

SAMPLE ANSWER TO FINAL EXAM

QUESTION 1

Many issues are presented in this question for resolution. To summarize, Jamie, Sam and Dorothy should consider suits against the state, the manufacturer of the door and/or locking mechanism, and possibly against Greg's estate.

Claims against the State

The first issue would be to determine the manner in which the state has waived sovereign immunity and permitted itself to be sued. It appears from the statute that there is a fairly limited waiver of sovereign immunity, that covers only some types of negligent acts. Section 24-10-106(c) permits suits based upon a "dangerous condition of any public building." Although there is a discussion of health care providers in § 24-10-103, there is nothing that permits a suit against the state for negligence committed by a health care provider. However, perhaps some part of the statute I haven't seen would permit such a suit.

1. *Dangerous Condition.* There is a waiver of liability for maintaining a dangerous condition in a public building. We would argue that the dormitory, with its inadequate locking mechanism, constituted such a danger. We could also allege that failing to provide adequate security during the holiday recess also created or maintained a dangerous condition. Since this would be a premises liability case, the plaintiff's right to recover is dependent upon her status. Given the payment of money to the university, this would be considered an invitee relationship, giving rise to the duty to use reasonable care. (Some jurisdictions don't recognize the status distinctions, requiring "reasonable care under all the circumstances." However, in this case it wouldn't make any difference, since J is owed a duty of reasonable care—with respect to the premises—in any event.)

2. *Medical Malpractice.* (Note the doubt expressed above about whether there is a waiver of sovereign immunity with respect to such a claim.) When J was treated by the student counseling center, we could argue that she was owed a duty to be treated with reasonable care. I can't tell whether the treatment was reasonable; she was told to sever her relationship with Greg, which sounds reasonable, but perhaps other specialists would have more effective ways of treating this condition. We would need to consult experts who would be qualified to testify concerning the standard of care prevailing for that specialty under those circumstances.

3. *Failure to Warn.* A final theory would be that the state owed a duty to Jamie similar to the duty that the University of California was held to owe in the *Tarasoff* case. This is the least plausible duty pursuant to the statute, since it disclaims any duty to assume care for another's safety (§ 24-10-106.5). But it might tie into the previous case if there was knowledge of this danger to her and if she was already owed a duty of care because of the counseling treatment she received.

An additional issue involving the claim against the state is the requirement that the action be filed in a timely way. There is an initial claim-filing requirement that bars the claim unless notice of the claim has been given to the state within 180 days of the time the injury occurred. That time period has already passed, but perhaps a claim has already been filed. Also, since Sam is a minor the statute may be tolled until he becomes an adult.

Product Liability

It appears that Jamie's injuries were related to the failure to the door mechanism to close properly, and thus could give rise to a product liability claim. The first argument would be that there was some kind of manufacturing defect either in the door or in the locking mechanism. This theory seems unlikely, but the advantage would be that any manufacturing flaw would give rise to strict liability. The second possibility is that the latch or door was defectively designed so that it didn't result in reliable closing and locking. One issue would be whether the product was designed with this kind of use in mind; that is a likely possibility, since it would be anticipated that one of the functions would be for security purposes. However, we would have to show that the cost to redesign the door such that it would avoid this kind of injury would be less than the expected frequency of injury. In other words, would a reasonable person have redesigned the product? Finally, we would have to show that the change in design would have made a difference. We don't know exactly how Greg got in; if he simply waited until someone went out and then followed before the door had a chance to shut, then the defect in the door would be irrelevant. (Per the instructions, legal cause is assumed once a but-for cause is established, thus excluding—for purposes of this analysis—any argument that Greg was a superseding cause.)

#### Potential Contractor Claim

There doesn't appear to be any negligence on the part of the contractor who built the building or installed the door, but perhaps that was done in a negligent fashion. The advantage of looking for the contractor rather than the university is that we wouldn't have to worry about sovereign immunity. The downside is that a contractor who finished work more than 6 years ago may be shielded by a statute of repose that requires suits to be filed within 6 years of the time that the work was substantially complete.

#### Claim v. OB/GYN

We would also want to investigate a claim against the OB/GYN who treated Jamie during her pregnancy. Sam obviously suffers significant handicaps, and while there is no suggestion that the OB/GYN was in a position to prevent these handicaps, it's a possibility that should be explored. Even if prevention were impossible, some jurisdictions impose upon the doctor a duty to warn the pregnant mother of the possibility for such defects to occur, giving her the chance to choose to have an abortion. While Jamie appears to have made the decision herself to give birth rather than have an abortion, she may not have been fully informed of the risks that she was running.

#### Defenses

*Contributory Fault.* In addition to the statute of limitations we should be concerned about a defense based upon comparative fault. Union follows a 49% modified comparative fault rule; that is, the plaintiff may recover so long as her negligence is not as great as that of the defendant against whom recovery is sought. (It also appears that the calculation is made on an individual basis, rather than a group basis; thus, if Jamie were found 20% at fault and an individual defendant were found 20% at fault, she could not recover against that defendant.) Jamie might be accused of contributory negligence in opening the door without looking first to see who it was. On the other hand, a jury might find her situation quite understandable, and find the argument of contributory negligence cruel in light of what has happened to her. Similarly, her choice to continue with her pregnancy rather than have an abortion might be considered an assumption of risk, but again the jury might find that an unfair burden. However, we should expect the defendant to raise these issues.

*Joint Tortfeasors.* This jurisdiction seems to have abolished joint and several liability almost entirely. It provides for a calculation of proportionate shares (§ 13-21-111.5) and then limits each defendant's liability to that share. (Joint liability is permitted where there was a conspiracy or concerted action among defendants, a situation not applicable here.) This is bad news for us, since there is also a procedure by which the defendant can name other defendants as a "nonparty at fault" and have a percentage assigned to him. In this case Greg would certainly be identified as a party at fault and the defendants would attempt to have the jury assign the lion's share of fault to him; even if they were found at fault their liability would be a small fraction of the total damages. This could reduce our settlement leverage considerably. If by chance Greg happened to leave a huge estate that could be claimed against, we would be able to establish his liability for the injuries, but there would be no prospect for insurance coverage since the harms he committed were all intentional. Thus, it would probably be better for us simply to ignore his participation but be prepared for the state or other defendants to include Greg in the calculation of percentage shares.

### Damages

The damages picture is quite complex. First, the state has limited its liability to a maximum of \$150,000 per person, and a total of \$600,000 per occurrence (§ 24-10-114). Thus, Jamie, Sam and Dorothy would be limited to a maximum of \$150,000 each. (While some jurisdictions have struck down caps on damages as unconstitutional, the freedom of the state to waive sovereign immunity to the extent it chooses would render the constitutional challenge quite marginal.) (The claims against the product manufacturer(s) and contractor would not have any damage limits.)

Second, Jamie could claim damages as a result of the rape, but also for the wrongful birth of Sam. In most jurisdictions a parent can claim damages resulting from the birth of a child that would not have been born but for the doctor's negligence. (Since Sam is significantly handicapped, there would be no problem with a court deciding for policy reasons not to recognize claims for wrongful birth.) The damages would be calculated based upon both the economic and non-economic costs of raising Sam, minus the off-setting benefits. Having a child who was the result of rape, and severely handicapped besides, would place the damages on the high side. In addition, there could be a claim for wrongful life. In cases like *Harbeson* the courts have recognized that a child who would not have been born but for the negligence of the defendant may claim damages if the child has such severe injuries that it could plausibly argue that it would have been better off not to have been born at all. The calculation of a remedy is often limited to the out-of-pocket expenses connected with raising the child (which in this case would be significant), less whatever has been received in the wrongful birth action. No damages for pain and suffering are usually recoverable.

The damages recoverable against the OB/GYN, assuming the OB/GYN is not responsible for the handicaps themselves, would be limited to the wrongful birth / wrongful life damages. The other defendants would be sued for the damages from the rape plus the consequent birth.

Some jurisdictions would also recognize a cause of action for Dorothy. Since Jamie was a first-year student, she might be below the age of 18. Some jurisdictions will permit parents to recover for injury to their relationship with their children. In addition, Dorothy might claim to be a bystander for the injuries resulting either to Jamie or to Sam.

### QUESTION 2

The primary argument in favor of such a proposal is that it might stem the tide of "runaway" verdicts, and not paint the legal profession as ambulance-chasing scum. Since the suggestion of an amount is not really based upon any kind of calculation from the evidence, it is arguably

superfluous. In opposition to the proposal, one might point out that juries really have no other baseline to use in order to calculate these awards, and they benefit from the suggestion of a number. Also, as distinguished from the per diem argument, which has "delusive exactitude," this number is admittedly arbitrary. Finally, one might suggest that the jury should get more information—in the form of a recommendation of an arbitrator based upon similar cases—rather than less.

## SUMMER '95 FINAL—CHECKLIST

## QUESTION 1

- |  |   |
|--|---|
| <input type="checkbox"/> Overview  | <input type="checkbox"/> Contributory Fault   |
| <input type="checkbox"/> Claim v. State                                  | <input type="checkbox"/> Negligence in opening the door?                                |
| <input type="checkbox"/> Sovereign Immunity Statute                      | <input type="checkbox"/> Assumption of Risk in Carrying the Child to Term?              |
| <input type="checkbox"/> Dangerous condition of a building (§ 24-10-106) | <input type="checkbox"/> Joint Tortfeasor Issues  |
| <input type="checkbox"/> (1) Premises Liability Theory                   | <input type="checkbox"/> Several liability only   |
| <input type="checkbox"/> Status as Invitee                               | <input type="checkbox"/> Will Greg be a joint tortfeasor?                               |
| <input type="checkbox"/> Duty to use reasonable care                     | <input type="checkbox"/> Should his estate be a co-defendant?                           |
| <input type="checkbox"/> Failure to Maintain (§ 24-10-103(1))            | <input type="checkbox"/> Damages  |
| <input type="checkbox"/> (2) Medical Negligence Theory                   | <input type="checkbox"/> Wrongful Birth case  |
| <input type="checkbox"/> (3) Duty to Warn (Tarasoff)                     | <input type="checkbox"/> Probably allowable because child has substantial defects       |
| <input type="checkbox"/> Doesn't seem to be permitted by statute         | <input type="checkbox"/> Wrongful Life claim?   |
| <input type="checkbox"/> Was she in a "special relationship"             | <input type="checkbox"/> Might argue better not to be alive                             |
| <input type="checkbox"/> Was there "justifiable reliance"                | <input type="checkbox"/> Subsequent therapeutic mistakes                                |
| <input type="checkbox"/> Product Liability Theory                        | <input type="checkbox"/>  |
| <input type="checkbox"/> Door manufacturer                               | <input type="checkbox"/> Cap on damages against state: \$150K for Jamie; \$150K for Sam |
| <input type="checkbox"/> Latch mechanism manufacturer                    | <input type="checkbox"/> Parent's claim?  |
| <input type="checkbox"/> Manufacturing Defect?                           | <input type="checkbox"/>  |
| <input type="checkbox"/> Design / Warning Defect                         | <input type="checkbox"/>  |
| <input type="checkbox"/> Defenses  | <input type="checkbox"/>  |
| <input type="checkbox"/> State: Claim filing?                            | <input type="checkbox"/>  |
| <input type="checkbox"/> Time Limit                                      | <input type="checkbox"/>  |
| <input type="checkbox"/> Applicable to Sam?                              |   |

## QUESTION 2

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|---|---|
| <input type="checkbox"/> Overview                           | <input type="checkbox"/> Con side                           |
| <input type="checkbox"/> Pro Side                           | <input type="checkbox"/> Difficulty of suggesting figures   |
| <input type="checkbox"/> Not evidence                       | <input type="checkbox"/> Different from "per diem" argument |
| <input type="checkbox"/> escalating awards discredit system | <input type="checkbox"/> How else would the jury know?      |
|   | <input type="checkbox"/> Should use more information?       |
|   | <input type="checkbox"/>                                    |
|   | <input type="checkbox"/>                                    |
|   | <input type="checkbox"/>                                    |

Exam Number \_\_\_\_\_