Fall 1999

FINAL EXAMINATION

TORTS

PROFESSOR RUSSELL

INSTRUCTIONS:

1. DEADLINE: This is a six-hour examination due by 4:00 pm on 16 December 1999. If you return the exam after 4:00 pm, you get zero points for the exam. NO EXCUSES.

2. HONOR CODE: The full text of the Honor Code is as follows:

HONOR CODE: The study of law is an integral part of the legal profession. Students engaged in legal studies should learn the proper ethical standards as part of their education. All members of the legal profession recognize the need to maintain a high level of professional competence and integrity. A student at The University of Texas at Austin School of Law is expected to adhere to the highest standard of personal integrity. Each student is expected to compete honestly and fairly with his or her peers. All law students are harmed by unethical behavior by any student. A student who deals dishonestly with fellow law students may be dishonest in the future and harm both future clients and the legal profession. Under the honor system, the students must not tolerate unethical behavior by their fellow students. A student who knows of unethical behavior of another student is under an obligation to take the steps necessary to expose this behavior. Students in The University of Texas at Austin School of Law are governed by the Institutional Rules on Student Services and Activities. Students may be subject to discipline for cheating, plagiarism, and misrepresentation.

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3. OPEN-BOOK: This is an open-book, take-home examination. Your answer must be of your own composition. You may work on this examination wherever you wish, and you may consult any written material that you wish. However, you violate the Honor Code if you show or distribute this examination to anyone at all before you turn in your answers, and you violate the Honor Code if you discuss this examination with anyone before you turn in your answers.

4. EXAM NUMBER: Please put your exam number on each page. The easiest way to do this is to use your

software to put the exam number in a header on each page. Do not put your name anywhere on the exam.

5. LENGTH: This examination consists of three sections on 9pages. Your job is to produce printed--that is, not hand-written--answers that total no more than 2,000 words. Each question specifies the maximum number of words that you may use to answer a question.

6. SPACING: You may single-space or double-space your answers, as you prefer.

7. WEIGHT: This exam accounts for 80 percent of the grade in the course. For grading purposes, the sections and questions in this exam are weighted according to the maximum number of words allowed for each section. You should divide your time with these weights in mind. Keep in mind that many students spent too much time on the short-answer questions.

8. SHORT ANSWERS: The first section consists of ten (10) short-answer questions. For each, you should supply an answer totaling not more than 50 words. For Section One, you should answer each question and offer a brief explanation of your answer. You should print your answers to questions 1-10 with just a line or two between answers. That is, do not use a new sheet of paper for each short answer.

9. MEDIUM ANSWER: The second section has one question. Your answer may be up to but not longer than 500 words. Please begin this answer on a new sheet of paper.

10. LONG ANSWER: The third section is longer and you may use up to 1,000 words to answer this question. Please begin this answer on a fresh sheet of paper.

11. HOW TO ANSWER: In answering each question, use judgment and common sense. Emphasize the most important issues. Do not spend too much time on easy or trivial issues at the expense of harder ones. If you do not know relevant facts or relevant legal doctrine, indicate what you do not know and why you need to know it. You must connect your knowledge of tort law with the facts before you. Avoid lengthy and abstract summaries of general legal doctrine. Discuss all plausible lines of analysis. Do not ignore lines of analysis simply because you believe that, *clearly*, a court would resolve an ambiguous question one way rather than another. Pay attention to the call of the question, that is, do what the question asks you to do.

12. CONCISION: Professor Russell desires quality not quantity. Think through your answer before you begin to write. You have a lot of time to write relatively brief answers. Concision will win you points.

13. YOURS TO KEEP: You may keep your copy of the exam questions.

14. CHEATING: If, in preparing for this examination you have violated the Honor Code, or if, during this examination, you violate the Honor Code, the best course of action is for you to report to the Assistant Dean of Student Affairs immediately after this examination ends.

15. GOOD LUCK: You are a fine group of students, and I have enjoyed our semester together. Please keep in touch.

(Section One begins on next page.)

SECTION ONE

(500 words: 10 answers @ 50 words/answer)

1. **(50 words) Why is there general agreement that *res ipsa loquitor* is available to plaintiffs in cases where the plaintiffs have undergone surgery and later discovered that surgical sponges were left inside them?**

2. **(50 words) Describe three circumstances in which you would have a legal duty to save a drowning person.**

3. **(50 words) Describe an instance in which the Duty to Defend leads to a conflict of interest between the insurance company and its insured.**

4. **(50 words) If Australia had been a comparative fault jurisdiction in 1960, would The Wagon Mound *cases* have turned out differently?**

5. **(50 words) In the movie *The Sweet Hereafter,* the lawsuit ends after Nicole's deposition. What about the story that Nicole tells makes the lawyer give up the lawsuit?**

6. **(50 words) Describe an intentional tort that the movie *The Verdict* depicts.**

7. **(50 words) What is market-share liability?**

8. **(50 words) In *Tarasoff,* Justice Tobriner wrote for the California Supreme Court that "In our view, however, once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger." Why not also say that that "In our view, however, once a *bartender* does in fact determine that a *patron* poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger"? Make your strongest argument against there being a duty of a bartender to a foreseeable victim of a patron.**

9. **(50 words) You are Mrs. Palsgraf's lawyer. Describe her case as one involving injury to a business invitee.**

10. **(50 words) Some judges and law professors describe *Palsgraf* as a case involving an unforeseeable plaintiff. You are her lawyer. Describe her as a foreseeable plaintiff.**

END OF SECTION ONE

SECTION TWO

(500 words: 1 answer @ 500 words/answer)

11. (500 words)

Dr. Sue Mie is your boss. She is also the president of the American Medical Association. She is entirely freaked out a recent CNN story, which reports that mistakes by medical professionals kill from 44,000 to 98,000 people each year.

Two years ago, Dr. Mie lost a wrongful death suit. The judgment against her was for $1 million dollars, which included a punitive damage component. She predicts that the 44,000 to 98,000 yearly deaths will lead to around 40,000 lawsuits. At $1 million per lawsuit, that will be a total of $40,000,000,000 in damages, which she thinks will wipe out American medicine.

Dr. Mie would like you to consider the CNN story (which you will find in the box on the next page) and make litigation and damages projections for her. She says, "I was found guilty of malpractice myself, and I know that the judges and juries hold doctors liable for every little mistake. Given that, I want you to tell me how many lawsuits we can expect to see from this yearly toll. I know, from personal experience, that jurors are hostile to doctors. How many suits will doctors lose and how much will they have to pay?"

Write a memo in which you use your expertise to answer Dr. Mie's questions.

[The CNN story is on the next page.]

WASHINGTON (CNN) -- More people die each year in the United States from medical errors than from highway accidents, breast cancer or AIDS, a federal advisory panel reported Monday.

The report from the National Academy of Sciences' Institute of Medicine cited studies showing between 44,000 and 98,000 people die each year because of mistakes by medical professionals.

The groundbreaking report urged Congress to create a National Center for Patient Safety within the Department of Health and Human Services to set goals for avoiding medical mistakes, track progress in meeting them and to fund research on better ways to prevent such errors. It suggested as a minimum goal a 50 percent reduction in medical errors within five years.

The American Medical Association said that while any error that harms a patient is one error too many, "overwhelmingly the system of medicine in the United States is safe ... when you consider the millions of doctor/patient interactions each day."

Most errors involve medication

The institute said medication errors are among the most widespread -- everything from the stocking of full-strength drugs in hospitals that may be toxic if not diluted, to improper administering of medicines that results

from illegible writing in a patient's medical record. In addition, the report said, "when a patient is treated by several practitioners, they often do not have complete information about the medicines prescribed or the patient's illnesses."

The institute said tens of thousands of people die in hospitals alone each year as the result of medical errors. It cited one study that put the number of such deaths at 44,000 annually and another that more than doubled that figure. "Even using the lower estimate," it said, "more people die from medical mistakes each year than from highway accidents, breast cancer or AIDS." It said medication errors that take place both in and out of hospitals total more than 7,000, exceeding those from workplace injuries.

"These stunningly high rates of medical errors -- resulting in deaths, permanent disability and unnecessary suffering -- are simply unacceptable in a medical system that promises first to 'do no harm,'" said William Richardson, chairman of the committee that wrote the report and chief executive officer of the W.K. Kellogg Foundation of Battle Creek, Michigan.

Hospital administrators say they have been putting in more machine-driven backstops, such as automated drug dispensers. But, they say, it is impossible to eliminate all errors. Medical care is "people taking care of people, one patient at a time -- and as long as we have human beings doing that ...the potential is going to be there for human beings to make mistakes," said the Vice President of the American Hospital Association Rick Ward.

Correspondent Eileen O'Connor and The Associated Press contributed to this report.

END OF SECTION TWO

SECTION THREE

(1,000 words: 1 answer @ 1,000 words/answer)

12. Clark Kent is a young male, a bit of a troublemaker with a taste for life in the fast lane. Bored with life in Smallville, Clark posted notices around town that a drag race would take place on the afternoon of 15 December 1999 on Main Street. Main Street is a major thoroughfare (by Smallville's standards) that is usually filled with cars, bicyclists, and pedestrians. One section of Main Street runs directly past the Smallville Casino. The Casino is a riverfront property.

When the appointed hour rolled around, however, no one showed up to race. Undeterred by this, Clark began to drive at 60 miles an hour down the street. The posted speed limit is 35 miles an hour.

Driving down the street at the same time and in the same direction was Bruce Wayne, on his way home from work. When Bruce saw Clark pass him, Bruce decided to join the fun, and Bruce began driving as fast as Clark. Bruce was still a quarter-mile behind Clark when he saw Clark suddenly lose control of his car. Horrified, Bruce saw Clark's car go off the street onto the sidewalk and then onto the driveway of the Smallville Casino. Clark's car rammed the rear end of a casino shuttle bus, which then rolled into the Wannabe River.

The shuttle bus came to rest upside down and partially submerged in the river. Jane Beanstalk, the driver, freed herself from the wreckage, and civilians on the scene helped to rescue her almost immediately. Jane, who is an ex-Navy seal, was completely unhurt in the crash. There was one passenger in the shuttle bus--Victoria Haunter. Victoria remained inside the shuttle bus after Jane escaped.

A number of people in the area observed the crash and placed emergency calls to notify the Police Department and media. The Police Department immediately dispatched a boat from its River Patrol unit. The boat arrived at the site within approximately three minutes of the crash. At least one of the Police officers on board was a certified diver. However, none of the officers had his or her scuba diving equipment on board the boat. As a result, they left the scene of the accident to retrieve the equipment.

While the River Patrol officers went to retrieve their equipment, other River Patrol officers and members of the Fire Department secured the crash scene. Sandy Diver, an experienced civilian scuba diver, was present at the scene and had access to diving equipment. She told the officers that she wanted to rescue the passengers, but the officers ordered Sandy and all civilians to stay out of the water. Dustin Paddler, an inexperienced scuba diver, became angered at the lack of police activity, took Sandy's scuba gear, and dived in. However, he became entangled in the shuttle bus wreckage and rescued no one.

More than 20 minutes later, the River Patrol divers returned with their gear and commenced rescue

operations. The River Patrol divers rescued Dustin, who suffered only minor injuries. Although the police divers were able to remove Victoria from the shuttle bus, she died later in the day.

WPXR-TV, the local public-access cable TV station, broadcast the entire rescue. The broadcast was live, but few people were watching. However, among the few who were watching was Victoria's fiancé, Frank Loss.

According to the coroner, Dr. Michael Smarty, Victoria did not die from the impact of the crash. Victoria died because of being submerged for an extended period of time. Dr. Smarty thinks that if rescuers had removed Victoria within the first ten minutes after the crash, then Victoria would have had a 40-60 percent chance of survival.

Here's your job: Pa Kent, Clark's stepfather, wants you to help him think through Clark's liability for Victoria's death, including Clark's liability to all those whom Victoria's death has affected. Is Clark liable and if so, to whom and for what? Jane, the ex-Navy seal, is uninjured and also too macho to sue. Pa Kent has already given Dustin $500 to quiet him and received in exchange an enforceable release. So, you need not concern yourself with Clark's possible liability to Jane or Dustin. Your concern should only be about persons who have suffered damage as a consequence of Victoria's death. Pa Kent is particularly interested in knowing whether Bruce Wayne would also be liable; Bruce Wayne is a millionaire and witnesses did identify him at the scene in spite of his attempts to evade detection. Pa Kent also wonders whether there is anyone else who might share in the liability for Victoria's death.

END OF SECTION THREE

END OF EXAMINATION

Memorandum

To: Fall 1999 Torts Students

From: Thomas D. Russell

Date: 22 April 2011

Re: Student Sample Answers

Attached please find some high-scoring student sample answers from the December exam. Although these answers scored well, there is room for improvement with each answer.

Short Answers. The hardest question seemed to be number 8, which dealt with the *Tarasoff* principle and bartenders. The best answer is that that bartenders lack the control over patrons that psychotherapists have over patients. Many students emphasized that bartenders lacked the training to identify those who posed serious threats, which is true. However, the question took that issue out of contention by specifying that the bartender knew that the patron was dangerous to a foreseeable victim.

The other difficult question seemed to be number 4. Many students neglected to comment on both of the *Wagon Mound* cases.

Medium Essay. Almost no one made the first analytical step correctly. Most students calculated that for every 1,000 injuries, there would be 38 filed suits. However, Galanter explained that we would expect 38 suits from every 1,000 grievances, which are different than injuries. With regard to medical injuries, we would expect only 3-12.5 percent of all injuries to yield a grievance. From the stage of a grievance, there is further winnowing. When all is said and done, I calculated that from 98,000 medical mistakes that resulted in death, the highest number of plaintiff wins in lawsuits that we would expect is about 6. Remarkable, isn't it? As for damages, we would expect something on the order of a few million dollars, tops.

Long Essay. Most of you did fairly well on this essay. The key was to keep focused on the call of the question, that is, to look for those who had a claim as a consequence of Victoria's Haunter's death. This means a wrongful death suit by her family (with a survival action on Haunter's behalf, perhaps) and a suit by her fiancé. As defendants, Clark Kent, Bruce Wayne, and the River Patrol were of principal interest. Most students did well in writing organized, complete answers with regard to Kent's liability. However, most students also tended to write incomplete analyses of the liability

of other potential defendants. Generally speaking, your best strategy in writing exams will be to address each plaintiff/defendant grouping separately and completely. Mushing them together almost never serves you well.

Section Three

12. Powder gets damages from all defendants, if they don't settle. Powder should sue the deep pockets of Kirby or Franchiseworks.

POWDER v. HOOVER Battery

Powder: vacuuming his stomach is intentional harmful or offensive touching, battery. Advantages are avoiding elements of negligence and a better chance at punies. Disadvantage is that homeowner's insurance is unlikely to pay.

Powder: Vacuuming others is both objectively and subjectively offensive, no matter the health or condition of the person's abdomen. Loss of consciousness bears no Impact on the offensive nature of the vacuuming.

Hoover will argue for a stringent definition of offensive and intentional. She did not vacuum him out of anger, but in fun, so there is no intent. She did not know or have reason to know the consequences of vacuuming his stomach.

Cause See below.

Defense - consent

Hoover: Powder impliedly consented to the vacuuming as part of the demonstration. Ineffective argument.

Powder: His injury rendered him incapable of moving away quickly. Her actions were beyond the scope of his consent, and/ or that he was under duress to go to the demonstration. Hoover wondered if she was pushy.

Strict liability for inherently dangerous activity

Advantage: avoidance of negligence. Powder must show cause. Powder should confirm that Hoover's homeowner's would cover this. Demonstration has *a* high degree of risk of harm, the risk cannot be mitigated, and that it is an unusual activity with little value to the community. He would have to show that the risk that strict liability was intended to protect against was the one suffered.

Powder: Hoover's spreading glass, hair, and dirt on the carpet would result in an accident no matter what precautions Hoover took.

Hoover: not inherently dangerous. The harm that could result from the dangerous cat hair, glass, and dirt was not the one suffered here. Hoover wins.

Exam Number 00056

See cause below.

Negligence claim

Powder has the benefits of getting at the homeowner's insurance and not having to prove intent.

1. DUTY

Duty is a legally recognized relationship between a plaintiff and defendant that obligates them to act in a certain manner. Under all jurisdictions, Hoover had a duty to act reasonably to Powder.

A. Common Law jurisdiction

Powder: Hoover owed him the heightened SOC reserved for invitees, guests invited on premises for your own financial benefit. Hoover had the responsibility of discovering the danger inherent vacuuming Powder's gut by inspecting the situation. She should have asked about his hesitation on the phone. Court should use of Rowland anyway.

Hoover: argue that he is a social guest and a licensee. He was tired of being cooped up and had no intention of buying a vacuum. She had no knowledge of the danger of hosing his gut and no duty to protect him from it.

B. Rowland v. Christian

Powder will argue that Hoover had a duty to use reasonable care and warn him of the dangerousness of her demonstration.

Hoover will argue that a reasonable person would not see the danger in putting a vacuum up to his stomach.

C. Intermediate

Powder would be comfortably within the collapsed, heightened standard for invitees and licensees. Hoover will argue that she used reasonable care.

2. STANDARD OF CARE (SOC)

Standard of care is usually measured by the reasonable person standard, which allows the jury to define what a reasonably prudent person would do in the same or similar circumstances. There is no heightened standard for Hoover because of her training, but she is expected to act reasonably with her extra knowledge.

Custom

Custom is a well-defined and consistent way of performing certain activities. Custom does not define SOC except in professional cases. In ordinary civil negligence suits, deviance from custom can help a plaintiff show breach of the standard of care. Unless the custom is deemed unsafe, it relates to the probability of injury and the burden on the defendant of preventing injury.

Powder: Hoover's use of the vacuum deviated from custom of use on the floor. If the custom is to use the vacuum against one's skin, it is unsafe and should be discarded.

Hoover: it is customary in her field to demonstrate the vacuum's power on the client's skin. It is a reasonable custom and it shows compliance with SOC.

3. BREACH OF DUTY

Breach of duty is a breach of the relevant standard of care. The jury will determine if Hoover violated the relevant standard of care, that of a reasonable person. The jury is likely to say if Hoover operated within the custom, it should be discarded. She did not act reasonably in using a powerful vacuum against another's skin.

4. CAUSATION

A. Actual Causation

"but for"

Powder: Hoover's actions were the "but for" cause of his injuries. He would not have had to go in for additional surgery, were it not for Hoover's actions. He would not have had an infection, nightmares, and months of convalescence.

Hoover: Powder's recent surgery was the cause of his injury. But for his surgery, he would not have sustained any injury from the vacuum. Powder could counter that his pre-existing condition that required surgery would have, combined with the suction from the vacuum, resulted in the injury, too.

"substantial factor

The substantial factor test is unnecessary. This is not a case of redundant multiple causes. Powder: the standard should be changed regardless of what the case is. it would be a lower burden to bear. Powder could show that Hoover's actions materially contributed to his injury. Hoover would not have a successful argument against this.

B. Proximate Cause

Character or type of harm must be a foreseeable risk within the harm or a direct cause of the injury. Extent is irrelevant.

Powder: His injuries were a foreseeable "harm within the risk" of vacuuming abdomens. Pressing a vacuum against someone's stomach involves the risk of damaging internal organs. Hoover must take her plaintiff as she finds him, eggshell belly included. The infection and emotional harm are unforeseeable extent of injury. This makes Hoover responsible for them. Or, it was the direct cause of his injuries.

Hoover: Character of harm, not extent was unforeseeable. She has no liability for the immediate injuries and ensuing infection and emotional harm. If the immediate harm was foreseeable, the infection was a result of an intervening superceding cause. Emotional distress is not a traditional part of the eggshell plaintiff rule. No argument to direct cause.

Courts are uncomfortable with allowing an otherwise culpable defendant off for lack of legal cause. Court may limit damages to the immediate harm such as ambulance and surgery. Emotional distress is especially unpredictable because the "eggshell psyche" is not a universally accepted rule.

5. DEFENSES

Comparative/ contributory negligence (fault) Hoover: By disobeying the doctor's orders to stay in bed for one more day, Powder contributed to his injuries. If he had asked her to come over and do the demonstration, she would have known about his bum tummy. In a contributory negligence jurisdiction, this would be a total bar to recovery. In a pure contributory fault jurisdiction, Powder would recover for all damages he was not responsible for. In any of the modified jurisdictions, Powder would recover as long as he did not exceed the cutoff for liability.

Powder: Walking to his neighbor's house is within the doctor's orders. The demonstration was to be restful entertainment. Getting out of bed did not cause his injuries, suction of a vacuum did.

Hoover's argument may be compelling, but the jury is likely to be more sympathetic to Powder.

Assumption of the Risk

May be subsumed in the comparative fault argument depending on jurisdiction. Hoover does not have a compelling argument. There was not a risk to be impliedly assumed.

6. DAMAGES

A. Compensatory

1. Pecuniary

Powder gets expenses from the ambulance, surgery, and time in the hospital. If the court does not cut off responsibility with the infection, he can recover for the extra time in the hospital for that treatment. He can recover all or some of lost wages, depending on when the court severs liability.

2. Non-pecuniary

Powder could recover for pain and suffering for the period right before he passed out. Post-operative pain and suffering are recoverable.

Nightmares and other emotional distress as a result of the accident are recoverable if the court does not deem them outside of proximate cause. **B. Punitive**

Depends on which action is successful. Powder gets punies for the intentional tort. Public policy dictates strong deterrence. With the negligence claim, he would have to argue wanton behavior without regard for his safety that was unjustifiably risky. Not too compelling.

KIRBY and FRANCHISEWORKS

Respondiet superior *d*

Powder will sue on respondiet superior, a form of vicarious liability. Employers are responsible for negligent actions of their employees within the scope of their employment.

Powder: He was injured by Hoover's negligent activities, which were in the scope of her employment. Even if Hoover is an independent contractor, her employers should have supervised this very important aspect of her work. It is a joint enterprise, so both big companies should be held liable. He will make the same negligence arguments seen above.

AS: Hoover is not responsible, if she is, her actions were outside scope of work. She is an independent contractor, so they are not responsible. This argument will be more compelling for Franchiseworks, as Kirby works directly with Hoover and hired her. This is analogous to representation by insurance companies. They do not have her best interests in mind.

Damages

See compensatory Punitives

Depending on the jurisdiction. The Restatement, adopted by many states, allows recovery of punies under respondiet superior if "the agent was unfit and the principal or managerial agent was reckless in employing or retaining him". Powder: at least negligent to hire and retain Hoover. If it is within the custom of the industry not to check backgrounds, the custom should be thrown out. They should have checked into her background and found her criminal past.

Franchiseworks will argue that they did not hire her and should not be responsible. Kirby will argue that they followed the franchise instructions as employees of Franchiseworks, which did not indude a requirement of checking backgrounds. Her criminal record has nothing to do with this action because it always involved money, not physical abuse.

Factfinder will more readily consider punies in this action. It is unjustifiably reckless and wanton to fail to warn representatives of the danger of using suction

on human flesh. Also, they benefit tremendously from these demonstrations and should have considered possible injuries and protected against them. They have a much deeper pocket, so a higher amount of punies is necessary for them to feel the deterrent and punitive affect.

Contribution/ indemnification

Employers can will sue Hoover for contribution if she is partially liable and indemnification if she is entirely liable. She is probably fairly judgment proof.

INSURANCE

The companies' insurance plans will defend them. Hoover's homeowner's insurance will defend her. This creates huge conflicts of interest. The insurance plans have an incentive for Hoover to be guilty of an intentional tort so they do not have to pay. Hoover and the companies' insurance groups are likely to work against each other and in favor of Powder, so he is smart to implead all of them and let the evidence come out.

GALANTER

Hoover and the companies are likely to have better, more experienced representation than Powder, it is unusual that Powder even brings a claim.

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Section Three

Powder will have the burden of proving negligence or battery- by a preponderance of evidence

Negligence Duty

Hoover was engaged in a risk-creating activity (demonstrating the power of a vacuum) and. therefore, owes a duty to Powder. In addition. Powder was an invitee in her home. Hoover hoped to financially benefit from his visit by making a vacuum sale This also establishes a duty to use reasonable care in conducting activities on the premises

Standard of Care

Hoover was expected to act as a reasonably prudent person in the community under the same or similar circumstances.

Breach

Powder will argue that the harm could easily have been avoided since Hoover had no need to demonstrate the power of the vacuum on Powder's body The probability of harm in using an electrical appliance on a human is at least moderate, and the gravity of the potential injury that it could cause is also at least moderate Since the burden is slight compared to the probability of harm multiplied by the gravity of the potential in)ury. the Hand formula indicates that Hoover did not act as a reasonably prudent person

Causation

But tor Hoover's act of testing the vacuum on Powder's belly. Powder would not have been injured Hoover is the cause-in-fact

For proximate cause. Powder was a foreseeable plaintiff He was the one likely to be haimed hv Hoover's negligence with the vacuum. Hoover will argue that injury to Powder's small intestine was an unforeseeable consequence that negates proximate cause However, personal injury was foreseeable. The Egg Shell PlaintilTrule establishes that once personal injury is foreseeable, the unforeseeability of the type or extent of personal injury will not affect proximate cause. Although Powder was injured tar worse than one would expect, his particular vulnerability will not excuse Hoover's nenliLience

(uiilrihlitorv Negligence

Hoover must prove contributory- negligence by a preponderance of evidence She will argue thal Powder did not act as reasonable person by failing to heed the doctor's advice

lu stay in bed for four full days. But for Powder's decision to visit Hoover on his third day of recovery, he might not have been injured. He is a cause-in-fact.

For proximate cause. Powder will argue that losing part of his small intestine was not a foreseeable consequence of visiting Hoover for a sales demonstration one day betore full recovery. Hoover will argue that failing to follow the doctor's advice would foreseeably lead to complications from his abdominal surgery. Although the manner and extent ol harm may have been unforeseeable, harm to Powder's abdominal area was foreseeable, that is sufficient for proximate cause. Powder may argue that Hoover's negligence was so extraordinary as to amount to a superseding cause, breaking the chain of causation for Powder

If the court decides that Powder was negligent, the consequence will depend on whether the court has switched to a comparative negligence regime. Under contributory-negligence, Powder will be haired from recovery, but, since Hoover's negligence occurred after Powder's, the court might use the last clear chance doctrine to allow recovery anyway Under comparative negligence. Powder's recovery would be reduced. but the exact results will depend on the jury's determination of comparative faults and on the jurisdiction's choice between pure and modified versions ofcomparative negligence

Vicarious Liability

Under the theory- ofrespondeat superior. Powder will argue that Kirby and Franchiseworks are vicariously liable for the misconduct of Hoover, their employee. because she was acting within the scope of her employment in making her sales demonstration. They are responsible for hiring carefully and training employees to conduct sales safely. Kirby maintains control over Franchiseworks through a detailed franchise agreement. It held the sales convention which Hoover attended, so it is as responsible as Franchiseworks.

Vicarious liability makes Kirby, Franchiseworks, and Hoover joint tortfeasors that are jointly and severally liable with Hoover to Powder (unless a statute has altered joint and several liability) Powder may seek the entire judgment from any of the three

Powder might also consider suing Hoover for battery. She intended to make contact with Powder's stomach with the vacuum hose. Though she meant no harm. the contact proved to be harmful Thus. Hoover committed a battery. This theory will have consequences on insurance and damages discussed below.

Damages

Most cases are settled out of court, but, if the case goes to trial and the defendants are held liable, a jury will determine the damages that the plaintiff can recover

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Powder yvill seek recovery' for his economic expenses, including his medical expenses as well as his lost wages. Expert testimony will assist in the calculation.

He will also want damages for his pain and suffering (including nightmares), lvpicallv calculated on a per diem basis.

Assuming this jurisdiction maintains the collateral source rule. payments that Po\\dci receives from other sources will not reduce the amount the defendants must pay

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Punitives are fairly rare in non-business litigation such as this Many- jurisdictions require that the elements for punitives be proven by clear and convincing evidence Powder will have to show Hoover was reckless or willful and wanton. This will be easier it'thev pursue the battery theory, an intentional ton. but this has undesirable insurance ramifications. Punitives are sometimes difficult to recover from vicariously liable employers like Franchiseworks and Kirby, but it is easier when the employer was reckless in hiring as is the case here.

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Insurance companies may represent the parlies. If the case is pursued under the theory- *of* battery, Hoover's home insurer as well as Kirby and Franchiseworks's third-party liability' insurers will probably not pay Powder's recovery because that is an intentional ton often excluded from policies. If Powder is concerned about the solvency of the defendants, he is best advised to pursue the negligence claim instead

Punitives may not be covered under the insurance policies

If Powder's policy contains a subrogation clause, his insurance company will claim a portion of the damages for money it paid out as a result ofthis accident

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Section Two

Duty and proximate cause are two separate elements of negligence that serve as a limit on liability **Duty** establishes that there is a legally recognized **relationship between the defendant and the** plaintiff whereby the defendant owes a legal obligation Proximate cause establishes that the **causal relationship** was not too attenuated, remote, or freakish to justify imposing responsibility on the defendant. The elements overlap to some extent. yet there are some key differences that make them distinguishable

First, both are often policy-based determinations that cannot be described b\ mechanical rules. However, the court normally makes the policy judgment as a matter ot' law for duty. In contrast, proximate cause constitutes a matter of fact to be decided b\ the jury. Although, at extremes, the judge may also decide proximate cause as a matter of law, the chances are much better for getting a proximate cause issue to the jury As a practical matter, this is a tremendous distinction. Duty can stand as a great barrier to getting the case before a jury. Once before a jury, sympathies that mav not have been a factor before the judge play a crucial role and may influence the determination of proximate cause.

Second, foreseeability is an important factor in the determination of both duty and proximate cause. Often, the defendant is said to owe a duty to foreseeable victims of foreseeable harm. Proximate cause equally requires the plaintiff and the type of harm or consequence to be foreseeable. Indeed, sometimes the same foreseeabilitv consideration could preclude liability under either duty or proximate cause. For example, in /-W.v^m/, Cardozo found that the defendant did not owe a duty for a negligent explosion to a woman injured by scales that fell far down the platform because she was an unforeseeable victim. Andrews, writing for the dissent, argued that proximate cause, nol duty. was the proper method of limiting liability in such a case

Generally, dutv has developed as a mechanism ior limiting liability in specific contexts, tending to be more restrictive than foreseeability. For example, a land occupier does not owe a general duty to use reasonable care to protect trespassers from dangerous conditions on his land even when he is aware that trespassers enter and could toreseeably be injured Various policy issues weigh against such a duty The language of toreseeability is not used to justify such decisions. While proximate cause also involves a heavy consideration of social and economic effects, the decisions draw more consistently on the language of foreseeability to justify precluding liability-in conclusion, foreseeabilitv has become a fundamental, although not the sole. concept in duty and proximate cause analysis, vet it continues to play a more prominent role in proximate cause issues

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Although the principles of duty and proximate cause have traditionally been areas used by the courts to limit unjust liability, they are not indistinguishable in that they have been used in different ways and serve different purposes. Duty is premised on the underlying policy that our society is not a collective social

insurance system and tortfeasors do not owe a standard of care to every' individual they encounter Because of our discomfort with denying a duty in many circumstances (such as where a babv lies on the tracks) we have begun to impose liability through the use of exceptions. For example, in Farwell v Keaton, the judge found that companions on a social venture owed a duty to *each* other of mutual aid. These exceptions are defined by judges and thus are justified by precedent

Courts use proximate causation as a method of precluding liability where a series of events is so unexpected that the defendant could not be fairly held responsible for their results Proximate cause is a question for the jury to decide and therefore is less structured around precedent There is no general rule that there is or is not a proximate cause. Rather, the jury must conclude whether the reasonable man would have foreseen or prevented the risk that he caused Courts have developed some exceptions to this general rule - such as when the plaintiff suffers an unforeseeable type of injury or where a superseding clause renders liability unjust. However, this is a less defined principle that allows the jury to follow its gut reaction about liability

Both concepts are linked to foreseeability and therefore can overlap. For example, in Palstyaf. Justice Cardozo found that the fact that those injured were unforeseeable meant that the defendants owed them no duty. However, Justice Andrews countered in his dissent that foreseeability is a factual question that should go to the jury as proximate cause. He argued that proximate cause is a question of public policy, fairness, and substantial justice that can't be reduced to any one formula

In sum, both duty and proximate cause play an important (and similar) role in limiting liability However, they do so in very different ways. Duty serves as a gate-keeper that promotes judicial efficiency to prevent suits from being litigated where defendants owe no duty of care Proximate cause is a last resort for the jury It allows foreseeability as well as Justice Andrew's other factors to influence a finding of liability in order to ensure justice is served As both doctrines are further expanded in the future, more overlap is likely to occur, but they will still serve different functions that must be treated independently.

SECTION TWO Judge v. Jury

The student's remarks seem a bit procedurally short-sighted with the magic wand comments. Yes, ajudge will determine duty questions, but *aJun'* (or trier of fact) will determine proximate cause. However, like any jury question, courts can hold as a matter of law that no reasonable jury could differ from the court's finding. Thus, a judge determines proximate cause in situations ofjudicial imposition.

Policy Decisions

The student probably derives much of her stance from the fact that both duty and proximate cause involve policy decisions. To be more specific, policyJ^usually trumps the mechanical analysis in duty and proximate cause. For instance, despite probable duty in the mechanical sense, courts will limit the duty of utilities companies as in Strauss and Albala to insure low rates for the public and survivability of these companies. Similarly. in determining proximate cause, courts will modify their foreseeability analysis to comport with an overreaching policy of liability concerns (when to rule for plaintiff would create too much liability). Also. proximate cause tests such as "Practical Politics" stress policy over logic. Thus, policy becomes a "magic wand" for ajudge to find no liability.

Role ofForeseeability

In addition, foreseeability plays a part in duty and proximate cause. The Rowland court found that foreseeability of harm to a plaintiff is a factor to establish duty. Foreseeahility assumes a larger role in proximate cause as the majority test. but courts limit the test *lo* result and type ofharrn. The student's comments point to a weakness in the foreseeahility analysis - vagueness. For example, the Wagon Mound cases seem to contradict each other in terms offorseeability. On similar facts. No. 2 imports a magnitude ofnsk clement to find forseeability that counteracts the lack offorseeability in No. 1. Thus, from the student's perspective, a judge can use foreseeability as the "magic wand" to destroy plaintiffs' cases.

The Student's Argument - "Magic Wands"

The student uses this metaphor to indicate a lack of reasoning. Howver. the ludges rely on policy. One could argue that this is too much flexibility, but the dangers ofngid rules in duty and proximate cause become apparent in both areas. As Cardo/o indicates in Pokora. rigid rules are dangerous in legal analysis because technology and outlooks change over time. In Polemis, the court's rigid adherence to the direct causation test disabled the plaintiffs case although the injury was foreseeable. Thus, although flexibility might have potential for abuse, bright-line rules make casualties out of dcseninr claims.

Duty and Proximate Cause Distinguished:

Yes. duty and proximate cause share similar elements offoreseeability and policy. but they are anything but indistinguishable. Duty is a legal question that serves as a threshold requirement that allows a case to get to ajury. Proximate cause is a factual question that is on the tail-end of a tort claim. In addition, ajury decides proximate cause (unless judicial imposition). These two elements appear to run together because policy and foreseeability influence them. However, one denotes a relationship between parties. and the other indicates relationship between events.

defense as an absolute bar) b/c the assumption was most likely both unreasonable and secondary (which are absorbed into comparative negligence). claims against FW and K

P will also sue FW and K(respondeat superior) separately for negligence through breach of duty to control.

P will argue that FW owes him a duty to use reasonable care to guard him against dangerous employees. Since the nature of the work involves close personal contact in confined spaces. FW should take precautions—as a minimum—investigating past criminal records. FW will argue that H's past criminal record does not involve violent crimes and is t/f irrelevant.

Even ifP can't prove a separate duty. he will try and bring in the deep pockets (FW and K) for vicarious liability through a respondeat superior theory. Since H was acting in the scope of her employment, this should not be too difficult.

Battery'

There are 3 basic elements to battery'—(I) def. must cause a touching to pl. (2) the touch must be harmful or offensive and (3) Defmust have the requisite intent to touch.

Cause

Hoover could try and claim that she didn't cause a touching at all. It is well established however, that the protection from intentional contacts extends to anything attatched to the body—which would be the vaccurn attachment here. Intent

I he Restalement limits the intent element to intending the harm itself, but to intending a harmful or offensive touching. Hoover will argue that she was horsing around and wanted to give him a vaccurn "kiss". But. courts have found the intent element to be satisfied in "jokes" such as this one. Powder will argue that he is entitled to protection from such nonsense and should be free to live his life w/o such behavior, and that the law-should protect this.

Powder will argue that Hoover insisted that he come over lo her house—and then would not let him leave. Since the intent can transfer from false imprisonment to battery. Powder could try' to establish intent in this way—by showing that Hoover intended confinement in a bounded area. But. Hoover will argue that he was free to leave.

Damages

Since most cases are settled out of court, we may never make it past here. but if we do. ajury will calculate the damages. II. FW. and K will be held jointly and severally liable through vicarious liability discussed earlier.

First. P can recover his past pecuniary losses—including medical bills tor the resulting operation, and all expenses resulting from the time that he spent in the hospital. I his will cover his 2 month leave and other bills. He can also get future pecuniary losses—which include lost wages (or diminished earning capacity) and future drugs. lherapy. and treatment, which will be calculated by estimating how long P is expected lo live. He will likely have to bring in an expert to prove these.

P can also get non-pecuniary compensatory damages in tlie form of pain and suffering, emotional harm, and toss of enjoyment of life. Since he was fully conscious and sutTcred physical harm, he will have no problem recovering.

Through the intent element of his battery claim or through some showing of

wanton behavior on the part ofH. P could seek punitive damages. FW and K will against this. since they did not actually commit any act. But P will argue (citing the Restatement §909)—that the agent was unfit, as evidenced by her criminal record.

All of the pecuniary damages will be discounted to their present value (w the exception ofP+S). and the punitive damages will likely be taxed.

IfITs assumption ofthe risk defense is absorbed into comparative negligence— then the jury will somehow figure P's % of comparative fault—and reduce P's judgment accordingly.

Insurance companies may represent *defs* during this entire process. IfH is guilty of battery, her insurance probably will not cover it. The judge may reduce the damages through remittitur. the lawyer will take *his* cut. and finally P will be left with a carved up sum—which couki later be reduced even more through subrogation.

Duty and proximate cause are two of the most complex and evasive principles in tort law. The two principles resemble each other in three main respects: (I) they are both terms that are bound up in the relation between the particular plaintiff and defendant (2) they both serve a limiting function, acting as a barrier between the plaintiff and the pot of gold and (3) they are both conclusory labels applied byjudges as a matter of law.

Duty is something that exists between individuals (plaintiff and defendant). although it is sometimes spoken of as if it just Iloats in the air. It is a relative term that defines the legal obligation that one party has to conform to a particular standard of conduct toward another person, Ifthere is a duty. the plaintiff must still show breach of such duty to recover lor injury. But, if no duty is established between the two parties. then the plaintiff has no casa^^roximate cause is also a relative concept. This is no great revelation, but important in comparing the two concepts. Cardozo—who couched the case in terms of duty—emphasized this in Palsgraf: "the conduct of the del's guard, if a wrong in relation to the holder of the package, was not a wrong in relation to the plaintiff standing far away." Andrews counters that the conduct is a wrong to all people injured— except those *who* whose injury the pi. did not proximately cause, lie goes on to explain that this line he draws is esentially a line based on policy. The physics of line drawing engaged in (in my opinion) by both sides is still a line whether you call it duty or proximate cause. So. there are reasons and principles for distinguishing b/t duty anJ prox. cause, but they are mostly mental gymnastics. The two concepts are very similar, because they perform important limiting

functions. Duty. in the broad sense that Cardozo uses it—serves as an excluder, in order to shield industry from crushing liability in certain instances, the courts will Find that no duty is owed. in the same way, proximate cause is evoked.

The student is correct in concluding that the two principles are indistinguishable in the sense that they are both conclusory labels. Every proximate cause issue could be decided by the conclusory labels of "duty!"(if there is proximate cause) or "no duly!"(if there is none) instead of couching the decision in terms of proximate cause. In this sense. il doesn't matter what you call it.

However, many specific tests and rules have developed that distinguish the two concepts. While certain cases—like Palsgraf—bring out the similarities in the two (doctrines—the specific rules that courts have created make easier cases more clear-cut.

Powder(P) will file suit against Hoover(H), Franchiseworks(FW). and Kirbv iTianufacturers(K). P will sue H for battery and negligence—and bring in FW and K. on a respondeat superior vicarious liability theory. Negligence

First, P must establish that H owes him a **duty.** If he's in a c/l landowner-duty jurisdiction. P will argue that he is an invitee, since he was invited over to do business. H will argue that she merely asked him to come see a demo^-J^t^Hy""^ argues that invitation is implied—she clearly wanted to make a sale. N^egardles^^he landowneF^ owes a duty to use reasonable care in activities on the land—wElCh would cover this vaccum incident. If they are in a Rowland jurisdiction or even a general Heaven v. Ponder jurisdiction—the general duty to exercise reas. care would cover this act of misfeasance by H.

The **standard of care** would be that ofan average reasonable person under similar circumstances. P must show that H's conduct imposed an unreasonable risk of harm to him. Even ifH claims she is crazy, she will be held to this standard. This case resembles Brown v. Kendall in some ways. Certainly H will claim that she caused the injury by accident—she is just a wacky, silly kinda gal. But—when you ask whether the action will lie in this case, you must apply the reasonable person standard.

A jury could easily determine that H did not meet the requisite standard of care (and t/f **breached her** duty), as she could probably have avoided the accident—at the cost only of a foregone joke—by exercising the kind of ordinary care which a reasonable person does. H will argue that no customer has ever complained before. H will argue that P should have related his condition. P will argue that the law should not protect the interests of a person in H's shoes whose actions create no social or economic bcncl'it— but create a risk. Although the extent of injury unusual, the fact that injury occurred was not unusual, and even a slight risk should be enough to establish breach of duty.

The element **of cause-in-fact** will likely be easily decided in favor ofP by the jury. P will argue that but-lor H's vaccum attack, his stitches would not have re-opened. P will argue that H **proximately caused** the injury to him. b/c—not only was the injury reasonably forseeable. but P suffered just the kind (although perhaps more severe) of damage that a person risks when they use a vaccum in such a way.

P will argue that only the extent of damage was unforseeable—and this does nol need to be forseeable. H must take her pi. as she Finds him. 11 will argue that the type *of* damage was unforseeable, as there is no way anyone would expect this type of harm. She yvill cite Wagon Mound & argue that even with the surgery, she could not have forseen such harm. as the vaccum was not that powerful.

in defense of the claim against her. H will argue that P impliedly assumed the risk. Since P knew ofhis incredibly fragile condition, he knew that he could be injured. Rite's lough—accidents happen. P will argue that he did not have knowledge of the *particular* risk—and if he did, he would not have come over. P will also argue that he did nol voluntarily assume such risk. as H took advantage ofhis fragile condition, and compelled him through duress, if assumption olrisk remains a complete defense, then P will be barred from recovering. This is unlikely (unless the jurisdiction retains the