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FINAL EXAM SAMPLE ANSWER

QUESTION 1

The facts for this question were loosely based upon *Collins v. Byrd*, 204 Ga.App. 893, 420 S.E.2d 785 (1992), in which the court affirmed the dismissal on summary judgment of claims against the van manufacturer and the Department of Transportation.

Annie could bring claims against the Evergreen Department of Transportation ("DOT") for negligently designing the highway, against General Motors Corporation ("GMC") for the defective design of the van/tire, against Daniel Thomas ("DT") for negligently operating the automobile, and possibly against Michael Collins ("MC") for negligently loaning the van. Even if liability can be established, it will be subject to defenses including the statute of limitations and contributory fault, as well as potential reduction as a result of comparative fault principles.

The Suit v. DOT

Sovereign Immunity. The claim against DOT would depend upon whether or not the State of Evergreen permits such suits. The statute makes a general waiver of sovereign immunity (E.S.A. § 50-21-23(a)) subject to a series of exceptions. One of the exceptions is the plan/design/improvement of highways (50-21-24(10)), but that exception seems to be limited to cases "where such plan or design is prepared in substantial compliance with generally accepted engineering or design standards ... ." If the exception to the exception is grounds for liability, then we should be able to sue DOT if the jury believes our expert's testimony that the highway was negligently designed and/or resurfaced. Moreover, this seems to dispose of any argument that the design of the road was a discretionary function and thus exempt from liability under § 50-21-24.

Duty of Care. An additional point DOT is likely to raise is that they owe no duty to travelers on the highway to avoid injury. I think this argument is likely to fail given the clear statement in the statute and the fact that the poor design of the highway did not simply fail to avoid injury but can be said to have been a cause of the harm.

Claim v. GMC

GMC would be liable for Annie's injuries if the jury finds that the van was defective in having such small tires. The key question is what standard the jury would apply in making that determination. Some jurisdictions employ a test based upon what a reasonable consumer would expect in terms of potential danger. Recently the Restatement (3d) has suggested that a consumer expectations test by itself is not very reliable, since the parameters of those expectations are hard to determine. Another method of determining whether the design is defective is to use a risk/utility comparison, which is basically a cost/benefit analysis of whether additional investments in safety would have been worthwhile. In many ways this test is similar to similar to the question of whether GMC was negligent. It is different, however, in that some jurisdictions will allow the jury to consider evidence of what is now known about the danger of the product even if such evidence was not available at the time of manufacture (some jurisdictions refer to this "hindsight" test as a form of strict liability).

The basic issue for the jury will be whether or not a reasonable manufacturer would have made the tire larger in order to provide more traction. The downside would probably be that larger tires would be more expensive, and arguably if driven at lawful speeds on good highways provide adequate traction.

Conceivably, Annie might also argue that the tire design, even if not defective, created enough danger that she deserved to be warned about the potential for loss of control. However, this claim seems much weaker than a design claim; if the risk was so substantial that it required warning, then it would be worth reducing by a different design.

Claims v. DT/MC

Annie could sue DT for negligently driving the van. In fact he might be the most responsible party, given the fact that he was speeding and driving with a suspended license. However, DT may not have insurance coverage, and the ability to have him covered under Michael Collins' policy. The claim against MC will be complicated by the fact that MC may enjoy parental immunity; in order to avoid this defense, Annie will argue that in loaning his car to someone with a suspended license, MC was acting in his capacity as an automobile owner rather than in his role as parent.

Defenses

Statute of Limitations. This case is more than three years old, which would bar the claim in most jurisdictions. However, Annie was only 16 at the time of the accident, and in many jurisdictions the statute would be tolled (would not run) until she reached majority (18).

Statute of Repose. It is possible that GMC would raise the statute of repose as a defense to the product liability claim. Some jurisdictions have enacted statutes that limit the manufacturer's liability to a period of time reflecting the "useful safe life" of the product. The accident occurred when the product (the van) had been in use more than 15 years, so the argument might be made that it was beyond its useful safe life. I doubt, however, that this defense would be successful.

Contributory Fault. Evergreen has a pure comparative fault statute (§ 51-12-1); even if Annie is found to be at fault, it reduces her recovery by the percentage of fault attributed to her. The only ground for asserting fault would be that, in view of Michael's suspended license, she *assumed the risk* by being his passenger. Unless there was some more explicit conversation concerning the risk of DT's driving, I believe a judge would most likely treat this as simply a case of *contributory negligence*, or secondary unreasonable assumption of risk—that is, Annie should have her recovery reduced if the jury finds that a reasonable person in her position would have declined a ride from DT in view of his license having been suspended.

Comparative Fault

In view of the likelihood that DT will likely be assigned a significant percentage of fault, and the likelihood that DT will be unable to pay his percentage share, it is crucial to know whether Evergreen will impose joint and several liability or not. The Evergreen statute imposes several liability if Annie is found at fault (§ 51-12-33). This implies that, so long as the jury finds that Annie was not at fault in riding with DT, Annie can recover the full amount of her damages from

any defendant, unless the jury chooses to specify the particular damages to be recovered from each defendant (§ 51-12-31).[1]

QUESTION 2

[This question was not based on any actual case.] Dr. Doone ("LD") may face liability based upon a medical malpractice claim for Lester ("LM")'s death. There are two primary forms of malpractice liability. First, a health care provider can be found liable for injuries resulting from a failure to follow the standard of care expected of someone practising in that specialty. To meet their burden of proof, the plaintiffs would need to supply expert testimony as to what the standard of care is for a psychologist. It is not clear whether LD held herself out as a specialist, or as a general practitioner of psychology. The plaintiffs would undoubtedly seek out someone who would testify that LD failed in one or more particulars to exercise what a reasonable psychologist would do under those circumstances. For example, it might be claimed that, given his condition, LD should have acted more quickly to hospitalize Lester, and/or that his comments were in effect a "cry for help" that went unanswered. Along the same lines, it might be claimed that her method of handling calls was not adequate in light of the emergency needs that her patients had.

A second claim would be that she failed to secure informed consent from LM for his treatment. LM obviously chose not to follow LD's advice (which could be a source of comparative fault, as we shall see), but the record isn't clear as to what LD offered him by way of treatment options. Before treating (or not treating) a patient in a particular way, the health care provider should give the patient a full range of options, giving the material risks and potential benefits associated with each form of treatment. Medication was LD's preferred method, but perhaps other forms of therapeutic intervention should have been offered to LM, and perhaps LD's failure to present them deprived LM of an opportunity to choose.

Notwithstanding the allegations that LD was at fault in her treatment, LM obviously shares some of the blame for his own death. He refused to follow LD's advice, and his act of taking his own life could be considered culpable. Evergreen's comparative fault statute makes it a complete defense if the plaintiff consented to the negligence of the defendant, and arguably that was done here. On the other hand, LM's impaired mental functioning might relieve him of some of the responsibility for his actions. If the jury did find LM partially at fault, it would reduce (but not bar) the claim; that is, assuming the jury found that LM's conduct is not considered a consent to the wrong.

A final point is that this is not a difficult question about the duty of care, unlike the *Tarasoff* case, because LD clearly owed LM a duty to use reasonable care in treating him. Unlike the victim in *Tarasoff*, LM had engaged LD to treat him, and LD had accepted the obligation to use reasonable care on his behalf.

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1. There is also language in § 51-12-33(a) suggesting that the jury may apportion liability, where the plaintiff is found at fault in a multiple tortfeasor case, among the defendants who are found more liable than the plaintiff. This may mean that in such cases the plaintiff couldn't recover from a defendant where the plaintiff's negligence was a greater percentage. But that seems to be in conflict with the pure comparative fault language in § 51-12-1. Further research would be necessary to resolve the conflict.

Spring 2000, § 1 Torts Final Checklist

QUESTION 1

- ☐ **Overview**
- ☐ Claim v. Department of **Transportation**
- ☐ **Statutory** Authority / Waiver of **Sov. Immunity**
- ☐ § 50-21-24(10) No liability for highways designed **in compliance** with accepted practice
- ☐ Does **reverse** imply potential for liability?
- ☐ Does this dispose of **discretionary function** argument? (§50-21-24(2))
- ☐ Would our **expert** be believed?
- ☐ **Duty** of Care is clearly owed
- ☐
- ☐ Claim v. **GMC**
- ☐ Product cases require proof of **defect**
- ☐ Was the **tire design** defective?
- ☐ Standard -- **Consumer Expectations**
- ☐ Standard: **Risk / Utility** analysis
- ☐ **Cost** of larger tire vs. **benefit** from safety
- ☐ **Strict** Liability / Hindsight
- ☐ Would jury believe **our expert**?
- ☐ **Warning** claim?
- ☐ If so dangerous as to need warning, better to **redesign**
- ☐
- ☐ Claim v. **DT**
- ☐ DT probably doesn't have **$$$**
- ☐ Claim v. **MC**
- ☐ **Parental immunity** argument
- ☐ Alternatively, **negligent entrustment**
- ☐ Statute of **Limitations**
- ☐ Did childhood **toll** the statute?
- ☐ Statute of **Repose** -- probably not
- ☐
- ☐ Comparative fault -- **pure** (§ 51-12-1)
- ☐ Assumption of **risk?**
- ☐ Probably just **contributory negligence**
- ☐
- ☐ **Joint and several** liability?
- ☐ Lost if AC found **at fault** (§ 51-12-33)
- ☐ **Implies J&SL** available if AC not at fault
- ☐ Unless jury **chooses to limit** (§ -12-31)
- ☐
- ☐
- ☐

QUESTION 2

- ☐ Medical **Malpractice** claim
- ☐ Claim #1: failure to follow **standard of care**
- ☐ **Expert testimony** would be required
- ☐ Standard tailored to her **specialty**
- ☐ Best expert would be another **psychologist**
- ☐ Was failure to **hospitalize** reasonable?
- ☐ Did "life not worth living" comment **trigger a duty** to intervene
- ☐ Reasonable method of **handling calls**?
- ☐
- ☐
- ☐ Defense of **Comparative Fault**
- ☐ **Pure** Comparative Fault
- ☐ Affected by his **disease**?
- ☐
- ☐ No **Duty of Care** issue
- ☐ (Not like ***Tarasoff***)
- ☐
- ☐
- ☐
- ☐

Exam # _____