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SPRING 1992 §§ 2 & 3

SAMPLE ANSWER TO FINAL EXAM

QUESTION 1

This case is based on *Tirrell v. Navistar Intern., Inc.*, 591 A.2d 643, 248 N.J.Super. 390 (1991). In that case the court affirmed a jury award of $2.25 million in favor of Tirrell's widow for product liability. Navistar International was found to have produced a defective trailer in that it lacked a back-up warning device.

Samantha ("S") should consider filing a products liability claim against the manufacturer of the tractor/trailer for failing to have some kind of back-up warning system. Before doing so, we need to discuss why a claim against the employer or fellow employees would be barred.

A. Claims against the Employer or fellow Employees would be Barred

Under the terms of G.S. § 97-10.1, tort claims against the employer are barred; instead, the employee is entitled to the benefits under worker's compensation. They would be significantly less than the estimate of recoverable tort damages. However, any recovery from the product manufacturer would either be reduced by the amount of compensation already paid by the Worker's Compensation program, or else the Worker's Compensation Fund would have a subrogation claim requiring S to reimburse it if she recovered from a third party.

B. A Product Liability Action

1. *Was there a defect?* Manufacturers of products are liable for damages caused by the use of their product if the product contains a defect. The key question in this case is whether or not the tractor/trailer that ran over Tirrell was defective. A *manufacturing* defect is present when the product is "out of spec"—an individual product differs from the standard design of the product. In this case it may be that the product originally included some kind of back-up warning device (like a horn that beeps whenever it is moving backward), but that through manufacturing error it didn't work or failed prematurely to operate. If so, the manufacturer would be *strictly liable* for such a defect. That is, S would not need to show that the defect arose as a result of failure to use reasonable care, but only that such a defect in fact existed when it left the manufacturer's hands. On the other hand, if a back-up device failed in operation, the manufacturer would probably claim that it was damaged or improperly maintained. Here, however, that possibility seems to have been ruled out.

A second possibility[1] is that the trailer did not contain a back-up device (e.g., a horn that sounds when the equipment is moving in reverse). S could then allege that the product contained a *design defect*—that is, the design of the product itself was defective. The critical question is whether a reasonable person in designing the equipment would have placed some kind of warning device on it to prevent accidents like this one. Although the employees who worked with the trailer were apparently familiar with it, and probably knew that it could back up without warning, it would probably be relatively cheap to install a device on the trailer that would sound an alarm as it was backing up. If the jury finds that the trailer without such a device was *unreasonably dangerous* (some jurisdictions ask whether it failed to meet the ordinary consumer's expectations, which is a similar test), they would find the trailer defective, and could impose liability. S

[1]It was in fact the situation in *Tirrell v. Navistar*, although the facts as given in the exam are not explicit on this point.

would be dependent upon expert testimony to establish this fact. Some jurisdictions (who use strict liability for design defects) would also allow S to use "hindsight"—knowledge about the product gained since it was manufactured—but in this case there doesn't appear to be anything that would make strict liability much more advantageous than an ordinary negligence test.

A third possibility is that S could claim that the product manufacturer *failed to warn* about this danger, but it is clear that Tirrell ("T") knew all about the problem of the trailer (or the backhoe) backing up. Thus, failure to warn probably wouldn't be successful.

2. *Would comparative negligence apply?* Even if the product was defectively designed, T might be subject to a comparative negligence. Although some jurisdictions don't permit contributory negligence as a defense to strict liability claims, most treat it as a percentage reduction. If failed to use reasonable care for his own safety (particularly in view of his knowledge that these things backed up without adequate warning), then perhaps he was contributorily negligent. Since this jurisdiction uses *modified* comparative negligence, (G.S. § 1A-1), and if T were found to be more negligent than the product manufacturer, it would bar recovery altogether. Otherwise, any contributory negligence on his part would result in a percentage reduction from his damage award. Similarly, the defendant might argue that, knowing of the risk that the trailer might back up, T *assumed the risk* that he might be injured. However, since this would be the variant of assumption of risk that amounts to the same thing as contributory negligence, it would have the same effect—i.e., it would only reduce the recovery so long as the plaintiff's fault was less than or equal to the defendant's fault.

QUESTION 2

The facts of this case, aside from the sovereign immunity issue, are based on *Foard v. Jarman*, 93 N.C.App. 515, 378 S.E.2d 571 (1989). In that case the plaintiff's complaint was dismissed on summary judgment, but the appellate court found there were genuine issues of fact warranting a trial.

Jarman should be concerned about the possibility of a medical malpractice claim brought against him by Foard. The liability would arise either from (1) failure to exercise an appropriate degree of professional skill in carrying out the procedure; or (2) failure to obtain "informed consent" from the patient. However, before addressing liability the impact of sovereign immunity should be considered.

A. Sovereign Immunity

Since Jarman was acting in the course and scope of his employment with the State Hospital, his actions are covered by G.S. § 143-291. That statute contains a partial waiver of sovereign immunity, and transfers jurisdiction over such actions to the Industrial Commission. I assume this would result in trial before a hearing board of professional "judges" rather than a jury of ordinary people. It is unclear whether that would be good or bad for establishing liability. More to the point, however, the statute limits the amount of damage recoverable against the state to $100,000. Since Foard appears now to have kidney failure, has undergone several unsuccessful surgeries, her damages are probably well in excess of $100,000. Thus, the principal question is how likely it is that Foard could establish liability.

B. Liability

1. *Failure to Exercise Professional Skill*. If Jarman negligently performed the gastric reduction procedure, he could be found liable for the resulting damage. In order to determine whether he was negligent, Foard would need to obtain expert testimony by a doctor familiar with the type of practice that Jarman was engaged in. Although the facts state that Jarman was a professor of surgery, it's unclear whether he was board-certified or otherwise held himself out as a specialist. Nonetheless, since he was operating in a state hospital and Foard was referred to him as a specialist, then other specialists would be qualified to testify concerning how that procedure was commonly performed by specialists. Some jurisdictions require the

expert to be familiar with the standard of care exercised in the state (Euphoria) whereas others allow experts who are familiar with comparable conditions of practice anywhere in the nation. In any event, it is likely that an expert could be found who was familiar with how this procedure should have been carried out. If that expert testifies that Jarman did not use the level of care expected of a person in like circumstances, he could be found liable for the resulting damage (again, limited by the $100,000 ceiling). Although one doctor has testified that Jarman used reasonable care, it would be a question for the triers of fact, assuming a qualified doctor could be found to provide a contrary opinion.

2. *Failure to Obtain Informed Consent*. Jarman is also liable to Foard, even if he carried out the procedure with adequate skill, if he failed to obtain her informed consent. It does state in the facts that Jarman obtained from her a signed statement that she had read about the procedure and was aware of the risks. However, two things could go awry for Jarman: first, if the booklet failed to discuss the likelihood that this result would be obtained, he would have failed to disclose "material risks" that need to be considered before deciding upon the procedure. Second, it doesn't say in the facts that Jarman discussed with her the alternative forms of therapy that were available. Since Foard was seeking treatment for obesity, less intrusive measures could have been used before resorting to gastric reduction surgery. It may be that Jarman, as a professor of surgery, was too anxious to use his technique rather than a diet, exercise, etc. Even if the risks of the procedure were fully disclosed, if the alternatives available were not pointed out, there may have been a failure to obtain "informed consent." Foard would probably also have to establish that she would have changed her mind about the procedure had she been informed of other forms of therapy (and in some jurisdictions, also that a reasonable person in her position would also have changed her mind). I don't think that would be too difficult.

Overall, I would give Foard a better than even chance of recovery, depending upon the strength of the expert testimony on the skill that was used. Informed consent would be a more doubtful avenue of recovery, but combined might produce a relatively strong chance of recovery. I would think a settlement in the $40,000 to $70,000 range would be pretty good for both sides.

QUESTION 3

The facts of this case were taken from *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325, 335 (1981). They were actually more gruesome in the original; while being handcuffed to the farm machinery Dickens was repeatedly beaten. Also, Puryear's wife helped to lure him to the scene. The issues on appeal had to do with the application of the statute of limitations.

Dickens clearly has some strong claims against Puryear. He could sue him for (1) battery; (2) assault; (3) false imprisonment; (4) the tort of outrage.

(1) *Battery*. Puryear committed several batteries upon Dickens. He cut his hair, and he handcuffed him to the farm machinery. A battery is defined as a "harmful or offensive contact with the person of the other." It would certainly be offensive to Dickens to have his hair cut or be placed in handcuffs. And there is no question that these actions were done with intent.

(2) *Assault*. More serious than the battery in terms of creating psychological damage was the apprehension that he would be killed or castrated. An assault occurs when the plaintiff is put in "imminent apprehension of harmful of offensive contact." Dickens was clearly placed in such imminent apprehension. In addition, the purpose of the exercise was to put Dickens in such imminent apprehension, so an assault clearly occurred.

(3) *False Imprisonment*. False imprisonment occurs when the defendant (1) intentionally acts to place the plaintiff in confinement; (2) complete confinement results; and (3) the plaintiff suffers harm as a consequence. Here, all three elements are met; handcuffing Dickens was done intentionally; the confinement was complete; and the plaintiff alleges emotional harm as a consequence.

(4) *The Tort of Outrage*. Dickens might also claim that Puryear's conduct was so outageous that it constituted the intentional infliction of emotional distress. Three elements must be met: (1) the defendant must intend to cause the distress; (2) the conduct must be outrageous; and (3) severe emotional distress must result. Both the first and the third elements apply; the only question is whether the conduct is so "outrageous and extreme" that it is "utterly atrocious" and unacceptable in civilized society. Puryear's conduct would certainly qualify; the only problem is that it will be a jury question, and a jury might have less sympathy with Dickens because of the original conduct that precipitated Puryear's conduct.

Defenses. Puryear does not appear to have any viable defenses. If he claimed to be acting in defense of his daughter, it was not to prevent potential injury to her, but rather was designed to punish Dickens for his prior conduct. Moreover, the force used was clearly in excess of the "reasonable force" permitted by the Restatement.

If the jury finds that Dickens satisfies one of these claims, and that claim is not barred by the statute of limitations, the jury could award compensatory damages for his emotional harm; in addition, because the conduct is clearly intentional they could also award punitive damages.

CHECKLIST: SPRING 1992

Question 1

- ☐ Overview
- ☐ Worker's Comp.
- ☐ Immunity
- ☐ Collateral Source implications

- ☐ Product Liability
- ☐ Concept of Defect
- ☐ Manufacturing Defect
- ☐ Manufacturing Defect defined
- ☐ No intervening negligence in maintenance
- ☐ Strict Liability applied
- ☐ Design Defect
- ☐ Defined
- ☐ Back-Up Warning Device
- ☐ Unreasonably Dangerous without it?
- ☐ Hindsight not critical
- ☐ Failure to Warn wouldn't apply
- ☐ Statute of Repose?

- ☐ Comparative Fault
- ☐ Modified comparative fault
- ☐ Potential for Claim to be Barred
- ☐ Assumption of Risk same as CN

Question 2

- ☐ Overview
- ☐ Sovereign Immunity
- ☐ Applies to Employees
- ☐ Limitation of $100,000

- ☐ Lack of Professional Skill
- ☐ Would he be considered a specialist
- ☐ Would expert testify he was negligent
- ☐ Supporting affidavit not dispositive
- ☐ Lack of informed consent
- ☐ Did she get all material facts?
- ☐ Were alternative therapies pointed out?
- ☐ Would she have changed her mind?
- ☐ Statute of Limitations?

Question 3

- ☐ Claim for Battery
- ☐ Elements of Battery
- ☐ Offensive Touching

- ☐ Claim for Assault
- ☐ Elements of Assault
- ☐ Apprehension was extensive
- ☐ False Imprisonment
- ☐ Elements of case

- ☐ Tort of Outrage
- ☐ Jury question of whether it was "outrageous and extreme"
- ☐ No defenses
- ☐ Punitive damages would be available