

SEMESTER EXAM SAMPLE ANSWER

QUESTION 1

This case is based upon *Torres v. Xomox Corporation*, 49 Cal.App.4th 1, 56 Cal.Rptr.2d 455 (1996), in which the court sustained a jury verdict finding that Xomox was at fault, but assigned 75% of the fault to R-P, which was immune under worker's comp. Xomox, Torres and Sornborger were each found 5% at fault.

Sornborger ("S") would have a reasonably strong claim against the Xomox Corporation; in order to recover, S will have to prove that the negligent design of the valve proximately caused his injury. However, because of S's possible negligence and the role of the employer (R-P), who would be immune under worker's compensation statutes, the damage recovery, assuming liability can be proven, will likely be reduced.

S's Claim v. Xomox ("X")

Breach of Duty. Xomox would be liable for the damage to S if S can prove that X breached a duty to him which proximately caused his injury. Although a breach of duty can be proven by either strict liability¹ or negligence, this case will be based on negligence.²

S could allege that the valve was either negligently designed or that inadequate warnings were supplied with the product. Negligence is based upon the standard of the reasonably prudent person. If X failed to follow the standard of a reasonably prudent person in designing or marketing the valve, then they can be found negligent. The primary factor in this case will be the jury's evaluation of the expert testimony to decide if a reasonable person would have used a different design or would have provided a better warning. X's engineer thought the design was adequate, given the low number of failures, but the extensive damages resulting from those few failures would suggest that a better design would be desirable.

One particular piece of evidence that would be significant is the fact that X changed the design after they had sold the valve to R-P. Post-accident repairs are inadmissible, but we would argue that this change was not made after *our* accident, and therefore would be admissible.

A final consideration would be the use of the Learned Hand test. X's engineer explicitly relies upon the low rate of failure, but this is similar to the type of argument used by Ford in the Pinto case. It might have a similarly negative effect on the jury.

1. Although the sulfuric acid is obviously very dangerous, and might be an abnormally dangerous activity, the activity was engaged in by R-P, not by the defendant X. Because X did not carry on an abnormally dangerous activity, but merely made a component (the valve) that was used in an abnormally dangerous activity, they would not be subject to strict liability.

2. Product manufacturers are also subject to a form of strict liability for defects in their products. However, since this case involves an allegedly defective design, and since the course has only covered negligence (not strict liability for products), the analysis will be in the form of whether or not the product was negligently designed.

Proximate Cause. In addition to proving negligence, S would have to prove that X's negligence proximately caused S's injury. That is, (1) the injury would not have occurred *but for* X's negligence, and also that X's negligence was a legal cause of the injury. Although, because of S's inconsistent testimony, there is some question about whether or not better instructions or a better design would have prevented this accident, there is certainly enough evidence for a jury to find that, but for the design of the valve, the injury would not have occurred. On the other hand, X is likely to argue that the conduct of R-P and of the employees constituted *superseding causes* of the injury. The employer admitted doing a poor job in modifying the cover for the valve, and the employees were at fault in the way they handled the situation. However, a superseding cause is typically one which is either not foreseeable and/or is so disproportionately reprehensible as to break the chain of causation between the negligent act and the injury. Here the valve's design made errors foreseeable and the negligence of both the employer and the employees was not particularly reprehensible.

S's Contributory Fault. S was at fault in several ways. First, he was careless in the way he handled the removal of the valve bracket. He didn't check the diagram in advance, and he didn't double-check the safety of what he was doing. Second, he was negligent in not wearing his protective gear; most of his injuries resulted from that failure. Ordinary negligence on the part of a plaintiff results in a finding of contributory negligence, and in this jurisdiction it simply reduces the plaintiff's recovery by that percentage, regardless of how much the plaintiff is found to be at fault. It is also possible that X will accuse S of having assumed the risk of injury. But this is not a case where S preferred the risk or was engaging in an activity like skiing or performing pyramid stunts in which the risk was freely chosen. Instead, this is a case in which the negligence of X in designing the valve was followed by S's negligence in not looking out for his own safety. Thus, I think this would be considered indistinguishable from contributory negligence.

Employer Fault and Joint Tortfeasor Questions. The employer is likely to be found at fault, but since the employer is immune (because of worker's comp.), that's not to S's advantage. Instead, S must hope that the bulk of the fault is due to X. In this jurisdiction an assignment of fault to X makes X jointly liable for economic loss, but only severally liable for economic loss. If in this jurisdiction the employer is assigned a share of fault (some would not consider the employer's share in calculating percentages of fault), that could significantly reduce the amount and collectibility of the non-economic loss award.

Worse, S will probably have to repay a substantial amount of the worker's comp. award he has already received, because most jurisdictions permit subrogation of a worker's comp. award.

Damages. Given the severe nature of his injuries, S's damages are likely to be very large. For economic losses he is entitled to any future wage loss, plus the cost of medical care, past and future (both are likely to be quite large). Also, the disfigurement, pain and suffering, plus the mental anguish from the trauma of the incident and the death of his co-worker are likely to be very large. A final consideration would be whether or not X would be liable for punitive damages. They seemed well aware of the problem and seemed to make a conscious choice not to inform their customers. Perhaps this will strike the jury as similar to the behavior of Ford in the Pinto case.

QUESTION 2

This case is based upon *Johnson v. County of Ventura*, 29 Cal.App.4th 1400, 35 Cal.Rptr.2d 150 (1994). The County and the state were held to be immune as a result of the exception for immunity specified in § 856.2.

Because of a fairly clear immunity provision in the statute, the claim appears to be very weak. However, all of the issues will be analyzed.

Liability Issues

In both the wrongful death and the bystander claim, Mark and Cindy ("M" & "C") would have to establish that the state's negligence proximately caused their injuries.

Breach of Duty. The first task is to identify an act of negligence on the part of the state. This could be either in the failure to keep closer track of K, or in the failure of the state patrol to do as they were asked by the state hospital. Not only did the state patrol not return K to the hospital, but they did not notify the hospital that they were not doing what was requested. The negligence of the state seems pretty clear.

Proximate Cause. There must be a proximate cause link between the state's negligence and the plaintiffs' injuries. Proximate cause consists of but-for cause and legal cause. Obviously if the state had restrained K, he would not have caused the subsequent injury. As to legal cause, the issue is whether or not K's subsequent conduct was foreseeable. Since he was being restrained because he was dangerous, and since the injury occurred close at hand in time and space, I do not think there would be much question on legal cause.

Immunity. States are immune from liability except to the extent that they waive their immunity by state. Evergreen's waiver of immunity (§ 820.2), makes the state liable for acts of a public employee "to the same extent as a private person." However, there is an exception to liability reserved by § 815 and then specifically in § 856.2 that preserves immunity for injuries caused by an escaping person. This seems pretty clearly to apply. (Although there is an exception in § 856.2(b), it applies only (1) if there was bad faith; or (2) if injury is inflicted *on* an escaped prisoner or mental patient; in other words, if the officers had negligently harmed KK or some bystander in recapturing him, they could be liable to KK or the bystander.)

Damages

Wrongful Death. Even if there were some way to get around the immunity statute, the damages under the wrongful death statute appear to be limited. Section 377.20 permits a survival action, and Mark is clearly eligible to file under § 377.60(b). However, the amount of the damages seems to be prevent recoveries for non-economic damages (pain and suffering, etc.) (§ 377.34). The economic damages from the death of a 90-year-old woman would not be extensive, however tragic her death might be from a human standpoint. Moreover, no punitive damages may be recovered against the state (§ 815.2(b)).

Bystander Claim. In addition to the claim on behalf of Velasta Johnson's estate, M&C have claims of their own from being traumatized by coming upon the bloody crime scene. Most jurisdictions follow something like the *Dillon* standard, under which the ability of the plaintiff to recover depends upon three factors: was the plaintiff at the accident scene? Did the accident inflict a direct emotional injury; and was the plaintiff closely related to the accident victim? As to the first criterion, it's mixed, since they didn't actually see the stabbing, but they came upon it shortly thereafter. Moreover, we can only assume (but we do not know) what kind of direct emotional shock they experienced. Finally, Mark is clearly a close relative, but Cindy is another question. Perhaps she was very close to her mother-in-law, but that's not established. Regardless, the immunity statute is still a bar to any recovery.

Conclusion

I would be confident that the state can avoid any liability arising from this claim, since the immunity statute is clear, and the claims themselves are rather weak.

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|--------------------------|-----------------------------------------|--------------------------|-------------------------------------------------------------|
| <input type="checkbox"/> | Overview | <input type="checkbox"/> | Contributory Fault |
| <input type="checkbox"/> | Claim v. Xomox | <input type="checkbox"/> | Contributory Negligence |
| <input type="checkbox"/> | Breach of Duty | <input type="checkbox"/> | Pure comparative fault |
| <input type="checkbox"/> | (Strict Liability?) | <input type="checkbox"/> | Assumption of Risk |
| <input type="checkbox"/> | Was the valve negligently designed | <input type="checkbox"/> | No different from C.N. |
| <input type="checkbox"/> | Did they provide reasonable warning? | <input type="checkbox"/> | Employer - immune |
| <input type="checkbox"/> | Standard of Negligence: reasonable care | <input type="checkbox"/> | Joint & several liability issues |
| <input type="checkbox"/> | The reasonably prudent engineer | <input type="checkbox"/> | Joint liability for econ. damages |
| <input type="checkbox"/> | Jury must evaluate Expert testimony | <input type="checkbox"/> | Several Liability for non-econ. damages |
| <input type="checkbox"/> | Was design change "post-accident"? | <input type="checkbox"/> | Subrogation to worker's comp. |
| <input type="checkbox"/> | Learned Hand Test? | <input type="checkbox"/> | |
| <input type="checkbox"/> | Proximate Cause defined | <input type="checkbox"/> | Damages |
| <input type="checkbox"/> | But-for cause | <input type="checkbox"/> | Economic damages would include lost wages, medical expenses |
| <input type="checkbox"/> | S's inconsistencies troubling | <input type="checkbox"/> | non-economic damages |
| <input type="checkbox"/> | Legal Cause satisfied? | <input type="checkbox"/> | pain and suffering / mental anguish |
| <input type="checkbox"/> | Were there <i>superseding causes</i> ? | <input type="checkbox"/> | punitive damages? |
| <input type="checkbox"/> | Foreseeable / not reprehensible | <input type="checkbox"/> | Was failure to send warning/recall reckless? |
| <input type="checkbox"/> | | | |
| <input type="checkbox"/> | | | |
| <input type="checkbox"/> | | | |

QUESTION 2

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|--------------------------|------------------------------------|--------------------------|-----------------------------------------------------|
| <input type="checkbox"/> | Overview: two cases | <input type="checkbox"/> | Wrongful Death |
| <input type="checkbox"/> | | <input type="checkbox"/> | Survival action: children qualify under § 377.60(b) |
| <input type="checkbox"/> | Breach of Duty | <input type="checkbox"/> | looks like economic damages only |
| <input type="checkbox"/> | Negligence of the state hospital | <input type="checkbox"/> | Bystander claim |
| <input type="checkbox"/> | Negligence of the state patrol | <input type="checkbox"/> | <i>Dillon</i> factors: |
| <input type="checkbox"/> | | <input type="checkbox"/> | (1) presence at scene - ½ |
| <input type="checkbox"/> | Proximate Cause | <input type="checkbox"/> | (2) immediate impact - ? |
| <input type="checkbox"/> | But-for causation is easy | <input type="checkbox"/> | (3) close relationship - Mark, yes |
| <input type="checkbox"/> | Legal cause: superseding cause | <input type="checkbox"/> | |
| <input type="checkbox"/> | | <input type="checkbox"/> | Conclusion: no liability |
| <input type="checkbox"/> | Sovereign Immunity Issue | | |
| <input type="checkbox"/> | § 856.2 seems to clearly eliminate | | |