

SAMPLE ANSWER TO FINAL EXAM

QUESTION 1

[This case is based upon *Benjamin v. Deffet Rentals, Inc.*, 66 Ohio St.2d 86, 419 N.E.2d 883 (1981); in that case the court of appeals found that Benjamin had assumed the risk of injury and barred him from any recovery.]

I would consider claims against (1) the campground and (2) the manufacturer of the pool slide. However, significant comparative fault problems must also be addressed.

I. The Campground

Since the injury was caused by a condition of the premises (the pool slide), the duty owed by the owner of the campground would be determined by the status of the visitor (Benjamin) at the time the injury occurred. It appears that this is a commercial campground where the pool was part of the attraction that generates income. Since a business purpose is served by Benjamin's presence in the pool, Benjamin would be considered an invitee, and thus is owed a duty of reasonable care. The question is whether the owner met that duty. It could be argued that by re-installing the pool slide (assuming there is widespread knowledge of the potential risks from such pool slides, including the potential for horseplay), the owner failed to use reasonable care. Similarly, it might be argued that a lifeguard should have been present to supervise the use of the pool slide. However, this would be a jury question, and probably difficult for us to prevail on.

II. The Pool Slide Manufacturer

A manufacturer of a product is liable for injuries caused because the product is defective. We could argue two kinds of defects in this case. First, the product's design might be one that fails a risk-utility test. Although the non-slip strip at the top of the slide interferes somewhat with the slide's performance, it might be worthwhile in view of the significant number of injuries that apparently result from the use of the product. Another possibility would be to argue that the product was defective for lack of adequate warning. Nothing in the facts suggests that the product warned of the risks associated with diving or jumping from the top of the slide. If a risk-utility test is not used, a consumer expectations test would probably yield the same result: would a reasonable consumer expect that such injury could result? One very helpful point is the Consumer Product Safety Commission's regulations, which verify the existence of a significant and unjustifiable risk.

III. Comparative Fault

It is likely that a jury would find that Benjamin was at fault in causing his own injury. He was aware of the risk and the fact that this was not the intended purpose for which the slide was designed. How much fault the jury would assign is difficult to speculate, but it could easily be more than that of the defendants'. This jurisdiction follows a pure comparative fault rule, meaning that the plaintiff is not barred even if his fault is greater than that of the defendants'. However, there is

no explicit reference to assumption of risk in the statute. It could be that the jurisdiction would treat this kind of behavior as a primary assumption of risk and bar recovery altogether. Also, Benjamin would only be able to recover on the basis of joint and several liability for economic damages against any defendant whose fault is equal to or greater than his.

IV. Damages

Benjamin's damages from a lifetime of quadriplegia would be very high, not only because of the significant economic damages (including attendant or nursing care) and pain and suffering damages. The statute also seems to permit parents to recover damages for injury to the society and companionship with their children.

QUESTION 2

[This case is based upon *Estates of Morgan v. Fairfield Family Counseling Ctr.*, 77 Ohio St.3d 284, 673 N.E.2d 1311 (1997); in that case the trial court dismissed the complaint, but the appellate court remanded for trial, finding that, based on reasoning similar to *Tarasoff*, a special relationship existed between the plaintiff such that the defendants owed a duty of care.]

I would consider a variety of claims against the State for negligently failing to protect Marla and her parents from Matt's violent conduct. However, there are a number of significant obstacles that we would face, including sovereign immunity, an uncertain duty of care, and limitations on damages.

I. Claims v. State

The primary difficulty in this case is the fact that almost all of the care provided to Matt was provided by doctors and counselors employed by the state. So long as they are acting in the course and scope of their employment they are shielded by the state's sovereign immunity. The State of Columbia has enacted a limited waiver of sovereign immunity, but the chief drawback in this statute is a cap on damages of \$100,000 per person and \$200,000 per occurrence. There may be a way around this (the statute allows the deficiency in an award to be brought to the attention of the legislature for additional action), but prospects seem dim for an award above \$100,000 from the state.

In addition, we would have difficulty establishing that the State owed Marla a duty of care. It is clear that in providing services to Matt, they owed him a duty of care. However, with respect to the public as a whole, an actor generally owes no duty to protect them from harm caused by a third person, unless some exception can be found. This case is similar to the *Tarasoff* case in that the court would be invited to find that there was either justifiable reliance on the part of the family, or a special relationship between the State and the family, that would trigger a duty of care to them. However, it should be recognized that whereas *Tarasoff* involved a specific threat toward an individual—of death, here the indications were that Matt had violent tendencies, but nothing specific. Moreover, whereas in *Tarasoff* they were asking to be warned about the potential for danger, here the family already knew that Matt was dangerous.

An additional problem in this case is that there seemed to be some kind of policy that limited the availability of care toward certain individuals. Even if the policy was questionable, if it falls with a discretionary or policymaking function of the state, then the state retains immunity from injury caused by that policy. The state will certainly argue that the decision not to commit Matt involuntarily was a result of a policymaking function rather than an operational error.

II. Medical Malpractice

We would argue that this is closer to a case of ordinary malpractice. There seems to be sloppy record-keeping and an inappropriate delegation of authority to a vocational counselor to make medical decisions. In order to hold a medical practitioner liable for malpractice, the plaintiff must establish the standard of care that is expected under those circumstances. Here we would find other psychiatrists who could testify as experts about how to treat an individual like Matt. We would have to find people familiar with this kind of outpatient treatment, operating under budget constraints and so forth. If the jury believed our experts in finding the care inadequate, then the doctors could be found liable. In addition, perhaps our best case is against the vocational counselor who decided on her own that Matt was just malingering and didn't really need medical care. Her diagnosis was certainly proven wrong, and her failure to refer the case to someone qualified to make a diagnosis would probably look bad to a jury. One ray of hope is that Dr. Brown is on some kind of independent contractual relationship. Although the scope of the state's immunity is unclear, it might be that Dr. Brown would not be shielded by the State's immunity and would not be able to limit his liability to the \$100,000 cap.

III. Defense Issues

The injury occurred more than three years ago, but the statute of limitations for claims against the state is four years. Again, the claim against the doctor might be independent of the claim against the state, but might also have a shorter statute of limitations. Perhaps Marla is a minor and could assert some kind of tolling principle to avoid having the statute run against her.

There are a host of joint tortfeasor issues in the case. First, we would want to determine what other defendants might be named. Certainly Matt will be named by the defendants as one of the "entities" responsible for the injury. Under the statute, defendants are jointly liable for economic damages if their percentage of fault is equal to or greater than that of the plaintiff. There is no reason to think that Marla or her parents would be considered partially to blame for Matt's conduct. (I don't think the State would be so stupid as to make that argument in view of their own incompetence and refusal to provide care when requested.) Thus, there would likely be joint liability for economic harm and several liability for non-economic damages.

In terms of the damages recoverable, the wrongful death statute seems to be quite generous. It provides for a recovery for the economic loss resulting from the loss of Marla's parents, and assuming Marla is younger than 25 (she's still living at home, so that seems probable), then she can also recover for the loss of her parents' society and companionship.

SUMMER '97 FINAL—CHECKLIST

QUESTION 1

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|------------------------------------------------------------|-----------------------------------------------------------------------|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Contributory Fault |
| <input type="checkbox"/> Claim v. Campground | <input type="checkbox"/> Contributory Negligence |
| <input type="checkbox"/> Benjamin's status | <input type="checkbox"/> Pure comparative fault |
| <input type="checkbox"/> Invitee | <input type="checkbox"/> Assumption of Risk |
| <input type="checkbox"/> Duty of Reasonable Care | <input type="checkbox"/> What kind of AoR |
| <input type="checkbox"/> Was that Duty Fulfilled? | <input type="checkbox"/> Will it bar recovery? |
| <input type="checkbox"/> Installation of slide / lifeguard | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> Joint tortfeasor issues |
| <input type="checkbox"/> Claim v. Pool Slide Mfr. | <input type="checkbox"/> Several liability only, since he is at fault |
| <input type="checkbox"/> Was Pool Slide Defective? | <input type="checkbox"/> Damages |
| <input type="checkbox"/> Defective Design | <input type="checkbox"/> |
| <input type="checkbox"/> Defective warning (label?) | <input type="checkbox"/> |
| <input type="checkbox"/> Test to be used? | <input type="checkbox"/> |
| <input type="checkbox"/> CPSC regulations | |
| <input type="checkbox"/> Would imputed knowledge benefit? | |

QUESTION 2

- | | |
|------------------------------------------------------------------------|------------------------------------------------------------------|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Defenses |
| <input type="checkbox"/> | <input type="checkbox"/> Statute of Limitation - 4 yrs |
| <input type="checkbox"/> Claim v. State | <input type="checkbox"/> |
| <input type="checkbox"/> Sovereign immunity | <input type="checkbox"/> Joint Tortfeasors? |
| <input type="checkbox"/> Dollar limit | <input type="checkbox"/> Claims v. Matt are worthless |
| <input type="checkbox"/> Did the State owe a duty to Marla? | <input type="checkbox"/> No liability for bad parenting |
| <input type="checkbox"/> State owed a duty to Matt | <input type="checkbox"/> Potential claim v. drug mfr?? |
| <input type="checkbox"/> Doctors & counselors in course and scope | <input type="checkbox"/> Joint liability for economic loss |
| <input type="checkbox"/> Justifiable reliance? | <input type="checkbox"/> Several liability for non-economic |
| <input type="checkbox"/> "Special relationship"? | <input type="checkbox"/> |
| <input type="checkbox"/> Discretionary function exemption | <input type="checkbox"/> Measure of Damages - § 768.21 |
| <input type="checkbox"/> Was decision not to commit discretionary? | <input type="checkbox"/> Economic loss |
| <input type="checkbox"/> | <input type="checkbox"/> Loss of parental consortium recoverable |
| <input type="checkbox"/> Is this a medical malpractice case? | <input type="checkbox"/> |
| <input type="checkbox"/> Standard for specialists | <input type="checkbox"/> |
| <input type="checkbox"/> Will experts convince jury? | <input type="checkbox"/> |
| <input type="checkbox"/> Was vocational counselor practising medicine? | |
| <input type="checkbox"/> Is there an informed consent issue? | |
| <input type="checkbox"/> Is Dr. Brown independently liable? | |

Exam Number _____