Fall 2021 Torts Final Examination

House of Russell

Cadillac of Amusement Parks

Attached are three high-scoring student answers.

The first two answers are the strongest. Each addresses the claims against Damian (the driver of the Escalade), the Amusement Park, and the architects. Each also includes analysis of whether Lauren, the mother, had a claim for negligent infliction of emotional distress.

The analysis of damages in the third answer stood out as exceptional.

Please see the video that accompanies this exam for a fuller discussion.

FINAL EXAMINATION

TORTS

HOUSE OF RUSSELL

INSTRUCTIONS:

1. **DEADLINE:** This is a 24-hour examination. You may download the exam beginning at 9 a.m. on December 11, 2021. Once you download the exam, you have 24 hours to complete and turn in your answer. You have only a 24-hour window within the 36 hours between 9 a.m. on December 11 through 9 p.m. on December 12 to complete and submit your answer. You must turn in your answer no later than 24 hours after downloading the exam and in no case after 9 p.m. on December 12, 2021. Therefore, if you download the exam after 9 p.m. on Saturday, December 11, 2021, you will have less than 24 hours to write and submit your answer.

2. **EXAM NUMBER:** Please put your exam number on each page within the header. **Do not put your name or ID number anywhere on any page of your answer.** Name the file Torts-Russell-[Exam Number]. Email your exam answer to yourself to provide evidence of when you finished the exam.

3. **TURNING IN YOUR ANSWER:** https://www.exam4.com/org/600 is the examination portal, which you will use to turn in your answer. The registrar has already sent you login instructions. If you have technical problems turning in your answer, please contact the registrar. Be sure to save a copy of your answer. **Do NOT contact Professor Russell with difficulties related to exam submission.**
DO NOT SEND YOUR ANSWER TO PROFESSOR RUSSELL; YOU VIOLATE THE HONOR CODE IF YOU SEND YOUR ANSWER TO PROFESSOR RUSSELL.

4. **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 answer to anyone at all before the exam ends at 9 p.m. on December 12, 2021. Be cautious, for example, about posting anything on TikTok, Instagram, Twitter, or Facebook that anyone might think is a request for assistance. Once the exam starts, you may not discuss it with anyone at all before the examination ends at 9 p.m. on December 12, 2021.

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 may be one of the challenges of this examination. Do not feel that you have to write 2,500 words. **Include the word count at the end of your answer.**

6. **SPACING AND FONTS:** Please double-space your answer. Avoid miniature fonts, okay?

7. **HOW TO ANSWER:** In answering, use judgment and common sense. Be organized. Emphasize the most important issues. Do not spend too much time on easy or trivial issues at the expense of harder ones. If you do not know relevant facts, relevant statutes, 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 or 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 the 51st state, which is called Newstate, apply to all the issues in this examination. The laws of New County, Newcity, and Newtown apply, too. The appendices include statutes and ordinances, which you should analyze. The 51st state is NOT Colorado.

9. **CONCISION:** Professor Russell looks for quality not quantity. Unnecessary words and discussion weaken your answer. You have time to write and edit. Think before you begin to write. Think through your answer again after you write. You will earn a better grade by being thorough and concise. The best answers will be well-organized.

10. **EXPERTISE:** Please note that sometimes House of Russell exams deal with subject matter about which some of you may have expertise or outside knowledge. You have to accept the exam's presentation as true. For example, if there is lava in the exam, and the exam indicates that lava is 2,500 degrees Fahrenheit, but you happen to know that lava is not typically that hot, you should put aside your superior knowledge and accept the lava as being the temperature that the exam says. Typically, House of Russell exams try to simplify some issues by mashing down the science just a bit.

11. **KEEP A COPY:** You should feel free, of course, to keep a copy of the exam. Please keep your answer also.

12. **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.

13. **EXAM MEMO:** After he completes the grading, Professor Russell will issue a memo or video for your review. Do not ask to review your exam until you have reviewed the exam memo. By faculty policy, you may never argue your way to a higher grade.

14. **GOOD LUCK:** Good luck and have a safe, healthy break. You are a terrific class. Teaching you has been my honor.

The Cadillac of Amusement Parks

From as early as when they were 8 or 9 years old, Frank (he/him) and Aimee (she/her) both understood that when the white lights on the back of a car went on, the car was going to back up. They thought of the lights not as "reverse lights" but as "backup lights." Alas, the Cadillac Escalade that rolled over them pulled forward out of the parking space rather than backing out. No backup lights warned them.

Aimee and Frank were best friends. They were both 11 years old on the day of the injury: September 1, 2020.

Aimee and Frank had been in pre-school together, lived around the corner from each other, and played together all the time. Their parents were close friends.

Aimee and Frank loved going together to the All Fun Amusement Park. They were old enough and smart enough that their parents allowed them to buy their own tickets with cash. Aimee and Frank would each hand over $40 to the cashier, who would issue them a ticket in a plastic holder on a lanyard. The front of the ticket was a QR code that park staff would scan as the kids waited in lines for rides. The back of the ticket included only these words:

Ticketholder assumes all risks of park activities, including injuries or death.

Aimee and Frank knew their way around the park very well and were capable enough, their parents thought, to navigate through the park on their own. Newtown, a small, comfortable city, had one of the lowest crime rates in Newstate.

Aimee and Frank agreed that the two best rides in the park were the Mind Crusher Rollercoaster and the Black Mirror Tower of Terror. Aimee thought the rollercoaster was the best; Frank favored the tower. The children had been tall enough to ride these rides for two years.

The Tower of Terror was south of the Mind Crusher Rollercoaster. Between the two rides was a huge parking lot that All Fun Amusement Park owned and operated. For cars, the entrance to the lot was on the east side. A sidewalk ran north and south along Newtown Boulevard to the east of the parking lot. On the Newtown Boulevard side of the lot, hedges with a fence inside separated the sidewalk from the parking lot. There was one opening through the hedges and fence on the east side so that patrons could walk from their cars toward the park entrance without having to walk through the car entrance/exit. Patrons parked in the lot and exited on foot to the east and then to the south to get to the gate and ticket booths. During the day, patrons could freely access their cars to get snacks, lunch coolers, changes of clothes, umbrellas, hats, or anything else they needed to enjoy their day at the amusement park.

Around the south, west, and north perimeters of the parking lot, there were planted hedges but no fence. Outside those hedges was a footpath around the southern, western, and

northern perimeter of the parking lot. To get from the Tower of Terror to the Mind Crusher, park patrons walked from the Mind Crusher to the path. With the hedges to their left, they turned to the west for about one-quarter of a mile and, next, turned straight south along the western edge of the parking lot. Patrons walked due south about one-half of a mile, and then they walked left to the east for another one-quarter of a mile before arriving at the line for the Tower of Terror. (There was always a line for this popular ride.) Altogether, the walk on the path from one ride to the next was just about one mile—the park was quite large and drew a lot of patrons. There were numerous other rides along the footpath—bumper cars, the ghost ship, a merry-go-round, and a Ferris wheel; places to eat; and restrooms.

Rather than take the footpath around the parking lot's perimeter, Aimee and Frank cut through the parking lot as they always did. There was a gap in the hedges—a space between the plants that never filled in with vegetation because so many people went through the opening. Some years before, the Amusement Park had put up a sign to try to keep people from cutting through the lot. The sign said:

No shortcut through
the parking lot.
Use the footpath.

The parking lot's aisles—the lanes where the cars drove—ran north and south. Cars parked in spaces or stalls that drivers entered at 90-degree angles from the aisles. That is, the parking spaces were perpendicular to the aisles, so parked cars faced east/west. Four-inch wide painted stripes marked the spaces, which were 9 by 18 feet. There were no wheelstops in the

spaces, so a driver could enter a space and, if the space in front were empty, could pull into that space and park with the front of the car adjacent to the aisle. The aisles, which the park marked with arrows to allow two-way driving, were 19 feet wide.

Siddhartha & Qusair, LLC were the architects who designed the All Fun Amusement Park. Their contract with the amusement park, which concluded on the day that Newtown granted the certificate of occupancy, was one of the best days in the architecture firm's history. The subsequent success of the park had made them sought-after architects for amusement parks throughout the United States and Western Europe for ten years. After reaching the pinnacle of success as amusement park architects, they both decided to quit the architecture business, go to law school, and, after graduation, they opened a civil rights law firm together. After ten years, their law practice is very successful.

The park's owners wanted narrower aisles in the parking lot so that they could have 9 percent more parking spaces in the lot. In the late stages of the park's design, S&Q—as everyone called them—reluctantly narrowed the parking aisles to 19 feet from the 22 feet that the Newtown zoning code required. The park's owners had not made changes to the original design of the parking lot since the park opened.

The day was hot, and Aimee and Frank walked in the shade of the cars. With the late afternoon sun to the west, cars cast shadows to the east. The kids sang silly songs and skipped

and walked along on the shaded pavement behind the cars—while keeping an eye out for backup lights.

Earlier in the day, Damian (they/them) had parked his Cadillac Escalade in the lot. After arriving, Damian drove northbound in one of the parking aisles. They turned to their right and headed eastbound into a parking space. Damian chose the space because there was an empty space in front, and they pulled forward (eastward) into the second, open space so that the front end of the Escalade was on the parking aisle. Because only painted lines separated the spaces, any patron could pull through one space into the one in front. Damian parked their Escalade facing out toward the aisle because on many previous trips to the park, Damian had experienced the parking aisles as a bit narrow. Although the Escalade had a rear-facing video camera and a large video screen, Damian felt that pulling out of the parking space rather than backing out of the space was the more reasonable, prudent move. The Escalade did not have a frontview camera.

Damian was tired out after most of a day in the hot sun at the park. They started the engine, turned up the air conditioning, and checked their mobile phone while holding the phone in their lap. Done checking texts, Damian tossed the phone into the passenger seat and quickly pulled the Escalade forward. Damian heard a high-pitched scream and felt a bump. They had no idea what had happened, as they had not seen and still could not see anyone in front of the car. Damian jumped down from the Cadillac and saw a child's legs sticking out from beneath the car. They looked forward and saw a bleeding girl on the asphalt aisle in front of his car. Damian

immediately called 9-1-1 and did their best to comfort the girl during the four minutes before Newtown paramedics arrived.

Lauren (she/her), Frank's mother, had heard Aimee's scream. Lauren was also at the park that day, and she was having a rest in the shade and eating a soft ice cream cone at a snack bar just west of the parking lot. She was about 500 yards from the Escalade when Aimee screamed, and though the park was noisy with the sound of rides and excited patrons, Aimee's scream pierced her. With a parent's intuition—even though Aimee was not her daughter—she understood that Aimee's scream signaled Aimee's peril but also that her son Frank was in danger.

Lauren dropped her ice cream cone and moved instinctively toward the parking lot. Because she did not know about the gap in the hedges, she exited the park and followed the sidewalk to the pedestrian entrance to the park on the lot's east side. Lauren got to the lot just after the paramedics had arrived. She followed the paramedics' truck and saw, to her horror, that Aimee was bleeding on the asphalt and Frank was beneath a large car.

Frank fought hard but died two months later in mid-November. He suffered a traumatic brain injury and severe orthopedic injuries. About a week after the injury, he regained consciousness, and doctors discovered that he had lost his sight due to an injury to his optic nerve. He experienced severe pain. The boy was alternately cheerful and despondent about his future. While in the rehabilitative hospital where he was beginning to learn how to adapt to his

new life, he suddenly collapsed and died. The medical staff was unable to revive him. An autopsy revealed that he died from aortic dissection. The largest blood vessel in his young body had split open.

The cause of Frank's aortic dissection is unclear. The pathologist who conducted the autopsy thinks that the trauma most likely weakened the aorta. A congenital defect could also be the cause, but the pathologist believes there is at most a ten percent chance that Frank had the problem from birth. The pathologist reviewed all of Frank's studies—CT scans, MRIs, x-rays, and ultrasounds—and found no evidence that physicians treating him for the car crash injury had missed an injury to his aorta.

Medical Provider	**Billed Amount**
Newtown Medical Center	$31,668.13
Newpoint ER Physicians	$1,168.00
Newtown Imaging Associates PC	$583.00
Spine, Pain & Rehab	$36,212.00
Newtown Neurology	$27,896.00
Newstate Surgery Associates	$33,880.00
Newtown Adventist Hospital	$35,524.16
Health Images of Newtown	$5,226.00
Defined Physical Therapy	$1,217.00
Pro-Active PT - Newtown	$822.00
Kirk Rehabilitation Hospital	$75,876.47
TOTAL MEDICAL BILLING	**$250,072.76**

Frank’s parents assembled the list of medical expenses above, but they may have forgotten some items. They have good insurance and have paid only $2,250 out of their own

pockets. Their health insurer has paid $55,016.00, and the providers have written off the balances.

Aimee survived. She now mourns the loss of her best friend, is depressed, fears going outside, and communicates little with anyone. Her face is scarred from where she hit the parking lot's asphalt. She limps because, notwithstanding the best efforts of her physicians to reconstruct her shattered right leg, that leg is an inch shorter than her left. She suffered abdominal and pelvic trauma. Doctors removed her shattered spleen and one of her ovaries. The loss of an ovary will likely delay the onset of menstruation, make conception more difficult, and cause menopause earlier.

Aimee's mom has provided the following list of medical bills, which are current as of last week. She does not know how much her medical insurance has paid.

Medical Provider	**Billed Amount**
Newtown Paramedics	$ 5,310.00
Newtown Hospital	$106,331.39
Newtown Power Rehab	$37,789.00
Newtown Emergency Physicians	$12,795.59
Newstate Anesthesia Practice	$13,650.00
Newtown Surgical Practice	$75,930.00
Newtown OBGYN	$ 7,865.00
Mindful Wellness Therapy	$ 6,350.00
TOTAL MEDICAL BILLING	**$266,020.98**

Your job: Evaluate the tort claims related to Frank and Aimee.

In so doing:

1. Pretend that the COVID-19 pandemic never started. For example, do not look for negligence because the amusement park was open, there were no vaccine checks, and no masks.

2. Ignore the possibility of medical negligence claims against any medical providers. There is no evidence of physician negligence. Even if there were evidence of physician negligence, such lawsuits are prohibitively expensive, and Newstate physicians win 80 percent of all cases filed against them.

3. Do not target any of the parents as defendants. They have suffered enough and have agreed among themselves that they will not take any action if any one of them may be a defendant.

4. Do not analyze product liability claims. A product liability specialist will evaluate whether there may be a product liability claim against Cadillac. For your analysis, you should disregard the idea of bringing in Cadillac as a defendant or nonparty.

Appendices with some Newtown ordinances and Newstate laws follow.

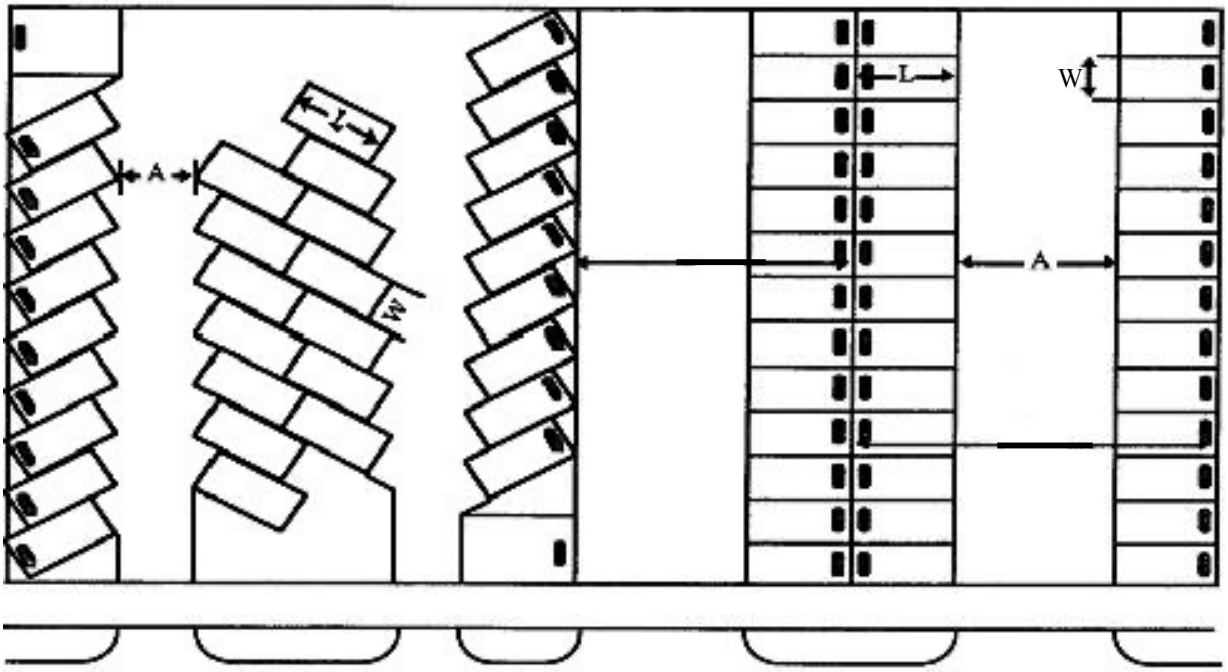
Appendix 1. Newtown ordinances.

Ordinance 125--SIZE OF REQUIRED PARKING SPACES AND AISLES.

A. The minimum size of off-street parking spaces shall conform to the requirements established on Table 125, Off-Street Parking Dimensions.

B. Any aisle providing access to required parking spaces shall be at least the width designated in Table 125, Off-Street Parking Dimensions, based on the angle of parking provided.

Table 125. Off-Street Parking Dimensions (in feet)



Parking Angle	Parking Space Width (W)	Parking Space Length (L)	Aisle Width (A)
45°	9.0	18.0	18.0
60°	9.0	18.0	18.0
90°	9.0	18.0	22.0

Ordinance 126—Wheelstops

A. Wheel stops are required in all parking lots to define the perimeter of the parking area and to protect landscaping from vehicle encroachment. In addition, wheel stops are required for each parking space in a parking lot with more than 35 stalls.

B. Wheel stops shall be provided as follows:

(1) Materials and Installation. Wheel stops shall be constructed of concrete, continuous concrete curbing, asphalt, timber, or other durable material not less than six inches in height, or an approved functional equivalent. Wheel stops are to be securely installed and maintained as a safeguard against damage to adjoining vehicles, machinery, or abutting property.

(2) Setback. Wheel stops or other vehicle barriers shall be located approximately three (3) feet from the front of the parking space.

(3) Functional Equivalent. Wherever possible, functional equivalents in the form of raised sidewalks or curbs surrounding planters or similar may be used in lieu of wheel stops.

Appendix 2. Newstate statutes.

Statute 1 Comparative fault.—

(1) DEFINITIONS.—As used in this section, the term:

(a) "Accident" means the events and actions that relate to the incident as well as those events and actions that relate to the alleged defect or injuries, including enhanced injuries.

(b) "Economic damages" means past lost income and future lost income reduced to present value; medical and funeral expenses; lost support and services; replacement value of lost personal property; loss of appraised fair market value of real property; costs of construction repairs, including labor, overhead, and profit; and any other economic loss that would not have occurred but for the injury giving rise to the cause of action.

(c) "Negligence action" means, without limitation, a civil action for damages based upon a theory of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories. The substance of an action, not conclusory terms used by a party, determines whether an action is a negligence action.

(d) "Products liability action" means a civil action based upon a theory of strict liability, negligence, breach of warranty, nuisance, or similar theories for damages caused by the manufacture, construction, design, formulation, installation, preparation, or assembly of a product. The term includes an action alleging that injuries received by a claimant in an accident were greater than the injuries the claimant would have received but for a defective product. The substance of an action, not the conclusory terms used by a party, determines whether an action is a products liability action.

(2) EFFECT OF COMPARATIVE FAULT.—In a negligence action, comparative fault chargeable to the claimant diminishes proportionately the amount awarded as economic and noneconomic damages for an injury attributable to the claimant's comparative fault but does not bar recovery.

(3) APPORTIONMENT OF DAMAGES.—In a negligence action, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.

(a) In order to allocate any or all fault to a nonparty, a defendant must affirmatively plead the fault of a nonparty and, absent a showing of good cause, identify the nonparty, if known, or describe the nonparty as specifically as practicable, either by motion or in the initial responsive pleading when defenses are first presented, subject to amendment any time before trial in accordance with the Newstate Rules of Civil Procedure.

(b) In order to allocate any or all fault to a nonparty and include the named or unnamed nonparty on the verdict form for purposes of apportioning damages, a defendant must prove at trial, by a preponderance of the evidence, the fault of the nonparty in causing the plaintiff's injuries.

(4) MEDICAL MALPRACTICE.—Notwithstanding anything in law to the contrary, in an action for damages for personal injury or wrongful death arising out of medical malpractice, whether in contract or tort, if an apportionment of damages pursuant to this section is attributed to a teaching hospital, the court shall enter judgment against the teaching hospital on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability.

Statute 2 Employer presumption against negligent hiring.—

(1) In a civil action for the death of, or injury or damage to, a third person caused by the intentional tort of an employee, such employee's employer is presumed not to have been negligent in hiring such employee if, before hiring the employee, the employer conducted a background investigation of the prospective employee and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for the employment in general. A background investigation under this section must include:

(a) Obtaining a criminal background investigation on the prospective employee;

(b) Making a reasonable effort to contact references and former employers of the prospective employee concerning the suitability of the prospective employee for employment;

(c) Requiring the prospective employee to complete a job application form that includes questions concerning whether he or she has ever been convicted of a crime, including details concerning the type of crime, the date of conviction and the penalty imposed, and whether the prospective employee has ever been a defendant in a civil

action for intentional tort, including the nature of the intentional tort and the disposition of the action;

(d) Obtaining, with written authorization from the prospective employee, a check of the driver license record of the prospective employee if such a check is relevant to the work the employee will be performing and if the record can reasonably be obtained; or

(e) Interviewing the prospective employee.

(2) To satisfy the criminal-background-investigation requirement of this section, an employer must request and obtain from the Newstate Department of Law Enforcement a check of the information as reported and reflected in the Newstate Crime Data Center system as of the date of the request.

(3) The election by an employer not to conduct the investigation specified in subsection (1) does not raise any presumption that the employer failed to use reasonable care in hiring an employee.

Statute 3 Wrongful Death.—

(1) RIGHT OF ACTION.—When the death of a person is caused by the wrongful act, negligence, default, or breach of contract or warranty of any person, including those occurring on navigable waters, and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.

(2) PARTIES.—The action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death. The wrongdoer's personal representative shall be the defendant if the wrongdoer dies before or pending the action. A defense that would bar or reduce a survivor's recovery if she or he were the plaintiff may be asserted against the survivor but shall not affect the recovery of any other party.

(3) DAMAGES.—All potential beneficiaries of a recovery for wrongful death, including the decedent's estate, shall be identified in the complaint, and their relationships to the decedent shall be alleged. Damages may be awarded as follows:

(a) Each survivor may recover the value of lost support and services from the date of the decedent's injury to her or his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority, in the case of healthy minor children, may be considered.

(b) The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury.

(c) Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury. For the purposes of this subsection, if both spouses die within 30 days of one another as a result of the same wrongful act or series of acts arising out of the same incident, each spouse is considered to have been predeceased by the other.

(d) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors.

(e) Medical or funeral expenses due to the decedent's injury or death may be recovered by a survivor who has paid them.

(f) The decedent's personal representative may recover for the decedent's estate the following:

(g) Loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest. Loss of the prospective net accumulations of an estate, which might reasonably have been expected but for the wrongful death, reduced to present money value, may also be recovered:

1. If the decedent's survivors include a surviving spouse or lineal descendants; or

2. If the decedent is not a minor child, there are no lost support and services recoverable under subsection (3)(a), and there is a surviving parent.

(h) Medical or funeral expenses due to the decedent's injury or death that have become a charge against her or his estate or that were paid by or on behalf of decedent, excluding amounts recoverable under subsection (3)(e).

Statute 4 Actions; surviving death of party.—

No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted, and defended in the name of the person prescribed by law.

Statute 5 Alcohol or drug defense.—

(1) As used in this section, the term:

(a) "Alcoholic beverage" means distilled spirits and any beverage that contains 0.5 percent or more alcohol by volume.

(b) "Drug" means any chemical substance set forth in or controlled under Title 3, Chapter 9 of the Newstate statutes [omitted from this appendix]. The term does not include any drug or medication obtained pursuant to a prescription if taken in accordance with the prescription, or any medication that is authorized under state or federal law for general distribution and use without a prescription in treating human diseases, ailments, or injuries and that was taken in the recommended dosage.

(2) In any civil action, a plaintiff may not recover any damages for loss or injury to his or her person or property if the trier of fact finds that, at the time the plaintiff was injured:

(a) The plaintiff was under the influence of any alcoholic beverage or drug to the extent that the plaintiff's normal faculties were impaired, or the plaintiff had a blood or breath alcohol level of 0.08 percent or higher; and

(b) As a result of the influence of such alcoholic beverage or drug the plaintiff was more than 50 percent at fault for his or her own harm.

Statute 6 Limitations other than for the recovery of real property.—Actions other than for recovery of real property shall be commenced as follows:

(1) **WITHIN FIVE YEARS.—**

(a) An action on a judgment or decree of any court, not of record, of this state or any court of the United States, any other state or territory in the United States, or a foreign country.

(b) A legal or equitable action on a contract, obligation, or liability founded on a written instrument.

(2) **WITHIN FOUR YEARS.—**

(a) An action founded on negligence.

(b) An action founded on the design, planning, or construction of an improvement to real property, with the time running from the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest; except that, when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered with the exercise of due diligence. In any event, the action must be commenced within 10 years after the date of actual possession by the owner, the date of the issuance of a certificate of occupancy, the date of abandonment of construction if not completed, or the date of completion of the contract or termination of the contract between the professional engineer, registered architect, or licensed contractor and his or her employer, whichever date is latest.

(c) An action for trespass on real property.

(d) An action for taking, detaining, or injuring personal property.

(e) An action to recover specific personal property.

(3) **WITHIN TWO YEARS.—**

(a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

(b) An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued, except that this 4-year period shall not bar an action brought on behalf of a minor on or before the child’s eighth birthday.

(c) An action for wrongful death.

(d) An action for libel or slander.

(4) **WITHIN ONE YEAR.—**

(a) An action for specific performance of a contract.

(5) FOR INTENTIONAL TORTS BASED ON ABUSE.—An action founded on alleged abuse or incest may be commenced at any time within 7 years after the age of majority, or within 4 years after the injured person leaves the dependency of the abuser, or within 4 years from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the abuse, whichever occurs later.

End of Appendices

All characters and other entities appearing in this exam are fictitious. Any resemblance to real persons, dead or alive, or other real-life entities, past or present, is purely coincidental.

For their guest lectures in the House of Russell this semester, Professor Russell thanks the following Denver Law alumni:

Aimee H. Wagstaff, Esq., Wagstaff Law Firm

Frank Azar, Esq., Franklin D. Azar and Associates, P.C.

Siddhartha Rathod, Esq., Rathod Mohamedbhai LLC

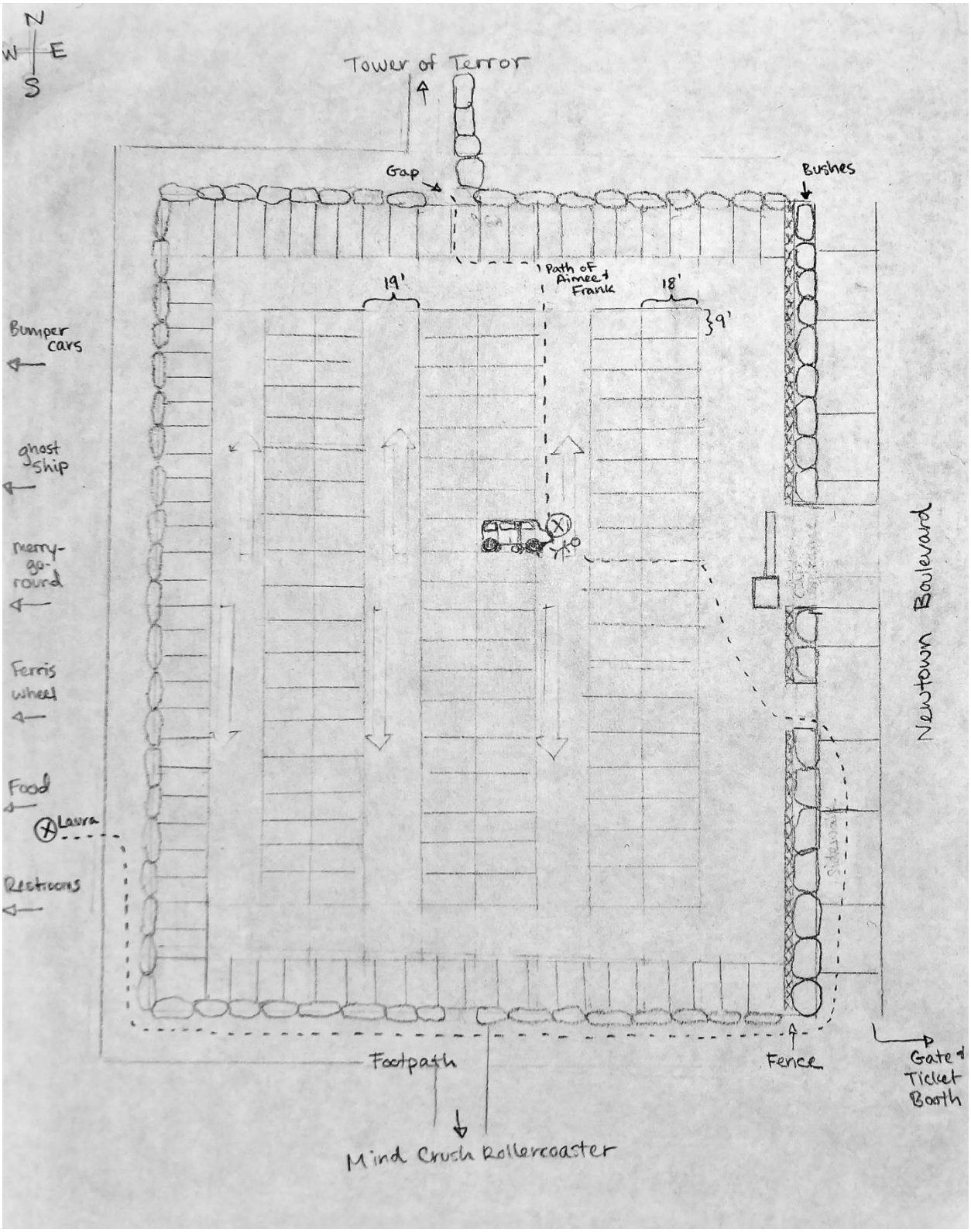
Damian J. Arguello, Esq., Crest Insurance Law& Consulting

Lauren Varner, Varner Faddis Elite Legal, LLC

Professor Russell thanks the following attorneys for helping with the medical damages: Jennifer Simpson, Esq., Buckley Simpson Law LLC; Haley M. Rank, Esq., Tomazin Law Group LLP; Brian N. Aleinikoff, Esq., LEVENTHAL PUGA BRALEY P.C.; Nathan Berger, Esq., Nathan Berger & Associates; Ross Ziev, Esq., The Law Offices of Ross Ziev, P.C. Thank you as well to the members of the Colorado Trial Lawyers Association for supporting Professor Russell's practical approaching to teaching Torts. Ms. Aleesha McDowell, Ms. Kiersten Ann Hillkirk, and Mr. Nick Williams provided timely, crucial production help. Ms. Sarah Sweetman, the registrar, ably ensured the distribution of this exam.

END OF EXAM

Mind Crush of Terror



Aimee (A/N/F Parent) & Frank's Estate (Lauren) v. AFAP

- **Duty**

Status-approach jurisdiction:

Some courts require evidence of "prior similar incidents" before businesses have a duty to protect. However, AFAP is a landowner and has a nonfeasance duty to protect. AFAP owes a higher duty – a duty to inspect. A landowner must exercise reasonable care to protect an invitee from dangers of which the landowner knew or should have known.

Aimee and Frank ("A&F") were invitees because they bought tickets. AFAP owned and operated the parking lot.

Not a status-approach jurisdiction:

AFAP has a duty of ordinary care and a duty to rescue because it created the peril. There could also be a duty to control based on negligent entrustment because AFAP allowed 11-year-olds in the park without adult guardians.

- **Standard of Care ("SOC")**

AFAP must either remedy dangers by maintaining required safety features or warn the invitee of the existence of known perils. When a landowner can remedy a danger with very little effort or cost, warnings are no longer sufficient.

Ordinance 125 – 90º parking spots require an aisle width of 22'.

Ordinance 126 – Parking stalls must have wheelstops when the parking lot has more than 35 stalls.

- **Breach of SOC ("Breach")**

AFAP breached the SOC when it required narrower aisles during construction, continued to keep the narrow aisles, only had fencing on one side of the parking lot, did not replace the

warning sign, and did not put in wheelstops. AFAP would have prevented A&F's injuries by using cheap fencing or wheelstops made from almost any material.

Negligence *per se* ("NPS")

Negligence due to the violation of laws meant to protect the public. AFAP is in violation of ordinance 125 & 126's requirements for parking lots (assuming more than 35 stalls) and AFAP never fixed the lot's violations. Newstate developed the ordinances to prevent the injuries that A&F experienced and A&F are in the class of protected plaintiffs. Wanting 9% more parking spaces is not an excuse.

- **Cause-in-fact ("CIF")**

But-for AFAP breeching the SOC, Damian would not have run over A&F and A&F would not have suffered injuries. Only needs to be *a* CIF.

Frank:

It is harder to prove that AFAP's actions caused the aortic dissection. Expert testimony from a pathologist is necessary to prove the accident caused a weakened aorta. This argument is stronger because previous imagining did not identify it.

- **Proximate Cause ("PC")**

Given the breach, the injuries were foreseeable, even if the severity (eggshell) or the mechanism leading to those injuries was not (rat flambé). It's foreseeable that someone would run over children when AFAP did not construct its parking lot to code.

Frank's intervening cause:

A car accident causing an aortic dissection is not so outside the foreseeable injuries to be a supervening intervening cause, and AFAP is liable for the original injury and may also be for the future injuries.

- **Damages:** to make someone whole.

Damages are likely lump-sum payments that the court will reduce to present value. Damages can include interest. There are possible caps on total damages or categories of damages. A&F had minimal personal property loss with little to no market value. Plaintiffs participated in mitigation of damages by receiving proper medical care. The court could award punitive damages if it finds AFAP was reckless in its statute violations or land maintenance. Collateral source rule allows for damages equal to the billed amount, not the amount paid. A&F's parents should ask for the full amount of $250,072.76 and $266,020.98 respectively. No need to reduce damages if attorney waited until after trial to negotiate or parents negotiated independently. Parents might need to pay back health insurer (subrogation).

Aimee's Damages:

	Past	**Future**
Pecuniary	○ Medical expenses Transport, hospital, testing, imaging, doctors, medication, follow-up, etc. $266,020.98 ○ Incidentals	○ All future medical expenses PT, OT, counseling, plastic surgery for scars, missing spleen care, IVF ○ Diminished earning capacity ○ Incidentals – special shoes
Non-pecuniary	○ Pain and suffering (& embarrassment) pre-trial: accident and medical procedures	○ Loss of enjoyment of life Disfigurement, athletic failure, problems conceiving and early menopause ○ Pain and suffering post-trial: depression, anxiety ○ Emotional distress

Frank's Damages:

	Past	**Future**
Pecuniary	○ Medical expenses Transport, hospital, testing, imaging, doctors, medication, follow-up, etc. $250, 072.76 ○ Incidentals	
Non-pecuniary	○ Pain and suffering (& embarrassment) From 09/01/2020 until death in November (while conscious), distress from blindness, sadness about future	

This is a survival action brought on behalf of Frank by his parents to recover for his injuries before death. See below for wrongful death claim.

Defenses

No Breach:

AFAP claims it did not breach the SOC because it had no reasonable knowledge of the parking lot danger. However, AFAP had constructive notice because the vegetation did not grow in the "shortcut" path due to so many people crossing through the opening. Also, AFAP had actual knowledge of the danger because it had previously posted a sign to address the problem.

No PC for Frank's Death:

AFAP will claim that Damian's intervening cause is a supervening intervening cause because aortic dissection is outside the foreseeable consequences of breaching the landowner's SOC. However, it is foreseeable that a child would die from breaching the parking lot ordinances, and eggshell plaintiff and rat flambé are not defenses.

Comparative fault:

Newstate has a pure comparative fault statute. No amount of plaintiff's fault will remove liability for defendants.

AFAP claims nonparty liability. AFAP claims it was S&Q's negligence that caused the tort, despite S&Q's reluctance to narrow the aisles. However, AFAP required S&Q to build the parking lot negligently. Court will determine liability percentages to all parties. Plaintiffs may not recovery from S&Q because of time bar, but percentage of fault might still be allocated to S&Q.

AFAP claims it was Damian's negligence that caused the tort. The court will allocate appropriate percent of liability to Damian if the court finds they were negligent. Damian claims if the aisles were the correct size and wheelstops in place, this would not have happened.

Because parties cannot be jointly liable, separate suits may mean that plaintiffs do not recover the total amount.

Newstate might integrate assumption of risk into comparative fault. The court can allocate some fault to A&F if it finds A&F assumed risk by waiver (express) or by fault of crossing the parking lot when they should have used the path (implied). However, A&F did not have knowledge of the particular risk of a car pulling forward out of a spot but did know about general dangers of parking lots. The court may find no express or implied assumption of risk. No amount of A&F's fault (<100%) will bar recovery.

AFAP claims a congenital defect caused Frank's aortic dissection. The court may reduce liability by the percentage of likelihood that it was a congenital defect based on expert witness.

Invitee v. trespasser:

AFAP only has a duty to warn of artificial conditions if A&F were trespassing. The court might find trespass because A&F entered the lot outside the prescribed method. However, patrons could freely access the parking lot and A&F were patrons. Also, the court can consider A&F as known trespassers (see constructive notice above). Landowners must warn known trespassers of dangers involving serious injury or death when they approach a human-made conditions. Further, the attractive nuisance doctrine gives special treatment to children trespassers and the landowner must exercise reasonable care.

Waiver of Liability:

A&F typically buy their own tickets. They are not old enough to enter a contract or consent to the removal of AFAP's liability. Lauren was in the park that day, she might have bought the tickets. However, parents cannot sign away children's rights to sue either.

The ticket simply read, "[t]icketholder assumes all risks of park activities, including injuries or death." Although the language was clear, no one signed the tickets. Also, there was no informed consent because the "waiver" did not detail the included activities and associated risks. It is unlikely the "waiver" would have included the parking lot as an assumed park risk.

Alternatively, AFAP was reckless, which also negates the "waiver."

Statute of limitations ("SOL")

Plaintiff's must bring action within 4 years if the action is founded on negligence, as it is here. The court may bar AFAP's original negligence, but AFAP's continued negligence is actionable.

Aimee (A/N/F Parent) & Frank's Estate (Lauren) v. Damian

- **Duty**

Be reasonable when active. Damian was active while driving.

- **SOC**

Damian's duty of care was to act as a reasonably prudent person under the circumstances.

The circumstances were driving a death machine (Escalade).

- **Breach**

It's unclear if Damian breeched the SOC. Maybe Damian created an unreasonable risk of bodily injury & death to foreseeable victims.

Plaintiff's will argue it was unreasonable for Damian to drive right after putting their phone down, not checking the front by getting out or using a camera, or alternatively parking so they could back up to exit. Also, A&F were tall enough to ride the rides for two years, they might have been tall enough for Damian to see them over the Escalade. The average height of 11-year-olds is 56" and the front of an Escalade is about 56". The children would have been visible if they were even a couple of inches away front the front of the car and still in its shadow.

- **CIF**

The mere fact that the accident happened does not show CIF. However, Damian caused the accident, so, CIF is likely.

But-for Damian breeching the SOC, A&F would not have suffered injuries.

Frank: see above under AFAP CIF.

- **PC**

  Given the breach, the injuries were foreseeable, even if the severity (eggshell) or the mechanism leading to those injuries was not (rat flambé). It is foreseeable that the unsafe operation of a car would injure or kill.

  Frank's intervening cause:

  An aortic dissection is not so outside the foreseeable injuries to be a supervening intervening cause, and Damian is liable for the original injury and may also be for the future injuries.

- **Damages**

  See above under AFAP damages.

Defenses

No Breach:

Damian will claim there was no breach in the SOC. They will claim driving an Escalade is not inherently negligent. They might claim they acted as reasonably as any other Escalade driver would in this circumstance.

Comparative fault:

See above under AFAP for comparative fault analysis.

SOL:

Plaintiff's must bring action within 4 years if the action is founded on negligence, as it is here.

Aimee (A/N/F Parent) & Frank's Estate (Lauren) v. S&Q

- **Duty**

The duty of a professional architect not to commit malpractice, or when active designing a parking lot, be reasonable.

- **SOC**

Custom establishes the standard of care. S&Q must act with the minimal competence exercised by other architects in good standing. An architect expert witness is necessary to determine SOC.

See ordinance 125 and 126 above.

- **Breach**

S&Q created an unreasonable risk of bodily injury & death to foreseeable victims by not following custom. It is easier to prove NPS in this case than breach of custom.

NPS

Negligence due to the violation of laws meant to protect the public.

S&Q violated both ordinances. See explanation above under AFAP.

- **CIF**

But-for S&Q breeching the SOC required by law, Damian would not have run over A&F and A&F would not have suffered injury.

Frank: See above under AFAP.

- **PC**

Given the breach, the injuries were foreseeable, even if the severity (eggshell) or the mechanism leading to those injuries was not (rat flambe).

Frank: See above under AFAP.

- **Damages**

See damages above under AFAP.

Defenses

Comparative fault:

See above under AFAP.

No PC for Frank's Death:

See above under AFAP.

*SOL:

Plaintiff's must bring action within 4 years if founded on the design, planning, or construction of an improvement to real property, with the time running from the date of the issuance of a certificate of occupancy. In any event, Plaintiff's must commence action within 10 years after the date of the issuance of a certificate of occupancy. It has been over twenty years since the certificate of occupancy was issued (and ten since S&Q opened their law practice). **The court will bar this action!**

Lauren v. AFAP, Damian, & S&Q (separately and for not more than 100% of damages)

Wrongful death

Wrongful death action to recover for her loss as a parent stemming from Frank's tortious death.

- **Duty, SOC, Breach, CIF, PC** – same as above.
- **Damages**

Funeral expenses and "mental pain and suffering from the date of the injury." 3 § 3(d)–(e).

Defenses

SOL:

The court will dismiss the wrongful death suit if Lauren brings it after 2 years.

Comparative fault:

Lauren's own fault in negligently allowing her children to run amuck in the park or Frank's fault in crossing through the lot can affect Lauren's recovery.

Emotional distress

- **Duty**

Duty is limited by type of harm.

Direct action:

Lauren suffered no physical harm, no defendant "touched" Lauren during tortious action, and she was not at risk of impact. She might have suffered physical manifestation of harm: sleep issues, migraines, diarrhea, etc.

Bystander action:

A bystander can recover when she had a close relationship with the injured person and is in the danger zone. A parent/child relationship is a close relationship.

- **SOC, Breach** – same as above.
- **CIF**

The defendants' conduct caused Lauren to "witness" the tortious death of her child and caused Lauren's emotional distress.

- **PC**

Given the breach, Lauren's emotional distress was foreseeable.

- **Damages**

Non-pecuniary damages of pain and suffering.

Defense

*No Duty:

Defendants claim Lauren was not in the zone of danger because she was more than 500 yards away and outside the line of sight. Also, her only sensory observation was hearing the other child, not her child, scream.

Word Count: 2,483

Frank and Aimee v. Damian

Duty:

Damian was active when operating their car and pulling out of the parking space, therefore they owed a duty to Frank and Aimee. *Heaven v. Pender*.

Standard of Care ("S/C"):

The S/C is to act as a reasonably prudent person under the circumstances. The circumstances include driving a large SUV in an amusement park's parking lot.

Breach of the S/C ("Breach"):

Damian breached the S/C because they acted unreasonably when pulling out of their parking space. Damian was tired and had been looking at their phone before they quickly pulled the Escalade forward without adequately checking their surroundings, given the size of their SUV.

As a frequent patron of All Fun Amusement Park ("AFAP"), Damian should have known that people often cut through the parking lot.

Frank and Aimee were singing and skipping through the parking lot. They had been tall enough to ride the Mind Crusher and Tower of Terror for two years. A reasonably prudent driver (in a reasonable car) would have heard and seen the children before pulling forward.

Cause in Fact:

But for Damian pulling the Escalade forward without checking their surroundings as a reasonably prudent person would, Frank and Aimee would not have been injured.

Proximate Cause:

Significant injuries, including death, that result from an Escalade hitting a child are foreseeable. Under the eggshell plaintiff rule, the extent of the damage is irrelevant.

Damian may argue that Frank's aortic dissection is a superseding, intervening cause. However, while the cause is unclear, the pathologist surmised that the trauma from the crash likely weakened Frank's aorta; there is at most a ten percent chance the aortic dissection was due to a congenital defect. Therefore, this is not too far outside the realm of foreseeable injuries, and Damian can be liable for Frank's death if they are liable for the crash.

Damages:

We would investigate both lists of medical expenses Frank and Aimee's parents compiled to ensure they are complete and only include those medical expenses due to the crash. For example, Aimee may also have separate imaging bills like Frank, and Frank likely has paramedic bills, too. The lists do not appear to include extraneous expenses.

The collateral source rule allows claimants to recover the billed amount instead of only the paid amount. Frank's parents' health insurance is a collateral source. That they paid $2,250 and their insurer paid $55,016.00 is irrelevant because Damian should not benefit from their foresight. However, Frank's parents should be aware that their health insurer may seek subrogation, in accordance with Newstate's laws, to recoup the amount it paid from their awarded damages. These considerations apply to any payments Aimee's mom's insurance made, too.

If it was negotiated for, Newstate may not allow Frank's parents to recover the written-off amount ($192,806.76) to avoid double compensation.

Frank and Aimee may recover for property damage to their clothes from the crash.

If Newstate caps damages, Frank and Aimee should strategically frame some of their damages, such as under "impairment," to maximize their recovery.

Frank: Under Statutes 3 and 4, Frank's estate can recover damages Frank was entitled to had he lived (survival action), and his family can recover loss of support and services and mental pain and suffering (wrongful death).

Frank's Damages	Past	Future
Special	**Medical:** • Hospital, rehabilitation, imaging, PT, neurology, and other medical bills: $250,072.76 • Items potentially missing: o Paramedics/ambulance o Anesthesia o Optometrist **Incidentals:** • Any travel expenses to hospital • Any accommodations made to Frank's home • Funeral/burial expenses	**Wages:** • Loss of future earnings/support (This would be difficult to determine due to Frank's age) (Statute 3(3)(a))

General	**Pain and Suffering** • Severe physical pain of injuries • Mental/emotional distress (despondency) • Frank's parents' mental/emotional distress from date of injury (Statute 3(3)(d)) **Loss of Enjoyment** • Inability to enjoy previous activities (visiting amusement park, playing with Aimee, enjoyment of eyesight) **Impairment** • Loss of eyesight	**Pain and Suffering** • Frank's parents' mental/emotional distress • Frank's parents' loss of society

Depending on Newstate's laws, Frank may not be able to recover pain and suffering or loss of enjoyment damages for the week he was unconscious.

Frank's mom, Lauren, likely will be unsuccessful in recovering bystander emotional distress damages. She was not in the zone of danger because she was 500 yards away. Lauren did not witness the accident, she only heard Aimee's—not her child's—screams, and she did not see Frank until after the paramedics arrived, at least four minutes after the crash.

Aimee:

Aimee's Damages	Past	Future
Special	**Medical:** • Paramedic, hospital, emergency, OBGYN, and other bills: $266,020.98 • Any missing items: diagnostic, imaging, medical equipment, ambulance **Incidentals:** • Travel to medical providers • Any modifications to home	**Medical:** • We would need an expert to create a life care plan detailing all future medical expenses, including complications from limp, loss of spleen and ovary **Wages:** • Diminished earning capacity due to limp or ongoing mental distress
General	**Pain & Suffering:** • Physical pain • Mental/emotional distress (mourning Frank; anxiety) • Embarrassment from scarred face and limp **Loss of Enjoyment:** • Inability to enjoy previous activities (playing with Frank, visiting AFAP)	**Pain & Suffering:** • Continued physical pain from injuries • Mental/emotional distress • Embarrassment from injuries **Loss of Enjoyment:** • Inability to enjoy activities • Potential inability to have children

Defenses:

Statute of Limitations ("SOL"): Newstate's SOL for an action sounding in negligence is four years (Statute 6(2)(a)) and two years for a wrongful death action (Statute 6(3)(c)). So long as Aimee and Frank bring their actions by September 1, 2022, there should be no SOL issues.

Comparative Fault: In Newstate, comparative fault diminishes proportionately the damages claimant can recover (Statute 1(2)). Damian would argue that Frank and Aimee were at fault because they were walking along the cars in the parking lot.

The court will evaluate Frank and Aimee's potential negligence based on the standard of a reasonable child of similar age, experience, and intelligence under similar circumstances. They were familiar with AFAP, including the parking lot, and were old and smart enough to purchase tickets and navigate the park on their own. Since they knew to watch for backup lights, perhaps Frank and Aimee should have known that cars may pull forward, too.

Implied Assumption of Risk: Walking through a parking lot is not an unreasonable activity that constitutes assumption of risk. If the court finds Frank and Aimee acted unreasonably when doing so, most likely their damages will be reduced accordingly under comparative fault.

Apportionment of Damages: Since Newstate does not follow the doctrine of joint and several liability (Statute 1(3)), Damian will likely try to apportion as large a percentage of the damages as possible to AFAP. This would be a prudent strategy for Aimee and Frank, too, as it is likely that AFAP's insurance has a higher limit of liability than Damian's.

Frank and Aimee v. AFAP

Duty:

AFAP was active in operating the amusement park, including the parking lot, and, thus, had a duty to Aimee and Frank.

Because of the business-customer relationship (Aimee and Frank had purchased tickets), AFAP may also have a duty to protect. We would need to investigate to determine if Newstate requires a showing of prior, similar incidents to establish this duty, and if so, whether such incidents had previously occurred.

AFAP also has a duty as a landowner of the amusement park and parking lot. Aimee and Frank are invitees because they paid money to enter the park.

S/C:

Because it was active, AFAP's S/C was to act reasonably under the circumstances.

As a landowner, AFAP's S/C to invitees, regarding activities, such as patrons driving in the parking lot, is that of a reasonably prudent person. Regarding conditions, like the lack of wheelstops, AFAP has a duty to inspect and remedy or warn invitees of dangers that it knew or should have known about.

Breach:

AFAP did not act reasonably under the circumstances because it constructed a parking lot in the middle of its large amusement park. It failed to secure the perimeter of the parking lot with a fence, instead opting for penetrable hedges.

This failure also constitutes a breach of AFAP's landowner duty to remedy the dangers on its land. AFAP should have repaired the gap in the hedges or constructed a fence on the three remaining sides of the parking lot. The burden of such construction would be low compared to the high risk of pedestrian-car crashes.

It also failed to sufficiently warn invitees of the danger of walking through the parking lot. It knew patrons did this because it allowed patrons to access their cars as needed. Also, not only would the gap in the hedges have been obvious to a prudent landowner, but AFAP demonstrated actual knowledge of it by posting a sign discouraging use of the shortcut.

This sign may be enough to meet AFAP's duty to warn. However, since we do not know the sign's placement or height, it may not have provided adequate warning to children like Aimee and Frank.

Negligence per se: As the owner and operator of a parking lot, AFAP had a statutory duty under Newtown ordinances 125 and 126.

Ordinance 125(B) requires that off-street parking lots with spaces at a 90° angle have aisles of at least 22 feet wide. AFAP's parking lot aisles are 19 feet wide. Although the ordinance does not state a purpose, presumably these requirements are for the safe operation of parking lots and the prevention of car crashes with other vehicles or pedestrians. As pedestrians in a parking lot, Frank and Aimee are likely within the class of persons the ordinance seeks to protect.

Ordinance 126 requires wheelstops along the perimeter of all parking lots and in each parking space for lots that have more than 35 stalls. Ordinance 126(B) states wheelstops "shall be constructed of concrete,…curbing, asphalt, timber, or other durable material not less than six

inches in height, or an approved functional equivalent." A functional equivalent includes "raised sidewalks or curbs…or similar" (Ordinance 126(B)(3)).

It is unclear if the hedges surrounding AFAP's parking lot are acceptable wheelstops. Although the hedges are probably more than six inches tall, they are not as durable as concrete or timber. The fence on the eastern side is likely sufficient, but it does not surround the entire parking lot. We must investigate to determine if there are more than 35 stalls in AFAP's parking lot. If so, AFAP is violating Ordinance 126(A) because there are no wheelstops in its parking spaces.

Like Ordinance 125, a likely purpose of the wheelstop requirement is to protect against car crashes in parking lots. However, AFAP may argue that Aimee and Frank are not within the class of protected persons under Ordinance 126 because sections A and B(1) state the purpose as to "protect landscaping from vehicle encroachment" and "safeguard against damage to adjoining vehicles, machinery, or abutting property."

Cause in Fact:

But for AFAP's unreasonable construction and maintenance of its parking lot, with its too-small aisles and lack of wheelstops, Damian would not have felt that pulling forward out of the parking space was the better tact, nor would they have been able to pull through the parking spaces to do so.

At minimum, AFAP's breach was a cause in fact under the lesser substantial factor test. That is, AFAP's failure to remedy or adequately warn of the parking lot dangers materially contributed to the crash that injured Aimee and Frank.

Proximate Cause:

Pedestrian injuries from a car crash in a parking lot are foreseeable. However, AFAP will likely argue that Damian was a supervening cause that breaks the chain of causation, it is also foreseeable that a person would act as Damian did and pull through the parking spaces due to the lack of wheelstops and the narrow aisles.

Damages:

See above.

Although AFAP did not appear to act with malice, the court may consider punitive damages to punish and make an example of AFAP.

Defenses:

SOL: As noted above, the SOLs for negligence and wrongful death actions are four and two years, respectively. Since the accident took place just over one year ago, this should not pose a problem.

However, an action based on the design, planning, or construction of an improvement to real property must be brought within four years, and in no event later than ten years after the grant of the certificate of occupancy (Statute 6(2)(b)). Although the exact date AFAP obtained the certificate is unclear, it appears this occurred at least ten years ago since S&Q's contract with AFAP ended that same day, and we know S&Q were sought-after architects for ten years following the success of AFAP who also had a law practice for ten years.

Aimee and Frank should be careful to frame their actions as sounding in negligence rather than the design of the parking lot, so their claims are not prevented by this statute of repose.

Comparative Fault/Implied Assumption of Risk: As discussed above, AFAP will try to reduce Aimee and Frank's damages proportionately by proving they were at fault for walking through the parking lot.

Express Assumption of Risk: AFAP will argue that Aimee and Frank expressly assumed the risk because of the release included on the back of their tickets. However, depending on Newstate's willingness to enforce such waivers, this defense will probably fail.

When evaluating the validity of a waiver, courts consider the language of the contract, whether it was fairly entered into, and public policy. AFAP's release is on the back of its tickets: "Ticketholder assumes all risks of park activities, including injuries or death." This language is vague in part because it is unclear if the parking lot constitutes a "park activity." Aimee and Frank should argue that they did not fairly agree to the release because they likely did not know about it when purchasing the tickets, nor could they have made an informed decision about assuming the risk because of their age and desire to enjoy the amusement park.

Nonparty at Fault: AFAP may argue that S&Q is a nonparty at fault as the architecture firm that constructed the parking lot (Statute 1(3)(a)-(b)). Although S&Q should not have agreed to violate Ordinance 125, it did so at the direction of AFAP. Considering the attenuated chain of events, it is unlikely that AFAP will be successful in proving S&Q were at fault for more than a small percentage of Aimee and Frank's damages.

Apportionment of Fault: AFAP will also try to mitigate the percentage of damages it is responsible for by arguing that most of the fault lies with Damian.

Conclusion:

Aimee and Frank likely can prove their prima facie cases by a preponderance of the evidence. Thus, they will be successful in recovering damages for their injuries and death. The amount recovered will depend on the apportionment of damages between Damian and AFAP, their respective insurance limits, and a determination of any comparative fault.

Word count: 2,465

Frank's parents -> wrongful death (WD) & survival claim

Lauren -> negligent infliction of emotional distress (NIED) as a bystander

Alice (through parents) -> Negligence and NIED as a bystander

V.

Damian

Unless Damian has poor insurance, it is likely to be easiest to win the most money in a suit against them.

Duty:

Damian was active while driving and therefore had a duty to the children.

Lauren was over 500 yards away not did not arrive until four minutes after the injury. She only perceived that Frank was in danger instead of the harm causing injury. Her only sensory and contemporaneous "observance" of the injury was Aimee's scream. These factors would typically weigh against finding a duty to Lauren. However, because she arrived on the scene while Frank was still under the car and therefore, "before substantial change" in Frank's "condition or location" a judge may find a duty to Lauren.

Aimee was in the zone-of-danger, physically impacted and likely aware, a witness, and in shock of the harm to Frank. The only hurdle left for a judge to find a duty to Aimee for NIED is therefore whether the judge will recognize a long-time best friend as a close enough relationship (unlikely).

Standard of Care:

Damian's duty of care was to act reasonably under the circumstances. The circumstances include that the Escalade is large enough to prevent a view of children in front and that Damian was looking down checking texts before pulling forward.

Breach:

The plaintiffs will need to show by a preponderance of the evidence that Damian breached the standard of care. Damian's subjective belief that pulling forwards was reasonable is not relevant. In this case, plaintiffs should argue that a reasonably prudent person would have first checked for people around their Escalade, then proceeded slowly, or would have backed out to use the backup camera. Therefore, Damian pulling forward, without first checking for people around, after looking down, was not reasonable. Applying the Hand formula, a jury would likely find that getting out of the car and looking around, or backing out of a parking space, is not overly burdensome compared to the probability of there being an unseen child multiplied by the foreseeable severe injury or death from running over that child.

Cause-in-Fact:

The but-for test is met for the children's injuries because if Damian had not pulled forward quickly while unaware of their surroundings, they would not have run over the children.

A jury will likely find the but-for test for Frank's death is met because trauma likely weakened the aorta. However, the 10% chance that the condition was congenital weighs against the finding. Damien should have another pathologist investigate to find evidence that it was a congenital defect or testify the chances exceeded 10%.

Newstate is a pure comparative fault state, therefore Damian should argue the kids were negligent and another but-for cause by walking so closely to the vehicles and by cutting through the

parking lot. Damian should also argue S&Q and the amusement park were but-for causes according to the analysis provided in the next section.

Proximate Cause:

The children's injuries are foreseeable and pose no proximate cause issues. If the jury finds Frank did have a congenital defect causing aortic dissection, it would be an intervening and supervening cause of his death (preventing recovery under WD, but without impact to the survival claim). However, because the extent of injury need not be foreseeable ("eggshell" victim), if the trauma weakened Frank's aorta, even with a congenital defect, Damien's breach is the proximate cause of Frank's death.

Damages:

Property: The children's clothing or property the Escalade damaged.

Frank - Survival	Past	Future
Special/Economic - medical bills - incidentals	**Medical bills:** Each medical bill and amount should be specifically alleged from injury to death (not copied here for brevity) Any other medical expenses uncovered through investigation (prescriptions, ambulances, and appointments) should be included. Incidentals: Cost of going to/from the appointments and medical supplies **Total: 250,072.76 +** other found expenses.	N/A
General/Noneconomic: Pain & Suffering (P&S)	P&S AFTER regaining consciousness to time of death including: pain from recovery, loss of enjoyment (LOE), loss of capacity (blindness), emotional upset, mental anguish	N/A

	other mental and emotional distress the plaintiffs suffered of which the injury was the proximate cause.	

Frank - WD	Past	Future
Special/Economic - Statute does not provide recovery for loss of earnings or lost support for survivors of minor children.	- Funeral Expenses - If the survival claim is unsuccessful, the parents could recover the $2,250 they paid. Otherwise precluded as double recovery.	N/A
General/Noneconomic: - Mental P&S	Mental P&S from date of injury to the trial. Try for loss of society and grief characterized as P&S.	Mental P&S from the trial onwards. Try for loss of society and grief characterized as P&S.

Aimee/Lauren – NIED	Past	Future
Special/Economic Medical expenses	None unless they incurred counselling fees or there are physical manifestations that required medical attention before trial	None unless there are reasonably certain counselling fees or physical manifestations that will require medical attention after trial
General/ Noneconomic	Shock, fright, fears, anxiety, emotional upset, emotional distress.	Fears, anxiety, emotional upset, emotional distress

Aimee – Negligence claim	Past	Future
Special/Economic - medical bills - incidentals	Each medical bill and amount should be specifically alleged from injury to time of trial (not copied here for brevity) Any other medical expenses dug up through investigation (prescriptions, ambulances, and appointments) should be included.	The present value of any reasonably certain medical expenses after the trial including: continued rehab for leg, and counseling or therapy for depression expenses related to fertility complications

	Incidentals: Cost of going to/from appointments and medical supplies **Total $266,020.98 +** other found expenses	expenses related to a dermatologists or plastic surgeons for the scar on her face
General/ Noneconomic	P&S from date of injury to trial including: Fear pain from recovery LOE of life due to time spent in surgery, recovery, or therapy other mental and emotional distress suffered of which the injury was the proximate cause.	P&S from the time of trial into the future including: Continued pain LOE of life because of any complications with mobility because her leg and because of uncertainty with fertility Embarrassment (from her limp, or complications with fertility, menstruation, or menopause and the scars on her face)

The insurance companies will likely try to recover the $55,016.00 they paid out for Frank (and whatever Aimee's insurance paid) through subrogation of any damages awarded. Despite this, Frank's and Aimee's parents should claim damages for the entire billed amount (even portions the hospitals wrote off) (collateral source rule). Frank's parents will not be able to separately claim the $2,250 they paid out of pocket in the survival action as it would be a double recovery.

Defenses:

Statute of Limitations:

The statute of limitations bars recovery after 4 years for suits in negligence and 5 years for property. The injury occurred less than 2 years ago so the statute does not bar plaintiff's claim.

Comparative Fault:

Damian should argue to allocate fault wherever they can to limit their damages. However, the jury will likely diminish any fault that Damian tries to place on the children because the children are 11-year-olds, and their reasonableness will be determined according to other kids their age with similar intelligence and experience.

Damian should therefore argue the children are of above average intelligence and experience compared to an average 11-year-old as the kids are trusted to go to the amusement park and navigate it on their own as they have done many times before. The children know to lookout for "backup lights" and so they appreciate the risks of vehicles pulling out of parking spaces while walking through a parking lot. However, as 11-year-old children have never driven, they are ignorant to the blind spots of an Escalade, significantly reducing any "voluntary assumption of risk" type arguments. These arguments may be futile as I believe no Jury would consider children walking through a parking lot open season for SUV's and would therefore allocate less than 5% of fault to them. Damian should also try to allocate fault to S&Q and the amusement park according to the analysis below.

Assumption of Risk:

Assumption of risk arguments will be subsumed into the comparative fault analysis.

Failure to Mitigate:

Failure to mitigate is not an issue as everyone acquired adequate medical attention.

Conclusion:

Damian is likely liable for greater than 90% of damages for negligently running over Frank and Aimee. Damian is likely liable for Frank's parents WD claim as well. Damian is likely not liable to Aimee, but likely liable to Lauren for NIED for severely harming Frank.

Frank's parents -> WD & survival claim

Alice (through parents) -> Negligence

V.

S&0

Amusement Park

Any suit against the city for failing to enforce its ordinances is futile because failing to enforce ordinances is unlikely to be found as a but-for cause and governmental immunity will preclude recovery. Under the Federal Tort Claims Act, the city will claim non-enforcement was a policy decision and therefore not an exception to governmental immunity

Duty:

The Amusement Park has a duty to the children as Invitees because they paid for admission. The Amusement Park was also active in operating the parking lot and rides and therefore owes a duty to the children. The Amusement Park may argue the children were trespassing when ignoring the "no shortcut" sign, however, patrons were freely allowed access in the parking lot throughout the day, and the sign was not a command to stay out but could be interpreted as a statement that the parking lot was not a shortcut because the hedge was in the way. These factors will likely lead a judge to conclude the children were not trespassing.

S&Q was active in designing the parking lot and therefore owes a duty to the children.

Standard of Care:

The Amusement Park has the duty to inspect conditions on the land and to act reasonably in operating the park.

The standard of care for S&Q is professional custom

Breach:

There are two ways to establish breach.

Direct Breach:

The families should investigate the professional customs to find out whether architects typically accommodate client requests for nonconforming designs with respect to city ordinances, or if designing parking lots without protected sidewalks is custom to find a breach for S&Q if they broke professional custom. More research is needed to find breach.

Unfenced parking lots with children in them are ubiquitous in our society and therefore unlikely for a jury to find the amusement park breached the standard of care. However, the families should investigate to find specific evidence about the rates of injuries in the lot exceeding the cost of adding a fence around the lot or protected walkway to tip the Hand formula in favor of negligence. Finding the amusement park negligent via *respondeat superior* is unlikely as S&Q are contractors and not employees.

Negligence per se (NPS):

NPS requires the existence and violation of a statute, which is met here because the aisles were 19 feet wide instead of 22 like the ordinance required and there were no wheel stops for each space for lots with over 35 spaces (a lot at least ¼ x ½ mile in size should contain many more than 35 spaces). However, the injury the ordinance seeks protection over is property whereas the injury to the children was personal. The class of persons whom the statute protects is the owners of adjoining vehicles,

machinery, and abutting property, which the children do not belong to. Since the last two elements of NPS are not met, the jury should not find breach in this way.

Cause-in-Fact:

The lack of wheel stops and wider aisles were not but-for causes of the injury. Damian could have backed into a spot with wheel stops and still pulled out forward into the children. Wider aisles would not have prevented the children from walking near the vehicles in the shade where Damian couldn't see them. The lack of fencing around the hedges could be seen as a but-for cause of the children cutting through the parking lot, but had their mother parked in the lot to drop them off they could have been in the parking lot (which is freely accessible to patrols all day) regardless of a gap in the hedge. Therefore, S&Q's design will likely not be found as a cause-in-fact unless the professional custom is to design protected sidewalks in parking lots. The amusement park's operation of the parking lot will also not be found a cause-in-fact unless reasonableness requires protected sidewalks or fencing.

Proximate Cause:

Negligent drivers are foreseeable like negligent medical care is. The amusement park knew of people taking the shortcut. Therefore, the jury may likely find proximate cause as the injury was foreseeable. However, the amusement park and S&Q should argue that Damian's operation of the Escalade was an intervening and supervening cause of the children being run over, but the jury is unlikely to agree.

Damages:

See above analysis.

Defenses:

Statute of Limitations and Repose

The statute of limitations does not bar recovery. However, S&Q have been attorneys for 10 years after ending their career as architects. Therefore, the park has been operated more than 10 years since the certificate of occupancy. The statute of repose for actions founded on the design, planning, or construction of an improvement to real property is triggered and so a claim cannot be brought against S&Q.

One could argue that the operation of the parking lot is not the design, planning, or construction and so the statute of limitations/repose would not preclude recovery for the amusement park's negligent operation of the parking lot.

Assumption of Risk:

The park will argue that the ticket expressly provides that the children assumed all risks involved in the activities of the park, precluding them from liability. However, courts will likely find this unenforceable on public policy grounds as they are children, their parents weren't asked to sign, and before payment or admission they were not informed of the nature of the activities or risks involved. Furthermore, negligent drivers running someone over in the parking lot would not be within the scope of assuming the risks of "park activities".

Failure to Mitigate:

N/A

Comparative Fault:

The park and S&Q's best defense is to try to pin as much fault as possible on Damian since Newstate is a pure comparative fault state. As a result, if they are found liable at all, it will likely be for a small percentage of the total when the jury allocates fault.

Conclusion:

Suits against S&Q are time barred under a statute of repose, winning against the park is unlikely, and regardless, so much fault would likely be allocated to Damian it would be futile to sue the park unless Damian has no insurance or assets.

WORD COUNT: 2473