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SAMPLE ANSWER TO FINAL EXAM

QUESTION 1

This case is based upon *Keep v. Noble County Department of Public Welfare*, 696 N.E.2d 422 (Ind. 1998), in which the court affirmed a summary judgment against the plaintiff for having waited too long to file the claim.)

There is a potential claim by Keep ("K") against the Department of Welfare ("DW"). Unfortunately, the statute of limitations may have run on the claim.

Nature of the Claim

The first difficulty is to determine what sort of claim K has. In a way, the case is like a wrongful birth case, in that, as a result of the negligence of the DW, K wound up having a child who, absent DW's negligence, K would not have had. On the other hand, it is speculative exactly what would have occurred if DW had told the truth about G. Perhaps K would have decided to take her chances. Maybe she would have had no child at all. Maybe she would have waited to adopt a "fine, healthy" child.

A related problem is determining whether DW owed K a duty. On the one hand, DW didn't really create G's problems; in that sense DW could argue that they are in the role of a "rescuer" trying to make the best of a bad situation. By contrast, K will probably be successful in arguing that DW created the risk by misrepresenting the kind of child that K was about to adopt. Unlike the lobster fishermen in *Brown v. U.S.*, this was not a storm that was on its destructive path before the government intervened; the risk of unhappiness by the parents was created by DW by their misrepresentation. Thus, it can be fairly easily concluded that DW at least had a duty to warn K about G's problems.

The policy questions surrounding this kind of placement decision are ultimately wrapped up in the sovereign immunity issue.

Sovereign Immunity

Since this is a suit against a governmental agency, it is governed by the statute by which the state waives its sovereign immunity. Section 34-13-3-1 is a broad waiver of immunity, similar to the Federal Tort Claims Act. However, § 34-13-3-2 lists a series of exceptions for which the state retains its immunity. One is for "misrepresentation if unintentional." It appears from the evidence that this misrepresentation was intentional, but perhaps there will be a more defensible position. Second, there is no liability for exercising a discretionary function. It seems hard to imagine that lying to prospective parents could be part of a policymaking function of the government, but again there may be more to the story when it comes out. Perhaps there is some explicit policy that at least prevents negative information from being shared with prospective parents. But at first glance there appears no policy justification for deceiving prospective parents.

Another negative feature of the sovereign immunity statute is the cap on damages of $300,000 per injured victim. The only victim we know about now is K herself, but perhaps she has a husband who would also qualify, and it is even conceivable that G would qualify as a victim, since

arguably correct information provided to the parents would have given him a better chance to have a better relationship with his parents.

Statute of Limitations. A worse problem in the statute is the short limitation period. Section 34-13-3-6 requires that the attorney general be given notice of the claim within 270 days "after the loss occurs." This is difficult to apply to this case, since we don't know when the loss actually occurred. Was it when K first adopted G? Was it when K discovered his problems? Was it when she first learned that the state probably knew of the problems when he was adopted? Or was it when she confirmed that information? If the court picks any of the dates except the last one, her claim is untimely and will be barred. It also seems doubtful that the court would adopt a "discovery rule," since the claim is one against the state and the generosity that courts indulge by use of the discovery rule may be hampered by the narrow grant of liability under the statute.

A final argument that could be used to avoid application of the time barrier is "fraudulent concealment" by the state agency. Unfortunately, this is part of the original tort committed by the state. If in fact the loss occurred on one of the earlier dates, which would now be barred by the passage of time, there has been no fresh fraudulent act that would somehow revive that stale claim.

Damages

As noted above, we are limited by the $300,000 statutory cap; but in any event we might have some difficult establishing what damages K is entitled to. Would we measure it by the difference between a normal child and G's impaired condition? Would it be the difference between G and no child at all? Would there be some right to claim loss of parental consortium, because of the difficulties involved? Is it possible that G could make a claim based upon an analogy to "wrongful life"? Or, as mentioned before, would it be possible for G to claim that, because the parents were misled, he has suffered by having parents who weren't prepared for his true condition? These would make added difficulties to proving our case.

QUESTION 2

> This case is based on *Finney v. Rose's Stores, Inc.,* 614 So.2d 772 (N.C. 1993), *reversed*, 344 N.C. 627, 476 S.E.2d 106 (1996). In the Court of Appeals the plaintiff's claim was dismissed because she was contributory negligent. The Supreme Court reversed on the premises liability claim but affirmed the judgment on product liability.

Rose's ("R") is facing a lawsuit from Shirley Finney ("SF") and her husband ("JF"). R will defend by asserting contributory negligence and may attempt to bring in the manufacturer of the product as an additional defendant.

The Claims against R

SF would begin by asserting a premises liability claim against R. As a business visitor to the store, SF is owed the duty of reasonable care in the preparation of the premises for her visit. The treadmill could be considered a condition of the premises, and arguably she was invited by the display to test it out. If a reasonable person would have anticipated this potential "try-out" of the goods on display—which seems likely—then R would be under a duty to use reasonable care to make that safe. SF will argue that R was negligent in failing either to warn about the potential for

being upset by the sudden movement of the treadmill, or perhaps to go further and actually unplug the machine in the absence of someone who wanted to see it operating.

An alternative theory would be that SF was a "seller" of the product, the treadmill, and that R is liable for a defect in the product. However, this theory is more easily discussed in relation to the attempt to bring in Diversified Products ("DP") as a co-defendant.

Defenses

Our primary defense would be that SF was contributorily negligent in getting on the treadmill and starting it without making sure she was stable. The standard to be imposed would be that of a reasonable person. If the jury finds that a reasonable person would have exercised greater care, then they will assign her a percentage of fault. In this jurisdiction the plaintiff can still recover (minus her percentage of fault) if she is no more than 50% at fault. The comparison is made against all of the defendants; thus, if there were a finding that she was 40% at fault and R and DP were each 30% at fault, SF would still be able to recover.

It might even be argued that SF assumed the risk in getting on the treadmill. I don't think this would be a successful argument, since it would appear to be simply another form of contributory negligence. However, we would argue (without success, most likely) that she assumed the risk and her claim should be barred.

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Cross-Claim v. DP

It might benefit R to make sure that DP is added as a defendant. In order for DP to be liable, it would need to be shown that the treadmill contained a defect. The basic issue is whether or not there should be some kind of device that would warn the user that the unit is plugged in and is about to start up. If a mechanical device (a light or a safety interlock feature) is added to similar devices, it would be good evidence that the product contained a *design* defect. On the other hand, it may simply be that the product should be accompanied by a *warning* that would point out the risk of leaving the machine plugged in and having it start without warning. Although there are jurisdictional differences in the way that the product liability standard is determined (strict liability vs. negligence), it appears that this case would essentially involve a negligence test. That is, the ultimate question is whether a reasonable person would have found it desirable to add either a safety feature or a warning that would have effectively avoided this injury.

Damages and Joint Tortfeasor Issues

If SF successfully showed that we were negligent in our display of the treadmill, then she would be entitled to wage loss and pain and suffering damages. In addition, JF would be entitled to claim damages for loss of consortium. Not only would he be entitled to the loss resulting from any injury to the society and companionship of his wife, but he may also have a bystander claim since he was actually at the scene of the injury.

The good news for R is that the liability imposed in this jurisdiction is several only (§ 34-51-2-8); that is, if the jury found that R was only partially responsible for the injury, and allocated fault to DP and/or to SF, then R would only have to pay the percentage assigned by the jury. As a corollary, the statute specifically prohibits the award of any contribution.

CHECKLIST

QUESTION 1

- ☐ Overview

- ☐ Claim v. Dept. of Welfare
- ☐ Not wrongful birth / wrongful life?
- ☐ They would not have a child if they had been told
- ☐ Negligent failure to warn

- ☐ Did they owe a duty of care
- ☐ They created the risk

- ☐ Sovereign immunity
- ☐ § 34-13-3-1: broad waiver
- ☐ § 34-13-3-2: Exceptions
- ☐ "Misrepresentation if unintentional"
- ☐ Appears "intentional"
- ☐ Was it a "discretionary function"?
- ☐ No real policy reason apparent

- ☐ cap on damages: $300,000
- ☐ Does father count?

- ☐ Statute of Limitations
- ☐ § 34-13-3-6: Notice Requirement
- ☐ When did the "loss" occur?
- ☐ Would "discovery rule" be used?
- ☐ Note problems w/ application to state
- ☐ Fraudulent concealment?
- ☐

- ☐ Does child have a claim?
- ☐ Is there a loss of consortium claim?
- ☐ What would be the measure of damages
- ☐
- ☐
- ☐
- ☐

QUESTION 2

- ☐ Overview
- ☐ Premises Liability Claim v. R
- ☐ SF is a business visitor
- ☐ R owes a duty of reasonable care
- ☐ Duty to warn?
- ☐ Duty to fix?

- ☐ Defenses:
- ☐ Contributory fault issues
- ☐ standard of reasonable person
- ☐ Modified (50%) comp. fault (§34-51-2-6)
- ☐ Must be more at fault than the *group*
- ☐ Assumption of risk? - probably just CN
- ☐
- ☐
- ☐

- ☐ Product Liability Claim v. DP
- ☐ (Retailer liability against R?)
- ☐ Is product *defective*?
- ☐ Was product defective in *design*?
- ☐ Should product have had a *warning*?
- ☐ Essentially a negligence test

- ☐ damages: wage loss and P&S
- ☐ Loss of consortium claim
- ☐ Bystander injury?
- ☐ several liability only (§ 34-51-2-8)
- ☐ No contribution
- ☐
- ☐

Exam Number ______________