INSTRUCTIONS

The examination consists of three essay questions, all of which you should answer. The essays are of equal weight for grading. You should devote an hour to each question.

If you believe you need to know more information about a case in order to resolve an issue raised by the facts given, tell me what you need to know and how it would affect your legal analysis. But do not add facts to create new issues. Be sure to address all issues raised by the facts even if you think a single issue is dispositive of the case.

Read carefully, and think before you write. Accurate reading is essential. Good organization, clear statement, and avoidance of irrelevancies and filler all count in your favor.

The examination is closed book. You may not consult any materials or another person.

If you write your exam, use one side of a page only, and skip lines. If you type, double or triple space, and leave wide margins.

GOOD LUCK! Have a good holiday.
QUESTION I (60 minutes)

The vessel Goodship is a bulk grain carrier. While the Goodship was refueling at the North Pacific grain facility on the Columbia River, fire broke out aboard the vessel. The fire occurred when a steam boiler on board the ship exploded.

After the fire was discovered, the local fire department was called in to combat the fire. The fire department put together a plan to combat the fire. Film-forming foam and firefighting equipment were used on the dock to combat the fire.

As the flames were being brought under control, and at a point in time when the fire was within minutes of being extinguished, North Pacific's dock foreman Harry arrived at the scene. Within five minutes of his arrival, and without consulting any of the firefighters, Harry ordered the ship cast off from the dock. Harry wanted to protect his dock from fire.

The firemen yelled at Harry not to cast off the ship. He ignored them, and released the last line that held the ship to the dock. He then tried to clean up the dock, but could not remove the permanent stains from the fire-fighting foam.

Unable to maneuver on her own smoke-choked engines, the Goodship was cast hopelessly adrift, with several firefighters stranded aboard. The Goodship was finally brought to rest on her anchor. Since the vessel was no longer accessible from the dock, further efforts to extinguish the fire were doomed. The Goodship burned up. The firefighters on board suffered serious burns. The grain burned up entirely.

The last spark from the fire on the Goodship landed on Polly's private dock, where Polly was preparing to celebrate the Fourth of July. The spark hit the fireworks, which went off. Polly suffered serious burns from the exploding fireworks. Her dock was not set on fire.

The Uniform Fire Code provides that "Any person who obstructs the operations of the Fire Department in connection with extinguishing any fire shall be guilty of a misdemeanor."

1. The owners of Goodship sue North Pacific for their damages, and North Pacific countersues for the damage to the dock. Analyze the issues. (Do not worry about respondeat superior.)

2. Will Polly collect for her damages?
QUESTION II (60 minutes)

Portia decided to take her cousin Renee, who was visiting from France, to a football game. The Colonels were playing the Generals. Portia bought expensive tickets on the 50-yard line (at mid-field) so that she would have a good view of the game. She selected seats on the Colonels' side of the field because she was a Colonels fan and wanted to be able to see her favorite players sitting on the bench.

Quarterback Willie Namath plays for the Colonels. During the first quarter of the game, Generals linebacker Lawrence Drycleaner tackled Namath and broke his leg. Drycleaner had told his teammates before the game that the Generals couldn't beat Namath and that he wanted to "take Namath out of the game." Drycleaner aimed low when he tackled Namath, because everyone in the League (including Drycleaner) knew that Namath had weak knees. Namath was taken out of the game on a stretcher.

Joe Wyoming replaced Namath at quarterback. Wyoming was leading his team down the field. On one play, Wyoming couldn't find an open receiver, so he threw the ball out of bounds. The ball flew past everyone on the sidelines and hit Renee in the face. Her nose started bleeding. Renee suffered from vertigo, and the bleeding accentuated the vertigo. She passed out, and Mary Sue caught her as she fell. Renee was rushed to the hospital. The doctor, who was a Generals fan, had the game on TV while he treated Renee, and he gave her the wrong medicine. The medicine gave Renee permanent vertigo.

On the play that injured Renee, the officials called a penalty on Wyoming. The penalty was for "intentional grounding" of the ball. (Intentional grounding occurs when a quarterback can't find anyone available to catch the ball, and so throws it where no one can catch it. A quarterback usually throws the ball straight into the ground or just barely out of bounds.)

Because of the penalty, Wyoming's team (the Colonels) couldn't score a touchdown. So the Colonels kicked a field goal on the next play. The ball went up and through the goal posts. The kicker asked the referees for the ball as a souvenir. They were able to give it to him because the stadium has nets at each end of the field (but not at mid-field). The nets keep the ball from going into the stands when field goals are kicked. Most teams put the nets up
only at the time field goals are kicked. The Colonels keep the nets up all the time.

What tort suits are available to Mary Sue, Renee, and Willie Namath? Who will win the suits?

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QUESTION III (60 minutes)

In *The Common Law*, Oliver Wendell Holmes states that:

"the law of torts . . . started from a moral basis, from the thought that someone was to blame.

. . . while the terminology of morals is still retained, and while the law does still and always, in a certain sense, measure legal liability by moral standards, it nevertheless, by the very necessity of its nature, is continually transmuting those moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated."

Comment on Holmes' observation.
The three questions were of equal weight. I assigned 34 points to question I, 33 points to question II, and 33 points to question III.

The answers were very good. I graded the first two questions with attention paid to issue-spotting as well as good analysis. I usually subtracted 3-4 points for a missed issue.

Question III appeared to be the most difficult question for many of you. I subtracted a lot of points if you failed to discuss one of the three areas of the law, or if you refused to discuss any cases, as the directions stated.

On question I, too many of you thought there could be a battery against the boat. But Harry's intent was important and merited some attention.

Following are the numerical grades for the exam, and the letter grades I assigned to them. For your final grades, I will use + and - grades as necessary, but did not think they were required for this round. I will average the numbers, and not the letters, for the final grade, so don't argue now for the letter grade if you're on the borderline.

93, 92, 91, 90 (2) A (5)
87 (2), 86 (4), 85 (4), 84 (5) B (15)
83, 82 (2), 81 (3), 80 (4), 76 (2), 75 C (13)
70, 66, 60 D (3)

I attach sample student answers that received high grades. I will not give you my own "model" answer. If you compared tests you would see that there are several ways to write a good answer to a question. Some answers are very long and include everything; others get right to the point and win for their organization and clarity. This is particularly true for question three, where I looked for some creativity and some analytical ability. (I did some cleaning up of spelling and paragraphs.)

Question I

The first issue to analyze is the possible claim the owners of the Goodship would have against the owners of the dock.

The law recognizes that everyone has a duty to use reasonable care under the circumstances. There are also special relationships that could create a duty i.e. innkeeper-guest, parent to child, employer to employee. In this case the Goodship was docked at Atlantic refueling and a fire broke out. Goodship would have a duty to use reasonable
care while at the dock and Atlantic would also have a duty of reasonable care. However when the fire broke out Harry intentionally released the ship from the dock. The firemen explicitly told Harry not to do this but he ignored them. Harry as a D might try to say he didn't hear the warnings or see the fire but this is a weak argument. With an intentional tort there need not be a duty and breach. This case appears analogous in a way to the case where the boat was docked when a severe storm arose. The court in that case recognized that the owner of the ship intentionally left his ship at the dock and saved his ship at the expense of damaging the dock. Therefore it is possible that in Harry's counterclaim he could say that the owners of the Goodship were the ones who had the intent to leave their ship docked at the expense of burning the dock. However in a case of necessity for the firefighters could not put out the fire if the ship was floating at sea then it could be argued that it was necessary for the owners to remain docked.

Therefore the owners could sue for the intentional torts of assault and battery. For Harry 1) had intent to release the ship 2) the releasing of the ship caused the owners fear of apprehension of harm 3) and there was a link between the fear of harm and releasing of ship (assault). Or they could sue for battery which requires 1) intent 2) causation 3) harmful or offensive touching. Harry had the intent to release the ship which caused the harmful or offensive touching, i.e., contact with fire. However these claims would only address the owner's personal damages. They could possibly sue for intentional infliction of emotional distress.

However with regard to the damage on the ship (fire), Harry had a duty to use reasonable care while the ship was docked at the harbor and the ship might even fit into one of the special duty categories, i.e., trespasser, invitee. The Goodship would probably be an invitee for they came to the harbor for the benefit of Harry. As an invitee Harry has to refrain from active negligence. However Rowland said these categories were no longer determinative and that they were just a factor to consider and that reasonable care under the circumstances is what is to be used. Harry did not use reasonable care but breached the duty by letting the ship loose (actively negligent) when there was a fire that was trying to be contained. Harry might try to say in his countersuit that as an invitee the invitee cannot damage the dock while on the premises. However, this would probably be weak. Harry's best bet would be to say that the exploding of the steam boiler was negligence by the owners. They had a duty to operate it carefully and didn't (possibly) therefore they should pay for damage to the dock. Harry could also use res ipsa loquitur to say that the owners had a duty or due care in operating the boiler and that this is the kind of accident that doesn't occur unless one is negligent and the boiler was within exclusive control of the owners and Harry did not contribute to its exploding in any way. The fire was caused by the boiler exploding and the result was damages to the ship.

With regard to the causation element in the ship's claim against Harry the owners would have to prove actual and legal cause. But for Harry letting the ship loose the ship would not have burned. It was furthermore foreseeable and a direct consequence of Harry's actions that caused the ship to burn. Even if Harry did not believe the ship would burn the extent of the damages need not be foreseeable (Polemis).

Therefore since the resulting damages i.e. ship burned were sustained the owners might be able to recover from Harry on a negligence theory and Harry might in turn be able to recover for damages to his dock based on negligence of the owners. Harry might try a strict liability theory in his counterclaim but this probably wouldn't be effective. [why not?]
Each P and D would probably argue contributory negligence and if the jurisdiction followed that method or a comparative negligence theory damages could be none or be reduced.

Polly will probably try to collect either from the owners of the ship or the dock owner. She could sue for possible negligence against either party for damages for her burns and emotional distress. Polly was an indirect victim here so she would have a harder time proving her case. However according to Andrews in Palsgraf dissent a duty is owed to all. However the majority said that a duty is owed only to those foreseeable victims. Therefore if Polly could establish that she was a foreseeable victim since neither Harry or the owner used due care then they both breached their duty. Causation would also have to be proved.

"But for" the steam boiler blowing up in a suit against the owners of the ship or "but for" Harry releasing the ship then Polly would not have been burned. Furthermore with regard to legal cause the extent of the damages need not be foreseeable however the victim must be foreseeable according to Palsgraf. Therefore Polly would have a hard time proving she was a foreseeable victim for her situation is analogous to the woman at the train station in Palsgraf.

As far as damages Polly was burned and suffered. Harry and the ship owner would probably both try to implead one another in a suit against either one by Polly.

The firefighters would have a harm time collecting since encountering dangerous hazards is part of their job. However the UFC would appear to permit recovery from Harry.

If Harry violated a statute (UFC) then he could possibly be liable for negligence per se (driving without lights case). The statute was probably intended to protect firefighters from harm from purposeful acts. However Harry would probably try to argue that the statute was intended to possibly prevent people from parking in front of fire hydrants and the like. The firefighters would probably have the stronger argument since the releasing of the ship is what caused ("but for" and legal cause) the ship to be engulfed and the firefighters to be burned.

If Harry possibly had a valid excuse for his violation of the statute or following the statute would have caused more danger than Harry possibly would not be liable. Again the firefighters would probably have the stronger case.

As against the ship owners the firefighters would probably not be able to recover for they assumed the risk (case about policeman that talked about firefighters) and even if the owners were negligent in the operation of the steam boiler fires are usually the result of one's negligence.

QUESTION II

Willie Namath has a possible suit against L. Drycleaner for battery. Battery is present if there is an act by Drycleaner which brings about harmful or offensive contact to the plaintiff's, Namath's person; there is intent by the defendant to bring about that contact, and there is causation, such that Namath's injury resulted directly from the harmful contact.
Here, when Namath was tackled, there was an offensive or harmful contact, so this element is satisfied. The intent requirement may be a bit more tricky, but it appears from Drycleaner's statements to this teammates before the game that he wanted to "take Namath out of the game," seemingly even if it meant flagrantly. Intent though, for battery purposes, is not measured by a subjective standard of desiring malice, but rather just knowledge that the intended contact would result or was substantially certain to occur. Here, this element is satisfied too. Causation is also satisfied in that Namath broke his leg as a result of the tackle. The fact that he had weak knees should be irrelevant, based on the thin-skull plaintiff rule, which says you take the plaintiff as you find him.

There is a possible defense against Namath's claim by Drycleaner of assumption of the risk. Drycleaner will claim that by playing professional sports, Namath is voluntarily encountering a known danger and that his conduct expressly or impliedly consents to the risks involved. The question is whether or not Drycleaner's action was within the general code of conduct and generally accepted rules of professional football. It is difficult to ascertain from the facts given how this question would be answered. It might turn on the nature of the tackle (viewing a taped replay) or if Drycleaner was tossed from the game. In general though, cases have held professional sports participants to have assumed some risk in their participation in their sport.

Finally, with respect to Namath, some recent CA cases have distinguished AOR by two categories, primary and secondary. Primary AOR says that each participant accepts the risk of each other's ordinary negligence while competing, and therefore, Namath might have no claim, but secondary AOR considers more in depth the nature of flagrant fouls and deliberate actions designed to injure and might allow Namath to bring a claim under comparative negligence, reducing his recovery amount by his own comparative negligence contribution percentage.

Renee has a possible suit against either the stadium or the 'home' team for negligence in not protecting her from 'gone-astray' footballs. The first question is whether the stadium had a duty of due care to Renee to warn her of the dangers of the game of football or to construct some type of barrier or an extension or the netting to more adequately protect her. In general, cases have held, such as for hockey and baseball, that there is no duty to Renee in this type of situation, charging plaintiffs with the common knowledge of the rules of a widely played-in sport and saying that the burdens/costs of placing barriers outweigh the benefits gained by not having them in place, such as greater enjoyment of viewing the game. This has been demonstrated over and over again by use of Hand's Carroll Towing formula (B < PL), where the probability of injury multiplied by the magnitude of the loss is in fact less than the burden of putting into place remedial measures.

Yes, Renee was new to the country and was unfamiliar with the game of pro football, but the stadium and team ownership cannot be expected to protect each and every spectator from each and every injury that might occur. As duty interrelates with AOR, it is as if Renee has assumed the risk of a flying football by attending the game.

Renee might also have a potential claim of battery against Wyoming, who threw the football and hit her in the face. Although there was an act by Defendant which brought about a harmful or offensive contact with Renee's face, it seems that it would be difficult to make a case for intent. It would seem unlikely that Wyoming intended to cause a harmful contact or knew with substantial certainty that one would occur. If not, then intent requirement not met, and no battery (no p/f case). If, on the other hand, it is
proven that Wyoming would have to know with substantial certainty that throwing a football into the stands would cause a contact, Renee could have a battery action. Again, it is not clear from the facts, how severe the officials thought Wyoming's behavior was. He was clear penalized but was he ejected?

Interestingly, though, if Wyoming could be strapped with a battery suit, he may be liable for the other consequences Renee suffered as well, such as the doctor's mistake in rendering medical care. This is because of the medical aggravation rule which says that a defendant may be held responsible/liable for all injuries which follow from those attempting to render aid in case of emergency.

There is, of course, the problem of proximate cause here, and whether or not the doctor's mistake was an intervening force (human wrongdoing) where Wyoming might be taken off the hook for the 'permanent' vertigo, but this is balanced against the thin-skull rule, where you take Renee as you find her, bloody nose and all. Renee could also have a claim against the doctor who treated her for medical malpractice, or battery (if operating/attending to without Renee's informed consent).

For a medical malpractice claim, doctors are held to a higher standard of care based on their specialized skill and knowledge. The role of custom plays no significant role here, as it is clearly not custom to be watching a football game while treating a patient. Also, expert testimony would not be necessary as it is "common knowledge" to a jury that what the doctor did was wrong. Here, all the elements are met for negligence and Renee would have a claim. Duty to Renee of due care measured by higher standard, breach of that duty, act by the defendant, doctor of giving wrong medicine, cause-in-fact--but for doctor's giving medicine incorrectly, she may not have had permanent vertigo, proximate cause which might also raise the question of loss-of-a-chance, but unlikely due to not life and death situation, and damages in the permanent injury.

For a battery claim against the doctor, it would be an offensive contact to Renee if Doctor attended to her without her consent. She would have to prove that there was a material risk to her, that the doctor should have disclosed (patient's rule) and that she would have opted for another treatment based on that information, and obviously that the doctor did not disclose.

As far a Portia, she could attempt a claim for negligent infliction of emotion distress but it is unlikely under either the Bovsun, Zone of danger test (NY) or the Dillon/Portee test (CA), because in either case she was not what would qualify as a sufficiently close family member/relative although if she qualified at all it might be under the Bovsun test, because she could be said to be in the zone of danger. Here though, Renee's injuries do not seem sufficiently severe to qualify under either set of criteria and therefore Portia should have no claim.

Loss of consortium for Portia? No, I won 't even try it!

QUESTION III

Holmes is concerned with the morality of tort law. He seems to recognize the problem that morality is an individual thing, and that it is difficult to codify into a legal system suitable for an entire society. How do we do what is fair in all situations?
Negligence, using a fault principle, seems to be the most fair when a problem arises from an unintentional injury. The thinking behind negligence is that when someone fails to use due care, they should pay for injuries they cause. This is the case in Roberts, where a man drove during an episode of illness, and did not pull over once he became aware of it. A court looks at a situation such as this and asks what a "reasonable" person would do in his situation. That is the best the legal system can do, in terms of generalizing morality of society.

A problem with this is that people are often left behind, as victims of faultless crimes. In Hammontree, the driver was not on reasonable notice of his condition, and was acting as a reasonable person, using due care, when he lost consciousness and all control. He therefore had no moral fault as the legal system views things. The victims of his faultless act, though, are left uncompensated. In a completely "moral" society, who should pay for this type of a problem? Since it was nobody's "fault," perhaps insurance should pay, but the reality is that it must be someone's insurance, and that person's monthly premiums will rise. The reality is that someone has to pay for faultless crimes and under negligence, it is often the victim.

There are many different ideas as to how a moral society can correct that imbalance. That is what Holmes refers to when he discusses changes toward a system that ignores guilt.

First, some judges, such as Hand and Posner, tried to deal with fairness in an economic formula that resembled strict liability but was premised in negligence. (B< PL) If the burden of taking precautions is less than the product of the probability of harm and the magnitude of loss then the D should be held liable. (Carroll Towing) This analysis does not consider whose fault it was, but who deserves to pay. However, Posner admits that this does not always work.

Res Ipsa was another attempt to make the legal system more moral. In cases where the fault of someone cannot be pinpointed, the court will assume it, instead of placing the loss on the victim. Plan crash cases such as Newing are good cases for res ipsa. We know that the accident probably involved negligence, that D was in control of the situation and that P was an innocent victim. We can assume negligence and place the fault on D, without getting more details. Ybarra was this too, fortunately for the victim who was unconscious and could not have known who caused his injury. The courts recognize that in the absence of clear evidence of fault, the victim should not always take the blame.

Strict liability is the ultimate step away from a system requiring the "guilty" party to pay. Fletcher recognizes what Holmes seems to allude to in this quote, the fact that morality and fairness sometimes require us to ignore fault. Fletcher discusses non-reciprocal risk in certain activities. An example is the pilot or owner of an airplane, who takes a risk by flying. The passengers aboard also take a risk, so it is reciprocal. However, the farmer tending his crops below is taking no risk, and should never have to pay should the airplane crash on him. Looking into whose fault caused the crash should be irrelevant in a situation of non-reciprocal risk, because the victim should always be compensated.

Strict liability in general tries to deal with situations such as these, in analyzing the dangerous nature of the D's activity, and weighing it against such factors as society's benefit. I would agree, and I'm sure Holmes would too, that certain activities should not take fault into account, because morality calls for recovery to victims.
The nature of intentional torts is also greatly determined by considerations of morality--who deserves to pay, and who deserves recovery? Intentional torts seem to take most of the benefit of the doubt away from the wrongdoer. In a situation of negligence, the D is at fault, but did not mean any harm. Therefore, the P must prove by a preponderance of the evidence that D owed a duty, that he breached it, and that the outcome is foreseeable in almost every way. The Palsgraf case is an example of where the negligence system seems to ignore the victim. Because she was not a "foreseeable victim" in an "orbit of duty" she got nothing for all of her pain which was by no means her fault.

If that case had involved an element of intentional wrongdoing, though, the D would not have enjoyed the benefit of questionable proximate cause. Even cause-in-fact can be speculative. Our legal system strives to deter wrongdoing, and this is one of the ways. Even a D who is bankrupt, or who is up against a contributorily negligence P, is called to pay for his wrongdoing. Here, in the case of intentional torts the legal system pulls morality closely into its considerations. While it may not be "wrong" to be negligent, it certainly is "wrong" to purposely injure.

The tort system distinguishes between moral and legal liability in many ways in cases of negligence. The victim does not always get compensated, for one. Also, the legal system imposes no duty to act in situations where a "moral" duty may be appropriate. If you have no legal duty, then you need not save someone from peril.

Moral and legal liability are separated still in strict liability, since fault is taken completely out of the picture, however. But, the moral good of compensating the victim in all cases is met.

Finally, in cases of intentional wrongdoing, moral and legal liability seem to merge a great deal. Wrongdoers have few excuses such as duty and foreseeability and only some strictly delineated defenses, such as consent and self-defense. I believe that morality is impossible to incorporate with 100% satisfaction into the legal system because morality is inside individuals and is different for everyone. The legal system tries to generalize it through its various tort liabilities. This is the problem that Holmes recognizes.
**Question I**

**Goodship v. North Pacific**

**Negligence per se**

The owners of Goodship will argue that, because Harry violated the Uniform Fire Code by casting the Goodship adrift, and in so doing, obstructing the Fire Department’s extinguishment of a fire. Because that action was wholly unexcused by the circumstances and the statute was designed to protect human life from situations along the same lines as these facts, Goodship will argue that Cardozo’s reasoning in Martin v. Herzog is analogous to the case at hand. North Pacific will argue that Harry’s actions were excused by the risk that the fire posed to its property; Harry was justified in setting the Goodship adrift because doing so prevented damage to the dock. North Pacific will also likely bring up the three-part Sheehy Test, as utilized by the Uhr court, to argue that the statute does not carry with it a right of private enforcement. The Sheehy Test sets three standards for determining whether a private cause of action exists under a statute: 1) whether the plaintiff is one of the class for whom the statute was enacted; 2) whether a private cause of action would further the legislative purpose; and 3) whether creation of such a right would be consistent with the legislative scheme.

The first argument, that Harry was justified in his actions, is unlikely to persuade a court because the fire was already under control and posed no risk to the dock by the time Harry arrived, and Harry failed to investigate that fact by acting without consulting the
firefighters. The Sheehy Test, however, presents a better defense for North Pacific. The first two prongs are easiest for Goodship to satisfy. Clearly, the statute was meant to protect those who would suffer greater damage if firefighters were prevented from doing their jobs, so the first prong is satisfied. Similarly, consistent with the Uhr court’s reasoning, a private cause of action here furthers the legislative purpose of the statute because it encourages compliance. The Uhr court found that creation of a private cause of action was inconsistent with the legislative scheme where the statute carries its own potent enforcement mechanism. North Pacific will argue that this statute does just that, but Goodship will decry the potency of a misdemeanor conviction as well as the lack of financial sanctions that distinguish this case from Uhr.

Because Harry’s actions were unjustified and statutory punishment is feeble at best, a court would likely find that Harry’s, and by extension North Pacific’s, actions constituted negligence per se.

**Negligence**

In the alternative, however, Goodship may argue that Harry’s actions constitute negligence. A claim for negligence consists of four separate parts, which I will discuss in order.

**Duty**
There is no duty to prevent harm to others, but there is a general duty not to cause harm to others. However, Goodship may be able to establish that it enjoyed a special relationship with North Pacific that placed a more burdensome duty on North Pacific. As a property owner who invited Goodship onto its property in order to do business with it—the act of refueling—North Pacific has likely made Goodship its licensee, and is thus liable to protect Goodship from or warn Goodship about dangers that are either known or reasonably discoverable. The danger posed by the fire was known to Harry, as demonstrated by his actions meant to protect the dock, and the danger posed by the ship’s malfunctioning engines was reasonably discoverable.

Additionally, because Harry arrived at a time when the flames had been contained and almost extinguished and because the firemen told him not to cast off the ship, Goodship will argue that he had constructive notice that there was no risk of damage to the dock. North Pacific will counter that constructive notice should be applied to dangerous conditions, not the lack of them, and even if constructive notice applies in this case, the facts do not meet the requirements set out in Gordon v. American Museum of Natural History that the condition last for a period of time long enough for the defendant to discover it. Because Harry arrived during the fire, North Pacific will argue that he necessarily acted quickly, and did not have time to discover that the fire was under control. Goodship will likely respond that Harry had five minutes to consult with the firemen and/or discover the safeness of the dock himself. Though a court would likely be convinced that North Pacific already owed a “duty to investigate” to Goodship because of Goodship’s status as a licensee, the reasonable investigation he had a duty to complete as
a result of that duty would have led to his knowledge that the engines were ineffective and the fire was under control. Because those facts were reasonably discoverable, the constructive notice he had of the situation should strengthen the duty he owed to Goodship.

Breach

Harry first breached his duty to Goodship in failing to investigate the situation when he arrived. Though he may not have known that the Goodship’s engines were ineffective because of smoke damage, he would have discovered that fact through a reasonable investigation that would have included nothing more than consulting a firefighter. That discovery would have let him know of the dangerousness of setting the ship loose, which he had a duty to protect Goodship, as a licensee, from. When he set the ship loose, he breached his duty to protect Goodship from the dangerous condition he should have discovered, the malfunctioning engines, as well as the obvious and apparent danger posed by the fire.

Causation

The causation element of a negligence claim has two parts: cause in fact and proximate cause. Cause in fact is demonstrated by the “but-for” requirement. In this case, Goodship will make the obvious argument that, but for Harry’s actions in casting off the ship, the ship may have been damaged, but would have been repairable, and the grain cargo would
have been saved. North Pacific may respond that because the fire was not yet extinguished, it was still possible for it to strengthen and consume the whole ship, so Harry’s actions can not conclusively be said to be the actual cause. This argument will likely fail along the lines of the defendant’s argument in Stubbs v. City of Rochester. The Stubbs defendant posited that there were many ways the plaintiff there could have contracted typhoid fever, and if the plaintiff could not rule out all other possibilities, the defendant was entitled to judgment as a matter of law. The Stubbs court disagreed and found that an injured party need only to establish with reasonable certainty that the defendant’s actions are the direct cause of the injury. In this case, the testimony of the firefighters will help establish that the fire would not have strengthened if they had been able to stay near their firefighting equipment on the dock, and a court would likely find that Harry’s actions were the cause in fact of the Goodship sinking and the cargo being destroyed.

Proximate cause

Proximate cause is usually only a question when something unexpected contributes to the occurrence or severity of an injury. In this case, North Pacific will likely argue that Harry could not have foreseen that the ship would be destroyed by the fire, but Goodship will counter that the ship’s complete destruction need not be foreseeable because it falls under the “extent” element of proximate cause, and per the Wagon Mound case, the extent of harm need not be foreseeable. For proximate cause, only the type of harm and the victim must be foreseeable. In this case, the type of harm, fire, and the victim, Goodship, are
imminently foreseeable. The court will surely find that Harry’s actions were the proximate cause of the sinking ship and the lost cargo.

Damages

Because the court is likely to find that North Pacific’s breach of duty caused the destruction of the Goodship and its cargo, the court will likely award it damages. Compensatory damages are intended to return the injured party to the position they would have been in if the negligent act had not occurred. Here, the value of the grain on board the Goodship is easily calculable, and should be awarded to the ship’s owners. Compensatory damages should not be awarded for the full value of the ship, because it would have been damaged to some degree even if it had not been destroyed. Expert testimony should be presented to the jury to determine the value the boat would have had if Harry had not prevented the firefighters from extinguishing the fire, and that amount should be awarded to Goodship. Goodship will also argue that, per Taylor v. Superior Court, punitive actions are appropriate because Harry consciously disregarded the safety of others—the firefighters and people on nearby docks, like Polly—and punitive damages would discourage such actions in the future. The court will likely award punitive damages in this case, using the Gore factors to determine their severity.

North Pacific v. Goodship

Negligence
Duty

Goodship here had a general duty to North Pacific not to harm the dock or any of its employees.

Breach

North Pacific will likely argue that Goodship’s breach of that duty is apparent in the damage inflicted upon the dock. Goodship will argue that it did not breach because it was not the actor that harmed the dock; instead, it was the firemen who inflicted the damage that North Pacific now sues for.

Causation

North Pacific would likely have little problem proving that Goodship’s fire was the cause in fact of the permanent stains from the firefighting foam. But for the fire, there would have been no firefighting foam, and the stains would not exist on the dock.

The biggest issue with North Pacific’s case is the element of proximate cause. Though the type of harm, stains from firefighting equipment, and the victim, North Pacific, are foreseeable, the firefighters will likely be seen as an intervening cause that breaks the causation chain, much like the rapist in Doe v. Manheimer. The firemen formulated their
own plan to combat the fire, and that plan included the intentional spraying of firefighting foam on the dock. Goodship could not possibly have foreseen the firefighters’ intentional actions, and therefore Goodship will likely be able to defeat North Pacific’s claim on causation grounds. The manner or mechanism that causes an injury usually need not be foreseeable, but there is an exception when there is an intervening intentional action by a third-party actor. North Pacific will argue that the firemen were foreseeable third-party actors in the situation at hand, but it is highly doubtful that the injury they caused to North Pacific was foreseeable. The court will likely find that the extent of their actions that was foreseeable to Goodship was the fact that their firefighting equipment would be used on Goodship itself. With the facts at hand, Goodship had no way of knowing that their plan would be to set up a perimeter of firefighting foam before attacking the fire on the ship.

Damages

If North Pacific were to overcome its substantial difficulty in proving Goodship’s proximate cause, it would be entitled to collect compensatory damages for the cost to refinish or re-cover the stained parts of the dock. Because Goodship’s actions were not made with disregard to the safety of others, and because punitive damages would be unlikely to deter similar future conduct—the loss of their ship and cargo should be enough to do that—punitive damages are unlikely to be awarded.

**Polly’s Damages**
Polly will be unlikely to collect on her damages from Goodship, which had no control over its proximity to her dock, and which can claim Harry’s actions as an intervening cause to break the chain of causation. However, she will likely be able to prove North Pacific’s negligence, and thus collect for her damages.

**Negligence per se**

Polly can use much the same argument as Goodship to argue that Harry’s actions in violating the Uniform Fire Code constitute negligence per se, though she can argue that her case is even stronger on that front. The Code was meant to protect the human life of innocent bystanders even more than the property that is originally on fire. Polly will likely argue that the statute is intended to be used in a densely populated area so that firefighters can stop the fire in one building before it spreads to another and threatens more human life. Similarly, she will argue, it was intended to prevent panicking dock foremen from risking the lives of those on nearby piers. A court will likely find that North Pacific committed negligence per se.

**Negligence**

In the alternative, Polly has a strong negligence case.

**Duty**
North Pacific does not have the same duty to Polly that it has to Goodship because Polly is not a licensee, but North Pacific does still owe her a duty not to harm her.

Breach

Polly will argue that North Pacific breached its duty to her by cutting loose the Goodship while it posed a danger to all bystanders and letting it float aimlessly until it caused an injury to her. North Pacific will argue that it did not breach any duty, but Goodship’s negligence in letting its steam boiler explode was the real cause of her injury.

Causation

Though North Pacific will claim that the damage to Polly was caused by the steam boiler’s explosion, Harry’s actions reach the threshold of the but-for test. If he had not cut loose the Goodship, the harm to Polly would not have occurred.

Polly was a foreseeable victim as the owner of a nearby dock, and the type of damage, fire or explosion, was foreseeable at the time of Harry’s actions. There was no intervening cause to break the chain of causation, so a court will likely find that North Pacific’s actions were the cause of Polly’s damages.

Damages
Because she will likely be found to have satisfied a negligence claim, Polly is entitled to compensatory damages from for medical bills arising out of her burns, as well as the value of the fireworks that were lost in the accident. For the same reasons put forward in Goodship’s claim, she should be found to be entitled to punitive damages, limited by the Gore factors.