

Please put your name here: _____ and return this sheet.

CAUSE IN FACT TORTS QUIZ

Prof. Bell

NOTE: Choose the one best answer to each question, applying the Restatement of Torts (2d) and relevant case law. As on the MBE, you have 1.8 minutes/answer.

Question 1

Vicky carelessly failed to clear ice from the sidewalk in front of her house, in contravention of a local ordinance. Warren, who was carelessly driving while drunk, swerved off the road, onto the icy sidewalk, and into a nearby tree, causing him injuries. In subsequent litigation by Warren against Vicky, the finder of fact determined that the condition of her sidewalk contributed 25% to Warren's accident, his own negligence causing the rest.

- (a) Vicky should be held not liable because she owed no duty to Warren.
- (b) Vicky should be held not liable because she did not cause a substantial amount of the risk suffered by Warren.
- (c) Vicky should be held liable because we cannot be sure whether she caused Warren's injuries and similarly situated defendants might otherwise escape liability.
- (d) Vicky should be held liable for having caused Warren to suffer a 25% loss in his chances of avoiding an accident.

Question 2

The Department of Motor Vehicles negligently failed to put up a sign outside the city limits of Desertville warning motorists that there were no services for another 200 miles. While driving that stretch of road, Barton ran out of gas, tried to walk to the next town, and perished of thirst. Barton's estate sued the Department, and the finder of fact could not establish whether the sign would have convinced Barton to buy fuel. The negligence claim by Barton's estate will:

- (a) Fail because Barton's estate cannot prove that the Department caused his death.
- (b) Fail because Barton was contributorily negligent.
- (c) Succeed because the Department substantially reduced Barton's chances of survival.
- (d) Succeed because otherwise the Department will always escape liability for its negligence in posting such signs.

CAUSE IN FACT TORTS QUIZ--ANSWER KEY

1. This question should remind you of the facts in *New York Central R.R. v. Grimstad*, where the court found the defendant not liable, despite failing to supply a lifesaving device, because other factors predominated in causing the decedent's drowning. We know that a contemporary court in a pure comparative fault jurisdiction might let Warren sue, but we don't have an answer that addresses that possibility.
 - (a) while triable, is not the best answer, because we do not know if the sidewalk is on Vicky's land (and thus do not know if we should treat Warren as a trespasser on her property) and we cannot be too certain whether the local ordinance establishes a duty of Vicky to Warren.
 - (b) is the best answer, as it most closely resembles *Grimstad*.
 - (c) is wrong because this is not plausibly a "recurring miss" kind of case. In contrast to *Gardner* and *Haft*, after all, we know to what degree Vicky caused the injury in question.
 - (d) is wrong because this does not quite resemble the sort of medical cases that typically support "lost chance" claims. The finder of fact did not, after all, say that Vicky denied Warren 25% of a chance of avoiding an accident.

2. This case should remind you of *Gardner* or *Haft*, as it also presents a problem of recurring misses.
 - (a) is wrong because where, as here, we have a recurring miss problem, lack of certainty in the proof of causation is not necessarily a bar to recovery.
 - (b) is almost certainly wrong, given that most jurisdictions have abolished the common law rule that a contributorily negligent plaintiff cannot recover.
 - (c) is wrong because it assumes a fact not in evidence; indeed, it assumes a fact that we know the finder of fact could not determine.
 - (d) is right, as it describes the motivation for imposing liability in recurring miss cases.