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Final Examination
UNM School of Law
Four Credits

Exam Number _____

Professor Occhialino
Tuesday, April 30, 2002
1:30 p.m. to 5:45 p.m.

510 TORTS

Instructions

1. You have four hours and fifteen minutes to do this examination. The suggested times for each question add up to four hours. Use the first fifteen minutes of the exam to read the questions and the appendix.
2. This is a closed book examination.
3. This examination consists of two questions. Question One has four subparts. It is NOT necessary that you start each subpart of Question One in a separate bluebook. DO start a new bluebook when you answer Question Two.
4. The suggested time for each question and subpart reflects the relative value of each question and subpart. This examination counts for seventy-five percent of your final grade. The remaining twenty-five percent is based on your midterm examination.
5. Write as neatly as possible under the circumstances. Write only on every other line. Write on only one side of a page. Write with a pen. Thank you.

Question One
Suggested Time: Three Hours

Memo

TO: Inez Intern
FROM: Pat Partner
RE: Representation of Diana Draper
DATE: April 23, 2002

On March 15, 2002, Paul Prano bought a new Ford Taurus from Rich Ford in Albuquerque. The Taurus came equipped with air bags for both the driver and the front seat passenger. At the time, Prano's wife, Pam, was pregnant. Pam Prano read a story by an unknown author on the WEB that asserted that air bags were very dangerous for pregnant women. The theory was that the force of an opening air bag might well cause more harm to a fetus than would result if the pregnant women wore a seatbelt without the additional "protection" afforded by an air bag. Pam was particularly cautious about her pregnancy because she was approaching the end of her child-bearing years and the doctor told her that she would have only a 10% chance of having additional children. Because of this article, Paul and Pam decided that it would be best that Paul disengage the air bag mechanism in the Taurus. Because Pam sometimes drove and sometimes was a passenger in the Taurus, on March 20, 1999, Paul and Pamela agreed that they should disengage the air bags on both the passenger-side and the driver-side and would make them operational once again after Pam gave birth.

Paul went to the Rich Ford dealership where he purchased the Taurus and asked the service department to disconnect the air bags. Rich Ford informed Paul that federal regulations CFR 595.1 to 595.5 (see Appendix) forbade disconnecting airbags without first obtaining a letter from the National Highway Traffic Safety Administration and even then, federal regulations required that the airbags remain operational but that "ON" "OFF" switches be installed to allow the bags to be rendered inoperable for particular occasions when turned "OFF", but to remain operational when the switch is turned "ON." The regulations also require installation of a yellow light in the car that will turn on when the air bags are "OFF." Rich Ford estimated the cost at \$1,200.00 and that it would take at least three months to obtain the permit, install the switches and fully retrofit the Taurus.

Paul decided that the cost was too great and the time too slow. Instead, Paul went to Romeo's Repair Shop, a local Albuquerque auto repair shop run by Robert Romeo. Romeo was aware of the federal regulations, but agreed to simply make the air bags inoperable, without complying with the federal regulations if Paul would pay Romeo \$200 in cash. Paul agreed and paid and Romeo disarmed the air bags so they would not work. That evening Paul told Pam that the task was done.

On April 1, 2002, Diana Draper apparently drove through a red light at Carlisle and Montgomery in Albuquerque and smashed her vehicle into the Ford Taurus. At the time, Paul Prano was driving the Taurus. Pam was seated in the front seat on the passenger side of the vehicle. Paul was slightly hurt. Pam was badly hurt. Pam lost the baby. Both Paul and Pam

were wearing seat belts. Because the air bags had been disabled, neither air bag in the Taurus opened.

We represent Diana Draper

Part One (Suggested Time: 60 minutes)

April 4, 2002: We anticipate that Paul and Pam Prano will sue Diana Draper soon. We are planning our defense strategy. Information is now sketchy and we must learn more before we make firm decisions. We have, however, hired an expert on accident reconstruction who informs us that pregnant women really should not fear air bags. The expert has supplied us with information from the federal government to that effect. (see Appendix) He also believes that further analysis may show that if the air bags had not been disabled Pam would not have lost the baby.

We realize that you have recently finished a course in Torts and so we solicit your advice. We want to know whether the fact that neither air bag opened because Paul had them disabled can be used in some fashion as a defense against Pam when she sues Draper.

We leave it entirely to you to formulate a response, and to cover any topics relevant to this defense but listed below are the questions that we are struggling with and want you to answer thoughtfully and fully:

- A. Is Pam a nonfeasor who did not have a duty to act reasonably to protect herself?
- B. If Pam owed a duty of care, did she act reasonably?
- C. Given the history of the seat belt defense in New Mexico and its current status, even if Pam acted unreasonably, is New Mexico likely to adopt some form of an “air bag” defense?
- D. Did Pam assume the risk of harm due to the lack of airbags and if so, what impact does this have on Draper’s defense?
- E. Does Pam’s conduct constitute comparative negligence or is it mitigation of damages and what difference does it make, if any, which we label it?
- F. We find the “successive tortfeasor” doctrine a bit confusing. If our expert can establish that Pam would not have lost the baby had her airbag been operational, may we assert that Pam is a successive wrongdoer? If so, what impact does this have on our defense against the expected claim that Draper’s negligence was the proximate cause of all of Pam’s injuries? Might we be better off not using our expert to establish that the baby would have survived had the air bag deployed?

Thank you.

Part Two: (Suggested Time—40 Minutes)

April 4, 2002: Draper has informed us that she was intoxicated when she went through the red light. She said that she knew that she had drunk too much at her home, that she was depressed and that she had decided that she might drive the car recklessly so that she could kill herself in a crash with another vehicle. This will make our defense of Draper more difficult of course. Fortunately we expect that we will be able to use the conduct of Romero as a means of diminishing or eliminating our liability for Pam's injuries.

Please analyze fully for us whether and, if so, how we can diminish the fault of Draper and can "lay off" fault on Romeo or can use Romeo's conduct to eliminate any liability for Draper. Include in your analysis a consideration of how we best can prove to the jury that Romeo is at fault.

Question Three: (Suggested Time---40 Minutes)

April 15, 2002: We have just learned some important news. Draper now tells us that she was depressed but that she was not considering committing suicide when the accident occurred. Instead, she now tells us that she was being threatened and chased by a person driving a red "low rider" Honda and she was fleeing for her life. (Assume she now is telling the truth). She tells us that she saw the license plate of the car chasing her and that the first five digits were "REDLR" which was followed by a single number she could not make out.

Our investigator learned that on the evening in question, a "Honda Low Rider Club" was meeting on Montgomery for fun and games. She informs us that Uno, Duo and Tray are club members who own red Honda low riders and that each was in the area at the time. She also learned that there are only four New Mexico "vanity" license plates that start with the letters "REDLR" Uno's license is "REDLR-1", Duo's license is "REDLR-2" and Tray's license is "REDLR-3." The fourth is owned by Quatro. He is not a member of the club, and has never been a member. He has been a "Real Estate DeaLeR" for four years and so he selected "REDLR-4" as his New Mexico plate number. He also owns a red Honda with a low rider silhouette. On the in night in question, he went to the New Mexico Symphony in the Honda and says that he does not remember whether he drove home on Carlisle and Montgomery or by way of a different route.

We definitely want to reduce our own liability by "laying off fault" on whoever was responsible for chasing and threatening our client as she drove through the red light. Please formulate a plan for accomplishing this, pointing out any difficulties and explaining how we can accomplish our goal.

Part Four: (Suggested Time 40 Minutes)

April 20, 2002: I am sorry to report that after nineteen days in the hospital, where she suffered excruciating pain and was fully aware of the death of her unborn child and her own

impending death, Pamela Prano died yesterday because of injuries resulting from the collision with the Draper vehicle.

Please give us a complete assessment of the injuries and criteria for determining the damages (no need to assess the amount of damages) that Draper will be liable for if Paul sues Draper successfully for negligence and gross negligence resulting in death to Pam Prano. Under the New Mexico Wrongful Death Act, Paul is the sole statutory beneficiary of the wrongful death action and we expect that he will be named personal representative of the estate of Pam Prano.

Appendix Follows

Appendix to Question One

PART 595—RETROFIT ON-OFF SWITCHES FOR AIR BAGS

Subpart A—General

Sec.

595.1 Scope.

595.2 Purpose.

595.3 Applicability.

595.4 Definitions.

Subpart B—Retrofit On-Off Switches for Air Bags

595.5 Requirements.

Subpart B—Retrofit On-Off Switches for Air Bags

§ 595.5 Requirements.

(a) Beginning January 19, 1998, a dealer or motor vehicle repair business may modify a motor vehicle manufactured before September 1, 2012 by installing an on-off switch that allows an occupant of the vehicle to turn off an air bag in that vehicle, subject to the conditions in paragraphs (b)(1) through (5) of this section.

(b)(1) The dealer or motor vehicle repair business receives from the owner or lessee of the motor vehicle a letter from the National Highway Traffic Safety Administration that authorizes the installation of an on-off switch in that vehicle for that air bag and includes a form to be filled in by the dealer or motor vehicle repair business with information identifying itself and describing the installation it makes.

(2) The dealer or motor vehicle repair business installs the on-off switch in accordance with the instructions of the manufacturer of the switch.

(3) The on-off switch meets all of the conditions specified in paragraphs (b)(3)(i) and (ii) of this section.

(i) The on-off switch is operable solely by a key or a key-like object.

(ii) A telltale light in the interior of the vehicle shall be illuminated whenever the driver or passenger air bag is turned
switch...

(iii) States that an on-off switch should only be used to turn off an air bag for a member of one of those risk groups, and

(iv) States the safety consequences for using the on-off switch to turn off an air bag for persons who are not members of any of those risk groups

THE ON-OFF SWITCH DECISION

Vehicle owners and lessees can obtain an on-off switch for one or both of their air bags only if they can certify that they are, or a user of their vehicle is, in one of the risk groups listed below:

Two risk groups have a high enough risk that they would definitely be better off with an on-off switch:

- 1) Infants in rear facing infant seats
- 2) Drivers or passengers with unusual medical conditions

A national conference of physicians considered all medical conditions commonly cited as possible justifications for turning off airbags. The physicians did not recommend turning off airbags for persons with ... or who are pregnant.

National Highway Traffic Safety Commission Report # 2000-12

Pregnant Women

It's important to note that while as many as 3,400 fetal deaths occur in motor vehicle accidents each year, only one has been documented that involved an air bag. Pregnant women can reduce their risk by following these simple rules:

The National Highway Traffic Safety Administration recommends that pregnant women wear safety belts. The shoulder portion should be positioned over the collar bone. The lap portion should be placed under the abdomen as low as possible on the hips and across the upper thighs, never above the abdomen.

Pregnant women should sit as far back from the air bag as possible. The Insurance Institute for Highway Safety recommends that pregnant women who drive should move the seat back, making sure there is as much room as possible between their abdomen and the steering wheel. . . .

How do I get an on-off switch?

If you are eligible, you must fill out a NHTSA request form. Forms are available at state motor vehicle offices and may be available at automobile dealers and repair shops. You may also get one by calling the NHTSA Hotline or visiting the NHTSA Web site. On the form, you must indicate which air bags you want equipped with an on-off switch, certify that you have read this information brochure, certify that you are, or a user of your vehicle is, a member of a risk group listed above, and identify the group. Then send this form to NHTSA. Upon approval of your request, the agency will send you a letter authorizing an automobile dealer or repair shop to install an on-off switch in your vehicle.

Should a pregnant woman get an on-off switch?

No, not unless she is a member of a risk group. Pregnant women should follow the same advice as other adults: buckle up and stay back from the air bag. The lap belt should be positioned low on the abdomen, below the fetus, with the shoulder belt worn normally. Pull any slack out of the belt. Just as for everyone else, the greatest danger to a pregnant woman comes from slamming her head, neck or chest on the steering wheel in a crash. When crashes occur, the fetus can be injured by striking the lower rim of the steering wheel or from crash forces concentrated in the area where a seat belt crosses the mother's abdomen. By helping to restrain the upper chest, the seat belt will keep a pregnant woman as far as possible from the steering wheel. The air bag will spread out the crash forces that would otherwise be concentrated by the seat belt.

Question Two
(Suggested Time: 60 Minutes)

To: Lauren Sosa, Law Student and Legislative Assistant
From: New Mexico State Senator Sam Snead
Re: Statutory Limitations on Consortium Recovery

As you know, I am not a lawyer. I need your expertise to help me with an issue that has arisen during this session of the State Legislature.

I recently have been inundated with lobbyists (most of them representing insurance companies) urging me to “do something” about skyrocketing jury verdicts for consortium.

The lobbyists told me that New Mexico relatively recently decided to allow recovery to one spouse who is not even hurt just because the other spouse is hurt. The unhurt spouse gets to collect for his/her “emotional distress” and, possibly for loss of sexual services of the other spouse as well.

The lobbyists showed me the New Mexico Uniform Jury Instruction which states in its entirety that recovery may be had for:

13-1810A Loss of Consortium

The emotional distress of _____ (plaintiff) due to the loss [of the society], [guidance], [companionship] and [sexual relations] resulting from the injury to _____ (name of injured or deceased person).

The lobbyists told me that consortium has now been expanded even to grandparents whose grandson has been hurt and that it is inevitable that it will apply to parent/child relationships, same sex relationships, and heterosexual relationships even if the parties are not married.

The lobbyists also told me that there is really no way to measure the amount of money that should be given for such “emotional distress” damages; that a trial judge recently begged the appellate court to explain how to measure such types of damages and the court refused to do so, apparently because the appellate court had no idea how to do so. They went on to say that the amount of damages awarded might depend on how much the spouses love one another and that this means that intimate details of their life together may be relevant evidence. They said that some lawyers are making arguments asking for awards of “\$1000” or “\$500” etc a day for the rest of the spouse’s life and that some juries are making awards based on such evidence.

The lobbyists told me that insurance rates are going way up because of the frequency of consortium awards and the large amounts being awarded by juries.

The lobbyists have asked me to sponsor the following legislation:

Proposed

NMSA 41-20-1 Consortium Abolished; Exception; Damages Limited

- A) The common law claim for consortium is totally abolished with the exception and subject to the limitations stated in this section;
- B) Consortium claims shall only be available to the legally-married spouse of a person who is physically injured by the tortuous conduct of a wrongdoer which rises to the level of reckless or wanton misconduct;
- C) No award for consortium shall exceed in amount the award made to the physically injured spouse for past and future medical expenses.

Please do the following:

Fully advise me of A) the validity and B) the wisdom of the proposed statute while also C) explaining to me whether the information I have received from the lobbyists is accurate and fairly presented (You may assume that the UJI is correctly quoted).

Thank you.

END OF EXAMINATION