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FINAL EXAM SAMPLE ANSWER

QUESTION 1

The facts of this case are loosely based on *Cole v. Fairchild*, 198 W.Va. 736, 482 S.E.2d 913 (1996), which reversed a judgment against Flat Top, ruling that the trial judge should not have allowed the jury to find that Stephen was a business invitee. In the real case Stephen was only 6 years old and died of his injuries. The jury assessed damages at $94,000 and divided liability 80% to Flat Top and 20% to Fairchild Jr.

I would consider claims against Flat Top ("FT"), Fairchild Jr. ("JF"), Jeremy, and Yamaha ("Y").[1] The defendants would assert a variety of defenses and we would need to consider the impact of the comparative fault statute.

I. SC v. Flat Top

Aside from Y, FT is the primary deep pocket in this scenario. I would try to establish that FT breached a duty in the way that they maintained their property. The first issue is to determine SC's status. The best we could hope for would be that SC would be considered an invitee. To be an invitee, SC would have to be FT's the land pursuant to a business purpose of the owner. In this case, we would argue that FT obtains a business benefit from the sale of land to its members, and that permitting its members to use the property furthers the business purpose of selling lots and other real estate interests. Unfortunately, the facts in this case wouldn't be terribly supportive. For one thing, SC is not actually a member. Although Fairchild's father is a member of the Association, and presumably Fairchild, as a guest of his father, would be on the land pursuant to FT's business purpose, it is a further stretch to say that SC's presence also served FT's business purpose. A jury could easily find that SC's presence was merely pursuant to permission rather than a business purpose.

If SC is ruled to be an invitee, then FT would owe a duty of reasonable care. SC might be able to establish that FT was negligent in failing to eliminate the "blind spot" in the course that was used for motorcycle riding. Particularly if Kessler had previously been warned about the danger, this would be helpful in establishing FT's negligence.

On the other hand, if SC is ruled to be a mere licensee, then FT would only owe him a duty to warn of hidden perils. The blind spot could be considered a hidden peril, but on the other hand it might be considered something obvious. In part it would depend upon whether SC's age would be taken into account in determining whether the blind spot was obvious.[2]

II. SC v. Yamaha

Next in priority would be a product liability claim against Yamaha. Yamaha could be held liable if their motorcycle contained a defect. Defects come in three varieties: manufacturing, design, and warning. There is no basis in the facts for a manufacturing defect; with respect to the design of the motorcycle the injury was caused by the handlebar, but I doubt there is any alteration of the handlebar that could be made to reduce the likelihood of injuries such as this one. On the other hand, we could argue that the product was defective because

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1. The parents have come to me for advice, and there are claims that relate specifically to them, but ultimately the court would appoint a guardian ad litem to represent the interests of the child as distinct from the interests of the parents.

2. One might even argue for an attractive nuisance theory, but that does SC no good; he'd have to show a "cheap fix" for the danger, and cutting the grass wouldn't fall into that category.

there was no warning of the need to wear a chest protector to prevent injuries like this one.[3] We would have to show that the motorcycle without such a warning is unreasonably dangerous. The good news about that test is that the cost of the warning would be negligible while the benefits might be very large. The disadvantage is that we would have to show that the warning would have made a difference. I don't think there would be a substantial difference between those jurisdictions that utilize a strict liability standard for design or warning defects and those that have shifted to something more like a negligence standard.

III. SC v. Jeremy

SC (or another defendant) could also claim that Jeremy was negligent. Jeremy would be held to the standard of a reasonably prudent person (although he is only 10, he is engaged in an adult activity and therefore his age would not be taken into account in establishing the standard of care). He drove the wrong direction on the track, and was traveling too fast to avoid a collision with Stephen.

IV. SC v. Fairchild Jr.

SC might claim that Fairchild Jr. was negligent in failing to prevent the injury. One argument would be that he shouldn't have brought SC along on the motorcycle ride, but that by itself would not be found negligent. Moreover, to the extent that Fairchild Jr. (or for that matter, Meador) failed to stop Jeremy or otherwise warn Stephen about the risk of collision, this would fall under the heading of "failure to rescue," and in order to find that Fairchild Jr. owed SC a duty of care, the court would have to find either that Fairchild Jr. (or Meador) had a special relationship to SC or that SC justifiably relied upon Fairchild Jr. (or Meador) to prevent the injury. I don't think either one could be established. Another theory is that Fairchild Jr. failed to train Jeremy or failed to use reasonable care to stop him when he took off counterclockwise. In order for a parent to be held liable for injuries caused by his child, the parent needs to have knowledge of a propensity for some kind of harm. It doesn't appear that this accident was the result of any propensity on Jeremy's part, but simply an unexpected collision. Even if Fairchild Jr. is assigned some fault I don't think it would be very much.

V. SC v. SC's Parents

A final claim that might be raised is that the negligence of one or both of SC's parents contributed to the accident. This claim would be relevant either as a way for SC to obtain compensation (for example, through insurance) or else as a way for one of the other defendants to assign fault and reduce their own liability. I don't think SC's father could be found at fault. Any error in judgment as far as SC would fall within the scope of parental immunity.

A better claim would be against Diane for failing to bring SC's chest protector. The argument would be that this was unrelated to her parental function (for which she has immunity), but I doubt that argument would prove persuasive.

VI. Contributory Fault

Even if SC could establish liability on the part of one or more defendants, there would certainly be a defense of contributory fault. One allegation would be that SC was *negligent* in operating his motorcycle, particularly without the chest protector. If this claim was raised by Yamaha, it would contradict their defense that a warning about a chest protector wasn't needed, but SC should anticipate this defense from FT. It's unclear what standard would be applied:

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3. That is, we are assuming that a chest protector would have been helpful in reducing the severity of the injury to Stephen. Some degree of injury might have occurred anyway (the brain damage might be unrelated to the lack of a chest protector), but Yamaha would be liable for the difference between what would have occurred if the product had been properly designed or contained adequate warning.

whether a reasonably prudent 8-year-old or that of a reasonably prudent person (since SC was engaged in an adult activity). In any event, the jury would be asked to assign a share of fault to SC. The good news is that Linden is a pure comparative fault jurisdiction; that is, no matter how much SC were found at fault, he could still recover, albeit reduced by his share of contributory fault.

A related defense would be that SC *assumed the risk* in riding the motorcycle. I don't think this would operate as an independent defense (the judge would probably rule that this was simply another form of contributory negligence), since an 8-year-old is not capable of legally surrendering his right to expect reasonable care, either from FT or from Yamaha.

VII. Joint and Several Liability

If more than one defendant is found to be at fault, Linden follows a complex rule that appears to apply several liability only to non-economic damages. That is, whatever the jury awarded in non-economic damages would be recoverable only to the extent of each defendant's proportionate share of the liability. With respect to economic damages, there is partial joint and several liability for defendants found to be more than 10% at fault. The amounts vary, but the bottom line is that a defendant found only partially at fault is likely to be liable only for that defendant's proportionate share. The only way to get something close to a full recovery is to show that a deep pocket defendant is more than 50% at fault.

VIII. Parents' Loss of Consortium

While most of the claims described above would be on behalf of SC,[4] it's possible that if SC succeeds in establishing liability, Diane and Stephen Sr. could bring claims against the same defendants for loss of consortium. Some states permit parents to sue for loss of consortium with their children, and Linden may be one of them. However, SC's negligence would be used to reduce any recovery they would be entitled to, and their own negligence as parents (or even assumption of risk) might be relevant in calculating the amount of damages they would be entitled to. The same rules for comparative fault would apply as described above.

IX. Statute of Limitations

Most states toll the statute of limitations until the plaintiff reaches the age of majority. That's 7 years from now. The parents's claim for loss of consortium will run on July 28, 2004 if Linden has a 3-year statute of limitations.

QUESTION 2

The facts for this question were based upon *Kirkland By and Through Kirkland v. State, Dept. of Health and Rehabilitative Services*, which dismissed an appeal from a partial summary judgment for the defendant.

I would prepare for a claim by Jean Kirkland ("JK") against the State of Linden ("L"), and possibly by the truck driver who struck her. The good news is that the statute waives sovereign immunity only to the extent of $100K per individual.

Sovereign Immunity Statute

4. Again, a guardian ad litem would be appointed to represent SC's separate interests, so the parents could advance their own.

A governmental entity such as L may only be held liable to the extent it has waived its immunity via statute. The Linden legislature passed a statute similar to the Federal Tort Claims Act, except that it makes no mention of retention of immunity for discretionary acts, and places a cap on damages of $100,000. Thus, even if JK proved her case, she could recover at most $100K (she can appeal to the legislature for a higher amount, but it would take an act of Congress, so to speak).

Despite the absence of a specific reservation of immunity for discretionary functions, I would argue that the state should be immune for the exercise of a discretionary or policymaking function. I would argue that the question of whether to have a "buddy pass" system was the exercise of a discretionary function, analogous to the choice to leave the weather buoy unrepaired in *Brown v. U.S.* I'm not sure how far this would get us, however, because it's not the existence of a "buddy pass" system, but rather the decision to issue one to a patient who is "in an agitated and disoriented state of mind."

Medical Malpractice

The substance of JK's claim would be that she was injured by medical malpractice at the hospital. She would say that Dr. Asner was negligent in giving her a "buddy pass" when she had suicidal inclinations. The first question is whether Asner even owed her a duty of care. After all, she ran out and got hit by a truck. He didn't injure her; he just failed to rescue her. However, it would be easily shown that by committing herself to the hospital, she justifiably relied upon L to provide her with competent medical care. If the medical care did not meet the standard, L could be found to have caused her suicide.

Medical malpractice cases are based on two distinct doctrines. The first is that the health care provider must offer the level of care that is expected for a physician of that particular specialty. In this case the specialty would be psychiatry. The plaintiff has to provide a qualified expert who can testify that Dr. Asner failed to meet the standard of care observed by psychiatrists in treating suicidal patients. I'm sure the plaintiff could find such an expert. We could respond with experts of our own, who would explain the difficulty of making such diagnoses (although she was reportedly in such a state, it's not clear whether Dr. Asner knew or had reason to know she was in such a state). It would be up to the jury to resolve the question.

A second medical malpractice doctrine is the need to obtain informed consent. JK might sue us based on the idea that before giving her this treatment (the "buddy pass" system), JK needed to be given the risks and then make an informed choice. If in fact she was not in her right mind, then she couldn't really consent.

Under either theory, there is a substantial risk that a jury would find that we were negligent.

Comparative Fault

We could allege that JK was herself negligent in throwing herself in front of the truck. She would argue that she could not be assigned any comparative fault, for the same reason that she could not consent to the treatment. If the jury agrees with her, she's not responsible for her conduct. On the other hand, if they found her comparatively at fault (for example, for failing to disclose her condition to Dr. Asner), then her recovery would be reduced by the percentage the jury assigned to JK. Linden has a pure comparative fault rule, so there is no limit to how much she could be assigned in terms of fault and still be entitled to recover whatever fault was assigned to L.

(I see no issues about other tortfeasors; all the defendants would be agents of the state and treated as a single defendant.)

Claim by the Truck Driver

It's possible the truck driver would file a claim for bystander injury. Arguably, as a result of L's negligence, the truck driver saw this woman throw herself in front of a truck and he or

she was traumatized. Linden probably follows a rule similar to the analysis in *Dillon v. Legg*, in which the court would decide whether or not to permit the case to go to a jury depending upon (1) presence at the accident scene (yes); (2) immediacy of the emotional impact (yes); and (3) relationship between the injured victim and the bystander (not a good fit here). If, for example, the truck driver spent a lot of time dealing with JK after the collision, that might make the case stronger. In any event, there is an upper limit to the recovery of $100K per claimant and $200K overall. Many jurisdictions also employ some standard limiting recovery to plaintiffs who exhibit "objective medical symptoms." We don't know if that would apply here.

Statute of Limitations

JK would have to file a claim before July 6, 2004, and would have to wait for a denial of the claim before suing the state, which has to be done by July 6, 2005.

Summer 2003 Final Exam Checklist

QUESTION 1

- ☐ **Overview**
- ☐ **Premises Liability** Claim
- ☐ What was SC's **status**
- ☐ **Invitee** requires **business purpose**
- ☐ Business purpose for **Fairchild Sr**.?
- ☐ Does SC qualify for **business** status?
- ☐ If an invitee, duty is **reasonable care**
- ☐ Was failure to cut grass **negligent**?
- ☐
- ☐ SC might be a **licensee**
- ☐ Licensees can only expect **warning**
- ☐ Was tall grass a **hidden peril**?
- ☐ No benefit from **attractive nuisance**
- ☐
- ☐ **Product liability** claim
- ☐ Liability based on proof of **defect**
- ☐ **Design** probably unexceptional
- ☐ **Warning claim** is a possibility
- ☐ Was bike w/o warning **unreas. dangerous?**
- ☐ Would warning have **made a difference**?
- ☐
- ☐ **Contributory fault**
- ☐ Was SC contributorily **negligent?**
- ☐ (**Standard** for 8-year-old?)
- ☐ **Pure** comparative fault in Linden
- ☐
- ☐
- ☐
- ☐

- ☐ **Assumption** of risk?
- ☐ Probably just **contributory negligence**
- ☐ Too young to **legally** assume risk
- ☐
- ☐ Claim v. **Jeremy**
- ☐ Standard for **10-year-old**
- ☐ Engaged in **adult** activity?
- ☐
- ☐ Claim v. **Fairchild** Jr./**Meador**
- ☐ Did either owe a **duty of care**
- ☐ Did invitation create **special relationship**?
- ☐ Did SC **justifiably rely** on FJr./Meador?

- ☐ Liability of **Parents**?
- ☐ Would parental **immunity** apply?
- ☐ D's forgetting protector **non-parental** function?
- ☐
- ☐ Comparative **Fault** issues
- ☐ Statute limits J&SL based on D's **%age** of fault
- ☐ Sliding scale for **economic** damages
- ☐ **Several** liability for **non-economic** damages
- ☐
- ☐ Parents' claim for loss of **consortium**
- ☐ **Reduced** by SC's or parents' negligence
- ☐
- ☐ Statute of **Limitations** (tolled for minor)
- ☐
- ☐

QUESTION 2

- ☐ **Overview**
- ☐ Claim v. **State**
- ☐
- ☐ **Sovereign immunity** statute
- ☐ Cap of **$100,000**
- ☐ Excess reported to **legislature**
- ☐ **Discretionary** function?
- ☐
- ☐ **Medical malpractice** claim
- ☐ **Duty** of care
- ☐ Claim for improper **diagnosis**
- ☐ Standard for **Psychiatrist**
- ☐ **Informed consent**
- ☐ What were the **risks** of "buddy pass"
- ☐ **Who** should have **consented**?

- ☐ JK's **contributory** negligence
- ☐ Was she **competent**?
- ☐ **Pure** comparative fault rule
- ☐
- ☐ Claim by **truck driver** for bystander?
- ☐ Analyze ***Dillon*** factors
- ☐
- ☐ **SOL**: Claim must be filed before 7/6/2004
- ☐
- ☐
- ☐
- ☐
- ☐
- ☐
- ☐

Exam # _____