NOTE: This Grading Outline presents the professor’s notes which he referred to as he graded students’ answers to this examination. This outline is not a comprehensive statement of all possible issues that could be addressed in response to this examination, nor should this outline be understood as indicating the only possible sequence in which claims or issues could have been addressed effectively.

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QUESTION I

Longero v. MCC

Vicarious liability for conduct of employee operating backhoe, and of employees responsible for planning and verifying site work. Assuming master-servant relationship exists, and activity seems within scope of employment.

Negligence claim re burns: Failure to verify pipeline location before digging.

Duty owed to foreseeable victims in the area of the risks created by digging near the pipeline. MCC’s contract with water agency indicates MCC was expected to verify location, presumably to avert foreseeable risks of digging near petroleum quantities.

Is duty owed to voluntary rescuer? Wagner and “rescue doctrine” accept foreseeability that a rescuer will come to aid of person put at risk by defendant’s negligence, so duty owed to rescuer as well. Viewed as a Palsgraf question, both majority (Cardozo in both cases) and dissent would find duty owed to Longero.

Breach of duty shown by conduct of reasonably prudent excavating company:

Accident investigator’s comment suggests strong custom in excavation projects to have detailed, advance knowledge of pipeline location. Comment doesn’t explain what customary conduct is, but does suggest customary recognition of need to have some way to know location with precision.

Standard of conduct set by MCC’s own usual practice of hand-digging in advance. If other excavators also do this, deviation from custom is strong evidence of breach of duty of care.
Breach also shown by MCC’s failure to call KMI’s number to confirm location indicated by signs.

Application of Carroll Towing formula suggests small burden of verifying location is outweighed by great harm of petroleum leaks and explosions “times” some probability of occurrence.

Res ipsa loquitur available for Longero? Probably can satisfy first element as such explosions don’t usually happen unless there is negligence. Unlikely to show MCC had exclusive control of the cause of the harm, for pipeline and information regarding its location more under KMI’s control. Also, Longero’s entry into situation for rescue purposes defeats third element.

No indication of statute requiring pipeline location verification.

Alternative approach to breach of duty focusing on whether welding activity was being done closer to excavation activity near a known pipeline than reasonable care would prescribe.

Actual cause readily shown, as but for MCC’s failure to verify pipeline location, harm would not have come about.

Legal cause: On foreseeability basis, is harm to a voluntary rescuer to be anticipated? Wagner indicates so, as noted re duty, but question arises re whether Longero’s conduct of running closer to area where explosion has occurred is so dangerous to self as to be unforeseeable. Calculus of risk (per Eckert (167) rescuer case) suggests conduct not unreasonable, and thus is a foreseeable intervening cause and not a superseding cause.

On direct causation basis, closeness in time and space between Longero’s injury and MCC’s digging suggests directness satisfied.

Defenses: Rebuttal arguments as noted above re standard of care and breach of duty.

MCC argues it reasonably relied on KMI’s sign re pipeline location and this satisfied its duty of care re the digging activity, even if sign was inaccurate. Longero replies that burden of calling the telephone number was slight, and explosion risk was great, so MCC should have taken that additional precaution.

If KMI was negligent in sign placement, and if Longero or MCC bring KMI into the case as an additional defendant, joint and several liability with apply to them as concurrent tortfeasors causing indivisible injury.
Assumption of risk, either in primary or secondary (i.e., pure comparative contributory negligence) meaning, by rescuer? MCC can argue obviousness of risk clear to Longero, but this weakened by his lack of knowledge that there would be a second explosion. Rescue doctrine takes generous view toward rescuer, in order to recognize noble human reactions in emergencies and to encourage them, or at least not discourage them.
QUESTION II

Olivia Keys v. Mike Andrews

Negligence: Physical injury from pressuring her to dive.

Duty of coach to protect student’s safety from foreseeable risks of participating when not prepared emotionally and physically.

Standard of care of reasonably prudent, experienced coach arguably breached by sudden breaking of agreement and harsh choice imposed on teenager.

Breach also in adequacy of diving practice prior to imposition of the choice.

Negligence per se as coaching without teacher’s license.

What significance to violation of licensing statute?

If Andrews proven to be competent in instruction given, is licensing violation irrelevant or should legislative policy, for protection of this type of plaintiff from this type of harm, be promoted by tort liability?

Causation: But for causation readily shown, and legal cause also, either on foreseeability or direct causation basis.

Assumption of risk defense in primary meaning? Difficult to show teenager understood the risk and knowingly agreed to encounter the danger.

As contributory negligence in secondary meaning? Difficult to show young teenage swimmer would have acted differently when faced with harsh choice.

Battery: Andrews made contact with Olivia’s body during practice instruction, with intent based on purpose to make the contact.

Consent given by her, but was it based on fraud? She presumably assumed he was a qualified, licensed coach, but he falsely conveyed that impression to the school and its students.

Is the fraud on a collateral matter, rather than going to the nature of the contact itself? Especially if Andrews was acting competently as an instructor at the time, the fraud is not relevant to why and how he made the contact and her agreement to it.
Intentional infliction of emotional distress: Knowing her fear, Andrews arguably acted outrageously and recklessly for her emotional wellbeing when he suddenly broke his agreement and pressured her to dive presumably realizing this would be very distressing to her.

Her immediate upset arguably is severe, especially when he knew of this vulnerability already.

Any subsequent upset, including pain and suffering from the injury, may be recovered for as parasitic damages to the neck injury, or alternatively as further emotional distress under the intentional claim.

**Olivia Keys v. Susan Ogle**

Negligence: Failure to meet affirmative duty to act to prevent dangerous conduct of Andrews after Ogle knew of his falsehoods and lack of coaching experience.

Generally no duty to act to protect someone from tortious conduct of a third person, but if a special relationship can be found, then a duty arises.

In view of general responsibility of school personnel for safety of school children, and ability of Ogle to control or at least monitor and supervise Andrews’s activities, and inability of the children to know of Ogle’s falsehoods, special relationship conclusion readily can be reached.

Breach of the duty to act by failure to take reasonable action such as investigating his coaching methods more, speaking to him about the falsehoods, firing him, or adding other personnel to the swim team staff.