Two student answers (Question 2) from the Spring '03 Torts exam

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In examining the potential liability of the State of Linden (SL) in this suit, we must first address the concept of immunity from suit and the applicable SL statute. The traditional common law rule was that the sovereign (the state) was immune from any type of suit. Most states have chosen to waive this absolute immunity and by statute have consented to be sued for specific causes of action and by specific state affiliated actors. In our case we must consider the claims brought by the Ps in light of Chapter 39 of the LS Code of Civil Procedure. The statute waives immunity in many specific circumstances and with regard to many specific actors. For our purposes we must determine whether or not SL has waived immunity for suit based on the actions of Ernest Romero (ER) while acting within the course and scope of his duty in plowing snow from the road. There appear to be two possible ways of interpreting the statute on this question. In section 1-39-105, the statute submits itself to liability for damages caused by the negligence of public employees while "acting within the course and scope of their duties in the operation of any motor vehicle..." By applying this standard to the snow plow driven by ER, we could conclude that SL has abrogated immunity in such situations.

Another interpretation of the statute, however, can be found by looking at section 1-39-120. This section enumerates several exclusions from the specified waivers of
immunity in the statute. It mentions that the liability imposed by sections 1-39-106 through 1-39-112 does not include liability for damages caused by: (iii) The maintenance, including maintenance to compensate for weather conditions, of any...highway, roadway, [or] street..." If we look back to section 1-39-108, which would fall into the sections to which this exclusion would be applied, we see the mention of the liability of SL for the negligence of public employees "while acting within the course and scope of their duties in the operation of public utilities and services, including...ground transportation." The application of these sections to our situation would depend on the inclusion of the plowing of the roads within the operation of ground transportation. If these activities could be considered as the "operation of ground transportation" within the meaning of these sections, the statute would appear to be granting the state immunity from suit in these situations. The retention of such immunity in this case would prevent the Ps from bringing suit against SL in this case.

In looking at sovereign immunity issues, courts often make the distinction between policy functions and operational functions. Policy functions are often considered to be immune from suit, whereas operational functions often are not. Policy functions are those actions taken by govt agencies in enacting the policies necessary for the administration of the govt activities. Immunity to policy functions is often based on the idea of separation of powers. The courts try to avoid telling the legislature what the property way to make laws looks like, or the executive how to enforce said laws. Operational functions can be said to be those activities that result when said policies are put into actions by the appropriate state agents. A suit against SL for the improper training of their plow drivers would most likely be considered a policy function and be
immune from suit. A suit based on the actual driving by ER would most likely be considered an operational function an expose SL to suit for the activity. The statute provided allows for wrongful death claims under 1-1-109 (a)(vi). In this section a party can recover damages when the death of the person is caused by a fault that would have been actionable if the deceased had not died. This means that an action brought by Jean Hoppel's estate would have to show that JH could have recovered if she would not have died.

Should SL be determined to be not immune from suit in this case (as under 1-39-105), there are several issues that would have to be addressed. The first issue would be the idea of contributory fault. (see previous question for history of contributory fault). In this case, a jury might find that Richard Hoppel (RH) had been negligent as to the method in which he was driving his van. Negligence in this case would be the failure to use reasonable care for his own protection and the protection of those other parties in the van. As previously mentioned, the SL statute on comparative fault only requires that a P not be more at fault than the total of all of the other actors (50% rule). A jury would most likely look at RHs activities in passing the snow plow and make a determination as to if this action was negligent and how much it contributed to the injuries of the involved parties. If a jury were to find that RH was more than 50% at fault for the accident, any claims brought by RH against SL would most likely be dismissed. This would most likely not release the state from liability for injuries to the other involved parties, including the Estate of Jean Hoppel (JH), Michelle, Anita, and Greg Hoppel (MAG). RHs activities might also bring up the idea of assumption of risk. RH might have known that there was some risk in passing the snow plow, but he went ahead and
passed it despite the risk involved. According to the statute provided, the theory of assumption of risk is included in those activities that constitute fault for the purposes of comparative fault.

All of the exceptions to immunity mention that the state actor must be found to be negligent within the course and scope of his duties. Without a finding of such negligence, any recovery would be denied.

The presence of these other parties brings up another issue in this possible action. If JH and MAG should bring suit against the state, SL may implead RH as another defendant in the action. This might cause any negligence on the part of RH to be counted in allocating the total fault for the injuries to JH and MAG. We are not told the relationships of the injured parties. If any of the parties besides RH are the children of RH, this might affect their ability to bring suit against RH in addition to SL. Most jurisdictions don't allow for the liability of parents for the "bad parenting" of their children should injury occur to the children based on such activities. Courts will, however, differentiate between activities that arise as a result of parenting and those that arise out of activities that are not considered to be exclusive to parenting. A classic example of this is the driving of a car. If a child is injured because of a parent's negligent driving of a car, this activity does not arise as a direct result of the parent-child relationship and most courts will allow for the liability of the parents for such activities. This might allow SL to bring RH in as another defendant should SL be subject to suit by JH and MAG.

The SL statute also applies a cap to the damages collectible by parties bringing suit against SL. In section 1-39-118, the statute appears to be limiting the collection by
any one claimant for injuries arising out of a single transaction or occurrence to
$250,000. The next subsection then appears to be limiting the liability of SL to
$500,000 for the sum total of all claims of all claimants arising out of a single
transaction or occurrence. This part of the statute may limit SLs liability in this case to
$500,000, since all of the claimants claims arise out of a "single transaction or
occurrence."

It might also be alleged that ER "induced reliance" by RH by moving towards the side of
the road in order to give RH more room to pass. RH, relying on the expertise of ER as
a state licensed driver, may have taken this action as ERs signal that passing the plow
would be safe. Such a finding of induced reliance would go to the showing that even
though ER may have not initially owed a duty of care to RH, by inducing RHs reliance
on ER as an expert, he imposed on himself a duty of care with respect to the safety of
RH and the other passengers of the car.

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The main issue in this case will be whether Linden has immunity from having to pay damages. If the state does have to pay damages, the statute limits the amount that can be paid. Also at issue will be comparative fault because it could be found that Richard Hoppel (RH) is liable for some of the fault.

**Government immunity:**

In the state of Linden the government is not immune from all liability. The state claims immunity for employees acting within the scope of their employment except for the exceptions in the statute. The exception that may make Linden liable is section 1-39-105. That statute makes the state liable for negligence of public employees acting within the scope of their employment when they are operating any motor vehicle.

However, liability is limited to $500,000 for all claims arising out of the same transaction or occurrence unless the government has insurance to cover that kind of claim (section 1-39-118). In addition, there is an exception to liability if it arises as a result of a defect in the plan or design of any highway or roadway, or the maintenance of any highway or roadway (section 1-39-120).

In this case, the plow driver was acting within the scope of his employment so the state is liable under the statute above. However, liability is limited to $500,000 despite the fact that the damages claimed by the plaintiffs are $1.6 million dollars unless the state
has insurance to cover this kind of accident because all the damages arise from the
same transaction or occurrence, the crash. In addition, the state might have an
argument that there should be an exception if the facts turn out to indicate that the
plow digging in to the road was caused by a design defect in the road. Also the state
has a case for the exception that there is no liability for damages caused by
maintenance including weather condition compensation maintenance. The plower was
compensating for the snow when the accident occurred. However, since the exception
does not include section 1-39-105, the state would have to prove that the driver of the
plow was not negligent to escape liability.

It is likely that the state is not immune from this suit because the exception to liability
does not include the negligence of state employees acting within the scope of their
employment to avoid liability.

**Comparative Fault:** (this assumes that the court finds that the state is not immune)

Since it could be argued that RH was in some way responsible for the injuries, the
issue of contributory fault comes up. The old rule of contributory negligence barred
recovery from a plaintiff that was found to contribute in any way to his own injury. The
rule which changed that in most states in the concept of comparative fault. In Linden,
there is a statute which adopts comparative negligence. It says that "contributory fault
shall not bar recovery in an action by any claimant . . . if the contributory fault of the
claimant is not more than 50% of the total fault of all actors." It also states that
damages will be reduced in proportion to the amount of fault attributed to the plaintiff.
Then the statute goes on to explain how the court will determine fault. Thus, the statute says that the plaintiff can still recover from the defendant/s if his fault is not greater than 50% of the damages. This is a modified comparative fault statute. Another important element is that the 50% only has to be more than the collective fault of the defendants. RH's damages will be decreased in proportion to his share of the fault.

Another issue that comparative fault brings up is the assumption of risk. In the common law, the assumption of risk by a plaintiff barred recovery. There were three types of assumption of risk: 1) primary: defendant wasn't negligent, 2) secondary unreasonable: plaintiff was negligent/unreasonable in assuming risk, and 3) secondary reasonable: plaintiff assumed an inherent risk. Under the newer comparative fault statutes, if the defendant isn't negligent, then they are not liable, if the plaintiff is unreasonable in assuming the risk, then plaintiff can still collect, but the standard is the same as comparative negligence, and if there is an assumed inherent risk, then the states are split as to whether the plaintiff can collect.

In this case the state can argue that the crash was more than 50% RH's fault because he was making a pass in an illegal lane. RH might argue that the reason for the crash was the plow driver's bad driving and digging the plow into the road. However, the fact remains that the plow driver would not have had to make corrective action if RH had obeyed the law. If the judge or jury finds that RH was more than 50% negligent, then he will be barred from recovery. The state could also argue that RH assumed an
inherent risk by passing a snow plow illegally and if this is a state (the statute isn’t clear on this) that bars recovery for those types of risk, then RH will be barred.

Another possibility in this case is for the children and the estate of Jean Hoppel to sever their claim from Richard Hoppel's and make RH a defendant along with the state. In that situation, RH would not be immune from liability from his children because he was not performing a parenting duty when the crash happened. He was driving. The state's liability limit of $500,000 won't go up either because that is the limit from all claims for all claimants arising out of the same transaction or occurrence. The children probably wouldn't do that but the state would want to move for RH to be a defendant.

The nice thing for the state if this happens is that since this state is a pure several liability state by statute (section 1-1-109), if RH's liability is high enough, the state won't have to pay as much, and the plaintiffs won't be able to collect what he can't pay from the state. Since the state is a several liability state, the children won't be likely to name their father as a defendant, so the state will have to join him as a defendant to avoid his liability as to the children. There is no contribution or reallocation either, so for RH to be a co-defendant is important to the state.

In conclusion, it is likely that the state will not be immune in this case, but unless there is insurance by the state to cover this sort of accident liability will be limited to $500,000.