

## FINAL EXAMINATION-FALL 2015

### TORTS

#### HOUSE OF RUSSELL

1. **DEADLINE:** This is a 75-hour examination. You may begin the exam at any time after 3 pm on Friday, December 11, 2015. You must submit your answers by 6 pm on Monday, December 14, 2015. If you turn in your answers after 6 pm on December 14, then you will receive an F for your grade. NO EXCUSES.
2. **TURNING IN YOUR ANSWER:** Turn in your answer by sending the file to registrar@law.du.edu. Sending your answer with either a send receipt or a delivery receipt is a good idea. As well, send yourself a copy of the message that you send to the registrar. This will verify the fact and time of your sending your answer. **DO NOT SEND A COPY OF YOUR ANSWER TO PROFESSOR RUSSELL; YOU VIOLATE THE HONOR CODE IF YOU SEND A COPY OF YOUR ANSWER TO PROFESSOR RUSSELL.** In the subject line of your email, put the following text: “Russell-Torts-[exam number]” where [exam number] is your exam number. Name the file that contains your answer using the same convention: Russell-Torts-[exam number]. 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 discuss, show, or distribute this examination or your answers to anyone at all before 6 pm on Monday, December 14. Avoid, for example, posting anything on Facebook that looks like a request for assistance. Avoid, too, appearing to work with other people in study rooms or the library. Once the examination starts, you may not discuss it with anyone at all before the examination ends on Monday.
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. You should name the file Russell-Torts-[Exam Number]

5. **LENGTH:** This examination consists of one question. You may use no more than 2,500 words to answer the question. Reducing your answers to this word limit will be one of the challenges of this examination. Please include the word count at the end of your answer.
6. **FORMATTING:** Please double-space your answers. Avoid miniature fonts, okay? Avoid putting bullet points in front of every paragraph as this is oddly distracting to Professor Russell. Note, too, when the registrar rechecks the word count, bullet points are sometimes counted as words. This generates needless confusion.
7. **HOW TO ANSWER:** In answering, use judgment and common sense. Be organized. 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 waste of time by avoiding 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:** The laws of Newstate, the 51st state of the union, apply to all the issues in this examination. Newstate is NOT Colorado. New City is the name of a fictional city.
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. You will earn a better grade by being thorough and concise. And, of course, well-organized answers will be the best answers that earn the highest grades.
10. **KEEP A COPY:** You should retain a copy of your exam answer. You should feel free, of course, to keep a 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 Student Conduct Office in Driscoll Center North (303-871-4504) immediately after this examination ends.
12. **GOOD LUCK:** Good luck and have an excellent break.

## Sorting Cases

The Newstate personal injury law firm for which you work has two employees: the attorney and you. This means that you do pretty much everything. Your boss, Sue Litigator, has asked you to evaluate three potential cases. She wants a full analysis of tort liability for each case. If you see a products liability issue, ignore it; products cases are just too expensive and difficult for the firm. Likewise, remember that this firm handles tort cases not contracts, criminal law, or other areas.

### **Potential Case #1. Open Carry—Guns not Alcohol.**

Newstate is an “open carry” state, which means that people can and do carry weapons openly in the state. This has led to a number of problems.

Ms. Litigator, the firm owner, received a call from the family of someone who died after gunshot wound. The caller referred to some newspaper stories about the death. These stories include all the details available at the moment. Here are the stories:

#### **Newspaper story #1. Bystander Shoots Beer Shoplifter**



An alleged shoplifting incident turned deadly when the suspect was shot and killed by a bystander. The incident happened near Grant and Oracle around 2:30 p.m. on Dec. 6.

New City Police Department officials said they received a call that a man was stealing beer from the Circle K convenience store. Investigators say an armed man on a bicycle followed the suspect and shot him after the suspect allegedly lifted a large piece of wood in a threatening manner.

The alleged shoplifter was transported to the hospital with life-threatening injuries where he later died. His identity has not yet been released. The shooter has not been charged and is not in custody, according to Sgt. Pete Dugan. The investigation is continuing.

#### Newspaper story #2. **Family Says Shooter Should Face Consequences**

The family of a New City man fatally shot after stealing two cases of beer says the shooter should face consequences. Police are still investigating the Sunday shooting and haven't released the name of the man who killed 46-year-old Gerald Ramon.

Several people watched Ramon walk away from a convenience store on West Grant and North Oracle roads with the beer without paying, police said. Some of them followed Ramon out.

One armed man on a bicycle followed Ramon across a major intersection and to the back of an auto repair shop. The man who followed Ramon had a Glock handgun in a holster. The open carrying of handguns is legal in Newstate and New City.

That's when New City police say Ramon may have picked up a log and may have charged the man.

Sgt. Kimberly Bay said the shooter may have been acting in self-defense, but that it's up to the county attorney whether he should face criminal charges.

Sitting on the ground in front of a small makeshift memorial at the site of the shooting, three of Ramon's cousins said they were upset that the shooter hadn't been charged. They described Ramon as a fun and loving man who liked to make people laugh. He had a teenage daughter, they said.

"He didn't have to shoot him. He should have just stayed over there and let police handle it," said Valita Ramon. "We're so filled with anger and we're never going to feel at ease with losing him."

Ramon was a landscaper who liked to feed stray cats around his mobile home, the cousins said. He grew up about two hours southwest of New City and was proud of his Newstate heritage, often singing traditional Newstate songs. "He was always funny, he was always doing silly things. He was always making us laugh," Bernadette Ramon said.

Police on Tuesday said there was no further information to release.

### Newspaper story #3. **Gunman Shoots And Kills New City Man Who Shoplifted Beer From Circle K**

Police in New City, Newstate have released the name of a 46-year-old man who was shot and killed by a gun-toting civilian on Sunday.

According to the Newstate Daily Star, Gerald Ramon was attempting to shoplift beer from a Circle K store when a witness gunned him down.

At around 2:30 on Sunday, said police spokesman Sgt. Pete Dugan, Ramon entered the Circle K store and attempted to leave the premises with several “beer items” without paying.

Witnesses chased Ramon, who fled on foot. An armed witness on a bicycle caught up with Ramon at a nearby Burger King, but Ramon reportedly threatened to hit the man with a large piece of wood. The witness drew a gun and fired, hitting Ramon, who was pronounced dead at Banner University of Newstate Medical Center.

The shooter remained on the scene and is reportedly cooperating with police.

[End of newspaper stories]

You boss wants an assessment of possible a wrongful death case against Circle K and the shooter. Be complete in your analysis of the plaintiff’s and defendants’ cases.

### **Potential Case #2. Looked But Failed to See**

Regarding the second potential case that you must analyze for Ms. Litigator, there is also a news story:

New City (WWJ/AP) – A bumbling ambulance crew is under fire after failing to spot the broken body of a Newstate crash victim, telling a dispatcher the car was empty before leaving the scene, authorities said. They found the smashed-up car — but not the fatally injured driver inside. Cortez Cheathams, 28, was dead when

a persistent neighbor finally persuaded dispatchers to send a second crew for a closer look.

Emergency calls began shortly after 4 a.m., when residents dialed 911 to report a car had hit a tree. New Town Police said they were tied up at a homicide investigation and a separate shooting, so dispatch sent an ambulance. The ambulance crew reported that no one was in the car and the incident was then downgraded to a less-serious call of a single-car property damage accident involving a damaged vehicle.



The 911 calls continued to come in and at 5:39 a.m., dispatch sent out a second ambulance crew to the scene. Those workers found Cheathams dead in the driver's seat of his vehicle.

Police eventually arrived at the crash scene, an hour and 55 minutes after the first 911 call was made.

Following the crash, MMR Director of Community Relations Lynn Schutter said she didn't know whether any of the emergency medical technicians got out of the initial ambulance to check inside of the crashed car. She added that ambulance crews respond to crash scenes to be of service to victims, not to investigate or act as police.

Police Chief James Tolbert said it's unclear if Cheathams was alive when the first ambulance responded.

At the time of the initial 911 call for the crash at Chevrolet and Jackson Avenues, police were busy investigating a homicide and a critical shooting, police said. New City dispatchers instead sent a Mobile Medical Response ambulance.

Callers reported that they did not see anyone get out of the crashed car, and the ambulance crew was "called as normal response to a possible injury," Chief Tolbert said in an emailed statement to The New City Journal.

But when the first ambulance arrived at 4:26 a.m. — just one minute after it was dispatched — the crew reported there was no one in the vehicle, and the report was downgraded to a less-serious call of a single-car property damage accident, police said.

"When we get information that there is no patient, that's nothing we're going to rush to," Tolbert said. "It must be reiterated that once MMR made the scene and reported back that there was 'no patient,' this call became a property



damage CFS (call for service). Other higher priority calls were dispatched," he said in his statement.

That's when dispatchers sent police to the four other calls instead of the crash scene.

Ms. Schutter told The New City Journal that the company had nothing new to add to its statement from Thursday, July 23, in which it says the first responding crew exited the ambulance and assessed the scene of the crash but was unable to locate the deceased.

Tolbert said he has called MMR to discuss what happened in hopes of preventing a similar occurrence in the future. "We have received some correspondence from them referring us to their attorney," he said.

The morning of the crash, there were seven officers, two sergeants, and one lieutenant working when the first 911 call came in at 4:12 a.m., Tolbert said. Tolbert said dispatch removed officers from one of the shooting scenes to go to a crash on Crestbrook that involved people. The call came in just before Cheathams' crash, he said,

Had New City police known Cheathams was in the car on Chevrolet, officers would have been sent to Cheathams' crash immediately, Tolbert said. "But when you're told there's nobody in the car. . .," Tolbert said, trailing off.

There are 40 Newstate State Police troopers embedded in New City's detective bureau. Tolbert said there was no request to have the Newstate State Police take over one of the shooting scenes in order to allow New City police

officers to respond to the Chevrolet crash. Police at that time were still unaware there was a victim inside the car.

"The officers assigned to the shooting were in the process of performing various duties," such as evidence canvassing, transporting witnesses, and following up at the hospital, Tolbert said in his statement. "When we get information that there is no patient, that's nothing we're going to rush to."

At 5:28 a.m., dispatchers called MMR, and the ambulance confirmed "no patient found," police previously said.

A second MMR ambulance was dispatched about 10 minutes later after a neighbor investigated, saw a man in the car and made a fifth call about the incident to 911 at 5:39 a.m., police said. About 20 minutes later, that second ambulance reported at 6 a.m. that Cheathams was dead in the driver's seat.

California resident Muriel Gladney was visiting her brother when Cheathams' vehicle crashed into the tree in the front yard of the home Gladney was visiting. She said she called 911 at least five times. "The police were told right away there was someone in the car," Gladney said. "People could see him, but he was laying down on the seat."

When emergency responders didn't show up, Gladney said she called her daughter, who works for another ambulance company in Genesee County, to try to get some help.

"The police said, 'Well, we're really busy,'" Gladney said. "There had to be at least a minimum of 10 calls go in to 911 telling them there was someone in the car. That boy might have still been alive."

New City police arrived at the crash scene at 6:07 a.m. July 18, according to the New City Police Department, one hour and 55 minutes after the first 911 call was made. The night and early morning hours prior to the crash, Tolbert said, New City police had extra officers working from 7 p.m. until 3 a.m. July 18 as part of "Operation Inside Out," which puts police who normally work inside the office out on the streets.

Tolbert said it was "a fruitful night" after the special detail netted nine prostitution arrests, 30 illegal parking tickets around local bars, two arrests for drag racing, and 18 traffic tickets.

But those officers finished working before the crash happened. "At the time of the crash, they had been off duty for over an hour," Tolbert said in his statement.

MMR, the private ambulance company, is reviewing the incident, the company said in its statement issued Thursday. Any findings of its internal review won't be made public, Schutter said.

"The MMR crews responded immediately, arrived on scene, and activated scene lights," MMR claimed in statement. "The crew exited the ambulance, assessed the scene but were unable to locate the deceased."

MMR is also turning the findings of its investigation over to the New County Medical Control Authority, which is the agency in charge of overseeing emergency medical services.

That peer review could take about a month, and the findings will be released to the public only if there is a call for a suspension or revocation of a

license, according to Bruce Trevithick, executive director for the New County Medical Control Authority.

[End of newspaper story]

Further evidence has emerged concerning the cause of Mr. Cheathams' crash. Video surveillance tapes from a nearby business show that another automobile may have been involved. The video does not show the actual crash but appears to show two cars moments before Mr. Cheathams' car left the road and hit the tree. The second car was in the oncoming lane just opposite to the lane in which Mr. Cheathams was driving. The video shows that the second car, which was headed toward Mr. Cheathams' car, was swerving over the center line and driving without illuminated headlights. The owner of the second car has been identified as Mr. Jonas Driver. Mr. Driver has admitted to driving the car at the time of the accident but denies that he was involved in the accident.

Additional evidence shows that Mr. Cheathams was likely texting at the time that he swerved from the roadway and hit the tree.

Evaluate the tort claims that the firm might make regarding Mr. Cheathams' death including claims against the police, ambulance company, and the other driver.

### **3. Crackhead hitchhiker**

The third case that you must evaluate is also a strange story. The potential client is Parveen Parsa. Parsa lives in New City and is 32 years old. She works as a software programmer and makes \$150,000 per year. She and her husband have two children ages 10 and 12.

On December 15, 2013, Parsa was rear-ended as she sat a red light in downtown New City. The accident was literally a hit-and-run. A car crashed hard into the rear end of Parsa's Subaru, and then the driver and passenger of the car behind jumped out of their car and ran. Within a few days, the Police apprehended the two who fled from the car behind. Witness reports differ as to whether the man or the woman in the car behind was behind the wheel.

Dudley Dominick and his girlfriend Gianna Franca were the in car that rear-ended Parsa. But, they did not own the car. Charles Owing was the owner of the car that hit Parsa.

On December 13, 2015, Mr. Owing was drunk—very drunk—and he wanted to drive from New City back to the city of Moulder, which was about 35 miles away. Owing started driving his 2003 Honda Element, and after going just a few miles, he stopped to pick up Dudley Dominick, who was hitchhiking. Owing had never met Dominick before this night. Owing stopped to pick Dominick up because Owing thought that he (Owing) might be too drunk to drive. Dominick got into the passenger seat in the front of the car.

Shortly after Owing picked up Dominick, Owing observed that Dominick was smoking crack in the front seat of his car. At this point, Owing stopped his Honda on the shoulder of the road, and Owing got out of the car so that Dominick could smoke crack alone in the car. (This seems totally improbable but is true.) Feeling very drunk and having seen Dominick smoke crack in his car, Owing concluded that while high on crack, Dominick was probably a better driver than Owing would be while drunk. So, Owing gave the keys to his car to Dominick and asked him to drive the Honda to Moulder.

When the two of them arrived—without further incident—in Moulder, Owing asked Dominick to park the Honda. Owing said that he was going to eat at Ted's Newstate Grill, and

he claimed to be a friend of Ted Turner, the owner. Owning said that he would buy dinner for Dominick.

Dominick never appeared for dinner. About 24 hours later, Owning attempted to report his Honda as stolen, but he could only remember that it was a Honda and could not identify the year it was made or its license plate (which was from California) nor did he have any registration papers for the car. The Moulder Police dropped the report after Owning failed to produce any relevant details apart from the make of the car.

Remarkably, though, Owning's car was very full insured with liability coverage of \$1,000,000. His mother, concerned about his activities, paid for his insurance.

On the day after Owning attempted to report the car stolen, Dominick and Franca drove the car in downtown New City. Parsa was wearing her seatbelt and driving when the Honda slammed into the rear end of her Subaru.

An ambulance took Parsa from the scene to New City General Hospital, where she underwent immediate emergency surgery to remove her ruptured spleen and also to stabilize her cervical spine by fusing her C2 and C3 vertebrae. She spent a total of three weeks in the hospital, another three weeks in Greg hospital for spinal injuries. She has experience pain and discomfort, continuing need for medical care, treatment, and therapy. Although she can walk and move her limbs, she is not able to perform the activities of daily living, cannot work without extreme fatigue, cannot sit without pain, has great difficulty sleeping, and suffers from PTSD.

Parsa's medical bills so far have included \$675,000 from New City General; \$345,000 from Greg Hospital; \$7,689 for medications; \$12,450 for psychotherapy; and \$22,000 for various forms of physical therapy. She has paid \$11,500 out of pocket. Anthem, her insurance company,

has paid \$775,000, which amount the medical providers have accepted, per their contracts with Anthem, as payment in full. Her medical insurance costs have been \$375 per months, but she has just received notice that her rates will increase to \$425 per month starting next year. She has had to modify her house in order to make it easier to live in the house with her injuries. She has, however, saved roughly \$850 in greens fees because she has not been able to play golf since the accident.

Disregard the possible lawsuit against Dominick and Franca, because they have no assets, insurance, nor prospects in life. Evaluate, instead, a claim against Owing paying special attention to the issue of whether Dominick or Franca was driving.

After you have analyzed all the three potential cases, rank them from best to worst in terms of the likely payoff to the firm and advise Ms. Litigator accordingly.

**STATUTORY APPENDIX BEGINS ON THE NEXT PAGE**

## STATUTORY APPENDIX

### **Statute 1. Immunity Of Governmental Entity Or Employee**

A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from the following:

- (1) The natural condition of unimproved property.
  - (2) The condition of a reservoir, dam, canal, conduit, drain, or similar structure when used by a person for a purpose that is not foreseeable.
  - (3) The temporary condition of a public thoroughfare or extreme sport area that results from weather.
  - (4) The condition of an unpaved road, trail, or footpath, the purpose of which is to provide access to a recreation or scenic area.
  - (5) The design, construction, control, operation, or normal condition of an extreme sport area, if all entrances to the extreme sport area are marked with:
    - (A) a set of rules governing the use of the extreme sport area;
    - (B) a warning concerning the hazards and dangers associated with the use of the extreme sport area; and
    - (C) a statement that the extreme sport area may be used only by persons operating extreme sport equipment.
- This subdivision shall not be construed to relieve a governmental entity from liability for the continuing duty to maintain extreme sports areas in a reasonably safe condition.
- (6) The initiation of a judicial or an administrative proceeding.
  - (7) The performance of a discretionary function; however, the provision of medical or optical care shall be considered as a ministerial act.
  - (8) The adoption and enforcement of or failure to adopt or enforce:
    - (A) a law (including rules and regulations); or
    - (B) in the case of a public school or charter school, a policy;unless the act of enforcement constitutes false arrest or false imprisonment.
  - (9) An act or omission performed in good faith and without malice under the apparent authority of a statute that is invalid if the employee would not have been liable had the statute been valid.
  - (10) The act or omission of anyone other than the governmental entity or the governmental entity's employee.
  - (11) The issuance, denial, suspension, or revocation of, or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization, where the authority is discretionary under the law.
  - (12) Failure to make an inspection, or making an inadequate or negligent inspection, of any property, other than the property of a governmental entity, to determine whether the property complied with or violates any law or contains a hazard to health or safety.
  - (13) Entry upon any property where the entry is expressly or impliedly authorized by law.
  - (14) Misrepresentation if unintentional.
  - (15) Theft by another person of money in the employee's official custody, unless the loss was sustained because of the employee's own negligent or wrongful act or omission.



(16) Injury to the property of a person under the jurisdiction and control of the department of correction if the person has not exhausted the available administrative remedies and procedures.

(17) Injury to the person or property of a person under supervision of a governmental entity and who is:

(A) on probation; or

(B) assigned to an alcohol and drug services program or a community corrections program.

(18) Design of a highway, toll road, or project if the claimed loss occurs at least twenty (20) years after the public highway, toll road project, tollway, or project was designed or substantially redesigned; except that this subdivision shall not be construed to relieve a responsible governmental entity from the continuing duty to provide and maintain public highways in a reasonably safe condition.

(19) Development, adoption, implementation, operation, maintenance, or use of an enhanced emergency communication system.

(20) Injury to a student or a student's property by an employee of a school corporation if the employee is acting reasonably under a:

(A) discipline policy or

(B) restraint and seclusion plan.

(21) An act or omission performed in good faith under the apparent authority of a court order that is invalid, including an arrest or imprisonment related to the enforcement of the court order, if the governmental entity or employee would not have been liable had the court order been valid.

(22) An act taken to investigate or remediate hazardous substances, petroleum, or other pollutants associated with a brownfield unless:

(A) the loss is a result of reckless conduct; or

(B) the governmental entity was responsible for the initial placement of the hazardous substances, petroleum, or other pollutants on the brownfield.

(23) The operation of an off-road vehicle by a nongovernmental employee, or by a governmental employee not acting within the scope of the employment of the employee, on a public highway in a county road system outside the corporate limits of a city or town, unless the loss is the result of an act or omission amounting to:

(A) gross negligence;

(B) willful or wanton misconduct; or

(C) intentional misconduct.

## **Statute 2. Comparative Fault**

In an action based on fault, any comparative fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's comparative fault, but does not bar recovery except as provided in Statute 3.

**Statute 3. Barring Recovery; Degree of Comparative Fault**

In an action based on fault that is brought against:

- (1) one (1) defendant; or
- (2) two (2) or more defendants who may be treated as a single party;
- (A) the claimant is barred from recovery if the claimant's comparative fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages.
- (B) In an action based on fault that is brought against two (2) or more defendants, the claimant is barred from recovery if the claimant's comparative fault is greater than the fault of all persons whose fault proximately contributed to the claimant's damages.

**Statute 4. Survival Of Actions; Death Of Injured Person During Pendency Of Action.**

All actions and claims survive death. Actions on claims for injuries that result in death shall not be prosecuted after the death of the injured person except pursuant to the next section. If an action is pending at the time of death the claims may be amended to bring it under the next statute. A failure to so amend will amount to a waiver of the claim for additional damages resulting from death.

**Statute 5. Wrongful Death**

- (1) Whenever the death of a person , injuries resulting in death, or death shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death, and although the death was caused under circumstances that constitute a felony.
- (2) Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased . Within 30 days after the commencement of an action, the personal representative shall serve a copy of the complaint and notice as prescribed in subsection (4) upon the person or persons who may be entitled to damages under subsection (3) in the manner and method provided in the rules applicable to probate court proceedings.
- (3) the person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased:
  - (A) The deceased's spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.
  - (B) The children of the deceased's spouse.
  - (C) Those persons who are devisees under the will of the deceased, except those whose relationship with the decedent violated Michigan law, including beneficiaries of a trust under the will, those persons who are designated in the will as persons who may be entitled to damages under this section, and the beneficiaries of a living trust of the deceased if there is a devise to that trust in the will of the deceased.
- (4) The notice required in subsection (2) shall contain the following:

(A) The name and address of the personal representative and the personal representative's attorney.

(B) A statement that the attorney for the personal representative shall be advised within 60 days after the mailing of the notice of any material fact that may constitute evidence of any claim for damages and that failure to do so may adversely affect his or her recovery of damages and could bar his or her right to any claim at a hearing to distribute proceeds.

(C) A statement that he or she will be notified of a hearing to determine the distribution of the proceeds after the adjudication or settlement of the claim for damages.

(D) A statement that to recover damages under this section the person who may be entitled to damages must present a claim for damages to the personal representative on or before the date set for hearing on the motion for distribution of the proceeds under subsection (6) and that failure to present a claim for damages within the time provided shall bar the person from making a claim to any of the proceeds.

(5) If, for the purpose of settling a claim for damages for wrongful death where an action for those damages is pending, a motion is filed in the court where the action is pending by the personal representative asking leave of the court to settle the claim, the court shall, with or without notice, conduct a hearing and approve or reject the proposed settlement.

(6) In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased. The proceeds of a settlement or judgment in an action for damages for wrongful death shall be distributed as follows:

(A) The personal representative shall file with the court a motion for authority to distribute the proceeds. Upon the filing of the motion, the court shall order a hearing.

(B) Unless waived, notice of the hearing shall be served upon all persons who may be entitled to damages under subsection (3) in the time, manner, and method provided in the rules applicable to probate court proceedings.

(C) If any interested person is a minor, a disappeared person, or an incapacitated individual for whom a fiduciary is not appointed, a fiduciary or guardian ad litem shall be first appointed, and the notice provided in subdivision (b) shall be given to the fiduciary or guardian ad litem of the minor, disappeared person, or legally incapacitated individual.

(D) After a hearing by the court, the court shall order payment from the proceeds of the reasonable medical, hospital, funeral, and burial expenses of the decedent for which the estate is liable. The proceeds shall not be applied to the payment of any other charges against the estate of the decedent. The court shall then enter an order distributing the proceeds to those persons designated in subsection (3) who suffered damages and to the estate of the deceased for compensation for conscious pain and suffering, if any, in the amount as the court or jury considers fair and equitable considering the relative damages sustained by each of the persons and the estate of the deceased. If there is a

special verdict by a jury in the wrongful death action, damages shall be distributed as provided in the special verdict.

(F) If none of the persons entitled to the proceeds is a minor, a disappeared person, or a legally incapacitated individual and all of the persons entitled to the proceeds execute a verified stipulation or agreement in writing in which the portion of the proceeds to be distributed to each of the persons is specified, the order of the court shall be entered in accordance with the stipulation or agreement.

(7) A person who may be entitled to damages under this section must present a claim for damages to the personal representative on or before the date set for hearing on the motion for distribution of the proceeds under subsection (6). The failure to present a claim for damages within the time provided shall bar the person from making a claim to any of the proceeds.

(8) A person who may be entitled to damages under this section shall advise the attorney for the personal representative within 60 days after service of the complaint and notice as provided for under subsection (2) of any material fact of which the person has knowledge and that may constitute evidence of any claim for damages. The person's right to claim at a hearing any proceeds may be barred by the court if the person fails to advise the personal representative as prescribed in this subsection.

**END OF EXAMINATION**