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Course / Session **F19 Torts - Carey**
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Count(s)	Word(s)	Char(s)	Char(s) (WS)
Section 1	4117	20234	24438
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Answer-to-Question-_1_

**Claim #1: Kim v Ed - negligence for waxing the floors with
bowling alley wax**

Duty:

One has a duty to foreseeable plaintiffs to exercise reasonable care with regard to foreseeable risks of harm arising from one's conduct. Since Ed was a minor, the standard of care is what a reasonable child of like age, intelligence, experience, and maturity would have done under the same or similar circumstances.

In this case, Ed owes a duty to Kim. Ed is responsible for maintaining the interior of the bowling alley as his job and thus he owes a duty to patrons of the bowling alley to keep the alley in reasonably safe working order. Ed is a 16 year old high school boy of presumably average intelligence. He has experience working at the bowling alley and therefore should use a reasonable standard of care that a high school boy would use while working.

Evidence of the defendant's compliance or noncompliance with custom and usage, while not conclusive, can be used to show the reasonableness of the defense's conduct under the circumstances.



In this case, Ed's duty includes using the customary procedures that are used to clean bowling alleys, avoiding any known hazards of bowling alley cleaning in the industry.

Breach:

Unreasonable conduct in light of foreseeable risks of harm, measured relative to the child standard of care.

In this case, Ed likely breached his duty. Ed knew that he was supposed to use the regular floor wax, instead of the bowling alley wax. It was unreasonable to use the bowling alley wax, since it would have only taken him a few minutes to get the correct wax. He knew that there was a foreseeable risk of harm that arises out of using the bowling alley wax, namely patrons slipping on the floor. Therefore, Ed's use of the bowling alley wax unreasonable conduct in light of foreseeable risks of harm.

Hand rule: The defendant breaches if $B < P * L$. That is, liability depends on whether the burden of taking adequate precaution is less than the product of the probability of injury times the gravity of the injury.

Ed still breaches when you apply the Hand Calculus. The burden of retrieving the correct wax was low - it would have only taken



him two minutes. He was simply being a stupid and unreasonable high school boy who prioritized flirting with Denise over executing his job in a safe manner. The probability of injury is clearly high, given how slippery bowling alley wax is and that many patrons could slip on the wax. Additionally, the gravity of injury is high, since people could break bones on the slippery wax. Children and old people both especially like bowling, thus increasing the potential gravity of injuries that would ensue. Additional injuries are likely to occur due to the known notorious toxicity of the wax.

Custom breach rule: The plaintiff may introduce evidence of customary practice to show the defendant's deviation from custom as evidence of breach.

In this case, bowling alley wax is notoriously toxic and it is customary at bowling alleys to only use the wax when the bowling alley is closed and there is excellent ventilation. Therefore, Ed deviated from custom by using this wax to clean the regular floors during business hours where patrons would be nearby.

Additionally, it is not customary to use bowling wax on floors since it is insanely slippery.

Causation:



The plaintiff must establish but for the defendant's wrongful conduct, the plaintiff would not have been injured.

The plaintiff must establish that the defendant's wrongful conduct was a substantial factor in contributing to the plaintiff's injuries.

A reasonable inference of causation based on facts and conditions is sufficient for showing causation so long as the inference is more probable than another explanation.

In this case, Kim was injured due to an allergic reaction to the bowling alley wax. Kim usually bowls in a league, so we can assume that Kim's allergy is not aggravated by the usual amount of bowling wax on the lanes. Thus, it is reasonable to infer that the allergy was activated by the excessive amount of bowling wax around her due to Ed's use of the wax on the floors.

Therefore, but for Ed using the bowling wax on the floors during business hours, Kim would not have passed out while bowling and injured her foot. Hence, Ed's use of the bowling alley wax was a substantial factor leading to Kim's injury.

Scope of liability:



Scope of liability limits liability when the connection between the defendant's wrongful conduct and the plaintiff's injuries is too remote, attenuated, or surprising to make it fair to impose liability on the defendant.

The general type of harm must be foreseeable. The manner of harm and extent of harm do not have to be foreseeable.

In this case, it is foreseeable that a bowling alley patron would suffer cognitive impairment after inhaling a notoriously toxic chemical. One could foresee things like faintness, lightheadedness, and even passing out. Since it is a bowling alley, one could also foresee physical injuries associated with cognitive impairment while throwing around bowling balls. It is thus not surprising, attenuated, or remote that Kim would pass out and drop a ball on her foot after inhaling noxious chemicals that were spread on the floor near her by Ed.

Foreseeability rule: Typically, the plaintiff and consequences must both be foreseeable. However, eggshell skull provides an exception to this rule.

Eggshell skull: A tortfeasor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the tortfeasor makes the injury greater than that which the tortfeasor as a reasonable



person should have foreseen as a probable result of his conduct.

In this case, Kim had a severe allergy to an ingredient in bowling alley wax. Therefore, her reaction to the wax was more severe than those around her, leading her to pass out and drop the bowling ball on her foot. It may not have been foreseeable that Kim would have such a severe reaction. Nevertheless, Ed must take the plaintiff as he finds her and is liable for injuries that resulted due to her susceptibility to the chemicals based on her allergy.

Damages:

Kim can recover three types of compensatory damages:

1. Past and future medical expenses:

Kim's right foot was shattered by the bowling ball. She had to have surgery to repair her foot and was in a boot for six weeks. Kim can recover the costs of the ambulance ride to the hospital, surgery and related costs, doctor's visits, and future medical expenses that arise out of a shattered foot. Her medical expenses must be reasonable and necessary. Her future medical expenses should be discounted to present value and adjusted for inflation in medical costs.

2. Past and future lost wages:



Kim is a waitress at a diner and had to miss work for four weeks because of the injury. She can recover these lost wages. She likely cannot recover future lost wages, since we have no evidence that these damages would occur and damages must be based on substantial evidence.

3. Pain and suffering:

Kim can receive a lump sum for her past and future pain and suffering. The pain includes the physical pain of the injury, surgery, and recovery. The suffering includes the mental anguish associated with her injury.

In some jurisdictions, she can also recover for loss of enjoyment of life, which is sometimes included in pain and suffering and sometimes separate. For instance, if the injury impacts her future ability to bowl or use her foot, she could possibly recover for this.

Claim #2: Kim v Holiday Bowl, vicarious liability

If an employee commits negligence within the scope of the employment, then the employer is liable for the negligence. The scope can include a detour but not a frolic.



In this case, Ed was clearly acting within the scope of his employment when waxing the floors, because it was his job to clean and maintain the interior of the bowling alley. So, Holiday Bowl will be jointly and severally liable.

The employer is jointly and severally liable for the damages caused by its employee. The employer can sue the employee on his indemnity to force the employee to reimburse the employer for damages.

In this case, if Holiday Bowl has to pay Kim for Ed's negligence, then they can sue Ed to recover the damages that they paid. However, recovering damages from a 16 year old kid seems like a bit of a pipe dream, and this is why we have vicarious liability - to exploit employer's insurance policies when employees cannot pay.

Claim #3: Hal v Rupert, Holiday Bowl - artificial conditions on land

The bowling wax was left on the floor overnight. Hal fell on the wax at least a day after Ed waxed the floor. At this point, the bowling wax is an artificial condition on land (rather than an activity or instrumentality).



This claim will likely succeed against both Rupert and Holiday Bowl, since Rupert owns the property and Holiday Bowl is an occupier on the land. For simplicity, I will simply refer to "the defendants" throughout the claim.

Duty:

Status trichotomy: First, we must assess Hal's status. A invitee enters another's property with the owner's knowledge and for mutual benefit of both. As a test, we can ask: did the owner invite the plaintiff to enter? did both parties have present business relations that would make the plaintiff's presence beneficial to both? and was there a potential pecuniary profit to the owner. A licensee enters another's property with the owner's consent and for his own convenience or for business with another. A trespasser enters another's property without any lawful authority, permission, or invitation.

In this case, Hal is clearly an invitee. He has gone to the bowling alley with his wife to bowl and to eat lunch. As a public bowling establishment, the defendants implicitly invited Hal to enter. The defendant's had a potential pecuniary profit by making money off the bowling and food, and Hal's presence was a benefit to both - defendant's get money, and Hal was supposed to get fun.



The duty owed to an invitee is the duty to use reasonable care to protect the invitee from conditions that create unreasonable risk of harm of which the owner/occupier knows or by exercise of reasonable care should have known about.

In this case, the defendants owe a duty of reasonable care to the bowling alley patrons to keep the premises safe from hazards that could foreseeably harm the patrons. Keeping the floors in safe condition would of course be included in this duty.

Landowner reform duty: Many courts have eliminated the distinction between invitees and licensees. The duty is simply a general duty of reasonable care.

In this case, since Hal is an invitee, the duty under the reform rule is the same as the duty under the traditional status trichotomy.

Breach:

Failure to use reasonable care to protect the invitee from conditions that create unreasonable risk of harm of which the owner/occupier knows or by exercise of reasonable care should have known about.

In this case, the defendant's breached their duty. The bowling



wax on the floor was an artificial condition on land that created an unreasonable risk of harm. Rupert should have known about the bowling alley wax on the floor. Several employees of the bowling alley had tried to alert Rupert to the hazard by leaving notes on his desk, but Rupert didn't read the notes. It would have been reasonable to read the notes. Moreover, Holiday Bowl as a business did know about the slippery floors, given that "several employees" left notes. These employees could have exercised reasonable care to clean up the wax or put cones around the slippery part of the floor to warn patrons. But Rupert didn't read his notes and his employees didn't clean up the known hazard. Further, the employees of the bowling alley and Rupert knew that the wax is super slippery and that patrons could fall on this wax. Hence, there was a foreseeable unreasonable risk of harm and neither Rupert or the Holiday Bowl employees exercised reasonable care by cleaning up or at least warning patrons against the hazard.

Causation:

The plaintiff must establish but for the defendant's wrongful conduct, the plaintiff would not have been injured.

The plaintiff must establish that the defendant's wrongful



conduct was a substantial factor in contributing to the plaintiff's injuries.

A reasonable inference of causation based on facts and conditions is sufficient for showing causation so long as the inference is more probable than another explanation. In fact, using Cardozo's rule, causality can be inferred and the burden of proof is shifted to the defendant to causation when a negligent act is wrongful because the act increases the chance that a particular type of accident would occur and an accident of that type did occur.

In this case, Hal slipped on the floor near where Ed was waxing the floor with bowling alley wax. Bowling wax is very very slippery and increases the chance that someone will fall on the floor. Hal fell on the floor. Therefore, while we cannot conclusively prove that the wax caused Hal to fall, a reasonable inference of causation based on a preponderance of the evidence can be made. The facts and conditions here were such that the floor was way slipperier than usual due to the bowling wax on the floor and Hal slipped on the floor.

Hence, but for the defendant's failure to warn Hal or clean up the bowling alley wax, we can infer that Hal would not have fallen. Also, the failure to clean up or warn about the wax was a substantial factor in Hal's fall.



When two or more independent tortfeasors cause a single indivisible harm to the plaintiff, each tortfeasor is jointly and severally liable for all of the plaintiff's injuries when (1) the injuries are indivisible and (2) the liability cannot be apportioned with reasonable certainty.

Here, both Rupert as the owner and Holiday Bowl as the occupier of land should be jointly and severally liable for Hal's injuries. The employees of Holiday Bowl knew that patrons had been slipping and sliding on the wax, but they did not clean up the wax. Rupert as the owner did not read the notes on his desk. Hence, both the Holiday Bowl employees and Rupert caused Hal's injuries and thus Holiday Bowl and Rupert will be jointly and severally liable.

Scope of liability:

Scope of liability limits liability when the connection between the defendant's wrongful conduct and the plaintiff's injuries is too remote, attenuated, or surprising to make it fair to impose liability on the defendant.

The general type of harm must be foreseeable. The manner of harm and extent of harm do not have to be foreseeable.



There are no issues with scope of liability here. Hal was walking around the bowling alley looking for a bowling ball and fell on the slippery floor. The type of harm one would expect from a slippery floor is a fall on the floor. All sorts of physical injuries, including head injuries, are possible from falls. It is in no way surprising, remote, or attenuated that Hal fell on the floor and suffered a nasty head injury.

Damages:

Both Holiday Bowl and Rupert should be jointly and severally liable for the damages here.

Hal can recover three types of compensatory damages.

1. Past and future medical expenses: Hal was in a coma for six weeks and suffered traumatic brain injuries and became a paraplegic. He will have loads of past and future medical expenses. He can recover for the cost of his hospitalization and treatment for the brain injuries. He can recover future costs associated with his injuries, such as doctor's appointments, therapy, etc.. Future medical expenses must be proved on a preponderance of the evidence and must be reasonable and necessary. Further, they are discounted to present value (using



a rate of return based on an unsophisticated investor in a conservative investment) and then adjusted for inflation in medical costs. Written off or otherwise paid for expenses (e.g. by insurance) are still included in Hal's damages.

2. Past and future lost wages: Hal was previously a plastic surgeon but can no longer perform his job. Therefore, he can recover past and future wages from his inability to work. He will likely recover a lot of damages, since plastic surgeons make a very good living. His future wages must be discounted to present value and adjusted for inflation.

3. Pain and suffering: Hal can recover a lump sum for pain and suffering. Pain is physical pain and suffering is mental anguish. Hal can only recover for pain and suffering during the time when he was aware of his injuries. Therefore, he cannot recover for pain and suffering during the time that he was in a coma. However, he can recover for pain and suffering that occurs after the coma, including physical pain associated with his injuries and the subsequent mental distress that arises from his brain injury and paraplegia.

Further, in jurisdictions that allow loss of enjoyment of life damages, Hal will recover for these as well. Some jurisdictions include these in pain and suffering and some keep them separate. Some jurisdictions require awareness to recover. Regardless, Hal



will recover for the loss of his career and loss of other life activities that he enjoyed (e.g. he can probably no longer bowl).

One might also be able to argue here that their actions were reckless, rather than negligent. In this case, Hal could also get punitive damages. Reckless conduct typically is an actor's disregard of a known and substantial risk.

In this case, the Holiday Bowl employees knew about the wax and everyone knows how slippery bowling alley wax is. Further, Kim had just been injured the day before, so you would think they would be really concerned about the wax incident. Presumably they figured out Kim was near the bowling alley wax, as they stuff has to smell pretty bad. Failing to clean up this wax therefore seems reckless, not negligent.

To award punitive damages, the Gore guideposts are used. They consider the degree of reprehensibility, harm incurred, and civil penalties.

In this case, the conduct was somewhat reprehensible. Physical harm was the likely result, and the conduct disregarded the safety and health of others. On the other hand, the target was not financially vulnerable, there were not repeated actions, and there was no intentional malice. The harm was pretty great - Hal was permanently physically and cognitively injured. In general,



the ratio of compensatory to punitive damages should not exceed 1:9. There are no relevant civil penalties to compare against. It is up to the jury to use common sense to decide punitive damages here.

Claim #4 & 5: Wanda v Rupert, Holiday Bowl

- Loss of spousal consortium:

Wanda has a derivative loss of consortium claim from Hal's negligence claim.

A claimant must be married to the injured party to recover. Wanda and Hal were married, so Wanda has a viable claim.

Loss of consortium compensates for damage to a relationship including loss of society and companionship. Two types of damages are recoverable: pecuniary damages (e.g. services by Hal that can no longer be provided) and non-pecuniary damages (e.g. lost sexual relations, emotional support, shared experiences).

In this case, Wanda and Hal seemed to have a good relationship - they liked to bowl together. Wanda cared for him after his accident. We would need more facts about the quality of their relationship to accurately predict their damages. For instance,



we would want to know what services Hal performed for the household and the market value of replacing these services. We would also want details about the quality and intimacy of Wanda and Hal's relationship.

- Negligent infliction of emotional distress as a bystander

Rule: To recover, a family member must suffer serious injury or death and the claimant must perceive the injury.

Here, Wanda is Hal's wife and Hal was seriously injured.

Therefore, Wanda may have a claim, depending on the type of jurisdiction, as detailed below.

There are three different types of NIED bystander jurisdictions.

1. Impact: Plaintiff suffers severe emotional distress from perceiving the death or serious injury of an immediate family member and is somehow touched by the defendant.

In this case, Wanda could not recover in an impact jurisdiction. She was inputting their names in the bowling machine at the time of the accident, and thus was in no way "touched" by the negligently placed bowling alley wax on the floor.



2. Zone of danger: Allows one who is threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress resulting from viewing (and possibly perceiving) the death or serious injury of his or her immediate family.

In this case, Wanda likely could not recover. She was never threatened with bodily injury from the slippery wax. She didn't know that it was there until she heard hal fall. While she did perceive Hal's fall (via the thunk), she still can't recover here because she never experienced the threat.

3. Foreseeability: The bystander can recover when:

- the bystander is closely related to the injury victim
- emotional injury of the bystander is caused by the contemporaneous sensory perception of the event or conduct that causes the injury OR by arriving on the scene soon thereafter and before substantial change has occurred in the victim's condition or location.
- the victim's injury must be substantial, resulting in his or her death or serious physical injury
- bystander's emotional injury must be serious, beyond that which would be anticipated in a disinterested witness and which is not the result of an abnormal response.

Alas, Wanda can possibly recover in this jurisdiction. Hal was



her spouse, so she was closely related to the victim. She had a contemporaneous sensory perception of Hal's injury - she heard him scream and then hear a presumably awful "thunk" when his head hit the floor. She also arrived at the scene right after the fall, when she ran to him. There was no change in Hal's condition at this point - he was passed out in a pool of blood. Hal's injury was clearly substantial - he was in a coma for 6 weeks and sustained permanent brain and bodily injuries.

What we do not know is the extent of Wanda's emotional injuries. If she has experienced emotional distress from the accident, she can recover. In many jurisdictions, she must have a physical manifestation of emotional distress. Many courts also want to see evidence of treatment for the emotional distress. We lack the facts here to assess the extent of her distress, but, nevertheless, one can imagine that the "thunk" coupled with her husband's permanent severe injuries has caused Wanda some severe emotional distress for which she can recover.

Damages:

We don't know the extent of Wanda's emotional injuries, so it is difficult to predict her damages. Theoretically, she can recover all three types of compensatory damages (past and future medical expenses, past and future lost wages, and pain and suffering) that resulted from her emotional distress. Holiday Bowl and



Ruper will again be jointly and severally liable.

Claim #6: Hal and Ed v. Holiday Bowl - negligent hiring and employing of Ed

We don't have enough facts to fully flesh out this claim. However, Ed seems like quite a goofball of a high school boy. If he had previously acted unreasonable in light of foreseeable risks of harm during the course of his work, Holiday Bowl would have a duty to exercise reasonable care by firing him or trying to correct his behavior. They would breach their duty if they did not take these actions.

Claim #7: Kim v Holiday Bowl - strict liability for storage of hazardous materials

Kim might be able to try a strict liability claim against Holiday Bowl for failing to properly store hazardous materials. The bowling alley wax is notoriously toxic. Poisoning any patron with this abnormally dangerous substance might merit a strict liability claim. For the strict liability claim, no culpability is required. The fact that Kim was injured by a hazardous material controlled by Holiday Bowl should be sufficient. Holiday Bowls dissemination of the hazardous material was a but for cause and substantial factor in Kim's injuries. Thus, she



may have a good claim.

The damages would be the same as in Kim's claim against Ed for negligence.