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FINAL EXAM SAMPLE ANSWER

MULTIPLE CHOICE

1. (A) is incorrect, because this statement omits the requirement that Blinker *intended* to cause such fear; (B) is *incorrect*, because it doesn't require that Blinker actually desire to cause apprehension; substantial certainty is enough; **(C) is correct**; substantial certainty is treated as the equivalent of actual intent; (D) is incorrect, because there is no requirement of severe emotional distress.

2. **(A) is correct**, because it is the least incorrect of the statements; (B) is incorrect, because substantial certainty can constitute offense even if the defendant lacks the desire to cause the harm; (C) is incorrect, because a defendant's "instinctual" conduct can still be intentional; (D) is incorrect, because repetition of wrongful conduct doesn't make it any less actionable.

3. (A) is incorrect, because physical harm is not required; **(B) is correct**, because one has to be confined within fixed boundaries to claim false imprisonment; (C) is incorrect, for the reason stated in answer (B); and (D) is incorrect, because it doesn't state whether Blinker intended to confine her.

4. (A) is incorrect, because one can commit the tort of outrage by acting recklessly; **(B) is correct**, since the conduct could be considered reckless and outrageous; (C) is incorrect, because one need not be aware of the remarks when they are made, so long as they are ultimately communicated; (D) is incorrect, because truth is not a defense.

ESSAYS

QUESTION 1

> The facts for this question are based on *Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007), in which the Nevada Supreme Court found that the discretionary function exemption did not apply and the the damage restriction (then $50,000) was constitutional.

I would analyze this medical malpractice claim[1] in light of the sovereign immunity statute and the wrongful death statute.

I. Medical malpractice claim

The State of Evergreen (SOE) would be liable for medical malpractice if Dr. M (DM) either failed to follow the appropriate standard of care in that situation, or if he failed to secure informed consent.

Negligent Procedure. A plaintiff in a medical malpractice action is required to provide expert testimony that the defendant didn't follow the standard of care for that particular specialty. In this it would be trauma surgery, and the plaintiff would have to find a qualified expert who could testify that the rupture of the artery was a result of negligence on DM's part. Even if there were such testimony, SOE would be entitled to provide experts of its own to contradict such testimony, and it is generally a fact question. Since the judge hears such cases without a jury (ERS § 41.031(2)), it would be for the judge to weigh the relative credibility of

1. A student might logically think about a premises liability claim, but there is little in the facts to support one (unlike the medical malpractice claim). And in light of the low amount at which the state's liability is capped, speculating about the potential of a premises liability claim wouldn't be worthwhile.

competing witnesses. Nonetheless, in light of the fatal result from the surgery, it seems likely that a judge would find fault with the procedure.

Failure to obtain informed consent. Even if the procedure was performed without negligence, it is still necessary for the health care provider to secure the patient's informed consent before providing medical care. If DM was confronted with an emergency (unexpected complications during surgery) and the patient was unable to provide informed consent because he was under anesthesia, the law will imply the person's consent to necessary medical treatment. On the other hand, if DM were doing something that didn't have an emergency quality to it -- if he could have waited to discuss the risks associated with the procedure -- then he had an obligation to do so.

II. Sovereign Immunity Statute

Broad waiver. SOE is protected by a sovereign immunity statute. Although the waiver of immunity is broad -- SOE agrees to be subject to "the same rules of law as are applied to civil actions against natural persons and corporations," (§ 41.031(1)), this waiver is limited by two features.

Discretionary function exemption. The first is an assertion of the discretionary function exemption, which is in § 41.032(2). This seems to be word-for-word the same as the Federal Tort Claims Act, and would likely be interpreted in a similar fashion. We would argue that in deciding to do this procedure, DM was exercising a discretionary function. However, the plaintiff would argue (likely successfully), that this retention of immunity only applies to policymaking. A decision of whether to perform a particular medical procedure, though it might be discretionary, would not appear to fit the classic policymaking function that this exemption is designed to protect.

Damage limitation. The more important reservation is the limitation on damages that is contained in ERS § 41.035, which caps the damages at $75,000.[2] The plaintiff may have some argument as to how this doesn't apply, but it appears relatively straightforward. While some jurisdictions have struck down limitations on medical malpractice statutes that impose limitations, where the state is choosing the scope of its sovereign immunity waiver, I doubt that a court would find that this violated any constitutional guarantee. Nonetheless, we should make sure that the damages cap is reliable.

III. Damages Under the Wrongful Death Statute

It's a good thing there is a cap on damages, because the wrongful death statutes are quite generous. They provide that the "heirs" (in this case, the spouse of the decedent) are permitted to recover not only her "loss of probable support" (that would be the lost income from a successful accountant), plus her "grief and sorrow, loss of . . . companionship, society, comfort and consortium." That would be an awful lot of money. Moreover, although the statute permits a recovery for the decedent's pain and suffering, it would appear that he didn't suffer any because his death occurred while he was presumably under anesthesia.

If for some reason the cap on damages turned out to be unenforceable, the state's liability could be several million dollars.

IV. Comparative Fault

Although there could conceivably be some contributory negligence in the horseback riding, or possibly assumption of risk, we don't know enough about the facts to speculate about it at this point. Moreover, even if it would be a defense to a claim against the state based on

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2. Because the language of the statute forbids awarding more than $75K "to or for the benefit of any claimant," it wouldn't matter if it were a single claim by Mrs. Perry or a combination of a wrongful death suit and a survival action, assuming that Mrs. Perry is the beneficiary of the survival action.

some sort of premises liability, it wouldn't have much effect upon the medical malpractice case. Moreover, in light of the cap on damages any finding of contributory fault from a remote antecedent event would not affect the value of the case.

QUESTION 2

The facts for this question are based on *Price v. Blaine Kern Artista, Inc.,* 111 Nev. 515, 893 P.2d 367 (1995), in which the court held that the trial court erred in dismissing the product liability claim against BKA.

In this case we would sue to recover from Blaine Kern Artista, Inc. ("BKA") on a product liability theory, but we would be concerned about the application of comparative fault.

I. Product Liability Claim

To show that BKA was liable, we would have to show that the mask was defective. Product defects are categorized as either manufacturing, design or warning defects. It doesn't appear that there is a *manufacturing* defect in this case. (If there were—for example, by a failure to include safety straps per the manufacturer's design—the court would apply a strict liability standard.) The expert seems to think there was a defect in the *design* of the mask—that it lacked safety straps that would have prevented this kind of injury. Most courts use some version of a negligence test. That is, a design is defective if a reasonable person would have used a different design. The negligence test typically incorporates a risk/utility analysis, similar to the Learned Hand balancing test used in ordinary negligence cases.

The only qualification to this negligence test is that some courts employ a form of strict liability. If strict liability is applied, the plaintiff can establish a defect by showing that the design of the product is one that a reasonably prudent person would not use, taking into account not only what was actually known (or should have been known) at the time of design, but utilizing information that is now available about the risks of the product. It seems highly unlikely that there is any new information that would result in a different evaluation of what a reasonable person would do in designing this product. Any information we have today about the risks posed by the product would have been known (or should have been known) at the time the product was being designed. Thus, we would not expect that applying strict liability would result in a different outcome in determining whether the product was defective (but it may have an effect on joint and several liabliity, as discussed below).

Some jurisdictions require that the plaintiff identify a "reasonable alternative design" (RAD), to show that a reasonable designer would have used the RAD in preference to the way the product was actually designed. Fortunately, our expert has already proposed one. On the other hand, our expert would likely be countered by an opposing expert would say that adding the safety harness would either add unreasonably to the cost of the product, or render it less useable, or even pose additional risks that outweigh the risk of an accident such as this one. It will be up to the jury to evaluate the relative credibility of the expert witnesses.

Warning. Even if the product's design is such that the safety harness would not be judged to be a safety measure that a reasonably prudent person would have taken, we might assert that the risk of injuries like this would be something that the user should be warned about. There is no information concerning the warnings that actually accompanied the product. Moreover, we would also have to prove that if a better warning had been in place, Price would have heeded the warning and avoided this injury.

II. Comparative Fault

There are a variety of comparative fault issues that arise from this case.

Contributory Fault: Contributory Negligence. A jury might find that, even if the mask was defective in design or in the lack of adequate warning, Price was partially at fault in the way

that he wore the mask, or in failing to remove the mask before attempting to navigate through an unruly crowd. In this jurisdiction a plaintiff can still recover even if the jury finds the plaintiff to be partially at fault, but if the plaintiff's negligence is greater than 50%, then the claim is barred. From these facts it is hard to say how much, if any, fault a jury would assign to the plaintiff in comparison to the fault of the defendant.

Contributory Fault: Assumption of Risk. It is possible that BKA would assert that Price assumed the risk of injury when he wore the mask. There is no evidence that Price was aware that injuries like this could occur, and the defense of assumption of risk only applies when there is a *voluntary* encounter of a *known* risk. Still, BKA might find evidence that Price was aware of the risk (he may have said something about it to another person, or someone else complained about receiving an injury from using the mask). Still, it doesn't seem plausible that BKA would want to emphasize that the mask was dangerous in order to show that Price assumed the risk of injury. They would be more inclined to deny that the product was dangerous at all.

The fault of the unknown person ("UP"). It is hard to tell what would happen if the defendant tried to assign fault to the UP who actually caused the fall.[3] The statute provides that there is several liability (§ 41.141(4)), but it is unclear whether this provision applies only when the plaintiff is found to be at fault, or if it applies to all cases, subject to the exceptions in § 5. It's also unclear whether the UP would wind up being "a defendant" in the action, against whom a recovery would be allowed. Thus, if this "phantom tortfeasor" were named as a defendant (even a third-party defendant) and fault were assigned to UP, it could significantly reduce the amount that BKA would owe. Thus, of the $1 million in damages, BKA might be found to be liable only for 20%, while Price was found to be 10% and the UP to be 70% (those are just wild estimates). If so, it appears that ordinarily BKA would then be liable only for 20% of the damages.

The Strict Liability Exception. There is an exception in § 5 for actions based on strict liability. Thus, it appears that if BKA were found to be strictly liable, they could still be held jointly and severally liable for the share of the UP, even if the UP were assigned most of the percentage of fault. Thus, under the %ages described above, Price would be able to collect $900,000 from BKA. While the distinction between strict liability and negligence wouldn't make much difference in terms of the test for whether the product was defective, if there is a strict liability standard for design or warning defects, it could trigger joint and several liability under the statute. We'd have to research this issue further.

Worker's Comp. Since Price incurred this injury while he was at work, he would presumably receive worker's compensation benefits,[4] which could be considerable. Such

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3. In the real case on which these facts are based, the trial court dismissed the claim against BKA, finding that the actions of the UP were a superseding cause of the injury. The appellate court reversed, finding that this was a factual issue to be decided by the jury. Under the instructions for this exam, students are expected to ignore issues of superseding cause and treat all but-for causes as legal causes of the injury.

It is possible that the actions of the UP will be considered intentional, and therefore not considered part of the allocation of "fault" (that's the rule, for example, that Washington follows). However, if instead the finding is that the person who pushed the plaintiff was simply part of the crowd, and negligent (even reckless) rather than intentional, then most jurisdictions would include the UP in the allocation of fault.

4. The facts are ambiguous as to whether Price was an employee of the club, or employed by somebody else who contracted with the club. If he is an employee of the club (which was the real situation), then any claim against the club would be barred. Since the call of the question is to analyze "the prospects of recovering tort compensation from BKA," it doesn't really matter whether Price was employed directly by the club or by someone who contracted with the club. In either event, BKA would seek to use the employer as another "defendant" to whom fault could be allocated,

benefits would include medical expenses and wage loss compensation. In the event of a recovery from BKA, the worker's comp. system would undoubtedly be entitled to reimbursement for whatever amounts they have already paid Price. This could complicate any settlement negotiations with BKA, since Price would be interested.

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lessening BKA's liability. In addition, whoever employed Price would be liable for worker's comp. benefits, which in turn would have to be paid back.

QUESTION 1

- ☐ **Overview**
- ☐ **Medical Malpractice** claim
- ☐ Failure to follow **Standard of Care**
- ☐ **Expert** testimony required
- ☐ Comparable **specialty**
- ☐ We could offer **opposing** testimony
- ☐ Q of fact **for judge**
- ☐ **Informed** consent
- ☐ Duty to disclose **Material risks**
- ☐ Were **Alternative** therapies disclosed?
- ☐ Would emergency **imply** consent?
- ☐ Sovereign **immunity**
- ☐ Statute provides **broad waiver**
- ☐ Exemption for **discretionary function**
- ☐ If like FTCA, was this **policymaking**?
- ☐ **Unlikely** to be immune
- ☐ Damage **limitation**
- ☐ Maximum of **$75K**, per § 41.035
- ☐ Would **constitutional** challenge be made?
- ☐ **Measure** of damages for wrongful death
- ☐ "Heirs" include **Wendy**
- ☐ Wendy entitled to **economic loss**
- ☐ Wendy entitled to **grief** and loss of **consortium**
- ☐ **Enormous** $$$ if limitation ineffective
- ☐ **Comparative fault?**
- ☐ Maybe contributory **negligence** or **AoR**
- ☐ **Wouldn't** matter if damage limitation holds up

QUESTION 2

- ☐ **Overview**
- ☐ **Product** Liability Claim
- ☐ Liability for a **defect**
- ☐ Was there a **manufacturing** defect?
- ☐ If so, **strict liability**
- ☐ Was lack of harness a **design** defect?
- ☐ **Standard**: would reasonable designer add safety harness?
- ☐ "Strict liability" uses **hindsight**
- ☐ No **new knowledge** of risk
- ☐ Even if **RAD** required, expert has it.
- ☐ BKA will have its **own experts**
- ☐ **Warning defect**
- ☐ What warnings **accompanied** mask?
- ☐ Would enhanced warning **change** outcome?
- ☐ **Comparative** Fault
- ☐ **Contributory** negligence
- ☐ **Modified** comparative fault
- ☐ If Price more than 50%, **barred**
- ☐ Assumption of **risk**
- ☐ **Doubtful** Price voluntarily assumed risk
- ☐ **"Unknown** Person" also at fault
- ☐ Does **§ 41.141(4))** apply even if P **not** at fault?
- ☐ **Joint and several** liability?
- ☐ Several liability only per § **41.141(4)**
- ☐ **Exception** for "strict liability"
- ☐ Would "strict liability" apply to **PL?**
- ☐ Reduction for **worker's comp.**
- ☐ Was employer **at fault?**

Exam # _____