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#548

TORTS
Semester I, 2003-04

UNM School of Law
Final Examination

Professor Margaret Montoya
Friday, December 19, 2003
1:30 p.m. to 4:30 p.m.

INSTRUCTIONS

1. If you are not typing your exam, please write legibly. Use only the right side of the bluebook pages and skip every other line. Please do not use pencil to write the exam.

2. If you are typing your exam, use only one side of the paper.

3. You will have three hours (180 minutes) to write this exam and it will be worth 45% of your final grade.

4. **Don't forget to put your exam number on your bluebooks.**

5. This is a closed book exam. You are not allowed to consult your notes, outlines, or summaries.

Take a deep breath and good luck.

Question #1. 30 points

Wells Fargo Alarm Services Division (Wells Fargo) installed a burglar and fire alarm system at premises owned by Arett Sales Corporation (Arett). After Wells Fargo began monitoring the system, but prior to the time the system became fully operational, Wells Fargo contracted with Advanced Automatic Sprinkler Protection Systems, Inc. (Advanced) to perform certain services on the system. Although Advanced asked both Wells Fargo and Arett whether the system was operational and monitored, both responded it was not. On the morning of May 10, 1990, Advanced proceeded to perform the necessary services without first testing whether the system was operational and without taking steps to shut the system down. At no time during the course of the services being performed by Advanced was the alarm monitoring system or the local fire dispatch center notified that service was being performed on the Arett system. The failure to give such notice was contrary to both the internal policies of Wells Fargo and the standards of the National Fire Protection Association. It is likely that proper notification would have prevented a response to the false alarm that resulted from the performance of services on Arett's alarm system.

Additionally, on the morning on which Advanced was working on the system, the Wells Fargo monitoring station received two supervisory signals, which are indicative of a problem with the system. Although proper procedures mandated that the monitoring station contact the client to determine the nature of the problem, the monitoring station never contacted Arett. Had Wells Fargo followed proper procedure, it would have learned that service was being performed on the system and could have made the necessary notation to avoid reporting the subsequent false alarm. Two minutes after the second supervisory signal was received, an alarm was received at the monitoring station indicating the existence of a fire at Arett. Although an alarm after a supervisory signal often means that a system is being serviced and that the alarm is false, the monitoring station erroneously notified the Waterbury fire department that a fire was in progress at Arett's business. At approximately 11:20 a.m. Waterbury Fire Engine Company 11 was dispatched to respond to the alarm. Engine Company 11 was operating Engine #9, a spare vehicle in use because their primary vehicle was undergoing repairs.

Prior to the alarm, James Morotto, the engine driver, had been advised that the brakes were not functioning properly. When Morotto tested the brakes, they appeared to be adequate. Later that morning Morotto noticed that the brakes were not operating properly so he drove the engine to the city garage for repairs. The mechanic noted that the brakes need minor adjustments but informed Morotto that he was unable to attend to the task until after lunch.

The alarm from Arett was received after the Engine Company 11 returned to the station but before the brakes were repaired. Because the roads were wet, Morotto flipped a switch to eliminate power to the engine's front brakes because, although this

maneuver reduces braking power by about 50%, it is usually safer to operate without front brakes on wet roads. Once the engine began to descend a hill at a speed of fifteen miles per hour, Morotto realized that the brakes had failed. The engine's auxiliary brake also failed so Morotto veered into a parking lot to avoid cars stopped at the bottom of the hill. Morotto struck an embankment and lost control of the vehicle and struck a tree. As a result of the collision, two firefighters died and two were seriously injured. The brake failure was caused by a leak in a water hose that had been neglected by the city.

As employees of the city, the firefighters have received benefits under the Waterbury Workers' Compensation Act but their damage award was limited by the Act's statutory schedule of payments. Consequently, the injured firefighters and the estates of the deceased firefighters have brought a separate action against Arett, Advanced, and Wells Fargo, the companies involved in transmitting the false alarm. The defendants have filed a motion for summary judgment alleging that they did not proximately cause the injuries to the plaintiffs. (Note: you are to ignore any workers' compensation issues.)

Assume you are the clerk for the trial judge. You have been instructed to prepare a memorandum analyzing the arguments that the two opposing parties are likely to make in support of or in opposition to this motion. The judge has also asked for your recommendation on whether to grant or deny the motion.

[This fact pattern is adapted from *Lodge v. Arett Sales Corp.*, 246 Conn. 563 (1998).]

Question No. 2. 15 points.

On his way to work on Friday, October 12, 1990, William Piner stopped his truck to let a pedestrian cross the street. While he was stopped, a car driven by Billy Jones hit Piner's truck from behind. Police were called to investigate the incident. Piner waited for the police to finish their investigation before calling Dr. Lisa Padilla, his primary physician, to complain of pain in his neck, upper back, left arm, and head. The doctor's staff told Piner that she was busy but that he would be seen later in the day. Piner considered fixing the broken taillights on his truck, but instead decided to return to work until he heard from Dr. Padilla.

Later the same day, Piner was driving to lunch when the car ahead of him stopped to allow pedestrians to cross the street. Piner stopped and was again hit from the rear by a vehicle driven by Cynthia Richardson. Now, in considerable pain, Piner again called and talked with Doctor Padilla. She was still occupied but told him to come to the office for a check-up. He waited for hours to see Dr. Padilla but eventually left her office without being seen. He was finally treated on Sunday at the emergency

room. Piner suffered serious injuries as a result of the two collisions plus the delay in being treated. The medical experts are unable to attribute any particular part of Piner's injuries to one accident or the other or to the subsequent delay in being seen by a doctor.

Piner's damages amount to $200,000. Billy Jones has left the jurisdiction and is not involved in the litigation. The jury has concluded that Richardson and Padilla are liable and Piner was contributorily negligent. Assume that this case is being tried this year in New Mexico and that you represent the plaintiff. How should the damages be apportioned among the parties? Explain your answer and show your calculations.

[This fact pattern is loosely adapted from *Piner v. Superior Ct.*, 192 Ariz. 182 (1999).]

TORTS GRADE SHEET, FINAL EXAM EXAM NO. 548

PROFESSOR MONTOYA

QUESTION #1, 30 POINTS:

Motion for summary judgment

(def/analysis) 3 3 PTS.

Proximate Cause Analysis

Issue(s) : 2 4 PTS.

Do the corporate defendants through the foreseeability of the consequences of their collective negligence in causing the false alarm owe a duty to the firefighters who were injured as a result of a poorly maintained fire engine or alternatively did they proximately cause the fire fighters' injuries?

Rule(s): 2 3 PTS.

Duty vs. Policy (Cardozo v. Andrews)

Arguments re: motion 3 5 PTS.

Counter arguments re: motion _____ 3 PTS.

Conclusion/recommendation 2 2 PTS.

Unallocated Points 8 10 PTS.

TOTAL Q #1 22

QUESTION #2, 15 POINTS

Issue: Successive Acts Of Negligence With

Contributory Neg . and Absent Def. 2 3 PTS.

Rule (Several Liability) 3 PTS.

Analysis And Computation Of Damages 3 3 PTS.

Unallocated Points 5 6 PTS.

TOTAL Q #2 12

Exam ID: 548
Course: Torts
Professor Name: Montoya
Exam Date: Friday, December 19, 2003

QUESTION 1

Note: because the question says that the ***defendants* have filed a motion for summary judgment, alleging ***they*** did not p.c. the injuries, I am making the assumption in my analysis that these defendants are bringing a motion together should be analyzed together and not separately.

The overall issue in this case is whether whether Wells Fargo (WF), Arett and Advanced will succeed in their motion for summary judgment? The specific issues that must be addressed are whether breached their duty of care and were the cause-in-fact and proximate cause of the firefighters' injuries?

A motion for summary judgment is made after discovery but before a trial, and if granted, a trial will not occur. In order for a motion for summary judgment to be granted, the moving party must prove two things:

. That there are no genuine issues of material fact

2. That the law on this issue is clear.

If they can prove both, then the moving party's motion will often be granted.

In order to establish a prima facie negligence claim, a plaintiff must prove the following elements:

1. Duty

2 Breach of Duty

3 Causation

4 Damages

WELLS FARGO, ARETT, ADVANCED v. FIREFIGHTERS

DUTY (I know this isn't the point of the question, but to succeed under a negligence claim the plaintiffs would have to prove all elements, so I thought I would do a brief duty analysis)

The first question that must be asked when analyzing a negligence claim is whether there is a duty owed to the plaintiff. Duty is split into two types: nonfeasance and misfeasance. In nonfeasance—nonaction—there is no duty to act unless there is a special relationship, contractual relationship, statutory duty, the instrumentality is in the defendant's control, the defendant has started to act, or the defendant has control over the offending person/instrument. In this case, the firefighters might argue that there was nonfeasance because Wells Fargo failed to give the fire department notice of the monitoring , or check that the system was fully operational. The firefighters could argue that there was an implied contractual relationship between the firefighters and the WF, and that by not telling them of the manintanence they ignored this duty. However, WF could argue that there really wasn't a contractual relationship, but this argument would likely fail since such failure of notice was contrary to the internal policies of the company. This might also be a case of misfeasance (mis-acting). The general rule is that there is a duty to act reasonably under the circumstances. One could argue that the WF misacted when they

didn't give notice to the fire department of their activities. Although it doesn't list the jurisdiction, if this case were in NM, the rule is that duty is owed when there is a foreseeable plaintiff + policy (statutes, constitutions, precedent). The firefighters would argue that there is both: WF knew that a false alarm would bring the firefighters, and there was policy—both the internal policies of Wells Fargo and the regulations of the National Fire protection Association—that required them to give notice of the maintanence. It is likely that WF would have to concede that there was a duty under misfeasance for this reason. If there wwere no duty under non-feasance or misfeasance, the firefighters could argue that one should be created (A FAIR DEAL) because policy dictates it. Although WF might argue that they didn't know they had a duty to the firefighters because they thought the system was not operational, their argument would probably not succeed

BREACH OF DUTY

The general rule for the standard of care is what would a reasonable person would do under the circumstances. This standard is not subjective but objective, and the courts would probably not allow for the subjectivization of the standard in this case because none of the companies fall into any of the subjective categories (child, physical disability). Thus, the question is whether the defendants acted reasonably under the circumstances. One could argue that none of them acted reasonably. WF and Arett did not check to see whether the system was operational, and WF didn' give notice to the fire department that Advanced was going to do the monitoring. A reasonable person would probably have checked to see whether the firedepartment was reasonably notified,

especially if it part of the internal polices of the company The companies might argue that they each performed reasonably under the circumstance because they were relying on the other to give them proper information. However, I do not believe that this argument would be persuasive, since it would have been easy for any of the companies to check with one another.

However, to prove that the companies breached the standard of care, there are a number of tests that can be imployed. One is the B<PL test, another is negligence per se.

B<PL

The test for B<PL is to look at whether the burden of the precation is less then the probability of the injury times the cost of the injury. This test does not necessarily prove negligence but is a risk analysis test. In this case the B is the burden of the companies checking up on one another and following procedure. One could argue that this burden would have been relatively low since it is required by the National Fire Protection Association, and proper procedures required WF to contact the client to detmine the nature of the problem. The probability of the injury was likely high since it is noted that proper notification (really on any of the companies part) would have prevented a response to the false alarm (and theoretically prevented the firefighters from being dispacted). The cost of the injury in this case is obviously high and thus, it would appear that the firefighters could argue in this case that the precaution should have been taken. The companies might argue that the burden was too high, or that they believed one of the other companies was shouldering the burden. However, because it seems to be procedure

for each of these companies (especially Advanced and WF) to avoid false alarms, it seems that their arguments would be unpersuasive.

NEGLIGENCE PER SE

The firefighter's could try to show breach through negligence per se by violation of a statute. There are three ways states have dealt with handling violation of statutes as a way to show negligence.

Negligence per se (strictest liability)

2 Presumption of negligence

3 Evidence of negligence

If this case were being handled in New Mexico, NM has negligence per se with excuse and justification

The test for this jurisdiction would be: was there a statute? The firefighters could argue that the standards of the National Fire Protection Association is a regulation, and a regulation is equated with a statute for the purposes of negligence per se. The companies would say that this Association is not a governmental agency, and thus the standards are voluntary; there was no violation of the statute (and thus, no negligence per se). Assuming that this standard could be a regulation, the next question is 2. whether there was violation. In this case, it is unequicobale that the companies violated the statute by failing to report or investigate the other's activities. 3. were the firefighters the group of

people who were the class of people the statute intended to protect? The firefighters would argue yes because they are the one's that would respond to the false alarm. The companies would argue no, that they were really not the one's intended to be protected; the class of people was much larger. 4. was the harm the type that the statute intended to prevent? Yes. The standard probably wanted to prevent false alarms—thereby wasting tax payer money and possibly putting firefighters at risk

Under either of these tests, it is likely that the firefighters could show that that there was a breach of duty on the part of the companies in exercising a reasonable duty of care.

At this point the companies might try to bring up one of two defenses depending on which jurisdiction they were in. They might try to argue that the firefighters were contributorily negligent. Under common law this was a complete defense. In such a case, the companies might argue that by not getting the engine's breaks repaired, the firefighter's contributed to their injuries. Under a comparative negligence state, the companies would still try to show that the firefighter's contributed to their injury in order to mitigate their liability. However, the firefighter's might respond by saying that they did try to mitigate their harm by flipping a switch to eliminate power to the engine's front breaks.

CAUSATION

In addition to proving all the elements above, the firefighters would have to prove that the companies were both the cause-in-fact and the proximate cause of their harm. Normally

the test for cause-in-fact is the "but for" test (but for the defendants' conduct, would the plaintiff's injuries have occurred? The plaintiff wouldn't have to disprove every other possible injury; just show that it is likely that the defendant was likely the cause of the harm). However, in a case with multiple tortfeasors, the but for test will not work Thus, the court could say, "too bad, too sad". However, they have come up with an alternative test: the substantial factor test; were the defendants' a substantial factor in causing the harm? There are two tests that can be applied: one in which the defendants all acted negligently and there is a indivisible harm (*Summers*) and one in which there are multiple defendants, there is indivisible harm, but it isn't possible to tell which defendant caused the actual harm (*Ybarra*). Thus, because although there are multiple defendants and they all acted negligently (see analysis above), it is probably best to use the Summers test. Such a stest is as follows

that the plaintiff is not contributorily negligent: the defendants are going to argue that the firefighters were negligent in not getting their breaks fixed

2. that it would be unfair for the platinff to bear the burden of the injury: although they received worker's comp, their damage was limed by teh Act's statutory schedule of payments

3 that the defendants's were negligent: Arett and Advanced did not take the time to check whether the system was working before the work began; WF did not follow procedure

4. That it is impossible to tell which of the defendant's caused the injury: while it is easy to point out that the WF was in charge of monitoring the work, it can be argued that if the other two companies had fulfilled their duty, then the alarm

wouldn't have gone off. Thus any of the companies harm could have caused the injury.

5. The defendant's conduct was the sole cause of the injury: the firefighters are going to argue that they wouldn't have responded if the false alarm hadn't gone off, the companies will argue that the firefighter's actions also caused the injury
6 Can't seperate the conduct: the conduct of the defendants was interrelated; it would be difficult to try and show that their actions were separate and autonomous

Thus, it is possible to argue that the firefighters met their burden of proof and that because the defendants are in the best position to get to the truth, that the burden should be shifted to the companies. At this point the companies might try to separate and show that only one was the "but-for" cause of the injury (such as WF since they had the duty to report the actions). If the court does shift the burden to the companies, than it could either hold them jointly and severally liable.

PROXIMATE CAUSE: in order to complete a causation analysis, the companies will have to be the proximate cause of the firefighter's injuries. Only 10% of cases will have proximate cause issues. The essential question for determining whether there is a proximate cause issue is whether or not a defendant could have foreseen that his conduct would have CAUSED THAT PARTICULAR INJURY. There are two ways of looking at proximate cause (foresight or hindsight)

If this is a foresight jurisdiction, the courts will look from the defendant's conduct to the injury and ask whether it was foreseeable (*Wagonmound*)

If this is a hindsight jurisdiction, the courts will look from the injury to the the defendant's conduct to see if there was direct and continuous sequence (*Polemis*). The defendants have argued that they are not the proximate cause of the injury. They will say that looking forward, it was not possible fore them to see that even by placing a false alarm, that the firefighters would be using a a spare engine, that the engine would have break problems that the firefighters had not repaired, and that even using a maneuver to reduce breaking power that the breaks would fail and the engine would crash. The company would also say that if in a jursidcition that allowed an independant intervening cause defense, that the firefighter's negligence in fixing the breaks broke the causal chain, and they are not the proximate cause. However, if this were in NM, a plaintiff can never be an intervening cause, and the IIC UJI is only given in cases where the is an intentional tort, criminal action, act of nature or extraordinary circumstances (leaving it open to policy). In this case the firefighters would likely be out of luck (couldn't use the defense)

The firefighters would say that there is no proximate cause issue (that the firefighters were the proximate cause) because it was foreseeable that being called out on a false alarm that something could have happened. Specifically, that car accidents happen all the time, and that it if people aren't more careful about using the fire department, that with every call that they have to respond to, the chances of getting into a car accident increase. The firefighters could also make a policy argument, saying that it would be appropriate

for the court to find the companies the proximate cause because it would forward the tort goal of deterrence. If the companies were held liable, then they would make sure that they followed procedure and didn't act negligently

Although it is likely that a duty was owed to the firefighters, it is not completely clear that the companies breached their duty, and it is also not clear whether they are the cause-in-fact or proximate cause of the firefighters injuries . Thus, there is a question of material fact. The courts have also gone many differnt ways on determining causation and breach of duty. Thus, it can be argued that the law is not necessarily clear on this issue. Therefore, I don't think the moving party has met its burden of proof, and the companies' motion for summary judgment ought to be denied.

QUESTION 2

The issue here is how should damages be apportioned in Piner's case when the jury has determined that both Padilla and Richardson are liable and Piner was contributorily negligent? New Mexico is a pure comparative negligence jurisdiction with several liability (*Scott*, *Bartlett*, respectively). Under comparative negligence jurisdiction with several, each party is responsible for his fault concerning the injury. Thus, if Piner could show that he was 20% negligent and Padilla is 70% negligent and Richardson is 10% negligent, he could recover $162,000 from Padilla and 18,000 from Richardson.

First we should try to figure out by how much Piner was contributorily negligent. We could try to argue that his percentage is low because he wasn't in the wrong in terms of the accidents; he was stopping to allow pedestrians to cross the street, and that this action is lawful and what society would want people to do. However, his negligence probably occurred when he 1. waited for the police to finish their investigation before calling his doctor and 2. not actively trying to seek out better medical treatment (instead of waiting for Padilla to call him back). However, because soceity wants driver's to act lawfully, and he did take action to treat his injuries, Piners negligence would probably be considered minor wen compared to the unlawful and negligent actions of either of the defendant's. Therefore, I believe that Piner should only be found 10-20% negligent in this case.

In this case, there is an indivisible injury from both parties, and both parties acted negligently (the hospital experts were unable to attribute any particular part of Piner's injuies to one accident or other or to the fact that Padilla didn't see him right away), thus it would be possible to argue that without any further investigation, the defendants should each split the damages 50/50 minus whatever % that we would find that Piner was contributorily negligent. This would be consistent with the philosophy of several liability, and notions of fairness (the plaintiff should not be favored and allowed to collect more than the fault of the individual defendants).

Piner could argue, however, that that Padilla should pay more for two reasons: 1.because of loss of chance, and 2. because her negligence constituted more than one action

Because Padilla did not see Piner when he first called on Friday, but told him that he would be seen later in the day, she created a situation which prevented him from seeking other help (and perhaps worsened the situation). However, Padilla would argue that the loss of chance argument wouldn't work because the medical experts were unable to attribute any particular part of Piner's injury to either the accident or the delay in medical treatment. Piner could also argue that Padilla should pay more for this very reason: although they can't attribute the injury to one defendant or another, Richardon only acted against Piner once: she hit his car. Padilla refused to see him twice. Given that, it seems one could make the inference that Padilla should pay twice as much as Richardson However, Padilla could argue that Richardson was active in her negligence and she, only passive. The law should want to deter active tortfeasors more (however, it is likely that the law wants to deter both). Plus Padilla could argue that Richardson was acting illegally and she was not (nor could she have foreseen that her omission would contribute to his injury), and therefore, Richardson should pay more.

Given these arguments, I think Piner should be held 10% contributorily negligent; Padilla should be 45% and Richardson should be 55% negligent. Because Piner negligence was minimal; he did try to help himself. Padilla's negligence was substantial, but that Richardson was actively negligent in her actions (and perhaps her actiosn were even illegal)

Under several liability, Richardson could sill collect the 5% difference from Padilla through contribution. In contribution, on defendant is allowed to collect from another defendant the difference in the amount to make 50% (shares the liability).

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