

SAMPLE ANSWER TO FINAL EXAM

MULTIPLE CHOICE

1. (a) is incorrect, because battery requires that the defendant intend to cause either harmful or offensive contact with the person of the other, or to cause apprehension of such contact. Since Martha did not intend to cause either (she only intended to play a practical joke). (b) is incorrect for the same reason. Thus, **(d)** is the **correct** answer.

2. **(a) is correct**, because false imprisonment requires that the defendant intend to cause confinement. (b) is incorrect, because awareness of confinement is sufficient to create liability. Thus, (c) and (d) are both incorrect.

3. **(a) is correct**, because even if the contact is offensive because of abnormal sensitivity on the part of the plaintiff, there is liability if the defendant knew of such heightened sensitivity and intended for the contact to occur. (b) is incorrect, because it is the opposite of (a). Thus, (c) and (d) are also incorrect.

ESSAY QUESTION 1

This question is based upon the facts in *Walthour v. Com., Dept. of Transp.*, 2011 WL 5573934, which reversed a dismissal by the trial court of the plaintiff's claims.

Edwards ("EE") could recover if the state's waiver of sovereign immunity permits liability for cases like this, and would be reduced by the degree of fault attributed to EE.

Before addressing the merits of the claim, there is the possibility that because this case occurred more than two years (but less than three years) since the injury occurred, it is possible that the statute of limitations has run on a claim against the state. It is stated that EE has filed a tort claim, but it doesn't say when. I'd look into the possibility that her claim is time-barred.

I. Sovereign Immunity

States can be held liable for tortious conduct only to the extent that they have waived their sovereign immunity. In Evergreen the state has adopted a statute that contains significant limitations on liability, identified as follows:

*Narrow waiver.* Evergreen's waiver of sovereign immunity is relatively narrow. It only applies to specified "acts which may impose liability." ERS § 8522(b). The good news is that "potholes and other dangerous conditions" is listed as one of the acts that can result in liability. ERS § 8522(b)(5). However, in order to establish liability, the claimant must establish that the dangerous

condition "created a reasonably foreseeable risk of the kind of injury which was incurred" and "that the state had actual written notice of the dangerous condition of the highway." *Id.* In EE's case there appears to have been written notice of the poor condition of Route 837, but the primary thrust of the letter concerns property damage such as chipped paint or broken windshields. We would argue on behalf of the state that it was not notice of the risk of potholes or personal injury. EE of course would argue that the description of the road was adequate to alert the State to the fact that the road was in "disrepair," and that patchwork had caused additional problems. Anyone familiar with highway repair would recognize that this would likely create potholes.<sup>1</sup>

*Need to Show Negligence.* The plaintiff would still have to prove that a reasonable person would have repaired the road. Even though ERS § 8522(b)(5) doesn't use the word negligence, the previous language in the statute permits the state to be held liable only "for damages arising out of a negligent act where the damages would be recoverable under the common law or . . . if the injury were caused by a person not having available the defense of sovereign immunity." We would argue that the manner in which the previous repairs were conducted, and the decision to postpone additional repairs, were reasonable.

*Discretionary function.* The exercise (or failure to exercise) a discretionary function is excluded from liability (ERS § 8522(b)). We would argue on behalf of the state that the decision to repair Route 837 was dependent upon the availability of "necessary funding." Just as the 2nd Circuit found in *Brown v. U.S.* that the decision not to replace a weather buoy because of funding limitations was shielded from liability by the discretionary function exemption, we could argue that the decision not to undertake the repairs was an exercise of the "discretionary function" that exempts the state from liability.

*Damage limitation.* Even if EE can establish liability, the maximum she would be permitted to recover is \$250,000 (ERS § 8528(b)).

## II. Contributory Fault / Damages

Even if Evergreen were found liable under ERS § 8522, the State could assert the defense of contributory negligence.<sup>2</sup> In Evergreen the plaintiff is not barred by contributory negligence, but is permitted to recover so long as the plaintiff's negligence is "not greater than" the negligence of the defendant(s). In other words, in this case if EE were found more than 50% at fault, relative to the State, she would be barred from recover. Otherwise, her damages would simply be reduced proportionate to her fault. Since in this case her damages are projected to be in the \$2 million range, a finding of contributory fault of 50% or less would have no practical effect, since the maximum she can recover is \$250,000.

### ESSAY QUESTION 2

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1. In the *Walthour* case the state argued that the notice requirement would be satisfied only if the specific pothole had been identified. This doesn't seem like a very plausible argument.

2. I don't think that any form of assumption of risk would apply in this case, since operating a motorcycle is not in itself an activity that is so dangerous that the operator assumes the risk of injury.

The facts of this case are drawn from *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47 (1999). At trial the jury awarded Rodriguez \$30 million in compensatory damages, with 0% fault assigned to Dubis and Rodriguez. The appellate court reversed the award, 936 S.W.2d 104, and on retrial the second jury awarded \$25 million in compensatory damages, finding Suzuki 99.85% at fault.

On behalf of Rodriguez ("KR"), I would consider a claim against Suzuki and against Dubis. Because of the huge amount of potential damages, it is unlikely that Dubis would carry sufficient insurance to pay for the damages, and therefore the primary focus of potential liability is Suzuki. In order to recover from Suzuki, KR must show that Suzuki manufactured and sold a vehicle that was defective, and that this defect resulted in KR's injuries. Suzuki in turn will argue that KR assumed the risk of injury, and/or negligently caused her own injuries, and that Suzuki is only liable for its proportionate share of fault, with the bulk of liability falling on the driver of the car (Dubis).

#### I. Liability for a Defective Product

KR's primary task will be to show that the Suzuki that caused her injuries was defective. Product liability law recognizes three types of product defects: manufacturing, design, and warning. A manufacturing defect is found when the injury was caused by a deviation from the standard for the product set by the manufacturer. In this case it does not appear that the particular Suzuki KR was riding in was different from any other Suzuki of the same model. Instead, the problem appears to have arisen from a *design* defect -- the high center of gravity and the potential of the Suzuki to roll over.

A product contains a design defect if the product is "unreasonably dangerous." In effect this requires the jury to find that the design was one that a reasonably prudent person would not use. While there is some dispute over whether to employ a standard that incorporates a form of strict liability, it does not appear in this case that there would be any substantial difference as to whether this design was unreasonably dangerous.<sup>3</sup> Thus, the question would be whether or not a reasonable manufacturer would design and sell a car that has such a high center of gravity and is prone to roll over. Obviously there are some advantages to a car with these characteristics, and we should expect a stout defense from Suzuki to the effect that the car as designed was not unreasonably dangerous. It is critical that the jury find credible our expert's opinion regarding the increased vulnerability of the Samurai to accidents like this, and that Suzuki's theory of the accident is not accepted.

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3. The availability of strict liability is important in those cases where nature of the danger posed by the product was not known at the time the product was designed, manufactured and sold. In cases like *Brown v. Superior Court*, where the manufacturer sold DES before it was known that DES could cause injury to the unborn daughters of the patients who took DES, the difference between applying strict liability (i.e., evaluating the reasonableness of the design based upon what we *now* know about the product) and applying a true negligence test (i.e., did the manufacturer use reasonable care in designing the product) would be substantial. Here, by contrast, the danger of the product rolling over because of its high center of gravity would have been obvious at the time the product was designed.

(I do not think a warning claim would have any application here. There is no danger that KR could have avoided through a more effective warning. Perhaps a warning to the driver regarding the risks of rolling over would be considered, but that presupposes that there is an inordinate danger of rolling the car. In other words, there would be no warning claim unless the design was already unreasonably dangerous. Moreover, a warning claim to be effective must establish that the more effective warning, if it had been supplied with the product, would have changed the user's behavior (in this case, the driver). It seems unlikely that Dubis would testify that if she had been warned about the potential for a rollover she would have driven the car differently.)

## II. Contributory Fault

In Evergreen there is a general statute regarding contributory negligence, but a different one applied to product liability claims. For a product liability claim the plaintiff is subject to a reduction in the damages that can be recovered, in proportion to the plaintiff's fault, but there is no bar to recovery regardless of the plaintiff's degree of fault. In other words, this is what is called a "pure" comparative fault rule for product liability claims. There is a specific set of types of fault that are permitted as defenses to a product liability claim. Among them is § 537.765(3)(3), "Use of the product with knowledge of a danger involved in such use with reasonable appreciation of the consequences and the voluntary and unreasonable exposure to said danger." This would be a form of assumption of risk. That is, Suzuki would argue that KR, by being a passenger in a car driven by a driver who was impaired by alcohol, voluntarily accepted an unreasonable risk. If the jury found that KR was aware of Dubis' alcohol consumption, and acted unreasonably in continuing to be a passenger in the car with her, she would be assigned a proportion of the total fault. This would result in reducing, but not barring, her recovery.

## III. Joint and Several Liability

Even if KR proves that Suzuki sold an unreasonably dangerous product that caused her injury, and therefore is subject to liability, the amount of Suzuki's liability will depend upon the findings of fault regarding not only KR but also Dubis. Suzuki will undoubtedly suggest that the blame for KR's injuries lies primarily with Dubis. She admittedly was consuming alcohol, and the facts state that while she was driving the car "left the highway." There is no suggestion that this resulted from the defective condition of the car; rather, the injuries resulted because the car wound up in a ditch, and later the car rolled over (or so Dubis claims). If Dubis had not operated the car in such a way that it left the highway (with no apparent excuse), the injuries would never have resulted. Suzuki might succeed in convincing the jury that, even if their car was prone to roll over, it is only partially to blame, relative to the fault of Dubis.

Under Evergreen law, a defendant is only held jointly liable for the plaintiff's damages if their fault is at least 51% of the total. ERS 537.067(1). Thus, if Suzuki is found to be 51% or more at fault, they will be liable for all of KR's damages (minus KR's percentage of fault), even if Dubis unable to pay her proportionate share. On the other hand, if the fault of Suzuki is assessed at less than 51%, then Suzuki will only be liable for their proportionate share. Say, for example, that the jury determines that KR's damages are \$30 million, and Dubis is 70% at fault, KR is 20% at fault, and Suzuki is 10% at fault. Suzuki would then be liable to KR for \$3 million.

## CHECKLIST

MC \_\_\_\_

## QUESTION 1

- |  |  |
|--|--|
| <input type="checkbox"/> <b>Overview</b>                                   | <input type="checkbox"/> Was the state <b>negligent</b> ?                |
| <input type="checkbox"/> Statute of <b>limitations</b> ?                   | <input type="checkbox"/> Plaintiff must prove negligent acts             |
| <input type="checkbox"/>   | <input type="checkbox"/> Was there a <b>foreseeable risk</b> of injury   |
| <input type="checkbox"/> <b>Sovereign immunity</b>                         | <input type="checkbox"/> Is it a <b>discretionary</b> function?          |
| <input type="checkbox"/> Nature of waiver -- <b>narrow</b>                 | <input type="checkbox"/> <b>Funding</b> decisions might be discretionary |
| <input type="checkbox"/> " <b>Potholes</b> and other dangerous conditions" | <input type="checkbox"/> <i>Brown v. U.S.</i> <b>analogy</b>             |
| <input type="checkbox"/> Did state have <b>notice</b> of the danger?       | <input type="checkbox"/>   |
| <input type="checkbox"/> Was it notice of the <i>kind of injury</i>        | <input type="checkbox"/> <b>Damage limitation</b>                        |
| <input type="checkbox"/>   | <input type="checkbox"/> <b>\$250K</b> maximum per person                |
| <input type="checkbox"/>   | <input type="checkbox"/> <b>Contributory</b> fault                       |
| <input type="checkbox"/>   | <input type="checkbox"/> <b>Modified</b> comparative fault               |
| <input type="checkbox"/>   | <input type="checkbox"/> EE's claim <b>barred if &gt; 50%</b> at fault   |
| <input type="checkbox"/>   | <input type="checkbox"/> <b>Wouldn't matter</b> if $\leq 50\%$           |

## QUESTION 2

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|---|--|
| <input type="checkbox"/> <b>Overview</b>  | <input type="checkbox"/> <b>Contributory</b> fault                     |
| <input type="checkbox"/> Likely inability of <b>Dubis</b> to pay                | <input type="checkbox"/> <b>Product</b> liability statute is different |
| <input type="checkbox"/> <b>Product</b> Liability Claim                         | <input type="checkbox"/> <b>Pure</b> comparative fault                 |
| <input type="checkbox"/> Liability for a <b>Defect</b>                          | <input type="checkbox"/> includes only <b>some types</b>               |
| <input type="checkbox"/> <b>Types</b> of Defects                                | <input type="checkbox"/> <b>unreasonable exposure</b> to known danger  |
| <input type="checkbox"/> <b>Manufacturing</b> -- not applicable                 | <input type="checkbox"/> would <b>passenger</b> of intox. driver fit?  |
| <input type="checkbox"/> <b>Design</b>  | <input type="checkbox"/> <b>Joint</b> and several liability            |
| <input type="checkbox"/> Does design make prod. <b>unreasonably dangerous</b> ? | <input type="checkbox"/> Suzuki would blame <b>Dubis</b>               |
| <input type="checkbox"/> <b>Strict</b> liability helps in some cases            | <input type="checkbox"/> Dubis <b>lost control</b> of car              |
| <input type="checkbox"/> <b>Not likely</b> here                                 | <input type="checkbox"/> <b>Intoxicated</b> status?                    |
| <input type="checkbox"/> Their <b>expert</b> would contradict ours              | <input type="checkbox"/> If $\geq 51\%$ , Suzuki subject to J&SL       |
| <input type="checkbox"/> Expert battle would be <b>jury</b> question            | <input type="checkbox"/> If $< 51\%$ , only several liability          |
| <input type="checkbox"/> <b>Warning</b> claim not likely helpful                | <input type="checkbox"/>   |
| <input type="checkbox"/> <b>Driver</b> wouldn't have changed behavior           | <input type="checkbox"/>   |

EXAM # \_\_\_\_\_