

FINAL EXAMINATION

TORTS

PROFESSOR RUSSELL

INSTRUCTIONS:

1. **DEADLINE:** This is a six-hour examination that starts at 10:00 a.m. on 14 May 2003 and is due by 4:00 pm on 14 May 2003. **If you return the exam after 4:00 pm, you get zero points for the exam. NO EXCUSES.**
2. **TURNING IN YOUR ANSWERS:** You may turn in your answers either by delivering a printed copy to the registrar's office or by sending your answers via E-MAIL to the registrar at dricciardi@law.du.edu. **If you return your answers using e-mail, please send e-mail to dricciardi@law.du.edu with your answers attached as either a Word or WordPerfect document. Please also send a copy of the answers to yourself.**
3. **OPEN-BOOK:** This is an open-book, take-home examination. Your answer must be of your own composition. You may work on this examination wherever you wish, and you may consult any written material that you wish. However, you violate the Honor Code if you show or distribute this examination to anyone at all before you turn in your answer, and you violate the Honor Code if you discuss this examination with anyone before you turn in your answer.
4. **EXAM NUMBER:** Please put your exam number on each page. The easiest way to do this is to put the exam number in a header on each page. Do not put your name anywhere on the exam.
5. **LENGTH:** This examination consists of one question. Your job is to produce a typed—that is, **not hand-written**—answer of no more than 2,500 words.
6. **SPACING:** Please try to double-space your answer. Avoid miniature fonts, okay?
7. **HOW TO ANSWER:** In answering, use judgment and common sense. 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. **CONCISION:** Quality, not quantity is desired. Think through your answer before you begin to write. You have a lot of time to write your answers. Concision will win you points. Good organization will win you points as well.

9. **YOURS TO KEEP:** You may keep your copy of the exam.

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 congratulations on finishing your first year of law school.

QUESTION

(2,500 word limit)

Duane's Sober

Duane remembers slipping a CD of Mozart's Jupiter Symphony into the CD player of his 1999 Ford Taurus. The next thing he remembers is stepping out of his wrecked car, which was stopped on a lawn near the highway, looking eastward. Behind him, he heard screams.

This was not Duane's first wreck. A few years before, Duane's life had bottomed out when he crashed a pickup truck into a an SUV carrying a family of four, killing the mother instantly, paralyzing the father, injuring the daughter, and damaging the son psychologically—the boy still had not spoken a word since the accident. A year after the crash, the quadriplegic father died from his injuries, too.

When the earlier crash happened, Duane had been drinking Shiner Bock and playing the then-popular music of Eminem very loudly. He was an underage drinker and an underage driver. Later investigation by his insurance company shifted the blame entirely to the driver of the other vehicle—the mother of that family—but even so the crash was a wake-up call for Duane. Though exonerated by the defense lawyers of his insurance company, Duane saw his recklessness with clarity and turned his life around.

Duane learned to enjoy Mozart's music in the alcohol rehabilitation facility. He exchanged Shiner Bock, Eminem, and pickup trucks for sobriety, music of the late eighteenth century, and a Ford Taurus. He came to see that his previous dreams of moving to the big city—Lubbock—reflected his earlier reckless lifestyle. He changed

his life plans and decided that when he reached the age of 18, he would move to a small city of 3,000 in a neighboring state.

He especially liked the third movement of Mozart's great work. For more than a year, his plan had been to listen to the third movement of the Jupiter symphony just as he crossed the city limits of the town where he would start his adult life. The last thing he remembers was inserting the Mozart disk into the Taurus's CD player.

Sounds

Guests at Mayor Lickenhooper's party clearly remember two sounds. One sound—really two noises in close sequence—was a great snap followed by screams as one of the stairs snapped on the wooden two-story, outdoor staircase that led from the Mayor's back deck to the backyard of the house that the City provided to him. The other distinct sound that the guests heard was the crashing of timber as Duane's Ford Taurus careened into the yard and snapped the timbers that supported the staircase. The guests disagree as to which sound they heard first.

House

Like his life, Mayor Lickenhooper's party was a mixture of work and business. As a professional politician with the aspiration of someday running for the County Board of Supervisors, Lickenhooper always mixed his political ambitions into his choice of social activities. He invited the 15 wealthiest people in town to his party as well as all of the City Council members and the City Manager. He also invited the County's entire Board of Supervisors, even though it was a 50-mile drive for many of them to get to his house.

Mayor Lickenhooper held the party at his house, which he liked to call the mayoral mansion. As part of the compensation package that the City provided to the mayor, Lickenhooper was able to rent the 3,000 square foot, two-story house from the city for only \$100/month, which was well below the market rate for the town.

The City's planner and the City's architect had designed and built the house ten years previously. There were few two-story houses in the small town of 3,000 people—most of the houses were ranch homes with all the rooms on a single floor. These houses averaged about 1,500 square feet of floor space, so the mayor's house was substantially larger than most of the other houses in town.

The city's planner and architect wanted the mayor's house to signal the town's prosperity, so they placed the house in a prominent spot. In designing the house, they reconfigured the main road into the town so that visitors coming from the west, as

Duane did, would see the house directly in front of them and then make a sweeping turn to the left around the house. Before its reconfiguration, the road ran directly over the spot on which the house now sits. After its reconfiguration, the road traced a semicircle just to the north of the house, forcing those driving by the house to slow down and giving them a chance to admire the construction and beauty of the house. Duane's Taurus left the highway just where the left turn started and tracked the path of the old road right into the mayor's backyard.

The City maintained the property, inside and out. Once a week, someone came to clean the interior of the house, and the city's maintenance crews took care of the exterior, including the landscaping. Mayor Lickenhooper was very happy with the housecleaner whom the City provided, but he had mixed feelings about the outside crew's supervisor, who had a tendency to allow the lawn to get too long and the bushes too overgrown. Of late, the mayor thought that the exterior of the house itself was looking a bit shabby. He also felt that the outside stairs—the ones that lead to the backyard—were getting to feel a bit rickety. As he watched the stairs collapse following the impact of Duane's Ford Taurus, the mayor was reminded that two days before, as he hurried up those same stairs to answer a phone call, the usual creaking of the stairs had turned to cracking. After he heard the third stair from the top crack loudly when he stepped on it, he had written himself a mental Post-it to call the outside maintenance crew's supervisor and ask him to check on the stairs. He forgot to make that call before the party.

Injuries

Remarkably, Duane was uninjured in the crash and his Taurus remained drivable though it sustained \$3,000 in damage. Duane's car clipped right through two of the four timbers that supported the outside stair case, snapping them like toothpicks. His driver's side airbag inflated at that moment, and the Taurus continued on through the mayor's yard, coming to rest just near the edge of the highway.

Duane has no memory of the impact. Duane does not know why he has no memory of leaving the highway nor of crashing through the steps. He suspects that his brain is trying to keep him from reliving the memory of when his pickup truck had crashed into the family traveling in the Explorer; Duane has no training in psychology, though.

The last of the steps that Paula set foot upon was the third one from the top. Paula, who worked for the caterers whom the mayor had hired to help with the party, was on her way down the stairs with a coffee urn. Knowing that the mayor liked to serve his coffee very hot, Paula made sure that the temperature of the coffee was above 180

degrees just before she started to carry the urn down the stairs to the backyard where the Barbecue buffet was set up.

As Paula stepped down onto the third step from the top, Quincy stepped up onto the same step. Quincy was on his way up the stairs, and he had to turn sideways just a bit in order to let Paula pass by. They both had most of their weight on the third step at the same time. Although the mayor had not invited Quincy to the party, Quincy had learned of the party and decided to attend anyway. He had aspirations to gain a larger share of the city's excavation and paving contracts, and he thought that coming to the party would be a good chance for him to get to network with the Council members as well as the members of the County Board. He arrived at the party a bit late and was on his way up the stairs for the first time when the calamity struck.

With Paula and Quincy's combined weight on the third step from the top, the step broke. The board snapped right in half. Paula remembers hearing the crash of Duane's car followed by the step giving way. Quincy recalls beginning to fall through the step just as Duane's car hit the base of the stairs. Paula shrieked and threw her arms up in the air. She remembers the glint of the sun off the stainless steel exterior of the coffee urn as the urn flew through the air. Quincy's memory is of falling downward through the steps and seeing the staircase begin to rotate away from him in response to Duane's car hitting the stairs.

Quincy hit the ground hard. His right femur—the bone between the hip and the knee—broke into three big pieces and several smaller pieces when he hit the ground. He also shattered his right humerus—the bone between the shoulder and elbow. In the instant after he hit the ground, the coffee urn hit him. The hot coffee delivered third-degree, full thickness burns to Quincy. The burns covered 20 percent of his body, including the entire right side of his face. He had, of course, never felt such pain.

Paula was only slightly more fortunate than Quincy. She escaped the burns, but she broke both of her legs as well as her right hip.

Paula and Quincy were not the only persons who suffered injuries. As the wooden staircase fell, one of the city council members, Richard, was trapped beneath the wreckage of lumber. Richard had been standing near the base of the stairs although he had not yet started up the stairs. After Duane's car hit the stairs, the entire staircase rotated eastward—moving in the same direction as the Taurus. The stairs collapsed onto Richard, breaking his neck. He lived for a horrifying three minutes beneath the wreckage of the staircase, but he was dead when the paramedics finally got to him.

Richard's wife, Samantha, watched from the other side of the backyard as the stairs collapsed upon her husband. Samantha was at the party because of her wealth not

because of her marriage to Richard, from whom she had been separated for 18 months. Their divorce from an unhappy marriage of 10 years was pending, as the lawyers charged them great fees in connection with the settlement of their property claims.

Richard's new girlfriend, Tammy, was at Richard's side when the steps collapsed upon him. Remarkably, no falling timber touched her, not even a splinter. She was close enough to Richard to hear his neck break, and she could hear his anguished groans as he was trapped beneath the lumber.

You are the Assistant City Attorney. Your boss, the City Attorney, wants you to assess the likely liability of the City for the injuries that people sustained at the mayor's party. You have 2,500 words to do so.

END OF EXAMINATION

MEMORANDUM

To: 2002-03 Torts Students

From: Tom Russell

Re: Torts Final

Date: 30 June 2003

You have by now received your final grades for Torts. If you wish, you may pick up your exams from my assistant, Hope Kentnor. I made only a few comments on the exams. I apologize for how long it took to get the grades posted. A variety of events made it impossible for me to get them in earlier.

Please remember that grades do not change except in cases of arithmetic error. That is to say, there is no possibility of arguing for a higher grade. This is law school policy.

I was generally quite pleased with the answers to the final exams. You did a good job at looking at the different conceptual and doctrinal issues that the exam provided, and you were properly skeptical of the facts that I presented in the hypothetical situation.

I was also happy to see the improvement in the organization of the exams. As I emphasized throughout the year, good organization is essential to both a complete analysis of an issue and also to giving your reader confidence that you have addressed all the elements of the problem.

Because the general quality of the exams was higher than in the fall, the grades were as well. Whereas in the fall the mean grade was 2.86, for the year it was 3.13, which is just about as high as I am permitted. Below, please find a chart that shows the distribution of grades in the fall and for the year.

Fall		Year	
A	8	A	12
A-	9	A-	13
B+	15	B+	16
B	15	B	23
B-	16	B-	11
C+	7	C+	2
C	7	C	3
C-	2	C-	3
D+	0	D+	2
D	2	D	0
D-	2	D-	0
F	1	F	0

Below, please find three strong, high-scoring students answers. Each answer has strengths and imperfections. The first answer is particularly strong because of its division of the analysis into third-step plaintiffs and staircase plaintiffs. The second is very well-organized, with each of the elements laid out nicely for each plaintiff. The third does a very good job of integrating the doctrinal strands of the course into a complete analysis.

Note that this document, if printed, is 35 pages long.

To: City Attorney

From: Assistant City Attorney

Re: City's Liability for Mayoral party accident

Injured Parties

There are 5 potential plaintiffs in this situation. They are:

- Paula: injured legs and hip
- Quincy: injured leg, arm, and burns
- Richard: dead
- Samantha: watched husband die from across the backyard
- Tammy: watch Richard die while standing next to him

Cause in Fact

There are two different types of causation in this case, and this divides the potential plaintiffs into two groups: the third-step plaintiffs and the staircase plaintiffs

Third-step plaintiffs

Paula and Quincy's fall from the top of the staircase to the ground caused their injuries. Their fall was caused either by the collapse of the 3rd stair from the top, or by Duane's crash into the staircase. There is dispute over which event took place first, but either event was sufficient to cause the fall. Thus it is impossible to say that the collapse of the third step was a but-for cause of their injuries.

Where the conduct of two or more actors is sufficient independently to cause the harm, the doctrine of multiple sufficient causes comes into effect. Multiple sufficient causes has two main implications. First, the burden of proof shifts from the plaintiff to the defendants; the defendants must prove that it was not them that was the but-for cause of the harm. Second, if a defendant cannot prove that they were not a cause in fact of the accident, they are held jointly and severally liable for the damages.

In this case, it will be difficult, if not impossible, to prove that the collapse of the 3rd stair was not a cause of Quincy and Paula's fall.

Staircase plaintiffs

Richard, Samantha, and Tammy's injuries were caused by the collapse of the staircase. The collapse of the staircase was caused by Duane's car crashing into the stairs support beams. But-for Duane's crash, the staircase would not have collapsed and Richard, Samantha, and Tammy would not have been injured. Duane's car crash was the but-for cause of their injuries.

It is conceivable that the City's 10 year old reconfiguration of the road was a substantial factor in causing the injuries. Richard, Samantha, and Tammy will likely

argue that the reconfiguration created a condition in which a motorist could hop the curb and smash into the house, causing injuries. Thus, the change in the roadway was a substantial factor in causing their injuries. Similar cases have upheld this type of causation (*Tieder v. Little*).

Duty and Standard of Care

The City is the owner of the land on which the house stands. Mayor Lickenhooper is the land occupier. Although the City rents the house to Mayor Lickenhooper, he rents it cheaply as part of his compensation as a City employee. Under the doctrine of *respondeat superior*, the City is vicariously liable for the actions of the Mayor taken within the scope of his employment. If his actions are outside the scope of his employment, a frolic, the City is not vicariously liable for his actions.

In this situation, the Mayor probably threw the party to get elected to the County Board of Commissioners. This is unrelated to his employment with the City. However, the Mayor could have conceivably thrown the party as part of his employment. This is an issue for the jury to decide. In the worst-case scenario, the City will be held responsible for the Mayor's actions and omissions under *respondeat superior*, and it is safest to proceed under this assumption.

As the land occupier, the Mayor, and thus the City, has a duty to all those who enter upon the land. The standard of care that the land occupier owes under its duty to

entrants upon the land depends on the status of the entrant and the nature of the condition that injures the entrant.

Common Law Land Occupier Duty Analysis

In this case, the injuries sustained were related to the staircase, an artificial condition upon the land. In relation to artificial conditions, the common law has set forth different standards of care that the land occupier must observe depending on the status of the entrants.

If the entrant is a trespasser, one who enters upon the land without permission, the land occupier has no standard of care toward the trespasser.

If the entrant is a licensee, one who enters the land with the permission of the land occupier, the land occupier's standard of care mandates that he warn the licensee about artificial conditions upon the land that he knows to be dangerous.

If the entrant is an invitee, one who enters the land with consent and for the potential financial gain of the land occupier, the land occupier's standard of care demands either discovery and mitigation of the known dangers, or warning thereof.

The potential plaintiffs in this case entered the land under different pretenses, and thus the City has different standards of care toward them.

Third-step Plaintiffs

Quincy had no permission to enter the land whatsoever, and thus was a trespasser. The City had no duty to warn Quincy of any artificial danger upon the land. If no duty is

owed by the defendant toward the plaintiff, the plaintiff cannot bring a negligence based action against the defendant. This would kill Quincy's claim against the City.

Paula was working the party for the City. Her presence was based on a financial transaction for the benefit of both parties involved. Thus, Paula entered the land as an invitee. As an invitee, the City had a duty to remedy artificial dangers upon the land or to warn Paula of their existence.

Staircase Plaintiffs

The Mayor invited Richard, Samantha, and Tammy to the party. They were social guests, present on the land with permission, and thus were licensees. The City had a duty to warn them of known artificial dangers upon the land.

Unitary Standard Duty Analysis

This Jurisdiction may follow the Unitary Standard concerning land occupier duty. This standard mandates that the land occupier's obligation is to act with reasonable care towards all entrants upon the land, regardless of status. If this were the case, the City's standard of care toward all the potential plaintiffs in this case would be that of reasonable care under the circumstances. This would maintain Quincy's claim against the city, whereas before it would have failed for lack of duty.

Breach of Duty/Standard of Care

Breach of duty, the defendant's failure to meet the standard of care, is required to maintain a negligence cause of action. If this requirement is not met, the plaintiff's claim will fail summarily.

Common Law Breach Analysis

Third-step Plaintiffs

Mayor Lickenhooper knew of the danger presented by the third step, but did not mitigate or provide warning of this danger. The City, under *respondeat superior*, owed a duty to Paula, as an invitee, to discover and remedy or warn her of artificial dangers upon the land. The City breached this standard of care in relation to Paula.

As a trespasser, the City owed no duty to Quincy and his claim will fail at this point.

Staircase Plaintiffs

In relation to Richard, Samantha, and Tammy, the City had an obligation to warn them of known artificial dangers upon the land. The City was not aware that Duane's car would crash into the staircase, the but-for cause of their injuries. Thus the City breached no duty to them.

Unitary Standard Breach Analysis

Under the Unitary Standard of reasonable care, the City owed Quincy and Paula a duty of reasonable care under the circumstances in relation to the dangers presented by the 3rd step. If a jury finds that the City's actions fall below the level that a reasonable person, armed with the Mayor Lickenhooper's heightened knowledge of danger presented by the third step, would have taken, then the City has breached the standard of care.

Proximate cause

Liability for negligence requires that the conduct of the City was the proximate cause of the plaintiff's damages. Proximate cause cuts the chain of causation leading up to an accident. Proximate cause is a fact intensive question for the jury. It is based in two main tests. The first and main test is foreseeability. The second test is substantial factor.

Foreseeability

The main test of foreseeability is whether the defendant should have reasonably foreseen, as a risk of his conduct, the general type of harm suffered by the plaintiff.

Third-step plaintiffs

In relation to Quincy and Paula, a jury is likely to find that the City's conduct in relation to the third step was a foreseeable cause of their injuries. It was foreseeable that the failure to mitigate or warn of the danger would result in the general type of harm of falling through the step and incurring injuries upon impact. Thus, since it was foreseeable, it was a proximate cause of the conduct.

Staircase Plaintiffs

In relation to Richard, Samantha, and Tammy, it is unlikely that a jury will find that the City's reconfiguration of the roadway was the proximate cause of the injuries. It was not reasonably foreseeable to the City that its reconfiguration of the roadway would engender injuries caused by a motorist driving off the road and into the house. Since it was not reasonably foreseeable, the City's conduct is not a proximate cause of the injuries.

However, if the roadway was constructed negligently, (the curb was too low, there was no posted speed limit or guardrail) then perhaps the City should have reasonably foreseen such injuries. The facts in this case do make this information available.

Substantial Factor

A substantial factor test is enumerated in Restatement (Second) of Torts §433. §433 considers the following factors in determining whether the defendant's conduct was a substantial factor in causing the plaintiff's harm: (1) the number of other factors that contributed to creating the harm and their relative importance in creating it, (2) whether the actor's conduct created a series of forces in continuous and active operation up to the time of harm, and (3) the lapse of time between the actors conduct and the harm.

Third-step plaintiffs

Using this test, and assuming that it is impossible to prove that the City's conduct was not a cause in fact of the injuries, it is likely that a jury will find the City's conduct in relation to the third step was a substantial factor in causing Paula and Quincy's injuries. First, the conduct was as important as Duane's car crashing into the stairs in creating the fall and thus the injuries. Second, the discovery of the danger was chronologically close to the harm and set into motion a continuous series of event that led to the harm. Third, there was no appreciable lapse of time between the conduct and the harm. Thus, a jury is likely to find that the city's failure to warn or mitigate the danger of the third step was a substantial factor in creating the harm

Staircase Plaintiffs

Under this test, the City's reconfiguration of the road was not a substantial factor in creating Richard, Samantha, and Tammy's injuries. First, the reconfiguration of the road was less important in creating the harm than Duane's driving into the staircase. Second, the City's conduct did not create a series of continuous forces that led up to the harm because the reconfiguration of the road occurred 10 years earlier. Third, a large lapse of time, 10 years, occurred between the City's conduct and the plaintiff's harm. Thus, the City's conduct was not a substantial factor in creating the harm suffered by Richard, Samantha and Tammy.

Damages

Damages must be proven by the plaintiffs in order to maintain a negligence based action against the City.

Staircase Plaintiffs

The staircase plaintiffs, Richard, Samantha, and Tammy each have their own unique set of subjective damages.

Richard's damages are a result of his three minutes of survival; a survival action on his behalf is possible. This survival action will be limited to the pain and suffering he sustained during this three-minute interval. Richard suffered no economic damages for which he can get receipts

Samantha's damages are generals since she was not physically harmed in the accident. Samantha's general damages are: loss of consortium and pain and suffering. Samantha may also be entitled to damages from the City for the negligent infliction of emotional distress if the City is found negligent to the Staircase Plaintiffs. Samantha was Richard's wife. She witnessed his death. However, Samantha was outside the zone of danger; she was across the yard. Depending on the jurisdiction, this may preclude her recovery for negligent infliction of emotional distress. She does have potential for some economic damages as well, including: Richard's lost future wages, burial costs, and the proceeds of Richard's survival action.

Tammy was not physically injured either. Since she was not part of Richard's family, she is precluded from seeking damages based on the negligent infliction of emotional distress. Since she was not physically injured, she may not seek special damages. She receives no damages, and thus her claim fails

Third-step plaintiffs

Paula is entitled to special damages for her injuries to her hip, leg, and arm. They include: medical expenses, loss of earnings (past and future), and other provable specials. Provided that she can prove pain and suffering, she may be entitled to this also.

Quincy is entitled to special damages for his medical expenses, loss of earnings (past and future), and any other economic damages he can prove. He may also be entitled to general damages if he can prove them.

Defenses

The city is a government entity, and as such, has immunity from negligence based lawsuits, with exceptions. One exception is when the lawsuit is based on the government's discretionary functions.

In order to sue the city under this exception, the plaintiffs must prove that the negligent conduct of the City flowed from its discretionary functions. The plaintiff must show that the City's conduct involved an element of choice of judgment, and that this choice or judgment was grounded in public policy considerations.

Third-step plaintiffs

The third-step plaintiffs will fail to meet the discretionary function exception to governmental immunity. The City's conduct of failing to warn or mitigate the danger of third step was not based in any sort of policy consideration. It was simply based on the

Mayor's forgetfulness. Thus the third step plaintiffs fail to meet the requirements to sue the City under the discretionary function exception to governmental immunity.

Staircase Plaintiffs

The staircase plaintiffs, if they are able to prove that the City's reconfiguration of the road was the proximate cause of their injuries, will likely be able to sue under the discretionary function exception to governmental immunity. The City's reconfiguration of the road did involve a choice, and that choice was based in public policy considerations. As such, it meets the requirements necessary to defeat the City's governmental immunity

Conclusion

The City may be liable for Paula, Samantha, and Richards harms, but not for Quincy and Tammy's harms.

Word Count 2,499

Torts Final Exam

(Spring 2003)

Duane' Minority Status:

Duane is less than 18 years old and most probably a minor. Since he is engaged in operating an automobile, an adult activity, the Stand of Care (SOC) applied to his actions will be an adult one.

Mayor's Relationship to the City:

Since the house is maintained, inside and out, by the City, issues related to the maintenance of the house can be imputed to the City.

Mayor's Party:

It is unclear if the party is a social or business event. If it is a business event related to the City business, then the City has more exposure to liability than if it were a private social event. If it is a private social event, then Mayor's insurance company would be liable. In the analysis below, I have assumed that City would be responsible instead of Mayor. If it is the other way, then the analysis can be adjusted easily by replacing City by Mayor, except in Sovereign Immunity situations which would not change.

Duane v. City

Duane will probably bring a negligence action against the City based on the negligent design of the road and the location of the house.

Duty: City has a duty to design & build roads so as not to pose dangers to the driving public (Duane being one of the deriving public) and City has a duty to locate structures so as not to harm drivers.

SOC: Be reasonable in designing the roads and location of structures.

Breach: Duane will argue that by designing and building a road in a semi-circular fashion, City breached its duty to the driving public by introducing an increased risk of accidents.

Cause-in-Fact: Duane will argue that “but for” the poor design and location of the house, the accident would not have happened.

Proximate Cause: Duane will argue that this poor road design and location of the house is the proximate cause of the accident since City could have readily foreseen that an accident of this nature would occur i.e. someone will miss the semi-circular road and ram into the structure.

Damages:

Special Damages: Damage to the car \$3,000.

City's Argument:

- City will most probably invoke Sovereign Immunity claiming that the road design and the location of the house are policy decisions to promote the City and to impress the visitors. Hence protected by the Sovereign Immunity.
- City may also invoke the Statute of Repose. Since the house and the road were built around 10 years ago, it is possible that the state Statute of Repose, if limited to 10 years, may bar any claim on this issue.

Most likely Duane's Negligence Claim against the city will fail.

Quincy v. City

Quincy will probably bring three actions of negligence.

1. Negligent Design of the Road & Location of the House

- Duty: City has a duty to design the roads and locate structures so that automobiles do not stray from the road and injure people on the adjacent properties.
- SOC: City must use reasonable care in the design of the roads and location of structures.
- Breach: City breached its duty by designing and building the road that allows for the motorists to stray from the road and injure people on the adjacent properties.
- Cause-in-Fact: But for the city's breach, Duane would not have veered off road and caused injuries to Quincy.
- Proximate Cause: It is foreseeable that the flaws in the design of the road will cause a motorist to veer off the road and injure people at the poorly located house.

Damages:

Special Damages:

- Medical Expenses for injuries suffered i.e. right femur, right humerus, third degree burns. Both Past & Future (Plastic Surgery etc.).
- Lost wages while receiving medical treatment.

General Damages:

- Pain and Suffering for the pain suffered as part of the injuries.
- Disfigurement of his face. This will be difficult to establish, and a jury could be very generous with these types of damages.
- Quincy will also argue that he should be awarded damages for the lost chance of getting business, since with a disfigurement, his ability to market his business has been impacted.

2. Negligent Maintenance of Staircase

Duty: City has a duty to maintain the staircase in safe condition.

SOC: City must be reasonable in its maintenance of the staircase.

Breach: City breached its duty by not maintaining the staircase in a safe condition.

Cause-in-Fact: But for city's poor maintenance of the staircase, Quincy would not have fallen through and injured.

Proximate Cause: It is foreseeable that if City does not maintain the staircase that people using it will get injured when it breaks.

Damages: (Same as in Quincy's 1st negligence action).

3. Negligently Hot Coffee

Duty: City has a duty to not burn people on its property.

SOC: City must be reasonable in the preparation and transportation of coffee.

Breach: City breached its duty by preparing and transporting coffee at the extremely hot temperature of above 180 F.

Cause-in-Fact: The extremely hot coffee was the cause of 3rd degree burns suffered by Quincy.

Proximate Cause: It is foreseeable that coffee, at the extremely hot temperature of above 180 F, will cause 3rd burns to people who come in contact with it.

Damages: (Same as in Quincy's 1st negligence action related to Coffee burns only).

City's Argument:

- City will probably invoke Sovereign Immunity and Statute of Repose defense against the 1st negligence action. (Same analysis as in Duane v. City).
- Against the 2nd negligence action, the City will claim that it has No Duty to Quincy, because Quincy is a Trespasser. Land Occupier's duty to Trespasser is only to not Willfully injure them. There is No Duty regarding artificial conditions and the staircase is an artificial condition on land.
- Superceding Intervening Cause: City will also claim that Duane's crashing into the staircase was the cause of the staircase failure and that Duane's crashing into the staircase was a Superceding Intervening force that relieves the City of any negligence even if the stairs were lacking in maintenance.

- City will argue that it has No Duty to Quincy as a Trespasser in relation to the temperature of the coffee.

The city will most likely prevail on these claims.

Paula v. City

Paula will also bring a negligence claim against the city. Her claim will look very much like Quincy's except for Damages (no claim 3 from Duane v. City).

Damages:

Specials

- Medical cost for the treatment of both broken legs and her right Hip (both Past and Future medical expenses).
- Lost wages while she is under treatment.

General Damages

- Pain & Suffering because of the injuries.

City's Arguments

- City will probably invoke Sovereign Immunity and Statute of Repose defense against the 1st negligence action. (Same analysis as in Duane v. City).
- City can not argue No Duty as it would against Quincy, because Paula is not a Trespasser in fact she is a Invitee and as such the Land Occupier (City) has as duty to observe reasonable care in its activities and warn her and mitigate any natural and artificial conditions that may pose a risk of injury that the City knows or should have known about. Since Mayor had notice of the problem step, that knowledge will be imputed to the City. By not repairing the step, the City breached its duty and will be liable for damages.
- City will also claim the Superceding Intervening Force defense. (Same analysis as in Quincy v. City).

- City will probably not prevail and will be liable to Paula.

Richard v. City

- Survival Action: Since Richard did not immediately die after the accident, lingered on for 3 min in extreme pain; his estate can bring a Survival Action.
- Wrongful Death Action: Since Richard did die after the accident; his immediate family (Samantha in this case) can bring a Wrongful Death Action against the City.

Negligent design of road & location of house

This action will look exactly as the action in Quincy v. City. The damages will be:

Specials:

- No medical treatment, as he died on the scene.
- Funeral Expenses

General

- Pain and Suffering. He suffered great amount of pain for the last three minutes of his life.
- Pecuniary Damages i.e. loss of income.
- Loss of Consortium (even though his is separated, he is still married)

City's Argument

- City will probably invoke Sovereign Immunity and Statute of Repose defense against the 1st negligence action. (Same analysis as in Duane v. City).

- City will also argue that it is not the Proximate Cause of Richard's Injuries and Death. City will argue that Duane is the Cause-in-Fact and the Proximate Cause of Richard's Injuries and Death, since it was the collapsing staircase that killed Richard.

City will most probably prevail on its defenses.

Samantha v. City

- Bystander Action: Samantha can bring a Bystander Action against the City. She is legally married to Richard, was at the scene of Richard's death and was looking as the events unfolded. She was not in the zone of danger (being on the other side of the backyard). Zone of danger does not seem to be a requirement in most jurisdictions now.

City's Argument

- City will argue that it is not the Proximate Cause of Richard's Injuries and Death. City will argue that Duane is the Cause-in-Fact and the Proximate Cause of Richard's Injuries and Death. Hence it is not liable for the Bystander Action.

Tammy v. City

- Bystander Action: Tammy will not be able to bring a Bystander Action against the City as she is not legally married to Richard and the Bystander Action requires that the person be a close relative of the victim. Tammy does not qualify.

General Issues

- The exact sequence of event is not clear from the facts and is probably in dispute i.e. the step broke first and then Duane crashed into the stairs or if Duane crashed in to the stairs causing the step to fail. Under these circumstances, the plaintiffs might be better off bringing an Alternative Liability Suit against both City and Duane, so that they may be relieved of the causation problems. This would work because both Duane and City have some fault imputed to them. City however is the deep pocket and Duane's insurance may be limited. He might even be judgment proof. This would work for Richard and Quincy's cases.

Word Count = 1,747

To: Senior Attorney
From: Assistant City Attorney
Date: May 14, 2003
RE: Potential City Liability--Incident at Mayoral Residence

Authorization for Claims

The plaintiffs will bring actions under the Federal Torts Claim Act (28 U.S.C. §1346(b) (1)). I suggest that we argue that the grounds for any claims fall under the Discretionary Function Exception (DFE). Although we may go all the way to appeal, we know everyone in the system and make this argument monthly.

The plaintiffs' claims will relate either to the relocation of the road or the maintenance of the staircase. If we can prove that our decisions in those areas were "discretionary," (not compelled by statute or regulation, and that our decisions were grounded in consideration of public policy), we can avoid defending on the merits altogether.

There was a planning process on relocating the road, so we should be able to prove immunity on that issue. Duane will

not have a claim about the road conditions. Even if we lose on immunity, the Statute of Repose may bar a claim against the City for the construction of the road or house. The Statute of Repose is eight years, and the City built the road and the house over ten years ago.

The real issue is on the maintenance of the Mayoral residence. I suggest we get our DU intern started researching to determine if there was a planning meeting on the residence's maintenance schedule (specifically, evidence that someone analyzed the financial, social, and policy reasons for the decisions).

Alternately, the plaintiffs will argue Reckless Negligence to defeat immunity.

Negligence

The plaintiffs' prima facie negligence cases must prove duty, standard of care, breach, causation, proximate cause, and damages. Each must prove each element by a preponderance (>50%).

The plaintiffs will name both Mayor Lickenhooper and the City under the theory of respondeat superior—arguing that the mayor was acting within the scope of his duties by living at the residence and hosting the party, so the City must answer for his actions. The City charter requires that we indemnify the Mayor.

Quincy

Duty

The amount of duty the City owes Quincy depends on his entrant-upon-land status. Depending on our jurisdiction's rule, the judge will consider duty one of three ways: 1) status approach—imposing different levels of duty depending on if Quincy is found to be a trespasser, a licensee, or an invitee; 2) the unity standard—imposing the duty of “reasonable care” regardless of status; or 3) a collapsed distinction between licensee and invitee—imposing “no duty” for trespassers and “reasonable care” for both licensees and invitees. Because the

most recent legislation uses the status approach, I will discuss using that method.

Quincy will assert that although he invited himself to the party, Mayor Lickenhooper would have warmly accepted him (the Mayor is openly pro-business) once the Mayor saw him, and this acquiescence would transform Quincy to a licensee. In that case, the City's duty is to warn of known conditions, but the City need not go out and inspect. However, the Mayor had knowledge of the condition. That is a problem.

Regardless of the Mayor's oversight, we will argue that Quincy, an uninvited party-crasher, was a trespasser. Quincy had not even made it upstairs to the party, so there is no way his status could have changed to a licensee. In that case, the City has no duty.

The judge will make this determination. Should the judge find Quincy a trespasser, he will lose on summary judgment.

Standard of Care

Should Quincy survive summary judgment, he will claim that the standard of care is “reasonably prudent person under the circumstances.” Quincy will argue that this reasonable person is “the man who mows the lawn in his shirtsleeves” and would have noticed the faulty condition of the stairs.

Negligence Per Se (NPS)

Alternately, if we have a statute requiring certain maintenance levels on City-owned properties, Quincy will also argue negligence per se in lieu of the standard of care (the statute would set the standard), and breach (violation of the statute would prove breach). Quincy will need to prove that the statute clearly defines the required conduct; that the City violated the statute; that Quincy was in the class the statute was designed to protect; and that the type of harm Quincy suffered was the type of harm the statute was designed to protect against. Further, the existence of such a statute would defeat our immunity defense.

Breach

Quincy will argue that the City breached the standard of care by acting unreasonably, by failing to maintain the stairs.

Causation

Quincy cannot argue that “but-for” the City’s negligence in maintaining the steps, he would not have been injured, because of the “Duane factor.” Even if Quincy does not name Duane as a defendant, we will join Duane in the suit.

Quincy will have to argue one of the alternatives to but-for causation. He may argue that both the faulty step and the destruction of the staircase were multiple sufficient causes—that either one alone were sufficient to cause his injury. This shifts the burden to the City to prove that the City did not cause the injury. We will counter with an analogy: like small spark (the creaky step) and a huge fire (Duane’s obliteration of the stairwell) coming together, one (the obliteration of the stairwell), was a superseding cause, thus, shielding the City from liability.

Quincy may argue that the City was a substantial factor causing his injury. We will point out how weak that argument

is. We will warn the jury not be duped by the pseudo-science of calling something “substantial” (even though it is not substantial enough to be a but-for cause), and question Quincy’s assertion that this meets the preponderance requirement.

Quincy will also argue alternative liability—that he knows it was either the City or Duane’s negligence, he just is not sure which one it was. The City will have the burden of proving our negligence did not cause it. Please ask the intern retain an expert to check out what remains of the third step and the stairwell to prepare for this defense.

Finally, should Quincy settle with Duane before the suit, Quincy will not be able to argue these alternatives to causation; Quincy will have settled his case away.

Proximate Cause

Quincy must convince the jury that his injury is not too attenuated from the City’s allegedly negligent maintenance of the step, in order to prove proximate cause. Although Quincy may argue that his injury was foreseeable and thus was the

proximate cause (a neat and tidy argument), the Duane factor will defeat that argument. Arguably, Duane is a superseding, intervening cause.

Instead, Quincy will argue a practical politics/rough sense of justice standard (he'll probably quote Judge Andrew's dissent in Palsgraf v. Long Island RR Co.). He will assert that his injury was the natural and continuous sequence of events; that the step was a substantial factor in his injury; that there was directness without too many intervening events; that there was not great attenuation; that the likelihood of injury was high; that the injury was foreseeable; and that the injury was not too remote in time or space from the condition of the step.

The City will point out that the excess weight of the coffee urn, plus two adults on the same small step was unforeseeable. Further, the City will counter Quincy's philosophical wish-list of factors with our standard, jury-winning line, "who'da thunk it?" We will painstakingly trace the details: Quincy's ascent on the steps, Quincy's stop on the same step as Paula and the enormous urn, Duane's car

jumping the curb and crashing into the yard, the complete demolition of the stairwell, and, oh yes, that slightly creaky step. We can expect the jury to be thoroughly confused at this point, since most law students can barely sift through the workings of proximate cause.

Damages

Quincy will claim special damages including: doctor bills, hospital bills, the ambulance, multiple surgeries, physical therapy, skin grafts, a private nurse, lost wages during recovery, future lost wages if he is permanently disabled (we will have to bring in an expert to drive these down), medical equipment and medications. He will argue to for the inflation-adjusted method—to adjust for inflation and productivity increases for his lost wages. He will also note that the cost of money is so low right now, that the discount rate should be almost zero. The City will argue to apply the offset present value method in order to ignore inflation and decrease the award.

Quincy will claim general damages including: physical pain and suffering, inconvenience, mental anguish, disability, disfigurement, emotional distress, loss of society, loss of consortium (if applicable), hedonic loss, and recovery for fear of future harm (such as fear of incomplete recovery). The City will argue about the subjectivity of these awards and will argue against per diem arguments to keep the award down.

Paula

Duty

Paula will assert that as a paid employee of the caterer, she was an invitee at the Mayoral residence, and thus, she was owed a higher duty—the duty to inspect and warn of dangerous conditions. The City will argue that Paula was merely a licensee, thus limiting duty to “warn of known conditions.”

Standard of Care, Breach and NPS

See Quincy, p. 4.

Causation

See Quincy, p. 6. Also, please ask the intern to retain an expert to testify on enormous weight of coffee urn.

Proximate Cause

See Quincy, p. 7.

Damages

Paula will claim similar special damages as Quincy, albeit without the burn treatment and skin grafts. She will argue to calculate her award like Quincy, the City will counter-argue the same points, see p. 7.

She will claim the same general damages as Quincy. The City will make similar arguments to those that we make against Quincy's damages, see p. 8. Further, Paula is the same woman Duane injured three-years ago. Unfortunately, the egg-shell plaintiff rule will prevent the City from claiming that Paula's injuries were worse because she had prior disabilities. However, the City will be able to argue that making Paula "whole" only entails getting her back to the disabled state she was in before this second encounter with Duane.

Richard

Duty

Richard's estate will argue that as a guest of the hard-lobbying Mayor Lickenhooper, Richard was actually an Invitee, and thus, the City had a duty to inspect the Mayoral residence. We will counter that Richard was merely a Licensee, limiting the City's duty to warning of known conditions.

Standard of Care, Breach and NPS, Causation and Proximate

Cause

See Quincy, p. 4-7.

Damages

Richard's estate will bring a survival action to compensate Richard's estate for the three minutes of suffering Richard underwent while he was trapped under the staircase. We will argue that it was only three minutes, and he was probably unconscious. Like an eggplant stuck with a stickpin, he probably never even knew what happened, and thus, never suffered.

Samantha

Samantha will bring a claim of Negligent Infliction of Emotional Distress (NEID), for having to watch Richard suffer and die, and a wrongful death claim.

Duty

For her NEID claim, the City may have a duty to Samantha, because she was still married to Richard. Depending on our jurisdiction, Samantha will either have to show that she was in the “zone of danger” (at risk of physical impact + physical manifestation of emotional distress); or show that she was not physically at risk, but she was: 1) physically near, 2) had contemporaneous sensory perception of the accident and 3) was closely related to the victim. In either case, the City should discuss the antagonistic nature of the pending divorce, to try to diminish the relationship element.

The duty requirement for the wrongful death suit will be the same as it was for Richard, see p. 10.

Standard of Care, Breach, NPS, Causation and Proximate Cause

See Quincy, p. 4-7.

Damages – NEID

Samantha's special damages will be for any medical bills (doctor, shrink) she incurred after witnessing Richard's death. The City should subpoena her therapist's billing records though, because Samantha may go to less therapy now that she doesn't have to deal with Richard anymore.

Samantha's general damages would be for pain and suffering (if she had weight loss, hair loss, IBS, etc.) The City will assert that she has actually had a decrease in negative symptoms since Richard is gone.

Damages – Wrongful Death

Samantha may bring a special damage claim for burial expense (if she is responsible), and lost wages. Given that she was mid-divorce at the time of Richard's death, and she brought the money to the relationship, it is unlikely that she would bring an action for these. Her chance of prevailing is too slim.

Samantha will not be successful general damages, (particularly loss of society and loss of consortium) because the City will present the sordid details of her failed marriage and bitter divorce proceedings.

Tammy

Like Samantha, Tammy will bring a claim for negligent infliction of emotional distress and wrongful death.

Duty

See Samantha, p. 11. Tammy may not satisfy the requisite relationship requirement for her negligent infliction of emotional distress claim, depending on the quality and time of her relationship with Richard.

Standard of Care, Breach, NPS, Causation and Proximate Cause

See Quincy, p. 4-7.

Damages

Damages – NEID

Tammy will make damage claims similar to Samantha's, and should Tammy (rather than Samantha) pay for the funeral

service, she will claim it. The City will argue that Tammy barely knew Richard, that their relationship was nothing more than a superficial sexual fling, and that it would be absurd to award her general damages.

Damages – Wrongful Death

Tammy may make similar damage claims to Samantha. However, it is unlikely that she will be able to prove that she was entitled to any of Richard's future wages. Further, the City will reiterate the transient nature of her relationship with Richard to deny a claim for general damages such as loss of consortium.

Defenses

Contributory/Comparative Fault

For the claims by Quincy, Paula, Richard, Samantha (wrongful death) and Tammy (wrongful death), depending on our jurisdiction's rules, contributory negligence by Quincy, Paula or Richard will defeat those claims. Under pure comparative fault, their awards will be reduced by the amount

the victims contributed. Under modified comparative fault, if the victims were equal or greater at fault than the City (49% Rule), or more at fault (50% Rule), they will not be able to recovery.

Secondary Implied Assumption of the Risk (SIAR)

If the City can prove that any of the victims knew of the dangerous condition of the stairs, but voluntarily used them or stood below them, it may be a complete defense or a part of the comparative fault analysis.

Joint and Several Liability (JSL)

Under JSL, even if Duane is at fault, the City will likely bear the whole cost of the damages, because Duane appears judgment-proof. If there is a reform statute and the City is liable, the City will only be liable for the City's percentage of the apportionment of the fault.

Word count of the above (not including heading): 2,496