Professor DeWolf Fall 2024
Torts, § 1 December 9, 2024

FINAL -- SAMPLE ANSWER

Multiple Choice

1. (a) is incorrect, because there must be an intent to cause contact that would harmful or offensive to a person of reasonable sensibility or the apprehension of the same; (b) is incorrect, because under the facts Jefferson did not have reason to believe that the contact would be harmful; (c) is incorrect, is incorrect, because intent to cause harm is not an element of the tort; it is the intent to cause the contact that is required; therefore, **(d) is the best** answer.

2. (a) is incorrect, because there is no evidence of severe emotional distress; (b) is incorrect, because as to Spreckel the conduct would not be utterly outrageous; **(c) is correct,** because Spreckel wouldn't be in a vulnerable position making the comment outrageous; (d) is incorrect, because it is not the intent to cause emotional distress that is required; it is the intent to engage in the behavior that is judged to be outrageous.

3. (a) is incorrect, because battery requires an intent to cause contact that is either harmful or offensive. Elbowing past someone in the aisle would not be offensive to a person of reasonable sensibility, and therefore Ray's conduct is not a battery; (b) is incorrect, for the same reason; **(c) is correct**, because Ray was not acting in self-defense; (d) is incorrect, because under the eggshell plaintiff rule, the unforeseeability of the scope of injury is not a defense.

4. **(a) is the best** answer, because it correctly states the rule defining the tort of assault; (b) is incorrect, because Washington's future conduct would not qualify as the threat of imminent harm; (c) is incorrect, because the tort of assault doesn't require a touching—only the apprehension that a harmful or offensive touching will occur; (d) is incorrect because an intentional tort is actionable even if the damage is just emotional.

QUESTION 1

> The facts for this case, at least with respect to product liability, were (loosely) derived from *Nichols v. Swimquip,* 171 Cal.App.3d 216, 217 Cal.Rptr. 272 (Cal. App. 1985), which reversed a trial court dismissal based on the statute of repose.

On behalf of James Nichols ("JN"), I would recommend pursuing claims against West Hills Country Club based on a premises liability claim as well as an ordinary negligence claim. JN should also sue Swimquip for the unreasonably dangerous design of the railing. A claim against Greg's parents would even be a possibility. The comparative fault of the parties will be an important part of the claim.

The Premises Liability / Negligence Claim

Because JN was injured as a result of a condition on the WHCC premises (the diving platform), JN's claim against WHCC would probably be governed by premises liability principles. The duty owed to a visitor to land is determined by the visitor's status. Invitees are owed a duty of reasonable care; licensees must be warned about hidden perils known to the owner, and (adult) trespassers are only entitled to be free from intentional efforts to harm. It is unclear what JN's status

would be in this case. Had he been a recognized guest, he would be an invitee. However, because he essentially snuck in using a false ID, his status might be reduced to that of a licensee or even a trespasser. If a licensee, JN would be owed a duty to be warned of a hidden peril. WHCC might argue that the peril in the railing was not hidden, but relative to a 7-year-old it could be considered such. It was certainly known by WHCC. A child trespasser is owed a duty under the "attractive nuisance" principle. An owner owes to child trespassers a duty to implement a "cheap fix" to avoid a serious injury to children who are known to trespass. The "cheap fix" in this case would be to place a vertical bar in the open area, similar to the newer model of the railing.

The Claim Against Swimquip

It is very likely that JN would also sue Swimquip, claiming that the opening in the railing made the swim platform unreasonably dangerous. (Even if Swimquip proves to be insolvent, WHCC would bring them in as a nonparty at fault.) A product manufacturer can be held liable if their product is defective, that is, unreasonably dangerous.

The test for whether a product is defective depends upon the nature of the alleged defect. Manufacturing defects (that is, a departure of the individual product in question from the specifications for the product) are held to a strict liability standard. That is, if it is proven that the product contains a manufacturing defect, the plaintiff need not prove that the defect resulted from negligence. Here that is not the case. Instead, the defect here appears to be in the design—the failure of the product to have the vertical bar that would have prevented JN from slipping through the railing. Alternatively, a warning might be necessary to reduce the likelihood of injuries like this.

A plaintiff may establish a design defect in one of two ways. If the product is dangerous beyond the expectation of an ordinary consumer, it will fail the "consumer expectations" test. Alternatively, if the risk of the product's design is unreasonable compared to the utility produced by the product, the product can be found unreasonably dangerous, or defective. The risk-utility test is essentially a negligence test. Here the evidence of negligence is strong in light of the subsequent modification of the railing to include a vertical bar. Such a modification would not impair the utility of the product and would not be expensive, as demonstrated by the fact that the change was actually implemented. I would be quite confident that a jury would find that the diving platform was defective in design.

Defenses

1. *Contributory Fault.* Both WHCC and Swimquip might argue that JN was himself negligent, and that his fall was at least in part a result of his own lack of reasonable care. In addition, they might argue that he assumed the risk of injury. As to assumption of risk, I would be reasonably confident that a jury would not find that he voluntarily assumed a known risk of injury. If he had been hurt by diving off a 3 meter platform, that would be one thing. Here he was presumably unaware that he might slip through the railing and get hurt. It could not be said that he voluntarily chose a known risk, both because at age 7 he can't really consent, and also because this particular risk was not known to him. With respect to contributory negligence, he would be held to the standard of a reasonably prudent 7-year-old. This jurisdiction allows recovery so long as the plaintiff's negligence is not greater than that of the defendants combined. ERS § 34-51-2-6(b). I do not think that a jury would assign much fault, if any, to JN.

2. *Statute of Repose*. Because it has been more than 20 years since the product was sold, I would want to verify that there was no statute of repose shielding a product manufacturer from liability beyond the product's useful safe life.

Comparative Fault

In this case it is possible that both WHCC and Swimquip (and possibly even the parents of either JN or Greg) could be considered parties at fault in causing JN's injuries. In Everglade, there is no joint and several liability; any verdict in the plaintiff's favor would result in a judgment against each defendant according to that defendant's percentage of fault. ERS 34-51-2-8(b)(4). Even if the jury finds that WHCC was at fault, if it also finds that the injury was primarily the result of the defective design of the diving platform /railing, and if it further turns out that Swimquip is insolvent or unable to pay a judgment, the judgment against WHCC would be limited to WHCC's percentage of fault.

It is even conceivable that either JN's parents or Greg's parents could be considered a nonparty tortfeasor, who would be brought in by WHCC and/or Swimquip as owing a duty to supervise JN, and their failure to do so resulted in JN's injuries. Ordinarily, parents are immune from liability for failure to supervise a child, but under ERS § 34-51-2-8, the calculation of fault must include nonparties, even if they are immune, and if Greg's parents were somehow responsible for JN, they might be found to have accepted a duty to use reasonable care in protecting JN. It would not be something that JN would probably want to argue, but it might be an argument that WHCC or Swimquip would use to try to reduce their liability.

QUESTION 2

The facts of this case were drawn from *Benton v. City of Oakland City,* 721 N.E. 2d 224 (Ind. 1999), which reversed the trial court's dismissal; the Supreme Court held that the City owed a duty of care to warn against diving into shallow water.

In order to recover from the State, Thomas would have to prove that (1) the State had waived its immunity with respect to the claim in question; (2) that the State owed a duty to prevent injuries like this; and (3) the State was negligent in failing to warn. Thomas would face several defenses, including the denial of any duty of care, contributory fault, and the cap on damages recoverable from the State.

I. Sovereign Immunity

A state's liability is limited in two ways. First, the type of claim being brought must fall within the scope of the state's waiver of sovereign immunity. Second, it is subject to any limitations placed on the state's liability identified in the statute. Here the State of Everglade has provided a broad waiver of liability (liability may be imposed "for tort claims under circumstances where a private person or entity would be liable to the claimant"). On the other hand, there is a long list of exemptions from liability. The only one that might apply is ERS § 34-13-3-3(a)(1), which exempts the government entity or employee from liability for "the natural condition of unimproved property." The State would argue that the lake was unimproved property and the shallow depth was a natural condition. However, Thomas could argue that by marking off a swimming area with buoys, building a parking lot and charging admission, the property was no longer unimproved.

The other significant feature of the sovereign immunity statute is that it places a cap on damages. ERS § 34-13-3-2(a)(1)(C) limits the recovery for any one person to $700,000.[1]

II. Did the State owe a duty of care?

The State will likely argue that it did not owe a duty of care to Thomas to warn him of the danger of diving into the shallow part of the lake. (In fact, in the real case the trial judge granted summary judgment on this basis, although it was reversed on appeal.) If Thomas' injury was caused by an *act* of the State (so-called "misfeasance"), then they owed a duty of reasonable care in acting. On the other hand, if Thomas was injured because of an *omission* by the State (so-called "nonfeasance"), then they could argue that they did not owe him a duty of care to prevent the injury. Under the public duty doctrine, a duty to all is a duty to none.

We would argue that Thomas was owed a duty of care, for two reasons. First, he could argue that it is a premises liability case, and he was a public invitee. When a plaintiff is injured by a condition of the premises, the duty of care depends upon the plaintiff's status. Here it was a condition of the land (shallow water) that caused the injury.[2] Even as a licensee, he would be owed the duty to be warned of hidden perils known to the owner. We don't know to what extent this anomaly in the depth of the lake was known to the operators of the park.

The second theory upon which a duty to warn would be owed is if the State, by opening a swimming area, marking off with buoys and so forth, created *justifiable reliance* on the part of the swimmers that it was safe to swim. Had it been an open area of the lake, no such reliance would have been justifiable; but to the extent they created the impression that they had made the area a safe swimming area, they would arguably have a duty to warn if some condition (like the shallow water here) rendered the area unsafe.

Even if we proved a duty of care, we would still be required to show that they breached that duty. The extent of their knowledge, and perhaps prior incidents where people complained about the deceptive depth in that area, would certainly be relevant.

III. Defenses

The state might claim that Thomas was contributorily negligent, or that he assumed the risk of injury. In Everglade, a plaintiff may recover so long as the plaintiff's negligence is not greater than that of the defendant. ERS § 34-51-2-6(a).[3] It seems very unlikely that a jury would assign a significant amount of fault, if any, to Thomas. With regard to contributory negligence, he was in an emergency situation, and therefore didn't have time to verify that the water depth was similar to the other parts of the lake. And the choice to dive in rather than jump in and then swim would probably

[1] Unfortunately, a typo in the exam stated the damages as $2,00,000 rather than $2,000,000. It would be appropriate to make an assumption that what was meant was $2 million, but perhaps it meant $200,000. Most students correctly guessed that what was meant was $2 million.

[2] However, because the State specifically retains its immunity for "[t]he natural condition of unimproved property," a reliance on a conventional premises liability theory might not work.

[3] As noted below, it is possible that the State would argue that whoever pushed Frank into the water was also a party at fault under ERS § 34-51-2-8, but that seems unlikely. Even if they did, Thomas would still be allowed to recover so long as his fault was less than that of the combination of the State plus such other person.

seem reasonable under the circumstances. Even if the jury did assign fault, it would not exceed the 50% threshold, and in light of the cap on damages, it would be unlikely to result in an actual reduction of the award. A separate defense is assumption of risk, which in some circumstances results is a bar to recovery. In Everglade, however, the statute refers to "contributory fault," which is likely to include assumption of risk as a damage-reducing factor. Even if Everglade permitted assumption of risk to bar recovery where the plaintiff, for example, chose to sit in an unscreened section of the baseball stadium, this is not the kind of case where the plaintiff voluntarily chose a more risky form of the activity. It seems unlikely that Everglade would even argue that assumption of risk applied, because the jury might even be offended at such an argument.

CHECKLIST

QUESTION 1

- ☐ **Overview**
- ☐ Claim v. **WHCC**
- ☐ **Premises** Liability
- ☐ What is JN's **status?**
- ☐ Would **sneaking in** count against him?
- ☐
- ☐ Did WHCC **fail to warn** of hidden peril?
- ☐ Did WHCC **negligently** fail to repair?
- ☐ Could JN claim **attractive nuisance?**
- ☐ **Elements** of attractive nuisance
- ☐
- ☐ Claim v. **Swimquip**
- ☐ Was the product **defective**?
- ☐ Was the **design** defective?
- ☐ **Consumer expectations** test
- ☐ **Risk-utility** test
- ☐ Would **reasonable person** change design?
- ☐
- ☐ **Contributory fault**
- ☐ Unlikely to find **contributory negligence**
- ☐ **Assumption of Risk** not likely
- ☐ Statute of **repose?**
- ☐
- ☐ **Multiple tortfeasors**
- ☐ Liability is **pure several**
- ☐ Would **non-parties** be included?
- ☐ JN's or Greg's **parents**
- ☐
- ☐

QUESTION 2

- ☐ **Overview**
- ☐
- ☐ **Sovereign immunity** statute
- ☐ Exception for **natural condition**
- ☐ Is swimming area an "**improvement**"?
- ☐ $700,000 **Cap** on damages
- ☐
- ☐ Did State **owe a duty** of care?
- ☐ Was this a **premises liability** case?
- ☐ Would "**natural condition**" exception apply?
- ☐ Would **public duty doctrine** apply?
- ☐ Did State induce **justifiable reliance?**
- ☐ Was the State **negligent** in failing to warn?
- ☐
- ☐
- ☐ **Contributory fault**
- ☐ Contrib. **negligence** unlikely
- ☐ Assumption of Risk not likely
- ☐
- ☐ Other possible nonparties at fault
- ☐ No impact on **overall recovery**
- ☐
- ☐
- ☐
- ☐
- ☐
- ☐

Exam # _____