

WASHINGTON AND LEE UNIVERSITY
School of Law

Examination in Torts
Fall Semester 1994

Professor Gilles

INSTRUCTIONS:

This is a closed-book/open-outline examination. You are only permitted to consult an outline of your own making. No other material may be used. **YOU HAVE THREE AND A HALF HOURS TO COMPLETE THIS EXAMINATION.**

There are three questions. I have indicated the amount of time you should spend on each question; these time allotments roughly reflect each question's relative grading weight.

Your answers must be written in blue books. Please write only on one side of each page. You must write your examination number on each blue book. You may not use a computer.

All of the questions are set in the fictional state of Uunl. Except where you are specifically told the law of Uunl, you should assume that the State has not addressed the issue and you should treat all the case law we have studied as persuasive authority.

Good luck.

QUESTIONS 1 and 2

(two questions follow this fact pattern]

On November 20, 1994, on his way to work Sergeant Rogers stopped in at the local Taco Hell to pick up a breakfast burrito. As he stood at the counter waiting to be served, Rogers noticed that the sales clerk, whose name tag read "HI MY NAME IS FRED," was acting somewhat oddly. As minutes passed, Fred began to swear loudly and kick the counter. Rogers muttered under his breath, "I guess work is starting early today," and went over to Fred. As Rogers approached, Fred pulled a hand gun from under his apron and screamed, "Freeze turkeys."

For the next two hours, Fred continued to wave his gun in the air and refused to allow anyone to enter or leave the restaurant. During that time he repeatedly asked if everyone was having "a great time on the farm" and wanted to "stay around." The patrons, including Rogers, all responded in the affirmative. After an hour had passed, Fred insisted that Rogers join him behind the counter. Fred let loose a string of threats which were largely incoherent. Indeed, he appeared almost trance like at times. At one point he said to Rogers, "you poor turkey, Christmas is coming and you know what happens to turkeys at Christmas" and at another, he told Rogers that "I can

see the future and in yours I see a sad, sad Christmas."

As time passed, Fred became more and more comatose. Seizing the opportunity, Rogers reached for his police revolver and shot Fred. Fred was hit, but as he collapsed he let off a stream of bullets which struck Rogers in the leg. Rogers staggered backward and reached out with his left hand to steady himself on what appeared to be a metal counter. However, he was severely burnt when the counter turned out to be a grill which Taco Hell had recently installed to increase their taco production. Within seconds, the police stormed the building and both Rogers and Fred were transported to hospital. Both survived, however, Rogers has 3rd degree burns on his hand and is paralyzed in the leg from the bullet wound.

At his criminal trial Fred was convicted of violating Uunl's criminal statutes prohibiting battery, assault, kidnapping and use of a firearm in the perpetration of a felony. Fred's own testimony and that of his doctor, reveal that Fred was suffering from severe depression for two months preceding the incident. To treat this condition, Fred was taking a prescription drug called Prozac (one tablet per day).

Fred's doctor testified that his examination of Fred after the incident showed that on the day of the incident Fred had taken twenty times the prescribed dosage of Prozac and as a result was suffering from a severe delusion. Fred testified that at the time of the incident, he believed he was in charge of a turkey farm and that all the people around him were in fact turkeys who he was responsible for guarding. The doctor confirmed that Fred had been under such a delusion triggered by his use of Prozac: "it was as if his brain was plugged into a different reality. In his mind he was not threatening people, he was guarding turkeys. He had no intent to harm anyone - just to keep the turkeys under control."

Introduced in 1989 by the multi-national drug company PZP, the prescription drug Prozac is the most effective drug on the market for curing severe depression (it has a 92% success rate). PZP's television advertisements note the prevalence of severe depression in the United States (it is the second leading cause of lost work days and in the year prior to Prozac's introduction 300 suicides per year were attributed to severe depression). PZP's advertisements picture a smiling woman surrounded by a happy family, with a soothing voice stating, "Depressed? Ask your doctor about Prozac. For many it is the first step back to a happy and normal life." Prozac has been widely praised by the media, and government reports show that, nationwide, lost work days have decreased and suicides linked to depression dropped to around 100 in each year following the drugs' introduction.

However, as all doctors know, given that Prozac alters the brain's chemical balance, it has side effects. In 1987-88, prior to the release of Prozac, PZP conducted extensive clinical trials. PZP discovered that the drug was addictive. Prozac gives an immediate "happy feel" after it is taken. However, it was not until a second set of clinical studies were conducted in 1993 that it was learned how addictive Prozac is: most users immediately crave more tablets, and 10% of Prozac users admitted that in the last 6 months they had on one or more occasion taken extra tablets.

The 1987-88 pre-release studies also indicated that in one in a million cases Prozac might cause some temporary confusion or minor delusions if more than three times the prescribed dosage (i.e. more than 3 tablets) was taken. During these clinical studies, PZP also tested an alternative, less potent, form of the drug, code-named P-alt. P-alt cost the same amount to manufacture as Prozac and was less addictive. It also had less side effects -- a patient had to consume 50 tablets before any confusion or loss of awareness appeared. However, P-alt was also less effective and the studies showed it would only cure 60% of those treated.

At the time Fred took Prozac it carried a warning which stated:

WARNING: THIS PRODUCT IS ADDICTIVE. IN ADDITION IT IS VERY IMPORTANT THAT THE PRESCRIBED DOSE NOT BE EXCEEDED. EXCEEDING THE DOSE CAN CAUSE MINOR TEMPORARY DELUSIONS.

The warning did not indicate that exceeding the dosage would cause severe delusion or that the sufferer might become violent. However, none of the pre-release tests run by PZP had revealed any likelihood of severe delusion or violence, and PZP had run all of the tests recommended by the Federal Drug Agency. PZP had not run a Gerbo test (which might have indicated the severe delusion side effect). The Gerbo test was not developed until 1992 and is still not widely used by American drug companies. After, the "Fred incident" PZP did review all data from all patients using PZP and found that in the entire five years the drug has been available, only five patients in the entire United States had reported suffering severe delusions. In none of these cases had the patient shown any signs of violence or even anti-social behavior. Moreover, in all five cases where the severe delusions occurred, the patient had taken at least fifteen times the prescribed dose within a twelve hour period. After the "Fred incident" PZP also ran the Gerbo test which indicated that very high dosages (20 or more tablets) of Prozac might trigger severe delusion sometimes accompanied by violent tendencies.

Rogers retains your law firm. He wants to know who he can sue and on what theories. The partner on the case assigns you to write memoranda on the two questions set out below. For your information the state of Unnl has adopted to a pure comparative negligence system (i.e. plaintiff's negligence is not a bar to recovery but simply reduces the award) in all negligence cases, but does not recognize such a defense to strict liability for products claims. The state also follows the traditional position of predicating a landowner's liability on the plaintiff's status on the land.

QUESTION 1 (75 minutes)

Can Rogers proceed against PZP, the manufacturer of Prozac, on a theory of strict liability for a defective product? The State of Unnl has recognized strict liability for products (adopting the test set out by the Californian Court in Baker v. Lull Engineering which looks to consumer expectation and risk/utility), but it has not yet decided how it should treat claims that a prescription drug is defective. Thus, you must examine PZP's liability under the various approaches which courts have considered to strict liability for prescription drugs.

Include an explanation of which theory is most favorable to our client.

Your memorandum should also address the arguments and defenses to liability that PZP will

likely raise under Uunl law.

QUESTION 2 (60 minutes)

Who else can Rogers sue and on what theories? Your memorandum should explain which claims are the strongest and what defenses would be raised. Please organize your memorandum to deal with one potential defendant at a time. You may cross reference prior analysis where relevant. Do not address claims against PZP in this question.

QUESTION 3 (75 minutes)(this question is based solely on the facts set out below)

You are a law clerk for Justice Tattle one of the most respected members of the Supreme Court of Uunl. Pending before the Court is a wrongful death claim by John Strand against Doctor Pallmall to recover damages for the death of John's 23 year old spouse Sophia. Sophia suffered an extreme headache in the early hours of the morning. John took her to the emergency room. Doctor Pallmall prescribed aspirin and released her. Sophia died later that day from meningitis. Unrebutted expert testimony at trial showed that Doctor Pallmall negligently failed to test for meningitis and that if he had performed the requisite test and given follow up treatment, Sophia Strand had a 40% chance of survival.

The jury awarded John Strand \$23 million, however the trial court granted a judgment notwithstanding the verdict (JNOV) in favor of defendant Doctor Pallmall. Strand appealed, but the Court of Appeals upheld the JNOV, finding that "plaintiff cannot recover as there is no proof by a preponderance of the evidence that the doctor's negligence was the "but for" cause of Sophia's death."

Strand has appealed to this Court.

Justice Tattle requests that you write a memorandum advising her on this case. Justice Tattle asks that you start by briefly explaining what the Court of Appeals means by the "but for" test, and why it arguably precludes recovery in this case.

The Justice is, however, disturbed by the result in this case. She wants to know how other courts have treated this issue and what test or theory she could adopt which would allow the plaintiff to recover. She asks you include a section in your memorandum briefly explaining such theories and how they would work here.

Finally, Justice Tattle wants you to pick one of the alternative approaches you have outlined above and discuss in depth the POLICY arguments for and against adopting that approach over the "but for" test applied by the Court of Appeals. She is particularly concerned that her colleague Justice Lawsgrate will strenuously oppose any change from the "but for" test.