Final Exam Memo - Torts Spring 2024

This memo carefully reviews the final exam. The purpose of this memo is to provide you with information that will help you understand why you earned the grade that you earned the final exam and improve your test-taking skills for future classes. This memo is shorter than the memo I provided after your midterm exam because that memo was designed to help you prepare for the final exam.

Included in the memo are sample student answers. These answers are not perfect and each have their flaws, but taken together they represent a set of thoughtful approaches to addressing different exam questions.

For each question on the exam, students were rewarded for identifying the correct legal issues, applying the correct legal rules, and crafting thoughtful, persuasive, credible legal arguments that dealt with nuances, gaps, contradictions, and ambiguities in the law. Extra credit was occasionally awarded to answers that were particularly thoughtful and precise. Even when students identified the incorrect issues or rules, they could earn partial credit by writing strong legal arguments applying those rules.

In accordance with Loyola Law School policies, I graded each exam anonymously. To minimize bias, I also graded each question separately and randomly sorted the exams for each question.

As stated in the class syllabus, the final exam was worth 75% of your grade for the year, and the midterm exam was worth 25% of your grade for the year.

Fact Pattern for Parts I, II, III, and IV

Parts I, II, III, and IV of this exam concern the following fact pattern.

You are a junior attorney at a law firm that represents a potential plaintiff, Lauren Avila.

After working for nearly twenty years as an administrative assistant at “Prankster's Paradise,” a company that designs and manufactures gag or prank toys, Avila retired earlier this year. In the days leading up to her retirement, none of Avila’s coworkers spoke with her about her impending departure or offered her well wishes for the future. Avila had assumed that her coworkers had forgotten that she was retiring. But at the end of her last day of work, as Avila left the office and stepped out into the company parking lot, her coworkers jumped out from behind the parked cars and yelled “Surprise!” Instead of forgetting about her retirement, all of Prankster’s Paradise had been secretly planning a retirement party in the company parking lot, complete with a cotton candy machine, an ice cream truck, and a DJ and dance floor, all paid for by the company.

“I should have known there’d be one last prank!” said Avila. For years, Avila had been the favorite unwitting victim of the “Prankster’s Paradise” toy designers. The designers would test out their latest product ideas by playing pranks on her, including leaving exploding pens on Avila’s desk, staging fake mice and vomit in the kitchen, and giving Avila cans of potato chips that released spring-loaded toy snakes when opened.

Quinton Kidd was a coworker of Avila’s who always took pranks too far. At the party, Kidd was responsible for cutting and serving Avila’s retirement cake. As he offered Avila a slice of cake, she said, “I should know better than to trust a slice of cake from you.” Kidd replied, “You don’t work here anymore. I’m not allowed to prank you.” But the slice of cake that Kidd served Avila was not the same as the slices served to other guests. It was a prank slice of cake called the “Sneak Heat Sheet Cake” that Kidd had purchased from another gag toy company, “Whoopee Works.” The box for the cake contained the following message: “Turn Up the Heat at Your Next Party! Invite your guests to a taste challenge they’ll never forget with Sneak Heat Sheet Cake — where the only thing hotter than the candles is the cake itself! WARNING: Spicy!”

After taking a bite of the slice of cake, Avila’s mouth immediately began to burn because of the spiciness of the cake. “Gotcha!” Kidd yelled, pointing both fingers at Avila. She began to panic as her doctor had advised her to avoid spicy foods because of an underlying heart condition. Concerned that she was not reacting well, Kidd gave Avila a glass of milk that she gulped down immediately. “We were just having some fun with you for old time’s sake,” Kidd explained. As the burning sensation in Avila’s mouth subsided, she said, “I think I’m okay.” She was not. Moments later, she suffered a heart attack, had to be taken by ambulance to the hospital, and spent the next week being treated in the hospital before returning home.

Prankster’s Paradise formally reprimanded Kidd for his behavior, including a written statement by his direct superiors that, “Pranking people outside of official prank testing procedures is neither condoned by this business nor a part of your job.” Investigation into Kidd’s behavior revealed that he had chosen the “Sneak Heat Sheet Cake” because it used the “Posner Peppercorn,” an incredibly hot type of chili pepper that is banned in the State of Loyola because it often carries a bacteria harmful to citrus plants that could decimate the orange and grapefruit trees within the state. Before deciding to use the “Sneak Heat Sheet Cake,” Kidd and his coworkers tested out the prank spicy cake slices offered by other companies. These other companies used milder types of pepper that resulted in less of a spicy reaction.

Avila’s doctors are confident that eating the spicy cake was “the straw that broke the camel’s back” and triggered Avila’s heart attack. But they also point to Avila’s unhealthy lifestyle and eating habits as the primary cause of her heart attack. According to Avila’s doctor, “It is a medical certainty that, absent a radical change in lifestyle and eating habits, Avila would have suffered a heart attack within the next year.”

Avila is now considering her legal options for redress for this harm. A partner at your firm has asked you to write one memo with four different parts (Part I, Part II, Part III, and Part IV of this exam) analyzing different aspects of this case.

Your memo should be organized around the following issues:

I. Intentional torts
II. Negligence
III. Products liability
IV. Miscellaneous issues: workers' compensation, vicarious liability, and insurance

Read through the instructions for each of these parts before you start your memo. Be sure to confine your analysis of issues of workers' compensation, vicarious liability, and insurance to Part IV, even though these issues relate to the claims addressed in Part I, II, and III.

Part I (Question 101)

Evaluate the merits of Avila's potential intentional tort claims against Kidd for assault and battery. Also evaluate any affirmative defenses that Kidd might raise.

Prof. Doyle Commentary

Students needed to analyze the tort claims of assault and battery separately as individual torts. Both claims presented some tricky issues to sort out that required students to be precise and accurate about the elements of each claim. For Avila to have a valid claim against Kidd for assault, it was not enough for Avila to have a reasonable fear or apprehension that Kidd would prank her. Avila needed to have a reasonable fear or apprehension of an imminent harmful or offensive touching. As some students were wise to note, the stronger the argument that Avila was afraid of a harmful touching, the stronger the defense that Kidd can raise that Avila consented to the touching since she chose to eat the slice of cake after saying, "I should know better than to trust a slice of cake from you." For both assault and battery, students had to make the argument that when Kidd served the prank cake to Avila, he intended to cause a harmful contact due to the spice levels of the cake causing a burning reaction in Avila's mouth. The harmful or offensive touching should be defined as the burning in the mouth, not the heart attack, because the fact pattern does not indicate that Kidd acted with the desire/purpose or knowledge with substantial certainty that the cake would give Avila a heart attack. Strong answers used facts from the fact pattern to show that Kidd did have knowledge with substantial certainty that the cake would cause the harmful touch of a burning sensation. Although serving a cake is not as traditional a way of committing a battery as punching someone, strong answers drew analogies from the caselaw to show that the elements of the tort can still be met here. All in all, Avila is much more likely to succeed on a battery claim than an assault claim because she only perceived the harmful touching *after* the harmful touching happened, not when it was imminent. The only potential defense that Kidd could raise would be consent. He would be unlikely to succeed with this defense because although he might be able to prove that Avila consented to being pranked in general, he would have a difficult time proving that Avila consented to the harmful touch of a spicy cake.

Examples of strong student answers:

Battery Claim

In order to establish the intentional tort of battery, the defendant must have committed an intentional act that results in offensive or harmful touching. Intent hinges on the defendant's desire or knowledge with substantial certainty that the harm will result.

Here, Kidd most likely satisfies the intent requirement. Although he may not have necessarily desired to bring about the result, as illustrated by his "gotcha"

and "we were just having some fun for old times sake," insinuating that he wished this to be a prank and immediately trying to rectify the situation with the glass of milk, he most likely committed the act with substantial certainty that harm will result. He had tested other cakes prior and did not choose them because they were not spicy enough. Instead, he chose the "Sneak Heat Sheet Cake" because it was an incredibly hot type of chili. The warning on the cake also dictated that it was "SPICY" and "hotter than candles." Therefore, Kidd was hoping to serve Avila's an extremely spicy cake.

Additionally, harmful touching occurred. By eating the cake, Avila's mouth was burned and she had a heart attack. The cake is considered an extension of Kidd, as a gun's bullet would be for a battery case including a shooting. While the extent of the harmful touching was unexpected (a heart attack), Kidd still committed a harmful touch.

Assault Claim

To succeed on the intentional tort of assault, the defendant must have intentionally willed an act or put the plaintiff in a reasonable fear or apprehension of imminent harmful or offensive touching. Imminency is a requirement that the defendant be put in a state of immediate fear the act will be done, and not some sort of future harm. Generally, assault is applied to claims of failed battery.

Here, intent is much the same as battery. Kidd did desire to serve the cake to Avila and commit the act.

However, assault fails because Avila was not aware of the act imminently. Although she had her suspicions about the nature of the cake before taking a bite due to Kidd's history of taking pranks too far, Kidd reassured her that she did not work there any more and would not be subject to pranks. Additionally, none of the other cakes showed signs of extreme spice. Therefore, Avila was likely not suspecting any imminent harm from the cake, and assault would fail.

Kidd Affirmative Defense

Kidd will most likely employ the defense of consent. If someone partakes in activity that allows for the intentional tort to occur, then they have consented to the resulting harm. Essentially, to one willing, nothing is wrong. However, if certain intentional torts not agreed upon or outside the scope of the activity take place, the defense of consent cannot apply in those cases.

Here, by taking part in a party put on by her "Prankster's Paradise" employer, it is likely that Avila knew this environment would allow for pranks to be directed toward her. She has been subject to this treatment as a significant part of her job, and this is her "surprise" send off party for that specific role. However, it is unlikely Avila consented to the harm of eating the spicy cake as a prank, considering her doctor told her to avoid spicy foods due to her health condition. More specifically, Avila implicitly informed Kidd that she would not be consenting to a prank by mentioning her distrust in Kidd before taking the slice, and not taking the bite until he reassured her it was not a prank and there

was nothing wrong with the cake. Therefore, although Avila consented to eating the cake, she did not consent to the prank or have knowledge there would be resulting harm. As a result, it is likely the affirmative defense will fail.

Additionally, although not as persuasive, Prankster's Paradise had a rule against pranking outside of official procedures. Therefore, consent cannot be given to this kind of behavior outside the realm of the workplace. However, it is possible Avila never knew of these procedures, as she has always been in the role of the person testing the prank and was likely not expecting these occurrences. Therefore, she may have very well been expecting pranks given it is her end of the year party, and the previous argument is more efficient at establishing lack of consent.

—

Assault Issue The issue is whether Avila has a potential claim of assault against Kidd.

Rule A plaintiff will have a claim for assault if the defendant's intentional act put the plaintiff in reasonable fear or apprehension of an imminent harmful or offensive touching by the defendant. Intent is satisfied if a defendant acted with the desire or purpose to produce a certain outcome, or when a defendant acts with substantial certainty that the specific outcome is to occur. Imminent means that the harmful or offensive touching is going to happen soon and not in the future.

Analysis In this case, Avila may argue that Kidd, known to be a prankster serving her a slice of cake put her in immediate apprehension or fear of imminent offensive touching. Avila is unlikely to succeed on a claim for assault because she will have difficulty proving that she was put in fear or apprehension of harmful contact. Avila was not aware that the cake was a spicy prank cake even if she had a feeling Kidd was going to prank her and stated that she should know better than to accept a cake from Kidd. To state a claim for assault a plaintiff must be placed in state of fear or apprehension. Avila was not aware of the imminent pain she would soon experience after taking a bite of the cake.

Conclusion For these reasons, Avila is unlikely to have successful claim against Kidd for Assault.

Battery Issue The issue is whether Avila can state a successful battery claim against Kidd.

Rule A battery is an intentional act by the defendant that resulted in an offensive or harmful touching or contact. Battery requires that a defendant act intentionally or with substantial certainty that resulted in an offensive or harmful touching. The defendant must have acted intentionally, and voluntarily when making contact with the plaintiff. The defendant must have made contact with the plaintiff. Contact and touching extends to items that are so attached to the body. This includes clothing, a hat, and items directly in the plaintiffs grasp. The defendant can also make contact with the plaintiff by throwing an item and it hitting the plaintiff, or even by giving a plaintiff with a nut allergy peanuts.

The plaintiff must have been harmed or offended by the contact made by the defendant.

Analysis In this case, Avila can state a claim for battery against Kidd for giving her a prank cake. Kidd intentionally purchased the "Sneak Heat Sheet Cake" specifically. After Kidd tested out other spicy prank cakes Kidd chose this specific cake because Whoopee Works uses an incredibly spicy chili pepper not used by its competitors. This shows that Kidd voluntarily and intentionally purchased the cake for Avila to consume and find her mouth enflamed. Kidd may argue that he was unaware of Avila's heart condition and instructions and did not intend to cause Avila serious pain. Still, Kidd acted with substantial certainty that by Avila eating the cake her mouth would burn, and could even lead to an upset stomach and other after effects. Harmful contacted resulted from Kidds actions because Avila did in fact eat a bite of the cake and her mouth immediately began to burn. Although Kidd didn't intend on causing a heart attack he did produce the result he was after, Avila being surprised and her mouth burning. Kidd's intent would intend to the ultimate harm caused as it was a result of his intentional actions.

Affirmative Defense

An affirmative defense available for Kidd would be consent. Consent can be explicit or implicit. Implicit consent can be established through the specific acts of the plaintiff where a jury can see they are complicit. In this case, Kidd might argue that Avila consented to being pranked because it is a company practice for the toy designers to test out their products on the staff. Avila implicitly consented to being pranked at work having worked at Prankster Paradise for nearly twenty years and being constantly pranked. If Avila had issue with being pranked by her coworker's at work it is reasonable to conclude that she might not have continued working for a gag toy company. Kidd is unlikely to succeed on a consent claim because his actions exceeded the scope of implied consent. This was a party being held in the parking lot after work hours and it is not a company norm to expend prank testing beyond work. Avila may have consented to being pranked at work for the sake of testing company products but this doesn't necessarily extend to competitor products outside of work. To truly have consent you must have informed consent, meaning Avila was fully aware to what she was consenting which Kidd cannot establish.

Conclusion Although Avila may not state a successful claim for assault, this doesn't impact her claim against Kidd for Battery. Avila can satisfy all of the battery elements, and Kidd is unlikely to succeed on an affirmative defense of consent.

Part II (Question 102)

Evaluate the merits of Avila's negligence claim against Kidd. Also evaluate any affirmative defenses that Kidd might raise.

You are asked to evaluate *only* a negligence claim against Kidd. Do not evaluate any negligence claims against Prankster's Paradise as we have other attorneys analyzing this issue.

Prof. Doyle Commentary

I told you that there would be a question that would require you to evaluate each of the elements of a negligence cause of action. Here it is! Kidd had a duty to Avila because his action of serving a prank spicy cake created a risk of harm of someone eating the cake and suffering an adverse physical reaction to the chili spice. Students could prove that Kidd failed to exercise reasonable care in a variety of ways: foreseeability, the reasonable person standard, custom, and the Hand formula. This was not a case of negligence per se. Although there was a statute that banned the use of the Posner Peppercorn, that statute was in place to protect citrus trees from infection, not to protect people from spicy food. Factual cause could be proven through the doctors' assessment that this was the straw that broke the camel's back. Factual cause only looks to whether the defendant's negligence was necessary for the harm to occur, not whether it was a "primary" cause. Kidd could use the doctor's assessment that Avila was almost certainly going to have a heart attack within the year to reduce the damages awarded, but not to disprove factual cause. Proximate cause for the heart attack is met through the eggshell plaintiff rule. Although the heart attack may have been unforeseeable, the harm of the spicy food burning Avila's mouth was foreseeable, and the heart attack is a consequence of the outsized effect that the initial harm had on a vulnerable plaintiff. The defenses that Kidd could raise are comparative negligence and assumption of risk, neither of which are strong.

Examples of strong student answers:

Negligence is defined as the failure to exercise reasonable care or do something which a "reasonably prudent person would not do." The elements for negligence are (i) duty (ii) breach (iii) causation and (iv) harm. While it may appear that the claim can proceed on a negligence per se basis, because the reason for the Peppercorn's outlaw is to protect citrus plants and not to reduce the harm that Avila suffered, therefore Kidd cannot be found negligent as a matter of law under this theory, but we can still prevail.

Duty: To satisfy duty, the defendant needs to either have created the risk of harm or fall under an affirmative duty exception. Here, the defendant created the the risk of harm to the plaintiff by giving her the slice of cake he knew was not only going to be spicy, but going to be extremely spicy. As such, the affirmative duty exceptions need not apply because he is the creation of the risk of her harm. Extent of the harm is immaterial at this point.

Breach: Kidd breached his duty of reasonable care because the harm (though not the extent) was (i) foreseeable and he (ii) deviated from what a reasonably prudent person would do under the circumstances. Because he failed to use reasonable care in either of those two instances, the harm to the plaintiff occurred and the defendant breached his duty.

Foreseeability: It is foreseeable that giving someone a slice of cake with a pepper that is known to be extremely spicy will result in harm. People have been known to get severely ill and seek medical treatment for burns and tissue damage due to extremely hot peppers -- heart attacks are also a known risk. Even if Kidd was not aware of the extent of the harm that could occur, it is foreseeable that some harm would occur. He did not choose the cake with the lowest spices; he chose the cake with the highest, most spicy ingredients because it was not only foreseeable, he knew that it would produce a negative reaction. It was reckless.

Reasonable Person: Kidd failed to do what a reasonably prudent person would do under the circumstances. A reasonably prudent person would not give someone a spicy cake, let alone an extremely spicy cake, to someone at their going away party. Would a red velvet have been so hard?

Causation: Causation has two elements: factual cause and proximate cause.

Factual Cause: This is satisfied with the "but-for test" -- "But for the defendant's negligence, would the harm to the plaintiff have occurred?" Had he not given her the spicy cake (which he knew to be spicy) the harm would not have occurred. The same question can be asked under the reasonable person standard. Had Kidd acted as a reasonably prudent person the harm would not have occurred. He is the factual cause for both.

Proximate cause: Proximate cause is a policy question revolving around the foreseeability of the harm occurring in proximate time and space to the defendant's actions. Here, it's not a concern because the harm that occurred to Avila was a direct result of Kidd. He will, no doubt, attempt to rebut that the heart attack cuts off the chain of causation because she was already known to have the condition, but under the Eggshell Plaintiff Rule, he must take Avila as he finds her. This means that Avila's heart disease is not a factor that cuts off the proximate cause analysis here, and Kidd will be on the hook for the entire injury. Given that he accelerated the condition, this will be taken into account during the damage award phase (like in Steinhauser), but it does not absolve his liability.

Harm: the harm that was resulted was a legally cognizable harm of personal injury.

We do not know if the State of Loyola would allow a res ipsa argument for this, but it is unlikely to apply as heart attacks (and even heart disease) are not usually caused by negligence.

Possible Defenses

Comparative Negligence: This defense is unlikely to be persuasive, if raised. The defendant cannot be said to have breached a duty of care to herself if she was unaware of the potential harm, especially after being told that she was not going to be pranked. He may span out her duty and say that she had a duty of care to be healthy and take care of herself, but as mentioned above, the Eggshell Plaintiff Rule will preclude this.

Assumption of Risk: There is no known explicit agreement, so the defendant will instead likely use implicit assumption of risk as a complete defense. Given her long time at the company and long years of being an unwitting victim to the pranks, Kidd will argue that she was well aware that a prank might happen and still knowingly went into the transaction, like playing a game of touch football. However, this is unlikely to be persuasive because Avila cannot have implicitly agreed to the type of harm that occurred. The type of harm that occurs from pranks is fright and maybe being grossed out (vomit). She cannot implicitly agree to harm that is unlikely to occur from such a prank. Pranks do not cause heart attacks.

—

To prove a negligence cause of action, there needs to be duty, breach, causation, and harm. Here, the harm is the heart attack that Avila suffered.

Where a defendant's actions create a risk of physical harm, they have a duty to practice reasonable care towards the plaintiff. If the defendant's actions do not create a risk of physical harm, a special relationship, undertaking, non-negligent creation of risk, non-negligent injury, or statute could still make the defendant owe a duty. Here, Kidd's actions did create a risk of physical harm. Serving someone a cake that is made with an incredibly hot type of chili and that has warnings affixed to it about its high spiciness level creates a physical harm to those that may consume the cake. This is why restaurants warn consumers about spiciness and allow customers to adjust the level of spiciness in their dishes because many people cannot tolerate the effects of spicy food.

Reasonable care could be established by the reasonable person standard, foreseeability, custom, statute, or the Hand formula. The reasonable person standard is an objective standard that asks what a reasonably prudent person in the defendants position would have done under the circumstances. Foreseeability asks if the defendant took reasonable precautions to guard against foreseeable dangers, but not extraordinary circumstances. Here, a reasonably prudent person would have asked their coworker if they had any food allergies or sensitivities, as it is very common nowadays for people to have very specific diets that exclude many foods. Furthermore, a reasonably prudent person would not have chosen to feed their coworker (after failing to ask them about allergies/food sensitivities) a food that contained an "incredibly hot type of chili" when there were several alternatives that were milder but still had a spicy effect. It is foreseeable that feeding someone an incredibly spicy food

without asking about their food allergies/sensitivities could result in a negative physical reaction. Therefore, because Kidd failed to ask Avila if she had food sensitivities/allergies and proceeded to feed her an extremely spicy food, he failed to practice reasonable care and breached a duty to Avila.

Factual cause asks whether the defendant's negligence was the but for cause of the harm. Here, but for defendant's negligence of feeding Avila an extremely spicy cake, she would not have suffered a heart attack. Kidd may argue that Avila's doctors said Avila would likely have suffered a heart attack anyways within the next year due to her unhealthy lifestyle and eating habits, but that does not bar liability for Kidd due to the eggshell plaintiff rule and the reasoning in Steinhauser v Hertz Corp. The eggshell plaintiff rule holds that a defendant takes the plaintiff as they are. In Steinhauser v Hertz corp, the court held that where the defendant sped up the manifestation/onset of schizophrenia even though it was bound to manifest anyways, the defendant was still the legal cause of the schizophrenia even though they were technically not the but for cause. Similarly, here, Kidd took Avila as she was, so even if she would have eventually suffered a heart attack, the fact that by feeding her the cake Kidd sped up the onset of the heart attack is enough to say that he caused it. Foreseeability is a touchstone for proving proximate cause and in re Polemis, the court demonstrates that the way in which we define the danger of the harm determines whether we can find proximate cause. Here, what made Kidd's actions negligent was that feeding someone extremely spicy food could cause a physical negative reaction and that is precisely what happened. We do not have to focus on the extent of the harm, a heart attack, because what made the actions negligent is exactly the harm that occurred.

Therefore, because the elements of duty, breach, causation, and harm are met, it is likely that Avila could succeed on a negligence claim against Kidd.

Kidd may argue the affirmative defense of assumption of risk and comparative negligence. Kidd will argue that Avila assumed the risk of eating the cake because she acknowledged that she should not trust Kidd to feed her, and proceeded to eat the cake anyways. However, when evaluating the defense of assumption of risk, we want to ask what types of risks the plaintiff assumed. If a plaintiff did not assume that specific type of risk that lead to their harm, then the assumption of risk defense cannot apply. Here, Avila did not assume the risk of suffering a heart attack and therefore the assumption of risk defense likely fails. Comparative negligence defense fails because although Avila had a duty to protect herself from harm, a reasonable person in her position would not assume her coworkers would feed an incredibly spicy food without asking her about her food sensitivities.

—

To win on a negligence claim, the plaintiff must prove duty, breach, causation and harm. First we will look at duty. This is normally a straight forward inquiry where we must ask: did the defendant's actions create a risk of physical harm?

Here the answer is likely yes, by serving a cake that increased the risk that the plaintiff would suffer any kind of negative health effect.

A defendant has breached their duty when they fail to exercise reasonable care. Reasonable care can be determined by the reaonable person standard, forseeability, or the hand formula. The reasonable person is an objective standard that illustrates reasonable care. We ask: would a reasonable person serve someone cake contianing "posner peppercorn?" The answer here would likely be no. A reasonable person would liley not serve a friend a cake that contains such an extreme spice. However, it would be helpful to know whether this cake is sold often/commonly used to prank people and how harmful eating it generally is. Breach is likely met here.

The defendants negligence must be the factual and proximate cause of the plaintiff's harm. Loyola follows the "But for test". This tests asks "but for the defendant's negligence, would the harm to the plaintiff have occurred?" The question ordinarily looks at whether the defendant's actions were necessary for the harm to occur. Here the analysis is "but for the defendants negligence in serving a cake containing "posner peppercorn" would the plaintiff's heart attack have occurred?" The answer here is no. This is established by the medical testimony that that eating the spicy cake "was the straw that broke the camel's back" and triggered Avila's heart attack. Therefore, factual causation is met.

Proximate cause is a policy determination that analyzes the question of how far from the defendant's actions will we continue to hold them liable. Proximate cause is very standard like, but one of the bright-line rules is the eggshell plaintiff rule. Under the eggshell plaintiff rule the defendant is fully liable for all damages resulting from their negligence, even if the plaintiff suffered injuries that were significantly greater than what an ordinary individual would suffer. The defendant takes the victim as they find them, and any preexisting conditions do not absolve the defendant of liability. The facts here are similar to the Benn case, where the defendant negligently crashed into the plaintiff and caused him injuries, which resulted in him having a heart attack 6 days later. While her unhealthy lifestyle may have increased the chance of her heart attack, Kidd is still the proximate cause of the harm. The extent of the injury doesn't matter for whether the defendant will be found to be the proximate cause, BUT extent of the injury does matter for damges. As the testimony indicates that "avila would have suffered a heart attack within the next year" the evidence of Avila's unhealthy lifestyle could be introduced to reduce the damage award. Kidd would only need to pay for the amount of days that he shortened the plaintiff's life. Additionally, it doesn't appear there are any intervening causes that could cut of the defendant's liability here.

The element of harm is clearly met, as this was personal injury/death.

There could be a potential argument for negligence per se, if buying/having foods CONTAINING "posner peppercorn" in loyola is prevented by a statute. The conditions for negligence per se are that the defendant violated a statute designed to prevent against the kind of harm that occurred AND the plaintiff

was within the class of persons the statute was designed to protect. However, the argument here is weak because the statute is likely only meant to protect tree destruction from bacteria, rather than the death or injury from spice.

Defenses:

Defenses to negligence include assumption of risk and comparative negligence. Here, it is unlikely that either would succeed. For explicit assumption of risk, the plaintiff must sign a waiver or contract releasing liability. This did not occur here. For implicit assumption of risk, the plaintiff must knowingly encounter a danger. Without her seeing the box, the best argument that she voluntarily assumed a risk (implicit assumption of risk) is that she said "i should know better than to trust a slice of cake from you." But this defense would likely be hindered by the fact that Kidd reassured her that he was not going to prank her because she didn't work there anymore. At that point, she may have believed she was not agreeing to any danger, despite the fact that she had awareness of pranks being played on her traditionally as an employee.

Comparative negligence here is unlikely to succeed for the same reasons as assumption of risk would fail. Although duty, breach, and factual cause would be met, it would be difficult to prove that the plaintiff was the proximate cause of her injuries, considering the defendant's primary involvement.

Part III (Question 103)

Evaluate the merits of Avila's products liability claim against Whoopee Works under a design defect theory. Also evaluate any affirmative defenses that Whoopee Works might raise.

You are asked to evaluate *only* a design defect claim. Do not analyze potential negligence claims or potential products liability claims related to a manufacturing defect or failure to warn.

Prof. Doyle Commentary

There are two tests for proving a design defect: the consumer expectations test and the excessive preventable danger test. The excessive preventable danger test is always available, but the consumer expectations test is not available for sufficiently complex products (and is not available at all in some jurisdictions). The consumer expectations test is bit of an odd fit for our fact pattern given that the product is a prank product designed to surprise the plaintiff and not conform to their expectations. Strong answers did their best to wrestle with what a consumer would and would not expect about the safety of a prank cake.

Under the excessive preventable danger test, a plaintiff usually must prove that there was a reasonable alternative design for the product. Here, the fact pattern supplied reasonable alternative designs in the other prank heat cakes on the market. Whoopee Works may argue that this is not a reasonable alternative because what makes the Sneak Heat Sheet Cake a signature product is its excessive spiciness. But even so, under the excessive preventable danger tests, the excessive spiciness must provide some utility that outweighs its danger. A manufacturer can't waive away a design defect claim by asserting that their product is dangerous by design. Strong answers argued that the danger of the design was significant and the added utility of the design was not. It was worth noting that warning labels cannot defeat a design defect claim.

Factual cause was a sneaky issue here. Avila needs to prove that the defect in the cake's design was a but-for cause of her injury. Even if Whoopee Works had adopted the reasonable alternative design of a less spicy cake, she may have still suffered a heart attack as a result of eating a less spicy cake. Proximate cause can be met because it is foreseeable that the cake would be given to an unwitting victim given that it is sold as a prank. Kidd's negligence would not be an intervening cause because the harm that befell Avila was the harm that made the design defective.

Whoopee Works could raise defenses of comparative negligence and assumption of risk, but those would fail for similar reasons as the previous question.

.

Examples of strong student answers:

Design defect claims refer to claims that a product was defectively designed across the product line. Loyola is a jurisdiction where strict liability governs products liability law, and Avila is required to prove that the Sheet Cake product was defectively designed to prevail on this claim. If successful, Whoopee Works can be held strictly liable for the harm their product caused.

Two tests are used to prove the 'defect' requirement of a design defect claim. The Consumer Expectations Test asks whether a product deviates from the average consumer's reasonable expectations about it. This test is not available for complex products where consumers don't have sufficient knowledge of the product that would inform their expectations. The box for the cake includes a general warning that it is spicy and the colloquial idea that 'the only thing hotter than the candles is the cake itself!' It is reasonable to argue that a consumer who purchases a product like the Heat Sheet Cake expects it to cause some degree of spiciness, and the writing on the box informs that consumers expectations as such. However, it's reasonable to assume that a product that is capable of sending a user into a panic, and subsequent heart attack do not fall within the expectations of a product sold as a prank toy.

The Excessive Preventable Danger test looks to see whether there was a 'reasonable alternative design' for a product that the manufacturer could have pursued. If the alternate design does not currently exist on the market, a plaintiff can bring in expert witness to help establish the alternative design. Avila could point to the other prank spicy cakes offered by other companies that produce milder reactions, like the ones Kidd and coworkers had tested out, presumably without any banned ingredients. Further, two common issues with the reasonable design test ask when an alternate design is simply a different product altogether, as well as when danger is inherent to a product, and not a defect of it. Avila could argue that switching out the pepper to a milder ingredient could come at no additional cost to Whoopee Works, and would allow it to remain the same product capable of the same prank/spicy factor, just at a decreased risk of harm. Thus, there was a reasonable alternative design for the product available to Whoopee Works, and they did not pursue it and can therefore be liable for her injury.

However, it may be even more convincing for Avila to argue that the risks posed by the Heat Sheet Cake greatly outweigh the benefits it provides society. Although the facts do not specify where the Heat Cake is currently sold, if it is sold in a toy story the risk of a child using it assuming its safe for pranks could be enormous. The risk of this product being used by vulnerable children under the guise that it's a normal toy are enormous. The only real benefit this product serves society is the potential for a small laugh from partaking in a prank. Our tort law system is interested in encouraging people to take reasonable precautions in order to achieve optimal deterrence. Thus, the risk of harm from the product outweighs the minimal benefit. Additionally, the underlying principles of product liability law recognizes the asymmetry of knowledge

between consumers and product manufacturers. Thus Avila may not have to demonstrate a reasonable alternative design, and can instead show that our tort law goals point to Whoopee Works being liable for Avila's injuries, as it disfavors these sorts of products from being sold.

For causation, Avila needs to prove that Whoopee Works' actions were the factual cause of her injury. But for Whoopee Works designing a product capable of this degree of harm, Avila would not have suffered the heart attack exactly when she did. Avila may then argue that Whoopee Works' negligence in selling this product is also the proximate cause of her injury. It is foreseeable that selling a product that's capable of producing harm and contains a banned ingredient consumers aren't familiar with could result in harm when advertising it as a simple prank toy. What made Whoopee Works' actions negligent in the first place is the risk that came to pass - harm to a product user.

The harm that Avila experienced was a personal injury, which is a legally cognizable harm.

Whoopee Works may try to argue for the defense of assumption of risk. In order for implied assumption of risk to bar Avila from recovering from Whoopee Works for her injury, Avila would have had to have been aware of the risks associated with eating the cake, and chosen to partake anyways. (Steeplechase). Avila can argue that she was unaware of the risks associated with this product as she was not informed, and therefore can not be bound by it. Whoopee Works can argue that Avila was also comparatively negligent for not reviewing all the risks posed by partaking in an activity beforehand, especially with knowledge of her underlying health conditions.

—

Defect

Avila might have a case for products liability under a design defect theory. To succeed under a product liability claim a plaintiff must show that the product was defective and that it caused the harm suffered. To establish a design defect theory, a plaintiff must use either the consumer expectation test or the excessive preventable danger test to show that it was defective. We will examine the product here using the excessive preventable danger test. This test is a risk-utility balancing test that weighs factors such as the inherent danger of the design, the likelihood of harm from the design, and the feasibility of alternative designs. The defendant may raise a defense that they issued warnings or that the Avila was comparatively negligent, but these are unlikely to succeed.

The company's design was likely defective. The extremely spicy chilli pepper was inherently dangerous. The problem here is that the cake is being sold as a prank item, so the people who consume it are usually unwitting or unwilling consumers who had no opportunity to familiarize themselves with the product or its dangers, and because of their lack of knowledge the likelihood of harm increases significantly. It would be different if it was being sold as an ordinary cake to people who are getting it for themselves. Further, there is a reasonable

alternative design on the market that uses milder chillier peppers that pose a far smaller risk than the incredibly hot chilli peppers currently being incorporated into the product. The company may argue that its customers seek out their cakes because they are so unusually spicy, but this does not excuse the excessive danger posed by the product. Their customers can still get the satisfaction of their pranks through milder chilli peppers. I doubt most of their customers want to cause serious discomfort or pain to their victims.

Causation

Avilia might be able to establish factual cause. There is a big question for factual cause here under a design defect theory. There is some uncertainty as to whether the product would or would not have caused Avila's heart attack if it had the milder peppers incorporated into its design, considering what her doctors had recommended. Therefore it is tough to say that the but for plaintiff's defective design, the heart attack would not have occurred. We might be able to establish factual cause using Zuchowicz, where the plaintiff took nearly double the recommended dosage and had some kind of health condition. There the court found that the type of injury that occurred was precisely the kind of harm that made the act negligent in the first place. However, this a products liability case, not negligence, so I'm uncertain whether that applies here. Overall, I think this is a question that needs to further fact finding.

Avilia can likely establish proximate cause. It is foreseeable that an extraordinarily spicy pepper being eaten by unwitting prank victims would result in a health condition or adverse reaction, even if the precise manner or extent in which it happened were not known. However, using the eggshell plaintiff rule, a defendant must take a victim as they come.

Comparative negligence

Avilia was likely not comparatively negligent. To show comparative negligence a defendant must show that a plaintiff had a duty, breached it, caused her harm. Here, Avilia had a duty to protect herself. The company might argue that she breached that duty and did not act reasonably when she chose to trust Kidd despite his history of pranking her. However, his assertions that he would not prank her on her last day may have seen genuine to her given it was her last day and people usually want to go out on positive terms when a long time coworker departs. They may also argue that they installed a warning on the box warning of its spiciness. However, these warnings are not effective because the products are primarily being eaten by unwary customers who are clearly not actually being warned. Avilia was the factual cause because but not for her eating the cake, she would not have had the heart attack when she did. However, she was likely not the proximate cause of her own harm. She had no idea what was in the cake and had no way to know that it contained spicy ingredients. Therefore, it seems unlikely that a jury will find her comparatively negligent.

Assumption of risk

Avilia did not assume the risk of eating a spicy cake. Whoopee Works may say she assumed the risk by agreeing to eat the cake, but this will not be an effective as a defense. Unlike the flopper case, where the defendant was assuming known and obvious dangers, the only risk she assumed were the risks inherent in eating an ordinary cake.

Conclusion

If Avilia can establish the issue of factual cause more substantially, she will likely be successful on her product liability claim.

Part IV (Question 104)

Please resolve the following miscellaneous issues:

Does workers' compensation prevent Avila from being able to utilize the tort system at all?

If Kidd is found liable, can Avila hold Prankster's Paradise vicariously liable for Kidd's tortious conduct?

If Prankster's Paradise can be held vicariously liable, can Avila introduce into evidence the fact that Prankster's Paradise has third-party liability insurance to show the jury that Prankster's Paradise's insurance company would be responsible for paying damages and that a ruling for Avila would not financially devastate Prankster's Paradise?

Prof. Doyle Commentary

This was a multi-part question that had students address three distinct issues: workers' compensation, vicarious liability, and the role of insurance in the tort system.

There were multiple workers' compensation issues. One issue was whether Avila was still within the scope of employment at the time of her injury. If she was, then workers' compensation is her exclusive remedy and she cannot sue her employer or coworker for negligence. This is a borderline case. Avila had technically finished her last day of work, but she still hadn't left company property and was attending a company function, her retirement party. Different states have different rules about whether workers' compensation applies when someone is injured in a parking lot arriving at or leaving from work, so students could argue both sides. Another issue was whether Avila could use the tort system for tort claims other than negligence. Even if workers' compensation applied, workers' compensation would not preclude Avila from bringing an intentional tort claim against Kidd or a products liability claim against Whoopee Works.

For vicarious liability, students had to analyze whether the employee was acting within the scope of employment. There was a lot to consider here! The most important considerations were whether this was the work Kidd was hired to perform and whether he was acting at all in his employer's interest or just out of his own personal interest. It doesn't help Avila that the product that Kidd was testing was a product from another prank company. But if Prankster's Paradise encouraged an environment of pranking (perhaps to spur the creativity of its prank designers), then Avila could argue that Kidd was more like the bartender in Sage Club v. Hunt than the truck driver in Kuehn v. Inter-city Freight. The written reprimand that Kidd received for acting outside the scope of his employment is unlikely to be dispositive because it was written after the plaintiff was injured. Prankster's Paradise may have reprimanded Kidd for the very purpose of trying to prevent the company from being held vicariously liable.

For insurance, Avila cannot introduce evidence of Prankster's Paradise's liability insurance for the purpose of encouraging the jury to award a higher damages award because the prank company's insurance company would be paying out, not the prank company itself. This evidence could certainly affect the jury's assessment of damages, but the tort system does not want juries to be swayed by these kinds of facts because they are misleading and prejudicial. A compensatory damages award should be set at the amount that would restore the plaintiff to the position they would be in had the injury not occurred. Whether the defendant has liability insurance may affect the defendant's ability to pay damages, but it should not affect the amount of damages that the jury awards. There are limited circumstances in which the existence of insurance can play an explicit role in tort litigation — such as the prevalence of liability insurance as a factor within the Rowland factors — but this is not one of those circumstances.

Examples of strong student answers:

Does Worker's Compensation Apply?

Worker's Compensation does not prevent Avila from being able to utilize the tort system at all. Once an employee suffers an injury under their scope of employment, tort liability vanishes for the employee in attempting to get damages from their employer, however they may still be able to seek damages from third parties.

Here, given that Avila has retired and left the building of her employment, presumably once the work day has ended, Avila very well still can pursue a non worker's compensation tort claim against her employer given that she is no longer within her scope of employment. Additionally, even if worker's compensation did apply and it is determined that Avila is still operating under her scope of employment, there is nothing stopping Avila from pursuing damages from third parties, such as from Whoopee Works.

Can Avila Hold Prankster's Paradise Vicariously Liable?

In order to hold Prankster's Paradise vicariously liable for Kidd's tortious conduct Avila must demonstrate that Kidd committed his tortious act under his scope of employment. In Christen v. Swensen, the court presented a 3 factor test to determine whether an employee has committed a tortious act while under his scope of employment. The test from this opinion outlines that courts must consider (1) whether the conduct was of the general kind that the employee was hired to perform, and not relating to a wholly personal matter; (2) whether the conduct occured substantially within the time and spatial boundaries of their employment; (3) whether the conduct was motivated, at least in part, to serve the employers interest. It must be noted that this is not an elements test, rather are just factors that courts should consider when deciding on the matter of scope of employment.

Here, it is likely that Kidd committed his tortious act while under his scope of employment. In respect to the first prong of the test, although it is true that its unlikely he was hired for the sole purpose of putting on retirement parties for his coworkers, volunteering and throwing on work sponosred events can very well be the kind of conduct that an employee is expected to perform while working at a place of business. Whats more it is stated that "Kidd was responsible for cutting and serving" and given that this event was all paid for by the company it is likely that such a request was ordered from a superior. Additioanlly, the conduct of cutting cake at a work party is not a "wholly personal matter", rather Kidd is doing this task for the purpose of the work event and not for his own personal pleasure. In respect to prong 2 it is without question that the conduct took place well within the spatial boundaries of his employment given that the party took place in the work place parking lot, an area that is undoubtably apart of the busniess' place of work. However, the time element is of only concern here for this event could have been taking place after working hours. In respect to prong three it is clear that Kidd's conduct was motivated to serve the employer's interest. Kidd was at the loaction he was, doing the cake cutting, all for the purpose of serving the employers interest of throwing a work place party for his coworker, it is unlikely that Kidd would be doing this task otherwise if he was not obliged by his employer to do so. Taken all these factors as a whole it is likely that Kidd committed his tortious act while under his scope of employment and therefore Avila can likely hold the employer responsible.

Can Avila Submit Insurance Evidence?

Avila cannot submit evidence that Prankster's Paradise has third party liability insurance to show the jury that Prankster's Paradise insurance company would be responsible for paying damages due to the collateral source rule of insurance. The collateral source rule is a rule of both evidence and damages, in that it bars a party from submitting evidence that a party's damages is being covered through a collateral source, such as through a insurance company, and bars a party from discounting the damages that they owe through the collateral sources that are available to the plaintiff. Therefore, given this collateral course rule as it relates to insurance bars the submission of evidence as it relates to collateral sources, Avila will likely be barred from submitting evidence to the jury relating to Prankster's Paradise third party insurance.

—

1. Worker's compensation may prevent Avila from being able to ultitze the tort system though the line is blurry. She is at her retirement party and she had already concluded her final day of work so one could argue that she is no longer employed and workers comp would not apply at all. However the party was paid for by her employer and occurred at her place of work's parking lot, if the second situation applies then Avila is no longer able to sue her employer for negligence or a fellow employee unless in intentional torts, but she can still sue the 3rd party manufacturer. Workers compensation allows workers injured

while at work in the scope of the job to receive comp for medical, and if disabling for a percent of wages, vocational rehab, and survivor benefits. Here, under workers comp she could have her medical expenses such as the hospital stay covered and any medical in the future from this harm. A defense to a workers comp claim is that that the injury was not within the scope of work. Arguably, that could be the case here because although funded by her work, and on work property the party was not a scope of her job description. An injury at work is not enough, and she was no longer an employee since it was after the hours of her last day. If workers comp does apply she is barred from suing her employer and holding them vicariously liable.

2. If worker's comp does not apply Avila may be able hold Pranksters Paradise vicariously liable for Kidds negligence. Vicarious liability allows an employer to be on the hook for another's negligence. According to the Christensen test an employer can be liable if the employee (1) was performing conduct that they were generally hired to do (2) was within the time and spatial restraint of their job (3) was acting in the interests of the employer. (1) Kidd was performing conduct he was generally hired to do in that he worked for a gag factory and it was commonplace to test products on their coworkers. This cake was not malicious, it too was a prank and pranking was general conduct he usually did. However the employer may argue that this like Sage Hunt where an employee was acting in their own interests by taking job practice too far, here taking the pranking too far. One could also argue that this is like Miller in that Kidd was doing this prank for his own happiness not as normal job conduct. (2) They perhaps were within the scope and time of their employment. It was on their company's parking lot and paid for by their company, however it was after hours and in the parking lot not in the gag facotry. Regardless this element is likley satsifed bacause it was a company event similar to where Christensen where an employee was being paid on their lunch break . (3) This element may be where the claim fails because Prankster's claimed and made a statement that "pranking people outside of prank testing procedure is not part of your job." Although pranking generally is allowed as part of his job, off duty pranking was not. This case is similar to Sage Hunt in that the employee was performing conduct that somewhat was in employers interests, a bartender removing surly patrons v a gag worker playing a prank, but both employees take it too far going as far as potentially battery and assault. At that point courts hold that these employees are not serving employers interests and their actions are entirely their own. Thus vicarious liability will likely fail.

3. Avila cannot introduce evidence that that Prankster's has 3rd party insurance because of the collateral source rule. As introduced in Kenney a party cannot bring evidence of discounts or compensation to reduce or increase the total damages that the tortfeasor has to pay. To maintain fairness in the tort system for both plainitff's and defendants as well as maintain corrective justice this evidence cannot be brought regardless of whether is would aid to show that employers are best suited to bear the responsibiity of harm. If vicariously liable

the damages award should reflect the total harm, rather than any gifts or discounts although this may raise fears of deterrence. This evidence is irrelevant.

Part V (Question 105) Essay Question

You are a wise Loyola trial judge with experience managing complex tort cases. Policymakers in Loyola are considering a set of reforms to tort law in the state entitled "The Equitable and Certain Compensation Act" (ECCA). You have been asked to advise the group that oversees the drafting of the proposal.

The proposal is currently in the earliest stages of development and a rough draft of the key provisions have been cobbled together for experts in the field to consider. Here are some features of the current plan:

- **Economic Damages Multiplier**: Jury awards of economic damages would be recalculated according to a formula that would increase awards for low-income plaintiffs and decrease awards for high-income plaintiffs. For plaintiffs earning below the median state income, economic damages would be calculated using a multiplier to increase a jury's award of economic damages proportionally to the plaintiff's economic disadvantage. For plaintiffs earning above the median state income, economic damages would be calculated using a multiplier to reduce a jury's award of economic damages proportionally to the plaintiff's economic advantage. The multiplier would be capped. Lower income plaintiffs could receive no more than twice as much in economic damages as the jury's initial award. Higher income plaintiffs could receive no less than half as much in economic damages as the jury's initial award.
- **Non-Economic Damages Schedule**: The amount of money that plaintiffs can recover for non-economic damages would be determined by a statutory schedule rather than being determined on a case-by-case basis by individual juries. A jury would still decide whether a plaintiff should be compensated for a particular non-economic harm, but the compensation that the plaintiff would receive for that harm would be set by a predetermined schedule. Under the schedule, the amount of money awarded for a particular harm would reflect the average noneconomic damages award for that kind of harm that plaintiffs in Loyola have been awarded over the ten years prior to the schedule being enacted. There would also be a cap on noneconomic damages. For an individual case, awards of noneconomic damages could not exceed one million dollars. The award amounts and damages cap would increase over time based on the rate of inflation.

You have been asked to speak at a roundtable discussion of the current plan. Along with other guests — including judges, attorneys, and law professors — you are expected to share your thoughts on the plan's strengths, weaknesses, and your most important suggestions for revision. Enlighten your audience about how these reforms relate to tort law's underlying values, what the likely consequences of these reforms would be, and what you think the best policy would be.

Prof. Doyle Commentary

This policy question gave students the opportunity to assess the strengths and weaknesses of two proposed policy reforms and to offer their own alternative proposals. This was a chance to go beyond issue spotting and assess a set of policies in light of tort law's underlying, conflicting values, including corrective justice, optimal deterrence, fairness, efficiency, sensitivity to power imbalances, distributive justice, and so on.

The economic damages multiplier is a wacky idea, and not one that we can expect any jurisdiction in the United States to adopt. But it was important to analyze how it does and does not align with different goals of tort law. Corrective justice is thrown out the window as some plaintiffs will be overcompensated and some undercompensated relative to their loss. Deterrence is a mixed bag. Potential tortfeasors may be less encouraged to harm the poor and more encouraged to harm the rich. This may be unfair. But our current system is also unfair because it encourages potential tortfeasors to harm the poor over the rich because damages awards for economic loss will be less for plaintiffs with less money and lower income. The multiplier is a blunt instrument, considering only wages and not other economic information, which could result in unfair outcomes in many cases. If adopted as state law, the proposal would raise all kinds of due process concerns. Even though BMW v. Gore and State Farm v. Campbell were about punitive damages, the constitutional due process concerns for defendants would apply here as well.

The non-economic damages schedule would import into tort law compensation funds' process for calculating many types of damages. The benefits are that it would be a rule-like system in which parties could have firm expectations of potential damages, which would encourage settlement and reduce administrative and litigation costs. Because jury awards for non-economic damages are inherently arbitrary, it would reduce the lottery-like nature of jury awards for pain and suffering or loss of enjoyment. Because the amounts awarded would reflect the averages from recent years, this would ensure that plaintiffs as a group were adequately compensated, while reducing the number of people who received either windfalls or nothing at all. But the reforms would come at a cost. A rule-like system is not sensitive to the circumstances of a particular case, which means that some plaintiffs would be overcompensated and others undercompensated. The reform would take away a central role of the jury in American law. The damages cap may result in suboptimal deterrence for noneconomic harms. And the policy could prevent tort law from continuing to evolve in a creative common law fashion because non-economic damages would be fixed going forward.

Examples of strong student answers:

One of the main concerns in tort law, regarding economic damages like compensatory damages, is to make the plaintiff whole. Making the plaintiff whole emphasizes our responsibility as a society, that when we cause harm to

someone else, accidental, or intentional, to come together to attempt to make things right. In a system where economic damages awards would be recalculated according to a formula that would increase awards for low-income plaintiffs and decrease awards for high-income plaintiffs, we fall short of this principle. If economic damages like compensatory damages are apportioned based on income instead of damage done to the plaintiff, we run the risk of not making the plaintiff whole again. Additionally, in a system where economic damages are awarded based on income as the deciding class factor, it fails to recognize and think about potential plaintiffs who earn above the median state income, but who don't actually have a lot of money because perhaps they are paying of student loans, medical debt, credit card debt, rent, mortgage, etc. People can have higher than median incomes yet still live paycheck to paycheck, and if this multiplier is used to calculate damages, they get screwed over. The torts system inspires the common person to take on wealthy individuals or entities. This new system almost works the opposite where it actually deters wealthier plaintiffs from seeking recovery because they will not get as much compensation for the harm they have suffered. This goes to my earlier point about not being made whole again.

Jurisdiction, equity, and deterrence are all key principles and factors that are considered in the torts system when deciding whether or not a punitive damages award is excessive. While this new schedule for non-economic damages (and also economic damages) strives toward class equity, I fear it misses the mark in real world application. Part of non-economic damages like pain and suffering, loss of enjoyment, punitive damages is that they are subjective, not objective. To make them objective would be to take away the nuance from plaintiffs who have experienced horrible loss, and give them a predetermined number for how much their pain is worth. Additionally, if non-economic damages are awarded on a statutory schedule, it takes away the opportunity to punish defendants who have committed minor crimes, serious injuries, and have created public safety concerns. If these awards are on a statutory schedule, they will not be adequately deterred from committing some of the most egregious misconduct, even if there are high statutory caps.

My suggestion for this new system would be to have compensatory damages be calculated the way they are in the torts system. I think that making the plaintiff whole again can and should be the number one priority of any compensation system. In regard to non-economic damages, like pain and suffering, I think that even though the jury calculation system isn't perfect, I think that real people instead of a chart or formula, coming together to decide what these particular non-economic damages mean, is very important to making the plaintiff whole again, and having empathy for the people in our community. However, I think it would be interesting to examine what punitive damages would look like if a formula/multiplier/what-not was used to proportion the economic impact of these damages based on the respective defendant. If a defendant is tremendously wealthy and is found liable of the same misconduct as a poorer defendant, make the punitive damages amount that they each have

to pay proportional. So if it would be the equivalent a $100 impact on the poorer defendant, and the richer defendant is 10 times richer than them, then the richer defendant owes $1,000 in punitive damages.

—

There's no doubt about it: damages have done damage. For centuries, biased judgments in tort law have not only reflected, but also perpetuated social inequalities. When calculating damages, lives are reduced to mere calculations and our tort system has put certain prices on certain kinds of life. When calculating damages, race for example has immeasurable effects. Juries and judges harbor biases that have even crept into what should be neutral mathematical formulas. For example, when calculating damages, black lives have not been valued as much as white lives. Such damages are made on the average white man or black man of this age with this level education. It doesn't take into account the person. It only accounts for systems that are already inequitable and are only based on historic past calculations, creating a horrific positive feedback loop of inequality. This not only hurts the person at hand, but whole groups of people moving forward into the future. Loyolan policymakers have drafted "The Equitable and Certain Compensation Act" in hopes to reform this inequitable system.

The first proposal drawn up was the Economic Damages Multiplier. It proposes re-calculating jury awards of economic damages according to plaintiffs' income levels. Damages for high-income plaintiffs would be reduced by no less than half as much economic damages as the initial award. Low income plaintiffs could have their damages multiplied by as much as two. This policy is well-meaning and intends to distribute wealth, while setting meaningful boundaries. It's a sound check on the single judgement rule and in doing so prioritizes equity over efficiency, as it involves a second review.

However, the tort system wasn't designed to take on notions of wealth distribution. This is better left to other governmental bodies to improve. The tort system currently operates in a neo-liberal fashion (though, who is to say we cannot change this) and certain factions could regard this policy as "punishing" high-earners simply for being high earners, while the tort system isn't intended to be punitive. Furthermore, the system is designed to make the plaintiff whole: it isn't designed to make them receive more or less than they're entitled to in relation to injury.

Nevertheless, this doesn't mean we should abandon damages reform in the world of torts. No, instead, we should reform it in the ways we can like with the jury: a very reason why damages are inequitable in the first place. Instead of interviews on the stand, they should take cognitive tests to unveil subconscious biases that may impact awards. Furthermore, formulas in determining how much one might make in their life based on their race, ethnicity, gender, and more must be wholly uprooted.

The second provision, the Non-Economic Damages Schedule addresses non-pecuniary damages which compensate for the Plaintiff's pain and suffering and loss of enjoyment of life: damages that are in many ways, immeasurable. How do you even begin to put a price tag debilitating pain, lost serendipity, or even a life well lived? There's really no answer. The current system we have allows cases to proceed on a case by case, individualized basis and results in a particularized damages award. The system is emblematic of our progressive culture. It may not be efficient, but it provides agency and allows creativity in pleadings to ailing plaintiffs. As, it should. To adopt the ECCA's particular policy on non-economic damages, the Nono-Economic Damages Schedule, would be a regression in the name of efficiency. This schedule would match particular non-economic injuries from harm up with the average noneconomic damages award for that kind of harm from the past 10 years. Such damages would be adjusted to reflect appropriate inflation levels. Although good-intentioned, this policy threatens the world of personal injury and plaintiffs. For one, it eradicates the agency of tort law that is its beauty and is emblematic of its progressive nature. Pivoting to a set, concrete scheme, is not in line with American values of individualism and reeks of a pivot into authoritarianism and the deprivation of due process.

Similarly, if the eggshell plaintiff policy remains, I don't see why particular sensitivities in particular Plaintiffs wouldn't be noted under certain damage schemes. After all, violinist's pain and suffering and loss of enjoyment for the loss of a finger is going to be much more than this loss for a soccer player. Shouldn't they recover more? It's clear this policy intends to provide equity. I agree with its ethical impulse and particularly to remedy the problem of gaps to sound legal counsel. However, we need to simply provide better safety nets: an equal adeptness of lawyers for individuals able to convey their stories for parties of all backgrounds, then relying on a callous, cold formula. We don't need to turn to such a schedule for answers. We are humans. We are thinkers. We are humanists, not calculated machines.