

MIDTERM EXAM SAMPLE ANSWER

QUESTION 1

The facts for this question were based upon *Craig v. Driscoll*, 64 Conn.App. 699, 781 A.2d 440 (2003), in which the court reversed a summary judgment for the defendant, finding that a common-law action was not preempted by the statute.

On behalf of the Pub, my assignment is to anticipate claims that Valerie and Samuel (V&S) would bring for the injuries they suffered as a result of observing the death of Sarah Craig. In order to succeed, V&S would need to prove (1) a breach of duty on the part of the pub that (2) proximately caused (3) compensable damages. Each element will be addressed in turn.

I. Breach of Duty

A breach of duty may consist either of a negligent act on the part of the Pub or there may be a basis for imposing strict liability upon the Pub. In this case the immediate question is what effect ALC § 30.102 has on this case. It states that a seller of alcoholic beverages is subject to liability for injuries caused by the sale of alcoholic beverages to an intoxicated person. This statute may preempt ordinary causes of action, but I am assuming (at least for starters) that it is in addition to ordinary tort remedies.

Negligence. Ordinarily, it is sufficient for a plaintiff to show that the defendant acted negligently and that such negligence proximately caused the plaintiff's injuries. Here the negligent act would be selling alcohol to Driscoll when he was already intoxicated. The facts state that the Pub actually delivered a pitcher of beer to Driscoll, but there is probably some kind of regulation or standard that would specify that even if a sober person orders the beer, it can't be served (either directly or indirectly) to someone who is drunk. There may also be some policy adopted by the Pub (formally or informally) regarding serving someone who is already intoxicated. In addition, industry standards could be relevant to determining what a reasonable tavern owner would do to prevent patrons from obtaining alcohol after they are intoxicated.

Strict Liability. The statute (ALC § 30.102) appears to impose a form of strict liability. That is, one who sells alcohol to an intoxicated person (even if it isn't done negligently) is liable for persons injured "in consequence" of such intoxication. We would attempt to argue that, since the Pub didn't *sell* the alcohol directly to Driscoll, the statute doesn't apply. But it is very possible that a court would interpret a sale to include providing it to anyone at the table. On the other hand, we would say that the determination of who is intoxicated can only be done at the time the drink is ordered, and thus a sale to a non-intoxicated person (who later furnishes it to an intoxicated person) shouldn't count. I'm not very sanguine we would win that argument, particularly in light of the strict liability character of the statute.

II. Causation

Even if the Pub breached a duty by providing alcohol to Driscoll, it may still avoid liability if V&S fail to show that providing alcohol was a proximate cause of V&S' injury. To constitute proximate cause, the breach must be both a but-for as well as a legal cause of the injury to V&S. A but-for cause is one without which the injury would not have occurred. The Pub could obviously claim that the evidence wouldn't support a finding that, but-for the "glass or two" of beer purchased at the Pub, V&S wouldn't have been injured. But in cases involving multiple redundant causes, courts will substitute a "substantial factor" test. Thus, V&S can satisfy the but-for test by showing that the provision of alcohol to Driscoll was a substantial factor in the injury.

Legal cause means a "direct and unbroken sequence" between the breach of duty and the injury. In this case Driscoll's actions of driving a car intervened between the negligent act of selling him alcohol and the time he caused the fatal accident. We might have tried to argue that this

independent cause operated to break the chain of causation, but we are going to lose this argument because the statute supplies *legal* cause: by imposing liability upon sellers of alcohol the legislature established that such defendants cause the subsequent harm.

III. Damages

Obviously, V (and possibly S) might be beneficiaries under the wrongful death statute, but someone else is handling that part of the claim. Our assignment is to look at the claims that V&S might bring aside from wrongful death. That would be their claims as bystanders who observed V shortly after she was hit. Most jurisdictions use some variation on the standard adopted in *Dillon v. Legg*: a bystander can recover injuries if they are (1) present at the scene of the accident; (2) suffer a direct emotional shock; and (3) have a close relationship to the injured person. Here V&S weren't present when the blow was first dealt, but many jurisdictions allow recovery so long as the plaintiffs arrive at the accident scene before substantial change in the victim's status has occurred. V&S would certainly qualify on that score. Second, they certainly suffered a direct emotional shock, particularly tending to V's serious head injury. Finally, they are closely related (mother and brother, respectively).

The statute permits damages "up to ... \$250,000." This may operate as a cap on the Pub's liability, at least with respect to the statute. However, if a common-law action based on some other theory (like negligence) succeeded, the cap might not apply. Finally, I don't think that punitive damages could be included in the award; they can be awarded when the defendant is found to have acted with malice or with flagrant disregard of the plaintiff's rights. Here the defendant may not have even been negligent; there no evidence of the kind of conduct that would justify a punitive award.

QUESTION 2

The facts of this case were drawn from *Nelson v. County of Los Angeles*, 113 Cal.App.4th 783, 6 Cal.Rptr.3d 650 (2003), in which the court reversed a \$2 million judgment in favor of the parents, finding that they had standing to sue but the award was excessive.

This will be a challenging case to evaluate. On the one hand, our client's negligence has pretty much been conceded. On the other hand, significant causation and damages issues remain.

Proximate Cause. In order to recover damages, the plaintiff must show that the negligence of the defendant proximately caused the injury. Proximate cause is composed of two prongs: the "but-for" test and legal cause. But-for cause requires a showing that, but for the defendant's negligence, the plaintiff would not have been injured. In this case we have a serious conflict between the testimony of the plaintiffs' and defendant's experts. If the plaintiffs' expert is believed by the jury, but-for cause has been established. On the other hand, our expert might convince the jury that Dwayne would have died anyway, even without the "TARP" procedure. Under a traditional understanding of proximate cause, that would defeat the plaintiffs' claim for recovery. On the other hand, the plaintiffs might attempt to utilize an exception to the but-for test known as "loss of a chance." Under the loss of chance theory, the plaintiff is entitled to be compensated for the value of the chance to avoid injury that was forfeited by the defendant's negligence. Here, if the plaintiffs could show that there was a chance of surviving Dwayne's various conditions, but that chance was lost by the TARP procedure, they could construe that as loss of a chance. On the other hand, most jurisdictions have rejected loss of a chance theories outside the medical malpractice context.

The other prong of proximate cause, legal cause, requires the plaintiff to show that the injury occurred in a direct and unbroken sequence. I don't see any prospect to avoid such a conclusion. If our negligence is found to be a but-for cause, it is also a legal cause.

Standing to Sue. The Linden statute dealing with wrongful death awards damages to a particular set of beneficiaries, and the parents of Dwayne may not qualify. Under § 377.60(a), parents have standing to sue only if "there is no surviving issue of the decedent." The evidence is

apparently mixed as to whether Dwayne has children. It's not clear who has the burden of proving the parents' standing, but it's certainly possible that they would have enough proof that Dwayne left no surviving issue. If so, they would stand to collect whatever the statute provides.

Measure of Damages. The Statute seems to be divided into two sections: a recovery for the estate (ALC § 377.34), which is quite limited, but includes punitive damages, and a recovery for designated beneficiaries (ALC § 377.61), which is more expansive, but does not include any damages already awarded under § 377.34. Under § 377.61, the parents would be entitled to damages that, "under all the circumstances, may be just." This is pretty generous; it would certainly include any economic damages suffered by the plaintiffs, but in this case it appears that Dwayne would have been returned to prison if he had survived, and would not have had any significant economic future in any event. Thus, the economic loss would be negligible. However, the non-economic damages, the loss of the society and companionship of their child, would be recoverable, assuming the generous definition of damages includes such non-economic harm. The evidence shows that the parents had had no contact with Dwayne for a long period of time, and on the one hand we could say that the damages would likewise be nil. On the other hand, the parents might pursue a so-called "prodigal son" theory, under which the parents' hopes for an eventual reunion with their wayward son were obviously dashed by the defendant's negligence. In arguing to the jury that they wouldn't have reunited with their son in any event, the defendant may dig itself a deeper grave. It's hard to know how the jury would react. They might be very skeptical of the plaintiffs or they might be quite generous.

I don't think any punitive damages would be awarded under ALC § 377.34; such an award requires evidence that the defendant acted with malice or with flagrant disregard of the plaintiff's rights. Here the defendant may be conceding negligence, but under the circumstances they were doing an arguably heroic thing. Nonetheless, if the videotape makes our client look bad, and the jury feels that the defendant deserves to be punished, they can simply make a large compensatory award and it will be hard to challenge it.

Overall, it's a very mixed bag. I don't know that I would recommend paying \$500,000. On the other hand, I can't guarantee that the results at trial are so sure that we shouldn't make some kind of offer to the plaintiffs to settle the case.

Fall 2004 Torts Midterm Checklist

QUESTION 1

- Overview**
- Breach** of Duty Defined
- Effect of statute, § 30.102
- Pre-emption?**
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- Negligence** Claim
- Negligence **defined** as failure to use RC
- Are there **Rulebook** standards?
- What is industry **custom**
- Green: Driscoll didn't **appear** intoxicated
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- Strict Liability**
- Based on **statute**
- Does the statute require a **sale**?
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- Proximate cause** issues
- Prox. cause = but-for **plus** legal cause
- Statute requires damages "**in consequence**"
- Does statute impose **unique** causation test?
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- But-for** cause defined
- Didn't **Shadows** cause most of the intoxication?
- Multiple **redundant** causes
- "**Substantial** factor" replaces but-for test
- One or two beers could be "**substantial factor**"
- Legal** cause defined
- Statute defeats **superseding** cause argument
-
- Damages**
- Is V a beneficiary under **WD** statute?
- Bystander** claims
- What version of *Dillon* does Linden use?
- Were V&S **present** at the scene?
- Emotional shock was **direct**
- Relationship** is close
- Does statute place **cap** on damages?
- No **punitive** damages
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QUESTION 2

- Overview**
- Breach of **Duty** already established
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- Proximate** Cause = but-for + legal
- But-for** cause defined
- Conflict in **doctors'** testimony
- Loss of a **chance**?
- Does Linden permit l/c **outside med.**?
- Legal** cause defined
- No **obstacle** to proving legal cause
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- Damages**
- Wrongful death **statute**
- Beneficiary preference: **spouse / children**
- Parents** collect only if no children
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- Damages include "**all** damages"
- Economic** damages wouldn't be significant
- Loss of **consortium** would be included
- How much would jury give **parents**?
- Prodigal son** theory
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- Punitive** Damages not likely
- Uncertain **jury** reaction
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Exam # _____