

SAMPLE ANSWER TO MID-TERM EXAM

The underlying facts for this question were drawn from *Vetter v. Morgan*, 22 Kan.App.2d 1, 913 P.2d 1200 (1995); I added the part about the employer in order to include a vicarious liability issue.

In order to recover, Vetter ("LV") would have to show (1) a breach of duty that (2) proximately caused (3) compensable injury.

I. Breach of Duty

A breach of duty can be established either through negligence or strict liability. *Negligence.* Negligence is the failure to use reasonable care. LV would base a lawsuit on one of two theories. Either she could argue that Morgan and Gaither ("M&G") were in the course and scope of employment, or else she could argue that Westwood was negligent in their hiring or supervision of M&G.

*Vicarious Liability.* In order to impose liability on an employer, it must be shown that the employee acted negligently while in the course and scope of employment. There are two aspects of acting in the course and scope of employment that matter. First, the employee must be on the job. It appears that M&G were returning from an errand obtaining the roof trusses, and were in the course and scope of employment. Thus, if they had negligently caused injury to LV, there would be vicarious liability. On the other hand, here M&G were doing things that are arguably outside the course and scope of employment. They were not "furthering the master's interests." Morgan stated that he was doing what he did to amuse his friend.

*Negligent Hiring or Supervision / Negligent Entrustment.* Alternatively, even if the court were to find that M&G were outside the course and scope of employment, LV could argue that Westwood was negligent in its hiring or supervision of M&G. After all, they had a previous record of being belligerent on the job site and had been suspended for a week, but kept on the job and entrusted with a company vehicle for a late night errand with no other coworkers. We need to know more about whether or not they displayed other characteristics that would cause a reasonable person to restrict them. Another way of putting the same issue is that Westwood was negligent in entrusting them with a truck. In both cases the question is whether a reasonable person would have recognized the risk and exercised more caution -- perhaps by not sending the two men together at night. Further investigation might reveal industry standards, or company policies, that were not followed. Departure from industry standards or from company policy would be strong evidence that Westwood was negligent in their hiring / supervision / entrustment practices.

*Strict Liability.* I don't see anything in the fact pattern that suggests that strict liability could be applied to the actions of the defendant.

II. Proximate Cause

To establish proximate cause, LV would need to show that W's negligence was both a but-for cause as well as a legal cause of the injury.

*But for cause* would not require much analysis. But for W's continued employment of M&G, providing them with the truck and sending them on an errand, this incident would not have occurred.

*Legal cause.* To satisfy legal cause, the negligence must cause the injury by way of a "direct and unbroken sequence." W would have a plausible argument that their negligence did not proximately cause the injury to LV. While it could be expected that furnishing M&G with a truck would pose a risk of injury to other vehicles and passengers on the highway, it might not be foreseeable that it would lead to this type of harm. Another way of putting this is that the actions of the employees became a "superseding cause" of the injury. Unless the defendant could reasonably foresee the actions of the third party (in this case, M&G's behavior toward LV), then the defendant cannot be said to have proximately *caused* the subsequent injury. W could argue that the only previous incident was with a group of electricians, and it was not reasonably foreseeable that these employees would threaten a motorist (rather than a coworker) for no reason, W did not proximately cause LV's injuries.

### III. Damages

W could argue the LV suffered "mere" emotional injury, and in the absence of any physical injury she can't recover. Most jurisdictions deny recovery for emotional distress in the absence of physical injury, unless some aspect of the case, like a "guarantee of genuineness" for an unusual and significant injury (like negligently notifying the plaintiff that her mother has died, when in fact it was a different person of the same name; or negligently informing the plaintiff that she suffered from a venereal disease, when in fact she did not).

One question here is whether LV actually suffered a physical injury. The facts state that she bumped her head and fell to the floor of the van. If she had a physical injury, with accompanying emotional harm, then there is no barrier to recovery. Even if it is "mere" emotional injury, the court might allow her to recover on the theory that what happened to her contained a "guarantee of genuineness" or complied with a standard that requires "definite physical symptoms capable of clear medical proof." Again, we would need to find out the latest definition of the boundary for permitting recovery for the negligent infliction of emotional distress.

If the plaintiff were permitted to recover, it would be up to the jury to decide on the appropriate measure of damages. So long as the evidence supported the award, it would lie within the jury's discretion to set the amount.

*Punitive Damages.* If the defendant's conduct is worse than mere negligence, and could be classified as a flagrant indifference to or reckless disregard of the risk of injury to the plaintiff, a jury might be permitted to award punitive damages. I don't see anything in the fact pattern that suggests that W would be vulnerable to such a charge. Even though the employees committed conduct that would justify a punitive award, unless the employees whose conduct justifies punitive damages are in a managerial position or the employer ratifies the acts of the employee, the employer won't be held vicariously liable for punitive damages.

### CHECKLIST

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- Overview
- Breach of Duty

- Negligence or Strict liability
- No basis for strict liability
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- Negligence defined as lack of reasonable care
- Vicarious liability for Morgan / Gaither
- Were they in course and scope of employment?
- "On the clock" - yes
- "Furthering master's business" -- probably not
- "Trying to amuse his friend" argues against V.L.
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- Negligent hiring or supervision / entrustment
- Even if outside course and scope of employment
- Would a reasonable person have continued employment / entrusted a vehicle
- Are there any rulebook / guidelines?
- What about industry standards
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- Proximate Cause
- But-for cause + legal cause
- No problem with but-for cause
- Legal cause = "continuous, unbroken sequence"
- Was intentional conduct a superseding cause?
- Was assault on non-employees foreseeable?
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- Damages
- General rule requires physical injury
- Was LV physically injured?
- Did injury exhibit "guarantee of genuineness"
- Jury would decide the amount
- Punitive damages?
- No flagrant indifference by employer