

Exam memo: Torts fall 2008

Dear all:

What follows is not by any means a sample answer. I have had the benefit of reading all your exams, and of leisurely thinking about the responses. You had neither, so I wouldn't expect anyone to actually answer a question this way. I intend rather to summarize some of the things you might have written about, and my thoughts on what a good answer might have contained.

A few general comments: pretty much everyone got the basics on these questions. The differences came in how well you saw counter-arguments, distinctions and subtleties in the analysis, and the opportunities for creative argument. The other major failure was lack of organization - you had the right ideas, but didn't connect them to the right places in your answer. I tried to point these out. The exam also had a few new features, like more short questions and a single long question. While the short questions were meant to be straightforward, I found that (as is usually the case when dealing with law) there was no clear, single answer, so I gave lots of partial (and even full) credit for good explanations, even if the "answer" was not the one I had predicted.

I did not write much when you missed a point, on the assumption that this memo will tell you what you left out or mis-analyzed. Most of the notations are places where you mis-stated the law, or where I could see a pattern that was causing you trouble, as well as places where I thought you did something particularly insightful or creative. I am happy to give more feedback if you need it; send me an e-mail and we'll make an appointment. I urge you to look over all your exams and try to see what you did well, and what you could improve on, both in the substance and, more importantly, in your organizational approach. Exam-taking is a learnable skill. With that, here goes:

Q. I

The possible lawsuits here were C v. Benihana, P v. Benihana, J. v. Benihana, any of these plaintiffs (but most successfully P/J) vs. Hibgas, and C/J v. school (counselor). Benihana and Hibgas would probably implead each other in the respective suits. The case against Benny as an individual would be subsumed under that of his employer (see below). There is a battery case of C v. P., but the instructions were meant to indicate "don't bother" and most of you didn't. BTW, the problem is based on an actual case (I added in the Hibgas component and the kid, but the neck-wrenching from thrown shrimp is real).

Generally speaking, the cases worked better if you tackled them separately rather than as "family v. B." Lumping all 3 plaintiffs together meant you didn't see the differences in breach theories and in scope arguments as clearly. It also helped if, in considering breach theories, you separated out those theories that relied on vicarious liability for Benny's acts, and those that involved the direct liability of Benihana.

C v. Benihana

Most of you started with vicarious liability of Benihana for Benny's acts. He seems to be an employee. Some of you raised the question of whether he was acting within the scope of employment when he took a phone call and abandoned the grill, arguing that there have to be work rules against such a thing. Even so, he would probably still be within the scope of employment because he was engaged in the job he was hired to do (grilling, interacting with customers) within the authorized time and space limits, and actuated arguably in part to serve the employer (making birthday boy happy). There are of course contrary arguments and I gave credit for those who made them, even though we didn't spend any class time on it so no worries if you didn't address it.

The next step is to establish a duty running from Benihana (B) to the plaintiffs. All you really need is that they are customers, so a duty of reasonable care arises. If you think the grill is a defect, then they're invitees. There's not much more to it - not really a contested point. Some of you (apparently thinking this was too easy) got all wound up in the landowner categories, or in duty to protect against criminal acts, but none of that was necessary. Even if P isn't paying for his own meal, he's still owed a duty of reasonable care since his meal will be paid for by someone, giving B a benefit. It was possible to argue that when B lets P behind the grill he is then in an employees-only area and so a trespasser, but it probably doesn't work because Benny gave him permission to be there. A few of you argued for a professional standard of care, but chef is not one of the professions where that standard will apply. One could argue rpp+ since B has special expertise in dealing with flame and fire that B will be expected to use, but not clear it matters. The fact that he's new doesn't matter.

Breach was a bit more complex. There are several sets of breaches: a) one could argue that B was negligent in its own acts by failing to adequately train their employees not to abandon their grills/talk on the phone while working/give tongs to non-employees. Some kind of harm, even if not the exact harm that occurred, was reasonably foreseeable from the lack of training. Any one of those would have been easy, cheap, safer and effective in avoiding the accident, at least unless you argue that a rambunctious and troubled 12-year-old would have grabbed the cooking tongs anyway. A variation on this might be to have more supervisors on hand, at least at the busy dinnertime hour, or to have a master chef looking over Benny's work closely, since he was a new hire. These would be more costly and not necessarily as effective, but were still feasible untaken precautions. If you went this route you had to argue under causation that greater supervision would have avoided the accident.

B) One could also argue vicarious liability for Benny's breaches, which might include abandoning his post/talking on the phone/giving tongs to P. None of these breaches seem especially burdensome to avoid, although B could argue that allowing customers to participate in meal preparation is part of the charm of the restaurant, that Benny could have reasonably believed allowing an almost teenage birthday boy to grill was both not a foreseeable risk to anyone and a source of customer satisfaction. You could look to the custom of other Japanese open-grill restaurants to see if there is a departure from what the industry considers reasonable care, but you didn't really have enough facts.

Several of you raised the question of negligent entrustment, along the lines of *Ilok v. Glock*. If you give a dangerous instrumentality to another person knowing or having reason to know they will use it to physically harm another, you are liable. Does this apply here? Well, first you have to argue that grilling tongs, like assault rifles, are a dangerous instrumentality - the defendant will obviously contest this characterization. Even if you get past that, does the defendant know or have reason to know the boy is a budding pyromaniac? Even the aunt and uncle don't know. On the other hand, C will argue that all Benny needs to know is that he's a 12-year-old boy in a restaurant where food throwing and chopping goes on, and that's enough to give reason to know he will most likely do something dangerous with the combination of food and fire.

c) A third type of breach involves the screens separating the dining area from the grill. P will argue that the 6" screen is inadequate, and that a higher screen would have avoided flying food hitting him. D will argue that anything higher would make it too hard to see the grill and the chef's actions on it, defeating the purpose of a tableside grill (same with a few proposals to cook the food in the kitchen), which would be too much impact on both cost and utility. P can argue that a higher grill could have been clear plexiglass which would not obstruct vision, but it would still remove some of the immediacy of the dining experience.

d) A number of you raised the issue of height of the flame and Benny not turning it down (or B not listening to staff re hard to control nature of new grills). This is where it paid off to separate C and P's case: it's not clear there's any causal connection between the high flame and Peter flinging shrimp once he gets in front of the grill. However, as discussed below, the flame is clearly relevant to P's (and J's) injuries.

I was looking for a number of things: could you articulate the breach(es), could you evaluate according to some set of criteria (B<PL, SAFETY, etc.) and think about counterarguments. I also looked for how/whether you tied your preferred breaches into causation and scope.

Causation was fairly straightforward here - either but-for or substantial factor. Some of you differentiated the two, saying that but-for would not work because there was a confluence of several factors. That is not the case: there can be more than one but-for cause of an event, but each one must meet the more likely than not test. There was an argument that it wasn't the shrimp-throwing but some/any other factor that would have made C move his neck and hurt himself, but given that you didn't have any info on other possible reasons for wrenching his neck it was hard to get much mileage out of the argument.

Scope, on the other hand, was complicated. Here is where it was particularly important to separate out C's and P's arguments, which are different. Re C, there are not really issues around whether he's an unexpected plaintiff, since anyone sitting around the grill could expect to be hit by flying food. B will argue that this is an unforeseeable and unexpected type of harm. One could expect burns or a stained shirt from flying food, not wrenched vertebrae. B will stress the unexpected details of the events: who could have

foreseen that an employee would leave his post, turn over cooking to a child, who would turn out to have pyromaniac tendencies (unknown to anyone) and decide to fling food directly and intentionally at a family member, etc. etc. If your preferred breach is the lack of training/supervision, there's one more step in the process - who would have foreseen that such lack of training would lead to an employee doing all these things. C will respond that these are mere details of the manner of harm. He will say that in a restaurant where food is cooked directly at the seats and then served to diners the foreseeable type of harm is anything related to hot food and diners, including ducking thrown food. The fact that ducking in his case resulted in more extensive harm than could be foreseen due to his earlier injuries does not relieve the defendant of liability under the "eggshell skull plaintiff" rule - you take the plaintiff as you find them. If your breach involved the height of the 6" screens this set of arguments would be central.

The third scope issue concerns intervening acts. B will argue that Benny's act in leaving his post and turning over tongs to P, and P's act of immediately taking the tongs and flinging food, were independent and unforeseeable intervening acts that should break the chain of causation. C will respond that the risk of turning the grill over to a child was precisely that they would act in a way that put nearby persons at risk, and that therefore these were dependent intervening acts. B will also attempt to shift responsibility to both Hibgas and Benny, arguing that either a product defect or complete ignoring of whatever rules they have on phone use/turning over grills to customers should let them off the hook.

Defenses: there is a weak argument about assumption of risk: C had been to the restaurant before and knew food was flung around by chefs, yet he voluntarily chose to come back. However, there's no evidence he knew or agreed to non-chefs doing the food-flinging. There is also an argument for comparative fault, based on C's inability to control his nephew, but it only works if you argue that as a stand-in parent he should have known of P's pyromaniac tendencies even without the school telling him, a difficult argument to make. If it works, you then have to show that given that knowledge it would be unreasonable to take the kid to an open-grill restaurant, and that doing so was the cause of C's injuries. It seems a difficult argument to make.

Peter v. Benihana/Benny:

Duty: see above

Breach: here you might raise the same breaches, but focused on a different harm: his being burned. Thus, as mentioned, the failure to turn down/inspect the burners despite complaints from customers (C) and employees might be a relevant breach, although B might argue there was no constructive notice about this particular burner. One could also think about inspecting the burners regularly to make sure they don't flare, which would be a bit more costly but still cost-effective. You could also argue that installing the new veggie oil attachment without more testing is unreasonable, but the facts tell you it's been extensively tested. The higher screens mentioned above would not be a good breach theory here - no connection to causation.

The problem is that you really don't know what happened with the burner - was it Benny's acts, Benihana's lack of inspection, some defect with the burner, etc. When you don't know what the theory of breach should be, you should consider *res ipsa*. Here, there is a possible, if problematic, *res ipsa* case. You needed to apply the *res ipsa* factors: do people usually get burned by a 2-foot high flame while using an indoor grill? Probably not. Is the defendant the most likely source of the negligence? Well, you could argue that one of the defendants - Hibgas or Benihana - had control of the instrumentality when the accident occurred. The defendants will reply that Peter was in control at the time, having taken over the cooking and perhaps doing so in a way that led to grease fires, and thus there was no exclusive control. Along the same lines, they will argue that the plaintiff was contributorily at fault for playing at the grill, and thus the *res ipsa* case doesn't work. P will reply that the shooting flames were the defect and that he had no control over the settings on the grill - he was just grilling food - while the settings remained with Benny and B.

Causation: again, what I was looking for was the connection between the breach(es) you specified and causation. B will argue that this was an unexpected spike and that therefore even if they had inspected regularly/in this instance it would not have avoided the harm. Similarly, as mentioned, if your breach was the low screens, you needed to explain how raising the screens would have avoided the injury. How high?

Scope: here the issue of unexpected victim will become relevant. B will argue that there was no way they could/should foresee that Benny would let a child behind the grill, there's no way to know that he would be in a position to be harmed by a sudden ball of flame. P will argue that anyone within reach of the flames was a foreseeable victim.

The type of harm issue really won't come up here - getting burned is exactly what you'd expect from any one of the breaches listed. However, the unforeseeable intervening acts question will come up. B will argue that Benny's act of turning over the tongs to P was unforeseeable and not part of his job, but it probably won't work because he's still acting within the scope of his employment and so it should have been foreseeable to B that he might let a kid use the grill (and part of what makes abandoning post/taking phone call negligent is that this sort of risk could materialize.) B will also argue that there's something wrong with the grill, and will implead Hibgas and argue any defect was not obvious and was unforeseeable. P will argue that if there was something wrong with the grill B should have noticed/inspected for it. The facts don't make clear whether the flare-up was due to an inevitable random occurrence, a problem with the grill, or P's acts once he got behind it, so you had to work with all three possibilities (this was also a key piece of info to seek out).

Defenses: comparative fault is the most obvious. However P would be held the standard of a minor, that is of a child of like intelligence, age, experience, etc. He's twelve and we know that he's had emotional trouble and his parents have just died and he's been acting out in school. Given that, it may not have been unreasonable for him to take up Benny's invitation to grill and to then get too close to the grill and be the victim of a flareup. On the other hand, a child should know not to get too close to an open flame.

### B. v. J.

This one was pretty easy, and almost everyone got it. She's got an action for negligent infliction of emotional distress. There are two potential theories. First, she could sue on a bystander theory based on seeing P get burned. She was right there, saw the accident at the time it happened, the kid was seriously harmed (burned) and she can get a professional to testify that she's been seriously emotionally harmed. This is enough under the *Clohesy/Dillon/Thing* line of cases. If she were in New York, she could argue that she was within the zone of danger. The problem is she's P's aunt, not his mother, and under states that use a bright line rule she would not qualify as a close relative. Nonetheless, even though the adoption papers aren't final she is acting as his mother, albeit she's only done so for 8 months. She will have to argue to a court that it should construe the close relative requirement broadly to include de facto adoptive parents, even if they don't have the formal papers yet. You would use policy arguments and precedents re broadening of the strict requirements on what constitutes "family" to do so.

She can avoid this whole issue by arguing as a direct, "near-miss" victim. She's within the zone of danger since the flames could just have easily have burned her. In the few jurisdictions that require it, she could argue that her singed scarf is enough to constitute "impact." The only problem is that the facts tell you she's not upset because of her own fear but because of guilt due to P's injuries - she may not get expert testimony to support the theory that her emotional distress is due to her own harm.

B will raise scope arguments, saying it's unforeseeable that she would jump up and put herself in harms way. The answer to that is "danger invites rescue."

B might raise comparative fault and assumption of risk arguments, but they are probably losers for the same reason – it's not unreasonable to try to save your kid.

### P. v. Hibgas

First, note that this is a far easier case than *C v. Hibgas*, which will create enormous and possibly insurmountable scope problems. The duty and breach elements will be the same. J. could also sue Hibgas, but her case would mirror and be derivative of P's.

The case could be brought under either negligence or strict products liability. The problem is that under negligence it's hard to show exactly what the defendant did wrong. You could try *res ipsa* here too, but again the exclusive control element will be problematic. The facts tell you they extensively tested, and that similar outdoor grills have worked fine, but it's not clear they tested enough under indoor grill conditions. There seem to have been complaints about difficulty to control with a number of them, but no 2-foot flames from any other, so it's not clear the harm was foreseeable.

Under strict products liability (which is not absolute liability - you have to prove defect and cause) there are several options. It's not clear from the facts whether this grill was

special or whether all the grills had this problem. If there was something particularly wrong with this one, P will argue a manufacturing defect. He will just need to show that it departed from the specifications, or that, like in *res ipsa*, this kind of harm does not happen with some kind of product defect.

If given the complaints about several grills you think the problem is more widespread than just this grill (another piece of useful info to have) then you may have a design defect problem. There are two tests for design defect: consumer expectations and risk-utility. It's not clear this is a product used by consumers in general, but P can use experts to explain what expectations the specialized users of the product would have. Most people have some experience with grills and would be able to form expectations about them. Presumably those expectations don't include having 2-foot flames shooting up. On the other hand, H will argue that the purpose of a grill is to produce flames, and that therefore the defect is open and obvious. What's more, they will analogize to the Bic case to argue that they have no reason to expect or make the grills safe for children to use given that they're installed in restaurants where professional chefs are supposed to be in charge. They will also, therefore, argue that putting a child in front of the grill constitutes unforeseeable misuse of the product.

If the court thinks the type of defect involves design tradeoffs and that the issues around the new attachment and how it works are too technically complex to be decided without experts, it will use a risk-utility test instead. Presumably, P will argue that the substitution of fuel made the grill harder to handle and therefore unreasonably dangerous, and that the advantages in terms of "greenness" - both for Benihana (awards, new clients, etc) and for society were outweighed by the increased danger. The reasonable alternative design would be the existing, butane-based grills, although it's not clear those would be any less likely to shoot flames on occasion. B will argue the opposite. H will also argue that because the technology is so new, it's state of the art - there's no scientific knowledge out there that the veggie fuel will create higher flames, and so no defect.

A few of you argued for a warning defect. The facts give you no warning anywhere. It might say "Do not allow children to use this grill" "For use only by trained personnel." Or something like that. Not clear it would have been effective here: even assuming a heeding presumption, it's only a presumption and could be overcome by a showing that a 12-year old would have been unlikely to pay attention, or that his guardians would even have seen the warning. On the other hand, if the warning were aimed at Benihana, perhaps they would have been more adamant about not letting non-employees use the grill.

### C, J and P v. school counselor (school district, via vicarious liability)

The plaintiffs' argument here will be that the counselor owed a duty of care to C and J to warn them about the risks posed by their ward's pyromaniacal behavior. They will argue by analogy to Tarasoff that the counselor had a special relationship with the boy akin to that of a therapist, and that the behavior posed foreseeable risks of physical harm to them. There are a number of problems with this theory. First, it's not clear that a school

counselor, by dint of training and responsibilities, stands in the same relationship to P as a therapist who presumably can predict violence. Second, even if counselors receive equivalent training, it's not clear the adoptive parents are identifiable, rather than merely foreseeable victims. After all, the kid never threatened them or did anything indicating they were specifically at risk. This would reprise the arguments in the Dunkle case - it's statistically true they would be likely victims just by being around the kid more, but that's not enough.

If you get past the duty hurdle, the next question is what standard of care applies? Are counselors treated like professionals or not? Not clear from the facts, it would depend on their training, certification, etc. Assuming the standard was RPP, the question would be whether the failure to warn was unreasonable, given privacy concerns but also that the relatives were now acting like parents. Even if you get past that, there are still substantial causation and scope issues. Plaintiffs will argue that had they known of the setting fires they would not have taken Peter to a restaurant specializing in open grills - they would have kept him far from any kind of flame. The school district will argue there's no evidence that the knowledge of behavioral problems (in a recently-orphaned kid) would have made any difference. Moreover, the type of harm problems we saw earlier in scope of liability would be repeated here - who could have foreseen these harms from not telling adults about their ward's setting fire to a wastebasket...

Short answers:

- 1) manufacturing defect. What I was getting at here (as opposed to question was the theory of liability that would entail the easiest evidentiary showing. Strict products liability will be easier than negligence. Surely melamine is not supposed to be in cat food, so this is not a design defect. It's the one batch that's different from the specifications. That's all she needs to prove, as opposed to negligence where she would have to show what exactly the companies did wrong. Res ipsa would work, but not as well since it still leaves the jury the option of showing that the defendant companies had no exclusive control or that they acted reasonably, and thus will have more evidence required. Warning defect is not an option – what would the warning say – “watch out for poison?”
- 2) market share liability. You have a problem with causation, since you don't know which of the companies, or what combination of companies, put their melamine-laced chicken meal into the cat food batch that Mitzimeow unfortunately ate. You needed to recognize this fundamental issue. You do know that there are 5 companies, and you have a relatively short time period with which to work (period in which cat food sold on a certain date could have been manufactured). Since all 5 sourced the chicken meal from the same place, it was a fungible product, and traces of melamine in the dead or sick cats' blood could presumably act as a “signature” for the injury. Thus, many of the objections to market share liability in the lead paint case could be overcome. If all five, or even less but a substantial share are before the

market, you can figure out what their market shares were at the time (easiest of course would be to sue Gallmart (the retailer), but that's not what the question asked.) Many of you thought alternative liability would work because there are only 5 companies and there's no reason to think you can't get them all before the court and make them prove themselves out. The problem with this is that it's not clear that only one company's chicken meal was involved – in mixing the final cat food, Gallmart could have used chicken meal from any number of the companies, unlike in Summers v. Tice where only one shot could have entered the plaintiff's eye.

- 3) Res ipsa loquitur. Presumably, (and assuming she's telling the truth – see next question), fingers don't end up in customers' food without negligence on someone's part, but given that you're not in the kitchen it will be hard to tell exactly what happened to put the finger there. The chili is in the exclusive control of Wendy's at the time the alleged negligence occurred, and poor Marguerite is just sitting there eating her bowl, so no fault on her part. Plus the defendants have better access to the information as to what actually happened. A few of you weren't sure about severe indigestion as physical harm and went into issues around negligent infliction of emotional distress, but severe indigestion will do to establish harm (hospital stay, etc.) and then the emotional harm will come in on top of that. If you did try the emotional harm route your best analogy is to the handling of bodies/death telegram/misburial cases.
- 4) The requisite intent is missing. In order to make out a claim of IIED, the plaintiff must prove intentional or reckless extreme or outrageous conduct causing the victim severe emotional distress. Here, there's no evidence she is aware of and disregards a high probability of risk of harm to the founder of Wendy's, much less that she intends to cause him emotional distress. She's just trying to make a buck. Several of you made the argument that this is enough for recklessness because she has to know it will impact his business and reputation, and although I disagree I gave credit for making the argument. Some of you thought the behavior was not extreme and outrageous – swindles and scams are the American way of life, see B. Madoff et al. – and a business owner has to be hardened to lawsuits of all sorts. I don't think a jury would agree (human fingers – ew yuck!) but gave credit for the argument as well. Some of you argued that a heart attack was not emotional distress, but the facts tell you he's seriously upset and I expected you to infer a connection.
- 5) Adult (RPP) standard of care/negligence per se. Lilly will argue that she's just sixteen and so should be held to the standard of a child of like age, experience, knowledge, judgment, etc. This would have two consequences: first, she'd be able to argue that she was immature, easily influenced by uncle, thought it was a lark, etc and so was not unreasonable in getting on the skylight. Second, if it worked the court would not be able to instruct on negligence per se (presumably breaking and entering is against some statute)

but could only use the statute as evidence of negligence. To avoid this, Jane will argue that breaking into houses through the roof is either an adult activity or an inherently dangerous activity, depending on the jurisdiction.

- 6) No duty to trespasser, and no actual notice of defect if Paul is found to be a licensee. Darla will argue that when Paul stopped paying his dues he lost his membership in DA and thus the invitation to her house. He then became a trespasser and she had no duty towards him other than not to injure him willfully or wantonly, which she did not do. Paul will argue that he continued to have some privileges since his membership was never officially terminated. He will argue that he was a known trespasser since Darla knew that people would be coming in and out on Sunday afternoons (note it's not whether she knows him in particular, it's the habitual nature of the comings and goings that matter.) She will argue that even if he's not a trespasser, he's a licensee since she gets no money from the monthly fees and merely opens her house as a private person, so it's a social gathering. If so, she was not actually aware of the need to salt the ice, so has no liability. He will argue that the house-openings are part of a mutual financial arrangement and so he should be treated as an invitee. If this is the case, she needed to inspect for ice and to comply with the custom of salt-spreading.