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632 EVIDENCE/TRIAL PRACTICE

Fall 2006

Final Examination
UNM School of Law
Six Credits

Professor Barbara Bergman
December 9, 2006
December 12, 2006
9:00 a.m. to 12:00 noon

INSTRUCTIONS

1. This examination consists of thirty (30) multiple-choice questions and two essay questions. The multiple-choice questions are worth a total of sixty (60) points (i.e., 2 points for each question). The essay questions are worth a total of 40 points. The first question is worth 10 points and the second is worth 30 points. Thus, the entire examination is worth a total of one hundred (100) points. I suggest that you take the point allocations into account when apportioning your time.
2. Laptop computer users: Start the Secureexam program entering your examination number, course name, professor's name, and date of the examination. Click "proceed" to enter the program. Type START in the next window that is displayed but do NOT press the enter key until the proctor says to begin the exam. **You may indicate the correct answer to the multiple choice questions either by circling the correct answer on the examination itself or by typing the number of the question and then indicating which letter is the correct answer**
3. Bluebooks for writing: **Answer the multiple-choice questions on the examination itself.** Answer the essay questions in a bluebook(s). Please be sure to:
 - (a) On the front of each bluebook please record the class name, professor's name and date of the examination. Make sure to number each bluebook in order.
 - (b) For the essay answers in the bluebook, please write on every other line and only on the front page of each sheet.
 - (c) Go to the exam check-in table at the conclusion of the exam and fill out an examination receipt.
4. 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

Part II: Essay Questions

(Total: 60 points)

For purposes of answering these questions, assume that the Federal Rules of Evidence (or federal common law when appropriate) apply, unless instructed otherwise.

Question 1
(10 points)

On December 21, 2004, Phyllis Killjoy was on the third floor of Proffitte's Department Store engaged in holiday shopping. Killjoy wanted to use the elevator to go to the first floor, but the line was too long. She went to the escalator but noticed that it was not running and was stationary. She assumed it would be safe, as she had seen other people going down it.

Alas! It proved to be a perilous journey. During her descent, Killjoy observed that the risers of the escalator created what she considered an "optical illusion" as she looked down the escalator. Instead of retracing her steps up the escalator, she continued to descend. She fell as she neared the bottom of the escalator. The uneven height of the steps caused her to lose her balance and she fell, breaking a leg and her wrist.

Killjoy sued Proffitte's Department Store. She has proffered the expert testimony of Bert Barnes, a licensed architect who has practiced architecture for a decade. Barnes has never designed a department store or a building that contained an escalator. He has a Mechanical Engineering degree but has never worked as an engineer. He has, however, published two articles in peer-reviewed journals on energy efficient construction. As an architect, he says that he must always be conscious of potential safety issues.

If allowed, Barnes would testify to three propositions: (1) a stationary escalator is dangerous and should not be used as a stairway, because the risers at the bottom are not uniform in height; (2) a stationary escalator is dangerous and should not be used as a stairway, because the escalator creates an "optical illusion" that causes disorientation and confusion; and (3) because of those dangers, the owner of the escalator must take certain safety measures (warning bells or whistles, signs, and cordoning off the escalator) to ensure that the escalator is not used as a stairway.

In support of the first proposition, Barnes relied on a website from the Escalator Safety Foundation, which has a section entitled, "Escalator Myths and Fears." This section says, "Myth: If an escalator is standing still, it is just a set of stairs. Truth: Not at all. Escalator steps are not the correct height for normal walking. Escalator steps in general are of a greater height than ordinary steps in a stairway."

In support of the second proposition, Barnes relied on (a) a website article entitled, "Wallpaper Illusion Causes Disorientation and Falls on Escalator," and (b) his own personal experience riding escalators. The internet article stated, "Because the striations on the top of the steps, the steps tended to merge together in appearance, thus causing an optical illusion." The article, however, did not provide the research or methodology on which it relied.

In support of the third proposition, Barnes relied on "common sense" and "industry standard," though he was unable to produce any information of an industry standard. Indeed, he admitted in his deposition that the building code did not require such safety measures. Nor did he point to any research that determined that such measures were effective.

Proffitte's Department Store has filed a motion to exclude Barnes's proposed testimony. How should the trial court rule and why?

Question 2
(30 points)

A few days before Christmas 2004, Robert Marti, the 2004 Major League Baseball Player of the Year was killed in the crash of an Air Guantanamo flight to the U.S. Base at Guantanamo. His flight was a regularly scheduled flight from Miami to Guantanamo Base for visitors, family and other non military personal to visit the base. His trip was to be the star attraction of the USO Christmas show for military personal stationed at the base.

While Marti's trip had been planned for some time, he had recently caused a uproar of significant proportions. Marti had just signed a multi-million dollar contract, including an equally large bonus, with the Florida Marlins. At the signing, after handing his wife a massive diamond ring, he announced that all the money he just signed for would be dedicated to building a major league capable baseball stadium in Havana, in the hopes of establishing a major league baseball team in his father's home city. The Miami Cuban community, some of his staunchest fans, were not amused.

The Air Guantanamo flight was about 30 minutes late departing and just after it cleared the runway it exploded in a ball of flames. The size of the explosion caused complete disintegration of the aircraft and the loss of all on board. The National Transportation Safety Board (NTSB) and the FBI investigated the crash. After a lengthy investigation, the NTSB and FBI issued a joint 500 page report, divided into 4 sections: Factual Findings, Opinions and Recommendations, Probable Cause, and Criminal Conduct.

The Factual Findings stated that the plane was carrying explosives and weapons in its cargo compartment marked as “humanitarian aid upon Cuba’s liberation.” For the past several years various Cuban-American groups were being permitted by the U.S. Government to

stockpile humanitarian aid in Guantanamo as part of a plan to assist Cubans in restoring democracy once Castro passed away. An explosive device was planted in the cargo, timed to explode over the ocean as the plane neared Cuban airspace. The cargo was packed and shipped by “Friends for a New Cuba” (FNC). The airline, Air Guantanamo, had become lax in failing to properly inspect cargo from a “known” shipper. The Miami Federal Aviation Administration, which was responsible for inspection oversight, had failed in its responsibility to inspect various cargo shipments.

The Opinions and Recommendations stated that FNC had been shipping explosives and weapons for some time on the flights, all marked as humanitarian aid. The airline’s weight and balance sheets made it obvious that the cargo was quite a bit heavier than typical for aid cargo but no inquiry had ever been made. There was no record of, or evidence of, any inspection of the cargo shipments before loading or after arrival for flights over the past few years. It was the opinion of the NTSB that FNC and the Airline were in some sort of arrangement, that may or may not have involved the U.S. Government. The records of the FAA on its operations in connection with the airline were seized by the Department of Defense and were not disclosed to the NTSB.

The Probable Cause section stated that the probable cause of the crash was loss of aircraft hull integrity and controlled flight by the intentional detonation of an explosive device by timer, planted in or near an unauthorized and undisclosed weapons shipment.

The Criminal Conduct section, written by the FBI, states that FNC had been taken over by a radical anti-Castro contingent. Their plan was to stage a revolution and armed overthrow of the Cuban government in the chaos that would follow the death of Castro. The report states that shredded documents found at the headquarters of FNC established their involvement and supported a theory that airline personnel were being paid or intimidated to look the other way on the shipments so long as all the paperwork for humanitarian aid was in order. A section of the report titled “Other Involvement” was designated as classified by Homeland Security and the Department of Defense. No public disclosure of its contents has been made. The Criminal Conduct section recommends criminal prosecution of FNC, its leaders, various airline personnel and unnamed co-conspirators, which everyone imagines involves members of the U.S. government or military. The events quickly became called “Castro-gate.”

Marti’s wife, Carmen, has filed an action for damages for Marti’s wrongful death in the Federal District Court in Miami alleging (1) negligence, willful and wanton misconduct, and wrongful death by Air Guantanamo in accepting the shipments, (2) negligence by the FAA for failing to stop the practices of the airline in not inspecting the shipments, and (3) negligence, wanton and willful misconduct, and wrongful death by FNC for improperly labeling and shipping illegal explosives and weapons on the flight.

During the plaintiff's case-in-chief, Carmen's lawyer wants to introduce the following evidence:

1. The shredded FNC records which establish FNC's involvement and support a theory that airline personal were being paid or intimidated to look the other way on the shipments so long as all the paperwork for humanitarian aid was in order.
2. A handwritten note, contained in the margin of a shredded record, stating that Marti had betrayed the Cuban Americans and that action against him had been approved at the highest levels.
3. The NTSB/FBI Report.

In the defense case-in-chief, the defendants seek to offer the following evidence:

4. The statement a Miami FAA inspector, Joe Smith, gave to the FBI in which he said that he had routinely inspected containers from the FNC and they all had blankets and gloves marked for the Cuban people. He passed this information to his supervisor. He expressed some dismay at the shipments but was told there was no heat in Cuba. Smith has now been transferred to an FAA office in Saudi Arabia, but his supervisor is available to testify.

You are the trial judge's law clerk. Please prepare a brief memo advising her regarding the admissibility of each of these pieces of evidence, including the reasons supporting your conclusions.

[END OF EXAM]