UPDATE MEMORANDUM
2016 ISBA High School Mock Trial Invitational

Dunn v. Davies

First Update Memo 1/4/2016

ANSWERS TO QUESTIONS SUBMITTED BY TEAMS

1. Question: It seems jury instructions explain analysis of affirmative defenses regarding count 1, page 4/11, but do not mention count 2 issues? Is something missing?

   Answer: This was an inadvertent omission. At the end of ***Court Instruction No. 10- Burden of Proof on the Issues - Affirmative Defenses,*** please add the following new paragraph:

   "If you find from your consideration of all the evidence, that either defendant's First Affirmative Defense or Second Affirmative Defense as to Count 2 has been proved, then your verdict shall be for the defendant as to Count 2."

2. Question: The complaint lists the claim of Battery as an alternative cause of action to the primary claim of negligence. I read this to mean that the jury is ONLY to consider the claim of battery if they find the claim of negligence has not been proven by a preponderance of the evidence or if the defense proves an affirmative defense to negligence by a preponderance of the evidence. This makes sense because otherwise the plaintiff could recover twice for the same injuries. (This same line of thinking would extend to if the plaintiff's damages are reduced because he is found to be comparatively negligent by 50% or less). However, in my reading of the jury instructions, I see nothing that tells the jurors that they may only consider finding the defendant liable for battery if they find him/her not liable for negligence, i.e. on page 5 the instructions say to use verdict form A, B, or C for Count 1 and forms D or E for Count 2, but they don't say the jury must use form E for Count 2 if they choose form A or B for Count 1. Is this is an oversight in the jury instructions or are we to argue this case as if the defendant can be found liable for both counts simultaneously?

   Answer: To address the issue raised in this question, there will be two new jury instructions added to the materials:

   Court Instruction No. 13: "Plaintiff seeks damages from defendant under more than one legal theory. Each legal theory is set forth in a separate count, being

one count of negligence and one count of battery. You are to consider and to render a verdict as to each theory of liability for which plaintiff produces evidence. However each item of damages may be awarded only once, regardless of the number of legal theories which plaintiff alleges and for which you find in favor of the plaintiff. Therefore, if you find in favor of plaintiff on both the negligence count and the battery count, the total amount of damages that you award to plaintiff must be the same as to each count."

Court Instruction No. 14: "You are instructed that, as a matter of law, plaintiff can only obtain a single recovery for his/her injuries from the damages awarded. During your deliberations and in determining your verdict, you are not to concern yourself with the manner in which any damage verdicts will be enforced should you find in favor of plaintiff on both the negligence count and the battery count and award damages to the plaintiff on both counts."

3. Question: My reading of the affirmative defenses in the answer to the complaint is that for affirmative defense 2 for negligence, the defense argues that the plaintiff was comparatively negligent by playing in the hockey game, and for affirmative defense 3 for negligence, the defense argues that the plaintiff was comparatively negligent by playing without a helmet. However, on page 3 of the jury instructions, it lists affirmative defense 2 for negligence as the plaintiff being 50% or less comparatively negligent so damages should be reduced, and affirmative defense 3 reads that the plaintiff is over 50% negligent and should be barred from recovery. Are the affirmative defenses that we are to argue for 2 & 3 that the specific acts listed in the pleadings resulted in comparative negligence or may we argue that a collection of the plaintiff's actions make him/her more or less negligent than the defendant as is provided for by the more general statements in the jury instructions' version of affirmative defense 2 & 3?

   Answer: This was an inadvertent error. Paragraph 4 of Affirmative Defense No. 3 is correctly stated. Accordingly, Paragraph 4 of Affirmative Defense No. 2 should also read as follows:

   "4. Should Plaintiff's negligent conduct be found to be fifty percent (50%) or less at fault for the proximate cause his/her own injuries and damages when compared to Defendant's fault, then the award of any damages in this case to Plaintiff should be reduced proportionately with the extent of Plaintiff's comparative negligence."

4. Question: Line 35 of Dr. Cameron Leonard's affidavit states: "The dark area on the right (emphasis added) side of the head shown on the CT scan..." However when you look at the CT scan, whether you are speaking from the perspective of a lay person looking directly at the scan or from the anatomical perspective, the dark area is on the left side of the brain. Is this a typo or intentional?

   Answer: This is an inadvertent error in Dr. Leonard's affidavit. Line 35 of the affidavit should read that the "dark area on the **left** side of the head shown on the CT scan…"

5. Question: Several sections of the rules deal with "creation of material fact." . . . [A]t what point does something become a "material fact"? Also, if a team is offering quite a bit of "outside" material, how much time are teams expected to spend on cross examination pointing out for evaluators . . . to what extent a team has, in fact, gone beyond the provided case materials? Especially if they are referencing factual knowledge that someone in that position would reasonably know. We're trying to help our students develop a strong approach to the material that balances what happens "in the real world" alongside specific Mock Trial Rules.

   Answer: While in the "real world", there may be more detailed facts that could be developed from interviewing and deposing clients and witnesses, Mock Trial is a simulated trial experience, the main goal of which is to educate students about the legal system and transferable skills, such as teamwork, analytical thinking, and confidence. With this goal in mind, and within the limits of a mock trial, the Law-Related Education Committee strives to provide a workable set of facts from which students can develop and present their side of a case within the allocated time limits.

   Under the Mock Trial Rules, a witness's testimony may go beyond the specific facts in his or her own affidavit if: (i) there are facts recited in other affidavits which it is apparent the witness must have known; (ii) if the fact is reasonably inferred from a witness's fact statement or reasonably inferred from facts recited in other affidavits about which the witness must have known; and/or (iii) when the witness is challenged on cross-examination, the facts are consistent with the facts in the trial and consistent with all other affidavits. A fact becomes a "departure" from the "script" when it goes beyond these parameters. As to whether the departure is "material", the Mock Trial Rules provide as follows:

   "If the answer is likely to affect the outcome of the trial, opposing counsel may object and ask for a bench conference. The presiding judge will decide whether to allow the testimony. If the

presiding judge rules that testimony is an unreasonable deviation from a witness affidavit and disallows the testimony, each evaluator/juror may subtract points for each rule deviation." Rules & Procedures Handbook, X. Summary ¶20, page 38.

The expectation is that all participants will act in good faith to adhere to the Mock Trial rules and to recognize why there are rules that direct participants to "stick to the script." It is up to each team to decide how much time it wants to devote to cross-examination to impeach a "straying" witness. This is a problem which confronts attorneys in the "real world." Should a witness go beyond these bounds, the witness's testimony can be impeached; just as would be the case in the "real world" where a witness gives testimony beyond a witness's written or recorded statement. As stated in the Mock Trial Rules:

"There is no objection of 'creation of material fact' or 'beyond the scope of the mock trial materials.' Mock trial participants are expected to address any 'creation' through the use of other more realistic objections or through impeaching the witness on cross-examination. This does not permit teams to create facts. Creation of material facts may cause point deductions for the creating team." Rules & Procedures Handbook, p. 33.

So to restate the intent of the rules: (i) the witnesses are expected not to materially stray from the facts given in the problem; (ii) if a witness does stray from the facts you are given this is expected to be handled by the standard evidentiary objections or impeachment; (iii) but it is possible that there may be instances where the creation of fact is such an unreasonable deviation from the facts given that it could affect the outcome of the trial, in which instance this could trigger a bench conference and possibly affect the team's point scores by the evaluators.

Teams should remember that, as in the "real world", the interpretation and application of these rules, as with all of the Mock Trial rules, are dependent upon the view of the judge/evaluator hearing the testimony during the trial. Just as in the "real world", there may be differences in how judges/evaluators apply the rules and handle matters that arise during a trial. The Mock Trial judges and evaluators always strive to apply the Mock Trial rules fairly, equitably and intelligently consistent with the spirit of the Mock Trial.

6. Regarding Dr. Leonard's witness statement, it states in Line 6 that s/he is a professor at "Western University School of Medicine." Is this a typo that should read "Northwestern University School of Medicine?"

   Answer: Yes, it should read Northwestern School of Medicine.

7. The packet has a lot of information regarding Jury Instructions. Will there actually be a trial by jury this year?

   Answer: Yes; however, this is not a change to the Rules & Procedures. The Mock Trial Invitational trials have been conducted as jury trials for the past several years. The evaluators who score the rounds are considered jurors. Please review the Rules & Procedures Handbook, which contains several references on this point, including:

   "All ISBA High School Mock Trial Invitational trials will be conducted as jury trials; however, you do not have to concern yourself with the additional steps involved in a jury trial such as voir dire (jury selection) and jury instructions (when the judge explains the law to the jury). Jury instructions may be provided in the mock trial case materials as a guideline on what needs to be proven, but they should not be referred to during trial. For purposes of these trials, please address the evaluators as the jury. Please address the presiding judge when addressing remarks to the court." Rules & Procedures Handbook, p. 17.

8. Question: How many students can participate in each trial? Can different students on a school's team compete in different trials, as long as there are no more than 7 students from each team participating in each trial?

   Answer: Please refer to Mock Trial rules VII.A and VII.F (Part A) and IX (Part B). In accordance with these rules:

   i. Each school may enter one team in the Invitational consisting of a total of ten (10) students;

   ii. No more than seven (7) of the team members from each school's Invitational team may participate in each trial;

   iii. One member from each 10-member school team shall be assigned the duty of timekeeper.