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SAMPLE ANSWER TO FINAL EXAM

QUESTION 1

This case is based on *Austin v. Mylander*, 717 So.2d 1073 (Fla. 1998), in which the court found that the sheriff did not owe a duty to the taxi driver.

Helena and Samantha would file a wrongful death claim against the County. We would have several defenses and above all a dollar limitation on any potential award.

The Liability Issues

The wrongful death claim (analyzed in terms of damages below) would be based on a claim that the County negligently exposed Austin to an unreasonable danger in the person of Gramblett.

Duty of Care. Before the question of negligence is evaluated, we have to determine whether the County even owed Austin a duty of care. The County could argue that they didn't create the risk, and are only under a duty to help avoid injury to Austin if they either had a special relationship with him or if he somehow justifiably relied upon him. Austin could argue that they created the risk by putting someone they knew to be a potential risk into his cab. In other words, it wasn't a danger that was threatening the plaintiff (like the tropical storm in the *Brown* case) but one that the County created by their own affirmative act. I don't know how that would be resolved. In the alternative, Austin could argue that he was in a special relationship with the County, because they used him to transport Gramblett, and if they should reasonably have anticipated a danger, then Austin was someone whom they had a duty to protect, or at least to warn. Similarly, Austin might argue that he justifiably relied upon the County to warn him if there was a significant danger.

To conclude this section, I would say that Austin might have some difficulty identifying a solid basis that creates a duty of care, but assuming that there is one, then the question will be whether they violated that duty of care.

Sovereign Immunity. A state entity in Disrepair is entitled to whatever limitations are placed upon claims against the state by the sovereign immunity statute. On the one hand, the waiver, § 768.28(5), is very broad, making the state liable on the same basis as a private person. On the other hand, it places a relatively low cap (discussed below) on the maximum damages recoverable. Also, although the statute doesn't explicitly state an exemption for discretionary functions, the court would probably imply one. Therefore, if this were a discretionary function, it would be immune, but I don't think so, since the error of failing to warn the cab driver or take other precautions would be considered an operational, rather than a policymaking, function. Finally, the question must be addressed of whether a private person would be liable under similar circumstances. If a private person knew about a dangerous passenger, and sent him home in someone else's cab without warning of the danger, would that constitute actionable negligence? It's questionable.

Damages. This would a wrongful death claim, and under §§ 768.16-.27 the state permits recoveries by the survivors for injuries they have suffered. In this case the survivors would be Helena and Samantha, and they are permitted to recover not only economic damages but also the value of lost society and companionship (§ 786.21). However, the limitation placed by the statute on the liability of the state will place a cap of $100,000 on each individual claim (§ 786.28(5)), with

a maximum of $200,000 per occurrence. Thus, under the best of circumstances, the most that could be collected on this claim would be $200,000.

A miscellaneous consideration would be whether or not Gramblett's share of fault could be considered. The statute provides that in the comparative fault calculation, intentional torts are not to be included (§ 768.81(4)(b)). That's bad for us, since we could otherwise reduce our share of fault by Gramblett's overwhelming responsibility.

Conclusion. Particularly in view of the questions for proving the underlying liability case, the statutory damages cap gives us a very strong negotiating posture.

QUESTION 2

This case is based upon *Rodriguez v. Brutus*, 702 So.2d 1302 (Fl. 1997), in which the court reversed a judgment of $300,000 for Claudine. The Court of Appeal found that the landlord owed no duty to the plaintiff other than to avoid willful or wanton injury, and that there was no duty that was not open and obvious to her).

We would have two potential claims in this case. The first would be against the Rodriguez family based on premises liability, and the second would be against Rockwell for product liability. Neither looks terribly promising, but perhaps better facts will emerge.

The Claim v. Rodriguez

Claudine ("C") could only make a claim against the Rodriguez' for allowing the table saw to be left in a dangerous condition that posed a risk for C. The Rodriguez' would undoubtedly argue that this is a premises liability case, since it arises from a dangerous condition (the shed) which they permitted on their property. Premises liability cases are ordinarily determined by reference to the status of the plaintiff at the time the injury took place.

(However, some jurisdictions employ a test of "reasonable care under all the circumstances," which would allow the jury to consider the plaintiff's status -- the fact that she was specifically forbidden from entering the shed -- in determining whether or not it was reasonable to leave the shed in such condition. This would be quite helpful to us, since it would get the case to the jury rather than be rejected on summary judgment.)

Assuming this is a jurisdiction that employs the status classifications, then we have to determine what C was at the time she entered the shed. Our best case would be to argue that she was an invitee, but that requires a showing that her presence served a business purpose of the owner. Just the opposite is the case here. Since there was an explicit instruction that her family not enter the shed, she might even be considered a trespasser. However, there might be some claim that she had a kind of implied permission. I don't think would be the case, but in any event it wouldn't help us very much, because all that a landowner owes to a licensee is the duty to warn of hidden perils. If the saw was a hidden peril, then Rodriguez would owe a licensee the duty to warn. However, C seems pretty well aware of the danger and thus there wasn't any hidden peril.

An alternate approach would be to say that, even if C was a trespasser, she was a child trespasser where the owner had reason to anticipate that there would be children who would be attracted to the dangerous condition. If the owner knows there is a dangerous condition where children are likely to trespass, and if the children *because of their youth* fail to appreciate the danger, then the owner must use reasonable care to implement a "cheap fix" -- if there is one. Here installing a door that could be locked might be considered a cheap fix, but it doesn't seem plausible to argue

that she was unaware of the danger. Thus, I would be pretty pessimistic about being able to sell a premises liability claim against Rodriguez.

Claim v. Rockwell

Rockwell would be liable for C's injuries (at least in part) if C could show that they resulted from a *defect* in the saw. A defect could be one of three different kinds: (1) a *manufacturing* defect would be a departure of the saw from the specifications established by the manufacturer. There is nothing in the fact pattern to suggest that the saw did something it was not supposed to do. (2) A *design* defect is a feature of the saw that a reasonable person would have eliminated in view of its unreasonable danger to users of the saw. The facts state that there was a blade guard that had been removed, and that this apparently was the way the saw was designed. In order to establish that this constituted a defect, we would have to produce an expert who could testify that the cost of redesigning the product would be outweighed by the gains in safety. That would have to take into account the reduction in usefulness of leaving the saw the way it is. Perhaps a removable guard was the best compromise between the value of providing maximum safety and at the same time permitting full use of the saw. On the other hand, perhaps safer designs have been introduced that would render this saw unreasonably dangerous by comparison. (It might make a difference if the State of Disrepair permits "imputed knowledge"--things we know today about the product that wasn't necessarily known at the time it was manufactured--to determine whether a reasonable person would have designed it that way; if so, it would convert the test for a defect into a form of strict liability.) (3) A final possibility is that the saw should have had a more effective warning of the potential for this kind of injury. It is clear that C was aware of the possibility of injury, but perhaps there were specific ways she could have been warned that would have helped her avoid this injury. That sounds pretty thin, but the advantage of a warning claim is that it would be relatively cheap for the manufacturer to provide.

A final problem with the product liability claim is that there might be a *statute of repose* in place that would limit the manufacturer's liability to some period of time (12 years is a common starting point), beyond which there is no duty to users of the product. It's been 20 years since the saw was manufactured, so this might be a problem.

Contributory Fault Issues

Even if C could establish that either defendant would be liable, it is likely that the defendants would assert contributory fault as a defense. The defendants would certainly claim that C was *contributorily negligent*—that C failed to use reasonable care for her own safety. Even though she would be held to the standard of a child her age,[1] she would probably be considered to be negligent in operating something that was clearly forbidden to her and which she understood to be very dangerous. Fortunately, this jurisdiction has a "pure" comparative fault system (§ 768.81(2)) which would reduce her damages proportionately to any finding of fault, but would not bar her claim, no matter how much at fault she is. A second problem would be that of assumption of risk, which is a doctrine that applies when a plaintiff gives consent to a known risk. Sometimes, assumption of risk has served as a bar to recovery, but there is no reason to think it would do so in this case.

1. She might even be considered to be engaging in an adult activity, which would impose upon her a standard of using reasonable care, without regard to her age.

Instead, it would be likely that C's behavior would be classified as "secondary unreasonable," or in other words, it is no different from ordinary contributory negligence.

Damages

C would be entitled to economic damages (loss in wages she would have been able to earn before she lost part of her thumb), plus any medical expenses for dealing with her injury. Beyond the economic loss, C would also be entitled to pain and suffering damages, including the consequence of a disfiguring injury. Another possibility would be a claim on behalf of the parents, who might be able to recover for some sort of loss of society and companionship damages.

Joint Tortfeasors

This jurisdiction only recognizes joint and several liability for economic damages where the fault of the defendant exceeds that of the plaintiff. In the unlikely event that both defendants were found liable, C would be entitled to joint and several liability for economic damages from any defendant whose fault was greater than C's. A final possibility is that the parents could be alleged to be partially at fault for failure to supervise their child. There is generally immunity from this kind of claim, and besides that, it doesn't appear that there was any negligence on the part of the parents, since they had no prior notice that this was a problem.

CHECKLIST SUMMER '99 FINAL EXAM

QUESTION 1

- ☐ Overview
- ☐ Claim v. County
- ☐ Question of whether duty was owed
- ☐ Special Relationship?
- ☐ Justifiable Reliance?
- ☐ Did Baptiste create the risk?
- ☐
- ☐ Sovereign Immunity Statute
- ☐ Financial limitation
- ☐ Broad waiver
- ☐ Was it a discretionary function?
- ☐ Probably operational
- ☐ Question of whether reasonable person would have acted differently
- ☐

- ☐ Damages
- ☐ Each person given right to recover
- ☐ Includes wage loss
- ☐ Includes loss of companionship, etc. (§ 786.21)
- ☐
- ☐ Helena/Samantha could get $100,000 each
- ☐ No CF for Gramblett (§ 768.81(4)(b))
- ☐
- ☐
- ☐
- ☐
- ☐

QUESTION 2

- ☐ Overview
- ☐ Claudine's claim v. Rodriguez
- ☐ Premises Liability Claim
- ☐ Categories
- ☐ RC under circumstances would help
- ☐ Claudine's Status
- ☐ Licensee / Trespasser
- ☐ Duty owed to licensee: warn
- ☐ Claudine knew of danger
- ☐ Child trespasser
- ☐ No better than licensee
- ☐
- ☐ Claim v. Rockwell
- ☐ Was the saw defective?
- ☐ No apparent mfg. defect
- ☐ Design Defect
- ☐ No particularly new info
- ☐ Warning defect
- ☐ Again, Q of value of warning
- ☐ Statute of Repose
- ☐

- ☐ Contributory Fault Issues
- ☐ Contributory negligence
- ☐ Assumption of Risk
- ☐ Secondary Unreasonable (CN)
- ☐ Pure Comparative Fault (§ 768.81(2))
- ☐
- ☐ Damages
- ☐ Economic Loss?
- ☐ Pain and Suffering
- ☐ Parents' loss of consortium
- ☐
- ☐ Parents' failure to supervise
- ☐ Joint Liability Issues
- ☐
- ☐
- ☐
- ☐
- ☐

Exam Number _____