Professor DeWolf | Torts I
Fall 1997 | December 20, 1997

SAMPLE ANSWER TO MID-TERM EXAM

QUESTION 1

This case is based upon McLeod v. Cannon Oil Corp.*, 603 So.2d 889 (Ala. 1992). In that case the court reversed a trial judgment in favor of the defendant Cannon Oil, finding that the statute created strict liability sellers of alcohol to minors.*

The suit by Deon McLeod's estate ("DME") would focus primarily on Cannon Oil, since they probably have significantly greater resources to pay a judgment than Brent Head. However, it is clear from the facts that Head is also liable for the damages. I will briefly review Head's liability and then consider the liability of Cannon.

In order to find either defendant liable, a jury would have to determine that the defendant (1) breached a duty of care; which (2) was a proximate cause of Deon's death.

Brent Head ("BH")

BH is clearly liable. Not only did he breach his duty to use reasonable care in driving the automobile, but those breaches proximately caused the injury. In the first place, it appears that BH was driving under the influence, which is negligence per se in most jurisdictions. That is, the violation of the statute prohibiting driving under the influence is considered negligence as a matter of law. Moreover, BH appears not to have been using reasonable care when he attempted to pass the van; he lost control of the car which suggests an additional failure to use reasonable care. There can be little doubt that both acts of negligence were direct causes of his injury and therefore he would be found legally liable. Unfortunately, most drivers don't carry $1,000,000 in insurance coverage, and we must therefore look for a deeper pocket.

Cannon Oil ("CO")

1. **Breach of Duty**. On DME's behalf we would claim that CO breached a duty by selling intoxicants to Deon. Two different approaches could be taken. First, it could be claimed that CO was *negligent* in selling intoxicants to Deon. Second, it could be claimed that CO should be held *strictly liable* for selling intoxicants.

a. *Negligence*. Negligence is the failure to use reasonable care. Reasonable care is what a person of reasonable prudence would have done under the same or similar circumstances. Every person is under a duty, when engaging in activities that could foreseeably result in injury to another, to use reasonable care. In this case the duty of reasonable care has been codified in a statute, M.A.C. § 6-5-70, which prohibits sale of "spiritous liquors"[1] to a minor. Moreover, there are agency regulations that prescribe the procedure to be followed to

[1]Although some judges dissented from this interpretation (holding that "beer is beer"), a majority of the court found that the sale of "spirituous liquors" included sale of beer.

insure that persons who are not of legal age are prevented from purchasing alcohol.[2]

In many jurisdictions a violation of this kind of statute is considered *negligence per se*; that is, a violation of a statute intended to prevent the kind of injury that occurred will be found by the court to be negligence as a matter of law. If this jurisdiction followed such a rule, the jury would not address the question of negligence but rather would be instructed to consider CO negligent. On the other hand, some jurisdictions regard a statutory violation as merely *evidence* of negligence and make the jury the final arbiter of whether to find negligence.

Another limitation on the negligence per se principle is the principle of excuse; if a defendant violates a statute but has a valid excuse for doing so, then the jury may find that the defendant acted reasonably. In this case, the defendant's excuse would appear to be that the clerks thought that Deon was of legal age. Under the law, one is excused if one is justifiably ignorant of the occasion for compliance. Here the argument would be that Deon's appearance would not trigger any suspicion that he was under age. However, the fact that the first clerk thought he should produce identification is good evidence of the fact that the error was not an excusable one. If the clerk thought that he should produce identification and Deon claimed not to have it, then it seems obvious that Deon's appearance raised a question of whether he was of legal age.

Unfortunately for DME, if a jury is allowed to consider CO's excuse to the negligence per se violation, it may decide that CO did not act negligently in selling him beer.

b. *Strict Liability*. The statute may be read to impose strict liability. It says that a person who sells intoxicants to a minor is liable for damages if the person selling alcohol "had knowledge of or was chargeable with notice ... of such minority." Although the question is not without controversy, it could be asserted that the intent of the statute is not simply to make a person who violates it to be negligent, but rather that it imposes a form of strict liability.

2. **Proximate Cause**. In addition to establishing a breach of duty, DME must show that CO's breach of duty proximately caused Deon's death. Proximate cause is composed of two elements: but-for cause and legal cause. To establish but-for cause, DME must persuade the jury that, more probably than not, but for the breach there would have been no injury. It seems likely that a jury could conclude that if the beer had not been sold and Head had not become intoxicated, the fatal crash could have been avoided. The second prong of the test is more difficult. To find legal cause the jury must find that there was a direct and unbroken sequence between the breach of duty and the injury. If the claim is based upon negligence, a jury might find that the selling of the beer to Deon was interrupted by his giving it to Head, Head's drinking it, going to the concert, going home, going back to the concert, driving negligently, and then driving negligently, causing the injury. While a jury might also find that the very reason for prohibiting the selling of beer to minors was to prevent injuries like this from occurring, we should also be prepared for a finding that the negligent act was separated from the injury by several superseding causes, including Deon's own behavior in giving beer to someone who was driving the car. One rule of thumb for determining whether a subsequent act is a superseding

---

[2]It is important to note that the negligence of the clerks will be imputed to CO via the principle of *vicarious liability*. So long as an employee is acting in the course and scope of employment (and here, although they violated the statute, the two clerks were attempting to further the interests of their employer), the employee's negligence is considered that of the employer.

cause is the degree of foreseeability and the relative culpability of the subsequent act. In this case a resulting accident was quite foreseeable from the selling of beer, and Head's subsequent act of drinking the beer and driving would not be disproportionately reprehensible in comparison to CO's wrongful act in selling the beer. Moreover, the existence of a statutory prohibition might be evidence of a finding by the legislature that the selling of beer to minors is a legal cause of injury. (In this way the case is similar to *Ross v. Hartman*)

With respect to the strict liability cause of action, the case is more clear-cut; the intent of the statute is to provide damages to people injured by the selling of beer to minors; this accident seems to be precisely the kind of thing that the legislature had in mind in imposing liability.

Question 2

This case is based upon Trefney v. National Super Markets, Inc.*, 803 S.W.2d 119 (Mo.App. 1990) In that case the court upheld a verdict in favor of the plaintiff based upon res ipsa loquitur.*

Victoria Trefney ("VT") would sue National Grocery ("NG") based upon a claim that NG negligently maintained the door. In order to establish liability, she would have to show that not only that NG was negligent but also that NG's negligence proximately caused her injuries.

Negligence. Negligence is the failure to use reasonable care. We should anticipate several different potential arguments. (a) *Failure to follow employer rules*. The assistant manager checked the door that morning, but he didn't walk through it to make sure it was operating properly. Perhaps the employer had a policy of expecting the employees to perform a more complete inspection. If so, the failure of the employee to follow this procedure would be strong evidence of negligence. (b) *Failure to follow the manufacturer's instructions*. It could also be that the manufacturer, Schultz, suggested some kind of testing procedure for the door, and that this procedure wasn't followed. Again, this would be powerful evidence of negligence. (c) As a related matter, there may be some kind of *industry custom* with respect to the inspection of doors that should be consulted in formulating the standard of reasonable care.

(d) *Res ipsa loquitur*. A final theory to be applied would be the doctrine of res ipsa loquitur, or "the thing speaks for itself." If the judge allowed VT to use this theory, she could shift the burden of proof to us to explain how the door would cause this kind of injury other than through negligence. In order to succeed on a res ipsa loquitur claim, the plaintiff must show the following elements: (1) that the type of accident that occurred doesn't ordinarily occur except where there has been negligence; (2) that the instrumentality or process that caused the accident was in the control of the defendant; and (3) that other potential explanations have been sufficiently eliminated. VT would probably use an expert of some kind to argue that this kind of accident doesn't ordinarily occur without negligence; as to factor #2, we were certainly in control of the door in an immediate sense, but we would want to argue that Schultz shared control, through their service contract. (Whether the court would agree with us, as they did in the *Montgomery Elevator* case, is unknown). With respect to factor #3, we would certainly argue that the there was something unexpectedly wrong with the product and that's why it failed, or we would also argue that there is really nothing unknown about this accident to justify the use of res ipsa loquitur. But the judge might decide it's a jury question and rule against us on that point.

In the event that a *res ipsa* instruction was held by the judge to be appropriate to this case, then there are two different ways of handling it:

some jurisdictions treat res ipsa as a means of establishing the plaintiff's prima facie case, but leave the burden of persuasion with the plaintiff; in other words, the jury would have to make a positive finding that we were negligent. Other jurisdictions treat the *res ipsa* inference as shifting the burden of proof, so that if the judge instructs the jury on res ipsa then it is up to us to proof that the accident did not result from negligence. That might be a difficult psychological burden for us to meet.

(e) *Post-accident repair*. The fact that NG replaced various parts of the door after the accident would not be admissible to show that the parts should have been replaced beforehand; courts do not wish to discourage safety measures by allowing such precautions to be used as evidence that pre-accident measure were inadequate.

Proximate Cause. Assuming there is a finding that we were negligent, it shouldn't be difficult for VT to establish that our negliegnce proximately caused her injury. Not only is the but-for test met (the injury would not have occurred but for our negligence), but legal cause would be easily established through the direct connection between our negligence and the injury.

FALL '97 MID-TERM—CHECKLIST

QUESTION 1

- ☐ Overview

- ☐ Claim v. Head
- ☐ Clear Liability
- ☐ Negligent in drinking
- ☐ Negligent driving
- ☐ Proximate Cause not an issue
- ☐ Ability to pay?

- ☐ Claim against Cannon Oil
- ☐ Breach of Duty
- ☐ Negligence Theory
- ☐ Negligence Defined
- ☐ Negligence Per Se

- ☐ Statutory purpose is clear
- ☐ Regulations re ID clarify statute
- ☐ Does jx use NPS or just evidence?
- ☐ Excuse based on ignorance of occasion for compliance
- ☐ Excuse argument is weak

- ☐ Vicarious Liability for clerks
- ☐

- ☐ Strict Liability claim
- ☐ intent of statute?
- ☐ solves the proximate cause problem

- ☐ Proximate Cause
- ☐ Two elements
- ☐ But-for cause should be easy
- ☐

- ☐ Legal Cause is difficult
- ☐ Superseding cause?
- ☐ Foreseeable
- ☐ Not disproportionately reprehensible
- ☐ Statute evidence of legal cause
- ☐
- ☐
- ☐

QUESTION 2

- ☐ Overview

- ☐ Negligence Claim
- ☐ Negligence Defined
- ☐ Rulebook violation?
- ☐ Failure to follow mfr. instructions
- ☐ Custom of the industry

- ☐ Res ipsa loquitur
- ☐ Was accident the **type** suggesting negligence?
- ☐ Did we have **control**?
- ☐ Did Schultz share control?
- ☐ Are other causes **sufficiently eliminated**?

- ☐ What happens to burden of proof?
- ☐ Post-accident repair is inadmissible

- ☐ Proximate Cause
- ☐ But-for cause seems easy
- ☐ Legal cause seems easy
- ☐

- ☐
- ☐
- ☐
- ☐
- ☐
- ☐

Exam Number __________

COmmon mistakes:

Q1: Failure to identify the strict liability theory
Failure to identify Head
Failure to identify excuse
Use of alternative liability / substantial factor
application of *Palsgraf* when the victim is within zone of danger
focus on ignorance of law instead of ignorance of fact as excuse
confusion of but-for causation with lack of superseding cause