
ACME ELECTRONICS

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CASE DESCRIPTION

The primary subject matter of this case concerns business law and statistical analysis. Secondary issues examine negligence vs. negligence per se; cause in fact; contributory vs. comparative negligence; statute of limitations; and statistical analysis involving proportions and expected value. The case also presents strategic thinking and ethical issues related to business conduct and their affects on consumers.

The case has a difficulty of level three, appropriate for junior level courses. The case is intended to be taught in three class hours, including a class presentation by student teams. The case is expected to require a minimum of three hours of outside preparation by student teams that present a report.

This case is designed for use in an upper division inter-disciplinary business course. The purpose of the course is to enable students to utilize knowledge they have gained in their lower division core business courses that include one business law course and one statistics course. However, the case can be easily modified for use as an in class or take-home assignment in an introductory business law course by eliminating the Case B Questions on statistics.

CASE SYNOPSIS

Students are presented with a factual setting that they can identify with quickly. A consumer's computer hard drive "crashes" presenting immediate concerns. Can the computer be repaired and the hard drive replaced? Will the repairs be covered under warranty? Can the data be retrieved? If so, at what cost?

The consumer takes his computer to the repair department of the retailer where he originally purchased the computer. He learns that the "crashed" hard drive (defective drive) can be easily replaced with a new hard drive. However, the repair department is not equipped to retrieve data from the defective drive. The consumer is assured that the defective drive will be returned to him and he is given the name and telephone number of an individual who specializes in the retrieval of data from crashed hard drives.

After the repairs have been completed, the consumer picks up his computer and what he believes to be the defective drive from his computer. The consumer takes the defective drive to the data retrieval specialist who is able to retrieve about 90% of the data from the defective drive. The

consumer is excited. He pays the specialist for his services and returns home to view the retrieved data. The excitement of retrieval quickly turns to disappointment when the consumer discovers that the data retrieved from the defective drive is not his data.

The consumer is able to trace the problem to a mix-up at the computer repair department. Apparently the hard drive the consumer received was not from his computer. By the time the mix-up was discovered it was impossible to trace the whereabouts of the consumer's drive and he is resigned to the fact that the data is lost.

The consumer has spent \$800 to recover data from a defective drive that was not his. In addition, he is faced with the cost of reconstructing the data that is lost. Following an exchange of letters with the consumer, Acme Electronics contemplates settling the case. However, before this step is taken, several questions must be answered. The case can be divided into three major parts. The first part requires students to analyze a possible negligence claim against Acme with respect to its failure to return the appropriate defective drive to the consumer. Students are required to address the following negligence concepts – negligence per se; actual (cause in fact) causation; damages; and defenses to negligence (i.e., contributory vs. comparative negligence).

The second part of the case requires students to utilize their understanding of several statistical issues. They are required to recognize a proportion, calculate the appropriate sample size for estimating it, and calculate a confidence interval for the estimate. Students will also be asked to apply the concept of expected value as it relates to a statistical variable in the damage estimate.

The last part of the case enables the students to propose strategies regarding settlement and ethical issues raised by Acme's refusal to assume responsibility for its actions.

It is interesting to note that the principal facts in this case are based upon a real life experience of one of the authors.

INSTRUCTORS' NOTES

Recommendations for Teaching Approaches

This case is designed for use in an upper division inter-disciplinary business course. The purpose of the course is to enable students to utilize knowledge they have gained in their lower division core business courses. In addition, the course also aims to improve a student's communication, written and oral, and teamwork skills. Student teams prepare the answers to questions presented in the case with coaching from faculty. The faculty coaching is intended to provide answers to team questions. All teams submit a formal written business report containing an analysis of the issues presented in the case. One team of students formally presents their case solution to the class. A second team of students acts as a "discussion team" by asking the presenting team for further explanation or clarification of its case solution. Following the discussion team's exchange with the presenters, the entire class is welcome to participate in an active question and answer session.

Although this case is designed to be used in an upper division inter-disciplinary business course, the case can be easily modified for use as an in class or take-home assignment in an introductory business law course by eliminating the Case B Questions on statistics.

Case A Questions – Legal Issues – Negligence

1. Has Acme been negligent in its actions regarding keeping track of replaced computer components and failing to return the parts to Gunter?

In order to prevail in a claim for negligence, Gunter must establish several points. These elements combined are referred to as the prima facie case. The prima facie case in negligence consists of the following: (1) conduct; (2) duty; (3) breach of duty; (4) actual cause; (5) proximate cause; and (6) damage. (Note: some textbooks do not include conduct as a specific point in the prima facie case.)

In Gunter's case against Acme some of the elements (conduct, duty, breach of duty and proximate cause) can be easily established, while other elements (actual cause and damages) are more difficult to establish. Remember, in order for Gunter to prove that Acme was negligent, he must establish each of the six elements of the prima facie case.

THE PRIMA FACIE CASE FOR NEGLIGENCE

Conduct

Conduct refers to acting affirmatively (doing something) or failing to act (an omission). What is Acme's conduct? Certainly there was affirmative conduct in the repair of the computer, including the removal of the defective hard drive and returning a hard drive that was not the one that was removed from Gunter's computer. However, the conduct leading to the claim of negligence is a failure to act, an omission on the part of the repair department - failure to properly identify the hard drive once it was removed from the computer. This failure to properly tag the hard drive is the reason why Acme is unable to return to Gunter the defective hard drive that was replaced in his computer.

Duty

The next two elements of the prima facie case (duty and breach of duty) can be established by a traditional determination of how a reasonable computer repair dealer should act under the same or similar circumstances or by application of the doctrine of negligence per se.

Duty requires an analysis of two issues. The first issue relates to the standard of care that Acme must exercise in this case. The second issue requires a decision as to whom Acme owes a duty.

Standard of Care – Traditional Approach

With respect to the standard of care, in very general terms one must act in such a way as to not expose another to an unreasonable risk of injury. Stated differently, one must act as a reasonable person of ordinary prudence would act under the same or similar circumstances. In this particular case it can be said that Acme must act in a way that we would expect a repairer of computers to act under the circumstances.

Does the standard of care require identification or marking of defective computer hard drives when removed from a computer so that the hard drive can be returned to the owner of the computer? The standard of care to be exercised may be determined several different ways. For example, custom in the computer repair business may be an indication of how one should act under the circumstances. Without specific custom or usage evidence, students may merely arrive at a conclusion that they would feel is reasonable under the circumstances.

To Whom is The Duty Owed?

Does Acme owe a duty to Gunter? Generally, a defendant owes a duty of care to those who the defendant would foresee to be at risk of harm as a result of the defendant's conduct. Students may explain this part of the prima facie case in terms of "foreseeable plaintiffs" or plaintiffs who are within a certain "zone of danger" as defined by the nature of the defendant's conduct. There is little doubt that Gunter, as a customer of Acme's, is a foreseeable plaintiff.

Breach of Duty

The next point of the case requires a determination of whether Acme has breached the duty of care that it owes to Gunter. The usual approach to determining a breach of duty is to "calculate the risk" that the plaintiff is exposed to by the defendant's conduct. This approach requires weighing the chances of harm occurring and its severity against the cost of preventing the harm and the value assigned to the defendant's conduct. One may look at this approach as similar to a cost-benefit analysis. If the chances of harm occurring and severity of the harm outweigh the cost of prevention and the value assigned to the defendant's conduct, then the duty has been breached. The question presented here is whether Acme has failed to act as a reasonable computer repair dealer in failing to return Gunter's replaced hard drive. On the one side of the calculus of risk scale, the chances or likelihood of harm under these circumstances would be high and the extent of the harm could also be high depending upon the nature of the information contained on the hard drive that was not

returned. The risk of confusing the hard drives was high as evident from Acme's letter indicating that it had "experienced a large volume of replacements," and admitted being "unable" to keep track of defective parts. The severity of the harm would be any and all information held by the hard drive.

On the other side of the scale one must consider the cost of preventing the harm and the value attributed to Acme's conduct. The cost of preventing the harm is arguably low. How much would it cost to place a tag on the hard drive to identify it as belonging to Gunter? A high value, however, might be placed on providing computer repair services. However, it might be argued that Acme would not have a valid reason for attempting to repair more computers than it could repair in the exercise of ordinary care.

In the final weighing, a likely conclusion is that the chances of harm and the severity of the harm would outweigh the cost of prevention and the value of Acme's conduct. Thus the duty of reasonable care would be breached by Acme.

If, however, the reverse is determined, that the cost of preventing the harm and the value placed on providing computer repair services would outweigh the chances of harm and the severity of harm, then the duty would not be breached.

Negligence Per Se

Before moving on to the actual cause element of the prima facie case, it would be helpful to look at the concept of *negligence per se*. This concept provides a way to establish two elements of the prima facie case of negligence (duty and breach of duty) in light of a statute. There are a number of cases that the instructor may choose from to illustrate the concept. One case that serves multiple purposes for this assignment is *Haft v. Lone Palm Hotel*, 3 Cal. 3d 756, 478 P.2d 465 (1970). The *Haft* case addresses, in depth, two issues that arise in Gunter's negligence cause of action - *negligence per se* and actual cause.

Statutes can clearly specify how a person should behave. Proof of a statutory violation can create a presumption of negligence. The common law doctrine of *negligence per se*, presumes the failure of a person to exercise ordinary care if: (1) He violated a state statute or regulation of a public entity; (2) Death or injury results from an occurrence of the nature which the state statute or regulation was designed to prevent; and (3) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the state statute or regulation was adopted.

Statute – Standard of Care Owed to the Customer

It is at this point that the report may analyze duty and breach of duty with reference to the *negligence per se* doctrine. Gould Business and Professions Code section 8984.10 reveals that a computer repair dealer is required to "return replaced computer parts to the customer at the time of the completion of the repair" if the customer made that request at the time of the order. The statute

clearly specifies the standard of care that must be exercised. Presumably the purpose of the law is to protect the customer. When the hard drive is returned the customer is reassured that the part was actually replaced (as opposed to just being repaired) and gives the customer an opportunity to retrieve the information on the drive. In addition the statute clearly indicates that the duty is owed “to the customer.” Gunter, being a customer, is certainly within the class of persons that the statute was designed to protect.

Statute – Breach of Duty

If the element of breach of duty is analyzed from the standpoint of the statute and *negligence per se*, a conclusion of breach of duty is easily reached. The statute does not specify exactly how the dealer may fulfill the duty to “return replaced computer parts to the customer.” Presumably the dealer will develop procedures whereby the replaced parts can be identified for return to the owner. The statute merely requires the dealer to return replaced parts to the customer. However, merely returning to the customer a hard drive would not appear to satisfy the requirements of the statute. The dealer's standard of care would logically require that the hard drive that is returned to Gunter must be the hard drive that was specifically replaced in Gunter's computer. The statute, arguably, is intended to assure the customer that the hard drive had in fact been replaced. In addition, however, it is also likely that the statute also required the return of the hard drive so as to enable the customer to retrieve the contents of the defective/replaced hard drive. The harm that was caused (the loss of information on the drive) may be precisely what the statute was intended to prevent. Nevertheless, without question, the facts clearly indicate that Acme failed to return to Gunter the defective hard drive that was replaced in his computer.

However, proof of the statutory violation does not establish that a defendant's negligent conduct is the actual cause of the plaintiff's harm. Thus, the analysis must move on to the next element of the prima facie case – actual causation.

Actual (Direct) Cause

Of the six points of the prima facie case, this point is the most difficult to establish in this case. Actual cause requires that there be a direct link between the conduct of the defendant and the harm suffered by the plaintiff. In this case Acme's failure to return the hard drive to Gunter must be the cause of Gunter's loss. Generally the issue of actual cause is analyzed using a "but for" question. “But for” the defendant's conduct plaintiff would not have suffered a loss. Stated differently, the defendant's conduct led to the plaintiff loss.

Since actual cause is part of the prima facie case of negligence, the burden of establishing the causal connection is on the plaintiff. So what is the difficulty facing Gunter in this case? The difficulty is that the hard drive that was replaced in Gunter's computer is not available. Thus Gunter is unable to establish that had he been given his defective hard drive he would have been able to

recover the information from the hard drive and thus would not have been injured. It is impossible for Gunter to establish the link between Acme's conduct and Gunter's loss because he does not have his replaced hard drive. Although Gunter might argue that since Retriever was able to recover Gottmilk's materials from Gottmilk's defective/replaced hard drive and since his hard drive was the same as Gottmilk's, therefore, presumably, Retriever would have been able to recover Gunter's materials from Gunter's defective hard drive. Acme's position would most certainly be that Gunter would not have been able to recover any information from the hard drive even if Acme had returned it to him.

Given that it is impossible for Gunter to establish the causal link between his loss and Acme's conduct, is Gunter's negligence cause of action defeated? The answer to this question is not necessarily YES. In some instances, the courts will assume that the casual connection exists and shift the burden to the defendant to establish that his conduct was NOT the actual cause of the plaintiff's loss. Although the presentation of evidence regarding actual causation is normally one of the burdens that must be undertaken by a plaintiff in proving his case, if the lack of evidence in a case results directly from the defendant's conduct the court will shift the burden of proof on the issue of actual causation to the defendant to absolve himself if he can. This shifting of the burden of proof rarely occurs. However, in the present case, Gunter may be successful in arguing that because of Acme's failure to return to Gunter his hard drive it is impossible for him to establish that he would have been able to recover the data from his hard drive because Acme no longer has the drive. Thus, the burden should be shifted to Acme to prove that that failure was NOT the actual cause of Gunter's loss. The inability of Acme to provide such proof will result in the "actual cause" of the loss being established as a matter of law. (*Haft v. Lone Palm Hotel*, 3 Cal. 3d 756, 478 P.2d 465 (1970), provides a discussion of the circumstances under which the court shifted to the defendant the burden of proof on the issue of actual causation.)

Proximate Cause

This point of the prima facie case is easily met. It is important to note that proximate cause has nothing to do with proximity or closeness of the loss to defendant's conduct. Proximate cause is a concept that will enable a limitation of the extent or scope of a defendant's liability for conduct, on the part of the defendant, that has actually (in fact) resulted in a loss to the plaintiff.

Some courts discuss proximate cause as the natural and probable consequences of a defendant's conduct. Cases dealing with difficulties relating to proximate cause are those where the plaintiff's loss arises as a result of a series of connected, weird and unforeseeable events.

In this case what would be the natural and probable consequences of Acme's actions? Stated differently, are the damages suffered by Gunter the natural and probable consequences of Acme's failure to return to Gunter his replaced hard drive? The answer is most certainly yes. The events leading to the loss are not weird or unforeseeable. There are not a lot of intervening forces at work here. There is no need to explain this concept in further detail since its existence is rather obvious.

Damages

Compensatory Damages

Has Gunter been damaged by Acme's conduct? If so, what are the damages? Clearly Gunter has expended \$800 to retrieve data from a hard drive that was not his. The retrieved data was of no value to Gunter. Thus, Acme's failure to return the proper hard drive to Gunter resulted in his needlessly spending \$800 to retrieve information from Gottmilk's hard drive that was of no value to Gunter.

Gunter has indicated that he wants Acme to pay him \$5,000 to cover the cost of his time to reconstruct lost materials that he used in his consulting work. Here, Gunter must provide some evidence as to the nature of the data that was lost and the efforts he would need to expend in order to reconstruct that data. There are probably not enough facts given in the case to evaluate the validity of Gunter's \$5,000 claim. A conclusion that an award of \$5,000 should be made would not appear to be out of the realm of possibility. However, an opposite conclusion is also reasonable since the facts of the case are vague on the costs of reconstructing the lost data.

Punitive Damages

In addition Gunter is seeking \$10,000 in punitive damages because of the way Acme has handled the entire matter. Students might explain the difference between intentional tort cases and negligence and the possible recovery of punitive damages in these cases. The rationale for awarding punitive damages in intentional tort cases (e.g. assault, battery, false imprisonment, defamation, infliction of emotional distress) is two fold. First, the intentional nature of one's conduct is viewed as reprehensible and should therefore be punished. Second, punishing the defendant for conduct specifically aimed at causing harm provides a deterrent affect with respect to the behavior of others.

Generally, punitive damages are not recoverable in a case of negligence. In this case Gunter would not be able to recover any amount for punitive damages. Acme did not act with the specific intent to damage Gunter, but merely failed to exercise ordinary care. The conduct here is not reprehensible, was unintentional, and a deterrent message for others is not appropriate.

Conclusion - Negligence

Student reports will, more than likely, conclude that Acme's conduct amounted to negligence and that its conduct caused harm to Gunter. The extent of the harm would certainly include the \$800 spent on recovering useless data. It is likely that students would also conclude that the request for \$5,000 to cover the cost of recreating the lost data is reasonable. However, a conclusion that Acme would be liable for punitive damages would be clearly erroneous.

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2. Assuming Acme has been negligent, what defense(s) may be available to Acme to lessen or eliminate any liability on its part?

DEFENSES TO NEGLIGENCE

Contributory Negligence

In lawsuits based upon a negligence cause of action there are several defenses that may be available to the defendant. If successful, a defense is usually a complete bar to recovery by the plaintiff in spite of having established that the defendant was negligent. This is the result of a successful defense of contributory negligence. If the plaintiff contributes to his loss to any degree, then the plaintiff will recover nothing for the damages suffered as a result of the defendant's negligence. The "Daily Tribune" article states that the State of Gould currently recognizes contributory negligence as a defense. Thus, if Gunter is responsible for bringing about his loss, to any degree, Gunter will recover nothing from Acme.

Did Gunter contribute in any way to the harm that he suffered? The analysis here regarding Gunter's behavior is the same prima facie case that was used in evaluating Acme's behavior, i.e., conduct – duty – breach of duty – actual cause – proximate cause – damage. Reports may not include an in-depth analysis of Gunter's behavior and will provide a superficial coverage of Gunter's possible negligence. Gunter owed a DUTY to HIMSELF to avoid any harm he would suffer if the hard drive crashed. He clearly BREACHED this duty by failing to back up the hard drive. That failure ACTUALLY CAUSED the DAMAGE.

A more thorough discussion of Gunter's conduct is most desirable. Gunter's conduct in this case is an omission – he failed to make a back-up copy of his hard drive. Gunter certainly owes a duty to himself to act as a reasonable person would act under the same or similar circumstances. (This covers the points of duty and to whom the duty is owed.) The interesting question presented here is whether the standard of care would include backing up the hard drive. This is a critical decision. If the standard of care would include backing up the hard drive then the next issue, i.e., has Gunter breached the duty that he owes to himself, is easily determined. If the duty includes backing up the hard drive, Gunter has failed to do this; therefore he has breached the duty. The failure to back-up has caused the harm (actual cause established). The "but for" question would be answered in the affirmative. If Gunter had backed-up the hard drive he would not have been harmed. If the hard drive crashes, Gunter would have a back-up copy and therefore any harm that might have occurred is avoided. The degree of contributory negligence on Gunter's part is not relevant. Contributory negligence, to any degree, results in a complete bar to recovery from Acme.

On the other hand, if the duty does not include making a back-up copy of the hard drive, then the duty is not breached because of that failure. If the duty to oneself is not breached then one element of the prima facie case of negligence is missing and Gunter was not negligent

(contributorily). If Gunter was not negligent then the defense of contributory negligence is unsuccessful and Gunter's recovery of damages from Acme will not be affected.

Comparative Negligence

The "Daily Tribune" article indicates that the Gould Supreme Court is considering changing the contributory negligence doctrine to a comparative negligence standard. The article provides the students with an explanation of comparative negligence (both pure and mixed). The pertinent part of that article is:

These comparative negligence systems vary among the states; however, there are basically two different applications. One form is described as "pure" and the other as "mixed" or "limited."

Under the "pure" version of comparative negligence, the award of damages to the plaintiff will be reduced in direct proportion to the plaintiff's percentage of fault, regardless of the ratio. For instance, in the above example, the plaintiff was found to be two percent at fault. Thus the plaintiff could recover 98% of his or her damages. Further, even if the plaintiff were found to be 51% at fault, he or she would still be able to recover at least 49% of his or her damages. Finally, even if the plaintiff were found to be 99% at fault, the plaintiff would be entitled to recover, from the defendant, 1% of the damages suffered. Under the "pure" comparative system it is evident that the harshness of the contributory negligence doctrine is significantly softened.

Under the "mixed" or "limited" version of comparative negligence, in order for the plaintiff to receive any damage recovery, the plaintiff must be no more than 50% at fault for the injury. Thus in the above examples the plaintiff would not recover any damages where the plaintiff was found to be at fault 51% in the one instance and 99% in the other instance.

In addition to the "Daily Tribune" article, the instructor may assign textual material or a specific legal case; or conduct class discussion that will assist the students in analyzing the comparative negligence issue. There are numerous legal cases that an instructor might choose from. One case is *Li. v. Yellow Cab Co. of Californian*, 13 Cal. 3d 804, 532 P.2d 1226 (1975). The *Li* case discusses contributory and comparative negligence. The case also addresses the issue of retroactivity once the court decides to abandon the contributory negligence standard and adopts in its place a "pure" comparative negligence standard.

Gunter Not Comparatively Negligent – Full Recovery

The determination of whether Gunter has acted negligently in failing to exercise reasonable care is the same prima facie case we have discussed above. If Gunter has not been negligent then he would be entitled to full recovery of damages from Acme. The result in this instance is the same regardless of whether the defense is based on contributory negligence or comparative negligence.

Gunter Comparatively Negligent – Recovery Differs

If Gunter is negligent, then the percentage of his contribution to his own loss must be determined. The analysis can only make statements based upon certain assumptions. If the Supreme Court of Gould adopts a pure comparative negligence standard then Gunter's recovery would be reduced by the percentage of his contribution to his own loss. Suppose Gunter contributed 60% to his own loss. Under the pure form of contributory negligence Gunter would be able to recover 40% of his damages from Acme.

If the Court adopts a mixed comparative negligence standard, then Gunter would be able to recover damages from Acme if the percentage contribution to his own loss is less than 50%. Thus, if Gunter were determined to have contributed 49% to his own loss, he would be able to recover 51% of his damages from Acme. However, if Gunter were determined to have contributed 50% or more to his own loss, he would be barred from recovering anything from Acme.

Case B Questions – Statistical

3. Consider the sample of 600 past negligence cases. Suppose you are willing to let the 80% estimate be within .03 (3%) of the true proportion. You are willing to assume a 90% confidence.

a. Is 600 an adequate sample size for the estimate of 80%? Show why or why not.

It has been estimated that 80% of the time the plaintiff is awarded damages (let $p = .8$). Several assumptions with respect to risk are made. (1) It is desired that our estimate of 80% is within 3%, up or down, of the true proportion (let $B = .03$). Recall that we do not know the true proportion; we can only estimate it. One might be familiar with similar risks used in political polling. (2) The confidence of 90% is the proportion of times that a confidence interval based on the 80% contains the true proportion. This *confidence interval* contains an upper value, higher than 80%, and a lower value, lower than 80%. We can be 90% certain that this interval contains the true percent the plaintiff is awarded damages. (Hint: You may wish to review the concept of confidence intervals. Go to <http://www.davidmlane.com/hyperstat> and check topic 8 and then 10.) The calculation of

this confidence interval is shown in part b below. Let confidence or $(1-\alpha) = .90$ so that $\alpha = .10$.

The 80% proportion follows a binomial probability distribution. However, the sample sizes in this problem are large enough to use the normal approximation to the binomial. The probabilities of various percentages occurring can be described by the *normal distribution* or *bell-shaped curve*. (See <http://www.davidmlane.com/hyperstat> and check topic 5.) Errors can either be up or down, so this problem involves two tails, each with a probability of $\alpha/2$ or .05. From a normal table $Z_{\sqrt{2}(.05)} = 1.645$.

The sample size $n = [Z_{\sqrt{2}} \sqrt{p(1-p)} / B]^2 = [(1.645)(.4) / .03]^2 \approx 481 < 600$.

Therefore, a sample of 600 is large enough given our assumptions.

b. Construct a 90% confidence interval on the estimate of 80%. How would you interpret it?

Again, using the normal approximation to the binomial distribution, the confidence interval is $p \pm Z_{\sqrt{2}} \sqrt{p(1-p)/n}$ or $.8 \pm (1.645) \sqrt{(.8)(.2) / 600}$. The actual sample size is 600 so $n = 600$. The formula gives an upper bound of $.8 + .027 = .827$ and a lower bound of $.8 - .027 = .773$.

It is important that students correctly define this confidence interval. There are several ways to state it. One way is to state that one can be 90% confident that the interval (.773-.827) contains the true percent the plaintiff is awarded damages. Another is that 90% of all confidence Intervals will include the true percent. However, it is NOT correct to say that the probability the true percent is in the interval (.773-.827) is 90%.

4. Determine the expected value of the amount that could be paid to Gunter in a settlement. Use the 80% probability figure. Also determine a maximum and minimum expected value for the settlement figure based on the confidence interval above. Be sure to include all of the damages Gunter will be able to recover. How would you interpret your expected values?

The *expected value* is the weighted average of a set of values where the weights are the probabilities of the values. In this problem the values are all costs so the expected value can be called *expected cost*. Here the expected value is found by multiplying the probability

of each possible event by the monetary consequence (cost) of that event. Then the results for all events that can occur are summed.

Acme's conduct in this case does not appear to meet the egregiousness standard for purposes of awarding punitive damages. It did not appear to deliberately act with knowledge of a high probability of harm and reckless indifference to the consequences of its actions. Thus, *no* punitive damages are considered.

The negligence claims that can be considered are (1) the payment of \$800 as reimbursement for the expenditure to Mr. Retriever and (2) the payment of \$5,000 to cover the cost of time to reconstruct lost materials. Your students may rationalize different values; give them credit if their answers are well thought out.

The expected value (or expected cost) = $(.8)(.5)(\$5800) + (.2)(\$0) = \$2320$. The expected value based on the upper bound of the confidence interval of .827 is \$2398. The expected value based on the lower bound of .773 is \$2242. If there were many cases with similar costs, the mean settlement would be \$2320, assuming the 80% figure. Even if the 80% varies (and assuming the 50% is correct), the interval \$2242 - \$2398 is relatively small. \$2320 appears to be a reasonable estimate.

Case C Question – Ethical & Strategic Issues

- 5. Should Jetson attempt to settle the matter with Gunter before he files a lawsuit? If so, what would be the recommended monetary amount of the settlement? Be sure to include all of the statistical and legal issues involved as well as any strategic and ethical issues.**

The expected value of \$2320 could be used as the basis for a settlement. This amount is much less than Gunter's claims. If Jetson can convince Gunter to settle for something approximating this amount, both parties would save lengthy and expensive litigation costs. (Settling would be particularly beneficial to Acme if the Gould Supreme Court adopts the pure comparative negligence standard). A settlement appears to be in the best interests to the stakeholders involved and appears to be fair and ethical.

Please note that is an open-ended question. A number of good answers are possible. Some of your best students may mention the following ethical and legal issues.

ETHICAL ISSUES

One ethical issue that the case presents is Acme's response to Gunter's request to be reimbursed the \$800 out of pocket expense for recovery of data from Gottmilk's defective hard drive. The facts clearly indicate that Acme did not return Gunter's defective hard drive to him. Legally Acme may or may not have to compensate Gunter. However, Acme has already

acknowledged that it failed to tag the hard drive due “to the large number of hard drive replacements” it was making during the first two weeks of October 2007. The right thing to do, one might argue, is to assume responsibility for one’s actions. The \$100 gift certificate settlement offer does not accomplish this. The student reports should look at this issue and make some attempt to apply at least one approach to ethical decision-making.

There are numerous approaches that are used to determine if one’s actions are ethical. The most common of these approaches is the Stakeholder/Utilitarian Theory (maximize the net benefits to society as a whole, i.e., the greatest good to the greatest number). Other theories include the Rights Theory (respecting and protecting individual rights); Justice Theory (fair distribution of benefits and burdens); Categorical Imperative Theory (looking at the results if everyone acted in the same manner); and the Front Page Test (reaction if the decision is reported on the front page of the local newspaper). In order to answer this question instructors must provide students with a framework whereby they can analyze Acme’s behavior from an ethical standpoint.

STRATEGY

The strategy involving the legal case revolves around the one-year statute of limitations, the possible change in the contributory negligence defense in the State of Gould, and if there is a change to a comparative negligence standard will the standard be applied retroactively.

Gunter’s Dilemma

If the Gould Supreme Court retains the contributory negligence defense, then Gunter should settle. It is likely that if the case were to go to trial, Gunter would be found to have been contributorily negligent and would be barred from recovering any damages from Acme. Acme would appear to have the upper hand at this point and may not have any interest in settling the matter quickly.

If the Gould Supreme Court adopts the “pure” comparative negligence standard then Gunter may wish to take his chances in court and try to establish his claim for \$5800. Even if he is found to have contributed to his own loss, his recovery would only be reduced by the percentage of his contribution to his loss. Under these circumstances, Acme may want to settle the case with Gunter. Acme, of course would try to settle for as small an amount as possible.

If the Gould Supreme Court adopts the “mixed” comparative negligence standard, Gunter faces the possibility of being barred from recovering damages from Acme if the jury determines that he was at least 50% responsible for causing his loss. In this instance, Acme would again have the upper hand and may not have any interest in settling the matter.

The one-year statute of limitations will soon bar any lawsuit that Gunter may file. The one-year period of time within which to file the lawsuit would begin to run from the time Gunter knew or should have known that he was injured. From the facts stated in the case it is not clear on what

precise date Gunter knew he had not been given his replaced hard drive. However, the date is somewhere between the middle of October and December 1, 2007 when Gunter wrote his first letter to Acme. If Gunter does not file the lawsuit in a timely manner he will lose the opportunity to have a court hear his case. The dilemma here is that if the Court adopts the new standard, will that standard be applied retroactively and, if so, how? A reading of the “Daily Tribune” article should raise this dilemma. If Gunter files his case before the Court adopts the new comparative negligence standard, that standard may not be available to him in his lawsuit. The court may retroactively apply the new standard only to those cases that are filed after it changes the law from the contributory to a comparative negligence standard. (As mentioned earlier in the comparative negligence discussion, *Li v. Yellow Cab Co. of California* may provide the students with some guidance with respect to the issue of retroactive application of the comparative negligence defense.)

Acme’s strategy, in light of the statute of limitations and the retroactivity issues, would depend upon decisions reached by the Supreme Court of Gould in the case before it relating to changing the law of contributory negligence. If the Court does not change the law, (the retroactivity issue is not raised) Acme has the advantage and is not concerned with settling. If Gunter does not file his suit within the one-year time period, Acme would escape liability. If the Court changes the law to a “pure” comparative standard and determines that the new standard will apply retroactively to only those cases that are filed after the Court’s decision, then Acme may want to settle the case as soon as possible.

AUTHORS’ NOTE

Dates are extremely important when a statute of limitations issue is presented in a case. The dates currently included in the case are appropriate if the case is assigned in a Spring 2008 class. If the class is assigned in a subsequent term see the table that follows for suggested dates for the events in the case.

Event	Spring 2008	Fall 2008	Spring 2009	Fall 2009	Spring 2010
Computer Purchased	January, 2005 (Nimbus 2005)	January, 2005 (Nimbus 2005)	January, 2006 (Nimbus 2006)	January, 2006 (Nimbus 2006)	January, 2007 (Nimbus 2007)
Hard Drive Crash	October, 2007	April, 2008	October, 2008	April, 2009	October, 2009
Gunter’s First Letter to Acme	December 1, 2007	June 1, 2008	December 1, 2008	June 1, 2009	December 1, 2009
Fontz’s Response	December 21, 2007	June 21, 2008	December 21, 2008	June 21, 2009	December 21, 2009
Gunter’s Response	December 26, 2007	June 26, 2008	December 26, 2008	June 26, 2009	December 26, 2009
Daily Tribune Article	January 7, 2008	July 7, 2008	January 7, 2009	July 7, 2009	January 7, 2010
Court Decision Expected	August, 2008	February, 2009	August, 2009	February, 2010	August, 2010

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