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FINAL EXAM SAMPLE ANSWER

QUESTION 1

The facts for this question were based upon *Hoffman v. Orthopedic Systems, Inc.*, 327 Ill.App.3d 1004, 765 N.E.2d 116, 262 Ill.Dec. 290 (Ill.App. 2002), in which the court affirmed the dismissal of her product liability claim because it was not brought within two years of the time her attorney was on notice of the existence of a product liability claim.

Barbara Hoffman ("BH")[1] has a product liability claim against Orthopedic Systems Inc. ("OSI"), a medical malpractice claim against Dr. Wetzel and the hospital, and possibly a legal malpractice claim against the attorney who handled her STA claim. She will have to respond to defenses based on the statute of limitations, and may have to consider the effect of the settlement with the bus company.

I. Product Liability Claim[2]

To recover damages from OSI, BH would have to establish that the surgical table (SST-3000) was defective. The evidence is unclear as to exactly how the accident happened, but the hospital could provide strong evidence that there was a failure of the SST-3000. There are three basic kinds of defects: manufacturing, design, and warning.

a. *Manufacturing Defect*? It is possible that there was something wrong with this particular SST-3000, that is, for some reason it did not meet the manufacturer's specifications. For example, the steel holding the bar might have been of inferior quality, or it was not properly welded, or some other defect in the manufacturing process occurred. If that is what happened, the manufacturer is strictly liable. Unfortunately, it looks like the evidence that would support such a claim will be difficult to obtain given the length of time since the accident happened.

b. *Design defect*? Even if the SST-3000 was properly manufactured, it may be that the design was inferior. The fact that the equipment slipped in the course of the surgery suggests something wrong with the equipment; even if part of the problem was with the operators of the equipment, the serious consequences for BH suggest that greater care should have been used in preventing such accidents. Jurisdictions vary as to the standard used to determine whether a design is defective. Some use a true negligence standard, particularly for medically related products (although medical equipment might not get the same treatment as pharmaceutical drugs). Other jurisdictions use a "strict liability" standard, which usually means that the jury judges whether the product is reasonably safe by asking whether a reasonably prudent person would have used the

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1. If BH has a husband, he would be able to file a claim against the same defendants for loss of consortium.

2. In the recitation of the facts there is also reference to a monitor alarm that went off during surgery, as well as statements that the monitor was broken. It does not appear that the monitor had anything significant to do with her injury. If it turns out that a defect in the monitor did in fact cause her injury, the analysis would be similar to the analysis of the claim against OSI.

design that OSI used. The primary difference is that the jury can use "20-20 hindsight" in imputing to OSI the knowledge we now have about the product, rather than using a true negligence standard of what OSI knew or should have known about the product. It doesn't seem likely that there would be any significant difference here. The risk of the bar slipping underneatn an anesthetized patient must have been well known to OSI when the product was designed.

c. *Warning defect*? Even if the design of the product was not unreasonably dangerous, the product is still defective if it lacks warnings that allow it to be used safely. In this case the surgical team apparently was unaware that the bar had slipped underneath BH and was causing her serious injury. If a warning about this potential would have helped avoid the injury, then the SST-3000 can be found defective. On the other hand, the surgical team may have been well aware of this risk, and hence the warning would have done little good. As with the design defect issue, the difference between strict liability and negligence wouldn't be significant; the real question is whether the product's potential to cause this kind of injury was so high that a reasonable person would have avoided it through better design or more effective warning.

II. Medical Malpractice Claim

That naturally brings up the alternative possibility that the SST-3000 was reasonably well designed but the people who used it were incompetent. Medical malpractice cases fall into two areas:

a. *Failure to Meet the Standard of Care*. First, the health care provider may be negligent in performing a procedure, such as diagnosis or surgery. To determine whether or not there was negligence in performing a procedure, the health care provider's performance should be compared with someone with the same level of expertise practicing in the same or similar circumstances. Thus, Dr. Wetzel would be judged by the standard of care exercised by surgeons in a similar hospital setting. It's unclear exactly what caused the problem with the SST-3000, but someone, perhaps on the hospital staff, didn't use it properly. Moreover, no one seemed to notice when the equipment had failed. It seems hard to believe that all of the hospital personnel and the surgeon were meeting the standard of care; even if there was some problem with the equipment it would seem that reasonable procedures should be in place to check on the patient's condition during the surgery to avoid this kind of catastrophe. Nonetheless, the burden will be on BH to find a competent expert witness who can testify that either the physicians or the hospital staff (whichever way the evidence points—possibly both) did not meet the standard of care.

b. *Failure to Secure Informed Consent*. Even if the procedure were not done negligently, BH may still have a medical malpractice claim if she did not give informed consent to the procedure. Informed consent must be given after the patient has been provided with a disclosure of the risks of surgery along with alternative forms of treatment. The facts suggest that Dr. Wetzel told BH this would be "fairly simple" surgery. If he did not disclose the risk that something catastrophic could happen, he is liable for the subsequent injury even if he was not negligent in performing the procedure.

III. Statute of Limitations

I am troubled by the length of time since the procedure. If this jurisdiction has a two-year statute of limitations, it could bar both claims. The statute of limitations is probably subject to a "discovery rule"—the statute begins to run when the plaintiff knows or should know of the injury and its cause. On the one hand, BH didn't know the full details of the product liability case until her second surgery, but given the description of the surgery by all concerned, it would seem to put a

reasonable person on notice of the potential for a claim against either the product manufacturer, the hospital, or both. With respect to the claim against the medical personnel/hospital, it appears that at least Dr. Wetzel and perhaps others engaged in fraudulent concealment; he told her that her problems were a result of her reaction to anesthesia rather than the true cause of her injuries. That affirmative misstatement (as opposed to mere silence) would toll the statute of limitations until she learned the true cause of her problems. On the other hand, the statements made by other personnel at the time may have alerted her to her problems and the statute may have commenced then.

IV. Claim against BH's Attorney Harvey Walner ("HW")

The very fact that there seems to have been such a strong claim against *somebody*—whether for product liability or medical malpractice—raises the question of whether HW acted with requisite diligence in settling her claim with the STA for only $2,500. For one thing, the medical defendants and OSI might claim that STA is a party (they might now be a non-party—see below) who is responsible for BH's injury, and thus their liability should be reduced to the extent that STA caused the injury. If $2,500 is an inadequate settlement relative to the jury's assignment of STA's share of fault, that would HW's recommendation to settle for $2,500 questionable. For another thing, HW may not have properly pursued the claim against the medical defendants and OSI to see whether or not a medical malpractice or product liability claim should be filed. If the statute of limitations has indeed run, HW would be liable for malpractice. Similar to the medical claims, the standard of care and the extent of informed consent would have to be investigated.

V. Comparative Fault Issues

If the case is limited to a claim against either the medical defendants or OSI, or a combination, then I do not foresee much in the way of comparative fault issues. Each defendant presumably has sufficient resources to pay the share of judgment assigned to them. On the other hand, if STA is determined to have a share of fault in causing the injury that led to the surgery in the first place, it appears that Evergreen has something like a pure several liability approach to comparative fault. Under § 34-51-2-8, the jury appears to multiply each defendant's share of fault by the plaintiff's total damages, and then a verdict against each defendant is entered limited to that defendant's proportionate share. There is also a provision for nonparties to be included (§ 34-51-2-8(b)(1)), and thus STA's share could in effect be deducted from what otherwise would have been a full recovery.

QUESTION 2

The facts for this question were based upon *Hertz v. School City of East Chicago*, 744 N.E.2d 484, 152 Ed. Law Rep. 252 (Ind.App., 2001), in which the court reversed a summary judgment for the defendant, finding that the trial court erroneously found the condition of the parking lot and sidewalk to be "temporary."

Joyce Hertz ("JH") has a claim[3] against the State for her injuries; her claim would (1) be based upon premises liability, but (2) sovereign immunity might bar her claim; (3) contributory negligence could reduce or even bar her claim; (4) there might be a problem with the statute of limitations; and (5) her worker's compensation benefits would be admissible as evidence.

I. Premises Liability

JW's claim against the State would be based on a premises liability theory, that is, the landowner's duty to use the degree of care associated with the plaintiff's status during the visit. In this case Joyce was a public invitee. That is, a public invitee is similar to a business invitee, who is on the owner's land pursuant to a business interest of the owner. Public invitees are visiting a governmental or charitable institution in connection with the "business" of the government or the charity. Here JH was visiting the state education department for a meeting, and would clearly be a public invitee. As such, she is entitled to the exercise of reasonable care by the owner. She could certainly allege that the condition of the parking lot and the sidewalk was too slippery, and that, even though they had put salt on the surfaces, they had done so in a negligent fashion. For JH to recover, a jury would have to decide that the maintenance people were indeed negligent.

II. Sovereign Immunity

Even if JH could establish that the State's employee was negligent by the standards of reasonable care, we first have to examine whether or not the State of Evergreen has permitted itself to be held liable for this kind of injury. The statute dealing with claims against the state government doesn't specifically provide a kind of omnibus waiver of sovereign immunity, but instead lists a series of exceptions. § 34-13-3-3(3) retains sovereign immunity for "a temporary condition of a public thoroughfare that results from weather." Assuming the sidewalk and parking lot would be considered a public thoroughfare (the real court said it was), the question would be whether this condition was "temporary." On the one hand, the testimony was that it hadn't snowed in five days. On the other hand, what makes a parking lot or sidewalk slippery may be the thawing and refreezing of snow, which could appear and then disappear within a matter of hours. That question could go either way.

I do not believe the state could argue successfully that the decisions as to how to avoid slippery surfaces would be protected by the immunity retained for discretionary functions (§ 34-13-3-3(7)); there isn't any policymaking involved in deciding when or how to put salt on slippery sidewalks or parking lots.

In addition, there is a dollar limit on the amount any one person can recover—$300,000.

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3. If JH has a spouse, he could bring his own claim against the state for loss of consortium. His claim would be joined with hers in determining liability, but would then be evaluated for whatever damages he has suffered.

III. Contributory Negligence

The state would certainly argue that JH was contributorily negligent in slipping and falling not once, but twice. Plaintiffs, just like defendants, are obligated to exercise reasonable care for their own safety. If a jury finds that JH wasn't using reasonable care, either in the choice of footgear, or where she was walking, or how she was walking, they would find her negligent. The Evergreen statute (§ 34-51-2-5&6) provides for "modified comparative fault"—that is, JH can recover so long as her fault is not greater than that of the state. If, for example, the jury found JH and the State equally at fault, JH would recover 50% of her damages. On the other hand, if the jury found that JH was more than 50% at fault, she would get nothing.

It's possible that the state could argue that, after the first fall, when she was aware of the slippery conditions, JH assumed the risk of injury. I don't think this would work, since in most jurisdictions on these facts the defense of assumption of risk would simply be another way of describing contributory negligence

IV. Statute of Limitations

There is nothing in the statute about a statute of limitations, but it has been more than three years since the day of her injury. We should find out if a claim is still timely. I see no basis for extending the statute of limitations beyond what is provided in the statute.

V. Collateral Source Benefits

Evergreen has modified the traditional common law rule that excludes evidence of collateral source payments from consideration by the jury. Thus, if JH has received payments for her medical expenses or for wage replacement, that evidence would be admissible the trial of her case against the state. On the other hand, she can also introduce evidence of her obligation to pay that money back (which is likely).

Summer 2002 Final Exam Checklist

QUESTION 1

- ☐ **Overview**
- ☐ **Product** Liability Claim
- ☐ Was the product **defective**?
- ☐ **Manufacturing** defect?
- ☐ True **strict** liability
- ☐ Is **evidence** still available?
- ☐
- ☐ **Design** defect
- ☐ Evidence required if test is **negligence**
- ☐ If risk was unknown, **SL** would help
- ☐ Product risk probably **known**
- ☐ Design liability even if **operator error**
- ☐
- ☐ **Warning** defect
- ☐ If design okay, but still **dangerous**
- ☐ Did personnel **know** of risk?
- ☐
- ☐ Loss of consortium claim?
- ☐
- ☐
- ☐
- ☐ Medical **malpractice** claim
- ☐ Professional **negligence**
- ☐ Standard of **care—comparable** position
- ☐ **Admission** of problems
- ☐ Informed **consent**
- ☐ **"simple"** didn't accurately describe risk
- ☐
- ☐ Statute of **Limitations**
- ☐ SOL for claim v. **OSI**
- ☐ **Two** years or **three** years?
- ☐ **Discovery** rule still requires diligence
- ☐ Lawyer's investigation may trigger **duty**
- ☐ SOL for claim v. the **Hospital**
- ☐ Was there **fraudulent concealment**?
- ☐ When was she put on **notice**?
- ☐
- ☐ Claim v. **Attorney Walner**
- ☐ Bad **settlement**?
- ☐ Delay in pursuing **malpractice** claims
- ☐
- ☐ Multiple tortfeasor **statute**
- ☐ **Settlement** reduces total recovery

QUESTION 2

- ☐ **Overview**
- ☐ Claim v. **State**
- ☐
- ☐ **Premises** Liability
- ☐ Public **Invitee**
- ☐ Standard of **Reasonable care**
- ☐ Was Sanchez' **maintenance** negligent?
- ☐
- ☐ Sovereign **Immunity**
- ☐ Exception for "**temporary** condition"
- ☐ Is **refreezing** of snow temporary?
- ☐ No **discretionary** function exemption
- ☐ Cap of **$300K**
- ☐
- ☐
- ☐
- ☐ **Contributory** negligence
- ☐ **Modified** Comparative Fault statute
- ☐ If >50%, claim is **barred**
- ☐ **Assumption** of risk = CN
- ☐
- ☐ Statute of **Limitations**
- ☐ More than **three** years
- ☐
- ☐ Admissibility of **collateral source** benefits
- ☐ Loss of **consortium** claim?
- ☐
- ☐
- ☐
- ☐
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- ☐
- ☐
- ☐
- ☐
- ☐

Exam # _____