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Exam Name: Torts1_LS1_(Murr)_Final_F08

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Grade: _____

1)

Ben (B) v. Flying High (FH): scraped knee

Ben (B) will sue Flying High (FH) for negligence for his scraped knee. In order to establish a prima facie case for negligence, Ben must show a duty imposed upon FH, a breach of that duty, a causal connection between FH's negligence and B's injury, and damages. FH may claim certain defenses.

Duty:

A person engaged in risk-creating conduct has a duty to exercise reasonable care under the circumstances. A higher standard is imposed upon professionals. Here, one could argue that FH qualifies as a professional party because the two owners were the people engaged in the wrongful conduct and, as owners of a kite store located near the beach, it is likely they adhere to a particular set of rules in conducting their business affairs. Because kites are a specialized field, Flying High could be held to a professional level of care, that of a reasonable professional in good standing under the circumstances. However, because it seems unlikely that there are national certifications to become a kite vendor, this argument may not hold up in court. Therefore, the duty imposed upon FH is that of a reasonably prudent person under the circumstances. These circumstances may be tailored according to custom, minority, emergency situations, or physical disabilities. FH's duty of reasonable care extends to foreseeable plaintiffs. In this case, FH's duty will likely be considered in light of the custom surrounding kite stores and displays. This particular sunny Saturday afternoon was windy, and FH will be held to a duty of reasonable care in keeping with the custom of controlling kites in very windy environments.

Breach:

A person breaches their duty by falling below the standard of care established by the duty, in this case that of reasonable care. There are three types of evidence available to establish breach: direct evidence (that which a layperson could view and conclude breach), circumstantial evidence (evidence from which a jury would be required to draw conclusions), and *res ipsa loquitur*. Additionally, Judge Learned Hand has provided a balancing test to apply in determining breach of a duty: (1) what is the likelihood of harm, (2) what is the magnitude of harm if it should result, and (3) what is the burden to prevent the harm? In weighing these three factors, a court will be able to determine whether a defendant breached his or her duty. Here, FH had been struggling to keep their large (20-30 feet) kites airborne, given the gusty winds. The likelihood of harm with such large kites and such unpredictable winds is high, as the kites are very difficult to control and large enough to inflict harm. The magnitude of the harm, should it

result, could be great. Because the kites are so large ("as large as a parachute"), they could cause direct harm or even cause other chain reactions by frightening people and making them react accordingly. The burden to prevent the harm is minimal, as FH could simply keep the kites indoors, bring them to a slightly less-populated area of the park/shopping area, or bring out more employees to help control the kites. Given the great risk of harm, the great potential for injury, and the small burden to prevent the injury, FH has breached its duty of reasonable care under the circumstances. It is important to keep in mind custom, as it may be customary for kite stores to display kites outdoors on very windy Saturday afternoons. Nonetheless, customary practices does not outweigh the unreasonable risk of harm imposed upon the general public.

Causation:

In order to establish negligence, B must prove that FH was negligent and that FH's negligence actually caused B's injury. B must prove factual ("but for") cause and legal (proximate) cause. Factual cause may be established by showing *sine qua non*, or "but for" causation, that FH was a substantial factor in causing the harm, or concurrent causation. Here, B may present arguments for substantial factor. B cannot successfully argue that "but for" FH's negligence, he would have fallen and scraped his knee, but FH was certainly a substantial factor in bringing about the injury because, without FH's kite having careened toward the ground where B was seated, B would not have jumped up and into the direct path of Disco Stu (S), resulting in the injury. FH and S did not come together to cause B's injury but, rather, S's impact was an intervening cause.

The second element of causation that must be established is legal (proximate) cause. Proximate cause, grounded in public policy, is a tool by which the courts cut off liability of a defendant if the resulting injury was not foreseeable. B must show that the type of harm (although not necessarily the manner in which it occurred or its extent) was foreseeable (*Wagon Mound 1*). B may also again balance the (1) likelihood of harm, (2) magnitude of harm, and (3) burden or utility of defendant's conduct (*Wagon Mound 2*). According to *Palsgraf*, B must also show that he was a foreseeable plaintiff. The majority of jurisdictions adopt Justice Cardozo's opinion of *Palsgraf*, that only those plaintiffs in the "zone of danger" are foreseeable, while Justice Andrews' dissenting opinion states that any and all plaintiffs are foreseeable. Here, B suffered from a scraped knee after having fallen to the ground. This type of injury is certainly a foreseeable result of FH's negligent control of its kites. When a kite moves with the wind it can make sudden, sharp movements in any direction and, when they are in close proximity to people, can strike and injure them. B was in the "zone of danger" as he and his son were seated on the grass under the airborne kites.

An intervening cause is one which occurs after the defendant's negligent conduct and before the plaintiff's injury. Here, S collided with B, causing him to fall onto the ground and injure his knee after FH's negligence caused B to jump out of harm's way. S can be said to be an intervening cause. An intervening cause becomes superseding when it is highly unforeseeable, such that it is extraordinary. Here, B jumping from his seat and onto the adjoining boardwalk is a foreseeable result of a wayward kite. Because B's resulting harm was a foreseeable result of FH's negligence, S is not a superseding cause, which would cut off FH's liability.

Damage:

B suffered a minor scrape on his knee. The damages available to him would most likely be only compensatory (to restore him), as nominal damages typically are not awarded for negligence claims (no rights are being vindicated) and punitive damages, which deter wrongful conduct, rarely are awarded for negligence, as it is not an

intentional act.

Defenses:

FH may argue defenses, which could minimize or altogether eliminate its liability. Available defenses are contributory negligence, last clear chance, comparative negligence, express or implied assumption of risk, statute of limitations, or immunity. Here, FH will likely argue contributory negligence, as it will claim that B was negligent in jumping in front of S and causing the collision. This argument is weak, however, as B was responding as a reasonable person would under emergency circumstances, not of his own creation.

Ben (B) v. Flying High (FH): NIED

Duty:

By engaging in risk-creating conduct, such as setting up kite displays in very gusty winds in a largely populated area, creates a duty to exercise reasonable care under the circumstances. This duty extends to all foreseeable plaintiffs, and witnesses of injury caused by negligence. The duty imposed for the protection against negligent infliction of emotional distress (NIED) is due to plaintiffs who (1) are contemporaneously aware of the injury of another, (2) experience actual emotional distress, (3) have a close relationship (such as blood or marriage) to the injured person, and (4) are within the zone of danger (*Thing*). Here, (1) B was contemporaneously aware of Jerry's (his son, J) injury because they were seated together on the grass below the kites. (2) For argument's sake, it is assumed that B has suffered actual emotional distress as a result of seeing his son's eye bleeding profusely after being hit with a kite. (3) B and J have a close relationship, as B is J's father. B was within the zone of danger because he was sitting with J and had to jump out the way to avoid being harmed by the same instrumentality that caused J's injury. Therefore, B was a foreseeable plaintiff and FH owed him a duty of reasonable care under the circumstances.

Breach:

FH breached its duty by failing to meet the standard of reasonable care. The two owners attempted to control the kite, but to no avail. In balancing of factors (see above for the Learned Hand Test application) in determining circumstantial evidence of breach, one concludes that FH breached its duty because the risk of harm was high, the magnitude of harm was great, and the burden to prevent it was minimal. Therefore, FH breached its duty.

Causation:

Here, B may established that "but for" FH's negligence, he would not have suffered emotional distress as a result of experiencing his son being injured. In terms of proximate cause, the type of harm (B suffering from emotional distress after watching his son bleed profusely) and particular plaintiff (B, who was within the zone of danger) were foreseeable. For this reason, proximate cause has been met and there exists a causal connection between FH's negligence and B's injury. There are no superseding or intervening causes here.

Damages:

Under the slight assumption, again, that B actually suffered emotional distress as a result of FH's negligence, B will be entitled to compensatory damages to restore him to his pre-injury condition. It is important, with damages, to be forward thinking and

consider both economic (lost wages, medical costs, rehabilitative expenses, etc.) and non-economic (pain and suffering) damages, as B may continue to suffer from FH's negligence beyond the trial.

Defenses:

FH could attempt to argue contributory negligence here, since B and J were sitting directly below the kites, but this is a weak argument because simply enjoying the San Diego Bay and watching kites on a sunny weekend afternoon is not, on its face, negligent. Furthermore, FH had the last clear chance to mitigate harm because they had control over the kites.

Ben (B) v. Disco Stu (S): scraped knee

Duty:

Duty may be imposed when a person engages in risk-creating conduct or by statute. Here, a local ordinance prohibits "rollerblading, biking and skateboarding on the boardwalk at speeds in excess of 5 miles per hour." This statute is intended to prevent against harm to other people on the boardwalk, as many guests stroll or jog along the boardwalk, and would be at risk of collision if people using "vehicles" were moving much faster on the boardwalk. Therefore, the duty imposed by the ordinance requires S to rollerblade no faster than 5 miles per hour on the boardwalk, for the protection of other people in the area (B and P).

Breach:

Violation of statute proves breach of the duty imposed by the statute. An unexcused statutory violation results, in a majority of jurisdictions, in *negligence per se*, which is conclusive evidence of breach of a duty. A minority of jurisdictions find evidence of negligence or a rebuttable presumption of negligence. B must prove that (1) he is a member of the class the legislature intended to protect and (2) the type of harm that resulted is that which the statute is designed to prevent. As discussed above, B is a member of the public using the boardwalk and park area, so he falls into the protected class. The type of harm that resulted was S crashing into B (and P), causing B to suffer a minor scrape on his knee. This type of harm is protected by the statute. Here, S was rollerblading at "top speed" (12 miles per hour), which is far above the maximum speed limit on the boardwalk. None of the available excuses apply to S, so his unexcused violation of the local ordinance leads (in a majority jurisdiction) to *negligence per se*. The fact that it is not uncommon on weekends to see rollerbladers skating along the boardwalk at speeds upwards of 5 miles per hour does not excuse S's breach of his statutory duty.

Causation:

First, B must establish factual cause. It is a weak argument to claim that "but for" S speeding, B would not have been injured. The facts simply state that S was unable to stop quickly enough to avoid hitting Ben and Patti, and do not reveal whether he could have stopped if he were in compliance with the statute and exercising due care. B cannot simply argue that S might have caused his injury; he must prove that S more likely than not was the cause of his injury. Because S was a substantial factor in bringing about the harm, B can show factual cause. S was a substantial factor because, without his rollerblading down the boardwalk, he could not possibly have collided with B, causing B to injure his knee.

In order to show proximate cause, B can illustrate that the type of harm (colliding

and falling to the ground) was foreseeable, and, under Cardozo's rule, B was within the zone of danger because he was adjacent to the boardwalk, on the grassy area near the water. There were no intervening or superseding causes to cut off liability here.

Damages:

Here, B will be awarded damages in compliance with his skinned knee.

Defenses:

S may claim that B was contributorily negligent, to bar recovery, but will be unsuccessful, as B was not acting negligently, but was acting as a reasonably prudent person would under emergency circumstances such as those.

Jerry (J) v. Flying High (FH): eye

Duty:

FH was engaged in risk-creating conduct when the two owners set up kite displays on a large, crowded grassy area in a popular park/shopping area. This created a duty for FH to exercise reasonable care under the circumstances. The duty extended to reasonable foreseeable plaintiffs. J was sitting on the grassy area below the kites and, therefore, was a foreseeable plaintiff.

Breach:

FH breached its duty by falling below the standard of care. Here, (1) the risk of harm was great because the kites were large and difficult to control and the winds were unpredictable, and (2) the magnitude of harm should it occur was great, as a 20-30' kite could seriously injure someone or cause people to respond in dangerous ways (like B did). (3) The burden for FH to prevent the harm was minimal, as FH could have kept the kites indoors or displayed them further from the crowd. For these reasons, FH breached its duty of reasonable care under the circumstances.

Causation:

But for FH's negligence, J's eye would not have been injured by the kite hitting him in the face. This type of harm is a foreseeable result of negligently displaying kites in a highly populated area with gusty, unpredictable winds. J was a foreseeable plaintiff as he was seated directly below the kites, within the zone of danger. Because J's injury was a direct result of FH's negligence and J and his injury were foreseeable results of FH's negligence, causation is present.

Damages:

J will be able to recover for the medical costs, pain and suffering, and rehabilitative care needed to restore him to full (or as close to full) health as possible.

Defenses:

FH will argue that J assumed the risk by sitting directly below the wild kites. Implied assumption of risk will be found if the plaintiff (1) had actual knowledge of the risk, (2) voluntarily assumed the risk, and (3) appreciated the magnitude of harm should it result. Here, the facts do not suggest J's age, for a determination of whether he appreciated the magnitude of harm. However, J will prevail over FH's defense because he did not have actual knowledge of the risk, as he did not hear B's warning when the kite approached J. This point will be arguable, and more facts desirable, as it is relevant whether the wayward kite was facing J or behind him, his age, whether his father

"forced" him to sit below the kites, and several other factors. Nonetheless, the evidence weighs in favor of J prevailing over FH.

Patti (P) v. Disco Stu (S): collision and unconsciousness

Duty:

S had a statutory duty to comply with the speed limit (5 miles per hour) to prevent harm to foreseeable plaintiffs (other members of the public traversing the boardwalk)(see above for full analysis).

Breach:

S breached his duty of due care under the circumstances and to rollerblade within the speed limit when he was "moving at top speed" and was unable to stop quickly enough to avoid hitting...Patti." S was traveling 12 miles per hour, as opposed to 5, and his violation of the local ordinance is *negligence per se*. (1) Patti is a member of the protected class because she is a guest using the boardwalk and was put in harm's way by S's breach of the statute. (2) The type of harm that resulted was Patti falling off the boardwalk and into the water unconscious. This type of harm, though extreme, is the type which the legislature intended to protect, as it was a speeding rollerblader colliding with a pedestrian. P's attorney will need to be creative in pleading the case, as a narrower interpretation could find that unconsciously falling in the bay is not a foreseeable result of someone speeding on rollerblades. Under the circumstances, however, P's injury is the type which the legislature intends to prevent. The fact that it is not uncommon on weekends to see rollerbladers skating along the boardwalk at speeds upwards of 5 miles per hour does not excuse S's breach of his statutory duty.

Causation:

P can prove that but for S's speeding on the boardwalk, he would not have collided with P. P was a foreseeable plaintiff and the type of harm (collision, knocking someone unconscious and into the adjacent water) was foreseeable. Therefore, P can establish factual and legal causation.

Damages:

P likely suffered bruising and lost consciousness when S collided with her.

Defenses:

S will plead the last clear chance doctrine, suggesting that P could have avoided S. The evidence that suggests this defense is the fact that P screamed as S swerved toward her. It may have been possible for P to dodge him, if she had time to notice him and scream. Several other factors would weigh into this, however, as she may not be very fit and able to move quickly, or he may have been too close before she noticed him.

P v. S: broken rib

P could sue S for negligence for her broken rib as well, but B's intervening cause would likely be found to be an intervening superseding cause because it is highly extraordinary that P would fall unconscious into the bay, be rescued by B, and CPR would lead to her injury.

Patti (P) v. Bluto (B): broken rib

Duty:

B has a duty of reasonable care under the circumstances and that duty extends to foreseeable plaintiffs, of which P is one. The relevant circumstance is emergency. When B saw P fall into the water and decided to assist, he created a duty for himself, where he didn't originally have one. His duty was to act as a reasonably prudent person in an emergency situation would. The emergency, not created by his own conduct, was his concern for P's life.

Breach:

B breached his duty to P when he fell below the standard of care. B's failure to read the first page of the first aid manual was negligent and a breach of his duty of reasonable care. A reasonably prudent person under emergency circumstances would consider the instructions in context and be sure to thoroughly review them before acting. B hastily conducted CPR on P without realizing that she had a pulse and was breathing. Because P may have trouble providing direct or circumstantial evidence, she may assert *res ipsa loquitur*, "the thing speaks for itself." Under *res ipsa*, the plaintiff must prove that (1) the instrumentality causing harm was within the exclusive control of the defendant and that (2) this type of harm ordinarily does not occur in the absence of negligence. Here, B had exclusive control over his facilities and over P's care and people do not ordinarily suffer broken ribs in the absence of negligence. The fact that broken ribs are a common result of CPR administration does not weigh heavily in the *res ipsa* analysis because B breached his original duty, which was one of reasonable care (which would have precluded CPR).

Causation:

But for B's negligence in administering CPR, P would not have incurred a broken rib. This type of harm is the foreseeable result of breaching a duty of reasonable care under emergency circumstances. A reasonable person could foresee that failing to thoroughly examine life-saving instructions could result in harm to the injured person. P was a foreseeable plaintiff within the zone of danger as she is the one whom B was "treating."

Damages:

P suffered a broken rib and B will be liable for expenses incurred at the first-aid station across the bay and any associated expenses.

Defenses:

B can claim no defenses.

Patti (P) v. Bluto (B): false imprisonment

P will sue B for false imprisonment. She will prevail on a claim if she can establish that B acted with the intent to cause unlawful confinement or restraint and unlawful confinement or restraint resulted. After P regained consciousness, she demanded that B take her to the nearest dock immediately. B disregarded her demand, thinking he knew better, and raced to a first-aid station across the bay. B intended to cause unlawful confinement because he thought he knew better and volitionally took her to the first-aid station. Although P received appropriate medical treatment and made a full recovery, she was nonetheless unlawfully confined in B's boat while he drove her to the station. The fact that P was conscious at this time attests to the awareness component of false imprisonment, which requires awareness or actual injury. Therefore,

B will be liable to P for false imprisonment.

B v. S: battery

B will sue S for battery. Battery occurs when the defendant acts with the intent to cause harmful or offensive contact and harmful or offensive contact results. Here, S acted with general intent because he was substantially certain that rollerblading down a boardwalk at 12 miles per hour will cause him to make contact with another person. Harmful and offensive contact resulted when S collided with B, causing him to scrape his knee. Therefore, B will prevail in a suit of battery against S.

P v. S: battery

P will sue S for battery. See above for appropriate analysis.

P v. S: assault

P will sue S for assault. Assault occurs when the defendant acts with the intent to cause apprehension of imminent harmful or offensive contact and reasonable apprehension of imminent harmful or offensive contact results. Here, S acted with general intent when he sped down the boardwalk rollerblading 12 miles per hour (in violation of the local ordinance) because he was substantially certain that he would cause apprehension of imminent contact with another person. P actually apprehended imminent harmful or offensive contact, as evidenced by the fact that she screamed as he swerved toward her. Therefore, P will prevail in a suit of assault against S.

P v. B: battery

P will sue B for battery. Battery occurs when the defendant acts with the intent to cause harmful or offensive contact and harmful or offensive contact results. Here, B intended to cause offensive contact with P because he performed CPR on her while she was unconscious and offensive contact actually resulted, as evidenced by P's broken rib. B will claim the privilege of implied consent, as he was performing what he thought was a life-saving maneuver. This point is arguable, as implied consent in the medical field is generally granted to doctors and medical professionals because the patient *would* consent if they were conscious. Here, however, B is not a licensed medical practitioner and P would not have consented to CPR. Because of B's negligence in performing the life-saving technique, the court will likely find for P, saying that her consent, if it was implied, was invalidated based upon B's fraudulent assumption that he could perform CPR. Furthermore, the fact that B was acting in good faith does not negate his intent to cause offensive contact.

END OF EXAM