

River of Law III – Duty of Engineers to Third Parties

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1. Introduction

No doubt law and the American legal system are mysterious to those not routinely associated with it. The law and the American legal system is a living process. A process whereby the law is debated and tested by different courts, eventually being hammered out after much trial and error, no pun intended. Perhaps therein lies the mystery, that law is a process not some type of “truth” or “rule” or even some concrete thing. Law is a continually changing process. Like all processes it is alive and continues to grow and develop and become more complex. It does not often stand very still for us to study. What is studied today may not exist tomorrow. The process needed to develop a particular law may span decades, even hundreds of years. Law has most of the characteristics of a living system. That is, it grows, develops and gives birth to new law.

People, who try to “learn” the law in order to use it to their advantage, or gain an understanding of the regulatory environment of business, are doomed to failure. Only people who learn the legal process can succeed in understanding the law and properly putting it to work for them. This paper explains in basic terms the legal system in operation in the United States of America, and provides an interactive project designed to facilitate an understanding of the American legal system and the process by which law is developed.

2. Characteristics of the Legal System in Operation in the United States

The two major characteristics which give the United States legal system its character are: 1) it is a common law system and 2) it consists of fifty-one separate, independent court systems in simultaneous operation.

A. Common Law System

The basic characteristic of a common law system is that decisions by appellate and supreme court judges (not trial judges) become law for subsequent cases containing similar facts and issues. The common law system developed in the early Middle Ages in England, at a time when little if any statutory or governmental law existed. The law came from the “customs” or “common” practices of the people. At that time the decisions of the judges would be written

down for future reference. This allowed for more predictability in the law since parties wishing to understand the law could read prior decisions and determine, at least to some extent, what the law was. Past cases are called “precedent” for future cases. A past case may be law if it contains the same or very similar facts and issues as a case being presently litigated.

The alternative to the common law system is the civil law system. A civil law system is based upon statute, and for most civil law systems case law is NOT precedent for future cases, though it is often referred to by judges and lawyers. A civil law system generally has a lesser degree of predictability than a common law system.

Law comes to us from several sources, not just the decisions of appellate and supreme court judges. The most commonly recognized sources of law are constitutions, statutes, administrative regulations (such as OSHA regulations and IRS regulations) and case law.

Not all law is of equal effect, but is arranged in a hierarchical structure. At the top, and of primary importance, is the constitution; followed by statutory law; administrative regulations and, finally, on the bottom of the hierarchy, case law. If two sources of law conflict, the law higher up in the hierarchy prevails.

Notice case law is at the bottom of the hierarchy and therefore can be changed by any other type of law. For example, assume a court interprets the Federal Fair Labor Standards Act to apply to employees of American companies in their overseas operations. The Federal legislature could pass a law that states, no, the Fair Labor Standards Act does NOT apply to employees of American companies in their overseas operations. In effect the legislature overturns the case law.

The only corollary to this concerns issues of constitutional interpretation. With that type of issue the constitution has modified the hierarchy to prevent the legislature from passing unconstitutional legislation. The hierarchy for these types of issues is: constitution, case law, statutes, administrative regulations. For example, if the Federal government were to pass a law outlawing abortions in the first trimester the United States Supreme Court would have the power to declare that law unconstitutional, and therefore null and void. In order to change the case law, the constitution would have to be amended.

Case law is referred to by a variety of names: judge-made law, precedent, common law, opinions, or simply cases. Each term describes the same thing: the decision of an appellate or supreme court judge in a particular case. The term “common law” may also be used to describe our system of law, or any system where court decisions are precedent for succeeding cases.

It is important to understand that a prior court decision becomes precedent, or law, only for a case having **THE SAME OR SIMILAR FACTS AND ISSUES**. If the facts and/or issues are different, the judges hearing the second case need NOT follow the prior case, but are free to craft a decision different from that in the first case. For example, assume an appellate court has

decided in Case #1 that a landowner living next door to the owner of a project (a neighboring landowner) can collect damages from the owner's engineer who negligently prepared plans and specifications, and that negligence caused damage to the neighbors property. Sometime later Case #2 arises. In Case #2 a general contractor sues an engineer for damages the general contractor suffered as a result of the engineer's negligent preparation of plans and specifications for the owner. The general contractor will claim Case #1 is precedent for Case #2, and therefore the general contractor can collect damages from the engineer. The engineer however may convince the court in Case #2 that the facts are sufficiently different so that Case #1 is not precedent.

This requirement, that the facts and the issues be the same in the two cases, allows for great flexibility in the law. This flexibility allows the law to be tailored to fit the specific facts of a case rather than law which is broad and dogmatic and may prove unworkable when the facts change.

B. Fifty-one Separate, Independent Court systems

The second characteristic of the legal system in operation in the United States is the existence of fifty-one separate, independent court systems. The federal government and each state has its own independent court system.¹ Every one of these courts, both federal and state, has limited jurisdiction. In other words, every court's power is limited in some way. No court, not even the United States Supreme Court, has the power to hear every type of case.

Jurisdiction is the power of a court to hear a case. For example the Bankruptcy court, a division of the federal court system, has jurisdiction over bankruptcy cases. A state probate court has jurisdiction over probate cases. A state municipal court might have jurisdiction over misdemeanors and civil matters where the amount in controversy is less than \$25,000.

In general, the federal courts have jurisdiction over cases involving the laws and treaties of the United States government, and cannot hear matters relating to purely state law. Contracts are, for the most part, state law issued. One exception to this rule is diversity jurisdiction. If the litigants are from different states, and the amount in controversy is greater than \$50,000, the federal court may have jurisdiction to hear that case, even if the issues are only state law issues. The framers of the United States Constitution thought the state court might favor the litigant from its own state, and therefore gave the Federal Court jurisdiction to determine cases involving litigants from different states or countries. For example, assume a California resident sues a North Carolina company for \$100,000 in the California State court system. In this case the North Carolina company can "remove" the case to the federal court system and out of the California court system. The federal court must apply the state law applicable to the controversy however.

The state courts have jurisdiction over controversies occurring or causing effects in their own state. Notice that state jurisdiction is not only different than federal jurisdiction, but it is greater. Most

people do not realize this and think the jurisdiction of the federal courts is greater than the jurisdiction of the state courts. State courts can generally determine *any* matter occurring within their boundaries, including matters involving federal law or the law of other states. For example, assume two parties, one of whom is from New York, agree to build a project in Texas. The parties agree New York law will govern the contracts. The Texas court can hear this case, but will have to apply New York law. This case can be appealed as far as the Texas State Supreme Court. Note that it might be possible for the New York resident to remove this case to the federal system as a diversity case.

What if a controversy concerns a law of the United States, such as an OSHA regulation or the Americans with Disabilities Act, and occurs on the above project in Texas? Does the State court have jurisdiction to interpret the law of the United States? The answer to this question is usually, yes. However, since this case involves Federal law the case can be appealed up through the state court system, but can also be appealed to the United States Supreme Court. For example, the famous case of *Roe v. Wade* was a Texas case, filed in the Texas court system and appealed up through the Texas Supreme Court. An appeal was then made to the United States Supreme Court, and since the issue involved a U.S. Constitutional issue, the United States Supreme Court had the jurisdiction to hear the matter.

Therefore, if a controversy concerns only state law, and does not raise any issue of federal law, the general rule is that Federal courts, including the United States Supreme Court have no jurisdiction over the case and cannot hear it. Since most issues involving contracts involve state law, most construction cases are governed by state law.

3. Three Levels of Courts and What They Do

Most states and the federal government have three levels of courts within their system: trial courts, appellate courts and one supreme court. (See Figure 1 below). The specific names of courts at each level are different depending on the system. For example, in the federal court system the trial courts are called “District Courts”. In California the trial courts are called “superior courts” and operate at the county level.

Trial courts hear witnesses' testimony and resolve legal and factual controversies. Trial courts do not make law, and the result of a trial court decision is not precedent for subsequent cases. In the state court systems trial decisions are not published anyway. However, in the federal court system federal district courts publish many of their decisions. These published decisions are found in the Federal Supplement.

At the trial court level legal issues are determined by the judge and factual issues by a jury. It is possible to waive a jury, and in those trials the judge also decides the factual issues.

In a factual issue two (or more) pieces of evidence contradict each other. When this occurs, the jury must decide which piece of evidence to believe. For example Driver gives evidence, called testimony, saying the light was green. A Police officer gives evidence, again called testimony, saying the light was red. The factual issue presented here for the jury's determination is: Was the light red or green? The jury will decide if the light was green or red.

The jury will decide this factual issue after hearing the testimony and observing the demeanor and judging the credibility of the witnesses. This decision of the jury is seldom overturned on appeal. Appeal courts do not hear testimony or retry cases – no witnesses testify in front of appellate judges. Because the appeal court judges do not see the witnesses and cannot judge their demeanor, they are very hesitant to substitute their own interpretation of the facts for those of a jury, a jury that was present during the giving of evidence and testimony.

Because issues decided by juries are unlikely to ever be overturned on appeal they are extremely important at the trial level. A trial is not some preliminary stage in the legal process to be approached with the idea that appeal is a second chance. While it is true any party can appeal anything, it is difficult to overturn the decision of a jury. Every effort should be made to win a case at the trial level or to settle, knowing that issues decided by the jury are unlikely to be changed.

In general all other issues in a trial will be legal issues decided by the trial judge. The issue of whether or not a neighboring landowner can sue an engineer for damages is an example of a legal issue decided by trial judge. This decision is subject to review by the appeal court. *The appellate court structure is designed primarily to determine if trial judges have made errors.*

In most states, and in the federal court system, the final level of appeal is a supreme court. Parties dissatisfied with the appellate court judges' interpretation of the law can further appeal to the supreme court. However, appeal is not automatic and most supreme courts chose whether or not to hear a particular case. It is not uncommon for supreme courts to wait for a conflict to occur in the lower court before accepting a case.

If the supreme court decides not to hear the case, the appellate court decision stands and there is no further avenue of appeal. A small number of state lawsuits can be appealed to the United States Supreme Court. In order to appeal from a state supreme court to the United States Supreme Court, a state case must involve an issue of federal law.

Ultimate judge-made law in any particular jurisdiction is determined by the supreme court in that jurisdiction². Once the supreme court decides what the law is, that law must be applied by all lower courts until changed. This judge-made law can be changed either by legislation or a later supreme court decision overturning an earlier case.

Change is one of the hallmarks of law. Because law is a reflection of the ethical and moral climate of a jurisdiction, it will change as that climate changes. New legislation is passed. Decisions in older

cases may be overturned or modified. However, the parties in those old cases cannot now return to court and get the decisions in their particular case changed – only the law has changed, not their case. In actual practice it is unlikely the parties even know their case has been overturned or the law applicable to their case has changed. Many years or decades may have elapsed.

4. The River of Case Law

With all of these different courts making and interpreting the law, how do we know what the law is? Is there any consistency among the courts? Is it not possible for different courts to come to inconsistent decisions? How does a case affect later cases?

In the United States the fifty-one independent court systems produce fifty-one independent sets of law. The law of Alabama applies in Alabama, but not Minnesota, and vice versa. Judge-made law in the federal court system (except for U.S. Constitutional issues) is not law in any state court system. Any particular judge might read cases from these different jurisdictions in order to get a better *understanding* of what the law should be in their particular state, but the judge need not apply the case law of another state or federal court.

A typical case is filed in a particular trial court in a particular state. This trial court is in a particular appellate court jurisdiction within the state. In other words an appellate court will hear appeals from trial courts in its geographic area. A particular appellate court must apply precedent (judge-made law) made in its own court and the supreme court. However, it is not required to apply precedent from appellate courts in other geographic areas, even within its own state. For example, in Figure 1 a case may be filed in the Old Town County Trial Court. If one of the parties is dissatisfied with the decision that party can appeal to Appeal Court #1. The case can be further appealed to the supreme court.

Figure #1 is set up to model a river. Cases go up the river, and law flows down the river. Each jurisdiction has its own river of judge-made law. Judge-made law flows down from the supreme court, into various branches of the river, each branch representing an appellate court. The river continues to branch below the appellate courts to the trial courts below.

The supreme court will put law into the river, and that law flows downriver to all points below it. Appellate courts however, put law into the river only at their branch of the river, and that law flows downriver only to the trial courts below it. That law does not flow sideways to other appellate courts, even within the same state. For example, in Figure #1 law from Appeal Court #1 flows downriver to the Old Town County court, but not across to the Buena Trial Court. Courts on different branches of the river do not have to follow the case law from other branches. Each state and the federal government has its own separate river.

Because different appellate courts do not have to follow decisions of other appellate courts, even in their own state, it is possible for the appellate courts to come to different conclusions, even in

similar cases. When this happens the supreme court is more likely to accept a case involving that law in order to clarify the law and make it consistent for the entire state.

This same process works in the federal court system. Law flows down from the U.S. Supreme Court to all lower courts. Law is added by the Circuit Courts, which are the appellate courts in the U.S. Court system, and that law flows down river to the trial courts below. For example, at the time this paper is being written the 5th Circuit Court of Appeal determined that the University of Texas Law School's method of admitting students was illegal. The illegality was caused by the particular way race was used as a criterion for student admission. The result of this decision has been that many colleges and universities in the 5th Circuit have stopped using race as a criterion for admitting students. However other Circuit Courts in the United States have upheld the use of race as a criteria for admitting students. At the present time the law is different for different areas of the country. It is likely the U.S. Supreme Court will hear a case involving this issue in order to clarify the law for the entire country. Once it does, the law will flow down the river to all areas of the country and will therefore be consistent.

This appellate process is used not only to determine and develop the common law, but also to interpret statutes. You may ask, why do courts need to interpret statutes? Why cannot the courts just follow the statute as written? Legislation is usually fairly broadly written and is not in response to a particular set of facts. Whenever legislation is broadly written, ambiguity or injustice can result. For example, assume the law prevents students from giving or selling prescription drugs to other students. One day the life of a girl suffering from an extreme asthma attack is saved when another student allows her to use her inhaler. Technically the second student has committed a crime. Rather than helping the suffering student, she should have left her to die. It is unlikely however a court would find the helpful student had engaged in criminal behavior. While no doubt the development of law by and through judges can result in injustice, when weighed with alternatives, the existing system has proved workable.

As a simple example of a court's statutory interpretation, assume the state of California passed a law stating "only vehicles with two or more passengers can use the carpool lane". A motorist is ticketed for illegal use of the carpool lane, but goes to trial on the matter, claiming the cadavers in the rear of the van he was driving are to be considered as passengers for purposes of the statute. The trial court does not agree with the driver and imposes a fine for violation of the statute. The driver appeals. The appellate court upholds the trial court's decision and states the statute means "only vehicles with two or more live passengers can use the carpool lane". A word, "live" has in effect been added to the statute by the court.

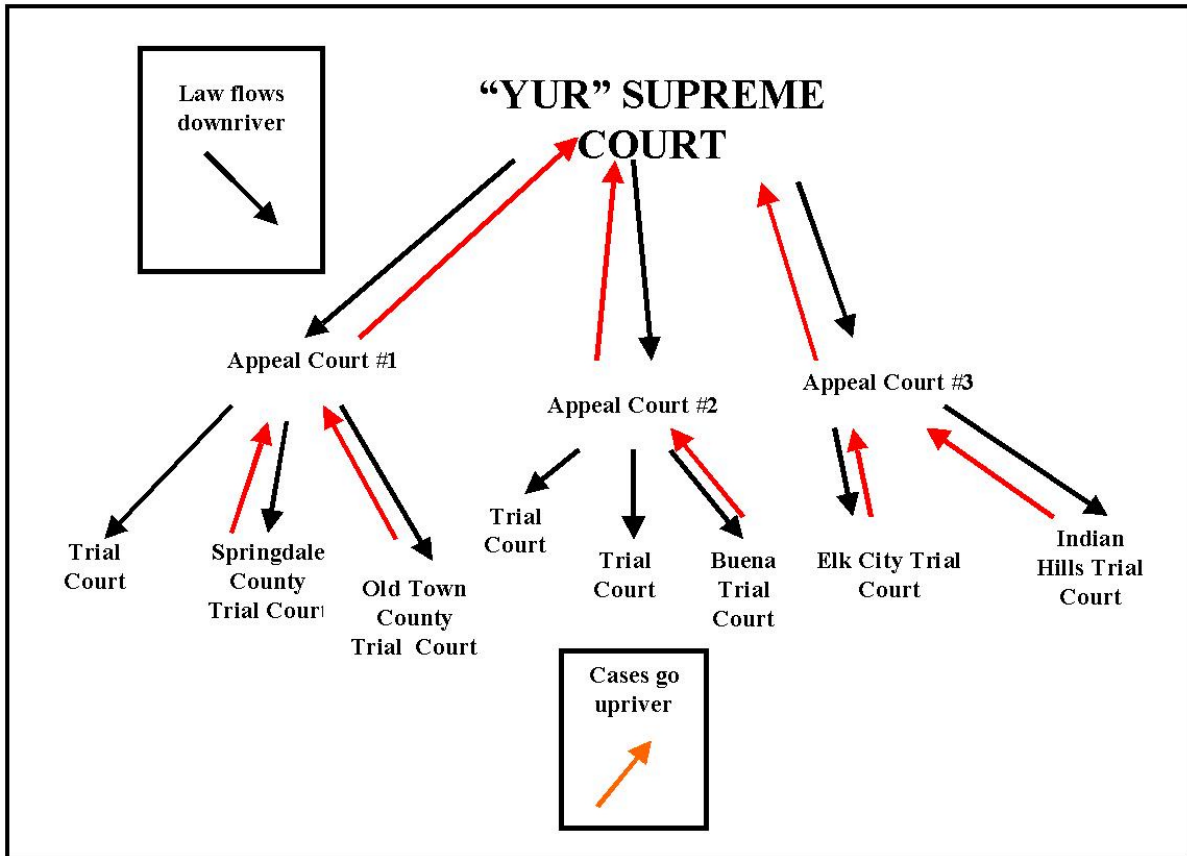


Figure 1

The above explanation gives some insight to the actual process of the court system. However these concepts can more easily be understood by following the development of a particular law. The following exercise has been developed to accomplish this.

5. The Law To Be Analyzed

The law to be analyzed is the traditional common law doctrine that limits actions relating to damages for breach of contract to persons in privity of that contract. Persons (or business entities) that enter into a contract are “in privity of contract” with each other. For example, your local drug store has a contract with a pharmaceutical company to sell certain drugs. The drug store and the pharmaceutical company are in privity of contract. The buyer of the drugs is not in privity of contract with either the drug store or the pharmaceutical company.

Assume the pharmaceutical company mislabeled some medicine. The buyer of the drug would be prevented from suing because the buyer is not in privity of contract. (Note: that is not the

law). In other words, when a damage occurs, and that damage is the result of a contract between two people (or business entities), the damaged party can collect damages *only* if it is one of the two people who made the original contract.

A typical construction contract contains many parties with varying duties to each other and the owner. A simplified pictorial representation is presented below at Figure 2:

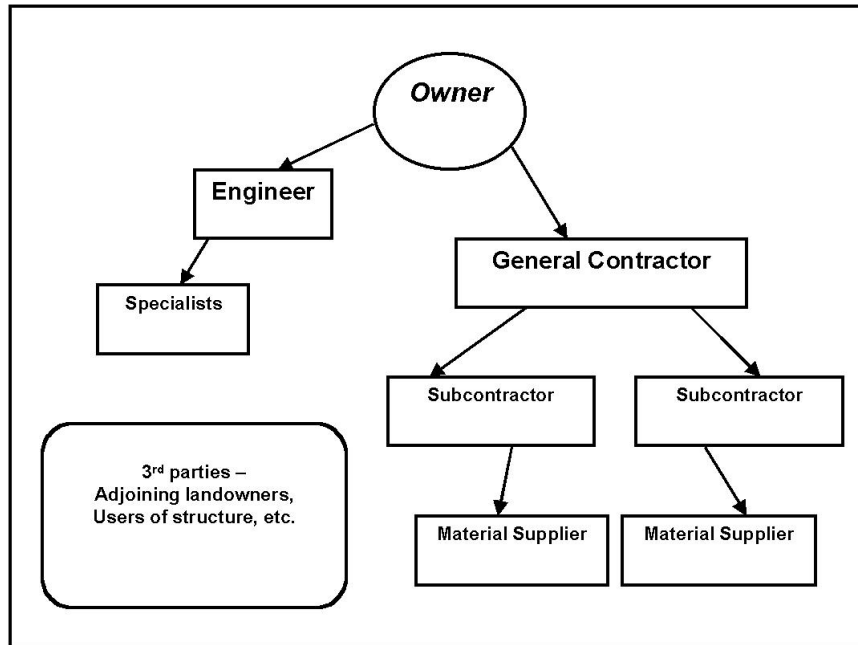


Figure 2

In this representation the lines represent the contractual relationship among the pictured parties. Parties connected by lines are “in privity”, parties not connected by lines are not in privity. The engineer and the owner are in privity of contract with each other. The owner and the general contractor are in privity of contract with each other. However, neither the general contractor, nor the subcontractors are in privity of contract with the engineer. None of the parties is in privity of contract with 3rd parties, though it is possible in some instances for the owner to be in privity of contract with certain third parties. For example if the owner leases the premises, the owner is in privity of contract with the lessee.

The doctrine under discussion was laid down in *Winterbottom v. Wright*³ in England in 1842. In this case the defendant, Wright, contracted with the Postmaster General of England to provide horse-drawn mail coaches. Another supplier was to provide horses and coachmen, one of which was Mr. Winterbottom. Winterbottom was subsequently pitched from the coach when it broke down, and he sued Wright for the injuries he sustained. The court refused to allow Winterbottom

to sue Wright and said such a ruling would allow every passenger and passerby to sue the manufacturer should the coach be poorly made. This would interfere with the contract and the negotiations between the buyer (the Postmaster) and the seller (Wright) concerning the contract.

6. The Learning Process

In order to understand how the court system works this law will be studied from this point, and applied through a series of cases. The recommended method of presenting the concept is to divide the students up into groups of four or five and give each of the students Handout #1, the first case, and Handout #A – Student Worksheet. Allow the students to discuss the case in Handout #1 and write their argument/analysis and answer the questions on Handout #A. In this way the numbered handouts can be used repeatedly and only Handout #A need be turned in or graded. If possible use differently colored paper, or a variety of colors for Handouts #1-7. In order to save space in this paper, and provide handouts that do not need to be retyped, the Handouts without any answers or recommended answers are included in the Appendix. The following section of the paper includes answers to the questions asked in the numbered handouts and also possible arguments. The following section discussing the handouts must be read in conjunction with the handouts in the Appendix.

Students can work individually, or in groups and discuss the case with each other. Questions can be asked of the professor. There is no “right” or “wrong” conclusion. The process is designed so that the different courts in the system come to different and conflicting conclusions. The case goes to the state supreme court where the student is free to choose which of the four different rules the student wishes to apply. There is no “right” or “wrong” rule – some states, but not all, follow each of the four different rules.

8. Discussion of Handouts

Handout #1

All handouts are in Appendix. It is necessary to read the actual Handout with this discussion in order to fully understand the following explanation.

This handout introduces the first case to be decided on the legal issue (given in the handout) in the state. The Procedural History section of each handout lets the student know where in the judicial process the case is. This section introduces several concepts related to how cases are handled in the American legal system.

The summary judgement procedure is a common procedure in most court systems in the United States. It is a quick, that is summary, way of getting to a judgement. A judgement is the final document prepared in a case at the trial level and outlines how the case has been decided, including who wins and how much money, if any, they are awarded in damages.

A summary judgement is possible only if there are no factual issues in a case, though many states have “partial summary judgements” to decide legal issues before trial. This often results in early settlement of cases. Either party may file a summary judgement, claiming there are no factual issues in the case, only legal issues.

In the *BW vs. Able Engineers*, Able has filed a summary judgement motion claiming BW cannot recover any damages from Able because there is no privity of contract between BW and Able. Able is saying, even if all of the facts claimed by BW are true, BW still cannot recover damages from Able. This is a legal issue to be determined by the court, not a factual issue to be determined by the jury. Hence, the trial judge can decide this case without the expense of a trial.

Question 1: The question of which rules are precedent is always difficult and often the subject of much debate. A case is precedent ONLY if the facts and issues in the first case are the SAME as the facts and issues in the second case, AND the case is upriver in the River of Law analogy. Because this is the first case in Yur to discuss this issue in this fact situation (construction contract), none of the rules cited are precedent for the *BW vs. Able Engineers* case. The appeal court is free to use some or all of the rules as it deems appropriate.

Question 2: The issue, “Is Able liable to BW for the damages BW sustained?” is the issue at the trial court level, where facts and legal issues are decided. The main purpose of an appeal court is to determine if the trial judge made an error on a legal issue. It is possible, but extremely rare, for an appeal court to overturn a factual or jury issue. Therefore, the issue on appeal is usually: Did the trial judge err when (fill in the blank)? This distinction is not so important in this example, but in other areas of the law it can be. Notice that since appeal courts generally only review legal issues, it is extremely important to put the time and effort into factual issues at the trial level. A party does not get a second bite at the apple on appeal.

Handout #2

This handout introduces the next case. Notice it contains the rule as determined by the Appeal Court #3 from the prior case. ***The students may use this rule, together with all prior rules, to the extent applicable, to determine the answer to this case.*** In order to save space the rules are not repeated on each handout, however they are still usable.

Question #1: This handout is the first to actually illustrate the River of Law concept. None of the prior rules are precedent for Appeal Court #1 because it is not down river from Appeal Court #3. The decision of Appeal Court #3 has no effect upon Appeal Court #1. The students may decide this case differently from the *BW v. Able* case.

Question #2: Any. Again, none of the cases is precedent (that is required to be followed). When there is no precedent the appellate court may use any case, any source, or no case or no source as the basis for its decision.

Question #3: Case #1 involved parties to the construction operation – a subcontractor (BW) and the engineer (Able). However, this case involves a tenant’s child – a person who was not involved in the original construction. This might convince the appellate court that this situation looks more like a regular tort case, such as the case which enunciated Rule #2. It is possible the court will follow Rule #2 rather than Rule #4.

Handout #3

This handout is the first one where the issues are being decided by the trial court, rather than the appellate court. Note, however that this case is in the federal court system, not in the state court system. Case #3 has been introduced to show how the federal court handles a case involving state law.

The federal court can, in rare cases, try cases involving issues of state law. This case involves one of those instances. This case is in the federal court on “diversity jurisdiction”. That is, all of the parties are from different states. The federal court must apply state law however. The law of the state in which this damage occurred governs this case.

The student is given factual information that might affect a decision for or against the engineer. However, if the engineer can get the suit dismissed on a summary judgement motion, no jury will ever hear this testimony obtained during discovery, or any other evidence.

Question #1: Because this case is in the federal court system, the federal court must apply the law of the state. Yur has two cases, *BW v. Able* and *Platts v. Olshew*, which might be precedent. *BW v. Able* has raised the same issue and is factually similar to this case, therefore, it is precedent for this case, and the federal court must apply that law.

Question #2: This question again brings to the student’s attention the difference between issues in the trial court, and issues in the appeal court. The issue in this case is the actual legal issues involved, while the issue in Case #1 is, “Did the trial court err?” Notice also that the issue is “Can Sanchez sue the engineer for negligence?” As a general rule anyone can sue anyone for anything. This is the point in a case where the judge makes the determination. If the judge says no, the case is dismissed.

Question #3: There are few factual differences between the cases. The specific act of negligence in each case was different. BW involved an error of the engineer in the elevations requiring additional fill. This case involves an order by the engineer to lay the pipe at a later time, necessitating the slurry to be cut. Case #1 involves a subcontractor, and this case involves the general contractor. Also, in Case #1 the general contractor filed for a bankruptcy. We also have testimony in Case #1 that the engineer ordered BW to complete the contract or it would be

ordered off the job. None of these facts are sufficiently significant to result in a difference between the cases.

Question #4: It is possible this case could be appealed to the U.S. Supreme Court because it is in the federal court system. It is extremely, extremely unlikely the U.S. Supreme Court would accept this case however since it involves an issue of state law only.

Question #5: There is no possibility this case will be appealed to the Yur State Supreme Court because the case is in the federal court system.

Question #6: The “discovery stage of the litigation” is the stage after the filing of the complaint, answers, cross-complaints and counterclaims. After the parties have filed their allegations (which are contained in the above documents), they engage in the process of discovery. In discovery, the parties attempt to discover all of the facts of the case and all of the opinions of experts. The parties are given great latitude in the discovery process – they are not limited to discovering admissible evidence, but can discover anything that might lead to admissible evidence. The discovery process can be very lengthy and expensive.

The most common discovery tools are interrogatories, requests for documents (or other things such as models) and depositions. Interrogatories are written questions sent from one party to another. Requests for documents are requests for files and records held by the other party. Depositions are face-to-face interviews between the attorneys and parties to the litigation or potential witnesses. Depositions can also require the deponent to bring documents or other things such as models to the deposition.

Question #7: No, the Appeal Court merely decided that Platts could sue the engineer. The case would have been sent back down to the trial court to determine whether the engineer was negligent or not.

Question #8: Platts will have to prove the engineer negligently designed the balcony. This is a factual issue to be decided by a jury.

Question #9: Most state Supreme Courts have discretionary jurisdiction similar to the United States Supreme Court. That is, they decide whether or not they will hear a case. It is unlikely this case would be accepted by the state supreme court.

Question #10: No, because this case is in the state court system and involves an issue of state law. It cannot be appealed out of the state system to the U.S. Supreme Court. The only time a case can be appealed from the state court system to the U.S. Supreme Court is if it involves an issue of U.S. law. Since this case does not, the federal courts have no jurisdiction.

Handout #4

Question #1: Notice that the trial judge's decision in Sanchez is not listed as a rule. This is because trial courts do not make law, only appellate courts. Since this case was dismissed by the trial court, and we have no indication it was appealed, no law has been made.

Question #2: A tort liability or duty is a duty the law requires a party to uphold. A tort duty is often the minimum duty (standard of conduct) acceptable to a society or jurisdiction. For example our system of law says some people (not all) have a duty (standard of conduct) to act reasonably so as not to cause harm to others in some (not all) situations. The breach of this duty is called negligence. Negligence is a tort and it has established a legal duty of certain people to act in certain ways and not in other ways. People who fail to uphold this duty (to act reasonably and not harm others) are liable for the damage they cause. It makes no difference whether or not any contracts exist between the person injured (the victim) and the person who failed to uphold the duty (called the tortfeasor). The tortfeasor will be liable to the victim for breach of the tort duty.

For example, our society has said that drivers of automobiles must drive in a reasonable manner so as not to cause harm to pedestrians walking along the roadway. A driver who drives in an unreasonable manner and injures a pedestrian has committed the tort of negligence and must pay damages to the pedestrian. These damages must be paid even though there is no contract between the driver and pedestrian.

A contract liability or duty on the other hand, is a duty to another party that one voluntarily accepts pursuant to a contract. No one is required by law to enter into a contract or to accept contractual duties to other entities. For example, Chris enters into a contract to buy Terry's home. There is no law that says Terry must sell her home to Chris, only a contractual obligation. Terry however has a contractual duty to sell her home.

The difference between tort and contract duties is often difficult to see since the breach of either will result in damages. However, courts are much more willing to *refuse to uphold a contractual duty* for a variety of reasons. As a simplification one might say the law does not care whether or not a party upholds a contractual duty, as long as it pays damages. *The law does not discourage breach of contract*, and in fact encourages it if it is in one parties economic interest to breach the contract. In effect the law says, "it is alright to breach a contract as long as you pay the damages."

However, the law *wants* parties to uphold tort duties. *The law discourages the commission of a tort*. The law does *not* say, "it is alright to be negligent as long as you pay for the damages".

The law will more fully punish the breach of a tort duty. The damages for breach of a tort duty are generally greater. Punitive damages are only possible in breach of tort cases.

Question #3: Both cases #1 and #2 were dismissed after the filing of a summary judgement motion by the engineer. That is, the trial judge was presented with the legal issue, decided for

the engineer, and dismissed the case. No jury ever heard any evidence. In this case the trial judge *refused* to dismiss the case on the engineer's motion for summary judgment. The matter went to trial, and the jury awarded damages to the general contractor. The engineer then appeals the trial judge's decision after the jury trial. Procedural rules prevent the filing of an appeal until this point.

Handout #5

There is no correct or incorrect answer to the issue in this case. Students may come to any conclusion they wish, as long as they can support it using appropriate rules. The decisions in Appeal Court #1 and #3 are not binding on this court.

Using the *BW* case the student can support a decision for the engineer. The case should be dismissed because no privity exists between Best Engineers and Knew Owner.

Using the *Platts* and *Holiday* cases a student can support a decision in favor of Knew Owner. *Platts* stands for the rule that privity of contract is not necessary in a suit for breach of a tort liability. The engineer has a tort duty, implied in law to supervise the project in a reasonable manner so as not to cause injury to subsequent users of the structure, such as Knew. The *Holiday* case also supports a decision for the Owner. The court need not follow the old common law rule that privity of contract must exist.

Question #1: Yes, the two decisions are inconsistent. This can happen because the appeal courts do not have to follow law set by other appeal courts – only law from the supreme court or the legislature (which is not an issue in this line of cases).

Question #2: None. Again, none of the law so far flows down to Buena Vista.

Handout #6

The student should follow the rule outlined in *Platts* when developing its argument. It might be argued that *Platts* is not precedent because *Platts* involved a subsequent user of the property, a tenant, and this case involves a neighboring landowner. Since the facts are different, *Platts* is not precedent. It is likely this appeal court would apply *Platts* however since that fact does not warrant a different rule.

Question #1: It is extremely unlikely an appellate court will overturn a decision made by the jury. Appellate courts generally only determine if judges have made errors, not if juries have made errors. The correct issue for appeal is: Did the trial Court err in failing to dismiss Neighbor's case?

Handout #7

Again, there is no correct answer to this issue. Rules # 8, 9, 10 and 11 represent the four rules developed by the various states in connection with the engineer's liability to third parties. All are listed here for convenience.

Rule #8 was established by the California Supreme Court.⁴ Because of the number of elements and the balancing required it is a difficult rule to apply and certainly to predict.

Rule #9, is known as the Economic Loss Rule, and is probably the rule used by the greatest number of states. It is applied in Texas⁵ and many other jurisdictions, including Mississippi⁶, Wisconsin⁷, Ohio⁸. This rule combines the rule requiring privity for contract actions, but allows for tort recovery if the damages are not covered by the contract. In essence this rule allows recovery for claims of personal injury or for tort claims that are independent of the contract.

Under this rule the plaintiff in this case, Thor, can recover for the losses associated with claim #1 – negligent design of the drainage and storm run-off system which caused damage to OTHER buildings in the skyscraper/apartment/business park complex, and road in the complex. However, the plaintiff is precluded from collecting under claim #2, because those damages are considered “economic losses”. The facts in this case are from an actual case.

Rule #10 bypasses the privity issue, but comes to the same conclusion as a privity requirement. It does this by stating that the design professional has no duty to a remote plaintiff. In order to prove that someone is negligent, the injured person must prove 1) the tortfeasor had a duty to the injured person, 2) the tortfeasor breached that duty, 3) the breach of the duty actually caused the damage and 4) damage. Since duty is one of the elements of negligence, a lack of duty to a party will preclude a finding of negligence even if all of the other elements exist. For example, you cannot be found negligent for failing to save a stranger from drowning, since you have no duty to that person.

Rule #11 is followed by a minority of jurisdictions.

Question #1: None. This case is at the supreme court level. The supreme court need not follow any cases below it, or from any other jurisdiction.

Question #2: Case #4 – *Holiday*. The engineer in that case, Grand, cannot get its money back from the general contractor, Rogers. Only the law of the case has been changed, not the decision. It is unlikely the parties to Case #4 are even aware the law has changed.

Question #3: Case #1, *BW*, Case #2, *Sanchez* and case #5, *Knew*.

Question #4: No, the jury determined that issue. The appeal court determined the trial court did not err in allowing the case to go to the jury.

Appendix A

Sequential Handouts for the River of Law

River of Law II – Duty of Engineers Absent Privity
Student Worksheet – Handout #A

Date: _____

Grade: _____

Student Name: _____

Student I.D. Number _____

Write *only* on this sheet, not on the sheets containing the cases, Handouts #1-7.

Case #1: Case No. 1 – BW v. Able Engineers (1985)

Conclusion: Yes or no answer to the Issue: _____

Argument/Analysis:

Questions:

1. As the appellate court judge, which of the above rules are precedent for this case? That is, which rules **MUST** you follow? Why or why not?
2. Why is the issue in this case **NOT**: Is Able liable to BW for the damages BW sustained?

Case No. 2 - Platts v. Olshew Engineers (1987)

Conclusion: Yes or no answer to the Issue above: _____

Argument/Analysis: You are one of the appellate judges on Appeal Court #1. Support your conclusion above:

Questions:

1. As the appellate court judge, which of the above rules are precedent for this case? That is, which rules **MUST** you follow? Why or why not?
2. As the appellate court judge, which of the above rules **CAN** you follow, if you so choose?

3. Are there any factual differences between this case and the other cases, facts the Tenant might be able to use to convince the appellate judges to rule in his favor?

Case No. 3 – Sanchez v. Owner and CD (1989)

Conclusion: Yes or no answer to the Issue above: _____

Argument/Analysis: You are the trial judge in this case. What is your decision, and provide support for it:

Questions:

1. As the trial court judge, which of the above rules are precedent for this case? That is, which rules **MUST** you follow? Why or why not?
2. What is the difference between the issue in this case, and the issue in Case #1?
3. What are some of the factual differences between this case, and Case #1 and #3? Should any of those facts make a difference in the outcome of this case? Do they make any difference in how the case should be decided?
4. Is there a possibility this case will be appealed to the U.S. Supreme Court? Why or why not?
5. Is there a possibility this case will be appealed to the Yur State Supreme Court? Why or why not?
6. What is the “discovery stage of the litigation”?
7. In the *Platts v. Olshew* case, did the Appeal Court #1 decide that Olshew was in fact negligent and must pay for the damages to the child?
8. What will Platts have to prove in the new trial in the Springdale County Trial Court?

9. Assume the engineer in the Platts case files an appeal to the Yur State Supreme Court. Can/Must the Yur Court hear the case? Why or why not?

10. Assume the Yur State Supreme Court refuses to hear the case. Can the U.S. Supreme Court hear the case? Why or why not?

Case No. 4 - Holiday Concrete v. Rogers (1991)

Conclusion: Yes or no answer to the Issue above: _____

Argument/Analysis: You are one of the appellate judges on Appeal Court #1. Come to a conclusion, and support it below.

Questions:

1. Why can you not use the trial court's decision in Sanchez in support of your conclusion?

2. What is the difference between a tort liability and a contract liability?

3. What is the difference PROCEDURALLY between this case, and Case #1 and #2?

Case No. 5 - Knew Owner v. Best Engineers (1993)

Conclusion: Yes or no answer to the Issue above: _____

Argument/Analysis: You are one of the appellate judges on Appeal Court #2. Come to a conclusion, and support it below.

Questions:

1. Is the decision in *Holiday Concrete v. Rogers* (1991, Yur Appeal Court #1) inconsistent with the decisions in *BW v. Able Engineers* (1985, Yur Appeal Ct. #3)? Why or why not? How can this happen?

2. What rules are law or precedent for the Buena Vista Trial court? In other words, what rules does it HAVE to apply.

Case No. 6 – Neighbor v. Ace Engineer (1994)

Conclusion: Yes or no answer to the Issue above: _____

Argument/Analysis: You are one of the appellate judges on Appeal Court #2. Come to a conclusion, and support it below.

Questions:

1. Why is the following NOT an issue in this case: Did the jury err in awarding \$350,000 to the Neighbors?

Case No. 7 – Thor v. Vespers (1997)

Conclusion: Yes or no answer to the Issue above: _____

Argument/Analysis: You are one of the judges on the State Supreme Court. Come to a conclusion, and support it below.

Questions:

1. What rules are law or precedent for the Yur State Supreme court? In other words, what rules does it HAVE to apply?
2. Assume Yur adopts the reasoning of the *Moorman Mfg. Co. v. National Tank Co.* case. Which case(s) has the Yur state Supreme Court overturned? Can the engineer get the money back it paid out?
3. Assume Yur adopts the reasoning of the Yur Appeal Court #2 from the *Neighbors* case. Which case(s) so far discussed have been overturned?
4. Did the appeal court in the *Neighbors* case decide that the engineer owed the Neighbors money? If not, what did it decide?

River of Law II – Duty of Engineers Absent Privity

Case No. 1 – BW v. Able Engineers (1985)

Procedural History: BW, plaintiff, files the following case in the Elk City Trial Court, State of Yur. Yur is a state in the United States of America. The trial court dismissed BW's case on a summary judgement motion by Able claiming the lack of privity between BW and Able precluded BW from suing. In other words the trial court entered a judgement for Able dismissing the case. BW appealed to Appeal Court #3. A summary judgement motion is a quicker way of getting a case (or part of a case) dismissed when the law does not support that case (or part of the case).

Facts: Elk Entertainment, Inc. hired Able Engineers to develop plans and specifications for a theme amusement park. Elk Entertainment, Inc. hired Smith Construction as the general contractor. Smith subcontracted the grading to BW. According to the plans and specifications prepared by Able Engineers, all fill material was on site, and no additional fill would need to be brought in. However, after commencing the project it was determined the elevations on the plans were 1-1 ½ feet higher than actually existed on site. This necessitated the use of additional fill, which Elk Entertainment, Inc. refused to pay for. The engineer told the general contractor to tell BW to complete the contract or BW would be ordered off the job. BW completed the contract, but filed a claim with Smith Construction. Smith Construction filed bankruptcy shortly thereafter and cannot pay BW. You can assume the law would have found Smith Construction had breached its contract with BW and owes BW the costs associated with the additional fill. BW sues the engineer for negligence in preparing the plans and specifications, which BW relied upon to its detriment.

Issue: Did the trial court err when it dismissed the lawsuit?

Rule #1: Parties to contracts have contractual duties to each other, but no duty to others outside the contract.. If one party, A, breaches its contractual duty to the other party to the contract, E, only E can sue and collect damages from A. There must be privity of contract between the plaintiff and the defendant in order for the plaintiff to have any cause of action against a defendant for breach of the defendant's contractual duties. Facts: In this case the defendant, Wright, contracted with the Postmaster General of England to provide horse-drawn mail coaches. Another supplier was to provide horses and coachmen, one of which was Mr. Winterbottom. Winterbottom was subsequently pitched from the coach when it broke down, and he sued Wright for the injuries he sustained. *Winterbottom v. Wright*, (1842, England).

Rule #2: A party must act reasonably in its interactions with others so as not to cause damage. This duty to act reasonably is a duty established by law, which is also called a tort duty. Tort duties are legal duties established by law, rather than contract duties which are legal duties agreed to by persons and entities and enforced by law. Facts: This case involved a motorcycle

Case Handout

accident and a pedestrian injured by the motorcycle driver. (Simplified negligence rule, with definitions of tort duties and contract duties). (You can assume this to be Yur common law).

Rule #3: The law does not allow the parties to turn a breach of contract into a tort. Damages for tort are usually larger than damages for contract, so the tendency to do this exists. (Simplified rule of contract/tort law). (You can assume this to be Yur common law). This case involved the sale of a pharmaceutical drug between a major pharmaceutical company and a retail drug store.

Conclusion: Yes or no answer to the Issue above: _____

Argument/Analysis:

Questions:

1. As the appellate court judge, which of the above rules are precedent for this case? That is, which rules MUST you follow? Why or why not?
2. Why is the issue in this case NOT: Is Able liable to BW for the damages BW sustained?

River of Law II – Duty of Engineers Absent Privity

Case No. 2⁹ - Platts v. Olshew Engineers (1987)

Procedural History: Steve Platts, a tenant of a skyscraper designed by Olshew Engineer, sued the Olshew for negligent design of a balcony. Engineer filed a summary judgement motion to dismiss the case, claiming Platts cannot sue because there is no privity, and cited all of the rules above. The trial court in Springdale County dismissed the case, and Platts appealed to Appeal Court #1.

Facts: Platts sued engineer for severe injuries his child suffered when she fell off of a third story balcony. Platts claimed negligent design of the balcony. The wrought iron railings were designed such that a toddler could easily fit through the railings. The child climbed between the railings and fell to the ground below.

Issue: Did the trial court err when it dismissed the case?

Rules: You may use all prior rules, if applicable, plus the following:

Rule #4: The plaintiff cannot turn its breach of contract action against the general contractor into a tort action against the engineer. Privity of contract must exist between the plaintiff and the defendant in order for the plaintiff to sue for its contract damages. Even though the engineer may have breached its contract with Elk Entertainment, it did not breach a contract with BW. *BW v. Able Engineers* (1985, Yur Appeal Ct. #3).

Conclusion: Yes or no answer to the Issue above: _____

Argument/Analysis: You are one of the appellate judges on Appeal Court #1. Support your conclusion above:

Questions:

1. As the appellate court judge, which of the above rules are precedent for this case? That is, which rules **MUST** you follow? Why or why not?
2. As the appellate court judge, which of the above rules **CAN** you follow, if you so choose?
3. Are there any factual differences between this case and the other cases, facts the Tenant might be able to use to convince the appellate judges to rule in his favor?

River of Law II – Duty of Engineers Absent Privity

Case No. 3¹⁰ – Sanchez v. Owner and CD (1989)

Student Name: _____

Student # _____

Procedural History: Sanchez sued CD Engineering Company and the Owner to recover costs associated with a levee it was required to rebuild after it failed. All parties waived a jury. Engineer has filed a summary judgement motion to dismiss it from the case since no privity exists between it and Sanchez. The trial court is deciding whether or not to grant this motion. This case is filed in the Federal District Court (trial court) in Yur because the parties are all from different states and the amount in controversy is over \$50,000. In other words this case is not in the court system of the state of Yur.

Facts: CD was hired by the City of Old Town to perform design and engineering services for the construction of a waste water treatment plant for use by the city. The city hired Sanchez as the General Contractor. At one point in the construction certain pipes, which the city was obligated to supply, were not available. These pipes were to be laid under the levee, and through slurry. CD's original design called for these pipes to be laid prior to the levee and slurry wall construction. But CD determined the levee construction could continue and the levee and slurry could be cut later for pipe installation. This procedure was done. However the levee collapsed and failed. The city required the contractor to repair the levee at the contractor's cost. Sanchez did so, and is now suing CD Engineers for the costs of rebuilding the levee. (Note: There might be several reasons why Sanchez would not or could not sue the government entity. Assume for this exercise that it has not and cannot sue the Owner).

The following testimony has come to light during the discovery stage of the litigation: In a process called "piping" water flows along a seepage channel, gradually enlarging the channel. Eventually the channel(s) can be widened to the point where the surrounding structure will collapse. This was the problem with the above levee.

Experts testified that the chief problem was the attempt to "marry" the slurry and the concrete pipe despite different physical and mechanical properties. Water pressure against the two dissimilar materials caused the slurry to give, thereby permitting seepage paths or "piping" to develop between the slurry and the concrete piping. This caused the levee to fail.

CD did not consider the deformability characteristics of the slurry and the concrete piping. The expert testifying at a deposition stated, in her opinion, that CD's design was not reasonably prudent and it should have realized that cutting the levee and slurry and then installing the pipes would likely lead to collapse of the levee.

Issue: Can Sanchez sue the engineer for negligence?

Rules: You may use all prior rules, if applicable, plus the following:

Case Handout

Rule #5: Privity of contract is not necessary in a suit for the breach of tort liability such as negligence. The engineer has a tort duty, implied in law, to design its structures in a reasonable manner so as not to cause injury to subsequent users of the structure. Failure to do so will subject the engineer to liability for damages caused by its negligent design of a structure. Trial court's decision reversed, and the case is remanded to the jury to determine if engineer negligently designed the balcony. *Platts v. Olshew Engineers* (1987, Yur, Appeal Court #1).

Conclusion: Yes or no answer to the Issue above: _____

Argument/Analysis: You are the trial judge in this case. What is your decision, and provide support for it:

Questions:

1. As the trial court judge, which of the above rules are precedent for this case? That is, which rules MUST you follow? Why or why not?
2. What is the difference between the issue in this case, and the issue in Case #1?
3. What are some of the factual differences between this case, and Case #1 and #3? Should any of those facts make a difference in the outcome of this case? Do they make any difference in how the case should be decided?
4. Is there a possibility this case will be appealed to the U.S. Supreme Court? Why or why not?
5. Is there a possibility this case will be appealed to the Yur State Supreme Court? Why or why not?
6. What is the "discovery stage of the litigation"?
7. In the *Platts v. Olshew* case, did the Appeal Court #1 decide that Olshew was in fact negligent and must pay for the damages to the child?
8. What will Platts have to prove in the new trial in the Springdale County Trial Court?
9. Assume the engineer in the Platts case files an appeal to the Yur State Supreme Court. Can/Must the Yur Court hear the case? Why or why not?
10. Assume the Yur State Supreme Court refuses to hear the case. Can the U.S. Supreme Court hear the case? Why or why not?

River of Law II – Duty of Engineers Absent Privity

Case No. 4¹¹ - Holiday Concrete v. Rogers (1991)

Student Name: _____

Student # _____

Procedural History: Holiday Concrete, subcontractor, sues Rogers, General Contractor, for balance due for concrete on a school project. Rogers sues Grand Engineers, claiming negligent supervision of the project and particularly, negligent supervision of the testing laboratories. The trial is in Old Town County Trial Court. The trial court has refused to dismiss Grand Engineers from the case despite a summary judgment motion by the Engineer citing all of the rules so far discussed. The case proceeds to trial, and Rogers is awarded damages of \$125,000 payable to it by Grand. Holiday is awarded nothing. Grand appeals to Appeal Court #1 claiming the trial court should have dismissed Rogers suit because there is no privity of contract between Grand and Rogers citing all of the rules so far discussed.

Facts: School District hired Grand Engineers to develop plans and specifications for a school, to supervise construction and in particular supervise and review the testing laboratories hired to perform tests on the concrete. Holiday Concrete supplied transit mix concrete for pre-formed structures called bends, which when hoisted formed the skeleton the school. The testing results proved the pour to be inadequate, however the Engineer passed the pour anyway. At some point the school district refused to accept the bends, and required Rogers to redo them at Rogers's own expense. Rogers was also delayed in delivering the project to the School District because of the need to redo the work and incurred damages relating to delay.

Issue: Did the trial court err when it failed to dismiss the case?

Rules: You may use all prior rules, if applicable.

Trial judge's holding in *Sanchez*: Contractor's case against engineer dismissed because there is no privity between the contractor and the engineer.

Conclusion: Yes or no answer to the Issue above: _____

Argument/Analysis: You are one of the appellate judges on Appeal Court #1. Come to a conclusion, and support it below.

Questions:

1. Why can you not use the trial court's decision in *Sanchez* in support of your conclusion?
2. What is the difference between a tort liability and a contract liability?
3. What is the difference PROCEDURALLY between this case, and Case #1 and #2?

Case Handout

River of Law II – Duty of Engineers Absent Privity

Case No. 5¹² - Knew Owner v. Best Engineers (1993)

Student Name: _____

Student # _____

Facts and **Procedural History** – Knew Owner purchased a hotel designed by Best Engineers and built by Dewey Developers. The hotel had been built by Dewey on speculation – that is not built pursuant to a contract with an owner, but in the hopes of finding an owner once the hotel was completed. Dewey’s brother-in-law was the general contractor. According to the contracts Best Engineers was also to supervise the construction. After Knew purchased the hotel, numerous design and construction deficiencies were found. Knew Owner sued Best Engineers for negligent supervision of the construction and for negligently preparing the designs and specifications. This case is filed in Buena Vista. The trial judge dismisses the lawsuit because there is no privity between Knew and Best. Knew appeals to Appeal Court #2 citing all of the prior rules.

Issue: Did the trial court err when it dismissed the case?

Rules: You may use all prior rules, if applicable, plus the following:

Rule and **Argument/Analysis #6:** This court chooses not to follow the old common law rule that privity of contract must exist in order for the contractor to sue the engineer. “The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff...”

“Considerations of reason and policy impel the conclusion that the position and authority of a supervising engineer are such that he ought to labor under a duty to the prime contractor to supervise with due care...Altogether too much control over the contractor necessarily rests in the hands of the supervising engineer for him not to be placed under a duty imposed bylaw to perform without negligence his functions as they affect the contractor. The power of the engineer to stop the work alone is tantamount to a power of economic life or death to a contractor. It is only just that such authority, exercised in such a relationship, carry commensurate legal responsibility.”¹³

Rogers suit against the Engineer for its damages was properly determined by the Trial Court. Trial Court’s decision upheld. *Holiday Concrete v. Rogers*. (1991, Yur Appeal Court #1).

Conclusion: Yes or no answer to the Issue above: _____

Argument/Analysis: You are one of the appellate judges on Appeal Court #2. Come to a conclusion, and support it below.

Questions:

1. Is the decision in *Holiday Concrete v. Rogers* (1991, Yur Appeal Court #1) inconsistent with the decisions in *BW v. Able Engineers* (1985, Yur Appeal Ct. #3)? Why or why not? How can this happen?

2. What rules are law or precedent for the Buena Vista Trial court? In other words, what rules does it HAVE to apply.

River of Law II – Duty of Engineers Absent Privity

Case No. 6¹⁴ – Neighbor v. Ace Engineer (1994)

Student Name: _____

Student # _____

Procedural and Factual History: Mr. and Mrs. Neighbor sue Ace Engineer claiming Ace’s design of Fly Bye’s mansion was done in a negligent manner. Fly Bye was a “one-hit wonder” and made several million dollars from a recording deal, but has not had a hit in several years. Fly Bye hires Ace to design a mansion/recording studio on a hill. The hill is uphill from the Neighbor’s property. Shortly after being built Fly Bye’s mansion/recording studio slides down the hill and destroys Neighbor’s home. Fly Bye takes what little money he has left and moves to a Tibetan monastery. The Neighbor’s sue Ace for the damage to their home claiming the design caused destabilization of the slope and the slide of Fly Bye’s mansion/recording studio into theirs. The case filed in Springdale Trial Court. Ace Engineer files a motion to dismiss the case because of lack of privity between it and the Neighbors. The trial court refuses to dismiss the case. The jury finds Ace negligent and awards the Neighbors \$350,000 in damages. Ace appeals to Appeal Court #1.

Issue: Did the trial Court err in failing to dismiss Neighbor’s case?

Rules: You may use all prior rules, if applicable, plus the following:

Rule #7 and **Argument/Analysis:** A party cannot turn a breach of contract action into a tort action. Perhaps if there is a tort action separate from the contract, as in the *Platts* case, the injured party can sue in tort. Otherwise, the injured party is limited to its contract. Trial court decision upheld. *Knew Owner v. Best Engineers* (1993, Yur Appeal Ct. #2)

Conclusion: Yes or no answer to the Issue above: _____

Argument/Analysis: You are one of the appellate judges on Appeal Court #2. Come to a conclusion, and support it below.

Questions:

1. Why is the following NOT an issue in this case: Did the jury err in awarding \$350,000 to the Neighbors?

River of Law II – Duty of Engineers Absent Privity

Case No. 7¹⁵ – Thor v. Vespers (1997)

Procedural History: Case originally filed in Indian Hills Trial court where it was dismissed by the trial judge based upon Vespers's motion, which cited the *BW* case as precedent. Plaintiff's counter-motion cited all of the other rules mentioned above. Plaintiff further appealed Appeal Court #3 which upheld the trial court's decision. Plaintiff further appealed to the Yur State Supreme Court. The State Supreme Court accepted the case.

Facts: Thor is a joint venturer in an entity called "Lostin Joint Venturers" which has since gone defunct. Lostin Joint Venturers entered into a contract with HW Company for the construction of a Phase 2 of a skyscraper/apartment/business park complex. HW Company hired Vespers Engineers and Designers to (among other things) 1) perform design of drainage and storm run-off systems and 2) inspect the construction on a regular basis and report on whether construction was proceeding according to the plans and specifications. Other provisions of the contract are omitted because they are to relevant to this proceeding.

Shortly after substantial completion of the project numerous design and construction defects were reported to Lostin Joint Venturers. Both Lostin and HW Company go bankrupt. Thor sues Vespers for 1) negligent design of the design of the drainage and storm run-off system which caused damage to Phase 1 of the project, including roadways and; 2) damages related to correcting the numerous construction defects.

Rules: You may use all prior rules, if applicable, plus the following:

Rule #8 and **Argument/Analysis:** The following balancing test is used to determine the liability of the engineer to third parties:

the foreseeability of harm to the plaintiff;

the degree of certainty that the plaintiff suffered injury;

the closeness of the defendant's connection between the conduct and the injury suffered;

the policy of preventing future harm; and

moral blame for a design professional's actions, and preventing future harm.

Based upon this test we hold that the engineer has a duty to Neighbor's because the damage to their property is foreseeable because of the location of the lots and the care needed to design a project on Fly Bye's lot to prevent injury. In this situation Neighbor's possessed no moral blame for the actions which caused the destruction of their home. Trial court decision and jury's award upheld. *Neighbor v. Ace*, (1994, Yur Appeal Ct. #2).

Rule #9: A third party who is damaged as the proximate result of the engineer/engineer's negligence in preparing plans and/or specifications is precluded from collecting economic losses related to the negligence. Economic losses are defined as "[d]amages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits without any claim of personal injury or damage to other property...as well as diminution of the value of the Case Handout

product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold. However, the third party is not precluded from collecting damages for other tort actions related to damage to OTHER property or for personal injury. *Moorman Mfg. Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443 (1982).

Rule #10: Engineers have no duty to third parties and therefore cannot be sued for negligence. (This rule does not use the privity rule at all, but is based upon negligence.) *Amazon v. British Am.Dev.Corp.*, 216 A.D.2d 702, 628 N.Y.S.2d 204 (1995).

Rule #11: A third party who is damaged as the proximate result of the engineer/engineer's negligence in preparing plans and/or specifications has a valid negligence claim against the design professional. No privity is required. *A.R. Moyer, Inc. v. Graham*, 285 So.2d 397 (1973).

Conclusion: Yes or no answer to the Issue above: _____

Argument/Analysis: You are one of the judges on the State Supreme Court. Come to a conclusion, and support it below.

Questions:

1. What rules are law or precedent for the Yur State Supreme court? In other words, what rules does it HAVE to apply?
2. Assume Yur adopts the reasoning of the *Moorman Mfg. Co. v. National Tank Co.* case. Which case(s) has the Yur state Supreme Court overturned? Can the engineer get the money back it paid out?
3. Assume Yur adopts the reasoning of the Yur Appeal Court #2 from the *Neighbors* case. Which case(s) so far discussed have been overturned?
4. Did the appeal court in the *Neighbors* case decide that the engineer owed the Neighbors money? If not, what did it decide?

¹ This explanation is very generalized. For example the district of Columbia has a court system operated under the federal system and Puerto Rico has a court system. The purposes of this article is to give a general outline of the legal system.

² As usual Louisiana gets its typical footnote here. In most articles discussing the common law Louisiana is footnoted as the only state that does not have a common law system, but a civil law system. This is because of its heritage as a French-owned colony. France and other continental european governments are generally based on a civil law system developed by the Romans and Napoleon. The main difference between the two systems is that in the civil law systems prior court decisions are not precedents. A judge with a case similar to a prior case need NOT, but frequently does, follow prior cases. This system offers less uniformity and predictability, but has advantages in that new ways of thinking may be applied earlier than in the common law system.

³ *Winterbottom v. Wright*, 10 Meeson & Welsby 109, 152 Eng.Rep. 402 (Ex. Ch. 1842).

⁴ *Dale v. Cooper*, 56 Cal.App. 2d 351, 128 Cal.Rptr. 724 (1976).

⁵ *Thomson v. Espey Huston & Assocs. Inc*, 899 S.W.2d 415 (Tex.Ct.App. 1995).

⁶ *Acoustic & Tile, Inc. v. Grenfell*, 223 So.2d 613 (Miss. 1969).

⁷ *A.E.Inv.Corp. v. Link Builders, Inc.*, 62 Wis 2d 479, 214 N.W.2d 764 (1974).

⁸ *Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp.*, 54 Ohio ST.d3d 1, 560 N.E.2d 206 (1990).

⁹ Loosely based upon *Hanna v. Fletcher*, 231 F.2d 469 (DC Cir. 1956).

¹⁰ Based upon *Mayor of Columbus v. Clark Dietz*, 550 F.Supp. 610 (1982).

¹¹ Based upon *U.S. v. Rogers & Rogers*, 161 F.Supp. 132 (SD Cal. 1958)

¹² Facts based upon *Bryant v. Murray-Jones*, 653 F.Supp. 1015 (ED Mo. 1985).

¹³ Id at 161 F.Supp. 135-6

¹⁴ Facts are completely fictitious. Rule comes from: *Dale v. Cooper*, 56 Cal.App.3d 860, 128 Cal.Rptr. 724, 729 (1976).

¹⁵ Based upon *Thomson v. Espey Huston & Asso., Inc.*, 899 S.W.2d 415(Tex.App – Austin 1995).

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