

FINAL EXAM SAMPLE ANSWER

QUESTION 1

The facts for this question were based upon *Roseboro v. New York City Transit Authority*, 2001 WL 869643, 2001 N.Y. Slip Op. 06580 (Aug. 2, 2001), in which the widow's judgment against the Transit Authority (\$788,822) was ordered to be reduced by the percentage of fault attributable to the crack addicts who murdered him.

I would explore a claim on Lydia Roseboro ("LR")'s behalf against the Linden State Transit Authority ("LSTA") for failing to protect AR Roseboro ("AR") from the assault.¹

- (a) Does the sovereign immunity statute permit such claims?
- (b) Did LSTA owe AR a duty of care?
- (c) Will comparative fault limit the claim?
- (d) Will the statute of limitations bar the claim?
- (e) What damages are recoverable under the statute?

A. Sovereign Immunity

The State of Linden can only be sued pursuant to permission granted in the statute waiving sovereign immunity. Fortunately, in the state of Linden, the statute waiving sovereign immunity is quite broad. It permits suits "in accordance with the same rules of law as applied to actions in the trial courts against individuals or corporations." (§ 8) The only significant limitation is that there is no liability for the exercise of a discretionary function (§ 12). It is unlikely that LSTA would be able to claim that failing to summon help for AR was in the exercise of a discretionary function, although we would need to be careful in framing the claim in such a way that it did not involve criticizing LSTA for policymaking judgment. Instead, some operational error would be the foundation -- in particular, Hutchinson's lack of attention paid to the events. There may also be some negligence in the operation of the train, but it doesn't appear that the train operator was at fault in failing to stop the train on time. Other issues, such as the level of security provided at the station, would be matters of policymaking and therefore shielded by sovereign immunity. We would have to show that Hutchinson failed to follow existing policy, not that the LSTA's policy was bad.

B. Duty of Care?

LSTA is not liable if the court finds that they did not owe AR a duty of care. Another way of saying this is that a defendant cannot be found negligent simply for failing to rescue the plaintiff; before a duty of care is imposed to rescue the plaintiff from a pre-existing risk, the court must determine whether (1) a "special relationship" existed between the plaintiff and the defendant; and/or (2) the plaintiff *justifiably relied* upon the defendant for protection. Here there is a good argument

1. I would not expect a claim against the murderers to be of any value as a civil action. Their fault, however, may figure into the recovery against LSTA, as described below.

on both counts. AR could claim that his "regular" presence in the train station resulted in a special relationship, and the knowledge of harm being done to passengers meant that the defendant had a duty of care. In addition, the knowledge of the regular presence of crack addicts might create a special relationship that required some level of warning or rescue by LSTA. In a related way, LSTA's act of holding open a train station probably induced passengers to rely upon the defendant to exercise reasonable care for their safety.

An alternative approach to this case would be to argue that this is a premises liability case and that AR was a business invitee. An owner of premises must exercise reasonable care toward business or public invitees. However, this claim might be blunted by arguing that in fact it wasn't a condition of the premises that injured AR, but rather the assailants just happened to use the railway station as a means of perpetrating crime. Nonetheless, the fact that AR had in effect paid (by way of train fare) for his presence on the train platform adds to the notion that LSTA owed him a duty of reasonable care.

As a fallback, we might also argue that operating the train actually caused AR's injury, thus converting this from a case involving the rescue of the plaintiff to one involving the infliction of the plaintiff's injury, thus giving rise to a duty to use reasonable care to avoid such injuries.

C. Comparative Fault

I don't see any basis for holding AR in any way contributorily negligent, or to say that he assumed a risk. (If the defendant were to argue that conditions were so dangerous that a reasonable person would have avoided them, it would be a damaging admission of their own abdication of responsibility.) Even if AR were assigned some share of fault, it would only reduce the recovery, not bar it, since Linden uses a pure comparative negligence rule. On the other hand, the Linden statutes provide for a reduction of the defendant's financial responsibility whenever the defendant is found to be 50% or less responsible for the plaintiff's injury (§ 1601). In such cases the defendant is only liable for a proportionate share of the non-economic damages assessed.

I don't know whether the fault of the murderers will be included in the assessment. It could be excluded as an intentional harm, but if the court ruled that the statute required including them, then we would be limited in collecting only the proportion of fault assigned to LSTA for non-economic harm. Since the murderers are overwhelmingly to blame, the percentage of fault assigned to LSTA might be very small.

Nonetheless, it appears from the statute that LR would still be entitled to a full recovery of economic damages, even if LSTA were only found partially at fault.

D. Statute of Limitations

Under the sovereign immunity statute, there are two requirements for filing the claim. First, notice of the claim must be filed within 90 days of the incident (§ 10(2)), and the claim itself must be filed within two years of the death of the decedent (§10(2)). I hope someone in our office has already filed such a claim, since it has been more than two years since AR's death. Under (§10(6)) there is a provision for relief from failure to file notice of the claim, or the claim itself, within the statutory limits, provided that the claim would not be barred if brought against a private citizen. It appears the court can exercise its discretion in permitting such a claim if the interests of the state haven't been prejudiced. However, if we haven't filed the claim, and if a claim against a private citizen would be barred (or if the judge decides not to take pity on us), then we're out of luck.

Moreover, there is a separate statute of limitations for wrongful death actions (§ 5-4.1), which appears to create a limitation of two years, regardless of any extenuating circumstances as noted in § 10(2). Let's hope we got this timely filed.

E. Wrongful Death Damages

Every state is entitled to set its own standard for the measure of recovery in cases of wrongful death. In Linden LR is entitled to "the pecuniary injuries resulting from the decedent's death." This might mean just the economic damages. However, some jurisdictions have also permitted non-economic damages under this heading. We'll have to see how that provision has been interpreted by the Linden courts. Since AR was on his way to work, we know he had a job; whatever the lifetime earnings he would have provided could be assessed, along with the "pecuniary" value of other services. In addition, the estate is entitled to medical and funeral expenses.

QUESTION 2

The facts for this question were based upon *Krohn v. Agway Petroleum Corporation*, 564 N.Y.S.2d 797, 168 A.D.2d 858 (1990), in which the plaintiff claimed that the lack of a childproof interlock on the gasoline pump rendered the product defective.

Wilson's ("W") could face a claim from Walter Krohn ("K"), possibly Walter's father ("F"), and even Jimmy Flynn ("Jimmy").

To recover, K would have to establish that W's product was defective; even if such a finding were made, W could reduce the liability by establishing fault on the part of K, and possibly F.

A. Product Liability

W is liable for injuries caused by a defect in their product. K will undoubtedly claim that the pump unit was defective because it lacked a mechanism to prevent casual use by a child such as K. The law is somewhat unclear as to what constitutes a defect. With respect to manufacturing defects, strict liability is imposed. However, it doesn't appear that there was any defect in this particular pump unit; rather, the question is whether the lack of a locking mechanism renders the design defective, or whether a reasonable person would have included a better warning about the dangers of leaving it like that.

Depending on the jurisdiction, a variety of different tests may be used to determine whether a design is defective. Some jurisdictions use a consumer expectations test, which asks whether the product is dangerous beyond that which a reasonable consumer would expect. I don't think W has much to worry about on that score, since it seems reasonable for consumers to expect that a gasoline pump would pump gasoline. Childproofing the gasoline pump unit doesn't seem like something a reasonable consumer would expect. On the other hand, many jurisdictions use a risk/utility test, in which the factfinder (typically the jury) essentially evaluates whether or not a reasonable manufacturer, in light of the risks associated with this design, would have used a better design. Relevant to that consideration is the cost or burden associated with the alternative design and the potential loss of utility from changing the design. In this case it appears that the "childproof" feature would have cost an additional \$5 per unit, which would be an acceptable cost if a significant number

of accidents of this kind could be prevented. Even if only a small number of accidents would be prevented, we may have a hard time persuading the jury that preventing horrible burn injuries like Walter's wouldn't be "worth it." But we might benefit from the likelihood that a locking/childproof design wouldn't have made a difference. For example, the Ajax "childproof" feature might have slowed K down, but not stopped him.

(I don't think that the debate over strict liability—whether today's knowledge should be imputed to the manufacturer at the time of design to determine whether a reasonable person would have used this design—would make any difference, since the knowledge of the risk hasn't changed since the time of manufacture.) In fact, if we can get the evidence in, it would be advantageous to show that, at the time it was manufactured, the product conformed to the standard of the industry, and that no other safer product was available.

W could also be liable if the product was defective by lacking a suitable warning. Here again the standard is somewhat uncertain, although the basic test is whether a reasonable person would have placed a more effective warning on the product. Here again it is questionable whether K would have behaved any differently if there had been a warning on the nozzle, or on the pump unit itself. We would argue that K was fully aware that gasoline is flammable (he wanted to use that very quality for his amusement); thus a better warning would have been to no avail.

B. Contributory Fault

Even if the pump unit were found to be defective by reason of unsafe design or inadequate warning, K would still be responsible for his own conduct. Even though he was only ten years old at the time, he is still expected to use the care of a child of similar age and maturity. Unfortunately, Linden uses a pure comparative negligence system, whereby the fault of the plaintiff doesn't bar recovery, but only reduces the recovery proportionate to the plaintiff's fault (§ 1411). The reduction could be substantial, however, depending on how the jury views the culpability of the child relative to the manufacturer's choice to use this design.

The plaintiff would also be subject to an assumption of risk defense. Assumption of risk applies when the plaintiff voluntarily encounters a known risk. At common law assumption of risk was a bar to recovery, and the law is still confused on this point. However, the same statute that adopts pure comparative fault includes assumption of risk as a damage-reducing factor, rather than as a bar. Thus, I would not think that assumption of risk could be used to bar the claim; rather, it would be considered simply another form of contributory negligence. Moreover, K's conduct in this case could be characterized as one in which he was not aware of the full extent of the risk, and given his youth, he probably wouldn't be held to be responsible for making such a life-altering choice.

C. Comparative Fault

Under the Linden statutes, the defendant is only liable for a proportionate share of the non-economic damages if that defendant is found 50% or less at fault. I think it likely that, even if W is found to have produced a defective product, the jury would assess W's fault at less than 50%. In addition, there is the potential for identifying Walter's father ("F") as another defendant. While most jurisdictions grant parental immunity where the parent is exercising his or her role as parent, we could make the argument in this case that F was negligent in failing to secure the pump unit with regard to anyone on his farm, not just the person who happened to be his child. Thus, if the jury finds that a reasonable person would have locked the pump unit, or otherwise prevented easy access

to it, they could assign F a share of fault in the injury that K suffered. That would further reduce W's share of fault.

Nonetheless, if W were found liable, they would be responsible for the full extent of K's economic harm; they would have a claim for contribution from F, but that might turn out to be uncollectible.

D. Bystander Claims / Loss of Consortium

It is likely that Jimmy witnessed the accident. Although he was not physically hurt, he might qualify for a recovery under a "zone of danger" theory, or even under an "impact" rule, if he was, for example, singed by the lighting of the fire. He, too, would be subject to a reduction for his own contributory negligence, but I wouldn't expect his recovery to be large because it doesn't appear he was seriously hurt.

F would also make a claim, perhaps on two grounds. First, if F arrived at the scene of the accident shortly after K was burned, he too could claim recovery as a bystander. Most jurisdictions base a bystander's right to recover on three factors: (1) he was at the accident scene, or arrived shortly thereafter; (2) he suffered a direct emotional shock; and (3) he is closely related to the victim. F would probably qualify for all three, although again he may be at fault for failing to exercise reasonable care in securing the gasoline to prevent accidental injury. His fault would reduce his own recovery, and the claim against him for contribution would serve to offset any claim on his own behalf.

