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FINAL EXAM SAMPLE ANSWER

The facts for this question were based upon *Butler v. City of Dyersburg*, 798 S.W.2d 776 (Tenn. 1990), which reversed the trial court's finding that the city was liable for failing to consider whether to install a stop sign. The Supreme Court held that the decision was a discretionary function and thus was shielded by the doctrine of sovereign immunity.

QUESTION 1

On Butler ("B")'s behalf, I would consider suits against Finley ("F") and against the State. Issues of contributory fault and joint and several liability also need to be evaluated.

Claim v. F

F would be liable to B if a jury determined that she had acted negligently. Apparently she was approaching the intersection, knowing that she had to turn, and there were no signs indicating that either party had to stop. She failed to see that B was about to enter the intersection, apparently unaware that there was other traffic. If a reasonable person would have been more careful and avoided the accident, a jury could find her to be negligent.

On the other hand, the claim against F has limited value because she only has $20,000 in assets. If she is more than 10% at fault, B will be unable to recover from her what is her fair share of the damages. On the other hand, Evergreen uses a "dollar method" for reduction of claims following settlement. If B chooses to settle with her for the limits of her insurance policy, it won't adversely affect the ability to collect from other defendants.

Claim v. State

The State's failure to install a traffic control device, such as a stopsign, could be the basis for a suit by B against the State. The first question is whether the State owed a duty of care to B to avoid such injuries. That might be a more debatable issue, except that the statute clearly contemplates suits against the State for such negligence.

However, the State would also assert defense of sovereign immunity. In Evergreen the immunity of the State is preserved (§ 29-20-201), except for certain cases, which include the unsafe condition of a street, including a traffic control device (§ 29-20-203). There is an exception to liability (§ -203(b)) where the State does not have notice of the condition, but we would assert that the State in fact had notice of the defective condition of the roadway, because of the State troopers' familiarity with the road.)

The State would certainly argue that the failure to place a stop sign was a discretionary function, but B could argue that it was simply an operational mistake, and not a discretionary function. An additional, albeit less persuasive, argument is that the statutory provision protecting discretionary functions only applies to negligent acts of State agents, and the section dealing with liability for defective conditions doesn't reference any discretionary function exemption. At the same time, in order to supply the notice that is needed to perfect a "defective condition" claim, we may be relying upon the activity of State agents, who will then seek the shelter of the discretionary

function exemption. All of this would have to be worked out by further research into the interpretation of the statute.

Contributory Negligence

Even if B could establish negligence and overcome sovereign immunity, F and the State would allege that B was also negligent. Evergreen uses a system of comparative fault known as modified comparative fault, in which contributory negligence (a plaintiff's failure to use reasonable care for his or her own safety) will not necessarily bar the plaintiff's recovery, instead reducing it in proportion to the amount the plaintiff is found at fault -- so long, however, as the plaintiff's fault is "not as great as" (§ 13-21-111(1)) the negligence of the party against whom recovery is sought. The rule in Evergreen is sometimes referred to as a "49%" rule, because the plaintiff may be as much as 49% (actually 49.9+%) at fault and still recover. This also assumes that the comparison is between the plaintiff and all the other parties combined. Some jurisdictions interpret the "not as great as" requirement to apply to the comparison with *each* defendant, which would be even worse for us. We would hope that if B were found 40% at fault, and F and the State both 30%, we would hope that the statute would be interpreted to permit B to recover $60,000 from each defendant, rather than nothing. Further research will need to be conducted.

Joint and Several Liability

Evergreen follows a rule rejecting joint liability (§ 13-21-111.5), except in circumstances that do not apply here. Thus, if the jury determines that F is mostly liable for the injury, with the State partially liable, the State will only be responsible for its percentage share of the damages. Using the same figures suggested above, if the State were found 30% at fault, and F 30% at fault, B would only be able to recover $20,000 from F (that is the limit of her assets), and $60,000 from the State.

QUESTION 2

The facts for this question were based upon *Luu v. Kim*, 323 Ill.App.3d 946, 752 N.E.2d 547, (2001), which affirmed a grant of summary judgment to the mall owner and the manufacturer of the conveyor belt.

I would advise Billy to consider claims against the following individuals and entities:

(1) Peter Kim/Pilsen Park
(2) Donald Luu (his father); and
(3) Buschman

Claim v. Kim

Peter and Edmund Kim ("EK") could be found responsible for the injury if they breached a duty to Billy based on his visit to the mall. (EK will be considered the owner of the premises for purposes of this discussion, but if further research discloses that some other entity actually had responsibility for control and maintenance of the area in question, the same analysis would apply

to them.) This case is governed by premises liability, which requires different levels of care depending upon the status of the visitor. Initially Billy was an invitee, because he was in the mall with the purpose of playing video games, and thus was fulfilling a business purpose of EK. A landowner is obligated to use reasonable care for the safety of business visitors within the scope of their invitation. The best piece of evidence for Billy's status as an invitee is that EK knew that Billy would be in the area of the video games and that children could get into the second floor storage area. Billy could allege that EK was negligent in failing to secure the storage area. However, EK could respond by pointing out that Billy and other children did not in fact have permission to be on the second floor, and that when they went there they left their status as invitees and became trespassers. Since the classification of trespassing does not require any culpability on the part of the visitor, but rather is a question of whether there was express or implied permission, it seems likely that Billy would be viewed as lacking permission and would thus become a trespasser, who is owed no duty beyond the landowner refraining from efforts to injure the trespasser.

Nonetheless, even trespassing children are owed a limited duty under the test set out in the Restatement of Torts, followed by most jurisdictions. Landowners who (a) are aware of trespassing children, (b) who are subject to a risk of grave injury, (c) who because of their youth are unaware of the risk, where (d) a slight burden ("cheap fix") could avoid the risk, have a duty (e) to use reasonable care in implementing the "cheap fix." Here, a simple lock on the door would be a cheap fix, and the alacrity with which the problem was remedied (albeit inadmissible as a post-accident repair) suggests this may be a successful argument. The more problematic elements would be proof that the owner was aware of the risk of injury. Even if EK were shown to be aware of the children's potential presence, it is not clear from the record that EK knew or should have known of the risk of grave injury.

(A potential claim could be stated against the landlord as well (P-K Mall), but their responsibility is no greater, and probably less, than that of EK. We'd have to sort out who was responsible for what.)

Claim v. Donald

Billy's father, Donald Luu, would not be liable (either to Billy or by way of a cross-claim for indemnity or contribution) unless if he failed to use reasonable care for the safety of his son, and the lack of care was in connection with a duty other than the one he owed by virtue of being Billy's father. The facts suggest that Donald gave Billy money to amuse himself (and his cousin) while Donald conducted business. I don't think it would be possible to show that Donald owed Billy a duty separate from the one that arose from being Billy's father. For example, if Donald had set up a display that fell over on Billy, Donald would be liable as a store owner, and the fact that he was Billy's father would not prevent him from being held liable. I don't think, however, that Donald gave Billy money as a store owner, but rather as his father. Therefore, I don't think any duty other than a failure to supervise his own son would be viable. Nonetheless, though Donald is probably immune from a claim for negligent supervision or "bad parenting," the jury might assign a share of fault to Donald for purposes of comparative fault (see the discussion below).

Claim v. Buschman

The manufacturer of the conveyor belt could be held liable for Billy's injuries if they were caused by a defect in the conveyor belt. (Since there doesn't seem to be any failure of a component

part, and thus the injury arises from the way in which the product was designed, I don't see any potential for filing a claim against any of the component part manufacturers, and thus will focus solely on Buschman.) Most jurisdictions base the test for product liability on the type of defect that caused the injury: (1) *manufacturing* defects are subject to strict liability. Thus, if there was a defect in a switch or a mechanism that caused the conveyor belt to turn on suddenly, that would result in liability without the need to prove any kind of negligence on the part of the manufacturer.

(2) *Design* defects, on the other hand, are subject to a test that is closer to the negligence standard, as further discussed below. In this case the conveyor belt could be considered to have a design defect because it lacked an automatic stop mechanism ("ASM"). To determine whether this lack of an ASM rendered the belt defective, some jurisdictions use a consumer expectations test. This test asks whether the reasonable consumer would have expected an ASM, and thus the lack thereof would be in violation of such. Since the belt was designed for use in a business, and for relatively infrequent use, Buschman would argue that the reasonable consumer would not expect an ASM. We would look for an expert to say otherwise.

A second formulation of the test for a design defect is to examine whether the risks of the product outweighed the utility of leaving those risks in place. Relevant to this inquiry would be whether or not a cost-effective safety device (such as an ASM) was missing from the device. In this respect, the risk-utility test resembles the traditional negligence test, based upon what a reasonable person would do. The major distinction that some jurisdictions recognize is that the test can be employed with *imputed knowledge*--what we know today about the product (particularly its risks) rather than what was (or reasonably could have been) known at the time the product was designed (a true negligence test). Those jurisdictions that permit the use of imputed knowledge are sometimes said to have a strict liability test for design defects.

A finaly theory of liability would be based on a (3) *warning* defect -- if the lack of warning about the risk rendered the product defective. In this case there is little evidence as to how the conveyor belt got turned on, and whether or not an effective warning could have been placed on the machine to prevent injuries such as this. Assuming some lack of warning could be assigned as a product defect, it would be subject to an analysis similar to that of a design defect, that is, we should look to see how Evergreen uses tests such as consumer expectations and risk/utility, and whether or not imputed knowledge is used in evaluating the alleged defect.

Contributory Fault

Even if Billy could establish liability on the part of one or more defendants, they would undoubtedly argue that Billy is primarily responsible for his own injury. Evergreen uses a system of modified comparative fault, in which contributory negligence (a plaintiff's failure to use reasonable care for his or her own safety) does not bar the plaintiff's recovery, but only reduces it in proportion to the amount the plaintiff is found at fault -- if Billy's negligence is "not as great as" . (§ 13-21-111(1)) the negligence of the defendant(s). We also need to investigate whether comparison is against the fault of *all* of the defendants (taken as a group), or against each defendant individually. Thus, if Billy and two defendants were each found 33-1/3% at fault, and two defendants each 30% at fault, Billy might be able to recover, but the statute might be interpreted to mean that Billy was as much at fault as each defendant and thus would get nothing. Since juries might say Billy was equally at fault compared to one or more of the defendants, this is a serious risk.

The defendants might also argue that Billy assumed the risk by going where he should have known he was not supposed to go, but children are less capable of effective consent or waiver, and

thus the worst that I would foresee is that assumption of risk would be treated as another form of contributory negligence.

Joint and Several Liability

Evergreen follows a rule rejecting joint liability (§ 13-21-111.5), and limits each defendant's liability to the percentage share assigned. Non-parties can also be assigned a share of fault, and thus Donald, although immune, might be blamed for part of the injury, and his share would then be unrecoverable. Although none of the defendants appears to be insolvent, it is worth checking out whether there would be any problem collecting from Buschman or Kim.

As an aside, Billy's cousin appears to have no role in causing the injury and therefore should not be considered a defendant.

Spring 2002 Checklist

QUESTION 1

- ☐ **Overview**
- ☐ Claim v. **Finley**
- ☐ Based on **negligence**
- ☐ Limited value b/c of lack of **assets**
- ☐ **Settlement**? Evergreen uses $ method
- ☐
- ☐ Claim v. **State**
- ☐ Duty of Care by **statute**
- ☐
- ☐ Sovereign **Immunity**
- ☐ provision for suits based on "**dangerous condition**" (§ 29-20-203(a))
- ☐ Actual **notice** provided (-203(b))
- ☐ **discretionary** function (§ 29-20-205(1)
- ☐ - is DF only applicable to **individual** neg?
- ☐ **Contributory** Negligence
- ☐ **49%** rule (modified comp. fault)
- ☐ Is it **compared** to all or just individual?
- ☐
- ☐ Joint and several **liability**
- ☐ Evergreen has **several** liability
- ☐ State only liable for its **individual** share
- ☐
- ☐
- ☐
- ☐
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- ☐

QUESTION 2

- ☐ **Overview**
- ☐ Claim v. **Kim**(s)
- ☐ Edmund Kim's **duty** for mall supervision
- ☐ **Premises** liability theory
- ☐ Was Billy an **invitee**?
- ☐ If he went beyond invitation, **Trespasser**
- ☐ **Attractive** nuisance
- ☐ - **Notice** that children played
- ☐ - Knowledge of **grave** injury
- ☐ - children **unaware** of risk
- ☐ - **cheap** fix - lock on door
- ☐ Potential claim v. **Landlord** (Pilsen Park)
- ☐
- ☐ Claim v. **Buschman**
- ☐ Liable if injury caused by **defect**
- ☐ no **manufacturing** defect
- ☐ no **component** mfr claim
- ☐ possible **design** defect?
- ☐ lack of automatic **stop** mechanism
- ☐ possible **warning** defect
- ☐ which **standard** would be used
- ☐ **consumer expectations** test
- ☐ **risk utility** test
- ☐ **strict** liability standard
- ☐ **negligence** standard
- ☐ have **recent** advances reduced risk?
- ☐ Statute of **repose**?
- ☐ Claim v. Donald (**Father**)
- ☐ Is it solely a **parenting** claim?
- ☐ Could claim be stated **outside** parenting?
- ☐
- ☐ **Contributory** negligence
- ☐ **49%** rule (modified comp. fault)
- ☐ **compared** to all or just one?
- ☐ Billy's negligence **substantial**
- ☐ could **bar** claim
- ☐ **Assumption** of risk
- ☐
- ☐ Joint and several **liability**
- ☐ Evergreen prescribes **several** liability
- ☐ Does **father**'s share count?
- ☐
- ☐ No claim v. cousin
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Exam # _____