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FINAL EXAMINATION

Comparative Decision-Making Processes

Instructions

PLEASE --

1. Place your number on each examination "blue book" you use and, if you type your examination, on each separate typed page.
2. Read and reread each question carefully before writing your answer. Plan your answer carefully. Clarity, conciseness and organization of your answers will be taken into account. Use your judgment, your discretion and your common sense, as well as your knowledge of the processes involved, in developing your answers and in allocating your time among the questions.
3. Write legibly on only one side of a blue book page, leaving margins. Do not cram your handwriting. If you type your answers, double space, leave reasonable margins and use 8 1/2 x 11 paper.
4. This is an open-book examination. You may consult your own notes and any material received as a handout or assignment in the course during the semester. You may not, however, examine any other written or printed materials nor may you consult with any other person except the instructors.
5. Although the examination is designed to be answered within three hours, four hours have been allocated in order to insure that time pressure does not become a significant factor. When you have completed your examination deliver your blue books or typed examination pages to the secretary's office, room 7. You may then leave the premises but must not discuss the examination or any aspect thereof with any student who has not yet completed his or her examination.

QUESTION I

45% - One Hour and Fifteen Minutes ~~4:30~~ 11:00

Peter Pikake (P), while walking across Broad Street in the City of Kaipupu, State of Kamehameha, was seriously injured when he was struck by an automobile owned and driven by David Driver (D). Pikake brought suit against Driver in the 1st Circuit Court of Kamehameha seeking damages of \$1,000,000 including \$50,000 for past and future medical expenses, \$250,000 for past earnings lost and future loss of earning capacity and \$700,000 for past and future pain and suffering.

At the trial in Circuit Court, Pikake's lawyer requested the trial judge to charge the jury by giving it the following instructions (among others):

1. If you find that defendant Driver was negligent in operating his automobile and if you find that his negligence was a direct and proximate cause of the collision and plaintiff Pikake's injuries, then you must return a verdict for the plaintiff.
2. Alternatively, whether you find defendant Driver guilty of negligence or not, you should return a verdict in favor of plaintiff Pikake if you find that defendant Driver, while operating his automobile, struck and caused injury to plaintiff.

The trial judge, Shibai, J., instructed the jury in accordance with the first requested instruction, above, but refused to give the second instruction stating, in a brief memorandum opinion:

"The second requested instruction would have me tell the jury that defendant is liable for plaintiff's injuries if those injuries were caused by defendant's driving his car against plaintiff irrespective of whether defendant was negligent in causing the collision. I'm not sure what plaintiff's game is, but it appears as if he is asking this court, a trial court, to overrule the doctrine of negligence and in its stead adopt a novel theory of liability without fault for injuries caused by automobile collisions. Of course, this court has no power to make such a far-reaching change, particularly because the common law rule, basing recovery in such cases on negligence or other fault, is so well settled in this state. Plaintiff's counsel had better address his arguments on this point to the State Legislature or the State Supreme Court, but not to me.
"Instruction #2 refused."

strict liability

Thereafter, Judge Shibai sent the case to the jury. The jury returned a verdict for defendant Driver and indicated, by special interrogatories, that it found defendant not guilty of negligence or other fault but did find that plaintiff's injuries were caused

by Driver's operation of his automobile. It also found plaintiff Pikake not guilty of contributory negligence.

Plaintiff's attorney then appealed to the State Supreme Court. The issue on appeal, as framed in Defendant-Appellee's brief and as accepted by the Supreme Court, was:

"Whether this court should overturn the well-accepted and long-settled rule that liability in automobile accident cases requires negligence or other fault and adopt, in its stead, a rule of liability without fault (absolute ^{strict} liability) for automobile-caused injuries?"

In his brief, defendant's attorney pointed out that the Legislature of the State of Kamehameha had on six recent occasions rejected the concept of no-fault for automobile accidents and he urged the Supreme Court to leave the matter to the Legislature.

In his brief, plaintiff's lawyer agreed that the State Legislature had six times rejected no-fault, but he asserted that the reason for this failure was that 55% or more of the legislators were lawyers who earned all or part of their income from personal injury litigation involving automobile accidents. He also argued that there was ample precedent for the Supreme Court's overruling old and unworkable doctrines of tort law and cited the fact that the Supreme Court of Kamehameha had in recent years eliminated the requirement of privity of contract in negligence actions, as in the case of McPherson v. Buick (materials, p. 253), and had adopted a strict liability rule for defective products, as in Henningsen v. Bloomfield Motors, Inc. (materials, p. 66).

After the first decision conference of the Justices of the Supreme Court regarding this case, it appeared that a majority of the justices were amenable, on substantive legal-policy grounds, to eliminating fault as a basis for liability in automobile accident cases and replacing it with absolute liability. However, all of the justices expressed deep concern over the process issues, i.e., whether such a change in the basis of liability, if it is to come, should come from the State Supreme Court or from the State Legislature, and several justices expressed the opinion that it might be inappropriate for the Supreme Court to make such a revolutionary change in the basis of liability.

To help the justices resolve the process issues, the Chief Justice has asked you, his clerk, to draft a memorandum discussing the problems and the pros and cons of judicial overruling of the negligence/fault requirement for liability in cases of automobile-produced injury and its replacement by an absolute liability rule. He does not want any discussion of whether negligence is preferable to absolute liability, or vice versa, as a substantive rule. He does want you to discuss the the problems and considerations relevant to judicial overruling versus legislation in this situation, giving full regard to the characteristics of judicial and legislative decision-making, especially differences between them. He also invites you to suggest how the Supreme Court

might overcome any process-type problems created by judicial overruling. Finally, he asks for your insights and your reasoning on the question whether the problems of judicial overruling in the privity of contracts situation and in the case of judicial adoption of absolute liability for injuries caused by defective products might differ in any significant way from the problems in the case at bar. He informs you that if your memorandum is a good one he might use some of its language in his opinion.

Draft the memorandum.

QUESTION II

40% - One Hour and Fifteen Minutes 12:30

Assume that you are counsel to a consortium of Hawaiian community groups and landowners which desires to promote a change-over in the source of energy used to generate electricity for Oahu, from fossil fuels to solar, geothermal, or tidal power sources. Further assume that the governing board of the consortium has decided to launch a sustained effort to win the active interest, if not the firm support, of both the state Department of Transportation and the Hawaiian Electric Company. Finally, assume that the board has asked you to prepare a memorandum which, focussing primarily on the inner workings of the Department and the Company, you

1) indicate what information the consortium (members and staff) should try to obtain about these institutions before an approach is made and why you believe this information would be useful;

2) introduce plausible assumptions about the Department and the Company on the basis of your knowledge about similar institutions, taking care to point out significant differences, if any, that may exist between the Department and the Company; and

3) state and justify some preliminary strategy recommendations in light of what you have said in 1 and 2.

Write the memorandum.

Be as specific and concrete as possible.

In framing your recommendations, be sure to consider questions of timing as well as the relevant characteristics of the Department and the Company.

QUESTION III

15% - One-half Hour

Examine the excerpts from the Occupational Safety & Health Act (OSHA), (materials, pp. 122-137) and provide one or two examples of who is charged under the Act with the performance of each of the seven decision-making functions -- the intelligence function, the promotion function, the prescription function, the invocation function, the application function, the termination function and the appraisal function.

State, in not more than one page, what purposes may be served, and how, by using this special terminology for identifying discrete decision-making functions.