

SAMPLE ANSWER TO FINAL EXAM

QUESTION 1

[This case is based upon *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1 (Ky. 1990). In a 4-3 decision the Kentucky Supreme Court reversed a decision by the court of appeals that would have allowed the case to go to a jury on the basis of the tort of outrage.]

I would anticipate two claims from Seitz: first, she could sue based upon medical malpractice, and second based upon the tort of outrage.

1. *Medical Malpractice*. Medical malpractice can arise in two different ways: first, if the health care professional (HCP) does not use the level of skill that can be expected of a HCP in like circumstances; second, if the HCP fails to provide the plaintiff with adequate information upon which to give informed consent to a procedure. (Taking the latter first, there doesn't seem to be any informed consent problem here.) In Seitz' case, there are two things she can complain about: first, the hospital employees were slow to respond to her initial request for help. Second, they did not provide appropriate post-injury care after the miscarriage. As far as the first incident, it does not appear that the hospital's conduct made any difference; apparently, even if prompt attention had been provided, nothing could have avoided her loss of the fetus. Thus, unless there is new evidence that the baby could have been saved, there is no liability for that occurrence. Second, the post-accident care was insensitive. The issue is whether there can be any medical malpractice recovery for emotional trauma alone. There is no evidence that she suffered physically; in a negligence claim it is ordinarily necessary to show that there was either some physical injury or that there was such great trauma that it provides a guarantee of the genuineness of her injury. However, if the jurisdiction allows claims for the negligent infliction of emotional distress, such as was done in the case of *Johnson v. State of New York*, then there might be liability. I would tend to doubt it, however.

2. *Tort of Outrage*. Seitz might also file a claim alleging the tort of outrage. There are three elements to a tort of outrage claim: (1) The defendant must have intentionally or recklessly cause emotional harm to the plaintiff; (2) The defendant's conduct must be outrageous and atrocious, beyond all bounds of decency; and (3) The plaintiff must suffer severe emotional distress. In this case the defendant did not apparently act intentionally, but the delay in responding to her complaints and the harsh words afterward might be seen as exhibiting a reckless disregard for the plaintiff's vulnerable condition. (2) The nurse's words—telling her to shut up and later telling her that the fetus would be "disposed" of right in the hospital—were certainly insensitive, but they doesn't seem to be so shocking that it would be considered utterly intolerable. But that's a judgment call. Finally, there is nothing in the record indicating severe emotional distress. Undoubtedly some harm occurred because of the miscarriage itself, and how much was attributable to the additional stress of an insensitive nurse is hard to tell.

Overall, I would guess that we would probably escape a medical malpractice case, but there is a risk that a court would find there was enough for a jury to decide that the conduct constituted the tort of outrage.

QUESTION 2

[This question is based upon *Ingersoll-Rand Co. v. Rice*, 775 S.W.2d 924, (Ky.App.1988). In that case the court held that a judgment against Ingersoll Rand for \$850,000 for product liability was supported by the evidence.]

Ingersoll Rand (IR) faces product liability exposure from Rice. To determine the risk, we need to analyze three different issues: (1) was the drill rig defective; (2) what is the significance of the fact that Rice himself may have been negligent; and (3) what is the effect of any comparative fault on the part of the employer?

1. *Was the Product Defective?* In product liability, a manufacturer is liable for damages caused when he sells a product that is "defective"—unreasonably dangerous. There are three kinds of defects: manufacturing, design and warning. A manufacturing defect occurs when the product as sold departs from the specifications that were established for the product by the manufacturer. For example, in this case if the drill rig contained missing parts or was incorrectly assembled by the manufacturer, it would be defective. Strict liability is applied in cases of manufacturing defects. Here there doesn't appear to be anything missing at the time the product was delivered; instead, poor maintenance caused it to fall apart.

Next, the second type of defect may come into play: the drill rig may contain a *design defect*: the specifications for the drill rig may be inadequate to prevent the type of risks that are commonly encountered in using the product. Here the drill rig apparently was designed in such a way that it could cause severe injury when the workers used it as an elevator. The jury would have to decide whether there is an alternative design that would have reduced or eliminated this risk at an acceptable cost, including the effect on product performance. Since the plaintiff has an expert who appears ready to say that the design was unreasonably dangerous, it will be for the jury to decide.

Finally, the plaintiff may claim that there was no warning about the dangers of using the product in this way. He might claim that there should have been a warning either on the rig itself or in the operator's manual that would warn people using the rig of the dangers from this kind of use. Even if the use of the drill rig was not intended by the manufacturer, so long as it was a "reasonably foreseeable" misuse, the manufacturer has a duty to use reasonable care to avoid it.

Another issue in the design and warning cases is whether the evidence will be based upon a strict liability standard or negligence. A negligence standard would base the analysis upon what was known or should have been known in 1976 when the product was manufactured. The strict liability standard would use today's knowledge ("hindsight") in analyzing whether the product is unreasonably dangerous. Jurisdictions are split on which of these two tests to use, and in what circumstances.

2. *Contributory Negligence.* The plaintiff may have failed to use reasonable care for his own safety in using the drill rig as an "elevator." If so, it would reduce his recovery in the amount of the percentage he is found at fault. The statute (§ 411.180(a)) is a pure comparative fault statute, allowing him to recover even if his fault exceeds IR's.

In addition, IR might argue that there was an assumption of risk. If Rice knew his conduct was risky, but proceeded anyway, he could be said to have voluntarily assumed a known risk. However, the statute in this jurisdiction (§ 411.180(b)) would probably make this *unreasonable* assumption of risk, which would be the same thing as contributory negligence.

3. *The Employer's Comparative Negligence.* There is much evidence that the employer and Rice's fellow employees were at fault. However, claims against the employer are barred by the

worker's compensation statute (§ 342.690). Not only is the plaintiff barred from suing the employer, but the liability of the employer to "another person who may be liable for or who has paid damages on account of injury or death" of any employee is limited to the worker's compensation benefits. Thus, the employer seems immune not only from claims by the employee but also for any contribution action that might be brought by IR. This jurisdiction also seems to provide for joint and several liability. The statute provides in § 411.182(3) that the judgment entered against one defendant shall state the respective percentages of fault, but it doesn't seem to limit the liability to such a percentage of fault. Instead, § 411.181 talks about the right to recover contribution by those who are held jointly and severally liable; and § 411.181A discusses situations in which a party pays more than his equitable share and seeks contribution. Thus, I think joint and several liability would apply. Thus, even if the jury found that the employer was 90% at fault, and IR only 5% at fault, they would appear to be liable for the entire judgment minus whatever percentage of fault found on the part of Rice, and subject to a reduction for any amounts paid under worker's compensation.

QUESTION 3

[This question is based upon *Jenks v. City of West Carrollton*, 58 Ohio App.3d 33, 562 N.E.2d 1338 (1989). In that case the court affirmed a jury verdict in favor of the defendant, finding that the DYS acted within the scope of the professional judgment rule.]

There are four issues in this case:¹ (1) Did the Department of Youth Services (DYS) owe the plaintiff a duty to use reasonable care; (2) Is the DYS protected by sovereign immunity; and (3) Did the DYS exercise reasonable care? and (4) Could a judgment be collected against DYS for the entire amount?

1. *Did the DYS Owe a Duty to Use Reasonable Care?* Negligence liability can only be assigned when the defendant owes the plaintiff a duty to use reasonable care. A defendant owes a duty to use reasonable care if he has (a) created or contributed to creating the risk of harm to the plaintiff; (b) induced justifiable reliance upon his use of reasonable care; or (c) established a special relationship carrying with it an obligation to use reasonable care.

a. It does not appear that the DYS increased the risk of harm to the plaintiff. Although they had custody of the murderer, they did not generate his murderous instincts. At worst they failed to shelter society adequately from his behavior.

b. There does not appear to be any justifiable reliance on the part of the Jenkses. There may be a tenuous notion that by paying taxes that finances the DYS, the Jenkses implicitly relied upon their use of reasonable care, but I would think that an unworkable argument. The Coopers, for example, relied upon them to some extent, but I don't think that the Jenkses did.

c. We could argue that a special relationship did exist; by taking custody of this youth, the DYS had an obligation to use reasonable care either to restrain him or to warn of his dangerous propensities. After he had been placed in the Coopers' custody, the DYS was notified of his violent behavior, but took no action. Arguably, this case is like the *Tarasoff* case, in which the California court recognized a duty on the part of the psychiatrist to warn potential victims when the danger reached a certain threshold.

2. *Does Sovereign Immunity Apply?* Since this case is brought against the DYS, and a state agency that is part of DYS, the sovereign immunity statutes (GRS § 44.072 and .073) would apply.

¹Liability could obviously be imposed on Loudon, but he is undoubtedly judgment-proof.

It appears that Grace has waived sovereign immunity for claims brought against it, but subject to several conditions. First, the lawsuit is in the jurisdiction of the board of claims. It is hard to tell what kind of procedure they use, but it appears that they make findings of fact that serve as the basis for the subsequent proceedings. In addition, § 44.073(13) appears to retain sovereign immunity for discretionary acts, for duties owed to the public as a whole, and for self-imposed protective functions to the public as a whole. I would think the state would have a strong argument that this injury falls into either category two or three. Since this case doesn't present any case of specific reliance by Arelene or David, there would be an argument that the state owed a duty to the world as a whole to keep Loudon from harming other people.

3. *Did the DYS Use Reasonable Care?* If this case is not barred by sovereign immunity, and if a duty of care is owed, then the plaintiff would have to prove that the DYS acted negligently. That could be shown by finding an expert who would testify that Loudon's behavior could and should have been predicted. It would probably fall within a kind of medical malpractice model: the jury would be asked whether a reasonably prudent psychiatrist would have acted differently based upon the evidence then available.

4. *Would the Liability Be Joint and Several?* If by some miracle there were a recovery, it appears that the plaintiff would be entitled to the full \$1 million from DYS even though Loudon is disproportionately at fault. Although the statute (GRS § 411.182(4)) refers to allocating the percentages of fault, it talks elsewhere about persons held jointly and severally liable. Thus, I would think that joint and several liability would apply.

CHECKLIST, Summer 92, Final

QUESTION 1

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|----------------------------------------------------------------|--------------------------------------------------------|
| <input type="checkbox"/> Medical Malpractice | <input type="checkbox"/> Tort of Outrage |
| <input type="checkbox"/> Standard of Care | <input type="checkbox"/> Rule: Intentional or Reckless |
| <input type="checkbox"/> Informed Consent doesn't apply | <input type="checkbox"/> Outrageous |
| <input type="checkbox"/> Cause of the Injury? | <input type="checkbox"/> Severe Emotional Injury |
| <input type="checkbox"/> Emotional Damage Only | <input type="checkbox"/> Applied: No apparent intent |
| <input type="checkbox"/> Neg. Infliction of Emotional Distress | <input type="checkbox"/> Questionable if outrageous |
| | <input type="checkbox"/> Don't know about her damages |

QUESTION 2

- | | |
|-----------------------------------------------------------------------|----------------------------------------------------------------|
| <input type="checkbox"/> Product Liability | <input type="checkbox"/> Misuse not a defense if foreseeable |
| <input type="checkbox"/> Was the drill rig defective? | <input type="checkbox"/> Comparative fault will reduce by %age |
| <input type="checkbox"/> Defective: Unreasonably dangerous? | <input type="checkbox"/> Assumption of Risk is same as CN |
| <input type="checkbox"/> Manufacturing Defect | <input type="checkbox"/> Worker's Comp. bars cross-claim |
| <input type="checkbox"/> defined | <input type="checkbox"/> Ambiguous statutes re J&SL |
| <input type="checkbox"/> Strict liability if found | <input type="checkbox"/> Joint and Several Liability applies |
| <input type="checkbox"/> Was there a Design Defect | |
| <input type="checkbox"/> Design Defect defined | |
| <input type="checkbox"/> Would a RPP have used an alternative design? | |
| <input type="checkbox"/> Warning defect | |

QUESTION 3

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|--------------------------------------------------------------------------|-----------------------------------------------------------------------|
| <input type="checkbox"/> Does DYS owe a duty? | <input type="checkbox"/> Obligations for public; protective functions |
| <input type="checkbox"/> DYS didn't create the risk | <input type="checkbox"/> Seems to exclude liability |
| <input type="checkbox"/> DYS didn't induce just. reliance | |
| <input type="checkbox"/> Was there a special relationship | <input type="checkbox"/> Did DYS use reasonable care? |
| <input type="checkbox"/> Does sovereign immunity apply? | <input type="checkbox"/> Medical Malpractice standard |
| <input type="checkbox"/> § 44.072 waives sovereign immunity | <input type="checkbox"/> Liability would be joint and several |
| <input type="checkbox"/> § 44.073 retains SI for discretionary functions | |