

July 2004
Question 6

Jack owned the world's largest uncut diamond, the "Star," worth \$1 million uncut, but \$3 million if cut into finished gems. Of the 20 master diamond cutters in the world, 19 declined to undertake the task because of the degree of difficulty. One mistake would shatter the Star into worthless fragments.

One master diamond cutter, Chip, studied the Star and agreed with Jack in writing to cut the Star for \$100,000, payable upon successful completion. As Chip was crossing the street to enter Jack's premises to cut the Star, Chip was knocked down by a slow moving car driven by Wilbur. Wilbur had driven through a red light and did not see Chip, who was crossing with the light. Chip suffered a gash on his leg, which bled profusely. Though an ordinary person would have recovered easily, Chip was a hemophiliac (uncontrollable bleeder) and died as a result of the injury. Chip left a widow, Melinda.

Jack, who still has the uncut Star, engaged Lawyer to sue Wilbur in negligence for the \$2 million difference between the value of the diamond as cut and as uncut. Lawyer allowed the applicable statute of limitations to expire without filing suit.

1. What claims, if any, may Melinda assert against Wilbur, and what damages, if any, may she recover? Discuss.

2. What claims, if any, may Jack assert against Lawyer, and what damages, if any, may he recover? Discuss.

Answer A to Question 6

6)

WHAT CLAIMS, IF ANY, MAY MELINDA ASSERT AGAINST WILBUR, AND WHAT DAMAGES, IF ANY, MAY SHE RECOVER?

Standing - Melinda, the widow of Chip, will sue Wilbur either as his representative under a survival action or for wrongful death as his widow.

Melinda v. Wilbur

Negligence - a breach of duty which is the actual and proximate cause of damage to the plaintiff.

Duty - as the driver of a car, Wilbur owed a duty of reasonable care to the people who were within the zone of danger (Cardozo) or the entire world (Andrews view). Chip, as a person crossing the street in front of Wilbur, was within the zone of danger and therefore owed a duty by Wilbur.

Breach - Wilbur drove through a red light and hit Chip because he did not see him. In driving through the red light, Wilbur was probably negligent. Negligence per se may be implied if driving through a red light is a violation of an applicable law, since Chip would be the kind of person that such a law would be designed to protect.

Causation - actual - but for Wilbur driving through the light and striking Chip, Chip would not have died.

Causation - proximate - it was foreseeable on Wilbur's part that driving through a red light would injure someone. The fact that Wilbur did not see Chip would not relieve him of liability. Wilbur may argue that the fact that Chip actually died was the result of his hemophilia, which caused him to bleed to death when another person would have easily recovered from the gash in his leg. Wilbur may argue that it was not foreseeable that Chip had this condition and that therefore the cause of Chip's death was not caused by Wilbur.

However, hemophilia is a pre-existing condition, and the rule in negligence cases is that the defendant takes his victim as he finds him. This is analogous to the "soft skull" cases where a particular plaintiff was particularly susceptible to injury. Therefore, the hemophilia defense will not work.

Damages:

Lost earnings - future earnings are allowed in negligence actions. The court would compute the amount of time that Chip probably would have lived, using some form of

actuary table. The fact that Chip was a hemophiliac would be relevant to possibly reducing the amount of future earnings allowed by discovering what the expected lifespan of a hemophiliac of Chip's age and general health is. The amount of future earnings would be reduced to present-day value, because only one recovery is allowed. However, no reduction would be allowed for the fact that Chip is engaged in an especially lucrative profession; again, Wilbur has to take his victim as he finds him.

Particular earnings - the \$100,000 under the contract is not going to be earned at this point, because the contract between Jack and Chip said that the \$100,000 would only be paid upon successful completion. Completion will never take place, because Chip is now dead, and Chip's performance was a condition precedent to Jack's obligation to pay. This money would have gone to Chip, but Melinda can bring the suit as the representative of his estate. She does not need to show that she is a third party beneficiary because she is not attempting to enforce the contract itself, but to show that Chip would have recovered under the contract if he had not been injured. However, if forced to rely on a third-party beneficiary claim she would probably fail because she was not an intended beneficiary of the contract between Chip and Jack, but merely an incidental beneficiary.

The question will be whether or not Chip would have successfully completed cutting the Star had he not been struck by Wilbur's car. If it appears that he would have completed, then it is possible that this \$100,000 could be recovered. However, there is a very strong argument that Chip would not have completed the task. 19 of 20 master diamond cutters in the world declined the job because they thought that they could never do it without shattering the Star. This means that in the professional judgment of men and women who are masters in their field, 95% of them (19/20) turned the job down as impossible. Since the burden of proof in a civil action is a preponderance of the evidence (51 %), it is almost certain that the burden of proof cannot be met here to show that the \$100,000 would have been recovered had Wilbur not knocked down Chip.

Melinda will probably not recover the \$100,000.

Loss of consortium - as Chip's wife, Melinda can get damages for loss of companionship.

Punitive damages - not usually available in negligence cases unless the action of Wilbur in driving through the red light was gross negligence. We have no evidence of gross negligence here, however, since Wilbur was moving slowly at the time he struck Chip.

WHAT CLAIMS, IF ANY, MAY JACK ASSERT AGAINST LAWYER, AND WHAT DAMAGES, IF ANY, MAY HE RECOVER?

Jack v. Lawyer

Jack will sue Lawyer for malpractice.

Duty - Lawyer had a duty to act in a competent manner and as a reasonable attorney under the circumstances. There was a client-lawyer relationship between Jack and Lawyer, and so the duty was owed to Jack.

Breach - Lawyer breached this duty by not filing the lawsuit until the statute had run. This was something that a competent attorney would not have done.

Causation - actual - but for Lawyer failing to file the suit, the statute would not have run and Jack

would still have a cause of action against Chip.

Causation - proximate - it was foreseeable that failing to file the suit would result in the suit being barred by the statute.

Damages - Jack will claim that he should recover from Lawyer the same thing he would have recovered had Lawyer not been incompetent and failed to file the suit. This means we must look to Wilbur's liability to Jack, because the mere fact that Lawyer was incompetent does not mean that Jack is immediately entitled to a recovery; the lawyer is not the insurer of the validity of the client's claim such that a client can get an automatic recovery from the lawyer if the lawyer breaches some duty of care in regards to the client where the claim was one which had a low chance of success.

Hypothetical lawsuit - Jack v. Wilbur

Negligence - supra.

Duty - Jack will have a very difficult time proving that Wilbur owed him a duty. Wilbur was driving down the street and ran a red light. It is difficult to argue that Wilbur owes a duty to Jack, who was probably in his house across the street and was not physically harmed by Wilbur's actions. Jack was probably well outside the zone of danger which resulted from driving a car down the street.

Jack can probably not show that he was owed a duty by Wilbur. If he can, then he will attempt to show breach, causation, and damages.

Breach - If Jack can show a duty owed by Wilbur, then driving through the light probably breached this duty.

Causation - but for Wilbur driving through the light, Chip would not have been injured.

Causation - proximate - it was probably not foreseeable that driving through the light and hitting someone would cause damages to Jack, who was not at the scene; furthermore, these are only economic damages without physical damages[,] which are not the kind of harm anticipated by the breach of duty.

Damages - Jack would have had the same problem showing that the job would have been completed as Melinda: the chance of the job actually being finished is so low and difficult to prove that a court would almost certainly not allow a recovery in this case.

The question will be whether or not Chip would have successfully completed cutting the Star had he not been struck by Wilbur's car. If it appears that he would have completed, then it is possible that this \$100,000 could be recovered. However, there is a very strong argument that Chip would not have completed the task. 19 of 20 master diamond cutters in the world declined the job because they thought that they could never do it without shattering the Star. This means that in the professional judgment of men and women who are masters in their field, 95% of them (19/20) turned the job down as impossible. Since the burden of proof in a civil action is a preponderance of the evidence (51 %), it is almost certain that the burden of proof cannot be met here to show that the \$100,000 would have been recovered had Wilbur not knocked down Chip.

Furthermore, Jack only has economic damages under a contract to which Wilbur was not a party.

Contract- because Wilbur was not a party to the contract and did not intentionally interfere with the contractual relations of Wilbur and Jack, it is unlikely that Wilbur can be sued for interference with this contract.

Jack will probably not recover from Lawyer, due to the fact that Chip actually cutting the Star properly was extremely unlikely to occur.

Answer B to Question 6

6)

1. Melinda v. Wilbur

The issue is what claims if any may Melinda, Chip's widow, assert against Wilbur, and what

damages, if any, may she recover?

Survival/Wrongful Death

The executor of a decedent's estate or certain other individuals (spouses, children) enumerated by the state's wrongful death statute may assert a claim against a tortfeasor for damages caused by the tortfeasor's negligence through a wrongful death claim. In a wrongful death action, the executor or other specifically enumerated individual steps into the shoes of the decedent for purposes of asserting the claim on the decedent's estate's behalf. If the decedent survived for even a brief period of time, a claim for survival is also permissible. In both actions, the party asserting the claim is required to prove the underlying tort she alleges lead [sic] to the decedent's death. Thus, Melinda may assert a wrongful death and survivorship claim against Wilbur because Chip survived long enough to bleed to death after the accident before dying.

Negligence

Melinda should claim that Wilbur's negligence in running through a red light caused Chip's death. To assert a successful negligence claim, the plaintiff must demonstrate: (1) a duty owed to her by the defendant; (2) a breach of that duty by the defendant; (3) causation; and (4) damages. As explained below, she can establish each element.

An individual owes a duty to others to act as a reasonably prudent person would in similar circumstances. A reasonably prudent person does not drive through red lights. Thus, Wilbur owed a duty to Chip to not drive through a red light.

A breach is demonstrated by showing that the defendant failed to act as a reasonably prudent person would've acted in similar circumstances. Here, Wilbur breached that duty by driving through a red light. This action also likely constitutes negligence per se. Negligence per se arises when a statute prohibits behavior engaged in by the defendant (here, running through a red light) to protect individuals (like Chip) from harm (injury by failure to stop at a red light). In the presence of such facts, a duty and breach is presumed.

Causation is divided into two parts: (1) factual causation and (2) proximate causation. Factual causation is typically referred to as the "but-for-test," i.e., but for the defendant's negligent conduct the plaintiff would not have been harmed. Here, but for Wilbur's failure to stop at the red light, Chip[,] who was crossing with the light[,] would not have been injured and then died.

Proximate causation relates to issues of foreseeability. The question is whether the harmed [sic] suffered by plaintiff is foreseeable or rather if some intervening act cuts off the defendant's liability. Wilbur will likely claim that Chip's injuries were not foreseeable because an ordinary person would not have died from a gash on his leg. Here, Chip was a hemophiliac and died as a result of this condition[,] not because of a gash. Running a red light, however, may result in injury to another which could include death, thus proximate causation is clearly present.

Wilbur may also attempt to argue that a defense exists because Chip was comparatively negligent and had the last clear chance to avoid the accident. Defenses to negligence include contributory negligence, which cuts off a plaintiff's right to damages if he shares in the negligence in

any way, comparative fault[,] which apportions damages based upon the plaintiff's negligent acts (and in some states limits recovery all together if the plaintiff is more negligent than the defendant), and the last clear chance doctrine, which denies a plaintiff recovery if he had the last opportunity to avoid the accident.

Contributory negligence has been abolished in almost all states and should not come into play here. But what about comparative fault? Wilbur was in a slow moving car so that Chip might have avoided the accident by merely stepping out of the way. This defense seems likely to fail since the facts indicate Chip was crossing with the light. Even if Chip is somewhat negligent for failing to avoid the accident, it is doubtful that his negligence is enough to deny him recovery.

Negligence Damages

A successful negligence plaintiff may recover compensatory damages. Compensatory damages must be certain, foreseeable, and unavoidable. These damages can be divided into economic and non-economic damages which include medical bills, lost wages, and pain and suffering. Chip's estate is entitled to medical bills, funeral expenses, lost wages, and pain and suffering damages. These damages must be reduced to present value after inflation is taken into account.

Here, Wilbur will attempt to argue that some if not all of the damages were not foreseeable. Specifically, he will claim that Chip's death was unforeseeable because an ordinary person would not have bleed [sic] to death after suffering a minor gash to the leg. This claim will fail because of the eggshell-skull doctrine which requires the defendant to take the plaintiff as he finds him. This plaintiff, unfortunately for Wilbur, was a hemophiliac and dies. It sucks to be Wilbur.

Wilbur may also attempt to argue that some if not all of the damages were unavoidable because his car was moving slow and Chip could've avoided the accident. As explained above, this factor may limit damages but not preclude them completely.

Finally, Wilbur may argue that some damages like lost wages (for instance the \$100,000 Chip would've made to cut the Star) are not certain. This may work as to this claim since 19 expert diamond cutters refused to take the job. But again it will simply limit recovery, not result in a denial altogether.

Loss of Consortium

A spouse may also assert a claim for loss of consortium if her spouse is injured by a tortfeasor. Here, Melinda may assert her own claim based on the fact that she lost certain benefits because of Chip's death. She will lose companionship; she will lose his assistance around the house and may have to hire someone to come in and take care of the chores he performed; and she may lose sex.

Since Wilbur caused Chip's death because of his negligence, Melinda should prevail on this claim. She can recover damages based on the amounts if any she paid for substitute services as well as for any other damages she can demonstrate based on the foregoing test.

Negligent Infliction of Emotional Distress

A family member may assert a claim for negligent infliction of emotional distress by demonstrating that she was within the zone of danger when the defendant's extreme and outrageous actions resulted in harm to a fellow family member. Although Melinda may assert the claim, Wilbur's actions do not appear to be extreme and outrageous and it is unlikely that she will recover on this claim.

Jack v. Lawyer

The next issue is what claims if any may Jack assert against Lawyer for failing to file his negligence claim against Wilbur within the applicable statute of limitations, and what damages may he recover if any.

Malpractice

A lawyer may be sued for malpractice if she breach[es] a duty to her client and this breach results in a harm to the client. To assert a successful claim against Lawyer, Jack must show the Lawyer's conduct fell below that of any other attorney practicing in the locale and that but for this breach of duty he would have not been harmed. Specifically, Jack must show the Lawyer (1) breached a duty to him; (2) causing damages.

A lawyer owes her client a duty to act as a reasonably prudent lawyer would while representing a client under similar circumstances. Here, a reasonable lawyer does not blow a statute of limitations. Lawyer's failure to file a negligence claim against Wilbur on Jack's behalf within the applicable statute of limitations is a breach of that duty. To demonstrate causation, Jack must show that but for the plaintiff's failure he would've succeeded on his claim against Wilbur.

This requires a brief analysis of Jack's potential negligence claim against Wilbur. The elements of a successful negligence claim have been stated above. First, Jack must show that Wilbur owed him a duty. A person owes a duty to act as reasonable person would [sic] in similar circumstances. But the duty extends only to all foreseeable plaintiffs per Pfalsgraf. Here, Wilbur didn't owe a duty to Jack because Jack was not a foreseeable victim to Wilbur's failure to stop at a red light. Accordingly, Jack cannot show that but for the Lawyer's failure to file a claim within the applicable statute of limitations his claim would've succeeded. Even if the Lawyer had filed the claim, which seems a bit frivolous, Jack still loses.

Accordingly, Jack cannot succeed on his claim against the Lawyer for failing to file that claim. Since his claim will not be meritorious, he cannot recover the damages ordinarily available to a successful claimant in a malpractice action, which include compensatory damages and might well have included damages resulting from his failure to be able to have the "Star" cut since no other master diamond cutter is willing to do it.

Breach of Contract

A contract is a legally enforceable agreement between two people. The facts only indicate that

Jack hired Lawyer to file this lawsuit. In California, however, a Lawyer is generally required to enter into a written agreement with a client relating to her representation of him. Assuming the presence of such an agreement, it was likely valid as a bilateral contract (mutual assent plus consideration based on the promises between both parties).

A breach occurs where no conditions exist to performance and the party required to perform fails to do so. Here, the Lawyer failed to file a claim even though she was required to do so. Accordingly, a breach occurred.

When a breach of contract occurs, several remedies are available to a successful party including compensatory damages (those necessary to place the non-breaching party in the same position he would've been in but for the breach), consequential damages (all damages foreseeable as a result [o]f the breach), perhaps liquidated damages. Restitutionary damages are permitted when the defendant confers a benefit on the plaintiff and it would be unjust for her to retain it. In the appropriate situation, injunctive relief, specific performance, rescission or reformation might also be appropriate.

Here, if the Lawyer breached a contract, then she owes Jack compensatory damages - - those necessary to place him in the same position he would've been in but for the breach. As explained above, he would still have lost so this is probably nothing. He is also not likely to recover consequential damages for the same reason. However, if he paid the Lawyer any money for her services she may be requi[r]ed to return any amounts that were not used to institute this action

Jack might also consider contacting the local bar association to report Lawyer's actions.