TORTS II PROFESSOR DEWOLF
SPRING 1994 May 17, 1994

SAMPLE ANSWER TO FINAL EXAM

QUESTION 1

[This case is based upon *Mathis v. Cleveland Public Library*, 459 N.E.2d 877 (1984), in which the court reversed a dismissal of the public library, but affirmed summary judgment against the seller of the van.]

In preparation for settlement discussions, the following issues need to be analyzed: (1) What liability theories are available against DOE? (2) Can the plaintiff be found partially at fault? (3) What additional defendants may share responsibility for the injury? and (4) What is the effect of a finding of joint liability by the DOE and other tortfeasors?

I. Liability claims v. DOE

A. Preliminary Issues

Cory will allege that DOE acted negligently in failing to provide a safe environment as he exited the bookmobile. As a preliminary matter, it might be questioned whether or not (1) DOE owed a duty of care to Cory; and (2) whether or not the claim against DOE is limited by the doctrine of sovereign immunity.

1. Duty of Care. DOE didn't actually injure Cory, but it is likely that Cory's lawyer will allege that DOE negligently failed to prevent the injury because there should have been more effective safety precautions to protect bookmobile patrons as they exited the bookmobile. An actor owes a duty to exercise reasonable care if the actor has increased the risk of injury to the plaintiff, or if the actor has induced justifiable reliance upon the actor to use reasonable care to protect the plaintiff's safety. In this case, DOE will likely be found to have increased the risk to patrons like Cory because the bookmobile drew them to a busy roadway and thus made it more likely that they would be injured. In the alternative, Cory could argue that he justifiably relied upon the DOE to insure that he could enter and exit the bookmobile safely.

2. Sovereign Immunity. The state of Grace has adopted an omnibus waiver of sovereign immunity in the form of the "Grace Tort Claims Act." Section 50-21-23 makes the state liable for conduct that would make a private party liable, subject to certain limitations. The only conceivable limitations are the exercise of a discretionary function (§ 50-21-24(2)), the claim-filing requirement (§ 50-21-26(a)), and the damage limitation (§ 50-21-29) (limiting claims to $1 million). Otherwise, the claim follows the same rules as would apply in any other suit. Significantly (unlike the Federal Tort Claims Act), the case is tried to a jury.

a. Time Limitations. The statute requires that before suit is filed, notice of the claim must be filed with the state. The statute requires that a claim be filed with the Risk

Management Division within 12 months of the time the injury occurred, but for claims arising between 1/1/91 and 7/1/92 the period runs until 7/1/93. Thus, unless the plaintiff submitted a claim to the Risk Management Division prior to July 1, 1993, the claim is barred (§ 50-21-26(a)(3)). Assuming the claim was timely filed, however, then an action can be brought as late as July 1, 1994 (§ 50-21-27(b)).

b. Discretionary Function. Depending upon what Cory alleges in the way of negligence, DOE might argue that it is immune based upon the discretionary function exemption. Section 50-21-24(2) exempts the state from liability for "performance of or the failure to exercise or perform a discretionary function or duty." Courts interpreting the discretionary function exemption as applied to the federal government have distinguished between the "operational" role (which is not exempt) and the "policymaking role," which is exempt. Perhaps the decision not to fit the bookmobile with signs was a conscious policy decision; if so, it might be entitled to immunity. On the other hand, it is likely that it was simply an oversight. Similarly, the decision to park on a busy area, or the failure to provide someone who would escort the children from the bookmobile would not be policymaking decisions and would enjoy no immunity.

c. Damage Limitations. Cory is limited to a maximum of $1 million from the state (he may recover more damages via claims against other parties).

B. Theories of Liability

Cory might argue this case as a premises liability issue, or he may allege that DOE was negligent in its failure to provide adequate specifications for the bookmobile to prevent accidents like this. There is no significant difference between the two theories. Cory would be considered a public invitee[1] on the premises of the DOE, and therefore would be owed a duty of reasonable care. The question that would be posed to the jury is whether or not a reasonable person in the position of the DOE would have done more to prevent injuries of this type. Another angle of approach would be to allege that it was negligent to park the bookmobile in a busy area, or that it was negligent not to provide someone who would escort children in and out of the bookmobile. Again, the standard would be whether reasonable care was exercised.

II. Contributory negligence

DOE might assert the affirmative defense of contributory negligence. However, most jurisdictions do not hold a child negligent if they are below the age of 7. Since Cory was six at the time of the injury, he is likely not to have a finding of contributory negligence. There is no provision in the statute provided that addresses whether this state has a pure or modified comparative fault formula. However, as discussed below, the formula for dealing with comparative negligence may address part of this issue.

III. Additional defendants

---

[1]A public invitee is a person who is using a public building for purposes analogous to those of a private party who conducts business.

DOE may seek to limit its liability by filing third-party complaints against other defendants (if the plaintiff has not already named them). Before discussing the effect of a comparative fault finding, it is important first to identify the theories that are likely to be pursued against these defendants.

A. Perry

Perry was driving above the speed limit. This could be found negligent. While the facts indicate that Cory jumped out so fast he didn't have time to stop, the speed may have enhanced an injury that might otherwise have been less serious. Thus, the jury may assign a percentage of fault to Perry and to other defendants.

B. Gohred Motor Company

A product manufacturer is liable to a person injured from the use of the product if there is a defect in the product. The defect may be in the form of a manufacturing defect (bad specifications) or a design defect (inadequate specifications). A product is defective in design if a reasonable person would have made the product safer. [Jurisdictions differ on whether knowledge obtained after the time of manufacture is admissible to prove that the design was defective.] The facts do not indicate any defect in the way the bookmobile was designed or manufactured, at least in the form in which it was purchased by Morrison. Presumably the van was used for a wide variety of other purposes besides as a bookmobile. Thus, the thing that made the vehicle dangerous (lack of warning signs, lights, etc.) would not render the vehicle defective in design.

C. Morrison

Morrison had the opportunity, and arguably the duty, based upon its knowledge of the use to which the vehicle would be put, to provide warning lights, signs or other safety features that would have reduced the risk of injury. Morrison may or may not be a manufacturer, and thus subject to a strict liability standard; however, as a practical matter there would be no substantial departure from the requirement to use reasonable care. Assuming that a breach of this duty could be established, it is far more likely that DOE would be held responsible to a greater degree than Morrison, since it was DOE who provided the specifications to Morrison, and DOE approved it after the van was delivered. Morrison could reasonably rely upon DOE to make the assessment of what dangers would be presented by the bookmobile, and to make whatever changes in the vehicle would be appropriate. Particularly in view of the fact that it was a fixed-price contract, Morrison should not be expected to make changes to the bid after the project was completed. In summary, DOE should not anticipate that any significant degree of responsibility could be shifted to Morrison.

D. Parents?

The facts don't indicate whether Cory's parents had any role in the accident. Even if they were in the vicinity and should have been exercising better care of Cory, parents are ordinarily immune from liability for the exercise of their parental role.

IV. Effect of comparative fault

A. Joint and several liability

The statute (§ 51-12-31) seems to provide that a fault-free plaintiff is entitled to joint and several liability. Under § 51-12-33 a plaintiff who is found at fault may only recover from each defendant according to that defendant's share of fault, and then only from those defendants whose fault exceeds the plaintiff. But as noted above, the plaintiff is likely to be found fault-free, and thus DOE could face a judgment for the entire amount (subject to the $1 million limit), even if Perry were found to be significantly at fault.

B. Settlement

Since we are meeting with the plaintiff's lawyer to discuss settlement, it is important to know what effect a settlement would have on the plaintiff's right to obtain relief from other defendants. Unfortunately, the statute does not provide any provisions that indicate whether a settlement would reduce the plaintiff's claim by the dollar amount of the settlement, the settling party's percentage of fault, or some other method.

QUESTION 2

Mrs. Granado's estate ("Granado") should consider a medical malpractice action against Dr. Delfino and a product liability action against Halothane.

I. Medical malpractice action

Granado was entitled to two things from her physicians: (a) that they perform the procedure using reasonable care; and (b) that they provide her with adequate information concerning material risks so that she could give informed consent to the procedure.

a. *Errors in performing the procedure*. There do not appear to be any errors in the way that the procedure was performed.

b. *Failure to secure informed consent*. Granado's only argument would be that her physician, Dr. Delfino, did not secure informed consent before performing the procedure. Most jurisdictions impose a standard that requires the physician to inform the patient of any material risks associated with the procedure and any alternative therapies that would avoid the risk of the procedure. A material risk is one that a reasonable person would want to consider prior to making a decision. Granado would want to argue that she should have been informed of the risk that she might have an adverse reaction to Halothane. However, this is a pretty weak argument.

Is Prince qualified to testify? There is some dispute as to whether or not the risk was worth advising patients about. Dr. Prince is prepared to testify that in his opinion the risk was sufficiently grave that warning was required. After all, even a small risk is relevant if the consequence of the risk is death. However, Prince is not an anesthesiologist and does not appear particularly well qualified to testify concerning the standard of care to be exercised by a physician of that specialty

under those circumstances. It is very possible that the trial judge would exclude Prince's testimony altogether. If that were the case, our malpractice claim would be thrown out.

Assuming we could show that informed consent was not properly obtained, we would still need to show that it was a proximate cause of the injury. In some jurisdictions this requires that we demonstrate that a reasonable person in the patient's situation would have refused the treatment. In light of the testimony of the expert witnesses for the defense, this seems highly dubious.

II. Product liability action

A second avenue to explore would be the potential for a product liability action. If Granado could show that the patient's death occurred because of a defect in the product (Halothane), then the drug manufacturer would be liable. A defect may occur in manufacturing, design or warning. Nothing in the facts indicates a manufacturing defect; therefore, the question would be whether there was a defect in design or warning. Design and warning defects are present if the risks of the product outweighs the burden of redesigning the product or of providing a better warning. Jurisdictions are divided on the issue of whether knowledge obtained after the time of manufacture is admissible to prove that the design was defective. It doesn't appear that this would make any difference, since there isn't anything in these facts that suggests that the product could have been made safer.

In addition, some jurisdictions have adopted a policy that eliminates strict liability for manufacturers of prescription drugs; the only question is whether or not they used reasonable care. In this case it would require Granado to show that something in the design process was negligent. There is nothing in these facts to indicate that such would be the case.