

TORTS  
Spring 2000  
Prof. Kotler

Final Exam - Model Answer

Part I

Question 1

Madden v. Prosser (Action for personal injuries alleging negligence based on violation of statute only).

Negligence per se – Apart from a traditional negligence claim (which you were not asked to address), the plaintiff may seek to persuade the court to utilize the statutory provisions quoted in the fact pattern in order to establish the defendant's liability.

Appropriateness of the statute for use in a civil action - The statute in the facts provides only for criminal penalties for non-compliance. Therefore, by itself, it would not serve to create tort liability. Nevertheless, a trial judge might adopt the legislatively announced standard of care which forms the basis of the statute's criminal sanction and use that standard in a negligence case. Before it is appropriate to use the statute's standard of care, however, it is necessary for the court to find that (1) the plaintiff is a member of the class which the statute sought to protect, and (2) the harm suffered by the plaintiff was of a type which the statute sought to avoid.

It seems doubtful that this statute is appropriate for use here. The statute, enacted as part of the "America the Beautiful" legislation, prohibits littering and provides funds to financially assist municipalities which institute recycling programs. Given this background, the purpose underlying the statute would seem to relate more to aesthetics and ecology than to safety. If this is the case, the class of people to be protected is the public at large. Although Madden is, of course, a member of the public, in sustaining the harm which he sustained here, he was not acting in his capacity simply as a citizen, but as a citizen who was engaged in a very specific activity (jogging on a public thoroughfare). More importantly, the harm to be avoided (ugly litter and wasteful disposal practices) is not the harm which Madden suffered. While it is true, of course, that legislation can have multiple purposes and one is free to argue that this statute did, unless one can convince the court that physical safety was one of the purposes of the legislation, it would not seem appropriate for the court to adopt the standard established by statute in this tort case.

However, assuming the court can be convinced that the statute is appropriate for use, the analysis does not end there. A "negligence per se" analysis must be completed.

Duty - The statute itself creates the duty. It is, of course, binding on Prosser and the earlier determination that it was intended to protect a class of persons of which

Madden was a member also establishes the foreseeability of Madden as a victim in a Palsgrafian sense.

Breach - Having determined that the statute's standard of care is to be adopted by the court, one need only prove that, as a factual matter, the defendant violated the statute. The facts tell us that the statute requires trash to be disposed of properly and Prosser clearly did not do this.

Actual Cause - The "but for" test is appropriately used in this case. "But for" Prosser's violation of the statute (leaving the glass), the harm to Madden would not have occurred. Although the violation was also a substantial factor in causing Madden's harm, one does not use the substantial factor test except in those rare cases where there are multiple acts, any one of which would have caused all of the plaintiff's harm. [Please note: the mere existence of multiple causal factors will not justify the use of the "substantial factor" test. If a defendant's act was a necessary condition for the happening of the harm, the "but for" test can be used even if other acts were also necessary conditions].

Proximate Cause - In a negligence per se case, proximate cause is established when it is shown that the statute was intended to avoid a particular type of harm and the plaintiff suffered that type of harm. This is, of course, the "hazard" test which, in fact, has its origin in the negligence per se cases. Here, if this was a safety statute (which is admittedly unlikely) directed at this type of injury, the proximate cause is established.

Damages - Personal injury is given by the facts and compensatory damages are available.

Legal effect of finding that the statute is appropriate for use in a tort case and has been violated - Jurisdiction differ in their treatment of a statutory violation. It is possible (though unlikely in this type of case) that a true negligence per se approach would be taken. The result would simply be that a violation which causes harm establishes a prima facie case.

More commonly, courts hold that only an "unexcused violation" of an appropriate statute establishes negligence. Although the restatement lists a number of excuses (inability to comply, compliance more dangerous than non-compliance under the circumstance, etc.), the facts here do not even hint at the possibility of a legally recognized excuse. We are told only that Prosser was tired and therefore declined to clean up.

Some jurisdictions take the position that a violation of an appropriate statute creates a rebuttable presumption of negligence. In such a jurisdiction, establishment of the violation would have the effect of shifting the burden of producing evidence (though not the ultimate burden of persuasion) to the defendant. If the defendant is unable to rebut the presumption, the plaintiff would be entitled to a directed verdict on the issue.

This might be the case here. Prosser has no excuse and it seems unlikely that much in the way of rebuttal could be offered. Some courts might allow the case to go to the jury simply on testimony of the defendant that "I was exercising due care." Others would not consider this sufficient to avoid a directed verdict.

A few jurisdictions have not adopted a negligence per se rule. In these jurisdictions, the violation of an appropriate statute is simply evidence of negligence. In that case, the fact it was violated would be presented along with the general evidence that Prosser failed to behave as an ORPP.

Defenses - In both negligence and negligence per se cases, the two most common defenses are voluntary assumption of risk and contributory/comparative negligence (although, if the court were to find that the statute sought to protect one who is incapable of protecting oneself, and the plaintiff's misconduct is the danger that the statute sought to avoid, the defenses might not be available--e.g. sale of liquor to minors).

To establish voluntary assumption of risk, it is necessary to show that the plaintiff (subjectively) knew of the risk created by the negligent conduct of the defendants and, with such knowledge, voluntarily chose to encounter that specific risk. Here, while it is true that Madden was jogging at night, knowledge of the general risks involved in that activity is not sufficient to establish the defense. One would have to show that he knew of Prosser's conduct on this occasion, knew of the presence of the bottles and broken glass and chose to run through it. In short, there is no basis for claiming assumption of risk on these facts.

To establish contributory or comparative negligence, one would have to show that Madden failed to exercise the care of an ORPP for his own safety and that this breach of duty on his part was an actual and proximate cause of his harm. Whether he was exercising due care is a question of fact. The resolution of the issue would depend on whether people consider it reasonable to run in the dark, how much light was there, how much attention Madden was paying to his surroundings and so on. If, in fact, he was not paying a reasonable amount of attention and the harm would have been avoided if he had been, one can find contrib/comparative and cause in fact. Presumably the hazard created by not watching where you are going is that you will fall and injure yourself, therefore, proximate cause would be clear.

### Question 2.

Mrs. Wade v. Prosser (Action for damages alleging intentional infliction of emotional distress).

The elements of the tort of intentional infliction of emotional distress are as follows: (1) intent or recklessness; (2) extreme or outrageous conduct; (3) causation; and, (4) severe emotional distress.

To establish intent, one must show that Prosser acted for the purpose of causing Mrs. Wade emotional distress or (subjectively) knew with substantial certainty that emotional distress would be caused by his conduct. It seems unlikely that intent could be established. The facts tell us that Prosser was joking. Furthermore, it is clear from the facts that these folks are all friends. After all, the Wades were invited to Prosser's party (not to mention the fact that they co-authored the leading torts casebook). All in all, it seems unlikely that Prosser either sought to cause harm or realized that he would do so.

Nevertheless, notwithstanding the name of the tort, intent is not required. It is sufficient that one establish "recklessness." The test for recklessness is objective. Would a reasonable person realize that his conduct creates a very high degree of risk that harm would result? In other words, it similar to negligence, differing only in that there is a higher probability that harm will result.

In the case at bar, it is very possible that Prosser's conduct could be characterized as "reckless." He was certainly aware of Wade's psychiatric problems and should have realized the distress this was causing his friend's spouse. In other words, his conduct must be assessed in light of his knowledge that he was dealing with someone in an emotionally fragile state.

It is also relatively easy to characterize his behavior as "extreme" or "outrageous." The test is whether such conduct goes beyond the bounds of social acceptability taking the time, place and general context into consideration. What is acceptable in Marine barracks may not be acceptable at the country club. What was acceptable 50 years ago, may not be acceptable today.

Here, the frequency of the phone calls, the repetition of the same stale jokes, and the mailing of insects, taken as a pattern of behavior (even among friends) is probably over the edge.

The conduct must cause the emotional distress. This requirement might cause problems for the plaintiff here. The facts indicate that she was already distraught over her spouses deteriorating mental condition. Perhaps her distress is attributable to that, rather than Prosser's conduct. On the other hand, she will testify that Prosser's conduct was the cause and it is not implausible to conclude that, at least, Prosser exacerbated the problems. Having a mental health professional support the causal link would be helpful.

Finally, the emotional distress must be severe. Importantly some jurisdictions (a minority) require that the severity of the emotional distress be demonstrated by the existence of physical manifestations of the distress. Exactly what qualifies as a "physical manifestation" is somewhat unclear. Mrs. Wade is not claiming a heart attack or miscarriage, but rather is complaining of a disruption in eating and sleeping, as well as depression and anxiety. Some courts would say that is enough. Others have been more skeptical.

### Question 3

In a negligence action by Mr. Wade against Croka Cola, can the plaintiff establish the defendant's breach of duty?

The facts do not tell us how or when the frog was introduced into the bottle. Since, to establish breach, it is necessary to prove that the defendant failed to exercise reasonable care, one must attempt to prove breach by seeking to have the trier of fact draw an inference from the fact of the accident/incident itself. In other words, this is a classic *res ipsa loquitur* case.

To show *res ipsa*, it is necessary to show that first, this is the type of incident which probably would not have occurred in the absence of someone's negligence. It is not enough to show that it is an uncommon occurrence. The probable explanation for it must be someone's failure to exercise due care. Second, the plaintiff must show that it is probably CC's negligence, rather than some other potential party. This second requirement is typically phrased as the need to show that the instrumentalities involved in the accident were under the exclusive control of the defendant.

Although the older cases insisted that the plaintiff prove that no part of the accident was caused by the plaintiff's negligence, this is apparently related to the old rule of contributory negligence where the plaintiff's fault (in any amount) would serve to preclude recovery. Since most jurisdictions have moved to comparative negligence, disproving the plaintiff's responsibility should no longer be required.

Here, one can confidently assert that, in the absence of somebody's negligence, frogs are not found in soft drinks. This is simply a variation of the old toe-in-the-chewing-tobacco case.

The exclusive control requirement is a little trickier. Here, the bottle passed from Acme Glass to CC to Ed's Market to Prosser to Wade. In theory, at least, the frog could have gotten in at any point (although the fact that the bottle was sealed at CC's plant may be sufficient to show exclusive control). In any case, the typical approach would be for the plaintiff to elicit testimony from Acme, Ed, Prosser and Wade that they did not add a frog (or in the case of Acme exercised care to prevent the introduction of foreign objects), thus allowing the inference that the frog got in while the bottle was in CC's control.

Effect of proceeding on a *res ipsa* theory - Jurisdictions differ as to the precise effect given to a *res ipsa* presentation. The majority (and better) view is that it is a circumstantial case like any other. In some cases the inference of a particular defendant's negligence (breach) will be very strong. In other cases, it will be weak. A directed verdict will be given (for one side or the other) only if reasonable people could not disagree as to the existence or non-existence of the inference.

A minority of jurisdictions take a somewhat different approach. They take the position that a *res ipsa* presentation creates a rebuttable presumption of negligence. This has the effect of shifting the burden of producing evidence to the defendant. If the defendant fails to come forward with rebuttal testimony, the plaintiff is entitled to a directed verdict.

In the case at bar, however, a directed verdict would not be appropriate. CC's personnel is prepared to testify that each bottle is individually inspected. Certainly 100% quality control would be admitted by the court as evidence of due care. Having met their burden of producing rebuttal evidence, the case will now go to the trier of fact to weigh the inference of negligence created by the incident itself and the rebuttal evidence and reach a verdict in light of the conflicting inferences. The plaintiff would still bear the ultimate burden of persuasion and thus would have to convince a jury that it is more likely than not that CC was negligent.

A couple of jurisdictions shift not only the burden of producing evidence, but the ultimate burden of persuasion as well. In these states, the plaintiff would be entitled to a verdict unless the jury was convinced that CC had shown that it was more probable than not that they were not negligent.

#### Question 4

In a negligence action by Samsa against Dr. Schwartz, assuming Dr. Schwartz committed malpractice and all other elements are established, can Samsa establish that Schwartz's conduct was the proximate cause of his injury?

The issue, stated differently, deals with the extent of Schwartz's liability given his negligent failure to diagnose Wade's head injury. While subsequent injury to Wade is clearly foreseeable (is within the scope of the hazard created by the breach of duty), is injury to a third person foreseeable (within the scope of the hazard).

One's initial reaction is probably that holding Schwartz liable to Samsa is pushing things too far from a foreseeability standpoint. Moreover, the facts tell us that Wade, thinking he was a frog, (deliberately?) ran into Samsa's VW Beetle. If Wade's conduct was intentional, it might well rise to the level of a superseding cause. The mere fact of insanity, you will recall, does not necessarily preclude a finding of intentionality.

On the other hand, although Wade's driving was an intervening act, perhaps it was foreseeable. One could plausibly argue that the misdiagnosis made Wade a danger on the road and an accident waiting to happen.

Furthermore, perhaps this is a Fuller v. Preis situation. In that case, the plaintiff suffered a head injury in an automobile accident and some time later committed suicide. The court found that the suicide was the result of an irresistible impulse caused by the

organic brain damage caused by the defendant's negligence. We described the case in class as an interesting variation on a modern "directness" approach to proximate cause, with the fact of "irresistible impulse" arguably negating the intentional intervening act.

In any case, the issue of causation is typically a jury question and this problem is one of recognizing the arguments to be made, rather than choosing any particular outcome.

#### Question 5

What is likely to be considered to be the key issue in a false imprisonment action by Dobbs against Owen?

It is not enough to be intentionally confined within a fixed area (which obviously happened here). To maintain a false imprisonment action the plaintiff must be aware that he is being confined (at the time of confinement) or be harmed by it.

The facts tell us that Dobbs was already unconscious in the tub when Owen locked the door. Dobbs was still unconscious the following morning when Prosser discovered him. If, like Mr. Parvi, he can present some evidence that he regained consciousness during the course of his confinement and thus became aware of it, fine. Otherwise, he is going to have to show that he was harmed by the confinement.

The hangover was pretty clearly not caused by the confinement. The bruise is not as clear. It is not enough to suffer injury during the period of confinement, there must be some connection between the event and the consequence. If he can prove that he hurt himself during the night while trying to escape, he can win. If he hurt himself before he was confined or in a manner unrelated to the confinement (flopping into the tub, for example), he will lose.

Since he is never going to be able to prove what happened, he should forget about it.

#### Question 6

Henderson v. Kalven (action for trespass q.c.f.)

Trespass q.c.f. is an intentional tort. It is not enough to show that the defendant entered upon the land of another, but that he intended to be where he was.

The facts tell us that Kalven lost control of the cab due to his inexperience in driving. He did not intend to jump the curb and end up on Henderson's front lawn, therefore, the tort probably cannot be established.

The only claim which might be raised to get around this problem is “transferred intent.” We are told that Kalven was joy riding in the taxi. One might argue that his intent to trespass to chattels can be used to satisfy the intent requirement for trespass q.c.f. Since both trespass to chattels and trespass q.c.f. were original trespass vi et armis actions, this claim might work.

The fact that no damage was done to the property wouldn’t matter since, under the traditional approach to trespass to land, damage is not an element.

Although the question does not call for a discussion of negligence, it is worth pointing out that the lack of damage to the land would preclude an action based on trespass.

### Question 7

In a battery action by Mrs. Keeton against Mr. Keeton, can the plaintiff establish a prima facie case? (Ignore spousal immunity).

To establish the tort of battery, one must show a volitional act done with (1) intent to touch; (2) the person of another; (3) which directly or indirectly results in touching which is (4) harmful or offensive.

In the case at bar, the existence of volitional conduct by the defendant is indisputable. The intent, however, is a problem. The facts tell us that Mr. Keeton, seeking to avoid having his glass filled, swatted at the bottle in Prosser’s hand. The result was that the bottle was knocked onto Mrs. Keeton’s foot.

To establish intent, one must show that the defendant acted for the purpose of touching the plaintiff or (subjectively) knew with substantial certainty that the touching of the plaintiff would result. Here, neither is true. While Mr. Keeton’s conduct could be judged negligent or even reckless with regard toward his wife, there is no reason to believe either prong of the subjective intent standard can be met.

Importantly, however, the same is not true with regard to Prosser. Mr. Keeton clearly acted for the purpose of touching the bottle in Prosser’s hand. The fact that he intended to hit the bottle, rather than the hand, is of no consequence since the bottle was in Prosser’s hand and thus so intimately connected with his person that an intent to strike one is an intent to strike the other.

Under the doctrine of transferred intent, if one intends to strike A, and accidentally strikes B, instead, the intent to strike A is sufficient to satisfy the intent requirement as to the striking of B.

Therefore, use of the doctrine of transferred intent allows Mrs. Keeton to establish this element. (Note: you do not transfer all of the elements of the tort--just the intent element)

The volitional act done with the necessary intent must cause a touching (direct or indirect). Here, the facts tell us that the bottle struck the plaintiff's foot. That's enough.

The touching must be harmful or offensive. The facts tell us that Mrs. Keeton was not harmed. The question of the "offensiveness" of the touching is more difficult. "Offensiveness" is normally judged by using an objective test, i.e. would a reasonable person find the touching offensive under the circumstances. The only real exception to this is where the defendant has knowledge of the plaintiff's idiosyncrasies.

It is debatable whether having a bottle harmlessly fall on one's foot in the context of a New Year's Eve party would be considered offensive or not. (Most student thought it was).