

JULY 1998 CALIFORNIA BAR EXAMINATION ESSAY QUESTIONS AND SELECTED ANSWERS

Torts

QUESTION

Transco, a common carrier, hauls toxic chemicals by train through an area where Paul operates a commercial greenhouse. Concerned about the risks if there were spillage from one of the boxcars containing the chemicals, Transco hired Diana, a consultant, to assess that risk. Diana concluded there was little or no risk to nearby property owners if any such spillage occurred, and she so advised Transco.

Thereafter, one of Transco's trains containing a known toxic chemical derailed because the train engineer suffered a heart attack while operating the engine. The engineer was obese and, five years earlier, had taken a leave of absence because of a mild heart attack he had suffered. The derailment caused chemical spillage near Paul's property, and Paul closed his greenhouse business out of fear that the spillage would damage his greenhouse plants and cause him to get cancer. In fact, no lasting damage resulted from the spill.

Six months after the accident, Paul moved back into his previously vacated premises and began operating the greenhouse again. Paul's fear for his health from possible exposure to the chemical continued, however, and subsequently he suffered severe anxiety and depression because of this fear.

On what theory or theories, if any, can Paul recover damages from, and what defenses may reasonably be raised by:

1. Transco? Discuss.
2. Diana? Discuss.

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ANSWER A

1. Paul v. Transco:

Paul has numerous theories in tort to try to recover from Transco, and each will be considered separately.

A. Negligence:

In General, to prove negligence, a plaintiff must show a duty on the part of the defendant, defendant breached the duty, that breach actually and proximately caused the injury, and damages resulted.

Duty:

In order for Paul to recover against Transco in a negligence suit, he must establish that Transco has a duty to him. First, he must show that he is a foreseeable plaintiff. In an Andrews jurisdiction, any plaintiff is foreseeable, and Paul will recover. In a Cardozo jurisdiction, Paul will have to show that he was within the foreseeable zone of danger from the accident. Here, the derailment occurred near Paul's land, and thus his injuries were within the foreseeable zone of danger.

After it is established that Paul is a foreseeable plaintiff, he must still show that Transco owes a duty of care towards him. Transco is a common carrier. Common carriers must use a standard of care in situations involving the persons or goods that they are carrying. However, Paul is not a person that was using Transco as a common carrier, therefore Transco will be held the ordinary standard of care.

The ordinary standard of care in a negligence case is the standard of care that a reasonably prudent person in the situation of the plaintiff would use. Transco owes Paul a duty of care that a reasonably prudent carrier transporting toxic wastes would use in the situation.

Breach:

Paul must establish that Transco breached a duty towards him in order to recover. Paul will argue that that breach here was continuing to let the train engineer operate the Transco train when Transco knew that the man had a heart condition. Paul will argue that since the man was obese, his medical history might have shown that he was prone to a heart condition. Further, Transco knew that five years earlier, this engineer had suffered a heart attack, and therefore it might be dangerous to allow him to operate the train. Any negligence on the part of the engineer would be imputed to Transco under the doctrine of *respondeat superior*.

On the other hand, Transco will argue that the incident with the engineer's heart attack was five years in the past, and that it was far removed from this incident. Because it was so far removed, a reasonable company in Transco's position would have let an engineer conduct in such a situation.

Paul will also argue that regardless of whether Transco was negligent in letting him drive the train, it was definitely negligence when a Transco train leaves the tracks. Perhaps the doctrine of *res ipsa loquitur* could help Paul show negligence here. This doctrine allows a plaintiff to infer negligence by showing that normally, conditions like this do not happen, the instrumentality causing the injury was within the exclusive control of the defendant, and the

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plaintiff caused no fault. Here, trains do not normally derail without negligence. Second, the train was within the exclusive control of the Transco engineer. Finally, Paul was not at fault. Through *res ipsa*, Paul will be able to avoid a directed verdict on the issue of negligence.

Causation:

Next, Paul will have to show that Transco's breach actually and proximately caused his injuries. Actual causation is shown using the "but for" test; but for Transco's negligence the injury would not have occurred. Actual causation is satisfied because without the toxic chemical spill, Paul would not have closed his greenhouse or suffered emotional distress.

For proximate causation, Paul will have to show that it was foreseeable for such injuries to occur from the breach. As for his economic injuries for closing his greenhouse, foreseeability should not be a problem because it is likely that if a chemical spill happened near a greenhouse, that greenhouse would close for health and safety reasons until it was determined that it was safe to reopen. As for Paul's emotional distress 6 months later, proximate cause probably is not satisfied. It is not foreseeable that six months after a derailment, a property owner would continue to suffer anxiety from such a spill in the absence of no lasting damage to his property. Therefore, Paul will probably be barred from recovery due to proximate cause.

Damages:

Paul's damages are shown in the facts. He suffered economic losses from closing his greenhouse for six months. Further, although potentially barred under proximate cause, he also suffered severe anxiety and depression from the injury after six months.

B. Intentional or Negligent Infliction of Emotional Distress:

Intentional:

Intentional infliction of emotional distress requires extreme and outrageous conduct on behalf of the defendant which causes severe emotional distress for the plaintiff. Although Paul may have suffered emotional distress, there is no showing here that Transco acted intentionally or recklessly here in an outrageous manner. Paul will not recover under this theory.

Negligent:

Negligent infliction of emotional distress does not require the intentional or reckless conduct, merely negligent conduct. However, in most states, the plaintiff must suffer some physical injury from the activity in order to recover for emotional distress. Here, it appears that Paul suffered anxiety and depression. Transco will argue that these are not physical injuries, and therefore he cannot recover. Paul is likely to be barred from recovery since he has suffered no physical injuries from the incident.

C. Strict Liability:

Strict liability is usually the theory in products liability cases, which has no application here. However, a form of strict liability holds defendants who are conducting abnormally dangerous activities to be strictly liable for any injuries that result. Here, Paul will argue that transporting toxic chemicals is an abnormally dangerous activity, and therefore Transco should be strictly liable. However, Transco will argue that transportation of these chemicals is not

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abnormally dangerous because studies have shown that even if the chemicals spilled, they would cause little or no risk to nearby property owners. Since there was no real danger from the transportation, Transco may win on the point. However, what about the property that actually suffers the spill? Does the chemical spill harm that property? If so, then the activity might be considered abnormally dangerous, if not to surrounding property owners, then to property owners whose lands are actually harmed by the spill.

Causation and Damages:

Regardless of whether a court would find an abnormally dangerous activity here, Paul would still have to prove causation and damages to recover. The analysis here would be similar to the causation and damages analysis above in negligence.

D. Nuisance:

A public nuisance is conduct on behalf of a defendant which threatens the health or safety of the public at large. In order to assert a public nuisance suit, Paul would have to show a “special injury”, or that he suffered damages different from the public at large. Here, Paul’s land did not suffer any spills. Therefore, he probably does not have a special injury, and he has no standing to sue.

E. Trespass:

Trespass requires a physical injury of a person’s land. Since none of the chemicals has entered Paul’s land, he may not recover under this tort.

Transco’s Defenses:

Transco’s defenses have been addressed above in relation to each individual tort. Additionally, Transco will argue that it was unreasonable for Paul to close his greenhouse in such a situation, given that there was no actual risk to his land. However, this was probably just cautious behavior on his part and not any unreasonable behavior, given that a large toxic chemical spill had just occurred near his land. Paul will probably not be punished for cautious behavior.

Assumption of risk for emotional distress damages

Transco could also argue that Paul assumed the risk of any emotional distress or damages of the like when he re-opened his greenhouse after six months. However, Paul did not assume the risk unless he knew that it might be dangerous for him to come onto the property, and knowingly did so. If he had been assured that it was safe, he was not assuming any risk.

2. Paul v Diana:

Paul will primarily argue a negligence case against Diana, that she negligently performed her consulting activity since she assured Transco that there would be little risk if the chemicals spilled, but Paul actually suffered injuries. As in the negligence action above, Paul will have to show duty, breach, causation, and damages.

Note that Transco would have argued in the above case that even if Diana was negligent, that this negligence should not be imputed to them since Diana was an independent contractor.

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Employers cannot be held liable for the negligence of their independent contractors generally, with a few exceptions not applicable here.

Duty

As for a duty, Diana probably did not owe a duty to Paul. First, in a Cardozo jurisdiction, he may not have been a foreseeable plaintiff. Second, her duty was to Transco to provide a competent report, not to Paul as a landowner. As for preparing the report, she would be held to the standards of a reasonably prudent professional who prepares such reports in their business.

Breach:

Diana has surely not breached any duty that she had to either Transco or to Paul. She prepared a report stating that spillage would cause little or no risk to nearby landowners. In fact, no lasting damage did happen from the spill, and there is no evidence that Paul's land was in fact harmed. Therefore, she competently prepared her report, and did not breach any duty.

Causation and Damages:

Without a breach of duty, there is no need to discuss this. However, it is worth noting that causation is tenuous here at best. Her negligent preparation of the report, if any, did not cause the accident. The train engineer caused the accident. Further, proximate cause is also stretched here also.

Diana's defenses:

Diana will assert the defenses described above, that she did not breach her duty, and that if any breach occurred, this did not cause any injury.

Contribution and Indemnity:

Should a court find that somehow Diana was negligent, she would be entitled to contribution or indemnity if Transco was also negligent in the case as well. Likewise, if Transco is found negligent, it could seek contribution or indemnity from Diana if she were to be found negligent also.

ANSWER B

1. Paul v. Transco

Paul will make the following claims against Transco and attempt to recover damages.

a. Strict Liability - Ultrahazardous Activities

Paul will argue that Transco is strictly liable for the damages caused by Transco because they were engaged in an ultrahazardous activity. An ultrahazardous activity requires the following elements:

- (i) The activity poses a serious risk of personal or property injury;
- (ii) The activity cannot be safe no matter how much care is taken; and
- (iii) The activity is not commonly carried on in the community.

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Paul will argue because these are toxic chemicals they pose a serious risk of harm and that transportation of these chemicals cannot be made absolutely safe because there are serious risks involved that cannot be eliminated. Also, he will argue this activity is not common in the community. Transco, on the other hand, will argue that the activity can be made safe and they received information from a consultant who studied their activity that there was no serious risk. Also they will argue that this accident shows there was no major harm because the activity is not ultrahazardous.

Causation

Paul will also have to show that this accident both actually and proximately caused his damages. He will argue that the spill occurred while Transco was operating and transporting these toxic chemicals and the derailment caused spillage that went on his property. Also he will argue that he had to close down his greenhouse and leave because of the risks and that his current injuries of anxiety and depression are caused because of the accident. Transco will argue that no actual damages occurred and he left for six months and then came back. His damages six months later are not proximately caused according to Transco and they will argue the fear and depression are part of Paul's paranoia and unrelated to the accident.

Damages

Paul will try to get actual damages caused by the spillage, which he is entitled to. He will also argue that he gets the anxiety and depression damages, but again Transco will argue that these damages are not proximately caused Paul will also try to get damages for loss use and/closing down of the greenhouse. Transco will argue that it was unreasonable for him to leave and there were no actual damages or risk to health or safety and these damages should thus not be recoverable.

b. Negligence

Paul will argue Transco was negligent in transporting the chemicals. To prove negligence, Paul must show:

- (i) Duty owed to him by Transco
- (ii) Breach of the duty
- (iii) Causation
- (iv) Damages.

Res ipsa Locquitor

Paul will use *res ipsa* to show that Transco owed a duty to him and breached that duty. *Res ipsa* requires that (i) the accident normally does not occur in the absence of negligence, and (ii) the instrumentality was in the control of Transco.

Paul will argue that train derailments and chemical spills do not normally occur in the absence of negligence and that the train company had control of the train, thus the breached a duty to him in not safely transporting the chemicals. Transco, on the other hand will argue that derailments occur only during freak incidents, such as the one here where the conductor had a

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heart attack and thus there is no negligence. Paul has a good opportunity to win on *res ipsa*. Nonetheless, he must still prove causation and damages.

Duty

Paul will argue that Transco owed a duty to him to transport the chemicals safely because he is a foreseeable plaintiff. He will argue that not carrying the chemicals safely makes it reasonably foreseeable that he will be injured because his property is near the train tracks.

Breach

Paul will argue that Transco breached its duty to him by not transporting the chemicals in a manner that a reasonable person engage in transporting the chemicals would. He will argue that a reasonable person would not let a person with a bad medical history and history of heart attacks conduct a train transporting toxic chemicals. Also, he will argue that they failed to get safer containers to prevent spillage or take other reasonable measures. Transco will respond that they hired a consultant to research their activities and that the evidence from the study shows that their activities did not pose an unreasonable risk.

Causation

Actual Cause

Paul will argue that his damages were actually caused by Transco's negligent activities. But for the train spill, he would not have had the chemicals spilled on his property, he would not have had to leave his property for six months and he would not have suffered his anxiety and depression.

Proximate Cause

Paul will also argue that all of the damages are directly caused by Transco's negligence and that these harms are reasonably foreseeable. He will argue that an ordinary person would abandon their property after such an accident and still fear the possible long term damages from the spill, such as contamination to groundwater and other pollution that may cause long-term damage that is undetectable presently. Transco will argue that such harms are not reasonably foreseeable because no actual damages occurred. Thus, concern for future harms is unreasonable and there should be no recovery because his anxiety and depression are unreasonable and unforeseeable.

Damages

Paul will get damages for the property and for having to leave his property. However, he must show that having to leave has proximately caused (discussed above). He will especially have a problem with the anxiety and depression because Transco will argue these damages were not proximately caused and are not definite.

Defenses

Contributory Negligence

Transco will argue that Paul was contributorily negligent for having his greenhouse near the tracks. This will fail however, both in strict liability (always fails) and in negligence because

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Paul will show that it is not unreasonable to have a greenhouse near train tracks and he did no negligent act to cause the harm.

Assumption of Risk

Unlike contributing negligence, assumption of risk is a defense to strict liability. However, Transco must show that Paul either knew of the risk or a reasonable person in Paul's shoes would know of the risk to having the greenhouse near the tracks. Transco will fail in this defense both in strict liability and in negligence.

c. Vicarious Liability

Paul will argue that Transco is vicariously liable for both the driver's negligence in driving a train with risk of a heart attack and for Diana's negligence in improperly assessing the risks from Transco's activities. He has to show that each employee acted negligently while in the scope of their employment in order for Transco to be negligent for their acts. With the engineer he will succeed because he was negligent while driving the train for Transco. With Diana, however, there probably is no vicarious liability because Transco will argue she was an independent contractor.

d. Negligent Selection of Diana

Paul will argue Transco negligently selected Diana to assess the risk and relied on her assessments of the risks from the activities. Transco will try to argue that they properly researched her qualifications and made an informed judgment in selecting her.

e. Negligent Infliction of Emotional Distress

Paul will argue that Transco unreasonably exposed him to physical injury or threat of physical injury by transporting the chemicals negligently. He would show he was in the zone of danger because the spill actually came on to his property and the risk to his health was definite. He can only get damages for actual physical harm suffered however. Thus, he is better off pursuing his negligence claim and adding the depression and fear damages to his physical damages.

f. Nuisance

Paul will argue Transco unreasonably has interfered with the use and enjoyment of his property. However, the injury already occurred, so his damages would be diminutive in value. Since the property was only minimally injured and there does not appear any permanent damages, his damages will be limited. He could also try to seek an injunction to prevent this from occurring again, but he will likely lose because the risk is small, the damages were small, and the benefits of transporting these chemicals might be great. Also, he will recover costs of clean up.

g. Trespass

As with both negligence and strict liability, Paul can recover damages from the chemicals coming on to his property.

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Transco-Indemnity

In addition to defenses to Paul's action, discussed in this answer, Transco will seek indemnification or at least contribution from Diana. This will not be a defense to Paul's action however, and he will be able to get his money judgment from Transco regardless of any indemnity or contribution claim Transco might have.

2. Paul v. Diana: Negligence

The elements and requirements for negligence are discussed in part one. Their application against Diana is discussed below.

Duty

Paul will argue he is a presentable plaintiff from Diana's activity and thus he owes a duty to her. Diana will defend by saying that there is not a reasonably foreseeable harm to Paul if she is negligent in an assessment of safety.

Breach

Diana will argue that she did not breach any duty because she made a reasonable and accurate assessment of the possible damages from Transco's activity. She will argue that there is no evidence here that she did not make an assessment as would a reasonable person doing consulting on this issue. She will also argue that the fact there was no major damage is evidence her report was accurate.

Causation

Actual and Proximate Cause:

Diana will argue that her report was not the actual cause of the damage because even if she hadn't concluded as she did, this accident still would have occurred because nothing could have been done to prevent it. Paul would argue the company might have used safer containers and thus her negligence is the actual cause of his injury.

Diana will argue that she was not the proximate cause because the heart attack was a superseding force. She will argue this accident was not reasonably foreseeable because she could not have anticipated a conductor getting a heart attack and that a conductor with bad heart problems was involved. Paul will argue that it is foreseeable that any event, such as a heart attack, must be protected against because of the great risk if there is an accident.

Damages

Finally, Paul will seek full damages for his injuries. However, Diana will make the same arguments that Transco will make (discussed thoroughly in part 1), including that the damages were not proximately caused and that Paul's unreasonableness is the cause of his mental damages and that there was very minimal physical damage to his property.

Indemnity and Contribution

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Diana will try to get indemnity and contribution from Transco if she is found liable but this will not be a defense to Paul's claim. Nevertheless, Diana has a good defense to Paul's claim based on lack of negligence.