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FALL EXAM SAMPLE ANSWER

QUESTION 1

The facts for this question were amalgamated from several cases, including *Ruggerio Ambulance Service, Inc. v. National Grange Ins. Co.*, 430 Mass. 794, 724 N.E.2d 295 (2000), and *McDougald v. Perry*, 716 So.2d 783, (1998). *Ruggerio* held that the loss of a chance doctrine should apply, and *McDougald* reversed the appellate court's decision that it was incorrect to instruct the jury on the doctrine of res ipsa loquitur.

Charlene should consider a suit against three defendants: John Allen, Ruggerio Ambulance Services, and Michael Bolton. To establish liability Charlene (CW) would need to prove (1) a breach of duty, that (2) proximately caused her husband (TW)'s death; and (3) that the statute permits CW to recover.

I. Breach of Duty

Establishing a breach of duty in this case will require proof of negligence, since none of the defendants was engaged in an activity for which strict liability is imposed. Negligence is the failure to use the care that a reasonably prudent person would use in the same or similar circumstances.

John Allen. Allen swerved to avoid a tire in the middle of the road. The question for the jury would be whether his conduct was that of a reasonably prudent person. As in the wasp case (*Lussan*), the jury would be free to conclude that his conduct was reasonable under the circumstances. On the other hand, they might conclude that, despite the unforeseen difficulty, he was either driving too fast, or not paying attention, or didn't use reasonable care in handling the emergency.[1]

Ruggerio ("R"). The facts aren't specific, but it's possible that R wasn't using reasonable care when he came across the situation where Allen was swerving to avoid the tire in the road. As an ambulance driver he should be prepared to deal with such circumstances. Again, the jury would have to determine whether he was driving with reasonable care. In addition, his failure to use a siren might be considered negligent. In his favor he could cite what is apparently an industry custom of using a siren only during the day or when traffic is heavy. As in the *T.J. Hooper* case, the jury is the final arbiter of what is reasonable care, and they might impose a higher standard than what is observed by his industry.

Bolton. Bolton Industries would be vicariously liable for the conduct of its driver, acting in the course and scope of employment. Bolton could be found negligent for speeding past Allen. However, it's not clear that his speed had anything to do with the accident. If the tire were jarred loose by his speed, that might make it relevant, but if speed simply put him ahead rather than behind Allen, that is an example of the "mere chance" that is insufficient to sustain liability. Another tack we might take would be to ask for a res ipsa loquitur instruction to the jury. That is available if (1) this is the kind of accident that doesn't ordinarily occur in the absence of negligence; (2) the

1. The fact that he crossed into the other lane of traffic would be a statutory violation, but it would be excused since it arose from an emergency not of his own making.

defendant had exclusive control over the instrumentality that caused the accident; and (3) other plausible explanations have been sufficiently eliminated. We might have difficulty with (2) if we can't pin down the ownership of the tire. However, it would seem that, despite Bolton's coyness, we should be able to get a level of confidence that would allow the judge to give the instruction. Once we do, it seems logical to assume that spare tires only fall off of trucks if someone has been negligent in storing or maintaining the tire. Moreover, the jury only has to find by a preponderance that the inference is well taken in order to find for us.

II. Proximate Cause

Perhaps more difficult will be the establishment that one or more defendant's negligence proximately caused TW's death. A proximate cause is one which in a logical sequence, produces the injury, and without which the injury would not have occurred. In other words, the plaintiff must prove (1) "but-for" cause; and (2) "legal" cause.

But-for cause. As far as R is concerned, we have only Allen's statement that if he'd heard the siren he would have slowed down. Unless the jury believes that, we can't show that the lack of a siren was a but-for cause of the injury. With respect to all the defendants, we have the problem of the doctor's statement that, even with prompt care, he couldn't say that TW would have survived. Unless we can get that testimony from someone, we'll fail the but-for cause test. As a back-up, we should consider making a claim for "loss of a chance," which some jurisdictions recognize as an exception to the normal rule. However, even the jurisdictions that do recognize this doctrine tend to confine it to medical malpractice cases. I'd be more interested in finding a doctor or another expert who could somehow help us satisfy the traditional test.

Legal cause. Beyond the but-for cause challenges, we also have to establish that there is an unbroken causal link between the defendants' negligence and the plaintiff's injury. With respect to R, that won't be too difficult. If indeed R was negligent in driving the ambulance, taking too high a risk that he wouldn't get there on time, this is precisely the kind of injury he could expect, and therefore legal cause shouldn't be a problem. On the other hand, Allen and Bolton will both argue that they owed only a duty to people on the highway, and that a heart attack victim miles away would be unforeseeable. Some jurisdictions follow the Cardozo approach articulated in the *Palsgraf* case, asking whether the plaintiff was within the "zone of danger" to be anticipated by a reasonable person. Other jurisdictions adopt the view of Justice Andrews which looks at all of the circumstances and asks whether it is fair to consider the defendant's negligence a proximate cause of the injury. Under either test, we could lose.

III. Damages

The good news with respect to damages is that the statute is relatively generous. It not only provides for recovery of any economic loss in the form of wages that TW would have earned if he had lived, but also for the loss of "society and companionship" that the decedent would have provided. Thus, CW can offer evidence to the jury of the value of their relationship and be compensated for it. Thus, if we were able to establish liability, the damages would likely be very significant. As a final note, although the statute authorizes an award of punitive damages for wrongful death, I don't see anything in the facts that would support a finding that any of the defendants acted recklessly or with gross negligence.

QUESTION 2

This case is taken from *Tyson Foods, Inc. v. Stevens*, 2000 WL 1716977 (Ala. Nov 17, 2000 (NO. 1990131), in which a judgment of $2,500 in compensatory damages was sustained, and an award of $75,000 in punitive damages was reduced to $25,000.

We face some potential liability in this case. The first question to answer is whether or not we will be held vicariously liable for Burnett's conduct, which looks pretty bad. The rule for vicarious liability is that an employer is liable for acts of an employee who is in the course and scope of employment, but not for the work of independent contractors. The bad news is that, even though we called Burnett an independent contractor in our contract with him we exercised a degree of control over his actions to make him our employee for purposes of the vicarious liability test. The rule is that a defendant is vicariously liable for an "independent contractor" if the defendant has the *right to control* how the contractor does the work. In this case the evidence of micromanagement by Tyson of Burnett is strong enough that I fear the court would permit the imposition of vicarious liability.

Negligence. One approach the plaintiffs might take would be to claim that the hog farm was operated negligently. I don't know what standards would be imposed on a hog farm, but it seems likely that a well-run hog farm wouldn't cause the kinds of problems that this one has. The plaintiffs would probably come up with experts who would provide testimony about the custom of the industry in this respect, and probably find our operation wanting. Moreover, there might be statutory prohibitions on the kind of conduct that has taken place, either giving rise to a finding of negligence per se, or else classifying this operation as a public nuisance.

Nuisance. Even if the plaintiffs couldn't prove negligence, they could still establish liability through a nuisance claim. A property owner is strictly liable for a nuisance, which is defined as an activity that interferes with the reasonable expectations of the neighbors in using their own property. Here the plaintiffs seem quite reasonable in expecting that they not be bombarded with odors and pig sewage. On the other hand, we don't know exactly what the character of the neighborhood is, in terms of zoning classification, and in terms of who was there first. It's conceivable that this is a rural area and some degree of agricultural "aroma" would be normal and acceptable.

Proximate Cause. As with other cases, the plaintiffs would have to establish that their damages were proximately caused by the defendants' conduct, but here that's a given. There are no difficult questions that would hinder the plaintiffs' claims.

Compensatory Damages. The easiest item of damage would be to recover for any property loss suffered by the plaintiffs as a result of the offending activities on the hog farm. It's likely that they have suffered some diminution in value of their property as a result of the incursion by the hog farm. That would be recoverable based on the difference of what the property would have been worth if not for the offending operation, compared to what the experts say it is worth now. In addition, the plaintiffs will likely claim some kind of mental distress or pain and suffering damages. These will not be awarded under a simple negligence test, in the
absence of some kind of physical injury, unless the plaintiff can offer some kind of exception, such as a "guarantee of genuineness," which doesn't suggest itself here.

Equitable remedies. A finding that the defendants are engaged in a nuisance usually permits the court not only to award damages, but to enjoin the offending operation. That's not necessarily a direct threat to Tyson, since it would mostly affect Burnett. However, it could be bad for Tyson economically (since Tyson has financed Burnett), and it would add to the leverage that the plaintiff might use to force a more favorable settlement.

Punitive damages. The plaintiffs are likely to ask for a punitive award, on top of the copmensatory damages they have suffered. To get punitive damages, the plaintiff must establish some kind of reckless indifference to the plaintiffs. Here there were repeated requests, and they were essentially ignored. Again, this would have mostly to do with Burnett, but there may be some

indication that Tyson was well aware of what was going on and chose to ignore it. To the extent that Burnett is found to be an agent or employee of Tyson, and they ratified the actions of Burnett in ignoring the plaintiffs' problems, punitive damages might be imposed on Tyson.

CHECKLIST: QUESTION 1

☐ **Overview**
☐ **Negligence** claim
☐ Negligence **defined** as failure to use RC

☐ Claim v. **John Allen**
☐ Was he **negligent**?
☐ **jury** question / jury experience

☐ Claim v. **Ruggerio Ambulance**
☐ was driver's **failure to avoid** Allen neg.?
☐ was lack of **siren** negligent?
☐ industry **custom** would **help** RA
☐ but custom is only the **floor**

☐ Claim v. **Bolton** Industries
☐ **Speed** was probably negligent
☐ Negligence **per se**
☐ Was speed more than "**merest chance**"?
☐ **res ipsa** theory for loss of truck tire
☐ **Elements** of res ipsa; what about control?
☐ **burden** is only "more probably than not"

☐ **Proximate cause** questions
☐ Proximate cause **defined**
☐ but-for cause re **siren**
☐ but-for cause on **delay** in medical care
☐ General problems with **loss of a chance**
☐ will the **jurisdiction** recognize it?

☐ ***Palsgraf***/remote causation problem
☐ doesn't apply to **Ruggerio**
☐ **standard** to be used for Allen/Bolton?
☐ **Cardozo**: scope of duty/zone of danger
☐ **Andrews**: whether highway negligence proximately caused injury

☐ **Statutory basis** for **Damages**
☐ Reasonably expected **net income**
☐ **Society/companionship** etc. recoverable
☐ **punitive** damages allowed, but no facts

QUESTION 2

☐ **Overview**
☐
☐ **Vicarious Liability** Issue
☐ Did Tyson have the **right to control**?
☐
☐ **Negligence** Claim
☐ What **standards** apply to hog farm?
☐ **Custom** of the industry
☐ **Public nuisance** / negligence **per se**?
☐
☐ **Nuisance** claim
☐ What are reasonable person's **expectations**?
☐ Who was there **first**?
☐ Any **zoning** restrictions / permissions?

☐ **Proximate** Cause questions are easy
☐
☐ **Damages**
☐ **Economic** harm is recoverable
☐ Reduction in **FMV** of property
☐ Can **emotional harm** be recovered?
☐ What **exception** would apply?
☐
☐ **Injunctive remedy** would give leverage
☐
☐ **Punitive** Damages
☐ Reckless **indifference** standard
☐ Was **Tyson** recklessly indifferent?