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SPRING 2007 May 5, 2007

FINAL EXAM SAMPLE ANSWER

MULTIPLE CHOICE

1. (A) is incorrect; one must have the *intent* to imprison in order to constitute false imprisonment; **(B) is CORRECT**, since the principle of *transferred intent* makes the intent to imprison transferable from the intended victim to the unintended victim; (C) is incorrect, because pecuniary loss is not part of the plaintiff's burden of proof; (D) is incorrect, because Mike's fault is not a defense.

2. (A) is only partially correct; placing the camera in this location would be an *intrusion upon seclusion*; (B) is only partially correct; distribution of the photos would be a public disclosure of private facts; **(C) is CORRECT**, because it is the more complete answer; (D) is incorrect for the same reason.

3. (A) is incorrect, because one must act intentionally to commit trespass to chattels; **(B) is CORRECT**, because there must be an intent to intermeddle with the chattel; (C) is incorrect, because Mike suffered loss of use of the watch, which is a form of damage; (D) is incorrect, because Mike's negligence is not a defense to trespass to chattels.

4. (A) is incorrect, because fraud doesn't require that the seller have title to the goods fraudulently represented; **(B) is CORRECT**, because justifiable reliance is required for an action in fraud; (C) is incorrect, because if Alec was acting at least recklessly with respect to the falsity of the representation, he is liable for fraud; (D) is incorrect, because there might be a reason that Chris paid less than the actual value of the property.

5. Fraud entitles the owner to the "benefit of the bargain"; thus, if the watch was worth $5,000, which is what the E-Bay auction item suggests, then Chris would be entitled to what the watch would have been worth if it were as represented ($5,000), minus what it is actually worth ($30), or $4,970. Thus **(D) is the CORRECT answer --** but if you are math challenged like me and thought it was $4,700 (C) I would score that a correct answer as well.

6. (A) is incorrect, because the permission was later withdrawn, making Karl a trespasser; (B) is incorrect, because monetary loss is not required for trespass; (C) is incorrect, because one needn't experience apprehension in order to recover; thus **(D) is CORRECT**.

7. (A) is incorrect; if a public official can prove actual malice, that is sufficient; (B) is incorrect, because there is nothing in the facts to suggest he was actually naked; **(C) is CORRECT**, because a defeamatory meaning could be inferred from the article; (D) is incorrect, because severe emotional distress is not required for a defamation claim.

8. **(A) is CORRECT**, because Bonnie's claim of self-defense would require that she act reasonably in evicting Karl; (B) is incorrect, because even if Karl is trespassing, her overreaction would not be justified; (C) is incorrect, because fear of being hurt is not required for an assault; (D) is incorre

9. [Since all of the answers are incorrect, any answer is marked as a correct answer.] (A) is incorrect, because battery and assault may occur during the same incident and may permit recovery of damages for each; (B) is incorrect, because emotional damages are part of the compensation; (C) is incorrect, because Bonnie's battery, if not reasonable in light of her right to protect her property,

would not be justified; (D) is incorrect, because failure to mitigate might reduce the recovery, but would not bar recovery.

ESSAY QUESTION 1

This case is roughly based on the facts of *Buckley v. Town of Greenwich*, 2006 WL 1461104(Conn.Super. May 11, 2006), which found that the school district was negligent in failing to provide adequate supervision, and which rejected the claim that governmental immunity would bar the claim. Brent was found 10% at fault.

On behalf of Brent Buckley ("BB") I would consider a claim against the State of Evergreen (SOE) and against the other badminton player (OBP).

Claim v. the Sate of Evergreen SOE

The first thing to note about a tort claim against SOE is that unless the state has consented to suits of this type, they are barred by the principle of sovereign immunity. We must therefore turn to the statute waiving sovereign immunity to determine the conditions that must be met before suit can be filed. Evergreen has waived sovereign immunity only where the "Claims Commissioner" permits them. If a claim submitted to the Claims Commissioner "presents an issue of law or fact under which the state, were it a private person, could be liable" (EGS § 4-160(a)), then the Claims Commissioner is directed to authorize suit against SOE. To commence a lawsuit against SOE one must first file a "Notice of Claim" with the Office of the Claims Commissioner (EGS § 4-147). This notice of claim must be filed within one year of the time it accrues (EGS § 4-148). Since our claim is one alleging injury to person, it is deemed to accrue "on the date when the damage or injury is sustained." (§ 4-148(a).) The only way a claim can be filed beyond that point is if the General Assembly by special act decides to waive this limitation. I wouldn't count on that. Therefore, a Notice of Claim must be filed by May 8, which is only a few days. Fortunately, we can file it with a postmark no later than May 8, 2007.

The statute's standard for liability is the same as for a private person. Therefore, we would allege that SOE's employee Palmer was negligent in the manner in which he organized and supervised the activities of the students.

It doesn't appear that there is any statutory provision for a "discretionary function" exemption. Even if there were some interpretation of the statute that preserved this under a "separation of powers" concept, I can't imagine that Palmer's practices would fall within a discretionary function. He simply made a poor judgment about how to arrange the game, or how to instruct the players, inviting the kind of injury that occurred.

In addition, cases against the state are tried by a judge sitting without a jury (§ 4-160(f)). Thus, the prediction of damages might need to be adjusted in light of the fact that a judge, not a jury, will make the award.

Claim v. OBP

The direct cause of the injury to BB was being hit by OBP. According to Palmer, the students were instructed to catch the birdie and then serve it back, not return it. Instead, OBP tried to return serve, hitting BB in the mouth. OBP was behaving like a third-grader, but he might be responsible for some degree of negligence. It is questionable whether OBP would be in a position to pay a significant amount of the $500,000 in damages, but SOE would likely name him as a defendant.

OBP's parents would be potential defendants for failing to supervise OBP, but only if he had displayed a propensity to harm other children with a badminton racket (or in a closely analogous way) and the parents had failed to take reasonable steps to prevent it. I don't think such a scenario is likely.

Contributory Fault

Even if SOE is negligent, there is the issue of BB's contributory fault. The first defense SOE would assert would be BB's *contributory negligence*. A plaintiff has the obligation to use reasonable care for his or her own safety. BB was instructed only to catch the birdie and then serve it back. Instead, BB attempted to hit the birdie rather than simply catch it. It's hard to tell what the circumstances were and whether BB would have been better off simply to try to catch the birdie rather than hit it with his racket, or how that would have affected the OBP's behavior. How the judge would assess their relative fault is difficult to determine. In Evergreen, contributory negligence is not a bar to recovery "if the negligence was not greater than the combined negligence of the persons against whom recovery is sought" (EGS § 52-572h(b)). This is the so-called "50%" modified comparative negligence rule. Suppose, for example, the judge determined that SOE was 30% at fault, BB was 40% at fault, and OBP was 30% at fault. That would allow BB to recover, minus his 40% of fault.

Assumption of Risk. Ordinarily a defendant would argue in a sports case that assumption of risk would be relevant. However, it appears that Evergreen has abolished the defense of assumption of risk (EGS § 52-572h(*l*)).

Joint and Several Liability

Assuming that SOE was found at least partially at fault for BB's injuries, but that OBP was also found to be at fault (but can't pay anything), SOE has a complex system for allocating fault among joint tortfeasors. First, the damages are computed after subtracting the plaintiff's share of fault. (EGS § 52-572h(b)) Then, each defendant is required to pay its own percentage of fault. (EGS § 52-572h(c)). However, if one of the defendants (like OBP in this case) can't pay, then the plaintiff may seek *reallocation* of the uncollectible amount under § 52-572h(g). There is a limit to the amount that noneconomic damages can be reallocated (only as much as SOE's share of fault multiplied by the uncollectible amount), but there is no limit on the economic damages that can be reallocated. Thus, it appears that if BB were successful in showing that SOE was at fault, but the judge also found that OBP and BB were at fault, there would be a recovery of all of BB's economic damages (after his share of fault is deducted), plus a percentage of the noneconomic damages somewhere between SOE's share of fault and the total of BB's recoverable noneconomic damages.[1]

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1. Here's an example of how the statute appears to work in practice. (It took me approximately an hour to figure out how to do the math):

Assume that the judge found BB 20% at fault, OBP 50% at fault, and SOE 30% at fault. BB's recoverable noneconomic damages are $300,000 minus his share of fault, or $240,000. His recoverable economic damages would be $200,000 minus his share of fault, or $160,000. Assume that OBP can pay nothing.

SOE would first be required to pay its own "proportionate share of damages" (§ 52-572h(d)), which is 30/80 of the recoverable noneconomic damages ($240,000), or $90,000. SOE would also be required to pay its proportionate share (30/80) of the recoverable economic damages ($160,000), or $60,000, for a total of $150,000.

Now comes reallocation. Assume OBP's entire share was uncollectible; the formula is as follows. We take the noneconomic damages that OBP owed (50/80 of $240,000), or $150,000, and we reallocate it, but only to a maximum of 30% (SOE's percentage of negligence) of the uncollectible amount ($150,000), or $45,000. OBP's uncollectible share of economic damages (50/80 of $160,000, or $100,000) would be reallocated according to the formula of SOE's share (30%) divided by the remaining defendants, excluding OBP, which is 30%. This means that the percentage to be reallocated is 100%. Thus, the entire economic damage award ($100,000) would be reallocated, meaning that SOE would owe $145,000 in addition to the $150,000 it owed initially, for a total of $295,000. Thus, even though BB was only found 20% at fault, he winds up losing more than 40% of his recovery. SOE, on the other hand, though found only 30% at fault, winds up paying almost 60% of the total damages. This is an example of a mixed system of joint and several liability.

QUESTION 2

The facts for this question were based upon *Barry v. Quality Steel Products, Inc.,* 280 Conn. 1, 905 A.2d 55 (2006), which affirmed a judgment in favor of the workers against the manufacturer, and rejected a motion by the manufacturer to obtain allocation of fault to the employer.

On behalf of Neil Barry ("NB"), I would consider a product claim against Quality Steel Products, Inc. ("QSP"), and possibly Ring's End. The claim will be complicated by the comparative fault issues. (I am also assuming at the beginning that my firm has timely filed a lawsuit against the various parties in this case. The date of the accident (1998) suggests that ten years have passed, but I will assume for purposes of this analysis that a claim has already been filed or there is some other way to avoid the statute of limitations.)

Product Liability Claim v. QSP

I would file a product liability claim against QSP based upon the apparently defective nature of the roof bracket.

In most jurisdictions, a product manufacturer is liable for injuries that result from a defect in the manufacturer's product. Product defects are categorized as manufacturing, design or warning claims.

A manufacturing defect is a discrepancy between the specifications for the product and the product as manufactured. Here it appears from the facts that the roof bracket was "undersized (thinner) in comparison to the manufacturing specifications." There is also evidence that the roof bracket was "in a distorted condition" following the fall. This suggests a manufacturing defect.

QSP would be strictly liable if the jury found that the fall resulted from a manufacturing defect.

On the other hand, a design defect arises from an aspect of the product that renders it unreasonbly dangerous. For example, a jury might find that the designed thickness of the roof brackets was insufficient to hold the amount of weight that is ordinarily placed upon them.

Jurisdictions differ on the standard that they use to evaluate whether or not a design is defective. Most use something like a negligence standard, which asks whether or not a reasonable person would have used a design similar to the one that QSP used. If a reasonable person would have increased the thickness of the bracket, then the design would be defective.

A third form of product liability arises from inadequate warnings. If the warning is insufficient to give the user reasonable notice of potential danger, or how to avoid the danger, then the product is defective. Most jurisdictions use a test similar to the one for design defects, namely whether a reasonable person would have used a more effective warning.

Liability of Ring's End

Under the Restatement (2d) a retailer was liable for selling a defective product even if the defect arose while in the hands of the manufacturer. Modern product liability rules tend to relieve the retailer of liability unless the retailer has some independent basis for fault. Unless Ring's End was somehow negligent in selling the roof brackets (e.g., damaged them or noticed that there was something wrong with them and sold them anyway), it wouldn't add anything to the case to include them as another defendant.

Contributory and Comparative Fault

Strict Liability? An initial puzzle is whether the rules for dealing with negligence cases (EGS § 52-572h) would apply to this case. Some theories of recovery involve strict liability, and according to subparagraph that would appear to fall outside § 52-572h. EGS § 52-572*l* says that contributory negligence is not a bar to recovery in cases based on strict tort liability, but it doesn't specify what effect contributory fault will have. By contrast, § 52-572h prescribes specific rules for

dealing with multiple tortfeasors; perhaps it would be extended by analogy to apply to cases based on strict liability. And if a claim (such as defective design or inadequate warning) was a negligence-based claim, then § 52-572h would definitely apply.

Contributory Fault under § 52-572h. QSP would undoubtedly claim that the injury arose in part as a result of NB's own negligence. There is considerable doubt about who exactly installed the roof bracket or what nails were used to secure it. If the jury found that NB used the wrong size nail, or if he otherwise didn't use proper care in arranging the roof bracket, then they might assign him a share of fault. Under § 52-572h, contributory negligence is not a bar to recovery in claims based on negligence "if the negligence was not greater than the combined negligence of the persons against whom recovery is sought" (EGS § 52-572h(b)). This is the so-called "50%" modified comparative negligence rule. Also, assumption of risk has been abolished by statute, so it's not going to affect the outcome.

Employer / Fellow Employee fault. There is some evidence that the employer may have been at fault. As noted above, there may be difficulties assigning a share of comparative fault to the employer or a fellow employee if strict liability is applied. But assuming it is not, then the employer might be assigned a share of fault. In every jurisdiction some form of worker's comp. has been substituted for ordinary tort liability, so the employer and fellow employees would be immune. However, they might be assigned a share of comparative fault.

Joint and Several Liability

As noted above, the statutes are not clear as to how a claim based on strict liability (as distinguished from negligence) would be handled as far as joint and several liability. If § 52-572h applies (because one of the theories of recovery involves negligence, or there is some other reason that this statute should be applied), the statute says that defendants are liable only for their proportionate shares, but then it provides that damages can be reallocated if there is an uncollectible amount. It varies between the noneconomic damages (which are recoverable up to a limit of the solvent defendant's proportionate share of the uncollectible amount), and the economic damages (which appear to be subject to full reallocation). If it turns out that the cause of action is based on strict liability, and this statute regarding assignment of proportionate shares and reallocation is inapplicable, NB would probably be entitled to a more favorable rule--one that imposes joint and several liability.

As a final note affecting the recovery, whatever NB has already received through the worker's comp. system is typically provided under the condition that any recovery from a third party like QSP would have to be repaid under the principle of subrogation.

Spring 2007 Final Exam Checklist

MC Score_____

QUESTION 1

- ☐ **Overview**
- ☐
- ☐ **Sovereign immunity**
- ☐ Has state **waived** immunity?
- ☐ Submitted to **Claims Commissioner**
- ☐ Claim filing **w/i one year** of accrual
- ☐ **May 8** is last day to file notice
- ☐ Once authorized, **one year** to file suit
- ☐ Was Palmer **negligent**?
- ☐ **Discretionary** Function?
- ☐ Supervising badminton is **ministerial**
- ☐ Claims tried before **judge**; no jury
- ☐
- ☐ Claim v. **OBP**
- ☐ Not likely to have big share of **fault**
- ☐ Not likely to be able to **pay $$$**
- ☐ Parents only liable if **on notice**
- ☐ **Contributory** Negligence
- ☐ Evergreen has **50% modified** CN rule
- ☐ Could SOE assert **Assumption of risk**?
- ☐ AoR **abolished** by statute (§ 52-572h(*l*))
- ☐
- ☐ **Joint and Several Liability** Issues
- ☐ Initially, **several** liability only
- ☐ **Reallocation** procedure, generally
- ☐ **Noneconomic** damages: up to double
- ☐ Unlimited reallocation for **economic damages**
- ☐
- ☐
- ☐
- ☐
- ☐
- ☐

QUESTION 2

- ☐ **Overview**
- ☐ Statute of **Limitations** Issue?
- ☐ Claim v. QSP: **Product Liability**
- ☐ QSP liable if **defective** product --> injury
- ☐ Was there a **manufacturing** defect?
- ☐ **Strict** liability for mfg defect
- ☐
- ☐ "Undersized" **bracket** suggests mfg defect
- ☐ Perhaps a **design** defect (if bracket not sturdy enough in design
- ☐ Was **warning** inadequate
- ☐ Is **neg. the test** for design/warning defects
- ☐ Liability of Retailer (**Ring's End**)?
- ☐ Did RE do something **independent**?
- ☐
- ☐
- ☐
- ☐ Evidence of **contributory** negligence?
- ☐ Evergreen uses **50% modified** CN rule
- ☐ **Assumption** of risk?
- ☐ **Abolished** by statute (§ 52-572h(*l*))
- ☐ Does **52-572h(*o*)** prevent allocation in SL case?
- ☐
- ☐ **Comparative Fault** Issues
- ☐ **Employer** Not Liable
- ☐ Initial **several liability** only
- ☐ **Reallocation** generally
- ☐ Difference between **Economic** & **noneconomic**
- ☐
- ☐ **Subrogation** liability
- ☐
- ☐

Exam # _____