Law 201
Model Answer #1
Schwartz
Fall 2009

Question 1 (part 1)

Joe's Claims

Joe v. Acme World Film Studio

Negligence

Joe can likely bring a claim against Acme World Film Studio for negligent operation of their ride "Brad Bull." To make prevail on a claim for negligence, Joe has to show that Acme World Film Studio owed him a duty of care, that they breached that duty of care, that the breach was the cause of his injury, and that he suffered damages as a result of the injury.

Duty

Everyone has a duty to act in a way so as to not cause harm to others. Furthermore, in pre-Rowland tort law, land owners and occupiers owed the highest duty of care to *licensees*: persons invited to a premises for commercial purposes. Although Rowland v. Christian eliminated the old distinctions of premises liability, this distinction is still useful in understand the duty that AWFS owed to J. Because AWFS invited J to Randy Rodeo World for commercial purpose they owe him a duty to act reasonably in ensuring his safety.

Breach

Breach is established when a party that owes a duty to another party fails to meet the standard of care prescribed by that duty. There are three ways to show breach: the reasonable person standard, res ipsa loquitur and negligence per se. Res ipsa loquitur holds that breach is established when the harm that occurs is: 1) harm that doesn't usually occur absent someone's negligence 2) harm occurs by an instrumentality entirely within the defendant's control and 3) there is no voluntary action on the party of the plaintiff in bringing about that harm. Here it is likely that J will not prevail in showing breach,

because it is unclear whether the bull's movement became more challenging because of some malfunction or whether it was an inherent aspect of the ride for the bull to become violent.

Under the reasonable person standard, it is important to ask ourselves: did Acme act in way in which we want owners of amusement parks to act by providing a dangerous ride like "Brad Bull" to patrons? One way of determining whether Acme acted reasonably is to apply the Hand Formula (United States v. Carroll Towing). Under the Hand Formula, Acme is negligent if the burden of taking some precaution is less than the probability that a harm will occur multiplied by the magnitude of the loss (B<PL). Here the burden of taking a precaution, such as providing for a softer carpet as a landing surface for patrons to fall on is relatively low. The probability that patrons will fall off the "Brad Bull" seems high because while Joe and his friends are watching, 8 of the 10 patrons who ride the ride fall down. Finally, the magnitude/severity of loss to be suffered in the absence of a precaution seems great in that people can sustain severe injuries (at least one other patron who fell off the ride was limping). Under the Hand Formula, breach is established.

Causation

To show that Acme's breach was the cause of his injuries J must show that the dangerously operated ride was 1) the factual cause of his injuries 2) the proximate cause of his injuries and 3) that there were no intervening causes.

Here, factual cause is easily established, because J would not have sustained injuries absent the dangerously operated ride (Grimstad).

There are two ways to show proximate cause 1) the direct cause approach and 2) the foreseeability approach. Under the direct cause approach, Acme's ride was the direct cause of J's injury if the injury

resulted from the negligent operation of the ride (Polemis). Under the direct cause approach, A would be the proximate cause of J's injuries. Under the foreseeability approach, we must ask ourselves 1) was J a foreseeable plaintiff? 2) was the harm within the risk? (Wagon Mound I). Under this approach, a rider is a forseeable plaintiff of a negligently operated ride. Furthermore, the harm of falling and being injured is within the risk of a negligently operated dangerous ride.

Causation Problem/Intervening Act

Acme may also raise the defense that Carter's Monroe's taunts were the proximate cause of J's injury, because Monroe encouraged J to stay on the mechanical bull. However, here they are unlikely to prevail because we have read at least one other case where a man taunts man to jump into a hole full of water. As a result, the man who jumps in drowns. These kinds of taunts were not held actionable. Furthermore viewed as an "intervening act," the taunts of other patrons are a foreseeable aspect of the amusement park experience and therefore will likely not break the chain of causation.

Damages

In this case the damages are Joe's severe injury and his hospital bills.

<u>Defenses</u>

Assumption of Risk

Acme will likely raise the defense of assumption of risk. To prevail on this defense A must show that 1) J had knowledge of the risk inherent to the ride 2) J was able to appreciate the risk and 3) that J consented to proceed in the face of that risk (Murphy v. Steeplechase Amusement Co.). Here J's knowledge is evident, because he has ridden on mechanical bulls before. We are told that j "has ridden more than a few mechanical bulls in his day." Furthermore, it is also likely that J *appreciated* the risk

involved with the ride because he and his friends spent a few minutes observing the ride and noted the number of patrons who were thrown from the ride. Finally, J and his friends also observed at least one other patron who is visibly injured by partaking of the ride. Consent can be established by the fact that J voluntarily chose to ride the ride in the absence of any pressure. Furthermore, J did not have to ride the ride to proceed to other amusements in the park (Murphy v. Steeplechase Amusement Co.).

Contributory Negligence

Acme may also raise the defense, if it is permissible (it has been eliminated in many jurisdictions) that J was contributorily negligent in the way in which he chose to land when he was thrown from the mechanical bull. The elements of contributory negligence mirror those of negligence, and A must show duty, breach, causation and damages (Gyerman).

Duty

Everyone has a duty to act in a way so as to protect themselves from harm. Furthermore, everyone has a duty to act so as to not injure others.

Breach

Breach is best established under the reasonable person standard. Did J act reasonably in choosing to wrench his body so as to avoid harming the child? It is arguable that J was acting in an emergency situation, therefore he is held to the standard of care a reasonable person might exercise in an emergency situation (Lyons v. Midnight Suns Transportation). Arguably, J was unable to perceive whether he would hit the child or not, and sincerely believed that he would injure the child. The law has a high regard for human life and although it might be argued that J did not act in the best way possible

to protect himself, he did act in a way so as to not cause harm to others. (Beems v. Chicago, Rock Island, & Peoria Railroad).

Causation

A must show that J's actions are both the factual and proximate cause of his injury. Here factual cause is not easily established because J would not have fallen but-for the dangerously operated mechanical bull. A will likely not prevail on this defense.

Damages

The damages sustained would be the medical expenses relating to J's injuries. However A is unlikely to prevail upon this defense.

<u>Ellen's Claims</u>

Ellen v. Acme World Film Studio

Negligence

Ellen can likely bring a claim against AWFS for negligence in the design of a dangerous product/in failing to warn customers of the extreme risk associated with a dangerous product.

To prevail on a claim for negligence, E must show duty, breach, causation and damages (see above).

Duty

Everyone has a duty to act in a way so as to not injure others. Arguably, in this case AWFS stands in the position of a kind of land owner who has knowledge of a concealed trap, the Brad Bull Home Edition (Rowland v. Christian). A landowner who has knowledge of a concealed trap has a duty to warn if he/she is aware that a person will come into contact with the trap (Rowland v. Christian). Although we

haven't studied products liability, this analogy seems to lend itself to AWFS's position. AWFS had a duty to supply its customers with fair warning of the dangerousness of their product.

Breach

Breach can be established by the reasonable person standard, res ipsa loquitur, and negligence per se. In this instance, breach can be established under the reasonable person standard. Did AWFS act reasonable in not including some form of warning with the ride? Under the Hand Formula, breach is established by showing that B<PL (United States v. Carroll Towing). Here, the burden was the burden of providing some kind of warning on the package. The probability of injury was high given the fact that this is Brad the Bull the "Dangerous Edition." Furthermore the loss to be suffered was high, because an inherent aspect of the device is that people will be riding it and therefore injury to human life is likely.

Causation

E must established causation by showing that the dangerous ride was 1) the factual cause of her injury 2) the proximate cause of her injury and 3) by showing that there was no intervening cause that resulted in her injury.

Here, factual cause is easily established. E can show that her harm would not have occurred absent the dangerous ride (Grimstad).

To show proximate cause, E can use either 1) the direct cause approach or 2) the foreseeability approach. The foreseeability approach, which is the more widely used approach to proximate cause, asks 1) was E a foreseeable plaintiff 2) was the harm within the risk? (Wagon Mound I). Here it is foreseeable that person who takes the mechanical bull home will try to ride it, therefore E is a foreseeable plaintiff. The harm of falling is certainly within the risk of a dangerous mechanical bull.

The final question then, is whether there were any intervening causes? In this cause one might argue that Ellen's own conduct was an intervening cause that created *at least part* of her injuries: Ellen "rolls over after the initial injury and strikes the narrow table." The result of this action is that the 78's and Victrola smash into E and she is hurt more. The question then becomes whether E's actions broke the chain of causation that began with the negligently labeled/manufactured mechanical bull ride? In this case, however, it seems that the risk created by the mechanical bull was still "live" (Marshall v. Nugent). E's actions, in rolling to move and get herself up, were a foreseeable aspect of the original negligence (Marshall v. Nugent) and therefore do not break the chain of causation.

Damages

In this case the damages are E's dislocated shoulder and her serious head injuries. Medical expenses relating to these injures might be included in the damages.

Defenses

Assumption of Risk

In this case, Acme might raise the defense of assumption of risk. To prevail on a defense of assumption of risk, A must show 1) that E had knowledge of the risk 2) that E appreciated the risk 3) and that E consented to the risk (Murphy v. Steeplechase Amusement Co.) Here is unlikely that A will prevail on a defense of assumption of risk. We might argue that E had knowledge of the risk inherent to the ride, because she stood with her friends at the amusement park and witnessed several people being thrown from "Brad Bull." Still, however, arguably there are special risks associated with Brad Bull "Dangerous Edition" that she could not have understood. Furthermore, one might argue, as Epstein posits, that when two version of a ride are available, a person who chooses the more dangerous ride has assumed

the risk of that ride given the safer option (Mission Space). Here, however, it is unclear whether E was aware that there were two versions of the ride or whether she actually *chose* the more dangerous version. It seems as if, in this case, her friends made that choice for her.

Susan's Claims (On Isaac's behalf)

Susan v. Thomas Probst

Negligence

S might bring a claim against TP on I's behalf for negligence in failing to warn her of the dangers associated with the "Beginner's Edition" of the Brad Bull Ride.

To prevail on a claim for negligence, S will have to show duty, breach, causation, damages (see above for fuller explanation of these elements).

Duty

Duty is a legal relationship that establishes a standard of care that one must meet. Under the doctrine of *respondent superior*, an employer has a duty to ensure the responsibility of its employees in the course of business. Here, the duty that TP owes to S seems to extend to I because she is legally responsible for him.

Breach

Breach can be established by showing that IP acts *unreasonably* in supplying a dangerous ride to S without, as it seems from the fact pattern, any further warning attached. It is important to think of reasonable conduct as conduct we want people in society to engage in. Do we want employers to supply their employees, who are parents of young children, with dangerous instrumentalities in the course of their work? Here breach is perhaps best demonstrated through the "calculus of risk": the Hand

Formula. Under the Hand Formula, a party is negligent if B<PL (see above) (United States v. Carroll Towing). Here the burden on TP was the burden to provide a warning to S, something as simple as saying "please be careful not to let anyone else ride the ride." The probability of injury was high, because, although the Brad Bull that S had was the "Beginner's Edition," TP was likely aware that S had a young son. It seems likely that a child could be injured even from a beginner's edition of a mechanical bull. Loss in this case would be great: injuries sustained by a young child. Under the Hand Formula, therefore, breach is established.

Causation

To prevail on a defense of negligence, S must further show that 1) the mechanical bull was the factual cause of I's injuries 2) that the mechanical bull was the proximate cause of I's injuries and that 3) there were no intervening causes.

Here factual cause is easily established: I would not have suffered injury but-for the fact that PT supplied S with a dangerous ride.

To establish proximate cause under the foreseeability approach, S must establish that 1) I was a foreseeable plaintiff and 2) that the harm was within the risk (Wagon Mount I). Although it is not clear from the fact pattern, we will assume that PT had knowledge that S had a young son at home as most employers know something of their employee's family life. Furthermore a rider of a mechanical bull is a foreseeable plaintiff. Finally, the harm of injuries sustained by falling is within the risk of riding a ride.

Here, there are no intervening causes.

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Damages

The damages sustained are I's broken elbow and the medical expenses associated with his injury.

Defenses

Contributory Negligence

TP might raise the defense of contributory negligence against I. The elements of contributory negligence mirror those of negligence (Gyerman) and TP must show duty, breach, causation and damages.

Duty

Here I had a duty to act in a way to ensure his own safety.

Breach

Breach can be established in at least three ways, but here the reasonable person standard is perhaps most applicable because I is a child. Under this standard, we compare I's conduct to that of a child of the same age, intelligence and experience (another 6 year old) (Daniels v. Evans). Under this standard, we must consider whether it was reasonable for I to take on the risk of riding the "Beginner's Edition" of Brad Bull in the absence of adult supervision. It seems from the descriptions of Brad Bull, that this kind of mechanical bull would seem like a simple toy to a child: much like a mechanical horse. Although E and her friends do that that Brad Bull "looks creepy" it seems unlikely that a child of 6, the standard to which I is held, would be able to perceive of the dangers of a mechanical device based on the menacing look of the bull. Therefore, breach is not easily established here.

Causation

To prevail on this defense of contributory negligence, PT will also have to show that I was the factual and proximate cause of his own injuries (see above). Here it seems that causation would be easily established because I chose to ride the ride voluntarily. However, because I acted reasonably with respect to standard of care for a child, it seems unlikely that the defense of contributory negligence would be successful.

Damages

The damages are the injuries I sustained and the medical expenses associated with those injuries.

Assumption of Risk

To prevail on a claim for assumption of risk, PT would have to show that I 1) had knowledge of the risk 2) appreciated the risk and 3) consented to the risk (Murphy v. Steeplechase Amusement Co.) Here TP is also unlikely to prevail because it is unlikely that a child could have knowledge of a risk or appreciate the kind of risk associated with a mechanical bull.

(Part 2) *Cases We've Discussed and Their Relevance to This Fact Pattern*

<u>Murphy v. Steeplechase Amusement Co.</u>

The fact pattern above is very similar to the case *Murphy v. Steeplechase Amusement Co*. at least with respect to plaintiff Joe. In *Murphy*, the plaintiff was a patron at the defendant's amusement park. There the patron and his girlfriend spent a few minutes watching the ride "The Flopper" in operation. After watching the ride for some time, they decide to ride "The Flopper." "The Flopper" consisted of a mechanical belt that moved fairly rapidly on an incline (see Torts Stories). In that case, the plaintiff contended that he felt a sharp "jerk" when he stood on the moving belt and fell over as a

result. The plaintiff Murphy sustained injuries as a result of his fall. The defendant Steeplechase prevailed on a defense of *assumption of risk* because it came to light at trial that while watching the ride, plaintiff and his girlfriend observed several people falling over. Cardozo posited that the harm of falling was within the risk of the ride. This case is very similar to Joe's, because here we find that Joe, Ellen and Susan spend some time observed the mechanical bull before Joe attempts to ride it. In the course of their observation, they note that most of the patrons are unable to stay on the ride: the harm of falling is within the risk associated with the ride. Furthermore, and here the present case diverges from *Murphy*, in that they observe that at least one patron is seriously hurt. This fact pattern seems to illuminate some of the weaknesses in Cardozo's argument which allow the assumption of risk defense to prevail. Firstly, it is not clear that the harm of a *serious injury* was within the risk of riding "The Flopper" or that plaintiff Murphy could have appreciated that the risk was that serious, because in that case it is not clear than any of the patrons who fall sustain severe injuries. Finally, in the present case, we are told that Joe has ridden many mechanical bulls before. Joe is presented to us in the light of an "expert." In his opinion, Cardozo stresses Murphy's physical appearance, that he is a healthy young man, to underscore the point that Murphy had likely engaged in activities that caused risk before, however this analysis seems weak given lack of evidence that Murphy had ever ridden a ride like "The Flopper" before.

<u>Mission Space</u>

Although not an actual case, Epstein includes the story of Disney's Mission Space ride in our casebook (CB page 368). Epstein describes mission space as a kind of modern "Flopper"-like phenomenon. In this ride, Disney World resort's patrons are put in teams and loaded into a "spinning centrifuge." In this spinning centrifuge, they experience forces twice that of gravity. As a result of the great force created by the ride, it is reported that 194 guests were treated for symptoms ranging from

nausea, vomiting, chest pains, and irregular heartbeat. As a result of these symptoms, in 2006 Disney created a "half-throttle ride." Epstein posits the question of whether the availability of the half-throttle rides serves as a warning sufficient to patrons such that those who proceed to take the full throttle ride "assume the risk" of that ride. In the present case, patrons leaving the park have the choice of taking with them two versions of the "Brad the Bull" ride. Patrons can choose either 1) "Beginner Edition" or 2) "Dangerous Edition." The question then becomes, in the presence of these two choices, one clearly hinting at its dangerous nature, does a plaintiff "assume the risk" of any harm that occurs. The fact pattern above lends itself to the answer that the *plaintiff does not assume the risk* just because *two versions* of a ride are available. The doctrine of assumption of risk hinges on both 1) the plaintiff's knowledge of the risk 2) and the plaintiff's ability to appreciate that knowledge. Only when these two factors are satisfied can it be argued that a plaintiff has consented to a risk created by a defendant. The above fact patterns illuminate how even in the presence of two options, knowledge and consent are not always possible. With respect to Ellen, it seems likely that she may not have had knowledge of the risk, because she did not know that two options were available. Her friends purchased the mechanical bull for her. With respect to Isaac, it seems that he had neither knowledge nor the ability to appreciate the risk associated with mechanical bulls. Because many patrons to theme parks are young children, the availability of two options, even if there are signs posted, doesn't seem to lend itself to supplying knowledge of a risk and appreciation of that risk.

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QUESTION 2

(Part 1)

Ralph Rossnagel's Claims

Ralph Rossnagel v. Boys

Trespass to Land

RR can likely bring a claim against the boys for trespass to land. Trespass to land occurs when one intentionally enters land in the possession of another. There is no need to show damage to the land (Dougherty v. Stepp). Here, intent is established by the fact that the boys were playing on the roofs of RR's shed. Although there is a playground that borders RR's property, it is unlikely that the boys believed that the sheds were part of the playground. Therefore, intent is established. The land, because it was not part of the playground, was clearly in the possession of another. Therefore the elements of the tort are satisfied.

RR v. Frank Thorne

Intentional Infliction of Emotional Distress

One is liable for intentionally inflicting emotional distress on another where one acts either intentionally or recklessly in a manner that is "extreme or outrageous" and another suffers emotional distress as a result. Here, Frank Thorn imitates Ralph's stuttering and makes fun of him during their ride to the hospital. As a result of this imitation, we are told that RR's nervousness increases and he suffers some mental distress. However, not all conduct that creates distress is actionable. Arguably, it is

common for people to make fun of one another: teasing is a normal part of social interaction (Hustler Magazine v. Falwell). To satisfy the "outrageous" element of the tort, we must ask ourselves if a normal community member would consider FT's actions "outrageous!" It is unlikely that a normal person would consider teasing to be so extraordinary. Although one might argue that FT's teasing is mean spirited, he was, as a trespasser, likely unaware of RR's sensitivity towards the presence of his stutter. Therefore this claim will likely not succeed, because FT's conduct will likely not be found "outrageous."

James Williamson v. Ronald Asheton

Assault

JW can likely bring a claim against RA for assault. Assault occurs when one acts intending to cause harmful or offensive contact with the person of another or to create imminent apprehension of such contact, and the other is thereby put in imminent apprehension of such contact. No further damages are necessary to state a claim for assault (I de and S. Wife). However, here the fact patter posits JW as "unsuspecting" and therefore unaware of the harm about to occur. Therefore, JW will likely not prevail on a claim of assault.

Battery

Battery occurs when one intentionally acts to make contact with the person of another, or causes some third person or instrumentality to do so, where such contact is harmful, offensive or otherwise not authorized by privilege or consent. Here intent is established because RA acted intentionally by putting the firecracker in JW's shoe (Vosburg v. Putney). Furthermore, under the minority view, there was substantial certainty that the firecracker would make harmful contact (burn)

JW (Garrett v. Dailey). Here it is sufficient that RA intended for the instrumentality, the firecracker, to make contact with the person of JW. Therefore JW will likely prevail on this claim.

Frank Thorne's Claims

Frank Thorne v. Wolfgang Rossnagel

Assault

Frank Thorn may bring a claim for assault against Wolfgang Rossnagel. Assault occurs where one intentionally acts to make harmful or offensive contact with the person of another or to put another in imminent apprehension of such contact AND the other is put in apprehension of that contact. Here WR acts intentionally when he throws the stick at the boys. Even though he claims that he didn't see FT, evidence is offered that FT was in his sight and was likely therefore put in imminent apprehension of such contact. Therefore FT will likely prevail on a claim for assault.

Battery

Battery occurs where one acts intentionally and makes contact with the person of another, causes some third person or instrumentality to make such contact, where such contact is harmful, offensive, or otherwise unauthorized by privilege or consent. Here, WR intentionally when he threw the stick in the direction of the boys. It does not suffice to say that he intended to throw the stick at the *other boys*, and not Frank Thorne, because the doctrine of transferred intent applies to claims for battery (Talmage v. Smith). Here the offensive contact was made with the person of FT therefore the elements of the tort of battery are satisfied.

Defenses: Defense of Property

WR may argue that he acted in "defense of property." Under this defense, WR would be able to use only as much force as necessary to protect his property (Bird v. Holbrook). Although throwing a stick isn't using much force, there is evidence that it was "more than necessary" in light of the fact that there is evidence that the boys were starting to get down upon Ralph's command anyway. Therefore, WR will likely not prevail on this defense.

Frank Thorne v. Wolfgang Rossnagel & Ralph Rossnagel

False Imprisonment

False imprisonment occurs when a defendant acts intentionally to confine the person of another in boundaries set by the defendant by fear or force. Here WR and RR take Frank into Ralph's car. The force that is used doesn't have to be substantial, it must be enough so that the plaintiff feels he can do nothing but submit (Coblyn v. Kennedy). Here RR loads F into his car. Therefore the boundaries, the walls of the car, are boundaries fixed by RR and WR. The elements of the tort of false imprisonment are satisfied.

Defenses: Consent (Fictitious Implied Consent in Emergency Situations)

However, it is unlikely that FT will prevail on this claim because RR and WR may raise the defense of "consent." Consent is a complete defense to false imprisonment (Weardale Steel, Coal & Coke Co.). Furthermore, in emergency situations, it is often posited that an unconscious patient/victim has given implied consent to medical treatment (Canterbury v. Spence). Therefore, RR and WR will likely be successful in their defense against false imprisonment.

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Frank Thorne v. Dr. Tamar Weisman

Outrageous Professional Conduct- Intentional Infliction of Emotional Distress

Here FT may try to bring a claim against Dr. TW for intentional infliction of emotional distress. The elements of this tort are satisfied when one acts intentionally or recklessly engaging in conduct that is "extreme or outrageous" and thereby subjects another to emotional distress. Under this tort, the conduct of a profession can often be found "outrageous" given the standards that professionals are held to (Rockhill v. Pollard). Here, one might argue that Dr. TW acted, if not intentionally, at least recklessly by showing up to the emergency room drunk. As a result of his recklessness, FT suffers trauma and is reminded of when he was beaten by other boy scouts as a child. The emotional distress element, is therefore present. What remains to be considered is whether Dr. TW's conduct would be considered "outrageous" to the average member of a community. Arguably, most would consider it "outrageous" for a drunken doctor to show up to the emergency room to treat them. Dr. WT's conduct is therefore actionable.

<u>Susan Smith's Claims</u>

Negligence

SS v. Bartender (dramshop liability)

SS can likely bring a claim against the bartender of the tavern for negligent professional conduct.

Negligence

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Negligence is established where a person has a duty of care, they breach that duty of care, the breach causes some damage, and the plaintiff suffers that damage.

Duty

Everyone has a duty to act in a way so as not to injure others. Furthermore, under pre-Rowland categories of visitors for the purposes of premises liability, S would be considered an invitee: a person brought to premises for the purposes of business (Rowland v. Christian). The highest duty of care would be owed to an invitee. Although Rowland eliminated the distinction between licensee and invitee, these categories point to a duty of care owed in the present case.

Breach

Breach can be show in three ways: the reasonable person standard, the doctrine of res ipsa loquitur, or through negligence per se. In the present case, negligence per se is perhaps the most applicable standard. Typically, a dram shop is liable for serving a patron who is visibly drunk or a habitual drunk (Ewing v. Cloverfield Bowl). Here there is evidence that the bartender paid no notice of Susan's intoxicated condition and "kept pouring her drinks as long as she had money." Here, under the standard of negligence per se, breach is established.

Damages

The damages in this case are the medical injuries associated with SS's broken leg.

Defenses

The bartender/dram shop may raise the defense of contributory negligence. The elements of contributory negligence mirror those of negligence (Gyerman) (see above).

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Duty

SS had a duty to act in a way to ensure her own safety.

Breach

There are three ways to establish breach: negligence per se, reasonable person, and res ipso loquitur. Here the standard perhaps most applicable is that of negligence per se. By choosing to pass a car on the right side of the road, we are told that SS broke a rule of the motor vehicle code. Negligence per se can give evidence of breach where the rule/statute 1) is designed to protect a class of persons which includes the one whose interest is invaded 2) to protect the particular interest that is invaded 3) to protect the interest from the kind of harm that occurs and 4) to protect the interest against the particular hazard from which the harm results. Here, the elements of negligence per se are easily satisfied because SS, as a driver, is within the class of persons that the motor code rules strive to protect. An accident, the hazard, and injuries sustained from that accident, the resulting harms seem to be the kinds of results that a statute pertaining to traffic safety would strive to protect. Under negligence per se, therefore, breach is established.

Under the reasonable person standard, we must ask ourselves whether SS acted in a way in which we want people in society to behave by breaking the motor vehicle code. Here there is evidence that people often pass on the right, a kind of "custom" for passing on the right is in place. However, the restatement takes the view that "Custom is evidence that an actor's conduct is not negligent but does not preclude a finding of negligence…though a departure from custom can carry with it a significant weight." (CB page 228). In the present case, although SS complies with custom it is likely that breach will be found. It is not in society's best interests to have people violate the motor vehicle code

irrespective of the customs of a particular locale because of the great harm that is plausible from motor vehicle accidents.

Causation

Here the dram shop owners must show that SS's negligence was both the factual and proximate cause of her accident. Furthermore, they must show that there was no intervening cause that severed the causal connection between her negligence and the harm suffered (Gyerman). Should a court apply the reasonable person standard to establish breach, and therefore look to the custom of the road, factual and proximate cause might be easily proven. SS's choice to break the rule of the road caused the accident. The accident was a forseeable risk.

It further remains to be considered whether RR's actions were an intervening cause. One might argue that SS would be able to pass if it had not been for the fact that RR's car drifted slowly to the right side of his lane. However, this action on the part of RR was foreseeable and therefore does not break the chain of causation (Marshall v. Nugent).

<u>Damages</u>

The damages suffered here are the medical expenses associated with SS's broken leg.

<u>Dr. Tamar Weisman's Claims</u>

Dr. TW v. Naomi Young

Negligence

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Dr. Weisman may try to bring a claim against Naomi Young for negligent conduct as a social host in serving him too many drinks. However the general rule is that social hosts are not liable for injuries sustained by drunk guests (Klein v. Raysinger) unless they serve alcohol to minors (Congini v. Portersville). Here Dr. Weisman was not a minor and so Young doesn't incur liability.

(Part 2)

Negligent Tortfeasors v. Intentional Tortfeasors

The above fact pattern seems to indicate that there is a dichotomy between the way in which Tort Law treats negligent tortfeasors and the way in which it treats intentional tortfeasors. Liability for intentional torts seems to be founded on principles of individual corrective justice whereas liability for negligence seems to rest on a desire for corrective justice for society.

Intentional torts are much simpler to prove, because the law seems to find conduct that is intentionally harmful to be more actionable than other forms of conduct. Evidence of this is given in the above fact pattern in the way in which an actor who acts intentionally to hurt someone, but accidently hurts another, may still be liable for battery (Talmage v. Smight, Frank Thorne v. Wolfgang Rossnagel). The theory of transferred intent precludes a defense to liability where a wrongdoer has not completed his wrongful act by some fluke or accident. Furthermore, for the intentional wrongdoer, there may be liability even if not actual physical harm occurs. Under the elements of the tort of assault, no physical harm is required (I de S. and Wife). It is enough that the potential defendant intended to create an imminent apprehension of impending harm in the mind of the plaintiff. Furthermore, a lenient, subjective standard is applied in the case of this particular tort whereby the apprehension depends on

the impressions made in the mind of the victim (Allen v. Hannford). Intentional tort law seems to almost favor the plaintiff who has been harmed by the intentional acts of the defendant. This view seems to align itself most closely to the theory of *individual corrective justice* whereby a plaintiff should recover where a defendant has caused her harm.

The leniency with which the plaintiff's cause of action is viewed with respect to intentional torts is not as readily available where tort law considers negligent tortfeasors. Oftentimes negligence rests on nonfeasance and tort law seems less ready to impute liability without definite proof of some harm that has occurred. Notably, unlike with the intentional torts (where one might recover for emotional and dignitary harms without evidence of physical harm) some evidence of physical harm is required under the "damage" element of negligence. Furthermore, negligence takes consideration of whether or not some duty, establishing a standard of care, was present between the two parties. Negligence, as an aspect of tort law, seems to be more concerned with whether or not a person acted in way that is the best interests of society (see the Reasonable Person standard/custom as applied to Susan Smith's conduct above). Negligence seems to be a party of the policy of corrective justice for society. Even negligence per se, a doctrine often applied to show breach, rests on an individual's inability to comply with a statute/rule enacted for the safety of society (FDA laws, motor vehicle code, worker's safety codes). Under the doctrine of negligence, there seems to be a "higher burden of proof" on the plaintiff who must show that the defendant should have taken an alternative course but failed to do so. Under the theory of negligence, therefore, conduct that creates a risk that results in harm may not always be actionable. There are often times where the harm must lay where it falls, because there is no evidence of any kind of breach or failure to meet a standard of care. Tort law seems more concerned with punishing misfeasance in the absence of overwhelming proof of negligence.

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