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Torts

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### MID-TERM SAMPLE ANSWER

The facts for this case were (very loosely) derived from *Jordan v. Peet*, 2013 WL 5312401 (Mo. App. W.D.), which reversed a summary judgment dismissing the claim against Peet.

This would be a challenging case. The initial word for Cooper is that he doesn't appear to qualify himself for any of the recovery based on MR ("MR")'s death. However, he may encourage MR's mother June to file a wrongful death action. To recover, June would need to establish (1) a breach of duty, that (2) proximately caused (3) recoverable damages. Each of these issues is addressed in turn.

#### I. Breach of Duty

In order to recover damages, a plaintiff must establish that the defendant breached a duty owed to the plaintiff. Although strict liability applies in some cases, there is nothing in the facts suggesting a basis for holding any of the Stuarts strictly liable. Thus, June would have to prove that one or more of the Stuarts was negligent, that is, failed to use reasonable care.

*Negligence.* Negligence is the failure to use reasonable care. Based on the toxicology report, Jennifer was clearly intoxicated at the time of the collision,<sup>1</sup> and could be considered negligent behavior.

In some jurisdictions a violation of a statute (particularly one like driving / boating under the influence) is considered negligence as a matter of law. In any case, it wouldn't be difficult to establish that Jennifer was negligent in operating the Sea-Doo under the influence. If the additional investigation continues to show that Decker wasn't at fault, then it seems pretty clear that Jennifer was both intoxicated and operated the Sea-Doo in a negligent fashion.

*Negligent entrustment.* An additional target would be Gerald and Paula Stuart, who owned the Sea-Doo. A person can be held liable for injuries caused by negligently entrusting an irresponsible person with a dangerous instrumentality such as a vehicle or a firearm. In this case Gerald gave Jennifer the key to the Sea-Doo. He was likely aware that she had been drinking that afternoon, but he may or may not have been negligent in handing over the key to her. It would be up to the jury to decide whether a reasonable person in Gerald's position would have recognized the danger in giving the keys to Jennifer.

#### II. Proximate Cause

The next element that June would have to prove is that MR's death was proximately caused by the Stuarts' negligence. There are two elements of proximate cause: but-for causation and legal cause.

To establish the first element, June would have to show that, but for the negligence of the Stuarts, MR would not have died. It seems easy to show that Jennifer's negligent operation of the Sea-Doo was a cause without which the fatal collision would not have occurred. Similarly, if a reasonable person would have refused to give Jennifer the keys to the Sea-Doo, then the negligent entrustment of the Sea-Doo is

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<sup>1</sup> Of course, MR was as well, and that might be considered some kind of contributory fault, but since that is beyond the scope of this analysis (and exam), it won't be addressed.

also a but-for cause of the two deaths.

The second prong of the proximate cause test, legal cause, would also be straightforward. Since the negligence of the Stuarts led in a direct and unbroken sequence to the collision, legal cause could be easily satisfied.

### III. Damages

Despite the strong showing that can be made on the first two elements, recovering significant damages would be challenging. Under Linden's wrongful death statute the beneficiaries for a wrongful death claim are the spouse, child, father, mother, and siblings of the decedent. (§16-62-102(d)(1).) Moreover, Cooper is explicitly denied any recovery as the beneficiary of Melissa's estate (§16-62-102(e)). Thus, the only recovery from MR's death would have to be for MR's mother or father,<sup>2</sup> and only the mother (June) appears to be eligible for any type of recovery. The statute authorizes "just compensation for pecuniary injuries" (§16-62-102 (f)(1)), but in this case June wouldn't have much "pecuniary injury" in the sense of lost economic benefits, since there is no reason to think that June would have received economic benefits from MR if she had lived. On the other hand, the statute does permit a recovery for "any mental anguish resulting to . . . beneficiaries of the deceased" (§16-62-102(f)(1)), and thus if June suffered mental anguish as a result of the death that would be compensable under the statute.

Whether June can make an appealing case for mental anguish resulting from the loss of her daughter remains to be seen. Her lack of contact with MR would be an obstacle, but perhaps there are extenuating circumstances and the loss of her only child might be particularly devastating. We don't know if June has already consulted a lawyer, but based upon her behavior at the time of the memorial service, she may simply be in a state of shock. Thus, if Cooper wants to facilitate some kind of recovery in recognition of the loss, he will need to make contact with June, and persuade her to explore a potential claim against the Stuarts. We don't know what sort of insurance or other assets are available to pay compensation, but if they are more than trivial, and if June can make a case that would appeal to a jury (or judge), it would be worth pursuing.

Some additional damage considerations: there is no mention in the statute of a recovery of punitive damages, but even if it were permitted, I'm not sure this case would justify such a recovery. The standard is whether the defendant exhibited a "reckless disregard" for the safety of the plaintiff, and while Jennifer's behavior might have been reckless, and the statute permits a recovery against the estate of the person who caused the death (§16-62-102(a)(2)), I wouldn't think that a jury (or judge) would be inclined to punish her (since she herself perished in the crash). Gerald and Paula were possibly negligent in entrusting the Sea-Doo, but I don't see any way that they would be found in reckless disregard, since their own daughter was also at risk.

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<sup>2</sup> There's no explicit mention of MR being childless, but Cooper made no mention of it, and presumably would have if a child were a potential beneficiary.

## CHECKLIST

- Overview**
- Breach** of Duty
- No **Strict** Liability
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- Negligence**
- Defined as failure to use **reasonable care**
- Negligent operation** of the Sea-Doo
- Driving under the **Influence**
- Negligence **per se**?
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- Negligent **entrustment**
- Would a reasonable person have **withheld** keys
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- Proximate** cause
- but-for cause **plus** legal cause
- But-for** cause test easily satisfied for **Jennifer**
- But-for** cause test easily satisfied for **Gerald / Paula**
- Legal** cause defined
- Direct and **unbroken** sequence
  
- Damages**
- Only **June** appears to qualify
- No remedy for **Cooper** under § 16-62-102(e)
- Economic** damages non-existent
- Mental anguish** authorized
- Would** mental anguish be significant?
- Punitive** damages not likely to enhance recovery
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