

MIDTERM EXAM SAMPLE ANSWER

QUESTION 1

The facts for this question (with respect to damages) were taken from *Knowles v. Corkill*, 51 P.3d 859 (Wyo. 2002), in which the court affirmed a jury verdict awarding no damages to the grandfather or children of the decedent. The facts relating to the bars and the employer were made up.

I would consider claims against a number of defendants: (1) the two bars (BB and PP); (2) Corkill; and (3) Corkill's employer. In order to recover from any of them, Clark Knowles (CK) or the grandchildren (GC) would have to prove that the defendant in question (a) breached a duty of care, which (b) proximately caused (c) compensable damages.

I. The Claim against the Two Bars (BB and PP)

A. *Breach of Duty*. The first challenge would be to establish a breach of duty on the part of the bars. Plaintiffs ("CKGC") could argue either that BBPP were *negligent* or that they should be held *strictly liable*.

(1) *Negligence* is the failure to use reasonable care -- the care that a reasonably prudent person would use under the same or similar circumstances.

By statute, Linden makes it illegal to sell to a visibly intoxicated person (ALC § 30-103). A violation of this statute would constitute either evidence of negligence or (in a jurisdiction that permitted it) negligence as a matter of law. Unfortunately for CKGC, we would need to prove that Corkill was visibly intoxicated. The evidence at this point is only that she was at the bars in question; whether she consumed alcohol or what her condition was at the time she consumed the alcohol is somewhat speculative. However, if she believed herself to be intoxicated at the time of the accident, and if she only consumed three alcoholic drinks prior to leaving home at 8 p.m., then it seems logical to infer that she must have consumed alcohol at either BB or PP. It's a shame that the evidence on this point is unlikely to be reliable due to the length of time that has transpired, but perhaps we will have admissible evidence that she actually consumed alcohol at both BB and PP.

The statute makes it clear that there is no liability unless the person who is served is intoxicated, so if the jury believes, for example, that Corkill was served while at BB, but was not yet intoxicated, then BB would not be liable.

(2) *Strict Liability*. ALC § 30-102 creates a form of statutory strict liability for serving someone who is intoxicated, where "in consequence of such intoxication" the plaintiffs suffer injury. There is a limit to this form of liability of \$250K (discussed below), but the primary difference between this and negligence liability is that it does not require that the person be *visibly* intoxicated. Thus, if there is evidence that either BB or PP served Corkill while Corkill was intoxicated, and if the fatal accident was a consequence thereof (discussed below), then BB or PP would be strictly liable. The defense might argue that this statute pre-empts liability based on negligence, but I don't see that in the statute; it appears to be something that comes in addition to any liability based on negligence.

B. *Proximate Cause*. To establish proximate cause CKGC must show both that the defendant's negligence was a "*but-for*" cause of the injury as well as a *legal* cause. The strict liability statute requires that the fatal injury was suffered "in consequence" of the serving of alcohol. Here presumably we would apply a traditional proximate cause test, but ordinarily that would create problems for but-for causation. Here CKGC could probably invoke the substantial factor test, since each defendant's negligence was a multiple redundant cause contributing to the injury without either being a but-for cause. A similar form of analysis would be used in the negligence case. Because the

statute clearly identifies the link between intoxication and injury, there is no difficulty showing that, if the serving of alcohol satisfies the but-for test (or the substantial factor test substituted for it), it would also satisfy legal cause.

The only problem with legal cause could arise from an argument that Corkill's failure to stop and render aid to Lynn constituted such egregious conduct that was a superseding cause that broke the chain of causation. It's unclear whether stopping to aid Lynn would have made any difference to her survival, and even if it did, I think it would be hard to convince a jury that it was unforeseeable that an intoxicated driver would fail to render timely assistance to an accident victim.

C. *Damages*. Wrongful death cases are dependent upon statutory authority for the award of damages. Linden has a general (and generous) description of the damages that can be recovered by "every person" who brings a claim -- the damages include "probable future companionship, society, and comfort." Of course the fly in the ointment here is that Lynn would not necessarily have provided much companionship, society, and comfort even if she had lived. Her track record at the time of her death was not good. What a jury would do with this information is very hard to predict.

The strict liability statute has an upper limit of \$250K (and presumably would apply to each defendant, for a total of \$500K), but it does not generate any new basis for the award of damages; the relevance of that statute is that, if the jury finds that the fatal accident was a "consequence" of serving Corkill in an intoxicated state, but they do not find that she was visibly intoxicated, then the damages would be capped at \$250K/\$500K.

II. The Claim v. Corkill

A. *Breach of Duty*. The bad news is the Corkill is dead, and it appears that, while the statute allows a claim against the estate of a person who, while alive, negligently caused a death, it is now seven years since she died and I don't know if there would be any way to recover damages. If for some reason her estate were still available for a claim, I see no difficulty in establishing a breach of duty (driving while intoxicated).

B. *Proximate Cause*. Unlike the case against BB and PP, the case against Corkill doesn't present any difficulties establishing proximate cause. Presumably by her own account the intoxication was a but-for cause of the accident, and it was a legal cause as well.

C. *Damages*. In addition to the compensatory damages discussed above, the statute also permits the recovery of punitive damages. Corkill's refusal to Again, whether they could actually be collected or not is unknown.

III. The Claim v. The Real Estate Agency ("Employer")

A. *Breach of Duty*. CKGC would argue that Corkill was drinking at the Breadbasket while in the course and scope of her employment for Employer, and that therefore Employer would be vicariously liable for her negligent acts. Assuming that there is no difficulty filing a timely claim against Employer, we would use Corkill's admission of driving under the influence as a basis for establishing negligence. Employer would undoubtedly question whether Corkill was actually in the course and scope of employment while she was drinking, but assuming that CKGC could prove that, and that she was negligent in doing so because of her knowledge that she would later have to drive, then the case for a breach of duty appears strong. It is conceivable that Employer could be found liable for Corkill's drinking, even if BB was not found liable for serving BB, even under the strict liability statute, because Corkill became drunk *after* she was served.

B. *Proximate Cause*. Since it was only the drinking at BB that is attributable to Employer, CKGC would have to prove that the drinking at BB proximately caused the later fatal accident. As discussed above, CKGC would argue that the proper test would be the substantial factor test, since the drinking at different establishments would constitute multiple redundant causes and fit within

the substantial factor exception to the but-for cause test. Assuming CKGC would be successful in this argument, the legal cause prong would pose no problem.

C. *Damages*. Compensatory damages would be awarded on the same basis as against BBPP, but since the strict liability statute does not apply, neither would the \$250K limit. On the other hand, even if Corkill individually were liable for punitive damages, there would be no basis for attributing them to Employer, since Employer never authorized or ratified the conduct that is subject to punitive damages.

QUESTION 2

The facts of this case were drawn from *Lofgren v. Motorola, Inc.*, 1998 WL 299925 (Ariz.Super., 1998), in which the court dismissed on summary judgment most of the plaintiffs' claims, finding that the medical evidence did not meet the proximate test or any of the exceptions to it.

Pacific will be required to pay tort compensation if the claimants can establish that Pacific (1) breached a duty it owed to the plaintiffs that (2) proximately caused (3) compensable damages.

I. Breach of Duty

Claimants ("Cs") will allege that Pacific breached a duty to Cs either by acting negligently or by being subject to strict liability.

Negligence. Negligence is the failure to use reasonable care. Reasonable care is what a reasonable person would do under the same or similar circumstances. Here we know very little about the risks of TCE, but in evaluating the reasonableness of Pacific's procedures we should find out about several aspects of its operations. First, we should find out what industry custom has been in exposing individuals to TCE. If there are measures that other users of TCE have employed to reduce the risk from exposure to the chemical, and if Pacific did not use such measures, that would be evidence that we were not using reasonable care. On the other hand, even if Pacific met the standard that other companies use, the jury could still find that a reasonable person would have been more vigilant to protect the public from exposure. A related consideration would be a cost-benefit analysis of protective measures such as warnings or ways to reduce exposure. If the burden of such measures is less than the projected risk, multiplied by the severity of the risk, a reasonable person would employ such safety measures.

I would also want to know if there are any statutes or regulations regarding TCE. If Pacific violated statutes or regulations designed to protect the public from exposure, such violation could be considered negligence as a matter of law (in some jurisdictions) or at a minimum such violation would be admissible evidence of negligence.

If Pacific had safety policies of its own specifying how to reduce exposure to TCE, and if Pacific's employees disregarded such policies, such violations would also be strong evidence of negligence on Pacific's part. However, any policies adopted after the exposure to Cs would not be admissible, since they would fall under the rule excluding post-accident repairs.

Strict Liability. Most jurisdictions impose strict liability for an abnormally dangerous activity. An ADA is identified using factors listed in § 520 of the Restatement of Torts. I don't know if there is a high level of danger associated with exposure to TCE, or if the risk can be eliminated using reasonable care; I would look at the decisions of this and other jurisdictions to see if TCE were considered an abnormally dangerous activity. I would also want to know if TCE had migrated to the property of the neighbors of the Redbluff plant. If so, then those Cs who were exposed to TCE in that way would have a strong nuisance claim. Nuisance is the invasion of the plaintiffs' property rights through the defendant's allowing some substance or activity to escape, causing the plaintiff harm. Here that might be the case for neighboring property owners.

A final form of strict liability would be statutory strict liability. Many jurisdictions have identified strict liability for hazardous substances like TCE. If TCE is such a hazardous substance and if it escaped, causing injury, there may be strict liability.

II. Proximate Cause

The primary weakness in the Cs' case is the lack of evidence of proximate cause. Ordinarily a plaintiff is required to show that the defendant's breach of duty is both a but-for and a legal cause of injury. But-for cause means a cause without which the injury more probably than not would not have occurred. Here the physicians' testimony falls short of that standard. The most they can say is that exposure to TCE "may have" caused the injuries in question. Ordinarily that is not enough to establish but-for causation. There are exceptions to the but-for causation test, but they do not appear to apply here.

First, this is not a case involving unknown identity, which would permit the application of one or more tests such as alternative liability, concert of action, enterprise liability, or market share liability. Apparently each of the diseases in question has causes other than TCE, and thus this case is unlike the DES cases where the disease-causing agent is known, but the source of the agent is unknown.

The second exception to but-for causation is loss of a chance. The plaintiffs might argue that, even if they acquired their disease from some other source, and the most they can say is that TCE "may have" contributed to their injury, exposure to TCE resulted in depriving them of a chance to avoid such injury. The trouble with this argument is that most jurisdictions have restricted the loss-of-a-chance theory to medical malpractice cases. It seems unlikely that a court would apply it to a case like this.

The third exception to but-for causation is multiple redundant causes. This theory would apply if there had been multiple exposures to TCE, or to other disease-causing agents where the Cs acquired their diseases through the combined actions of multiple negligent defendants. Here that is not the case. It appears that TCE plus some other causes combined to produce the injury, and unlike the asbestos or alcohol cases in which the substantial factor test is used, it doesn't appear that theory would apply to TCE.

Legal Cause. If the Cs could satisfy the but-for cause test, they shouldn't have any difficulty meeting the legal cause test, since Pacific's conduct increased the risk of injury, there are no superseding causes, and the Cs are certainly foreseeable plaintiffs.

III. Damages

If for reasons now unforeseen the Cs satisfy both the breach of duty and the proximate cause elements, they would be entitled to compensatory damages and possibly punitive damages. Compensatory damages would consist of economic losses (medical expenses and lost wages) as well as non-economic damages (pain and suffering). If Pacific's conduct were viewed as a flagrant disregard for the plaintiffs' rights, there would be a claim for punitive damages. And if some of the Cs died, their relatives would be entitled to claim the relatively generous benefits under Linden's wrongful death statute, which permits recovery not only of economic damages but also loss of the society and companionship of the decedent. However, unless Cs can satisfy the proximate cause test, they will not be able to recover.

Summer 2006 Torts Midterm Checklist

QUESTION 1

- Overview**
- Claims v. **BB/PP**
- Breach** of Duty
-
- Negligence** Claim
- Negligence **defined** as failure to use RC
- Statute: No Sale** to "Visibly Intoxicated"
- Was Corkhill "**visibly intoxicated**"?
- Negligence **Per Se**?
- Is it a **Cardozo** jurisdiction?
-
- Statutory **Strict Liability**
- Does it **Pre-empt** Negligence Claim?
- Doesn't require **visibly** intoxicated
- Rulebook** violations?
-
- Proximate cause** issues
- Prox. cause = **but-for** + **legal** cause
- But-for** causation
- Weak evidence** about BB and PP
-
- Substantial factor** test if Corkhill served
- Legal cause** defined
- Statute** establishes legal cause
-
- Damages**
- Wrongful death **Statute**
- Economic** damages?
- Non-economic** damages
- Loss of "probable future **companionship**"
- Would **Prodigal Son** have come to senses?
- What are **GC's** or **CK's** damages?
- SL statute sets **ceiling**, not floor
-
- Claim v. **Corkill**
- Corkill is **dead**
- Breach of Duty** is a no-brainer
- Proximate cause** is straightforward
- Compensatory Damages -- **same** as above
- Punitive** damages?
-
- Claim v. **Employer**
- Only applies to drinking at **BB**
- Was Corkhill **negligent** in drinking?
- Proximate cause**
- Use of **substantial factor** test
- Same** compensatory damages
- But **no \$250K** limit
- No punitive** damages -- no agency

QUESTION 2

- Overview**
- Breach of **Duty**
- Negligence** Theory
- Negligence **Defined**
- Industry **Custom**
- Learned Hand** Test
- Negligence **per se**
- Cardozo** Question
- Rulebook** Violations?
- Post-accident **repairs** inadmissible
-
- Strict Liability**
- ADA** Theory
- Nuisance**
- Some Cs clearly **satisfy** nuisance test
- Statutory** Strict Liability?
-
-
-
-
-
-
- Proximate Cause**
- Defined** as But-for + Legal Cause
- More probable than not **standard** for BFC
- "**May have**" does not satisfy
- Exceptions** to BFC
- No **Alternative Liability**
- (Because no other negligent defendants)
- No **loss of a chance**
- (Policy reasons **limit to Med Mal**)
- No **multiple redundant** causes
- (Unless other negligent defendants)
-
- Damages**
- Cs could recover **Economic** Loss
- Cs could also get **Pain and suffering**
- Punitive** damages?
- Would require **flagrant** indifference
- Wrongful death** cases?
- Statute: Generous measure of damages

Exam # _____