

Question 1

Patty is in the business of transporting human organs for transplant in City. She is paid only upon timely delivery of a viable organ; the delay of an hour can make an organ nonviable.

David transports gasoline over long distances in a tank truck. Recently, he was hauling gasoline through City. As David was crossing a bridge in City, his truck skidded on an oily patch and became wedged across the roadway, blocking all traffic in both directions for two hours.

Patty was delivering a kidney and was on the bridge several cars behind David when the accident occurred. The traffic jam caused Patty to be two hours late in making her delivery and made the kidney nonviable. Consequently, she was not paid the \$1,000 fee she would otherwise have received.

Patty contacted Art, a lawyer, and told him that she wanted to sue David for the loss of her fee. "There isn't a lot of money involved," she said, "but I want to teach David a lesson. David can't possibly afford the legal fees to defend this case, so maybe we can put him out of business."

Art agreed and, concluding that he could not prove negligence against David, decided that the only plausible claim would be one based on strict liability for ultrahazardous activity. Art filed a suit based on that theory against David on behalf of Patty, seeking recovery of damages to cover the \$1,000 fee Patty lost. The facts recited in the first three paragraphs above appeared on the face of the complaint.

David filed a motion to dismiss. The court granted the motion on the grounds that the complaint failed to state a cause of action and that, in any event, the damages alleged were not recoverable. It entered judgment in David's favor.

David then filed suit against Patty and Art for malicious prosecution.

1. Did the court correctly grant David's motion to dismiss on the grounds stated? Discuss.
2. What is the likely outcome of David's suit for malicious prosecution against Patty and Art? Discuss.

Question 1

Torts – Civil Procedure & Professional Responsibility

Patty is in the business of transporting human organs for transplant in City. She is paid only upon timely delivery of a viable organ; (This is economic harm) the delay of an hour can make an organ nonviable.

David transports gasoline over long distances in a tank truck. (The transportation of gasoline is an activity that is common in the community) Recently, he was hauling gasoline through City. As David was crossing a bridge in City, his truck skidded on an oily patch (There are no facts to indicate David is negligent) and became wedged across the roadway, blocking all traffic in both directions for two hours.

Patty was delivering a kidney and was on the bridge several cars behind David when the accident occurred. The traffic jam caused Patty to be two hours late in making her delivery and made the kidney nonviable. (Patty’s late delivery is not a foreseeable cause of David’s activity. Proximate cause is lacking. More importantly, the inherent dangerousness of hauling explosives was not the “cause” of Patty’s economic loss) Consequently, she was not paid the \$1,000 fee she would otherwise have received. (Pure economic loss is not recoverable without personal injury or property damage)

Patty contacted Art, a lawyer, and told him (Art is aware of Patty’s reason for instituting her civil suit) that she wanted to sue David for the loss of her fee. “There isn’t a lot of money involved,” she said, “but I want to teach David a lesson. (Patty is using the judicial process for an ulterior purpose and not its intended purpose) David can’t possibly afford the legal fees to defend this case, so maybe we can put him out of business.” (Patty’s suit is based on an improper purpose)

Art agreed and, concluding that he could not prove negligence against David, decided that the only plausible claim would be one based on strict liability (Not a federal claim) for ultrahazardous activity. (Assuming transporting gasoline is ultrahazardous, the gasoline did not “cause” Patty’s loss) Art filed a suit based on that theory (Art should have the competence to realize this suit is not meritorious) against David on behalf of Patty, seeking recovery of damages to cover the \$1,000 (The amount in controversy does not exceed \$75,000. Thus, it is in state court) fee Patty lost. (Economic loss alone cannot be recovered. There must be property damage or personal injury) The facts recited in the first three paragraphs above appeared on the face of the complaint. (Based on the pleadings, there is no “probable cause” to bring this suit)

David filed a motion to dismiss. The court granted the motion (Terminated in David’s favor) on the grounds that the complaint failed to state a cause of action and (The word “and” indicates the bar committee expected your answer in call 1. to be divided into the two grounds the court ruled on) that, in any event, the damages alleged were not recoverable. (Pure economic loss is not recoverable here) It entered judgment in David’s favor.

David then filed suit against Patty and Art for malicious prosecution. (The focus is whether Patty’s original suit was intended to harass David because it was not based on probable cause)

A Discussion Worthy of Attention

This was a nice essay to start your bar exam. It wasn't particularly difficult. The State Bar titled this a Torts-Civil Procedure essay. The Civil Procedure issues were likely minor. The calls of the question did a good job laying out the issues they wanted you to discuss, the motion to dismiss (no claim for ultrahazardous) and economic loss. They also gave you the tort of Malicious Prosecution and many facts to support David's claim. I felt there were also some minor Professional Responsibility issues here as well.

As you will see there wasn't a need for a rote memorization of law, there rarely is. To solve this essay you simply had to understand that the dangerous element of gasoline did not "cause" any harm. That was pretty much it. Paying attention to detail and understanding the fact pattern is always most important. *Note*: The issues and the lay out within were specifically what the bar exam committee was likely looking on this question.

Model Answer by One-Timers ©

1. Did the court correctly grant David's motion to dismiss on the grounds stated?

The court correctly granted David's motion because the transportation of gasoline is an activity that is of common usage in every community. More importantly, the grave risk of harm associated with transporting gasoline (likelihood of explosions) did not "cause" Patty's loss. Additionally, the court correctly ruled that the damages Patty alleged were not recoverable because "pure economic loss" not linked to any physical injury or property damage is not actionable.

Motion to Dismiss for Failure to State a Cause of Action

Under California's Code of Civil Procedure (CCCP) § 430.10(e) the party against whom a complaint has been filed may object to the pleading that the pleading does not state facts sufficient to constitute a cause of action. *Note*: It can reasonably be assumed that this case is in state court for two reasons. First, Patty's claim is based on strict liability for ultrahazardous activity. It is not a federal question. In addition, diversity jurisdiction does not apply as the amount in controversy does not exceed \$75,000. For those reasons, the case is properly in state court.

Here, David filed a motion to dismiss Patty's suit based on strict liability for ultrahazardous activity. The complaint contained specific facts on which Patty based her theory of recovery. The court granted David's motion and dismissed the suit. The issue is now whether Patty asserted enough facts sufficient to constitute a cause of action.

Pleadings (California Fact or Code Pleadings)

Under California's Code of Civil Procedure § 425.10 a complaint shall contain a statement of the facts constituting the cause of action and a demand for relief. California is a fact or code pleading jurisdiction. Thus, the plaintiff needs to plead facts sufficient to support each element of the claim.

Here, the facts within are the only ones that appeared on the face of the complaint. A court will only look at the four corners of a complaint and not consider any extraneous evidence. This entire incident took place in City. Thus, it is probably not a federal case unless it is based on diversity. Under California law, to survive David's motion to dismiss, Patty needs to plead enough facts sufficient for her to prevail under strict liability for ultrahazardous activity.

Strict Liability for Ultrahazardous Activities

Strict liability means liability without fault and can be imposed for ultrahazardous (or abnormally dangerous) activities which cannot be made safe or performed without serious risk of harm even if the defendant has exercised the utmost care. In order for an activity to be ultrahazardous it must not be commonly engaged in the particular community and the harm must be caused by the risk inherent with the abnormally dangerous activity. *See Rylands v. Fletcher*. Some examples include storage of flammable liquids, toxic chemicals, radiation, blasting, and explosives.

Factors the courts consider are the gravity of the harm, the ordinary nature of the activity, the value and interest to the community in comparison to the risk of harm and the inability to eliminate the risk by using reasonable care.

Here, it is questionable whether transporting gasoline over long distances is an abnormally dangerous activity. Gasoline is an unstable and highly volatile mixture of hydrocarbons and it would be difficult to contain an explosion no matter how much care is exercised. However, its transportation and use is a matter of common usage in every community.

Common Usage in the Community

In order for a defendant to be strictly liable for an ultrahazardous activity it cannot be typical in the community. The question is whether the activity is "a matter of common usage" in the locality.

In every city across this country, gasoline is prevalent. Its use and transportation is normal and ordinary. In addition, the value to the community outweighs the potential risk of harm an explosion would cause as it would be impracticable for a city to function without the use of gasoline. Thus, it should not be considered an ultrahazardous activity.

In the unlikely event a court were to hold this activity ultrahazardous, the nature of harm was not the cause of Patty's loss.

Causation

The scope of the duty owed is limited to the kind of danger to be expected from the inherent dangerousness of the activity.

Here, the truck is carrying gasoline. The type of harm and risk inherent with transporting a volatile material is an explosion of great force and magnitude. However, it wasn't an explosion that "caused" Patty's damage. It was the blocking of traffic from an accident that was completely unrelated to the dangerousness of the explosive and volatile nature of gasoline.

The fact that David's truck skidded on an oily patch and blocked traffic causing Patty to be late is not the type of harm inherent in the hauling of an explosive material. Thus, there is no causation.

Proximate Cause

Proximate cause is a limitation on liability and is concerned with foreseeability of the harm.

Here, David could not have reasonably foreseen, as a risk of hauling gasoline, that Patty would be two hours late in making her delivery causing her loss. This is not the usual consequence of hauling explosives. Since the harm caused was not reasonably foreseeable, there is no proximate cause.

Economic Loss

Generally, when a defendant's conduct causes solely economic loss there is no recovery absent physical injury or property damage. The *rational* behind such a rule is the concern about potential liability being out of proportion to fault and the difficulty in measuring damages.

Here, Patty was late in making her delivery and was not paid the \$1,000 fee she would have received but for David's accident. However, since she only suffered economic damages due to David's blocking traffic and no physical harm or property damage, she will be denied the right to recover. For those reasons, the court correctly granted David's motion on both grounds.

2. What is the likely outcome of David's suit for malicious prosecution against Patty and Art?

David has a good chance of prevailing in his suit against Patty and Art as the original suit against David was brought for an improper purpose and lacked probable cause.

Malicious Prosecution

In a suit for malicious prosecution (also known as the malicious institution of civil proceedings) the plaintiff will need to prove that the defendant originally:

- (i) instituted a civil proceeding;
- (ii) that was terminated in favor of the plaintiff;
- (iii) there was no probable cause for bringing the original suit;
- (iv) the original suit was brought for an improper purpose (bad faith); and
- (v) there were damages.

One defense that has been recognized is reliance on the advice of counsel. However, this defense is only applicable if the original plaintiff had a good faith belief for the original suit.

Here, Art filed a suit on behalf of Patty and thereafter, the court granted David's motion to dismiss the complaint. Thus, Art and Patty instituted a civil suit which terminated in David's favor. Those issues are not in dispute. However, whether there was probable cause to bring the original action is an important issue.

Probable Cause as to Patty

When Patty contacted Art she knew she would not reap a huge reward. That in itself does not mean there wasn't probable cause to bring the suit. After evaluating her case, Art decided that the only "plausible" claim against David would be based on strict liability for ultrahazardous activity. It was reasonable that Patty, a layperson, could rely on Art's profession advice and recommendation. Since the standard against Patty for malicious prosecution is different than Art's, she may have a good defense.

Art's Duty to Research (Competence)

Art did not include a negligence action because he concluded that he could not prove David's failure to exercise reasonable care. Thus, at first glance it seems David somewhat carefully evaluated Patty's claim and had probable cause for bringing the original suit. However, as discussed above, causation and economic loss is clearly lacking for Patty to prevail on her claim against David. While Patty may not have known this, Art definitely should have. By the nature of his profession and because Art is bound by the Rules of Professional Conduct, he is held to the standard of a reasonable competent lawyer and must handle matters by inquiry into the factual and legal elements of the problem. This requires the legal knowledge, skill, and thoroughness reasonably necessary for the representation. Based on the facts as they appeared on the complaint, Art did not have probable cause to institute Patty's suit against David and a competent attorney would have known it.

As to the improper purpose element, Patty did not use the judicial process for its intended purpose. She maliciously filed suit to "teach David a lesson" and potentially "put him out of business." Because Patty explained this to Art, he is equally culpable in bad faith.

David clearly has damages as he had to pay money to file the motion to dismiss as well as any embarrassment and humiliation he suffered. He may even acquire punitive damages.

On balance, it is likely that David will prevail against Art and has a respectable chance to recover against Patty.

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Answering each call of the question specifically and addressing each issue within it as well as numbering precisely and making logical coherent arguments supported by the law **7%**

1. Did the court correctly grant David's motion to dismiss on the grounds stated? **57%**

Motion to Dismiss for Failure to State a Cause of Action

Code Pleadings

Strict Liability for Ultrahazardous Activities

Common Usage in the Community

Causation

Proximate Cause

Economic Loss

2. What is the likely outcome of David's suit for malicious prosecution against Patty and Art? **36%**

Malicious Prosecution

Probable Cause

Art's Duty to Research (Competence)

This essay was written by Jason Tolerico (One-Timers Personal Bar Review Course ©). If you have any questions or wish to discuss this essay or any others, please feel free to contact me at (949) 500-7627 or jtlaws@gmail.com. It is an open invitation. Any critique, feedback, compliments or additions to this essay are welcome. Your opinion is valued and respected. Thank you. You may also find this essay at www.One-Timers.com