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Torts

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MID-TERM SAMPLE ANSWER

The facts for this case were derived from *Lasley v. Combined Transport, Inc.*, 2011 WL 4389890, which held that Clemmer's intoxication was not relevant to the question of causation, and *Aronberg v. Tolbert*, 207 N.J. 587, 25 A.3d 1121 (2011), which held that the mother of the decedent was barred from recovery because of the son's failure to carry medical expense insurance.

I would anticipate a claim by Theresa Gleason ("TG") against Combined Transport ("CT") seeking recovery of damages for the wrongful death of her father ("MG"). In order to succeed in her claim, TG would have to show that (1) CT breached a duty; (2) the breach of duty proximately caused her father's death; and (3) she qualifies for recovery of damages. Each element of her claim requires analysis.

I. Breach of Duty

In order to recover damages, a plaintiff must establish that the defendant breached a duty owed to the plaintiff. There are two major ways of doing this. First, the plaintiff may argue that the defendant should be held strictly liable. Alternatively, the plaintiff may show that the defendant was negligent, that is, failed to use reasonable care.

Strict Liability. The only conceivable basis for strict liability in this case would be an argument that CT was engaged in an abnormally dangerous activity for which CT should be held strictly liable. An example of this doctrine would be the case in which a large tanker truck carrying gasoline overturned and the resulting fire killed the plaintiff. To determine whether an activity is abnormally dangerous, courts apply the factors listed in Restatement (2d), § 520. Here, unlike the case involving the tanker truck carrying gasoline, the likelihood of injury from hauling large panes of glass is not high, reasonable care will prevent injuries from occurring, and the harm (while annoying), is not typically grave. Moreover, the feature of the activity that poses risk (sharp glass sprayed all over the place) is not what caused the harm; the fatal injury was caused by the same potential (a traffic tie-up) that would be common to lots of other activities.

Negligence. TG would have a much stronger claim arguing that CT was negligent in hauling glass. Negligence is the failure to use reasonable care. And if any of CT's employees (including the driver) acted negligently in loading the glass or securing it, CT would be vicariously liable for any resulting injury. A good avenue for TG to pursue would be *res ipsa loquitur* – the doctrine that some accidents "speak for themselves"; that is, the happening of the accident suggests that there was negligence. The *res ipsa* inference is generally permitted when there has been some loss of evidence that would prevent the plaintiff from showing negligence, and the plaintiff can prove three elements: (1) this type of accident doesn't ordinarily occur in the absence of negligence; (2) the instrumentality causing the accident was in the exclusive control of the defendants; and (3) other plausible explanations have been sufficiently eliminated. Here we may never know exactly what caused the accident, but up. the plaintiff could show that glass panes don't ordinarily fall off of a truck unless there is some negligence in the way they are loaded. The second element might be more of a factual question: who loaded the truck? If CT loaded the truck,

then the instrumentality would be in CT's exclusive control and the element would be satisfied. Even if someone else loaded the truck, it might be found that, once we assumed control we had exclusive control, and therefore that element was satisfied. And finally, have other explanations (e.g., a collision with another vehicle, or a defective strap that couldn't be detected through reasonable care) been sufficiently eliminated?

If the *res ipsa* case doesn't work, the plaintiff might still use other avenues to establish negligence. For example, there may be customs of the industry regarding how glass panes are secured that CT's employees didn't follow. Or Jesse may have violated company policies established by CT; either type of evidence would be highly persuasive to a jury that CT was negligent. Finally, there might even be statutes or regulations that prescribe how glass is to be transported, the violation of which could be used as evidence (or even conclusive proof) of negligence. Overall, it seems likely that CT would be found negligent.

II. Proximate Cause

The next element that TG would have to prove is that MG's death was proximately caused by CT's negligence. There are two elements of proximate cause: but-for causation and legal cause. To establish the first element, TG would have to show that, but for the negligence of CT, MG would not have died. In this case the burden of proof would be easily satisfied: If the glass had not been spilled on the highway, traffic would not have been stopped, and the collision would not have occurred.

The second prong of the proximate cause test would be more difficult. Legal cause requires that the injury occur in "a natural and continuous sequence" from the defendant's negligence to the injury. Here we could argue that the drunk driving by Judith Clemmer broke the chain of causation and that the negligence of CT in failing to secure the glass properly didn't proximately cause the fatal collision. In particular, we could argue that Clemmer's negligence was a superseding cause of the collision. In evaluating whether negligence has been superseded by another actor or force, the fact-finder would likely consider (1) the foreseeability of this type of injury; and (2) the relative culpability of the allegedly superseding tortfeasor. In this case Clemmer's conduct was not so reprehensible that it would be offensive to say that CT caused her to collide fatally with MG. Moreover, if you negligently drop large panes of glass on a freeway, it is quite foreseeable that traffic will back up and somebody will get rear-ended. While the severity of the collision may be disproportionate to what would ordinarily be anticipated, the "eggshell plaintiff" rule provides that if the defendant is liable for some injury to the plaintiff, it is no defense that the injury turned out to be more severe than what could have been foreseen. Thus, I think the superseding cause argument would fail.

In a related vein, CT might argue that, because the injury was so remote, it falls within the exception to liability identified in the *Palsgraf* case: tort liability should be limited to injuries that are reasonably foreseeable rather than so remote or unforeseeable that it is unfair to extend liability that far. Even if Evergreen follows the Cardozo approach taken in *Palsgraf*, MG was clearly within the "zone of danger" created by falling glass. And if the Andrews approach is taken, it will be a jury question as to whether CT's negligence proximately caused the injury. Either way, CT would lose the argument.

III. Damages

Perhaps the best argument that CT could make is that TG cannot recover damages even if CT negligently caused her father's death. Wrongful death recoveries are dictated by statute; at common law there was no recovery for wrongful death, and thus it was only by statute that such recoveries are permitted. Here the statute permits the "administrator" of the estate of the decedent to bring the action on behalf of the estate (§2A:31-2), for the benefit of certain types of beneficiaries, who in this case would be TG (§2A:31-4). She would be entitled to recover the "pecuniary damages" (§2A:31-5) assessed by the jury. That might mean that she can recover only the economic ("pecuniary") damages resulting from MG's death, such as his lost earning capacity, and whatever economic benefit she would otherwise have enjoyed had he lived; or it might be more broadly interpreted to include non-economic damages reduced to a dollar amount. In order to compute the economic loss resulting from MG's death, we would need to know more about the income he would likely have earned but for his untimely death.

Whatever might ordinarily be her measure of damages, we would argue that she is disqualified from recovery, because MG was not carrying insurance at the time he died. In § 39:6A-4.5 it states that the failure to carry medical expense benefits coverage at the time of an auto accident disqualifies the operator of an uninsured vehicle from recovering economic or noneconomic damages resulting from such an accident. TG would undoubtedly argue that this does not bar *her* from recovery, since *she* did not violate this statute. On the other hand, we would argue that the statute clearly contemplated denying benefits to anyone who did not carry the mandatory insurance, and that TG's claim is derivative of, and thus dependent upon, MG's right to recover. If the statute meant to deny MG a right to recover, then TG is likewise barred from recovery. It would be up to the court to determine which interpretation is more plausible.

In summary, CT would likely be found to have proximately caused the fatal injury to MG, but CT might escape liability if the statute bars claims by the beneficiaries of MG's estate.

CHECKLIST

- Overview**
- Breach** of Duty
- Strict** Liability
- Abnormally **Dangerous** Activity?
- § 520 factors **don't match** this case
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- Negligence**
- Defined as failure to use **reasonable care**
- Vicarious** liability
- Res ipsa loquitur**
- Elements** of res ipsa claim
- Exclusive** control?
- Relevance of industry **custom**
- Employer policy / **rulebook**
- Statutory or regulatory **violation**?
-
- Proximate** cause
- but-for cause + legal cause
- But-for** cause test easily satisfied
- Legal** cause defined
- Clemmer as **superseding** tortfeasor?
- Not disproportionately **reprehensible**
- Highly **foreseeable**
- Eggshell** plaintiff principle
- Palsgraf* argument
- Neither Cardozo nor Andrews **would help**
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- Damages**
- Statute** provides only remedy
- TG appears to **qualify** for recovery of “pecuniary” damages
- Do “**pecuniary**” damages include economic & non-economic?
- What would MG’s **earnings** have been?
- Disqualification** under § 39:6A-4.5
- MG** clearly barred
- But is **TG’s claim** derivative, or independent?
- Court** will determine

Exam # _____