Midterm Exam

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Contents

1 Instructions

- Carefully read the fact pattern. This will be the source of all the fact premises in your arguments. You may make *reasonable* inferences from the facts given, however you will not be awarded credit if you invent facts to make your arguments work.
- You can rely on any of the black letter rules enumerated in the Restatement (Second) of Torts and the cases we read for class (including note cases). You do *not* need to cite the Restatement or cases. If you would like to cite a case, but you cannot recall the case name, then simply provide a summary of the facts. However, if you simply state a black letter rule (preferably in *if-then* form), and you have correctly stated the rule, then that will suffice. The black letter law will be your source of rule premises.
- There are four precedent cases, from which you may infer additional legal rules to supplement/modify the black letter doctrines we studied in class. These cases were designed to generate several "Level 2" puzzles. You can construct many arguments attempting to harmonize these cases. The cases are:

  - Lumpkin v. Munchkin
  - Nastie v. Oats for Goats
  - Pets Emporium, Inc. v. Quilty
  - Runt v. Shunt

- Please note that the four precedent cases were invented (by me). They do not reflect the current law in any jurisdiction (that I'm aware of). They are binding precedents for the purposes of this exam only.

- The scope of this mock exam is limited to negligence torts. Products liability, strict liability, contributory/comparative negligence, and intentional torts issues *do* arise, however I have not attempted to discuss them in the model answer.

- This (real) final exam will have substantially the same structure as this mock exam. It will be somewhat longer, and it will expressly implicate additional issues. However, this is essentially what the character and format of the final exam will be.

2 Fact Pattern

Situated on the corner of Perdezh Boulevard and Swann's Way in the quaint New Hampshire village of Pompo City, an independent bookstore and café known as the "Belligerent Bibliosaurus" offers a diverse selection of eclectic literature, catering to the idiosyncratic tastes of its bohemian inhabitants. Patrons of the establishment often spend hours at the café, reading books, sipping lattés, and petting the bookshop's resident cat, Herodotus.

On the afternoon of August 22, 2023, a visiting tourist by the name of Augustus Ardens trundled into the café, which happened to be offering free samples of their newest menu item: garlic avocado scones. Intrigued, Augustus gladly took one. As he ambled through the aisles of the bookstore, sipping from his cup of coffee, he fished the scone out of its paper bag. With great anticipation, he bit into the pastry. He immediately recoiled in horror. Augustus muttered in disgust, "Begone foul substance!" and promptly shoved the remainder of the scone behind a row of books and departed the store.

On October 31, a black cat named "Chaos" sauntered into the Belligerent Bibliosaurus. There were no signs prohibiting pets; however such a warning would not likely have deterred Chaos, who, being a cat, lacked the capacity to read. His owner, Christoph Cartagena, was a local performance artist, whose studio was located nearby. He allowed Chaos to roam freely about the neighborhood, objecting on moral grounds to the confinement of indoor cats, which he believed to perpetuate the oppression of feline persons in industrialized Western societies. Attracted by the scent of the rotting scone, which Augusted had stashed two months earlier, Chaos clambered up the bookshelf and slid himself behind the books. Slinking along the wall, he located the festering pastry and hazarded a cautious nibble. Evidently pleased with the taste of it, he promptly gobbled up the scone entire.

Alas, Chaos immediately regretted his lack of gustatory self restraint, for his belly soon rumbled with a fantastic roar, attracting the notice of the many patrons who had assembled to hear an author reading of *The Devils of Devonshire*, the latest horror masterpiece by Stephen King. The gurgling sounds and pained mews of Chaos drew several concerned audience members to investigate the commotion.

The cacophony of digestive distress intensified until, unexpectedly, all was quiet. The mechanism of Chaos's relief had come, to the horror of the assembled customers, in the form of a gaseous release, which rapidly filled the shop in a cloud of noxious flatulence. The customers fled for the exits, coughing and wheezing. Their eyes watered. Stephen King was ushered out a back door.

Alarmed by the uproar of the exodus, Chaos rocketed from his perch like a furry

cannonball, flying swiftly out of the shop. At that very moment, a trapeze artist going by the stage name Dirk Daggler happened to be riding his unicycle at full speed down Perdezh Boulevard. He swerved to avoid Chaos, but collided with a tree and broke his leg. He arrived at the hospital unconscious. The emergency room doctors, misdiagnosing his leg as necrotic, amputated the limb.

Daggler was thereafter unable to perform his trapeze act, and his employment was terminated. Two months later, he obtained a job at an investment firm, where he demonstrated an exceptional talent for sales. However, his firm's practices were the subject of a federal investigation one year later, during the course of which he was convicted of fraud, and sentenced to twenty years in prison.

Beauregard Brussels, the proprietor of the Belligerent Bibliosaurus, had to close the shop for two weeks in order to allow the fumes to dissipate. He estimated his lost profits to have been approximately $10,000. In addition, he received no book sales from the author reading, which he expected to have generated $1,000 profit. Christoph, alarmed by the stench emanating from Chaos, rushed him to a veterinary clinic, where the cat was diagnosed with indigestion. The veterinary bill was $750. No treatment was required, and Chaos would make a full recovery.

3 Precedent Caselaw

Lumpkin v. Munchkin

Appellant Munchkin, a novice rancher, purchased a dozen cattle from a Vermont seller. Testimony at trial established that upon the sale of cattle, veterinarians are ordinarily contracted test for BVD, a highly communicable disease. Munchkin failed to make arrangements to test his newly purchased animals. Among them, a steer named "Caesar" subsequently leapt a fence which separated his property from the plaintiff-at-trial Lumpkin's ranch. Caesar was later found mingling with Lumpkin's herd, which became infected with BVD. Three calves perished.

Munchkin argues that the trial court erred in failing to instruct the jury that his duty of care ended at the point when Caesar was beyond his physical control. We disagree. Munchkin was responsible for the management of his animals, including whatever harms they might foreseeably cause if they should escape his control. His failure to maintain control cannot operate to excuse the evils which ensued on account of that very failure. . . .

Munchkin further contends that his failure to conduct BVD testing was not the proximate cause of the death of Lumpkin's cows because Caesar's bounding the fence was unforeseeable. Munchkin testified that none of his other cows had ever attempted

to vault the barrier, and he produced further evidence that such occurrence had not arisen during the tenure of the previous owner of the ranch. Caesar's behavior being unforeseeable, Munchkin claimed that the singular will of that unique specimen constituted a superseding event. Again, we disagree. The behavior of a cow, no matter how intrepid nor willful, does not constitute the choice of an "independent third party actor" of the sort which might break a chain of causation. All life is instinct with a lust for freedom. To claim that the will to explore new worlds is "unforeseeable" would be to deny that most fundamental axiom of biology: life finds a way.

Nastie v. Oats for Goats

Natalya Nastie brings suit against "Oats for Goats," a local non-profit animal shelter, for the death of her dog, Nestor. Two weeks prior to his demise, Nestor had escaped Nastie's fenced yard. He was discovered wandering the streets by an unknown third party, who delivered Nestor to respondents. The shelter's intake protocol for stray dogs involves a comprehensive medical examination, which includes testing for parvovirus, a treatable though potentially deadly illness.

Unfortunately, at the time Nestor was delivered to respondents, they happened to be overwhelmed with a sudden influx of incoming animals, and they neglected to properly assess and treat Nestor. He later succumbed to canine parvovirus.

Appellant claims that respondents owed Nestor a duty of care, however the trial court ruled as a matter of law that a duty in tort can be owed only to persons—not nonhuman animals. This is inaccurate. It is an atavistic principle that an animal may be either *res nullius* or *res mancipi*. A wild animal is *res nullius*, and being of no relation to human society, may be captured, tamed, or hunted without legal consequence. It follows that no duty of care is owed to *res nullius* in tort. However, if an animal becomes the possession of a person, then it is *res mancipi*, and it is the lawful property of he who possesses it. Any harm which thereafter befalls the animal is therefore a trespass upon the owner's property.

A duty in tort may thus be owed to an animal, deriving from the duty owed to its master. It is a factual question whether a reasonable person, situated in respondents' position, would have inferred that Nestor was a *res nullius* or a *res mancipi*. The question ought therefore to have been presented to the jury. Reversed and remanded.

Pets Emporium, Inc. v. Quilty

The facts which give rise to the present dispute are unusual in the extreme. Quilty, the defendant at trial, was the owner of a common brown octopus, which he kept in a sealed aquarium in his second-story apartment. Despite Quilty's diligent efforts to secure the tank using locks and weighted covers, these measures proved inadequate for the task. As is the wont of that peculiarly intelligent and evasive species, the audacious cephalopod effected an escape from its enclosure, wriggling its way into the pet shop located directly beneath appellant's apartment. Upon absconding into the appellant's premises, the octopus found refuge in an aquarium which housed a number of rare and valuable tropical fish, which it duly consumed prior to its discovery. . . .

Several expert witnesses, having inspected the tank in which the octopus was housed, were unable to determine its method of escape. Consequently, the trial court found that Quilty was not negligent in allowing the octopus to escape. A duty of care cannot extend to harms so improbable as to be utterly unforeseeable. *Palgraf*. The question whether Quilty breached therefore need not be put to the jury, for one cannot breach a duty that does not exist. Judgment affirmed.

Runt v. Shunt

Appellant owns and operates a "pet friendly" café and bistro. Her employees routinely place a metal water bowl for dogs outside the main entrance, and a sign prominently displayed at the storefront reads, "Pets Welcome!" On the occasion at issue, respondent visited the bistro with his dog, Barkley. While his owner was eating his lunch, Barkley wandered into the kitchen and consumed some raw meat, which resulted in food poisoning, requiring several hundreds of dollars in veterinary care.

Appellant contends firstly that she owed no duty of care to Barkley. We disagree. Barkley was respondent's property. Inasmuch as the appellant would be liable for damage to respondent's laptop, had it been doused by a leaky pipe, or for damage to his Italian leather briefcase, had a waiter spilled olive oil upon it, so too did the appellant, having invited pets onto her premises, acquire a duty to ensure Barkley's safety.

Appellant claims secondly that even if she had a duty of care to Barkley, she did not *breach* the duty of care owed to Barkley. The question here is somewhat more delicate. Were Barkley a trespasser, she would certainly owe him no duty of care whatever. However, if he were an invitee, then her duty to him would follow, *a fortiori*, from her duty to the public generally.

Despite a thorough search for prior caselaw, we are not aware of any holding in any jurisdiction where the question has heretofore arisen: under what circumstances is a pet an invitee? This dispute thus presents a novel issue. We think the logic of the law demands that because the duty to Barkley derives from his owner's property interest in him, so too must the measure of the duty owed. Respondent was unquestionably an invitee. We must therefore accord Barkley the status of an "invitee." The standard of care is consequently to ensure an environment safe for pets. Lacking any measures whatever to prevent a dog from meandering into the kitchen area, wherein multifarious hazards were present to creatures of his kind, appellant had unquestionably breached that duty. Judgment affirmed.

4 Model Answer

I have organized this model answer so that each *paragraph* would be worth approximately one point. You do not need to organize your own answer in this way. You may notice that some paragraphs contain two separate arguments. When I have done this, it is because the arguments independently are either obvious, or merely set up an interesting counterargument. In that case, I would not regard each argument independently to be sufficient to warrant a full point, however when grouped together, they would merit a point in the aggregate. Hopefully you will get a sense from the organization of paragraphs how much substance warrants a full point.

Please note that there are many issues relating to products liability, strict liability, and contributory/comparative negligence that could be made. For the purposes of this midterm, I have elected to keep the scope focused exclusively on negligence torts, so you will not see those arguments in this model answer. Also note that I occasionally cite cases and Restatement sections in the model answer. This is for clarity. You are *not* required to do this in your exam answers, although it could save you some time if you did.

Four distinct harms are discernible in the fact pattern:

1. Beauregard's lost profits.
2. Christoph's veterinary costs.
3. Dirk's injuries.

Therefore, there are (at least) three independent causes of action. I will address each separately.

Beauregard's Lost Profits

Beauregard will claim that Christoph is liable to him for his lost profits due to the temporary closure of the Bibliosaurus. He will also claim the loss of business due to the interrupted author talk. The lost profits from these interruptions total $11,000 = 10,000 + 1,000.

Christoph will counter that the noxious flatulence did not cause any damage to Beauregard's property, and therefore the alleged harm—i.e., lost profits—was "purely economic." If an injurer fails to undertake precautions causing only economic harms, then he is not liable for that harm. He is not liable, because the duty of prospective injurers "does not spread its protection so far" (*Robins Dry Dock*). Christoph did not

have a *duty* to prevent pure economic losses, and therefore an element of negligence is not met. Therefore, he is not liable to Beauregard.

Beauregard will counter-counterargue that it is foreseeable that a mischievous cat, allowed to roam freely without supervision, is very likely to cause some kind of trouble—even if the exact nature of the harm is indeterminate. This falls squarely within the exceptions to the economic loss rule. If a harm is foreseeable, even if it is a pure economic loss, then prospective injurers have a duty to take care to prevent it (*Palsgraf*, *People Express Airlines*, *532 Madison Ave. Gourmet Foods* (appellate division opinion)). Therefore, Christoph did have a duty.

Christoph will counter-counter-counterargue that pure economic harms are presumptively unforeseeable. The market effects which the cat set in motion are impossible to anticipate. Consider, for example, if it were not flatulence, but merely the presence of a black cat which frightened superstitious customers from entering the bookstore. Could such loss of profit be foreseen? Surely no. Indeed, suppose that the loss of Beauregard's business slightly depressed the demand for coffee beans, resulting in lost profits for his coffee bean supplier. Could the coffee bean supplier recover? What about the roaster whose volume of business was thereby decreased? What about the electric company who supplied power to the roaster? If such harms were compensable, then the plaintiffs suffering pure economic losses would be endless. This is an absurd outcome. This is precisely why pure economic losses are irrecoverable. The pure economic effects of any incident will ripple throughout the market unpredictably. The economic loss rule is simply a special case of *per se* unforeseeability (*532 Madison Ave. Gourmet Foods* (appeals court opinion), *Barber Lines*).

An alternative line of argumentation, relating to the *duty* element, is that owners have no duty to others for the conduct of escaped animals. Christoph will argue that *Pets Emporium* established that if an animal escapes the control of its master, then the master owes no duty of care to those whom the animal may harm. Since Chaos was no longer in his control at the time it entered the bookstore, he had no duty of care.

Beauregard will counter-counterargue that *Lumpkin* controls. *Lumpkin* held that, "If [an animal] should escape [the owner's] physical control, then [the owner] is responsible for whatever harms they might foreseeably cause." Therefore, the fact that Chaos had escaped Christoph's physical control does not defeat his duty to undertake reasonable efforts to reduce the probability of harm that Chaos could cause.

Christoph will counter-counter-counterargue that the present case should be distinguished from *Lumpkin*, because the harms which Chaos caused were unforeseeable, and foreseeability is an element of the rule in *Lumpkin*. This argument would sub-

stantially repeat my previous discussion of foreseeability, and the same considerations will also recur in the context of proximate cause, which I will discuss later. [Note: probably only a half point for this pargraph]

Beauregard will counter-counter-counter-counterargue that *Pets Emporium* can be distinguished from the present facts. In light of *Lumpkin*, the rule which emerges is that if an owner undertakes reasonable precautions to prevent the escape of their animals and to limit the harm they could cause if they did escape, then owners are not liable for the harms that their escaped animals cause. This rule is consistent with both *Pets Emporium* (where defendant Quilty had undertaken all reasonable efforts to contain the octopus) and *Lumpkin* (where defendant failed to mitigate the potential harm the steer would cause if it escaped). Since Christoph failed to take any precautions whatsoever to prevent Chaos from escaping (indeed, he affirmatively refused to restrain Chaos's freedom of movement), the limitation on duty articulated in *Pets Emporium* is inapplicable in this case.

Christoph will counter-counter-counter-counter-counterargue that the rule which best harmonizes *Lumpkin* and *Pets Emporium* is: if an owner undertakes reasonable precautions to limit the harm which could result if their animal escaped, then owners are not liable for the harms that their escaped animal causes. Christoph will argue that this is a better way of reading *Lumpkin* and *Pets Emporium* than Beauregard's interpretation, because the condition that owners must undertake reasonable efforts to restrain the movement of their pets is not necessary to reconcile *Lumpkin* with *Pets Emporium*. In other words, Beauregard's interpretation adds an extra element, which is not necessary to harmonize *Lumpkin* and *Pets Emporium*. Assuming that Chaos had all his vaccinations (not stated in the facts, but inferable from Christoph's providing veterinary care for Chaos), he has no further duty.

The next question which arises in relation to the loss of business is whether Christoph *breached*. Christoph will argue that if his duty of care extended only to the set of precautions feasible while Chaos was within his physical control, then his providing Chaos's vaccinations would suffice to meet the burden. Christoph did undertake those reasonable precautions, which prevented Chaos from spreading rabies or feline diseases. Therefore, no breach.

Beauregard will counterargue that if an owner fails to manage his animal outside his property, then he has breached his duty of care. Again, he will claim *Lumpkin* controls (although now it's in the context of breach rather than duty). Christoph's failure to supervise or restrain Chaos's movements outside the home constitute a breach of his duty to maintain his control over Chaos. Therefore, Beauregard will argue that Christoph breached.

Christoph will counter-counterargue that *even if* he had a duty to manage Chaos's

behavior when the cat was allowed to wander outside, he still did not breach. If he either exercised reasonable precautions or (equivalently) invested efficiently in precautionary care (i.e., $B \geq PL$), then he would not have breached. Christoph will argue that it was not unreasonable to allow Chaos into the Bibliosaurus. The bookstore was home to Herodotus, the "shop cat," implying that the Bibliosaurus was a "pet friendly" business. Consequently, Christoph did not have a duty to prevent Chaos from entering the bookstore. Neither was it breach to allow Chaos to eat the moldy scone. The probability that the scone would cause such violent indigestion in a cat is exceedingly low. Although it turned out that Chaos had a uniquely bad reaction to the discarded scone, the probability of that occurrence was so low that it could not justify the precautionary effort required to restrain Chaos (*Carroll Towing*). Ergo, neither the entry into the bookstore nor the consumption of the scone constituted a breach.

Beauregard will counter-counter-counterargue that the Bibliosaurus (unlike the café in *Runt*) did not post any signs welcoming pets, nor signal in any way that pets were welcome on the premises. It is therefore a question for the jury whether a reasonable person would have inferred that the existence of a shop cat implied that *all* pets were welcome in the store. He will further contend that, had Christoph been present during the initial period of Chaos's digestive turbulence, he could have removed the cat from the premises prior to the bout of flatulence. Again, the feasibility of this hypothetical is a matter which ought to be sent to a jury. More trenchantly, Beauregard will reject the scope of Christoph's counter-counterargument, contending that it was not the specific failure to prevent Chaos from entering the store, nor failure to prevent his eating the moldy scone, but rather the failure to manage his animal *generally* which constituted the breach.

The next issue is whether Christoph *caused* the harm to Beauregard. In order to establish causation, Beauregard must prove that Christoph was both the cause-in-fact and legal cause of the harm. Beauregard will first argue that if the harm would not have occurred but for Christoph's negligence, then Christoph was the cause-in-fact. Undoubtedly, *but for* Christoph allowing Chaos to roam unsupervised, the cat would not have eaten the scone, and the noxious fumes would not have interrupted the author talk nor forced the temporary closure of the shop. Beauregard will further argue that it is reasonably foreseeable that allowing a cat to roam unsupervised could result in *some* kind of harm, even if the specific manner by which the harm materialized is difficult to predict (*Petition of Kinsman Transit Co.*, *Colonial Inn Motor Lodge*, Fire-Rat).

Christoph will counterargue that the law requires not that he could foresee that some generic harm could result, but rather that he foresee a specific harm (*Doughty*).

Thus, *even if* he could foresee some generic mischief might arise, this would not be enough to establish legal cause. If he did not foresee the specific manner in which the harm would result, then he was not the legal cause. Since he could not have specifically foreseen that Chaos would eat the moldy scone, he could not be the legal cause of the harms which ensued.

Beauregard will counter-counterargue that the policy question which determines the scope of "foreseeability" is ultimately whether similarly situated prospective injurers would be responsive to the incentives created by imposing liability. If the owners of outdoor cats understood that they would be held liable for the mischief caused by their pets, then it is plausible that they would undertake precautionary care to limit those harms. Since they would likely respond to incentives, the law ought as a matter of policy deem the generalized harm sufficiently within the scope of "foreseeability" to consider the proximate cause element satisfied. Christoph will dispute whether the owners of outdoor cats would really alter their behavior.

There exists an alternative line of argumentation on the topic of proximate cause. Christoph could counterargue that superseding events break the chain of causation. He would claim that if the intervening actions of an an independent third party actor were also a cause-in-fact, then that event would supersede (*Watson v. Kentucky & Indiana Bridge*). He will contend that Chaos was himself an independent third party actor. On the question whether the actions of animals can supersede, he will contend that *Pets Emporium* establishes that once an animal escapes its owner's control, then it is in effect an independent third party actor, severing the causal link. Therefore, Christoph will argue, there was no proximate cause.

Beauregard will counter-counterargue that *Lumpkin* expressly rejects the proposition that animal agency can supersede: "The behavior of a cow, no matter how intrepid nor willful, does not constitute the choice of an 'independent third party actor' of the sort which might break a chain of causation." He will further argue that *Pets Emporium* is inapplicable to the present facts, because in that case the question of foreseeability related to the scope of *duty* and not to the scope of *proximate cause*. The *Pets Emporium* court did not reach the question of causation.

Christoph will counter-counter-counterargue that although *Pets Emporium* was limiting the scope of duty using foreseeability, it is the *same test* that courts should use to determine proximate causation. The difference is immaterial to the analysis of foreseeability. Therefore, *Pets Emporium* is applicable. Next, *Lumpkin* and *Pets Emporium* can be reconciled: *Lumpkin* does not say that *no* animal's decisions can supersede. It says specifically that "[t]he behavior of a cow" cannot supersede, whereas *Pets Emporium* in effect holds that the behavior of an octopus *can* supersede. This is not an arbitrary distinction, because cows are in general simple, docile,

and predictable animals, whereas octopods are crafty, cunning, and unpredictable animals. It is not unreasonable to hold as a matter of law that the behavior of some animals (e.g., slugs, frogs, cows) are predictable, whereas the behavior of other animals (e.g., chimpanzees, orcas, octopods) are not. Cats surely belong in the latter category, capable of breaking the chain of causation.

Beauregard will counter-counter-counter-counterargue that the real question here is whether the imposition of liability would affect a change in the behavior of cat owners. Specifically, he will claim that there is no point in imposing liability, because cat owners would probably be inelastic to those incentives. They will continue to allow outdoor cats to roam freely, regardless of the low-probability chance of being struck with liability. He will contend that this favors overruling *Pets Emporium*, which conflicts with *Lumpkin*. This line of argument would essentially be identical to the incentive/policy argument given earlier, so I will not repeat it here.

Christoph's Veterinary Costs

Christoph will claim that Beauregard's negligently allowing a toxic scone to fester in his bookstore for two months caused Christoph to incur $750 in veterinary costs.

Beauregard will argue that he did not have a duty to provide a safe environment for Chaos. An injurer has a duty only if (1) he undertakes an affirmative act, (2) he assumes the duty, (3) he had a special relationship with the victim, (4) he had a duty arising from the occupation of land, or (5) he had a contractual duty. None of these conditions were present in this case. Beauregard did not place the moldy scone behind the books—its presence was at worst an omission. His relationship with Christoph was nonexistent—certainly not comparable to that of a captain and seaman, nor a doctor and patient. He was not a rescuer, nor did he bear any other "special relationship" to Christoph. Christoph never entered the bookstore, and thus no duty could arise from his presence on Beauregard's property. And they had no privity relationship. None of these conditions being met, Beauregard therefore had no duty to Christoph.

Christoph will counterargue that Beauregard had a duty arising from the occupation of land. Since Chaos was Christoph's property, when Chaos entered the Bibliosaurus, Christoph was in effect occupying space in Beauregard's shop. Beauregard will presumably claim that Chaos was a "trespasser," and therefore that he owed him no duty of care, however Christoph will point out that a reasonable person would infer, from the existence of Herodotus, the "shop cat," that pets were welcome in the store. If a property owner welcomes or consents to visitors upon his property, then those guests are either licensees or invitees. *Runt* establishes that animals can

be *invitees*, and if they are, then shop owners have a duty to provide an animal safe environment for them. Therefore, Chaos was not a trespasser; he was either a *licensee* or an *invitee*, and Beauregard owed him a duty of care.

Beauregard will counter-counterargue that *Nastie* establishes that the duty owed to animals applies only to *res mancipi*, which is consistent with the holding in *Runt*, where it would have been clear to a reasonable person that the dog was *res mancipi*. However, Christoph did not accompany Chaos to the Bibliosaurus, and a reasonable person in Beauregard's position would not infer that Chaos was *res mancipi* rather than *res nullius*. If a reasonable person could not conclude that Chaos was *res mancipi*, then it follows from *Nastie* that Beauregard did not owe Chaos a duty in tort.

Christoph will counter-counter-counterargue that the duty owed to licensees and invitees is general and not specific. *Even if* Chaos were a trespasser, Beauregard ought still have a duty to non-trespassing cats, which he breached by permitting the moldy scone to remain festering behind a row of books for two months (*Herrick v. Wixom* illustrates precisely this point). The mere fact that the harm happened to befall a trespasser cat rather than a licensee or invitee cat should not absolve the otherwise negligent defendant of his liability for maintaining an unsafe environment.

Alternatively, Christoph will counter-counter-counterargue that *even if* Chaos were a trespasser, the moldy scone was nevertheless an "attractive nuisance," which had the propensity to attract cats—who are similar to children in their inability to identify their own status as trespassers, licensees, and invitees (*Keffe*). If a reasonable property owner fails to take precautions against an attractive nuisance, which draws trespassers toward a risk, then they have a duty to reduce that risk. The moldy scone being an attractive nuisance, Beauregard had a duty *regardless* whether Chaos was a trespasser.

Beauregard will counter-counter-counterargue that *Keffe* is inapplicable for multiple reasons. First, he will dispute as a matter of fact whether the scone did in fact have the propensity to attract cats. Herodotus, the "shop cat," resided in the Bibliosaurus for two months, during which time he never ventured to consume the moldy scone (else it wouldn't still have been there). It is therefore a disputable fact whether it was an "attractive nuisance." Second, he will contend that the "attractive nuisance" doctrine applies specifically to *children* and not to cats (noting that Restatement §339 specifically limits the language to children, declining to generalize to adult humans or nonhuman animals). Third, and most decisively, he will argue that *knowledge* of the existence of the hazard is an element of "attractive nuisance" doctrine, and Beauregard was unaware that the moldy scone had been stashed behind a row of books by a thoughtless customer (*Keffe*, *Ryan v. Towar*). An element

being absent, the "attractive nuisance" doctrine is not instantiated by these facts.

Next, on the question of breach, Christoph will argue that the Bibliosaurus was a business open to the public, and therefore its guests were *invitees*. By extension, *Runt* holds that the pets of invitees are also invitees. The duty of care that a property owner owes to guests includes the duty to inspect (Restatement §343). If a property owner fails to inspect his property to ensure it's safe for pet invitees, then he has breached his duty of care. Beauregard allowed the moldy scone to remain in the bookstore for two months, and therefore he breached.

Beauregard will counterargue that Chaos was not an invitee. *Runt* extends the status of "invitee" to pets derivatively. Pets are invitees only because they are the property of human invitees. In other words, the rule established in *Runt* is: if a pet owner is an invitee, then his pet is an invitee. However, Christoph never entered the Bibliosaurus. Therefore, Christoph was not an invitee. Consequently, Chaos was not an invitee. Therefore, Beauregard's failure to inspect did not constitute breach.

Christoph will counter-counterargue that he *was* an invitee, despite not entering the Bibliosaurus. If a person is *invited* to enter or remain on the property, then he is an invitee (Restatement §332). His status as an "invitee" does not require that he actually be present on the property. The existence of an invitation alone suffices to establish "invitee" status. Since the Bibliosaurus was a business open to the public, and Christoph was a member of the public, he was an "invitee" regardless whether he ever stepped foot in the shop. Therefore, Chaos was derivatively an invitee, and he was owed a duty to inspect to ensure a safe environment for pets, which Beauregard breached.

Beauregard will counter-counter-counterargue that Christoph was an invitee only to the extent that he was there for the purpose which the land was held open to the public (Restatement §332(2)). In other words, if the public were only "invited" to shop for books and patronize the café, then they are only "invitees" on the property if they are there to engage in those activities. A visitor would not be an "invitee" if he were visiting for an unrelated purpose. The purpose for which the bookstore was held open to the public was for the sale of books, food, and coffee. It was not held open as a playground for cats. If Christoph were there to buy books, and he allowed Chaos to roam the store while he browsed, then Chaos's presence would at least indirectly be related to the purpose for which the public was invited. However, Christoph was not there. He was in effect treating the bookstore as a playground for Chaos without the concomitant purpose of purchasing a book. Therefore, he was functionally *not* an "invitee." Therefore, Chaos was not an invitee, because his "invitee" status was derivative of Christoph's "invitee" status. Therefore, Beauregard had no duty to inspect. Therefore, there was no breach.

Alternatively, Beauregard could repeat the argument (relying on *Nastie*) that Chaos was functionally a *res nullius* because Beauregard had no reason to believe that Chaos was not a stray cat. The same line of counterarguments would follow.

Alternatively, Christoph could argue that *even if* Chaos were not an invitee, he was at least a licensee. If a person is privileged to enter or remain on land with the owner's consent, then he is a licensee (Restatement (Second) §330). Beauregard consented to animals entering and remaining in the Bibliosaurus. Therefore, Chaos was a licensee. If a visitor is a licensee, then the property owner owes him a duty of reasonable care (Restatement (Second) §341). Allowing a scone to remain festering in the bookshelves was a breach of that duty.

Beauregard could counter-counterargue that the duty owed to *licensees* does not include the duty to inspect (that duty is only owed to *invitees*). Rather, the standard of care owed to licensees extends no further than what the property owner himself would deem acceptable for his own presence on the property (*Davies*). In other words, he owes no more precautionary care to licensees than he exercises for his own safety on the property. There does exist a duty to warn, however this duty only arises if the property owner knows (or should know) of a non-obvious hazard. In this case, Beauregard did not know—nor would a reasonable person have discovered—the presence of the moldy scone. Since Beauregard did not think it necessary to undertake sweeps of the bookstore for discarded foodstuffs to ensure the safety of *his own cat*, Herodotus, he had no greater duty to licensee cats. Therefore, there was no breach.

On the issue of causation, Christoph will argue (1) Chaos would not have gotten ill but for Beauregard's negligently allowing the moldy scone to remain in the bookstore, and therefore Beauregard's negligence was the cause-in-fact of Chaos's illness; and (2) it is reasonably foreseeable that the failure to inspect for a toxic substance in the bookstore could result in an animal consuming it and falling ill, and therefore Beauregard's negligence was the proximate cause of Chaos's illness. Since both cause-in-fact and legal cause are satisfied, Beauregard caused the harm to Christoph.

Beauregard will counterargue that the harm to Christoph was not a *sick cat* (who recovered without treatment), but rather the *veterinary costs* associated with the cat's indigestion. Christoph's decision to take Chaos to the vet for an unnecessary examination constituted the act of an intervening independent third party which supersedes, breaking the chain of causation *per se* (*Wagon Mound*). Therefore, Beauregard's negligence was not the proximate cause of the harm.

Christoph will counter-counterargue that Chaos's symptoms were ambiguous, and a reasonable person in his position would suspect that Chaos could have been suffering from a more serious ailment necessitating medical treatment. Therefore,

Christoph had a legal duty to mitigate (*Benwell*). The law cannot hold Christoph's efforts to mitigate the harm, which he had a legal duty to do, to also be a superseding act foreclosing his right to compensation. The mitigation limitation is meant to incentivize Christoph to undertake efforts *ex post* to reduce the magnitude of the harm that Christoph caused. If the effort to mitigate thereby forfeits his right to compensation, then this entirely undermines the purpose of the mitigation rule. Therefore, efforts to mitigate cannot be considered superseding causes. Therefore, Christoph taking Chaos to the vet should not be undermine the claim that Beauregard caused the harm.

Dirk's Injuries.

Dirk can sue either Beauregard or Christoph for the physical injuries he suffered as a result of Chaos's bolting out of the Bibliosaurus. If he sues Christoph, then his arguments about *duty* and *breach* will be substantially identical to the arguments that Beauregard would make against Christoph (as would Christoph's counterarguments, *mutatis mutandis*), and I will not repeat them in this section. I will restrict the discussion on duty and breach in this section to Dirk's claim that Beauregard had a duty, which Beauregard breached.

On the question of whether Beauregard had a *duty* to Dirk, there are two possible sources from which a duty may arise. First, Dirk could argue that Christoph owed him a duty as a "licensee." If a member of the public is "invited to enter or remain on land for a purpose for which the land is held open to the public," then he is an "invitee" (Restatement (Second) §332). The sidewalk was held open to the public with the intention (in addition to the primary purpose of facilitating entry into the Bibliosaurus) that passersby might view the storefront window and be enticed to patronize the shop. Therefore, Dirk was an "invitee." If a person is an invitee, then the property owner owes him a duty of care. Therefore, Beauregard owed Dirk a duty of care.

Beauregard will counterargue that the public sidewalk was not the property of the Bibliosaurus. It was the property of the municipality of Pompo City. Therefore, Dirk was not an invitee. Dirk will counter-counterargue that the land need not be *owned* by the defendant, but merely *possessed* by the defendant in order for visitors to acquire "invitee" status. For example, the guest of a renter could be a "licensee" or "invitee" even though a renter does not *own* the land (*Rowland*). Whether Beauregard possessed the sidewalk is a factual question, depending on the level of control he exerted over that space. If the Bibliosaurus controlled the public sidewalk, then Dirk was effectively an invitee, and Beauregard owed him a duty of

care. Whether Beauregard exercised a sufficient level of control over the sidewalk to be a "possessor" is a fact question for the jury.

Dirk could alternatively argue that Beauregard had a duty of care to prevent dangers emanating from his business.[1] If Beauregard engages in the affirmative activity of operating a retail establishment, then Beauregard had a duty to operate that business in a reasonable and prudent manner. Beauregard would counterargue that any duty is limited to the prevention of foreseeable harms (*Palsgraf*), and the panicked escape of a distressed cat was unforeseeable. Therefore, although Beauregard may have had a generalized duty to Dirk, the duty did not extend to fleeing cats.

On the issue of *breach*, Dirk will argue that Beauregard breached his duty of care in three ways: (1) that he created the hazard by allowing the moldy scone to fester in the store, (2) that he failed to control the customers, who exited the store in a panic, and (3) that he failed to prevent Chaos from dashing into the sidewalk. In all three instances, Dirk will argue that Beauregard undertook less care than a reasonable store owner ought. As to the first alleged breach, Beauregard will contest negligence as to the moldy scone either on the ground of duty or causation—not on the element of breach—and I address those issues separately elsewhere. On the second alleged breach, Beauregard will contend that there were no reasonable precautions he could have taken to ensure an orderly exit from the shop. On the third alleged breach, Beauregard will contend that there were no reasonable precautions he could have taken to prevent Chaos from bolting out of the shop. Ultimately, these are fact questions for the jury.

On the issue of causation, neither Beauregard nor Christoph can reasonably dispute that their breaches (if they did breach) were the cause-in-fact of Dirk's injuries. However, they will argue that they were not the *legal* cause. If the voluntary actions of independent, third parties constitute an intervening event, then those events "supersede," breaking the chain of causation (*Brauer*). Beauregard and Christoph will argue that the panicked exodus of the crowd was an intervening event in the chain of causation. The customers were independent, third parties acting voluntarily. Therefore, neither Beauregard nor Christoph's breaches caused the harm.

Dirk will counterargue that the mass exodus from the bookstore was not *voluntary*. The desire to escape from the noxious fumes was comparable to a reflex. If a third party's conduct is reflex response, then it is not voluntary (*Scott v. Shepherd*). Therefore, the conduct of the customers was foreseeable and does not supersede. Therefore, the negligence of Beauregard and Christoph were proximate causes of

[1]Note that there are strict liability cases precisely on this point, however because this mock midterm is intended to cover only negligence torts, I am ignoring those cases.

Dirk's injuries.

Regarding causation in relation to Beauregard specifically, Dirk will contend that the customers fleeing the store was caused by Beauregard's negligently failing to remove the moldy scone. If the conduct of third parties was a response to the injurer's negligent act, then that conduct cannot be regarded as "independent," because it arises from the same negligent act. Since the customers were reacting to a consequence of Beauregard's original negligent act, their conduct did not break the chain of causation between Beauregard and Chaos's rocketing out of the shop. Therefore, Beauregard is the proximate cause of Dirk's injuries.

Both Beauregard and Christoph may try to argue that Dirk's decision to swerve into the tree supersedes, breaking the chain of causation. Dirk will counterargue that his avoiding harming Chaos was a reflexive reaction—again citing *Scott v. Shepherd*.

Finally, regarding *damages*, Dirk will claim compensation for lost wages, medical expenses, and pain and suffering. I will address the lost wages separately in the next section. Assuming the other elements are met, Dirk will likely recover his medical costs. Neither Beauregard nor Christoph have great counterarguments to that claim.

Regarding the pain and suffering, Dirk can sue Beauregard, Christoph, and *also* the doctors who amputated his leg. He is likely prevail against any of the three potential defendants on the issue of "pain and suffering" for the amputation of his leg (*Olin Corp. v. Smith*, *Williams v. United States*). Regarding the doctors specifically, if a medical professional fails to exercise the standard of professional care and skill customary to the medical profession, then they will have breached their duty. It is a fact question for the jury whether the doctors breached their duty, but it seems plausible that the misdiagnosis would not be considered reasonable. There does not seem to be any plausible counterargument against the claim that the amputation of the leg was the *cause-in-fact* of the injury. Beauregard and Christoph could try to argue that the doctors' misdiagnosis was a superseding cause. However, this fails because if the injurer would otherwise be liable, then he is also subject to "liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner" (Restatement (Second) §457). The doctors could not plausibly point to any superseding cause. Therefore, duty, breach, and causation would be satisfied for all three potential defendants on the issue of "pain and suffering."

Assuming he can prevail on the elements of duty, breach, and causation against all three, the calculation of his lost earnings remains problematic. Dirk will argue that he should be compensated for the loss of wages he would have earned as a trapeze artist. If a victim can no longer work because a negligent injurer has disabled him,

then the injurer is liable for the lost wages. Since a trapeze artist requires the use of his legs, and Dirk can no longer work as a trapeze artist, it follows that Beauregard, Christoph, and the doctors are liable.

The defendants could counterargue that Dirk's lost wages should be discounted by the wages he earned as an investment banker. If, as a result of a harm, the victim receives some benefit, then that benefit should be regarded as mitigation conferred by the defendants and deducted from the damages (Restatement (Second) §920). If he earned more as an investment banker (as seems likely) than as a trapeze artist, then compensatory damages should be zero.

Dirk will counter-counterargue that the mitigation principle is limited to benefits arising from the same harmed interest. If "damages resulting from an invasion of one interest are not diminished" by the benefit, then that benefit will not count toward mitigation (Restatement (Second) §920, *comment b*, *Benwell v. Dean*).

The subsequent harms Dirk suffered (e.g., being imprisoned for committing fraud as an investment banker) were the result of his independent, voluntary decisions, and therefore they are not proximately causal, and therefore Beauregard, Christoph, and the doctors cannot be liable for those ills (*Brauer*).