# Final Exam Memo

This memo carefully reviews the final exam. The purpose of this memo is to provide you with information that will help you understand why you earned the grade that you earned the final exam and improve your test-taking skills for future classes. This memo is considerably shorter than the memo I provided after your midterm exam because that memo was designed to help you prepare for the final exam.

Included in the memo are sample student answers. These answers are not perfect and each have their flaws, but taken together they represent a set of thoughtful approaches to addressing different exam questions.

## Grading

For each question on the exam, students were rewarded for identifying the correct legal issues, applying the correct legal rules, and crafting thoughtful, persuasive, credible legal arguments that dealt with nuances, gaps, contradictions, and ambiguities in the law. Extra credit was occasionally awarded to answers that were particularly thoughtful and precise. Even when students identified the incorrect issues or rules, they could earn partial credit by writing strong legal arguments applying those rules.

In accordance with Loyola Law School policies, I graded each exam anonymously. To minimize bias, I also graded each question separately and randomly sorted the exams for each question.

The instructions, given both at the time of the exam and provided over email and on our course website a week prior to the exam, stated that the character limit for each part of the exam was 5,000 characters with spaces. A separate instruction stated, "Do not exceed the character or bluebook limits. Failure to comply with these limits will result in a severe loss of points." Students received credit for the first 5,000 characters of their exam answers for each part and did not receive credit for any writing past the 5,000 character limit. Some students kept their exam notes below their answers on the exam. That was fine. These exams were not penalized for technically exceeding the character count. I did not read the notes, and they did not factor into anyone's grade on the exam.

As stated in the class syllabus, the final exam was worth 75% of your grade for the year, and the midterm exam was worth 25% of your grade for the year.

# Part I (Question 101) Short Answer Questions

## Question 1

You are an attorney at a small firm representing a defendant, Mathilda Fischer, who has been sued for intentional infliction of emotional distress. In your client

interview with Fischer, she says that her life's ambition is to be Virginia Carlson's worst nightmare. Fischer's now ex-husband had an extramarital affair with Carlson, and Fischer has decided that she will exact her revenge in every legal way possible. Carlson serves as the Loyola City Public Works Director, in charge of sewers and water runoff in Loyola City. After recent storm surges, the Public Works Department has come under scrutiny for its maintenance of the water cleanliness of Loyola City beaches. Fischer put up posters on every telephone pole in Loyola City that featured a photoshopped picture of Carlson looking angry, wearing yellow pee-stained pants, and exclaiming in a giant comic-strip balloon "Who wet my pants?" Text at the bottom of the poster asks, "Will Virginia Carlson ever take responsibility for her messes?" Because of the attention that the posters received, including being featured on late night comedy television shows, Carlson is now too anxious and depressed to show her face in public.

Carlson has sued Fischer for intentional infliction of emotional distress. Your co-counsel is very concerned that your team will lose this case because every time he describes the facts of the case to anyone, they spontaneously interrupt to say, "Outrageous!" She can't see how your team can possibly win the case. What do you say to convince her otherwise?

## *Prof. Doyle Commentary:*

The strongest reason why your client may still win the case is because the First Amendment bars the plaintiff's claim. Carlson has a prima facie case of IIED because Fischer's conduct was outrageous and intentionally caused Carlson severe emotional distress. But because Fischer's posters were a kind of political cartoon, the defendant cannot be held liable both because the posters were a parody (Hustler Magazine) and because the posters were political speech (Snyder).

## *Examples of strong student answers:*

To convince my co-counsel otherwise, I would suggest a First Amendment argument. In an IIED case, the plaintiff must show that the defendant's conduct was extreme and outrageous, that the defendant did so intentionally or recklessly, and that the conduct caused the plaintiff severe emotional distress. However, when the plaintiff is a public figure and the speech is political in nature, the First Amendment can come into play and not allow a plaintiff to succeed on their IIED case. Here, the plaintiff would be able to establish that our client's conduct was extreme and outrageous, as one of the tests is to tell someone the facts and see if they respond with "Outrageous!" The plaintiff would further be able to show that our client intentionally put up posters because she had stated that the wanted to exact her revenge in every legal way possible, meaning our client had the desire/purpose to cause the plaintiff emotional distress. Lastly, the plaintiff would be able to show she suffered severe emotional distress because she is now anxious and depressed. However, because the plaintiff is a

public figure being the Loyola City Public Works Director, and because the posters contained political speech being "Will Virginia Carlson ever take responsibility for her messes?", referring to the Public Works Department's lack of maintenance of beach water, our client would be able to assert a constitutional First Amendment defense. Our case is similar to the Hustler Magazine case in that the language may be less than desirable, but because the plaintiff is a public figure and the speech is political, the plaintiff's IIED claim cannot stand.

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The best defense for Fischer is a first amendment based defense, protecting her speech disparaging Carlson. This is because in all other respects Fisher has rather clearly committed Intentional Infliction of Emotional Distress. .

The rule for IIED is that there must be 1) Intent or reckless conduct, 2) outrageous in its nature, 3) that casues severe emotional distress. The courts do not have a bright line rule for the outrageous conduct. The standard is one of common sense born of common wisdom. As regards the severity of the distress, the court has recently done away with the requirement that there be hysical mainifestation of the emotional distress, reasoning instead that the underlying outrageousness of the conduct is a better barometer of severity. Especially in llight of the fact that the physica symtpms such as an upset stomach, muscle spasms, etc, are suscpeble to fakery and deception.

In the case, at hand Fischer has admitted her intent and has a clear motive--a fact that would not play well in front of jury. Though not conclusivse, that Co-counsel's acquaintances feel strongly that Fischer's conduct was outrageous, is strong indication that the court would agree. And per the slightly circular logic of the modern approach, this would also help prove the requisite severity.

The strongest affirmative defense available to Fischer would be one on first amendment grounds. Snyder v. Phelps is an important case. Snyder v. Phelps showed just how low the bar is for speech or conduct to qualify as poltical and thus nejoy protection under the fifrst amendment. [Time]. In that case the Westboro Baptist Church chanted slogans and help up signs with messages that ought not be repeated, at a funferal for a yung war veteran. Nonetheless, because of the identity of the deceased, the court held the speech to be political. Here, there are strong similarities. It seems Fischer's has a strong personal animus towards Carlson. Nonehteless, she couched her speech in poltical terms so will likely be entitled to first amendment protection.

## Question 2

Pablo Gomez runs a convenient store where Ivan Sharp broke his leg in a slip and fall accident. An ambulance drove Sharp from the store to a local hospital where Sharp was treated for his injuries. When lifting Sharp into the ambulance the emergency medical technician, Emma Torres, did not support Sharp’s leg

properly and accidentally injured his ankle. At the hospital, Sharp received separate treatment for the broken leg and the ankle injury.

Sharp sued both Gomez and Torres for negligence. A jury found that Gomez and Sharp were each 50% at fault for the slip-and-fall accident and that Gomez and Torres were each 50% at fault for the ankle injury when Sharp was loaded onto the ambulance. Gomez is insolvent and cannot pay damages. When apportioning damages, the trial court ordered Torres to pay 25% of the total damages, given that the plaintiff, Sharp, was 25% responsible and that the other defendant, Gomez, was 50% responsible but was insolvent.

As an appellate court reviewing the damages award, do you reverse or uphold the trial court apportionment of damages? Why?

## *Prof. Doyle Commentary:*

You know one of these questions was coming. As an appellate court, you should reverse the trial court's apportionment of damages and order the trial court to recalculate the damages. The trial court did not separate injuries based on factual cause. The facts reveal that the plaintiff received separate treatment for the broken leg and the ankle injury, which means that the harm that the injuries caused can be separated, at least in part, based on factual cause. Torres should not owe 25% of the damages overall but should owe 50% of the damages related to the ankle injury.

## *Examples of strong student answers:*

As an appellate court, I would reverse the trial court apportionment of damages because they did not separate injuries by factual cause before apportioning the damages.

The rule is that when there are multiple Defendants and multiple injuries, first separate the injuries by factual cause then apportion damages. Loyola is a modern several liability jurisdiction, so all Defendants are held liable based on their comparative fault. However, if a Defendant is insolvent, the Plaintiff cannot recover the portion of the insolvent Defendant's damages. In a "no-greater than" comparative jurisdiction, a Plaintiff can recover if they are 50% or less at fault.

Here, when separating the injuries by factual cause there are two categories: the slip and fall and the ankle injury. Gomez and Sharpe are the but-for cause of the slip and fall injury; Gomez and Torres are the but-for cause of the ankle injury-- damages must be apportioned separately for these injuries.

Analyzing the slip and fall injury, Sharpe can still recover because he is 50% at fault and this is a "no-greater than" comparative jurisdiction. However, since Gomez is insolvent, Sharpe cannot recover anything under this modern several liability jurisdiction because Gomez is insolvent. Next, for the ankle, Torres is 50% responsible, and thus should pay 50% of the damages that flow from that injury. However, since Gomez is insolvent, Sharpe cannot recover the other 50% from the ankle injury.

Thus, I would reverse.

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As an appellate court, I DO NOT uphold the trial court's determination of damages, finding them to be calculated incorrectly.

The first step in deciding damages is determining liability. A tortfeasor will be liable for additional harm caused after the initial injury, as long as that harm is reasonable and may foreseeably occur based on the original injury: medical malpractice will not usually be excused. Assuming liability for all parties, we then separate based on factual cause. Lastly, for harms with multiple liable defendants, we apportion based on comparative responsibility. Loyola is a Several Liability jurisdiction.

In the present case, the defendants have already been found liable. Gomez is the factual cause for both the leg and ankle injuries, but Torres is only the factual cause for the ankle injury. Under several liability, Torres will be responsible for only their comparative portion of the damages, regardless of Gomez's insolvent status.

Thus, the order for Torres to pay 25% of the TOTAL damages was made in error. The trial court should order Torres to cover 50% of the costs incurred only by the treatment of the ankle injury.

## Question 3

Sasha Weiss, an owner of a chimpanzee sanctuary in Loyola had all the necessary permits, followed all regulations for the safe keeping of wild animals, and followed the best safety practices in the industry. One day, a chimpanzee stole the keys from a security guard at the sanctuary, managed to unlock its cage, and escaped the sanctuary. Before being apprehended by authorities, the chimpanzee broke into a nearby home and attacked the people inside. The injured people are now suing the owner of the chimpanzee sanctuary for damages.

You are the attorney representing Weiss, the sanctuary owner. Weiss wants to fight the case and thinks that she should prevail because she did nothing wrong. How do you advise her on this point?

### *Prof. Doyle Commentary:*

Under strict liability, fault is not a consideration, so it will not matter if Weiss "did nothing wrong." Across various cases, Loyola courts have found that strict liability applies by relying on *Rylands v. Fletcher* or the Second Restatement. Under either test, strict liability applies. Weiss collected and kept something (a chimpanzee) likely to do mischief if it escaped, and "is prima facie answerable for all the damage which is the natural consequence of its escape." Keeping wild animals like chimpanzees on one's property is a quintessential abnormally dangerous activity.

Although the ultimate question is pretty straightforward, there are some nuances that students earned credit for exploring. Are chimpanzees natural or non-natural to Loyola? Does operating a chimpanzee sanctuary count as keeping something for one's own purposes? What is the value to the community of the chimpanzee sanctuary? How likely is it that a chimpanzee escaping will result in great harm (as compared to, say, a wild animal like a tiger)?

*Examples of strong student answers:*

The issue in this case is how to advise Weiss.

For strict liability, the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. Fletcher v. Rylands. Strict liability is not about fault.

Here, strict liability will apply because owning a chimpanzee is inherently dangerous and not common so upon the escape of the chimpanzee, Weiss will be prima facie answerable for the injury the chimpanzee caused. Even though Weiss thinks she isn't at fault because she did nothing wrong, her owning a dangerous animal will impose strict liability.

In conclusion I would explain strict liability to Weiss and advise her to settle the case.

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ISSUE

Is Weiss strictly liable?

RULE

A defendant will be found strictly liable is they engage in an abnormally dangerous activity that cannot be made safer through reasonable care. Strict liability finds a defendant liable regardless of their conduct or precautions taken. In Rylands, the defendant was found to be liable for bringing onto his land an unnatural use or a use not in its natural state and would be found liable of the damages to the plaintiff if the unnatural use escapes. 2nd restatement also considers degree of harm and the value of the use.

ANALYSIS

Here, Weis will be liable. Keeping a chimp, even legally, is considered an unnatural use as the chimp is in a location not natural to its existence. According to Rylands, if the chimp escapes and causes damages, which it did, then the defendant will be liable to the plaintiff for those damages. The potential damages here are severe as the chimp could kill a person. Although zoos are educational, they run a dangerous risk if animals escape. Even though Weiss followed all the custom safety precautions and had all necessary permits, this would not make

the consequences of the monkey escaping any safer. So regardless of what Weiss did, she will be found strictly liable for the damages to plaintiff.

## Question 4

Most grocery stores in Loyola have automated devices on their shopping carts that lock the wheels of the shopping cart if the cart is taken beyond a certain distance of the grocery store. Hilltop grocery store has not installed these devices on their shopping carts. Recently, an unattended shopping cart at Hilltop grocery store rolled downhill from the store parking lot, traveled a quarter mile down the road, jumped the curb, and crashed into a pedestrian, Dorothy Wang, causing personal injuries.

You are a junior attorney at a plaintiff-side firm representing Wang in her negligence suit against Hilltop grocery store. A partner at the firm is confident that questions of duty, causation, and harm will be resolved in your client's favor. The partner wants to know whether there is a realistic chance that you might lose on the element of breach. What do you tell the partner?

### *Prof. Doyle Commentary:*

This question focuses on the tricky issue of how custom can determine reasonable care. The most straightforward way that the plaintiff would like to resolve this case is by showing that Hilltop grocery store did not exercise reasonable care because it did not follow the industry custom of including locking mechanisms on its grocery carts. But there's an underlying question of why this is the industry custom. It's very likely that grocery stores have introduced locking mechanisms on shopping carts to prevent shopping carts from being stolen, not to prevent the harm of runaway shopping carts mowing down pedestrians.

Therefore, custom may not be as strong a basis as we would like for arguing that Hilltop did not exercise reasonable care. Students were welcome to conduct a reasonable care analysis based on the available facts (including the hand formula, the reasonable person standard, and foreseeability). Custom could also be used to inform the Hand Formula analysis. Because other grocery stores already employ this precautionary measure, the burden on the defendant must not be excessively high.

Constructive notice may also be a potential problem for the plaintiffs in this case. We don't know how this grocery cart managed to make its way out of the parking lot and down the hill. While Hilltop has a duty to keep its premises safe, they can't be expected to be in absolute control of all shopping carts all the time.

As a result, it's not certain whether the plaintiff will win on the element of breach based on the facts in the case.

*Examples of strong student answers:*

Is breach met? Breaching a duty, failing to uphold reasonable care, may be defined with customs and a risk-utility-analysis (BPL). To constitute a breach, a tortfeasor would need to not comply with custom meant to prevent the harm that occurred. Adequate constructive notice to prevent or warn of a harm is required of those with a duty.

Here, Hilltop has not complied with the custom of installing this device. If the custom is meant to protect against harms such as the one that occurred, then it was not reasonable for them to have breached this duty and they would be liable for the injury that resulted. However, if found that the custom was not meant to prevent the harm here, information for BPL and constructive notice are needed to help Wang argue a breach. Wang has a realistic chance of losing given the lack of information.

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Even if having automated locking devices on carts is customary, the purpose of that custom was probably to prevent thief of carts, rather than for the prevention of carts to roll downhill and cause injuries. Since this injury was not a result from the thief of court, the argument of custom will unlikely be persuasive. However, there may be a breach argument for Wang if the Wang reframes the purpose of the custom for locking cart. Wang could argue that the custom of locking carts past a certain distance of the store is to prevent the carts from being involved in non-shopping activity. Here Wang's injury was a cause of non-shopping activity and therefore such a breach argument may work. Hilltop may lose on foreseeability because, it is foreseeable that a cart will roll downhill from a elevated store and cause injuries—the type that Wang suffered. Additionally, Hilltop may lose under the Hand Formula because the burden of adding additional precautions (i.e. barriers, hiring attendants) is significantly lower than the magnitude of risk (e.g. possible severe physical injury)

# Part II (Question 102) Essay Question

Coach Dan Moss was in charge of the Burns high school cross-country running team. During an after-school practice session, Coach Moss led the team on a run through the town of Burns, following a predetermined route that included two busy intersections. At one intersection, a crosswalk signal was present to help pedestrians safely cross the road. Coach Moss and the majority of the team reached the intersection when the signal indicated “walk.” Coach Moss, traveling in front of the team in an electric golf cart, told the team to cross the street before the light turned, and the group began to do so. But Rosanna Scott, the slowest member of the team who was lagging behind the others, did not make it to the intersection until the signal had changed to “stop.” Scott, eager to catch up with her teammates, decided to cross the street despite the “stop” signal.

At the same time, a driver, Safwan Ayad, approached the intersection. Ayad saw that he had a green light and that the "stop" signal for pedestrians was on. Ayad's car entered the intersection — driving one mile over the posted speed limit of 30 miles per hour — and struck Scott as she stepped out into traffic, causing her serious injuries.

Scott's family contacted your firm, seeking representation in suing both Ayad and Moss for negligence. A partner at the firm wants you to write a persuasive memo that presents the strongest negligence case that the plaintiff has against each defendant. Don't write an objective memo that evenhandedly considers both sides. Argue for our client's position. Be sure to present our best arguments and address any serious counterarguments.

Format your memo in the following way:

1) Present a prime facie case of negligence against Ayad. Argue why any affirmative defenses that Ayad may assert will not defeat Scott's claim. Be sure to spell out the impact that these defenses could have on the outcome of the litigation.

2) Present a prima facie case of negligence against Moss. Argue why any affirmative defenses that Moss may assert will not defeat Scott's claim. Be sure to spell out the impact that these defenses could have on the outcome of the litigation.

## Prof. Doyle Commentary:

Both parts of this essay question required a full analysis of a negligence cause of action and any possible defenses. For Ayad, an answer should address the elements of duty, breach, causation, and harm and the defenses of comparative negligence and, possibly, assumption of risk.

The existence of a duty is straightforward: drivers of cars have a legal duty to not run over pedestrians. For the element of breach, negligence per se applies. Ayad was driving over the speed limit and the speed limit is a statute designed to prevent this kind of harm for this kind of plaintiff. On these grounds, a court will find that Ayad was negligent as a matter of law. One might want to prove Ayad's negligence in other ways as well, including the reasonable person standard, hand formula, foreseeability, and custom. If the plaintiff can establish that the standard of care was driving lower than the posted speed limit or more cautiously than Ayad was driving, then the next element of causation will be easier to prove.

Causation is where this question gets tricky. For factual causation, the question is whether the defendant's *negligence* was a but-for cause of the plaintiff's injury. If breach was established using only negligence per se, then Ayad's negligence was driving one mile over the speed limit. The but-for test would ask: If Ayad had been driving one mile slower would the accident still have happened? It seems that the plaintiff might have real difficulty proving that, but for Ayad's negligence, the accident would not have happened. But if breach was established using a different standard of care than the posted speed limit, then the

plaintiff may have an easier time proving that Ayad's negligence was the but-for cause of the accident. Proximate cause does not present a particular challenge for this question as the plaintiff's injuries are not remote from the defendant's negligent actions. Harm is a non-issue as the harm was personal injury.

The strongest defense that Ayad has is comparative negligence. The defense of assumption of risk would be implicit secondary assumption of risk. This would follow the same logic as the comparative negligence analysis. To analyze this, we must look at how the defendant will try to establish duty, breach, causation, and harm for Scott. Scott had a legal duty to protect herself. And she breached that duty by stepping out into an intersection despite the "stop" signal. Her negligence was the factual cause of her injuries. But-for her negligence, she would not have stepped out into the street. Her negligence was also the proximate cause of her injuries because the risk that made her actions negligent was precisely the harm that came to pass. Even though comparative negligence applies, it's important to recognize that comparative negligence is only a partial defense. The plaintiff's best opportunity for maximizing her recovery is to argue that Scott was less responsible for the injury than Ayad.

For the second part of the essay question, presenting a prima facie case of negligence against Moss requires analyzing each of the elements of a negligence cause of action: duty, breach, causation, and harm. The affirmative defenses that Moss may raise include comparative negligence and assumption of risk.

Duty is more of an interesting question for Moss than it was for Ayad. There are two possible routes for establishing that Moss owed Scott a legal duty. First, his coaching decisions may have created a risk of harm by sending the the cross country team on a route that crossed two busy intersections. Second, Moss may have had an affirmative duty toward Scott because of the special relationship exception. A few very attentive students observed that Moss is likely a government employee at a public high school but that this role would not relieve him of tort liability as he was performing a ministerial function.

Depending on how Moss's duty has been established, breach can be established in a number of ways. The strongest arguments concretely defined what would constitute reasonable care. Foreseeability and the reasonable person standard seem to be the most useful ways to establish reasonable care. The fact pattern doesn't give much to work with for statute and custom. The hand formula could be used to establish reasonable care, but the calculation is not easy or straightforward given the facts of the case.

For causation, factual cause is straightforward. But-for the coach's negligence, Scott would not have ventured into that intersection. Proximate cause requires a bit more analysis. Ayad's negligence was not a superceding or intervening cause because the risk that made Moss's actions negligent was the precisely the harm that came to pass.

For defenses, although Scott was hurt during a recreational activity, primary implicit assumption of risk defense is unlikely to apply because getting hit by a car

at a busy intersection is not a risk inherent to the recreational activity that the plaintiff has implicitly relieved the defendant of any liability for. The comparative negligence defense would be the same for Ayad and Moss. Ultimately, the comparative responsibility will be split among all three parties.

## Examples of strong student answers:

Ayad

When a person violates a harm preventing statute and injures a person who falls within the class of person the statute was meant to protect, the will be found negligent under the negligence per se theory and duty and breach will be established as a matter of law. For negligence per se to apply, the harm that resulted must have been the type of harm the statute was meant to protect and the injured person must be the person the statute was meant to protect from the harm.

Here, Ayad will be found negligent under negligence per se. He was driving above the speed limit, which is a violation of the statute. Speeding statutes are put in place to protect pedestrians from being hit by cars. As a result of the violation, he hit Scott who was severely injured. Because the type of harm the statute was meant to prevent occurred and Scott is the type of person the statute was meant to protect, Ayad is negligent as a matter of law, and duty and breach are established.

Ayad is also the factual cause of Scott's harm. Factual cause requires the negligent action be the butfor cause, meaning the harm wouldn't have happened without the negligent act. Here, but-for Ayad's negligent driving and violation of the statute, Scott wouldn't have been hit.

Ayad is also the proximate cause of the harm. Proximate cause is a question of scope of liability and is grounded in foreseeability. Proximate cause requires that the harm that occurs must be foreseeable result of the negligent action.

Here, the harm happened immediately after Ayad hit Scott, so the harm is not attenuated in time or place. Furthermore, hitting a person is the type of harm that is foreseeable from driving negligently, so proximate cause will not be cut off. The harm that resulted was Scott's physical injuries.

Ayad may try to argue Scott was comparatively negligent. Comparative negligence requires that the plaintiff's be negligent and their negligence be the cause of the harm. Duty is easily established because Scott owed a duty to protect herself. However, Scott never breached her duty because a reasonable person who is running with teammates would cross to keep up with the group rather than falling behind and end up lost. If this defense were to succeed, it would result in the damages award being lowered by however much Scott is found comparatively negligent, and could potentially result in no award at all if the jury finds her more than 50% liable because the no great than jurisdiction bars recovery when the plaintiff is greater than 50% liable for their harm.

Moss

A person has a duty to exercise reasonable care when their actions create a risk of physical harm.

Affirmative duty may apply if actions don't create a risk of harm.

Here, Moss took his cross country on a run that included crossing two busy intersections. By leading his students on this route, his actions created a risk of harm to the students because the route passes busy intersections where someone in the group could have been hit and he owed each student a duty to exercise reasonable care. There is also an affirmative special relationship duty because Scott entrusted her safety in Moss, her coach.

Breach is determined by the standard of care, which is the care a prudent person would exercise to protect themself or others and turns on 5 tools: foreseeability of harm, reasonable person, BPL formula, custom, and statute.

Foreseeability includes what harms were foreseeable, but doesn't cover extraordinary harms (Adams). Here, it is foreseeable that the decision to run through busy intersections could result in a student being injured by a car. Furthermore, the reasonable person standard informs how a reasonable person would have acted under the same circumstances. A reasonable person would have taking a route that doesn't go through busy intersections because they are leading a team of various people. Thus, Moss breached his duty to Scott by failing to act as a reasonable person and because the harm was foreseeable based on his actions.

Moss was also the factual and proximate cause of Scott's harm. See above for factual and proximate rules.

But-for the negligent decision to run a route through busy intersections and protect his students safety on the run, Scotts harm wouldn't have happened. Moss may argue that Ayad is an intervening cause because Ayad/s negligent action came between Moss' negligence and Scott's harm, but this defense will fail because the harm that made Moss' actions negligent in the first place, a student being hit by a car, was the harm that occurred. If Ayad was an intervening case, Moss wouldn't be liable for the harm and Scott could only recover from Ayad. Because the harm that made his actions negligent occurred, Ayad is not an intervening cause and Moss is the proximate cause of Scott's harm. The harm that resulted was Scott's physical injuries.

Moss may assert comparative negligence, but the analysis and potential impact on the outcome of the litigation is the same as above.

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1) Negligence case against Ayad.

Duty: Ayad was operating a vehicle and had to abide by the rules of the road. Driving is a risky activity which is why we have insurance. Even if a light is green and stop sign turned off, a driver has to check for pedestrians. Yes Ayad had a duty.

Breach: Ayad breached his duty by not looking for pedestrians before he entered the intersection. I can hear my driving instructors voice in my ear, "PEDESTRIANS HAVE THE RIGHT AWAY". A reasonable person would have seen the large group of cross country kids with their coach ahead on the street and driven lower than the speed limit. Furthermore, assuming there is a statute that says anyone who hits someone going above the speed limit has breached their duty then this can establish this too.

Finally, if we wanted to get economic we could throw in the hand formula because the burden of being 1 minute late was in no way worth the risk and magnitude of the harm suffered by Scott.

(Negligence per se: assuming there was a statute about hitting someone and speeding would satisfy breach and duty).

Causation: Ayad is the But for cause of the injury. Scott would not have been hit had he not gone through the intersection at 31mph and hit her. Further Ayad is the proximate cause because it is foreseeable that if you don't look for pedestrians and hit them then you are responsible. His negligent conduct of not looking for Scott and hitting her with his car is not too far removed to be responsible for what happened.

Harm: Scott suffered physical harm when she was hit by the car and I'm sure emotional harm based on how bad the damage was.

Affirmative Defenses

Ayad might argue that Scott is comparatively negligent for crossing the road on a stop sign when he had a green light. A court or jury could find that Scott was but it is unlikely that this will take away the full damages. Scotts damages would be reduced by the amount she was found at fault, even if it was half she could still get money because we are in a great or then district. Ayad might also try to blame the teacher but, the same result will happen he might be found at some fault but a majority of fault will likely fall onto Ayad who hit Scott with his car. Ayad might also try to show that he was behaving as a reasonable person would and that Scott can't establish breach. This is likely not to work because most reasonable people will look both ways in an intersection. Breach will be a big part of Ayad's case.

2) Moss

Duty: Moss had a special relationship to Scott assuming Scott is under the age of 18. Moss has a duty to protect and look out for Scott because she is under age and his student. Moss could also have a duty because making teenagers run in a busy intersection is inherently dangerous. Yes Duty.

Breach: It is probably not a custom for a cross country coach to predetermine a route among two very busy intersections for their kids to run. Furthermore, it is probably not a custom for a coach to leave a runner behind because they are slow, they should probably stay in the back of the pack with them. A reasonable

person would make sure that every runner crosses a busy street before they continue, especially if they weren't running with them but, were in a gold cart. Finally, the cost of staying with the runner is no where near the risk and loss that the runner could have suffered.

Causation: Scott would not have been in the busy intersection had not Coach Moss designed the run there. Moss is the But for cause. Moss is also the proximate cause because it is foreseeable that if someone is forced to run in a busy intersection there is a risk there, Even if Ayad is an intervening cause because he hit Scott, Moss is still the proximate cause because she wouldn't have ever been there if it wasn't for him.

Harm: Scott suffered physical harm when she was hit by the car and I'm sure emotional harm based on how bad the damage was.

Affirmative Defenses

The biggest one that comes to mind is assumption of the risk. This is because Scott is participating in a sport where the athletes have to run long distances. Moss will likely argue that by taking place in the sport Scott is accepting the risks that come with it. This can also be explicitly through a waiver that the high school students would have to sign before they participate in cross country. Just because Scott is participating in a sport does not give Moss a way out. The assumption of risk is going to apply to forseeable dangers with the sport, i.e. hurting your legs or falling down. It is not likely going to cover something that could have been prevented by Coach Moss. Scott will need to gather other coaches practice plans and habits to show that they don't put their kids at huge avoidable risks by having their kids run through busy intersections. Moss will also try comparative negligence would could reduce Scott's damages but, there is still fault for him. Finally, causation will be a big part of his defense but Scott is able to prove it.

# Part III (Question 103) Essay Question

TreadOnMe is a well-known manufacturer of treadmills for home use. TreadOnMe's new model, the "Legs Miserable Unlimited" or "LMU" for short, comes with a built-in safety feature that is supposed to stop the treadmill belt immediately when a user falls or trips. The safety feature is activated by a small plastic clip attached to the user's clothing and connected by a string to a magnet on the handlebar of the treadmill. If a person falls, the safety clip pulls the string, removing the magnet from the handlebar. Without the magnet attached, the treadmill will stop running.

Liam Levy, a customer who recently purchased the treadmill for home use, suffered a severe injury after falling on the treadmill. Before using the treadmill, Levy had noticed the plastic safety clip attached to the handlebar. But because Levy had not read the user's manual and had not read the warning labels affixed to the treadmill, Levy did not know why the clip existed and was unaware that

he was supposed to clip the plastic safety clip to his clothing to activate the safety feature.

In any event, Levy preferred to run in the nude and therefore had no clothing to secure the safety clip to. While running on the treadmill at its highest rate of speed and without holding onto the treadmill's handlebar, Levy fell. The safety feature failed to activate; the treadmill continued running; and Levy was flung from the treadmill across his small living room and into a large cactus. The impact of being catapulted naked into the spines of a cactus resulted in severe personal injury requiring multiple rounds of surgery.

After the incident, Levy later discovered that the safety mechanism on his treadmill was broken and that his treadmill could continue to run even when the magnet was not secured to the handlebar. Accordingly, even if Levy had worn clothing and attached the safety clip to this clothing, his fall would not have activated the safety feature to stop the treadmill.

Levy is now suing TreadOnMe for products liability, alleging a manufacturing defect in the plastic clip and a design defect in the safety feature. On the design defect claim, Levy plans to argue that a reasonable alternative design would be a safety clip that attaches to a wristband wrapped around the user's wrist while running on the treadmill. Levy is not pursuing a claim for failure to warn as the treadmill is covered in warning labels and the instruction manual extensively documents the safety feature, instructs the user on the proper use of the safety clip, and includes instructions on inspecting the clip for potential defects before using the treadmill.

You are a junior attorney at the firm representing TreadOnMe. A partner has asked you to write an objective memo analyzing the strength of each of Levy's claims and any defenses TreadOnMe might be able to raise.

Format your memo in the following way:

1) Manufacturing defect claim

2) Design defect claim

3) Affirmative defenses

## *Prof. Doyle Commentary:*

Manufacturing defect claim

Levy cannot prevail on a manufacturing defect claim because he cannot prove factual causation. Although there was a manufacturing defect in the safety mechanism, that defect was not a but-for cause of his injuries. Even if the safety mechanism was functioning properly, Levy would still have suffered these injuries because he did not engage the safety mechanism.

### Design defect claim

With design defect claims, there are two tests: a consumer expectations test and a risk-utility or cost-benefit test that compares the product's design to a reasonable alternative design. The consumer expectations test is not always available, particularly for complex products that have to balance many design and safety considerations. The consumer expectations test would probably not apply here, and the plaintiff did not even raise a consumer expectations argument. Reasonable alternative design is quite the open-ended standard as far as legal tests go. Students had a lot of flexibility with the costs and benefits they considered in comparing the existing design to Levy's proposed alternative. The strongest arguments dug into the details for the design and safety tradeoffs between a safety clip and a wristband.

For the element of causation, it was worth considering whether the allegedly defective design was a but-for cause of Levy's injuries. Would the alternative design have prevented the injury from occurring or would Levy have ignored the wristband just as he ignored the safety clip?

### Affirmative defenses

The defenses available to TreadOnMe are comparative negligence and assumption of risk. Assumption of risk can be subdivided into implicit primary assumption of risk and implicit secondary assumption of risk. Implicit secondary assumption of risk follows the same logic and reasoning as comparative negligence.

For comparative negligence and secondary implicit assumption of risk, strong answers addressed each of the elements of a negligence cause of action for Levy: duty, breach, causation, and harm. The most interesting issue here was what the standard of reasonable care should be. Levy may have acted negligently in a few different ways: not reading about or using the available safety feature, using potentially dangerous exercise equipment without wearing any clothes, placing a cactus behind a treadmill, and not discovering the manufacturing defect. The Second and Third Restatements offer differing perspectives on whether Levy could possibly be found negligent for failing to discover the manufacturing defect. Under the Second Restatement, this would not be grounds for establishing the plaintiff's negligence. Under the Third Restatement, it is usually not grounds for establishing the defendant's negligence but can establish comparative negligence in circumstances where it is customary for consumers to check for these defects. The jurisdictional rules did not specify whether Loyola follows the Second or Third Restatements, so that's an open question in this case. Levy's failure to read about or use the safety feature cannot alone establish comparative negligence in this case because the safety feature was broken. Therefore, Levy's failure to engage the safety feature was not a but-for cause of his injuries. Even if he had engaged the safety feature, the accident still would have happened. So to establish comparative negligence, the defendant would

need to prove Levy's negligence through his other actions like using exercise equipment in the nude and placing a cactus close to that equipment.

Under implicit primary assumption of risk, the manufacturer would be able to escape liability if the injuries Levy suffered were inherent to the recreational activity of running on a treadmill. The availability of safety mechanisms undercuts this defense because the safety mechanisms prevent these injuries from happening.

*Examples of strong student answers:*

Manufacturing Defect Claim

The issue is whether Levy can succeed on a manufacturing defect claim in regards to the TreadOnMe's treadmill. The general rule for manufacturing defects tell us that (1) whoever engages in the selling or distribution of (2) a defective product (3) may be held strictly liable for the harm to property and persons (4) caused by the defect.

Here, the court would likely view that the first three elements are satisfied, however, the fourth element of causation is not. TreadOnMe sold treadmills that did not perform to their correct usage. Although the treadmill was allegedly supposed to stop running when the plastic clip attached to the magnet on the handlebar removed the magnet from said handlebar, it shown that this feature actually did not work as intended by the company. Therefore, the company engaged in the selling of a faulty, defective product and could be held liable for the harm done to a customer.

The key issue is whether the harm was caused by the defect. Glancing at our elements of causation in Loyola, we see that actual "but-for" causation is required. Here, the plaintiff is not using the device in its intended manner. They are running in the nude without the clip attached to any piece of clothing. Because of this improper usage, it cannot be said that the defect caused the injuries to Levy. The work would likely rule in favor on TreadOnMe due to this lack of causation.

Design defect claim

The issue is whether Levy can succeed on a design defect claim. A design can be considered defective when it undermines the consumer's reasonable expectations and there is an excessive avoidable harm. This claim is strengthened when presented alongside a reasonable alternative design. A design can be considered a reasonable alternative when there is (1) a foreseeable harm from previous design which has (2) a risk that can be avoided, (3) the defendant has the capacity to produce the alternative, (4) the alternative is economically feasible and (5) the alternative does not alter the primary function of the product.

The plaintiff's strongest argument for a reasonable alternative design would be that it is foreseeable that a runner would be shirtless on a treadmill and that attaching the original plastic clip design to their shorts would create problems

due to the leg movement of the runner. Changing the plastic clip to a wristband would likely be economically feasible and that alternative would not alter the primary function of the product. This would enable the risk to be avoided, and therefore, satisfy all elements of the reasonable alternative design.

However, it cannot be said that the design undermined the Levy's reasonable expectations and, especially, that was an EXCESSIVE avoidable. A product can be said to undermine a consumer reasonable expectations when it does not perform as intended, while it is being used in a foreseeable manner. There is an excessive avoidable harm when there is a medium-high probability that this type of harm would be suffered other consumers of the product.

Here, it cannot be said that TreadOnMe undermined Levy's reasonable expectations because Levy did not use the clip in the manner that it was intended. Evidence shows that Levy had not read the user's manual or the warnings. Levy was also running completely nude with nothing to attach the clip to except for what was likely between his legs. Although there is a chance that there may be other nudist exercise enthusiasts, the chance of this particular type of injury occurring due to the design is very low.

Therefore Levy is unlikely to satisfy the elements to establish a design defect before the court.

Affirmative defenses

The issue is whether TreadOnMe could raise an affirmative defense to Levy's liability claims. Some affirmative defenses that the defendant could esatblish would include comparative responsibility and implicit assumption of risk. Comparative responsibility can be established when the plaintiff's own negligence contributes to the harm that they were exposed to. With Loyola being a "no greater than" jurisdiction, the plaintiff would not be able to recover damages due for the injuries suffered if they are more than 50% responsible. Implicit assumption of risk can be primary, such as with the risk assumed while playing recreational sports, and secondary, when the plaintiff willfully subjects themselves to the harm created by the defendant.

Here, the court would likely see that Levy's negligent misuse of the product contributed to more than 50%. While the treadmill would not have stopped even if Levy used it in its correct manner, Levy's non-reading of the reading of the instructions/warnings combined with the fact that he did not use the product in its intended manner would guide the court to view that Levy would primarily responsible for the injuries that occurred. He'd been properly warned, misused the product, and suffered injuries due to his actions. Therefore, the court should favor TreadOnMe.

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Levy's claims are weak primarily because of causation. The elements of a manufacturing and design defect claim include a 1) defect 2) causation and 3) harm. Levy's injuries are a legally cognizable harm, therefore we will focus on the first two elements.

Manufacturing Defect

A product contains a manufacturing defect when the product departs from its intended design. Here, it is indicated that Levy's machine did have manufacturing defect as his safety mechanism was broken.

Causation

Factual cause and proximate cause are both required to establish liability. The test for factual cause is that the plaintiff's injuries would not have occurred, but for the defect. Here, Levy's injuries would have occurred regardless of the defect because he wasn't using the safety clip and discovered the defect after his injury. Thus, the defect is not the but for cause of his injuries. Proximate cause assesses defendants' scope of liability. Defendants will be liable for any harms that foreseeably result from the defect. An intervening cause is a condition that comes in after defendants actions that will supersede defendant's actions because it was highly unusual or unforeseeable. A plaintiff's own negligence cannot be an intervening cause, that absolves defendant's liability. Here, proximate cause would be established because it is reasonable foreseeable that Levy would be injured as a result of a product defect. Defendant may try to argue that it is not foreseeable for people run on the treadmill nude as most of these machines are in gyms and workout clothes are popular/expected. Ultimately, the manner in which plaintiff was harmed and Levy's negligence will not absolve defendant of liability. Because factual cause is not satisfied though, the claim would fail on this element.

Design defect

A design is defective if the design embodies an excessive preventable danger, unless the benefits outweigh the risks inherent in the design. A plaintiff bears the burden of proving a reasonable alternative design would have prevented the foreseeable risk of harm.

Here, Levy is suggesting there is a design defect with the safety clip and suggests that if the design were a wristband it would prevent foreseeable risk of harm. A jury may find that a wristband is a reasonable alternative design because it likely doesn't cost much for defendant to replace the clip with it. However, defendant can argue that the wristband affects the functionality, as users would have to be more careful not to pull their arms back too far and have a ligament torn, and it could cause excessive injury if a user falls and their arm is stuck in the wristband. A treadmill also allows users to experience running indoors similar to the outdoors, but a wristband would negate this as users would feel chained to a device.

Also, the risk of harm was that Levy did not read the manual, which his wristband design would not prevent from causing a similar harm. Thus, it may be unlikely that he establishes a design defect.

Causation

Refer above to same causation rules and analysis. This claim would likely fail for causation as well.

Comparative negligence

Defendant may have trouble establishing this defense due to causation. A comparative negligent defense does not bar a plaintiff from recovery, as the plaintiff will still be able to recover for the portion of defendant's fault. A defendant must prove duty, breach, causation, and harm to establish the defense. Levy was harmed as indicated by his injuries. Here, Levy owes a duty to protect himself against foreseeable risks. Levy breached his duty of reasonable care because a reasonably prudent person would read a safety manual for a new treadmill as there are foreseeable risks involved.

Factual cause may not be satisfied however, because Levy's injuries may have still occurred even if he used the safety mechanism because it was defective. Proximate cause is satisfied because it is reasonably foreseeable that negligent use of a treadmill would result in the injuries that Levy suffered.

Because factual cause fails however, defendant will have trouble establishing this defense.

Assumption of risk

Primary implied assumption of risk is where the plaintiff's implicitly assumes risk by participating in an inherently risky activity, which is a complete defense. Here, a treadmill could be seen as an inherently risky recreational activity and therefore Levy assumed the risks associated with a treadmill. He could possibly argue that he did not assume the risk associated with a defect in the treadmill, but because that ultimately did not cause his injuries he is unlikely to prevail on this defense.

Most jurisdictions don't allow for warning labels (type of express assumption of risk) as a defense. Regardless though, a warning label would not be adequate to warn against defects, if a defect is found.

# Part IV (Question 104) Essay Question

You are a wise Loyola trial judge with experience managing medical malpractice cases. Policymakers in Loyola are considering establishing a specialized “health court” system to handle medical malpractice cases. You have been asked to advise the group that oversees the drafting of the proposal.

The proposal is currently in the earliest stages of development and a rough draft of the key provisions have been cobbled together for experts in the field to consider. Here are some features of the current plan:

- The plan would remove medical malpractice cases from generalized courts and place them in specialized health courts.
- In these courts, the standard of “negligence” will be replaced with the standard of “avoidability.” Existing somewhere between strict liability and

negligence, the "avoidability" standard would allow plaintiffs to recover for injuries that resulted from a medical professional's failure to follow best practices.

- An expert body will develop and periodically update decision aids for health court judges. These decision aids would identify certain injuries that would not typically occur if a doctor followed best practices. If a plaintiff's injury matches one listed in the decision aid, the plaintiff would be adjudged presumptively eligible for compensation.
- When allocating compensation, the plaintiff's economic losses will be compensable in full, but the collateral source rule will not apply in these courts. Noneconomic damages will be awarded according to a predetermined formula tied to injury severity.

You have been asked to speak at a roundtable discussion of the current plan. Along with other guests — including judges, attorneys, and medical professionals — you are expected to share a few brief remarks on the plan's strengths, weaknesses, and your most important suggestions for revision.

*Prof. Doyle Commentary:*

This question was a straight up policy question about alternatives to tort. In terms of structure, it closely paralleled the "toxic harms" policy question that we answered together as an in-class exercise near the end of the year. Like toxic harms, medical malpractice presents challenges for our torts system, and this proposal attempts to work around some of those challenges. Strong student answers were well grounded in the concerns that animate medical malpractice litigation and alternatives to tort.

Similar to other tort alternative schemes, the proposed system would reduce many of the administrative costs of current medical malpractice litigation by reducing the amount of fact-finding that a court is required to do by creating presumptions of compensation for certain injuries and determining noneconomic damages according to a formula. The heightened "availability" standard for doctors ought to result in greater deterrence because more plaintiffs will be eligible for compensation. Many strong answers explored precisely how a failure to follow "best practices" would and would not differ from a failure to follow "custom" as the current standard of reasonable care in medical malpractice cases.

Tying noneconomic damages to a formula runs counter to the tort principle of corrective justice because it does not consider each plaintiff's individual loss. But it is much more efficient than tort law, achieves a horizontal equity across plaintiffs and is a common feature of compensation funds. Moreover, determinations of noneconomic damages are by their nature arbitrary no matter how they are determined. Having predetermined formulas will also encourage settlement by reducing uncertainty about the outcome of litigation. Virtually all of

the compensation schemes we considered in class addressed noneconomic damages this way, if they provided compensation for noneconomic harms at all.

The removal of the collateral source rule will allow defendants to introduce into evidence the compensation that plaintiffs received from outside parties like health insurance companies. This will reduce the economic compensation that defendants must pay, but reducing defendants' payouts may be a necessary policy tradeoff for holding medical professionals to a standard of care that is higher than negligence. Under this system, more plaintiffs will get compensation, but the compensation will be less for plaintiffs whose bills have already been paid by their insurance providers. Removing the collateral source rule may also have a beneficial effect of making the economic compensation in medical malpractice cases more closely tied to the actual amount paid and not just the "sticker price" numbers that the medical provider drew up before reaching an agreement with the insurance company for a lower amount.

### *Examples of strong student answers:*

Strengths:

By placing medical malpractice cases in specialized health courts, this would remove some of the issues that arise in the current system with the standard of negligence. Currently, we use the reasonable doctor and reasonable patient standard to determine whether a medical professional has breached a standard of reasonable care. There is disagreement around the reasonable patient standard, since it's an objective standard while some think it should be a subjective standard. Having the reasonable patient standard as an objective standard limits a patient's autonomy by discrediting their ability to make medical decisions that may be deemed "unreasonable." The new "avoidability" standard seems to remove these discrepancies. This new standard focuses solely on medical professionals and their failure to follow best practices. This standard is clearer, and having an expert body outline specific instances in which professionals have failed to follow best practices makes it easier for courts to rule on cases, speeding up court proceedings and allowing quicker relief to the plaintiff.

Further, this proposal seems to solve the discrepancies currently faced with deciding between a "same or similar locality rule" or a "national standard" for expert testimony. Instead of having to decide this, the new system is beneficial in having a clear standard that all doctors are held to, which many experts create. Also, it would hopefully lead to less cases if doctors know specifically what the best practices to follow are. Overall, having clearer standards and ensuring economic losses will be compensated in full will likely promote corrective justice, as it will quickly ensure full recovery for patients when it is clear that a medical professional didn't follow best practices. It also may promote distributive justice by holding more doctors accountable when they do not follow best practices, which is important as doctors are in a position of power when treating patients. Lastly, would lead to deterrence, as doctors would have a clear outline of the best practices they need to follow, and what to avoid.

Weaknesses:

While making cases easier to rule on, the stricter standard has weaknesses. First, it may not make room for medical malpractice injuries that the expert body has not predicted. It is surely impossible for an expert body to predict all scenarios and the best practice that should be followed in each one, even with room to periodically update these decision aids. Another weakness is that the collateral source rule will not apply in the new courts. Our current system promotes corrective justice through the collateral source rule, by preventing evidence on insurance or other payments to the plaintiff as evidence in court, so the plaintiff is not denied full recovery. Here, although the plan states economic losses will be compensated in full, without the collateral source rule, this may present issues. As a result of removing the collateral source rule, insurance payments will likely rise, since insurers may not have the same opportunity to recover their losses in court. However, these weaknesses could be resolved through revisions. Lastly, having noneconomic damages awarded based on a predetermined formula does not promote corrective justice, as justice may suggest a plaintiff should recover noneconomic damages even if they fall outside of these predetermined formulas.

Suggestions for revision:

I suggest allowing for a case-by-case analysis when there are medical malpractice instances that are unforeseeable, which the expert body has not outlined. This would ensure plaintiffs can recover for injuries that may be unforeseen. Further, I'd want to add clearer guidelines surrounding how the plaintiff would recover their full losses. I think the best option would be to have the collateral source rule apply in these courts, so insurance companies can still pay off the plaintiff and have an opportunity to recover their full losses, which would prevent insurance rates from rising as a result of insurers not having this option. It's also unclear whether cases will be up to a judge or a jury, so I would specify this, and I think it is beneficial for the cases to still go to a jury to assess the nuances that may have been overlooked by the expert body. Juries should also still be responsible for determining noneconomic damages, to ensure fairness and justice and make sure plaintiffs are being made whole if their injuries fall outside of what the expert body has outlined. I also still think expert testimony should be allowed in addition to the expert body's aids, though the expert body provides beneficial standards that would make cases more efficient, provide clear guidelines to the jury, and promote deterrence by giving doctors a clear list of best practices. Overall, the new plan is good in that it creates stricter standards that can streamline cases, but juries and case-by-case analysis are still important to insure justice.

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Specialized Health Courts

The policymakers in the state of Loyola propose the establishment of specialized health courts to house all medical malpractice cases. In general, this aspect

of the plan may be fruitful. These specialized courts would most likely reduce congestion of general trial courts. Furthermore, expediting these medical malpractice cases would ensure the injuries and evidence are fresh for the court's review.

However, if the judges for these specialized courts are required to also be specialized in their knowledge of medical malpractice, it may lead to better justice in their determination, but it could also return us to court congestion if we ever have a shortage of these specialized judges. In any case, coupled with decision aids, a judge's specialization may not be required.

Standard of Avoidability & Decision Aids

The policymakers in the state of Loyola propose a new standard to replace negligence, the standard of avoidability. This standard would allow plaintiffs to recover for injuries resulting from a medical professional's deviation from best practices. Such deviations from best practices would be flagged by certain injuries - as provided by decision aids - that would not have otherwise occurred if best practices were followed. These decision aids are to be drafted by an expert body.

These decision aids, in naming injuries that could not have occurred without a medical professional's deviation from best practices, act as a list of identified common res ipsa loquittur cases. In this sense, administrative costs may be cut and court proceedings expedited. Provided these decision aids are merely to aid a judge's decision, they are not dispositive. I take comfort in a judge having discretion where circumstances vary or certain decisions have no precedent that can be listed on a decision aid.

However, I can see where a judge may mistake an aid as being determinitive. In regards to the avoidability standard, being closer to strict liability, the standard may have some positive effects. Holding medical professions to a standard of best practices will unify all regions of Loyola to be up to date on best practices, reducing judgement and fact discrepancies. And since the locality rule has already been snuffed, regional differences in resources and personnel would not be a valid reason to oppose this proposition.

Compensation Allocation

The policymakers in the state of Loyola propose also propose a new system of compensation. When allocating economic losses, they will be paid in full as pecuniary damages already are. However, instead of directing nonpecuniary damages to be determined by the jury, such damages are predetermined by a formula tied to injury severity. Furthermore, the collateral source rule will not apply.

Pecuniary damages being granted in full warrants no remark from me, given that our system already pursues that. However, the abolishing of the collateral source rule may keep such economic recovery from being "full." The collateral source rule renders inadmissible all evidence, and assertions to reduce damages, that a plaintiff did not suffer as much economic loss as purported by means of

health insurance - or insurance of any kind - or from any other outside payment. The rule of subrogation, implied or express, allows an insurance company to be reimbursed for the expenses they had paid for or to borrow the right to litigate on your behalf for such damages.

Since health insurance contracts these days are likely to have subrogation clauses - and since implied subrogation exists for other types of insurance - the collateral source rule is already negated from plaintiff receiving a windfall of unjust enrichment. However, in cases where a plaintiff has their medical expenses or any related expenses paid for by family friends or their church, subrogation does not exist.

In such cases, it's possible these friends or the church lend the money in hopes for the plaintiff to repay them. In such a case, they would not be reimbursed. And in the cases of insurance, plaintiff's insurance would never be reimbursed, instead the damages are cut, allocating a gain to the wrongdoer. Down the line, risks would be allocated in such a manner that malpracticing doctors would take larger risks when it comes to insured patients. The collateral source rule keeps the tortfeasor from unjust enrichment. They are the wrongdoer after all.

Furthermore, non-pecuniary damages - pain and suffering and enjoyment of life - are all circumstantial. I can see the predetermined list reducing discrepancies among jury awards for similar injuries. However, I'd like to know more about this formula. Who created it and how does it compare to past rulings of similar injuries. All in all, provided this formula aligns with precedent jury awards and provided you keep the collateral rule, I can see this new malpractice system reducing admin costs and expediting cases, furthering judicial efficiency.