

FINAL EXAM SAMPLE ANSWER

Multiple Choice:

QUESTION 1. (a) is incorrect; it is the intent to do the act that is required; an intent to do harm is not required; also, assault consists of apprehension, not harmful contact; (b) is incorrect; the doctrine of transferred intent makes the intent toward Bill "transferrable" to the cyclist; (c) is incorrect, because it is not whether the cyclist genuinely experienced pain; it is whether or not the contact by Jim is one that a reasonable would be one that a reasonable person would find harmful or offensive. (d) is therefore *correct*.

QUESTION 2. (a) is *correct*; (b) is incorrect, because only the tort of outrage requires severe emotional distress; (c) is incorrect, because an intent to cause harm is not required; (d) is incorrect, because there is no minimum length of confinement.

QUESTION 1

This case is based on *Lubecki v. City of New York*, 304 A.D.2d 224, 758 N.Y.S.2d 610 (2003), in which a judgment in favor of the plaintiff was remanded by the Appellate Division in order to determine whether the defendant could limit its liability to its percentage share of the non-economic damages.

The State of Linden faces liability based on the negligent handling of the armed robbery. We need to consider defenses of sovereign immunity and allocation of fault to the robber.

Sovereign Immunity

Since this is a claim against the State of Linden, it can only be held liable to the extent that it has waived sovereign immunity by statute. Under LRC § 2808, the state agrees to be held liable to the same extent as a private entity would under the same circumstances, subject to the limitations in § 2812. In § 2812 the state reserves its immunity from claims arising from errors or omissions "in the performance of a discretionary function." In addition, the case will be tried to a judge rather than a jury. LRC § 2812(3).

Duty of Care. Since this is a case where the state was responding to a criminal attack, the first question is whether the state owed a duty of care to protect the victim. That argument might have some application if the robber had killed the hostage, but since it was the actions of the police officers that killed the hostage, it is no longer a "sin of omission," but rather a "sin of commission." Therefore, the argument that the officers didn't owe her a duty would fail.

Discretionary Function. Since the officers at the scene were exercising judgment about when to fire their weapons, we would argue that their conduct fell within the exemption from liability for the "performance of a discretionary function." However, that typically involves policymaking. Assuming that Linden follows the same distinction as the federal courts in applying the Federal Tort Claims Act, it appears in this case that the officers already had a policy in place, and they simply didn't follow it. If there is a failure to use reasonable care in *implementing* a policy, as distinguished from *making* a policy, then the discretionary function is unlikely to apply.

Negligence

The officers didn't mean to kill Ms. Vargas, but they did so. If the judge who hears the case finds that the officers acted negligently, then the state would be held liable. Since even our own expert concedes that our officers did not follow the established procedure, our chances of avoiding a finding of negligence seem slim.

Joint and Several Liability

Even if the state is held liable we may seek to take advantage of the statute on joint and several liability. In Linden there appears to be only several liability for non-economic damages, if the defendant is found to be no more than 50% at fault. Obviously in this case the primary responsibility for the hostage crisis was the robber. Although he didn't actually kill the hostage, his criminal behavior created the hostage crisis in the first place and his firing at the officers triggered the fatal barrage of bullets. We could argue that he was primarily responsible for the fatal injury, and that the State's share of liability was modest, certainly no more than 50%. If we are successful, the state's liability for non-economic damages (the bulk of the damage award) would be limited to the State's percentage share.

There are some exceptions to this rule. First, if the plaintiff is unable to obtain jurisdiction over the robber, LRC § 1601(1), then the limitation does not apply. But in this case there should be no difficulty in obtaining such jurisdiction. A second exception is where the defendant (in this case the State) acted with "reckless disregard" of the plaintiff's safety. LRC § 1602(7). Vargas' estate would certainly argue that the conduct of the officers was reckless. But since they were firing back after being fired upon (although admittedly this was in violation of their policy), their conduct seems at worst negligent, not reckless.

As to economic damages, there is no explicit mention of them in the statutes we are given. On the other hand, where non-economic damages are distinguished from economic damages, legislatures are usually more inclined to impose joint and several liability for economic damages. Therefore, it seems logical to assume that economic damages would be subject to joint liability. Thus, even if the robber is found 80% at fault, the State would still have to pay the entire amount of the economic damages (\$800K).

QUESTION 2

The facts for this question were based upon *Sheridan v. State*, 17 Misc.3d 1105(A), 851 N.Y.S.2d 61, 2007 WL 2822540 (N.Y.Ct.Cl. 2007), in which the court denied the defendants' motion for summary judgment.

Sheridan's ability to recover depends on the resolution of several issues: (1) sovereign immunity; (2) premises liability; (3) contributory negligence.

1. Sovereign Immunity

I am assuming that the "Linden State University" is in fact a state university and is part of the state government. Because this is a suit against the State of Linden, rather than the individual employees of the university (see § 2812(6)), we must consider whether it is subject to the defense of sovereign immunity. Linden's waiver of sovereign immunity is quite broad; it holds the state to the

same standard as a private person or corporation would be held. The only exception to this is the retention of sovereign immunity for a "discretionary function." The state might argue that its decisions about how to maintain the laundry room was an exercise of discretion (e.g., how to avoid water from forming on the floor), but assuming that this state uses the same "policymaking" standard as the Federal Tort Claims Act in interpreting what is a discretionary function, then it seems doubtful that any of the decisions that are being challenged here would rise to the level of "policymaking."

Another feature of the sovereign immunity statute is that the case would be tried to a judge rather than a jury.

2. Premises Liability

Since Sheridan was injured by a condition of the defendant's premises, the duty of care that is owed to her is based upon her status on the defendant's property. Since she was a student at a state university, she would be either a business invitee (since she presumably paid tuition to attend) or else a public invitee (since she was there pursuant to the purpose for which the premises were held open to the public). As such she would be owed a duty of reasonable care in the maintenance of the premises.

Apparently we have an expert will testify that the use of the silverware holder caused the problem. That would help (but not determine) the question of whether or not the defendant was negligent. It would still be for the judge to decide whether or not the school's handling of the water problem was reasonable or not.

3. Contributory Fault

There are two versions of what happened in the laundry room, but in either case it seems very likely that Sheridan will be assigned a share of comparative fault. The good side would be that the judge would believe Sheridan, and not Battaglia; the latter claims that Sheridan was warned about the water and didn't pay attention. If the judge believes Sheridan, then the only "warning" that Sheridan got was the yellow sign, and she slipped soon after she entered the room. It is hard to evaluate which side the judge would believe, and how much comparative fault would be assigned to Sheridan in comparison to the university. The good news is that Linden has a pure comparative fault rule, and no matter how much at fault she is found to be, she can still recover the remaining percentage from the defendant.

If the university tried to argue assumption of risk as a separate defense, it wouldn't have any impact on the recovery. For one thing, Sheridan never voluntarily encountered a known risk -- at least, this is not the kind of case where the plaintiff voluntarily relieves the defendant of the duty to exercise voluntary care. Also, even if the judge were to find that Sheridan assumed the risk of injury, there is a statute that merges assumption of risk with ordinary contributory negligence. LRC § 1411.

4. Miscellaneous

I suppose one could imagine a product liability claim against the manufacturer of the silverware holder, but since the product was not designed to be used as a lint trap, it seems implausible to think that they could be considered defective. Similarly, to argue that the washing machine was defective because it produced lint, which in turn produced a clogged drain, which in turn caused a slip and fall, seems like a flirtation with Rule 11.

Spring 2008 Final Exam Checklist

MC Score _____

QUESTION 1

- | | |
|--|--|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Economic distinguished from N/E damages |
| <input type="checkbox"/> | <input type="checkbox"/> Presumably full liability for economic |
| <input type="checkbox"/> Sovereign immunity | <input type="checkbox"/> N/E damages may be limited to %age share |
| <input type="checkbox"/> State's waiver of immunity is broad | <input type="checkbox"/> Only if state's damages are not >50% |
| <input type="checkbox"/> Retention of discretionary function | <input type="checkbox"/> Only if robber can be sued |
| <input type="checkbox"/> Was it a policymaking function? | <input type="checkbox"/> (That shouldn't be a problem here) |
| <input type="checkbox"/> Appears to be more implementation | |
| <input type="checkbox"/> Our expert seems to concede negligence | <input type="checkbox"/> N/A if state acted w/ " reckless disregard " |
| <input type="checkbox"/> | <input type="checkbox"/> Would judge find officers' conduct reckless? |
| <input type="checkbox"/> Joint and Several Liability | <input type="checkbox"/> How would judge allocate fault? |
| <input type="checkbox"/> Would Robber be considered jointly liable? | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |
| | <input type="checkbox"/> |

QUESTION 2

- | | |
|--|--|
| <input type="checkbox"/> | <input type="checkbox"/> Contributory negligence? |
| <input type="checkbox"/> Sovereign immunity | <input type="checkbox"/> Linden has pure comparative fault rule |
| <input type="checkbox"/> State's waiver of immunity is broad | <input type="checkbox"/> Would judge believe Battaglia or Sheridan ? |
| <input type="checkbox"/> Discretionary function exemption | <input type="checkbox"/> How would judge assess relative fault |
| <input type="checkbox"/> Is " policymaking " the DF standard? | <input type="checkbox"/> Assumption of risk -- same as CN |
| <input type="checkbox"/> Laundry maintenance wouldn't qualify | <input type="checkbox"/> Recovery reduced by %age of fault |
| | <input type="checkbox"/> |
| <input type="checkbox"/> Premises Liability rules apply | <input type="checkbox"/> No plausible product liability claim |
| <input type="checkbox"/> Sheridan's status is that of an invitee | <input type="checkbox"/> Product not designed for use as drain filter |
| <input type="checkbox"/> Linden owed duty of reasonable care | <input type="checkbox"/> |
| <input type="checkbox"/> Our expert thinks employees were negligent | <input type="checkbox"/> |
| <input type="checkbox"/> Judge decides: were procedures reasonable? | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |

Exam # _____