

SAMPLE ANSWER TO FINAL EXAM

MULTIPLE CHOICE

1. (a) Is incorrect, because from Dempsey's perspective the injury was not substantially certain to occur. (b) is incorrect; Dempsey might be negligent, but it doesn't satisfy the test for battery; (c) this answer is only partially correct, because if it were substantially certain to occur, he might still be liable; thus, **(d) is the correct answer**

2. (a) is incorrect; unless there is actual intent (or substantial certainty), the elements aren't met; **(b) is the correct answer**; (c) is incorrect, because Baxter's negligence is not a defense to an intentional tort; (d) is incorrect, because even if Meadow thought she was part of the movie set, she could be liable under a theory of transferred intent.

3. (a) is incorrect, because the intent required for false imprisonment is lacking; (b) is similarly incorrect. **(c) is the best answer**, and (d) is incorrect because severe emotional distress is insufficient for false imprisonment because intent must be established.

4. (a) is incorrect, because the facts do not support a finding that the conduct was outrageous; (b) is incorrect because there was no threat of imminent harmful or offensive contact; (c) is incorrect, because Gilmore might still be reckless even if he's drunk; thus **(d) is the correct answer**.

ESSAY QUESTION 1

This question is based (loosely) upon the facts in *Cole v. Mandell Food Stores, Inc.*, 93 N.Y.2d 34, 710 N.E.2d 244, 687 N.Y.S.2d 598 (1999), which affirmed a jury verdict that found Mandell 20% at fault and United Steel 80% at fault.

In order to recover, Cole would have to establish that either Mandell Food Stores, Inc. ("Mandell") failed to use reasonable care in maintaining the gate, and/or that the gate had a defect for which United Steel could be found liable.

I. The Claim v. Mandell

Since Cole was injured by a condition of Mandell's premises, the case would be governed by the law of premises liability. The duty owed by a property owner (or possessor) to a visitor depends upon the visitor's status at the time of the visit. In this case Cole is clearly a business invitee, and thus Mandell would owe Cole a duty of reasonable care. That duty may require the owner both to inspect the premises as well as to make necessary repairs. It is still a duty of reasonable care, so a

jury would have to decide whether or not the problem identified by Mandell's employee on January 2 was one that would have led a reasonable person to make further investigation as to why the security gate malfunctioned. We would probably want to get an expert familiar with these kinds of gates to give us an opinion as to what normal procedure would be. We might also want to get the company that used to do the maintenance prior to 2005 to describe the kinds of problems that may have resulted from canceling the annual contract. A jury might conclude that Mandell was negligent in not renewing the contract, or at least in failing to substitute some kind of maintenance procedure in lieu of what the previous company had done.

## II. The Claim v. United Steel

A manufacturer is liable for injuries caused by its product if the product is defective. It's unclear from the facts of this case what sort of defect the gate may have had. There are three types of product defects—manufacturing, design and warning. It's possible that there was a manufacturing defect, such as inferior steel or the like. If a manufacturing defect causes the plaintiff's injury, there is no need to prove fault; a manufacturer is strictly liable for manufacturing defects. However, since the gate had functioned properly for 55 years it seems unlikely that the accident can be blamed on a manufacturing defect.

A second theory of recovery would be a design defect. For example, since this gate came crashing down on a customer, it apparently lacked a back-up or safety mechanism in the event that the control making it go up and down failed. Similar to the one-way ratchet that was missing from the sanding machine in *Phillips v. Kimwood Machinery Co.*, here an expert might opine that there should be some back-up in the event that the mechanism that ordinarily lowers the gate should fail, as it apparently did here. Although some jurisdictions use a consumer expectations test to determine whether the product was defective, it's unlikely to be applicable here. Instead, most jurisdictions use a risk/utility test that is similar to the test for negligence, except that the focus is on the product itself rather than on whether the manufacturer was negligent. But there is a similar comparison of the cost to make the product safer compared with the likelihood of injury that is used in evaluating negligence. If there was a relatively cheap way to prevent accidents like this, and the potential for injury is substantial, the design could be considered defective.

A final theory would be that the gate lacked *adequate warning* of how to use the product safely, or in this case how to prevent accidents like this. To the extent that Mandell was ignorant of how to maintain the product, that might be blamed on the manufacturer. However, it seems more likely that United Steel would have included instructions on how to use and maintain the gate.

One additional wrinkle that may come into play is a "statute of repose." Some jurisdictions make a manufacturer liable only for the "useful safe life" of the product – which will vary based on the type of product. Since this gate had been in use for 55 years, it's possible that a statute of repose would bar any claim against the manufacturer. But that seems unlikely.

## III. Comparative Fault

Before addressing the fault of the two potential tortfeasors, I don't see any indication that Cole might be found partially at fault.

If the jury were to find both Mandell and United Steel at fault, that would be good in some ways, but perhaps not so good. In this jurisdiction there appears is joint liability for economic loss, but only several liability for defendants who are found to be 50% or less at fault. Thus, if the jury found Mandell to be 80% at fault, and United Steel to be 20% at fault, but Mandell for some reason was unable to pay their fair share, United Steel would only be liable for

the economic loss (\$250,000), plus 20% of the non-economic loss (\$150,000). Depending on which of the two parties is most likely to be solvent, and where the preponderance of the fault seems to lie, it might behoove Cole to emphasize one or the other as the more responsible party. Similarly, if one of these parties is insolvent, the other would likely wish to characterize that defendant as the “empty chair” to whom the bulk of the fault should be allocated. Still, the rules apply only to those cases where there is more than one “defendant” who is held “jointly liable.” If for some reason either Mandell or United Steel were not a “defendant,” or were not held “jointly liable” (for example, if a statute of repose prevented United Steel from being liable), then this provision wouldn’t apply.

There is an additional provision that permits an exception to this limitation of liability, which is when the plaintiff has been unable, despite due diligence, “to obtain jurisdiction over such person” (§ 1601). I don’t know whether “obtaining jurisdiction” might include such things as the action being stayed by a bankruptcy proceeding, or some other situation. Again, further research is required.

## ESSAY QUESTION 2

This question is based upon the facts in *Weeks v. City of New York*, 181 Misc.2d 39, 693 N.Y.S.2d 797 (1999), which granted summary judgment to the defendant on a special relationship / justifiable reliance theory, but permitted the plaintiff to argue negligent entrustment of the motor vehicle.

The State of Evergreen (“SE”) would face liability if Allan could show that SE’s waiver of sovereign immunity extends to cases like this; that SE owed her a duty of care, and that this duty was breached. Even if liability is established, SE may avoid some of the damages by limiting its liability to a share of comparative fault. The case will be heard by a single judge (or possibly as many as three judges) with no jury.

### I. Sovereign Immunity

The State of Evergreen has adopted a broad waiver of sovereign immunity, such that it may be held liable to the same extent as a private party. The only limitation on that waiver of immunity is the retention of immunity for performing a “discretionary function.” In the federal government’s waiver of sovereign immunity, which most states use as a model, the discretionary function exemption is designed to preserve the separation of powers, so that the judiciary respects the policymaking authority of the executive branch. Here we would argue that the police officers were exercising discretion in determining how best to deal with Weeks, a mentally disturbed person. If liability were imposed using 20-20 hindsight, it would inhibit police officers from making their best judgment about how to deal with difficult situations. On the other hand, Allan would argue that there was no policymaking involved; it was simply a matter of neglecting to take proper steps to insure that a clearly disturbed individual didn’t get out on the road again. Since it is difficult to argue that the police officers were engaged in policymaking, I wouldn’t be very optimistic about avoiding liability on this basis.

## II. Duty of Care

Ordinarily there is no liability for failing to rescue someone – for failing to act as a “Good Samaritan.” We would argue that SE is not liable to Allan unless she can establish that we owed her a duty of care. Before analyzing the “failure to rescue” cases, we should first consider whether or not SE (acting through Lavo and Bonomo) actually *caused* the injury rather than simply *failing to prevent it*. Allan would argue that SE owed a duty of care if in fact they *made matters worse*, and by putting Weeks back in the car (twice), they actually made it more likely that he would start the car and drive away. If Allan argues this, she would need to show that, but for L&B putting Weeks back in the car, he would have simply continued his erratic behavior but he wouldn’t have caused a collision.

Alternatively, Allan might argue that even if SE didn’t actually *cause* the accident, they had a duty to *prevent it*. To do so, she would need to establish either that there was a *special relationship*, either between the officers and herself, or between the officers and Weeks. It’s pretty clear that the officers had no idea that Allan was on the highway, and so they had no relationship, special or otherwise, with her. On the other hand, having confronted Weeks and thrown him his pants, perhaps they had a special relationship with him that required them to insure that he would not inflict injury on someone else. That seems pretty thin, however, since the officers had minimal knowledge about Weeks and no other responsibility for keeping him in custody. Unlike cases like *Tarasoff*, where the defendant had an ongoing relationship with the perpetrator, and arguably had a duty to prevent him from causing harm, here we would argue that SE never had the degree of control over Weeks that would trigger a duty of care.

As far as justifiable reliance, again there was no basis for Allan to say that she had somehow relied upon the officers to restrain Weeks. That would not be a basis for establishing a duty of care.

Regardless of whether Allan persuades the court that the officers owed a duty of care because they made matters worse, or because they had a duty to restrain Weeks, Allan would still have to show that the officers acted *negligently*. Such considerations as the policies of the police department, usual practice in handling such cases, would be relevant to decide whether a reasonable person would have acted differently, and that if the situation had been handled properly it would have prevented Allan’s injuries.

## III. Comparative Fault

Even if Allan establishes liability, Evergreen has rules for dealing with comparative fault that could be quite helpful to SE. Before proceeding to examine comparative fault, it should be noted that there is no indication here of any contributory negligence on Allan’s part. Even if there were evidence that she was somehow at fault in the accident (which seems unlikely given the fact that Weeks was driving erratically), Evergreen follows a pure comparative fault approach, which would only reduce her recovery proportionately to any amount of fault (expressed as a percentage) applied to her.

On the other hand, it seems likely that the court would find that the majority of the fault lay with Weeks’ driving, rather than any negligence found on the part of SE. While Evergreen apparently requires each defendant to be jointly liable for economic damages (since the statute addresses non-economic damages but is silent on economic damages, and the traditional rule imposed joint and several liability), liability for non-economic damages is limited to that defendant’s share if the defendant is found to be 50% or less at fault. If, for example, Weeks (or

Weeks' estate) were named as a defendant, and the fault were assigned 20% to SE and 80% to Weeks, then SE's liability would be the economic damages (\$200,000) plus 20% of the non-economic damages (\$100,000), for a total of \$300,000.

There is an additional wrinkle that applies to claims against the State. Whereas the fault-allocation rules usually apply only to "defendants," and it might be that Weeks (or Weeks' estate) would not be a "defendant" in the case, § 1601 refers to cases "involving two or more tortfeasors jointly liable or in a claim against the state," and thus it appears that SE would be entitled to limit its liability to the percentage share, even if Weeks were not a defendant held jointly liable.

## CHECKLIST

MC \_\_\_\_

## QUESTION 1

- |   |  |
|---|--|
| <input type="checkbox"/> <b>Overview</b>                            | <input type="checkbox"/> Comparative <b>Fault</b> rules                    |
| <input type="checkbox"/> Claim against <b>Mandell</b>               | <input type="checkbox"/> No <b>Contributory</b> Fault                      |
| <input type="checkbox"/> Based on <b>premises liability</b>         | <input type="checkbox"/> Joint and several <b>liability</b>                |
| <input type="checkbox"/> Cole would be an <b>invitee</b>            | <input type="checkbox"/> Apparently J&SL for <b>economic</b> loss          |
| <input type="checkbox"/> Mandell owed him <b>reasonable care</b>    | <input type="checkbox"/> If $\leq 50\%$ , only several for <b>non-econ</b> |
| <input type="checkbox"/> Duty to <b>inspect</b>                     | <input type="checkbox"/> Is Mandell or United Steel <b>insolvent</b> ?     |
| <input type="checkbox"/> Duty to <b>repair</b>                      | <input type="checkbox"/> Must be <b>jointly liable</b>                     |
| <input type="checkbox"/> What would <b>expert</b> think?            | <input type="checkbox"/> Statute of repose would prevent                   |
| <input type="checkbox"/>  | <input type="checkbox"/>   |
| <input type="checkbox"/> Claim v. <b>United Steel</b>               | <input type="checkbox"/>   |
| <input type="checkbox"/> Would have to prove a <b>defect</b>        | <input type="checkbox"/>   |
| <input type="checkbox"/> Was door <b>unreasonably dangerous</b> ?   | <input type="checkbox"/>   |
| <input type="checkbox"/> Did it have a <b>mfg</b> defect?           | <input type="checkbox"/>   |
| <input type="checkbox"/> If so, <b>strict liability</b>             | <input type="checkbox"/>   |
| <input type="checkbox"/> Did it have a <b>design</b> defect         | <input type="checkbox"/>   |
| <input type="checkbox"/> Would additional <b>warnings</b> be needed |  |
| <input type="checkbox"/>  |  |

## QUESTION 2

- |   |  |
|---|--|
| <input type="checkbox"/> <b>Overview:</b> Claim v. State                  | <input type="checkbox"/> <b>Comparative</b> fault                          |
| <input type="checkbox"/> <b>Sovereign</b> immunity: broad waiver          | <input type="checkbox"/> No contributory <b>negligence</b>                 |
| <input type="checkbox"/> Were officers exercising <b>discretion</b> ?     | <input type="checkbox"/> Will Weeks be a " <b>defendant</b> "?             |
| <input type="checkbox"/> How is "discretionary function" <b>defined</b> ? | <input type="checkbox"/> Does a claim v. <b>state</b> invoke § 1601?       |
| <input type="checkbox"/> No real <b>Policy</b> -making involved           | <input type="checkbox"/> State jointly liable for <b>economic</b> harm     |
| <input type="checkbox"/>  | <input type="checkbox"/> If $\leq 50\%$ , only several for <b>non-econ</b> |
| <input type="checkbox"/> <b>Duty</b> of care to Allan                     | <input type="checkbox"/> <b>Weeks</b> likely to bear brunt of fault        |
| <input type="checkbox"/> Did L&B <b>increase risk</b> of accident?        | <input type="checkbox"/>   |
| <input type="checkbox"/> Allan: officers <b>made matters worse</b>        | <input type="checkbox"/>   |
| <input type="checkbox"/> Did L&B owe a <b>duty of care</b> to rescue?     | <input type="checkbox"/>   |
| <input type="checkbox"/> Was there a <b>special relationship</b>          | <input type="checkbox"/>   |
| <input type="checkbox"/> SR with <b>Weeks</b> ?                           | <input type="checkbox"/>   |
| <input type="checkbox"/> No SR with <b>Allan</b>                          | <input type="checkbox"/>   |
| <input type="checkbox"/> No <b>justifiable reliance</b>                   | <input type="checkbox"/>   |
| <input type="checkbox"/>  |  |
| <input type="checkbox"/>  |  |

EXAM # \_\_\_\_\_