

SAMPLE ANSWER TO FINAL EXAM

MULTIPLE CHOICE

1. (a) is incorrect, because there was consent to the procedure; **(b) is correct**, because it properly states the reason that Welby could be held liable; (c) is incorrect, because Welby doesn't have to intend harm to the other party in order to be liable for a nonconsensual contact; (d) is incorrect because we don't know whether Paula would have wanted the tattoo removed.

2. (a) is incorrect, because we can't say from these facts whether Otto's conduct was justified or not; (b) is incorrect, because Otto didn't actually use deadly force; (c) is incorrect, because Otto's intent could be transferred from the customer to Betty; thus, **(d) is correct**, because even if it's improbable that a person of reasonable sensibility would not be frightened, *if* it were true it would defeat the assault claim.

3. (a) is incorrect, because a shopkeeper can be justified in detaining a suspect even if they are mistaken; **(b) is the best answer**, because if the shopkeeper is behaving unreasonably, they lose the defense of detaining suspected shoplifters; (c) is incorrect, because the justification can be lost if the defendant acts unreasonably; (d) is incorrect for the same reason.

4. (a) is incorrect, because the facts would bear the opposite conclusion, and this is only one element in the claim; (b) is incorrect, because that's only one element in the claim; **(c) is correct**, because severe emotional distress is a required element; and (d) is incorrect, because it resolves a factual issue that is subject to conflicting interpretation.

ESSAY QUESTION 1

This question is based (loosely) upon the facts in *Core-Mark Midcontinent, Inc. v. Sonitrol Corp.*, 300 P.3d 963 (Colo. App. 2012), in which the court held that the burglar was not a "nonparty at fault" and also that the alarm company's willful and wanton breach of the contract made a damage limitation in their contract unenforceable.

Performance Industries ("PI") has a potential product liability claim against High Security ("HS"), but even if the product liability claim is successful it may be offset by comparative fault either on the part of High Security or other parties.

I. Product Liability

A manufacturer is liable for injuries caused by its product if the product turns out to be

defective. There are three types of product defects—manufacturing, design and warning. In this case the focus would be on whether there was a manufacturing defect or a design defect. (It doesn't seem likely that there was some warning that would have given the user any alternative way to avoid the loss.)

A *manufacturing defect* is present if the product differs in some way from the specifications that the manufacturer has adopted for the product. In this case there may be something wrong with the burglar alarm that caused it to malfunction. Unfortunately, we don't know exactly what happened to the alarm because the burglar has never been caught and the fire probably destroyed the evidence of the alarm. If, however, we could show that this particular burglar alarm simply failed to do what it was supposed to do, then the courts will apply a strict liability standard—that is, the PI would not have to establish that HS was negligent, only that the product was defective by reason of mismanufacture and such defect caused the harm.

Alternatively, and perhaps more persuasively, PI could argue that the burglar alarm contained a *design defect* that rendered the product unreasonably dangerous. If a reasonable person in designing the burglar alarm would insure that it could not be easily disabled, but this particular design lacked that security feature, then you could say that the alarm is unreasonably dangerous. Again, in the absence of knowledge as to why the alarm didn't trigger, it will be difficult to persuade a jury. However, our expert may have similar accounts of why this particular alarm system has a poor design. Jurisdictions differ on whether they apply a strict liability standard or a negligence standard to design defect claims, but in this case it doesn't appear it would make a significant difference.

II. Duty of Care

Before moving on to comparative fault, there is an additional issue to consider: did HS owe a duty of care to prevent the burglary? Since HS didn't *cause* the burglar's entry and subsequent fire, but merely *failed to prevent it*, they might argue that they didn't owe a duty of care. However, because PI justifiably relied upon the equipment supplied by PI to prevent burglaries, I don't think there's any question that a duty of care was owed.

III. Comparative Fault

As noted above, even if we are successful in showing that the product was defective, and but-for its failure the fire could have been avoided, we still face a significant reduction in the form of comparative fault. This would take two forms. First, contributory negligence (PI's fault in the fire), as well as comparative fault (the fault of other parties).

Contributory Negligence. HS would blame PI for its role in the fire by storing the windshield washer fluid inside the warehouse, in violation of the building and fire codes. How much fault a jury might assign to this would be uncertain, particularly since we don't know what sort of "fault" on the part of PI could be established. For example, if the alarm equipment had a manufacturing flaw or design defect of which HS was aware, that might count for a large amount of fault. On the other hand, if the defect is not egregious, the jury might assign it a relatively small amount of fault compared to the other factors. Unfortunately for us, Linden has a modified comparative negligence rule. If our contributory negligence is equal to or greater than the fault of HS, we wouldn't be able to recover. It is noteworthy that the comparison seems to be individual rather than for the defendants as a whole. Thus, if the jury returned a verdict that assigned 30% of the fault to PI, 30% of the fault to HS, and 40% to Standard, PI would recover

nothing. § 13-21-111(3).

Comparative Fault. As another unfortunate feature of Linden's statutory scheme, Linden has adopted a rule of pure several liability § 13-21-111.5(1). Thus, if the defendant blames the accident on other parties (or even non-parties, pursuant to § 13-21-111.5(3)(b)), any allocation of fault to someone other than HS would have the effect of reducing PI's judgment against HS.

There are two non-parties that HS could argue should be assigned a share of fault. The first is the burglar himself. We would certainly argue that there is no basis for comparative fault between parties who at worst are merely negligent and someone like the burglar who intentionally set the fire. However, the definition of "fault" doesn't explicitly exclude such a possibility, so I would be concerned about that argument. The second person who could be assigned a share of fault would be Standard Trucking. Again, because they are in bankruptcy, we can't name them as a party, but they could be a "non-party" to whom fault is assigned. Each percentage point assigned to them as a non-party would reduce our recovery to that extent. The defendant is required to name the non-party within 90 days of the filing of the action.

We might seek to obtain a ruling of joint and several liability under § 13-21-111.5(4), but in order to get such a ruling we would have to show that the defendants "consciously conspire[d] and deliberately pursue[d] a common plan or design to commit a tortious act." That doesn't seem to have a plausible application in this case.

The final thing we have to worry about is the statute of limitations. Some jurisdictions have a two-year statute of limitations for negligence. The more common rule is three years for a case like this; if so we should make sure that the claim is filed prior to May 2014.

ESSAY QUESTION 2

This question is based upon the facts in *Curtis v. Hyland Hills Park & Recreation Dist.*, 179 P.3d 81 (Colo.App., 2007), in which the court affirmed the trial court's determination that the water slide was not a "swimming facility" but reversed the finding that the accident resulted from a "dangerous condition" (result, dismissal of plaintiff's claim).

As the State of Linden we would argue that the statutory waiver of sovereign immunity does not encompass the injury that Leslie Curtis ("LC") incurred, and even if it did, she would be subject to a reduction in recovery (or possibly a bar to recovery) as a result of her assumption of risk and/or the comparative fault of John Brody.

Before addressing the two key issues, we might make a preliminary argument that the injury was not caused by anything we did; rather it was caused by the conduct of a third party (Brody) for whom we are not responsible, and thus there is no showing that we owed a duty of care to prevent this injury. I don't think this argument would have any independent strength aside from the way in which it relates to the sovereign immunity argument (below). If there is a finding that one of the sovereign immunity waiver clauses applies (i.e., that there was a dangerous condition or that the injury arose from the operation of a swimming facility), then it would answer any question about whether a duty of care was owed.

I. Sovereign Immunity

The State of Linden enjoys sovereign immunity except to the extent that it has been waived by statute. Linden has chosen a limited waiver of sovereign immunity (§ 24-10-106), retaining it unless the claim falls within a limited class of cases (§ 24-10-106(1)(a)-(h)). Thus, in order to avoid the application of sovereign immunity, LC would have to show that her case fell within one of the exceptions in (a)-(h). The closest she could come would be (e) or (f).

(e) “*Dangerous Condition.*” LC could argue that her injury was caused by a “dangerous condition,” namely the water slide. We would argue that this exception doesn’t apply, since there was nothing wrong with the water slide itself, only in the failure to have an attendant at the top of the slide to make sure that the previous visitor was safely at the bottom before allowing the next person to go down. LC would undoubtedly argue that, in the absence of an attendant at the top, the water slide was a dangerous condition, but we would counter that the condition itself has to be dangerous rather than the way in which it was operated.

(f) “*swimming facility.*” The other exception LC might rely on is the “operation and maintenance of any . . . swimming facility by such public entity.” § 24-10-106(1)(f). LC will argue that, since there is a small swimming pool at the bottom, this was a swimming facility, but again we would argue that it wasn’t the swimming facility that caused the problem, it was another aspect of the water park. There’s no definition of “swimming facility,” so it depends on how the court interprets it.

II. Comparative Fault

Even if the court determines that the sovereign immunity waiver includes a category that allows Leslie to sue the state, we would argue that the principles of comparative fault either limit or bar her recovery.

Contributory fault. Under § 13-21-111(3) a plaintiff can only recover if her fault is less than the fault of the “person against whom recovery is sought.” Although this language doesn’t exclude the possibility that the comparison is made with the defendants as a group, it appears (and we would certainly argue that) it refers to the defendants individually. Thus, if (for example) the jury were to find that plaintiff was 30% at fault, the State was 30% at fault, and Brody was 40% at fault, it would effectively bar her recovery from the State.

There doesn’t seem to be any contributory negligence on her part; she was acting as a reasonably prudent person when she took off from the top of “Thunder River.” On the other hand, we would argue that she *assumed the risk* of injury. Assumption of risk applies to activities where the plaintiff knows there’s a risk of injury but voluntarily assumes that risk because she benefits from taking that risk. A patron at a baseball park may prefer an unscreened seat to one that protects her more effectively from a screaming line drive. However, in order to apply, the assumption of risk must be *voluntary*. A court (or jury) might find that a sixteen-year-old is incapable of legally transferring the responsibility for an injury to herself that would otherwise lie on a defendant such as the State.

Nonetheless, the plaintiff may be found to have assumed a risk in using the water slide. The question is, what kind of assumption of risk? There are different kinds of assumption of risk and jurisdictions differ on the rules they apply. It seems unlikely that this would be the type of assumption of risk that would bar the claim (like an injury caused by the lack of a screen on the 3rd base side of a baseball park). It seems much more likely that, if it is considered at all, it would only result in finding Leslie partially “at fault” in causing her injury, resulting in a reduction of the damages to which she would be entitled. However, because Linden would in effect bar her claim against the State if her fault were judged to be equal to or greater than the

State's fault, it is a potentially significant factor.

Even if Leslie is found not to be "at fault," her claim might be significantly reduced if there is fault attributed to John Brody. If he could see from the top of the slide that Leslie hadn't gotten to the bottom, and if there was some kind of warning or sign telling him to wait until the previous person had gotten down safely, then he might be found negligent. Nonetheless, this is a potentially troublesome argument for us, because to the extent we blame him for failing to recognize the danger and prevent it, there would be criticism of the State for failing to provide some kind of procedure or mechanism to avoid it.

CHECKLIST

MC ____

QUESTION 1

- | | |
|--|---|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Comparative Fault rules |
| <input type="checkbox"/> Duty of care issue | <input type="checkbox"/> Contributory Fault |
| <input type="checkbox"/> PI justifiably relied on HS | <input type="checkbox"/> 49% rule |
| <input type="checkbox"/> Product Liability claim v. HS | <input type="checkbox"/> Applied individually |
| <input type="checkbox"/> Did alarm have a defect | <input type="checkbox"/> Liability of defendants is several only |
| <input type="checkbox"/> Manufacturing defect | <input type="checkbox"/> § 13-21-111.5 (1); (3)(a) and (b) |
| <input type="checkbox"/> Rule that applies | <input type="checkbox"/> Is the burglar a party? |
| <input type="checkbox"/> Design defect | <input type="checkbox"/> What about Standard Trucking |
| <input type="checkbox"/> Is easy circumvention a defect? | <input type="checkbox"/> Would 111.5(4) permit J&SL ? |
| <input type="checkbox"/> Was alarm unreasonably dangerous | <input type="checkbox"/> No conscious conspiracy |
| <input type="checkbox"/> No warning defect | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> Statute of limitations |
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |

QUESTION 2

- | | |
|--|---|
| <input type="checkbox"/> Overview: Claim v. State | <input type="checkbox"/> Comparative fault |
| <input type="checkbox"/> Duty of care | <input type="checkbox"/> No contributory negligence |
| <input type="checkbox"/> Sovereign immunity statute | <input type="checkbox"/> Leslie's Assumption of risk |
| <input type="checkbox"/> Limited waiver | <input type="checkbox"/> Could Leslie " voluntarily " agree? |
| <input type="checkbox"/> Is WW a " swimming facility " | <input type="checkbox"/> AoR at best a %age reduction |
| <input type="checkbox"/> " swimming facility " not defined | <input type="checkbox"/> Linden's 49% rule, individually applied |
| <input type="checkbox"/> Did injury result from " dangerous condition " | <input type="checkbox"/> John Brody's negligence? |
| <input type="checkbox"/> Was something wrong with facility | <input type="checkbox"/> Was Leslie visible ? |
| <input type="checkbox"/> Lack of attendant not a "dangerous condition" | <input type="checkbox"/> Several liability only |
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |
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EXAM # _____