MID-YEAR EXAMINATION

TORTS

PROFESSOR RUSSELL

INSTRUCTIONS:

1. **DEADLINE:** This is a 72-hour examination. You may begin the exam at any time after 7 pm on 3 December. You must submit your answers by 7 pm on Monday, 6 December. **If you turn in your answers after 7 pm on 6 December, then you will receive an F for your fall semester grade. NO EXCUSES.**

2. **TURNING IN YOUR ANSWERS:** Combine your answers into one single file and then upload that file at the following URL: http://www.law.du.edu/russell/torts/exam/ If you have difficulties turning in your answers, contact Mr. Ray Bailey at rbailey@law.du.edu or 303-871-6580. **Do NOT contact Professor Russell with exam-related difficulties.**

3. **OPEN-BOOK:** This is an open-book, take-home examination. Your answer must be of your own composition. You may work on this examination wherever you wish, and you may consult any written material that you wish. However, you violate the Honor Code if you show or distribute this examination or your answers to anyone at all before 7 pm on Monday, 6 December, and you violate the Honor Code if you discuss this examination with anyone before 7 pm on Monday, 6 December.

4. **EXAM NUMBER:** Please put your exam number on each page. The easiest way to do this is to put the exam number in a header on each page. **Do not put your name anywhere on the exam.**

5. **LENGTH:** This examination consists of two questions. You may use no more than 1,500 words to answer each question. Reducing your answers to this word limit will be one of the challenges of this examination.

6. **SPACING:** Please try to double-space your answers. Avoid miniature fonts, okay?

7. **HOW TO ANSWER:** In answering, use judgment and common sense. Emphasize the issues that are most important**. Do not spend too much time on easy or trivial issues at the expense of harder ones**. If you do not know relevant facts or relevant legal doctrine, indicate what you do not know and why you need to know it. You must connect your knowledge of law with the facts before you. **Avoid wasting time with lengthy and abstract summaries of general legal doctrine**. Discuss all plausible lines of analysis. Do not ignore lines of analysis simply because you think that a court would resolve an ambiguous question one way rather than another.

8. **JURISDICTION:** Each of the injuries that form the foundation of the exam questions takes place in Newstate, the 51st state of the union. Newstate is NOT Colorado.

9. **CONCISION:** Quality, not quantity is desired. Think through your answer before you begin to write. You have a lot of time to write and edit your answers. Concision will win you points. Good organization will win you points as well.

10. **YOURS TO KEEP:** You may keep your copy of the exam.

11. **CHEATING:** If, in preparing for this examination you have violated the Honor Code, or if, during this examination, you violate the Honor Code, the best course of action is for you to report to the Dean of Students immediately after this examination ends.

12. **GOOD LUCK**: Good luck and have an excellent break.

QUESTION ONE

The Metrotown News

Wasted lessons

Pamela Plainy's NSU pals grieve the loss of their sweet, hard-partying friend. But for most of them, denial still flows about the depth of her alcohol problem.

By Bill Briggs and Julie Dunn
Metrotown News Staff Writers

Sunday, November 28, 2004 -

Lunch-hour traffic grinds past as Baylor Ferrier peers out his front door with a groggy squint and a knot of pillow-tousled hair.

Another college weekday begins.

He shuffles to the refrigerator in sweat pants, pours a tall glass of red Kool-Aid and plops down at the breakfast table. As he gulps his drink, Baylor sneers at a slip of paper tacked to the kitchen wall. It's his police citation for giving 19-year-old Pamela Plainy some of the vodka that killed her on Labor Day weekend.

"I got a ticket," Baylor says, "for my friend dying."

The girl everyone called Pam had arrived at Newstate State University from Hometown, Neb., with a simple sweetness that charmed Baylor and the frat boys at Sigma Pi. A high school class president and head cheerleader, she apologized for any tiny mistake, gladly shared her cool T-shirts with girlfriends and flashed an electric smile that turned heads. She was a good kid with vast promise.

And in barely more than a year, she was gone.

Now, Pam is the poster child for this fall's steady stream of college drinking deaths. Her sudden absence has left friends wondering how the former homecoming queen crashed so hard and so fast.

Those close to Pam say they never saw it coming. That's not quite right.

Dozens of people watched her spiral from the vivacious blond to the alcohol casualty who stopped breathing in a frat house hook-up room.

But against a sea of college partying, amid Pam's own circle of hard-drinking buddies, no one saw that she was in deep danger.

Not Pam, who vowed in a Web posting 28 hours before her death to "get extremely wasted."

Not her economics professor, who noticed in the autumn of 2003 that she often came to class hung over, with droopy eyes and ruddy skin, then skipped many of his lectures altogether.

Not Baylor, who watched an intoxicated Pam throw up in his bed three times in the past year.

"I wasn't worried about her," Baylor recalls. "The girl could drink. She just could. It wasn't a big deal.

"It's what we all do."

'Let's go!'

Pam had one worry heading into Labor Day weekend, and she decided to share it with the world, according to police reports.

"My weekend," she confided to an Internet chat room at 4:08 a.m., "is going to be way too sober."

Pam was not about to let that happen. An hour before the kickoff of the Oklahoma – Newstate football game, she was showered and decked out in her favorite yellow "Get Shucked" T-shirt, jeans and sandals.

She was ready to leap into her comfort zone - the NSU party circuit. And Mirna Guerra, a 19-year-old freshman with a worldly edge, was ready to tag along.

"I called her up, it was like 5 o'clock: 'Pam, what are you doing? I'm bored!'

"She was like, 'Oh, my gosh! We're going to this barbecue. I'm coming to pick you up right now. Let's go!'"

Mirna had known Pam for just two weeks, having met her at a house party a few days before classes began. They shared a taste for the nightlife and a dislike for the frivolous drama of college-girl relationships. Mirna saw Pam as a kindred spirit. She was also the last person to see Pam alive.

"Pam was just so awesome. She was totally like, 'It's cool, you can come hang out with us anytime. I know how it is in the dorms.' We were going to go tanning. We basically just got along really well. But like the last night that we hung out, which is the night she died, that was when we really both got to know each other."

Pam-Bam's freshman year

Around campus, she was called "Pam-Bam." Even her car carried "PAMBAM" vanity plates. The moniker matched Pam's flighty personality - and hinted at her driving record.

A fender-bender, a collision with a deer in Nebraska and several speeding tickets had put Pam's driver's license in jeopardy. She fretted about the money she owed her parents for the legal costs of her driving mistakes. According to one friend, Pam's father had threatened to take away her black Chevy Monte Carlo.

That car was her freedom from Hometown.

Over the summer, Pam logged hundreds of miles between her hometown and NSU. She drove back to see Baylor, her ex-boyfriend whom she had dated the spring of her freshman year.

Lanky, sly and not exactly focused on school, Baylor had been ticketed before for underage drinking. Fraternity buddies called him a "player." As summer loomed, he broke up with Pam during an instant-message exchange. Yet she still seemed to crave something deeper with him.

"I never met anybody who would do anything for me, no questions asked," Baylor says. "She just wanted to be loved."

Baylor lived at the Sigma Pi frat house, a white, two-story stack of bedrooms atop a basement bar. Pam was drawn to the fun-loving boys who became her pals. Vanilla vodka was their drink. Pam quickly became their girl.

Pam didn't gently wade into the college party scene. As a freshman, she went out three or four nights a week. Before hitting the house-party circuit, Pam often warmed up by gulping shots of vanilla vodka with her friends in the dorm.

"She had a really high tolerance," says Sara Gibson, Pam's best friend from her freshman year. "You couldn't tell that often just how drunk Pam really was. She just handled herself well."

She was known to finish off many freshman-year nights by passing out at the Sigma Pi house, where the residents made her feel protected and safe. Sometimes, though, Pam needed help getting to the frat. Last April, Baylor was summoned to drive Pam home from an off-campus party because she was too drunk to walk.

In at least one class last fall, Pam's drinking habit was showing, a NSU economics professor told police after her death. The professor asked the police to leave his name out of their official report.

"He had her flagged as having a substance-abuse problem," reads the report. "... He had been concerned that Pamela had a problem a year ago, and he believed she was getting progressively worse."

This year, Pam was going out with friends just as much. But she seemed to be drinking even more when she did.

"Pam got down. That's for sure," Baylor says. "Especially this semester, she drank a lot. ... Like that week she died, she drank like that every single night, three or four nights."

All summer, Pam had yearned to return to school. But when she got back, something seemed "off," her friends say.

Nearly three weeks before classes began this fall, Pam moved into an off-campus house she had rented with four other women, including Sara Gibson and Liz Jokisch. Pam thought her new roommates hated her. She spent more time alone in her bedroom, napping or typing on her computer. Sara later told police that Pam "was more depressed this year."

More worries, more liquor

On her last Saturday night, over beers and football cheers at an off-campus house party, Pam opened up to Mirna about her roommates.

"She was like, 'I just kind of feel like I can't hang out with them anymore, like it's just something a little different. Liz and Sara always pair off, and it's kind of like I'm just stuck by myself and I don't know why, like I don't know what I did.'"

By 9:30 p.m., after drinking the equivalent of eight beers and two shots at a pair of off-campus parties, Pam was behind the wheel of her Monte Carlo. Based on Pam's weight - 126 pounds - her blood-alcohol level was at least 0.15 percent - nearly twice the legal limit of 0.08 percent.

With Mirna at her side, Pam searched for an ATM so they could purchase more liquor for the next party. "Murder on the Dance Floor" came on the car stereo, a song Pam told Mirna she often listened to in her room "because it totally pumps me up to go party."

With the music cranked, they drove south on a busy four-lane street, got lost and became blinded by a driving rain.

Pam gazed hard at the passing street signs along Timberline Drive to get her bearings. She didn't see the approaching curb. When her Monte Carlo collided with raised concrete, two tires blew. Pam stopped, tried unsuccessfully to change one tire, and then called her parents' cellphones. But neither Rick nor Patty Plainy, vacationing at Lake of the Ozarks, Mo., picked up. Mirna sensed the stress rising in Pam.

"She was getting all like, not upset, but kind of like worrying about, 'I owe my parents so much money. This is just another thing I'm going to have to worry about now.' And I just told her, 'It's not a big deal. It will be all right. Everything will work itself out.' She was like, 'All right, OK.'"

Pass the vodka

After hanging out at another party, Mirna, Pam and other friends arrived at the Sigma Pi house around 2:30 a.m. An hour later, Pam was laughing with Baylor, Mirna and three or four other students in Baylor's second-floor room. (Following Pam's death, NSU closed the Sigma Pi sorority and required all the men living there to move. This is why Baylor no longer lives in the fraternity.)

On Baylor's stereo: the sounds of the funk-reggae band Dispatch. In Baylor's refrigerator: another bottle of Pam's favorite brand of vanilla vodka. Baylor pulled it out and began passing that bottle around.

The party was winding down. The drinking was picking up.

Pam was walking and talking three hours before her death. To her friend Sara, nothing seemed unusual. But Pam still had a lot of drinking to do.

"I've been there holding her hair back before, and it was not one of those nights at 3:30 (a.m.)," Sara says. "Maybe she was thinking, 'It's 3:30, I'm not drunk enough,' and she totally overcompensated. She could do that.

"I tried to get her to come home with me, but she wanted to stay," Sara adds. "She would stay there all the time, so I figured it was fine."

Pam felt safe passing out at Sigma Pi, despite its R-rated décor. In the front foyer, more than 100 women's panties and bras hung from a chandelier. In the basement bar, a 2-foot- high corner stage surrounded a ceiling-to-floor stripper pole.

To Pam, these weren't bad boys. Among NSU's fraternity system, Sigma Pi had one of the highest grade-point averages last year. Many of the guys had respectful crushes on Pam, often chanting her name back and forth at parties: "Pam! ... Bam! ... Pam! ... Bam!"

Early that Sunday morning, however, the chant coming from Baylor's room was: "Chug! ... Chug! ... Chug!"

Pam took deep swigs each time the vanilla vodka bottles came around - the equivalent of two to three shots per turn.

As dawn approached, the party moved outside. Near the front door, one male student was still offering shots of vodka to anyone passing by. Mirna took a drink as Pam sat on one of the frat's two front steps, her head hanging down. She barely answered when people spoke to her. Nobody was alarmed.

Mirna had decided it was time to call it a night when she realized Pam wasn't able to stand on her own. She thought about calling a taxi to take her friend home.

"That's when Baylor and some other guy were like, 'No, she just needs to go pass out. That's what Pam does,'" Mirna later recounted.

Baylor threw one of Pam's arms around his neck. Matt Kilby, an 18-year-old friend of Baylor's who was visiting for the night, braced Pam from the other side.

Together, with Mirna following, they helped her walk up the frat's staircase and placed her on a love seat in an unlived-in second-floor room. On the wall, gold spray paint spelled out three words: "Le Boom-Boom." The frat boys called it their "boom-boom room."

Pam told Baylor all she needed was a little sleep. He lingered a few minutes to make sure she didn't throw up, then left.

"Where is she?"

On Sunday, Sept. 5, Pam and her four housemates had a noon date to pull weeds. They had been warned by the city authorities to clean up the yard of their one-story rental house or face city fines.

Pam didn't show. At first, no one was surprised.

"Sometimes we wouldn't come home at night, but we'd always be back by noon," Sara says. "The fact that she wasn't home at noon wasn't weird, but by 2 p.m., I was freaking out. I was calling everybody."

Including Pam. Lying a few feet away from her body in her white Gucci purse, Pam's cellphone rang 27 different times. No one at the frat house heard it.

Hours passed. Frustrated by the wait, Pam's roommates decided to go look for her car. Before fanning out, the girls taped a note on the front door in case Pam returned. Something bad began to nag at Sara.

"I get intuition," Sara says. "I had a funny feeling all day long, a really strange feeling. When no one had seen her and no one had heard from her, it was like, where is she?"

Although several people had seen Baylor help Pam into the "boom-boom room" earlier that morning, no one thought to look there. The door at the end of the hallway remained closed.

A little after 6 p.m., Kris Roggensack, Sara's boyfriend at the time, was giving his mother a tour of the Sigma Pi house. Kris opened the bedroom door and saw a blond, barefoot female kneeling on the floor in a fetal position. He could not see her face.

He called out "hello, hello," and bent down to touch her leg.

It was stiff.

Kris ran down the back stairs and out into the yard yelling for help. The first person he saw was Josh Vankirk, who followed him back into the house. Josh, another of Pam's close friends, felt the girl's cold skin and realized she was dead.

Neither recognized her.

Josh shut the door and dialed 911.

Pam's blood-alcohol level was 0.436.

Your assignment:

You are an associate in a law firm well-known for the quality of its defense work. The firm is in Newstate, the 51st state of the union. Baylor's parents are friends with one of the partners in the firm. They are worried about liability that they may face as a consequence of their son's actions.

Your job is to assess the potential liability of Baylor for Pam's death. At this point, do not concern yourself with whether Baylor's parents are liable for their son's actions. As well, disregard any comparative fault issues; that is, do not address whether there are other possible defendants. Instead, focus your analysis on the *prime facie* case against Baylor as a defendant in Pam's death.

At this point, the partner handling this case wants your analysis to be thorough but brief. Limit your analysis to no more than 1,500 words.

On the next page, you will find two of Newstate's statutes that may be of use to you. If there are other statutes that you may need to see, please indicate what they are and do the best you can with your analysis notwithstanding the absence of these statutes. Newstate is such a new state that its statutes are not yet available on-line.

Statute 1. Social Host Liability.

No social host who furnishes any alcohol beverage is civilly liable to any injured individual or his or her estate for any injury to such individual or damage to any property suffered, including any action for wrongful death, because of the intoxication of any person due to the consumption of such alcohol beverages, except when it is proven that the social host willfully and knowingly served any alcohol beverage to a person who was under the age of twenty-one years.

Statute 2. Alcohol Offenses

(1) It is unlawful for any person:

(a) To sell, serve, give away, dispose of, exchange, or deliver or permit the sale, serving, giving, or procuring of any alcohol beverage to or for any person under the age of twenty-one years, to a visibly intoxicated person, or to a known habitual drunkard;

(b) To obtain or attempt to obtain any alcohol beverage by misrepresentation of age or by any other method in any place where alcohol beverages are sold when such person is under twenty-one years of age;

(c) To buy any vinous or spirituous liquor from any person not licensed to sell at retail as provided by this article except as otherwise provided in this article.

END OF QUESTION ONE

SUV hits passengers at bus stop

Two men are injured, one critically; wife escapes injury

By Manny Gonzales
Metrotown Post Staff Writer

October 24, 2004

A motorist lost control of his sport utility vehicle on a wet road Saturday and careened into a bus stop in northwest Metrotown, seriously injuring one man who was sitting on a bench.

Paul Park was trapped between the concrete bench and the Chevrolet Blazer where it came to rest after crashing into the bus stop. He was rushed to the Metrotown Medical Center in critical condition. Paramedics said the 48-year-old man's leg might have to be amputated.

Sally Spouse-Park, the wife of Paul Park, was seated on the bench next to her husband. Remarkably, she escaped injury.

Another man in his mid 50s, Bob Quark, was seriously injured and taken to Metrotown Medical Center, but his injuries did not seem to be life-threatening, Metrotown police Detective Teresa Garcia said. The driver, identified as 35-year-old Buck Delano, was not injured. He was arrested and could face three charges of vehicular assault, Garcia said.

"Right now investigators are trying to determine whether he was driving too fast for the weather conditions," she said.

The driver had turned onto West 38th Avenue from General Sherman Boulevard just after 2 p.m., when light snow was falling. The vehicle skidded off the right side of the road and into the bus stop, Garcia said.

The driver will be tested for drug and alcohol use, which is standard procedure, Garcia said.

Neighbors and witnesses say motorists commonly speed through the intersection and run red lights. "People go through there so fast that it just doesn't even register with me anymore," said Brian Ruff, who was working at the corner tire shop. "It's scary because there are kids sitting at that bus stop bench all the time."

But the Rev. Leo Garcia, who said he saw everything from across the street, said the driver didn't appear to be speeding. The black SUV was traveling about 20 mph, he said. It appeared that the driver miscalculated the turn, overcorrected and then lost control, he said.

"The people were really hurting, and the ... man that was stuck under the car wasn't talking," the pastor said. "I prayed for God to help him."

Your assignment:

You work in a law firm that does exclusively plaintiff's side motor vehicle personal injury cases. The firm is in Newstate, the 51st state of the union.

It is now more than a month since the accident described in the newspaper article above. Paul Park and his wife and have contacted the firm looking for help. Since the accident, they have kept in touch with Bob Quark, and he has also contacted the firm.

Here is some additional detail concerning the accident and the injuries.

As it turns out, the paramedic at the scene was minimizing his description of the injury to Mr. Park. His leg was amputated by the impact of the SUV, and doctors were not able to reattach his leg. Mr. Park, who is currently undergoing therapy, has worked for the past 24 years as a letter carrier for the United States Postal Service. He's known throughout the town as the "whistling mailman," because he is such a cheerful and melodious whistler as he walks his delivery route. His salary as a mailman this year was $45,000.

Mr. Park's ambulance bill was $1,500 for the trip to the hospital following the accident. The initial hospitalization and surgical attempt to reattach his leg cost $45,000. This includes all of the doctor's bills except for the anesthesiologist, who sent a separate bill for $5,000.

Since leaving the hospital, he has been receiving physical therapy twice a week. The doctors expect that he will need one more small surgery within the next six months in order to finalize the repair to his leg.

Mr. Park no longer whistles. Mostly, he sits around in a chair at home and watches TV. He has been gaining weight. He does not often communicate cheerfully with his wife. They have not had sex since the injury. Ms. Park-Spouse has been getting headaches and having digestive trouble as she worries about her husband.

Bob Quark's injuries included a broken bone above the left wrist and elbow, burns on his left side, a bruised chest, and a head laceration that required 40 stitches. After a number of surgeries, Quark was determined to have a 70% loss of function to his left arm. Quark, a plumber, has no idea how he will continue in his line of work given the loss of function in his left arm. He's been making $55,000 a year as a plumber.

A few more details concerning the driver have emerged. First, he is an undocumented alien from Rumania who has overstayed his visa. He came to the United States two years ago on a tourist visa and has never returned to his native land. Remarkably, though, he does have pretty good insurance. His license, however, is expired. Blood tests showed that he was neither drunk nor taking drugs at the time of the accident.

Another detail concerns the crash itself. As you may recall, it had been snowing around the time of the crash. Delano had cleaned snow from the front windshield of his car, but he did not clear the three inches of snow from his rear window. That is, his vision through the rear window was completely obscured.

Please write a memo of no more than 1500 words that describes how the firm might help Mr. Park, his wife, and Mr. Quark with any claims that they might have against the driver of the car that hit them. Don't worry about any other defendants apart from Mr. Delano. As well, do not attempt to spot any products liability issues as related to the operation of the car. You do not know anything about products liability.

END OF QUESTION

END OF EXAMINATION

Student Sample Answers
Professor Russell's Mid-Year Torts Exam
(December 2004)

QUESTION ONE –

SAMPLE ANSWER - 1

Issue

Baylor Ferrier requests the details of his potential liability in the alcohol-related death of Pamela Plainy. Baylor has two major fronts of liability to consider under the Social Host Liability and Alcohol Offenses statutes of Newstate. The first concerns his role in serving alcohol to Pam during the course of the evening. The second revolves around his rendering of care of the drunken Pam at the frat.

Analysis

1. Service of Alcohol

Duty: Regardless of Baylor's host status (discussed below under 'Breach'), Baylor took in the partyers (including Pam) not only into the frat house, but also his room. Amidst the sounds of dispatch and to the tastes of mutually-adored vanilla vodka, Baylor's room under his auspices became the scene of illegal activity. This relationship between Baylor and Pam reflects the old common law duty relationship between innkeeper:guest. The privity between the two here is similarly host:guest. "When active, be reasonable." For the aforementioned reasons, Baylor created a duty to be reasonable toward Pam.

Standard of Care: required Baylor to act as a reasonably prudent person under the circumstances. That reasonably prudent person follows applicable statutes governing relevant conduct and acts in the fiduciary of guests as host of a party.

There exists no professional standard nor industry custom in this situation.

Breach: 1. Negligence *per se*. Breaking a statute is negligent on the face of its action. The Social Host Liability statute states that persons who "willfully and knowingly served any alcohol beverage to a person who was under the age of 21 years" liable for injury.

The rule needed here is a definition of "host". Baylor was part of the frat, but does the law require his planning, facilitating, or execution (i.e. purchase/actual distribution of EtOH) to qualify as the 'Host" in this statute? Regardless, he held the "favorite drink" of vanilla vodka in his personal refrigerator and passed it amongst a group that included 19-year old Pam.

2. Negligence *per se* take 2: Statute 2 (1)(a) states "It is unlawful for any person to sell, serve…any alcohol beverage to or for any person under the age of twenty-one years, to a visibly intoxicated person, or to a known habitual drunkard." Baylor broke this statute on all three parameters of age, intoxication of recipient, and alcoholic reputation of Pam.

Regardless of the host definition, Baylor breached his duty through the action of breaking the statute: negligent *per se*.

Cause in Fact: But for Baylor's providing this vanilla vodka (2-3 shots per swig taken by Pam), she may not have reached the EtOH amount that proved fatal. The action furthermore breaks the law and is therefore prima facie cause in fact.

Even by arguing that the providing of alcohol does not qualify as but/for causation by preponderance, it fails the substantial factor test. This test requires that defendant materially contributed to plaintiff's injury. The providing of 2-3 shots worth of vodka on multiple turns on the community bottle no doubt contributes to the substantial raising of one's alcohol level.

Proximate Cause: Besides receiving alcohol from Baylor, Pam initiated the night's festivities with "drinking the equivalent of eight beers and two shots at a pair of off-

campus parties". This is an intervening cause, but not superseding. Both this "pre-drinking" and the alcohol at Baylor's frat contributed to the fatal amount ingested by Pam. This pre-drinking is not superseding because it is not extraordinary under the circumstances (.15 BAC in light of .436 BAC overall).

Proximate cause exists under the forseeability test because 1) Baylor should have been able to detect a foreseeable result or type of harm by serving alcohol to a person already intoxicated and known to be a habitual drunkard AND 2) there are no superseding forces.

Damages:

Pecuniaries: Applicable pecuniaries include post-mortem expenses (autopsy, etc…), perhaps funeral costs.

Specials: It was the beginning of the semester and tuition has no doubt already been paid. A case requesting for Baylor to refund these costs is not unforeseeable. It is unlikely due to the argument that it could have been foreseeable Pam's drinking habit could have flunked herself out of school had this incident not occurred..

General:

Pain and Suffering: The nature of an EtOH-related death is one of a body relaxation leading to coma/asphyxiation. No pain and suffering.

Consortium/Loss of Relationship: Plainy's parent's claim to loss of relationship rests on the laws of Newstate. Knowledge of this law helps because some jurisdictions consider loss of consortium a valid claim while others do not. This ambiguity compounds in light of the fact that Pam was an adult and just about on her own.

Potential life lost: This possible claim rests on the laws of Newstate as jurisdictions vary on the validity of this claim. Assuming Newstate allows this claim, the damages would be determined by an extensive calculus charting her abilities and life potential. That gives a potential income that would have to be

multiplied by number of life years of work plus raises, etc… fewer barriers such as fewer promotions for women in this society, etc...

Grief: These claims bear little validity to the law. The above items make Pam's parents whole.

Plainy's Insurance: In the event that Pam's insurance (or her parent's policies covering her; be it life or health) covered post-mortem fees and funeral fees, Baylor (i.e. his insurance coverage) may be susceptible to the subrogation from Plainy's insurance.

Assuming that laws provide for damages to be collected from Baylor (i.e. insurance), the final amount liable would have to be deduced by the amount that intervening factors were deemed responsible. Assuming the story's figures about Pam's alcohol levels are correct, she had approximately .15 BAC before the frat party/occasion with Baylor. Her final BAC was .436. Therefore, Baylor's share of liability can be calculated as .286 (i.e. .436 - .15) of the .436 BAC, or 66.5% contribution (i.e. .286/.436).

2. Rendering Care

Duty: "There is a legally recognized relationship between the defendant and the plaintiff that obligates the defendant to act (or to refrain from acting) in a certain manner toward the plaintiff." Baylor's legal obligation to Pam was her safety based upon the premise of camaraderie. Pam was not just another person at the frat party, but one with whom there was an established relationship to the point of sharing a common favorite drink and having it on hand. The law recognizes joint endeavors amongst friends at a higher duty than to strangers.

Standard of Care: The standard of care dictated that Baylor act as a reasonably prudent person. In this situation, the prudent person acts in a manner that ensures a drunken person's health and stability from the offending incident.

Breach: Baylor's beginning care by taking Pam to a remote room to sleep off alcohol and

waiting to ensure she did not asphyxiate on vomit constitutes misfeasance. He rendered care but did not follow through with its application by leaving before she regained conscience.

Cause in Fact: But not for Baylor's leaving her in the room alone, Pam may not have died. Baylor's monitoring her situation and calling for help when needed could have saved her life had he stayed.

Proximate Cause: It was foreseeable that Baylor's leaving Pam in a remote room would expose Pam to dangers of alcohol poisoning. She could have asphyxiated or gone into coma. Both situations are likely when a person has drunk all night and both health outcomes are treatable if there is someone to monitor and report these situations. These facts satisfy 1) the reasonably foreseeable types of harm and 2) no superseding forces requires for the forseeability test.

Though the effects of alcohol leading to injury or death were probable at the time Baylor left Pam in "Le Boom-Boom", it cannot be shown his leaving precipitated the effects to establish directness. Foreseeability is the strongest line for satisfying proximate cause.

Damages:
If this case was taken to court and Baylor was found liable on this line of argument, then there would be no deduction from the total damages. He would be liable for the same items and potential items as in damages for point #1, except he would face bearing the full amount decided by the court.

Conclusion
Baylor carries significant chance of substantial liability. The more likely scenario is that he would be found partially liable on the first line of reasoning (i.e. contributory negligence by service of alcohol to minor/intoxicated person/known drunkard). The second line maintains a plausible argument but lacks the weight of the first; it contains more variables. Courts may not be as open to his full responsibility of rendering care to

Pam as Matt Kilby was involved in part by helping get her up the stairs. Yet, most liability still falls to Baylor as he assumed responsibility by saying, "No, she needs to go pass out," and commence taking her upstairs.

SAMPLE ANSWER - 2

Q 1. Analysis of prima facie case RE: Baylor Ferrier

Duty

Baylor's actions were purposeful when he gave Pam the vodka on the night she died and will likely give rise to a legal duty Baylor owed to Pam. A misfeasance case, showing Baylor exhibited acts of misconduct that directly contributed to Pam's injury and death may be demonstrated. Even though Pam was drinking prior to her arrival at Baylor's frat, she became worse off after Baylor gave her the vodka. In addition, Baylor's actions created foreseeable risks of harm to Pam because she was already drunk when Baylor gave her the vodka and he admitted to knowing she often throws up, and had done so in his bed on previous occasions, and passes out after drinking too much. Baylor reasonably knew that more liquor was likely to create additional harm to Pam.

In the event the court finds Baylor negligent, a duty to rescue may also be applied. Since Baylor helped create Pam's demise by giving her more liquor, Baylor may have a duty to rescue obligation. It is unlikely the court will find that a special relationship existed between Baylor and Pam because they broke up in the summer, however, because they had a previous boyfriend-girlfriend relationship and because Pam verbalized to her friends that she trusted Baylor and felt safe at his frat house, it is possible that Baylor had a duty to rescue because he previously had a special relationship with Pam. As an extrapolation of this, a duty to protect may arise if the court determines Baylor's stopping Mirna Guerra from calling Pam a Taxi and his putting her in the boom-boom room constitutes an undertaking of the task of protecting Pam.

Standard of Care

Baylor may be at risk for negligence and negligence per se. Under negligence and the reasonably prudent person standard, Baylor's actions, including giving Pam the vodka when he knew she was already intoxicated, will be examined and compared to those of a reasonable person in the community. When Pam could barely speak, could not walk, and had to be carried, passed out, to the boom-boom room, Baylor, under the reasonable person standard will likely be expected to have reasonably identified Pam as being in danger.

Baylor's conduct will be held to that of a reasonably prudent person in the same or similar circumstances and will determine negligence. If Baylor is found negligent for failure to demonstrate reasonable care under the circumstances, the amount of due care required will depend on the circumstances as interpreted, but the standard of care will not change. Also, Baylor will likely not be successful in asserting a defense of ignorance to the hazards of alcohol because under the objective reasonable person standard, a reasonable person is expected to be aware of such well-known dangers.

Baylor has violated two state statutes creating a situation of negligence per se. Under the Social Host Liability statute, had Baylor provided alcohol to someone over twenty-one, he would be protected from liability, but because Pam was nineteen, he is not protected. The statute limits liability to a social host unless the social host willingly and knowingly provides alcohol to persons under age twenty-one; Baylor also willingly and knowingly provided Pam the vodka. Furthermore, Baylor may have liability for negligent entrustment due to his misfeasance as described under duty. It could be asserted that Baylor supplied Pam with more alcohol knowing that Pam was not fit to handle more.

Under the Alcohol Offenses statute, Baylor is in violation because the statute directly prohibits serving alcohol to any person under the age of twenty-one, to a known habitual drunkard and to a visibly intoxicated person. Baylor knew Pam was nineteen, he admitted to being aware of her long history of drinking, getting sick and passing out, and he knew she was drunk when he gave her the vanilla vodka on the morning she died.

The two statutes set minimum standards and typically the statutes would replace the usual reasonably prudent person standard of care, but the judge will need to evaluate if the statutes were designed to protect such persons as Pam from harm and whether they

were designed to protect against the type of harm Pam suffered. If the judge declines to use the statutes as standards of care, Baylor and his actions will be evaluated under the reasonably prudent person standard of care for negligence determination.

Breach of Standard of Care

To demonstrate the breach of the standard(s) of care, direct and circumstantial evidence must show Baylor, more likely than not, did not act reasonably. The direct evidence includes eyewitness accounts of Baylor giving Pam the alcohol, of Baylor refusing to let Mirna Guerra call a taxi, and of Baylor carrying Pam to the boom-boom room, leaving her unattended. Moreover, the eyewitnesses may testify about their interpretation of and concern for Pam's condition, implying Baylor, having been in the same rooms as the eyewitnesses, should have reasonably had similar interpretations and concerns.

Circumstantial evidence includes: knowing Pam had problems with alcohol, knowing she had been drinking at two parties prior to coming to the frat, possible knowledge of her car accident earlier in the evening (indicating intoxication), and possible knowledge of her electronic statements she made about her intentions of getting drunk on the holiday weekend. This circumstantial evidence combined with the direct eyewitness evidence will likely show Baylor breached the standard(s) of care.

Cause-in-Fact

Application of the "but for" test in Baylor's situation results in plaintiff ability to claim causation by a preponderance of the evidence that Pam would not have died "but for" the fact Baylor gave her the vodka and the fact he left her in a room unattended. Plaintiffs will argue that the additional alcohol Baylor supplied Pam was the actual cause of her death and had he not given it to her, she would be alive. Proving that Baylor's actions were more likely than not to have been a "but for" cause of Pam's death will be the goal of the plaintiffs.

In the event the court also uses a "substantial factor" causation test, Baylor's actions will be evaluated to determine if they materially contributed to Pam's death. If it

is determined they did, Baylor's actions will be deemed causative. The combination of the two tests for causation will likely be difficult for Baylor to overcome.

Proximate Cause

Proximate cause will be determined by examining whether Baylor had reasonable foresee ability of harm (extent and manner in which the harm occurred need not be foreseeable), there having been no superseding intervening forces, whether Pam was an "egg-shell" person, whether Baylor's conduct was substantial in causing the harm, and the nonexistence of any rule of law that precludes liability due to the manner of Baylor's negligence causing the harm.

Baylor, even if he did not expect Pam to die, should have reasonably foreseen harm coming to Pam when he gave her the vodka because he has admitted to observing her getting sick and passing out on previous occasions; both are "harms" from too much alcohol. No superseding intervening forces were involved when Baylor himself gave Pam the alcohol. Plaintiffs may portray Pam as an "egg-shell" person because she was already heavily intoxicated at the time Baylor gave her the alcohol and had a history of hard drinking which put her at an even more increased risk for harm.

Damages

Pam's family members may assert wrongful death, loss of consortium, and a survival action against Baylor. As permitted by statute, family members, parents and siblings, are allowed to sue for the negligently inflicted wrongful death. Under wrongful death, they may recover pecuniary losses but these are difficult to calculate. The court, in awarding damages, may consider Pam's expected monetary contributions to her family versus what her family would have paid for her expenses such as education, food and clothing. Family members must show factual support to prove a claim of damages under wrongful death. Baylor may be able to assert a defense that Pam contributed to her own death and if he is successful, Pam's responsibility will affect the damage awards to Pam's family.

Pam's family, if they sue for loss of consortium, may be able to recover for loss of companionship and affection, but not for grief, sorrow or emotional upset from her tortiously caused death.

If the family proves Pam suffered damages before death, perhaps confirming that her death was not instantaneous, but instead was a slow, viscerally painful, organ killing experience where she was physically unable to express her pain, they would have a basis for a survival action. In a survival action, Baylor's tortuous actions need not to have caused Pam's death and damages include lost wages, pain, and suffering. It is possible that both the wrongful death action and the survival action may be brought against Baylor concurrently.

Based on the prima facie case analysis above, Baylor does have liability for negligence in Pam's death.

QUESTION TWO –

SAMPLE ANSWER - 1

DUTY

Delano was engaged in an activity (driving) that put everyone in his vicinity at risk of physical harm. This created a duty to our clients to exercise a standard of care that would minimize that risk.

Mrs. Park wasn't physically impacted by Delano's negligence, but his duty to her arises out of the fact that she was within the zone of danger, witnessed her husband's accident, and suffered emotional harm that manifest itself into physical symptoms. Regardless of whether Newstate adheres to a zone of danger or Dillon v. Legg theory of duty to bystanders, Delano had a duty to Mrs. Park.

STANDARD OF CARE/BREACH

Delano should have been exercising a standard of care that is consistent with that of a reasonable person under similar circumstances. If he was speeding, he breached the standard of care. Even if he was not speeding, if he was going too fast for that turn in those snowy conditions, he was acting unreasonably.

Delano will claim that speeding through the intersection is customary. Witnesses attest to this fact.

Adherence to a customary practice does not make Delano's actions reasonable under the circumstances if the custom itself negligent. Speeding in itself is negligent.

The defense that Delano should not have been expected to use the same judgment because his miscalculation of the turn created an emergency situation is unavailable since he contributed to creating the emergency by miscalculating the turn.

NEGLIGENCE PER SE

We'd want to make a case for negligence and negligence per se.

Speeding statutes set a standard of care that is designed to protect people from injuries resulting from auto accidents. The injuries to the Parks and Mr. Quark were among the injuries the statute sought to prevent and they were within the class of people the statute sought to protect. If it is shown that Delano was speeding and speeding is governed by statute in Newstate, then he was negligent per se.

Delano's driving with an expired license may have violated a statute, but it wouldn't establish negligence per se. Licensing statutes are designed to protect against drivers without the proper skills. Delano was in possession of a valid license prior to its expiration. He had the proper driving skill. The harm inflicted in this accident was not by an unskilled driver so it was not within the scope of injuries against which the statute is designed to protect.

Similarly, the fact that Delano is an undocumented alien won't prove negligence per se. Statutes requiring a valid visa are not intended to protect motorists or pedestrians from injuries resulting from an auto accident.

If Newstate has a statute requiring drivers to clean all of their windows before driving, then Delano's failure to do so might provide a case for negligence per se. It is questionable, though, whether our clients are within the group protected by the statute or whether they sustained the harm the statute is designed to eliminate.

CAUSE IN FACT

But for Delano's breach of the standard of care, the accident would never have happened. The standard but for test establishes his conduct as the cause in fact of our client's injuries.

PROXIMATE CAUSE

The type of harm suffered by our clients was a forseeable result of Delano's negligence. His actions can be said to be the proximate cause of their injuries.

Delano will counter that it was not forseeable that he'd hit pedestrians at a bus stop. However, the manner and extent of the harm need not be forseeable to establish his conduct as the proximate cause. An accident is the type of harm that is a forseeable result of not exercising the proper care when driving.

Delano could be relieved of liability if he showed that the weather was a superseding intervening cause. This is unlikely, though, because a superseding intervening cause occurs after the defendant's conduct. It was snowing before Delano made the turn.

DAMAGES

Mr. Park

We'll try to recover Mr. Park's pecuniary damages first because they are easily quantifiable and lend greater support to a pain and suffering award. The bills for the ambulance, hospitalization, surgery, anesthesiologist and therapy sessions fall into this category. Any medical equipment such as a wheelchair or crutches he had to use should also be considered. The wages he has lost in the month since the accident are compensable as are incidental costs such as travel to and from the doctor's office.

Mr. Park's future medical expenses are also recoverable. We want to point out the fact that he'll need another surgery in six months and continued physical therapy. The cost of any special care he might require because of the loss of his leg is also recoverable. If he is expected to return to work, then we should seek compensation for the wages he lost between now and his return. If he can't return to work, we want to seek lost wages up until his expected retirement age. His $45,000 salary as well as any raises, bonuses, and expected promotions should be taken into account when calculating this amount. Alternatively, we could try to recover for his diminished earning capacity if we don't want to prove lost wages. In doing this, we'll have to establish the fact that Mr. Park had a promising professional career ahead of him. The amount recovered will be reduced to present value to compensate for the fact that money now is worth more than money in the future. Future incidentals should also be considered.

Any pain and suffering that Mr. Park consciously experienced as a result of being hit by the car or undergoing subsequent medical procedures is compensable. We should point

out his mental distress up to this point over the loss of his leg. A per diem award for these damages should be our primary focus. They tend to be higher.

Future pain, suffering, and mental distress resulting from his second surgery and continued physical therapy should be compensated. We'll have to check to see whether Newstate's statutes allow hedonic damages separate from pain and suffering awards. If so, then we want to pursue those damages for Mr. Park's mental distress over his inability to do the things he once enjoyed doing. If he was a recreational athlete or jogger, for example, we'd want to bring these facts into evidence. He obviously enjoyed his work enough that he whistled while doing it. We'd want to point out that he can no longer enjoy his work, and has become depressed. If Newstate's statutes don't allow separate recovery, we'll try to work these items into the damages for pain and suffering.

Mrs. Park

Because Mrs. Park wasn't actually hit by Delano's vehicle, she hasn't incurred any medical expenses or lost wages. However, if she has incurred any costs associated with her headaches and digestive trouble, then they may be compensable.

Mrs. Park can recover separately for the emotional harm suffered as a result of watching her husband's accident. Depending on Newstate's statutes, she might also be able to recover for loss of consortium. Since his accident, Mr. Park has not communicated cheerfully with his wife and they have not had sex. These facts will aid us in proving that Mrs. Park's relationship with her husband was once fulfilling and is now impaired because of the harm Mr. Park suffered as a result of Delano's negligence.

Mr. Quark

Mr. Quark will be able to recover for the ambulance bill, hospitalization, surgeries, wages he's lost for any time he's been off of work, and the incidentals incurred in receiving treatment.

Mr. Quark could try to recover for his lost wages since he won't be able to be a plumber anymore. It would require establishing his $55,000 salary as well as possible raises and promotions and subtracting what he will make when he takes a different job. A better way to recover in this area would be to focus on his diminished earning capacity. We'll want to put forth evidence showing Quark's ability to make a substantial amount of money between the time of his accident and his expected date of retirement. This award might be reduced by 30% since Delano' negligence only caused a 70% loss of function in Quark's arm. On the other hand, a 70% loss of function is enough to keep Quark from working as a plumber. Full recovery may be a possibility.

Any conscious pain and suffering he experienced is compensable. The mental distress resulting from his burn and the loss of use of his arm will also be considered. If Newstate doesn't allow separate recovery for loss of enjoyment of life, we'll seek damages for Mr. Quark's inability to enjoy things that he used to enjoy because of the loss of function in his arm under pain and suffering. We'll seek a per diem award for these damages.

If his arm still causes him pain, Mr. Quark can recover for future pain and suffering. Mental distress and loss of enjoyment of life in the future are also recoverable.

SAMPLE ANSWER - 2

Memorandum

To: Senior Partner

From: Associate

Date: December 6, 2004

RE: Park v. Delano analysis

Duty

When undertaking an activity, such as driving an SUV, the driver has a duty to be careful. The driver must take reasonable precautions to not run over passengers waiting at a bus stop.

Mrs. Park, although not physically injured, has a case for negligent infliction of emotional stress. Even under the older stricter standard of direct impact, Mrs. Park can recover. She surely felt an impact because she was sitting on the bench that was struck by Delano's SUV. The impact does not need to cause physical injury for the rule to apply.

New State might not allow mental distress recovery under the impact rule. Mrs. Park can also bring bystander actions against Delano.

Mrs. Park was sitting in the zone of danger. She was right next to her husband, a close relation that was seriously injured, when the SUV impacted within inches of her location. In addition to fright from harm to her husband, she would have feared for her own safety.

New State may even allow Mrs. Park to recover under the Dillon v. Legg rule. Because she was sitting right next to her husband at the time of impact, she satisfies the criteria for the Dillon rule: she was located near the scene, she suffered direct emotional impact from contemporaneous observance, and she is closely related to the victim.

It must be clarified that her physical manifestations are a result of the fear and concern at the scene and not from worrying about her husband after the fact. Physical manifestations are a requirement for the Dillon rule.

Negligence

Per se:

Delano violated several statutes. However, being in the country illegally and driving without a license do not qualify as negligence per se. Tourist visas are not designed to protect people from auto accidents. Courts do not usually use licensing

statutes to establish per se negligence. The Parks would have to show Delano did not have the skills to drive.

Delano's snow covered rear window comes closer to negligence per se. The judge will have to determine whether, if there is a statute in New State, that the rear window being covered is relevant. A clear window statute would be intended to protect the plaintiffs in this case and would protect against the type of harm. Unless they can show that Delano not being able to see out his rear window was important then the judge will probably not deem that it sets a relevant standard of care.

Standard of Care

Delano had a duty to act as a reasonably prudent person in the circumstances. A reasonable person would realize that 20 mph can be unreasonable under certain circumstances. In this case a reasonable person would also realize that if it is snowing that it is cold enough to cause wet roads to become icy roads.

Expert testimony may be necessary to establish what the road conditions were at the time. We also need to find out if the corner was shaded preventing previous ice from melting.

Res ipsa loquitur is tempting because an SUV is not parked on a bus stop without some negligence. However, accident forensics will be able to establish what exactly happened and whether Delano was driving unreasonably fast for the conditions.

Delano may argue that he is from Rumania and not experienced in driving in New State's snowy climate. This argument does not matter because he must rise to the level of the community. Also, he has been in the state two years.

Cause in Fact

But for Delano's negligence in driving too fast for the road conditions the Parks and Mr. Quark would not have been injured.

Proximate Cause

It is foreseeable that driving too fast for the conditions would cause Delano to lose control, drive off the road, and run over innocent bystanders.

Our clients may seek the following damages in this case:

Mr. Park

Damages

Special past and future

Medical costs

Ambulance $1500

Surgery $45,000

Anesthesiology $5,000

Pain medication

Subsequent surgery and anesthesiology

Therapy

Prosthetics

Marriage counseling and anti-depression drugs

Lost wages while in hospital based on current pay rate.

Loss of Future Earnings

Begin with Current salary $45,000/yr

Need to add raises and bonuses over his lifetime.

Use life expectancy to calculate total.

Park is not completely unable to work, but his earning capacity is diminished by some amount to be determined by the jury.

General

Mental distress from the loss of his leg.

Pain and suffering calculated on a per diem basis.

Hopefully this jurisdiction allows for separating loss of enjoyment of life from pain and suffering. Park is no longer the "whistling mailman."

We will not be able to ask the jury how much it would take to trade places with Park but we should push for a per diem measure for generals.

Loss of consortium is reasonable because he is not having good relations with his wife as a result of the injury and her emotional distress.

Any kids the Park's might have could recover loss of consortium with their father.

Mrs. Park

Damages

Special Past and Future

Hospital bills – Even though she was not injured she probably was checked out at the hospital and possibly rode in the ambulance.

Emotional counseling

Depression medication

Treatment of her physical manifestations of emotional distress – This includes medication for her stomach and pain medication for her headaches as well as doctor visits.

Any lost wages due to dealing with her distress or physical manifestations. Costs to pay for any regular household duties she is unable to perform if she does not work outside the home.

General

Loss of consortium

Emotional distress

Pain and suffering from physical manifestations

Mr. Quark

Damages

Special Past and Future

Medical bills to repair Quark's arm, stitches, and burns.

Lost wages while in hospital at current pay rate.

Future medical procedures – skin grafts for burns.

Therapy to improve the usage of Quark's arm.

Loss of future wages

Begin with Current salary $55,000/yr

Need to add raises and bonuses over his lifetime.

Use life expectancy to calculate total.

Park is not completely unable to work, but his earning capacity is diminished as a plumber by approximately 70%.

General

Pain and suffering

The type of burn Quark suffered is relevant. Were the burns 1st , 2nd , or 3rd degree?

Per diem damages for 70% loss of arm and associated pain.

For all three clients the special damages, lost wages and any ongoing medical expenses, are subject to net present value calculations. We need to think about how we can argue the interest rate to our advantage (lower). The same strategy applies to inflation calculations on the medical expenses. We want to argue a high rate of inflation.

It might be worth remembering that taxes do not apply to compensatory damages when selecting the jury. We should look for jurors sharp enough to think about the taxes but not knowledgeable enough to know that compensatory damages are not taxed.

Insurance

Collateral Sources

We need to check if the collateral sources rule is followed in New State. We want to be prepared if we are required to divulge our client's first party insurance coverage to the jury.

Duty to Defend

These claims arguably fall under the coverage of Delano's policy therefore his insurance will defend him. If something comes up at trial that makes this intentional then Delano's insurance can go after him.

Regardless, the insurer's legal costs need to be added to our calculation for settlement offers.

Duty to Settle and indemnify

Even though he has a good policy, strategically we may want to demand a quick answer on the settlement offer. If Delano's insurer is late then they are liable for the entire award from the jury and therefore we can probably exceed the policy limits. As a practical matter, Delano would assign his action against the insurer for failure to settle to our clients.

This induced failure to settle may be necessary because when Delano is deported we will not be able to access his personal assets, not that we would try anyway. Three plaintiffs could quickly exceed the caps of even a good policy.

Note however, if we settle, the courts will assume that settlement amount is the amount of money it takes to make our clients whole.

We need to check this Jurisdiction, but if we go to jury, we can recover up to the limits of Delano's policy plus our clients' first party insurance up to the amount of the jury award.

Otherwise, our clients' insurers can subrogate for what they paid. We could potentially make a case to the insurer for not subrogating in order to make our client whole again. We need to be careful that we don't complicate future settlement negotiations with these insurers by bringing a case against them.

SAMPLE ANSWER - 3

MEMORANDUM

To: Senior Partner

From: Associate

Date: December 6, 2004

Re: Potential Claims of Park, Spouse-Park, and Quark

Our firm may be able to recover damages for Park, Spouse-Park, and Quark, as we can potentially prove all of the following five elements of a prima facie case in negligence against the driver who caused their injuries.

Duty

The driver, Delano, was active in the world and thus owed a duty to both Park and Quark. While driving a vehicle, one owes a duty to all foreseeable plaintiffs.

If Newstate is a "zone of danger" jurisdiction, Delano also likely owed a duty to Spouse-Park. If Newstate is a jurisdiction that requires the physical manifestation of emotional distress, Spouse-Park's headaches and digestive trouble may fulfill that requirement for a claim based on negligently-inflicted emotional harm. (Most jurisdictions are lenient in interpreting such conditions.) Because Spouse-Park was in personal danger of physical harm at the time of the accident, she can claim that Delano owed her a duty if she can show that she feared his vehicle would hit her.

However, if Newstate is an "impact rule" jurisdiction, Delano did not owe Spouse-Park a duty because she suffered no actual, physical impact at the time of the accident. (Since she was in the danger zone, a bystander action is not an option regardless of jurisdiction.)

Standard of Care

The law holds Delano to the reasonable person standard of care despite his having lived in Newstate for only two years. He must rise to the level of the community as necessary and to be reasonable under the circumstances.

Our firm would also bring a claim for negligence *per se* if Delano violated a relevant statute and Newstate's jurisdiction permits such a claim. (Even if we are not in a negligence *per se* jurisdiction, we can introduce any violation of relevant statute(s) on Delano's part as evidence of negligence.) Delano has probably violated several statutes; however, only one is likely to help us establish the standard of care in a negligence *per se*

claim. If Newstate has a statute requiring drivers to drive at a speed that is reasonable for the weather conditions, the court might permit a claim for negligence *per se* based on that statute. Lawmakers designed such a statute to protect against the type of harm that occurred here, and our plaintiffs are included in the class of persons the statute means to protect.

Depending on the results of the police investigation, a statute pertaining to Delano's failure to clean the snow off of his back window could be pertinent to our case. This is unlikely, however. Failure to follow a statute may constitute negligence, but this in itself does not establish a causal connection between the violation of the statute and the harm caused. Unless the investigators find that lack of rear visibility played a part in causing this accident, we will not have a negligence *per se* claim based on that particular statute.

Delano has also overstayed his visa, presumably breaking a law in doing so. This is not relevant to our case, however, as the intent of Newstate's laws governing immigration is not to protect people from car accidents. Furthermore, Delano's expired license is not likely to serve as the basis for a negligence *per se* claim, as most jurisdictions prefer the plaintiff prove the defendant's lack of ability or lack of due care rather than allow for lack of a valid license to constitute negligence.

Breach of the Standard of Care

If we can prove by a preponderance of the evidence that Delano drove unreasonably fast for the poor weather conditions or that he otherwise failed to exercise due care while driving, we will successfully prove that he breached the standard of care. This may be the most difficult element for us—we will know more about this issue once we learn from investigators how Delano was driving prior to the accident. We await this same evidence in our efforts to determine if our negligence *per se* claim (or claims) will be successful; Delano's unexcused violation of a relevant statute will mean he breached the standard of care.

Cause In Fact

If we meet the breach element, we will also successfully fulfill the cause in fact element: but for Delano's breach of the standard of care while driving, he would not have injured these plaintiffs with his SUV. The outcome is the same if a statute replaces the reasonably prudent person standard of care: but for Delano violating the statute, he would not have hit the bus stop and injured Park, Spouse-Park, and Quark.

Proximate Cause

If Newstate employs the directness test for proximate cause, we need only show that no new force joined with Delano's actions to injure the plaintiffs. Thus, under the direct causation test, we meet the proximate cause element, because Delano's breach was the direct and only cause of their injuries.

Newstate more than likely uses the foreseeability test to determine if proximate cause exists, however. Meeting the requirements of this test will not be difficult, as the harm to the plaintiffs was connected to Delano's tortious conduct; a reasonable person could predict that, once out of control, his vehicle might hit passengers waiting at a nearby bus stop (in the zone of risk); and no superseding intervening cause changed the result of Delano's loss of control of his vehicle. Our case will meet the proximate cause requirement regardless of which test applies in Newstate.

Damages

Because Delano has a good insurance policy, Park, Spouse-Park, and Quark are likely to recover adequately if we meet the other four elements of our case. Our goal is to restore each of them (theoretically, at least) to their pre-injury condition by getting each of them a sufficient award of compensatory damages.

Park is likely to recover special damages for past and future medical expenses related to the accident, including all costs associated with his initial emergency care, hospitalization, and surgery; his physical therapy; and any subsequent surgeries and medical costs related to injuries sustained in the accident. He should also receive specials for his loss of earning capacity, both past and future, and the amount of these damages should account for inflation, potential promotions, and potential pay raises.

Additionally, Park should receive general damages for past and future pain and suffering, and an award for loss of enjoyment of life. If Newstate is a jurisdiction that will allow us to split the awards for loss of enjoyment of life and pain and suffering, we will attempt to do so. We should easily be able to prove that Park is conscious of his pain, suffering, and loss.

Quark should also recover specials for his past and future medical (and related) expenses, as well as for his loss of earning capacity. Damages for the loss of past and future income should, again, take inflation and potential promotions and raises into account.

Quark should also receive an award for his pain and suffering, and he may be eligible for a loss of enjoyment of life award as well, depending on how the loss of function in his left arm has affected him and his lifestyle.

Spouse-Park can recover for her "zone of danger" claim if the jury finds that she is suffering emotional distress for which she can recover a damages award. She also has a potential claim for loss of consortium. Nearly every state allows a spouse to recover for loss of consortium provided the spouse can prove the loss of a fulfilling, healthy relationship.

Our firm should advise all three plaintiffs that their first-party insurance companies may have the right of subrogation, which may allow them to collect what they have paid with respect to this accident from any damages awarded in the settlement or judgment of our case. However, should subrogation become an issue for our clients, we will have the opportunity to argue against it using the "make whole doctrine." Furthermore, our clients should know that the collateral source rule means that the defendant cannot disclose information about any of our clients' first-party insurance policies to the jury. They need not worry that the jury will reduce the size of an award because they have personal insurance policies helping them pay for their losses.