

MID-TERM SAMPLE ANSWER

I would anticipate that Kenneth King (“KK”)¹ will sue Flying Fuels (“FF”) seeking recovery of damages for the wrongful death of his wife and daughter. To recover damages, KK would have to show (1) that FF breached a duty; (2) that the breach of duty proximately caused the fatal collision; and (3) the damages he seeks are legally recoverable.

I. Breach of Duty

The first step in pursuing a tort claim is establishing that the defendant breached a duty toward the plaintiff. That can be done either by showing that the defendant was *negligent*, that is, that the defendant failed to use reasonable care, or that the defendant is subject to a form of *strict liability*.

Negligence. Negligence is the failure to exercise reasonable care—that is, the care that a reasonable person would use under the circumstances. FF would be held vicariously liable for any negligence on Slater’s part, since he was clearly within the course and scope of employment when the accident occurred. Thus, the question is whether Slater acted negligently. The first point that comes to mind is whether Slater was negligent by traveling 63 mph when the speed limit was 60 mph. Jurisdictions differ as to whether a statutory violation is negligence *per se*—in which case the jury would be instructed to find FF negligent—or instead is simply evidence that the jury can consider. If the latter is the rule in this jurisdiction, a jury might decide that traveling only 3 mph in excess of the speed limit wasn’t negligent. But if this jurisdiction would make Slater (and therefore FF) negligent as a matter of law, that will be very bad for us.

Another argument KK would use is that Slater shouldn’t have slammed on his brakes, or should have controlled the truck to prevent the trailer portion from swinging into Cynthia’s lane. Some kind of accident reconstruction might be presented to show that there is a better way to avoid colliding with the blue sedan. KK would likely hire an expert who would testify that Slater didn’t follow best procedures when confronted with the blue sedan.

Strict Liability. KK wouldn’t have to prove negligence if a form of strict liability applied. Here FF was engaged in an abnormally dangerous activity—carrying large quantities of gasoline. However, the accident didn’t result from the type of danger (fire or explosion) that makes the activity abnormally dangerous. Thus, it wouldn’t apply.

II. Proximate Cause

The next element that KK would have to prove is that FF’s negligence proximately caused Cynthia’s and Susan’s deaths. There are two elements of proximate cause: but-for causation and legal cause. To establish the first element, KK would have to show that, but for FF’s negligence, no fatal injury would have occurred. If a jury² found negligence, either by speeding or by failing to

¹ The Everglade statutes provide that in a wrongful death case the personal representative of the decedent’s estate brings the action to recover damages. Presumably in this case Kenneth would be appointed the personal representative to represent the estate of his wife (and daughter, if she qualifies).

² I’m assuming that KK’s lawyers would ask for a jury; if not, the case would be decided by a judge as the finder of fact. For simplicity I will call that entity the jury.

control the trailer, it seems pretty obvious that but-for causation would be satisfied.

We might have better luck with the second prong of the proximate cause test, which is legal cause: even if the but-for cause test is satisfied, if the defendant's negligence wasn't a legal cause, there's no liability. Legal cause can be defeated by showing that (1) it was a "mere chance"; (2) there was a superseding cause of the injury; or (3) the injury to the plaintiff was unforeseeable. If the basis of the negligence claim is Slater's speeding, we might be able to convince the jury that speeding wasn't a cause in this case because it didn't make it more likely that an accident like this would occur. It was "mere chance" that the additional 3 mph brought Slater to the point where he was cut off by the blue sedan. Similarly, FF could argue that the blue sedan operated as a "superseding cause" of the injury. A superseding cause is one that prevents the jury from finding that the injury resulted from FF's negligence in a "natural and continuous sequence," as the typical jury instruction on proximate cause would require. However, the superseding cause argument wouldn't work for two reasons: first, the blue sedan's negligence occurred *before* Slater's alleged negligence (or at least didn't follow it), and more to the point, it is highly foreseeable, and not that much different from Slater's alleged negligence. Still, a jury might think that it wasn't so much Slater's fault as it was the blue sedan driver's fault, and could possibly result in a jury verdict in our favor.

III. Damages

The really bad news in this case is that the damages to which KK would be entitled are enormous. The wrongful death statute in Everglade, § 55-7-6, provides that the jury may award to the surviving spouse "such damages as may seem fair and just," and include "sorrow, mental anguish, and solace . . ." In other words, KK would be able to recover whatever the jury thinks is a fair award to compensate KK for losing his wife and daughter. Yikes! In addition, KK can recover the lost income Cynthia would have received had she lived.

It's unclear whether KK would also be able to recover for the death of Susan. Even though she wasn't viable at the time of the death, she was born alive and possibly would qualify as an additional decedent for whose death KK would bring an action. It is possible that an entire scenario could be played for the jury of what Susan would have earned over the course of her lifetime, and the sorrow, mental anguish and loss of society and companionship that KK suffered as a result of her death. Again, the zeroes just keep adding to the potential value of the claim.

Although there are some liability issues that might work in our favor, the overall value of the case is enormous and I would advise FF to seek a settlement that would avoid a potentially devastating verdict.

CHECKLIST

- ☐ **Overview**
- ☐ **Breach of Duty**
- ☐
- ☐ **Negligence**
- ☐ Defined as failure to use **reasonable care**
- ☐ **Vicarious** liability
- ☐ Statutory **violation** for speeding?
- ☐ Would the violation be just evidence, or **negligence per se**?
- ☐ Negligence for the **way he stopped**
- ☐ Industry **custom** for avoiding loss of control
- ☐ Company **rulebook**?
- ☐ **Expert testimony** regarding standard of Care
- ☐
- ☐ **Strict liability**
- ☐ Activity was **abnormally dangerous**
- ☐ But accident **didn't result** from what made it ADA
- ☐
- ☐ **Proximate** cause
- ☐ **Defined as** but-for cause + legal cause
- ☐ **But-for** cause test easily satisfied
- ☐ **Legal** cause defined
- ☐ Was speeding just a **mere chance**?
- ☐ Would blue sedan be a **superseding cause**?
- ☐ Highly **foreseeable**
- ☐
- ☐ **Damages** are determined by **statute**
- ☐ Cynthia's **lost income** would be recoverable
- ☐ KK can also recover **sorrow, mental anguish**
- ☐ Maybe **child** would be another object of recovery
- ☐
- ☐

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