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FINAL EXAM SAMPLE ANSWER

MULTIPLE CHOICE

1. (A) is incorrect, because of the doctrine of transferred intent. (B) is incorrect, because Susan could still suffer damage to her dignity. (C) is incorrect, because it is the intent to do the act that matters; whether or not one is aware of the risk to another person is irrelevant. (D) is therefore the correct answer.

2. (A) is correct, because Sam did indeed subject them to confinement, and if they suffered damage they might have a claim. (B) is incorrect, because physical harm is not required in order for false imprisonment to be actionable. (C) is incorrect, because it applies to persons suspected of shoplifting, and that isn't the case here. (D) is incorrect; it is the standard for civil rights violations.

3. (A) is incorrect, because being a public figure is not a requirement to recover for defamation; (B) is wrong for a similar reason; (C) is correct, because truth is a defense to defamation; (D) is incorrect because a private person doesn't need to show actual malice.

(4) (A) is incorrect, because there is nothing in the facts that suggests that Sam's use of steroids would be newsworthy or a matter of public concern; (B) is incorrect because truth is not a defense to public disclosure of private facts; (C) is correct, because the wrongful access to information is a basis for the tort; (D) is incorrect because no malice need be shown for the tort of privacy.

QUESTION 1

> The facts for this question were based on *Davila v. Bodelson*, 103 N.M. 243, 704 P.2d 1119 (1985), in which the jury returned a verdict for both the doctors and the drug manufacturer, and the appellate court affirmed.

I would consider two types of claims on behalf of Malynda and Laramie (M&L): (1) Malpractice claim(s) against the doctors (Mackel and Bodelson) and (2) a product liability claim against Parke, Davis (PD).

1. Malpractice Claims

In order to establish liability in a malpractice case, the plaintiff must show either (1) the doctor breached the standard of care for that type of procedure or (2) the doctor failed to obtain the patient's informed consent.

1. *Professional Negligence*. A doctor (or other health care provider)'s breach of the standard of care must be shown by qualified expert testimony. Malynda has an expert, Dr. Nygel, but the facts state that he practices in the neighboring state of Evergreen. Unless Dr. Nygel can show that he is familiar with the standard of care in Linden, his testimony may be excluded. Assuming his testimony is admissible, it will likely be met with testimony on behalf of the defendants showing that their treatment of M&L was not negligent, and that Laramie's problems were an unavoidable complication or resulted from causes other than medical care. It will be a jury question, and many malpractice claims end with a defense verdict.

2. *Lack of informed consent*. Alternatively, M&L could argue that she didn't consent to this procedure. Presumably the hospital had Malynda sign some kind of consent form, but she could

argue that she was not given sufficient information about the risks of a Pitocin-induced delivery and alternatives to make Malynda's consent informed. Informed consent requires an explanation of the material risks, along with a disclosure of alternative treatments. M&L could claim that they didn't get a complete explanation, and therefore didn't give truly informed consent. This isn't a very strong argument, but it may supplement the negligence claim.

2. Product Liability Claim v. PD

A product manufacturer is liable for injuries caused by a defect in a product that they placed in the stream of commerce. Dr. Nygel believes that Pitocin is defective in that it doesn't contain adequate warnings concerning the risks to the baby when it is used to stimulate uterine contractions.[1] The facts do not suggest a manufacturing defect or a design defect, but according to Dr. Nygel the drug isn't sold with adequate warnings.

In order to succeed on a failure to warn case, we would in effect have to show that a reasonable person would have enhanced the warnings concerning the risk to the baby from Pitocin.[2] Moreover, we have to show that the doctor, with a better warning, would have behaved differently. That may be a difficult burden to sustain. Like the medical malpractice case, this will be a question for the jury.

Comparative Fault Issues

To begin with, there is no evidence of any contributory fault on the part of the mother, and certainly none on behalf of the baby. Although there are multiple tortfeasors, and ordinarily that would raise questions about the application of joint and several liability, I don't think they would be particularly important here. Neither doctor (or, for that matter, the hospital at which the birth

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1. An issue we didn't discuss in class, but which would be relevant in the real world, is the *learned intermediary doctrine*. Pursuant to this doctrine, a manufacturer of prescription drugs is not required to warn the patient directly, but only the doctor who prescribes the drug, on the theory that the doctor, not the patient, is most qualified to determine whether the risks posed by the drug outweigh its benefits. In turn, the doctor is subject to the requirement of informed consent, so that material risks must be disclosed by the doctor to the patient. The only effect of the learned intermediary doctrine is to alleviate the burden of the manufacturer to warn the patient *directly* (this rule is subject to exceptions, such as the use of birth control pills, where the patient may decide to use the drug--or refill the prescription--without meaningful consultation with a physician. For a general discussion, see *Perez v. Wyeth Laboratories, Inc*., _____

2. There is really no advantage to be gained from arguing strict liability, since there is no new information about the risk of the product since the time it was administered to the patient. In the case of drugs like DES, where there we now know about risks that were unknown at the time of manufacture and sale, there is an important policy question about whether to apply this after-acquired knowledge to judge that the product was defective, even though the manufacturer may not have been negligent in selling it. Some jurisdictions, like California (*Brown v. Superior Court*), have rejected the strict liability standard for prescription drugs, but that controversy is irrelevant to this discussion, since the same question -- how would a reasonable person warn about the risks of using Pitocin -- will be asked regardless of whether it is styled as "strict liability" or a true negligence test.

occurred, if there should be any claim against the hospital) would have any difficulty paying for the damages that would be awarded.

Statute of Limitations

It has been a while since the incident occurred, and perhaps there are statute of limitations issues. However, since the bulk of the damages will be claimed by Laramie, most jurisdictions toll the statute of limitations during until a child reaches majority.

QUESTION 2

The facts of this case were drawn from Davis v. Board of County Com'rs of Dona Ana County, 127 N.M. 785, 987 P.2d 1172 (1999), in which the court reversed summary judgment for the county and remanded for trial on whether the county's negligence caused her injury.

My analysis of the State's exposure would depend upon the following: (1) whether the state owed a duty of care to Davis; (2) whether the claim is covered by sovereign immunity; and (3) how the relative fault of the multiple tortfeasors will be allocated.

1. Duty of Care

We might argue that the state did not owe a duty of care to Davis. After all, the state had no interaction with Davis, knew nothing about her, and didn't actually perpetrate the harm. Unless a defendant owes a duty of care to someone to avoid injury, there is no basis for a negligence claim. This is made explicit in the Tort Claims Act (more fully discussed below): "Liability for acts or omissions under the Tort Claims Act shall be based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty." (LSA 41-4-2(B)). However, I don't think this is a winning argument because Davis can argue that by giving a glowing recommendation of Herrera we actually created a risk of injury. It would be one thing if MVH asked for a recommendation and LSDC remained silent. Then we could argue that we failed to intervene for her safety, and deny that we owed her such a duty. But Davis will like succeed in showing that it was not an omission, but rather an *act* of the state that led to Herrera being hired Davis being assaulted. Even so, Davis would still need to show that, but for the glowing recommendation, she would not have been injured, but she might do that in two ways: either by showing that Herrera would not have been hired but for the recommendation (MV Hospital would probably be eager to claim that, if they had known about Herrera's past they never would have hired him), or at the very least that if they had not been assured of his good conduct they would have reacted more swiftly to signs that Herrera was a problem.

2. Sovereign Immunity

Waiver? In addition to showing that the state owed Davis a duty of care, she would also have to establish that the tort fell within the waiver of sovereign immunity contained in the statute.

The State of Linden has a narrow waiver of sovereign immunity; it retains such immunity except where it is waived. (LSA § 41-4-4(A)) The only waiver provision that seems to be applicable is § 41-4-9, which waives immunity for the operation of a "hospital, infirmary, mental institution . . . or like facilities." Davis would have to show that the Linden State Detention Center is a "like facility." To the extent that it houses inmates with "special needs," which might include medical treatment, it could be argued that LSDC is in fact a "like facility." However, if Davis fails to show that there is a waiver of immunity, she will have no claim.

Damage Caps. There is another feature of the statute that is important. LSA § 41-4-19 sets a cap on damages. A maximum of $300,000 can be recovered for past and future medical expenses, and a total of $400,000 for any other type of damage. Thus, the maximum that Davis could recover would be $400,000 plus the total of the past and future medical expenses up to $300,000.

3. Multiple Tortfeasors

The harm to Davis was caused not only by the negligence of LSDC, but also primarily by Herrera himself and perhaps by the negligence of Moose Valley Hospital. Linden follows a rule that generally applies several liability only, meaning that each defendant is only required to pay the percentage share of the damages assessed by the jury. Thus, to the extent that LSDC was assigned only a %age of the total fault causing Davis' damages, there would be a significant limit on what LSDC would be required to pay. The statute establishing several liability does contain an exception in which joint and several liability would apply (§ 41-3A-1(C)(4): "situations not covered by any of the foregoing and having a sound basis in public policy." I don't think that would apply to our situation, but it makes me a little nervous.

I don't think there could be any claim of contributory negligence on the part of Davis. Although she might have complained or otherwise protected herself from Herrera, she was a patient in a psychiatric facility and to blame her for Herrera's exploitation of her vulnerability would probably do us more harm than good. In any event, it would only have the effect of reducing the recovery (not barring it, even if Davis were found to be more than 50% at fault), and the plaintiff's negligence does not appear to have any effect on the imposition of joint and several liability.

4. Statute of Limitations

The facts state that Davis has already filed suit against the State of Linden. I'm assuming it was timely filed, but there may be problems for her, particularly if there are procedural requirements (as is common) unique to filing a suit against the State.

Spring 2009 Torts Final Checklist

QUESTION 1

☐ **Overview**
☐ **Malpractice** Claims
☐ Negligent **Procedure**
☐ Would Dr. **Nygel** be qualified?
☐ What does the **state** require?
☐ Did **Mackel** fail to meet standard?
☐ Is Bodelson held to **expert** standard?
☐ Did **Bodelson** fail to meet standard?
☐ Defendants will have **own experts**
☐ Question is for **jury**
☐
☐ Lack of **informed consent**
☐ Was Malynda informed of **risks** of Pitocin?
☐ Were **alternatives** presented?
☐ Was there a **written consent** form?
☐
☐

☐ **Product** Liability v. Parke, Davis
☐ Was product **defective**?
☐ No **mfg**. or **design** defect
☐ Failure to **warn** theory
☐ Warning is **defective** if reasonable person would have given more extensive warning about risks
☐ Would doctor have acted **differently**?
☐
☐ No **contributory** fault
☐ Linden follows **several** liability,
☐ As long as everybody has **sufficient insurance**, not an issue
☐ Statute of **Limitations?**
☐
☐
☐

QUESTION 2

☐ **Overview**
☐ **Duty** of Care
☐ No negligence unless duty of care **owed**
☐ **Statutory** affirmation of "traditional" duties
☐ Here LSDC actually **contributed** to injury
☐ **Glowing** report, not just failure to disclose
☐ But-for **causation** shouldn't be hard
☐
☐ **Sovereign immunity**
☐ **Narrowly** drawn: immunity if not waived
☐ only applicable waiver is **"medical facilities**"
☐ Was LSDC a **"like facility**"?
☐
☐
☐
☐

☐ No Q that Steele was acting in **course & scope**
☐ Damage **caps**
☐ **$400,000** minimum
☐ $300,000 max. for past/future **med. expenses**
☐
☐ **Multiple** tortfeasors
☐ Linden has **several** liability
☐ Except cases with a "**sound basis** in public policy"
☐ Can't think of any here, but who knows
☐ **Moose Valley** has a share
☐ **Herrera** certain has the lion's share of fault
☐ LSDC should argue for a **small %age** of fault.
☐ Statute of **Limitations?**
☐
☐
☐
☐

Exam # _____