TORTS I | PROFESSOR DEWOLF
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MIDTERM EXAM SAMPLE ANSWER

QUESTION 1

> The facts for this question were based upon *Trainor v. Estate of Hansen*, 740 So.2d 1201 (1999), in which the court held that the violation of the statute created a cause of action for social host liability.

In order to recover, Becky ("BT") will need to establish that (1) the Hansens ("Hs") breached a duty that they owed to Megan, (2) that such a breach was a proximate cause of Megan's death; and (3) BT is entitled to recover pursuant to statutory remedies for wrongful death.

Breach of Duty

A breach of duty can be shown either by establishing negligence on the part of the defendant, or that the defendant is subject to some form of strict liability. I don't see any basis for strict liability on these facts, and consequently we will need to show negligence on Hs' part.

Negligence is the failure to use reasonable care. One powerful way to establish negligence is to show that the defendant violated a statute that was designed to prevent injuries like this. Linden Statutes § 856.015 forbids permitting minors to drink at "open house parties," which this would appear to be. In some jurisdictions a violation of a statute is considered negligence per se; that is, the violation of the statute (if unexcused) establishes negligence as a matter of law. In other jurisdictions the violation is evidence of negligence.

However, negligence per se would not apply unless the statute is actually violated. Here the statute forbids having an "open house party" where the defendant (1) knows that an alcoholic beverage is in the possession of or being consumed by the minor, and (2) the defendant fails to take reasonable steps to prevent such possession or consumption. Here we would need evidence that Hs knew that minors were possessing or consuming alcohol and that they failed to take reasonable steps to prevent such possession / consumption. (In addition, the application of negligence per se requires a finding that the purpose of the statute was at least in part to prevent injuries like this. I don't think the judge would have any doubts about statutory purpose. In some cases a statutory violation would be excused, but in this case the excuse would likely be a denial of the elements of the statutory violation rather than a separate excuse such as an emergency.

Proximate Cause

Proximate cause is composed of two elements: but-for cause and legal cause. To satisfy but-for cause, BT would need to show that, more probably than not, but for the Hs' negligence Megan would not have died. To satisfy this test we will need to show that, but for the alcohol that Nelson consumed, he would not have collided with Benson. The facts state that Nelson drank five glasses in two hours. If Nelson is of average body weight, and the glass was of normal size, that would probably result in impairment of Nelson's ability to drive. Since even the first drink was illegal, even if Nelson's BAC was not above the legal limit, we will probably have persuasive evidence that alcohol made a difference in his ability to drive, and but for the influence of alcohol Megan would still be alive.

As far as legal cause, there is nothing to break the chain of causation between serving alcohol to a minor and the injury. True, there were many fortuities in how the accident came about, but none of them would prevent a finding of legal cause. In older cases courts refused to find that the overserving of a driver was a proximate cause of injury because of the intervening actions of the intoxicated driver. However, by enacting the statute prohibiting the supply of alcohol to minors, the legislature would likely be found by the court to have established legal causation as a matter of law.

Damages

The statute authorizes a recovery by "survivors" of the decedent, which would include BT. The statute is pretty generous in its enumeration of recoverable damages, and the courts are instructed to construe the statute "liberally."

BT is entitled to "lost support and services," which might include functions that Megan performed for the family, such as babysitting siblings or housecleaning. I'm assuming that Megan was a minor, as defined by the statute, which is anyone under 25 years old (§768.18(2). More significant is the right to recover for "mental pain and suffering" (§ 768.21(4)), which for a mother who lost her daughter would be considerable. (Even if MT were an adult, BT would be entitled to this recovery so long as MT had no other survivors.) There doesn't appear to be any basis for the estate of Megan to recover, since she would not qualify as a spouse, or as someone who is "not a minor child" (§ 768.21(6)).

If the evidence shows reckless disregard for safety (e.g., evidence that Hs were warned about minors imbibing, and Hs dismissed the concern), then BT could ask for punitive damages. Unless additional damaging facts are brought forward, I wouldn't expect a punitive award. In addition, there is no explicit mention fo punitive damages in the wrongful death statute, and it does say that actions for personal injury abate with the death of the decedent, so I'd want to be sure that punitive damages are authorized for wrongful death actions in this jurisdiction.

[NOTE: In the exam as originally given, the facts state that at the last minute the Hansens decided not to attend the party. It should have stated that at the last minute Nelson's parents decided not to attend the party. I don't think it changes the analysis significantly.]

QUESTION 2

> The facts of this case were drawn from *Koger v. Ferrin*, 23 Kan.App.2d, 926 P.2d 680 (1996), in which the court rejected a strict liability claim, but permitted entry of a judgment based upon defendants' negligence.

The owners of the Koger ranch (or anyone who lost property as a result of the fire) could recover from Seven-S Corporation (7S) would be found liable if the plaintiffs showed that (1) 7S breached a duty of care, which (2) proximately caused (3) the property damage.

<u>Breach of Duty</u>

There are two ways to establish a breach of duty. One is to show that 7S acted *negligently*; the other is to show that their conduct is subject to *strict liability*.

(1) <u>Negligence</u>. Negligence is the failure to use reasonable care. An employer is vicariously liable for its employees' negligence if committed in the course and scope of employment Plaintiffs would point to Seidel's apparent failure to make sure the fire was out. It may also be that Seidel and Ferrin's response to the phone call from the rancher was negligent. Several doctrines might prove useful to the plaintiffs:

Industry Custom. Farmers and ranchers might have methods of dealing with fires that would establish the reasonableness (or negligence) in Seidel's initial approach to the fire. If Seidel's conduct conformed to industry standard, we would still be vulnerable to the claim that a reasonable person would have done more. Perhaps Learned Hand's calculus (comparing the cost of prevention to the probability of loss multiplied by the magnitude of loss) would suggest that additional precautions (given the heightened fire danger) were advisable.

It's possible that 7S had its own *internal policies* or rules with respect to dealing with fires. If Seidel failed to follow those policies it would be strong evidence of negligence. Even worse, if a statute or regulation prescribes the proper way to deal with a fire, and Seidel failed to follow it, the judge might treat the violation as *negligence per se*—conclusive evidence of negligence. That would occur if the jurisdiction follows the so-called Cardozo rule, and assuming that the statute was in part designed to prevent damage from fires like this.

Res ipsa loquitur. Where the evidence of negligence is unavailable, a plaintiff may ask the judge to permit the jury to infer negligence. Under the doctrine of res ipsa loquitur a jury may infer negligence if (1) the accident is of a type that generally does not occur in the absence of negligence; (2) the defendant had exclusive control over the instrumentality or conditions that caused the accident; and (3) other plausible explanations have been sufficiently eliminated.

Here we don't know what caused the original fire. Perhaps there was something like a short in an electified fence, or a spark from the truck they were using—the point is, we don't know. If an expert were to testify that fires of this type don't occur in the absence of negligenc,e the first element would be satisfied. We would have to concede that the conditions instrumentality that caused the fire was in our exclusive control. But there may be other plausible explanations, such as lightning, spontaneous combustion from rotting grass, etc. Hopefully the judge would reject the plaintiff's attempt to use res ipsa loquitur.

(2) <u>Strict Liability</u>. Even if the plaintiffs couldn't prove that our client acted negligently, there might be a basis for imposing strict liability. The first theory would be that 7S was engaged in an abnormally dangerous activity. The criteria for an ADA are found in the Restatement (2d) of Torts, §§ 519-20. The fire was obviously an extreme danger, but we would argue that it's not an activity that 7S engaged in. The fire originated on 7S's land, but (assuming that it didn't arise from anything negligent that our client did), we would argue that we didn't really start the fire, so to speak. If strict liability reflects a judgment that the defendant "acted at his peril" in engaging in an ADA, then the plaintiffs cannot point to anything that 7S did in this case that was really a choice on the part of 7S.

An alternative theory would be *nuisance*. A landowner is subject to strict liability if he brings onto his land something that creates an interference with his neighbor's reasonable expectations to enjoy his property. We certainly have an interference with the Kogers' expectation of quiet enjoyment, but as with the theory based on ADA, the plaintiffs would have difficulty showing that 7S brought something onto its land. In *Rylands v. Fletcher* the court limited strict liability to cases where the defendant brought something "artificial" onto his land. Here, again assuming that the evidence only shows that the fire originated on our property, but doesn't establish that we did anything to start the fire, we could ask the judge to reject a nuisance claim because we didn't bring the offensive thing onto our land.

<u>Proximate Cause</u>

In addition to establishing (by way of one or more of the theories discussed above) that 7S breached a duty toward plaintiffs, plaintiffs would also have to show, more probably than not, that the negligence or strict liability was a *proximate cause* of the damages. Proximate cause consists of a combination of but-for cause and legal cause.

But-for cause is satisfied if, more probably than not, the plaintiffs would not have been injured but for the defendant's breach of duty. Again, our best hope is that the plaintiffs would fail with respect to the breach of duty, but if the succeeded, it seems more or less a foregone conclusion that the plaintiffs would be able to show this element of proximate cause.

Legal cause will not be found if there is a superseding cause, or the activity did not increase the risk of injury, or the link between the negligent act and the plaintiff's injury is so tenuous that it is not fair to impose liability. None of those considerations apply, and thus proximate cause is not a promising basis for our defense.

<u>Damages</u>

The plaintiffs would be entitled to recover the sum of money required to compensate them for their property loss. In some cases that is measured by the diminution in fair market value as a result of the injury (here, the fire). In other cases it is cheaper to repair the item, and if so that cost will be the measure of damages. In any event, the damages sound like they are extensive.

Summer 2005 Torts Midterm Checklist

Question 1

☐ **Overview**
☐ **No strict** liability
☐ **Negligence** Claim
☐ Negligence **defined** as failure to use RC
☐
☐ Negligence **per se**
☐ Is this a **Cardozo** jx. or Washington type?
☐ Was the statute (§ 856.015) **violated**?
☐ Defendants conducted "open house **party**"
☐ Did Hs **know** that Nelson was drinking?
☐ Did Hs take "**reasonable steps**" to prevent?
☐ Statutory **purpose** is satisfied
☐ **Excuses** would track statute
☐
☐ **Proximate Cause**
☐ Defined as **But-for + Legal** Cause
☐ **But-for** cause
☐ Did quantity of beer **affect** driving?
☐ More **probable** than not standard
☐ **Legal** cause defined
☐ Does **statute** establish legal cause?
☐

☐ **Damages**
☐ Wrongful death **statute**
☐ Generally quite **generous**; "liberally construed"
☐ Mother qualifies under § 768.18 as a **survivor**
☐
☐ § 768.21(1) permits "lost **support and services**"
☐ § 768.21(4): "mental **pain and suffering**"
☐ Medical and **funeral** expenses (§ 768.21(5))
☐
☐ No recovery by **estate** under § 768.21(6)
☐
☐ **Punitive** damages?
☐ Any evidence of **reckless disregard**?
☐
☐
☐
☐

Question 2

☐ **Overview**
☐ **Breach** of Duty
☐
☐ **Negligence**
☐ Defined as **lack of reasonable care**
☐ **Vicarious** liability for employee negligence
☐ **Seidel**'s failure to put fire out
☐ Ferrin & Seidel's **response** to phone call
☐ **Industry** Custom
☐ **Rulebook** violation?
☐ Negligence **per se**
☐ **Excuses**?
☐
☐ **Res ipsa** loquitur
☐ **Elements** of Res ipsa case
☐ Is **natural cause** a plausible explanation?
☐
☐ **Strict** Liability
☐ **Abnormally dangerous** activity
☐ **Restatement** criteria

☐ **Nuisance**
☐ Invasion of neighbor's **reasonable expectations**
☐ But did 7S bring **artificial** condition onto land?
☐
☐ **Proximate cause**
☐ Defined as **But-for + Legal** Cause
☐ Evidence supports **both** elements
☐
☐ **Measure** of damages
☐ **Property** loss
☐ Diminution in **FMV** or **cost to repair**
☐ No **punitive** damages
☐
☐
☐
☐
☐
☐
☐
☐

Exam # ____________________