

SAMPLE ANSWER TO MID-TERM EXAM

QUESTION 1

*The facts for Question 1 are taken from Stewart v. Ryan, 520 N.W.2d 39 (N.D. 1994), in which the court reversed a summary judgment in favor of all the defendants (on the basis of superseding cause) and held there was a jury question with respect to whether Johnny's Bar and LIA were a legal cause of the injury.*

In order for Jennifer and Eric to recover, they would need to establish that a defendant breached a duty to them, and that such breach was a proximate cause of compensable damage. One difficulty in the case is the fact that the most culpable defendant is likely to be insolvent and unable to pay for any of the injuries caused. We will look at the other defendants as potential "deep pockets" to pay for the injury.

Johnny's Bar ("JB")

*Breach of Duty.* The first element of a claim against JB is to show that JB breached a duty owed to the Stewarts. In this case the breach of duty would consist of a negligent act, namely, serving alcoholic beverages to Densmore after he was intoxicated. One method of establishing negligence is to show a statutory violation, in this case GSA § 5.001, which prohibits serving a person who is "obviously intoxicated." Ordinarily, proof of negligence requires a jury finding that the defendant failed to use reasonable care. However, many jurisdictions employ the doctrine of "negligence per se," which makes a statutory violation dispositive of negligence if (1) the violation was unexcused, and (2) the statute was intended to prohibit the kind of injury suffered by the plaintiff. Both appear favorable to us, but we would have to convince the jury that (1) Densmore was obviously intoxicated (presumably, serving anyone 15-20 drinks would render that person obviously intoxicated), and (2) whether the statute was designed to prevent armed assault rather than, for example, drunk driving or the like.

*Proximate Cause.* The test for establishing proximate cause is whether (1) the injury would have occurred but-for the defendant's negligent act; and (2) whether the negligent act was a *legal cause* of the injury—whether, as it is formulated in standard jury instructions, the injury occurred in a "direct and unbroken sequence" from the negligent act. With respect to "but-for" cause, it would be a jury question whether the shooting would have occurred if Densmore hadn't been drinking. Since intoxication leads to the clouding of judgment and a relaxation of inhibitions, it is likely that the jury would find the intoxication a but-for cause. With respect to legal cause, the question is whether Densmore was a *superseding cause* of the injury; a jury might find that the chain of causation was broken by the intentional, criminal act of shooting. (Unlike drunk driving cases, where careless driving is a foreseeable result of overserving a tavern patron, this case involves a very different kind of injury from the one that would be expected. Armed assault is also a much more serious and intentional crime, thus making it harder to show that the overserving by the bar "caused" the criminal conduct).

### Red Dog and LIA

The other two bars might be potential defendants, since apparently JB has insufficient resources to pay for damages. The claims for negligence would be similar to the claim against JB. However, several additional problems would emerge. First, it is not clear whether Densmore actually drank at either establishment. If the jury believes the evidence suggesting that he did, then they would also have to find that Red Dog or LIA was negligent in doing so; this could be accomplished through the doctrine of negligence per se, although there would still need to be proof that Densmore was "obviously intoxicated" when he was served.

*Causation.* The issue of but-for causation would be difficult, since Densmore was presumably quite intoxicated when he appeared at Red Dog and LIA, and thus the jury might doubt whether the serving made a difference. I would argue that the jury should be instructed on the "substantial factor" test, which applies when the defendants could be classified as *multiple redundant causes*, that is, their contributions overlapped in such a way that each could plausibly deny that their contribution was a but-for cause. In such cases, to avoid having the plaintiff be penalized by what is in effect an embarrassment of riches, courts will require the plaintiff to prove that the defendant's negligence was a "substantial factor" in causing the injury.

The legal cause issues would be the same for Red Dog and LIA as for JB, although it would be even more powerful for Red Dog and LIA to argue that their negligence was superseded both by the negligence of JB and especially by DD's intentional assault.

### Damages

If liability is established, the defendants would be required to pay any lost wages and medical expenses suffered by Eric; in addition, they would be required to pay for pain and suffering that he has experienced and will probably experience in the future. If the jury finds that the defendant's conduct was not just negligent, but was in reckless disregard of the plaintiff's safety, then the jury could award punitive damages. Jennifer is eligible (per statute) for her own separate claim based upon the loss of her husband's society and companionship; and if they have any children, perhaps Anxiety would recognize the right of the children to recover for serious injuries suffered by their parents.

### QUESTION 2

*The facts for Question 2 are taken from a newspaper account of a bus accident in Los Angeles on December 7, 1995. The facts were changed to make a private contractor rather than the City the party that operated the dump trucks.*

There are several difficult issues facing us in this claim. First, we must determine whether or not there was a breach of duty in allowing the injury to occur; second, whether that breach was a proximate cause of damages; and third, who would be eligible for damages and how those damages would be measured.

*Breach of Duty.* The two ways to establish a breach of duty are (1) to show that the defendant (our client, WasteCollect, hereinafter "WC") was negligent; or (2) to show that WC

engaged in an activity subject to strict liability.<sup>1</sup> The only basis for the latter claim would be that operating a garbage truck is an abnormally dangerous activity. That would be difficult to establish, given how common garbage trucks are, and the fact that injury can be avoided by using reasonable care. Thus, this analysis will focus on whether WC was negligent. Negligence is the failure to use reasonable care, and there would be two areas where negligence would be alleged: first, WC was arguably negligent in the way they maintained the trucks. Someone noticed that the hydraulic arm (piston) was not functioning correctly, but no one fixed the problem before it was used the following day. Perhaps expert opinion would be helpful as to what constitutes reasonable care under such circumstances. The admission by Randall Bacon that the truck "should have" been held out of service until it was fixed suggests pretty strongly that the failure was negligent. On the other hand, no one had reason to suspect that it would cause injury, certainly not of this catastrophic nature. Thus, the failure to promptly repair the piston may or may not be something the jury finds negligent.

A second source of negligence is the failure of the truck driver to notice, or worse, remedy the fact that the piston was sticking out. Some witnesses got the impression that the driver was aware of the piston sticking out prior to the accident, whereas other witnesses seemed to think it came out just at the moment of impact. If the piston was sticking out into traffic sometime prior to the accident, a driver exercising reasonable care would have presumably acted promptly to avoid causing an accident of the kind that occurred here. Any negligence on the part of the driver would be imputed to WC, under the principle of vicarious liability: an employer is legally responsible for any negligence committed by an employee acting in the course and scope of employment.

*Proximate Cause.* It should be easy for the plaintiffs to establish that any negligence by WC was a proximate cause of injury. Two questions must be answered in the affirmative: first, was the negligence a but-for cause of the injury? In this case, repairing the piston before using the truck again, or (if there was time between the extension of the piston and the accident) acting promptly to keep the piston from striking on-coming traffic—in each case the plaintiff could show that but for the negligent act there would have been no injury. Similarly, I would foresee no difficulty establishing legal cause, which is typically formulated in jury instructions as the question of whether the injury occurred in a "direct and unbroken sequence" beginning with the defendant's negligence. Although WC might argue that this particular injury, bizarre as it is, was not a foreseeable consequence of the original negligence, it is foreseeable that a mechanical problem could lead to personal injury. The exact sequence of events doesn't have to be anticipated so long as the potential for injury to people in the plaintiff's position was reasonably foreseeable.

*Damages.* The most complex issue in this case is how to calculate damages. The number of potential plaintiffs is very large. They include (1) the families of Matta and Serrano; (2) Garay and Aguilar; (3) the other children on the bus; (4) Sanchez and Caballero; and (5) other bystanders.

1. *Matta and Serrano.* The State of Anxiety has statutes that provide for recovery in the

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<sup>1</sup>There is also a provision in the wrongful death statute, § 71.002(d)(2)(C), that creates something akin to strict liability because it makes the operator of a public utility vehicle liable for any "unsafe condition" in the vehicle. This would apparently apply on to the wrongful death claims, not to any of the injury claims.

event of wrongful death. GSA § 71.010(a) states that "[t]he jury may award damages in an amount proportionate to the injury resulting from the death." The award goes to the parents, but not to siblings (§ 71.004). Although the statutory language does not spell out whether non-economic losses (such as the society and companionship) are recoverable, the plaintiffs would undoubtedly argue that in order to be "proportionate" to the injury, the award would have to include non-economic damages, since parents typically do not suffer economic loss as a result of the death of a child. On top of the wrongful death action, GSA § 71.021 also permits a survival action on behalf of the decedent. This might allow an additional recovery for any pain and suffering experienced immediately prior to death, or it might include wage loss or even non-economic damage suffered by the decedent (as distinguished from the survivors) because of premature death. I'd want to find out more about how these two statutes are reconciled with one another before reaching any firm conclusion.

The statute also specifically authorizes punitive damages, so if the conduct of the WC employees demonstrated a reckless disregard for the safety of the decedents, that might be an additional source of recovery.

2. *Garay and Aguilar*. Garay was in "critical condition," but was expected to recover; he suffered a skull fracture, but did not require surgery. He was not expected to suffer any brain damage or other permanent injury. Nonetheless, the jury will be asked to award any expected lost wages and whatever medical expenses now or in the future. He would also be entitled to pain and suffering damages, which will include compensation for emotional sequelae of the accident. Aguilar apparently suffered only "minor injuries" and should be entitled to relatively limited damages, including any medical expenses, and whatever pain and suffering the jury finds to require compensation.

3. *Other children on the bus*. Recovery for personal injury usually requires proof of a physical injury. Although the other children on the bus were not physically injured (so far as we know), they are probably entitled to damages since they were "in the zone of danger"; moreover, they were close by (in the same bus with) quite grievously injured fellow-passengers, and thus may come within the rule of *Ballinger v. Palm Springs Aerial Tramway*, which permitted a recovery despite the fact that the fellow occupants of the gondola were not blood relatives. The damages they may seek would include the trauma of observing the violent death of two of their classmates.

4. *Sanchez (Garcia) and Caballero*. Sanchez (Garcia) may also claim that he was in the zone of danger, since the piston narrowly missed him. He was also part of the rescue effort and was traumatized by seeing the carnage in the bus. Caballero also was arguably in the zone of danger, but he wasn't in as close contact.

5. *Other Bystanders, Parents*. There were others, including the rescue personnel, other parents, etc., who would have claims for their injuries, but their claims would be considerably weaker. A court would probably determine that they did not qualify for an independent action.

FALL '95 MID-TERM—CHECKLIST

QUESTION 1

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| <input type="checkbox"/> Overview                              | <input type="checkbox"/> Red Dog & LIA               |
| <input type="checkbox"/> Johnny's Bar                          | <input type="checkbox"/> Conflict in testimony       |
| <input type="checkbox"/> Breach of Duty                        | <input type="checkbox"/> "Obviously intoxicated"?    |
| <input type="checkbox"/> Negligence                            | <input type="checkbox"/> But-for causation?          |
| <input type="checkbox"/> Negligence per se                     | <input type="checkbox"/> Substantial factor test?    |
| <input type="checkbox"/> Was Densmore "obviously intoxicated"? | <input type="checkbox"/> Legal cause issues the same |
| <input type="checkbox"/> Does statutory purpose extend?        | <input type="checkbox"/> Damages                     |
| <input type="checkbox"/> Proximate Cause                       | <input type="checkbox"/> Lost wages                  |
| <input type="checkbox"/> But-for causation                     | <input type="checkbox"/> Pain & suffering            |
| <input type="checkbox"/> Legal Cause                           | <input type="checkbox"/> Punitive Damages?           |
| <input type="checkbox"/> Superseding?                          | <input type="checkbox"/> Loss of Consortium          |
| <input type="checkbox"/> Foreseeable?                          | <input type="checkbox"/> Children's claims?          |
| <input type="checkbox"/> Disproportionately Reprehensible?     |  |
| <input type="checkbox"/>                                       | <input type="checkbox"/>                             |
|  | <input type="checkbox"/>                             |
|  | <input type="checkbox"/>                             |

QUESTION 2

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| <input type="checkbox"/> Overview  | <input type="checkbox"/> Damages   |
| <input type="checkbox"/> Negligence  | <input type="checkbox"/> (1) Wrongful Death  |
| <input type="checkbox"/> Failure to properly inspect / maintain                              | <input type="checkbox"/> Parents (not siblings)                                    |
| <input type="checkbox"/> Admission of negligence   | <input type="checkbox"/> Economic Loss?  |
| <input type="checkbox"/> Subsequent repairs (inspection) would not be admissible in evidence | <input type="checkbox"/> Non-economic damages necessary for "proportionate" award? |
| <input type="checkbox"/> Expert opinion / industry custom ?                                  | <input type="checkbox"/> Loss of Society/Consortium                                |
| <input type="checkbox"/> Failure to notice after it "extended"                               | <input type="checkbox"/> Survival action (?)                                       |
| <input type="checkbox"/> Evidence in conflict  | <input type="checkbox"/> Punitive damages?   |
| <input type="checkbox"/> Vicarious liability   | <input type="checkbox"/> (2) Garay and Aguilar                                     |
| <input type="checkbox"/> Proximate Cause   | <input type="checkbox"/> economic & non-economic damages                           |
| <input type="checkbox"/> But-for cause   | <input type="checkbox"/> (3) other children on the bus;                            |
| <input type="checkbox"/> Legal Cause   | <input type="checkbox"/> "zone of danger"  |
| <input type="checkbox"/> Foreseeable   | <input type="checkbox"/> <i>Ballinger v. Aerial Tramway</i>                        |
| <input type="checkbox"/>   | <input type="checkbox"/> (4) Sanchez-Garcia and Caballero;                         |
| <input type="checkbox"/>   | <input type="checkbox"/> zone of danger  |
| <input type="checkbox"/>   | <input type="checkbox"/> (5) other bystanders, parents.                            |
| <input type="checkbox"/>   | <input type="checkbox"/>   |
| <input type="checkbox"/>   | <input type="checkbox"/>   |
|  | <input type="checkbox"/>   |

Exam Number \_\_\_\_\_