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# HAPLESS HARVEST

## CLIENT COUNSELING SKILLS EXERCISE

### Information for Jan Hapless' Attorney

[This exercise is intended for participants familiar with the Client and Attorney Information from the Initial Client Interview of Jan Hapless. It assumes that Jan Hapless conveyed all the essential information in the initial interview and retained the attorney to file a suit against the Harvest Plenty grocery store for personal injuries Jan sustained from a slip and fall there. If you did not undertake the Initial Client Interview Exercise in your course or workshop, you should be provided with the attorney's and the client's role information from that exercise before beginning this one.]

From Jan's initial interview, subsequent meetings, and some discovery, you learned the following: Jan Hapless was shopping at Harvest Plenty, a large new health-food oriented grocery store, when Jan slipped on some spilled carrot juice in Aisle Five. Jan fell against the shelves and then backwards, sustaining injuries. You sued Harvest Plenty on Jan's behalf for negligence, alleging that they knew or should have known of the dangerous condition in the aisle (also caused by the unsafe display and exacerbated by poor lighting). In its answer to the complaint, Harvest Plenty maintained that the carrot juice had been spilled just moments before, by a five-year old in a cart ahead of Jan. The cart had already turned the corner and was out of sight by the time Jan slipped. They maintain the lighting was adequate and that Jan should have seen the spill. Some discovery has taken place. Both sides have produced documents. Jan has been deposed, as have two other customers in the aisle and two store employees. Jan is thirty five years old, recently divorced with no children.

Regarding liability:

Jan denies seeing the carrot juice spill. Jan had heard some commotion at the cart approximately 20 feet down Aisle Five a while earlier, as a mother yelled angrily at her young son and wiped his face with a tissue. Jan did not pay attention to what they said. Jan spent considerable time reading a casserole recipe on a label, had gone back to Aisle Four to pick up a missing ingredient, and then returned to Aisle Five. Jan then picked up and read the label on a tofu package before walking further down Aisle Five and slipping on the carrot juice. Jan remembers the entire aisle (indeed much of the store) as dirty, with food bits and sticky spots. Harvest Plenty maintains that Jan was walking either "in a fog" or while reading labels. The mother and another customer testified in depositions that the incident with the 5 year old spilling the carrot juice was loud. The five year old screamed. His mom yelled. The woman down the aisle yelled "Watch it! as the juice splashed up to her skirt."

The parties dispute exactly how much later Jan slipped, but no one knows precisely. Depositions of store employees did reveal that there had been several other spills in that aisle during the previous few days, possibly due to the way the juices were stacked. The juice manager was new; the juice salesman had recently negotiated for more display product. Jan claims that, immediately after the fall, when Jan was writhing on the floor, a young employee with a mop apologized and said: "I'm sorry I didn't get this right away." He must have been part-time and short-term. He has not been found.

Regarding damages:



Jan claims to have suffered a sprained knee and back. Jan agrees with his/her doctors report that the knee sprain was mostly healed within two weeks. However, his/her back steadily worsened. By the time the knee was healed, Jan couldn't get up without pain. Jan spent two more weeks lying down. When physical therapy didn't help, Jan had back surgery, with a 4 month recovery period.

Jan denies that the back injury was a pre-existing condition at the time of his/her fall. While Jan had had back trouble in the past, there had been no symptoms for the previous two years. Two years ago, Jan lost some weight and followed the instructions of a physical therapist and personal trainer. Just six weeks before the fall, Jan had begun a more ambitious weight training regimen, proving that any earlier back troubles were long gone. The emergency room report does contain the note: "May have twisted back in fall." All other notes from the emergency room examinations and x-rays referred to the knee injury, which turned out to be a bad sprain and ligament strain. Jan's loudest and most frequent complaints were indeed about the knee because that pain was more intense. Jan felt the back injury at the time, due to an awkward twisting motion during the fall. Jan hadn't focused on the back because it was less painful, and Jan knew how to treat it.

The defense does not believe Jan but could not shake this story in deposition. The defense maintains that the fall only injured Jan's knee. The defense hired an investigator, who quoted Jan's health club manager as saying that Jan had really been pumping iron since the divorce.

Jan is a senior restaurant manager in an upscale restaurant. While Jan doesn't regularly wait tables or tend bar, Jan is often required to fill in as waiter or bar tender to expedite service. Jan's salary is \$60,000 per year, or \$5000 per month. Jan claims to have been out of work for 4 months due to these injuries.

The defense maintains that Jan didn't need to miss four months of work as a manager. Jan could have worked on crutches or sitting in an ergonomic chair. Jan is claiming special damages of \$62,500, based upon a four months' loss of salary of \$5,000, the \$1,500 cost of emergency room treatment, \$1,000 in additional care for the knee, and \$40,000 in back treatment and surgery. Jan claims that the physical therapy visits will continue once a month for \$150 per visit, for at least another year. Jan seeks compensation for pain and suffering at the time of the accident and its aftermath.

Jan also seeks compensation for his/her continuing loss of physical mobility and reduced quality of life. While having returned to work, Jan continues to suffer pain and cannot play any sports. Throughout the deposition, Jan was emotional and angry, blaming Harvest Plenty and the accident for changes in lifestyle and physical abilities. Recently divorced and now feeling unable to date due to constant pain, Jan is lonely and bitter.

Current posture of the case:

After the last deposition, opposing counsel confirmed that he planned to file a motion for summary judgment, arguing Ohio's "in plain view" or "open and obvious" doctrine. He provided you with a copy of a recent Ohio case setting forth that doctrine. "Even though I believe we have a strong case," the defense attorney said, "it might make sense to talk about settlement. What would you need to settle the case?"



Based upon earlier conversations with Jan, you told the attorney that you were authorized to demand \$250,000. The attorney sighed and said, “Well then, I am not offering you more than \$5,000. Why don’t you talk to your client and get serious, as I will with mine.”

You pressed the attorney to give you an indication of how high a number he would recommend to his client. After discussion of the costs of filing a motion for summary judgment, and of procuring expert medical testimony and a written report, the attorney hinted that he would recommend payment in the \$40,000 range.

Based upon this attorney’s reputation and your prior dealings, you suspect that means he could get \$45,000 or perhaps as much as \$50,000 - \$55,000. Thank goodness for those expensive defense firms! You would strongly urge your client to accept a settlement of \$50,000, if that could be negotiated. Of course, you would try to negotiate to get as much as possible.

You estimate the chances of being knocked out on summary judgment as 70%, and then only a 50% chance of a plaintiff’s verdict at trial. That is because you are concerned that a jury might find the plaintiff to have been 50% negligent. Even if the plaintiff prevails on liability, there is a significant chance that the award would be reduced for some contributory negligence. It is also possible that the plaintiff would prevail on liability, but a jury might find that only the knee injury was caused by the accident.

Because the lion’s share of Jan’s lost work time, medical expense and suffering relate to the back injury, this would greatly reduce the potential damages award. If the back injury and the knee injury were found to have been caused by the accident, you would predict a damages award as a low of \$100,000, a “medium” point of \$150,000 and a high of \$250,000. If the jury finds only the knee injury to have been caused by the fall, the damages would likely be a low of \$15,000, a “medium” point of \$30,000, and a high of \$50,000. (Note that these probabilities and damages estimates are your own analysis and may be reflected in your settlement recommendations.

You will not have sufficient time (and should not attempt) to review a full decision analysis with your client in this twenty minute exercise. However, you are free to discuss any of this [your] thinking with your client if that would be helpful.)

While the plaintiff in a personal injury claim is permitted to recover medical expenses from the defendant (which the medical insurer may then pursue), because Jan was insured, Jan’s “out-of-pocket” or actual losses from the accident were relatively modest. Jan lost 4 months of work or \$20,000, and perhaps \$1,800 more if required to pay for future physical therapy. By the time physical therapy is done, Jan will have paid approximately \$1,200 to a house cleaning agency (for the period when Jan was unable to clean the apartment). Thus, Jan’s monetary losses have been approximately \$23,000. Expert’s fees and other costs to date have been \$3,000.

If the case were to settle for \$45,000, you would receive a 1/3 contingency fee of \$15,000. Jan would get \$30,000, from which \$3,000 would pay for costs advanced. The balance of \$27,000 would be higher than the financial losses. Obviously, a \$50,000 (or higher) settlement would be better.

If you do not settle the case now, summary judgment motions will be briefed, filed, and argued within three months. A ruling on summary judgment can be anticipated six to nine months later. If the case survives summary judgment, trial would take place approximately eighteen months from now. If the defense appeals the denial of summary judgment, the entire process would take longer. (The terms of your engagement do not require you to pursue an appeal of summary judgment or of a defense verdict.)

You have asked Jan to come to your office to discuss the case and its possible settlement.