MINI-EXAM SAMPLE ANSWER

> The facts of this case are taken from *Com., Dept. of Public Welfare for Use of Molek v. Hickey*, 136 Pa.Cmwlth. 223, 582 A.2d 734 (1990), in which the court dismissed the action, finding that there was no strict liability under the statute, and that Lloyd was 100% liable. Because the wrongful death statute prohibits recovery by a decedent who is 100% liable, there was no action to pursue.

The question is whether Hickey is liable for loaning her car to Lloyd, with the result that DPW had to incur the cost of caring for Molek. Tort liability requires proof that the defendant breached a duty of care to the plaintiff. This can be done either by showing that the defendant was negligent or that the defendant is subject to strict liability for the injuries suffered by the plaintiff.

Negligence

In General. Negligence is the failure to exercise reasonable care. Reasonable care is what a reasonably prudent person would do under the same circumstances. DPW might argue that Hickey was negligent in loaning her car to Lloyd. Jurors might rely on their own experience of what care they use to determine the suitability of a person to whom they loan an automobile. It is not clear whether Lloyd's non-ownership of a vehicle would be cause to question whether he should be able to drive. Perhaps it is an urban area where it is common for people not to own a car. Or perhaps Lloyd told her a story about his car being in the shop or something. Again, the jury might find that Hickey failed to use reasonable care in deciding to loan her car to Lloyd, or they might find that it was something a reasonable person would do under the circumstances.

Negligence per se. DPW would probably argue that Hickey's violation of the statute constitutes negligence per se. We don't know whether Evergreen treats an unexcused statutory violation as negligence per se, or negligence as a matter of law, but if they did, then the jury might be bound to find that Hickey was negligent. (Other jurisdictions consider even unexcused statutory violations merely as evidence of negligence.) But before the doctrine of negligence per se could be applied, the court would have to find that the statutory purpose included preventing accidents like this. Hickey could argue that it would be third persons, not the unlicensed user, that were the object of protection. However, DPW might respond that there is a third party (DPW/Molek) that got hurt.

An additional objection to application of NPS would be the claim that the violation was excused. One recognized excuse under the Restatement of Torts is where the actor "neither knows nor should know of the occasion for compliance." Here Hickey didn't know that Lloyd was unlicensed. On the other hand, DPW could argue that she *should* have known. But Hickey in turn would respond that whether she *should* have known would be a question for the jury. It's hard to tell how the court would rule on this issue.

Vicarious liability. Alternatively, DPW might argue that the statute (or the general concept of vicarious liability) makes Hickey vicariously liable for injuries caused she loaned her vehicle to an unlicensed driver whose negligence resulted in injury to another. Vicarious liability applies when an employee commits a negligent act in the course and scope of employment. However, it usually

contemplates injury to a third person. Because it was the "employee" who was killed, vicarious liability might not apply.

Strict Liability

Strict liability is imposed where a defendant carries on an abnormally dangerous activity, conducts a nuisance, fails to control a dangerous animal, or is subjected to statutory strict liability. Here DPW might argue that the statute imposes a form of strict liability, since it states that the person who violates the statute shall be liable, along with the driver, for damage caused by the negligence of the driver. Again, related to the idea of vicarious liability, DPW could argue that, according to the statute, even if the owner is not negligent in loaning the car to the driver, the owner is subject to liability. It would be useful to obtain more information about the intent behind the statute. It seems that the statute could be read either way. We would need to research the legislative intent behind the statute and determine which interpretation (negligence per se, vicarious liability, or strict liability) is the most plausible.

Conclusion

Depending on how the court reads the statute in question, and what additional facts are discovered with respect to what VH knew or didn't know about Lloyd, VH might be held liable for loaning her car.

Fall 2007 Torts MiniExam Checklist

□ **Overview**
□ **Breach of Duty**
□ **Negligence** Claim
□ Negligence **defined** as failure to use RC
□
□ **Juror** experience
□ Would a **reasonable person** recognize risk?
□ What **facts** would have alerted VH to risk?
□ Negligence **per se**
□ Is this a **Cardozo** jurisdiction?
□ Statute was **violated**
□ What was legislative **intent**?
□

□ What was the statutory **purpose**?
□ VH **excused** for non-compliance?
□ Excuse for ignorance only if **reasonable**

□ **Vicarious** liability
□ Not a **typical** case of injury to 3d party
□ **Statutory** imposition of VL
□
□ **Strict Liability**
□ No **other** forms of SL
□ **Statutory** SL?
□

Exam # _____