

Examination in Statutory Law & Analysis

Spring, 2000

Mr. Creswell

Exam #

Instructions:

The exam consists of two essay questions and six short answer questions. The total time allotted for all questions is three hours. You should allocate your time as follows:

Essay Question # 1: 60 minutes

Essay Question # 2: 60 minutes

6 Short Answer Questions: 10 minutes each – 60 minutes

I strongly suggest that you read through the entire set of exam questions before you attempt to answer any question to avoid repeating yourself. I will allow an extra 10 minutes for you to scan the entire exam before your three-hour time limit begins to run.

Even if the answer to a question seems obvious to you, be sure to explain your answer fully. Answers that are direct, concise and well written will earn more credit than rambling, disorganized dissertations. If you must make assumptions about what is being asked, note your assumption at the beginning of your answer. I will not answer questions after the exam has begun.

You may assume that your reader understands all terms that we have used during the semester (i.e., cognitive, creative, context, legislative history, statutory history, etc.). You need not define these and similar terms so long as you use them correctly and so long as the question does not ask directly for such an explanation.

You must turn in your bluebooks AND these questions. Put your exam number on each item.

Good luck!

Essay Question #1 (60 minutes)

Consider the following opinion:

Van Horn v. William Blanchard Co.
88 N.J. 91, 438 A.2d 552 (1981)

Clifford, J.

In this negligence action the jury returned a verdict finding plaintiff forty percent negligent, and each defendant thirty percent negligent. The trial court entered judgment in favor of defendants concluding that, despite the fact that plaintiff's negligence was not greater than the combined negligence of defendants, recovery was barred under the Comparative Negligence Act, N.J.S.A. 15-5.

On appeal plaintiff argued that "In multiple defendant cases, in order to avoid harsh and unfair results, the negligence of an individual plaintiff must be compared to the combined negligence of the several tortfeasors." According to plaintiff he was entitled to a judgment on liability inasmuch as his negligence (forty percent) was not greater than the aggregated negligence (sixty percent) of the two tortfeasors.

The Comparative Negligence Act of 1972 was our Legislature's response to the harshness of the complete bar to recovery imposed by the rule of contributory negligence. New Jersey has a "modified" comparative negligence system. Section 1 of the Act reads as follows:

Contributory negligence shall not bar recovery in an action to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of *the person* against whom recovery is sought, but any damages shall be diminished by the percentage of negligence attributable to the person recovering. [N.J.S.A. 15-5, emphasis added].

The Legislature's use of the singular "the person" rather than the plural form strongly suggests that the plaintiff's negligence should be compared to the negligence of only one person at a time.

Our Comparative Negligence Act was taken nearly verbatim from the Wisconsin comparative negligence statute. A legislative enactment patterned after a statute of another state is ordinarily adopted with the prior constructions placed on it by the highest court of the parent jurisdiction. 2A C. Sands, Sutherland Statutory Construction § 52.02 (4th ed. 1973). Hence it is significant that at the time New Jersey adopted the Wisconsin "modified" form of comparative negligence, the individual approach rather than the aggregate system was a fixture in Wisconsin law. See *Schwenn v. Loraine Hotel Co.*, 111 N.W.2d 495, 499-500 (Wis. 1961). In cases decided after New Jersey had embraced comparative negligence, Wisconsin continued to adhere to the principle that the comparison of negligence in multiple defendant cases must be between the plaintiff and each defendant individually. Whereas it is true that Wisconsin briefly embraced the

aggregate approach, *May v. Skelley Oil Co.*, 264 N.W.2d 574 (Wis. 1978), the departure was but a momentary aberration, as disclosed by *Reiter v. Dyken*, 95 Wis. 2d 461, 290 N.W.2d 510 (1980).

There are public policy considerations supporting both sides of the issue confronting the Court today. We would have difficulty deciding this case on the basis of notions of fairness or the practicality of the two approaches. However, the unmistakable preference of the Legislature for the individual approach persuades us that any change of our law in this area should come from the legislative rather than the judicial process. *Affirmed.*

Handler, J., *dissenting.*

The Court's conclusion that the New Jersey comparative negligence scheme embraces the individual approach is rooted in its belief that determinative weight must be given to the construction placed on the comparative negligence statute of Wisconsin by the courts of that state. It is true that New Jersey's Comparative Negligence Act mirrors Wisconsin's. The majority opinion assumes that in adopting a comparative negligence statute similar to Wisconsin's, our Legislature intended to embrace that state's judicial interpretation of its statute as well.

While references to the Wisconsin statute are present in the legislative history, there is nothing in that history to indicate that the Legislature, in adopting our statute, considered the central issue presented by this case — whether to employ the aggregate or the individual approach. In addition, the sponsors' statement accompanying the bill introduced in the Assembly did not refer exclusively to the Wisconsin approach. Rather, it read, in pertinent part: "This State will not be unique if it adopts the law of comparative negligence. Other jurisdictions such as Wisconsin, Arkansas, Georgia, Maine, Florida, Iowa, Mississippi, Nebraska, South Dakota, Puerto Rico, the Canal Zone, the Canadian provinces, etc., have a form of comparative negligence." Assem. No. 665 (Introduced Feb. 7, 1972). Therefore, it seems clear that the sponsors of the bill considered not only the law of Wisconsin but also that of a variety of jurisdictions, some of which adhere to the aggregate approach.

One such state, specifically mentioned by the sponsors, is Arkansas. Though its comparative negligence statute was couched in terms of singular usage, that state adopted the aggregate approach through judicial construction as early as 1962.

In 1978, the Oklahoma Supreme Court held that the state's comparative negligence statute, then phrased in the singular, should be interpreted to apply an aggregate approach. The court reasoned that its statute was based on the statutory scheme of both Wisconsin and Arkansas and that Arkansas' "aggregate" approach was preferable. *Laubach v. Morgan*, 588 P.2d 1071, 1073 (Okla. S.Ct. 1978).

In addition, the majority opinion singularly ignores a portion of the sponsor's statement that tends to support a conclusion that New Jersey policy favors aggregating the negligence of multiple tortfeasors for purposes of implementing the comparative negligence statute. "The law

of comparative negligence will bring to our state's courts the ability to do justice in negligence cases where plaintiff is not totally free of negligence. No longer will a negligent plaintiff be left remediless against *those* whose negligence was the predominant factor in his injury." Assem. No. 665 (Introduced Feb. 7, 1972). This use of the plural pronoun clearly contemplates an aggregate approach to quantifying defendant negligence.

In opting to follow exactly or literally the Wisconsin judicial interpretation of the Comparative Negligence Act, this Court has abandoned any genuine interpretation of the Act and has walled off its analysis from any considerations of public policy. Yet no compelling argument is made why the decisions of the Wisconsin Supreme Court should be clamped around this State's comparative negligence law like an iron girdle, yielding no breathing room for our own tort law jurisprudence and public policy. In light of a legislative history that does not dictate such a course, our deliberations should be aired fully with reflections of our own public policy and legal traditions.

I respectfully decline to join the opinion of the majority.

The above opinion in *Van Horn v. William Blanchard Co.* was rendered by the Supreme Court of New Jersey in 1981. Since that time, the issue has not been addressed by either the Supreme Court or the legislature.

Earlier this year the Supreme Court granted certiorari to review another case, *Valentine v. Wilcox Moving, Inc.*, that poses the identical issue that was decided in *Van Horn*. You are the justice appointed to write the majority opinion of the Court in the *Valentine* case.

Write a persuasive opinion. Be sure to address major arguments of both appellant and appellee, giving your reasons for your embracing or rejecting each.

Essay Question #2 (60 minutes)

Martin Green was indicted and convicted of four counts of violating Section 711 of the state Criminal Code of 1980, one component of the Official Code of the State of Mercer, originally adopted in 1880 and amended in succeeding years. He was in unlawful possession of three items of personal property belonging to others, as follows:

- a thoroughbred racehorse belonging to Elizabeth Equestrian,
- a fork lift belonging to Home Depot, Inc., and
- a auto-transport trailer belonging to Car-Max, Inc.

The horse is a former champion, presently valued at \$500,000 for breeding purposes. The motorized, locomotive fork lift is designed to be driven in a warehouse setting to move goods on pallets. The auto-transport trailer has no engine and is designed to be loaded with automobiles and pulled by a tractor on the highways as a tractor-trailer rig.

Martin Green was arrested while parking his pickup truck in his barn, in which the personal property listed above was found. On the rear seat of the extended cab pickup was a duffel bag containing 13 pistols. Green received the maximum sentence for each count on which he was indicted, with the sentences to run consecutively. Relevant statutes are as follows:

Criminal Code Section 101: As used in this Criminal Code, "vehicle" means any device for transportation by land, water, or air.

Criminal Code Section 711: A person commits a crime when he knowingly obtains or exerts unauthorized control over the vehicle of the owner under circumstances not amounting to theft. Violation of this section is a misdemeanor punishable by imprisonment for no more than one year, or a fine of no more than \$10,000, or both.

Sentencing Act of 1990: Upon conviction of more than one count of violation of any section or sections of the Criminal Code, the judge shall impose sentences to run concurrently, unless the defendant is found to have committed the offenses, or any one of them, while carrying a concealed deadly weapon upon or about his person in which case the judge shall impose sentences to run consecutively.

Interpretation Act of 1880: As used in this Code, "vehicle" includes horses, mules, donkeys, jennies, jacks, buckboards, wagons, surreys, buggies, carriages, and other conveyances of every description.

Amendment, enacted 1910: The Interpretation Act of 1880 is hereby amended by inserting after the word "carriages" and before the word "and", the words "horseless carriages." (*There have been no amendments to the Interpretation Act since 1910.*)

On appeal of the trial court's judgment, what result? Why?

Short Answer Questions (10 minutes each)

1. The United States House of Representatives voted by a 2/3 majority to expel the elected representative from Florida's 10th district for her statements at a press conference in the "Little Havana" neighborhood of Miami, Florida advocating a civil uprising to establish that part of the city as a self-governing "Republic of Cuba in Exile." If the expelled Congresswoman sues the House Sergeant-at-Arms seeking an injunction requiring him to seat her as a member of Congress and sues the House payroll clerk seeking damages in the amount of salary payments accruing during her enforced expulsion, what likely results and why?
2. United States Senator Walter F. Gorge was sued by Professor Micah D. Stabbeth for defamation. The suit asserts that Senator Gorge falsely accused Professor Stabbeth of plagiarism during a Senate Appropriations Committee hearing on the federal budget. During that hearing, Dean Harry Dissem, who appeared as a witness in favor of an appropriation to support a program of federal tuition grants for law students, asked Senator Gorge why the senator was opposed to the appropriation. Senator Gorge replied "Because law schools like yours have professors like Micah Stabbeth who steal all the ideas for his speeches from his law students. He's a cheat and a fraud." Senator Gorge later reprinted his quoted statements as excerpts from the transcript of the committee hearing and mailed them to prospective law students all across the country and to all registered voters in his home state of Georgia. If Senator Gorge moves to dismiss Professor Stabbeth's defamation complaint, what result and why?
3. In the General Assembly of the State of Georgia, a bill was introduced entitled "A bill to enact the Georgia Beautification and Tourism Promotion Act of 2000, to provide for the planting of wild flowers along state highways, to provide for the replacement of roadside billboards by approved highway information signs, to provide for a tourism tax of 10% on all hotel and motel lodging facilities, to provide for appropriations to finance a nationwide publicity campaign for tourist attractions in Georgia, and to provide for the replacement of the Georgia state flag with a flag of less objectionable design." The bill was enacted and duly signed by the Georgia governor. A group called "Fans of the Flag" have sued to have the act declared unconstitutional under Georgia's constitutional provision that reads "All bills shall have but one subject and that shall be reflected in the title." What likely result and why?

4. What is the interpretative rule known as "*Ejusdem Generis*"? How, if at all, should a court employ that rule?

5. A 1990 federal statute requires agricultural employers to provide disability benefits to all employees who suffer disabling injury from exposure to agricultural chemicals in the course of their employment. In 1999 this statute was amended to extend disability benefits to all former employees of agricultural employers. If the employers challenge the constitutionality of the statute, what standards will be employed by the courts? What likely result and why?

6. State the best reasons *in favor of* "the Chevron rule" (requiring courts to defer to statutory interpretation by the executive agency in charge of implementing a statute so long as the agency's interpretation is a permissible one).