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FINAL EXAM SAMPLE ANSWER

MULTIPLE CHOICE

1. (A) is incorrect, because even harm to one's dignity is compensable; (B) is incorrect for the same reason as (A); (C) is incorrect, because one must experience apprehension of imminent harmful or offensive contact in order to recover for assault; **(D) is correct**, because the intent to punch him in the face would transfer to the tort of assault.

2. (A) is partially correct, because a battery can consist of harm to one's dignity, and an offensive touching did occur; (B) is partially correct; (C) is partially correct, because severe emotional distress is one of the elements of the tort of outrage; thus, **(D) is correct**.

3. (A) is incorrect, because it does not require that G intended to imprison Sam; (B) is incorrect, for the same reason; **(C) is correct**; (D) is incorrect, because one can recover for false imprisonment so long as one is aware of the confinement.

4. (A) is incorrect, because lack of reasonable care alone is insufficient to support a claim of battery; **(B) is correct**, because knowledge of a substantial certainty is the equivalent of an intent to cause harm; (C) is incorrect, because intent to cause the contact is sufficient, even if one does not intend to cause harm thereby; (D) is incorrect, because it is not a defense to an intentional tort that the plaintiff could have avoided the injury.

ESSAYS

QUESTION 1

> The facts for this question are based on Dornfried v. Berlin Bd. of Educ., 2010 WL 4352198, (Conn.Super. 2010), which denied a motion for summary judgment brought by the school board.

The State's potential liability depends upon (1) the interpretation of the state sovereign immunity statute; (2) whether a duty of care was owed; and (3) the application of comparative fault principles.

I. Sovereign Immunity Statute

Because this is a claim against the State, the first point is to determine the scope of the State's waiver of immunity. (Absent a waiver of sovereign immunity, the plaintiff's claim would be barred.) Here the statute establishes a preliminary review by a Claims Commissioner, appointed by the Governor. If the Claims Commissioner deems that it is "just and equitable" to do so (LRS § 4-160(a)), the Claims Commissioner may permit the claimaint to sue the State. In making this determination, the standard is whether or not the state, if it were a private person, could be held liable. It seems likely that a Claims Commissioner would permit JD to sue in state court. From the time the claim is filed with the Claims Commissioner, any statute of limitation is tolled; but from the time the Claims Commissioner authorizes suit in state court no more than one year can elapse (LRS § 4-160(d)).

Once in court, the claim against the State would be tried to a judge without a jury. Moreover, the rights and liability of the State are to be "coextensive with and shall equal the rights and liability of a private person in like circumstances." LRS § 4-160(c).

Thus, the burden on JD is to show that, if a private person committed the same acts as the state employees in this situation, that private person would be held liable.[1]

II. Duty of Care

Since no State employee actually caused the injury to JD, but at worst allowed it to occur, the State would dispute that it owed JD a duty of care to prevent this injury. JD would probably argue that a duty of care could be predicated on two grounds: first, JD could argue that the state had a "special relationship" -- in fact, two such relationships -- that created a duty of care. One was that the state operated the school where the alleged bullies ("Bs")[2] inflicted the harm that JD claims. Because of that relationship to the "perpetrators," the school had a duty to use reasonable care to see that they didn't cause harm to others. JD could also argue that there was a special relationship between himself and the school, because he was a student there and thus they owed him a duty to ensure a reasonably safe environment. (In this respect the case is like the *Tarasoff* case in which the school had a relationship to both the perpetrator and the victim.

Alternatively, JD might argue that in offering the services of the guidance counselor the school induced justifiable reliance that JD would be protected. On the other hand, the State might credibly argue that the promises made to JD were limited in scope: for example, Capodice only said he would talk to the players, which he did.

a. Malpractice Claim v. Guidance Counselor?

It would be a stretch, but JD might make a claim that the guidance counselor (Chiechetti) committed malpractice when she simply informed the principal of the problem and expected him to take care of it. The key question is whether or not guidance counselors are licensed, and whether they are considered "health care providers." The latter is dubious, but if this label applied, then it would provide a basis for suit. If this does turn out to be a malpractice case, there is a particular statute, LRS § 4-160(b), that requires a "Certificate of good faith" (essentially, expert testimony that alleges malpractice) to support a claim for malpractice. On the other hand, if such a certificate is attached to the claim, the Commissioner must permit the claim to go forward.

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1. There is no reference in the statute to anything like the discretionary function exemption. Even if there were some parallel principle adopted by case law (for example, in stating that private persons don't engage in "policymaking" and therefore governmental policymaking is excluded by the definition of the state's liability), it seems unlikely that Linden could claim that the failure to provide reasonable counseling (or protection) to JD was a policy decision. The only place where this might become relevant is if JD argued that the school's failure to adopt an anti-harassment policy was negligent.

2. It's not clear whether or not significant bullying took place. JD certainly alleges that it did, and the facts may bear him out. On the other hand, we don't want to admit this until further investigation has been conducted. But for simplicity's sake I will simply refer to them as the "Bs" rather than alleged bullies.

Even if the "health care" classification was inapplicable, JD might argue that the school engaged in "educational malpractice" by failing to address the situation in a more effective way. But this would be a weak claim.

b. Failure to Restrain Players

JD could more plausibly argue that the school, through its employees, was negligent in its response to alleged bullying. It would strengthen JD's case if he could point to anti-harassment policies already adopted by the school. Alternatively, JD might simply point to the ineffectual way in which the school responded to allegations of bullying. Although there are a number of hurdles for JD to overcome, including the issue of causation, a judge might find that the school's lax policies were responsible for JD's emotional injury.

III. Comparative Fault

There are two aspects of comparative fault here. One is the question of whether or not a judge would assign any contributory fault to JD. Perhaps JD failed to use reasonable care to avoid the bullying, or even deliberately provoked it. Since the case is tried to a judge rather than a jury, I would worry less about a backlash from "blaming the victim," but it's still a risky move. In Linden contributory negligence only reduces the claim proportionate to the degree of contributory fault, unless the plaintiff's fault is greater than that of the defendant(s) (unlikely).

A second aspect of comparative fault is the effect of assigning fault to the Bs. On the one hand, it seems intuitively obvious that the damages occurred primarily because of harm deliberately inflicted by the Bs. Shouldn't they bear the brunt of the damages? In support of that is Linden's statute, which adopts several liability as the default mode, making each defendant liable only for its proportionate share (except for reallocation rules[3]). On the other hand, there is a glitch: the statute explciitly forbids apportionment of fault between negligent defendants and defendants who are strictly liable or who are liable for intentional, wanton or reckless acts. (LRS § 52057h(o)). Thus, unless the Bs' conduct could be classified as a merely negligent (which seems highly unlikely), the State could not ascribe fault to the Bs and then attempt to limit liability to its proportionate share. If the State is liable for JD's emotional injury, it appears it will be liable for all of it.

QUESTION 2

The facts for this question are based on *Blankenship v. CRT Tree*, 2002 WL 31195215 (Ohio App. 2002), which affirmed a summary judgment of dismissal granted to the manufacturer).

3. If multiple defendants are found liable, but some are incapable of paying their proportionate share, the statute provides that the plaintiff can ask the judge to reallocate the insolvent defendant(s)' share(s), differing as to economic and noneconomic damages. The economic damages are reallocated in proportion to the proportionate share of each solvent defendant. (Thus, if there is only one remaining solvent defendant, that defendant could become liable for all of the economic damages.) Noneconomic damages are to be reallocated, but the statute limits the amount to be reallocated to an amount equal to the proportionate share of the noneconomic damages that the defendant would otherwise be obligated to pay.

The assignment is to evaluate the strengths and weaknesses of the case against the crane manufacturer, Manitex ("M"). The primary issues are (1) what is the standard for establishing liability? (2) What is the effect of contributory fault? and (3) What is the effect of the fault of other parties?

I. Product Liability Claim v. Manitex

A product manufacturer is liable for injuries caused by a defect in the product. In this case Blankenship ("B") would try to establish that the crane had a manufacturing, design, or warning defect. The tests for each are slightly different.

Manufacturing Defect. If the crane was not made according to the specifications, and that anomaly caused the injury, it would result in strict liability for M. There is some dispute in the facts about the presence of "retaining pins" that would have held the wire rope in place, but this appears to be a result of operator error rather than any defect in the crane itself.

Design Defect. If the design of the crane made it unreasonably dangerous, M could be held liable. Jurisdictions differ in the definition of a design defect: some use a "strict liability" test, which looks at the balance of risk and utility in light of what is known today about the product. Other jurisdictions use a true negligence test, which requires proof that a reasonable manufacturer, given what could reasonably have been known about the product at the time, would have used the design in question. Ordinarily the difference is only significant where there is additional knowledge since the time of design that would make the "strict liability" test easier to meet than a true negligence test. However, because of the comparative fault statute (discussed below), it would be important to know whether or not this jurisdiction classifies product liability for design (or warning) defects as a form of strict liability. In any event, our engineering expert would have to persuade the jury that there was a better design for this crane that would have prevented this injury from occurring. Even if our expert is of the opinion that there was a better way to design the crane, M will undoubtedly have its own experts who will dispute our expert's opinion.

Warning Defect. The crane might also be defective in lacking adequate warning of the product's dangers. There may be other types of accidents that occur when the "retaining pins" are missing, and B might be able to show that a reasonable person would have used a more effective warning. The information we have suggests there are other accidents that result from operator error. Depending upon how widespread this use of a crane might be, our expert might be able to show that a warning about the danger of this type of accident would be inexpensive compared to the risk of such accidents occuring. Like design defects, warning defects are subject to the same jurisdictional variation in terms of whether they are described as a form of strict liability or simple negligence. Again, it would make a big difference in terms of the application of the comparative fault statute if warning claims were governed by one rather than the other.

In addition to showing that the warning was inadequate, B would also have to show that, if it had been adequate, it would have changed either B's or Doyle's behavior. Since Doyle didn't read the instruction manual, it might be difficult to show that he would have behaved any differently even if there had been a warning of some kind. Alternatively, B might argue that a warning to *him* would have changed his behavior--but that seems implausible.

II. Contributory Fault

B's claim would be subject to two defenses based upon contributory fault. The first is that B was contributorily negligent; that is, he failed to use reasonable care for his own safety. A reasonable person would probably not engage in this kind of activity in the absence of a more

experienced crane operator who had tested the equipment previously. More particularly, B admits he was specifically warned not to bounce too high; but he did so anyway. The Linden comparative fault statute provides that a plaintiff's claim is barred if the plaintiff's fault is greater than the combined fault of all of the defendants (including any who have been released by a pretrial settlement).[4] As is suggested below, part of the difficulty is in determining who would be included in the apportionment of comparative fault, thus making it difficult to predict whether B would be barred from recovery.

A second form of contributory fault is assumption of risk. Some forms of assumption of risk result in a complete bar to recovery. When a plaintiff *voluntarily* assumes a *known* risk, such as a baseball patron who chooses to sit where she is struck by a line drive foul ball, then in most jurisdictions a negligence claim (e.g., claiming that a reasonable person would have erected a screen or net to prevent such injuries) is barred. However, Linden has a statute providing that assumption of risk is abolished. Before getting too confident about that language, it must be read in context: "The legal doctrines of last clear chance and assumption of risk in actions *to which this section is applicable* are abolished." M might argue that assumption of risk is abolished only if it simply a restatement of contributory negligence, whereas it remains as a complete defense in the baseball seat type of assumption of risk is based upon relieving the defendant of a duty of care. Even if that were true, however, it hardly seems to be the case that B voluntarily relieved M of a duty of care in order to enhance the experience. Instead, it seems as though in this case assumption of risk would simply be a factor in determining B's contributory negligence.[5] But even so, M would argue persuasively that B was more negligent than the combined fault of the defendants and by the terms of § 52-572h(b) should be barred from recovery.

III. Multiple Tortfeasor Liability

Even if M were found liable for a defect in the crane, it does not mean that they would be liable for all of the damages. In particular, Linden follows a rule that holds defendants liable only for their proportionate share of the liability. M would undoubtedly argue that, in addition to the contributory fault of B, there is significant fault on the part of other defendants, including Doyle, the owner of the property, and the lessor of the crane. M would argue that these other defendants should be assigned share(s) of fault and therefore any judgment against M -- even if B could establish liability against M -- would be modest.

However, we have good counterarguments. The first is that some of the defendants may be found to be B's employer(s), and might be excluded from the apportionment of comparative fault. It states in the facts that B was "employed, at times" by CRT Tree Service ("CRT") and by Sun & Seed ("S&S"). Of course, even if B were an employee of either CRT or S&S it is debatable whether or not B was actually employed at the time that he engaged in bungee jumping. But since the owner of

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4. LRS § 52-572h(b) addresses contributory negligence, and while § 52-572h(o) excludes strict liability from comparison with parties found liable for negligence, it explicitly permits a comparison of contributory negligence and strict liability pursuant to § 52-572h(b).

5. The facts of this case were actually drawn from a case that used a different comparative fault statute; in the jurisdiction (Connecticut) that adopted this statute, the courts reached precisely this conclusion about the statute: they found that assumption of risk was no longer a *bar* to recovery, but remained as a *factor* in determining comparative fault.

CRT had hoisted the owner of S&S up in the air on the crane, and since there seemed to be permission to continue with this activity, it might turn out that this could fall within employer immunity.[6] Many jurisdictions exclude immune employers from the apportionment of fault. Thus, even if Doyle, CRT or S&S's negligence were found to be proximate cause(s) of the injury, their fault might be excluded from any comparison with M.

The second caveat is that there is a specific statutory prohibition against apportioning fault between negligent defendants and defendants who are strictly liable. As noted above, the jurisdictional treatment of product liability as a form of strict liability (as distinguished from treating it as governed by a true negligence standard) would wind up mattering quite a bit because of the way that the statute excludes strict liability from the apportionment of fault.

In M's favor, if employer immunity does not apply, and if M is held liable on the basis of negligence rather than strict liability, then M might assert that S&S should be a defendant on the basis of premises liability. However, this would be a weak argument, because if B's relationship to S&S was not business related (and that would seem to be necessary in order to avoid employer immunity), then B's status on the property would be that of a licensee rather than an invitee, and as a licensee B could only expect to be warned of hidden perils of which the owner was aware. There is no evidence that Naploszek (the owner) knew anything about the crane's dangers that were hidden from B. Thus, a premises liability claim would seem like a dead end for M (as well as for us).

M's best case (and B's worst case regarding comparative fault) is if there is no employment relationship and Doyle is simply a defendant on his own. If Doyle is assigned a significant portion of the fault, and is unable to pay a judgment (which seems likely), and if apportionment of fault is permitted between M and Doyle, then a reallocation provision (LRS § 52-572h(g)) kicks in which could increase M's liability from just its proportionate share to something greater.[7]

Summary

To succeed in a product liability claim against Manitex, B would have to show that the crane was defective, and that this defect caused the injuries he suffered. Even if that were the case, M

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6. The scope of this question was to evaluate the strengths and weaknesses of B's case against M. If it were found that this accident occurred while B was in the employ of either CRT or S&S, it would mean that either CRT or S&S (conceivably both) would be immune from tort liability. Determination of the application of worker's comp. would require additional factual investigation and agency determination.

7. There is a complicated formula that permits greater reallocation of uncollectible economic damages, and more limited reallocation of non-economic damages.

would blame most of the injury on B, and on Doyle, CRT and S&S, and would seek either to have B's recovery barred on the principle of contributory negligence, or else reduced because of the fault of other tortfeasors.

CHECKLIST, Fall 2010

MC ___

QUESTION 1

☐**Overview**

☐Claim v. **State**
☐Sovereign Immunity **Statute**
☐Role of **Claims** Commissioner
☐Cmmr must find "**just & equitable**"
☐Rights and duties **coextensive** w/ private
☐**Judge only**; no jury
☐Would **"discretionary function"** apply?
☐Was claim filed **timely** (LRS § 4-160)?
☐
☐**Duty** of Care?
☐JD would argue **"special** relationship"
☐SR w/ **"bullies"**
☐SR **w/ JD**
☐Did state induce JD's **justifiable reliance**?
☐Were Ds' promises **limited** in scope?
☐

☐**Malpractice** Claim based on counseling?
☐Was counselor "**licensed health care** provider"?
☐"Good faith" **certificate** required
☐
☐School's failure to **restrain** "bullies"
☐Did school have anti-bully **policies**?
☐Would reasonable care have **prevented injury**?
☐
☐**Contributory** Fault
☐Barred **if > 50%**
☐Likely a poor **strategic** choice for State
☐What about fault of **"bullies"**
☐LRS § 52-572h: **Several** liability
☐But statute **excludes intentional**, etc. acts
☐**Reallocation** probably wouldn't apply
☐Liability would be **all or nothing**
☐

QUESTION 2

☐**Overview**
☐**Product** Liability Claim
☐Liability for a **defect**
☐Was there a **manufacturing** defect?
☐If so, **strict liability**
☐
☐Did crane have **design** defect?
☐Did design make crane **unreas. dangerous**?
☐"**Strict** liability" usually not a big deal
☐Here comp. **fault** statute makes it important
☐
☐**Warning** claim
☐Are warnings based on **neg.** or **SL**?
☐Would warning **alter** B's or D's behavior?
☐
☐
☐

☐**Contributory** fault
☐If B's negligence > 50%, **barred**
☐Assumption of **risk**
☐**Statute excludes** assumption of risk
☐
☐Multiple **tortfeasor** liability
☐**Several** liability only
☐But strict liability **not included**
☐
☐Was B **"employed"** at time of accident?
☐Would work. comp. **exclusion** apply?
☐**Reallocation** rules
☐
☐
☐
☐

Exam # _____