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MIDTERM EXAM SAMPLE ANSWER

QUESTION 1

The facts for this question were based upon *Jeffords v. Lesesne*, 343 S.C. 656, 541 S.E.2d 847 (S.C.App., Dec 11, 2000), in which the court reversed a summary judgment for the defendant, finding that a jury question was presented as to whether the assault on the plaintiff was foreseeable.

Jeffords ("J") would have a claim against Lesesne ("L"). In order to prevail, J would have to establish (1) (1) that L acted negligently[1] and that such negligence (2) proximately caused (3) legally compensable damages.

I. Negligence

Negligence is the failure to use reasonable care. Reasonable care is the care that a reasonably prudent person would have exercised under the same or similar circumstances. The most persuasive examples of negligence in this case would be (1) the serving of alcohol to an intoxicated person, in violation of the statute; and (2) the lack of supervision at the bar, particularly in the area of the pool room. Under the principle of vicarious liability, L would be liable for any negligent acts committed in the course and scope of employment by his bartenders.

Serving an intoxicated person. A West Dakota statute prohibits serving alcohol to someone who is already intoxicated. From the evidence available, it appears that Chris Driggers ("CD") was served alcohol after he was intoxicated. If the jury believes this testimony, L can be found to have violated W.D. Code § 61-6-2220. If West Dakota is a jurisdiction that treats statutory violations as negligence per se, then proof of the violation would result in the judge instructing the jury that they should regard L as having acted negligently. This rule is subject to exceptions where the violation is excused. I don't think any excuse would be viable in this case, since being unaware of CD's intoxication is itself something that resulted from the lack of supervision in the bar. Even if this is not a negligence per se jurisdiction, the jury could still find that L was in fact negligent for serving someone who looked intoxicated and/or out of control.

Rulebook violations. J can also use L's own policies to establish a standard of reasonable care. L wanted to have more bartenders on duty when business was heavy, and he wanted to have "protein rich snacks" available. Neither policy was followed. The jury may find that, by his own standards, L wasn't acting reasonably.

Custom of the industry. A jury might also look to the custom of L's industry to find out what would be reasonable. Other owners drinking establishments must have policies to provide adequate supervision of the sale of alcohol and adequate security. If L's practices fall below the standard observed by other owners, that could be used as evidence of negligence. Even if L is in compliance

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1. Because this is a case that doesn't involve any of the bases for strict liability (abnormally dangerous activities, nuisance, or a statutory basis for liability), J will have to establish negligence.

with the standard of the industry, J could still argue that a reasonable person would have exercised greater caution in view of the risks presented.

II. Proximate Cause

Even if J establishes that L was negligent, J must still show that L's negligence *proximately caused* J's injuries. Proximate cause is a two-prong test: first, would the accident have occurred, more probably than not, but for the defendant's negligence? In other words, is this a cause without which the injury would not have occurred? Second, did the defendant's negligence lead in a direct and unbroken sequence to the injury? J might have problems with both prongs of the test.

But-for cause. The jury would have to find that, more probably than not, J would not have been injured but for L's negligence. In this case, J alleges that L overserved CD and didn't provide adequate security. Will the jury find that, but for serving CD, he wouldn't have hit J in the face with a pool cue? Would the injury have been prevented by better security, particularly where the pool tables were located? These questions do not have obvious answers, but if the jury is convinced that CD should have been refused service, or should have been subject to more direct supervision, they could answer the second prong of the proximate cause test in the affirmative, and thus we move on to the next question.

Legal cause. The second prong of the proximate cause test is whether the injury flowed from the negligent act in a direct and unbroken sequence. L would certainly argue that CD's assault constituted a *superseding cause*, breaking the chain of causation. In evaluating that question, courts look at whether or not CD's act was foreseeable. J would have a strong argument that, given the previous experience with crime, and L's practice of offering free motel rooms to police officers in order to deter crime, he knew that serving large quantities of alcohol without supervisioni could lead to trouble. Although L will undoubtedly point to the evidence that CD attacked J "without warning," L had reason to anticipate a heightened level of risk. And calling the event a "bash" will certainly not help L. An additional factor will be the comparative culpability of L and CD. While CD's criminal sentence reflects a high degree of social disapproval, L is no angel either.

J could also argue that the statute establishes the link between overserving and J's injuries, but there is no guarantee that CD in fact was overserved, and there is legitimate question as to whether one of the purposes of the statute was to prevent injuries of this type (as opposed to, say, driving while intoxicated).

III. Damages

If J proves the first two elements, he can recover damages based on the following categories:

Economic damages. It appears that J has lost income as a result of the injury, and has incurred medical expenses. These are recoverable. In addition, we can seek out the services of an expert economist to establish the difference between what he would have earned but for the injury and what he is now expected to earn. In addition, any projected medical expenses in the future would be recoverable. However, future payments would need to be discounted to present value, reflecting the capacity to earn money on a present award.

Noneconomic damages. The disfigurement of J's face, as well as the chronic pain, would justify a significant award for pain and suffering, humiliation, anxiety, etc. A jury would probably be very sympathetic with such injuries and be generous in compensating for them.

Punitive damages. L could be vulnerable to an award of punitive damages if it could be shown that he acted in reckless disregard of J's rights. On the evidence presented, it appears that L was merely negligent, and did not act consciously or flagrantly to J's detriment. However, if evidence surfaced that, for example, bartenders had previously complained of the dangers presented by a lack of adequate personnel, L might appear to have sacrificed his customers' safety to make more profit. That could generate a punitive damages claim.

QUESTION 2

The newspaper article is mostly verbatim. No litigation has yet arisen.

Statewide ("S") should be concerned about a claim against them by (1) the condominium owner ("CO"); and (2) the parties injured in the fender-benders ("FBPs"). To prevail, a plaintiff would need to establish that S breached a duty to either CO or FBPs, and that the breach proximately caused compensable injury.

I. CO's claim v. S

A. *Breach of Duty*

CO's first task would be to establish that S breached a duty. This could be accomplished in one of two ways. CO could try to establish that S was *negligent*; or CO could argue that S should be held *strictly liable*.

Negligence. Negligence is the failure to use reasonable care—the care that a reasonably prudent person would use in the same or similar circumstances. Here the primary method that could be used to argue that S was negligent would be to apply the doctrine of *res ipsa loquitur*. Res ipsa may be applicable if the evidence regarding negligence has been lost or destroyed, which is the case here. To qualify for a res ipsa instruction, the plaintiff must show that (1) this is the type of accident that doesn't ordinarily occur except where there has been negligence; (2) that the defendant had exclusive control over the instrumentality that caused the accident; and (3) other plausible explanations for the accident have been sufficiently eliminated. I don't think CO would have a very good case in this instance, because CO had control over the site in question, and it is not clear that the accident happened because of a problem with the pipeline. Thus, if CO cannot establish that S had control over the instrumentality that caused the fire, they won't be able to get a res ipsa instruction. On the other hand, if evidence does turn up showing that the fire occurred as a result of a rupture of the pipeline, that would permit a res ipsa instruction.

Strict Liability. S could be held strictly liable if the court determines that a natural gas pipeline constitutes an abnormally dangerous activity. An abnormally dangerous activity is one which fits the description contained in the Restatement (2d) of Torts, §§ 519-520. Section 520 contains six criteria or factors to be considered by the court. They include whether the activity (1) has a high risk of injury, (2) resulting in grave harm; (3) that cannot be eliminated through the exercise of reasonable care; (4) that is uncommon; (5) and also inappropriate to the area; and (6) is of limited societal value. I believe a court would likely characterize the pipeline as an abnormally dangerous activity, although it is not uncommon or inappropriate, and it has very high value to the community. However, it remains to be seen whether the fire caused the pipeline to rupture or the other way around. If the fire had already destroyed the building, and the natural gas simply added

to the visual display, then it is hard to say that, under § 519, it is the abnormally dangerous aspect of the activity that caused the injury.

CO might even try to establish that the pipeline was a *nuisance*. A landowner can recover damages if a neighboring landowner allows some dangerous or harmful substance to escape and invade the owner's land, contrary to the owner's reasonable expectations to enjoy his or her property. Again, if it turns out that the pipeline ruptured somehow and then sent natural gas onto CO's property, that could be considered a nuisance, for which S could be held strictly liable.

B. *Proximate Cause*

If the fire/explosion indeed was caused by a rupture in the pipeline (rather than vice versa) then the proximate cause questions will be very easy for CO to establish. Proximate cause consists of but-for cause and legal cause, and there is no reason to think either would be seriously contested in this case if a breach of duty is established.

C. *Damages*

If the other elements were met, CO would be entitled to the economic loss represented by the difference between the fair market value before the fire and after the fire. This should be the same as the cost to rebuild what was burned down.

II. FBPs v. S

The victims of the fender bender would also try to blame S for the fire. To prevail, they would need to satisfy the same burden of proof identified above.

A. *Breach of Duty*

The analysis regarding negligence would be the same as above with respect to CO.

As to strict liability, neither theory would apply, even if it would apply to CO. As to abnormally dangerous activities, fender-benders are not the kind of risk that makes the activity abnormally dangerous (§ 519 of the Restatement), and thus strict liability would not apply. Similarly, there would be no strict liability for nuisance, since the automobile drivers do not enjoy a property right, the invasion of which is subject to strict liability. Thus, if they are to recover it must be on the basis of negligence.

B. *Proximate Cause*

It might be true that, but for the rupture of the pipeline, and the resulting "blow-torch," there would have been no fender-benders on Meridian Street. However, it seems like a real stretch to say that the rupture was a legal cause of the FDPs' injuries. They are not reasonably foreseeable to S. Under Cardozo's analysis in *Palsgraf*, the zone of danger extending from the pipeline would probably not include nearby vehicular traffic, at least on the basis of visual distraction. Similarly, Andrews' approach would incorporate several factors that militate against finding proximate cause. For one thing, there are intervening causes such as the other drivers whose inattention caused the collisions. In addition, a ruptured pipeline is not something which, "in the

experience of mankind," tends to produce fender-benders. Thus, I would not think it likely that the FDPs could establish proximate cause.

C. *Damages*

If by some miracle (for them) the FDPs were able to satisfy the first two elements of their claim, they would be entitled to economic loss (property damage, income loss & medical expenses), plus pain and suffering damages. Hopefully we won't get to that point.

Summer 2001 Torts Midterm Checklist

QUESTION 1

- ☐ **Overview**
- ☐ Claim v. **L**
- ☐ (Claim v. **CD** is probably worthless)
- ☐ (No **strict** liability)
- ☐ **Negligence** Claim
- ☐ Negligence **defined** as failure to use RC

- ☐ Serving an **intoxicated** person
- ☐ Jury would have to believe **witness**
- ☐ **Statutory** violation?
- ☐ **Jurisdictional** variants
- ☐ Elements of **negligence per se**
- ☐ No viable **excuse**

- ☐ Rulebook violation: **Food**
- ☐ Rulebook: Lack of **supervision**
- ☐ **Custom** of the Industry sets the floor

- ☐ **Proximate cause**
- ☐ Defined as **two-pronged** test
- ☐ **But-for** cause: MPTN standard
- ☐ Was **serving alcohol** a but-for cause?
- ☐ Was lack of **supervision** a but-for cause
- ☐ Lack of **food** not a but-for cause?
- ☐

- ☐ **Legal cause** questions
- ☐ Was CD a **superseding** cause/break chain of causation?
- ☐ Was assault **foreseeable**?
- ☐ **Free motel** rooms establish foreseeability
- ☐ What about CD hitting J "**without warning**"?
- ☐ Was L's negligence comparable in **culpability**?
- ☐ Does **statute** establish legal cause?
- ☐ What was statutory **purpose**?
- ☐

- ☐ **Damages** would be significant
- ☐ **Economic** loss
- ☐ Lost **income** / past and future
- ☐ **Medical** expenses
- ☐ Pain and **suffering** would be substantial
- ☐ **Punitive** damages?
- ☐ What evidence regarding **conscious** disregard?
- ☐

- ☐ Did **radio station** "employ" L?
- ☐
- ☐
- ☐
- ☐
- ☐

QUESTION 2

- ☐ **Overview**
- ☐ **CO**'s claim v. S
- ☐ Breach of **Duty**
- ☐ **Negligence** claim
- ☐ Negligence **defined**
- ☐ **Res ipsa** loquitur
- ☐ **Type** of injury -- maybe
- ☐ **Exclusive** control -- doubtful
- ☐ If pipe ruptured **first**, could be applied
- ☐

- ☐ **Strict** liability
- ☐ Abnormally **Dangerous** Activity?
- ☐ **Restatement** factors applied
- ☐ **Nuisance** might apply
- ☐ Did **escape** of gas cause injury?
- ☐

- ☐ **FDPs'** claims v. S are weak
- ☐ No **strict** liability for ADA
- ☐ No strict liability for **nuisance**

- ☐ **Proximate** Cause
- ☐ **Defined**
- ☐ CO has **no problems**
- ☐ FDPs will have **significant** *Palsgraf* issues
- ☐ Beyond the **zone** of danger?
- ☐ Andrews: not a ***proximate* cause**
- ☐

- ☐ **Damages** would be mostly **property** for CO
- ☐ FDPs would have **economic/non-economic**
- ☐

- ☐ **Punitive** Damages not likely
- ☐
- ☐

- ☐
- ☐
- ☐

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