

FINAL EXAM: SAMPLE ANSWER

QUESTION 1

On Monica's behalf I would suggest a lawsuit against the plane manufacturer and against Lee. I would hesitate to accept the settlement, for reasons explained below.

The Plane Manufacturer ("ACM"). Monica would be entitled to recover damages from ACM if she could show that the plane had a defect. It is unclear from the facts whether there was a manufacturing defect or a design defect. It states that the loss of power to the engine "shouldn't have happened." If that means that it was unusual for this to occur, it may reflect that something was wrong with this particular plane; in other words, there was a *manufacturing* or *construction* defect. In cases of a construction or manufacturing defect, most courts apply strict liability, that is, Monica would not have to prove negligence. In the alternative, Monica could argue that the plane's fuel mechanism was designed in such a way that it would stall when given a sudden burst of the throttle. That would seem to be an undesirable feature of an airplane. Jurisdictions differ on whether design defects should be judged by a negligence or strict liability standard. In both cases Monica would have to show that the costs of building a safer plane would be less than the risk posed by the existing design. The difference between them is whether or not the plaintiff can use information acquired since the plane was designed. For example, if new risks or problems with the engine were discovered in retrospect that could not have been known at the time, then a strict liability standard would work to Monica's advantage.

The Claim v. Lee. There appears to be a strong liability case against Lee, particularly in view of the insurance company's willingness to settle. However, because the damages that Monica would recover are considerably above \$50,000, recovering just from Lee would be inadequate.

Sovereign Immunity. There would be no claim against the State or the City of Junction, since in this jurisdiction sovereign immunity has been retained in its entirety, both for the state (Constitution, § 20) and for its political subdivisions (§ 21-9-301).

Comparative Fault and Settlement. Under the statute, a plaintiff is entitled to joint and several liability against any defendant (§ 16-61-203). However, if the plaintiff settles with one tortfeasor (e.g. Lee), that tortfeasor's liability for contribution to other co-defendants is not discharged unless the plaintiff agrees to give up a pro rata (equal) share of the claim against the other tortfeasor (§ 16-61-205). Thus, if Lee is to obtain a release from any liability to ACM (the only condition under which he is likely to settle), Monica would have to agree to give up a ½ share of the claim against ACM. This would be highly disadvantageous, since if a judgment were entered against both defendants at trial, Monica could recover the entire amount from ACM (§ 16-61-203).

Assumption of Risk. Monica doesn't appear to have done anything in this case that was negligent, nor does she appear to have assumed the risk of injury. If Lee had been an inexperienced pilot, and it were otherwise dangerous to travel with him, that would be one thing; but here it appears to be a relatively normal thing to do. Thus, the risk of injury was not one that Monica would be said to have assumed. Nor would there be any assumption of risk defense vis-à-vis ACM.

QUESTION 2

Hopkins would face suits from two parties: from Bill and from Frances. He might try to bring in the maker of the boat.

Bill's Claim

Bill would first have to establish that Hopkins owed him a duty of care. One avenue would be through premises liability. An owner (or occupier) of land owes a duty of care to those who are on the land, depending upon their status.¹ If Bill were an invitee (one who serves a business interest of the owner), he would be owed a duty of reasonable care; Hopkins would have to use reasonable care to avoid injury to Bill. Bill would need to show that he served some business interest of Hopkins, rather than just being a social guest. Since all the other guests were business invitees of Hopkins, Hopkins might be said to have benefitted from the good will of a recent buyer of his property.

The question is, what is reasonable care by Hopkins? Should he have provided a lifeguard to supervise if he allowed someone in the pool? Perhaps. If a jury decides that a reasonable person would have either forbidden swimming, or else provided supervision, then Hopkins might be found negligent, and liable for Bill's injuries.²

Frances' Responsibility. Frances was primarily responsible for watching Bill when she came into the pool area, but she is immune from suit if she is being sued in her parental capacity. That would appear to be the case here.

The Boat Manufacturer. It is possible that the boat lacked an adequate warning of the potential for this kind of accident. Most jurisdictions use a negligence standard to evaluate whether or not the product is defective without a warning. If a reasonable person would have provided a warning on the boat that would alert the purchaser or user to this risk, then the boat manufacturer would also be liable for the injury. Although this might be considered an unusual use of the boat, it would certainly be foreseeable, and therefore the manufacturer would have a duty to use reasonable care in warning about potential risks.

Comparative Fault Issues. Bill might be subject to the defense of contributory negligence for using the boat in this way. However, as a ten-year-old, it is unlikely that his conduct would be considered negligent. Unless a reasonably prudent ten-year-old would know of such risks, he would not be negligent. He might be negligent for swimming alone, but that's more of a claim against his mother. If the jury found his negligence to be equal to or exceed the negligence of the defendant(s),

1. If this were a jurisdiction like California that has replaced the status classifications with "reasonable care under all the circumstances," the court would apply a standard of reasonable care in view of the circumstances—which would include the status of the visitor as a primary determinant of what would be reasonable care.

2. If Bill were found not to be on the premises pursuant to a business interest of Hopkins, he would be considered a "bare licensee," one who is owed the duty to be warned of dangers known to the owner but unknown to the visitor. Since in this case the danger appears to be one that no one was aware of, Bill would probably lose if he were found to be a licensee.

he would be barred from recovery (§ 16-64-122(b)(2)). Otherwise, Bill's recovery would just be reduced in proportion to his fault.

Claims for Contribution. Any defendant found liable is subject to liability for all of the plaintiff's damages, but if any party pays in excess of his pro rata share, he may seek contribution from other defendants. Thus, if Hopkins and the boat manufacturer were both found liable, the jury would be asked to determine their relative degree of fault, but only if there is such a disproportion that would make an equal distribution inequitable. In other words, the jury could find that both were equally at fault; or the jury might find that it was necessary to assign a 20% share to one defendant and an 80% share to another.

Alternate Duty of Care Analysis. Bill might also claim that, independent of premises liability, Hopkins owed a duty of care. It's difficult to make this argument work; unless Bill somehow justifiably relied upon Hopkins to watch out for him, then Hopkins would owe no duty except as a result of having invited him onto the land.

Frances' Claims

Frances might also claim damages for witnessing the injury to her son. She was probably traumatized by giving life-saving aid to her son, and being unsuccessful. She would meet the criteria set up in *Dillon v. Legg* for an award of damages for emotional injuries suffered by a bystander: (1) she is closely related to the victim; (2) she was at the accident scene; and (3) her emotional trauma was substantial. However, Frances' failure to supervise her own son might cause a substantial reduction, if not elimination, of any liability faced by Hopkins. Although she is immune from suit by Bill, she might have her own negligence used against her when she claims for her *own* injuries. As noted earlier, the statute provides that a plaintiff whose negligence is equal to or greater than that of a defendant is barred from recovery.

QUESTION 3

Reynolds would want to sue both Peterson and Smith. In a medical malpractice case the plaintiff has to establish by expert testimony that the physician failed to use the care that a reasonably prudent physician of the same specialty would use in those circumstances. In this case Rosabeth would need expert testimony by an OB/GYN familiar with practicing in Peterson's type of circumstances. It wouldn't seem difficult to find a physician who would testify that in a case like this Reynolds (or perhaps her parents) should have been told about the problem, since there would be no guarantee that she would consult her medical records before getting pregnant. One issue would be whether or not the statute of limitations had run on Peterson, since more than ten years elapsed from the time of his treatment.

A second potential target would be Dr. Smith. He didn't read her medical records, which would seem very important. Again, expert testimony would be needed to determine whether or not this fell below the standard of care. It would seem likely that it does. (However, maybe Smith would reasonably assume that anything important would have been told to the patient and not buried in the medical records.) Obviously there would be no statute of limitations problem vis-à-vis Dr. Smith.

Damages. It's unclear in this case what would have happened if Rosabeth had gotten accurate medical advice. Perhaps she could have received treatment that would have allowed her to eliminate the risk of birth defects. If so, she (and her child) would sue for the difference between healthy existence and the problems the child is experiencing. On the other hand, perhaps the defects were unavoidable. In that case, Rosabeth might testify that she would have chosen not to have children at all. In that case she would file a wrongful birth claim. The burden of establishing negligence would be the same, but the measure of damages would be different. Most jurisdictions recognize that in the case of a severely handicapped child, the parents are entitled to an award of damages reflecting the difficulties of raising such a child. They often measure the damages as the difference between raising a normal, healthy child and raising a child with birth defects. Some courts have even allowed a recovery by the child on the basis of so-called "wrongful life." In such cases the child is able to recover for the costs of living after the parents are no longer obligated to provide support. No general damages or pain and suffering are awarded in such cases, and some jurisdictions have rejected any kind of wrongful life recovery. However, the chances of a recovery for wrongful birth in this case appear quite good, and the damages would be quite substantial.

Some jurisdictions have also placed a statutory cap on pain and suffering awards for medical malpractice; however, the economic damages here would still be quite large. In addition, some courts have held that caps on damages are unconstitutional.

QUESTION 1

- Plane Mfr.
- Need to show Defect
- Manufacturing Defect
- Description of Mfg./Construction Defect
- Design Defect
- Alternative of SL / Negligence
- Benefit of SL
- Warning Defect?
- Claim v. Lee
- Problems with Collectibility
- Sovereign Immunity
- Joint and Several Liability
- Problems with Settlement
- No contributory negligence/AOR

QUESTION 2

- Claim by Bill
- Where's the Duty of Care?
- Premises Liability Categories
- Does this Jurisdiction Use Status?
- Did Bill provide a business benefit?
- Right to Contribution from co-defendants
- Equal shares unless disproportionate
- Contributory negligence not strong
- Frances' Claims
- Dillon criteria
- Effect of contributory negligence
- What would constitute reasonable care?
- Mom's Responsibility
- Parental Immunity
- Boat Manufacturer
- Lack of adequate Warning
- Joint and several liability

QUESTION 3

- Definition of medical malpractice claims
- Claim v. Peterson
- Failure to tell Reynolds or her parents
- Statute of Limitations issue?
- Claim v. Smith
- Would he need to check the records?
- Measure of Damages
- Possibly a straight p/i case
- Wrongful Birth Damages
- Wrongful Life Claim
- Cap on non-economic Damages?