

San Luis Obispo College of Law

EVIDENCE

Mid Term Examination

FALL 2020

Professor S. Lizardo

INSTRUCTIONS:

There are three (3) questions in this examination.

You will be given four (4) hours to complete the examination.

QUESTION 1

Magician Shazam was performing on the stage of the Hocus Pocus Magic Castle. During his performance, Vicki assisted. Shazam requested that Vicki hold a bouquet of roses and he would make the flowers disappear. Shazam said, "Abracadabra," but the bouquet and nearby stage curtains accidentally caught on fire instead of disappearing. As a result of the fire, Vicki's hands were severely burned.

As Vicki was being taken to the hospital, Shazam handed Vicki a note. The note read, "I am so sorry. I will pay for your medical expenses." Two days later, the manager from Hocus Pocus, visited Vicki in the hospital and asked her, "Will you take \$75,000 to settle this case?" Vicki declined.

For the next magic shows, Shazam gave the audience volunteers fire retardant gloves when performing the bouquet trick. Also, fire retardant curtains were installed. No further injuries occurred. Vicki sued the Hocus Pocus Magic Castle and Shazam for her personal injuries. The Castle denied liability arguing that Shazam was not performing on the Castle's premises.

Assume the following occurred at the jury trial in a California state court. Discuss all evidentiary issues and arguments that would likely arise in each section below. Assume the proper objections were made. How should the court rule on each of the evidentiary objections or arguments?

Do not address hearsay related issues. Answer according to **California Law.**

1. During Vicki's case, she testified about holding the bouquet which caught on fire burning her hands. Then, she offered the note from Shazam into evidence.
2. Next, Vicki testified that the manager of Hocus Pocus offered her \$75,000 to settle the case. She declined.
3. Next, Vicki offered into evidence that after her accident, Shazam required volunteers wear fire retardant gloves and retardant curtains were installed by Hocus Pocus Magic Castle.
4. Finally, Vicki offers the Hocus Pocus insurance liability policy which states the stage is part of the premises.

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QUESTION 2

Doug is prosecuted for the crime of first-degree murder in the case of People of the State of X v. Doug.

Doug is the vice president at Boogle, a high-tech firm in Silicon Valley that was founded by his wife's father, Steve Works. Boogle occupies the 10th floor of a high-rise building. Vicky was a junior member of a Boogle team responsible for rolling out a new application for Boogle. Doug and Vicky had been working closely together over the six months preceding the homicide. Investigation subsequent to the homicide revealed that Doug and Vicky were having a secret romantic relationship.

On January 15, 2020, at 10:00 p.m. Walter, a Boogle employee, was working at his desk located in the east wing of Boogle when he heard a female voice yell and heard a crash coming from the west wing of the Boogle office. Walter walked to the area from where he heard the noise saw an open window. Walter looked out the window and saw Vicky lying motionless on the sidewalk outside the Boogle office. Walter called 911 minutes later. Walter told the 911 operator what he heard and saw and that only he (Walter), Doug and Vicky were in the office at the time of Vicky's fall. Police arrive and determine that Vicky died as a result of the injuries she sustained from falling out of the 10th floor window. After an investigation, the State charges Doug with Vicky's murder. Doug's defense is that Vicky committed suicide.

Assume that the following occurred in the jury trial of Doug. Discuss all the evidentiary issues and arguments that would likely arise in each section below, including objections, if any and the likely trial court ruling on the admissibility of the evidence. Apply the **Federal Rules of Evidence**.

1. In a pre-trial motion, the Prosecution seeks a ruling on the admissibility of the testimony of the 911 operator who would relate the conversation Walter had with the 911 operator. The prosecution presents evidence that Walter retired immediately after Vicky's death. Despite diligent efforts to locate Walter, the prosecution was unable to locate him for trial. The Defense objects.

2. The Prosecution calls Matt as their first witness. Matt testifies that he is an employee of Boogle and worked with Doug and Vicky. On January 13, 2020, two days before the homicide, Matt was working late at the Boogle office. Matt left the office at 10:45 p.m. but forgot his car key and had to go back into the office to retrieve it. When Matt got out of the elevator on the 10th floor, Matt heard Doug and Vicky talking. Doug told Vicky calmly, "I will not leave my wife for you. I am ending this affair". Vicky responded, "You can end the affair, but I am telling your wife and having the baby!" The Defense Objects.

3. Next, the Prosecution calls Doug's wife, Delores, as a witness.

Delores authenticates her prenuptial agreement with Doug. The prenuptial agreement includes an infidelity clause that states that if one party is proved to have been involved in an extramarital affair, the other spouse will receive \$10 million in a subsequent divorce settlement. The prosecutor seeks to introduce the prenuptial agreement into evidence. The defense objects.

4. Doug subpoenaed Vicky's social media records prior to trial. On Vicky's "ClapChat" page, Vicky posted, "I have nothing left to live for" on January 15, 2020 at 6:00 p.m. In the Defense case in chief, the Defense introduces the properly authenticated post from Vicky's ClapChat page. The Prosecution objects.

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QUESTION 3

Dwight, the safety supervisor for a local paper company, DM Inc., gave a PowerPoint presentation to his coworkers on emergency procedures in case of a fire. Dwight was dismayed when nobody in the office paid attention to his presentation. To seek revenge on his coworkers, and to reinforce the valuable safety lessons, Dwight hatched a plan to simulate a fire emergency. The week after the PowerPoint, and using special access keys given to him in light of his status as safety supervisor, Dwight locked all the outer doors of the office, disconnected the phone lines, and then lit a fire in a wastepaper basket to create smoke. When Dwight's coworkers noticed the smoke, they leapt to their feet in a panic and began trying to get out of the office. Dwight, eager to see his coworkers learn their lesson, began guiding them through the procedures, such as checking the temperature of door handles and reminding them to call authorities. Despite Dwight's best efforts to maintain peace, all the office workers were swept up in a mass panic. Dwight, fearing the exercise had gotten out of control, used a bullhorn to get his coworkers' attention and announced that the fire had been nothing more than a simulation. Stanley, one of the veteran salesman, immediately fell to floor, suffering a major myocardial infarction (a heart attack).

Dwight was disciplined by the company, and demoted from the position of safety supervisor. Stanley sued Dwight and DM Inc. in federal court for intentional and negligent infliction of emotional distress as well as negligent entrustment under the theory that the company should not have provided Dwight the position of safety supervisor in the first place. The medical bills and other damages from Stanley's heart attack, including pain and suffering, were over 5 million dollars.

Stanley proffers the following evidence:

- 1) Oscar, an accountant at the paper company, would testify that on a prior occasion, Dwight called in a bomb threat - both to DM Inc. and to the police - because his coworkers did not pay attention to his bomb threat PowerPoint. Dwight was never disciplined by the company on that prior occasion, but he was terminated from his job

as a Volunteer Sheriff's Deputy because calling in a false bomb threat is a misdemeanor in that jurisdiction.

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- 2) Mose, Dwight's cousin, who has developmental disabilities, would testify that, three weeks after the fire simulation incident, when Dwight was acting manager for 3 days, Dwight wore a revolver in a holster around the office for several hours. When his coworkers complained, he said he would put the revolver away, but while twirling it on his finger, fired a shot into the floor, damaging a coworker's eardrum.

Dwight proffers the following evidence:

- 3) Stanley's former mistress, Cynthia, will testify that Stanley weighs over 300lbs and has repeatedly chastised his fellow coworkers behind their backs for "eating too damn healthy." Stanley also disdains exercise.

Do not address hearsay. Analyze all the possible objections as though this case is being tried in Federal Court according to the Federal Rules of Evidence, but the controlling substantive law is California law. How would a court rule on the admissibility of these items of evidence?

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Q1- EVIDENCE MIDTERM EXAMINATION-FALL 2020

ANSWER OUTLINE SHAZAM

Please note: the focus of this essay is SPECIAL RELEVANCY ISSUES. Also, the instructions said, "Do not address hearsay."

1. VICKI'S TESTIMONY

LOGICAL RELEVANCY/CEC 250 Tendency Test- evidence is logically relevant if there is a tendency to prove or disprove any disputed fact of consequence.

Here, Vicki's observations of holding the bouquet during a magic trick directly causing her hand injuries is logically relevant to prove damages because the trick failed when a fire ensued. Her eyewitness testimony is relevant because it is based on personal knowledge of how her hands were burned.

Vicki will argue that since both the bouquet and stage curtains were on fire, both Shazam and the Hocus Pocus Magic Castle should share in liability.

LEGAL RELEVANCY/CEC 352 Balancing Test- the trial court has discretion to exclude evidence if the probative value is substantially outweighed by the danger of unfair prejudice. It does not seem likely that Vicki's testimony as an eyewitness to the accident would confuse or otherwise mislead or prejudice the jury.

Vicki will be able to present her own observations as a competent eyewitness. However, the note from Shazam is different. See below.

COMPETENCY- for a witness to be competent to testify, CEC states that all people are qualified unless there is a disqualification due to: perception, memory, or the witness does not understand the truth or cannot communicate. Witnesses must have the capacity to observe, recollect, communicate and be truthful.

Nothing in the facts suggest that Vicki is impaired or lacking competency. Her testimony on her observations will be admitted.

SPECIAL RELEVANCY – Relevant Policy Exclusions (Shazam note to Vicki)

The general rule is that offers to pay for medical expenses cannot be admissible to prove negligence or liability. Also, expressions of sympathy regarding pain may be excluded on public policy grounds.

Here, Shazam offered a note which read, "I am so sorry. I will pay for your medicals." This note has a tendency to show Shazam or the Magic Castle was potentially at fault. However, due to public policy, the note will not be admitted to establish liability. Likewise, Shazam's expression of sympathy, "I am so sorry," will be deemed inadmissible. (CEC 1160)

2. HOCUS POCUS OFFER- \$75,000 IN SETTLEMENT

LOGICAL RELEVANCY- defined above

The Manager's \$75,000 offer to Vicki in settlement for her burned hand injuries has a tendency to prove that the Castle was responsible for her damages due to a mishap by the magician. Therefore, the Castle breached duty of due care by having inadequate safeguards in place for magic tricks. Therefore, the settlement offer is logically relevant. However, see below.

LEGAL RELEVANCY- defined above.

Here, although the offer is logically relevant, special relevancy considerations are discussed below.

SPECIAL RELEVANCY

Generally, to promote settlements in civil cases, CEC prevents the use of settlement offers and statements to prove liability or the validity of a claim.

Here, Hocus Pocus manager came to the hospital and offered Vicki \$75,000 in settlement of her hand injuries. Vicki did decline the offer. Since the filing of the personal injury lawsuit is being disputed, this offer will not be admissible to prove liability or negligence.

3. SUBSEQUENT REMEDIAL MEASURES: Gloves and curtains

LOGICAL RELEVANCY- defined above.

There are two subsequent remedial measures. First, fire retardant gloves that Shazam gives an assistant which has a tendency to establish that the magic trick was improperly performed since Vicki's hand were burned. Second, the Castle's installation of fire-retardant curtains after the accident may have a tendency to prove a breach of duty or causation.

LEGAL RELEVANCY- defined above.

Although the subsequent remedial measures (fire retardant gloves and curtains) are legally relevant, there are governing special relevancy considerations. See below.

SPECIAL RELEVANCY- SUBSEQUENT REMEDIAL MEASURES

*Generally, evidence of safety measure or repairs taken **after** an accident are inadmissible to prove negligence or liability. This is due to public policy and concerns by the law wanting landlords or owners to fix problems.*

Here, there are two subsequent remedial measures: (1) the fire retardant gloves that Shazam gives the assistants; and (2) the fire retardant curtains installed by the Castle. In both cases, these fixes were done after Vicki's hand injuries.

4. THE HOCUS POCUS PREMISES LIABILITY POLICY- EXCEPTION

LOGICAL RELEVANCY- defined above

The premises liability insurance policy has a tendency to establish that the premises where the accident occurred was under the control or owned by the Hocus Pocus Magic Castle. As such, the policy is logically relevant. However, see below.

LEGAL RELEVANCY- defined above

See below.

SPECIAL RELEVANCY

Generally, insurance premises liability policies cannot be admissible to prove negligence. However, there is an exception for disputed "ownership and control."

Here, the Hocus Pocus Magic Castle is denying liability stating there was no coverage of the stage area. Plaintiff Vicki wants to establish that the Castle did maintain the stage premises were "controlled or owned." Thereby, since the curtains caught on fire and the magic trick failed, Vicki's hands were burned. The Castle breached the duty of due care.

LIMITING INSTRUCTION

The trial court will admit the premises liability policy with a limiting instruction. The restriction will be for the jury to consider that the Castle did own or control the stage area. However, the jury cannot use the policy to create liability or fault.

Q3

Q3

Oscar and Dwight's Bomb Scare

Relevance –

Relevant: shows he knew what he was doing was wrong for inflicting emotional distress;

Relevant: also shows that the company should have been on notice of his behavior. The factual issue here is whether the company actually knew, since there was no disciplined, but the call was made to them, weighing in favor of knowledge.

Character – likely to be sustained against Dwight as propensity evidence absent exceptions

Exceptions –

Elements of neg entrustment case against the company, so that is straightforward exception

Knowledge of how it was wrong

MO/Identity – probably not since identity and MO are not really at issue here

Intent – also not particularly clear since there was no similar result last time

403 – Response to exceptions

Not a criminal case; intentionality is important, so intent would be important, and knowledge informs intent (basic understanding of relatedness – distinctness of various exceptions; similarity may weigh in favor of exception but also in favor of confusion; criminality of act is more in favor or prejudice

conclusion: can go either way for Dwight, but since it would inform an actual element of negligent entrustment for the company, would probably come in as to the company

Mose and Dwight's Gunshot

Relevance –

Demonstrates that Dwight has a propensity for bad behavior, and shows the company should have known he did. However, the timing of the incident tends to weigh against being relevant for knowledge. Although it does tend to suggest the company is uncaring about Dwight's malfeasance because they allowed him to be acting manager

Conclusion: may have some tiny bit of relevancy, enough to make it over a very low bar

Character/Propensity

Shows that Dwight has a propensity for such dangerous antics. Informs the element as to negligent entrustment, but not very well, since it happened after the fact.

Exceptions:

Knowledge on the part of DM Inc./Element of cause of action (with the same weaknesses as mentioned above)

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Highly prejudicial use as propensity evidence with minimal use, especially in light of bomb threat evidence for proving element.

Conclusion: likely to be excluded.

Competency

Rule applicable:

FRE says that when state law controls suit, state law controls competency, so CA law controls competency.

Competent?

Not enough information to draw a full conclusion, but his ability to give all this info tends to suggest he is competent due to the presumption of competency.

Stanley's History

Relevance

Relevance of disdain for health

Tends to undermine causation arguments

Character

Propensity evidence

Exceptions – tends to undermine causation argument

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Because it is not bad acts, tends to be very little if any prejudice but goes to an element of defense, making it highly probative

1)

VICKI'S TESTIMONY: THRESHOLD ISSUES

Competency of the Witness

Before a witness is permitted to testify, the court must first consider whether the witness is competent based their capacity to observe, recollect, communicate, and appreciate the obligation to speak truthfully.

There are no facts to suggest that Vicki is young enough to lack the intelligence and maturity required to testify, nor do any facts suggest that she is insane or otherwise disabled or limited in her power to observe and recollect the things that happened to her. Neither are any facts given to suggest that Vicki would struggle to communicate, nor fail to understand the obligation to tell the truth once she has taken the oath.

Personal Knowledge

Generally, a witness may only testify about that which they have actual personal knowledge.

Vicki was present during Shazam's show and even joined him on stage to hold the bouquet. She was on the stage when the curtains caught on fire and was standing close enough that her hands were severely burned. There are no facts to suggest that Vicki became unconscious from the pain or was otherwise unable to perceive and recollect what was happening. Therefore she has firsthand personal knowledge of the facts that occurred.

ITEM ONE A: HOLDING THE BOUQUET

Relevance

Relevant evidence that relates to the time, event, or person in controversy is admissible, provided it is competent.

Logical

Evidence is logically relevant if it has the tendency to prove or disprove a material fact at issue in the case.

Vicki testifies that she was holding the bouquet which caught fire and that it burned her hands. Vicki's case is a civil personal injury suit against Hocus Pocus Magic Castle (HPMC), the venue, and Shazam, the magician. In order to prove that either or both of the defendants is responsible for her injuries, Vicki must prove (1) that she was injured, and (2) that the immolation of the bouquet is the cause, or a substantial factor, of her injuries. The fact that Vicki was holding the bouquet places her at the scene of the accident that she claims caused her injury. The fact that the bouquet caught on fire while she was holding it is direct evidence of causation. The fact that her hands were burned supports the reasonable inference that Vicki was injured and may be entitled to damages.

Legal

Evidence is competent, or legally relevant, if it does not violate an exclusionary rule and its probative value is not substantially outweighed by the risk of unfair prejudice, confusion, or inefficiency.

Vicki's testimony that she was holding the bouquet and it caught on fire is an eyewitness account. She can also testify regarding pain and suffering from the burns. Her testimony is highly probative because she was the closest person to the injury when it occurred and she actually experienced the injury. Shazam and HPMC may argue that the exhibition of Vicki's injuries will be prejudicial, but Vicki's testimony is only a verbal description of the fact that the bouquet caught on fire and therefore is unlikely to sway the finder of fact unfairly.

Conclusion

Vicki's testimony regarding holding the bouquet when it caught on fire is logically and legally relevant. Because it is eyewitness testimony, recounting factual occurrences, by a person with actual knowledge and recollection of the events and is not barred by any other exclusionary rule, it is admissible.

ITEM TWO B: SHAZAM'S NOTE

Real Evidence

Actual physical evidence addressed directly to the trier of fact may be introduced if relevant and authenticated by someone with firsthand knowledge or proof of the substantially unbroken chain of custody.

Shazam's note reading "I am so sorry. I will pay for your medical expenses." is offered into evidence by Vicki. This is a piece of physical evidence that was created by one of the defendants and given to the victim. Vicki is the sponsoring witness who can lay the proper foundation for the evidence by testifying that it was given to her by Shazam.

Relevance

Relevant evidence that relates to the time, event, or person in controversy is admissible, provided it is competent.

Logical

Evidence is logically relevant if it has the tendency to prove or disprove a material fact at issue in the case.

Vicki will argue that Shazam's note shows that he took responsibility for her injuries because he was willing to pay her medical bills. However Shazam will argue that he was simply an observer and took pity on Vicki because she was injured right in front of him during her show. He will say that his expression of sympathy and generosity are not an admission of liability. Whether or not Shazam felt sorry for Vicki and was willing to pay her medical bills could support a reasonable inference that he considered himself responsible, however it does not directly prove any elements of Vicki's case.

Legal

Evidence is competent, or legally relevant, if it does not violate an exclusionary rule and its probative value is not substantially outweighed by the risk of unfair prejudice, confusion, or inefficiency.

Shazam will argue that the risk that the jury will misinterpret his note as an admission of liability is simply too high considering its questionable probative value. Vicki will argue that it is highly probative because it is a statement by the defendant. Ultimately, the judge will likely focus on the extrinsic policy exclusion (aka public policy exclusion) rather than

conducting a deep analysis of the balancing test under the discretionary exclusion of CEC 352.

Extrinsic Policy Exclusion: Humanitarian Offers

Certain evidence, even if relevant, may still be excluded on the grounds of public policy because the associated behavior is desirable. One of these exclusions is humanitarian offers including expressions of sympathy and offers to pay medical bills. Note that any accompanying admission of fact that comes along with the humanitarian offer IS admissible.

Shazam expressed his sympathy that Vicki was hurt and offered to help pay her medical bills. There is no admission of fact contained in his note, therefore it is excluded on the public policy grounds that people should be encouraged to help each other and express sympathy when someone is injured in their vicinity.

Conclusion

Shazam's note is relevant, however its probative value is not particularly high because it does not speak directly to a material issue. Furthermore, it is subject to mandatory exclusion on public policy grounds.

ITEM TWO: OFFER FROM MANAGER OF HOCUS POCUS

Relevance

Relevant evidence that relates to the time, event, or person in controversy is admissible, provided it is competent.

Logical

Evidence is logically relevant if it has the tendency to prove or disprove a material fact at issue in the case.

When a business -- speaking through its manager -- offers to pay a substantial amount of money, in this case \$75,000, it is reasonable to infer that the business believes that it is financially liable. Vicki will argue that when the manager from HPMC visited her in the hospital and asked if she would take \$75,000 to settle her case, it was tantamount to an admission of liability. HPMC will argue that the \$75,000 offer was not an admission of liability, merely an offer made to avoid going to court.

Legal

Evidence is competent, or legally relevant, if it does not violate an exclusionary rule and its probative value is not substantially outweighed by the risk of unfair prejudice, confusion, or inefficiency.

A jury who learns that a generous offer was made to a victim of a personal injury is likely to infer that the entity making the offer believed that the claim was at least credible enough to get into court. Because the offer was not actually an admission of fact or opinion as to liability, its probative value is likely outweighed by the substantial risk of unfair prejudice that it poses to HPMC.

Extrinsic Policy Exclusion: Settlement Negotiations

Certain evidence, even if relevant, may still be excluded on the grounds of public policy because the associated behavior is desirable. Another type of public policy based exclusion is offers and statements made during settlement negotiations. The reasoning is that parties should be encouraged to settle their disputes. There must be a disputed (as to liability or amount) claim, though not necessarily filed in court, before this exclusion can arise. Additionally, any statements made during the negotiation of a settlement, including admissions of fact, are also excluded unless known to the parties before the negotiations. Note that the California Evidence Code contains additional protections specifically for communications made during mediation.

HPMC's manager's offer to pay Vicki \$75,000 "to settle this claim" is an offer of settlement. The fact that the manager used the words "settle" and "claim" indicates that they knew a claim was likely to be made. The fact that Vicki refused the claim indicates that the amount was in controversy. Therefore the statement is excluded on public policy grounds, along with any accompanying admissions.

Conclusion

The manager's offer to pay \$75,000 is inadmissible because it is an offer made during settlement negotiations.

ITEM THREE: SUBSEQUENT SAFETY MEASURES

Relevance

Relevant evidence that relates to the time, event, or person in controversy is admissible, provided it is competent.

Logical

Evidence is logically relevant if it has the tendency to prove or disprove a material fact at issue in the case.

After Vicki was injured, Shazam began providing fire retardant gloves to his audience volunteers. And HPCM installed curtains that were less likely to catch on fire. Vicki will argue that these measures were taken after her injuries, therefore they show that the defendants are admitting they were not as careful as they should have been. Proving that the defendant breached the standard of care of a reasonably prudent magician and magic venue operator is an essential element of Vicki's case. These subsequent safety measures tend to prove that the conditions when Vicki held the bouquet were unsafe.

Legal

Evidence is competent, or legally relevant, if it does not violate an exclusionary rule and its probative value is not substantially outweighed by the risk of unfair prejudice, confusion, or inefficiency.

Shazam and HPMC will argue that the standard of care does not require a defendant to take every possible precaution. Therefore it would be prejudicial to introduce Vicki's evidence of the safety measures to the jury because they might presume that a business custom they adopted after the fact sets the previous standard of care. The risk of prejudice is considerable since a jury would be unlikely to understand such a fine point of law, and the better safety measures are only indirect evidence that more safety features could have been used, not that they necessarily should have been used. Therefore it is likely that the court will weigh the balance against admissibility.

Extrinsic Policy Exclusion: Subsequent Remedial Measures

Certain evidence, even if relevant, may still be excluded on the grounds of public policy because the associated behavior is desirable. Subsequent remedial measures, or changes

that make conditions safer than they were before an injury occurred, are in the public interest. Because they may or may not speak to whether the standard of care was violated, they are generally excluded from evidence on public policy grounds.

The new gloves and curtains were added to the show after Vicki was injured. Presumably they are intended to keep the audience volunteers safer and prevent any additional fire injuries. However, since this subsequent remedial measure does not necessarily admit that the previous conditions were unreasonably dangerous, and because parties should be encouraged to improve safety, they are excluded from evidence against Shazam and HPMC. It is an interesting question whether Vicki might argue that the evidence of the gloves should be introduced against HPMC and evidence of the curtains against Shazam, but it is likely the court would come to the same conclusion regarding inadmissibility.

Note that the California Evidence Code does not apply this exclusion to products liability cases. Vicki could potentially join the manufacturer of the curtains as a defendant. Or HPMC could sue them for contribution if it is held liable for Vicki's injuries.

Conclusion

Because the evidence that fire safe gloves and curtains were added to the show after Vicki was injured falls within the public policy exclusion for subsequent remedial measures, Vicki's evidence of these improvements is inadmissible to show liability.

ITEM FOUR: LIABILITY INSURANCE POLICY

Relevance

Relevant evidence that relates to the time, event, or person in controversy is admissible, provided it is competent.

Logical

Evidence is logically relevant if it has the tendency to prove or disprove a material fact at issue in the case.

Vicki is introducing the liability insurance policy to prove that HPMC considered themselves responsible for things that happened on their stage. Part of HPMC's defense is that Shazam was not performing on their premises when he gave a show on the stage. If Vicki can prove that they carried

insurance on the stage, then a jury may reasonably infer that HPMC did indeed consider the stage part of their premises. Because the evidence would rebut HPMC's defense and provide an element necessary to hold them liable for Shazam's show and Vicki's resulting injuries, it is logically relevant.

Legal

Evidence is competent, or legally relevant, if it does not violate an exclusionary rule and its probative value is not substantially outweighed by the risk of unfair prejudice, confusion, or inefficiency.

HPMC will argue that their insurance coverage is not probative as to whether or not they are responsible for Vicki's injury and/or Shazam's show and the jury will be prejudiced if they know that the location was insured because they will not feel guilty about making the insurance company pay out. However Vicki is not using the evidence to prove either liability or ability to pay, therefore it is not prejudicial.

Extrinsic Policy Exclusion: Liability Insurance

Certain evidence, even if relevant, may still be excluded on the grounds of public policy because the associated behavior is desirable. Proof of insurance is not admissible to show liability or ability to pay. However it may be used for other purposes, including to show ownership and control of premises.

Because Vicki is using the insurance policy merely to show that HPMC secured insurance on the stage, and thereby rebut their claim that Shazam was not performing on their premises, it is not excluded by the public policy rule.

Limited Admissibility

Evidence may be admitted for one purpose but not another, or against one defendant but not another. When accepting evidence for limited admissibility, the judge will instruct the jury as to the scope and issues for which they may consider the evidence.

Because the liability insurance policy may only be admitted for certain purposes, the judge will likely instruct the jury that they are only to consider it as to whether or not HPMC controlled the stage where Shazam was performing.

Conclusion

The liability insurance policy is admissible for the limited purpose of showing that HPMC owned the stage where Shazam was performing.

END OF EXAM

2)

1. Testimony of 911 operator

Logical Relevance

Evidence having any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence.

Here, the Prosecution (P) want to admit the testimony of the 911 operator that Walter (W) spoke to the night of Vicky's (V) death. P will argue that the testimony has the tendency to show that the only people present the night of V's death were him, the defendant Doug (D) and V. P wants the testimony in because W told the 911 operator what he saw and and heard the night of the event, which was a female voice yelling followed by a crash coming from the west side of the office. D does not want the testimony in for hearsay reasons (see below).

The court will find the 911 operators testimony logically relevant.

Legal Relevance

Balances the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence, the court will exclude the evidence.

Here, P will argue the testimony of the 911 operator is probative because it will help put together the story line for what occurred the night of V's death. D will argue the testimony is unfair because W is not able to be cross-examined. However, the court will find the testimony of the operator more probative than prejudicial, thus the court will find the testimony legally relevant.

Competency of Witness

Generally, witnesses are presumed to be competent until the contrary is demonstrated. Witnesses must have the capacity to observe, recollect, communicate, and are obligated to speak truthfully.

Here, the 911 operator is presumed to have the capacity to observe what W told her, recollect it to the court and communicate to the court what W said. 911 operators are not uncommon to the courtroom and presumed to speak truthfully to the events in which they are a part of. The operator will be testifying to the call in which she was a part of and has personal knowledge of. Her lay

opinion will be based on his rationally based perception. Thus, the 911 operator is a competent witness.

Hearsay

An out of court statement offered to prove the truth of the matter asserted. Hearsay is inadmissible unless an exception or exemption applies.

Here, D will argue the statement made by W to the 911 operator is hearsay because the statement W made over the call were made out of court and is being used to prove the truth of the matter asserted, that D, V and W were in the office at the time of V's fall and that he heard a scream from where they were. P will argue the testimony is not hearsay because it's not being used to relay W's observations at the time of the death, not that D killed her.

Unavailability

A declarant is considered unavailable if they are unable to be in present during testimony and subject to cross-examination.

Here, P made diligent efforts to locate W but he retired immediately after V's death and is unable to be located. Thus, he is unavailable to testify to his observations the night of V's death and is not subject to cross-examination by D.

Confrontation Clause

Regardless of whether a hearsay exception is satisfied, the sixth amendment right to confrontation prohibits the use of testimonial hearsay statements against a criminal defendant if the declarant is unavailable and the defendant has not had a prior opportunity to cross-examine declarant.

Here, D will raise the issue that allowing the testimony presents a sixth amendment violation because they are unable to cross-examine W. D will argue that the statements W made to the operator were testimonial and not for emergency recovery purposes since V was already dead when W spoke to the operator. P will argue that W didn't know V was dead, only that she was motionless on the sidewalk. P will also argue that the operator (not W) is the one testifying and is subject to cross-examination, eliminating any confrontation clause issue.

Thus, the court is likely to find the testimony of the 911 operator admissible.

2. Testimony of Matt

Logical Relevance

Evidence having any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence.

Here, P will claim Matt's (M) testimony should be admissible because it has the tendency to show a motive for D killing V. D will argue M's testimony should be out because he didn't hear the whole conversation and was relaying incorrect information. However, the court is likely to find M's testimony legally relevant.

Legal Relevance

Balances the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence, the court will exclude the evidence.

Here, D will claim M's testimony will confuse the issues for the jury because they will see D as unethical man who had an affair with a junior member of his team, rather than if he murdered V. P will claim that the testimony is more probative because it explains the relationship between V and D, and explains D's motive for wanting to kill V. Thus, the court will find M's testimony legally relevant.

Competency of Witness

Generally, witnesses are presumed to be competent until the contrary is demonstrated. Witnesses must have the capacity to observe, recollect, communicate, and are obligated to speak truthfully.

Here, M is a lay witness who has personal knowledge about the matter and can testify to it. He is an employee at the same place that both D and V worked, and is presumed competent unless demonstrated otherwise. The facts do not indicate any reason M would not be competent, thus the court will find him competent to testify.

Hearsay

An out of court statement offered to prove the truth of the matter asserted. Hearsay is inadmissible unless an exception or exemption applies.

Here, D will argue that M's statements of what he heard two days before V's death were hearsay. M testifies that he heard D tell V "I will not leave my wife for you. I am ending this affair." D will claim this is hearsay because it is an out of court statement made by D being used to prove the truth for

the matter asserted. P will claim the statement is not hearsay because it is unknown if the affair actually ended that day or if D was really not going to leave his wife. The statement is being used to show motive that D had an intimate relationship with V and demonstrate D's state of mind.

D will also argue that M's testimony of V's response is also hearsay. V responded "You can end the affair, but I am telling your wife and having the baby!". D will claim this is hearsay because it is an out of court statement being used to prove the truth of the matter asserted, that V was going to tell Delores (D's wife) about the affair and their baby. P will argue the statement is not hearsay because it is being used to show V's state of mind and the effect this statement had on the listener, D, giving him motive to kill V. The statement is not being used to prove whether or not V actually told D's wife about the affair or pregnancy.

Excited Utterances

Statements made by declaration while under stress or excitement of a startling event.

Here, P will claim that V's statement "You can end the affair, but I am telling your wife and having the baby!", is a valid hearsay exception because the statement was made at the time of a stressful event, which is her break-up with D. Although V's breakup with D may be sad, it is unlikely a stressful event to make this a valid hearsay exception.

Present State of Mind

Out of court statements are admissible to prove the declarant's state of mind or the declarant's future intent to perform a particular act when the act is an issue in the case.

Here, P will argue that D and V's statements are admissible to show their state of mind, which D intended to end the affair and V intended to tell D's wife about the affair and pregnancy. However, both of these issues are not the issue in the case, the issue whether or not D killed V. Thus, this hearsay exception will likely not be valid.

Thus, the court will likely find Matt's testimony admissible due to non-toma reasons, the effect on the listener and declarant state of mind.

3. Testimony of Doug's wife, Delores and Prenup

The evidence presents two levels of hearsay analysis, the testimony of Delores and the prenup document.

Logical Relevance

Evidence having any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence.

Here, P will argue that the D's prenuptial agreement with his wife Delores is logically relevant because it has the tendency to show that D will lose \$10 million dollars if it is proved that D had an affair with V. Thus, the court will find the prenup logically relevant because it speaks to D's motive for killing V.

Legal Relevance

Balances the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence, the court will exclude the evidence.

Here, P will argue that the probative value of the prenup is more than prejudice because it gives D the motive to kill V when she threatened to tell his wife about their affair. D will argue that the prenup will not go into effect because it has yet to be proved that D had an affair, and the prenup is not in effect yet because there is no facts about the divorce being filed, triggering the prenup. The court will find the prenup logically relevant.

Competency of Witness

Generally, witnesses are presumed to be competent until the contrary is demonstrated. Witnesses must have the capacity to observe, recollect, communicate, and are obligated to speak truthfully. Delores will speak to the terms of the prenup agreement, which she has personal knowledge of. D will argue that Delores is will not be obligated to speak truthfully because she will get \$10 million dollars if she lies about D's affair. Since the facts do not indicate any reason Delores is not competent, she will be allowed to testify.

Hearsay

An out of court statement offered to prove the truth of the matter asserted. Hearsay is inadmissible unless an exception or exemption applies.

Here, D will claim the prenup is hearsay because the document is an out of court statement offered to prove the truth of the matter asserted, that Delores will receive \$10 million dollars if D is proved to have an extramarital affair. The prenup will not be admissible unless a hearsay exception applies.

Official Records and Public Records

Records of a public office that describes the activities at the office, made by a public official with a duty imposed by law are admissible. Must be made within scope and duty, near event and trustworthy.

Here, P will argue that the prenup is an official record, however, prenups only become public records when recorded and the facts do not indicate if that occurred. Thus, this will not be a successful exemption.

Business Records

A business record of an event is admissible if it is made by, or from information obtained from a person with knowledge of the event in the regular course of business, and it is the regular course of business to make such a record at the time of the event.

Here, P will argue that the prenup is not hearsay and is a business record because a prenup is regular business that occurred in her father's business. However, Boogie is a high tech firm and not in the business of regularly drafting prenups, so this exemption will not apply.

Thus, the court will not find the prenup or Delores' testimony admissible due to the prenup being hearsay.

4. Vicky's social media account

Logical Relevance

Evidence having any tendency to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence.

Here, D will argue that V made a social media post four hours before her death saying "I have nothing left to live for", which is logically relevant because it has the tendency to prove that V was suicidal the day of her killing and that she committed suicide later that night. The court will find the evidence of V's post logically relevant.

Legal Relevance

Balances the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, misleading the jury, or undue consumption of time. If prejudice is substantially greater than the probative value of the evidence, the court will exclude the evidence.

D will argue that the probative value of V's post is outweighed by any unfair prejudice because it will support D's claim that V committed suicide after he ended their affair. The court will find the V's post legally relevant.

Hearsay

An out of court statement offered to prove the truth of the matter asserted. Hearsay is inadmissible unless an exception or exemption applies.

Here, P will argue V's social media records are hearsay because they are out of court written statements being used to prove the truth of the matter asserted, that V had nothing left to live for. D will argue that the statement is not hearsay because it speaks to V's state of mind just hours before her death.

Dying Declaration

Statement made by dying person and now unavailable declarant about the cause or circumstance of her death made while under the belief of certain and impending death is admissible

Here, D will claim that V made the statement as a suicidal note. However, CA cases have ruled that suicidal notes are not dying declarations unless made after declarant has injured themselves. In addition, the statement is not about the cause of her death, making this exemption not successful.

Thus, the court will find the social media post admissible under non-hearsay, state of mind.

END OF EXAM

3)

FINAL QUESTION #3

#1 ADMISSIBILITY OF TESTIMONY OF OSCAR

RELEVANCY All relevant evidence is generally admissible. Relevance is determined by the Balancing test and the Tendency test.

LOGICAL RELEVANCY (Tendency test) Does the evidence tend to prove or disprove a fact of consequence? Evidence is logically relevant if it has a to prove or disprove any disputed fact that is of consequence in the determination of the cause of action.

Here, it is a disputed fact that the company should have entrusted Dwight to be in the position of the safety supervisor. The evidence being offered by Oscar has a tendency to prove that Dwight has a track record of making reckless decisions regarding office safety. Because the evidence being offered tends to prove a fact in dispute, logical relevancy has been met.

LEGAL RELEVANCY (Balancing test) Is the probative value of the evidence substantially outweighed by the the danger of unfair prejudice, confusion of issues, misleading the jury, or undue consumption of time?

Here, there is high probative value because the evidence being offered tends to prove a fact of consequence in the case. There is no risk that the jury would be confused, mislead, or that the evidence would waste the courts time. Because the probative value outweighs any prejudicial effect, Legal relevancy has been met.

Logical and legal relevancy have been met, the evidence should be considered relevant.

CHARACTER EVIDENCE in general is banned and inadmissible to prove conduct in conformity with past acts. In civil cases, there is an exception where the case places the character in issue, such as defamation, negligent entrustment, wrongful death, or child custody cases. Character evidence may be offered as substantive rather than impeachment evidence to 1) prove character when it is the ultimate issue in the case or 2) serve as circumstantial evidence of how a person probably acted. Character evidence can be offered through opinion, reputation, or specific acts.

Here, because the case is a civil negligent entrustment case, character evidence should be considered admissible. Oscar is providing that Dwight had a specific act where he called in a bomb

threat because his coworkers did not pay attention to his bomb threat powerpoint. Stanley's counsel would argue that this should have put his employer on notice that he was prone to erratic behavior, especially when it came to situations that had to do with office safety. Further, the office did not discipline Dwight after this incident. Dwight's counsel would argue that this was an isolated incident and the two situations are not connected.

In conclusion the evidence should be considered admissible under Character evidence.

#1 ADMISSIBILITY OF THE MISDEMEANOR OF DWIGHT

RELEVANCY All relevant evidence is generally admissible. Relevance is determined by the Balancing test and the Tendency test.

LOGICAL RELEVANCY (Tendency test) Does the evidence tend to prove or disprove a fact of consequence? Evidence is logically relevant if it has a to prove or disprove any disputed fact that is of consequence in the determination of the cause of action.

Here, it is a disputed fact as to if Dwight acts in a responsible manner. The evidence of Dwight having a previous misdemeanor would tend to prove that Dwight acts in an irresponsible manner. Because the evidence being offered tends to prove a fact that is in dispute, logical relevancy has been met.

LEGAL RELEVANCY (Balancing test) Is the probative value of the evidence substantially outweighed by the the danger of unfair prejudice, confusion of issues, misleading the jury, or undue consumption of time?

Here, there is high probative value because the evidence being offered tends to prove a fact of consequence in the case. There is no risk that the jury would be confused, mislead, or that the evidence would waste the courts time. Because the probative value outweighs any prejudicial effect, Legal relevancy has been met.

Logical and legal relevancy have been met, the evidence should be considered relevant.

CHARACTER EVIDENCE (rule supra)

Here, misdemeanor conviction should be deemed admissible under character evidence.

#2 ADMISSIBILITY OF TESTIMONY OF MOSE

RELEVANCY (rule supra)

LOGICAL RELEVANCY (rule supra)

Here, it is a disputed fact that Dwight had a propensity to put himself and his coworkers in dangerous situations. The evidence being offered by Mose would have a tendency to prove a disputed fact, therefore, logical relevancy has been met.

LEGAL RELEVANCY (rule supra)

Here, there is high probative value because the evidence being offered tends to prove a fact of consequence in the case. There is no risk that the jury would be confused, misled, or that the evidence would waste the courts time. Because the probative value outweighs any prejudicial effect, Legal relevancy has been met.

Logical and legal relevancy have been met, the evidence should be considered relevant.

WITNESS TESTIMONY/ WITNESS COMPETENCY witnesses must have the capacity to observe, recollect, and communicate properly and truthfully in order to be considered competent.

Here, the facts state that Mose has developmental disabilities. The court must evaluate whether Mose would have the capacity to observe, recollect and communicate properly and truthfully before any evidence from Mose would be admitted. Dwight's counsel in this case would argue that because of the developmental disabilities that Mose has, any evidence being offered by him should not be admitted. Stanley's counsel would argue that even though Mose has developmental disabilities, he is still able to observe, recollect, and communicate in a truthful manner as required by the court.

CHARACTER EVIDENCE (rule supra)

Here, because the case is a civil negligent entrustment case, character evidence should be considered admissible. Mose is offering evidence of a Specific Act where Dwight wore a revolver in the office for several hours, Mose also offered that Dwight shot the floor damaging a coworker's eardrum. Stanley's counsel would argue that this is additional evidence proving that the reckless behavior of Dwight continues to endanger the employees he was able to supervise. Stanley's counsel would also argue that this shows that his employer still let Dwight be put in a supervisor position in the office.

The evidence should be considered admissible.

#3 ADMISSIBILITY OF TESTIMONY OF CYNTHIA

RELEVANCY (rule supra)

LOGICAL RELEVANCY (rule supra)

Here, the reason of Stanley's heart attack is a disputed fact. The evidence being offered by Cynthia has a tendency to prove that the heart attack was caused by Stanley's bad health rather than the actions of Dwight. Logical relevancy has been met.

LEGAL RELEVANCY (rule supra)

Here, there is high probative value because the evidence being offered tends to prove a fact of consequence in the case. There is no risk that the jury would be confused, misled, or that the evidence would waste the courts time. Because the probative value outweighs any prejudicial effect, Legal relevancy has been met.

Logical and legal relevancy have been met, the evidence should be considered relevant.

WITNESS TESTIMONY/ WITNESS COMPETENCY witnesses must have the capacity to observe, recollect, and communicate properly and truthfully in order to be considered competent.

Here, Cynthia was a former mistress of Stanley. Because their relationship is no longer on going, Stanley will argue that Cynthia is not able to testify truthfully because she was his former mistress and wants to make Stanley look bad. Dwight will argue that because the witness has to take an oath to tell the truth before they testify this problem will be avoided. Cynthia should be considered a competent witness.

CHARACTER EVIDENCE (rule supra)

Here, Cynthia is offering a specific act where Stanley would chastise his fellow coworkers for "eating too damn healthy". Dwight's counsel would argue that he had nothing to do with the heart attack and that it was Stanley's poor diet and unhealthy lifestyle that caused it. Stanley's counsel would argue that the stress that Dwight put Stanley through caused the heart attack. Ultimately, the argument of

the counsel of Stanley would win. While Stanley being unhealthy could have been a factor in the cause behind the heart attack, the main force behind the causation was still Dwight.

The evidence being offered should be considered admissible.

END OF EXAM