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632 EVIDENCE/TRIAL PRACTICE
Semester I, 2003-2004

Final Examination
UNM School of Law
Six Credits

Professor Barbara Bergman
Saturday, December 13, 2003
Tuesday, December 16, 2003
9:00 a.m. to 12:00 noon

INSTRUCTIONS

- 1 This examination consists of twenty-five (25) multiple-choice questions and one essay question. The multiple-choice questions are worth a total of seventy-five (75) points. The essay question is worth twenty-five (25) points. Thus, the entire examination is worth a total of one-hundred (100) points. That means the multiple-choice questions are worth $\frac{3}{4}$ of the exam grade and the essay is worth $\frac{1}{4}$. I suggest you allocate your time accordingly.
2. Answer the multiple-choice questions on the examination itself. Answer the essay question in a bluebook(s). Please be sure to:
 - (a) Put your examination number on each page of your exam and on each bluebook.
 - (b) For the essay answer in the bluebook, please skip every other line so that your answer is easier to read and I have room to write comments.
 - (c) Turn in everything at the end.
- 3 This is a MODIFIED OPEN BOOK EXAMINATION. You are permitted to use your notes, any outlines that you and/or your classmates prepared, any required texts, and any material distributed in class (including the little Lexis booklet of the Federal Rules of Evidence). You may **not** use any commercial outlines.

End of General Instructions

GOOD LUCK!

[THE QUESTIONS BEGIN ON PAGE 2.]

PART II – Essay Question
(25 points)

For purposes of answering this question, assume that the Federal Rules of Evidence (or federal common law when appropriate) apply, unless instructed otherwise. Please answer the question in your bluebook(s).

You are a law clerk at a local civil litigation firm. The firm has taken on a new case that raises breach of warranty and product liability claims. The facts are as follows:

Maurice Werth and his mother, Betty Werth, want to bring suit against the manufacturer of an allegedly defective t-shirt that caused Maurice to sustain extensive burns. In 2002, Mrs.

Werth purchased this “Tasmanian Devil” t-shirt for Maurice, who was then ten years old. The shirt was an adult size and made of a 50/50 blend of cotton and polyester.

Maurice was wearing the shirt in January of that year while watching the Super Bowl. At some point during the game, Maurice decided to go into the kitchen to cook some hot dogs for dinner. He got too close to the open flame of the gas stove and the shirt caught fire. Maurice suffered second and third degree burns that covered 25 to 35 percent of his body. He has since undergone several surgeries and extensive physical therapy.

In preparation for trial, the firm has consulted Joe Exeter, a flammability expert who has experience with flammability warnings with regard to mattresses and furniture. He has no particular experience or special training with respect to warnings on clothing and has authored no peer reviewed publications in this area. He has, however, read extensively on the topic and is familiar with the writing in the field.

The firm has collected a series of advertisements from the 1990s by manufacturers of flame-retardant materials. The firm’s senior partner believes that these advertisements show the defendant’s knowledge of the availability of such materials that could have been used in manufacturing the t-shirt.

The firm has also collected portions of the Consumer Products Safety Commission (CPSC) press releases and publications that contain statements made by individual commissioners. (The CPSC is a public agency.) For example, one of the publications includes the statement: “As a mother, I hope parents will wisely choose the safer alternative of tight-fitting cotton sleepwear” and “it is imperative that a visible point of purchase label of some type be on the garment or inside the garment wrapper.”

Finally, the firm has put together a video depicting Maurice Werth’s therapy, special dressing requirements, and post-surgery condition. The video is in color and graphically portrays the extensive and debilitating effects of the burns Maurice suffered. You watched the video and almost threw up.

The senior partner has asked for your advice about the likely admissibility of (1) Joe Exeter’s testimony, (2) the advertisements, (3) the excerpts from the CPSC press releases and publications, and the (4) video. He realizes that he has not given you much detail, but he is primarily interested in your initial input on the evidentiary issues that are most likely to arise and how the firm might try to address them. He expects that the Federal Rules of Evidence will apply. What do you tell him?

[END OF EXAM]

of 2

Subject Evidence - Bergman

Date 12/13/03

Number 349

Write your number, title of course and date above and in each blue book.
Do not put your name on the blue book.

72 + 24 = 96

At

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Blue Book

HONOR CODE

have neither given nor received help on this examination.
have not seen anyone give or receive help.

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5. Warner's test y

Rule 702 governs the admission of expert

testimony. It must be qualified as an

expert in the field of flammability, 45 5.

SK experience to go to assist to be

his experience with flammability or 3 with

✓ res to stresses to be but he is +

his experience of spec to 29 the respect to

was 295 on the 5 e s d p bidly need more

information on how he became expert with

or 35 for stresses what e rat d e re ve

it + spe 1 to 3 st s de 1 1 3 3

the 35 a d re bla this know ge

a SK IF he e of bi fur 3 a expert

he t be be to give expert testimony

Good question

assuming he is an expert in flammability as he states, we need to determine how an expertise in warnings for mattresses and furniture will allow ^{him} to be qualified to give testimony ~~to~~ about warnings on clothing, especially since he has read extensively on the topic and is familiar with it. If scientifically there is too large of a gap between expertise in warnings on furniture and warnings on clothing, the judge may determine he is simply not qualified as an expert.

Second, Once we establish that he is qualified we must show ~~to~~ his testimony is based on sufficient facts or data. Whether Joe is an expert may affect the question of if he used

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ought to exist fo e to deter e -the appropriate

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to p o a The f st f to s etre

-the te y et te h de by J to deter r

what the warning ought to be as to the flammability of ~~the~~ the ~~shirt~~ shirt has been tested

and whether standards and controls for the operation of the theory or technique have been used and

maintained. Here we need to examine the general

scientific principles of flammability and make sure

they can survive this factor, ~~once~~ once

this is done we must make sure the same can

be said for determining warnings as to the flammability.

For this we will need more information from

Joe

The next factor is whether the technique has

been subjected to peer review. We know that

Joe has read on our specific issue so we

need to determine if those articles and the methods therein have been peer reviewed.

✓ The third Daubert factor is what, if any, is the known error rate of the technique. Again, Joe and the literature he has reviewed can

rely ~~on~~ provide an answer. This is

true for the last factor which is whether the

✓ technique has been generally accepted by the relevant scientific community.

With respect to these factors the court can rely some or of them or any other

factor that helps it to determine if Joe's

testimony is the product of reliable practices

and methods. Again, the factors have to be

true both as to the principles of flammability and of determining the appropriate warning

Finally, we must show that Joe has applied these principles and methods reliably to the facts of the case. Again, his inexperience with warnings on T-shirts may make this last requirement harder to meet. It may also depend on the principles of flammability and whether an expert in flammability can apply the principles to warning labels for any product or only products that that expert has extensive knowledge and experience with. If it is limited to what the expert has had experience with, the fact that Joe has not publicized articles in this

area and has only reviewed the literature and

and the court to conclude he did not

cannot apply the principle to our case reliably

Even if we can show that an expert such as

Joe could ~~possibly~~ apply the principles to the

shirt he still does so in a manner

that does not stray far from the

established principle. If his methods for

applying them to the shirt or the methods

used in the literature are questionable or limited

to certain circumstances the judge may still

conclude that Joe did not reliably apply the

techniques to our case

It is important that we are able to

show all of the above requirements to allow

Joe to testify as an expert in our case.

• The Advertisements

Assuming the advertisements can be authenticated, that is we can show that a reasonable juror would believe by a preponderance of the evidence that they are what they purport to be, we should be able to use them to establish notice to the defendants. They can be authenticated either by a witness with first-hand knowledge of who made them or perhaps they may be self-authenticated under 902(6) if they were published in periodicals or newspapers.

Next, we will need to show that a reasonable

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Blue Book

HONOR CODE

have neither given nor received help on this examination.
have not seen anyone give or receive help.

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could believe that these advertisements were seen by the defendant or the defendant was

✓ somehow aware of them. Once this established it will be for the jury to decide if indeed the defendant was not aware of the defendant's ~~ad~~ use of terms of trading rights

to keep these uses in force of the terms are appropriate to use in light of the state of

affairs. Thus, it ought to be shown

that the defendant was aware of the advertisement

they should be used in the first place

How can we say he alleged breach of

contract and paid but when defendant rec

is an showing of knowledge by the defendant but

only that the product was defective and

conform to the express warranty, by the

defendant or one of its implied warranties the

plaintiff may be deemed liable on the other

hand if we have plaintiff's punitive damages then

we will need to show knowledge to prove the

defendant acted unreasonably

Plaintiff's damages what we've proved

and the substantive law requirements the evidence

may be excluded under rule 403 if the defendant

knowledge of the plaintiff's liability to the

the danger of unfair prejudice of the ads may

substantially outweigh the probative value

and the exclusion of the evidence

Because it seems to me we need to show
knowledge if we do + evidence will be
admissible

Excerpts From CPSC

These terms must first be interpreted
to be admissible. This will be done under
✓ the self-statement in part of Rule 902(5) is
off-limits for a public statement

The next part of the admission to
he say that a later public record and
do not suit these are inadmissible for the
he except in 803(8) for public records reports
statements to see that rule covers that
the evidence or statement set for the first

the agency^{and} concern ~ those observed pursuant
to duty imposed by 1.3 The statement specifically
referred to the example given by commission
of the agency The statement about parents
choosing night fittings than sleepwear ~~could~~ seem
to be an opinion about what type of clothes
parents should buy as which are safer The

✓ arguably not pertinent to duty imposed
and it is what she would buy for children
the other hand it seems clear she does
have duty to say which clothes are safer
as that fits the rule So use the precatory
use of that to ~~be~~ as it has been
used May substantiate that she is the danger

of a prejudice to the defendant of the fact
 about the pay being safer will be
 The ~~second~~ second part of the sentence also the
 visible point of purchase label is more to the
 which is for statement in that the clearly
 the duty of the CPSC to state that is
 eg rd on the garment for warning purposes

This analysis is held to for a CPSC regulation
 Those statements that are made pursuant to CPSC

legal duty is public agency be ad

possible. Those that are to be held to the point

mentioned above & be admissible under s 80(8)
 because they are made in the course of duty

or have little probative value be excluded

under 403 if probative value is outweighed by the risk of prejudice

possibly need for information regarding the circumstances under which statements were made

cost is too high they are not to start

the cost of starting a defect program to break

a warranty. It seems that the program is not

the safety of the program is not appropriate

it is not possible to start here

The video

while the decision is not to start

it is not possible to start here

recognition of these things is the

probability of the decision

part of the program is not to start

the program is not to start

it is not possible to start here

the start of a defect program is not to start

Warrantly a th v there y be s₂ s to the
effect that these are essary to show the nature
of the prod + defect and exactly what
was breach

The end to the + rely e dent w₂ se
in the eo absent s c asse of fals

fabr. + will pr be e ily be otherli ate.

Thus rule 403 presents the assist beta te As

stated rule 403 exclude a evidence whose prob d

s substant ly out se ched by the d ger

at pr ce The nages + de

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punitive damages would be all that remains. This is

assuming the defense stipulates to actual damages,

emotional distress, pain and suffering, and hedonic

damages. Because all of these types of damages

make the information in the video more probative

than if the defense had stipulated.

In conclusion, the video is going to be admitted

in all likelihood absent a stipulation by the defense

to all damages except punitive. While testimony of

others is an alternative, the jury cannot know the

full extent of Maurice's damages without seeing

the video and seeing how it was for him

Depending on the court it may have to be in

black and white to avoid unfair prejudice and the

extent & nature of the damages lead to

an order for separate trial of the damages