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MIDTERM EXAM SAMPLE ANSWER

QUESTION 1

The facts for this question were based upon *Aldana v. School City of East Chicago*, 769 N.E.2d 1201 (Ind.App. 2002), in which the court reversed a judgment for the defendant, finding that the jury should have been instructed on res ipsa loquitur, and that the jury should not have been instructed on the sudden emergency doctrine.

The suits against us are numerous, but some may be eliminated because of the principle that there must be physical injury in order to recover emotional damages. To recover, the plaintiffs must establish (1) that the Academy *breached a duty*, in this case, as a result of negligence; (2) that negligence *proximately caused* injury to the plaintiffs; and (3) they suffered *legally compensable* harm.

I. Breach of Duty

One element of recovery is to prove that there has been a breach of duty by the defendant(s). In this case the theory the plaintiffs would rely upon is negligence.[1] Negligence is the failure to act in the way that a reasonably prudent person would have acted under the circumstances. Here the plaintiffs would argue that Person ("EP") was negligent in the way he drove the bus. To establish negligence, the plaintiffs would use one or more of the following doctrines or arguments: (a) juror experience; (b) industry custom; (c) employer policies; (d) negligence per se; (e) res ipsa loquitur.

a. *Juror Experience*. The plaintiffs might very well appeal to the jurors' own experience as drivers to argue that EP's conduct was negligent. Jurors might believe, based on their own experience, that a careful driver doesn't let the wheels slide off into the shoulder and slows down rather than trying a sudden corrective maneuver. The jurors might use their own experience to find that EP was negligent. On the other hand, they might also have had experience with rough roads and find that his behavior was reasonable under the circumstances.

b. *Industry Custom*. There might be safety standards observed by bus drivers as a whole that would be relevant to determining the standard of reasonable care. For example, perhaps there is a recommended way of handling a road with ruts and holes, similar to the one that EP blames for the accident. Such standards would surely be relevant to whether EP used reasonable care. Although industry standards are relevant, a plaintiff may still ask the jury to set a higher standard, if a reasonable person would find the industry custom inadequate.

c. *Employer policies*. If EP works for an independent bus company (see below under vicarious liability), or even if he works directly for the Academy, there may be policies that dictate how the bus is to be driven, or what to do if the bus driver encounters roads that appear dangerous, or how to react when the bus tires leave the roadway. Such policies would be relevant, particularly

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1. Since the activity of driving a bus is not abnormally dangerous, doesn't involve a nuisance or animals, nor is there any statutory basis for imposing strict liability, the plaintiffs would have to prove negligence as the basis for any recovery.

if EP did not abide by any of them. Deviations from employer policies are useful evidence of negligence.

d. *Negligence per se*. If EP violated a statute or ordinance enacted to prevent accidents similar to this one, it would be very strong evidence of negligence. Some jurisdictions even make an unexcused violation of a statute negligence as a matter of law, and the jury would dispense with any deliberation on negligence and move directly to proximate cause and damages. Here the plaintiffs might argue that EP violated the statute by crossing into the other lane of traffic. However, that seems debatable, since the purpose of that statute is to avoid contact with other cars. Moreover, I doubt that a judge would rule that EP was negligent as a matter of law, because, according to his testimony at least, he was reacting to an emergency not of his own making. Nonetheless, the introduction of the statute might put EP in a defensive mode, which would be good for the plaintiffs.

e. *Res ipsa loquitur*. When evidence of what caused an accident is missing, and the plaintiffs want the jury to infer negligence, the plaintiffs may be entitled to an instruction on *res ipsa loquitur*. To qualify, the plaintiffs must establish that (1) this accident is of a type that doesn't ordinarily occur in the absence of negligence; (2) the defendant was in control of the instrumentality that caused it; and (3) other plausible causes of the accident have been sufficiently eliminated. I think a judge might agree to instruct the jury on *res ipsa*, since (1) losing control of a vehicle is usually the result of negligence; (2) EP was clearly in control; and (3) the only other plausible cause -- the ruts in the road -- have been characterized by the state trooper as ones that should not have caused a reasonably prudent person to leave the road. It would still be for the jury to decide whether EP was negligent, but they would probably be given a *res ipsa* instruction.

Vicarious Liability. It is not clear from the facts whether EP was an employee of the Academy or just an independent contractor. The Academy is vicariously liable for the torts of its employees, so if EP is an employee, there is no question that the Academy would be liable if EP were found negligent. Even if EP is paid as an independent contractor, he may be an employee for torts purposes if the Academy has the *right to control* the way he performs his duties. On the other hand, if EP is employed by a separate body that supplies bus drivers, they may control the way he does things.

As an alternative avenue of liability, if the Academy knew that EP was not a good driver and employed him anyway, they could be responsible for negligent hiring/supervision.

II. Proximate Cause

There do not appear to be any significant proximate cause issues in this case. The plaintinffs must show that (1) but for the defendant's negligence, they would not have been injured; and (2) the defendant's negligence is also a legal cause of the injury. Neither prong of the proximate cause test would pose any difficulty for the plaintiffs.

III. Damages

Even if the Academy is found to be liable for EP's driving, there may be limits to the damages that can be claimed. Ordinarily, a defendant is not liable for emotional injury that is not accompanied by a physical injury, absent extraordinary circumstances. Thus, "a few" children--probably the two who were taken to the emergency room for observation--suffered cuts or bruises, which are a physical injury. They would be entitled to any economic loss (any medical bills) plus pain and suffering. On the other hand, any of the children or the chaperones who did not actually suffer a physical injury, even if they were "thrown around" the bus, we would argue that they do not qualify for compensation. Courts have made exceptions for emotional injuries so traumatic that they

have a "guarantee of genuineness," but I don't think this would qualify. Finally, because there was no malice or reckless disregard for safety, no punitive damages could be awarded.

QUESTION 2

The facts for this question are based upon *Perkins v. Entergy Corp.*, 782 So.2d 606 (La. 2001). The Supreme Court of Louisiana found that the electrical failure was not a substantial factor in causing the death of Robert Hracek.

I would file a wrongful death action against Entergy on behalf of Tommy and Tricia (T&T). (I don't think Judy qualifies under the wrongful death statute.) To recover, T&T would have to establish (1) that Entergy breached a duty to Ray Hracek ("RH") that (2) proximately caused his death, and (3) that the statute authorizes a wrongful death action on their behalf.

I. Breach of Duty

There are two ways to establish a breach of duty: first, T&T could argue that Entergy was negligent in permitting the power to be knocked out. Second, T&T could argue that Entergy should be strictly liable for the failure.

To address the second issue first, I don't think there would be a very good argument for strict liability. The only argument T&T could make is that providing electricity is an abnormally dangerous activity under § 519 of the Restatement. The problem is that strict liability only applies to that which makes the activity abnormally dangerous -- in this case, the capacity of large amounts of electricity to cause electrocution or burning. Because RH was injured by the lack of electricity, not too much, strict liability wouldn't apply.

Negligence. T&T would have to prove that Entergy failed to exercise reasonable care. That seems fairly obvious with respect to whoever was responsible for the static shield wire, because it was "improperly held together" and fell on the Entergy transmission wire. Even if Entergy was not directly responsible for the static shield wire, they may have been negligent in failing to inspect the lines that had the potential for knocking their own lines out of service. We'd need to find an expert who would be able to testify with some authority on Entergy's duties with respect to the maintenance of both the transmission wire and the static shield wire. If that expert testified that Entergy had not used reasonable care in its maintenance policies, a jury could certainly agree and find Entergy negligent.

It also may be possible to show that Entergy's handling of the initial power failure, when they tried to re-energize the line, was negligent. If expert testimony can be produced to show that a reasonable person would have taken a different approach to the power failure, we could show that the seriousness of the power failure was a result of Entergy's negligence.

II. Proximate Cause

The more serious hurdle for T&T to overcome is in establishing proximate cause. To do so, T&T would have to show that Entergy's negligence was both (1) a "but-for" as well as (2) a legal cause of RH's death. With respect to but-for causation, I don't see a major problem. If the wires had been properly maintained, or the attempt to re-energize the line more sure-footed, there would not have been the extensive power failure that eventually led to the fire.

But *legal cause* will be more difficult. The way in which the test is phrased in the jury instructions requires the jury to find that the defendant's negligence led in a natural and unbroken sequence to the plaintiff's injury. The three areas of challenging legal cause are (1) mere chance (lack of increased risk); (2) superseding cause; or (3) unforeseeable plaintiff. In this case I think T&T would find difficulty persuading the jury that the lack of power led in a natural and direct sequence to the fire and explosion. For one thing, Entergy could argue that it was mere chance that the lack of power led to problems with the compressor, which led to problems with the oxygen valves, which led to the fire. True, if there had been no power failure, the sequence of events would not have occurred, but that simply restates the but-for test. Entergy could claim that power failures do not actually increase the risk of a flash fire; instead, the chain of events was a "mere chance." Second, Entergy could argue that the actions of the plant manager and the other employees in attempting to restart the compressors, and then trying to deal with the open valve near the letdown station, were all *superseding causes* of the explosion. The loss of power, while it necessitated the other actions by the plant employees, was no longer a proximate cause; instead, the chain of causation was broken by the actions of other individuals. In making the assessment of whether the subsequent actions were superseding causes, a court or jury would consider whether or not the events were foreseeable as a result of a power failure. Entergy would certainly argue that the chain of events was sufficiently unlikely as to be unforeseeable. That would also tie into a *Palsgraf*-type argument that the plaintiff was not within the zone of reasonable foreseeability.

III. Damages

Assuming that T&T could establish proximate cause, they would then have to satisfy the requirements for recovery under Linden's wrongful death statute. A.L.C. § 4.20.010 permits an action for wrongful death, and § 4.20.020 provides that the award shall go to the spouse and/or children of the decedent. Since Judy is not legally RH's spouse, the award would go to the children. The jury is allowed to award "such damages as, under all circumstances of the case, may to them seem just." That seems to permit a recovery for economic as well as non-economic recovery. The facts don't detail whether RH had custody of the children or was making child support payments. If the latter, the amount of the child support payments, plus any other economic benefit Ray would likely have provided, would be recoverable. (These amounts, as calculated in the future based upon Ray's expected working life, would be reduced to present value to reflect the ability to invest the award today.) In addition, the loss of the non-economic benefits to the children of their father's companionship and guidance would also be recoverable. This might depend upon how close the children were to their father, whether he had custody, etc.

In addition to an award for T&T's personal losses, a separate statute, § 4.20.046, provides for the survival of the claim by the decedent for his own pain and suffering. Since RH survived from April 6 until April 11, his pain and suffering may have been considerable. This would also go to the beneficiaries listed in the statute--T&T.

In short, T&T could recover (1) the economic loss, (2) the non-economic loss, and (3) RH's pain and suffering between injury and death.

Summer 2002 Torts Midterm Checklist

QUESTION 1

- ☐ **Overview**
- ☐ Breach of Duty
- ☐ (No **strict** liability)
- ☐ **Negligence** Claim
- ☐ Negligence **defined** as failure to use RC
- ☐
- ☐ Juror Experience
- ☐ Industry Custom
- ☐ Rulebook violation
- ☐ Negligence per se
- ☐ **Jurisdictional** variants
- ☐ Elements of **negligence per se**
- ☐ Purpose of the statute?
- ☐ **Excuse** would go to jury
- ☐
- ☐ Res ipsa **loquitur**
- ☐ Elements
- ☐ Other plausible cause: did trooper eliminate?
- ☐
- ☐ **Vicarious** Liability
- ☐ Was EP an employee or an independent contractor?
- ☐ Did Academy have the **right to control?**
- ☐ What about negligent hiring/supervision?
- ☐
- ☐ Proximate Cause
- ☐ Not a Problem
- ☐
- ☐ **Damages** wouldn't be too bad for two individuals
- ☐ **Medical expenses** plus pain & suffering
- ☐ **Physical injury** test for other passengers
- ☐ No exception for "guarantee of genuineness"
- ☐
- ☐ No punitive damages
- ☐
- ☐
- ☐

QUESTION 2

- ☐ **Overview**
- ☐ Breach of **Duty**
- ☐ **No strict liability**
- ☐ Even if **Abnormally Dangerous**,
- ☐ § 519(2) is not met - AD aspect didn't burn
- ☐
- ☐ **Negligence** claim
- ☐ Negligence **defined**
- ☐ Who was responsible for shield wire?
- ☐ Was Entergy responsible for inspection?
- ☐
- ☐ Proximate Cause
- ☐ Defined
- ☐ **No problem with but-for** cause
- ☐
- ☐ Legal Cause a problem
- ☐ Is this a mere chance?
- ☐ Did subsequent actions constitute superseding causes?
- ☐ Was plaintiff too remote?
- ☐ **Damages**
- ☐ Statutory provisions
- ☐ Judy has no claim
- ☐ T&T are beneficiaries
- ☐ Economic loss recoverable
- ☐ Working life, reduced to present value
- ☐
- ☐ Non-economic damages are recoverable
- ☐ Companionship/guidance, etc.
- ☐ RH's own pain and suffering - 5 days
- ☐
- ☐ **Punitive** Damages not likely
- ☐
- ☐
- ☐
- ☐
- ☐
- ☐
- ☐

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