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Exam No. 855

# 510-003 Torts
Fall 2012

**UNM School of Law**
**Final Examination**

**Professor: C. Carey**
**Th: December 13, 2012**
**1:00-4:00 PM (180 mins.)**

## Examination Format: Essay

## Professor's Instructions

You have **three hours** to complete this final examination. There are **three questions**, and each question is worth one-third of your final examination grade. This is an **open book** examination. If there are any ambiguities as to law or facts, please state what you would need to know and proceed with your analysis. You will be evaluated on the strength of your analysis and the thoroughness of your answers. If you write in a blue book, please write on only one side of each page.

If needed, Bluebooks will be provided by the proctor. For Bluebook or Exam4 software use, see the essay technical instructions below.

The UNM School of Law Student Code of Conduct (Honor Code) applies to this exam.

**Good luck!**

## Essay Technical Instructions

**Bluebooks** for writing: using black or blue ink only, write on every-other line and only on the front side of each page. On the front cover of each bluebook record the class name, professor's name, date of exam, and your examination number. Make sure to number each bluebook in order (x of y). **DO NOT WRITE YOUR NAME ON BLUEBOOKS.**

**Laptop** for typing:

1. Log off all programs that you are currently running or have opened!
2. Start the Exam4 program.
3. Make sure **"Prepare to start new exam"** is marked and click, **"Next."**
4. Enter your **"Exam ID"** number and confirm it.
5. Click the drop box next to **"Course"** and select your course and professor and confirm. Click, **"Next".**
6. Optional choices screen: If you choose to change these options please do so. If not, click **"Next".**
7. Notice you should not turn off or restart your computer before contacting a proctor. Check the box marked **"Got it"** and click, **"Next".**
8. Type **"Closed"** for exam mode, check the box below that to confirm and click, **"Next"**
9. At this point Exam4 will indicate **"Wait!"** in the lower right side of the screen.

**WAIT!**

10. The proctor will tell you when to click **"Begin Exam."**
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## ALL EXAM TAKERS

If you have any questions or feel the need to explain/clarify your interpretation/understanding of the question being posed by the professor, please write them on the exam and do not sign your name.

If you have an emergency, procedural question, or issue that may occur during this exam period, **do not contact the professor**, please contact the Proctor or the Registrar's Office (William or Ernest) at 277-2146/2147 or *jackson@law.unm.edu* or *tafoya@law.unm.edu*

You may **not** make/keep a copy of this exam! You are required to return this exam with your answer.

**A five-minute warning** will be given prior to the conclusion of the examination. When time is called, **STOP** immediately.

**Bluebook (Writers):** At this point immediately stop writing, close all blue books and gather up any materials. If you have not already filled out the exam receipt, exit the room and fill out the receipt at the table(s) provided near the proctor(s), then proceed to the exam check-in table.

**Laptop (Typers):** At this point immediately stop typing and proceed to save the exam. Select **End Exam, End Exam Now** from the menu bar. Confirm that you want to end the exam. Select **Submit Electronically** and follow either the Mac or Windows user directions below:

**Mac users only:**

- Wait for the airport icon to indicate you have reconnected to the wireless network.
  - If the "Check Network Connection" screen displays, select OK.
  - Use your Airport to connect to Lobo-Guest, Lobo-WiFi, or Lobo-Sec.
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- Return to Exam4 and select **Exam4 Save Options**, then **Submit Electronically**.
- You will receive a confirmation that your exam has been saved successfully. Click **I understand** and **OK**.
- Exit the exam by selecting **Exam4 Save Options, Exit**.
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  - Start Exam4 again. Choose **Select existing exam,** highlight the exam name, and click **Submit Electronically.** Click OK to accept the default Start Code.
  - Click **Quit** to exit Exam4.
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**Windows users only:**

- If the Status" window indicates a problem with submitting electronically (usually Error 12: No response), close the window with the Red X and select File and Save Options. Select Exit (don't worry…the completed exam is saved to your hard drive). Check Network Connection" screen displays, select OK.
  - Exit the exam by selecting **File and Save Options, Exit.**
  - Connect to either Lobo-Guest, Lobo-WiFi, or Lobo-Sec network, making sure you authenticate as appropriate (open a browser and put in your NetID).
  - Start Exam4 again. Choose **Select existing exam,** highlight the exam name, and click **Submit Electronically.** Click OK to accept the default Start Code.
  - Click **Quit** to exit Exam4.

- Click the verification options and/or OK until you return to Exam4. Select **File and Save Options, Exit**.
- If the exam still did not submit electronically, contact an IT proctor.

**If you have not already filled out the exam receipt, exit the room and fill out the receipt at the table(s) provided near the proctor(s), then proceed to the exam check-in table.**

**[Exam begins at the top of the next page]**

**Question 1: Train** (1 hour)

Boris had been working for Trains Unlimited for seven years. Trains Unlimited is a privately-owned passenger railroad that operates throughout the United States. Boris is a train engineer (or train driver) who operates the coast-to-coast line. Boris has a particular liking for Russian novels. Because he finds the long hours of driving the train boring, he often will pull out a Russian novel to read and pass the time. Between chapters, he looks up to make sure there are no obstacles ahead on the tracks. In the middle of one of Boris's chapters, the train hits a dead cow that is lying on the tracks, causing the train to derail. The derailed train smashes into Paul's car, which is stalled near the tracks. Paul, an investment banker, had been drinking liquor in the car during his commute to his home in the suburbs and passed out right after crossing the tracks, stalling his car. Paul becomes a paraplegic as a result of the accident. Maria, a passenger on the train and also an investment banker, is thrown against the side of the train as a result of the derailment. She suffers a traumatic brain injury that limits her ability to think and reason. Homer, a homeless man who hid away on the platform between two cars while the train was stopped at the last station, is also injured. In the accident, the two train cars smash together, catching Homer's leg and leaving it mangled and punctured. Boris looks at the destruction, slips the novel into his pocket, and runs away from the train. Because of the delay in treatment for the injuries to his leg, Homer must have his leg amputated.

→ DUTY TO AID/R

Discuss the claims presented in the above scenario. Do not analyze any claims against any railroad employees other than Boris.

DAMAGES!

**Question 2: Circus** (1 hour)

Mindy took her five-year old son Bobby to see the Big Top Circus. Big Top Circus holds traditional circus performances in a big top tent. Mindy and Bobby were enjoying watching the lion act. Mindy was so engrossed in watching the act that she did not notice that Bobby had gotten up and wandered out of the circus tent. Bobby, a clumsy boy, tripped over the wheel of a well-placed and well-constructed cotton candy cart, fell, and broke his arm. Bobby was in quite a bit of pain, but he consoled himself by standing by the cart and slowly eating two large poufs of cotton candy, completely oblivious to the events that were to ensue under the big top. Meanwhile, inside the tent, the clown act entered the ring. One clown was carrying a large colorful plastic gun. He came right up to Mindy and aimed the gun at her. Under his breath, so only Mindy could hear, he whispered, "This gun is real, and I'm going to shoot you." Mindy, who is extremely afraid of clowns, freaked out because she was deathly afraid that the clown would shoot her. The gun was indeed nonfunctioning and plastic, and the clown continued through the clown act, getting in and out of clown cars and juggling.

eggshell

Archie, an arsonist, was watching the clowns from the wings of the tent. Using gasoline and a match, Archie lit a corner of the big top on fire. The flames spread rapidly. The circus goers rushed to exit the big top. The crowd was unable escape through two of the four exits because Toby, a Big Top Circus employee, had forgotten to unlock the two exits prior to the show. Mindy tried to exit through one of the locked exits. She turned around to find an open exit. At that moment, a piece of the tent that was on fire fell on Mindy, and she sustained second degree burns. Just before she made it to the open exit, an elephant (also seeking escape) stepped on her foot, crushing it.

Analyze what tort claims Mindy and Bobby can file and what defenses, if any, might apply.

**Question 3: Pig** (1 hour)

Henry bought a new house with a big yard in the country. Eager to entertain at his new place, Henry scheduled two events: a late-night keg party for his friends and a pig roast for several of his co-workers at the post office. Several days in advance of the pig roast, Henry dug a pit in which to roast the pig. On Friday night, Henry's friends came over for the keg party. Henry set up the keg in the yard. Henry chose to leave off the back porch lights so that his friends could enjoy the stars. His friends were excited to visit Henry's new place and walked around the large yard by moonlight. Within five minutes of arriving, Paulette walked right into the pig roasting pit. She fell, breaking her leg and spraining her wrist. Henry had not mentioned the pig roasting pit, so all of the guests were surprised by this turn of events. Paulette's date took her to the emergency room. Frank, another guest at the party, thought it would be fun to amuse himself and the other guests by showing that he could traverse the pig roasting pit without incident. He would get a running start and then jump over the pit. On his fourth try, he failed to clear the pit. He fell, landing on the side of pit and knocking out his tooth on a big rock. Around midnight all of the guests left, and Henry went to bed eager for his pig roast the next day.

On Saturday morning, Henry prepared the whole pig to be roasted. He had heard that you could roast a whole pig by filling a pit with hot coals, putting a pig wrapped in banana leaves on top of the coals, and covering the pig and coals with dirt. Henry thought this sounded like a piece of cake, so he did not consult a cookbook, check on the internet, or ask anyone about the proper pig roasting procedure. Two of Henry's co-workers – Bill and Andy – arrived at dinnertime with their wives – Sarah and Andrea. Bill and Sarah were especially happy to be attending Henry's pig roast dinner. They had always wanted to try roast pig and had hired a sitter to watch their two school age children for the evening.

Henry pulled the pig out of the ground and cut it into thin slices. He put the pork on plates for his guests. The pork was delicious and was enjoyed by all. Everyone thanked Henry for a lovely evening and went home. In the middle of the night, Bill, Sarah, Andy, and Andrea woke up feeling very sick. They had contracted food poisoning from the roast pig. Roast pig is meant to be cooked about 24 hours, but Henry had only roasted the pig for 10 hours. Sarah, Andy, and Andrea recovered within a day or two, but Bill was extremely ill. Sarah took Bill to the hospital almost immediately, as his symptoms were far more severe then hers. Bill died several days later as a result of the food poisoning.

Discuss any claims presented in the above scenario, including any claims that might be barred by any defenses.

Paulette
Frank

Institution **University of New Mexico School of Law**
Course **F12 Torts - Carey**

Instructor **NA**

Exam Mode **Closed**

Exam ID **855**

| Count(s) | Word(s) | Char(s) | Char(s) (WS) |
|---|---|---|---|
| Section 1 | **3117** | **15424** | **18638** |
| Section 2 | **2216** | **11128** | **13410** |
| Section 3 | **1814** | **8990** | **10855** |
| Total | **7147** | **35542** | **42903** |

Answer-to-Question-_1_

**Paul vs. Boris and Trains Unlimited for NEGLIGENCE**

Does Boris owe a duty to Paul? The **rule** for the general duty of reasonable care, expressed in *MacPherson v. Buick Motor Co.*, is that "one has a duty to foreseeable plaintiffs to act reasonably in regard to foreseeable risks of harm arising out of one's conduct." This rule was expanded through *Rudolph v. Arizona B.A.S.S. Federation* to prescribe that there need exist no special relationship between parties for a duty to arise. There is a "general duty imposed on all persons not to place others at risk of harm through their actions." This duty is often analogized to that owed by a motorist on the public roads. He has a duty to ensure that his operation of his vehicle does not place **anyone** at risk, and if he were to injure an innocent passer-by, it would not matter that no special relationship existed between the motorist and the passer-by. The analogy is perfect here; Boris is driving a piece of machinery which, if negligently handled, has the potential to injure others. He is under a general duty of reasonable care to see that his actions do not "place others at risk of harm."

Boris' standard of care, then, is the "reasonable care standard." The duty he owes to Paul is that of a reasonably prudent person acting under the same or similar circumstances.

Courts differ on what constitutes a "reasonably prudent person," and had Boris had any unusual characteristics, that might influence the ruling. But as the fact pattern makes no mention of physical or mental disabilities, or Boris' age, I will assume that he is a person of average intelligence and abilities. If anything, as a trained professional locomotive engineer, Boris should have skills relating to his profession which exceed those of the person of average intelligence. He should be better able to conduct his train safely than the "average" person.

The alleged wrongful conduct, then, would be Boris's reading of his novel when he was supposed to be paying close attention to the operation of his train. The general rule is that a defendant breaches his duty to the plaintiff if his conduct was unreasonable in light of foreseeable risks. Certainly it is foreseeable that there might be an obstacle - in this case a cow - on the tracks in front of the train. And while it is possible that the cow wandered onto the tracks too late for Boris to stop in any case, it is also possible that Boris, had he been alertly monitoring the tracks ahead instead of reading his books, would have seen the cow early enough to stop.

But even under other standards for determining reasonable conduct, Boris' actions do not stand scrutiny. The "Hand Formula" is one way of balancing the utility of precautions not taken against their cost. Courts must balance the probability of

harm and the possible seriousness of the harm against the *burden* of taking adequate precautions to prevent the harm. If the burden would bankrupt the defendant or stop the defendant from performing a societally-valuable service, then the precaution may be deemed to be an undue burden. Here, however, the only precaution alleged to be necessary is for Boris to put down his book. That costs him and the railroad absolutely nothing. Balanced against the possibility - however slight - of avoiding a deadly train derailment, the burden is worth its "cost." Boris is negligent for reading.

Likewise, per *Trimarco v. Klein,* evidence of a defendant's compliance (or non-compliance) with a given custom or usage, while not conclusive, can be used to show the reasonableness of the defendant's conduct under the circumstances. In this case, we would wish to show that Boris deviated from custom by reading his book, and that doing so was unreasonble. The fact pattern does not tell us whether reading on the job is "customary" in the railroad industry, but it seems safe to bet that it is not. Even if it was, "compliance with custom that does not involve imperative precautions does not constitute 'reasonable conduct' and thus does not excuse negligence." (*The T. J. Hooper.)*

Therefore, it appears that Boris' conduct was wrongful, and the next question becomes one of causation. Did Boris' wrongful conduct **cause** Paul's injuries? How we decide that will depend on

the rule followed in this jurisdiction. When only a single defendant is involved, many jurisdictions follow the "but-for" rule of *Sowles v. Moore*: "but for" the defendant's actions, would the plaintiff have been injured? As discussed above, it seems eminently logical to suggest that had Boris not been reading, he would have noticed the cow in time to stop or to slow down enough to prevent a derailment. "But for" the train derailing, it could not have hit Paul's car, which was stalled **near**, but not **on**, the tracks.

Other jurisdictions follow the "substantial factor" test, first voiced in *Corey v. Havener*. One could argue that the presence of the cow on the tracks was the sole "but-for" cause of this accident, and that "but for" the cow, Paul would not have been injured, even if Boris was reading. The substantial factor test does away with that possibility for defense by ascribing liability to any defendant whose actions were a substantial factor in the cause of the accident. Under this rule, Boris's actions constitute causation. Even with the cow on the tracks, disaster might have been avoided if he had only put down the book.

True, there **might** have been other causes of the accident, but "a reasonable inference based on facts and conditions is sufficient for showing causation so long as the inference is more reasonable and probable than another explanation." (*Ingersoll v.*

*Liberty Bank of Buffalo.*) There are no facts provided that offer a more probable explanation. And per *Williams v. Utica College,* "to establish a negligence cause of action, the Plaintiff has the burden of marshaling some evidence that the defendant's allegedly negligent conduct was the cause-in-fact of her injuries." Paul has met that burden here.

And while Boris may be the negligent party, he may also not be financially capable of meeting his obligations to pay the judgment likely against him. For that reason, the doctrine of *respondeat superior* allows Paul to pursue his cause of action against Trains Unlimited. The **rule**, expressed in *Kime v. Hobbs,* is that "an employer is vicariously liable for the negligence of an employed party as an employee, rather than as an independent contractor, when the employer controls the manner or method of the services provided as well as the end product of the work." Here, although the fact pattern does not tell us the nature of the arrangement between Boris and Trains Unlimited, it is unlikely that a railroad permits much discretion to its engineers in how its train is operated. Most likely, TU will be vicariously liable for Boris' actions.

Per *Pyne v. Witmer,* "an employer is vicariously liable for an employee's negligence so long as the act is within the scope of the employee's employment and any deviation from employment constitutes a detour and not a frolic." Boris was actually

operating the train at the moment of the derailment, and was on neither detour nor frolic. TU remains vicariously liable.

Finally, damages. Per *Calva-Cerquiera v. U.S.*, damages must be based on substantial evidence, not mere speculation. The Plaintiff has the burden to prove both the existence and the amount of damages, which must be proven to a reasonable certainty. Paul will have to substantiate his damages, but he can collect them. Likewise, per the collateral source rule, he may be fully reimbursed for all damages actually invurred, even if that results in a windfall due to previous reimbursements received from collateral sources such as insurance companies. What, then, are his damages?

Presumably Paul had to pay for medical treatment: doctor's visits, diagnostic tests, etc. He might also have had to buy medical equipment, such as a wheelchair, to compensate for his injuries. He most likely did not have any future earnings losses, as he should still be able to continue his work as an investment banker. However, he most likely lost earnings while hospitalized, and would have remained away from work while undergoing rehabilitation. He is entitled to be compensated for those losses. If he lost fringe benefits during that time, they would be compensable as well. Finally, he likely experienced physical **pain** from the injury, and may be **suffering** from emotional trauma or embarrassment as a result of his injuries.

Pain and suffering are both compensable losses. And if Paul is in a jurisdiction that recognizes Loss of Enjoyment of Life (LOEL) claims, Paul may be able to claim those; we do not know enough from the fact pattern to determine if any of his enjoyments of life have been curtailed due to his paralysis.

In computing damages, Paul will receive a lump-sum award, discounted to account for future investment and then adjusted upward to account for inflation. The manner in which this happens will vary by jurisdiction but will probably be some variation of the "Market Interest Rate" rule, which takes a projected interest rate, minus the projected inflation rate, established by expert testimony, to arrive at a factor by which Paul's lump-sum damages will be multiplied.

However, Paul, who had been drinking liquor in his car, seems to have contributed to his own injuries by passing out near the tracks. Must likely, that action will reduce or eliminate his damages. If this occurred in one of the four jurisdictions that still recognize contributory negligence as a complete bar to recovery, Paul gets nothing. If, however, it occurred in a "comparative fault" state, his damages will merely be reduced. In a "pure" comparative fault state, his award will be reduced by the percentage to which he was found negligent, with no limits - he could recover 1% of his damages even if he was ruled to be 99% responsible. In a modified comparative fault jurisdiction, he

could recover an amount reduced by his own percentage of fault, up to a "breaking point" typically equal to (or greater than, in some jurisdictions) 50% of his own fault.

The only question was whether the jury will find Paul to have comparative fault. Most likely, this becomes a question of negligence *per se*. This will depend on the approach taken in this jurisdiction. But all states have rules against drinking and driving. And while the facts don't specify, it would appear that Paul had been drinking sufficiently to be impaired under any state's laws. That creates an issue of negligence per se. Although how this rule is applied varies slightly by jurisdiction (from pure strict liability to being mere evidence of negligence) it seems very likely that a jury would find that Paul was negligently driving while intoxicated, and that his negligence contributed substantially to his injuries. His award from Boris and TU will be reduced accordingly.

Finally, as no immunities apply to either Boris or TU, the only question becomes one of punitive damages. These are extremely rare in negligence claims, and would only be awarded if the jury found that Boris acted **recklessly** rather than merely negligently - which is a possibility. In that case, punitive damages could be awarded, in an amount that should, in order to comply with guidance - albeit not bright-lien guidance - from the Supreme Court, normally not exceed a single-digit ratio compared

to the compensatory damages awarded.

**Maria vs. Boris and Trains Unlimited for NEGLIGENCE**

Boris has a special relationship with Maria, as he is operating a common carrier and she is one of his passengers, being carried for hire. That is sufficient to create a "special relationship" under the law. Boris has a duty to care for his passenger's safety.

Boris' standard of care, then, is the "reasonable care standard." The duty he owes to Maria is that of a reasonably prudent person acting under the same or similar circumstances. As discussed above, Boris, as a trained professional locomotive engineer, should have skills relating to his profession which exceed those of the person of average intelligence. He should be better able to conduct his train safely than the "average" person.

The alleged wrongful conduct, then, would be Boris's reading of his novel when he was supposed to be paying close attention to the operation of his train. Whether viewed through the lens of the "Hand Formula" or the usage of custom, Boris' conduct was wrongful in light of the ease with which he could have taken appropriate precautions against cow-induced derailments.

The questions of causation and *respondeat superior* are the same for Maria as for Paul, and will not be repeated here. Likewise, the same caveats regarding Maria's burden to prove her damages to a reasonable certainty apply here as well. What, then, are her damages?

Presumably Maria had to pay for medical treatment: doctor's visits, diagnostic tests, etc. She might also have had to buy medical equipment, such as a wheelchair, to compensate for her injuries. Since she has lost the ability to "think and reason," she may require ongoing care, such as that provided by an in-home hospice nurse. She most likely lost earnings while hospitalized, and would have remained away from work while undergoing rehabilitation. And since she has lost her ability to think and reason, she is unlikely to return to work as an investment banker. She is therefore entitled to compensation for ALL of her lost wages, past and future, as well as all lost past and future fringe benefits. Finally, she likely experienced physical pain from the injury, and may be suffering from emotional trauma or embarrassment as a result of her injuries. Pain and suffering are both compensable losses. And if Maria is in a jurisdiction that recognizes Loss of Enjoyment of Life (LOEL) claims, she may be able to claim those; we do not know enough from the fact pattern to determine if any of her enjoyments of life have been curtailed due to her inability to think and reason.

Finally, although we do not know if Maria had a husband or minor children, those relatives would most likely be able to file a derivative claim for loss of consortium, whose success would depend on Maria's success on her primary claim. Maria's damages will be computed in the same manner as Paul's, and awarded as a lump-sum award. Maria, however, did not contribute to her own injuries; she was merely a passenger in the train, and did not influence her own fate in any way. She will therefore not have to worry about her award being reduced by comparative fault. The only adjustments would be for additur, if it is permitted at the judge's discretion in this jurisdiction, or for remittitur if the judge thought it necessary. If he did, the remittitur would require Maria's consent, and would most likely be ordered contingent on a new trial if Maria did not consent.

Finally, as no immunities apply to either Boris or TU, the only question becomes one of punitive damages. These are extremely rare in negligence claims, and would only be awarded if the jury found that Boris acted recklessly rather than merely negligently - which is a possibility. In that case, punitive damages could be awarded, in an amount that should, in order to comply with guidance - albeit not bright-lien guidance - from the Supreme Court, normally not exceed a single-digit ratio compared to the compensatory damages awarded.

**Homer vs. Boris and Trains Unlimited for NEGLIGENCE**

Homer is not a passsenger being carried for hire on Trains Unlimited, and therefore it is unclear what his status would be. A common carrier is liable for the safety of its passengers, but would Homer qualify as a passenger? IT would depend on the jurisdiction. And while limited-duty rules pertaining to landowners do not expressly pertain to train operators, a court may find the analogy persuasive. Homer was a trespasser on the train, but a landowner owes even a trespasser a duty not to injure him willfully, wantonly, or through gross negligence. Homer may be able to plead the analogy that he was owed this basic duty, and that Boris breached it.

However, regardless of that duty, and regardless of Homer's trespassing, Boris does have a limited duty to act, assist, or rescue where he created the peril to which Homer is exposed. As discussed above, a jury is very likely to find that Boris was the causal factor - or at least A causal factor - in the derailment that mangled Homer's leg. Boris therefore had a duty to act, assist, or rescue Homer.

The alleged wrongful conduct, then, would be Boris's running away from the scene of the accident when he could have stayed to assist Homer. The facts speak for themselves; Boris had a duty that he did not perform, so he therefore breached his

duty.

The facts do not specifically say what assistance a train engineer could have provided Homer that would have prevented amputation. However, the "delay in treatment" for his injuries was apparently relevant. We would need to know exactly what treatment was required, and whether it would be reasonable to imagine that a layman would be able to provide it. However, assuming that can be proven, then Boris' causation of Homer's loss of leg is proven. At any rate, he questions of causation for his initial injuries, and for respondeat superior are the same for Homer as for Maria and Paul, and will not be repeated here. Likewise, the same caveats regarding Homer's burden to prove her damages to a reasonable certainty apply here as well. What, then, are his damages?

Presumably Homer had to pay for medical treatment: doctor's visits, diagnostic tests, etc. Since Homer, a bum, did not actually pay for these damages, he probably is out little out-of-pocket, but under the collateral source rule can still collect. Pain and suffering also apply. But his economic damages will probably be minimal, since it appears he is unemployed and will therefore not have past or future lost wages to claim.

Finally, as no immunities apply to either Boris or TU, the only question becomes one of punitive damages. These are

extremely rare in negligence claims, and would only be awarded if the jury found that Boris acted recklessly rather than merely negligently - which is a possibility. In that case, punitive damages could be awarded, in an amount that should, in order to comply with guidance - albeit not bright-lien guidance - from the Supreme Court, normally not exceed a single-digit ratio compared to the compensatory damages awarded.

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Answer-to-Question-_2__

**Mindy and Bobby v. Clown, Exit-Unlocking-Circus-Employee, and Big Top Circus for NEGLIGENCE, IIED, Assault and STRICT LIABILITY**

There need exist no special relationship between parties for a duty to arise. There is a general duty imposed on all persons not to place others at risk of harm through their actions. But Mindy and Bobby were on the Circus' property with the Circus' knowledge, for their mutual benefit. Mindy and Bobby would derive the satisfaction of a circus performance, and Big Top Circus would receive the pecuniary benefit of their paid admission.

Thus Big Top Circus is subject to a limited-duty rule prescribing especial care for their guests. It matters not whether this occurred in a jurisdiction that recognizes the status-trichotomy rule, or whether it follows the rule of *Rowland v. Christian;* Mindy and Bobby qualify as invitees under either convention, and thus the Circus has a duty or reasonable care to protect them from unreasonable risks about which the Circus knew or should reasonably have known. Also, under the Attractive Nuisance doctrine, the circus had a duty to protect children from

hazards on the land which might be especially attractive to small children, such as a candy cart.

Finally, under the rule of *Delta Tau Delta v. Johnson,* a property owner owes a reasonble duty to take precautions to protect invitees from the criminal acts of a third party when the crime is foreseeable under the totality of the circumstances. If a jury finds that arson was foreseeable under the totality of the circumstances, the Circus had a duty to protect Mindy and Bobby from him.

Here, a reasonable standard of care would apply. The duty owed is that of a reasonably prudent person acting under the same or similar circumstances.

The alleged wrongful conduct is many-fold. First, though the candy cart was "well-placed and well-constructed," it presented a potentially attractive nuisance to children passing nearby. Mindy and Bobby might be able to allege that the cart should have been attended or supervised by an employee to keep children from tripping over the cart. Second, the Clown should not have made his whispered threat to shoot Mindy. Third, the employee charged with unlocking all of the exits should have done so, and not failed (as he did) to unlock two of them. Finally, (if it is ruled that the possibility of arson was reasonbly foreseeable) the Circus should have taken reasonable precautions

to see that no arsonists lit the tent on fire.

Here again, the defendant breaches his duty to the plaintiff if his conduct was unreasonable in light of the foreseeable risks of harm. Stationing an employee near the candy cart, and ensuring that the exit-unlocking employee properly unlocked all four exits, are measures that can be done almost without cost. The former measure might have cost the Circus minimum wage, but would presumably have paid for itself with cotton candy sales. The latter measure would be completely free. Even under the "Hand Formula," these two measures seem self-evidently reasonable; they cost little, and ward against injuries that (even if improbable) are worth guarding against. However, the question of guarding against arsonists is potentially more vexing; since the entire tent was flammable, guarding against arsonists would require a fairly large security force, at not-inconsiderable cost to the circus. The injuries to be avoided by preventing a large tent conflagration are certainly serious enough to merit consideration, but they may also be rare enough that a jury would not find them foreseeable under the totality of the circumstances. This measure might be ruled either way.

However, under negligence per se, the Circus might well be found negligent in failing to unlock the exits. We do not know the laws of the jurisdiction in which this event took place, but most jurisdictions have certain minimal safety codes that require

unlocked exits in buildings (or tents) that are open to the public. It is highly likely that the circus' failure to ensure all four exits were unlocked is a violation of this code. That may therefore make the Circus negligent *per se*. This could happen in one of four ways:

- The jurisidiction could impose strict negligence per se, in which a violation equals negligence, with no excuses. This is uncommon.
- The jurisdiction could impose negligence per se, as a majority of states do. Under this systemm, the Circus' violation of the safety ordinance would be a presumption of negligence, which the Circus could rebut by pleading certain specific excuses. Here, however, none of the excuses seem to apply. The Circus was not unable to unlock the exits; it did not lack knowledge or occasion to comply; it was not unable to comply despite reasonable diligence; no emergency prevented it from unlockeing the exits, and compliance certainly would not create a greater risk.
- The jurisdiction could impose negligence per se "light," creating a presumption of breach but allowing the defendant to plead reasonable care despite the violation.
- Finally, the jurisdiction could, as few do, provide that the violation is merely **evidence** of negligence.

However, under neither of these systems is the Circus liable to escape liability. There was no reason for the exits to be locked.

C

The "but-for" theory of causation will most likely be inapplicable here, as there are so many parties who contributed to Mindy and Bobby's injuries. Even in the jurisdictions that apply "but for" reasoning to single defendants, the "substantial factor" test is usually used for multiple defendants. Bobby's claim is at least colorable; a jury might reasonably find that the Circus did not cause his injuries. But the locked exits certainly contributed to Mindy's burns. A finding of causation is likely on that count.

Where multiple defendants are involved in creating a single indivisible injury, the rule of *Fugere v. Pierce* provides that each negligent party is jointly and severally liable for all of the plaintiff's injuries and the liability cannot be allocated with reasonable certainty. Certainly, if either the arsonist had not lit the tent on fire or the Big Top had unlocked the exits, Mindy might not have been burned. But joint and several liability does not apply to intentional torts such as that committed by the arsonist. If a jury can apportion with a reasonable degree of certainty to what extent her injuries resulted from the arsonist alone, the Circus will not be held to answer for those injuries. However, if the injuries cannot be apportioned, the Circus may well be required to bear 100% of the damages.

Under *respondeat superior,* an employer is vicariously

liable for the negligence of an employed party when the employer controls the manner or method of the services provided as well as the end product of the work. Therefore, the Circus can be held to answer for the omission of the employee that forgot to unlock the exits. And while **scope of liability** might limit liability because of the tent fire, finding it too remote, attenuated, or suprising to impose liability due to the arsonists conduct, it seems unlikely in this case. Even if the arsonist himself were a surprising occurrence, the possibility of a tent fire was foreseen by the writers of the safety code that prescribed unlocked exits. Most likely the court will find that, per *McClenahan v. Cooley,* a defendant is liable even if there is an intervening act, so long as the intervening act could reasonably have been foreseen and the defendant's conduct was a substantial factor in bringing about the harm. Locked exits were a substantial factor in bringing about Mindy's burns.

Damages: Bobby suffered a broken arm requiring treatment; Mindy suffered 2nd-degree burns and a broken foot, both presumably requiring treatment. They are entitled to recover medical expenses. We do not know how Mindy was employed, but presumably her foot injury impeded that for a period of time. She is entitled to recover lost wages (if employed) or the lost value of her services to the household (if she was a stay-at-home mom). And if her injuries prevented future earnings or service tot he hosuehold, she would be entitled to recover those as well.

Bobby specifically experienced pain; presumably Mindy did too. Both would be entitled to recover for pain. (And suffering, and LOEL, if applicable.)

There does not appear to be any contributory negligence in Mindy's injuries, but she may be ruled contributorily negligent in Bobby's injuries. A parent has a duty to safeguard her child, under the rules of special relationships, so she will probably be ruled to have contributed to Bobby's injuries. (Bobby himself will most likely NOT be ruled contributorily negligent. Whether this jurisidiction follows the "rules of sevens," holding children under 7 years old to be incapable of negligence, or whether it follows the "child standard of care" from *Robinson v. Lindsay,* the result will likely be the same.) Damages will otherwise be computed as described in Question 1, and reduced by the degree to which Mindy bears partial responsibility.

**IIED and Assault**

Time does not permit an indepth analysis of this claim. However the IIED rule seems easy to satisfy in this case: where the clown engaged in (1) extreme and outrageous conduct (2) intended to cause and does cause (3) severe emotional distress to another, or where the defendant's actions indicate a reckless indifference to the likelihood they will cause severe emotional distress. The clown appears to have acted recklessly to whether

his threat, even if intended in jest, would cause severe emotional distress to Mindy. Here we do not know that Mindy in fact suffered such distress, but she would be entitled to recover if she did.

The same is true of assault: did the clown commit a "realistic and imminent threat to commit an unconsented-to or offensive touching" by threatning to shoot Mindy? The shooting would most clearly have been offensive had it occurred; the question is whether his threat was realistic. It was certainly imminent. But when backed up by a plastic toy gun which appeared to be a plastic toy gun, it is unclear whether a jury would find it realistic. If it did, Mindy could recover. She need not prove damages; the dignitary tort of assault constitutes damages on its own.

**STRICT LIABILITY**

Under rules of strict liability, a plaintiff prove neither duty nor breach in certain abnormally dangerous circumstances, such as the keeping of a wild animal. Here, the circus kept an elephant, an obviously wild animal, as part of its act. Strict liability therefore ascribes liability even in the absence of fault. Most jurisdictions follow one of the two tests of *Rylands v. Fletcher.* Whether our jurisdiction follows the Blackburn

test, which requires "the person who, for his own purposes, bring on his land...anything likely to do mischief if it escapes, [to] keep it at his peril," or whether it follows the Cairns test which justifies the imposition of strict liability where a defendant makes a "non-natural" use of its land is irrelevant to the result, which will be the same in either case. The Circus brought on his land an elephant, which is a non-natural use of the land, and which did mischief when it escaped from the control of its handlers. The Circus is therefore strictly liable for any resultant harm.

Even if our jurisdiction required a ruling of "abnormal danger" as a matter of law, following *Klein v. Pyrodyne Corp.*, Four of the six factors usually considered would go against the Circus:

- An elephant poses a **high degree of risk of some harm** to the person, land or chattels of others.
- Although the elephant might not be likely to escape, **the likelihood that any harm that results from its escape would be great** is very high.
- The Circus cannot **eliminate** the risk of harm posed by the elephant, even through the exercise of reasonable care.
- The keeping of elephants is most decidedly not a matter of common usage.

Therefore the Circus would be ruled strictly liable under this test.

Causation is as discussed above, as are damages.

**Mindy v. Arsonist for INTENTIONAL TORT of BATTERY and IIED**

Time does not permit an in-depth analysis of this claim. However, the arsonist's actions resulted in a harmful and offensive touching (of flaming tent materials) to Mindy, and might constitute a battery if Mindy can prove the arsonist's intent. This would depend on the rule of the jurisdiction. Is it "the modern rule" (where the arsonist merely had to cause the harmful touching?) Or is it the "dual intent" rule, where Mindy would not only have to prove the arsonist acted intentionally, but that he **intended to cause** the harmful touching. The latter standard, of course would be more difficult to prove.

The IIED rule seems easier to satisfy in this case: where the arsonist engaged in (1) extreme and outrageous conduct (2) intended to cause and does cause (3) severe emotional distress to another, or where the defendant's actions indicate a reckless indifference to the likelihood they will cause severe emotional distress. The arsonist appears to have acted recklessly to whether his actions would cause severe emotional distress to any of his victims. Here we do not know that Mindy in fact suffered such damages, but she would be entitled to recover if she did.

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**Answer-to-Question-_3_**

**PAULETTE AND FRANK V. HENRY FOR NEGLIGENCE**

The duty here is as discussed in previous problems: Henry owed a general duty of reasonable care not to put others at risk through his actions. More importantly, as a landowner he owed a duty to protect Paulette and Frank from conditions on his land. Exactly what duty he owed depends on the jurisdiction. P&F were both **licensees**, on Henry's land with his consent, but for their own convenience. In a jurisdiction that follows the status trichotomy, Henry owes them a duty not to injure them willfully, wantonly, or grossly negligently, and to warn of or make safe known dangerous conditions. However, in a jurisdiction that follows *Rowland v. Christian,* he would owe them a duty of reasonable care to protect them from unreasonable risks about which he knew or reasonably should have known. The result is essentially the same in this case. Henry should have either taken reasonable care to protected P&F from the dangers posed by the pit, or should have warned them of the pit or made it safe.

The rules themselves provide the **standard of care**, and Henry does not appear to have acted as a reasonably prudent

person would under the same or similar circumstances. Here the alleged wrongful conduct includes turning off the porch lights (making it more difficult to see the pit), not telling his guests about the pit (failure to warn), and not taking precautions (like fencing it off or covering it) to make safe the known dangerous condition.

Henry breached his duty or reasonable care because his conduct was unreasonable in the light of foreseeable risks. It is patently foreseeable that someone who does not know about a pit - an uncommon hazard in a residential back yard - might stumble into it at night. It is perhaps less foreseeable that a daredevil who knew of it might try to long-jump over it, but the possibility becomes infinitely more foreseeable with the introduction of a keg of beer. The probability of the harm was great; the likilihood of a resultant harm being extremely serious was probably less great. But against the simple expedient of turning on the porch lights or laying a $15 sheet of plywood over the top of the pit, the potential harm clearly outweighs the cost of taking simple, reasonable, and inexpensive precautions against it occurring. Henry breached his duty to his licensees.

Causation: whether under the "but-for" test, applied against a single defendant (Henry) in some jurisdictions, or under the "substantial factor" test used in all cases in other jurisdictions, Henry has caused the injuries to both Paulette and

Frank. "But for" the presence of a pit; "but for" the porch lights being off; "but for" his failure to warn her of the pit; "but for" his failure to cover it with plywood, Paulette would not have broken her leg or sprained her wrist. Henry might escape liability for Frank - who might not have lost a tooth "but for" his own foolhardy attempts to long-jump the pit - but more likely this will be a factor to be covered in comparative fault. And in any case, Henry was a substantial factor to both parties' injuries, and will be so held in a substantial-factor jurisdiction.

Per *Palsgraf v. Long Island R.R. Co.*, a defendant is not liable for a plaintiff's injury when the connection between the defendant's conduct and the plaintiff's injury is too remote, attenuated, or surprising to make it fair to impose liability. But as discussed above, injuries resulting from the presence of an unlighted pit in a dark backyard seem pretty foreseeable. A defense of scope of liability is unlikely to succeed.

Damages: Paulette requires medical care for her broken leg and sprained wrist; Frank requires dental work to repair his tooth. Both presumably experienced some pain, and possible some mental suffering. And while Frank's work (not specified in the fact pattern) is likely not affected by a lost tooth, it is not impossible - he could have been a toothpaste model or something unusual. We similarly do not know Paulette's line of work, but

presumably a broken leg would result in some minimal lost wages. Both P&F are therefore entitled to recover for medical expenses, past and future lost wages, and past and future pain and suffering. Presumably, however, both will make a full recovery, and the damages would be easy to compute. For both, damages will be computed as described in question one, with additur (if applicable) and remittitur applied.

Frank, however, will most likely have his reward reduced extensively by contributory negligence or comparative fault, both discussed in detail above. Per *Bowen v. Cochran,* his assumption of the risk will be **inferred** from his conduct if it demonstrates that he knew the risk, appreciated the risk and voluntarily exposed himself to it. Frank clearly knew about the risk, and appreciated the danger it could pose, as he had already seen Paulette fall into the pit and break her leg. And he was certainly under no obligation to jump over the pit, still less to jump over it four times, so clearly he voluntarily exposed himself to the risk. In jurisdictions that recognize assumption of the risk, it generally acts as a complete bar to recovery, so Frank would get nothing.

Other jurisdictions define this more strictly as "implied **secondary** assumption of risk," but it still imputes a waiver, even where none expressly exists, even where the defendant is negligent. Although we know that Henry is negligent, this

characterization of "secondary assumption" will still act as a bar to recovery. Whereas Paulette will likely be fully compensated for her injuries, Frank will likely have to bear his own costs.

**Bill, Sarah, Andy, and Andrea v. Henry for NEGLIGENCE**

Although Bill, Sarah, Andy, and Andrea are also all licensees of Henry, the duty of a landowner does not apply here, as the condition which resulted in food poisoning for all four was not a **condition on the land**. Therefore, Henry's duty was one of reasonable care as previously discussed, and the standard of care is that of a reasonable person under same or similar circumstances.

The alleged wrongful conduct would be Henry's failure to cook the pig long enough to ensure that no food poisoning could result. This can prove breach, once again, under either the general breach rule or the "Hand Formula." Henry, who had never roasted a pig before, did not avail himself of the many readily-available resources that would have told him how long to cook the pig properly. He could have consulted a cookbook, checked the internet, or asked anyone who had previously roasted a pig. His conduct was therefore unreasoanble in light of the foreseeable risk of food poisoning. In the alternative, we can balance the likelihood of food poisoning (reasonably remote, but nevertheless

possible) and the seriousness of possible results (death, which in this case did occur) against the burden of taking adequate precautions (minimal.) Henry breached his duty of reasonable care.

Causation: although Henry could make a weak attempt to blame food poisoning on the butcher/farmer/store from whom he obtained the pig, his failure to cook it properly is both a "but-for" cause of the food poisoning and a substantial factor in its occurrence. Henry will likely be found to have caused all four cases of food poisoning. Nor is scope of liability likely to cut off liability; the possibility of food poisoning from undercooked food might be remote, but it is hardly too remote to be surprising when it occurs.

We do not know if Bill suffered from any medical malpractice while in the hospital, or if such malpractice (if any) contributed to his untimely death. However, even if such malpractice had occurred, it would not protect Henry from liability. Under the Medical Malpractice Complications rule, an initial tortfeasor who negligently causes the original injury is liable for aggravated injuries caused by subsequent negligent medical treatment.

Damages would be substantially similar for Sarah, Andy, and Andrea, who all recovered within a day or two. They would have

their medical bills paid, be compensated for any lost wages or pain, and that's it. However, Bill died. The damages related to his death would be significantly higher. They could be pursued in one of two ways: either Sarah could file a survival action on his behalf, or she could file a wrongful death claim in her own right. With a few exceptions, the damages would be substantially similar, and will be discussed below.

**SARAH v. HENRY for WRONGFUL DEATH**

The analysis of duty, standard of care, breach of duty, causation, and scope of liability on this claim is virtually identical to the one above, and will not be repeated. The issue of damages is germane, however.

Sarah is entitled to compensatory damages for Bill's illness. This includes all of the doctor's bills, hospital bills, etc. for the treatment Bill received during the time he was ill. Similar in concept to those discussed for Sarah, Andy, and Andrea, they of course will be larger.

But past and future earnings losses will be enormous. We do not know how old Bill was, but we do know he was employed with the post office, which has a lucrative salary-and-benefits package. Expert actuarial testimony would be provided to establish what Bill's expected remaining work life would be, to

establish what his future earnings would be. The same expert would likely testify as to how much longer Bill could be expected to live AFTER he retired (and thus, how much money he would have received in pension benefits.) Sarah would receive this lump sum award (subject to the usual market-rate adjustments, additur and remittitur) as compensation for the financial support she would have received from Bill had Henry's negligence not resulted in his untimely death.

And while Bill's pain and suffering might be compensable to Sarah, that is highly jurisdiction-dependant; many do not recognize P&S as valid claims in a wrongful-death action. But Sarah would be able to recover for loss of consortium with her husband. The jury would have to place a monetary value on the loss of his companionship, any loss of enjoyment of life she may have experienced for lack of her life partner, etc.

In computing all of the foregoing damages, for this and all previous cases, any damage awards might be subject to actuarial adjustments. But in making those adjustments, the court is constrained by certain limits:

- Per *MacMillian v. City of New York,* the decedent's race may not be taken into account.
- Bill's gender might be considered (per *Reilly v. United States*)
-...but then again it might not (*United States v. Bedonie)*
- Bill's suffering, if compensable, must actually have been

suffered. If he was in a coma the entire time, his suffering is not compensable per *Williams v. New York.*