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FINAL EXAM SAMPLE ANSWER

QUESTION 1

The facts for this question were based upon *Jett v. Ford Motor Co.*, 335 Or. 493, 72 P.3d 71, (2003) in which the court sustained a jury verdict finding that Ford produced a defective truck, but assigning 15% fault to Jett.

I would advise Trudy ("TJ") and Ron ("RJ") that they would be entitled to compensation from Ford if they could show that the E450 truck was defective. However, her recovery might be reduced or even barred if the jury determines that she is more than 50% responsible for her injuries. She may also be unable to recover for whatever portion of fault is attributable to her employer's negligence.

Product Liability

Ford could be held liable for injuries resulting from a defect in the E450. The test for a defect depends upon the type of defect that is identified. From the facts it sounds as though there is something that is wrong with the design of the shifting mechanism, since the same model truck had the same problem. It would be preferable from our standpoint if the defect turned out to be a manufacturing flaw, since there is strict liability for such flaws. In other words, if the truck that injured TJ differed from the design specifications (for example, a part of the transmission that didn't fit properly), then Ford would be strictly liable for the injuries that TJ suffered.

On the other hand, the problem may be that the design of the E450 transmission is not one that a reasonable person would use, thereby making the product defective. Jurisdictions differ on how they approach this question. Some jurisdictions use a "strict liability" test for design defects, allowing a jury to find that the product is unreasonably dangerous even if the manufacturer was not negligent in using that design. Such a finding can come about if there is additional knowledge about the product that is available today compared to what was known at the time about the risks presented by the product. Under a strict liability test, the jury would "impute" the knowledge that we have today to the manufacturer at the time of design, and if a reasonable manufacturer would have modified the design, then the product can be considered defective.

Another test that is sometimes used is a consumer expectations test, asking whether or not the level of safety provided by the product is deficient compared to what a reasonable consumer would expect. The difficulty with this test is that it is difficult to distinguish what a reasonable consumer would expect compared to what a reasonable manufacturer would consider a reasonably safe design. However, this test would probably favor TJ, since she would not expect the truck to roll backward on her.

On the other hand, some jurisdictions have moved to a true negligence test (following the Restatement (3d), which asks simply whether or not the manufacturer acted reasonably in using this design.

A final basis for finding the product defective would be the lack of adequate warning. It is difficult to identify a more effective warning for the truck, since TJ presumably knew that if the product unexpectedly shifted from neutral into reverse it could injure her, but perhaps there is a specific warning, either concerning what to do about the transmission, or how to set the parking brake, that would have prevented this injury.

As a related matter, it may be that the retailer who sold the trucks to UPS had something to do with the problems both E450s exhibited. If the trucks were recently delivered to UPS and the retailer negligently prepared them, that might explain the problems. It would not necessarily exonerate Ford, but it would be worth exploring. On the other hand, if the trucks are very ancient, they may have exceeded the *useful safe life* of such trucks, although with a big company like UPS that unlikely that they would be using trucks beyond that point.

Comparative Fault

The bad news is that, even if TJ and RJ prove that the Ford E450 was defective, she will be held accountable for her own contributory fault. TJ is uncertain whether she set the parking brake. (It's also puzzling that she put the truck transmission in neutral, rather than putting it in Park. Maybe truck transmissions are different; or maybe it's a manual transmission.) If the evidence showed that she only partially set the brake (and that would have held the truck, even if it accidentally shifted into reverse), then she would be guilty of contributory negligence. In addition, her decision to take the truck even though she was told it was unsafe, and her failure to take precautions in case it malfunctioned, could be considered negligent. In Evergreen, a plaintiff who is more negligent than the combined fault of the defendants combined would be barred from recovery. (§ 13). On the other hand, if TJ is found negligent, but not more than 50% of the total fault, then her recovery would be reduced by that amount (§ 14).

I don't know what the rule in Evergreen is with respect to assumption of risk. There is no mention of it in the comparative fault statute. Ford is likely to argue that TJ was aware of the risk and proceeded to encounter it voluntarily. After all, Bill told her that the truck was unsafe. On the other hand, TJ might argue that her behavior was neither *knowing* (because she wasn't aware of the risk that it would actually run over her) or that her encounter of the risk was not *voluntary* (because she had to get her job done). I would still be worried that assumption of risk would operate as a bar. We would certainly argue that this is a case that is indistinguishable from ordinary contributory negligence (*i.e.*, the plaintiff certainly wasn't choosing this risk as a real preference), but it's uncertain how this would turn out.

Joint and several liability and employer fault. It appears that Evergreen requires an allocation of fault to each defendant. Since there is no indication that the fault of immune defendants is to be excluded, then if UPS is assigned a share of fault, it is a potentially unrecoverable aspect of damages, since an employer is shielded from tort liability under worker's compensation. Under Evergreen's statutes (§ 15), the liability of defendants is several only, meaning that Ford would only be liable for the share of fault assigned to it, subject to two exceptions that might be relevant here. First, a defendant who is more than 50% at fault is jointly and severally liable. Second, a fault-free plaintiff is also entitled to joint and several liability. I don't think the latter provision will apply, but we

Damages

The question specifies that TJ's losses total $3 million. Subject to the discussion of contributory fault and comparative fault discussed above, she would be be entitled to this amount, minus her share of fault. The jury would not learn about whatever money had been paid through worker's comp. (because of the collateral source rule), but whatever amounts had been paid by worker's comp. system would have to be repaid from any recovery at trial, or any settlement.

RJ would also be entitled to significant loss of consortium claims recoverable from Ford. Since TJ is apparently unable to have children (unless they risk birth defects), it may result in RJ not having any children. I would imagine that his claims for loss of consortium would be reduced by any contributory fault attributable to TJ.

QUESTION 2

The facts for this question are based on *Tinkham v. Groveport-Madison Local School Dist.*, 77 Ohio App.3d 242, 602 N.E.2d 256 (1991), in which the court held that sovereign immunity shielded the school district from liability.

Amy and Caron Ann Tinkham ("CT") would have a claim against the State of Evergreen ("SE"), but their claim would be significantly affected by the sovereign immunity statute.

Duty of Care

Before evaluating whether or not Amy's and CT's claims fall within the sovereign immunity statute, we should first evaluate whether or not SE owed Amy a duty of care. SE would undoubtedly argue that what happened to Amy was not something they had a duty to prevent. I think we have a strong argument that, when SE arranged for transporation by the taxi cab company, they induced Amy and CT justifiably to rely upon SE to use reasonable care to make sure this mode of transporation was safe. In particular, when SE didn't inform CT of the late arrivals, it made it difficult for CT to recognize that there was a problem.[1] Another approach to establishing a duty of care would be to show that there was a "special relationship" between SE and Amy. Since SE contracted with the taxi company to provide transportation, that might lead to a duty to prevent the use of that service to cause harm to others. But the justifiable reliance is a stronger basis for establishing a duty of care.

Sovereign Immunity

Our primary obstacle in obtaining compensation for Amy and CT is the sovereign immunity statute. Prior to the legislature's waiver of sovereign immunity, the state government and its subdivisions were immune from tort liability. In § 152.1 the statute first asserts the principle of sovereign immunity, but then it waives it "in the manner provided in this act." In § 153 Evergreen agrees to be liable for losses (subject to significant limitations and exceptions) "if a private person . . . would be liable for money damages under the law of this state."

Discretionary Function. § 155(5) exempts the state from liability for "any act or service which is in the discretion of the state or political subdivision or its employees." SE would certainly argue that this provision bars any liability here, since the decision to use a local cab company was discretionary. However, the scope of the "discretionary function" is unclear. In the Federal Tort Claims Act, a discretionary function is one that involves policymaking by the executive branch. By contrast, operational decisions, including mistaken exercises of judgment, are subject to liability. We would argue that this decision was not policymaking. Also, we would argue that, even if the decision to use a local cab company was discretionary, the failure of ESSNS to notify CT of the late arrivals was negligent, and didn't involve any policymaking.

Financial Limitations. It appears that the state has limited its liability to a claimant for any "single act, accident or occurrence" to $175,000. We would argue that in this situation there were multiple acts, and the limit would apply to each act of abuse, but it might be considered a single "occurrence."

Several Liability. SE would undoubtedly blame most of Amy's and CT's injuries on Hundley. They would also point to § 154(G), which limits the state's liability to "that percentage of total damages that corresponds to its percentage of total negligence." We would argue that the only negligence involved here is on the part of the state; what Hundley did was not negligent, but in fact an intentional tort. Maybe the language of the statute would be interpreted to limit the allocation of fault to those who were *negligent*; if so, that would prevent the allocation of fault to Hundley; but if the jury is asked to allocate fault to him it would undoubtedly be the lion's share, and the percentage allocated to the State might be miniscule. There is also a provision in the regular comparative fault statute referring to several liability (except for defendants >50% at fault, or plaintiffs who are not at fault), but this statute would defer to the sovereign immunity statute.

Statute of Limitations. In order to sue the state, a "written notice of claim" must be filed within one year of the date the loss occurs. (§ 157) The abuse began in August 2004 and continued until November. We should be sure to file the claim as soon as possible. Many jurisdictions toll the statute of limitations until the plaintiff reaches the age of majority, but that rule might not be applied to claims against the state.

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1. SE would undoubtedly characterize the Cab Company / Hundley as an independent contractor. We'd probably have to concede this point, but we would argue that SE still had a duty to exercise reasonable care in preventing injury to Amy.

Comparative Fault

I don't think there are any significant issues associated with potential allegations of fault on the part of Amy or CT. With respect to Amy, her age and disability would make it difficult to argue that she was negligent in permitting the harm to occur to herself. I don't think the state would risk arguing any negligence on her part. I also see little risk that CT would be assigned a share of fault. She appears to have acted reasonably in failing to detect the harm to Amy, and even if there was evidence of negligence, she would be immune because her failure to protect Amy would fall within a parental function which is subject to immunity.

Damages

The amount of Amy's damages has been specified. As noted above, the sovereign immunity statute will limit how much of those damages can be collected.

CT would be able to make her own claim for loss of consortium—the injury to her relationship with Amy. Some states would permit parents to make such claims; others would not. We need to find out what rules Evergreen has for claims of loss of parental consortium. If Evergreen permits such claims, then CT would also be subject to the $175,000 limitation, but it might have the potential to double the overall recovery.

Torts II (DeWolf) Summer 2005 Checklist

QUESTION 1

- ☐ **Overview**
- ☐ **Product** Liability Claim v. Ford
- ☐ Was there a **defect**?
- ☐ Was there a **manufacturing** defect?
- ☐ Mfg. defects subject to **strict** liability
- ☐ Multiple problems suggest **design** defect
- ☐ What **Test** is used for a design defect?
- ☐ Policy **dispute** concerning standard
- ☐ Potential **warning** claim?
- ☐ Any claim v. **Retailer**?
- ☐ Any issue regarding statute of **Repose**?
- ☐
- ☐ **Contributory** Fault
- ☐ Contributory **Negligence**
- ☐ Modified **(50%)** comparative negligence
- ☐ Measured against **combined** neg. of def's
- ☐ **Assumption of risk**
- ☐ Was her behavior ***knowing***?
- ☐ Was her assumption of risk ***voluntary***?
- ☐ Could AoR **bar** claim?
- ☐

- ☐ **Joint and Several** Liability
- ☐ Evergreen prescribes **Several** Only
- ☐ Worker's Comp. makes UPS **immune**
- ☐ Liability is Joint if Ford is **> 50%** at fault
- ☐ Also Joint if JT **not negligent** (unlikely)
- ☐
- ☐ TJ's **Damages**
- ☐ Worker's Comp. **Subrogation**
- ☐
- ☐ **RJ's** Loss of Consortium
- ☐ Would be **significant**
- ☐ **Reduced** by TJ's fault?
- ☐
- ☐
- ☐
- ☐
- ☐
- ☐
- ☐
- ☐

QUESTION 2

- ☐ **Overview**
- ☐ Suit v. **State** of Evergreen
- ☐ Did SE owe a **Duty** of Care
- ☐ Did SE induce Justifiable **Reliance**?
- ☐
- ☐ **Sovereign Immunity** Statute
- ☐ §153: **General** Waiver subject to exclusions
- ☐ **Discretionary** Function (§ 155(5))
- ☐ Was choice of taxicab **policymaking**?
- ☐ Failure to report late **arrival**
- ☐
- ☐ Financial Limits (**§ 154(A)**)
- ☐ **$175K** cap per "single act or … occurence"
- ☐ How many **"claims"** or **"occurrences"**?
- ☐
- ☐
- ☐

- ☐ **Joint and several** liability
- ☐ Statute prescribes **several** (§ 154(G)
- ☐ Is allocation limited to **negligent** parties?
- ☐ **Hundley's** share very large
- ☐
- ☐ **Statute of Limitations**
- ☐ One-year **claim filing** limit
- ☐ Does Amy's age **toll** the statute?
- ☐
- ☐ Did CT **negligently** fail to protect Amy?
- ☐ Parental function is **immune**
- ☐
- ☐ CT's claim for **Parental** Consortium
- ☐ Does Evergreen **recognize** parental claims?
- ☐ Potentially another **$175K**
- ☐
- ☐
- ☐

Exam # _____