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

QUESTION I

DELIVERY SERVICE CELL PHONE CRASH

Oscar v. Chuck -- For personal injuries

Negligence:

Duty to drive without creating unreasonable risks allegedly violated when drove while using cell phone, arguably not giving full attention to driving. Hand formula application favors plaintiff? Standard of care of an expert truck driver?

More facts needed to make out prima facie case: Was Chuck distracted by phone conversation? Is he otherwise “not a careful driver,” as his brother thinks.

Defense rebuttal: Emergency context, with Joe heading toward street on bicycle, is factored into the conduct of a reasonable driver under the circumstances. Unless not really an emergency because inattentiveness created by defendant’s cell phone use.

Custom for delivery services to use cell phones is evidence of standard of care, per T.J. Hooper.

Res ipsa loquitur: Possible proof of first element re ordinarily negligence needed for such crashes. Second element debatable as arguably car not under defendant’s exclusive control if suddenly reacting to Joe; similarly as to third element, another person, Joe, influencing situation.

Negligence per se: Presumption of breach of standard of care arises from violation of statute barring cell phone use while driving a vehicle.

Statute relevant as intended to cover this person, another driver, from this type of harm, physical injury in crash?
Defense rebuttal to presumption: Custom in this type of business is to use cell phones. Seems a weak basis for overcoming statutory purpose and establishing a nonstatutory standard of care.

Excuse for violating statute, as cell phone use necessary in order to run package delivery business and perhaps safer and more environmentally responsible than stopping frequently at pay phones, if available, or returning to office often. A stronger defense than custom itself, recognizing that criminal enforcement of statute remains available even if tort liability is not imposed.

Negligence per se: Presumption of breach of standard of care arises from violation of statute requiring vehicles to stay on correct side of center line?

Rebuttal based on emergency response to perception that Joe would try to cross street? Was that perception reasonable under the circumstances? If so, rebuttal likely to be effective, as Chuck proves he acted carefully then.

Battery: If intent can be shown, which is unlikely in short time span. But maybe a choice made to hit Oscar rather than Joe. If so, possible necessity defense to avoid greater harm to Joe.

Bob v. Chuck -- For emotional distress

Negligence: Same arguments re negligence and negligence per se as in Oscar v. Chuck, but with damage as emotional distress reasonably foreseeable to other person on the phone if driver/caller reacts to events on the road.

Falls into any prior category of negligent infliction of emotional distress?

As in Dillon, contemporaneous experience present, via sound not sight, and to a close relative, but not through physical risk to a third person. More like a direct victim case, as Chuck arguably has a duty not to upset Bob by exposing him through phone to hearing harm to Chuck himself?

Ill will between the brothers makes it less foreseeable to Chuck that Bob would suffer emotional distress? Policy concern re allowing plaintiff to sue the person he is supposedly so concerned about?

What result per Carroll Towing formula?
QUESTION II

PIRATES OF THE ANTARCTIC RIDE

Sue v. TRI -- Intentional torts and negligence

Vicarious liability for all employees’ tortious conduct.

Assault: Employee’s assertion she must be quiet or he would tighten the bar was a conditional threat to make unconsented contact, which would be offensive as uncomfortable and perhaps even harmful.

Intent as purpose to cause the apprehension that he would do this if she did not accede to the unjustified condition that she be quiet.

Only words involved, but still actionable in the context of her physical discomfort already under way and within his control to alleviate.

Negligence: Duty to business invitee, or per Rowland to any person on premises, to make premises reasonably safe. Arguably ride not safe if bar too tight for comfort and exit.

Standard of care shown by TRI’s own equipment maintenance manual, which was not adhered to.

Damages as confinement with physical illness resulting, plus parasitic emotional distress damages.

Res ipsa loquitur: Three elements apparently met.

Negligence: Breach of affirmative duty of first employee to respond to her call re tight safety bar. Having acted to place her in the uncomfortable position, a duty to aid her arises.

Breach of affirmative duty of later employees to check to see whether everyone was out, again because of prior undertaking to trigger the safety bar and operate the ride.

False imprisonment: Later employees had intent to confine, based on their knowledge to substantial certainty that anyone still there would be confined?

Defense rebuttal that at most were negligent in creating risk that someone remained after they did not check further. Suggestion that beer drinking had occurred suggests irresponsible judgment, but might also undercut intent argument?
Intentional infliction of emotional distress: Even if not intent to confine, recklessness re presence of passengers might support this claim. Outrageous conduct, plus recklessness re emotional distress results, plus severe emotional distress suffered.

_Sue v. Beth_ -- Negligence

Failure to satisfy affirmative duty to take careful action to assist Sue. No duty at the outset, but once Beth started to assist, arguably she had an obligation to continue carefully.

Defense rebuttal might be that Beth’s interrupted effort made Sue’s situation no worse than it would have been otherwise, but policy argument is strong that beginning the effort might have dissuaded other unknown persons from acting.