

SAMPLE ANSWER TO FINAL EXAM

QUESTION 1

[This case is based upon *Lucas v. R.G. McKelvey Building Co., et al.*, 1992 WL 219182 (Mo. App. 1992)). The defendant screen manufacturer had obtained summary judgment of dismissal, but the Supreme Court declined to affirm, requiring a more completely developed record.]

In this case I would consider claims against two major defendants—the screen manufacturer (and related distributors of the screen); and the contractor who installed the screens. In response, I would anticipate defenses based upon contributory negligence and statutes of limitation and/or repose. Finally, the interaction of the multiple defendants would be important.

1. *The Claim v. the Manufacturer.* The claim against the manufacturer would allege that the screen was defective in one or more of the following respects: (a) it was not strong enough to restrain a child (*i.e.*, it had a design defect); or (b) it lacked a warning of the danger of falling out.

a. *Design Defect.* A product manufacturer is liable for injuries that arise from a defect in the product. Whether or not a product contains a design defect is determined by whether or not it is unreasonably dangerous. In most cases this is the same question as whether or not the manufacturer was negligent in designing the product; if a reasonable manufacturer would have added features to the product to prevent the kind of injury that took place, then the failure of the product to contain those features renders it defective.¹ We could allege that a reasonably designed screen would be more likely to prevent objects from falling out. If we could find an expert who could explain how a better designed screen would function, then we could get the case to the jury.

b. *Warning Defect.* A product manufacturer is also liable if the failure to provide adequate warning renders the product unreasonably dangerous. In this case we would suggest that the product should have contained the kind of warning that was present on the Pencco screen. We would still face the problem of showing that a better warning would have made a difference; unless someone testifies that Courtland would not have fallen out if a warning had been provided, we will fail the proximate cause test.

2. *The Claim v. the Contractor.* We would also investigate to see whether we could successfully allege that the contractor negligently installed the screen. The evidence points to the installation of a screen that was too small for the window. The contractor is under a duty to use reasonable care in installation, and failure to do so would be considered negligence. However, we

¹The primary distinction between product liability and ordinary negligence principles is that some jurisdictions allow the plaintiff to take advantage of knowledge of product risks obtained since the time of manufacture. For example, if information is currently available about the risk of children falling through screen windows, that would be admissible in a strict liability case, whereas in a negligence case the manufacturer would be judged by the information that was reasonably available at the time the product was designed and sold. Since this accident was caused by a screen manufactured almost 20 years ago, it is possible (though unlikely) that use of today's standards for screen design would be more favorable than use of the standards of 20 years ago. In that event it would be important to know whether this jurisdiction uses strict liability rather than a negligence standard. Otherwise, the standard would be the same.

should be on guard that the jurisdiction may have adopted a *statute of repose* that would protect a contractor from claims based on improvement of real property. Many jurisdictions require that the claim arise within a time period (typically six years) commencing when work is complete. It's been eight years, so we might be in trouble. As a further consideration, some jurisdictions *toll* the statute of limitations during the period of time that a plaintiff is not legally competent, such as being a minor. That might help us here. Also, some jurisdictions consider such limitations unconstitutional.

3. *Defenses.* The defendants would assert that Courtland was contributorily negligent. The standard is what a reasonably prudent child would do under the same or similar circumstances. Since we don't know Courtland's age, it's hard to tell whether he could be assigned any fault, or how significant it would be. Fortunately, this jurisdiction recognizes *pure comparative fault*, meaning that any finding of fault on Courtland's fault would reduce, but not bar, recovery. Another defense that the defendants would raise is negligent supervision by David. Most jurisdictions recognize immunity for a parent who is acting in a parental role; that would probably happen here. But conceivably David could still be assigned a share of fault that would lower the percentage assigned to the defendants we are trying to collect from.

4. *Joint Tortfeasors.* This jurisdiction has partial joint and several liability; any defendant can be held liable for the plaintiff's full economic damages, but unless the defendant is found more than 50% at fault the plaintiff can only recover the defendant's percentage share of non-economic damages.

QUESTION 2

[This question is based upon *Rodriguez v. City of New York*, 1993 WL 87938. In that case the New York Supreme Court decided that a jury verdict of over \$2,000,000 against the City was excessive in view of the substantial recovery of the plaintiff from his gunshot wounds (although he lost a kidney and parts of his spleen and colon, he was basically okay, according to the court).]

This case raises a number of disparate issues:

- (1) Can the plaintiff establish a wrongful act on the part of the state?
- (2) Does sovereign immunity apply?
- (3) Would the statute of limitations apply?
- (4) Are any contributory fault / multiple tortfeasor issues implicated?

1. *Did the State Breach a Duty?* First, it is unclear in this case who exactly shot the plaintiff. One theory could arise from a finding that Flores shot Rodriguez. If that is the case, then the theory against the State would be that they failed to use reasonable care to prevent the shooting from occurring. It would probably involve establishing a "duty to rescue"² on the part of the police. In order for such a duty to attach, the plaintiff needs to show that the plaintiff justifiably relied upon the defendant to use reasonable care. That might be difficult in this case.

²It's possible that the plaintiff could also claim that the State actually created the risk by engaging in the gunfight in the first place. That would eliminate the need to show justifiable reliance.

A second theory would be based upon the assumption that it was actually a police bullet that struck the plaintiff. If the jury found that to be the case, they could find the State liable for negligence. In either case, the ability to recover from the State is qualified by the statute waiving sovereign immunity.

2. *Sovereign Immunity Issues.* At common law governmental entities were immune from liability. In this jurisdiction (as in most others) the state has waived immunity subject to various limitations. First, there appears to be a special Court of Claims that tries all such cases, and there is usually a single judge who hears the evidence. § 12(3). Also, there is no liability for performing a discretionary function (§ 12(5)). I'd like to know if there are any police policies that prescribe conduct in cases like this. If the policies were followed, we would assert that any claim for negligence would conflict with the discretionary function restriction.

3. *Statute of Limitations.* The statute prescribes that in order to file a claim against the state, the plaintiff must file a "written notice" of an intent to file such a claim within 90 days of the time the claim accrues against the state (§10(3)). Then the claim must actually be filed within 2 years. However, there is a savings clause that allows the court, in its discretion, to permit a plaintiff who fails to meet this standard to file within the time set for similar actions against a private person.

4. *Contributory Fault / Joint Tortfeasor Issues.* Plaintiff apparently walked across the street in a middle of a gun battle. We would assert that he was contributorily negligent in doing so. In this jurisdiction contributory fault reduces, but does not bar, the damages awardable to the plaintiff. The reduction is proportional to the plaintiff's fault. Also, we would want to assert that Flores was a joint tortfeasor in causing the injury, and that any liability would have to be divided with him. Since this jurisdiction only permits the recovery of a percentage of non-economic damages (unless the defendant is found more than 50% at fault), then we could substantially reduce our liability by having a jury find that Flores was more than 50% at fault in causing the injuries.

CHECKLIST, Spring 93, Final

QUESTION 1

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|--|---|
| <input type="checkbox"/> Statute of Limit's | <input type="checkbox"/> Case against Contractor |
| <input type="checkbox"/> Infancy may toll | <input type="checkbox"/> Was proper screen installed? |
| <input type="checkbox"/> Screen Manufacturer | <input type="checkbox"/> What about statute of repose? |
| <input type="checkbox"/> Relationship of Distributors | <input type="checkbox"/> Tolling for infant? |
| <input type="checkbox"/> Product Liability Generally | <input type="checkbox"/> Constitutionality of limit? |
| <input type="checkbox"/> Defective / Unreasonably Dangerous | <input type="checkbox"/> Contributory Negligence |
| <input type="checkbox"/> Manufacturing Defect? | <input type="checkbox"/> Reasonably Prudent child |
| <input type="checkbox"/> Design Defects | <input type="checkbox"/> Pure comparative negligence |
| <input type="checkbox"/> Warning Defect | <input type="checkbox"/> Claim against Dad |
| <input type="checkbox"/> Standard for Design/Warning Defects | <input type="checkbox"/> Parental Immunity |
| <input type="checkbox"/> SL / Neg. the same | <input type="checkbox"/> Effect of Joint Tortfeasor Rules |
| <input type="checkbox"/> Would warning have made a difference? | <input type="checkbox"/> > 50% / economic damages |

QUESTION 2

- | | |
|---|---|
| <input type="checkbox"/> Liability Issues | <input type="checkbox"/> Was claim timely filed? |
| <input type="checkbox"/> Who shot him? | <input type="checkbox"/> Was it intentional tort or negligence? |
| <input type="checkbox"/> Liability if crook shot him | <input type="checkbox"/> If untimely, would 2-year statute apply? |
| <input type="checkbox"/> Duty to Rescue? | <input type="checkbox"/> Factors under statute |
| <input type="checkbox"/> Justifiable Reliance | <input type="checkbox"/> Contributory fault |
| <input type="checkbox"/> Liability if employee shot him | <input type="checkbox"/> Multiple tortfeasor issues |
| <input type="checkbox"/> Sovereign Immunity | <input type="checkbox"/> Judge, not jury will decide |
| <input type="checkbox"/> Statute provides liability for neg. acts | <input type="checkbox"/> Economic v. Non-econ. damages |
| <input type="checkbox"/> Were police policies observed? | |
| <input type="checkbox"/> Relevance of Flores' conduct | |
| <input type="checkbox"/> Discretionary function? | |