

SAMPLE ANSWER TO FINAL EXAM

Question 1

[This case is based upon *Cochran v. Burger King*, 937 S.W.2d 358 (Mo. 1997); in that case the supreme court reversed a jury verdict in favor of the plaintiff, holding that Burger King did not owe a duty.]

Burger King should expect a lawsuit from Cochran ("C"). Burger King will successfully claim that the case is governed by premises liability categories, since the injury arose from a condition on the premises.

Premises Liability. Most jurisdictions classify visitors to an owner's premises according to their status: invitee, licensee, or trespasser. This status determines the duty that the owner owes. (Some jurisdictions have rejected the categories and instead require "reasonable care under all the circumstances." That would be greatly to C's advantage, since it would create a jury question even if they found C to be a trespasser.) An invitee is one who comes on the land for a business purpose of the owner. In this case C was only using the Burger King lot as a shortcut, and therefore would not be an invitee. A licensee is one who is on the owner's premises by permission; in this case C was probably a licensee when he was walking across the parking lot, since there could be an implied permission for this purpose. A licensee must be warned of hidden dangers. However, once he strayed into the dumpster, C went outside the scope of any implied permission and became a trespasser. As such he would be owed no duty of care.

Contributory Negligence. Even if C were owed a duty of care, there would still be the defense of contributory negligence. C is under a duty to use reasonable care for his own safety, and his intoxicated rummaging through a dumpster was hardly consistent with reasonable care. Similarly, it might be alleged that he assumed the risk of injury, since he strayed into an area where he had no permission. However, in this jurisdiction it would simply be considered a percentage of fault and reduce his recovery accordingly.

Joint Tortfeasors. Since the weakness in the wall was caused by the dump truck, BK should consider bringing the trash collection company in as a codefendant. In this jurisdiction joint tortfeasors are held jointly liable for economic harm, but are only severally liable for non-economic losses if their fault is less than 50%. If the fault of the codefendant, combined with contributory fault, brought BK's share below 50%, this could be an advantage.

Damages. In the event that BK were found liable, the losses could be significant. In particular, the jury might consider the failure to repair the wall, despite clear evidence of its danger, to be a form of reckless disregard for public safety. If so, the jury could award punitive damages along with a sizeable award for the pain and suffering associated with losing a leg.

Question 2

[This case is based upon *Nelson v. Speed Fastener, Inc.*, 428 N.E.2d 495 (Ill. 1981), which reversed a directed verdict for the defendant, finding that there was a jury question on whether the stud driver was defective.]

This case presents a potential product liability claim on behalf of Blackacre ("B") against the manufacturer of the stud gun. The key question would be whether or not the product was defective.

Product Liability. A product manufacturer is liable for injuries caused by a product if the product proves to have a defect. In this case there doesn't appear to be a manufacturing defect, because nothing in the facts suggests a discrepancy between the product and its design specifications. On the other hand, it might be found to have a design defect, as suggested by our expert. Most jurisdictions use a test somewhat based on a negligence analysis of whether or not the risks posed by the product are greater than a reasonable person would permit, in view of the cost of preventing the risk (both in terms of raising the price of the product and in reducing its utility). Some jurisdictions have adopted a consumer expectations test, which is more of a subjective focus on the perception of the product. Others have used a risk-utility test which is basically the negligence test--although it may be turned into a strict liability standard if there is new knowledge about the product discovered since the time of manufacture, and if the jurisdiction believes that strict liability is good public policy.

In our case the expert seems to think that under certain circumstances (and they appear to fit our facts, although the evidence is somewhat equivocal), the product has an unacceptably high risk of emitting debris. We would have to convince the jury that our expert knew what she was talking about, and that the risk indeed was unacceptably high.

A final theory that we could use is that the product lacked an effective warning of danger. Unfortunately, we'd have to show that a more effective warning would have resulted in different behavior on the part of the coworker.

Defenses. That in turn raises the question of what B already knew of the risk of splinters, and whether he was under an obligation to use some form of eye protection. If he negligently failed to protect himself, then his recovery could be reduced by the percentage that the jury found him to be at fault. Similarly, the jury might consider a knowing encounter of that danger to be assumption of risk, which would also result in a reduction on a percentage basis.

Worker's Comp. Finally, the effect of worker's comp. needs to be assessed. Because the employer and his employees are immune from tort liability, any fault on the part of the coworkers cannot be the basis of tort liability. Also, they are exempted from inclusion in the computation of comparative fault; thus, if the product manufacturer is found liable for a defective product, no reduction will be made for the employer's fault (§ 16-02(4)).

Question 3

[This case is based upon *Del Tufo v. Township of Old Bridge*, 685 A.2d 1267 (N.J. 1996), which reversed a \$300,000 verdict for the plaintiff in order to correct an overly narrow instruction regarding comparative fault.]

Kiken ("K")'s widow has several obstacles to recovery. The first is that she will have to establish that the State of Arcadia ("A") owed K a duty of reasonable care. K's death was not caused by a risk created or enhanced by the state; instead, the risk arose from his cocaine overdose. Thus, in order to establish that A owed K a duty to render medical assistance, she must persuade the court that A either created justifiable reliance on his part, or that they had a special relationship with him that created a duty of care. One theory would be that, since they took K into custody, he justifiably relied upon them to provide whatever medical care would be appropriate. Our expert will testify that they failed to recognize that he was in need of medical care. Assuming that the jury finds our expert persuasive, the jury could find that they owed a duty of care and thus were negligent. Another factor in our favor is that when A took K into custody, they prevented him from seeking out medical care on his own. Thus, it seems reasonable to suppose that they owed him a duty of care.

The second obstacle is that A is protected by the doctrine of sovereign immunity. Although the statute waives absolute immunity in favor of a relatively broad standard of liability, A still retains immunity for the exercise of policymaking judgment while state employees are engaged in discretionary functions. It seems unlikely that police officers are engaged in policymaking when they make judgments about the need for medical care, but our expert may in effect be questioning the overall level of care provided by police officers; if the court finds that the lack of greater training or awareness on the part of the police officers was a policymaking function, then the court could find A immune.

The third obstacle is the plaintiff's degree of contributory fault. The ingestion of cocaine, the flight from the police officers, the refusal of medical care when it was offered—all of these could be considered either negligence on the part of K or an assumption of the risk of injury. Under the statute these would not bar the plaintiff's claim, but would reduce the recovery by whatever percentage of fault was assigned by the jury. In comparing the police officer's fault with that of an evasive and combative drug user, the jury might be rather harsh.

Finally, we have to determine what damages are recoverable if the jury finds A at least partially at fault. The statute allows a recovery for the estate of the decedent, to be payable to specific "distributees," which include K's widow. The statute allows the recovery for "pecuniary injuries" resulting from the death. Although this seems to preclude the recovery of non-economic damages, such as loss of consortium, we should find out whether the courts have expanded the statute to allow for a more realistic assessment of damage.

SPRING '97 FINAL—CHECKLIST

Question 1

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|--------------------------|------------------------------------|--------------------------|------------------------------------|
| <input type="checkbox"/> | Overview | <input type="checkbox"/> | Contributory negligence |
| <input type="checkbox"/> | Is it a premises liability claim? | <input type="checkbox"/> | being drunk / climbing wall |
| <input type="checkbox"/> | Does the jx recognize categories? | <input type="checkbox"/> | pure comparative fault |
| <input type="checkbox"/> | If not, RC under all circumstances | <input type="checkbox"/> | Assumption of risk? |
| <input type="checkbox"/> | Jury question of RC | <input type="checkbox"/> | What kind of AoR? |
| <input type="checkbox"/> | Cochran's Status | <input type="checkbox"/> | Potential liability of trash truck |
| <input type="checkbox"/> | No business purpose for visit | <input type="checkbox"/> | Joint & several liability |
| <input type="checkbox"/> | Implied permission? | <input type="checkbox"/> | § 16-01: JL for economic loss |
| <input type="checkbox"/> | If a licensee, duty to warn | <input type="checkbox"/> | No JL for non-econ. loss if < 50% |
| <input type="checkbox"/> | Likely he was a trespasser | <input type="checkbox"/> | Right of contribution? |
| <input type="checkbox"/> | Straying beyond permission | <input type="checkbox"/> | Measure of Damages - significant |
| <input type="checkbox"/> | If a trespasser, no duty | <input type="checkbox"/> | Punitive Award? |
| <input type="checkbox"/> | | <input type="checkbox"/> | Did BK exhibit reckless disregard? |
| <input type="checkbox"/> | | <input type="checkbox"/> | |

Question 2

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|--------------------------|---------------------------|--------------------------|--------------------------------------|
| <input type="checkbox"/> | Overview | <input type="checkbox"/> | Defenses |
| <input type="checkbox"/> | Product Liability Issue | <input type="checkbox"/> | Contributory negligence? |
| <input type="checkbox"/> | Was the product defective | <input type="checkbox"/> | Safety goggles |
| <input type="checkbox"/> | No Manufacturing defect | <input type="checkbox"/> | Assumption of Risk? |
| <input type="checkbox"/> | Design defect? | <input type="checkbox"/> | Analysis of what kind of AoR |
| <input type="checkbox"/> | What test would be used? | <input type="checkbox"/> | Fellow employee/employer as joint TF |
| <input type="checkbox"/> | Consumer expectations | <input type="checkbox"/> | Effect on Joint Liability? |
| <input type="checkbox"/> | Risk-utility test | <input type="checkbox"/> | Effect of worker's comp. immunity |
| <input type="checkbox"/> | Duty to warn | <input type="checkbox"/> | |
| <input type="checkbox"/> | Would jury accept expert? | | |
| <input type="checkbox"/> | | | |

Question 3

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|--------------------------|---------------------------------------|--------------------------|--|
| <input type="checkbox"/> | Overview | <input type="checkbox"/> | Defense of contributory negligence |
| <input type="checkbox"/> | Did Arcadia have duty of care? | <input type="checkbox"/> | Ingesting cocaine / Fleeing officers |
| <input type="checkbox"/> | Did they create or increase the risk? | <input type="checkbox"/> | Pure comparative fault, § 14-11 |
| <input type="checkbox"/> | Did they create justifiable reliance? | <input type="checkbox"/> | Assumption of risk (same) |
| <input type="checkbox"/> | Will jury believe expert(s)? | <input type="checkbox"/> | Measure of damages for wrongful death |
| <input type="checkbox"/> | Restraint created duty of care | <input type="checkbox"/> | Survival statute, §5-4.1 |
| <input type="checkbox"/> | Sovereign immunity | <input type="checkbox"/> | Widow would be a distributee of estate |
| <input type="checkbox"/> | Broad waiver, § 8 | <input type="checkbox"/> | What are "pecuniary" injuries (§ 5-4.3(a)) |
| <input type="checkbox"/> | Not a discretionary function | <input type="checkbox"/> | Emotional injury /loss of consortium? |
| <input type="checkbox"/> | | | |
| <input type="checkbox"/> | | | |

Exam Number _____