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# FINAL EXAM SAMPLE ANSWER

## QUESTION 1

The facts for this case are a combination of *Sabich v. Outboard Marine Corp.*, 131 Cal.Rptr. 703 (1976), which upheld a judgment against the manufacturer, and *Mercer v. State*, 242 Cal.Rptr. 701 (1987), which upheld a dismissal based on sovereign immunity.

On behalf of Michael Jorgenson ("MJ") I would consider suing both the State of Evergreen as well as the manufacturer of the ATV. Even if liability could be established, I would need to consider comparative fault and multiple tortfeasor issues.

Suit v. State of Evergreen

MJ could allege that the State of Evergreen was negligent in failing to warn him about the dangers posed by the dunes. However, his claim would be subject to the principles of sovereign immunity as outlined in the statutes.

*Sovereign Immunity.* No state can be sued without its consent. THe state of Evergreen has waived its sovereign immunity in a way parallel to the Federal Tort Claims Act. That is, if a private person could be sued for the same conduct, the state permits itself to be held liable (§ 815.2), subject to certain exceptions. One of the important exceptions is § 831.2, which retains immunity for injuries "caused by a natural condition of any unimproved public property." It sounds like the sand dunes at Prism State Park are a natural condition, and therefore immunity appears to be retained. However, it is possible that the statute could be interpreted in such a way as to permit a recovery in this case based upon the argument that it wasn't the natural condition (alone) that caused the injury, but a failure to warn about the natural condition, or in setting up a "Vehicular Recreation Area" without providing any warning about the conditions that would be found there. It doesn't seem likely that such an interpretation would overcome the relatively clear text of the statute, but if so, (or if there is some other exception to the statutory immunity), let us examine the likelihood that liability could be imposed. Before doing so, it is worth noting that a typical reservation of immunity for discretionary functions (§ 820.2) wouldn't help the state; this doesn't appear to be a policymaking function.

*Premises Liability.* Since MJ was injured by a condition of the property, the case is governed by premises liability principles. The first step is to determine MJ's status. He appears to be a public invitee, since he is on public property pursuant to the purpose for which the public property is held open to the public. It's unclear whether any admission was being charged, but even if there is no charge for use of the ATV park, it would be similar to a patron's use of the public library. Even if, for some reason, MJ was considered a licensee rather than an invitee, he would still be owed a duty to be warned of hidden perils. He would claim that the steep drop-off was a hidden peril of which the owner was aware and failed to warn. If he is an invitee, the owner has a duty to use reasonable care to avoid injury to the visitor from the condition of the premises, and MJ could argue that a reasonable person would have posted a warning sign about the layout of the dunes.

Suit v. Outboard Marine

Even if the sovereign immunity statute barred a claim against the State of Evergreen, MJ might be able to recover from Outboard Marine ("OM"). They manufactured a product which caused him to be injured. Product liability applies when an injury is caused by a *defect* in the product, and it would be MJ's burden to establish that the Trackster was defective.

It doesn't appear that there was any *manufacturing* defect in the Trackster. It appears to have conformed to its design specifications. On the other hand, MJ might allege that the Trackster was defective in *design* or by way of *warning*.

To establish a design defect claim, MJ would have to show that a reasonable person would not have designed the Trackster to have its center of gravity forward. We have an expert (Moon) who appears ready to testify to that the Trackster contains a design that a reasonable person would not have used. If the jury finds his testimony credible, they can find that the design of the Trackster was unreasonably dangerous, and therefore defective. I don't believe there would be any effect in this case of the jurisdictional differences between strict liability and negligence, but it is possible that the incorporation of a consumer expectations test might bolster MJ's claim that the design was not one that a reasonable designer would have used.

On the other hand, there might be testimony that the advantages of putting the center of gravity forward provided benefits that outweighed the potential risks, and therefore the design, though dangerous, was not *unreasonably* dangerous. Thus, MJ might have more success arguing that the Trackster was defective because it lacked adequate *warnings*. In a manner similar to the analysis of the allegation of a design defect, the trier of fact would consider whether or not the warnings were inadequate, judged by what a reasonable person would have done in warning about the risks. It appears that there were quite a few warnings in the owner's manual and on the windshield, but the specific risk of tipping over may not have been clear enough. Still, the plaintiff would have the burden of showing that a different warning would have made a difference in MJ's behavior. It would be tough to show that it would have.

Contributory Fault

If MJ was at fault in causing his own injury, that will reduce his recovery. The defendant(s) would certainly argue that a reasonable person would not have been driving the Trackster at night on terrain with which MJ was apparently unfamiliar. The good news is that Evergreen uses a pure, rather than modified, approach to contributory negligence (§ 1430), and thus any finding of negligence on MJ's part would only reduce recovery to that extent. Moreover, the statutory definition of "fault" seems to include not only contributory negligence, but doctrines which "constituted a defense" under prior law. I would argue that this definition includes assumption of risk short of an affirmative preference of a risk. Since MJ didn't know of the particular risks that caused his injury, I doubt that he engaged in any assumption of risk that would bar his recovery.

Multiple Tortfeasors

If MJ were able to establish liability against one or the other of the defendants, we would need to consider the effect of multiple tortfeasors in this jurisdiction. It appears that Evergreen has adopted joint liability for economic damages (§ 1431) but several liability for non-economic damages (§ 1431.2). Thus, if it should turn out that, for example, both Evergreen and OM were found to be liable for MJ's injuries, each would be liable for his economic losses (medical expense and wage loss) but only severally liable for is non-economic damages (pain and suffering).

Miscellaneous

The facts don't mention a spouse, but if MJ has a spouse she might be eligible for loss of consortium damages.

The statute of limitations will run in April 2005 if there is a 3-year statute; it has already run if Evergreen has a 2-year statute for either of these claims.

I would also be concerned about a statute of repose applying to the product liability claim, since the product had been in use for 21 years at the time the injury occurred. If Evergreen places a "useful safe life" on the product and it turns out to be less than 21 years, that would bar recovery.

QUESTION 2

The facts for this question are based on *R.F. v. Greenblott,* 190 Cal.Rptr. 84 (1983), which reversed the dismissal of the plaintiffs' claims, finding a cause of action for wrongful birth and wrongful life.

I would be concerned about medical malpractice and wrongful birth/life claims brought by Sherrie Mead ("SM") and on behalf of James Mead ("JM"). I'm assuming from the facts that JM became pregnant through contact (to put it mildly) with another patient at Linden Care and Guidance Center ("LCGC").[1]

Medical Malpractice

As mental health facility, LCGC would be subject to potential liability as a health care provider. Similar to the obligations that a physician owes to a patient, LCGC has a duty to provide care that meets the standards of similar health care providers. The facts don't describe exactly what kind of facility LCGC is, but it would be similar to a hospital. SM and JM would have to provide expert testimony concerning the standard of care. They would undoubtedly find an expert who could establish that the procedures LCGC used to segregate and/or supervise the patients did not meet the standard of care for similarly situated facilities.

In a related way, an expert could undoubtedly be found who would testify that the standard of care was not met in LCGC's failure to detect SM's pregnancy until shortly before she delivered. It is unknown exactly what damages to attribute to the late detection of pregnancy, but it certainly adds to the appearance of incompetence.

LCGC would like to blame all of the errors on the doctors (who are lkely toe independent contractors, rather than employees of LCGC), but even if the doctors were incompetent, this will not absolve LCGC of responsibility, since LCGC would have had some responsibility to hire good ones. Moreover, some of the day-to-day responsibilities were undoubtedly in the hands of LCGC staff rather than the doctors themselves.

Even if we could persuade the jury that there were good reasons for permitting patients to have contact with other patients, including the risk of sexual contact, it might be a violation of the principle of *informed consent*, which is another avenue of medical malpractice. It is unclear who was making decisions for SM, but a patient (or the patient's representative) has the right to be given a choice with respect to medical treatment. If SM was subjected to the risks of an environment in which she could get pregnant, and she was not given options (either a more secure environment or birth control), then we could be held to have violated her right to informed consent and could be found liable for her damages. Even if SM wasn't capable of providing consent on her own behalf, whoever was acting in her place (presumably Ferrigan) should have been presented with the material risks and alternative treatment options for the care she was receiving.

SM will undoubtedly blame LCGC for the failure to discover SM's pregnancy. As noted above, it is unclear exactly whose responsibility it was to examine SM on a regular basis and thereby to detect her pregnancy. We would certainly want to blame Slade and Diebel for the fact that no one detected her pregnancy until two weeks before delivery, but in turn they might blame us for some responsibility that LCGC had in monitoring SM on a day-to-day basis.

Finally, there would be touchy policy issues surrounding the claim that SM was deprived of the opportunity to obtain an abortion. Some jurisdictions would consider the "damages" from deprivation of such an option to be incapable of measurement, or contrary to public policy to

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1. The facts don't exclude the possibility that she became pregnant through contact with the staff at LCGC, but that is unlikely; even if that occurred, the rest of the analysis with respect to malpractice would apply; there would be additional complications arising from the intentional tort committed by the staff member.

award. But SM wouldn't need to rely on this angle; I would expect more emphasis to be placed on preventing SM from becoming pregnant in the first place. But if for some reason we dodged the bullet with respect to how she got pregnant in the first place, we still might face liability for failing to give her options in a timely way.

Contributory Fault

Before discussing damages, it is worthwhile identifying the role of SM's own decisionmaking. Ordinarily a plaintiff can have her damages reduced if she fails to exercise reasonable care for her own safety. Here SM presumably engaged voluntarily in sexual intercourse, but because of her disability she was arguably incompetent to make such a choice. It also seems probable that she was aware of being pregnant, and her failure to receive proper treatment (or other options for dealing with her pregnancy) is at least in part a result of her own lack of reasonable care. On the other hand, this strategy might backfire. Moreover, I would hesitate to argue assumption of risk, particularly given the incorporation of assumption of risk into the general statute (§ 1430), which makes all contributory fault simply a damage-reducing factor. Even under the best of circumstances we would only achieve a reduction in damages, and at worst we might enhance the damages by appearing to blame the victim.

Contribution from Other Defendants and Settlement

The doctors in this case (Greenblott/Slade/Diebel) appear to be culpable as well. They failed to prescribe a more safe environment (at least, that's what we hope the evidence will show), and they (rather than us) should be primarily responsible for figuring out what she needs. In addition, she apparently was not prescribed any kind of contraceptive device(s), and that could either be negligent or a violation of informed consent, as described above. In Evergreen the jury would assign shares of comparative fault to LCGC and the three doctors, and we would hope that they would assign the lion's share of fault to them, rather than to us. The liability for economic damages is joint (each defendant is liable in full), whereas the liability for non-economic damages is several (each defendant is only liable for its percentage share).

With respect to the economic damages, we are entitled to contribution from our fellow tortfeasors if we are compelled to pay more than our pro rata share, but that right is extinguished if a co-defendant settles with the plaintiff. Evergreen follows the "dollar method" for settlement, which allows defendants to be released from any liability for contribution by making a "good faith" settlement with the plaintiff. If the doctors made a cheap settlement with the plaintiff that was found to be in "good faith," we could get stuck paying the balance (and thus more than our fair share) of economic damages without recourse to seeking contribution.

Damages

This case is complicated by the fact that the injury consists of a pregnancy and birth. Obviously the pregnancy involves sexual contact, and given her disorder, that was something that shouldn't have happened to her, and may lead to recoverable damages, particularly it exacerbated her mental condition, or worse yet, resulted in transmission of a communicable disease. But the potentially largest amount of damage arises from the *wrongful birth* and *wrongful life* claims.

*Wrongful Birth/Life*. When a defendant's negligence results in the birth of a child who, but for the negligence of the defendant, would not have been born, such cases are referred to as "wrongful birth" or "wrongful life" claims. Jurisdictions are divided over whether to permit wrongful birth damages where a child is born healthy; many permit a parent to recover the costs of raising the child (including pain and suffering), reduced by any *offsetting benefit* provided by the child.

When a child is born with a disability (and in this case we don't know whether the illness that makes SM "gravely disabled" is something that would be passed on genetically), then most jurisdictions would permit recovery of damages for wrongful birth, and some would permit recovery of "wrongful life" damages. Typically wrongful life damages are limited to the economic

costs for the child's impairment, but exclude any non-economic damages based on the incompetence of a court in comparing life with non-life.

Miscellaneous

The statute of limitations does not appear to be a factor in this case. While the child was apparently conceived more than two years ago (and some jurisdictions have only a 2-year statute of limitations), it seems doubtful that the cause of action was ripe (certainly for the claims involving the failure to provide adequate prenatal care and options) until some time after August 2002. I don't think we would succeed in raising the statute of limitations, but we should certainly explore this further.

Summer 2004 Final Exam Checklist

## QUESTION 1

- ☐ **Overview**
- ☐ Claim v. **State** of Evergreen
- ☐ Sovereign **Immunity**
- ☐ **General** Waiver
- ☐ No issue of **discretionary** function
- ☐ Immune: **natural** cond. on unimpr. prop.
- ☐ Was **rec. vehicle** park "**natural**"?
- ☐
- ☐ **Premises Liability** Claim
- ☐ MJ a public **invitee**
- ☐ **Invitee** owed a duty of **reasonable care**
- ☐ MJ might be a **licensee**
- ☐ Licensee must be warned of **hidden** perils
- ☐ **"drop-off"** known to State, not to MJ
- ☐
- ☐ **Product liability** claim
- ☐ Liability based on proof of **defect**
- ☐ No evidence of a **manufacturing** defect
- ☐ **Design** seems to have enhanced the risk
- ☐ Would reasonable designer **accept** risk?
- ☐ Was **warning** inadequate?
- ☐ Would warning have **made a difference**?
- ☐ **Contributory fault**
- ☐ Was MJ contributorily **negligent?**
- ☐ **Pure** comparative fault in Linden
- ☐ **Assumption** of risk?
- ☐ **§ 1430** seems to include AoR as "fault"
- ☐ No **bar** to recovery is likely
- ☐
- ☐ Multiple **Tortfeasor** issues
- ☐ § 1431: joint liability for **economic damages**
- ☐ **Several** liability for **non-economic** damages
- ☐ State (if immune) not assigned a share of fault
- ☐
- ☐ Loss of **consortium**/**bystander**
- ☐ Statute of **Limitations**: okay if 3 yrs or more
- ☐ Statute of **Repose** for ATV?
- ☐ **Useful safe** life < 21 years?
- ☐
- ☐
- ☐
- ☐

## QUESTION 2

- ☐ **Overview**
- ☐ Claim brought by **Sherrie**
- ☐
- ☐ **Medical malpractice** claim
- ☐ **Duty** of care
- ☐ Failure to meet **standard of care**
- ☐ **Expert testimony** regarding standard
- ☐ Better **segregation**/supervision?
- ☐
- ☐ Informed **consent** to risky environment?
- ☐ Should **Ferrigan** have been consulted?
- ☐
- ☐ Better **pregnancy detection**
- ☐ Claim v. **Slade/Diebel**
- ☐ Policy question re **abortion** remedy
- ☐
- ☐ **Contributory** fault?
- ☐ Assumption of **Risk** not applicable
- ☐ §1430: Contrib. fault can't **bar**
- ☐
- ☐
- ☐ **Damages**
- ☐ Damages from **sexual contact**
- ☐
- ☐ Wrongful **Birth** issues
- ☐ Was JM **healthy**?
- ☐ (Was SM's disability **inherited**?)
- ☐ If JM healthy, jurisdictions **split**
- ☐
- ☐ If JM **disabled**, recovery for W. **Birth**
- ☐ Also, JM could claim wrongful **life**
- ☐ Damages reduced by **offsetting benefits**
- ☐ No recovery for **non-econ** damgs re Wr Life
- ☐
- ☐ Joint liability for **economic harm**
- ☐ Several liability for **non-economic** harm
- ☐ Availability of contribution from **MDs**
- ☐ What is **their share** of fault?
- ☐ Watch for **settlement** reduction by **$** amount
- ☐ Statute of **Limitations**
- ☐
- ☐

Exam # _____