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Exam No. 375

510-002 Torts
Fall 2010

UNM School of Law
Final Examination

Professor C. Carey
R: December 17, 2010
1:00-4:00 p.m. (3 hrs)

Examination Format: Essay and Short Answers

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. Good luck!

Essay 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. **DO NOT WRITE YOUR NAME ON BLUEBOOKS.**

Laptop for typing:

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

12. A **"Security Check"** to scan your computer will run. Please be patient. It should disappear within a short period of time. If not, please exit the room and see a proctor.

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 reconnect to Lobo-Sec.
  - Reauthenticate using your browser.
- 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**.
- If the exam **did not submit electronically**, reconnect to the Lobo-Sec network, making sure you authenticate (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.
- 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.

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**.
  - Reconnect to the Lobo-Sec network, making sure you authenticate (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 on the next page]

Question 1: Don't shoot the donut (1 hour)

Hal was deeply in love with Pam. They had dated for many years but had broken up last year when Pam decided to reconcile with Brad, her ex-boyfriend and the father of her seven-year old daughter Dottie. Hal recently learned and was very upset by the fact that Pam had married Brad. Hal started weekly therapy sessions with a therapist named Tom to deal with his strong emotions about Pam's recent nuptial. Hal discussed many things with Tom, including how he was recently fired from his job as a wild game hunting instructor and how he was having a hard time controlling his anger. Specifically, he told Tom that he sometimes thought about shooting Pam. Pam was completely oblivious to Tom's feelings. She was busy working full-time at the Donut Shop, which was a joint with delicious donuts located in a very bad neighborhood. Pam enjoyed her job, including chatting with the customers and stuffing her face with donuts. However, in the last few months, her job had become rather scary as there had been a string of armed robberies at the Donut Shop.

One Saturday night, Hal grabbed a gun from his gun rack and drove over to the Donut Shop, intending to shoot Pam. When he arrived, Pam was behind the counter cheerfully packaging donuts. She was the only Donut Shop employee working that night, and there were no customers in the shop. Pam didn't see Hal walk into the shop. Instead, she was filling a box with jelly donuts, one by one. She held each donut up and looked at it before carefully placing it in the box. When Hal saw Pam, his heart softened. He decided that instead of shooting Pam he would try to win her back by impressing her. He took aim at the jelly donut in her hand, intending to shoot right through the center of it, thus showcasing for Pam his excellent marksmanship. Hal pulled the trigger. The bullet hit the edge of the donut, sending gelatinous goo everywhere. The bullet also hit Pam's hand. Pam collapsed on the floor, surrounded by a pool of her own blood. Because the shot was at close range, Pam lost most of her hand and all of her fingers.

Analyze all possible tort claims in the above scenario.

Question 2: Sam hates balloons (1 hour)

Mel had a real passion for balloons. He had been collecting them his whole life – helium balloons, balloon animals, and plain old party balloons. Mel was a lonely 34 year-old guy who had a much below average IQ. Mel liked to take the elevator to the top of the tallest building in his city and drop water balloons from the roof to the street level, which was 32 stories below. One day, while he was on the roof, he met a gregarious 15 year-old honors student named Lyle. Lyle was also on the roof of the building with a big basket of water balloons, about to catapult them to the sidewalk below. Mel and Lyle hit it off and decided to meet on that roof every Friday afternoon to throw water balloons off the building together. Mel volunteered to bring the water balloons. The following Friday, Mel and Lyle met on the roof. Mel brought a huge bag of water balloons. All of the water balloons were same baby blue color and were manufactured by the same balloon manufacturer. Mel and Lyle wanted to begin this fun joint enterprise together, so they each took a water balloon to drop at the same time. They counted out loud, "one, two, three," and dropped their balloons at the same moment. Sam – a single, childless, and wildly successful radio announcer with a buttery voice – was walking down the sidewalk in front of the building. The balloons fell 32 stories, and one of the balloons slammed into Sam's head. Sam didn't know what hit him, and he immediately lost consciousness.

Sam suffered a serious head injury and was rushed to the hospital. At the hospital, Sam received emergency surgery, which was performed by Dr. Dave. Because it was an emergency and Sam was still unconscious, Dr. Dave did not need to obtain Sam's consent for the surgery. During the surgery, Dr. Dave, a skilled surgeon, used proper and well-established medical procedures. However, no one on the surgical team remembered to remove the surgical balloon from Sam's head before stitching him up. As a result of the initial head injury, Sam lost his short-term memory and suffered from a lot of pain. The surgery did not correct his short-term memory loss. As a result of the surgical team's failure to remove the surgical balloon, Sam suffered additional brain damage and permanently lost his ability to speak.

Discuss all possible tort claims above, including what damages may be recoverable and from whom the plaintiff(s) could recover such damages.

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Discuss all possible tort claims above, including what damages may be recoverable and from whom the plaintiff(s) could recover such damages.

Question 3: Mabel to the Rescue (1 hour)

Sue is a woman who is always looking for a good challenge. Sue decided she wanted to pursue fire eating as a hobby and has been taking fire eating classes at Big Top Inc.'s circus school. Sue's mother Myrtle is always interested in whatever extracurricular activities her daughter is pursuing. Myrtle came to watch Sue participate in a group fire eating class at Big Top. Myrtle sat in the folding chairs set up nearby for spectators. Hank, Sue's instructor, began the class. Hank was holding two lit torches, about to hand one to Sue's classmate. He was not careful when handing off the torch, and as a result the torch flew to the ground, starting a small fire. Hank, still holding the other torch, ran for a bucket of water. As he sprinted for the water, he ran past the spectator section. Myrtle was wearing a significant amount of hair spray to keep her poufy hairstyle in place. Hank's torch came too close to Myrtle's head, accidentally setting her bouffant hairdo on fire. Hank, not noticing the flame, continued to retrieve a bucket of water, returning to throw it on Myrtle. Meanwhile, Mabel, a grandmother and fire eating class spectator, flew into action to save Myrtle. She ran toward a fire hose and tripped on her own two feet, sailing to the ground. Mabel had especially brittle bones as a result of her age and her health condition, and she broke many bones in her arms and legs as a result of the fall.

Myrtle sustained fourth-degree burns and experienced excruciating pain. She spent two months in the hospital, where she was unable to get out of bed and could only watch daytime TV, which she despises. Myrtle died two months after the accident as a result of her injuries.

Discuss all possible tort claims in the above scenario. Be sure to address damages.

Institution **University of New Mexico School of Law**
Course **F10 Torts -Carey**

Instructor **NA**

Control Code **N/A**

Exam ID **375**

Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	**5995**	**29516**	**35710**

Answer-to-Question-_1_

exam id 375

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QUESTION 1: Don't shoot the donut

--CLAIM 1: Plaintiff Pam v. Therapist Tom for failing to warn her of Hal's intent to do harm

Mental Health professionals owe a duty to 3rd parties to protect against the conduct of others. Under the Foreseeable Victim Rule in the Tarasoff v. Regents of Univ. of California case, a mental health professional owes a duty of reasonable care to protect foreseeable victims when he knows or should have known of a patient's intent to cause serious harm against the 3rd party victim. Here, Tom owed a duty of protection to Pam. She was a foreseeable victim, because he knew of Hal's obsession with her and Hal had discussed Pam with him. Tom also knew that Hal had anger control problems and worked as a hunting instructor, therefore having access to dangerous weapons. He should have known of Hal's intent to cause serious harm, and also that Hal had the means to cause serious harm. Thus, Tom also owed a duty to Pam. Under the Identifiable Victim Rule in the Dunkle v. Food Services East case, a mental health professional owes a duty of reasonable care to protect a readily identifiable victim when he knows or should have known of a patient's intent to cause serious harm against that identifiable 3rd party victim. Here, Tom owed a duty of protection to Pam. This test is more stringent than the Tarasoff test, and the duty is still present because Hal informed Tom that Pam would be his intended target of his violent actions. Thus, Tom also owed a duty to Pam if using this test.

Breach of duty relates to whether the defendant has failed to meet the standard of care owed to

the plaintiff. The two major components of the breach of duty analysis are: were there foreseeable risks of harm? Was the conduct unreasonable in light of the foreseeable risks? Here, there are both foreseeable risks of harm to the 3rd party, Pam, and Tom's conduct was unreasonable in light of these risks. Hal was distressed to an extreme degree over Pam, he confided in the Tom regarding this distress, Tom knew he was having a hard time controlling his anger, Tom knew he was a hunting instructor and thus could presume he had access to firearms, and Hal specifically told Tom that he sometimes thought about shooting Pam. Meanwhile, Pam was oblivious to all of this. It was unreasonable for Tom to not have warned Pam about Hal's possible intent to do her harm and thus Tom breached his duty to her. Looking at Judge Learned Hand's Risk Calculus as set forth in US v. Carrol Towing, where burden is less than the probability of an injury times the severity of the likely injury, there is a breach of duty. B < PL = Breach. B is the burden or cost of adequate precaution to prevent the risk of injury. P is the probability that the injury or harm will occur. L is the severity of the injury or harm that a reasonable person would foresee. Here too, Tom breached his duty to Pam. The burden of warning Pam of Hal's intent to do harm is minimal. It would take looking her up and giving her a phone call. Meanwhile, the probability of an injury to her was high given Hal's unstable and violent tendencies, and the severity of likely injury was also high, given that it would involve shooting her, which is potentially fatal. Thus, under the Hand analysis, Tom breached his duty. Custom also plays a role in determining breach, and while there is doctor-patient confidentiality at play in the relationship between Hal and Tom, it is custom for mental health professionals to breach confidentiality in cases where there is a threat of injury to another person. Therefore, Tom did not act in accordance to the custom of mental health professionals in his situation and therefore breached his duty under that analysis as well.

In determining causation, the plaintiff has to produce sufficient evidence such that a reasonable jury could find that it was more likely than not the defendant's careless conduct was a cause-in-fact of the injuries. Did the defendant's act or omission cause the injury? Were there resulting damages? The first test of this is the but-for test. The but-for test is the traditional, predominant approach. It requires the

plaintiff prove that more likely than not the defendant's conduct was the but-for cause of the plaintiff's injury. Here, Pam would have to establish that but-for Tom's failure to warn her of Hal's intent, there would have been no injury. Causation then will be an issue for Pam. It is not known and we would need to know what she would have done after finding out Hal's intent to determine if Tom's nonfeasance of failing to warn her when he had a duty to led to her injury. Would she have purchased a gun herself, gotten a restraining order, quit her job working alone in a sketchy neighborhood in order to protect herself against Hal? If so, then Tom was a material contribution to causing Pam's injury because she was not allowed the opportunity to do those things. But if she would have not taken Tom seriously, or not taken any precautions to guard herself against Hal, then Tom would not be the cause of Pam's injury.

For the scope of liability, a defendant is liable for the general results and harms that are reasonably foreseeable risks of the defendant's conduct. The type of result or harm has to be foreseeable. The extent and manner of the result or harm do not have to be foreseeable. The main test in determining scope is a foresight test. Was there an unforeseeable plaintiff? An unforeseeable injury? Intervening forces? Here, Pam was a foreseeable plaintiff - Hal told Tom that was who he intended to shoot. Here, her injury of getting shot was foreseeable - Hal told Tom he intended to shoot her. Furthermore, there were no intervening forces in the shooting. The test for intervening forces is if the action of the intervening force is a foreseeable risk of the original negligence. It doesn't matter what the intervening force is - it can be negligent, criminal, or even a force of nature. Here, Hal's criminal act could be a superseding intervening force, and Tom would try to argue that, but this was a completely foreseeable risk of Tom's original negligence of failing to warn Pam, so his argument would fail.

Pam could get a slew of damages here, including past and future medical expenses to take care of her hand, past and future earning losses if she has to quit her job and can't work due to losing ability to use her hand and fingers, past and future pain and suffering for both the physical pain of the injury and the emotional pain of losing her hand, loss of enjoyment of life because she would be unable to do all of

the things she enjoyed doing before because she lost an ability to use her hand. Furthermore, Brad, her husband can file a derivative claim for loss of consortium. Loss of consortium is a loss of the benefits that one spouse is entitled to receive from the other, including companionship, cooperation, aid, affection, and sexual relations. Brad would be able to recover here if Pam could because he lost those things when she lost her hand. Her child might also be able to file for loss of consortium, though most jurisdictions don't allow these claims.

--Claim 2: Plaintiff Pam v. Defendant Hal for the intentional tort of battery.

Battery is a harmful or offensive contact with or touching of another person resulting from an act intended to cause the plaintiff to suffer such a contact. Such offensive or harmful contact must occur. The elements of battery are: intent, causation, harmful/offensive contact, and that it happens to a person. Some courts say the perpetrator needs to intend the contact and it doesn't matter if the perpetrator intended the harm. Most courts, however, require a dual intent to both make the contact and cause the harm. Here, a perpetrator has to intend to make contact, intend that the contact is harmful or offensive, but the perpetrator did not have to indent the specific harm that resulted. There is inferred intent allowed with battery cases when the defendant did not intend the specific injury, but intent is satisfied if the defendant knows with substantial certainty that an injury will occur.

Hal shot Pam in the hand, which was a harmful and unwanted contact. The question is whether or not he intended to do so. While he went into the donut shop with the intent to shoot her, he decided instead he did NOT want to shoot her and just intended to shoot the donut to impress her and win her back. Therefore, he didn't intend to make contact and couldn't intend that contact be harmful. However, he did intend to shoot the jelly donut. Transferring intent there would be a stretch, but possible.

If battery would be out because of intent issues, we could try a claim for assault. Assault is an intentional act by one person that creates an apprehension in another of an imminent harmful or offensive contact. An assault is the showing of violence to another without striking the other. The victim's

apprehension must be reasonable apprehension to immediate harmful or offensive contact. Hal's actions of pulling out a gun and shooting it is an intentional act that would reasonably create apprehension in Pam of an imminent harmful or offensive contact. However, Pam did not see Hal. She was filling a box with donuts, oblivious to his presence. Did she thus have apprehension of an imminent threat? It is doubtful that she did.

If assault would be out, then Pam might have a claim for Intentional Infliction of Emotional Distress (IIED). For IIED, there must be extreme/outrageous conduct, intent/recklessness, causation, and severe distress to the plaintiff. Hal must have by extreme and outrageous conduct intentionally or recklessly caused severe emotional distress to Pam. Hal's conduct in shooting his gun was extreme and outrageous conduct. It was reckless in regards to hitting Pam, and intentional in regards to shooting. It is unknown whether or not she suffered severe distress regarding the situation, but it is likely that losing most of your hand and fingers would result in severe emotional distress. Therefore, the IIED claim would be successful.

Pam could get a slew of damages here, if she is successful on any of these intentional tort claims, including past and future medical expenses to take care of her hand, past and future earning losses if she has to quit her job and can't work due to losing ability to use her hand and fingers, past and future pain and suffering for both the physical pain of the injury and the emotional pain of losing her hand, loss of enjoyment of life because she would be unable to do all of the things she enjoyed doing before because she lost an ability to use her hand. Furthermore, Brad, her husband can file a derivative claim for loss of consortium. Loss of consortium is a loss of the benefits that one spouse is entitled to receive from the other, including companionship, cooperation, aid, affection, and sexual relations. Brad would be able to recover here if Pam could because he lost those things when she lost her hand. Her child might also be able to file for loss of consortium, though most jurisdictions don't allow these claims.

Furthermore, because Hal's actions were intentional, Pam might be able to recover punitive damages. These are allowed when the defendant committed serious, wanton misconduct. Hal shooting here was serious, wanton misconduct. There is no bright line rule for punitive damages. It is taken on a

case-by-case basis regarding the level of culpability of the defendant, but here, Hal had a high level of culpability, even if just reckless because he backed out of intending to shoot her and just wanted to shoot the donut.

There's a one year statute of limitation on the battery and assuault, and 3 year statute of limitation on the IIED claim. Statute of limitations arbitrarily cut off a claim for relief after a certain time period regardless of the merit of the claim. SoL begins to run when the injury is discovered, so it would begin to run immediately after the shooting incident.

--Claim 3: Plaintiff Pam v. Defendant Donut Shop for not protecting against criminal activity.

The general duty for owners to protect against criminal activity is: if a 3rd party person has a special relationship with the victim or perpetrator, that person may have a duty to take reasonable protective action against a reasonably foreseeable criminal incident. A more narrow rule that applies in this instance is: a property owner owes a duty for reasonable precautions to protect invitees from foreseeable criminal acts of 3rd parties when the criminal act is foreseeable under a totality of the circumstances test. Totality of the circumstances test incorporates the specific harm test--an owner owes no duty unless he knew that the specific harm was occurring or was about to occur--and the prior similar incidents test--an owner may owe a duty if similar incidents had happened in the past showing that the crime in question was foreseeable. The donut shop had a duty to Pam to protect her against the criminal conduct of others. The employee/employer special relationship imposes a duty, as does the land owner/invitee special relationship. Criminal incidents were reasonable foreseeable, as there had been a string of armed robberies at the donut shop and it was located in a very bad neighborhood. Therefore, the donut shop should have taken reasonable protective actions.

The donut shop breached this duty owed to Pam. A shooting incident was reasonably foreseeable, seeing as how there were armed robberies already occurring. Furthermore, it constitutes

breach under the Hand Calculus. The burden of hiring a security guard, making sure there are two employees on duty, installing bullet proof glass behind the counter, or taking other protective measures is less than the probability of a serious injury when there were known armed robberies in face of the likely severity of the injury, which could be death, robbery, perhaps even rape. Is it custom to leave a young woman working alone at night in the shop? Even if that is the custom at donut shops, it is a bad custom against public policy and thus would be a breach.

Did the donut shop owner's failure to protect against the potential criminal acts of 3rd parties cause the injury? Was the conduct within the scope of liability? Were there resulting damages? We would need to know a few things to determine if there was adequate causation. Would extra security measures have prevented Hal from being able to shoot Pam? Probably. If there was a security guard on duty or another employee, Hal might have been deterred or Pam might have been warned. If there was just improved lighting or security cameras installed, however, that probably would not have been adequate in preventing Pam's injuries. As for scope of liability, Pam as an employer was a reasonably foreseeable victim. Furthermore, being shot was a reasonably foreseeable injury given that there had been armed robberies going on, even IF Hal's intent was not to rob the place. The manner of the harm does not have to be foreseeable, just the type of harm. Therefore, there is no liability limiting under scope here. As for damages, she could get all the damages mentioned in Claim 1.

--Claim 4: Plaintiff Hal v. Defendant Pam for Intentional Infliction of Emotional Distress

Intentional Infliction of Emotional Distress is when a person who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another. While Hal felt severe emotional distress because of Pam's actions, her conduct was neither intentional nor reckless, nor extreme nor outrageous, so she does not satisfy the necessary elements of the intentional tort of IIED. Breaking up with a boyfriend in order to reconcile with an ex, who is the father of your child, is not so reckless as to warrant treatment as intentional infliction of emotional distress.

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QUESTION 2: Sam hates balloons

--Claim 1: Plaintiff Sam v. Defendants Mel and Lyle for negligence in general duty of reasonable care when they threw the balloons off the room.

The general duty of reasonable care is: a person has a duty of reasonable care not to subject parties to foreseeable risks of harm. This is based on an objective reasonable person standard of the reasonably prudent person under the same or similar circumstances. A person with a mental disability will be held to the same standard as a reasonably prudent, sane, mentally able person is held to. Here, Mel and Lyle had a general duty of reasonable care to not inflict foreseeable risks of harm onto Sam. Despite Mel's below average IQ, he is still held to the general reasonable person standard because mental disability is not taken into account.

Mel and Lyle breached this duty by throwing the water balloons off the roof. There are foreseeable risks of harm to people walking below in throwing water balloons off a 32-story building. The conduct of throwing it, then, was unreasonable in light of these foreseeable risks. Under the Hand Calculus of breach, the burden of not throwing the balloons was completely minimal. They would simply have to have found a different Friday afternoon activity that doesn't involve negligent conduct. The probability that an injury will occur is high in comparison, since a water balloon falling 32 stories is likely to gain speed and momentum in the drop, and, thus, the severity of the injury or harm is high and a reasonable person would foresee this. Accordingly, there was breach of the duty.

Causation here is tricky. But-for the defendants throwing the balloons of the roof, Sam would not have been injured. But, which defendant caused the injuries? The court would probably use the substantial factor test since it is increasingly popular, especially with multiple parties. It meets the test if the defendant's negligent conduct was a substantial factor in the plaintiff's injuries. Throwing the water

balloon was the substantial factor in Sam's injuries. To prove causation with 2 or more defendants when each breached a duty of care, but you can't tell from the facts which defendant caused the injury, the burden is shifted to the defendant to say "wasn't me." A plaintiff doesn't have to eliminate every remote possibility if the defendant is responsible under one sort of plausible cause. Thus a reasonable inference of causation is sufficient. With multiple parties, if you can apportion damages, you apportion the damages. That, however, is impossible with our facts. Our case is an issue of alternative liability. There is one harm caused by one person, but it is impossible to determine which person caused the harm. Which balloon hit Sam? Because both were the same color, but the same manufacturer, it can't be determined with reasonable certainty which balloon hit Sam and thus which defendant caused the injuries. Both defendants had the wrongful conduct, both breached their duty of reasonable care, and that conduct and breach is what cause Sam's injury. Thus, this would be a case of joint and several liability since neither Mel nor Lyle will be able to prove "wasn't me," though I'm sure they will try. For joint and several liability, each defendant is held responsible for the entire harm instead of a proportionate share. The defendant who pays for the other's share can file for indemnity to be reimbursed by the other party so that Mel and Lyle will split the damages awarded to Sam.

There are more proximate cause issues. What injury was foreseeable? The original head injury that was directly caused by the fallen balloon, or the injuries arising from the negligent surgery? Was the malpractice of the doctor and hospital employees an intervening cause? The original head injury was a direct consequence, without any intervening cause, and thus Mel and Lyle are liable even if the result was unforeseeable. But, for scope of liability, there are exceptions to the foresight rule that are applicable in this case, particularly the medical malpractice complications exception. This states that the initial negligent tortfeaser is liable for aggravated injuries caused by subsequent medical treatment. The policy behind this is so personal injury actions don't become medical malpractice actions. Therefore, Mel and Lyle are liable for all the injuries suffered as a result of the later malpractice that will be analyzed in claim 2. If Sam were to not go after the doctor/hospital staff, then Sam could recover all from Mel and Lyle.

For personal injuries, the purpose of compensation is to "make whole" the plaintiff. Here, Sam

could try to get past and future earning losses, which would be significant since he was a successful radio announcer, past and future medical expenses, which would also be significant since he had brain damage and lost his ability to speak, past and future pain and suffering for the physical pain, mental suffering, and emotional distress, loss of enjoyment of life (only if he realized that he had lost the enjoyment of life, which he might not given the brain damage). He was not married and had no kids so there would be no loss of consortium claims. He couldn't get punitive damages because the conduct was merely negligent.

Claim 2: Plaintiff Sam v. Defendants Dr. Dave and the surgical team for medical malpractice

The standard of care for medical professionals is custom. For a general practitioner, a person who is engaged in the general practice of medicine represents that he will have and employ knowledge and skill normally possessed and used by the average physician practicing as a general practitioner. For a specialist, such as a surgeon, a physician must exercise the degree of care, skill, and proficiency exercised by reasonably careful, skillful, and prudent practitioners in the same class under the same or similar circumstances. This is a national standard. Doctors have a duty to patients to abide by these standards of care. In this case, Sam received emergency surgery and the Dr. Dave used proper and well-established medical procedures, thus not straying from the standard of care for doctors, nor straying from that for specialists like surgeons.

Under the doctrine of informed consent, there are a few standards in determining whether a doctor performed medical malpractice. The professional medical standard says that a physician is required to disclose those risks which a reasonable medical practitioner of like training would disclose under the same or similar circumstances. The lay standard says a physician's disclosure duty is measured by the patient's need for the information other than by the standards of the medical profession. The objective lay standard says that a doctor is required to disclose risks that would be material to a reasonable person in the patient's position in deciding to undergo treatment. The subjective lay standard

asks: would this particular patient have consented to the treatment if he knew the risks? Sam was unconscious, however, and so the doctor did not need consent for the surgery. But, given the risks that arose from the surgery, the subjective lay standard might apply here. Would Sam have consented if he knew that they were going to fail to remove the surgical balloon from his head, resulting in permanent brain damage? It is likely that Sam would not have consented if he was aware of that risk.

Despite supposedly following normal procedure in the surgery, Sam was injured due to medical malpractice negligence. There was breach of a duty, though it is not known who breached this duty. Thus, Sam's injuries from the surgery were the result of res ipsa loquitur. For Res Ipsa Loquitur, which means "the thing speaks for itself," the plaintiff does not have to show the culpable party/parties. The burden of proof shifts to the defendant to prove "it wasn't me." (Res ipsa loquitur allows the jury to infer negligence without knowing what caused the injury.) The apparent cause of the accident is such that the defendant would be responsible for any negligence connected with it. Under res ipsa loquitur, the accident is of a kind that ordinarily does not occur in the absence of someone's negligence. The defendant had control or right of control over the instrumentality that caused the injury. There is no contributory negligence by the plaintiff, or at least less than 50% in comparative negligence. And the defendant has greater knowledge about what caused the harm than the plaintiff does. Sam was unconscious and therefore was not possible partly liable for his injuries. They happened during surgery - so one of the doctors or staff members in the surgery did not remember to remove the balloon. In fact, NONE of them remembered to remove the balloon. They are the ones with the superior knowledge of what happened inside the surgical room. And leaving a balloon inside a patient's head is an accident of a kind that does not ordinarily occur in the absence of someone's negligence. Therefore, all of the elements of res ipsa loquitur are established here and it becomes the defendant's responsibility to prove that they were not the cause for the balloon being left in Sam's head.

Sam could seek all the damages listed in Claim 1 that arose out of the injuries at the hospital. However, the defendants will try to pin this on Mel and Lyle, and would perhaps be successful in doing so because of the medical malpractice complications exception to the foresight rule under the scope of

liability. Mel and Lyle might not have any money, however, and the hospital and doctor's insurance probably does, so Sam will probably seek compensation from the doctor and hospital to ensure an appropriate payout.

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QUESTION 3: Mabel to the rescue

--Claim 1: Plaintiff Myrtle (her estate/beneficiaries) v. Defendants Hank and Big Top Inc. circus school in setting her on fire.

It was clearly stated in the facts that Hank was not careful when liting the torches, breaching the general standard of reasonable care not to subject parties to foreseeable risks of harm. There is possibly also a special relationship duty owed to spectators given that it is a school event. Big Top Inc would be liable for Hank's breach of duty of care via vicarious liability. Vicarious liability--respondeat superior--is when one party is liable for the negligence of another by reason of some relationship between the parties, such as employer/employee, which is applicable in this case. An employer (here, Big Top Inc.) is liable for the negligent conduct of an employee (here, Hank) acting within the scope of employment. For the scope of employment, the employee can be on a detour, but not on a frolic. The injured party can sue both the employer and the employee but is entitled to only one satisfaction of the judgment and thus can't get double awards. Hank was lighting a torch for the class and was thus within the scope of his employment. ✓

There might even be strict liability for this kind of breach of duty because there are inherent risks in fire. Strict liability is liability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe. Responsibility is based on causation without regard to whether the defendant's conduct can be characterized as involving fault.

For breach, looking at the Hand analysis, the burden of carefully handing over the torch, or not running around crazily with a burning torch in his hand, would be low in comparison to the foreseeable risk of someone being injured by fire and the potential severity of that risk, like 4th degree burns and eventual death. These actions are probably also against custom.

For causation, but-for Hank's actions, Myrtle would not have been set on fire. For scope of liability, the harm of being set on fire was a reasonably foreseeable risk. However, the defendants will probably try to argue that Myrtle's hairspray was a superseding intervening cause in her being set on fire. This argument is unlikely to succeed though.

Because Myrtle died, her beneficiaries can file a claim for wrongful death and her estate can file a survival claim. Wrongful death claims are by surviving family members for the wrongful death of another. It gives the economic benefit a family would have received had the decedent lived. Wrongful death actions go to the beneficiary because it is the family who suffers when the victim dies. Therefore, Sue, her daughter, would be able to collect anything from a wrongful death action. Also, creditors cannot go after beneficiaries. Survival claims are by the decedent's estate carrying out the lawsuits the decedent would have had if the decedent would have survived. Survival claims go to the estate since the victim actually suffered the claims during their life. Creditors, however, can go after the estate for these claims. These claims have to be claims the victim could have brought themselves had they lived. Myrtle could have gotten medical expenses, earning losses in the 2 months after the accident but before she died, and pain and suffering for that time period, both physically for her burns and emotionally for being subjected to daytime TV. I'm sure the irony of watching General Hospital while in the hospital did not amuse her.

There are several defenses that can be raised in this claim. First, in a contributory negligence jurisdiction, there can be a complete bar to recovery if Myrtle was at all found to be at fault. Because she was wearing an extreme amount of hairspray, which caused her to be set on fire, her contributory negligence would bar the claim. An exception of this is the last clear chance doctrine, which states that the defendant has the last clear chance to avoid the negligent conduct, so the defendant is liable even if

the plaintiff was also contributory negligent. Because the defendant would have had the last clear chance to avoid setting Myrtle's hair on fire, this would mean that Myrtle's claim would still be able to go forward even if it was a jurisdiction using contributory negligence, if they followed the last clear chance doctrine. If this court used comparative fault as a defense instead of contributory negligence, however, her share of fault would be apportioned. There are two types of comparative fault: modified and pure. Under modified, the plaintiff's negligence must be less than or equal to the defendant's negligence in order to recover. Therefore, if Myrtle's negligence was found to be 40% and the defendant's 60%, then Myrtle would get a 60% recovery. If, however, it was the other way around, Myrtle would get nothing. Under pure, you simply compare the negligence of the plaintiff and the defendant and use those percentages. Therefore, if Myrtle's negligence was 97% of the fault and the defendant's was only 3%, Myrtle would still claim that 3%.

Another defense that can be raised is assumption of risk. While the facts don't say that spectators to the fire eating class sign waivers explicitly or orally releasing another party from an obligation of reasonable care, there is an implied assumption of risk here. Implied assumption of risk reduces recovery via comparative negligence. Here, the danger is foreseeable, but the plaintiff negligently failed to see the danger. There are 3 basic elements: actual knowledge of the risk, appreciation of the risk, and voluntary exposure to the risk. The danger of being set on fire at a fire-eating class is foreseeable, and it can be said that Myrtle negligently failed to see this danger, as evident in her choosing to wear such a copious amount of flammable hairspray that day. But did Myrtle have actual knowledge of the risk? Did she have the capacity to appreciate the risk? And did she voluntary expose herself to the risk? While she probably voluntarily exposed herself to the risk--she was sitting front row at this event--it is not clear that she knew or had appreciation for it. However, there is a different standard for sports spectators, which this very well might be. Under this primary assumption of risk, a party enters into a relationship with another knowing and expecting that the other will not offer protection against certain risks arising out of the relationship. Like a baseball spectator getting hit in the head with a ball, perhaps a fire-eating spectator should accept the responsibility if set on fire.

--Claim 2: Plaintiff Mabel v. Defendants Hank and Big Top Inc. circus school for creating the harm to Myrtle that resulted in Mabel's injuries

The defendants Hank and Big Top Inc (again, via employer vicarious liability) had a general duty for reasonable care for the spectators of this event. They breached this duty when their negligence created the inflamed scene of both the ground and Myrtle on fire.

Because of this breach, Mabel tried to help Myrtle by running for the fire hose and slipped and fell, causing serious injury. The defendants will try to argue that Mabel tripping and falling was a superseding intervening cause to her injuries and they are thus not liable. Furthermore, under the scope of liability, a plaintiff and an injury has to be foreseeable. While Mabel as a spectator might be foreseeable, her injury of breaking many bones in her arms and legs is not a foreseeable injury to a fire-eating show.

There are, however, two exceptions to the foresight rule under scope of liability that are applicable here. First, the eggshell skull rule, which states that you take the plaintiff as you found him. What that means is that the negligent actor (Hank and Big Top Inc) is subject to liability for the harm of another (Mabel) although physical conditions not known make the injury greater than that which a reasonable person should have foreseen from the actor's conduct. Mabel was an eggshell plaintiff because she was a grandmother with especially brittle bones as the result of her age and health condition. This is what caused her to break so many bones in her arms and legs. Because of the eggshell skull rule, however, the defendants are still liable for her damages.

The other exception is the rescuer rule, which states that when a rescuer is injured in attempting to help a person who has negligently put themselves in danger, the rescued party is liable for any injuries sustained to the rescuer. This is based on the maxim that "danger invites rescue." This is influenced by policy because the courts don't want to discourage people from rescuing others. In the instant case,

Mabel was attempting to rescue Myrtle when she suffered her injuries and thus would fall under the

Mabel was attempting to rescue Myrtle when she suffered her injuries and thus would fall under the rescuer rule. However, the act of the rescuer may be considered unreasonable or reckless in some jurisdictions, in which case a claim might be barred for contributory negligence or mitigated for comparative fault. If the jurisdiction here allowed that, this might be a problem for Mabel. Given her condition, it was probably reckless to attempt to save Myrtle.

Defenses for this claim would be that Mabel voluntarily assumed the risk when she decided to help rescue Mabel and also that her behavior was comparatively or contributory negligent.

--Claim 3: Plaintiff Myrtle (estate/ben) v. Defendant Mabel for assuming duty of care and failing to rescue her.

would be omission - but she essentially said "I got this" and tried to help, therefore rendering herself liable.

Myrtle's estate would probably prefer to go after Hank and Big Top Inc, but it is still possible for them to go after Mabel for damages.