

MEMORANDUM

TO: Remedies Class Spring 2006

FROM: Mike Allen

DATE: May 2006

SUBJECT: Thoughts Concerning Final Examination

This memorandum sets forth my thoughts on the two essay questions posed in the spring 2006 final examination. My purpose here is to layout the general outline of my thoughts about the answers to the questions. I have by no means attempted to be comprehensive. In other words, there are certainly arguments that students raised that are not included in the discussion that follows. You can be sure that you received credit for arguments you made that were correct and relevant even if those points are not discussed below. Finally, I have at times used an outline format in order to present my information. Barring time pressures, I would have expected most students to write an answer using complete sentences and full paragraphs.

Question #1

Question #1 called on you to advise Weaver concerning its appeal of the judgments rendered in favor of three parties: (1) Laycock; (2) Shoben; and (3) Partlett. For organizational purposes, I would have discussed the issues concerning each party separately.

Laycock

Laycock prevailed below on a tort claim. He received both compensatory and punitive damages. The compensatory damages were broken down into three categories, each of which raised certain potential issues for appeal: (1) \$200,000 in medical expenses; (2) \$100,000 in lost wages; and (3) \$2.5 million for pain and suffering. The jury also awarded punitive damages of \$30 million.

Compensatory Damages

Medical Expenses

We do not have any information concerning the proof Laycock submitted to substantiate his claim to \$200,000 in medical expenses. If that proof were deficient, then a possible appeal point would be present. However, that scenario seems unlikely with respect to medical expenses here are more generally.

The true issue for discussion concerning the medical expenses award involves the collateral source rule. The facts tell us that Laycock in fact has already received \$200,000 in

reimbursement for medical expenses: \$100,000 from an insurance company and \$100,000 from a church group as a charitable payment. The majority of your answer should have dealt with the impact of these payments under Stetson Statute #3.

First, you should have noted that the statute by its terms applies to Laycock's situation. Thus, the common law collateral source rule has been modified by legislation. Second, you should have noted that the \$100,000 payment from the church group could possibly fall under this statute. Section 3 provides that "any contract or agreement of any group, organization [etc.] to provide, pay for, or reimburse the costs of [health care]" should be deducted. Seen in one way, the church payment would qualify. However, there is no contract or agreement here and the public policy implications of discouraging charity both suggest that the payment does not qualify as a collateral source under Section (2) of the Statute. Therefore, it is likely that Laycock's award does not need to be reduced as a result of that payment as would otherwise be required under Section (1). The insurance payment clearly does qualify as a collateral source under Section (2). As a result, Laycock's award should be reduced as a result of the payment. However, Laycock is entitled to a \$1,000 credit on account of the premiums he paid (pursuant to the last sentence of Section (1)).

In the final analysis, the best advice to Weaver is that the damages awarded Laycock should be reduced by \$99,000 leaving the medical expenses portion of the award at \$101,000.

Lost Wages

The key issue on appeal concerning the lost wages is whether the \$100,000 award is speculative. There is little possibility that the \$65,000 portion of the award related to Laycock's base salary could be challenged (at least not on the record we have). However, the balance (\$35,000) could be subject to a successful challenge on appeal on the ground that it is pure speculation that Laycock would have in fact closed the two deals he maintains would have yielded him a commission. We do not have sufficient information to take a firm position on this issue, but it is worth raising.

Pain and Suffering Damages

You should have recognized that pain and suffering damages are evaluated under a common law reasonableness standard. It is largely an issue of whether the jury was reasonable in awarding the damages given the nature of the plaintiff's injuries. Here, Laycock's injuries, while not permanent, were significant. He broke both legs and required several operations to repair the damage to his body. It seems likely that the jury would have been within reason to credit Mr. Laycock's likely testimony concerning the impact of the accident on his life. Moreover, the trial judge would be given great latitude in making the reasonableness analysis given that he or she was present to hear the testimony. In sum, you should have identified the issue as a possible appeal point but not one that was likely to be successful.

Punitive Damages

The most significant appeal point concerning Laycock relates to the \$30 million punitive damages award. There are two main types of issues one could raise as appeal points in this issue: (1) statutory matters under Stetson Statute #4; and (2) constitutional matters under the Due Process Clause.

Statutory Matters

It appears that punitive damage awards in Stetson are governed by Stetson Statute #4. There are two issues that could be raised under the statute. First, one could attempt to attack the award based solely on the amount of damages. Such an attack would almost certainly not succeed because Kelly was drunk at the time and, therefore, there is no limit on the amount of the award under the Statute.

The second statutory argument is potentially more powerful. This argument concerns whether the statutory prerequisites have been met for the imposition of punitive damages liability on Weaver for Kelly's conduct. It is true that Kelly was acting within the scope of his employment at the time of the accident. However, the Statute does not allow the imposition of punitive damages based on principles of vicarious liability. Rather, there needs to be some sort of affirmative conduct by Weaver in order to subject the company to liability for punitive damages.

You should have addressed whether, on the facts given, it appeared likely that Weaver could be held to fall within the Statute's provisions. It does not appear that (d)(1) would work as there is no evidence that Weaver "actively and knowingly participated in the conduct." The key would be whether anything would allow the jury to have concluded that Weaver fell within the terms of sub-sections (d)(2) or (d)(3).

My assessment on the facts given is that it is unlikely that Weaver's conduct would fit within the statutory terms. The most significant reason for this assessment is that we are told that Weaver had a system of random urine test of its employees but that Kelley was able to beat the test through no fault of Weaver. In any event, you should have discussed the issue and presented your conclusions.

Constitutional Matters

You should also have advised Weaver about the potential to challenge the punitive damage award under the Due Process Clause. The Supreme Court has in the last 10 years established a constitutional rule of proportionality of punitive damages derived from the Due Process Clause of the 14th Amendment.¹

¹The other constitutional doctrines the Court has mentioned in addressing limits on punitive damages do not appear to apply here. For example, there is no evidence of the use of Weaver's financial condition to support the award. Moreover, there does not appear to be any

The Court has laid out three “guideposts” by which to judge whether a punitive damages judgement is constitutionally excessive. I would have addressed this question by looking at all three guideposts.

REPREHENSIBILITY

The first guidepost is the reprehensibility of the defendant’s conduct. In other words, we are to ask how bad was the defendant’s actions. The Court has described this as the most significant of the guideposts. In *Campbell* the Court laid out five sub-factors that could be considered in addressing the level of reprehensibility. Those factors are:

- whether the harm at issue was physical or only economic

This factor would cut in favor of a high level of reprehensibility. Laycock was quite seriously physically injured in the accident.

- whether the tortious conduct showed an indifference to or reckless disregard of the health or safety of others

This factor also cuts in favor of a high level of reprehensibility. Weaver’s employee – acting in the scope of his employment – was drunk. The drunk driving had the potential to harm numerous people on the road, including but not limited to the passengers on the Weaver bus.

- the target of the act at issue was financially vulnerable

This factor is not relevant.

- the conduct involved repeated actions

This factor cuts against a high level of reprehensibility because there is no indication that it had occurred in the past. In fact, Weaver had policies in place designed to try and prevent the conduct from taking place.

- the harm was the result of intentional malice etc. and not an accident.

This factor is not particularly relevant. However, it does raise the issue that Weaver is on the hook for vicarious liability. This factor might cut against a high level of reprehensibility.

In the end you should have come to some conclusion concerning the level of reprehensibility of Weaver’s conduct.

“extraterritorial” issue that infected the judgment.

RATIO ANALYSIS

The second guidepost concerning the ratio between the punitive damages awarded and the compensatory damages awarded (or the potential harm). In this case, the compensatory damages were \$2.8 million (likely to be reduced to \$2,701,000 based on the collateral source issue above). This ratio is slightly more than 10:1 punitive:compensatory based on the \$30 million punitive award.

You should have discussed how the ratio guidepost could play out here. On the one hand, the Court held that a single digit ratio usually the limit (and with a large compensatory award the limit could be 1:1). On the other hand, the Court made clear that it was not setting a bright line rule. And the Court has never dealt with a case concerning physical injury. There is no correct answer about the likely outcome on the ratio issue. You should have discussed the various possibilities.

COMPARABLE SANCTIONS

The final guidepost is the relationship between the punitive damage award and potential civil or criminal sanctions. What we know here is that Weaver's maximum civil fine (which was in fact imposed) was \$5,000. Of course, this is much smaller than the \$30 million. Of course, Weaver could have lost its license, which seems to be as harsh as the \$30 million. But the Court has cast some doubt in *Campbell* on using this type of corporate death penalty as a comparison.

In the end, you should have evaluated all three factors and come to some conclusion regarding a constitutional attack on the punitive damages awarded in this case.

Shoben

Shoben's claim against Weaver is based on a breach of contract. There were several issues that you should have recognized and discussed concerning the damages awarded to Shoben.

You should start by laying out what Shoben recovered. The group recovered \$125,000. That figure consisted of \$100,000 that were awarded based on paragraph 5 of the contract and \$25,000 as the result of the missed promotional event which caused the group to pay \$25,000 to the promoter.

As to the \$100,000 the issue you should have addressed was whether paragraph 5 of the contract was a valid liquidated damages provision or whether it was a penalty. This is a situation of overliquidated damages because the actual damage to the group is almost certainly less than \$50,000 based on the facts we have.

As a general matter, the assessment of whether a contractual provision is void as a penalty or is a valid liquidated damages provision turns on whether the amount specified is a

reasonable estimation of anticipated damages as of the time of contracting or actual damages sustained. While we do not have all the facts, it seems that at the time of contracting everyone expected the tour to be far more successful than it turned out to be. Of course, that does not answer whether \$50,000 per performance was reasonable. In any event, you should have discussed the issue.

But it may not be all that significant if the clause was reasonable at the time because of the fact that it appears that the true damages in this case with respect to the two missed performances are clearly zero. In that case, the overwhelming rule is that we will not enforce the clause and will rather hold the plaintiff to the zero loss it actually suffered.

A second issue concerns the \$25,000 in damages awarded on account of the missed promotional event. The judge allowed the claim to go to the jury by striking paragraph 6. First, why does that matter? The answer is that paragraph 6 excludes the recovery of consequential damages. That is allowed. Without the exclusion, Shoben could recover consequential damages. With the exclusion in place, he could not. The \$25,000 is almost certainly consequential damages because while it was proximately caused by Weaver's breach, such damages would not always flow from such a breach. So long as Weaver had reason to know of the promotional event (not necessarily the \$25,000 in particular). There is no indication that Weaver knew of the event, but one might infer that he did because he was responsible for transporting the group. In any event, you should have discussed these issues.

So, the state of affairs is that Shoben could get these damages only if the trial judge was correct to strike paragraph 6 based on the unconscionability doctrine. The judge was almost certainly not correct. To be unconscionable you need to have both procedural unconscionability (i.e., surprise or a contract of adhesion) and substantive unconscionability (a truly unfair result). Neither one of these factors is present here. First, there does not appear to be surprise or adhesion. Indeed, paragraph 7 states that counsel was available to review the document. Also, it is not clear that the result is so unfair in the context of the agreement. Thus, Weaver likely has a strong ground for appeal on this ground.

A final issue that you should have flagged concerned an off-settling benefit. Shoben was able to earn \$10,000 (without expenses) by holding an impromptu concert on the side of the road. That is certainly a benefit to Shoben and it is one that would not have existed absent the breach. Thus, \$10,000 should be subtracted from whatever damages Shoben might be awarded. Of course, that amount could be zero because the concerts missed would have lost the group money and the \$25,000 will likely be excluded under paragraph 6.

Partlett

Partlett was awarded \$60,000 in lost profits based on the 5 day closure of the Stetson River to clean up the fuel spilled in the accident. There were three issues I would have raised with respect to Partlett.

First, depending on the common law rules in Stetson, Partlett's claim could be barred some version of the economic loss rule. In some jurisdictions, that doctrine would bar the recovery of purely economic losses when there is no physical impact to person or property. In this respect, the rule can serve as a limitation on damages that is akin to proximate cause in tort. If Stetson has such a rule, it is quite likely that the damages Partlett sought would be precluded. On the other hand, not all jurisdictions have such a broad definition of the economic loss rule. For example, if Stetson were like Florida the rule would not bar the claim here because there is no privity of contract between Partlett and Weaver and Weaver is not the manufacturer or distributor of an allegedly defective product. You should have discussed the various incarnations of the rule in your answer.

A second issue you should have at least raised is garden variety proximate cause/foreseeability. I would not have expected much discussion here, but you should have at least raised the idea that it was not foreseeable to Weaver that someone like Partlett could be harmed. You could also have raised the possibility that the government order to close the River was the real cause.

Finally, you should have raised as a possibility that Partlett's claims of \$12,000 per day in lost profits are too speculative. The company is a new business and its track record did not support the expert's claims. On the other hand, that expert testimony was in the record. Once again, I would not have expected you to resolve the issue.

Question #2

This question concerned Weaver's potential claims against Janutis and the remedial options in connection with those claims. You were specifically instructed not to consider punitive damages in this regard. There are a number of remedial matters you should have raised in connection Janutis. I discuss each of them briefly below.

Replevin

Although by no means an important remedy, Weaver may be entitled to the recovery of the physical Manual taken by the Janutis president. To be entitled to replevin Weaver would need to show that it owned the Manual (which it would be able to do) and that it wrongfully detained in Janutis' possession (which also appears to be the case). Thus, Weaver should be able to get the Manual back using this common law writ.

Declaratory Judgment

Weaver might also want to seek a declaratory judgment under Stetson Statute #2. There is clearly an actual controversy between Weaver and Janutis in this case. In particular, the DJ option might be useful in order to resolve the issue of whether the Manual contains a trade secret

that may be protected under law. This issue is one that seems to be quite important to Weaver. Of course, you should also have advised Weaver that there is no built-in enforcement mechanism with respect to a DJ.

Compensatory Damages

Weaver may also be entitled to receive compensatory damages as a remedy. Such damages would be designed to put Weaver in the position in which it would have been but for Janutis' wrong. The difficulty is that it is not entirely clear how those damage should be calculated. One option would be to try and determine a license fee that Weaver would have charged Janutis to use the Manual. These damages, however, are likely to be speculative given Weaver's history of not licensing the Manual. In addition, getting these damages might not serve Weaver's longer term interests because it might not allow for injunctive relief.

The other possibility is less prone to the "speculative" charge but it is not entirely clear that it would necessarily be the best option for Weaver given the discussion below concerning restitution. In any event, this option would be to award damages in the amount of what Weaver would have charged Janutis to layout the routes at issue. This would not be speculative because Weaver has a track record in this regard. But it is probably the case that the dollar figure in this regard will not be nearly as impressive the one for restitution. But it is an option you should have discussed.

Restitution

It is also possible that Weaver would be entitled to recovery based on restitutionary principles. The central concept of restitution is well-described by the term "unjust enrichment." There must be an enrichment of the defendant at the plaintiff's expense and that enrichment must be "unjust." In this case there is not dispute concerning the unjust nature of the defendant's conduct. The key issue was determining the amount of the benefit conferred by Weaver on Janutis.

Janutis has revenue of \$3 million during the relevant period. The first point you should have seen was that only \$2 million of that revenue is at issue. The reason is that only the private routes are infected with the Janutis wrongdoing.

The next step is to determine what is the net profit on the private routes. In other words, you needed to figure out what expenses Janutis would be allowed to deduct from the \$2 million. You should have seen that one category of expenses (salaries for government contracting officers) was not implicated by the private routes. However, the categories into which the remaining \$1.4 million in expenses fell were all implicated in the private routes. Thus, your next task was to determine an methodology by which to allocate these expenses between the public and private routes.

There seem to be three potential allocation methodologies. The first one would be

allocate expenses based on the percentage of routes that are private versus those that are public. Twenty-five percent (25%) of the routes are private. Thus, one could take the position that 25% of the \$1.4 million in expenses remaining (or \$350,000) should be subtracted from the \$2 million in revenue. Under this approach, we would be at \$1,650,000.

The second allocation methodology is based on ridership. Under this approach, one would take 50% of the expenses and allocate them to the private routes. Thus, you would subtract \$700,000 from the \$2 million leaving you with \$1.3 million.

The third approach would be to use the ratio between public and private routes based on revenues which would yield 66%. Under this approach one would have about \$924,000 in deductible expenses leaving \$1,076,000.

Clearly, Janutis would argue for the 66% allocation and then as a back-up the 50% allocation scheme while it would be in Weaver's interest to advocate the 25% method. You should have discussed which method would more likely to be used. My assessment would be that the court would most likely use the 25% one. First, it is more plaintiff friendly and, after all, Janutis is an intentional wrongdoer. Moreover, there is an intuitive soundness to allocating based on the number of routes, at least absent evidence that ridership means more to a particular category of expenses. That could be the case, for example, with respect to the salaries of drivers. Thus, in the end the court might use different methods of allocation for different categories of expenses. You could have been creative here in your discussion.

But you were not yet done. Whatever your bottom line number from the above analysis, you should have recognized that the figure you reached might not reflect the benefit wrongfully conferred on Janutis. The reason is that the net profit on the private lines almost certainly did not derive from the Weaver route layout alone. Thus, there was a potential to perform a "factors of production" analysis along the lines of Sheldon. The difficulty is that you do not have sufficient facts to make that determination. However, you do have sufficient legal knowledge to advise Weaver about the issue and suggest that an expert in this area should be consulted.

Preliminary Injunction

You should also have discussed the possibility of obtaining a preliminary injunction against Janutis. You should have carefully addressed the precise scope of that injunction because the nature of what Weaver will ask for will dictate much of the analysis. For example, if Weaver sought a preliminary injunction precluded Janutis from creating further routes, the analysis would track the following. You should also have noted that a preliminary injunction is most often associated with preserving the status quo. The injunction here might be seen as altering the status quo, but there would be ways to either ignore or otherwise avoid the application of the rule.

Is there a likelihood of success on the merits?: Yes. Based on the facts, Weaver is likely to win its suit.

Balance of Hardships: Does the balance of hardships tip in favor of Janutis if the injunction is granted when compared to the hardship on Weaver if it is not granted. I don't think so, especially with respect to new routes. Moreover, while as a technical matter the intentional conduct of Janutis will not bar balancing, the court (sitting in equity) will likely take it into account in the analysis one way or the other.

Public Interest: There should be no problem with this aspect of the analysis because there is no indication that any third party (or the public more generally) is relying on *new* routes.

No adequate remedy at law: The issue here is whether money damages can compensate Weaver *during the period between seeking the injunction and final judgement*. It does not appear that damages can do a particularly good job here no matter how one defines the time period for many of the reasons discussed above concerning compensatory damages.

Thus, it seems likely that this preliminary injunction would be granted. But you might have a different result if you phrased the request as not operating the private routes allegedly infected with the wrongdoing. The likelihood of success on the merits and no adequate remedy at law discussion would be the same. However, one would now have a serious problem with the *public interest* consideration. The fact is that the 5,000 people per day who ride these business would be severely impacted. That does not mean that one cannot issue the injunction as a matter of power, but as a matter of judicial discretion it is quite important. It is also possible that the party balancing could also come out differently here, but I suspect the major issue would be the public interest.

Permanent Injunction

You should also have discussed seeking a permanent injunction. Once again, it was quite important to define precisely what you would seek to enjoin. If it was continued use of the information from the Manual, the injunction would almost certainly enter. There would be no adequate remedy at law for the reasons discussed above (and note that the time considered here would be different than that for the preliminary injunction). In addition, it is unlikely that the court would engage in a balancing of the harms because of the intentional nature of Janutis' conduct. Moreover, the type of balancing would be different (i.e., the scales would need to tip significantly in favor Janutis). Moreover, there do not appear to be any public interest factors that would could counsel against issuing the injunction.

The result could be different if one sought a permanent injunction precluding Janutis from operating the routes. The balancing of harms analysis would be the same as would the consideration of the adequacy of the legal remedies. However, the public interest consideration would, I think, lead a court to decline to enter this type of relief. That conclusion is by no means certain, but you should have discussed the issue.

Remedial Defenses

Finally, you should also have discussed the possibility that certain remedial defenses could have an impact on any suit Weaver brought against Janutis. To begin with, there is no issue as to a statute of limitations because Stetson Statute #1 gives Weaver five years from the date of on which a tort occurs. Weaver comes within this period. But there are certain issues beyond the statute of limitations that you should have discussed. I discuss each of them below.

Laches

Under the doctrine of laches, a party is not entitled to equitable relief if the court determines that (1) it waited for an unreasonable length of time to assert the claim for relief at issue and (2) the other party (here Janutis) has been prejudiced by the unreasonable delay. Thus, it is possible that any relief that Weaver seeks which may be deemed equitable (certainly the injunctions and perhaps the restitution) could in theory be barred based on Weaver's failure to bring the suit at issue after the first Janutis private route began operations in 2003.

You should have discussed two issues here. First, was Weaver's delay "unreasonable." That assessment is based on all the facts and circumstances. It does seem that there is little to explain Weaver's failure to act in 2003 and then 2004. Indeed, the inaction continued until 2006 when Weaver contacted Janutis. You should have come to some conclusion about the delay.

The second issue is whether Janutis has been prejudiced *by the delay*. This issue is not nearly as clear as the delay prong. It may be the case that the delay in 2003 led Janutis to open the two additional private routes. But that is by no means clear, especially because Janutis takes the position that Weaver's Manual does not set forth trade secrets. As with the delay prong, you should have discussed the issue and come to a conclusion.

Equitable estoppel

Another possible defense is equitable estoppel. The elements of equitable estoppel using the relevant actors in this question are: (1) an act or conduct by Weaver that is inconsistent with the relief it now seeks against Janutis, (2) Janutis' reasonable reliance on those actions, and (3) injury to Janutis flowing from that reliance.

Although it does not fit as well as laches, the equitable remedies could also potentially be barred under equitable estoppel principles. However, this defense is less likely to be an issue. First, you should have recognized that this would be a case of estoppel by silence. In other words, Weaver's "act" would be its inaction. But even if that were true, it is not clear to me that Janutis can establish that it relied on that silence to its detriment.

Waiver

The final defensive possibility for Janutis is waiver. Waiver could apply to all the remedies sought, both equitable and legal. Waiver is the intentional relinquishment of a known right or conduct inconsistent with the later assertion of that right. There was no need for you to

discuss Janutis' reliance with respect to waiver because reliance is not an element of establishing this defense. It does not seem to me that Weaver's silence would like me the standards for waiving the rights to bring the claims now asserted.