

SAMPLE ANSWER TO MID-TERM EXAM

QUESTION 1

[This problem, at least the liability portion, is based upon the facts in *Madison v. Midyette*, 541 So.2d 1315 (1989). In that case the court held that it was a jury issue whether Reaves had been negligent, and whether it proximately caused the injuries.] I would advise GLHIC that Midyette ("M") would probably be liable to Graham and Julie Greene ("G") if Reaves ("R") acted negligently in leaving the smoldering piles of brush. However, I would also focus on the issue of proximate cause, since it may be difficult for G to prove that the smoldering brush was a proximate cause of the injury. The analysis focuses on five questions: (1) Would M be vicariously liable for R's negligence? (2) Can M be held strictly liable for the injuries? (3) Was R negligent? (4) Was the accident proximately caused by the smoke? and (4) What sorts of damages would be recoverable?

1. *Vicarious Liability*. Vicarious liability is imposed upon an employer if the employee acts negligently. Here it would be hard for G to show that M was an employer; instead, R would probably be viewed as an independent contractor, since M didn't exercise any control over the way R did his work, R would probably be considered an independent contractor. On the other hand, the test is whether M had the *right to control* the manner in which R did the work; based on that standard, the right to control, even if not exercised, might be sufficient to establish the existence of an employer-employee relationship. If that were true, then any act of negligence on the part of

2. *Strict Liability*. Strict liability is imposed where the defendant has acted in a way that is considered abnormally dangerous, or if the conduct can be considered a nuisance. *Abnormally dangerous activities* are defined by the Restatement (2d) of Torts, § 520. The courts consider a variety of factors in deciding whether to apply strict liability, including whether or not the activity poses a high risk of harm to others; poses risks that cannot be eliminated through the use of reasonable care; is inappropriate to the place where it is carried on; is of high value to the community; etc. The smoke that is generated by these fires may combine to cause a loss of visibility, and as the recent pile-up in California demonstrates, it can be quite deadly. Perhaps § 520 would apply. In addition, *nuisance* should be considered a possibility. A nuisance exists when one person's use of his property infringes unreasonably upon the right of neighboring property owners to enjoy their property. In this case the plaintiff was not really a property owner, and hence would have a rather weak claim. On the other hand, who but the motorists traveling down the road would be victimized by smoke drifting into the motorway.

There is a problem in both cases that arises from the statute, CSA §590.026 et seq., which deals with the regular use of burning as a forest management technique. The legislature seems intent on removing this from consideration as a strict liability or nuisance category, but it seems to hinge upon compliance with the terms of the statute, which include the presence of a "certified prescribed burn manager" who must be "present on site while the burn is being conducted." We don't have that here. Moreover, the statute says that no owner or his agent shall be held liable "unless negligence is proven." Thus, even if this section were to apply, it does not remove liability where there is negligence—either on the part of the owner or his agent, I would guess.

3. *Was R negligent?* Thus, a critical issue is whether R was negligent. To know whether someone was negligent we ask whether a reasonably prudent person in that person's shoes would have acted similarly. One relevant issue is whether it is common for people who clear land to leave

the piles burning overnight. Particularly if fog is a risk, and where the property is close to a congested freeway, as this property is, it might be considered reasonable care to put the fire out before leaving. On the other hand, we might find an expert who would say this is perfectly consistent with industry practice. We should be aware, however, that industry custom can be trumped by a claim that industry practice is too lax, given the risk involved. There may be other statutes that address the question of how to conduct burning. This doesn't seem to fall within the statute exactly, since it's not a prescribed burn, and there isn't someone present. It doesn't say that burns may only be done when a person is present, and the facts indicate that R did get a burn permit. So we don't know whether R violated a statute. If he did, that would constitute negligence per se. In some jurisdictions that is conclusive proof (absent an excuse) that the defendant was negligent; in others it would merely be evidence for the jury to consider in deciding the negligence issue.

4. *Did the smoke cause the accident?* Apparently there were witnesses who said that the smoke combined with the fog to reduce visibility. G would have to prove at trial that, more probably than not, the accident and resulting injuries would not have occurred *but for* the presence of smoke. That would be a close question, but if witnesses say that traffic was doing okay in the fog, but when it came to smoke plus fog, it got worse, it would probably go against us.

5. *Damages.* Graham Greene would be able to recover for lost wages, for medical expenses, and for pain and suffering associated with the accident. Julie Greene would also be allowed to recover for loss of consortium with her husband. Given her own health difficulties, the loss of the ability to enjoy "quality time" with her husband before her death might be particularly deserving of compensation in the jury's eyes.

Overall, I would think this case depends significantly on how strong the evidence is that R was negligent. If the case against R is strong, the chances of recovery against M are also strong, and therefore we should be prepared to offer a significant amount to settle the case.

QUESTION 2

[This question, at least in terms of liability, is based upon *Jackson v. Hertz Corp.*, 1990 WL 191953 (1990). The jury deadlocked on the liability issue, and the trial court then directed a verdict for the defendant. On appeal the court held, strangely enough as far as I'm concerned, that Hertz was not negligent as a matter of law.]

The first thing I would explore with Visalia ("VJ") is whether she is entitled to recover at all under the wrongful death statute. Cumulus' statute appears to be fairly liberal; not only does the statute explicitly say that it is to be liberally construed (§768.17), but it is written in a form that is designed to compensate the survivors of the decedent. Damages will be discussed in more detail below.

Negligence: Renting the Car. The first hurdle for Visalia in establishing liability will be to prove that Hirt's acted negligently. Negligence is the failure to use the care that a reasonably prudent person would use in the same or similar circumstances. Here an important question would be whether Hirt's violated the statute, CSA § 322.38, that requires a rental company to inspect the driver's license of the person to whom the car was being rented. Hirt's did not inspect Pat Perry's driver's license. However, they did inspect Owen Olsen's. Perhaps the "person to whom the vehicle is rented" would include Olsen. I don't know. Assuming there was a statutory violation, we need to look up what kind of effect that would have. In some jurisdictions a statutory violation is evidence of negligence and the jury must decide. In other jurisdictions courts hold that violation of

a statute designed to prevent the kind of injury that occurred to the plaintiff subjects the violator to a finding of negligence as a matter of law. It would certainly be beneficial to VJ.

Another avenue of establishing negligence would be violation of a company rulebook or industry custom regarding how cars are rented. Here Hirt's seems to be in good shape, although we might argue that industry customs are too lax.

Negligence: Reporting the Theft. Another area of concern is that Hirt's took such a long time in reporting the car theft. Two months passed between the rental of the car and the report of the car theft. However, this appears to be in conformity with local police rules, and may turn out to be reasonable.

Proximate Cause: The "But-For" Test. Even if Hirt's was negligent, their negligence must be established as a "but-for" cause of the injury. That is, VJ must show that, but for the negligent act of Hirt's, Junior would not have been injured. That seems obvious in the case of renting the vehicle to Pat Perry; if Hirt's had insisted upon seeing her driver's license and matching it to the signature, she never would have gotten the car. On the other hand, it's not clear that reporting the theft sooner would have prevented the injury. I don't know what the statistics are in terms of car theft. Assuming that through reasonable care the car would have been reported sooner, it would be necessary to show that, more probably than not, prompt notification would have prevented the injury. Expert testimony might perhaps answer that question.

Proximate Cause: "Legal Cause". In addition to showing "but-for" causation, VJ would also have to show that Hirt's negligence was a *legal cause* of the injury. (1) Is the negligence in this case the kind that tends to increase the kind of injury that occurred here? The answer is yes. (2) Was there a superseding tortfeasor involved? Arguably the thief was a superseding cause that broke the chain of causation, but that is the very risk against which the statutes are presumably passed. Thus, this should be no problem for VJ. Finally, (3) Was the plaintiff unforeseeable? The answer here is no, since it is not removed in time or space from that which makes the conduct negligent. Overall, I would conclude that VJ could meet the "legal cause" prong easily.

Damages. VJ should think about three kinds of damages: (1) lost income; (2) pain & suffering; and (3) punitive damages. First, *lost income*: The statute provides for recovery of lost "net accumulations," defined in §768.18(5), which is the amount that the estate would have built up and then distributed had he lived. Section 768.21(6)(a)(2)) provides that this amount can be recovered by her since VJ is the only surviving relative. It's unclear what sort of accumulation Junior would have had, but perhaps Junior was very industrious and frugal, indicated by riding his bicycle to work. On the other hand, maybe he wasn't much in the way of an economic power.

More importantly, the second aspect of the statute is CSA § 768.21(4), which allows the parents of minor children to recover for mental pain and suffering from the date of the injury. Minor children are defined as anyone under the age of 25. Junior's age is not stated, so he may be older than 25. However, even if he is an adult, § 768.21(4) also provides that parents of adult children are entitled to mental pain and suffering if there are no other survivors. Thus, there will be not only an economic recovery, but one for Visalia's pain and suffering as well. That should be a significant number.

Third, punitive damages would be recoverable if VJ could establish that Hirt's was guilty of a conscious or reckless disregard of her son's safety. I'm not sure she could prove that in this case. Hirt's obviously had their own stake in insuring that their vehicle wasn't stolen, so it's pretty hard to say they knew it was going to be stolen, or thought it would be, and just decided to dump the

problem on someone else.

Damage Limitations. CSA § 768.043 also provides for supervision by the court of any award. Thus, an award of more than, say, a million dollars—were VJ to get one—would be subject to reduction by the judge to insure that it is not a function of passion or prejudice.

Overall, I think VJ's chances of recovery would be pretty good, assuming she can establish a statutory violation.

Fall '91 Torts Mid-Term CHECKLIST

QUESTION 1

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|------------------------------------------------------------------------------|------------------------------------------------------------------------|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Was R negligent? |
| <input type="checkbox"/> Vicarious Liability | <input type="checkbox"/> Definition of Negligence based upon RPP |
| <input type="checkbox"/> Independent contractor or employee? | <input type="checkbox"/> Learned Hand test |
| <input type="checkbox"/> Right to control? | <input type="checkbox"/> Expert testimony regarding custom of industry |
| <input type="checkbox"/> If an employee, negligence by R would make M liable | <input type="checkbox"/> <i>Hooper</i> problem |
| | <input type="checkbox"/> Negligence per se |
| <input type="checkbox"/> Strict liability | <input type="checkbox"/> Proximate Cause |
| <input type="checkbox"/> Abnormally dangerous activities | <input type="checkbox"/> Definition of but-for causation |
| <input type="checkbox"/> Restatement test | <input type="checkbox"/> Application to this case |
| <input type="checkbox"/> Application of factors | <input type="checkbox"/> Legal cause no problem |
| <input type="checkbox"/> Nuisance | |
| <input type="checkbox"/> Definition of nuisance | <input type="checkbox"/> Damages |
| <input type="checkbox"/> Was the plaintiff a property owner? | <input type="checkbox"/> Lost wages & medical expenses |
| <input type="checkbox"/> Effect of statute | <input type="checkbox"/> Pain & Suffering |
| | <input type="checkbox"/> Loss of consortium |
| | <input type="checkbox"/> Potential for big award |

QUESTION 2

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|-------------------------------------------------------------------|------------------------------------------------------------|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Proximate cause defined |
| <input type="checkbox"/> Was Hirt's negligent? | <input type="checkbox"/> But-for causation |
| <input type="checkbox"/> Negligence per se | <input type="checkbox"/> Applied to this situation |
| <input type="checkbox"/> Was the statute violated | <input type="checkbox"/> Legal cause |
| <input type="checkbox"/> Was statutory intent to be applied here? | <input type="checkbox"/> Superseding tortfeasor |
| <input type="checkbox"/> Company rulebook/custom of industry | <input type="checkbox"/> Foreseeable plaintiff |
| <input type="checkbox"/> <i>Hooper</i> issue | |
| <input type="checkbox"/> Negligence in reporting the theft | <input type="checkbox"/> Damages |
| | <input type="checkbox"/> Overall structure of statute |
| | <input type="checkbox"/> Lost Wages—Explain how calculated |
| | <input type="checkbox"/> Pain and suffering |
| | <input type="checkbox"/> Punitive damages? |
| | <input type="checkbox"/> Remittitur |