (or other relative) was present at the accident scene, and since the accident was so gruesome that it required amputation of Erin's arm, perhaps the relative at the accident scene would likely be entitled to a *bystander* claim along the lines of *Dillon v. Legg*. Even if they weren't present at the accident scene, the parents in some jurisdictions are entitled to *loss of consortium* damages when their children are injured.

Comparative Fault

In this case there may be more than one defendant who is found liable. That could have a negative effect on the ability of the plaintiff to recover full compensation. For one thing, LSP's liability is limited to $300,000 per individual or $1,000,000 for a single occurrence. In this case there are two death cases that will have to be included in the $1,000,000 limitation, lowering the amount that Erin (and/or her father) would be able to claim. In Linden liability is *several* only; that is, each defendant is required to pay only their proportionate share (§ 604.02(1)). If LSP's liability is very substantial, it could mean that the other defendants have only small proportionate shares. However, Linden has several provisions that would permit Erin (or her relatives) a full recovery: (1) If either FSC or GMC were found liable for *more than 50%* of the proportionate fault, that defendant would be subject to joint and several liability (§ 604.02(1)(1)).

In addition, Linden has a provision for *reallocation* of the uncollectible amount based upon the relative fault of the plaintiff and other defendants (§ 604.02(2)). If Erin is 0% at fault, and if LSP's share beyond the statutory limit is considered uncollectible, then the reallocation should result in FSC or GMC paying the entire judgment. I'm assuming that LSP's unpaid amount would be considered "uncollectible" --it's not the same as a bankrupt or uninsured defendant, but I'm assuming the statute would provide the same treatment.

QUESTION 2

Some of the facts for this question are based on *Anderson v. Independent School Dist. No. 891*, 1999 WL 118648 (Minn.App. 1999), in which the court, applying a recreational use statute, held that the district court should have granted summary judgment to the school district.

I would be cautiously optimistic that Friends' Day School ("FDS") would be able to defeat any claim brought by Chris Anderson ("CA"), or claims by his parents or bystanders. CA's claim would require analysis as a premises liability claim, and I think that it is very weak.

Premises Liability

In most jurisdictions,[1] where the plaintiff's injury arises from a condition of the defendant's premises, the law imposes a duty that corresponds to the plaintiff's *status* on the property. Since CA was injured by a condition of the premises (the unpadded block wall), his status would determine the duty of care owed by FDS.

The highest duty of care is owed to *invitees*. To be an invitee, the plaintiff must either be on the property pursuant to a business purpose of the owner, or be a public *invitee*—someone who is on the property of a governmental or charitable organization pursuant to its governmental or charitable purpose. CA would undoubtedly argue that he was an invitee; he would base this argument on the fact that he saw someone (or claimed to see someone--this fact is disputed) with a school T-shirt on, and he rightfully assumed (he would claim) that he was there pursuant to the purpose of FDS in some sort of charitable function. The facts indicate that there had been a church service earlier in the day, and CA had seen other people playing basketball in the gymnasium; perhaps there is evidence that on other occasions FDS had invited people from the neighborhood to play basketball and used it as a way to obtain more students or to advance some charitable aim. Still, it seems hard to believe that any jury could find under these circumstances that CA was an invitee.

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1. Some jurisdictions employ a test of "reasonable care under all the circumstances," but in practice this test often resembles the one followed by so-called common-law jurisdictions. That is, the care that a reasonable person would use is heavily influenced by the circumstances (in other words, what was the visitor doing on the property) when the accident took place.

If CA *were* classified as an invitee, then FDS would owe him a duty of reasonable care. It might be claimed that a reasonable person would have done more to prevent access to the gym, or warn about the danger of playing basketball without the padded mats, but this seems like a difficult argument. If there were no regularly scheduled basketball games, and FDS didn't know about the presence of the boys, they could hardly be expected to prevent an injury like this. Still, since the question of reasonable care is one for the jury, there is a possibility that, in the unlikely event that CA were found to be an invitee, the jury could find that FDS didn't use reasonable care to prevent his injury.

The next lower status is that of a licensee. A licensee has permission to be on the premises, and here CA would have a difficult time showing that he had permission. He certainly had no actual permission. He might say that he *believed* he had permission, since the boy with the T-shirt appeared to be a student there, but the student wouldn't have authority to give him permission. CA's lawyer might argue that by leaving the door open FDS *implied* that CA had permission to play basketball there, but even that argument is shaky. The fact that CA came to believe he had permission (assuming he says he thought he did, or there is evidence to suggest that he thought he had permission) doesn't establish that he *had* permission. One can be an "innocent" trespasser and still be a trespasser; what matters is not the reasonableness of the plaintiff's belief but rather whether the owner did something that implied permission (like seeing CA there and not shooing him away).

If CA were classified as a *licensee*, FDS would owe him the duty to warn of hidden perils known to FDS. CA would have a hard time showing that the unpadded block wall was a *hidden* peril. Perhaps in his youth he would misjudge his ability to avoid the hazard, but it is different from a situation where, for example, the padding had been removed but it appeared that the wall was still padded. Here the danger was obvious. Moreover, FDS could argue that, even if the danger was unknown to CA, it wasn't known to FDS. When they took the pads off to be cleaned, they had no reason to know that someone would be playing basketball and subject to the risk. Thus, it seems unlikely that CA could succeed on a theory of failure to warn of hidden perils.

The most likely category in which to place CA is that of a *trespasser*. As noted above, one doesn't have to be negligent to be classified as a trespasser; it's only a question of whether CA had actual (or implied) permission. It doesn't appear in this case that FDS did anything to grant permission, and thus CA would properly be classified as a trespasser. If so, FDS only owes him a duty to avoid affirmative acts to injure, and in this case they did nothing of the sort.

However, there is an exception for trespassing children, otherwise known as the *attractive nuisance* doctrine. Under the Restatement test,[2] a trespassing child can recover for an artificial condition on the owner's land if (1) the owner knows that children are likely to trespass; (2) they face grave danger from the artificial condition; (3) because of their youth, the children will not know of the danger; (4) the burden on the owner to alleviate the danger is "slight"; and (5) the owner fails to use reasonable care to alleviate the risk. CA wouldn't have an easy time with any of these, but it's conceivable he could establish (1), particularly if there were evidence that boys had gotten into the gym on other occasions. With respect to (2), I wouldn't think an unpadded block wall would constitute a "grave" danger. It's like a slippery sidewalk. Moreover, a 14-year-old is not unable *because of his youth* to comprehend the danger of hitting an unpadded wall. Even if replacing the padding or placing a warning sign could be considered a slight burden, we could argue under (5) that replacing the pads within a reasonable time would constitute reasonable care. I think the attractive nuisance claim is quite weak.

Contributory Fault

Linden's statutes permit a plaintiff to recover even if he is partially at fault, so long as the plaintiff's fault is "not greater than" (>50%) that of the defendant. Even if FDS were found partially

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2. Some jurisdictions add the requirement that the condition be "alluring," but if that were the case CA could probably satisfy it by showing that the basketball gym constituted an allurement.

at fault, CA would also be likely found at fault, and if so, his fault might be found to exceed 50%, in which case his claim would be barred.

One form of contributory fault is contributory negligence—that is, CA didn't use reasonable care for his own safety. That's a strong argument in this case, since he played basketball where there wasn't any padding on the wall, and if he was aware of it, it was a risk he shouldn't have taken. On the other hand, since he was only 14 years old, his conduct will be judged by what is reasonable for a 14-year-old. The statute also classifies one form of assumption of risk ("unreasonable assumption of risk not constituting an express consent or primary assumption of risk") as a form of fault that is used for comparative purposes. In this case I suspect his choice to play basketball with an unpadded block wall will be included as a form of fault. We might argue that it is a form of primary assumption of risk (which would have the effect of barring the claim, not simply reducing the damages), but to succeed we would have to show that the risk of hitting an unpadded wall was similar to the risk a skier takes in descending a steep ski slope or the risk of a spectator sitting in an unpadded baseball seat. While CA wanted to play basketball and accepted some risks (e.g., being hit by another player), I don't think he voluntarily accepted the risk of hitting an unpadded wall.

Effect of Collateral Source Rule

I don't think the settlement offer is one we should accept. On the other hand, before thinking we could settle the claim for much less, we should bear in mind that if CA has received insurance benefits from another source (e.g., from an insurance policy provided by one of his parents' employers), any recovery would probably be subject to subrogation, that is, an obligation to repay. Thus, a more modest settlement (like $20,000) would probably be the equivalent to the plaintiff of getting nothing at all.

Torts II (DeWolf) Spring 2006 Checklist

MC _____ out of 3

QUESTION 2

- ☐ **Overview**
- ☐ Claim v. **FSC**
- ☐ Was there a **defect**?
- ☐ No apparent **manufacturing** defect?
- ☐ Was interlock failure a **design** defect?
- ☐ Was FSC **negligent** in not recognizing risk?
- ☐ Could EL use **SL** for a design defect?
- ☐ Policy **dispute** concerning standard
- ☐ Would **reasonable person** redesign?
- ☐ Potential **warning** claim?
- ☐ **When** did FSC learn of problem?
- ☐
- ☐ Same issue for **GMC**
- ☐ No problem establishing **duty of care**
- ☐ Would **reasonable person** redesign?
- ☐ **Warning** claim similar to FSC
- ☐
- ☐

- ☐ Claim v. **LSP**
- ☐ **Sovereign immunity**
- ☐ **Broad waiver**: private person standard
- ☐ Mistake was **negligent**
- ☐ **300K** ceiling
- ☐ $1M cap **Shared** with other plaintiffs
- ☐ Notice-filing / Statute of **Limitations?**
- ☐
- ☐ No **contributory negligence** or fault?
- ☐ Any parental **supervision** liability?
- ☐ Father's (or mother's) **bystander** claim
- ☐ **Multiple** Defendants
- ☐ Linden: **Several** liability Only
- ☐ Joint if GMC / FSC is **>50%** at fault
- ☐ But **Reallocation** of uncollectible amounts
- ☐ Is LSP's share "**uncollectible**"?
- ☐
- ☐

QUESTION 3

- ☐ **Overview**
- ☐ Claim by **CA**
- ☐ **Premises Liability** claim
- ☐ Mat was **condition** of premises
- ☐ What is CE's **status**?
- ☐
- ☐ **Invitee**?
- ☐ Did FDS use basketball for **outreach**?
- ☐ Seems like a **thin** argument
- ☐ **Licensee**?
- ☐ Would require **permission**
- ☐ No **actual permission**
- ☐ Did open door **imply** permission?
- ☐ Duty to **warn** of hidden peril
- ☐ Was the unpadded wall **hidden**?
- ☐ Did FDS **know** of peril?
- ☐
- ☐ **Trespasser**?
- ☐ No requirement of **fault**
- ☐ Only **duty** is not to actively hurt
- ☐

- ☐ Exception for **Attractive nuisance**
- ☐ **Restatement** criteria
- ☐ **Allurement** is met
- ☐ Aware of **Serious injury**?
- ☐ Was CA **unaware** b/c of youth?
- ☐ What was **cheap fix**?
- ☐ Did FDS use **reasonable care**
- ☐
- ☐ CA's **contributory fault**
- ☐ Linden uses **modified** (50%) CF
- ☐ **Contributory** Negligence
- ☐ Standard for **14-year-old**
- ☐ **Secondary** AoR = negligence
- ☐ Primary AoR would **bar**
- ☐ But CA didn't **accept** risk
- ☐ **Collateral** source rule
- ☐
- ☐
- ☐
- ☐
- ☐

Exam # _____