

## MID-TERM SAMPLE ANSWER

## QUESTION 1

[This fact pattern is loosely based upon *Williams v. Monarch Transportation, Inc.*, 238 Neb. 354 (1991 WL 100914). The court decided that, despite previous cases limiting damages to "pecuniary losses," an award to the parents of \$265,804 was not excessive. One judge dissented, finding that \$250,000 in pecuniary loss was not supported by the evidence.]

Shirley and Bill (W) would file claims against Sentinel Transportation (ST) and Gimbel (G) under the "wrongful death" statute, §§ 30-809; 30-810. In order to recover against ST or G, W would have to prove that the defendant was negligent, and that such negligence was a proximate cause of the injuries. The amount of damages recoverable under the statute is considered after the evaluation of the claims against each defendant.

### The Claim Against Sentinel (ST)

ST would be vicariously liable for any negligence on the part of Moonoo, since Moonoo was acting in the course and scope of his employment when he knocked over the stop sign.

*Negligence.* To establish negligence, W must prove that ST failed to act as a reasonably prudent person under the same or similar circumstances. In this case W would argue that ST was negligent in two ways: first, by driving in excess of the speed limit; second, in knocking over the stop sign. *Negligence per se.* In many jurisdictions an unexcused violation of a statute is negligence as a matter of law, providing the statute was enacted to protect the plaintiff against the kind of injury suffered. Here ST may have violated two statutes. First, the driver was speeding (traveling 60 to 65 in a 55 mph zone), violating § 39-662. Second, § 39-619 provides that it is unlawful to "in fact ... knock down, or remove any ... stop sign ...." The statutory purpose expressed in § 39-601 provides that the various road regulations are designed to "reduce the huge annual loss of life and property" on the highways. Thus, the statutory purpose in both cases appears fulfilled.

Only unexcused statutory violations qualify for negligence per se. ST would have a hard time arguing that Moonoo had an excuse for speeding. Nothing indicates that there would be a reasonable basis for traveling 60 to 65 mph in a 55 mph zone. However, as to knocking over the stop sign, Moonoo might argue that he had no knowledge of the fact that the stop sign had been knocked over. Under the Restatement, an actor is excused from compliance with a statute where the actor is unaware of the occasion for compliance. Here, however, the statute doesn't require a person to report a downed sign. Instead, it makes it unlawful to "in fact ... knock down ... a stop sign ... ." § 39-619. Thus, the statute doesn't seem to provide any excuses for ST.

In the event that this jurisdiction is like Washington, where statutory violations are simply evidence of negligence, then the jury would have to find that a reasonable person would have complied with the statute. In the case of speeding, the jury might be lenient, given the frequency with which trucks travel 5-10 miles over the speed limit. Moreover, since M was braking to avoid a deer, his actions might appear reasonable. Even so, the whole point of traveling within the speed limit is to be able to control your vehicle. By traveling so fast that a sudden stop caused his truck to jackknife, M was traveling faster than a reasonably prudent person would have. As to running over the stop sign, the jury might not consider that a violation if he had made an effort to investigate and had attempted to notify someone of the downed sign. However, just leaving the scene of the accident without further attempt to verify what happened might seem negligent.

*Proximate Cause.* Even if ST is found negligent, W must also establish that ST's negligence was a proximate cause of the collision and subsequent injuries. Proximate cause is composed of two elements: first, the negligence must be a "but-for" cause of the injury; and second, it must be a "legal cause." *But-for cause.* To be a but-for cause, the negligence must be such that, more probably than not, the accident would not have occurred if the defendant had used reasonable care. In this case, would the accident have occurred but for the speeding? That would be a close question. M would have been in a different place if he had been traveling slower, and would not have had to slam on his brakes to avoid the deer. A slower speed might have allowed him to retain control of the truck without causing it to jackknife. As far as the stop sign, there seems to be little question that, but for the stop sign being knocked over, G would have stopped and this accident would have been prevented. *Legal Cause.* W must also satisfy the jury that ST's negligence was a *proximate* cause of the injury, defined in jury instructions as one which "in a direct and unbroken sequence leads to the plaintiff's injury." Here ST might argue lack of legal cause in several respects. First, with respect to speeding, ST might argue that it was mere chance that the accident occurred. Traveling at 60 mph rather than 55 mph might not have increased the chance of a deer jumping out, slamming on the brakes, and knocking down the stop sign. Second, ST could argue that G was a superseding tortfeasor. I don't think this argument would work, since the very thing that made it negligent—knocking down the stop sign—could be foreseen as a risk of driving too fast and losing control. Moreover, G may not even have been negligent in entering Highway 286. ST could hardly argue that his negligence was so reprehensible as to break the chain of causation. Finally, ST might argue that the ultimate injury was unforeseeable. But as a matter of law, the fact that the statute prohibits knocking down stop signs establishes the causal link between doing so and the ultimate injury.

### The Claim v. Gimbel (G)

A claim might also be filed against Gimbel. As with Sentinel, W would have to prove that G was negligent and that such negligence was a proximate cause of the injuries.

*Negligence.* The only basis for asserting that Gimbel was negligent would be a claim that he should have been aware that he was approaching Highway 286. Since this accident occurred at night, what about Kari's headlights? Couldn't he see far enough in advance to tell that he was about to cross a major highway? The facts aren't clear on this point, but perhaps he was not as vigilant as he should have been. The statute (§39-662) does require driving with "regard to the actual *and potential* hazards then existing." There is also a statute that requires stopping upon entering an arterial highway (§ 39-618), but this statute only applies "when stop signs are erected as provided by law." Consequently, unless further facts are developed, it doesn't appear that G would be negligent in driving as he did.

*Proximate Cause.* If G were found negligent in failing to notice that he was about to enter the highway, then his negligence would be both a but-for and legal cause of the injury.

Damages

If either defendant is found liable, the jury must determine the amount of damages. The statute is enigmatic, providing simply that the action shall be brought on behalf of the decedent for "the exclusive benefit of the widow or widower and next of kin." Obviously there is no widow or widower, but there are next of kin, namely W. The statute doesn't describe what damages can be recoverable, but simply says that "the judgment should be for the amount of damages which the persons in whose behalf the action is brought have sustained." This would appear to include both economic (pecuniary) and non-economic or "pain and suffering" kinds of damages. However, the statute also provides that the damages shall be distributed to the next of kin "in the proportion that the pecuniary loss suffered by each bears to the total pecuniary loss suffered by all such persons."

Therefore, unless the individual plaintiff has suffered at least some pecuniary loss, there is no basis for recovery. Fortunately, in this situation there would probably be a substantial pecuniary loss arising from the medical care and/or the funeral expenses. (Although Kari was employed, and her estate would have suffered pecuniary loss, unless the parents would have anticipated receiving financial benefits from Kari's employment [not the usual pattern], they couldn't use that as a pecuniary loss.) As a matter of fact, although the brother and three sisters of the decedents, who might qualify as "next of kin," would be entitled to an award for their "damages," the total award will be distributed to each relative in proportion to the pecuniary damages. Thus, even if the damages to the brothers and sisters is compensable, the award would go exclusively to W.

Finally, it doesn't appear that either of the defendants, even if found negligent, could be said to have exhibited willful or wanton conduct toward the plaintiff, or reckless disregard of the plaintiff's safety. Thus, no award of punitive damages would be justified.

## QUESTION 2

[This question is loosely based upon the facts in *Matomco Oil Co. v. Arctic Mechanical*, 796 P.2d 1336 (Alaska 1990).]

Rose might sue Matomco on three different theories: (1) for negligently failing to tell Darcy about the previous contents of the tanker; (2) for conducting an abnormally dangerous activity; and (3) on the basis of vicarious liability for the conduct of Darcy.

### 1. Negligently Failing to Tell Darcy of the Contents of the Tanker

As discussed in more detail below, an employer is vicariously liable for any negligence committed by an employee in the course and scope of his employment. Here John Hendricks told Darcy that the tanker had contained diesel, when in fact it contained aviation fuel. If that act was negligent, Matomco would be vicariously liable for such negligence.

Matomco owed a duty to Darcy to use reasonable care, which is the care that a reasonable person would have used in the same or similar circumstances. Rose would argue that a reasonably prudent person would have checked before making any statements about the contents of the tanker. Using Learned Hand's calculus, it would have taken very little effort to ascertain the previous contents, and the probability of the risk multiplied by the severity of the injury is quite high. The jury would have to decide the issue of negligence, but the case against Matomco seems quite strong on this point.

*Proximate Cause.* Even if Matomco was negligent, the jury would also have to find that such negligence was a proximate cause of Rose's injury. To do so, two questions must be answered: first, more probably than not, would the accident have been avoided but for M's negligence (the "but-for cause" requirement)? And second, did the negligence lead to the injury in a direct and unbroken sequence (the "legal cause" requirement)? As to but-for cause, M might be able to argue that even if Hendricks told Darcy that the tanker contained JP4, Darcy might have done exactly the same thing. There is a statute, § 18-614, that requires a person in Darcy's position to clean out the tanker before doing any work on the tanker, to avoid an accident like this. Darcy might say that if he knew the tanker contained JP4 rather than diesel, he would have behaved differently. But particularly in view of his comments after the injury, the jury might conclude that he would have done exactly the same thing. (Conceivably, Rose might argue that even if the accident probably would have happened anyway, he's entitled to a loss of a chance instruction, valuing the chance of his escaping injury if M had acted with reasonable care. That seems like a long-shot, however.) Rose must also prove that the accident occurred in a direct and unbroken sequence. Although it took the intervening conduct of Darcy to cause the explosion, if the jury believes that he would not have worked on the tank in this way if a proper description of the contents had been given, then the "legal cause" aspect of proximate cause would also be satisfied.

## 2. Abnormally Dangerous Activity

Even if M were found to have used reasonable care, they could be held strictly liable if they are found to have conducted an abnormally dangerous activity. In addition to proving that the activity is abnormally dangerous, the plaintiff must show that the injury arose from that which made the activity abnormally dangerous. (a) *Abnormal Danger.* R might have a tough time showing that M's transportation of aviation fuel was an abnormally dangerous activity. A judge would determine whether the activity was abnormally dangerous based upon six factors. The ones that would support the plaintiff's case would be the high risk of injury and the severity of the injury; however, other factors would militate against strict liability: the risk can be eliminated through the use of reasonable care; and it seems relatively common and appropriate to the place where it is being carried on. (b) *Cause of the Injury.* This case would be dissimilar from cases like *Siegler v. Kuhlman*, where a gasoline carrier was held strictly liable, since the accident didn't arise from the spillage and ignition of large quantities of fuel; rather, the injury occurred because of the negligent handling of a very small quantity. Perhaps the business of carrying around lots of aviation fuel carries with it the risk that small quantities will explode, but if this were the only risk from carrying aviation fuel, it would probably not be abnormally dangerous. (After all, paint fumes will also explode under the right circumstances.)

As far as proving proximate cause, there would be no question that if the activity is found to be abnormally dangerous, then it was a proximate cause of Rose's injury.

## 3. Vicarious Liability

R might argue that M should be held vicariously liable for Darcy's negligence. Darcy apparently violated a statute that requires more careful handling of such containers. However, M would not be liable if Darcy is found to be an independent contractor. That certainly appears to be

the situation here. M would only be liable if M in fact had the right to control D's conduct, that is, to tell him how to perform the work. That doesn't appear to be the case here, either. Thus, Rose would have to prevail either on the theory of negligence in misinforming Darcy of the contents, or strict liability for an abnormally dangerous activity.

4. Damages

Rose would be able to recover past wage loss and any future wage loss attributable to the injury; and any pain and suffering resulting from the injury. As a long shot, R might argue that the failure to check on the contents of the tank displayed such a reckless disregard of the plaintiff's safety that it would justify the award of punitive damages (assuming this jurisdiction recognizes them). However, that seems highly unlikely.

CHECKLIST (Summer 91 Mid-Term)

Question 1

- Negligence **plus** causation **plus** damages
- Claim v. **ST**
- ST vicariously liable** for M's negligence
- Definition** of negligence
- Negligence **per se**
- Definition** of Negligence per se
- Application to **Speeding**
- Statutory purpose** in § 39-601
  
- Excuse** for speeding
- Excuse for **knocking over** stop sign
- Determination of negligence if **Cardozo approach not taken**
- Custom** of the industry
- Failure to **investigate**
  
- Proximate Cause **defined**
- But-for Cause** defined
- Speeding** as a but-for Cause
- Knocking over the **stop sign as BFC**
- Legal cause** defined
  
- Mere chance** from speeding
- Lousy **Superseding** Tortfeasor argument
  
- Claim v. **Gimbel**
- Was Gimbel **negligent**?
- Negligence **per se** wouldn't work
- Proximate cause** not a problem
  
- Damages**
- Statute provides a **recovery for "next of kin"**
- What **"pecuniary loss"** did the parents suffer?
- Next of kin might include **brothers and sisters**
- Money is distributed by **ratio** of pecuniary loss
- No **punitive damage** recovery

Question 2

- M's negligence in **failing to tell** of the contents of the tanker
- Definition** of Negligence
- Hendricks makes M **vicariously liable**
- Would a **reasonably prudent person** check the contents?
- Learned Hand** calculus
  
- Proximate Cause**
- But-for** Question
- Would Darcy have **buffed even a JP4** tanker?
- Loss of a **Chance**
- Not a **superseding** tortfeasor problem
  
- Strict Liability** Argument
- Definition of **Abnormally Dangerous** Activity
- Application of **Restatement** Criteria
- Question of whether **injury caused by** abnormally dangerous **aspect**
- No problem with **Proximate Cause**
  
- Vicarious Liability** Issue
- No liability for **Independent Contractor**
- M had no **right to control** Darcy
- Damages**
- Wages plus **pain and suffering**
- Probably no **punitive damages**

Exam # \_\_\_\_\_ Overall Grade \_\_\_\_\_