Torts—Final Examination
Professor Russell
10-13 May 2006

FINAL EXAMINATION

TORTS

HOUSE OF RUSSELL

INSTRUCTIONS:

1. **DEADLINE:** This is a 74-hour examination. You may begin the exam at any time after 3 pm on Wednesday, 10 May. You must submit your answers by 5 pm on Saturday, 13 May. **If you turn in your answers after 5 pm on 13 May, then you will receive an F for your spring semester grade. NO EXCUSES.**

2. **TURNING IN YOUR ANSWERS:** Turn in your answers according to the directions that the registrar has supplied to you. **Do NOT contact Professor Russell with exam-related difficulties. If you have difficulty, follow the instructions that the registrar has supplied. Your job includes ensuring that you have turned in the correct answer. Whatever you have turned in by the deadline will be the basis for your grade.**

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 discuss, show, or distribute this examination or your answers to anyone at all before 5 pm on Saturday, 13 May. Once the exam starts, you may not discuss it with anyone at all before the examination ends at 5 pm on Saturday, 13 May.

4. **EXAM NUMBER:** Be sure to put your exam number on your answer. **Do not put your name anywhere on the exam.**

5. **LENGTH:** This examination consists of one question. You may use no more than 2,700 words to answer the question. Reducing your answers to this word limit will be one of the challenges of this examination.

6. **SPACING:** Please try to double-space your answers. Avoid miniature fonts, okay?

7. **HOW TO ANSWER:** In answering, use judgment and common sense. Be organized. Emphasize the issues that are most important**. 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 law with the facts before you. **Avoid wasting time with lengthy and abstract summaries of general legal doctrine**. Discuss all plausible lines of analysis. Do not ignore lines of analysis simply because you think that a court would resolve an ambiguous question one way rather than another.

8. **JURISDICTION:** Each of the injuries that form the foundation of the exam questions takes place in Newstate, the 51st state of the union. Newstate is NOT Colorado.

9. **CONCISION:** Quality, not quantity is desired. Think through your answer before you begin to write. You have a lot of time to write and edit your answers. Concision will win you points. Good organization will win you points as well.

10. **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 Dean of Students immediately after this examination ends.

11. **GOOD LUCK**: Good luck and have a great summer.

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Alumni Speed-Dating

A doctor, a lawyer, and an engineer walked up the front steps. The trouble was about to begin.

Dan Defendme was the party host. He had a large, gracious home and was very active in Newerstate's chapter of the Ivy Alumni Association. He held an MBA from Ivy University and was a rising star in the executive ranks of an insurance company. Mr. Defendme was always interested in making new business connections with fellow professionals. He was an excellent networker.

Mr. Defendme was also heterosexual and single. He was seeking success in business and looking for love. Of the two, business was more important to him, and he was more effective at business than love. That's why he offered his large and gracious home to the Ivy University Alumni Association for a speed-dating event.

Speed-dating is a manifestation of the late twentieth-century's constriction of leisure time for professional people. According to Wikipedia,

> In the original idea of speed dating, men and women are rotated to meet each other for only eight minutes. At the end of each eight minutes, they are forced to the next round no matter how much they are enjoying the interaction (or dread the next one). At the end of the event, participants submit to the organizers a list of those to whom they would like to provide their contact information. To maximize the number of interactions, organizers often depart from the original idea and set meeting times as low as one minute per person. If there is a match, contact information is forwarded to both parties. Contact information cannot be traded during the initial meeting, in order to reduce pressure (especially on women) to accept or reject a suitor to his or her face.

Used to facilitate gay and straight matchmaking, the basic idea is to give speed-daters a quick opportunity to meet a number of other eligible, interested people whom they might like to date. The speed-daters move from table to table, talking briefly with their counterparts in order to gauge whether there is chemistry that merits a subsequent, real date. This particular Ivy alumni speed-dating event was a heterosexual event; the alumni association also held speed-dating for gay alumni. The Ivy speed-dating event at Defendme's house included 40 participants—20 men and 20 women. Defendme was one of the participants.

The alumni paid $100 each to participate in the event. Defendme, as host of the party, was exempt from paying the fee. From the $3,900 that the alumni association collected from the speed-dating participants, the association took $1,500 as profit. Alumni association staff spent the remaining $2,400 on the party. Association staff

bought the wine, made the hors d'oeuvres, set up the tables, and cleaned up after the party as well. As part of the deal, Defendme got to keep any leftover wine.

Dr. Medico was the first one injured. She never made it past the first landing on the 15 steps up to the front door. It was a cold, clear, and still winter evening with the temperature at 20 degrees Fahrenheit. Dr. Medico was walking just in front of Mr. Engineer and Mr. Lawyer when she slipped on the landing, which was five steps up the stairway from the sidewalk out front. She stepped on a patch of ice—smooth and dark on the dim stairway—and her expensive new black, high-heeled pump gave way. She could feel the Anterior Cruciate Ligament in her left knee snap like a rubber band as her leg twisted away beneath her, and the engineer and lawyer could hear bones in her right hand and wrist crack as her right fell to the ground. As she fell, Dr. Medico noticed how brightly the red giant Betelgeuse shone as the shoulder in the constellation Orion. Just after she hit her head, she worried that she had damaged her new shoes, and she had a vision of the heart surgery that she had performed early that morning. She then lost consciousness.

Mr. Engineer attempted to comfort the unconscious doctor while Mr. Lawyer telephoned 911 to summon an ambulance. The ambulance arrived from the nearby fire station within three minutes, and the paramedics stabilized the doctor, put her on a backboard, and transported her to the hospital. Dr. Medico, Mr. Lawyer, and Mr. Engineer were the last of the speed-dating guests to arrive at the party, and so no one had to step over the doctor's body in order to get up the steps and into the party. Defendme, some of the alumni association staff, and some of the guests watched from the steps as the paramedics arrived and did their work.

Mr. Engineer stayed with the doctor on the steps and held her limp, left hand while waiting for the paramedics to arrive. He was a very decent man--handsome, too. He was also a bit smitten with the doctor, whom he had met at a previous alumni event. After the ambulance arrived, Mr. Engineer asked the paramedics if he might accompany her to the hospital, and the paramedics agreed.

As soon as the paramedics arrived, Mr. Lawyer continued his climb up the steps. He specialized in medical malpractice litigation, advertised extensively during daytime soap operas on television, and knew from the Dr. Medico's first cold, hard look that he had no "chance" with her. He had no interest, either. To Mr. Lawyer, she looked like a well-heeled possible future defendant. When the paramedics arrived, the lawyer said to Mr. Engineer, "Well, it looks like you have everything under control. There's no sense in both of us freezing out here and missing out on the fun upstairs."

While the paramedics worked on Dr. Medico, Mr. Engineer analyzed the situation—not the love situation but the injury situation. He first noticed that the design of the staircase and in particular the design of the carved stone handrail on the stair case collected water and deposited it on the first landing of the staircase. He wondered about the design, and later, during a break in the speed-dating, he asked Mr. Defendme about

the front steps. Defendme had lived in the house for a little more than one year. The previous owner had built the house and lived in it for two years before selling it to Defendme. The architectural firm that designed the house and yard was Opulent Houses, Inc. Defendme said that he almost never used the front steps because he entered and exited the house through the garage, where he kept his BMW. Defendme said as well that he had never gone down the front steps while it was snowy or icy. He never really used the front part of his house.

Mr. Engineer noticed a second thing while he waited on the steps. By starlight, he saw a faint, perhaps oily sheen on the ice. He learned from the alumni association staff that they had used an herbal ice-melting remedy on the front steps. The name of the product was Herba-Melt. At work the next day, Mr. Engineer researched the product on the internet and found that the manufacturer claimed that Herba-melt was a combination of 19 different herbs and spices that would melt ice while generating runoff that would fertilize the garden. In an on-line review of the product that Mr. Engineer found on the Consumer Reports magazine website, Mr. Engineer learned that the Consumer Reports testers found that below 29 degrees Fahrenheit, Herba-Melt was completely ineffective and, indeed, tended to leave a slippery, oily sheen on the surfaces to which it was applied.

The main event—the speed-dating—started reasonably well given the terrible beginning. The wine, a Super Tuscan, was delicious with a powerful loamy bouquet and an underlying whiff of pheromone. Things went well for the first two rounds when suddenly the Ivy alumni heard a scream and the shattering of a glass. All eyes turned to Mr. Lawyer, who had ducked down near the table just as Ms. Computers threw her wineglass, just filled with the lovely red Super Tuscan, at the lawyer who had just made an astonishingly inappropriate remark. Frightened, he ducked just in time, and the glass sailed across the room and smashed against the small yet very nice Impressionist painting that Defendme had purchased for $300,000.

Mr. Lawyer, sensing that the time was right for his departure, grabbed his coat and hurried out the front door. He slammed the door behind him and hurried down the front steps, taking them two at a time. When he stepped onto the final landing—the one on which Dr. Medico had fallen—he lost his footing and tumbled down the front steps, hitting his head hard on the edge of a step. No one discovered his corpse for an hour, because the speed-dating had continued without him. The paramedics noted in their report that he had dialed 9-1 on his cell phone before, presumably, he passed out or died. Had he been able to dial the final 1, he might have lived.

After the speed-dating ended, the alumni discovered the lawyer at the bottom of the steps. This brought the paramedics for their second but not final trip to Defendme's house for the evening.

The final visit by the paramedics came just after midnight. Ms. Lastone, a member of the alumni association staff, had stayed behind to complete the final cleanup of the party. Mr. Defendme invited her to sample some of the Super Tuscan, a few

bottles of which were opened but not empty. She had foregone drinking during the event out of sense of professional responsibility, but she was so upset that she decided after packing up everything from the party that a glass of wine might be just the thing. One glass led to another and then one thing led to another and around midnight, Ms. Lastone and Mr. Defendme were naked together in his bed. Later, as the paramedics carefully loaded her and her broken leg onto a gurney, she exclaimed, "That boor smacked me out of the bed!" Mr. Defendme, in his bathrobe, whimpered, "We were just playing." The trauma doctor's report noted a hand-sized bruise on Ms. Lastone's thigh.

This terrible evening happened last December. Mr. Lawyer is dead, Ms. Lastone has a terrible permanent limp, and the Impressionist painting was a total loss. The only good thing that has happened is that Mr. Engineer and Ms. Medico are now engaged to be married. Mr. Engineer has stayed by her side, nursed her to health, and is now helping her make the transition to a new specialty of internal medicine. The damage to her hand and wrist—she is right-handed—ended her career as a surgeon.

YOUR JOB: You work for a defense firm and represent Mr. Defendme. He has considerable wealth and plenty of liability insurance. Like anyone, he would prefer that his insurer pay any damages for which he might be liable. He would prefer not to rely solely on the advice of the lawyers that his insurance company will provide. He thinks that the doctor, the lawyer, and the Ms. Lastone should have been more careful. Please analyze his responsibility, if any, for the injuries to Dr. Medico, Mr. Lawyer, and Ms. Lastone. Evaluate thoroughly the compensation that each might seek. Finally, Mr. Lawyer would like to be compensated for the destroyed Impressionist painting. Unfortunately for him, his own insurance will not cover that item because he did not specifically list the painting as a separate item under his policy. Please evaluate whether he has a claim and if so, against whom. If you happen to see any contracts-related issues, rest assured that lawyers with more experience regarding contracts will analyze those matters. Your focus should be on torts. Remember that your response should not exceed 2,700 words. Below, you will find seven of Newerstate's statutes; these may be of some help in your analysis.

Statutes

Statute 1. Negligence cases - comparative negligence as measure of damages.

(1) Contributory negligence shall not bar recovery in any action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in

proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made.

(2) In any action to which subsection (1) of this section applies, the court, in a nonjury trial, shall make findings of fact or, in a jury trial, the jury shall return a special verdict which shall state:

(a) The amount of the damages which would have been recoverable if there had been no contributory negligence; and

(b) The degree of negligence of each party, expressed as a percentage.

(3) Upon the making of the finding of fact or the return of a special verdict, as is required by subsection (2) of this section, the court shall reduce the amount of the verdict in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made; but, if the said proportion is equal to or greater than the negligence of the person against whom recovery is sought, then, in such event, the court shall enter a judgment for the defendant.

Statute 2. Pro rata liability of defendants.

(1) In an action brought as a result of a death or an injury to person or property, no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury, death, damage, or loss.

(2) The jury shall return a special verdict, or, in the absence of a jury, the court shall make special findings determining the percentage of negligence or fault attributable to each of the parties and any persons not parties to the action of whom notice has been given pursuant to paragraph (b) of subsection (3) of this section to whom some negligence or fault is found and determining the total amount of damages sustained by each claimant. The entry of judgment shall be made by the court based on the special findings, and no general verdict shall be returned by the jury.

(3) (a) Any provision of the law to the contrary notwithstanding, the finder of fact in a civil action may consider the degree or percentage of negligence or fault of a person not a party to the action, based upon evidence thereof, which shall be admissible, in determining the degree or percentage of negligence or fault of those persons who are parties to such action. Any finding of a degree or percentage of fault or negligence of a nonparty shall not constitute a presumptive or conclusive finding as to such nonparty for the purposes of a prior or subsequent action involving that nonparty.

Statute 3. Product Liability: comparative fault as measure of damages.

(1) In any product liability action, the fault of the person suffering the harm, as well as the fault of all others who are parties to the action for causing the harm, shall be compared by the trier of fact in accordance with this section. The fault of the person suffering the harm shall not bar such person, or a party bringing an action on behalf of such a person, or his estate, or his heirs from recovering damages, but the award of damages to such person or the party bringing the action shall be diminished in proportion to the amount of causal fault attributed to the person suffering the harm. If any party is claiming damages for a decedent's wrongful death, the fault of the decedent, if any, shall be imputed to such party.

(2) Where comparative fault in any such action is an issue, the jury shall return special verdicts, or, in the absence of a jury, the court shall make special findings determining the percentage of fault attributable to each of the persons to whom some fault is attributed and determining the total amount of damages sustained by each of the claimants. The entry of judgment shall be made by the court, and no general verdict shall be returned by the jury.

(3) The provisions of Statute 1 do not apply to any product liability action.

Statute 4. General limitation of actions - two years.

(1) The following civil actions, regardless of the theory upon which suit is brought, or against whom suit is brought, shall be commenced within two years after the cause of action accrues, and not thereafter:

(a) Tort actions, including but not limited to actions for negligence, trespass, malicious abuse of process, malicious prosecution, outrageous conduct, interference with relationships, and tortious breach of contract.

(b) All actions for strict liability, absolute liability, or failure to instruct or warn;

(c) All actions, regardless of the theory asserted, against any veterinarian;

(d) All actions for wrongful death.

(e) Repealed.

(f) All actions against any public or governmental entity or any employee of a public or governmental entity for which insurance coverage is provided.

(g) All actions upon liability created by a federal statute where no period of limitation is provided in said federal statute;

(h) All actions against any public or governmental entity or any employee of a public or governmental entity.

(i) All other actions of every kind for which no other period of limitation is provided.

Statute 5. General limitation of actions - one year.

(1) The following civil actions, regardless of the theory upon which suit is brought, or against whom suit is brought, shall be commenced within one year after the cause of action accrues, and not thereafter:

(a) The following tort actions: Assault, battery, false imprisonment, false arrest, libel, and slander;

(b) All actions for escape of prisoners;

(c) All actions against sheriffs, coroners, police officers, firefighters, national guardsmen, or any other law enforcement authority;

(d) All actions for any penalty or forfeiture of any penal statutes;

(e) All actions for negligence, fraud, willful misrepresentation, deceit, or conversion of trust funds.

Statute 6. Limitation of actions against architects, contractors, builders or builder vendors, engineers, inspectors, and others.

(1)(a) Notwithstanding any statutory provision to the contrary, all actions against any architect, contractor, builder or builder vendor, engineer, or inspector performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property shall be brought within two years after the claim for relief arises, and not thereafter, but in no case shall such an action be brought more than six years after the substantial completion of the improvement to the real property, except as provided in subsection (2) of this section.

(b) A claim for relief arises under this section at the time the claimant or the claimant's predecessor in interest discovers or in the exercise of reasonable diligence should have discovered the physical manifestations of a defect in the improvement that ultimately causes the injury.

(c) Such actions shall include any and all actions in tort, contract, indemnity, or contribution, or other actions for the recovery of damages for:

(I) Any deficiency in the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property; or

(II) Injury to real or personal property caused by any such deficiency; or

(III) Injury to or wrongful death of a person caused by any such deficiency.

Statute 7. When action survives death.

If any person entitled to bring any action dies before the expiration of the time limited therefor and if the cause of action does by law survive, the action may be commenced by the personal representative of the deceased person at any time within one year after the date of death and not afterwards.

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Answer-to-Question-_1_

I have outlined below the possible claim and liabilities relating to Mr. Defendme.

First, none of the claims analyzed below are presently barred by Newerstate's statute of limitations.
Defendme's claims are all within the SOL and will be filed in a timely manner.

Second, we need to address Newerstate's comparative negligence statutes which are ambiguous. Statute 1(1) uses a modified (51%) system which provides that a person shall not be barred from recovery if that person is **less** negligent than the person against whom recovery is sought.

However, statute 1(3) provides that if the injured person's allocation of damages **is equal to or greater than** the negligence of the person against whom recovery is sought then the court shall enter judgment for the defendant.

Resolving this ambiguity may limit Defendme's liability because the plaintiff's allocation of damages may be equal or greater than the allocation of multiple tortfeasors. If Newerstate adopted the Restatement (Third) of Torts then such an ambiguous statute would be interpreted as not to bar the plaintiff from recovery the damages will just be reduced as per statute 1 (3).

Third, we will try to minimize Defendme's liability by ensuring all tortfeasors, both parties and non-parties, are allocated their respective percentage of damages in accordance with Newerstate's statute 2.

Negligence Land Occupier: Dr. Medico and Mr. Lawyer v. Defendme

If Newerstate does not use the Unitary Standard which maintains the duty of landowners to that of a reasonably prudent person then we will apply the following analysis to determine the guest's status.

First, we'll argue that the plaintiff's were licensees because they were invited to Defendme's home for their own benefit of socializing and conferred no particular benefit on Defendme. Additionally, the Alumni Association reaped the financial benefit not Defendme.

Plaintiffs will argue that they were invitees because they paid money to attend the Alumni event. Defendme a well known networker in the insurance business hosted the event for making business connections as well as love connections. Although Defendme did not receive any money directly for the event, he did receive a benefit of the waived $100 fee plus the left over wine.

Courts are inclined to construe the status of business invitee broadly and thus, speed-dater's status will likely be found to be invitee's.

Invitee Duty:

Defendme has a duty to inspect and warn of dangers that he knows of or reasonably should have known about, unless they are open and obvious.

Standard of Care:

Inspect and fix or provide warning of known dangers.

Breach:

Defendme neither cleared the ice from the front landing nor did he warn of the danger.

Cause in Fact:

But for Defendme not clearing the landing of ice, Dr. Medico and Mr. Lawyer would not have fallen on the ice. Substantial factor may also apply because Defendme, Alumni Association, and Herbal Melt all contributed to the ice not being removed.

* In this case there may be multiple tortfeasors who are a "but for" cause of Dr. Medico's and Mr. Lawyer's injuries/death because any of the tortfeasors listed below could have avoided the accident by acting reasonably.

Proximate Cause:

Plaintiff- Dr. Medico and Mr. Lawyer's fall and subsequent injuries/death are a direct consequence of ice left on the landing on a cold winter night. This type of fall and injury is foreseeable.

Defendme- Alumni's use of the herbal ice melting remedy was an intervening cause because the product left a slippery, oily sheen on the landing.

Defendme will also argue that the design of the staircase depositing the water on the first landing was an intervening cause. This argument probably will not prevail because Defendme still had a duty to inspect.

Licensee Duty: Warn about concealed artificial or natural known dangers. No duty to inspect.

Defendme had no knowledge of the ice on the landing because he never used the front steps in

winter. He entered and exited the house from the garage. If he had no knowledge of ice then he had no duty to warn.

Standard of Care:

Warn of concealed known dangers.

Breach:

Only, if Defendme knew of the danger and failed to provide a warning or remove the ice from landing.

Cause in Fact:

See above

Proximate Cause:

See above

Damages: see below

Defenses: Dr. Medico v. Defendme

Comparative negligence or implied assumption of risk depending on Newerstate: Dr. Medico walked up a dimly lit stairway on a cold winter night in high heels. She impliedly assumed the risk of ice and did not take any precautions. Over thirty other guests had already climbed the steps without incident. The jury or court may apportion some percentage of fault for this action.

Defenses: Mr. Lawyer v. Defendme

Comparative negligence or implied assumption of risk depending on Newerstate: Mr. Lawyer watched as Dr. Medico slipped and fell on the ice on the front landing earlier in the evening. When he left the house he could have exited from the garage door. Instead he chose to leave the house through the front door and hurriedly took the steps two at a time. The jury or court will likely apportion a high percentage of fault to Mr. Lawyer for these actions.

Dr. Medico and Mr. Lawyer v. Alumni Association

Duty: Act reasonably under the circumstances. Duty is generally limited to reasonably foreseeable plaintiffs.

Standard of Care: That of a reasonably prudent person under the circumstances.

Breach: A reasonably prudent person does not try to remove ice with a herbal remedy without confirming that the ice was in fact removed, especially with over thirty guest arriving later in the evening.

Cause in Fact: But for the Alumni Association not removing the ice from the landing Dr. Medico and Mr. Lawyer would not have slipped on the landing.

Proximate Cause: Dr. Medico and Mr. Lawyer's falls and subsequent injuries/death are a direct consequence of ice left on the landing on a cold winter night. These types of falls and injuries are foreseeable.

Damages: see below

Defenses: See above for Dr. Medico and Mr. Lawyer

Herba Melt

Strict liability for product liability: look at product not the state of mind of the manufacturer

Defects: A person who sells a product in a defective condition unreasonably dangerous to the user or his property. Three kinds of defects:

1. **Manufacturing defect:** product not in the condition the manufacturer intended. Herba melt did not melt the ice and in fact left a slippery, oily sheen where it was applied.

2. **Design Defect:** Product design presented an undue risk of harm in normal use by not melting the ice and by leaving a slippery, oily sheen on the stair landing.

a. Competing test to determine defects. Risk utility, consumer expectation and a hybrid.

b. Consumer expectation test: Herba melt did not perform as safely as an ordinary consumer would have expected.

c. Risk utility test: Herba melt is defectively designed because the magnitude of the hazard (not melting ice and worse leaving a slippery, oily sheen) outweighs the individual utility or any broader societal benefits.

3. **Warning Defect:** Herba melt contained no warning regarding the dangers of not being effective in melting the ice below 29 degrees Fahrenheit. Additionally, there were no warnings that below this temperature the product left a slippery, oily sheen.

Cause in Fact: But for the manufacturing defect/ design defect/ the ice would have melted and Dr. Medico and Mr. Lawyer would not have fallen.

But for the manunfacturer not providing a warning the Alumni Association would not have used the product and would have removed the ice another way. Additionally, had the Alumni Association not used the product there would have been no slippery, oily sheen on the landing.

Proximate Cause: Dr. Medico's and Mr. Lawyer's injuries are a direct consequence of the ice on the landing. These types of falls and injuries/death are foreseeable.

Damages: see below

Negligence Herba Melt:

Duty:

Manufacturers must design and manufacture products that are reasonably safe to users. Manufacturers also have a duty to warn consumers of hazards associated with use of the product.

Standard of Care: same as a reasonable man who is an expert in the pertinent field of manufacture. Herba melt must exercise due care under the circumstances.

Breach: Herba melt did not melt the ice as advertised. Herba melt did not warn about the product leaving a slippery, oily sheen.

Cause in Fact: But for Herba melt not melting the ice and leaving a slippery, oily sheen Dr. Medico and Mr. Lawyer would not have fallen.

Proximate Cause: The ice not melting and the slippery, oily sheen left by the Herba melt

product is a direct cause of Dr. Medico and Mr. Lawyers falls. Their falls and injuries/death were a foreseeable result of the ice and slippery, oily sheen.

Damages: see below

Could also argue **Res Ipsa Loquitur** since such an accident doesn't happen without negligence. Manufacture in control at time of negligence. Plaintiff didn't contribute to negligence.

Misrepresentation: If the manufacturer said Herba melt would melt ice at any temperature. Co-council will explore further.

Breach of Warranty: Co-council will address.

Defenses Products Liability Claim: see above for Dr. Medico and Mr. Lawyer's comparative fault.

Opulent House (Architectural Firm)

* Negligent claim v. products liability depending on Newerstate. Architects are professionals providing a service to their client and are not selling products to enter the stream of commerce.

Duty: When active, Opulent House must act within the custom of architects. The architect-client relationship and foreseeable users of the home establishes the duty.

Standard of Care: The custom of professional architects sets the standard.

Breach: Failure to meet the custom. May need experts to establish the custom; however, this is

unlikely because this breach will be readily apparent to a layperson. Architects should not design a stair handrail to collect and deposit water on the stair landing, especially in cold climates.

Cause in Fact: But for Opulent House breaching the architectural custom of designing handrails, the handrail would not have collected and deposited the water on the landing. The water would not have frozen and Dr. Medico and Mr. Lawyer would not have slipped on the ice.

Proximate Cause: Dr. Medico and Mr. Lawyer's fall and subsequent injuries/death were a direct consequence of the water deposited from the handrail freezing on the landing. These types of falls and resulting injuries/death are foreseeable.

Damages: see below

Defenses: See above

Injuries & Damages:

Dr. Medico Injuries:

Snapped Anterior Cruciate Ligament in left knee

Broken bones in her right hand and wrist

Loss in consciousness

Loss of Ability to perform heart surgery

Damages:

Special Damages: Pecuniary damages, receipts, medical bills, etc.

Medical bills: past medical bills including ambulance cost plus any future bills for surgeries, rehabilitation, medications.

Wages: Lost wages while recuperating from injuries. Future earnings capabilities reduced due to the transition from heart surgeon to internist due to the hand and wrist injury.

Incidentals: Any cost associated with the retraining involved to transition to internal medicine. Any nursing or home care she required because of both a leg and hand injury.

General Damages:

Pain and suffering: Pain and suffering prior to unconsciousness, during the medical procedures to care for her leg, hand, and wrist plus any head injuries from the unconsciousness, and any continued pain and suffering resulting from the injuries.

Emotional Distress: Impact Rule: Distress over pain from injuries and loss of a dream career.

Hedonic/loss of enjoyment of life: Dr. Medico injuries to her right hand and wrist have ended her life long dream of being a heart surgeon. Her knee and hand injuries have limited her ability to enjoy many of the activities she did prior to the injury.

Mr. Lawyer's damages:

Special/ Pecuniary Damages: Funeral expenses, ambulance cost.

Wrongful Death: Recovery defined by statute, generally, "close relative." Recovery limited to pecuniary losses, replacement of value of wages or services provided by decedent.

Survival Action: Conscious for short time after he hit his head as evidenced from the partially dialed 9-1 call.

Ms. Lastone v. Defendme: We will try to have the plaintiff characterize the slap as negligence in order to have insurance defend suit and pay any damages. Plaintiff will likely characterize the slap as battery because Defendme has considerable assets. As an intentional tort, Defendme will have to pay the attorney's fees plus any damages. We may want to settle this suit.

Battery: Occurs when the defendant's acts intentionally cause harmful or offensive contact with the victim's person. The intent requirement is met if the defendant intended to cause the harmful or offensive contact irrespective of intent to cause harm.

Defendme intentionally slapped Ms. Lastone. Defendme's intent to be playful is irrelevant because the slap was harmful or offensive as evidenced by Ms. Lastone's comment to the paramedics and the bruise on her thigh.

Cause in Fact:

But for Defendme's slap, Ms. Lastone would not have fallen out of the bed and would not have broken her leg.

Proximate Cause:

Defendme's slap was a direct cause of Ms. Lastone falling off the bed and breaking her leg. Ms.

Lastone's injuries are a foreseeable consequence of slapping a person to the point of pushing them off the bed.

Defenses:

Consent:

If Ms. Lastone consented to playing by slapping each other then Defendme is not liable.

Based on Ms. Lastone's injuries and comment to the paramedics it appears that the slap from Defendme went beyond the scope of any consent expressly or impliedly given.

Additionally, if there was consent it would be invalidated if Ms. Lastone was incapacitated due to the alcohol.
Thus, Defendme will be liable.

Damages:

Ms. Lastone's Injuries:

Hand size bruise on leg

Broken leg resulting in a permanent limp

Special Damages: Pecuniary damages, receipts, medical bills, etc.

Medical bills: past medical bills including ambulance cost plus any future bills for surgeries, rehabilitation, medications.

Wages: Lost wages while recuperating from injuries. Future earnings capabilities reduced

because of only being able to walk with a limp. Need more information as to other career skills.

Incidentals: Any nursing or home care she required, crutches, wheelchairs etc.

General Damages:

Pain and suffering: Pain and suffering from the slap, medical procedures to care for her leg, and walking with a limp.

Emotional Distress: Impact Rule: Distress from embarrassing slap and distress over her injuries.

Hedonic/loss of enjoyment of life: Ms. Lastone is unable to enjoy many of the activities she once cherished because of the broken leg and resulting limp. (i.e. Avid tennis player etc. more information needed.)

Defendme v. Ms. Computers: (may argue as negligence if Ms. Computer has minimal assets because insurance will not pay for intentional torts.)
Intentional tort: transferred Intent to trespass to chattel- Intent to assault can be transferred to satisfy the requisite intent for trespass to chattel.

Assault: Standard: Ms. Computer's act of intentionally throwing the wine glass at Mr. Lawyer caused Mr. Lawyers reasonable apprehension of immediate harm.

Cause in Fact: But for Ms. Computer's intentional act, Mr. Lawyer would not have been

frightened (apprehensive).

But for Ms. Computer assaulting Mr. Lawyer the wine glass would not have hit the Impressionist painting resulting in a total loss.

Proximate Cause: Ms. Computer assaulting Mr. Lawyer with a wine glass is a direct result of the painting being destroyed. It is also foreseeable that a painting will be destroyed when Ms. Computer threw a wine glass across the room.

Damages: Ms. Computer is liable for the entire market value of the painting $300,000.

Defenses: none

Conclusion:

In Accordance with Newerstate's statutes we will be able to limit Defendme's liability for Dr. Medico and Mr. Lawyer's damages. The damage amount awarded will be apportioned according to the percentage of fault allocated by the court between Defendme, Alumni Association, Herbal Melt, Opulent House, and Dr. Medico and Mr. Lawyer respectively. Dr. Medico's claim will probably not be diminished or minimally diminished due to her comparative fault. Mr. Lawyer's apportionment of the fault will probably be quite high because he had knowledge of the ice, yet he hurriedly took the steps two at a time. He therefore, impliedly accepted the risk of ice on the landing.

Defendme will be fully liable for Ms. Lastone's damages.

Ms. Computer will be liable to Defendme for the $300,000 for the Impressionist painting.

Exam 941

Institution **DU Law**

Course **S06 Torts II 101-Russell**

Instructor **NA**

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Section 1 **2787**

Answer-to-Question-_1_

MEMO

To: Esteemed Defense Partner

From: 792

Re: Defendme's Speed-Dating fiasco

Date: May 13, 2006

This memo addresses Mr. Defendme's potential liability for the unfortunate injuries at his home last December during the Ivy Alumni's Speed-Dating event. It describes 1) each potential claimant's action(s) against Defendme; 2) Defendme's possible defenses; and 3) each plaintiff's damages if Defendme loses. Finally, Defendme's options regarding compensation for his destroyed Impressionist painting are examined.

Statutes of Limitations (SOL):

Negligence:	2 years
Wrongful Death:	2 years
Survival Action:	1 year after date of death
Product Liability/Failure to Warn:	2 years
Assault/Battery/False Imprisonment (Intentional Torts):	1 year
Actions against Architects:	2 years; SOR= 6 years

PLAINTIFFS' PRIMA FACIE CASES

(Elements must be proved by a preponderance of the evidence.)

Medico v. Defendme:

COA: Negligence

Duty: Heaven v. Pender – "when active, be careful;" legal obligation to behave as a reasonably prudent person would under similar circumstances. Ordinarily, no one has an affirmative duty to act, but landowners have a special relationship to entrants on their land and visitors like Medico, Lawyer and Lastone who are foreseeable plaintiffs. D's failure as the one who possesses and occupies the land to maintain his home with reasonable care and guard against endangering the lives of others on and off the property may be misfeasance. Plaintiffs' status determines the landowner's standard of care unless Newstate enforces reasonableness as the standard landowner duty.

Standard of Care: Plaintiffs, as Defendme's social guests (their only privilege derives from his consent), are licensees who assume the ordinary risks of their visit and have some responsibility to look out for themselves. Defendme would only have a duty to warn and protect licensees from dangerous conditions (both natural and artificial) if he "knew or had reason to know" of the condition, and if the condition was not known or likely to be discovered by the licensees. D may not have had reason to know of the defective design of the front steps or that ice tended to collect on the landing (having never used the front steps while it was snowy or icy).

However, because the plaintiffs paid to attend the event, they may have invitee status, meaning that D has the highest duty of reasonable care to them: the duty to inspect, warn, and possibly correct known dangers as well as dangers he should have known about. Plaintiffs could even argue that the nature of the event made them public invitees (any wine chilling invitingly on the front porch?). Front steps are part of D's responsibility to invitees, because he should have inspected the entrance he intended guests to use and ensured its safety.

Breach of the S/C: Because the danger posed by the icy front steps could have been easily and inexpensively remedied by using a proper de-icer, a warning or anything less than correcting the problem might not have been sufficient (B<PxL). D is obligated to use reasonable care in maintaining the premises and in his activities, and by contrast, the Herba-Melt product actually created a danger to the guests. Additionally, the stairway was dim, making it more dangerous. Plaintiffs will say that due to D's breaching the S/C of a reasonable landowner, they were injured.

Negligence per se – If D broke any of Newstate's laws, both plaintiff and injury must match the certain class of persons and particular type of harm the statute is designed to protect for the plaintiff to argue negligence per se. D's actions must still be the proximate cause and CIF of plaintiffs' injuries. Current information does not indicate negligence per se.

Cause in Fact: As the Gold Standard, plaintiffs will argue that "but for" D's breach of the S/C in maintaining his front steps, they would not have been injured. (Test: rewind the videotape of life to show that removing D's breach prevents the injuries.) Alternatively, they could say that his actions were a substantial factor in causing their injuries (suspenders & a belt).

Proximate Cause: On an icy winter night, it is foreseeable that someone might slip and fall on the stairs to D's home. Even if a jury finds that the oily sheen created by the Herba-Melt compound is a bizarre, rat-flambé-esque mechanism, the unlikely extent and/or precise manner in which the plaintiffs' injuries occurred will not preclude their claims.

Damages: see below

Lawyer v. Defendme:

COA: Wrongful Death, Survival Statute/Stat.7

Wrongful death and survival actions can be brought simultaneously in most states (check Newstate's statutes). Wrongful death creates a new action based on the death itself and can be brought by designated representatives (normally spouses – check Newstate's laws); survival actions are brought by the person's estate and continue or commence the claim the decedent would have filed had s/he lived. Lawyer lived long enough to dial 9-1 and may have suffered painfully before he died.

Duty: see above – when active, be careful/landowner

S/C: see above – licensee/invitee; RPP

Breach: A reasonable landowner would not have such dangerous front stairs.

CIF: Lawyer's estate/survivors will argue that "but for" D's breach of the S/C, Lawyer would not have lost his footing and died.

Proximate Cause: Lawyer's injuries and death were foreseeable results of D's breach which D should have anticipated.

Damages – see below. Wrongful death actions compensate the deceased's survivors or estate for their loss; survival statutes recover damages to which the deceased would have been entitled had he lived.

Defendme's Arguments against Medico and Lawyer:

Plaintiffs were licensees (lower S/C). If he downplayed his love of networking and emphasized the purely social benefits he expected, Defendme could argue that the plaintiffs were not at his home for business purposes or any reason that could financially benefit him (his only compensation for the event was a few leftovers), so he was not responsible for their safety.

Implied or express assumption of the risk: Did plaintiffs sign a waiver acknowledging acceptance

and awareness of the risks? Lawyer watched Medico fall, so D can argue that Lawyer was aware of the risks and chose to enter the house in spite of the risky stairs, thus impliedly accepting the danger and assuming responsibility for avoiding the peril.

Comparative fault: In a contributory negligence jurisdiction, if D proved any fault by the plaintiffs, he would win, but Newstate uses comparative negligence as a measure of damages. Therefore, unless the plaintiffs are at least 50% responsible for their injuries, they will recover damages for the remaining percentage. If D is found liable, he can still argue comparative fault to reduce the damages he owes. D can argue that Medico would have slipped anyway or that wearing high heels in winter was an intervening factor that superseded the impact of the Herba-Melt. Lawyer rushed out of the house, taking the steps two at a time, and his carelessness may likewise have caused his fall. Plaintiffs failed to avoid consequences by being careless. Really, who attempts speed-dating without a helmet? Also, if plaintiffs failed to mitigate their damages after falling, D's damages could be reduced, but Lawyer probably did not have a chance, and Medico received prompt medical attention.

D might escape complete liability regardless of the above defenses by bringing Ivy Alumni Association (IAA), Opulent and Herba-Melt (deep pockets) into the lawsuit, or joining them all as defendants and letting them sort out liability. He could claim that the defendants were alternatively liable (not acting in concert, but it is uncertain which defendant caused the harm), or that each cause was a substantial factor in bringing about an event which either could have brought alone (best for Herba-Melt and Opulent). Newstate uses pro rata liability, so each defendant is responsible for the percentage of damages allocated to it by the jury, but no more.

IAA – Vicarious liability for staff's actions/Respondeat Superior

If their actions were within the scope of their employment and were performed with some purpose of serving their master (such as preparing for the event), IAA could be vicariously liable for the resulting harm. IAA has a non-delegable duty to ensure that work is done with reasonable care.

Herba-Melt – Strict product liability

Herba-Melt has a duty as a manufacturer not to sell products in a defective condition unreasonably dangerous to the consumer [RST § 402A] and all others who might foreseeably come into contact with the product.

Under the "consumer expectation" test, "unreasonably dangerous" means that the product is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Herba-Melt breached this standard by putting an unreasonably dangerous, defective product on the market which does not comport with consumers' expectations for a de-icing product, as demonstrated by Consumer Reports. The risks involved in the use of Herba-Melt, as demonstrated by plaintiffs' injuries outweigh any utility it might have between 32 and 29 degrees. Herba-Melt's value to the community is slight compared to the value of human life.

It is foreseeable that a consumer would use Herba-Melt on front steps that are used by visitors. If Herba-Melt failed to use reasonable care in designing, marketing or manufacturing the product or failed to warn users of the nature, severity, and scope of the risk or describe means of avoidance (and this failure was the CIF and a legal cause of the plaintiffs' injuries), Herba-Melt is liable for plaintiffs' injuries.

Misrepresentation – The IAA staff relied on Herba-Melt's claims to de-ice the stairs, which is

justified. Plaintiffs' injuries resulted from IAA staff's belief that Herba-Melt was an effective de-icer. Herba-Melt could argue that IAA staff misused the product, but that is not likely to succeed.

Damages can be sought from the seller, too – any breach of warranty, such as fitness for an ordinary or particular purpose or implied warranty of merchantability, will be covered in a separate memo. There are actual injuries, so there is more than a warranty claim present.

Opulent

Opulent is held to a professional standard of care, as architects with highly specialized skills and they have a duty to act reasonably according to the customs of their profession. Is it unreasonable to have 15 steps to the front door? Was the design defective? There work product has an implied warranty of workmanship, and if the design is custom in the industry, it may not be negligent. Expert witnesses are needed to establish the S/C and Opulent's deviation from that standard or failure to act with the minimum competence exercised by other architects in good standing, because an ordinary jury would not have the necessary knowledge of building and design standards.

The work was completed a little over 3 years ago, which gives D less than three years left to file within the SOR. However, the action must be brought within two years after he discovered the design flaw.

Insurance

Under the Collateral Source rule, coverage for the plaintiffs from another source such as their own medical insurance will not exempt D from any damages he owes (no "windfall" for defendants). If the plaintiffs' insurance companies have paid anything, then they will exercise their subrogation rights and recoup any expenses they accrued covering the injuries from the plaintiffs' awards. If D is sued individually, and then seeks contributions from Herba-Melt,

Opulent and AA, D's insurance company may recoup expenses if it defended and indemnified him in the initial negligence suit.

Due to D's financial standing, the plaintiffs could choose to plead intentional tort claims (which are uninsured: "how 'bout nothin'?") rather than negligence, which trigger his insurance company's duties to defend and indemnify him against claims within policy limits. If D has a homeowner's policy or umbrella policy, a good plaintiff's lawyer will also consider accessing those.

DAMAGES: Medico & Lawyer

Goal = "make the injured person whole" but don't overcompensate. Damages can also be reduced to present value, adjusted for interest rates, and inflation.

Plaintiffs' damages do not change based on negligence, intentional torts or products liability claims. Defendant is liable even if damages are more than what is foreseeable, ("eggshell plaintiff" – the defendant must take him as he finds him). Regardless of who is liable for the damages, plaintiffs will be compensated for the following if successful:

Medico – Specials: psychotherapy; lost wages based on earning capacity, raises, promotions, etc (discounted for interest, present value, inflation), PT, OT, medicine, homecare and other incurred expenses, past/future medical bills
Generals: P & S: worrying about the loss of her expensive new shoes, LOE, the loss of her career as a surgeon, everyday pain
Consortium is actually found, not lost. Perhaps they can settle, due to her newfound happiness

and impending nuptials that certainly leave no time for litigation.

Lawyer –

Specials: lost earnings over his lifetime, funeral expenses, ambulance, medical costs

Generals: P & S from the time he fell to his death; under wrongful death, his family may be compensated for loss of consortium

Punitives: awarded to punish reckless disregard for the health or safety of others

D's best strategy is to push for a lump sum payment, not per diem calculation and combine pain & suffering and hedonic (LOE) loss if Newstate permits. He should also investigate structured settlements, and look for a damages cap.

Lastone v. Defendme

COA: Battery, Assault, False Imprisonment

Strict liability for inherently dangerous activities? :)

Duty – When active, be careful.

S/C – RPP

Breach – A RPP does not escalate "playing" into domestic violence.

Negligence per se: If Newstate has a statute against domestic violence, and Lastone falls into the class of people it is designed to protect, and if the harm protected against is the same which caused her injuries, D would be negligent per se.

CIF – "But for" D's "playing," Lastone would not have been injured.

Proximate Cause – Lastone may have instigated the activity, but that is a separate comparative fault analysis. The facts as they stand insinuate D's direct perpetration of her injuries; even if his intentions were not to hurt her, the fact that the harm resulted satisfies the requirements for battery.

Battery: Showing intentional touching that is harmful or offensive, such as the hand-size bruise on Lastone's thigh (if it matches D's hand), proves CIF and proximate cause in a battery action. Assault requires intentionally causing immediate apprehension of imminent harmful or offensive conduct. If Lastone was aware of the imminent offensive or harmful contact and reasonably apprehensive (understandable if a naked man were about to smack her), D could be liable for assault as well, since his actions are presumed intentional.
There is no evidence of false imprisonment.

Damages: see below.

Defendme's Arguments:
Assumption of the risk – Lastone knew of the danger, understood the risk involved, and voluntarily assumed that risk
Comparative fault – Lastone is responsible for her part in the events.

DAMAGES

Lastone – broken leg, ambulance costs, past and future medical treatment, prescriptions, PT, lost wages (past, present and future including raises and promotions), any reduction in earning potential, home care
LOE due to her permanent limp; P & S

Lastone might plead the COA as an intentional tort and expect D to cover the damages out of his own pocket.

D'S IMPRESSIONIST PAINTING

Defendme v. Computers – transferred intent of battery into trespass to chattel

D is likely to recover; no excuse for unforeseeable value of painting.

Duty: Heaven v. Pender – "when active, be careful."

S/C: Reasonably prudent person standard (RPP). Computers was required to act as a reasonably prudent person would under similar circumstances (as a guest attending the event at D's home).

Breach of S/C: A RPP does not throw glasses of wine at other people; Computers was unreasonable. No professional standard applies.

Cause in Fact (CIF): Gold Standard: "But for" Computers throwing the glass of wine at Lawyer, the painting would not have been soaked in wine and destroyed.

Proximate cause: No intervening circumstances. When Lawyer ducked, her intent to batter or assault him transferred into trespass to chattel.

Compensatory damages – D should receive the cost of replacing the painting, but nothing for its sentimental value.

Punitive damages – not usually awarded, but we would ask for them anyway. Computers willfully disregarded others' safety; people could have been injured.

Other possible claims:

Lawyer v. Computers for transferred intent: battery into assault

Computers v. Lawyer: assault (did his comment cause "immediate apprehension of harmful or offensive touching?")

Bystander action: anyone else in the line of fire?

D v. Super Tuscan - painting (superseding, intervening event: Computers hurling the glass at

Lawyer – unforeseeable and substantial misuse of the product, not predictable)

Institution **DU Law**

Course **S06 Torts II 101-Russell**

Instructor **NA**

Control Code **OPEN**

Exam ID **389**

Word Count(s)

Section 1 **2654**

INTERNAL MEMORANDUM

To: Client File
From: Perfect Partner #389
Re: Dan “Big Bucks” Defendme
Date: 05/13/06

GOALS

Defendme is soliciting a second opinion regarding his liability to three persons who were injured at his home last December. Defendme will be represented by insurance company counsel. However, Defendme possesses considerable wealth, so our goal is to retain Defendme as a client throughout his entire legal ordeal by assisting him with effective legal strategy.

Additionally, Defendme is seeking to recover damages for a $300,000 painting, which is not insured. Due to the potential revenue available from this suit, our goal is to assess the chances of recovery from potential defendants and, if worthwhile, win Defendme as a client.

This memo discusses Defendme's potential liabilities, then the painting.

DEFENDME'S LIABILITIES

To defeat claims brought by Medico and Lawyer, it is crucial that Defendme prove they were licensees, and not business/public invitees. Plaintiffs will argue that they were business invitees since they were on Defendme's property for the financial benefit of his “co-occupier,” Ivy University Alumni Association (IUAA), who earned $1,500 in profit on the evening in question. Additionally, Plaintiff's will argue that they were public invitees because the IUAA event was open to “the public at large” (common IU graduates) and attracted a large number of guests.

Defendme must prove to the jury that Medico and Lawyer were licensees. Defendme's argument should rest on the premise that his ownership of the land trumps IUAA's temporary

occupation. Moreover, it is important to emphasize that Defendme was the "designated host" of the event, the IUAA members were merely "social guests" in his home, and Defendme did not receive any financial benefit from the event. As host, Defendme was exempt from paying the $100-per-person fee, and was entitled to keep leftover wine. However, these allowances were IUAA's consideration to Defendme in exchange for the use of his home, not "financial benefits." Additionally, Defendme must argue that 40 members of an affluent, ivy-league association who were at Defendme's home by invitation only cannot reasonably be considered "the public at large."

Liability to Medico

For Negligence Cause-of-Action:

- **Medico as Invitee:**
  - **Land Occupier Duty:** To exercise reasonable care in maintaining the premises. Must take affirmative steps to discover dangers on the property (*Duty to Inspect*).
  - **Standard-of-Care:** If *know or should have known* of dangers, must remedy them or warn the invitee of their existence where the risk is not obvious or known. Where dangers can be eliminated with little effort, warnings may be inadequate.
  - **Breach:** Likely. Defendme did not inspect his property prior to the event, so he did not discover the dangerous ice or dimly lit stairway. Defendme could have eliminated both conditions with little effort. Defendme may be able to claim that he vicariously conformed to the standard of care due to his privity with the

IUAA. The IUAA discovered and attempted to eliminate the ice. However, this is a delicate argument. By attaching himself to the IUAA, Defendme may weaken his arguments elsewhere.

- **Negligence Per Se:** Newerstate might have a statue requiring homeowners to keep front entrances clear to protect persons from the type of harm which occurred to Medico. It is doubtful that such a statute is intended to protect the class of persons to which Medico belonged. Rather, such a statute would likely protect government employees, such as postal workers.

- **Cause-in-Fact:** Yes. But for the ice on the landing and the dimly lit stairway, Medico would not have been injured.
- **Proximate Cause:** Yes. It is foreseeable that if a person slips and falls, she may suffer injuries including torn ligaments and broken bones.
- **Damages:**
  - **Pecuniary:**
    - **Past/Future Medicals:** Hospital bills, medication, nursing/home care, physical/occupational therapy, ongoing doctor's appointments.
    - **Past/Future Wages:** Based on what Medico could have earned had she not been injured. This amount is likely to be significant since Medico must downgrade her career from surgery to internal medicine.
    - **Incidentals:** Travel, housekeeping, lawn-mowing.

§ **Non-Pecuniary:**

· **Pain/Suffering:** Medico was conscious for a short time after her fall. She will likely seek damages for the pain and suffering she endured during this time. Moreover, she will seek damages for pain and suffering after the accident.

· **Hedonic/Loss of Enjoyment of Life:** Medico may argue that her greatest enjoyment in life was performing surgery, which she can no longer do. In order to mitigate his liability, Defendme must argue against separating the damages for loss of enjoyment from pain and suffering.

· **Medico as Licensee:**

o **Land Occupier Duty:** To warn the licensee of concealed artificial or natural dangers on the property which are *known* to the occupier.

o **Standard-of-Care:** *No duty to inspect* property to discover potential dangers, or to make affirmative efforts to make the property safe. The licensee takes the property in the condition in which the land occupier uses it.

o **Breach:** Not likely. Since Defendme did not use the front entrance to his home, he did not know of the icy condition of the landing. Moreover, since Defendme is not required to make his property safe, he was not obligated to improve the lighting over the stairway. Plaintiff may argue that Defendme was vicariously in breach due to his privity with the IUAA. The IUAA knew of the dangerous conditions yet failed to warn its members.

o **Cause-in-Fact/Proximate Cause/Damages:** See above.

Defenses:

- **Statute of Limitations (SOL):** Two years for negligence. Not available until December 2007.
- **Comparative Negligence:** Modified 50% System. If Medico's negligence *is as great as* Defendme's, then Medico's negligence bars her from recovery. Defendme must convince the jury that Medico was equally negligent by not wearing suitable winter shoes. Had Medico worn suitable shoes instead of high-heels, she would not have slipped on the ice. Moreover, a reasonable person would have worn suitable shoes to the event, and then changed into the high-heels once inside Defendme's home. (Comparative Negligence absorbs Secondary Implied Assumption of Risk.)
- **"Pro Rata" Liability:** Defendme will only have to pay a portion of the damages if liability can be attributed to multiple defendants. He will not be liable for the shares of other defendants, or the total damages, in the event some or all of the other defendants are insolvent.
- **Comparative Fault-Manufacturer/Seller for Products Liability:** Medico's mishap occurred during the ordinary use of Herba-Melt. Moreover, the IUAA, who applied the ice melt remedy, expected the Herba-Melt to melt the ice. (Consumer Expectation Test). It does not matter that Medico was not in privity with the manufacturer/seller. Under the UCC, privity is not required. Newerstate may decide to whom the warranty runs provided it is reasonable that such a person would be affected by the product. The following are claims under which Defendme can assert comparative fault:
    - **Breach of Implied Warranty of Merchantability:** The Herba-Melt was not fit

for the ordinary purpose for which such goods are used. It did not melt the ice.

- **Strict Liability (RST § 402A):** The manufacturer/seller sold a defective product which was unreasonably dangerous. The design of Herba-Melt was defective since it did not work below 29 degrees and left a slippery, oily sheen. Moreover, there were likely defective or missing warnings regarding the effectiveness of the product.
- **Misrepresentation:** The manufacturer/seller misrepresented the product. The manner of misrepresentation (fraudulent, negligent, or innocent) is irrelevant.

· **Comparative Fault-Architect for Deficient Design:** Opulent Houses designed Defendme's staircase in a deficient manner. The handrail collected water and deposited it on the landing, creating icy conditions during winter months. It does not matter that Defendme and Medico were not in privity with Opulent. The SOL for actions against architects is two years after the discovery of the defect, or six years after the completion of the structure, so Opulent can be pulled into the suit until 2008.

Liability to Lawyer

For Negligence Cause of Action:

· **Lawyer as Invitee:**

- **Land Occupier Duty:** See above.
- **Standard-of-Care:** See above.
- **Breach:** Not likely. The facts do not state that the ice contributed to Lawyers fall. On the contrary, the facts state that "Lawyer hurried down the front steps, taking two at a time" and that he "lost his footing." Additionally, Lawyer knew

of the dangerous conditions on the landing, and should have been more careful. Lawyer's heirs will argue the opposite and claim that the dangerous conditions contributed to Lawyer's accident and should have been remedied immediately after Medico's fall.

- **Cause-in-Fact:** No. But for Lawyer's own carelessness he would not have fallen. Heirs will argue the opposite.
- **Proximate Cause:** No. Where the *type* of damage is foreseeable, Lawyer is liable even though the damage is more serious than might have been anticipated. Heirs will argue the opposite.
- **Damages:**
  - **Survival Action:** For pain and suffering prior to death. Lawyer attempted to dial 911 before he passed out. This means he was conscious and aware of his injuries.
  - **Wrongful Death Action:** Statutory heirs may recover past/future pecuniary damages, including burial expenses and lost wages based on what Lawyer could have earned had he survived. Survival and wrongful death actions can be brought contemporaneously.

- **Lawyer as Licensee:**
  - **Land Occupier Duty:** See above.
  - **Standard-of-Care:** See above.
  - **Breach:** No. Lawyer knew of the dangerous conditions on the landing, and was expected to take the property in the condition in which Defendme used it.
    - **Negligence Per Se:** See above.

For Res Ipsa Loquitur Cause of Action:

Lawyer's heirs may argue that , since Lawyer died, Defendme *must* be negligent. Such a death would not ordinarily happen without negligence, the stairway was under Defendme's control at the time of the accident, and there was an absence of contribution by Lawyer. This is a stretch. Based on the facts, Lawyer was responsible for his own accident. Moreover, it is reasonable to believe that someone can accidentally trip, fall, and suffer a fatal head injury without the negligence of another.

Defenses:

- **Statute of Limitations:** One year after the date of death for survival actions. Not available until December 2006.
- **Comparative Negligence:** Lawyer was 100% negligent. His behavior was unreasonable under the circumstances. Lawyer knew of the dangerous conditions. Nevertheless, he sprinted down the stairs.
- **Comparative Fault:** If necessary. See above.

Liability to Lastone

For Intentional Torts Cause of Action:

- **Battery:** The intentional infliction of harmful or offensive contact.
- **Cause-In-Fact:** Yes. But for Defendme slapping Lastone, she would not have been injured.
- **Proximate Cause:** Not likely. It is foreseeable that if you slap a person, you might

bruise her. However, a reasonable person would not expect that slapping someone would cause her to fall out of bed, break her leg, and limp for life. Plaintiff will argue the opposite.

- **Damages:**
  - **Pecuniary:**
    - **Past/Future Medicals:** Hospital bills, medication, nursing/home care, physical/occupational therapy, ongoing doctor's appointments.
    - **Past/Future Wages:** Based on what Lastone could have earned had she not been injured. Includes raises, promotions, inflation.
    - **Incidentals:** Travel, housekeeping, lawn-mowing.
  - **Non-Pecuniary:**
    - **Pain and Suffering**
    - **Hedonic/Loss of Enjoyment of Life:** Lastone will claim her limp has impaired her ability to do the activities she enjoyed before the accident.

      Past/Future Harm: Defendme could be liable for future damages for additional harm resulting from Lastone's gimpy leg.

For Negligence Cause of Action:

- **Duty:** Heaven v. Pender. When active, be careful.
- **S/C:** Frolic gently!
- **Breach:** Maybe. Could Defendme have been more gentle?
- **Cause-In-Fact/Proximate Cause/Damages:** See above.

Defenses:

- **Statute of Limitations:** One year for battery. Two years for negligence. Not available until December 2006 and 2007, respectively.
- **No Intent:** The purpose of the intent requirement is to confine liability to cases in which the defendant acts with a higher level of culpability than mere carelessness. Defendme did not act for the purpose of inflicting a harmful contact on Lastone, and did not realize that such a contact was substantially certain to result. Paramedics witnessed Defendme whimpering "we were just playing."
- **No Proximate Cause:** Too attenuated. See above.
- **Comparative Negligence:** It takes two to frolic. Defendme must argue that Lastone is a slut and was 50% negligent.

Conclusion: Since all parties are wealthy, Defendme will likely be sued. His greatest exposure is to Medico because she has the strongest claim. Once again, it is crucial that Defendme convinces the jury that all entrants were invitees. This will give Defendme the greatest advantage in fighting Medico, and Lawyer can virtually be eliminated with the invitee status. Lastone's claim is weak, and her promiscuous behavior will not earn any jury's sympathy. Defendme should try to get rid of Lastone by damaging her reputation and dragging her through years of legal minutia.

THE PAINTING

Defendme v. Computers

Intentional Torts Cause of Action:

- **Intent for Battery with Intent Transferred to Trespass to Chattel:** Computers intentionally threw her full glass of wine at Lawyers. Frightened by Computers' immediate harmful conduct (assault), Lawyer ducked. Instead of hitting Lawyer with the glass, Computers hit and destroyed Defendme's painting. Computers' intent for battery can be substituted to satisfy the requisite intent for trespass to chattel.
- **Cause-In-Fact:** Yes. But for Computers throwing her glass, the painting would not have been destroyed.
- **Proximate Cause:** Yes. It is foreseeable that if you throw a glass filled with wine, the glass will break, and/or the wine will spill causing injury or damage. Where the *type* of damage is foreseeable, the defendant is liable even though the damage is more serious than might have been anticipated.
- **Damages:** Market value of the painting.

Negligence Cause of Action:

- **Duty:** Heaven v. Pender. When active, be careful, especially in another's home.
- **Standard-of-Care:** The reasonable person. A reasonable person would not throw a full glass of wine across a crowded room, as this could injure persons and/or damage property. Such behavior is particularly unreasonable in another's home.
- **Breach:** Yes. Computers' behavior was unreasonable.
- **Cause-In-Fact/Proximate Cause/Damages:** See above.

Statute of Limitations: Two years for negligence. It is not clear if the SOL for trespass to chattel is one year or two years. The one-year statute lists specific intentional torts, but trespass

to chattel is not included. The two-year statute includes "all other actions of every kind for which no other period of limitation is provided." Regardless, Defendme is within the SOL for both causes of action. To be safe, a suit for trespass to chattel should be filed by December 2006.

Computers' Defenses: Computers will claim there is no proof of intent for battery. Moreover, she will claim that even if there was intent, the accident was Lawyer's fault. But for Lawyer making an inappropriate remark, she would not have thrown the glass. Finally, Computers will assert there is no proximate cause because the chain of events is too attenuated. Who'd a thunk the glass would have destroyed a $300,000 painting? These are ridiculous arguments, and will not stand.

Recovery of Damages: Defendme needs to determine if Computers is worth suing. Although most IU alumni are affluent, $300,000 is a lot of money. Computers may have an insurance policy that covers her liability for damage in someone else's home; however valuables may be excluded from the policy. Computers may have other assets including a home, cars, investments, or cash that can be seized. Last, but hardly desirable, Computers' wages may be garnished for life; however, future wages are unpredictable.

Defendme v. IUAA

Vicarious Liability Cause of Action: IUAA may be vicariously liable for torts committed by its members at IUAA functions.

Recovery of Damages: The IUAA may have an insurance policy that covers damages at IUAA

events. Valuables may be excluded from the policy. Aside from insurance, the association is bound to have more assets than Computers, but still may not be able to cover the value of the painting.

Defendme v. Lawyer

Lawyer did not do anything which would result in a valid cause of action. Unfortunately, you can not sue someone for being a jerk!

Conclusion: A suit against Computers and/or the IUAA will likely be successful. However, the suit might not be worth bringing if neither Computers nor the IUAA possess adequate insurance or assets to cover the value of the painting.

Institution **DU Law**

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Section 1 **2728**

To: Tort Yoda

From: Apprentice #1005

Re: Dan Defendme

Defendme hosted a party at his home in December 2005. Several people were injured. He has personal wealth, but would prefer to use his insurance to satisfy any judgments.

INSURANCE

Defendme's insurance company owes him three duties:

1. To Defend - against any claim which COULD be covered under the policy.

2. To Indemnify - any covered claim up to policy limits. This may be litigated separately if disputes arise.

3. Duty to Settle - in good faith, if a reasonable settlement within policy limits is proposed, and there is risk that ultimate liability may exceed this. Bad faith exposes the company to full liability.

MEDICO v DEFENDME

Claim - Negligence in maintaining a safe stairway.

Duty - Depends upon Medico's status as a land entrant.

Medico will claim she was an invitee. Business invitees enter for the "potential financial benefit of the occupier." Public invitees enter land open to the public at large. Medico may claim Defendme derived financial benefit from: 1) the waived fee, 2) the left-over wine, or 3) the

business connections fostered, justifying her as an invitee. This was not a "public event"; it was restricted to alumni of a private university.

If Medico is an invitee, she is entitled to reasonable care, including affirmative steps to discover dangers ("duty to inspect and remedy"). This might include inspecting the stairs prior to a party with freezing temperatures outside. If the land occupier "knows or should have known of a danger," he must remedy it (apply de-icer), or warn invitees while making timely efforts to remedy (signage - "Caution Ice"). The adequacy of lighting may also be raised ("dimly lit").

We must claim Medico was an invitee. An invitee does not enter for financial benefit of the occupier, and instead enters "for her own interest, convenience, or gratification" (social guest). Medico participated in the event to benefit her alumni association. Medico presumed she would be gratified (socially/romantically). She met her husband there.

Gratis participation and left-over wine posed nominal benefit to Defendme as he: 1) was in his own home and would have been present regardless, and 2) kept only the opened wine which likely would have been left behind anyway.

If Medico is a licensee, Defendme had a "duty to warn of known dangers." Defendme rarely used the stairs. He had never been on them during inclement weather. The status of the lighting and risk of ice was unknown. He had no duty to warn. The requisite element of duty fails.

Standard of Care -

If invitee - "to inspect and remedy" dangers such as ice or poor lighting.

If licensee - “to warn of known dangers,” but not of things beyond knowledge.

Breach -

If invitee - Defendme may have breached by failing to inspect and remedy the ice and possibly the lighting.

If licensee - Defendme did not breach. He had no knowledge of such dangers.

Cause in Fact - “But for” the ice on the stair (and/or the dim lighting), Medico would not have fallen and been injured.

Proximate Cause - It was “reasonably foreseeable” that on a winter night, with freezing temperatures, ice might form on an outdoor stair, yielding a fall. Poor lighting may be similarly pleaded, or may have contributed. While placement of Herba-melt by a third party might be claimed a “superseding cause,” it is unlikely a jury would find this “extraordinary enough" to interrupt proximate cause. The harm that occurred (falling) was the exact kind that made the conduct tortious (failure to remedy ice on walkway).” Per Palsgraf, the fall was the likely result of the defendant's negligence (ice on stairs) irrespective of the addition of Herba-melt.

Compensatory Damages (to make whole) - Medico suffered: 1) a torn ACL, and 2) a broken right wrist/hand (permanent disability).

Special (pecuniary - “receipts”)

1. Medical care (present/future), “value” of unskilled nursing provided by Engineer even if he did not charge, physical/occupational therapy, etc.

2. Incidentals - applications/interviews with re-training programs, disability accommodations (home/office), damaged shoes, etc.

3. Lost wages - recuperation time, decreased income during retraining, return to lower paying

specialty, etc.

General (non-pecuniary)

1. Pain and suffering - medical procedures, ongoing pain, etc. Medico wants per diem, defense suggests bulk payment.

2. Hedonic/Loss of Enjoyment - Medico can no longer enjoy operating; we will assert she was "cutting back" anyway. She may claim her hand injury decreased participation in hobbies, etc.

Medico met her "duty to mitigate damages" by seeking alternative employment. It would be difficult to attack damages in this regard.

Affirmative Defenses

1. Comparative Negligence ("knife to leg") - modern doctrine, militates harsh results of contributory negligence ("knife to heart").

Claim - Medico was negligent in wearing black, high-heeled pumps outdoors with temperatures below freezing.

Duty - When active be reasonable.

Standard - Reasonable people wear appropriate footwear outdoors, and change after entering.

Breach - Medico's footwear was unreasonable for conditions.

Causation - "But for" her unreasonabale footwear, she would not have fallen on ice.

Cause in Fact - Ice is expected outdoors during winter, and failure to wear appropriate footwear is a "reasonably foreseeable" cause of falls.

Damages - Established.

Per statutes, a comparatively negligent party may collect damages, as long as their percentage liability does not exceed that of the person from whom they wish to collect. Comparative negligence decreases Defendme's liability. If fault exceeds that of the defendant (>50% in 2 party suit), collection is barred.

2. Statute of Limitations - Negligence claims must be filed within 2 years of occurrence. Medico still has ~1.5 years to file.

3. Product Liability - Per statutes, these theories may be considered, with evidence, even if the manufacturers are not parties, but determinations are not binding in later actions.

A. Opulent Houses

i) Strict Liability - In a city with precipitation and freezing temperatures in winter, it was "unreasonably dangerous" for Opulent to market a handrail that channels water onto stairs. Such a design defect is not contemplated by the average consumer ("expectation test"). The average home buyer would not ponder, "Might this handrail channel water onto stairs?" The risk of the defective design exceeds any cosmetic benefit beyond that of a standard handrail ("risk-benefit test"). Proving strict liability eliminates duty, standard of care, and breach.

Causation -"But-for" the channeled water, ice would not have formed and Medico would not have fallen.

Proximate cause - Ice is a "reasonably foreseeable" consequence of water channeled onto a stairway in winter.

Damages - Established.

ii) Negligent Design - alternative pleading.

Duty - Manufacturers must design products with care commensurate to risk ("manufacture reasonably").

Standard - To produce a reasonably safe handrail.

Breach - With precipitation and freezing temperatures in winter, a handrail that channels water onto stairs is unreasonable.

Causation, proximate cause, and damages as above.

B. Herba-melt

i) Strict Liability - At temperatures <29 F, Herba-melt forms a greasy mess. It is unreasonably dangerous to market a de-icer for use only between 29-32 F. The average user will not contemplate the product will make ice MORE dangerous. The increased danger exceeds any advantage of fertilizing. Strict liability eliminates duty, standard of care, and breach.

Causation -"But-for" the greasy mess caused by the Herba-life, Medico would not have slipped.

Proximate cause -Falls are "reasonably foreseeable" when ice is made greasy by a defective de-icer.

Damages - Established.

ii) Negligent Design - alternative pleading.

Duty - Manufacturers must design products with care.

Standard - Produce a reasonably safe de-icer for use over a range of conditions.

Breach - A de-icer for use over a range of 3 degrees is unreasonable.

Causation, proximate cause, and damages - same as for strict liability.

iii) Failure to Warn

Duty - Manufacturers must warn of dangers known to be associated with reasonably foreseeable misuse.

Standard - Adequate and conspicuous warning of dangers from reasonably foreseeable misuse.

Breach - Herba-melt contained no warnings “calculated to impress” regarding its narrow operating range and dangers of misuse.

Causation - “But for” the lack of warning about possible grease formation upon ice, Medico would not have fallen on the slippery mess.

Proximate cause - Use of “de-icer” at temperatures below 29 F, leading to a greasy mess, was a “reasonably foreseeable” danger in the absence of a warning.

Damages -Established.

Per statutes, product liability against any other party will reduce Defendme's liability by an appropriate percentage. Newstater does not use joint liability. Defendme will not be responsible for the insolvency of another defendant.

SOL for negligence, strict liability and failure to warn is 2 years from occurence. For construction, a statute of repose of 6 years from completion exists. Defendme's house is just 3.5 years old. There is still ~1.5 years to file these actions.

LAWYER v DEFENDME

Claim - Negligent injury/wrongful death.

Duty -depends upon Lawyer's entry status. Per Lawyer's own words, he was there for "fun" furthering our argument he was a licensee, and deserved only a duty to warn.

Standard - A land occupier has a duty to warn, but they may assume a licensee will be "reasonably attentive to surroundings and will notice readily apparent dangers." Every guest watched the fall and/or its aftermath, and this is fortunate for Defendme.

Breach - Lawyer witnessed Medico fall on the stairs. He was well-aware they were icy and dangerous. There was no breach under the circumstances.

Causation - See "but for" for Medico.

Proximate Cause - Similar to Medico.

Compensatory Damages - Lawyer died, but had a period of lucency prior to his death (dialed phone). By statute, his estate has a right of survivorship. His immediate family may assert wrongful death.

General Damages for Right of Survivorship (nonpecuniary)

1. Pain and suffering - for time after injury but BEFORE unconsciousness. This will be speculation, and should be contested. His estate will wish per diem; we want lump sum.

Wrongful Death - spouse/children (if any) may bring a wrongful death suit. Wrongful death seeks funeral costs and financial losses to dependents that ACTUALLY would have been received. We want to demonstrate Lawyer was selfish man, and shared little with family.

Defenses

1. Stature of Limitations -

Survivorship - one year SOL from occurrence; will be defense if not filed in ~6 months.

Wrongful death - 2 year SOL from occurrence; still ~1.5 years to file.

2. Implied Assumption of Risk - Lawyer knew the stairs were icy. He learned this witnessing Medico's fall. He proceeded to enter the party with knowledge he would need to exit in some fashion. "One who voluntarily chooses to enter an area of risk, manifesting his willingness to accept it, is not entitled to recovery." Classically, assumption of risk was a "knife to heart" defense. In many jurisdictions it has been absorbed into comparative negligence. It is unclear how Newstater operates. Primary assumption of risk is often coincident with situations of no duty (and superfluous). Secondary implied assumption of risk is operative even if Defendme breached a duty (i.e. if Lawyer is an invitee).

3. Comparative Negligence

Claim - Lawyer negligently negotiated stairs he knew to be icy/dangerous.

Duty - When active, be reasonable.

Standard - Reasonable care is required in traversing icy stairs.

Breach - Bounding down icy stairs is unreasonable.

Causation - "But for" Lawyer's unreasonable bounding down the stairs, he would not have fallen.

Proximate cause - It is "reasonably foreseeable" bounding down icy stairs yields falls.

Damages - Established.

As in Medico, comparative negligence decreases any liability by Defendme.

4. Products Liability

For Lawyer's suit, Defendme may want to implicate the same manufacturers using a rationale

similar to Medico. Unfortunately, he did not remediate either danger (clean up grease, use different de-icer, lock front door, exit garage) making these arguments less persuasive (introduced for thoroughness).

LASTONE v DEFENDME

Typically, Lastone would assert a claim of negligence, instead of intentional tort, to benefit from insurance. Punitive damages are not allowed in insurance claims. Defendme has great personal wealth. Knowing this, Lastone may pursue both actions in the alternative. Defendme's insurance has a duty to defend separate from indemnification. This is where Defendme might benefit from private counsel separate from the insurance company.

Negligence

Claim - Due to negligently rough sex, Defendme broke Lastone's leg.

Duty - To have sex in a reasonable manner (“thrill don't kill”).

Standard - Consensual sex should be non-injurious.

Breach - Through “unintentionally” (negligence claim) rough sex, Defendme “smacked” Lastone knocking her from the bed yielding injury.

Causation - “But for” Defendme “smacking” Lastone she would not have fallen out bed, breaking her leg.

Proximate Cause - It is “reasonably foreseeable” that rough sex on an elevated bed could yield injury.

Compensatory Damages - Lastone suffered: 1) a broken leg (permanent disability), 2) a hand-sized contussion, and 3) mental distress.

Specials

1. Medical bills (present/future), physical/occupational therapy, psychological counseling for lost trust in sex, etc.

2. Incidentals - crutches/braces, travel, accommodations for disability, etc.

3. Lost wages - recuperation time, decreased income due to permanent disability, etc.

General

1. Pain and suffering - medical procedures, ongoing pain, etc. Lastone wants per diem, we want bulk payment.

2. Hedonic/Loss of Enjoyment - Lastone can no longer enjoy full use of her leg, limiting her sports, hobbies, etc.

3. Non-pecuniary damages also include mental distress from body deformity or due to lost trust in sexual relationships (if not restored with counseling, possible "egg-shell psyche"). Psychiatrists for both sides will serve as professional witnesses in this regard.

Intentional Tort

Battery

Claim -Defendant acts intentionally to cause harmful/offensive contact with the victim. Lastone will claim that Defendme intentionally "smacked" her on the thigh either with: 1) intention to cause harm (sadism), or 2) "substantial certainty" that hitting a lover hard enough to cause contusion will yield harm.

Causation - "But for" smacking Lastone she would not have been injured.

Proximate cause -Directly knocked Lastone out of bed breaking leg. No superseding cause.

Damages - Established.

Consent as Defense

Express consent exists if Defendme asked Lastone to participate in rough sex, and she openly consented. Implied consent exists if Defendme committed prior acts of SUBSTANTIALLY SIMILAR aggression during the sex encounter without objection by Lastone.

Invalidation

Consent is invalid if the party lacks capacity. Lastone may claim incapacity due to alcohol ingestion (wine). If Defendme, knowing she was drunk, attempted to glean consent for rough sex, this may be invalidated.

DEFENDME v COMPUTERS

Defendme should pursue Computers regarding destruction of the painting. If Defendme claims an intentional tort, it will not be covered by any insurance Computers owns; if he asserts negligence it may be (umbrella policy). If Computers is wealthy, like many of the alums, both courses may be pursued in the alternative.

Conversion

Claim - Computers intentionally threw wine resulting in irreparable damage to the painting. There existed “substantial certainty” in her actions that throwing a glass of wine would damage some aspect of Defendme's home.

Causation - “But for” Computers throwing wine, the painting would not have been destroyed.

Proximate cause -The wine directly impacted painting. No superseding cause.

Damages - In conversion, the defendant is liable for the market value of the chattel. Conversion is appropriate when property has “distinct artistic value”. This Impressionist painting meets such criteria. Damages would be $300k (expert appraisals needed). Grief and mental distress due to lost sentimental value are not typically compensated.

Negligence

Claim - Negligent destruction of property.

Duty - To be reasonable.

Standard - Reasonable “party behavior” to avoid destruction of property or injury.

Breach - Throwing wine at a crowded party is unreasonable.

Causation - “But for” the throwing of wine, the painting would not have been destroyed.

Proximate Cause - It is reasonably foreseeable that throwing wine inside a home will destroy property.

Damages -Established.

Defenses to Claim

Computers may claim her action was due to Lawyer's inappropriate comment. A comment, even if inappropriate, is not an immediate threat of death or serious bodily injury to herself, others, or to property. Throwing a glass that could cause injury was not justified; this was an excessive response. The law seeks to prevent this. That she did not act in bad faith is irrelevant. She may pursue actions against Lawyer's estate, but this is extraneous.

Torts rock!