

Memorandum

To: Torts Students
From: Professor Russell
Re: Fall 2016 Torts Exam—Leviathan Fire
Date: January 18, 2016

The fall Torts exam was based, of course, on the Ghost Ship fire that claimed 36 lives in Oakland, California on December 2, 2016. The exam incorporated elements of news stories but also departed from these stories and incorporated fictional elements.

The statutory appendix incorporated statutes from several different states not including California. The premises liability statute was modeled on the Colorado Act, but for the exam, I changed the Act to make clear that activities, as opposed to conditions, are subject to the reasonably prudent person standard. This is a change that the Colorado General Assembly ought to adopt.

More so than any other exam that I have written, I found this exam to be frightening. In the classroom, I do not like to injure students in hypotheticals, and I found, after I was too far to turn back, that writing this exam question about young people killed and injured in a fire caused me to imagine my students being in the same position. This disturbed me. I have come to hope that this exam may cause my students to be a bit more cautious about putting themselves in the same situation as those who lost their lives at Ghost Ship.

Attached to this exam are three-high scoring student answers. I have also recorded a podcast of about 35 minutes in which I discuss the exam. You can find that discussion in the Torts section of the House of Russell exam archive. The faculty assistants have copies of the exam answers, but I did not write much on them, so you may just wish to compare your saved answer to the attached answers while listening to the podcast.

The best answers identified the comparative fault of Bob and carried that through to the other elements of the exam. Most importantly, the estate of Bob's brother Steve has a claim against Bob for Bob's negligence in constructing the staircase and perhaps as well for negligence with regard to the rescue of Bob. Far too many students noticed Bob's comparative fault when addressing defenses to his own claim but then failed to carry the analysis of Bob's fault into the claim by Steve's estate. Many students also failed to notice and analyze Bob's comparative fault.

Another distinguishing trait of the strongest answers was discussion of the allocation of fault among the various defendants. Allocation is always an important issue when there are multiple defendants. With regard to this problem, the statutory immunity of New City and the likely judgment-proof nature of some defendants made allocation a particularly important issue.

The distribution of grades was as follows:

A	3
A-	4
B+	9
B	32
B-	14
C+	3
C	3
C-	1
D+	0
D	1
F	0

Steve Gemello's Estate v. Almena, Ng, New City, Bob Gemello

Claimants:

Steve's Estate (wrongful death)

Bob (negligence)

Mother (negligence)¹

Girlfriend (negligence)²

v. Almena

Duty

Be reasonable when active (RWA). Almena was active as the leader of Leviathan.

Landlord-tenant

Duty to rescue: creating the peril

Standard of Care (SoC)

Act as a reasonably prudent person (RPP) under the circumstances.

Maintain and repair defects in common areas and premises leased for admission to the public.

To rescue the victim when the defendant's negligence was a cause of the peril.

¹ May have to argue that watching her son die on Face Time satisfies the proximity prong for this claim; though she was not in any immediate danger herself, Steve's mother would have had a close-up view of her son suffocating to death and heard the screams around him.

² More information is needed. Generally, the girlfriend will have no claim, unless she is listed in Steve's will as a beneficiary (Statute 2(3)(C)). The couple also lived together for at least a few years, so there is a possibility that they are married under either New York or New State common law.

Breach

Created an unreasonable risk of bodily injury & death to foreseeable victims. Even having created dangerous conditions, risk could have been mitigated by ensuring fire extinguishers worked and were up to date; an extremely inexpensive precaution in comparison to the huge cost of property damage and lost lives.

As above breach, unsafe circumstances and lack of repair, defects in common areas such as faulty stairs, maze-like conditions downstairs, inability for public to escape, failure to supply working fire extinguishers.

Almena was not on the premises when the fire began, though he played a role in creating the danger, and was the leading force behind inviting the guests to the party.

Negligence per se (NPS)

As the lessor in possession of the warehouse, Almena had a statutory duty as landowner to invitees (Statute 6(2)(B)(I-II) & (C)). Because Steve paid a ticket price and was there engaged in an activity, he was an invitee. Steve's death was caused by conditions which Almena helped create, during an activity on Almena's property.

Cause In Fact (CiF)

But for the dangerous conditions which Almena created in an unsafe building, Steve would not have been trapped on the second floor of Leviathan to suffocate from smoke inhalation.

Proximate Cause

As the leader of Leviathan, Almena organized the warehouse. He knew that the building had no running water for a sprinkler system and one outlet for electricity. Under his leadership, the lower floor became a maze of wood and cloth stacked to the ceiling, with accelerants such as paintbrush cleaning fluid stored among the furniture, essentially kindling. The second floor was equally difficult to navigate for escape, and the guests were trapped when the shoddy wooden staircase caught fire and collapsed. Finally, fire extinguishers on premises were inoperable and old. Guests and residents had no way to stop the fire once it started.

Damages

Appendix

Defenses

Comparative fault – Defense will say Steve was conscious of some of the conditions of the warehouse, but he could not have been aware of them all. Steve may bear some allocated fault, but the Estate will suggest it is less than 5%.

Statute of Limitations – estate has three years to file suit unless accident involving motor vehicle; vehicles downstairs, but not cause of fire or death.

Whodathunk? Defense will say that the mechanism of the fire was not foreseeable, but it need not be. Rat flambé, or in this case, *cat* flambé.

No landlord-tenant duty. Defense will point out that there was no lease between Almena and the residents of Leviathan. It can be argued however that he held himself forth as such, and the warehouse was represented to the party guests as a residential location.

Direct action not the cause: will depend on jurisdiction whether Almena's actions created a duty to rescue

v. Ng

Duty

RWA. Active as landowner.

SoC

Act as an RPP under circumstances.

Breach

It was unreasonable to continue to rent to Almena, after she knew or should have known that people were living in her warehouse which was not zoned for human habitation.

NPS

As the actual landowner, Ng bears the same duty as Almena to invitees and licensees.

CiF

But for Ng allowing people to live in and enter property not safe for habitation, Steve would not have been at the warehouse when it caught fire.

Proximate Cause

Ng knew or should have known of the Leviathan residents and their parties, because of the repeat complaints about noise, fights, and illegal construction. There is evidence that she knew people lived there before the fire. By continuing to rent to Almena despite this knowledge, Ng implied that members of the public (the Leviathan community) were expected to enter or remain in the warehouse. The Leviathan community was allowed to remain and hold their parties, which resulted Steve's death.

Damages

Appendix

Defenses

Comparative fault as above

SoL as above

Whodathunk; cat flambé

Defense will say that Steve was a trespasser, but there is evidence Ng knew of the parties and implied invitation

v. New City

Duty

RWA. Duty to perform reasonable inspections.

SoC

Act as an RPP.

Breach

Unreasonable failure to annually inspect, pursue court order for entry, for thirty years

CiF

Without an inspection, which would have “shut the place down,” the extreme risk of bodily injury and death continued.

Proximate Cause

The fire marshal’s office stated that had a fire inspector seen the building they would have “shut the place down.” For thirty years the Planning and Building Department failed to adequately pursue the inspections, despite ongoing complaints and investigations for “blight” and “illegal interior construction” during the last few years. The residents of Leviathan continued to live there and hold their parties in extremely hazardous conditions.

Damages

Appendix

Defenses

Immunity of Governmental Entity or Employee. Statute 3(12) protects the governmental entity from liability for failing to make adequate inspections of property, including negligent inspection. Defense will claim these decisions were discretionary.

However, knowing of actual risk to residents and failing to inspect for 30 years is grossly negligent. Estate will argue decision was ministerial.

v. Bob Gemello³

Duty

RWA. Acted as lead on stair construction, and living at warehouse

Duty to Rescue: creating the peril and undertaking to act and reliance

SoC

Act as an RPP

To rescue victims when the defendant helped create the danger, and when undertaking rescue.

Breach

Bob was unreasonable and negligent in his construction of the stairs and role he played in creating the pile of kindling and maze in the warehouse

Bob failed to rescue Steve from unsafe conditions which he helped create

³ Bob's availability as a defendant will depend on the standards in New State. This may be allowed, or it may represent a conflict of interest because Bob is the personal representative of Steve's estate.

Bob terminated his attempt to rescue Steve after he started

CiF

But for Bob constructing shoddy stairs, Steve would not have been trapped on the second floor

But for Bob's failure to rescue and bring Steve out the back staircase, Steve would have survived

Proximate Cause

Bob designed and build the stairs. The stairs failed all building code specs, and were extremely susceptible to fire. Because the stairs collapsed during the blaze, guests were stuck upstairs to suffocate like Steve. Because he created this danger, Bob had a duty to rescue Steve. Bob did attempt to undertake this duty, but then did not check to see if Steve was behind him as he fled out the back stairs which Steve could not have known about.

Damages

Appendix

Defenses

Bob's duty to rescue did not extend to further risk his own life.

The estate will need to prove that with further intervention from Bob, Steve would have survived.

Bob Gemello v. Almena, Ng, New City

Claimants:

Bob (injury to the person)

Mom (negligence)

v. Almena

Duty

RWA: leader of Leviathan

Landlord-tenant

SoC

Act as an RPP

Maintain and repair defects in common areas

Breach

Created an unreasonable risk of bodily injury & death to foreseeable victims.

Even having created dangerous conditions, risk could have been mitigated by ensuring fire extinguishers worked and were up to date; an extremely inexpensive precaution in comparison to the huge cost of property damage and lost lives.

As above breach, unsafe circumstances and lack of repair, defects in common areas such as faulty stairs, maze-like conditions downstairs, inability for public to escape, failure to supply working fire extinguishers.

NPS

Bob was also an invitee because he paid Almena a monthly fee for access to the warehouse

CiF

But for Almena creating dangerous conditions in the Leviathan warehouse, Bob would not have been injured.

Proximate Cause

As the leader of Leviathan, Almena organized the warehouse. He knew that the building had no running water for a sprinkler system and one outlet for electricity. Under his leadership, the lower floor became a maze of wood and cloth stacked to the ceiling, with accelerants such as paintbrush cleaning fluid stored among the furniture, essentially kindling. The second floor was equally difficult to navigate for escape, and the guests were trapped when the shoddy wooden staircase caught fire and collapsed. Finally, fire extinguishers on premises were inoperable and old. Guests and residents had no way to stop the fire once it started.

Damages

Appendix.

Defenses

Comparative fault: will be relatively high, defense will try to convince the fact finder that it is 51% or greater so he doesn't recover, because he built the staircase that was not up to code and contributed negligently to the state of the warehouse.

SOL: Action should be brought within 3 years

Whodathunk – Cat flambé.

Landlord-tenant rule – generally no duty where landlord ceded control.

Includes exceptions however, such as staircases and common areas.

Also, there was no lease between Almena and the Leviathan residents. They paid a monthly fee, but in at least one case claimed that was for membership to a private club. Almena did not (and could not) provide leases for residents.

Counterclaim – professional negligence, using the standard for expert carpenters. Claim will depend on whether jurisdiction uses the Second Restatement professional standards including skilled tradesmen, or narrowly defines professionals to post-graduate education. Bob is an expert carpenter and represented himself as such, giving Almena reason to believe that Bob would take reasonable care in the construction of the staircase, use appropriate materials and adhere to building codes. Because he didn't, Bob was negligent. A reasonably prudent person knows that there are standards for construction.

v. Ng

Duty

RWA: landowner

SoC

Act as an RPP.

Breach

Ng took unreasonable action when she continued to rent to Almena, knowing that people were living in her warehouse which was not zoned for human habitation.

NPS

As the actual landowner, Ng bears the same duty as Almena to invitees and licensees.

CiF

But for Ng allowing members of the public to live in and enter property not safe for habitation, Steve would not have been at the warehouse when it caught fire.

Proximate Cause

Ng knew or should have known of the members of Leviathan living at the warehouse, and about the parties they held, because of the repeat complaints about noise, fights, and illegal construction. There is evidence that she knew people lived

there before the fire. By continuing to rent to Almena despite this knowledge, Ng implied that members of the public (the Leviathan community) were expected to enter or remain in the warehouse. Because they were allowed to remain, the Leviathan community continued to have their parties, which resulted in the fire which injured Bob.

Damages

Appendix

Defenses

Comparative fault – as above

SoL: as above

Whodathunk: cat flambé

Trespass to property: but see implied permission to invitees.

Counterclaim: Ng has a counterclaim against Bob for conversion and damages to property, because of his role in creating the conditions at Leviathan. Bob may expect to be joined with Almena as a defendant in a suit against Ng, as the two consciously conspired to build the staircase. The general duty is not to destroy others' property. Bob may be partly liable for the value of the warehouse.

v. New City

Duty

RWA: inspections

SoC

Act as an RPP.

Breach

Not inspecting the warehouse for thirty years was unreasonable.

Failing to pursue a court order to gain entry for an inspection was unreasonable, given that the warehouse had not been inspected for thirty years and inspections are usually performed at least annually.

CiF

Without an inspection, which would have “shut the place down,” the extreme risk of fire, and bodily injury and death, continued.

Proximate Cause

The fire marshal’s office stated that had a fire inspector seen the building they would have “shut the place down.” Because for thirty years the Planning and Building Department failed to adequately pursue the inspections, despite ongoing investigations for “blight” and “illegal interior construction,” the residents of Leviathan continued to live there and hold their parties in extremely hazardous conditions.

Damages

Appendix

Defenses

Immunity of Governmental Entity or Employee. Statute 3(12) protects the governmental entity from liability for failing to make adequate inspections of property, including negligent inspection. Defense will claim these decisions were discretionary.

However, knowing of actual risk to residents and failing to inspect for 30 years is grossly negligent. Estate will argue decision was ministerial.

Comparative fault. As above, Bob's role in creating hazardous conditions allocates to him some portion of fault.

Damages Appendix⁴
 Subject to allocation of fault adjustments

Steve Gemello's Estate Damages	Past	Future
Special	N/A	Loss of earning capacity – \$180,000/yr + what Steve could have earned as a promising lawyer going forward Loss of support
General	Pain & Suffering while Steve was conscious Emotional P&S for mother's witnessing harm claim	Wrongful death Hedonic/potential – loss of enjoyment of life Loss of society Loss of consortium Witnessing the harm

Bob Gemello's Damages	Past	Future
Special	Medical expenses ⁵ Lost wages Assisted living	Diminished earning capacity Assisted living going forward Future medical expenses
General	Physical Pain & Suffering Bob was conscious until he collapsed outside Emotional P&S	Hedonic/loss of enjoyment/potential Bob's blindness will prevent him from creating art Future physical P&S Future emotional P&S

⁴ There may be statutory caps on damages, include as many conceptually distinct categories as possible. Some damage categories may not be allowed in New State, eg recovery for Bob's allocation of fault in Steve's death, or the girlfriend's claims.

⁵ Anything covered already by insurance (arguably within the scope of policy) should not mentioned in claim. Possibly subject to subrogation.

I. STEVE'S "ESTATE" VERSUS NG/ALMENA/BOB/"RESIDENTS"/"NEWCITY"

a. DUTY

Ng, Almena, Bob, and the other sub-lessees ("Residents") of the subject property all have 'Landowner' liability because each of them were in possession of the property and/or legally responsible for the activities conducted thereon. Statute 6(1).

i. Condition Liability

Steve was an Invitee in that: 1) he entered and remained upon the property in response to a Landowner's (Bob/Almena) representation that the party was open to the public, and that the public was specifically requested/expected to attend, Statute 6(5)(A); and, 2) he "enter[ed] ... on the land ... to transact business" in the form of paying Almena \$50 to attend the party, Statute 6(5)(A). Thus, Landowners each owed Steve a duty to exercise reasonable care to protect him from perils of which Landowners knew or should have known. Statute 6(2)(C).

Alternatively, Steve was a Licensee/Social-Guest by statute in that he entered the property in response to the permission and consent of a Landowner (Bob/Almena). Statute 6(5)(B). Thus, each Landowner owed Steve a duty to prevent those dangers he/she caused (e.g. their 'stuff' being in the way of a safe exit), Statute 6(2)(B)(I), and warn him of those dangers that they knew about but did not personally create, Statute 6(2)(B)(II). Almena/Bob/Residents lived/worked on the premises and therefore likely knew of *all* of the conditions, and none warned Steve of any perils, so only Ng arguably benefits from Steve being a Licensee for condition liability purposes.

All Landowners, except arguably Ng, owed Steve a common-law duty to rescue since each Landowner materially contributed to his peril. Almena likely had an independent duty to rescue because he had a business (special) relationship with Steve.

ii. Activity Liability

Each Landowner owed a duty of reasonable care to Steve with regard to activities (i.e. the party) conducted on the property, *regardless* of Steve's status. Statute 6(7).

b. STANDARD OF CARE (“SOC”)

All parties are required to behave as a reasonably prudent person would in carrying out each prescribed duty, such as keeping the property up to code (e.g. maintaining required safety features), ensuring that persons can swiftly exit in an emergency, warning of known perils, and rescuing persons from perils when safely possible.

c. BREACH OF THE STANDARD OF CARE (“BREACH”)

i. Negligence

Landowners each breached their duties to Steve by failing to act as a reasonable person and ensure:

1) clear paths to an adequate number of up-to-code staircases each leading directly to sufficiently marked exits (note: 5/7 upper level windows were grated and, therefore, impassable), and from such exits to safety;* 2) fire extinguishers were not expired and operable;** 3) hazardous substances (e.g. solvent rag(s), butane tanks) were stored/disposed of properly;** 4) open flames (the candle) were properly contained;** 5) animals (the cat) were controlled; 6) electrical outlets were not overloaded;** 7) public patrons were aware of the second staircase (a material omission/substantial factor in Steve’s death because Bob’s escape proves that Steve could have escaped from the same location via the back staircase had he been aware of it); 8) proper emergency lighting;* 9) a fire sprinkler system;* 10) a permit for the party (which would likely have triggered an inspection by NewCity);* 11) the property was properly zoned for inhabitation;* and, 12) Steve was rescued from the fire [note: violations of the Newstate/“NewCity” fire/municipal/building codes given to us in the facts are marked by “*” and probable violations are marked by “**”].

ii. Negligence *Per Se*

Negligence due to the violation of laws meant to protect the public, such as building codes, is negligence *per se*; thus, eliminating the need to prove that a reasonable person should have acted differently since the conduct is considered negligent as a matter of law. This doctrine applies to Landowners’ failure to comply with the NewCity codes (other than the zoning/permit issues which are

'licensing' violations) that directly contributed to Steve's death. Ng and Almena, as owner and primary lessee respectively, are clearly liable for the violations, and the Residents are arguably liable due to their being in possession and control of the property. Thus, the codes become the standard of care, and the violations of the codes become breaches without the need for further evidence.

iii. *Res Ipsa Loquitur*

Res ipsa loquitur provides that one is presumed to be negligent if he/she/it had exclusive control of whatever caused an injury, when such injuries do not ordinarily result without negligence, even though there is no direct evidence of negligence. Thus, Estate could argue that it need not show a breach of duty because members of the public do not usually burn to death at parties absent negligence. However, meeting the requirement to show that a respective Landowner had exclusive control of the property/premises could be problematic, and this doctrine does not appear to add much benefit to the case since there is overwhelming evidence of negligence already available.

iv. Intentional Torts/Criminal Acts

The disadvantage of a claim for intentional torts such as assault/battery is that Landowners' insurance policies are likely to exclude such acts from coverage. The advantages include the ability to use any criminal convictions to estop a Landowner from arguing lack of intentionality. Further, under the majority view, one cannot consent to a criminal act. Proof of knowledge/intent will also impact the case for punitive damages as discussed below.

v. Burden of Avoidance

Landowners were obligated to protect Steve by eliminating the perils since the probability of danger and magnitude of loss were high, and the cost of correcting the physical defects on the premises were comparatively low.

d. CAUSE IN FACT (“CIF”)

But for Landowners’ negligent acts/omissions:

- i. The fire would likely not have occurred, or at least would not have spread so rapidly;
- ii. Any fire could have been contained and/or extinguished by a fire sprinkler system and extinguishers; and/or,
- iii. Steve would likely have escaped safely/unharmed via unobstructed stairs/paths to an adequate number of marked emergency exits.

e. PROXIMATE CAUSE (“PC”)

Steve’s death was reasonably foreseeable based upon the existence of the perils. None of the perils appear difficult to ascertain (i.e. all were reasonably foreseeable as dangers, contributors to the fire/delays/panic/chaos, and ultimately to Steve’s injuries/death).

f. DAMAGES

Newstate has a modified comparative fault regime. Statute 4. A party may recover damages even if he/she/it be at fault provided that his/her/its percentage of fault does not *exceed* 50%. Statute 5(3).

Newstate’s wrongful-death law is both a wrongful-death and a survival statute, which requires that all claims related to Steve’s death be brought by the personal representative of Estate in his/her name. Statute 2(1)-(2).

Steve’s “Girlfriend” may only recover if she is a devisee under Steve’s will (if any) or a beneficiary of a trust that is a devisee under such will, and their relationship did not violate Newstate law. Statute 2(3)(C). Bob and Steve’s mother may recover for Steve’s death through Estate regardless of whether they are beneficiaries/devisees. Statute 2(A).

Damages are all those Steve would have been able to recover had he lived, plus any damages to a party entitled to recovery (Bob/Mother/Girlfriend, or others not mentioned in the facts). Statutes 1, 2(1).

The damages sections are *inclusive*, not exclusive, so common law damages are likely available in addition to statutory damages. Statute 2(6).

Note that personal insurance policies likely exclude the business use of the premises, and most business policies likely exclude activities outside of the scope of the covered business; thus, there appears to be a low likelihood of coverage for Steve’s damages under any policies held by Landowners.

i. Compensatory

Compensatory damages must be allocated to each defendant individually. Statute 5(1). However, if it is proven that Almena and Ng conspired to operate Leviathan negligently (i.e. as an illegal residence/party-house), then they may be jointly and severally liable. Punitive damages are not allocated as they stem from bad behavior by a particular party. Additionally, compensatory damages may be reallocated among any liable parties if they cannot be collected from one of more defendants. Statute 5(4). This makes recovery possible if *any* of the defendants have available funds *and* are more at fault than the recovering plaintiff. Statute 5(4)(A).

	Past	Future
General/Economic/Pecuniary	Funeral/burial expenses (Statute 2(6)). Any property destroyed (phone/clothes).	Loss of earnings.
Special/Non-Economic/Non-Pecuniary	Pain/suffering before unconsciousness/death (<i>id.</i>).	Loss of consortium (financial support, society, and companionship) (<i>id.</i>). Emotional distress (Bob/Mother/Girlfriend?/Others?).

Future earnings may be limited because Steve intended to work for the ACLU (which likely pays substantially less than \$180k/yr).

Loss of consortium *may* be available to Bob/Mother/Girlfriend based on Statute 2(6). Girlfriend could benefit from a loss of financial support based upon the facts of the relationship.

Emotional distress damages may or may not be available to Mother, Girlfriend and/or Bob depending on Newstate common-law. Bob was in the ‘zone of danger’, but Mother and Girlfriend were not. Both Mom/Girlfriend witnessed his death remotely (which may not be compensable under Newstate law), and the text message was likely less traumatizing than the video call received by Mother. Also, since emotional distress is a common-law damage, Girlfriend may be barred from recovery entirely based upon the nature of her relationship with Steve (e.g. she was not a spouse).

ii. Punitive

The repeated, systematic, and apparently knowing violations of law as described above support a finding of extreme recklessness towards the rights of others and/or intentionality on the part of Ng/Almena (and possibly all Landowners) sufficient to support punitive damages. There are good public policy reasons to award punitive damages here to deter future misconduct (there are similar situations in many cities, “[i]t could have been any one of us,” and these circumstances should be discouraged). Punitive damages are fixed by the magnitude of the willful misfeasance/malfeasance and the means of the tortfeasor. Thus, punitive damages against Ng, who has deep pockets and significant prior misconduct of a similar nature on record, are likely to be *substantial* (unless capped by law). Punitive damages also cannot ordinarily be discharged in bankruptcy.

g. DEFENSES

i. Implied-Assumption-of-Risk/Comparative Fault

Defendants may argue that the dangers of the premises were so obvious that Steve assumed the risks of remaining on the premises. However, Estate can likely argue successfully that Steve acted reasonably in presuming that the premises were not unreasonably dangerous

ii. No Duty to Rescue

Landowners will argue that they had no duty to rescue because they could not rescue Steve without endangering themselves. However, at minimum, Bob had a duty to rescue because he was likely in no

more danger by attempting to rescue Steve than he was in already, and having started a rescue, he was obliged to complete it.

iii. Lack of Knowledge

Ng may argue lack of knowledge of the use of the premises for residency/parties as a defense. She is unlikely to prevail because she apparently knew and, at least tacitly, approved of the use of the premises. Evidence of her lying about her knowledge is also likely to weigh against her for punitive damages purposes.

iv. Sovereign Immunity

NewCity and its employees are immune from suit for breaching its statutory duties to enforce its building and fire codes, Statute 3(8), and failing to perform inspections, Statute 3(12). Nevertheless, NewCity must be allocated a percentage of fault, and that fault cannot be allocated to any other defendant. Statute 5(7). Thus, there will be no recovery for the damages apportioned to NewCity, including any under the reallocation provisions.

Estate should attempt to limit NewCity's percentage of fault, while defendants will want to maximize it (Bob, as both plaintiff and co-defendant, is stuck in a 'Catch 22' on this issue). The evidence suggests that Almena/Ng actively interfered with and lied to NewCity agents (e.g. by claiming the premises was being used as a members-only club, zoning it as a warehouse), which increases their fault relative to NewCity. Nevertheless, NewCity was at least partially at fault (e.g. for failing to follow-up to previous tips/information).

v. Statute of Limitations

A suit for damages for injury or wrongful death to a person must be brought within three years, Statute 9(1), and within two years for property, Statute 8(1). Although motor vehicles were present in the yard, they were likely not "involved" sufficiently to make the shorter periods of limitation relevant. Neither period has run as of this date.

II. BOB VERSUS NG/ALMENA/RESIDENTS/NEWCITY

a. DUTY

See I(a). Bob was a Licensee when he was attending the party, he was also a (business) Invitee as sub-lessee to Almena and through him to Ng since he paid rent (money/services) to Almena for use of the premises, who then paid the money to Ng.

Landowners also owed him a duty to protect regardless of his status for activity liability purposes.

b. SOC

See I(b).

c. BREACH

See I(c), but Bob likely already knew of the perils/second staircase.

d. CIF

See I(d).

e. PC

See I(e), Bob's injuries were equally foreseeable.

f. DAMAGES

See I(f), exclusive of the table/succeeding notes. Bob may sue and recover directly for his own injuries.

	Past	Future
General/Economic/Pecuniary	Medical costs (transport, burn unit/amputation, etc.). Loss of earnings during treatment. Any personal property damaged/destroyed.	Future medical expenses (likely to be <i>substantial</i>). Loss of earnings (hard to be a blind artist).

<p>Special/Non-Economic/Non-Pecuniary</p>	<p>Pain and suffering while conscious during fire, and during medical treatment (burns <i>hurt</i>).</p>	<p>Loss of enjoyment of life (burns, blindness, loss of right leg).</p> <p>Future pain and suffering (burns, phantom-limb-syndrome, etc.).</p> <p>Emotional distress (embarrassment at disfiguring).</p>
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Bob’s punitive damages case is significantly weaker because he has unclean hands.

g. DEFENSES

See I(g). Negligent assumption of risk/comparative fault defenses are much stronger because Bob lived on the premises and had knowledge of the conditions (thus arguably assuming the risk by living there) and directly/materially contributed to the perils. Bob may argue that the vast majority of the perils were the fault of Almena/Ng’s failure to keep the premises up to code. Proving recklessness and/or intentionality by Almena/Ng would be particularly helpful to Bob because of the majority no-consent-to-criminal-acts rule.

III. REPRESENTATION

Bob cannot be personal representative for Steve’s “Estate” as he has a conflict of interest in the outcome of any litigation (he would be impleaded as a co-defendant into any suit by Estate).

IV. CONCLUSION

The facts support a finding apportioning the majority of the fault to Ng and Almena with the rest to NewCity, and roughly equally between the Residents (including Bob). Estate likely has a very strong case against Ng/Almena and should have a significant recovery (especially if uncapped punitive damages are available).

Bob has a weaker case; his recovery is likely to be reduced under comparative fault principles, and any recovery could be problematic under the reallocation scheme (particularly if there is a lack of insurance coverage and/or financial means by the Residents).

The most significant defendant is Ng, who appears to have substantial assets and is vulnerable to a punitive damages claim. Finally, the reallocation provision in Statute 5(4) can be used, at least by Estate, to collect any judgment in the case, which will be particularly important if other defendants are insolvent, uninsured, or of little future financial worth.

Word Count: 2500/2500

Bob v. Almena, Rent Ng (Rent), and New City (New) (1 of 2)

Duty:

Almena, Rent, and New were all active therefore, they had a duty to act reasonably. Additionally, because Almena and Rent are landowners of the Leviathan they owed the highest duty among entrants to Bob as he was an invitee.

Further, Almena is liable under the theory of misfeasance because he took affirmative actions that contributed to the foreseeable and unreasonable dangers that lead to Bob injuries and Steve's death.

From the evidence, it is unclear if Rent took any affirmative steps to contribute to the harm, but she meets an exemption to parties liable for nonfeasance (an inactive party) and is liable due to her special relationship as a landowner.

Standard of Care (SOC):

Bob was an invitee to the Leviathan, he was there for "business," and his presence mutually benefited he, Almena, and Rent. Landowners SOC to invitees is to not willfully or deliberately harm and to warn of dangers: known; should have known; not ordinarily present; not created by the landowner, and; those created by the landowner.

The main staircase was a known danger it didn't meet building codes because it was constructed of flammable materials, there were gaps in treads, riser openings were not the correct height and exposed, handrails were insufficient where they existed, the landing was too small, it failed to lead to an exit, the foundation was inadequate, it was insufficiently lit, inadequately sloped, and the width was improper. The stairs were a "known danger, not ordinarily present, and created by Almena." He had a responsibility to warn people about such a hazard.

Rent arguably did not create the danger, but she “should have known” such dangers were present in this building. Rent was a substantial property owner familiar to building and planning, since she was known to building and planning it can be inferred that she was active regarding her properties, and had a duty to act reasonably.

Breach:

Almena’s negligence can be inferred from his failure to take precautions that may have prevented the fire, the burden of installing battery powered lighting and reflective signs that gave notice of exits was much lower than the probability of such an event multiplied by the expected loss. (B<PL).

Almena created the danger, he did something bad, and he prevented inspections by having doormen that knew to tell police the building was a private club. Constructive knowledge can be inferred that there was a system in place to not open the door to authorities. But, to collect the proceeds from Almena’s endeavor a sophisticated ticket system was placed in a structure that’s main power source was an extension cord from a neighboring business and was nicknamed the “deathtrap” by residents and guests.

Rent was an absentee owner who failed to exercise reasonable care when active. She should have taken steps to ensure the property was inspected, or demanded that an inspection took place. She failed to warn invitees of dangers she should have known of. Thus, she breached her duty as a landowner. Rent benefited from Bob and Steve’s presence, which allowed Almena to pay rent and to have leased the warehouse for nearly six-years. That provided incentive for her to act unreasonably, if the property value goes up because the Leviathan gentrifies the area she benefits the most.

The efforts that New exhausted to inspect the Leviathan are unreasonable, from the evidence it appears there may have been grounds for the inspectors to get a court order to access the property. While New boasts about having a policy to inspect commercial properties once a year if not more, it seemed to act unreasonably in failing to inspect the Leviathan warehouse in over thirty-years.

Negligence Per Se (NPS):

Both Almena and Rent violated New's premises liability statute. The parties breached the SOC described above that was owed to invitees. Statute six is designed to protect harm from occurring upon entrants to land, and Bob and Steve were invitees on the land.

If a recreational-vehicle qualifies as an off-road vehicle, then evidence supports the city would not have immunity from liability. Statute 3 § 23.

Cause in Fact (CIF):

But for Almena's unreasonable actions to sustain the Leviathan Bob wouldn't have been injured and Steve wouldn't have been killed. Generally, the plaintiff has the burden of proof but in this scenario, the burden shifts to the defendants because they breached statute six. (Lone Palm Hotel). Because there is more than one negligent and culpable actor that violated statutory law shifting the burden to them will ease plaintiff's difficulty of proving a prima facie case. (Summers v. Tice).

Proximate Cause (PC):

Almena may argue the events were unforeseeable, but it doesn't matter that a cat knocked over the candle that place was a "deathtrap," it was foreseeable that some incident where people would be injured would happen. (Rat-flambay). It was unreasonable to have people live at the Leviathan, it was unreasonable to use the second floor as an event venue when the main staircase

being utilized was made of “stolen pallets,” and it was unreasonable to rely on an extension cord of a neighboring business to serve as the primary power. It was unreasonable that New hadn’t inspected the warehouse in over thirty-years.

Damages:

If the burden is shifted to the defendants, because it is too difficult to determine the exact negligence that caused the harm Almena and Rent will be jointly and severally liable, which would leave them both on the hook for total damages.

Economic:

After accident - medical bills, ambulance, clothing, loss of earnings, and renovations to home to accommodate for his disability.

After Trial- travel, rehab, loss of earnings.

General and Hedonic:

After accident - pain & suffering, emotional distress, damage to reputation (expert carpenter), and humiliation.

After Trial- pain & suffering, emotional distress, damage to reputation, humiliation, loss of society (he lost his brother), and any other loss of enjoyment that can be evidenced.

Defenses:

Who’d a thunk? Sorry, mechanism doesn’t matter.

Comparative fault, but that will come into the damages calculation and damages will be reduced by Bob’s own percentage of fault.

Assumption of the risk, Bob is an expert carpenter, and if New holds skilled tradesmen to a higher SOC by statute then Bob may be further liable, but I don’t have enough information.

Authorized agent- Bob is an authorized agent, stepping into the shoes of the Landowner and is no longer owed a duty of his own. Unlikely because Almena is probably the lessee.

Pushing off liability to the Neighboring auto shop because it doesn't appear an extension cord could be run from any other business. Serve to reduce liability of other negligent actors.

If New's statutes hold skilled craftsmen to a higher SOC, Neal Bohr may have potentially contributed to the harm by expanding the power.

Almena will try and push liability off to Rent, and Rent may try to push it off on New. If it can be demonstrated that it appears New had a policy of inspecting commercial buildings, then the failure is protected by statute. Generally, if evidence supports that inspections were not policy but rather administrative then the immunity may be breached.

Insurance/Strategy:

New is the biggest pot of money, but the cloak of sovereign immunity is hefty and Rent seems to be the next biggest pot unless you could bring in the neighboring Auto Shop. Neal Bohr is most likely judgment proof. It is best to frame this as a concerted action by demonstrating Almena, Rent, and possibly the neighboring Auto Shop worked together. Providing encouragement or assistance to Almena. Almena would need an absentee if not complicit property owner to get away with such behavior, and the Auto Shop may have provided the power cord that acted as the main power supply for the Leviathan. The statute of limitations (SOL) to bring a claim is three-years

In Re Steve v. Bob, Almena, Rent, and New (2 of 2)**Duty:**

Anytime one is active there is a duty to act reasonably. Bob was active, he built the staircase and was leading Steve as they attempted to escape. Almena and Rent were active. Regardless, as landowners whether active or not they are liable for certain harm upon entrants of their land. Landowners owe the greatest duty to invitees. New was active it undertook the act of investigating.

SOC:

Depending on Bob's status his duties will vary. If New is part of the minority of jurisdictions that recognizes skilled tradesmen as having a higher "professional" SOC, Bob, could be attributed a percentage of fault for that night's events. If he was an agent of the landowner, or, a landowner himself then he owed the same SOC to his brother as Almena and Rent. The facts are not dispositive of Bob's status, but Almena employed doormen in some capacity for his parties. Therefore, he may have had employees acting as agents, not Bob.

Almena and Rent owed a duty to not willfully or deliberately harm invitees on their land and to warn of dangers: known; should've known; not ordinarily present; not created by the landowner, and; those created by the landowner.

Breach:

Based off the "Learned Hand" doctrine, Almena acted negligently here. He was the mastermind of these events, and it was unreasonable for him to not even take the most basic of precautions considering that the burden was much less than the probability of the loss ($B < PL$). Reflective exit signs, battery powered lights, or simply informing people of how to quickly escape in the event of a fire were all actions that imposed minimal burdens. Yet, none of these

protective measures were taken. The same logic applies to New and Rent, for a minimal burden they could have littered the place with danger signs or party at your own risk, something that did a better job to inform entrants of the risk.

Because the landowners violated the premises liability statute, they must prove by a preponderance of the evidence that they were not negligent. Generally, the plaintiff's burden. (Lone Palm Hotel).

NPS:

Almena and Rent violated New's premises liability statute by breaching the SOC described above that was owed to invitees. Statute six is designed to protect harm from occurring upon entrants to land, and Bob and Steve were invitees on the land. They were there for "business."

And, unless a recreational vehicle qualifies as an off-road vehicle the government will have the protections of sovereign immunity.

CIF:

But for Almena's failure to warn Steve and every other ticket paying entrant on his land (invitee, there for business) of known dangers he created by taking affirmative steps the entrants may not have been exposed to an unreasonable harm. A faulty staircase, a maze of furniture, recreational vehicles, instruments, and art up to the ceiling all contributed to the death of Steve and the others who perished that night.

Here the gold standard of "but for" causation with the burden of proof shifted to the presumed negligent tortfeasor(s) is most appropriate. Dependent on whether this is brought as concerted action. Because of the negligent tortfeasor(s) actions it may be difficult to separate the

specific cause that triggered the tragedies at the Leviathan and therefore the burden of proof is correctly shifted to them.

PC:

If New is a minority jurisdiction that has an expansive view of professionals, Bob may share some liability because a reasonably competent and skilled carpenter would seemingly know building and planning codes, and know that a staircase that is flammable and poorly footed is unreasonable per the custom of the profession.

If Rent had taken steps to ensure that the warehouse was being utilized within New's codes, then this tragedy wouldn't have occurred.

If New had acted reasonably once it undertook steps to investigate the warehouse this tragedy may have been prevented. Further, if New lived up to the practice of routinely inspecting commercial buildings, as it boasts that it does maybe the tragedy or harm could have been mitigated.

Damages:

There is no survival claim for Steve, he was only conscious for a matter of seconds after he made the call and before it was disconnected, so it is unlikely that he experienced any pain and suffering that is recoverable. (no survival claim).

If Bob is apportioned a percentage of fault, he is likely judgment proof. Therefore, if this is a concerted action the other liable parties are liable for an amount that equals Bob's uncollectable judgment multiplied by that party's own percentage of fault. (Statute 5). Bob has no grounds for recovery in this suit, a plaintiff may not receive double recovery (Bob needs to bring his own suit considering his substantial damages), and it is likely that Bob will be named as a defendant in the suit brought on behalf of Steve's estate.

If Steve and girlfriend were common law married (if New recognizes common law marriage & (outward manifestations and/or shacked up), or if she is a beneficiary or devisee of Steve's will, she would be eligible to recover damages.

No emotional distress for Mother (not zone of danger) lacking proximity element.

Economic:

Funeral and burial expenses.

Any loss of financial support for Steve's mother, and if Steve was married any loss of support to his wife (based off what he brought home after gambling, boozing, and whoring).

General and Hedonic:

Loss of society for Steve's mother, and loss of consortium for his wife based on the quality of husband he was.

Defenses:

If Steve didn't pay admission he would be a licensee, the evidence supports the notion that Steve attended not only to see Bob, but because of Almerna's pressure for Leviathan regulars to invite paying guests.

Assumption of the Risk: Steve didn't agree with Bob's lifestyle, which included living at the Leviathan. It was unreasonable to attend in the first place, and he voluntarily and knowingly took the risk of attending a party at the inherently dangerous "deathtrap."

If New courts recognize that an "expert carpenter" is held to the standard of his profession then Bob would be liable for a percentage of the fault, and the other parties would argue they trusted him as a professional. Generally, the professional standard is limited to true professionals.

Bob was a landowner or authorized agent and because he was the only landowner there that night, he owed the elevated level of care to his brother. No valid lease.

Insurance/Strategy:

Attempt to pierce sovereign immunity (most likely unsuccessful), and aim to bring as concerted action. Rent is the largest pot of money that is likely attainable, and therefore showing that she encouraged if not aided in the Leviathan's events is essential to this case. Aside from the auto shop that may have provided the Leviathan with power the other potential defendants Neal Bohr and Bob appear to be judgment proof. Unless Almena has third party insurance coverage that would not exclude such events he too is probably judgment proof. SOL is three-years.

Word Count: 2500