

FINAL EXAM SAMPLE ANSWER

QUESTION 1

The facts for this question (except for the product liability aspects, which I made up) were based upon *Bertagnolli v. Louderback*, 67 P.3d 627 (Wyo. 2003), which reversed the trial court's dismissal of the claim against the employer, holding that the injury could fall within the "intentional act" exclusion to employer immunity.

Joe Bertagnolli ("JB") will have two primary claims; one is against the employer ("GC"), and the other is against the manufacturer of the shuttle belt ("AEC"). Even if he is successful in establishing liability, JB will face issues of comparative fault.

Claim v. GC

The general rule for injuries received at the workplace is that the employer is immune from ordinary tort claims. This immunity is a product of the worker compensation statutes that substitute a set of fixed benefits (available regardless of fault) for ordinary tort liability. However, the employer immunity is limited to accidental injuries; intentional injuries are typically excluded from the coverage of such statutes, and for them the immunity is inapplicable and the worker may file a tort claim.

Thus the issue in this case is whether or not the GC's conduct falls within the intentional injury exclusion from the statute. On the one hand, it could be said that the employer was not merely inadvertent, but forced the employee against his will to encounter this risk. On the other hand, it is hard to distinguish this case from other typical injuries where the employee doesn't want to encounter a risk but the employer tells the employee, explicitly or implicitly, that failure to perform the job will result in termination.

Claim v. AEC

A product manufacturer is subject to liability for injuries received while using the product if the plaintiff can establish that the product was *defective*. A product defect may be established in one of three ways: first, if the product is *mismanufactured* or contains a *manufacturing defect*—that is, the product deviates from the specifications established for the product. I don't think there is any evidence that this product deviated in any way from its specifications. Second, the product may be defective in *design*; if the product is more dangerous than a reasonable person would have permitted it to be, we can say the product was defectively designed. Or finally, the product may be defective because *inadequate warnings* were supplied with the product.

With respect to manufacturing defects, there is general agreement that strict liability should be applied, but since that is not applicable in our case I don't think it's relevant. With respect to design and warning defects, there is dispute over whether the standard should be one that is based on *negligence*—that is, did the manufacturer fail to use reasonable care in designing the product or warning about its dangers?—or some form of strict liability, which either looks to the consumer's expectations (regardless of whether or not reasonable care could have prevented the injury) or to a standard based upon *imputed knowledge* (under an *imputed knowledge* test, the jury would ask

whether or not a reasonable person, if she knew what we now know about the product, would have used the design or provided the level of warning that the product was sold with).

I don't think the difference between strict liability and negligence would really feature prominently in this case, because there's no big surprise in what happened; the danger to the worker would have been well known to the manufacturer, as well as to the worker (that's why JB didn't want to work in that area). AEC in fact alerted the purchasers of the product to the risks involved, and recommended a "lock-out" procedure to be followed. JB could allege, and hopefully find an expert to testify, that a reasonable person in AEC's position would have been more aggressive in either finding a mechanical way to prevent these kinds of injuries, or providing something like a warning system that would sound a horn and/or flash a light just before the car began to move. That would be a design issue. The jury would have to believe our expert, against what would undoubtedly be a strong case by AEC to show that the product itself was not defective; AEC would claim that the injury was a function of operator error.

As far as a *warning* defect claim, it's hard to see how JB could have been any more alerted to the dangers of the system. It's not as though he was unaware of the danger and could have been more effectively warned. Again, the issue is whether some kind of mechanical device should have been included with the system to insure that accidents like this did not happen. AEC would undoubtedly blame the employer for failing to have a "lock-out" procedure in place, but JB could point out that employers frequently take shortcuts with products, and it's the manufacturer's job to design the product with the real world in mind. Again, it would be a jury question about what a reasonable person would have done.

AEC would undoubtedly argue that the product is subject to a statute of repose, if there is one in this jurisdiction. In Washington, for example, there is a 12-year presumption for the useful safe life of the product. If there is a similar statute in Linden, we'd have to establish that the useful safe life for shuttle belts is at least 14 years, and thus the defense of statute of repose would not apply. (A more exotic argument would be for the employer to assert that what caused JB's injury was actually the construction of the track, which might be considered an improvement to real property. Many jurisdictions have a statute of repose with respect to construction claims, and it might be argued that this case falls within it. I wouldn't think such a defense would be successful, but I wouldn't be surprised to see it raised.)

Contributory and Comparative Fault

Contributory Fault. There are two potential defenses that might be raised based on contributory fault. First, the defendants may charge JB with contributory negligence, that is, the failure to use reasonable care for one's own safety. The jury would have to make that determination, but considering the fact that JB tried to avoid this risk but was ordered by his employer to work anyway, I doubt that the jury would place his negligence at more than a very modest amount, if any at all. In Linden the rule is that contributory negligence reduces, but does not bar, the recovery of damages from the defendants, so long as the plaintiff's fault is no more than 50% of the total (the comparison is made to the defendants collectively, not—as in some jurisdictions—whether the plaintiff was more negligent than an individual defendant against whom recovery is sought). JB would probably be a sympathetic character to the jury, and therefore I doubt that, even if the defendant(s) were successful in persuading the jury to assign JB a share of fault for contributory negligence, that it would exceed 50%.

A second form of contributory fault is assumption of risk. One assumes a risk if one voluntarily encounters a known risk. Most employment situations that might trigger assumption of

risk defenses have been subsumed into the worker's compensation system, but since this case is potentially being taken out of the worker's comp. system it will need to be examined. Some forms of assumption of risk have operated as a bar to recovery, but they are usually in the context of some kind of voluntary participation in a very risky activity, like skydiving or a demolition derby. The key point to distinguish those cases is to point out that the element of *voluntariness* is missing. To be a bar to recovery, the plaintiff must have *voluntarily* assumed a known risk. Certainly with respect to the employer, this was not a voluntary encounter. Even with respect to the manufacturer, JB would have a strong argument that he did not voluntarily encounter this risk.

In further support of this position, the statute explicitly includes assumption of risk in its definition of "fault" (§ 1-1-109(a)(iv)). That should eliminate any argument that assumption of risk operates as a bar (at least in this case). Thus, even if the defendant(s) succeeded in persuading the jury to assign some share of fault to JB, assumption of risk will simply operate as a form of contributory fault, which will not bar the claim unless it exceeds 50%, which seems highly unlikely.

Joint and Several Liability

Under Linden's comparative fault statute, § 1-1-109, the jury will be instructed to assign percentages of fault to each "actor" that caused the injury. This could include the employer, even if the employer is determined to be immune under the worker's comp. statute. Each defendant is only liable for its percentage of fault (§ 1-1-109(e)), and thus it is possible that if the jury assigns liability against both the employer and AEC, but the employer's share is uncollectible because of immunity, JB will be limited in what he can recover. The same principle would apply if GC and AEC were both found liable but one was unable to pay because of lack of insurance, bankruptcy, etc.

Medical Malpractice

The facts don't suggest that there was anything wrong with JB's medical care. Assuming that the second doctor was competent and honest in making her assessment, we shouldn't look for anything by way of a medical malpractice action. In addition, the amputation was preceded by a second opinion, so it appears that JB gave informed consent to his medical treatment.

Statute of Limitations

Most jurisdictions permit an action to be filed within 3 years of the time the injury occurred. That would make a claim filed before November 2003 timely. However, some jurisdictions have only a 2-years statute of limitations. We need to check this out and make sure we're within the time limit.

QUESTION 2

The facts for this question were based upon *Romero v. Hoppal*, 855 P.2d 366 (Wyo. 1993), which affirmed the trial court in rejecting the state's argument that § 1-39-120, which retains immunity for "maintenance activities," shielded the state from liability in this case.

On behalf of the state of Linden, I would anticipate claims from the Hoppal family. There are a couple of defenses we might assert: sovereign immunity and comparative fault.

Sovereign Immunity

At common law governmental entities were not subject to liability because of the principle of sovereign immunity. Linden, like most states, has waived that liability to a limited extent. It accepts liability for "damages . . . caused by the negligence of public employees . . . in the operation of any motor vehicle . . ." § 1-39-105. This would appear to cover our case. However, the same statutory scheme retains sovereign immunity in § 1-39-120(a)(iii) for "maintenance, including maintenance to compensate for weather conditions, of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area." We would assert that this provision covers what happened here. On the other hand, § 1-39-120 only applies the restriction to §§ -106 through -112, and thus if the accident was really caused by operator negligence (as opposed to a condition in the roadway), then we would lose on the immunity claim. Nonetheless, if the evidence shows that Romero was using reasonable care in the snowplow, but hit an obstacle in the asphalt, or the roadway was too soft or otherwise badly maintained, then we be successful in arguing that the exclusion applies.

Even if the exclusion does not apply, the good news is that there is a statutory cap on the recoverable damages. The maximum for any single occurrence (like this accident) is \$500,000. Thus, even though the plaintiffs' damages are a total of \$1,600,000, we would not have to pay any more than \$500,000. There is a provision in the statute for unlimited liability if there is insurance coverage for it, but I have no information that such insurance is in place. (If it were in place it would increase the importance of the next section on comparative fault.)

Contributory Fault

The facts are sketchy as to how the accident occurred. Although Richard was passing in an authorized area, he may have been going too fast for the conditions or was otherwise failing to exercise reasonable care. The facts suggest that the snowplow flipped over right in front of him, giving him no time to stop, but again we need to know more about just what he was doing and whether it was a prudent time to pass the snowplow. If Richard were found to be negligent in his driving, he would be assigned a share of fault under the Linden comparative fault statute. So long as he is no more than 50% at fault, he can still recover (less his percentage of fault). Moreover, his passengers would not be subject to contributory fault, unless they did something like travel without a seat belt and the jury wanted to assign some contributory fault to that. I doubt that would get us anywhere, particularly in light of the fact that, if we are found liable, we are likely to be paying the maximum amount under the statute.

We might also investigate the plausibility of arguing that the decision to pass was an assumption of risk, but under these circumstances it appears that such a defense would merge (particularly in view of the statute) with contributory negligence and wouldn't have any more effect on our potential liability.

Comparative Fault

If Richard is found to be at fault his share would in effect reduce the state's liability to the other claimants, since Linden has a comparative fault system that limits each defendant's liability to the percentage of fault assigned by the jury (§ 1-1-109(e)). We might even look into other "actors" who could be assigned a share of fault under the statute, such as the snowplow manufacturer, if it turns out that there was something defective in the manufacture, design, or

warning provided with the snowplow; but at this point such claims seem highly speculative. Again, unless we thought we could convince the jury to allocate so much of the fault to the other defendants that our share would drop to 30% or less, our liability will still be the maximum permitted under the statute—\$500,000.

Spring 2003 Checklist

QUESTION 1

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|---|---|
| <input type="checkbox"/> Overview | <input type="checkbox"/> What about a Warning claim? |
| <input type="checkbox"/> Claim v. Employer (GC) | <input type="checkbox"/> Verbal warning would have been ineffective |
| <input type="checkbox"/> Ordinary rule is immunity | <input type="checkbox"/> |
| <input type="checkbox"/> Immunity is lost if intentional injury | <input type="checkbox"/> Comparative Fault |
| <input type="checkbox"/> Was injury intentional ? | <input type="checkbox"/> Contributory Negligence |
| <input type="checkbox"/> How distinguished from ordinary risks ? | <input type="checkbox"/> 50% rule (modified comp. fault) |
| <input type="checkbox"/> | <input type="checkbox"/> Compared to all, not just individual Def. |
| <input type="checkbox"/> Claim v. AEC | <input type="checkbox"/> Not likely to be very much |
| <input type="checkbox"/> Was the product defective ? | <input type="checkbox"/> |
| <input type="checkbox"/> Three different kinds of defects | <input type="checkbox"/> What about Assumption of Risk ? |
| <input type="checkbox"/> Not a manufacturing defect | <input type="checkbox"/> Worker's comp. usually eliminates this type |
| <input type="checkbox"/> Maybe a design defect | <input type="checkbox"/> Encounter wasn't voluntary |
| <input type="checkbox"/> Maybe a warning defect | <input type="checkbox"/> Statute treats it as a form of " fault " |
| <input type="checkbox"/> Explanation of strict liability | <input type="checkbox"/> Not likely to be much, certainly <50% |
| <input type="checkbox"/> Difference probably not relevant | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> Several liability only |
| <input type="checkbox"/> Mechanical warning device (design) | <input type="checkbox"/> If employer immune, share is uncollectible |
| <input type="checkbox"/> AEC would blame employer | <input type="checkbox"/> |
| <input type="checkbox"/> AEC knows employers are unreliable | <input type="checkbox"/> No medical malpractice |
| <input type="checkbox"/> What would expert say? | <input type="checkbox"/> Informed consent to amputation? |
| <input type="checkbox"/> Statute of repose for products? | <input type="checkbox"/> Statute of Limitations ? |
| <input type="checkbox"/> Statute of repose for construction? | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |

QUESTION 2

- | | |
|--|---|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Comparative Fault |
| <input type="checkbox"/> Governmental liability | <input type="checkbox"/> Richard's contributory negligence |
| <input type="checkbox"/> Sovereign immunity | <input type="checkbox"/> Statute allows up to 50% |
| <input type="checkbox"/> Limited statutory waiver | <input type="checkbox"/> Passengers not subject to CN |
| <input type="checkbox"/> § -105: motor vehicle operation | <input type="checkbox"/> Assumption of risk = CN |
| <input type="checkbox"/> § -120 Exclusion for maintenance | <input type="checkbox"/> |
| <input type="checkbox"/> Doesn't apply to poor driving | <input type="checkbox"/> Several liability (§-109(e)) |
| <input type="checkbox"/> But could apply to bad asphalt | <input type="checkbox"/> Snowplow manufacturer ? |
| <input type="checkbox"/> Statutory cap | <input type="checkbox"/> Unless <30% , pointless |
| <input type="checkbox"/> \$500K | <input type="checkbox"/> |
| <input type="checkbox"/> More if insurance covers it | <input type="checkbox"/> |
| | <input type="checkbox"/> |
| | <input type="checkbox"/> |