

FINAL EXAM

Instructions

DO NOT GO BEYOND THIS PAGE UNTIL THE EXAM ACTUALLY BEGINS.

THIS IS A CLOSED BOOK EXAM! While you are waiting for the exam to begin, be sure that you have written your EXAM NUMBER on EACH bluebook, that you have read these instructions, and that you are otherwise ready to begin.

IMPORTANT: This exam will last THREE HOURS. You should plan on spending AT LEAST 20 minutes reading the questions carefully and outlining your answers on a separate sheet of paper. Before writing your answers, REREAD each question to be sure you haven't missed anything.

DOUBLE-SPACE your answers in the bluebook.

Use SEPARATE BLUEBOOKS for EACH QUESTION. Label each bluebook according to each question and, if necessary, book number, e.g., "Question 1, Book 1"; "Question 1, Book 2"; "Question 2"; etc. When you are finished, turn to the back cover of the first bluebook, and place the second, third, fourth, etc. bluebook in order inside the end of the first bluebook, so the whole makes a single package. Then put it in the box at the front.

You are welcome to use abbreviations, but indicate what they are, e.g., 'Andropov ("A") would be sued by Brezhnev ("B"), alleging that A would be liable to B ... '!

PLEASE IGNORE issues relating to legal causation; assume that any but-for cause of an injury is also a proximate cause of that injury.

Plan on spending at least 15 minutes at the end PROOFREADING your answers. You may not write ANOTHER WORD after time is called.

A STATUTORY APPENDIX is provided that gives the law of this jurisdiction, the State of Evergreen, on some issues. If no law is specified on the point you are interested in, please comment on the possible alternatives.

Each question has been assigned a point total, and the exam as a whole has a point total of **135**. Spend the amount of time on each question reflecting its relative worth.

You may KEEP your copy of the exam questions if you wish.

REMEMBER THE HONOR CODE! Don't identify yourself.

DOUBLE SPACE!

DOUBLE SPACE!

DOUBLE SPACE!

GOOD LUCK!!!

QUESTION 1 (75 points)

Barbara K. Hoffman had a history of back problems that began with a hospitalization in 1976. She was later diagnosed by her doctor as having a herniated disc, requiring bed rest. Hoffman was hospitalized again in 1986 or 1987 for back problems. In 1988, she had back surgery, a laminectomy, at the L2-3 vertebrae. She suffered complications from the surgery, including paralysis and swelling of her spinal cord. She recovered after receiving steroid and physical therapy. Hoffman was in pain once more in 1997, which was not relieved by steroid and physical therapy. In December 1998, Hoffman had experimental surgery performed by Dr. F. Todd Wetzel, a 360-degree spinal fusion that fused together three discs and two vertebrae. Pain began in her upper back in August 1999, following an accident involving a Springdale Transportation Authority (STA) bus, wherein a myelogram revealed that a bone had overgrown a nerve in her back. Prior to the accident, Hoffman had no previous problems with her upper spine.

Hoffman also suffered from clinical depression, causing her to attempt suicide in 1994. She was hospitalized and, thereafter, received weekly medical attention and medication for her depression.

On September 27, 1999, Hoffman underwent back surgery, which included a decompression of the L4-5 and L3-4 discs in her spine, reexploration of a prior spinal decompression, a laminectomy at the L3-4 vertebrae, a bilateral facetectomy at the L4-5 vertebrae and a bilateral foraminotomy at the L3-4 and L4-5 vertebrae. Dr. Wetzel, who performed the surgery at Weiss Hospital, first explained to Hoffman that the procedure was to be fairly simple, would last for one and one-half hours and would relieve pressure on the L3, L4 and L5 areas of the spine. Prior to the surgery, Hoffman was positioned on an Andrews Spinal Surgery Table (Andrews Table), Model SST-3000®, a table designed, manufactured and sold by Orthopedic Systems, Inc. ("OSI"), which is used to position patients for spinal surgery with their hips flexed and in a kneeling position at a 90-degree angle.

Hoffman states that after being prepared for back surgery, she next remembered waking up in the intensive care unit, where nurses told her that she had hepatitis, causing her nausea. Doctors informed her that she had liver failure, kidney failure, gastrointestinal bleeding, pneumonia, a heart arrhythmia and septicemia. Dr. Michael Berger, an internist, and Dr. Nelson Kanter, a pulmonary specialist, told Hoffman that "everything that could go wrong went wrong." Hoffman's renal physician told her that she was "very, very sick," and that she was "never going to be the same again, ever." According to Hoffman, following her surgery, "nobody expected me not to die." Dr. Wetzel repeatedly stated in front of her that he was glad she did not die.

During her recovery, Hoffman underwent temporary kidney dialysis, from which she suffered hallucinations, and had seven blood transfusions within two weeks. When she asked for an explanation for her near-death experience, she was given "a different story from everybody," and was told, "sh** happens." Dr. Wetzel told Hoffman that her complications were due to the anesthesia she was given prior to surgery. Nurses, residents or whomever came into her hospital room told Hoffman that a monitor alarm went off during surgery, her blood pressure dropped and doctors had trouble "getting a vein or artery in order to give [Hoffman] the stuff to push it back up." She was told the monitor was broken. She was discharged from the hospital on October 19, 1999.

After release from the hospital, Hoffman could not leave her home for two or three months. Thereafter, she underwent continued physical therapy and rehabilitation. Prior to the surgery, she had retained a law firm, Harvey L. Walner and Associates, to handle the accident claim against the STA, resulting in a back pain claim, precipitating the September 27, 1999 surgery. On October 28,

1999, as part of the investigation into the accident, Hoffman's attorney sent a letter requesting Weiss Hospital to forward her medical records in order to determine the nature and extent of her injuries. Hoffman recovered a \$2,500 settlement from the STA.

On April 23, 2002, Hoffman returned to Weiss Hospital to undergo knee surgery. When she expressed reluctance regarding the general anesthesia she was to receive, citing her previous experience, Dr. William Conrad, an anesthesiologist, informed her that an internal hospital investigation of the September 27, 1999 surgery led doctors to conclude that the Andrews Table caused her complications. Dr. Conrad explained that during the surgery, she was placed on the Andrews Table on her knees, bent at the waist, with her sternum area resting on a bar called the Autoglide Torso Lift®. Dr. Conrad told Hoffman that at some point during the surgery, the bar moved to her stomach, under her rib cage, with her body weight slowly pushing down on the bar and crushing her liver during the surgery, resulting in the complications she suffered. The investigation did not determine whether the bar slipped into the questionable position or originally was placed in that position prior to surgery.

You represent Ms. Hoffman. Please evaluate her prospects for a tort recovery for the injuries she suffered.

QUESTION 2 (60 points)

On December 5, 1998, Michael Denton, the principal at West City High School, asked Joyce Hertz, a teacher in the school and the chair of the English Department, to attend a curriculum meeting at the Evergreen State Department of Education in Fairhurst, Evergreen. The meeting was scheduled for February 1, 1999. Ms. Hertz drove her car to Fairhurst and arrived twenty minutes before the meeting began. After she parked her car in the parking lot she tried to get from her car to the building, but due to the accumulation of snow and ice, she slipped once in the parking lot. She fell a second time on the sidewalk leading to the Education building. There was an accumulation of ice and snow on both the parking lot and the sidewalk of the school.

You work for a law firm that specializes in representing plaintiffs in personal injury suits. Your assignment is to prepare an evaluation of Ms. Hertz' chances for recovering. Previous work-up of the case includes the following information:

- (1) Victor Sanchez, the maintenance supervisor at the Department of Education building, provided a statement to an investigator. He stated that it had not snowed February 1, 1999, and that the last day it had snowed was on January 26, 1999. Someone from the maintenance department had spread 40 pounds of salt in the parking lot and on the sidewalks surrounding the building a little over an hour before her arrival in the parking lot.
- (2) Ms. Hertz' injuries include a fractured hip and a dislocation of discs in her spine. As a result of these injuries she is unable to stand for long periods of time and has been put on a medical leave of absence from her position at the school. Her doctor also prescribed medication for the pain that she has experienced, and her ability to concentrate and do complex thinking has been hampered. While her doctor hopes that she will eventually recover from these injuries, there is no guarantee that she will. Based on an extensive consultation with her and her physician, one of the partners in the firm believes that a jury would award her \$500,000 in compensatory damages. Please assume that to be correct for purposes of your analysis.

SELECTED STATUTES OF THE STATE OF EVERGREEN
ANNOTATED EVERGREEN CODE
TITLE 34. CIVIL PROCEDURE
ARTICLE 51. DAMAGES
CHAPTER 1. DAMAGES GENERALLY

§ 34-51-1-1 Collateral source payments

Sec. 1. Evidence of collateral source payments is governed by EC 34-44-1.

§ 34-44-1-1 Purpose of chapter

Sec. 1. The purpose of this chapter is:

- (1) to enable the trier of fact in a personal injury or wrongful death action to determine the actual amount of the prevailing party's pecuniary loss; and
- (2) to provide that a prevailing party not recover more than once from all applicable sources for each item of loss sustained.

§ 34-44-1-2 Personal injury or wrongful death actions; admissibility of evidence

Sec. 2. In a personal injury or wrongful death action, the court shall allow the admission into evidence of:

- (1) proof of collateral source payments other than:
 - (A) payments of life insurance or other death benefits;
 - (B) insurance benefits for which the plaintiff or members of the plaintiff's family have paid for directly; or
 - (C) payments made by:
 - (i) the state or the United States; or
 - (ii) any agency, instrumentality, or subdivision of the state or the United States;that have been made before trial to a plaintiff as compensation for the loss or injury for which the action is brought;
- (2) proof of the amount of money that the plaintiff is required to repay, including worker's compensation benefits, as a result of the collateral benefits received; and
- (3) proof of the cost to the plaintiff or to members of the plaintiff's family of collateral benefits received by the plaintiff or the plaintiff's family.

CHAPTER 2. COMPENSATORY DAMAGES: COMPARATIVE FAULT

§ 34-51-2-5 Effect of contributory fault

Sec. 5. In an action based on fault, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the

claimant's contributory fault, but does not bar recovery except as provided in section 6 of this chapter.

§ 34-51-2-6 Barring of recovery; degree of contributory fault

Sec. 6. (a) In an action based on fault that is brought against:

- (1) one (1) defendant; or
- (2) two (2) or more defendants who may be treated as a single party;

the claimant is barred from recovery if the claimant's contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages.

(b) In an action based on fault that is brought against two (2) or more defendants, the claimant is barred from recovery if the claimant's contributory fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages.

§ 34-51-2-8 Jury instructions; multiple defendants

Sec. 8. (a) This section applies to an action based on fault that:

- (1) is brought against two (2) or more defendants; and
- (2) is tried to a jury.

(b) The court, unless all the parties agree otherwise, shall instruct the jury to determine its verdict in the following manner:

(1) The jury shall determine the percentage of fault of the claimant, of the defendants, and of any person who is a nonparty. The jury may not be informed of any immunity defense that might be available to a nonparty. In assessing percentage of fault, the jury shall consider the fault of all persons who caused or contributed to cause the alleged injury, death, or damage to

property, tangible or intangible, regardless of whether the person was or could have been named as a party. The percentage of fault of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from a nonparty or nonparties.

(2) If the percentage of fault of the claimant is greater than fifty percent (50%) of the total fault involved in the incident which caused the claimant's death, injury, or property damage, the jury shall return a verdict for the defendants and no further deliberation of the jury is required.

(3) If the percentage of fault of the claimant is not greater than fifty percent (50%) of the total fault, the jury shall then determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded.

(4) The jury next shall multiply the percentage of fault of each defendant by the amount of damages determined under subdivision (3) and shall enter a verdict against each defendant (and such other defendants as are liable with the defendant by reason of their relationship to a defendant) in the amount of the product of the multiplication of each defendant's percentage of fault times the amount of damages as determined under subdivision (3).

CHAPTER 3. TORT CLAIMS AGAINST
GOVERNMENTAL ENTITIES AND PUBLIC EMPLOYEES

§ 34-13-3-3 Immunity of governmental entity or employee

Sec. 3. A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from the following:

- (1) The natural condition of unimproved property.
- (2) The condition of a reservoir, dam, canal, conduit, drain, or similar structure when used by a person for a purpose that is not foreseeable.
- (3) The temporary condition of a public thoroughfare that results from weather.
- (4) The condition of an unpaved road, trail, or footpath, the purpose of which is to provide access to a recreation or scenic area.
- (5) The design, construction, control, operation, or normal condition of an extreme sport area, if all entrances to the extreme sport area are marked with:
 - (A) a set of rules governing the use of the extreme sport area;
 - (B) a warning concerning the hazards and dangers associated with the use of the extreme sport area; and
 - (C) a statement that the extreme sport area may be used only by persons operating extreme sport equipment.

This subdivision shall not be construed to relieve a governmental entity from liability for the continuing duty to maintain extreme sports areas in a reasonably safe condition.

- (6) The initiation of a judicial or an administrative proceeding.
- (7) The performance of a discretionary function.
- (8) The adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or false imprisonment.
- (9) An act or omission performed in good faith and without malice under the apparent authority of a statute which is invalid if the employee would not have been liable had the statute been valid.
- (10) The act or omission of anyone other than the governmental entity or the governmental entity's employee.
- (11) The issuance, denial, suspension, or revocation of, or failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization, where the authority is discretionary under the law.
- (12) Failure to make an inspection, or making an inadequate or negligent inspection, of any property, other than the property of a governmental entity, to determine whether the property complied with or violates any law or contains a hazard to health or safety.
- (13) Entry upon any property where the entry is expressly or impliedly authorized by law.
- (14) Misrepresentation if unintentional.
- (15) Theft by another person of money in the employee's official custody, unless the loss was sustained because of the employee's own negligent or wrongful act or omission.
- (16) Injury to the property of a person under the jurisdiction and control of the department of correction if the person has not exhausted the administrative remedies and procedures provided by section 7 of this chapter.
- (17) Injury to the person or property of a person under supervision of a governmental entity and who is:
 - (A) on probation; or

(B) assigned to an alcohol and drug services program, a minimum security release program, or a community corrections program.

(18) Design of a highway if the claimed loss occurs at least twenty (20) years after the public highway was designed or substantially redesigned; except that this subdivision shall not be construed to relieve a responsible governmental entity from the continuing duty to provide and maintain public highways in a reasonably safe condition.

(19) Development, adoption, implementation, operation, maintenance, or use of an enhanced emergency communication system.

(20) Injury to a student or a student's property by an employee of a school corporation if the employee is acting reasonably under a discipline policy.

(21) An error resulting from or caused by a failure to recognize the year 1999, 2000, or a subsequent year, including an incorrect date or incorrect mechanical or electronic interpretation of a date, that is produced, calculated, or generated by:

(A) a computer;

(B) an information system; or

(C) equipment using microchips;

that is owned or operated by a governmental entity. However, this subdivision does not apply to acts or omissions amounting to gross negligence, willful or wanton misconduct, or intentional misconduct. For purposes of this subdivision, evidence of gross negligence may be established by a party by showing failure of a governmental entity to undertake an effort to review, analyze, remediate, and test its electronic information systems or by showing failure of a governmental entity to abate, upon notice, an electronic information system error that caused damage or loss. However, this subdivision expires June 30, 2003.

(22) An act or omission performed in good faith under the apparent authority of a court order that is invalid, including an arrest or imprisonment related to the enforcement of the court order, if the governmental entity or employee would not have been liable had the court order been valid.

§ 34-13-3-4 Limitation on aggregate liability; punitive damages prohibited

Sec. 4. The combined aggregate liability of all governmental entities and of all public employees, acting within the scope of their employment and not excluded from liability under section 3 of this chapter, does not exceed three hundred thousand dollars (\$300,000) for injury to or death of one (1) person in any one (1) occurrence and does not exceed five million dollars (\$5,000,000) for injury to or death of all persons in that occurrence. A governmental entity is not liable for punitive damages.