

FALL SEMESTER SAMPLE ANSWER

QUESTION 1

This question is based on Henderson v. Fields, 2001 WL 1529262 (Mo.App. W.D., Dec 04, 2001), in which the court upheld compensatory awards of \$3.5 million and punitive damages of \$4.5 million, but rejected the claim on behalf of the granddaughter because the plaintiffs failed to make a timely appearance as plaintiffs ad litem.

The recovery of damages in a tort case requires proof of (1) a breach of duty, (2) proximate cause; and (3) damages. In this case (1) and (2) will be easy, but there is quite a bit of difficulty in establishing both (a) on whose behalf Vernon and Laverne (VLR) will be allowed to recover as well as (b) what the measure of damages will be.

Breach of Duty and Causation. Fields was, at a minimum, negligent in his conduct. There can be no question that Fields was negligent in driving while legally intoxicated and well over the speed limit. In addition, it will be easy to establish that this negligence was Also, the injuries that he caused were quite foreseeable. Therefore, the question of liability will either be conceded or will take little time to establish.

Other Defendants? If Fields consumed the cognac on his own, or in a social gathering, there is no other person responsible. However, if Fields was served by a commercial establishment, or even by an employer (at a company Christmas party), then there could be liability if he was negligently served (i.e., after he was obviously intoxicated).

Damages. *Recovery for Tracy's death under the statute.* The amount that VLR will be able to recover depends upon the type of statute adopted in Linden to deal with wrongful death. Linden's statute, ALC § 537.080(1), authorizes a recovery by the father or mother of the deceased. The amount of the recovery is determined by § 537.090, which permits the jury to award what it deems "fair and just." It seems clear that the statute does not restrict the recovery to economic damages, although it suggests that the jury should make its award "having regard to the pecuniary losses suffered" by VLR, including the value of "services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support . . ." It is not known what kind of relationship VLR had with their daughter. To the extent that they relied upon her for services (for example, if either Vernon or Laverne were disabled and Tracy took care of physical needs, household chores, etc.), that would be compensable. "Companionship . . . counsel" and so forth, which would be a normal part of a parent/daughter relationship, would also be compensable. However, grief and bereavement are not compensable. There is also a provision in the statute for an award on the decedent's behalf for damages between the time of injury and death. If the death was instantaneous, this would not apply, but witnesses at the scene might provide evidence of pain and suffering that preceded death.

Given the horrific nature of the accident and the lack of sympathy for Fields, it is likely that the jury will be inclined to be quite generous. Even though grief and bereavement are not compensable per se, there seems to be sufficient flexibility in the statute, particularly with respect to companionship and counsel, to permit the jury may make a substantial compensatory award.

Punitive damages. There is no specific provision for punitive damages in the statute, but most states permit recovery of punitive damages based on common law principles. The standard

for awarding punitive damages is either intentional harm, or some kind of flagrant or reckless disregard of the plaintiff. Fields' behavior in this case seems to fit the latter description; what may be particularly damning is his initial response of trying to walk away from an accident in which he has fatally injured an entire family. His attorney may be able to blame everything on his intoxication, but that would easily be a two-edged sword.

One limitation to be considered with respect to punitive damages is the constitutional requirement that they be related to the compensatory award. Thus, while we can't rely exclusively upon the punitive damages aspect (we must establish a basis of compensatory damages to legitimate a large punitive award), so long as VLR can establish a strong case for compensatory damages, they shouldn't have much difficulty obtaining a large punitive award to go with it.

Recovery for Cecil and the Granddaughter (Sydney). There doesn't seem to be a logical beneficiary for the recovery of Sydney's death, or even Cecil's for that matter. None of Cecil's beneficiaries under the statute, except for his mother, are direct beneficiaries (the father would have a tough time establishing any right to recover given the measure of damages under the statute). Someone acting on Cecil's mother's behalf might try to obtain a recovery for her, but it would be logical to ask what Cecil's mother has lost by way of the death, since the statute looks for tangible benefits that the claimant would have obtained but for the death. The facts state that she suffers from Alzheimer's, but perhaps she was still capable of recognizing Cecil. In any event, it seems unlikely that she would have much of a claim.

The claim for Sydney, on the other hand, is one that would have some possibilities. VLR do not qualify as any of the categories in §537.080(1), but there is a provision in .080(3) that permits a "plaintiff ad litem" (PAL) to sue. The PAL may ask either for damages on behalf of someone who is entitled to recover (i.e., because they suffered damages listed in § 537.090), or because they are suing on behalf of the deceased himself or herself. This appears to be a kind of "backup" option to someone otherwise qualified, because only one action may be brought for the death of any one person. If Cecil's mother is included as one of the parties who could be represented by the PAL, then the VLR and Cecil's mother will share in the recovery, to be apportioned by the court. § 537.095(3).

Bystander injury. It doesn't appear from the facts that VLR suffered any direct loss from viewing the accident scene; if the facts turn out that VLR rushed to the scene after the accident but before substantial change had taken place in the condition of the accident victims, they might have a claim for bystander injury, similar to the claims recognized in *Dillon v. Legg*.

QUESTION 2

The central facts in this case were drawn from *Silber v. Motorola, Inc.*, 274 A.D.2d 511, 711 N.Y.S.2d 475, 2000 N.Y. Slip Op. 07111 (N.Y.A.D. 2 Dept., Jul 24, 2000), which affirmed a summary judgment dismissing the claim against the manufacturer and installer of the cellular telephone because they were not proximate causes of the accident.

To establish a defendant's liability for compensatory damages, Rochelle and Jim (R&J) would have to establish (1) a breach of duty, such as strict liability or negligence; (2) which proximately caused (3) legally compensable damages. There are a variety of possible defendants,

and the claim against each with respect to breach of duty and proximate cause will be considered, followed by a discussion of damages that would apply to any of the claims.

A. Frank Germond ("FG")

1. *Breach of Duty.* There are two methods of establishing a breach of duty—strict liability and negligence. In this case no basis of strict liability presents itself, so the standard would be whether FG was negligent. Negligence is the failure to use reasonable care. R&J would argue that FG was acting negligently when he took his eyes off the road and then overcorrected. In fact, R&J could claim that it was a statutory violation, and thus negligence per se, for FG to cross the center line and swerve into R&J's lane. FG's likely defense will be that answering a cell phone while driving is not by itself negligent, and FG's reaching for the phone when it fell out of the cradle was instinctive and understandable, much like the fellow who swatted a wasp when it flew into his car and lost control. While it is not negligent per se to be answering a cell phone while driving, the expectation of a driver is that the driver will not allow use of the phone to interfere with the ability to control the car. It is an excuse to negligence per se that the statutory violation was caused by an emergency not of the defendant's own making, but here it seems as though reaching for the cell phone was something that did not need to be done. Thus, a jury would probably say that FG was negligent.

2. *Proximate Cause.* A proximate cause is one which is both (1) a but-for cause as well as (2) a legal cause of the plaintiff's injury. Here FG's negligence was certainly a proximate cause of the injury to R&J, since if he had maintained control of his car the accident would not have occurred, and there is a natural and continuous sequence between his negligence and the injury. Thus, if the jury finds that FG was negligent, he will likely be found liable for the injury.

B. Miller Dental Group ("MDG")

Since FG is a computer consultant, he may lack the resources to pay the damages that are likely to have been incurred by R&J. Thus, it would be advantageous if R&J could establish is also liable for the injuries. R&J could argue that FG was an employee of MDG at the time the accident occurred, making MDG vicariously liable. To apply vicarious liability, it must be shown that the employee acted negligently in the course and scope of employment. MDG would first argue that FG was not an employee at all but rather was an independent contractor. To determine which category would apply, the question is whether MDG had the *right to control* the manner in which FG did his work. That doesn't seem to apply here, since MDG had no control over how he drove, and for that matter had no idea where he was when his cell phone rang. Had FG been running an errand for MDG, it might have been different, but since he was on his day off, it seems doubtful that MDG would be considered an employee in the course and scope of employment.

C. Tidy Car

Breach of Duty. It seems reasonably clear that Tidy Car's employee acted negligently in installing the cradle. It may be that there are standards either in the installation procedure or as a matter of company policy that would specify what to do in order to insure that the cradle remained secure.

Proximate Cause. The more difficult hurdle for R&J will be establishing that TC's negligence *proximately caused* R&J's injuries. R&J could probably show that, but for the negligent installation, FG would have maintained control of the car. However, R&J must also show that the negligent installation was a legal cause of the injury, which requires a direct and natural sequence leading from the negligent act to the injury. Legal cause is not applied where there is a *superseding cause* of the injury, defined as one that breaks the chain of causation. Here TC would certainly argue that FG's driving was a superseding cause of the injury. One standard that may be used in evaluating the strength of an argument for superseding cause is how foreseeable the injury is and how culpable the remote defendant is in comparison to the one who is the more immediate cause of injury. Here TC could certainly foresee that an error in installing their cradle could lead to an automobile accident, but they could also argue that the work they do is no different from someone who negligently installs a car radio or ventilation system that distracts a driver and results in an injury. Since the driver is primarily responsible for maintaining control of the car, a court might be reluctant to impose liability for something that distracted the driver.

D. Phone / Cradle Manufacturer

It seems clear that the phone / cradle manufacturers could not be blamed for any problem with their products. The phone itself contains a warning about the dangers of distracted driving, and they would argue that any defect in the product was superseded by the negligence of TC and FG.

E. Damages

J apparently was seriously injured. If he establishes liability, he would be entitled to compensatory damages in the form of economic loss and non-economic loss. Economic losses would include lost wages and medical expenses. Lost wages are calculated on the basis of what he would have earned if he had not been injured, compared to what he is likely to earn in light of his injuries. For example, if he suffered brain damage or loss of use of an eye or a limb, that could seriously affect his ability to earn a living later in life. Also, if he has medical expenses, the cost of those medical expenses both prior to trial as well as expected future medical expenses would be compensable. Finally, he would be entitled to non-economic damages such as pain and suffering resulting from the injury.

Rochelle is also entitled to a recovery on two bases. First, she may have been physically hurt in the accident. Even if her physical injuries are relatively minor (e.g., bruises or minor laceration) she is entitled to a recovery including non-economic losses such as pain and suffering. If she was not physically injured in the accident, she could still argue that she should be able to recover bystander injuries. In the case of *Dillon v. Legg* the California Supreme Court identified three criteria that many courts use to decide whether an award for bystander injuries are appropriate: (1) was the bystander present at the accident scene? Yes, in this case, R was in the same car; (2) did the bystander suffer a direct emotional shock from viewing the accident? Yes, in this case it is likely that the serious injuries suffered by J were perceptible at the time of the accident and R would have been traumatized by them; and (3) is the bystander closely related to the victim? Again, the answer would be yes, since the victim was her child. Thus, a substantial bystander award could be recovered even if R was not physically injured in the accident.

CHECKLIST

QUESTION 1

- | | |
|---|---|
| <input type="checkbox"/> Establishing negligence : Easy | <input type="checkbox"/> Punitive Award |
| <input type="checkbox"/> Causation : Easy | <input type="checkbox"/> Culpability Standard |
| <input type="checkbox"/> Other Defendants ? | <input type="checkbox"/> Common law basis |
| <input type="checkbox"/> | <input type="checkbox"/> Relationship to Compensatory |
| <input type="checkbox"/> Damages | <input type="checkbox"/> Damages for Sydney |
| <input type="checkbox"/> Wrongful Death Statute | <input type="checkbox"/> "Plaintiff ad litem" |
| <input type="checkbox"/> Recovery for Tracy | <input type="checkbox"/> Will Cecil's mother make a claim? |
| <input type="checkbox"/> Entitlement as Parents (§ 537.080(1)) | <input type="checkbox"/> Recovery in equal parts |
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> Measure of damages: "fair and just," | <input type="checkbox"/> Bystander injury? Probably not |
| <input type="checkbox"/> Pecuniary damages relevant to award | <input type="checkbox"/> |
| <input type="checkbox"/> Companionship /Counsel | <input type="checkbox"/> |
| <input type="checkbox"/> Any suffering between injury & death? | <input type="checkbox"/> |
| <input type="checkbox"/> No recovery for grief/bereavement | <input type="checkbox"/> |

QUESTION 2

- | | |
|--|--|
| <input type="checkbox"/> Overview | <input type="checkbox"/> No manufacturer liability |
| <input type="checkbox"/> | <input type="checkbox"/> No proximate cause |
| <input type="checkbox"/> Claim v. Germond | <input type="checkbox"/> |
| <input type="checkbox"/> Negligence Theory | <input type="checkbox"/> Measure of Damages: Jim |
| <input type="checkbox"/> Negligence Defined | <input type="checkbox"/> Economic loss |
| <input type="checkbox"/> Violation of statute ? | <input type="checkbox"/> Non-economic loss |
| <input type="checkbox"/> Emergency /excuse? | <input type="checkbox"/> |
| <input type="checkbox"/> No proximate cause problems | <input type="checkbox"/> R's claims if physically injured |
| <input type="checkbox"/> | <input type="checkbox"/> Rochelle's claim for bystander injury |
| <input type="checkbox"/> Claim v. Miller Dental Group | <input type="checkbox"/> <i>Dillon criteria</i> |
| <input type="checkbox"/> Vicarious Liability? | <input type="checkbox"/> |
| <input type="checkbox"/> Right to Control test | <input type="checkbox"/> |
| <input type="checkbox"/> MDG didn't control driving | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> Claim v. Tidy Car | <input type="checkbox"/> |
| <input type="checkbox"/> Negligence in installation | <input type="checkbox"/> |
| <input type="checkbox"/> Proximate Cause problems | <input type="checkbox"/> |
| <input type="checkbox"/> Superseding cause argument | <input type="checkbox"/> |
| <input type="checkbox"/> Foreseeability/culpability discussion | <input type="checkbox"/> |
| <input type="checkbox"/> | |

Exam # _____