

FALL EXAM SAMPLE ANSWER

QUESTION 1

The facts for this question were based upon *Brown v. Michigan Bell Telephone, Inc.*, 225 Mich.App. 617, 572 N.W.2d 33 (1997), which dismissed the complaint against the phone company and Hampton's on the theory that the injuries were unforeseeable.

I would seek a recovery for Tonya Brown ("TB")'s injuries, as well as the possibility of a recovery for the loss of her unborn child, but TB would have to establish (1) that either Hampton's ("H") or Tristate Telephone Company ("Tristate") breached a duty to her, (2) that such breach of duty proximately caused her injury, and (3) that she suffered legally compensable damages.

I. Breach of Duty

There are two ways to establish a breach of duty: first, by proving that a defendant acted *negligently*; or second, by showing that the defendant is subject to *strict liability*. There is nothing in these facts that suggests that either Tristate or H is subject to strict liability, so therefore TB will have to establish negligence.

Negligence is the failure to use reasonable care, which is what a reasonable person would have done in the same or similar circumstances. In this case we would allege that either H or Tristate (or both) were negligent in placing a public telephone closer to the street, where it would make its users more vulnerable to motor vehicle accidents. One way to evaluate whether some precaution is worth taking is to look at the likelihood that an accident will occur, the magnitude of loss of an accident does occur, and the cost to implement safety measures to avoid it. This is referred to as the Learned Hand test. In this case the burden of moving the telephones seems relatively slight, but so does the likelihood of being struck by a motor vehicle. Although the damages in this case were very high, it would be a tough sell to the jury to say that a reasonable person would have moved the telephones for that reason.

Particularly with reference to Tristate, there may be industry custom that is relevant to the location of pay telephones. If the placement of the telephone was inconsistent with standards observed in the telephone industry, that would be strong evidence of negligence. On the other hand, compliance with industry standards, while supportive of a finding of reasonable care, does not prevent a jury from finding that those standards were unreasonably lax.

As a related matter, Tristate or H may have internal policies that prescribe moving the telephone. If so, a violation of a company's "rulebook" is evidence of negligence.

Another way to establish negligence is to use a statutory violation, in this case the municipal ordinance prescribing the minimum distance. Statutory violations may be evidence of negligence (in jurisdictions taking a more relaxed view) or may even be negligence as a matter of law (in those jurisdictions that take the issue away from the jury) if three conditions can be satisfied. First, the statute must be violated. I'm assuming here that the kiosk would be a "structure," since Tristate seems to think it must move the telephone. Second, the purpose of the statute must be to prevent injuries like this. It's debatable whether or not the minimum distance is for convenience or aesthetics or safety. It's hard to think that the ordinance was adopted to prevent motor vehicle collisions, but perhaps that's a legitimate extension of its purpose. Third, there must be no excuse for the defendant's violation. Here it doesn't seem that the defendant would have a plausible excuse.

II. Proximate Cause

To satisfy proximate cause, TB must show that the negligence of H or Tristate was both a (1) "but-for" cause of the injury and (2) a legal cause of the injury. *But-for* causation requires that, more probably than not, the accident would not have occurred but for the defendant's negligence. In this case, TB would have to show that the car would not have struck her if it were not for the placement of the telephones so close to the street. It's not clear from the facts whether a telephone

on the side of H's building would have made a difference, but the jury might be satisfied that, for example, more probably than not the car would not have struck them if they had been next to the building rather than four feet closer to the street. (An alternative to showing but-for causation would be to argue that this case would justify a "loss of chance" instruction, but I don't think that would work because we're not in a medical malpractice context.)

The second aspect of proximate cause is *legal* cause, which means that there must be a natural and continuous sequence between the defendant's negligence and the injury; this standard would pose significant difficulties. First, the defendant(s) would argue that it was mere chance that the car swerved and hit them; four feet to one side is not an increased risk. On the other hand, every foot closer to the street increases the likelihood of injury. A second, more salient objection, is that Greer was a *superseding cause* of the injury. A superseding cause is one that breaks the chain of causation. The likelihood of such a finding increases in proportion to two factors: (a) the unforeseeability of the subsequent event; and (b) disproportionate culpability. In other words, if the defendant could reasonably foresee the conduct of the subsequent tortfeasor, that reduces the likelihood that it will be considered a superseding cause.<sup>1</sup> Similarly, if the defendant's culpability is comparable to the subsequent tortfeasor, that helps the plaintiff to establish that the chain of causation was not broken. Here Greer's conduct in driving a car under the influence of alcohol and crack cocaine, without a license, is a pretty major departure from what might be expected. If a car spun out on an icy patch and slid into the kiosk, that would be a more foreseeable result. But here the argument for a superseding cause is pretty strong. (On the bright side, there would be no argument along *Palsgraf* lines; if it was negligent to put the kiosk so close to the street, TB is the kind of plaintiff you would be expected to protect.)

### III. Damages

If TB were able to establish liability, the damages would be very large. She would be entitled to any economic loss as a result of medical treatment and wage loss. Both for wage loss and future medical treatment (if needed), the cost would be projected out into the future and then assessed in terms of today's dollars (in accounting lingo, discounted to present value). A very large component would be pain and suffering damages for the loss of the use of her legs, as well as the general emotional trauma from losing her unborn child. Depending upon how it is that Amber was lost, she might even have a "bystander" claim analogous to the mother's claim in *Dillon v. Legg*.

It's unclear from the wrongful death statute whether TB's fetus (the Latin word for unborn child) would be a "person" for whose death compensation may be sought under § 600.2922(1). If so, TB could recover for the loss of society and companionship. It is even possible that TB could recover the pain and suffering by the child prior to death, although the facts aren't clear how long the child survived from the accident until death. On the other hand, there is no malice or reckless disregard by the defendants such as would justify an award of punitive damages.

## QUESTION 2

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1. It might be argued that the ordinance in question would supply foreseeability, but that is problematic for two reasons. First, the ordinance may not have been intended to prevent injuries like this, as discussed earlier. Second, even if an out-of-control vehicle was contemplated by the statute, a vehicle driven (for the first time) by an unlicensed driver high on alcohol and cocaine might be considered beyond what the statute suggests is foreseeable.

The defendants would say this case is like the one where rat poison was purchased in violation of a statute prohibiting sale to an unlicensed applicator. While the statute foresaw careless use of the poison, it didn't envision intentional harm. Thus, the existence of the statute doesn't solve the foreseeability problem.

This case is based on the facts in *LaCross v. Consumers Power Co.*, 1997 WL 33354553 (Mich.App. 1997), which affirmed the dismissal of plaintiffs' complaint on summary judgment, holding that a plane crash was unforeseeable as a matter of law.

The primary beneficiary in this case would be Frank Lacross ("FL"). He would seek recovery for the death of his parents; to do so, he would have to establish (1) that Consumers Power Co. ("CPC") breached a duty that they owed to FL, (2) that such breach proximately caused FL's injury, which consists of (3) legally compensable damages.

I. Breach of Duty

FL would have to show that CPC breached a duty either by (1) doing something subject to *strict liability*; or (2) acting *negligently*.

With respect to strict liability, there is only one possibility, and that is the argument that transmitting high-voltage electricity is an abnormally dangerous activity ("ADA"). An ADA is determined according to six criteria contained in the Restatement of Torts, § 520. Conceivably, those criteria have been applied in Linden to high-voltage lines like ours. However, I would point to § 519, which limits the application of strict liability to those kinds of harms that make the activity an ADA. Thus, if Mike & Cynthia ("M&C") had been electrocuted, strict liability might apply. But to the extent that the crash was a physical collision, having nothing to do with the danger of electrocution, § 519 would prevent the application of strict liability. Thus, I am reasonably confident that this case will be limited to negligence.

*Negligence* is the failure to use reasonable care, which is what a reasonably prudent person would do in the same or similar circumstances. In this case FL would argue that CPC was negligent in failing to mark the lines. One tool in evaluating reasonable care is to apply the so-called Learned Hand test, which compares the burden of precautions (in this case, marking the lines) with the probability of injury multiplied by the magnitude of injury. FL would have a strong argument that the probability of a plane striking the lines is high enough (and the gravity so severe, as in this case, two deaths) that the burden of marking the lines would be justified. I would expect FL to find an expert who would make this point in a persuasive fashion.

I would also do some research to establish what is the industry custom with respect to marking power lines. If there are guidelines for when to mark power lines, and CPC failed to follow them, that would make CPC look very bad. On the other hand, if CPC were in compliance with industry custom, that would be persuasive evidence in CPC's favor, albeit not conclusive: the jury could always decide that a reasonable person would have recognized the need for greater caution than the industry had exercised heretofore. Similarly, I would want to find out if CPC has any internal policies regarding when lines are to be marked. If they were not followed, that again would be strong evidence of negligence.

I would want to make sure there are no statutes or regulations that specify when power lines need marking. I'm assuming that the briefing packet I've gotten would have included relevant statutes or regulations, but it's something to double-check.

II. Proximate Cause

To establish proximate cause, FL must show that the failure to mark the lines was both a (1) *but-for* cause of the accident as well as a (2) *legal* cause.

To satisfy the *but-for* cause test, plaintiff must show that, more probably than not, the injury would not have occurred but for the defendant's negligence. Here the plaintiff is likely to argue that the lack of marking on the wires prevented the decedents from avoiding the crash. However, we should make a strong argument that this is mere speculation. In fact, we should say, no rational juror could find that, more probably than not, the injury would have been avoided by marked lines. After all, we don't know how the crash occurred—whether the pilot had a heart attack, was trying to commit suicide, had mechanical problems, or was just sightseeing. In response, FL might try to

argue that the lack of marking deprived the decedents of a chance to avoid the injury, but loss of a chance is still speculative, and most jurisdictions won't permit it except in the medical malpractice area, if that.

On the other hand, if evidence emerges that would satisfy a reasonable juror that but-for cause can be established, I see no difficulty for FL in establishing *legal cause*, which means that the accident occurred in a natural and continuous sequence from the defendant's negligence.

### III. Damages

If CPC is found liable for the plane crash, one element of damages would be the property damage represented by the loss of the plane, which would be measured by the fair market value of the plane prior to the crash (minus whatever salvage value the plane wreckage would have, which I'm assuming would be zero).

As far as personal injury, this is a wrongful death case in which the measure of damages is specified by statute. In Linden the relatives of the decedent are authorized to recover, and the facts mention the decedents' son, FL, but the statute also seems to authorize recovery by siblings and parents. If there were surviving siblings and/or parents, it's not clear whether the statute would simply add them, or if there is some limiting feature; the measure of damages is "loss of financial support and the loss of the society and companionship of the deceased." (§ 600.2922(6)). Theoretically, the siblings and parents could also make claims, particularly for loss of society and companionship, and if the statute is interpreted to permit such recoveries, it might be a pretty big damage claim.

It's even possible, given the fact that there was a previous accident involving a collision with CPC's power lines on Sanford Lake, that there would be a request for punitive damages. Punitive damages are generally permitted when the defendant acts with malice or with reckless disregard for the rights of the plaintiffs. Here there is no specific mention of punitive damages in the wrongful death statute, but the list of damages seems inclusive rather than exhaustive. On the other hand, I don't think there is anything in this case worse than negligence (if there was even that); nonetheless, I wouldn't be surprised to see the plaintiff plead punitive damages, saying that the refusal to mark the lines after consumer advocacy for them was a "willful and wanton" act or a "reckless disregard" of the safety of air travelers.

Fall 2003 Torts Midterm Checklist

- G **Overview**
- G Breach of **Duty**
- G No **Strict Liability**
- G **Negligence** Theory
- G Negligence **defined** as lack of RC
- G Industry **custom**
- G **Learned** Hand theory
- G H / Tristate Safety Policy / **Rulebook?**
- G Was **placement** of kiosk negligent?
- G Negligence **per se**
- G What was statutory **purpose?**
- G
- G Proximate **cause—defined**
- G **But-for** cause—defined
- G Would 4 feet have **made a difference?**
- G Loss of a **chance** theory?
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- G **Legal** cause—**defined**
- G Mere **chance** v. increased risk
- G **Superseding** cause
- G Two **criteria** for superseding cause
- G Out of control car reasonably **foreseeable**
- G Driver's conduct highly **reprehensible**
- G No **Palsgraf** problems
- G
- G **Damages**
- G **Wage** loss
- G **Medical** expense
- G Future stream **discounted** to present value
- G TB's **pain and suffering**
- G "**Bystander**" injury for loss of child?
- G
- G **Wrongful death** action for fetus' death?
- G Any **P&S** damages prior to death?
- G Loss of child's **society & companionship**
- G No **punitive** damages
- G

QUESTION 2

- G **Overview**
- G Breach of **Duty**
- G **Strict** Liability
- G § **519** limits strict liability
- G
- G **Negligence**
- G Negligence **defined** as lack of RC
- G Industry **custom**
- G CPC's Safety Policies / **Rulebook**
- G **Learned Hand** calculus
- G Regulations / Negligence **Per Se?**
- G
- G Proximate **cause—defined**
- G **But-for** causation
- G Would marked lines **prevented** crash?
- G **Speculation** vs. evidence
- G Loss of **chance**

- G Legal Cause—**defined**
- G **No** substantial legal cause **issues**
- G
- G **Damages**
- G **Property** Damage
- G **Plane** based on FMV
- G Statute entitles **FL** to damages
- G Any other claimants (**siblings?** **parents?**)
- G Recovery for loss of **financial** support?
- G Recovery for Loss of **Consortium**
- G **Punitive** Damages?
- G Does **statute** authorize punitive?
- G Was conduct **malicious** / **reckless?**
- G
- G
- G
- G

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