

**HOFSTRA UNIVERSITY  
SCHOOL OF LAW**

**Final Examination in  
Selected Problems  
in New York Civil Practice**

**Exam No. \_\_\_\_\_**

**Professor Andrew Schepard**

**Thursday, May 1, 2003**

**Open Book Examination**

**Time: 4 hours**

**9:00 a.m.-1:00 p.m.**

**This examination consists of [fill in] pages including this cover sheet.**

**General Instructions for the Examination**

**1. Overall Structure:**

This examination consists of three (3) parts. All answers to all parts must be written *only* in the spaces provided in this examination booklet.

Parts I and II are based on different factual settings. You are asked to write explanations in the space provided for your answer about whether a statement based on the fact pattern in each Part is “true” or “false” or “neither true nor false.”

The factual setting of Part II is less complex than the setting of Part I. Part II contains only a single triple weighted question.

Part III calls for an essay.

There are eighteen (18) total questions in this examination.

Part I consists of sixteen (16) questions.

Part II consists of one (1) question

Part III consists of one (1) question.

The instructions for all the questions in Part I are the same. They are:

***Instructions:*** State whether the statement following the number is “true” or “false” and explain briefly why in the space provided. If you feel that a statement cannot be described as either “true” or “false” please state and explain why. Your answer to each question must be limited to the indicated space.

***Sample question:*** John can file an action for declaratory relief in the Civil Court of the City of

New York.

**Sample answer:** False. Under CPLR § 3001 only the Supreme Court is empower to render a declaratory judgment. The Civil Court can only provide monetary relief in most cases. Its power to provide declaratory relief is limited to declaring obligations of insurers, a circumstance not relevant here. .NYC Civil Court Act § 212-a.

The instructions for Parts II and III are stated at the beginning of each Part.

*Please fill in your examination number on the top of each page of this examination booklet right now. Write only your exam number, not your name or any other identifying information, on this examination booklet.*

2. **Length, Grading Weight, Overall Time Limit and Suggested Time Allocation**

The maximum possible numerical raw score on this examination is 100 points.

The weight given to your answers to each question is as follows:

**Single weight questions:** Your answers to most of the questions in Part I are each worth a maximum of four (4) points in your total numerical score. There are thirteen (13) such questions, for a total maximum score of fifty-two (52) points.

**Double weight questions:** Your answers to Questions 4, 15 and 16 in Part I are each worth a maximum of eight (8) points in your total numerical score. Together, these three questions are worth twenty-four (24) points of your total score.

**Triple weight questions:** Your answer to Questions 17 (the only question in Part II) and 18 (the only question in Part III) are each worth a maximum of twelve (12) points each in your total numerical score for a total of twenty-four (24) points.

**Recommended time:**

The following is thus the recommended allocation of time for the different parts:

**Part I :** three hours to complete all questions, both single and double weight. Spend about ten (10) minutes on each single weight question and about twenty (20) minutes on each of the three double weight questions (numbers 4, 15 and 16).

**Part II :** thirty minutes for the one question.

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**Part III** : thirty minutes for the one question.

3. **Answers in the Examination Booklet**

All questions on this examination **MUST** be answered in the spaces provided in this examination booklet. Answers written in other places will not be read. Please write legibly.

You may use scrap paper, but you must hand it into the proctor in charge at the end of the examination. Scrap paper will, however, not be graded.

4. **Instructions for Computer Users**

Computer users typing their examinations must clearly label which question they are answering and adhere to a limitation of :

Single weighted questions: 600 characters each

Double weighted questions: 1200 characters each

Triple weighted question: 1800 characters.

5. **After You Complete the Examination:**

You must turn in THIS EXAMINATION BOOKLET to the secretary or proctor in charge of the examination and sign out in his or her presence at the end of the examination. You *must* return the entire examination booklet.

The attached blue card must be completed (name, exam number and title of course) and returned with this examination booklet.

6. **What You Can and Must Bring Into the Examination With You:**

This is an open book examination. You are **required** to bring the one volume edition of the *CPLR*, which you purchased for the course, into the examination room with you. You may bring into the examination the following: the Chase and Barker Casebook; the Syllabus and Supplementary Materials for the Course; any additional materials handed out during the semester or downloaded from the Course Website; Siegel's *New York Practice* (one volume edition) and the Supplement thereto, and your own personal notes. You can also bring into the examination outlines prepared for the course by individuals or study groups. *You may not bring in prepared outlines that you have purchased from someone else, either commercially or privately.*

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7. **Governing Law and Assumptions For This Examination:**

Please remember that this is a course in New York civil practice. Focus your analysis, references and answers on the *CPLR* and the New York cases, statutes and rules that we studied, and not simply general statements of civil procedure or federal procedure.

If you believe you need any additional information to answer a question, explain what information you need and why you believe you need it.

8. **Calendar**

A calendar for 2003 is attached as the last pages of the Examination Booklet for your use.

9. **Academic Honesty**

A student violates the Law School's Code of Academic Conduct and is subject to disciplinary action if the student purposely or knowingly engages in or attempts to engage in or aids another to engage in the conduct defined in the following paragraphs:

1. Violations concerning examinations.

a. To give to a student any unauthorized information concerning the characteristics or content of an examination prior to the time the student who receives the information has taken the examination;

b. To obtain or to receive any unauthorized information concerning the characteristics or content of an examination prior to taking the examination;

c. To communicate (1) with anyone in any manner during an examination which the student is taking, except the Dean in charge of examinations, the persons involved in administering the examination or a faculty member, or (2) at any time with another student who is taking an examination;

d. To copy or read another student's examination paper or book or to consult any unauthorized material during the course of an examination or to possess any unauthorized material in the examination room;

e. Without proper authorization, to begin an examination before the prescribed time or to continue working on an examination after the announced conclusion of the examination period;

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f. To fail to submit all blue books and examination questions by the end of the examination, or to remove blue books or examination questions from the examination room, unless authorized to do so by the faculty member giving the examination.

By submitting this examination, you pledge that you are in compliance with Hofstra Law School's Code of Academic Conduct.

Good luck and best wishes.

### **Part I**

#### *Basic Facts:*

John and Rebecca Marshall, longtime residents of New York, are the parents of Eton Marshall, also a resident of New York, who died in a fire in a train in a tunnel in the Alps in Austria on May 1, 2002 on the way to Kaprun, Austria, a well-known ski resort in that Country.

The Marshalls have brought suit in Supreme Court, New York County to recover damages for Eton's death (the "Action"). The Complaint in the Action alleges that a number of defendants, including Austrian Hydro Power (AHP), were negligent in the construction of the tunnel in which the fire occurred and the train and its fire safety systems.

#### *Information about AHP:*

AHP is Austria's largest producer of electricity. It operates 89 power plants in that Country and accounts for approximately 40 percent of Austria's domestic power generation. The Complaint alleges the fire on the train resulted from AHP's "negligently designing, constructing and maintaining the power line for the train which caused sparks to fly in the tunnel and set the train and its cars on fire."

AHP is an Austrian corporation with its principal place of business in Vienna, Austria. AHP is not qualified or registered to do business in New York. It derives no sales revenues from New York. It has no employees in New York. It does not own or lease property in New York or maintain an office in New York.

In the 1990's AHP devised a strategy to raise capital for its expansion by leasing assets (its power stations in Austria) to trusts set up under United States law. The trusts then lease the power stations back to AHP for a shorter period. Banks made loans to the trusts using the power stations as collateral. In essence, under these lease transactions, Austrian-based assets are pledged to secure capital/loans to AHP provided by United States financial institutions. AHP used the funds to build more power stations in Austria.

All of the nine lease transactions closed in New York and the proceeds (millions of dollars) were deposited temporarily in AHP bank accounts in New York opened specifically to facilitate the lease transactions. The contractual agreements between the financial institutions and AHP stated that AHP accepted the jurisdiction of New York courts for any and all claims which arise out of the lease transactions. AHP agreed not to raise any forum challenges in any action related to the subject matter of the lease transactions.

AHP maintains a website designed to attract United States and New York investors and customers who are potentially interested in locating their plants and businesses in Austria. AHP has also entered into a consortium with a United States utility to purchase an Italian power company. To accomplish all of these transactions, AHP regularly engages the services of New York law firms and financial advisors.

Under Austrian law, private individuals are not authorized to serve foreign legal documents on Austrian soil. Private service is regarded as an infringement of Austria's sovereignty. All foreign legal documents must be served by an emissary of the Austrian government designated for this purpose. Furthermore, all foreign documents served by the emissary must be translated into German.

Assume that the statute of limitations on all claims against AHP is one year from the date of the occurrence.

1. The Marshalls must serve the Complaint in the Action on AHP by May 1, 2003.

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2. The Marshalls are automatically entitled to an extension of time to serve the summons and complaint in the Action on AHP because of the difficulties and complexities of serving process abroad.

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*Further assumption:*

AHP is appropriately served with the Complaint in the Action. It answers the Complaint, and its answer includes an appropriate reservation of the defense of lack of personal jurisdiction. With its answer, AHP serves a demand for a bill of particulars on the Marshalls. One item in the demand is:

“Identify the particular nature of each act of negligence by AHP in designing, constructing and maintaining the power line and state the manner in which act of negligence contributed to the cause of the accident described in the Complaint.”

The Marshalls’ bill of particulars contains the following response to this item of AHP’s demand.

“AHP was negligent in designing, constructing and maintaining the power line because it failed to prevent sparks from the power line from igniting and causing the fire. This is all the knowledge that plaintiffs currently possess on this subject. Plaintiffs will amend this bill of particulars when more knowledge becomes available to it after disclosure.”

AHP moves to compel further response to its demand.

3. AHP’s motion should be granted.

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8. The Supreme Court has personal jurisdiction over AHP in the Action because of the aggregate of its activities in New York.

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9. The Marshalls can create personal jurisdiction over AHP by attaching the bank accounts that AHP used to facilitate the lease transactions.

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*Further assumption:*

Assume that while AHP's motion to dismiss the Action for lack of personal jurisdiction is pending, the Marshalls' bring on a new motion to take the deposition of the Chief Executive Officer (CEO) of AHP. The theory of the motion is that the CEO's deposition is necessary to uncover more information about AHP's entry into the consortium with a United States utility to purchase an Italian company.

10. The lawyer for the Marshalls can submit an affidavit or affirmation in support of the motion explaining why it is important to the Marshalls' opposition to AHP's motion to dismiss for lack of personal jurisdiction.

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11. The Supreme Court should grant the Marshalls' motion and delay ruling on AHP's motion to dismiss for lack of personal jurisdiction until after the deposition of AHP's CEO.
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*Further assumption:*

The Supreme Court denies the Marshalls' motion to take the deposition of AHP's CEO and signs an Order (the "Order") to that effect entered by the Clerk on November 1, 2003.

12. The Marshalls must file and serve a notice of appeal from the Order by December 1, 2003.
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*Further assumption:*

Assume the Marshalls' timely file and perfect an appeal from the Order.

13. The Marshalls can appeal the Order to the Appellate Division.

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14. If the Appellate Division affirms the Order, the Marshalls can appeal the Appellate Division's decision and order to the Court of Appeals with the permission of either the Appellate Division or the Court of Appeals.

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*Further assumptions:*

Assume that the Supreme Court has personal jurisdiction over AHP in the Action.

Under Austrian law, a plaintiff does not get a jury trial for a claim arising out of wrongful death (indeed, Austria does not provide for jury trials at all), the right to conduct pre-trial depositions, or to seek punitive damages.

15. The Supreme Court should grant a motion by AHP to conditionally dismiss the Action under CPLR § 327 in favor of litigation in Austria (*double weight question*).

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*Basic Facts:*

The family of Carolyn Smith, the daughter of a well-known New York real estate developer and a well-known public relations executive, was committed to Brownstone Psychiatric Hospital in Manhattan by her parents after attempting to commit suicide. Three days later, Carolyn died because of an allergic reaction to an antidepressant medication prescribed for her. Her death received extensive publicity in the New York media.

Your client is Dr. Richard Shelton, M.D., Chief of Psychiatry at Brownstone Hospital who prescribed the medication for Ms. Smith and supervised her treatment there. On January 2, 2003, Dr. Shelton was formally charged with professional misconduct (negligence in treatment) by the Commissioner of Public Health (“Commissioner”) for prescribing the drug when he should have known of Carolyn’s probable allergic reaction to it. On that day Dr. Shelton received a formal written notice that the Commissioner has appointed a three-person Committee (“Committee”) of the Board of Professional Medical Conduct Panel (“Board”) to hear the evidence in the case against him. The notice stated that the Committee is comprised of two physicians and a physician's assistant. The hearing before the Committee is scheduled to begin on May 5, 2003 at the Commissioner’s offices in Albany.

*Background on the Public Health Law, the Commissioner and the Committee*

The Public Health Law (“PHL”) of New York requires that the Commissioner investigate and prosecute charges of professional misconduct by physicians. The PHL requires the Commissioner to appoint the members of the Board to hear evidence when such charges are brought.

PHL § 230 requires that charges against a particular doctor be heard by a three-person Committee of the Board designated by the Commissioner. It also requires that each Committee be made up of “two physicians and one lay member”

The PHL provides that after the hearing, the Committee transmits findings of fact and conclusions of law to the full Board. The Board then reviews the Committee’s findings, conclusions and recommendations, makes its own, and transmits the entire file and record to the Commissioner for final decision and order.

The PHL defines “physician” as “an individual who holds a degree of doctor of medicine (or doctor of osteopathy) and meets the experience and examination requirements established by the Board of Regents for a physician’s license.” The PHL does not, however, contain a definition of “lay member.”

Physicians’ assistants are licensed under a separate provision of the Education Law and their educational requirements are considerably different from that of a physician. A physician's









