

MIDTERM EXAM SAMPLE ANSWER

QUESTION 1

The facts for this question (except for the death of the firefighter) were based upon **Wawanesa Mutual Ins. Co. v. Matlock**, 60 Cal.App.4th 583, 70 Cal.Rptr.2d 512 (1997), in which the California Court of Appeals reversed a judge's finding of liability against Timothy Matlock and his father, holding that the statute's prohibition against furnishing cigarettes to minors was not intended to prevent fire, and the results of the fire were unforeseeable.

Circle K faces suits from two different potential plaintiffs: the estate of the deceased firefighter, and the property damage claim from Pacific Telephone. In order to prevail, each would have to establish that (1) Circle K breached a duty; (2) that the breach of duty proximately caused the plaintiff's injur(ies), and (3) that the plaintiff is entitled to legally compensable damages.

The cases do not differ significantly with respect to liability; the major difference between them arises in the measure of damages.

I. Breach of Duty

To establish a breach of duty, the plaintiffs can either prove that the defendant was negligent or that the defendant is subject to strict liability. I see no basis for arguing strict liability, so the basis of the claim against Circle K would be negligence.

Negligence. Negligence is the failure to use reasonable care, which is the care that a reasonably prudent person would use under the same or similar circumstances. The strongest argument the plaintiffs would make is that the violation of Penal Code § 907.308, regarding the sale of cigarettes to minors, is negligence *per se*, or negligence as a matter of law. Many jurisdictions take the position adopted by Justice Cardozo which treats an unexcused statutory violation as negligence as a matter of law. (Some jurisdictions allow the jury to make their own determination as to whether an unexcused violation is negligence or not.) To apply negligence *per se* ("NPS"), there must be (1) a violation of the statute; (2) an injury that falls within the type of harm the statute was designed to prevent; and (3) no excuse on the part of the defendant.

It seems clear in this case that Circle K did violate the statute by selling to someone under 18. Although there is a "safe harbor" in the statute for selling after ID has been requested and supplied, I doubt that it would help. The statute requires that the defendant *reasonably* relied upon what was shown, and it's not clear that the clerk even made a demand or relied upon identification. Instead, I would suggest that Circle K rely upon the second element of the NPS test, namely that the statutory purpose needs to include the prevention of injuries like the one suffered by the plaintiff. The purpose of the statute, I would argue, is to prevent the health risks associated with smoking, particularly where young people are not able to make informed choices about whether to take that risk. Nothing in the statute appears to address the risk that lighted cigarettes might cause fires. While it is true that minors, precisely because they are not able to smoke legally, may smoke in circumstances that make it more likely they will cause fires, I would argue on Circle K's behalf that 17-year-olds are no more likely than 19-year-olds to start fires with lit cigarettes. The title of the statute, after all, refers to the protection of morals.

Even if we avoid the imposition of negligence per se, we might still be found negligent as a matter of fact, since a jury might, based on their own experience, decide that Circle K's methods were inadequate to satisfy the standard of reasonable care. Using the Learned Hand test, which compares the cost of preventative measures with the expected safety benefits from the burden of prevention, the cost of an ID check seems negligible in comparison to reducing the costs from teen smoking. Even if the teenagers used fake ID, the plaintiffs could argue that sophisticated ways of smoking out (so to speak) fake ID would be worth it.

The plaintiffs might also benefit from any company policies relating to the sale of cigarettes; if employees were instructed on methods of checking IDs or had some other policy that was not followed, such disobedience could be used as strong evidence of negligence.

II. Proximate Cause

Even if the jury finds Circle K negligent, there is no liability unless that negligence proximately caused the injuries in question. To establish proximate cause, the plaintiffs must prove by a preponderance of the evidence 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. With respect to the first prong of the test, it seems clear that, without the cigarettes, there would have been no fire.

By contrast, I don't think the plaintiffs can prevail with respect to legal cause. There are several difficulties. One is that, to constitute legal cause, the defendant's negligence must *increase the risk* of injury to the plaintiffs. Circle K could argue here that the sale of cigarettes to a 17-year-old, while illegal, did not actually increase the risk of injury from fire. But cigarettes do cause a lot of accidental fires, so I don't think that argument would work. A more plausible argument is that the negligence of Circle K was superseded by the negligence of the boys who chose to trespass, and engage in horseplay, which eventually led to the fire. The test for superseding causes is whether or not they are (1) so unforeseeable in type, and (2) so disproportionate in culpability that they break the chain of causation. In some cases involving a defense claim of superseding cause, the plaintiffs can argue that the statute supplies the degree of foreseeability to establish legal cause as a matter of law. I don't think that's the case here, for the same reason that I think a negligence per se argument is dubious; the statute's intent was probably limited to the prevention of disease from underage smoking, not accidental fires. Assuming the statute can't be used to supply legal cause, the plaintiffs might still argue that there were no superseding causes because the careless use of the cigarette is hardly unforeseeable, nor was any act by the boys (or the telephone company) so disproportionately reprehensible as to break the chain of causation between the defendant's negligence and the injury.

The final and most promising argument for lack of legal cause is that the plaintiffs were *unforeseeable* in the sense that Cardozo and Andrews discussed it in the famous *Palsgraf* case. In some jurisdictions (those following Cardozo) the defendant's duty is limited to those plaintiffs who are within the "zone of danger." The question would be, could a clerk in a convenience store reasonably foresee that a sale of cigarettes to minors would lead to a fire, causing the collapse of a logpile and the death of a firefighter called to the scene? I don't think so. On the other hand, some jurisdictions use Judge Andrews' test, which does not limit the scope of negligence, but restricts recovery to those injuries which can be said to have been *proximately caused* by the defendant's negligence. Andrews' test was more flexible, but a judge or jury applying this test would still be troubled by the number of twists and turns in the fact pattern leading to the ultimate injuries. It would be a jury question, but probably a tough sell for the plaintiff(s).

III. Damages

There are two different types of damages here, reflecting the different plaintiffs. The property damage claim made by Pacific Telephone would be measured by the diminution in the fair market value of the logs (or other property) before and after the fire.

The claim for Perry's death would be more complex. The first question is who is eligible to collect the wrongful death damages. Under the statute, the benefits are limited to a spouse, parents, or children. There do not appear to be any. Sarah in particular does not qualify, although despite the statement that P was "single," and an engagement that reflects their own belief that they were not married, perhaps they in fact met the standard for common law marriage. It's a very long shot, but I'd want to verify that S is not P's spouse.

Moreover, the only damages permitted by the statute are *pecuniary* damages, which are usually interpreted to mean economic loss. Since there is (apparently) no one qualified to recover loss from Perry's death, again there would be no recovery. If Sarah were qualified as a common law spouse, she would be limited to lost wages, rather than any kind of pain and suffering or loss of consortium benefits.

There is a provision in the statute for recovery of funeral and medical care expenses if no one is qualified to recover for the economic loss. If Perry had lingered, this could be a substantial sum, but since he died at the scene it looks like the only damages will be the cost of a funeral.

It's conceivable that Sarah or some other person suffered a *bystander* injury from watching Perry die in the fire. Typically courts employ some version of the three-pronged test in *Dillon v. Legg*: (1) was the plaintiff at the accident scene; (2) did he or she suffer a direct emotional impact from observing the tragedy; and (3) were the plaintiff and the victim closely related? I doubt that any of the firefighters would qualify, and there's no suggestion that Sarah was at the scene of the accident. If she came shortly after the accident, before there had been a material change in the scene, she might have a claim, but that's speculative.

QUESTION 2

This case is loosely based on the facts in *Fifer v. Dix*, 2000 Wis.2d 66, 608 N.W.2d 740 (2000), in which the court reversed a summary judgment in favor of the dog owner, holding that the plaintiff had a statutory claim for strict liability, but failed to establish any negligence.

Fifer should consider tort claims against both Dix and Kappel. In order to prevail, Fifer would have to establish (1) a breach of duty that (2) proximately caused (3) his damages.

I. Breach of Duty

A breach of duty can be established in two ways: first, Fifer could establish that either Dix or Kappel was *negligent* in their handling of Zippy; or he could try to show that one or both is *strictly liable* for Zippy's behavior.

Negligence. Both Dix and Kappel would be under an obligation to use *reasonable care* in their handling of Zippy. Fifer might allege that Dix and/or Kappel failed to use reasonable care, and therefore should be found negligent. I don't know how promising this argument would be. It seems likely that the jurors, many of whom own dogs, and perhaps hunt, would exercise their own judgment about this matter, and would likely see Dix and Kappel as behaving reasonably in simply warning about Zippy's dangerous tendencies. On the other hand, the jury might think that either

Kappel or Dix was lax in choosing such a dog in the first place, or in failing to take more precautions in handling him so that he would not cause injury to someone else. The case would be much stronger if the victim were not on notice of the dog's dangerous potential,¹ but perhaps the jury would find that even in these circumstances either or both of the defendants acted negligently, since Fifer only found out about the dog's characteristics once they were en route.

Strict Liability. The more difficult question is whether Kappel, or more likely Dix, can be held strictly liable for the dogbite. Under the traditional rule, owners of dangerous animals are strictly liable for injuries they cause. This rule applies either to animals vicious by nature (e.g., tigers), or to domestic animals like dogs after the owner is put on notice of the dog's tendency to bite. (Hence the misleading aphorism that "every dog gets one bite"). In this case, Zippy had previously bitten someone, and each defendant knew about that capacity. Moreover, the statute is even stronger than the common law, making the owner strictly liable even before the first bite.

The problem for the case against Kappel is that he is not the owner of the dog, although he had temporary custody of the dog. I don't think that would be enough, but it's something to be explored with further research into previous interpretations of the statute. Dix, on the other hand, is the owner of the dog, and Fifer might be able to rely on the principle that Dix kept the dog at his peril. Again, this reading of the statute seems a little harsh given Dix's transfer of custody of the dog to Kappel, but strict liability is, after all, strict.

The statute lends support to a strict interpretation, since there is liability under § (1)(a) even where the owner has no reason (based on prior experience) to think the dog would bite someone. Where, as here, the owner is on notice, the damages are doubled (§ 174.02(1)(b)). This seems to suggest that the statute was intended to make owners keep dogs at their peril, and Dix's lack of fault in a traditional sense would be unavailing.

II. Proximate Cause

Proximate cause requires proof of (1) but-for causation; and (2) legal cause. I don't see any issue with but-for causation. The negligence claims would be based upon a failure to take a precaution (like leaving the dog at home, or putting a muzzle on him) that, if taken, would have prevented the injury. It's conceivable that Dix would argue that Kappel was a superseding cause of the injury, but that is implausible. To be a superseding cause, Kappel would have to do something unforeseeable, and in this case he was merely doing what he said he would do when he borrowed Zippy.

III. Damages

Damages for Fifer would consist of (1) economic loss—in the form of wage loss and medical expense; plus (2) pain and suffering; plus (3) potential doubling of the award.

The *economic loss* would be measured by past wage loss, plus the difference between what Fifer would have been able to earn and what he will now be able to earn because of the loss of use of his hand. Probably an expert economist would be employed to calculate the wage differential and reduce it to present value. There would also be medical costs, both those already incurred in treating his injury, and perhaps future medical expenses to deal with the nerve damage.

1. If this were not a first semester test, in which the instructions limit your analysis to the scope of what was covered in the first semester, it would be very relevant to consider the likely argument from the defense that Fifer was either contributorily negligent or assumed the risk.

Pain and suffering damages would include not only the physical pain, but also the emotional effects of losing manual dexterity for common activities.

Although punitive damages in the traditional sense would seem inappropriate, since Dix was loaning the dog as an accommodation to his friend, and he did his best to warn about the dog's nature, the statute does seem clear in imposing double damages when the owner has knowledge, so we would certainly ask the court to take the ordinary compensatory award and double it, per the statute.

Fall 2002 Torts Midterm Checklist

QUESTION 1

- Overview**
 - Breach of Duty
 - (No **strict** liability)
 - Negligence** Claim
 - Negligence **defined** as failure to use RC

 - Negligence **per se**
 - Jurisdictional** variants explained
 - Elements of **negligence per se**
 - Statute was probably **violated**
 - Excuse**/defense for checking ID?
 - Purpose** of the statute?
 - Are minors greater **fire risks**?
 -
 - Negligence **in Fact**
 - Juror** Experience
 - Learned Hand** test for ID check
 - Rulebook** violation?

 - Proximate Cause** defined
 - But-for test satisfied
 - Legal** Cause more difficult
 - Mere chance vs. **increased risk**
 - Superseding** tortfeasor
 - Statute prob. doesn't supply legal cause
 -
- Foreseeability** of subsequent harm?
 - Subsequent act not **disproportionately** culpable
 - Palsgraf* issue
 - Cardozo: was firefighter in **zone** of danger?
 - Andrews: did neg. **proximately** cause injury?
 -
 - Damages**
 - Property damage for **Pacific Telephone**
 - Measured by diminution in **FMV**
 -
 - Wrongful Death** claim
 - Statute limits recovery to *pecuniary damages*
 - Perry **left** no spouse, parents, or children
 - Recovery for **funeral** if no qualified beneficiary
 - Bystander** claim?
 - Dillon* test for bystanders
 -
 -
 -

QUESTION 2

- Overview**
 - Claim v. **Dix**
 - Negligence** Claim
 - Negligence **defined** as lack of RC
 - Juror** Experience with dogs
 -
 - Claim based on **strict liability**
 - Traditional** rule of SL after notice
 - Statutory **modification**
 - Did the **legislature** intend true SL?

 - Claim v. **Kappel**
 - Probably not the **owner**, so no SL
 - Was Kappel **Negligent**?
 -
 - No **Proximate** Cause issues
 - Kappel not a **superseding** tortfeasor
 - Kappel probably not even **negligent**
- Damages**
 - Economic** loss
 - Calculation of future **wages**
 - Medical** expenses
 - Pain & suffering**
 - Loss of Use
 -
 - No traditional **punitive** damages
 - Doubling** per statute
 -
 -
 -
 -
 -

Exam # _____