

February 1996 Question 3

Dave, owner of a physical fitness center known as "Dave's Gym," is being sued by Paul for negligence. Paul claims that he sustained permanent injuries as a result of an accident caused by faulty equipment supplied by Dave to Paul while Paul was working out at the gym. At the trial by jury, the following occurred:

1. Paul testified that while he was properly using the weight lifting equipment at Dave's Gym, the equipment broke, causing his injuries. Proper admissible medical evidence regarding Paul's injuries was introduced. No other evidence was introduced. Paul then rested his case. Dave moved for a judgment as a matter of law (a directed verdict). The court denied the motion.

2. Dave introduced into evidence a fax received by Dave's Gym the day before the alleged accident. The fax recites on its face that it was sent by Paul, and it states that Paul would no longer use his membership at Dave's Gym because he had been injured at work.

3. Dave then called as a witness, William, a trainer at Dave's Gym, who testified that he was the person in charge of the gym the day of the alleged accident and that no one reported to him that any accident occurred on that day.

4. On cross-examination, over Dave's objection, William was asked if he had written in a log book that someone was injured at the gym on the date of the accident. The court permitted the question and instructed the jury that William's answer could be considered for impeachment only.

5. The case was given to the jury. During a break in deliberations, a juror went to a sporting goods store near the courthouse and inspected weight equipment. That juror reported the information obtained to the other members of the jury during deliberations, and these facts came to the court's attention before a verdict was returned. The court advised the parties of the juror's conduct. Dave moved for a mistrial.

Assume that in each of the foregoing instances all appropriate objections were made.

I . Should the motion for judgment as a matter of law described in paragraph 1 have been granted?

Discuss. ,

2. Was the evidence in paragraph 2 properly admitted? Discuss. 3. Was the evidence in

paragraph 3 properly admitted? Discuss.

4. Did the court err in permitting the question and instructing the jury in paragraph 4? Discuss.

5. How should the court rule on the motion for mistrial described in paragraph 5? Discuss.

ANSWER A TO QUESTION 3

1. Judgment as a Matter of Law

Judgment as a matter of law should be granted if on the weight of the evidence no reasonable jury could come to any other conclusion.

Thus, if Dave is to win based on the evidence, no jury could reasonably conclude that Dave was negligent.

Negligence - Duty. Breach. Causation. Damages

Duty

Dave owed a duty of an owner occupier to an invitee. This means that Dave has a duty to make sure all equipment is safe and in working condition.

Breach

The evidence that Dave presents clearly establishes that the equipment broke, thus, it was unsafe.

Causation

Both actual and proximate causation are met.

Damages

Paul introduced evidence of damages.

However without presentation of defenses, no jury could reasonably not find negligence of this theory. Denial appropriate.

Res Ipsa Loquiter

- 1) Was this a type of injury where it only would occur if someone was negligent? Perhaps but probably not.
- 2) Was instrumentality solely in Dave's hands? No - it was in Paul's hands.
- 3) Was Paul at all contributorily negligent? From the evidence presented we don't know. But Paul did present enough evidence to survive a judgment as a matter of law.

The court's denial of the motion is appropriate.

FAX

Relevance

Evidence is relevant if it makes a fact more probable than not. Here this goes directly to causation and is relevant.

Best Evidence Rule

When the contents of a writing are in question, the original must be produced or its absence satisfactorily explained. Here the document is a fax. The BER does allow for copies that are identical. A fax probably will qualify as an original. However, Dave can satisfactorily explain that Paul has the original. This will probably satisfy the rule.

Authentication

The fax must be authenticated to be what it purports to be. If Paul wrote it in his own handwriting it can be authenticated by either: 1. someone with personal knowledge of the handwriting, 2. expert, or 3. jury doing a comparison with a sample of Paul's writing.

Hearsay

If all of the above are met, the last hurdle is hearsay. Hearsay keeps out all statements by a declarant which are being used to prove the truth of the matter asserted, as in the fax in this case. Without an exception, it can't come into evidence. However, the statement by Paul is a party opponent admission. This is considered not to be hearsay and can be introduced as substantive evidence. It is a POA because it is being offered by a party against the party who said it. Thus, it comes in.

3. Trainer

Relevance

This is relevant to indicate that no accident occurred.

Pragmatic Relevance

Evidence will be excluded if more prejudicial than probative. In this case it might be kept out as prejudicial unless it can be established that accidents are always reported and failure means there was no accident. An offer of proof, thus, might be needed to get past this.

Hearsay

Present sense impression is an exception to the hearsay rule that will allow William to testify that no accident occurred, because if it had, someone would have reported it. This is kind of a reverse Hillman Doctrine.

4. Log Book

The court erred; this was substantive evidence.

Impeachment

There are several techniques to impeach a witness. One is with specific acts that would show dishonesty or truthfulness. These questions must be asked in good faith and no extrinsic evidence is allowed to prove or challenge the answer. Thus, his answer comes in to

impeach his credibility.

Since he testified that no one reported an accident to him, if he wrote in the log book that there was, this would show he lied. A direct reflection on his credibility.

Substantive Evidence - Vicarious Admission

William is an employer of Dave, and if William was acting within the scope of his employment, his statements would be admissions.

Vicarious admissions are substantive evidence if said by employee during employment within the scope of his duties and the employer is a party.

Here all these factors are met and, thus, the judge was wrong. William's answer comes in both to impeach and as substantive evidence.

5. Mistrial

A mistrial is declared whenever there is manifest necessity to prevent injustice. A defendant has a constitutional right to a fair trial. A juror is not allowed to be influenced by outside evidence. A violation of this is a constitutional violation of Dave's right to a fair trial.

Remove the Juror

The judge had the option of removing the juror. However since the juror shared his information with the other jurors during deliberations, removing the juror would not do any good.

Question the Jurors

The judge with both counsel and parties present could question each juror about whether such evidence would in fact affect their deliberation. However, this would be interfering with the deliberation process. If the judge could have done it before deliberations then perhaps it would serve as an alternative to a mistrial.

Evidence Itself

Since the issue of the trial is the actual equipment, it seems that inspecting equipment other than the actual evidence is quite prejudicial to Dave.

However, the degree of prejudice depends on how similar the evidence and the store equipment was. If it was the exact same item, Dave's chances for a mistrial are quite good. The court should grant the mistrial.

Since there was no final judgment, Dave could not argue res judicata or collateral estoppel in the subsequent trial.

If the equipment was not even remotely the same, the juror should be excused, an alternate sworn in and deliberations should start over and mistrial motion denied.

ANSWER B TO QUESTION 3

1. Paul v. Dave

Motion for Judgment as a Matter of Law

A motion for judgment as a matter of law is granted at the end of plaintiff's case when the moving party establishes that no reasonable jury, in light most favorable to the non-moving party, could find against the moving party and therefore is entitled to a judgment as a matter

of law.

Here, Paul's case in chief resolved around Dave's negligence. Paul sought to establish liability under the doctrine of *res ipsa loquiter*.

In order for Paul to establish liability, he will need to show that: 1) acts of this kind do not ordinarily happen except by a negligent act; 2) defendant was at all times in control of the instrumentality; 3) plaintiff or a third party did not contribute to the negligence; and 4) plaintiff was injured.

Paul's testimony that he used equipment supplied by Dave which broke would establish that equipment does not normally break absent negligence. The fact that the equipment was on Dave's property (weight lifting equipment) and was supplied by Dave to his patrons, indicates that Dave had exclusive control over the instrumentality. Further, Paul's testimony that he properly used the equipment shows a lack of contributory negligence.

Finally, Paul's testimony regarding the sustaining of injuries goes towards establishing damages. Thus, Paul has met the requirements of *res ipsa loquiter*. However, a "res ipsa" showing presumptively establishes only duty and breach. Paul would still need to establish causation and damages.

Dave will argue that Paul's case in chief failed to establish that Dave was either the actual or proximate cause of the injuries.

Paul's introduction of properly admitted medical evidence establishes damages since it pertained to injuries suffered by Paul. A jury could reasonably infer from Paul's evidence that Dave's equipment was the legal (actual) cause of the injuries.

Proximate cause requires a nexus between defendant's acts and plaintiff's injuries. If the defendant's acts were the direct cause of plaintiff's injuries, then the defendant is liable. Absent a showing that an unforeseeable event superseded Dave's actual cause, Dave will be liable. Paul's evidence could result in a jury finding factual issues to resolve. Therefore, the court did not err in denying Dave's motion.

2. Evidence of the Fax

Relevance

Any evidence having a tendency in reason to prove/disprove the existence of a fact of consequence is relevant. Only relevant evidence is admissible.

Dave's introduction of the fax is relevant since it has a tendency to disprove Paul's claim that his injuries were caused by Dave's negligence.

Authentication

Any piece of direct testimony regarding non-testimonial evidence requires a showing of authenticity. This may be done by testimony establishing a "chain of custody" or by personal knowledge.

Here, the fax on its face purported to be from Paul. Dave would need testimony establishing the letterhead, signature or telephone number from where the fax was sent to properly verify or authenticate the fax.

Best Evidence Rule

The contents of an original document sought to be introduced should be proven, if possible, by the original writing.

Here, the fax would qualify as a writing. Dave will argue that the fax is the functional equivalent of the document that went through the machine. He can analogize the fax (facsimile) to a xerox copy or duplicate since the machine does not alter the contents.

Further, since Dave is not in control of the original and it can be presumed destroyed or unavailable due to no fault of Dave's, the copy will be admissible.

Hearsay

An out of court statement by one other than the declarant offered for the truth of the matter asserted.

Dave's introduction of the fax statement is hearsay since the statement was made outside of this proceeding and Dave is introducing it to prove that Paul was injured at work and not because of Dave's negligence. The statement will be excluded unless there is an applicable exception.

Admission by Party Opponent

A statement by the defendant admitting liability.

Here, the fax states that Paul gave up his membership the day before because of a work related injury. Since this testimony disputes Paul's negligence claim, it will suffice as an admission by party opponent.

Prior Inconsistent Statement

Under the Federal Rules of Evidence, a prior inconsistent statement is admissible as non-hearsay. Paul's testimony at trial that he was injured due to Dave's negligence is inconsistent with the statement in the fax dated one day before the accident. Dave would be able to introduce the fax if Paul had been given a chance to explain or deny the contradiction.

Acts of Legal Significance

Acts of independent legal significance are non-hearsay.

Dave may argue that the fax is being introduced to show that Paul ended his membership prior to the accident and not for the truth of the admission. The independent act of severing the contractual relationship would tend to establish no duty owed to Paul since Paul would be a trespasser.

Therefore, under the theories stated above, the fax, if properly authenticated should be admissible.

3. Testimony of William

Relevance

Defined above. Here, Dave is seeking to establish non-liability due to an absence of an entry

or in the alternative that Paul did not report the accident, thus, going to disprove Dave's negligence.

Hearsay

Defined above. William's testimony regarding the lack of an entry or report of injury would qualify as hearsay since William is seeking to testify about a non-statement.

Business Records Exception

A record kept during the regular course of business by someone with a duty to record, at or near the time of the event, by someone with personal knowledge is exempt from the hearsay rule.

William was the manager of Dave's gym on the day of the accident. Although normally a trainer in Dave's employ, William on the day in question, may have had a duty to record all problems with the machines. Courts have held that the lack of an entry, when an entry is generally made, may be admissible to dispute the existence of the claim. Thus if William, in his ordinary course of business as Dave's manager, was expected to record injuries or problems, his testimony may be admitted.

4. Permitting the Cross Examination Question of William

Cross Examination

The scope of cross examination is generally limited to areas raised in direct.

Here, Dave's direct examination of William raised the issue of an absence of a log entry in order to prove no injury to Paul. Since Dave "opened the door," Paul is entitled to walk through it. The scope of the question was proper.

Was the Question Proper?

A party may ask leading questions on cross examination.

Here, Paul's question to William asked, "Is it not true that you had entered into a log that someone had been injured on the day of the alleged accident?" Since this question seeks an answer which is implied from the question, it is leading. However, leading questions are proper on cross examination.

Assuming that Paul had a good faith belief that William had in fact made such an entry, the question would be proper. On the other hand, a party may not treat cross examination as a fishing expedition.

Absent a finding of bad faith on Paul's part, the court did not err in permitting the question.

Jury Instruction

A prior inconsistent statement may be used for impeachment and as substantive proof.

Here, before William answered Paul's question regarding the log book, the judge instructed that the jury could only use the answer to impeach William. This presupposes that the answer contradicted William's prior testimony.

If William answered in the affirmative, Paul's rebuttal would be used as impeachment. Further, since William would be subjecting himself to further penalties, including perjury, the statement would be evidence of a declaration against interest and thus add to the veracity of the

statement. Paul therefore could use the statement or entry as substantive proof of Dave's negligence.

If William answered in the negative, Paul would be bound by the answer and could not introduce the entry for either impeachment or substantive.

Therefore, the judge erred in issuing the jury instruction solely as impeachment.

Motion for Mistrial

The role of the jury is to decide the matters of fact as presented in court. A motion for mistrial may be granted for juror misconduct.

Here, Dave moves for a mistrial based on juror misconduct. A juror, while deliberating, used information not provided at trial, the information was disseminated to the other jurors during deliberations. Since the entire jury was tainted by this information, and the court was made aware by independent sources, not another juror, the court should grant Dave's motion for mistrial.