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510—TORTS

Semester I, 2003-04

Final Examination
UNM School of Law
Three Credits

Professor Occhialino
December 19, 2003
1:30-5:00 p.m.

INSTRUCTIONS

1. This is a closed book exam. Bring no materials into the exam.
2. Put your exam number at the upper right hand of this page now.
3. **** Write only on every other line of the bluebook and only on one side of each page.**
4. There are Three Questions in the TEAM A cluster and Three Questions in the TEAM B cluster. There are also Two Questions in the BOTH TEAMS cluster. You may choose to respond to the Three Questions in TEAM A cluster **or** the Three Questions in TEAM B cluster but do not respond to both the Team A and Team B questions. **In addition**, you are to respond to BOTH questions in the BOTH TEAMS cluster. Thus, you will answer five questions altogether.
5. Be sure to indicate on the first bluebook (or the first page of your typed response) whether you are answering the Team A or the Team B cluster.
6. You may answer the questions using New Mexico law if you wish to. Alternatively, if you prefer, you may provide the answers in accordance with common law principles unconnected to the law of any particular jurisdiction.
7. Each of the five questions is worth 20% of your final grade. Allocate time accordingly
8. Relax for a moment. Take a deep breath. Exhale. Begin. Enjoy!

Memo

To: Arnold Associate

From: Porter Partner

The trauma of September 11, 2001 will be with us forever. It has directly affected the Unger family here in New Mexico. The family has asked us to represent them in a wrongful death action for the death of their relative, Edward Unger. We have agreed to do so. The family decided to sue at common law for damages, as is their right, rather than to accept the optional alternative of receiving limited compensation pursuant to the federal act that Congress passed after the tragedy.

Many associates are working on various other aspects of this problem. I have a series of discrete questions that I want answered. There are Three Questions in the TEAM A cluster and Three Questions in the TEAM B cluster. There are also Two Questions in the BOTH TEAMS cluster. You may choose to respond to the Three Questions in TEAM A **or** the Three Questions in TEAM B but do not respond to both the Team A and Team B questions. **In addition**, you are to respond to BOTH questions in the BOTH TEAMS cluster. Thus, you will provide me with five responses altogether.

The core facts are described below. Additional facts relevant to specific questions are provided in conjunction with the questions where appropriate. You may assume for the purpose of answering these questions that the federal statute controlling common law litigation arising from the September 11 attacks provides that the tort law of the domicile of the deceased controls. Thus, feel free to answer the questions using New Mexico law if you wish to. Alternatively, if you prefer, you may provide the answers in accordance with common law principles unconnected to the law of any particular jurisdiction.

The Facts

The destruction began at about 8:50 a.m. Eastern Daylight Savings Time on September 11, 2001 when a hijacked American Airlines passenger plane smashed into the One World Trade Center, the northern tower. Then, at 9:04 a.m., another jet crashed into the southern tower, Two World Trade Center. The planes involved in the Trade Center crashes were American Airlines Flight 11, a Boeing 767 en route from Boston to

Los Angeles and United Airlines Flight 175, a Boeing 767 also headed from Boston to Los Angeles.

On the morning of September 11, 2001, two of the hijackers, Atta and Al-Omari, went through security at the airport in Portland, Maine and boarded a flight to Boston's Logan Airport. There, without the necessity of passing through security once again, the two hijackers connected to American Airlines Flight 11 in Logan Airport, where they joined two other terrorists, who had boarded the plane at Logan Airport after going through security at one of the several security checkpoints at that airport. Passengers on Flight 11 reported via cell phone calls to relatives during the hijacking that the four terrorists each wielded a metallic "boxcutter" that they used to injure and kill flight attendants in order to induce the pilots to open the cockpit door. It is not clear whether the tactic worked to accomplish the goal of gaining access to the cockpit or whether the cockpit door was smashed-in by the hijackers. In either event, the cockpit was stormed, and Atta is believed to have been the pilot when Flight 11 struck Tower One.

At about 10 a.m., Tower One collapsed. A half-hour later Tower Two also fell in on itself. More than 3,000 persons died in the terrorist attacks of September 11, most of them at the site of the World Trade Center.

Our law firm represents the family of Edward Unger, who was killed as a result of the attacks. We have considered many possible defendants but are now focusing on the following as defendants in a possible common law action for negligence:

The Maine Airport Protection Association (MAPA)

MAPA is a corporation that provides employees who operate the security service at the Portland, Maine Airport

The Boston Security Company (BSC)

BSC is a corporation that operates a portion of the security service at Logan Airport in Boston.

The New England Security Operations, Inc. (NESCO)

NESCO is a corporation that operates a portion of the security service at

Logan Airport in Boston.

American Airlines

American Airlines Inc. operated Flight 11, the airplane that took off from Boston's Logan Airport on September 1, 2001, was hijacked by terrorists and was purposely flown into Tower One of the World Trade Center that day.

United Airlines

United Airlines Inc. operated Flight 77, the airplane that took off from Boston's Logan Airport on September 11, 2001, was hijacked by terrorists and was purposely flown into Tower Two of the World Trade Center that day.

Medical Defendants: Dr. Esteban Gonzales and Dr. Linda Lucca.

Their roles are identified in the facts that continue below.

Additional Facts Relevant to the Death of Edward Unger

Edward Unger lived in Albuquerque, New Mexico. At age 50, he was diagnosed as having advanced congenital heart failure. His cardiologist, Dr. Linda Lucca, determined that he was a candidate for a heart transplant and determined, with a reasonable degree of medical probability, that if he had a heart transplant from an ideal donor within two days, he would probably live an additional 20 years. She determined that without a transplant in two days, Unger would, to a reasonable degree of medical probability, no longer be able to undergo the rigors of a heart transplant operation and would probably die from heart failure in six months.

Early on the morning of September 11, a person who previously had volunteered to be a heart donor died in Sitka, Alaska. The person was an ideal match for Unger. The Heart Registry determined that the donor-heart should go to Unger. The Great Alaska Air Taxi (GAAT) service was hired to transport the donor-heart to Albuquerque by charter jet. The donor-heart would have to reach Albuquerque by the early afternoon of September 11 or it would not be usable for the transplant. The GAAT jet was in the air over Portland, Oregon when the President, in reaction to the air attacks on the World Trade Center, ordered the FAA to ground all flights in the continental United States. The pilot

of the GAAT jet explained his mission and requested an exception, but the FAA refused. The GAAT jet landed at the Portland Oregon airport at 7:30 a.m. Pacific Daylight Savings Time and it was impossible to get the donor-heart to Albuquerque in time to help Unger. If the plane had not been grounded it would have reached Albuquerque in time for the donor-heart to be used in the transplant operation.

Learning of the loss of the donor-heart, Dr. Lucca put out a bulletin throughout New Mexico hospitals describing the immediate need for a compatible heart-donor. At 1:00 p.m. in Carlsbad, New Mexico, Donald Draper died in an auto crash. His driver's license listed him as an organ donor. He was determined by emergency room personnel at Carlsbad General Hospital to be a perfect match for Unger. The Heart Registry agreed to have the Draper donor-heart transferred to Albuquerque for implantation into Unger. The emergency room doctor, Dr. Edward Reese, had never "harvested" a heart for transplant and was reluctant to do so. Reese called Dr. Esteban Gonzales, a cardiologist and heart surgeon, who is the only physician in the Carlsbad area who had the training and skill to harvest the donor heart of Draper. Dr. Gonzales had a contract with Carlsbad General Hospital whereby he was paid a sum of money to be on call "to treat patients at Carlsbad General Hospital who are in need of the services of a trained and board-certified cardiologist when called upon to do so by physicians or senior administrators of said Hospital." Dr. Gonzales declined to come to the hospital to harvest Draper's heart. Dr. Gonzales explained that he had a sister who worked in the World Trade Center and he had learned from her husband that she almost certainly had died when the United Airlines plane struck Tower Two. He stated that he was simply too distraught to perform the necessary operation. Left without an alternative, Dr. Reese attempted to harvest Draper's heart but was not successful, through no fault of his own.

As a result of the grounding of the GAAT plane and the failed attempt to harvest Draper's heart, Unger did not receive a transplant during the two days when it would have been possible to do so.

Dr. Lucca decided that the only way to extend Unger's life was to attempt an experimental surgery that she had learned about at a recent convention of cardiologists. Unger consented. Unfortunately, through a lack of reasonable care, Dr. Lucca inadvertently allowed a scalpel to slip during the operation, as a result of which Unger

died on September 15, 2001, thus depriving him of the anticipated six months of life that he could have expected if he did not receive a transplant and if Dr. Lucca had not been negligent during the experimental operation.

Answer EITHER The three TEAM A questions or the three TEAM B questions but not both. In addition, answer both of the BOTH TEAMS questions. Altogether you will answer five questions.

TEAM A QUESTIONS

Team A—Question One

Did American Airlines owe a duty of care to Unger? Explain fully.

Team A—Question Two

[Assume for this question that American Airlines did owe a duty to Unger and did breach the duty by failing adequately to protect against air hijackers taking over the plane and crashing it into Tower One]

We have a cause-in-fact problem in that even if the American Airlines plane had not crashed into Tower One, the United Airlines plane would have crashed into Tower Two. Most probably, the President would have ordered all flights in the United States to be grounded because of the hijackers' success in destroying Tower Two by flying the United Airlines plane into Tower Two even if American Airlines Flight 11 had not been hijacked.

- A) Will our inability to prove "but for" cause-in-fact prevent Unger from recovering from American Airlines, assuming all other elements of a negligence action are proven? Explain fully.
- B) [Assume for this portion of the question that the lack of proof of "but for causation will not bar recovery] Explain why not and explain the likely ruling of the court with regard to the cause-in-fact problem.

Team A—Question Three

If we decide to sue American Airlines, I need to know the impact of the federal statute and regulation that are contained as an appendix to this document. Specifically, I want to know:

- 1) Did American Airlines violate the statute or regulations and, if so, in what way? Explain fully.
- 2) Assuming (for this portion of the question) a violation of the statute or regulations, what is the impact of that violation on a common law negligence action against American Airlines? Explain fully.
- 3) Assuming (for this portion of the question) that there was no violation of the statute or regulations, what is the impact of compliance with the statute and regulations on the ability of Unger to pursue a common law cause of action for negligence against American Airlines? Explain fully.

Team B Questions

Team B—Question One

Did Dr. Gonzales owe a duty of care to Unger? Explain fully.

Team B—Question Two

[Assume, for purpose of this question, that MAPA, BSC and NESCO owed a duty to Unger]

We have problems with suing MAPA, BSC and NESCO. First, we do not know if we can prove a breach of duty by any one or all of them. We know that one or more of them probably allowed the boxcutters to get through security but we do not know that they breached their duty of care simply because the boxcutters got on board. We are only in the first stages of investigation concerning our claims against the three companies.

Provide me with a short review of the means by which we might prove breach of duty against the three companies in this case, and advise me, explaining fully, of the one most promising means of doing so and the type of evidence that would be useful in proving a breach of duty using the one most promising means you have identified as well as the effect of successful use of that method.

Team B—Question Three

[Assume, for purpose of this question, that MAPA, BSC and NESCO owed a duty to Unger]

We also have a problem with causation when we sue MAPA, BSC and NESCO. How do we prove which security company or companies allowed the hijackers of

American Airlines Flight 11 to get past security with the boxcutters? We know that there were two hijackers who went through the MAPA security point in Portland and who were on the American Airlines Flight 11. We know that the other two hijackers on Flight 11 went through security in Boston's Logan Airport but we do not know whether they went through a BSC checkpoint or a NESCO checkpoint in Logan Airport. We also do not know whether one of the hijackers carried four boxcutters or whether each carried one through security.

We do know that BSC operates four checkpoints in Boston's Logan Airport while NESCO operates only one checkpoint and we also know that each checkpoint services an equal number of passengers. Thus, the odds of MAPA allowing boxcutters through security appears to be 50/50 since two Flight 11 hijackers went through MAPA security. The odds that BSC allowed the boxcutters through security when the other two hijackers passed through security at Logan would appear to be 40% and the odds that NESCO is responsible seem to be only 10%.

On the other hand, we have learned that NESCO concedes that some personnel at their security point in Logan were still in training and had not yet received a certificate certifying them as qualified to operate the X-Ray equipment used to detect metal items. NESCO officials deny that the personnel's lack of a formal certificate of competency led to a breach of security. We do not now have any similar indications that MAPA or BSC personnel acted without due care.

- A. Will our inability to prove but-for cause-in-fact prevent Unger from recovering from any of the security companies assuming all other elements of a negligence action are proven? Explain fully.
- B. [Assume for this portion of the question that you answered Part A by concluding the lack of proof of "but-for causation will not bar recovery]

Explain the likely ruling of the court with regard to the cause-in-fact problem and the impact of the ruling on our case and the liability of the three defendants.

BOTH TEAMS' QUESTIONS**Both Teams—Question One**

[Assume for this question that American Airlines owed and breached a duty of care to Unger and that the cause-in-fact problem is not a barrier to success against American Airlines]

Is it likely that American Airlines will be found to be a proximate cause of the death of Unger? Explain fully.

Both Teams—Question Two

[Assume for this question that the law firm has decided that lawsuits against the security companies and the airlines are not likely to succeed and instead has decided to sue only Dr. Gonzales and Dr. Lucca for the wrongful death of Unger. Assume further that Dr. Gonzales and Dr. Lucca each owed a duty to Unger and that they each breached the duty owed to Unger. Also assume that if Dr. Gonzales would have harvested the heart of Draper, Dr. Lucca would have successfully transplanted the heart and Unger would have lived for another twenty years. Instead, Unger had a life expectancy of only six months and that was lost due to the negligence of Dr. Lucca in performing the experimental surgery.]

This is a difficult fact pattern that recalls for me the doctrines of concurrent and successive tortfeasors.

What would be the liability of Dr. Gonzales under the assumptions presented in this question? Explain fully.

What would be the liability of Dr. Lucca under the assumptions presented in this question? Explain fully.

Appendix:**Relevant Only to Question "Team A—Question Three"****Section 44903 of the United States Code (titled "Air Transportation Security")**

Airline Operators shall propose and the Federal Aviation Administration shall approve regulations to protect passengers and property on aircraft operating in interstate air transportation against an act of criminal violence or aircraft piracy.

Approved regulations shall be consistent with the need to protect passengers and promote air transportation.

14 Code of Federal Regulations Section 108: FAA Regulations

This section prescribes aviation security rules governing the operation of air carriers [including American Airlines and United Airlines].

Each air carrier shall adopt and carry out a security program that meets the requirements of this section.

A. Each security program shall--

- (1) Provide for the safety of persons and property traveling in air transportation and intrastate air transportation against acts of criminal violence and air piracy;
- (2) Be in writing and signed by the certificate holder;
- (3) Be approved by the Administrator.

B. Each security program must include the following:

.....
Each certificate holder must have in place a security program that will prevent any passenger to have, on or about his or her person or property, a deadly or dangerous weapon, either concealed or unconcealed, accessible to him or her while aboard an airplane

Each certificate holder must have in place a security program that will assure that flight crew compartment doors [i.e., cockpit doors] on passenger planes are operated, installed and maintained so as to ensure privacy so that pilots can focus their entire attention on their flight duties.

- C. Unless otherwise authorized by the Federal Aviation Administration, each certificate holder required to have a security program for a passenger operation shall submit its proposed security program to the Administrator for approval. Within 30 days after receiving the program, the Administrator shall either approve the program or notify the certificate holder to modify the program to comply with the applicable requirements of this part. The Administrator shall amend an approved security program if it is determined that safety and the public interest require the amendment.

END OF EXAMINATION