Professor DeWolf Fall 2015
Torts December 19, 2015

FINAL -- SAMPLE ANSWER

Multiple Choice

1. (a) is incorrect, because it assumes a fact that may not be present; (b) is incorrect, because even a harm to one's dignity is compensable; (c) is incorrect, because intention goes to the act committed, not the intent to commit harm; **(d) is the best** answer.

2. (a) is incorrect, because false imprisonment requires intent rather than merely reckless conduct; (b) is incorrect, because there need not be actual physical harm if the imprisonment is against the plaintiff's will; **(c) is correct**; (d) is incorrect, because if the plaintiff is unaware of a reasonable means of escape, the plaintiff is under no duty to exercise it.

3. (a) is incorrect, because assault requires the apprehension of imminent harmful or offensive contact; (b) is incorrect, for the same reason; **(c) is correct**; (d) is incorrect, because if he experienced fear of harmful or offensive contact he could recover.

4. **(a) is the best** answer, because it points to her distress being caused by Casey's conduct; (b) is incorrect, because even if a reasonable person (or Miller herself) experienced severe emotional distress, unless Casey caused it (rather than the underlying trauma) Casey isn't liable; (c) is incorrect, because reckless conduct may satisfy the standard; (d) is incorrect because even factually accurate comments may constitute outrageous conduct if the other elements of the tort are met.

QUESTION 1

The facts for this case were (loosely) derived from *Clouse v. State*, 199 Ariz. 196, 16 P.3d 757 (2001), which held that the sovereign immunity statute's requirement that harm be proved by gross negligence was constitutional.

There are three major issues in this case which will determine whether Mr. Claus can recover damages:

(1) Is his claim one that is permitted under the statutory waiver of sovereign immunity?
(2) Did the state owe him a duty to protect him from harm?
(3) Would the claim be affected by Linden's comparative fault statute?

I. The Sovereign Immunity Statute

Each state is free to set its own standards with regard to sovereign immunity. It may waive it generally or only with respect to specific types of actions.

Linden has chosen to structure its sovereign immunity according to two major exceptions: first, it applies absolute immunity to the exercise of discretion regarding a fundamental governmental policy, which includes the setting of budgets. LRS § 12-820.01(A)(2) The second category is qualified immunity, which applies to our situation, which is "The failure to make an arrest or the failure to retain an arrested person in custody." LRS § 12-820.02(A)(1). Although the state permits claims of this type, it requires that the employee acting within the scope of employment either intended to cause injury or was grossly negligent. Our case would certainly not qualify as the former, but it might be argued that the failure to secure an arrest was grossly negligent.

Most states have some kind of "discretionary function" exemption, but in our state this exemption is written quite narrowly. It wouldn't apply to absolutely bar the claim (as it did in the case of the lobster fishermen whose widows sued the U.S. Weather Service). Instead, it only applies to "fundamental governmental policy." Moreover, by listing this kind of case as subject to the "qualified immunity" standard, an argument for discretionary function exemption would fail.

II. Did the State owe Mr. Claus a duty?

The second issue is whether or not the state owed Mr. Claus a duty. After all, the state didn't kill his wife or burn down his house – Mr. Van Horn did so. The worst that can be said about the State is that they failed to prevent this from occurring. Did they have a duty to do so? Ordinarily there is no duty to prevent harm to another, but a duty may arise under two circumstances: first, the defendant may have a "special relationship" with either the perpetrator or the victim. Second, the victim may justifiably rely upon the defendant to exercise care on his or her behalf. In this case Mr. Claus would argue that the state had a "special relationship" with Van Horn, because they had taken him into custody, but had negligently failed to secure an arrest warrant. Particularly in light of the fact that Van Horn was arrested in part because of his attempting to kill another person by running him over with a truck, Mr. Claus would argue that the Statute acquired a duty to use reasonable care in securing Van Horn.

Another indicator of the fact that the State would owe a duty is the fact that the failure to arrest or retain an arrested person in custody is identified as a basis of liability for the state – although gross negligence has to be proven. Assuming, however, that Mr. Claus succeeded in proving gross negligence, it seems unlikely that we could defend by saying we didn't owe him a duty.

III. Comparative Fault

As noted above, the state in this case merely failed to secure the arrest of Van Horn; Van Horn is the one who actually caused Mr. Claus' injury. If the State could succeed in having a jury (or a judge) assign comparative fault to Van Horn, it would significantly reduce the damages that the state would have to pay. Linden has a rule for comparative fault that imposes only "several liability." That is, unlike the traditional common law approach (and one used in many jurisdictions), the defendants are not held jointly and severally liable for the total of the plaintiff's recoverable damages, but instead each defendant is only liable for its proportionate share of the liability as determined by the finder of fact (judge or jury). That is, if the jury finds Defendant A 70% at fault and Defendant B 30% at fault, Defendant A would be liable for 70% of the plaintiff's damages, and Defendant B for 30% of those damages. Linden has a narrow exception from this rule of several liability, which applies when the defendants act in concert, or one is an employee or agent of the other.[1] There is no likelihood that Van Horn would be considered an agent of the state, or acting in concert with it, so the rule of several liability would apply.

Nonetheless, it is unclear whether or not the state and Van Horn would be considered "joint tortfeasors." In order to apply the rules of comparative fault, Van Horn's conduct would have to be considered "fault," which is defined in § 12-2506(F)(2) as including "negligence in all of its degrees." Mr. Claus would certainly argue that Van Horn was not negligent – he was acting maliciously and

[1] There is also an exception for liability arising under the federal employers' liability act, but that has no application here.

intentionally, and thus there is no basis for comparing the state's fault. On the other hand, to the extent the state is found grossly negligent, and if Van Horn was suffering from some mental disease that made him less responsible in causing the harm, there might be an argument.

There is a "redetermination" provision to the statute that allows shares of fault to be reallocated, but it only applies where there is joint and several liability. If we succeed in having Van Horn treated as a "joint tortfeasor," there would be no redetermination, because the liability would be several rather than joint.

QUESTION 2

The facts of this case were drawn from *Piper v. Bear Medical Systems, Inc.*, 180 Ariz. 170, 883 P.2d 407 (Ariz. App. 1993), which affirmed a judgment against the manufacturer of the Bear 2.

There are numerous issues that would need to be addressed in evaluating Mr. Piper's potential for tort compensation. He would have a claim against the hospital because of the negligence of the employees, as well as a claim against Stamina, the manufacturer of the respirator. In addition, there would be questions about how a comparative fault assessment would be made.

Medical Negligence Claim against Our Lady of Diversity Hospital

The nurse who accidentally knocked off the expiratory arm of the ventilator, and the nurse who tried to help her reassemble the expiratory arm, appear to have been negligent. To prove a medical negligence case, the plaintiff must provide expert testimony as to the standard of care expected of the particular type of medical provider, and an expert opinion that the standard of care was not met. Further, the plaintiff must have an expert testify that the failure to follow the standard of care resulted in injury to the patient.

In this case it would seem pretty easy to get a nurse who was qualified in this particular area (it sounds like it might be critical care, or respiratory therapy) to testify that it is not within the standard of care to accidentally knock of the expiratory arm. Moreover, even if that kind of accident could happen without negligence, this particular injury appears to be the result of the failure to follow the proper procedure when the expiratory arm gets disconnected – as the facts state, it is "proper procedure" to disconnect the patient and provide other types of assistance for breathing. It is likely that the hospital would have their own expert(s) testifying that a nurse exercising reasonable care could still have an accident like this occur.

There might be an additional claim against the hospital for its failure to provide a respiratory therapist on duty who could assist with the reassembly of the ventilator. Again, we would have to provide expert testimony as to the standard of care, and testimony that it was breached. The hospital would likely provide expert testimony to contradict our experts, for example, by showing that it is common practice for the expiratory arm to get removed, and that the reason it couldn't be properly reassembled was because of the problems with the product itself. In other words, the hospital might try to blame the product for being so difficult to work with.

Product Liability Claim against Stamina[2]

The second claim would be against the manufacturer of the ventilator. To succeed in a product liability claim, Mr. Piper would have to prove that the product was defective. The easiest approach is to show that there was a manufacturing defect, which means that the ventilator in this case was anomalous compared to other ventilators – for example, if the reason the expiratory arm got knocked off was because of some manufacturing flaw in the machine. That seems doubtful, but it would provide a clear path to liability, because a manufacturer is strictly liable for injuries resulting from a manufacturing defect.

The more likely claim(s) would be based on either (or both) a *design defect* claim or a *warning defect*. A design is defective if it is unreasonably dangerous. In essence, it is a design that a reasonably prudent person wouldn't use, because the risks outweigh the benefit of using that design. Much controversy has arisen concerning whether design defects should be judged by a true negligence test or a form of strict liability. If strict liability is applied, it would allow the plaintiff to take advantage of knowledge we now have about the product that wasn't available at the time the product was designed. In other words, even if the manufacturer wasn't negligent in using the design based on what was known (or reasonably could have been known) at the time, if in hindsight we would judge the design to be unreasonably dangerous, then a strict liability rule would permit imposing liability even if the product manufacturer wasn't actually negligent. On the other hand, if a true negligence test is used, only what was known (or should have been known) at the time of design can be used in judging whether the manufacturer was negligent in using that design.[3]

Applied to this case, the design defect claim would allege that including the universal adapter defeated the "idiot-proofing" of the one-way check valve. By designing the one-way check valve, Stamina recognized the danger of events like this one, and engineered a solution to them, but then reintroduced the danger by including the universal adapter. If a reasonable person would have done something different, then a jury might find that the design of the Bear2 was unreasonably dangerous.

The second theory that could be asserted is that the ventilator was defective because it had inadequate warnings. The advantage of a warning claim compared to a design defect claim is that warnings are relatively inexpensive, compared with redesigning the product. Again, the question is whether a reasonable person would have enhanced the warnings that accompany the product to minimize the chance that accidents like this would happen. Even if we found an expert who would testify to the need for more effective warnings, we would likely be faced with opposing experts who would challenge the need or efficacy of enhanced warnings.

Comparative Fault

Comparative fault would become an issue if either defendant turned out to be unable to pay its fair share. There is no contributory negligence in this case, and no basis for alleging assumption of risk, so there is no potential for reducing the judgment by any fault on the part of the plaintiff.

If for some reason either the hospital was insolvent (unlikely) or Stamina became insolvent (again, possible but unlikely), then Mr. Piper would be limited to collecting the percentage share

[2] The fact pattern refers to "Bear" but also refers to "Stamina" as the manufacturer. I will refer to "Stamina" as the manufacturer, even though the facts refer to "Bear."

[3] Courts have been particularly solicitous of manufacturers of medical products (such as pharmaceuticals) because of the public benefit from encouraging new products. Thus, it is more likely that a negligence test would be applied to this product compared to, say, a lawnmower.

assigned by the jury. Pursuant to LRS § 12-2506(D), the liability is several only (with certain exceptions that don't apply here). Thus, in the event that Stamina was assigned a large percentage of fault, and turned out to be insolvent, Mr. Piper would be limited to collecting the percentage of damages corresponding to the percentage of fault assigned to the hospital.

There is a provision in the statute for "redetermining" the shares of the tortfeasors if one is insolvent. However, there are several reasons this provision wouldn't apply: first, it only applies to defendants who are jointly and severally liable. Second, it only affects the tortfeasors among themselves; there is no provision (as there is in some statutes like the Uniform Comparative Fault Act) for increasing the percentage of fault assigned to the plaintiff. Finally, even if the statute were interpreted to provide for redetermining the plaintiff's share of fault, since the plaintiff in this case would not be found to be at fault, redetermination wouldn't affect Mr. Piper's right to recover.

MC Score _____ CHECKLIST

QUESTION 1

- ☐ **Overview**
- ☐ **Sovereign Immunity** statute
- ☐ **Absolute** immunity
- ☐ Not applicable here
- ☐ **Qualified** immunity
- ☐ Requires proof of **gross negligence**
- ☐
- ☐ Did State **owe** Claus **a duty**?
- ☐ Was there a **special relationship**?
- ☐ Only with **perpetrator**
- ☐ No **justifiable reliance**
- ☐
- ☐ **Discretionary function** very limited
- ☐ Must be **fundamental governmental policy**
- ☐
- ☐ Application of **comparative fault**
- ☐ LRS has **several liability**
- ☐ Would Van Horn be a **joint tortfeasor**?
- ☐ Did Van Horn commit **"fault"?**
- ☐
- ☐
- ☐

QUESTION 2

- ☐ **Overview**
- ☐ **Medical Malpractice** claim v. hospital
- ☐ Need for **expert testimony**
- ☐ What is the **standard of care** for nurses?
- ☐ Hospital would have its **own witnesses**
- ☐ Absence of **respiratory therapist?**
- ☐ Hospital **blames** Stamina
- ☐
- ☐ Claim v. **Stamina**
- ☐ Plaintiff has to prove **defect**
- ☐ **Manufacturing** defect?
- ☐ If MD, **strict liability** would apply
- ☐
- ☐ **Design** defect
- ☐ Would **20-20 hindsight** be admissible
- ☐ Was Bear 2 **unreasonably dangerous?**
- ☐ **Warning** defect claim
- ☐ **Less expensive** v. alternative design
- ☐
- ☐ **Comparative Fault**
- ☐ No **contributory** negligence
- ☐ Relevant if one defendant is **insolvent**
- ☐ Linden uses **several liability**
- ☐ Piper could be limited to **hospital's share**
- ☐
- ☐
- ☐
- ☐

Exam # _____