

## Spring 2022 Torts Final Examination

### House of Russell

#### **“Florida Man Holds These Truths to be Self-Evident”**

Attached are two high-scoring student answers as well as the examination itself.

The strongest answers organized analysis around the insurance available from each defendant. The most culpable defendants, the owner and driver of the Taurus, caused enormous damage but have only \$25,000 in insurance coverage and no assets of their own. The bar, which overserved the driver of the Taurus, has an ample liability policy and, if 51 percent or more responsible, can shoulder the entire liability. The owner and driver of the pickup has a good coverage and also may have personal assets, which would be valuable regarding the intentional injury claims of assault and battery.

An interesting wrinkle is that Tony Thomas, the Taurus Owner, may have a valuable claim notwithstanding all his fault. His medical bills alone were \$725,000. He has substantial pain, suffering, and loss of enjoyment over the rest of his life. His wage loss, though, is probably small. He is a Medicaid recipient, which means that in some states he will only be able to claim as damages the amount that Medicaid paid, which will be quite small, but other states will allow him to ask for the full \$725,000. Allocation of fault to the driver of the pickup may thus be valuable—just 10 percent yields \$72,500 on the medical bills alone. The fault of the bar in overserving Gator, the driver of the Taurus, would likewise be valuable.

The attached student answer provide the most thorough exposition of the issues, but you may wish to watch the brief [video](#) that touches upon the most important issues in the exam.

# 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 May 10, 2022**. 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 May 10 through 9 p.m. on May 11 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 May 11, 2022. Therefore, if you download the exam after 9 p.m. on May 10, 2022, 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.

**TURNING IN YOUR ANSWER:** The ExamSoft web portal is <https://ei.examssoft.com/GKWeb/login/uflaw>. Submit your answer by uploading your document into the portal. You can find instructions on how to upload through the portal at <https://help.examssoft.com/s/article/Legacy-Portal-Upload-Performance-Assessment>. You can confirm submission of your answer in the portal. Student Affairs will contact you if they do not receive your submission.

You are responsible for keeping track of time and ensuring that you turn in your answer within 24 hours of downloading the exam. **DO NOT SEND YOUR ANSWER TO PROFESSOR RUSSELL; YOU VIOLATE THE HONOR CODE IF YOU SEND YOUR ANSWER TO PROFESSOR RUSSELL.**

3. **Do NOT contact Professor Russell with difficulties related to exam submission.** If you have difficulty uploading your answer, then your email exam answer to [student.svc@law.ufl.edu](mailto:student.svc@law.ufl.edu)
  
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 before the exam ends at 9 p.m. on May 11, 2022. 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 May 11, 2022.
  
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 Newcounty, Newcity, and Newtown apply, too. The appendices include statutes, which you must analyze. The 51st state is NOT Florida and 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 summer. You are a terrific class. Teaching you has been my honor and a career highlight. Please keep in touch with me!

**“Florida Man Holds these Truths to be Self-Evident”**

Newstate Gazette Newspaper  
By Brian Ritchie  
*Published: Jul. 5, 2021*

NEWTOWN, Newstate. - The Newstate Highway Patrol is investigating a crash near Newtown late Sunday night that killed one person and injured three others.

Investigators say the driver of a Ford Taurus didn't stop at a stop sign at Farm Road 86 and collided with a pickup at the intersection of Highway 266. It happened just after 10:30 p.m. on July 4.

One woman died at the scene, one man was shot, the two drivers were arrested, and everyone involved was taken to the hospital. The Newstate Highway Patrol reports that Heidi Santos, a 36-year-old mother of two young children, died at the scene after Storm Gator, 29, of Tampa, Florida, ran a stop sign and hit the pickup in which Ms. Santos was a passenger.

Troopers are investigating whether anyone was driving under the influence. NSHP Troop D, which covers most of southwest Newstate, has reported 69 deaths from crashes in 2021.

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Two cars were involved in the crash that the news story above describes.

Storm Gator (they) drove a 2003 Ford Taurus. Their passenger was Tony Thomas (he). Thomas owned the Taurus. He liked to call his car TT's T or T3 for short.

Thomas has liability insurance for T3 with a policy limit of \$25,000, the minimum

that Newstate requires. Because Thomas let Gator drive, Gator was an insured driver under Thomas's policy. A law student once told Thomas that if he did not have any assets—which he didn't—he did not need to buy more than the minimum liability insurance.

Other than the coverage that Gator has as a permissive driver of T3, Gator has no liability coverage of his own. Gator does not own a car and has no car insurance. He does not own a house and therefore has no homeowner's insurance. He does not have renter's insurance. Gator has no appreciable assets—no real property, no savings, no investments.

Gator and Thomas were driving southbound on Farm Road 86 in a rural part of Newcounty about 12 miles from Newcity. The speed limit was 35 miles per hour. Gator was driving 55 mph when he crashed, according to the black box data recorder that investigators later removed from the totaled Taurus.

Gator had an expired Florida driver's license. They had moved from Tampa to Newstate three years previously. They never bothered to get a Newstate license and allowed their Florida license to lapse.

Gator was driving because he and Thomas talked and agreed that Gator was the least drunk of the two of them before getting into the car after leaving the bar. As it turns out, they both were wrong. Gator's Blood Alcohol Concentration (BAC) was 0.15, and Thomas's was 0.10. Newstate's legal limit was 0.07.

Experts generally agree on the effects of various levels of alcohol:

**0.08 BAC:** Poor muscle coordination, loss of balance, slower reaction time, slurred speech, loss of acuity in vision and hearing, difficulty in detecting danger, and impaired judgment, self-control, reasoning, and memory. When driving, difficulty with speed control and recognizing and reacting to signals and emergency situations. Increased risk of injuries, particularly those related to driving a vehicle.

**0.10 BAC:** Further deterioration of abilities at this level. Hard to maintain lane position and brake when needed.

**0.15 BAC:** Poor muscle control and ability to balance. Significant problems controlling vehicle and paying attention to driving and what is happening around the vehicle. Likely to vomit.

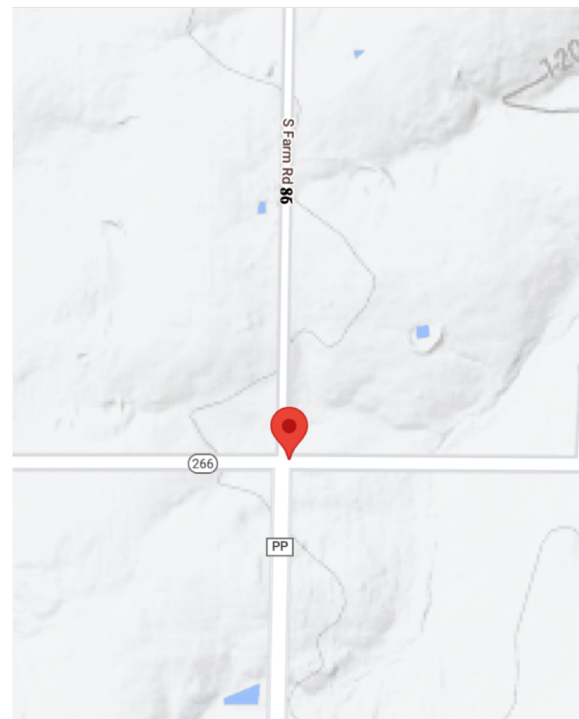
Because T3 was his car, Thomas knew that the passenger side airbag in the front was not working. The dashboard displayed a "Passenger Airbag" light that indicated the passenger-side airbag was not functioning. When Gator started the car in the parking lot of the PM Club bar, Gator noticed the "Passenger Airbag" light and asked Thomas about the light. Thomas told them that the airbag had been out for years, and



that he planned to take the car to the Ford dealer because he hoped there had been a recall so that he might get a free replacement airbag. There was, however, no recall. Indeed, there were no defects related to Ford's design or manufacture of the Taurus.

Gator's airbag deployed when the Taurus t-boned the pickup. Both Gator and Thomas had their seatbelts on. Thomas's airbag did not deploy, which partly explains why Thomas's injuries were more severe than Gator's. Another reason is that Gator did not receive a gunshot wound.

Gator ran the stop sign where Farm Road 86 met Highway 266 at a right angle. Gator did not see the stop sign, did not slow down, and entered the intersection doing 55 miles per hour. The center of T3's front bumper hit the center of the pickup's front passenger door. (See map. Note that the red pin marks the intersection but not the exact location of the crash.)



The 2019 Dodge Ram pickup was headed from east to west on Highway 266. The Ram weighed 4,798 pounds and was 228.9 inches long and 77.6 inches high. Melinda Aries (she) owned the truck and was driving. She did not see the Taurus before it slammed into the front passenger door of her truck—the pickup had four doors. The crash happened at 10:30 p.m., but the Ram’s headlights were off. Ordinarily, the Ram's headlights turned on automatically when the day got dark. Earlier that evening, Aries had manually turned the headlights to "Off" and had not remembered to turn them back on before getting in the truck with her friend Heidi Santos (she).

Santos and her friend Aries were utterly sober, drug-free, and unimpaired.

Santos was not wearing her seatbelt when the Taurus slammed into the Ram. All of the Ram's airbags deployed.

The Ram and its safety features protected Aries, who, as the driver, was on the side of the truck opposite the Taurus. Except for some soreness the next day and some bruising, Aries was physically intact. Santos, however, died in the crash.

The Newcounty Medical Examiner determined, after an autopsy, that Santos

died from the severing of her spinal cord due to the impact from the Taurus combined with a defect in Santos's 4<sup>th</sup> cervical vertebrae (C4). Santos had never had any problem with her C4 vertebra. The Medical Examiner concluded that the latent C4 problem amplified the harm of the collision. He also concluded that she might have survived the crash had Santos worn her seatbelt.

After the crash, Aries was stunned. Once she recovered her senses, she could see that her friend was dead in the seat next to her. Aries reached behind her seat and pulled her GLOCK G43 single-stack, 9 mm pistol from the pocket behind the driver's seat. Aries is a US Army veteran and fully licensed to have the weapon with her in her car, purse, pocket, or wherever she pleased. She got out of her truck, headed to the crashed Taurus, and when she was 30 feet away, pointed the gun at the driver (Gator) and yelled, "You killed my friend, you bastard!" Though he was dazed and drunk, Gator saw her pointing the weapon at him. Gator ducked as she pulled the trigger, and Thomas—not Gator—took the bullet in his left shoulder.

After firing the shot, Aries went back to her truck and sat on the ground with her Glock on the ground beside her. She waited for the paramedics and police, who arrived within 8 minutes of the crash after a passing motorist called 9-1-1.

The next day—July 5—the manager and bartender of the PM Club, the bar where Gator and Thomas had been drinking, saw a television news story about the crash. The news story included a mug shot of Gator, whom the sheriff had arrested for felonious vehicular manslaughter and DUI, and a photo of Aries, whom the sheriff had arrested for shooting Thomas. The bartender yelled to the manager, "Hey, that's the guy who was in here on the 4th. He was wasted, but I kept serving him drinks because he promised his friend would be doing the driving. He said the Declaration of Independence gave him the right to keep drinking." The bar manager then reviewed video from the evening, which shows Gator staggering while ordering drinks from the bar.

The bar has a commercial general liability policy with policy limits of \$10 million.

Santos died instantly. She was 36 years old. She left behind two children—ages 10 and 12, an ex-husband, and her parents in their early 60s. She worked as a software engineer and earned \$150,000 per year. Santos, a dutiful daughter, helped her parents with a \$2,000 monthly payment that she expected would increase as her parents aged.

Consistent with her wishes, her parents cremated Santos's body and paid \$35,000 to have the ashes carried on one of Space X's rockets to be distributed into space. Santos had recently purchased a house, which her parents had to sell after her death. Market conditions and higher interest rates caused them to sell the house for a \$40,000 loss.

Aries, now 37 years old, has suffered terribly since the crash ten months ago. She cannot shake the image of her dead friend from her mind, notwithstanding bi-weekly therapy sessions and, last December, when things got particularly dark, two weeks of in-patient psychiatric care. She is taking a medical leave from her job as a financial advisor. Her job pays her \$250,000 per year. Neither she nor her therapist thinks she will be able to return to that job. Aries has high-quality private health insurance with a low deductible.

Aries has ample liability insurance to protect her assets. For the Ram, she has \$1 million in liability coverage. Added to that is \$2 million in liability coverage through the umbrella policy connected to her homeowner's insurance. She thus has a total of \$3 million in liability coverage.

Aries pleaded guilty to a felony for shooting Thomas.

Thomas's injuries were severe. The gunshot severed an artery in his shoulder, and he nearly bled to death at the injury scene. When paramedics arrived, his heart had stopped, and though the paramedics were able to revive him, he suffered permanent cognitive injury due to the loss of oxygen to his brain. His other injuries included fractures of his skull, eye sockets, nose, sternum, ribs, pelvis, left femur, and lower legs. He is in constant, debilitating pain, which only opiates will relieve. He is likely addicted to opiates.

At the time of the injury, Thomas was not working. He had some experience working as a landscaper and providing light, unskilled labor at construction sites (cleanup, flagging). He is 28 years old and has never declared more than \$23,000 as income on his taxes.

Medicaid pays Thomas's medical bills. Medicaid thus far has paid \$45,000 to satisfy the claims of all hospitals and medical providers. When added up, Thomas's medical bills equal \$725,000. He has not had to pay anything out of pocket.

Gator's injuries were less severe than Thomas's. The driver-side airbag protected

him, and Aries missed him when she fired the Glock. He had a few broken ribs and a laceration on his forehead that required stitches and left a scar that reminds him every day of the crash. Gator is making progress with his therapist and has been able to return to his work as a veterinary technician, a job that pays him \$52,000 per year. He missed three weeks of work but will miss more because his plea deal will require that he serve anywhere from 2 to 10 years for vehicular manslaughter. His health insurance was quite good, paying \$14,000 to settle his \$60,000 in bills. His out-of-pocket costs have been \$2,700.

**Your job is to evaluate fully the personal injury claims related to the four persons injured or killed in the car crash. Do not consider claims against Ford or Dodge. You may use no more than 2,500 words to answer the question. Include the word count at the end of your answer.**

Appendices with some Newstate laws follow.

## Appendix 1. Newstate statutes.

### **Statute 1** Comparative negligence; definition

1. The defense of contributory negligence or of assumption of risk is in all cases a question of fact and shall at all times be left to the jury. If the jury applies either defense, the claimant's action is not barred, but the full damages shall be reduced in proportion to the relative degree of the claimant's fault which is a proximate cause of the injury or death, if any.

### **Statute 2.** Joint and several liability of defendants in tort actions, allocation of responsibility for judgment--defendants several liability for punitive damages

1. In all tort actions for damages, if a defendant is found to bear fifty-one percent or more of fault, then such defendant shall be jointly and severally liable for the amount of the judgment rendered against the defendants. If a defendant is found to bear less than fifty-one percent of fault, then the defendant shall only be responsible for the percentage of the judgment for which the defendant is determined to be responsible by the trier of fact.

2. The defendants shall only be severally liable for the percentage of punitive damages for which fault is attributed to such defendant by the trier of fact.

### **Statute 3.** Action for wrongful death--who may sue--limitation

1. Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person or party who, or the corporation which, would have been liable if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured, which damages may be sued for:

(a) By the spouse or children or the surviving lineal descendants of any deceased children, natural or adopted, legitimate or illegitimate, or by the father or mother of the deceased, natural or adoptive;



(b) If there be no persons in class (a) entitled to bring the action, then by the brother or sister of the deceased, or their descendants;

(c) If there be no persons in class (a) or (b) entitled to bring the action, then by a plaintiff *ad litem*. Such plaintiff *ad litem* shall be appointed by the court having jurisdiction over the action for damages provided in this section upon application of some person entitled to share in the proceeds of such action. Such plaintiff *ad litem* shall be some suitable person competent to prosecute such action and whose appointment is requested on behalf of those persons entitled to share in the proceeds of such action. Such court may, in its discretion, require that such plaintiff *ad litem* give bond for the faithful performance of his duties.

2. Only one action may be brought under this section against any one defendant for the death of any one person.

**Statute 4.** Defenses to wrongful death action

On the trial of such action to recover damages for causing death, the defendant may plead and prove as a defense any defense which the defendant would have had against the deceased in an action based upon the same act, conduct, occurrence, transaction, or circumstance which caused the death of the deceased, and which action for damages the deceased would have been entitled to bring had death not ensued.

**Statute 5.** Damages to be determined by jury--factors to be considered

In every action brought under Statute 3, the trier of the facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death and without limiting such damages to those which would be sustained prior to attaining the age of majority by the deceased or by the person suffering any such loss. In addition, the trier of the facts may award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not

ensued. The mitigating or aggravating circumstances attending the death may be considered by the trier of the facts, but damages for grief and bereavement by reason of the death shall not be recoverable. If the deceased was not employed full time and was at least fifty percent responsible for the care of one or more minors or disabled persons, or persons over sixty-five years of age, there shall be a rebuttable presumption that the value of the care provided, regardless of the number of persons cared for, is equal to one hundred and ten percent of the state average weekly wage. If the deceased is under the age of eighteen, there shall be a rebuttable presumption that the annual pecuniary losses suffered by reason of the death shall be calculated based on the annual income of the deceased's parents, provided that if the deceased has only one parent earning income, then the calculation shall be based on such income, but if the deceased had two parents earning income, then the calculation shall be based on the average of the two incomes.

**Statute 6.** Action for personal injury or death to survive regardless of death of either party.

Causes of action for death shall not abate by reason of the death of any party to any such cause of action but shall survive to the personal representative of such party bringing such cause of action and against the person, receiver, or corporation liable for such death and his or its legal representatives.

**Statute 7.** Sale of alcoholic beverage may be proximate cause of personal injuries or death--requirements--(dram shop law)

1. Since the repeal of the Newstate Dram Shop Act in 2010 (Laws of 2010, extra session, page 77), it has been and continues to be the policy of this state to follow the common law of England, to prohibit dram shop liability and to follow the common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons.

2. Notwithstanding section 1 of this statute, a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises when it is proven by clear and convincing evidence that the seller knew or should have known that intoxicating liquor was served to a person under the age of twenty-one years or knowingly served intoxicating liquor to a visibly intoxicated person.

3. For purposes of this statute, a person is “visibly intoxicated” when inebriated to such an extent that the impairment is shown by significantly uncoordinated physical action or significant physical dysfunction. A person’s blood alcohol content does not constitute prima facie evidence to establish that a person is visibly intoxicated within the meaning of this section but may be admissible as relevant evidence of the person’s intoxication.

4. Nothing in this section shall be interpreted to provide a right of recovery anyone who suffers injury or death proximately caused by the person’s voluntary intoxication unless the person is under the age of twenty-one years. No person over the age of twenty-one years or their dependents, personal representative, and heirs may assert a claim for damages for personal injury or death against a seller of intoxicating liquor by the drink for consumption on the premises arising out of the person’s voluntary intoxication.

5. No employer may discharge his or her employee for refusing service to a visibly intoxicated person.

**Statute 8.** Seat belts required for passenger cars--passenger cars defined--exceptions--failure to comply, effect on evidence and damages, admissible as evidence, when--penalty--passengers in car exceeding number of seat belts not violation for failure to use.

1. As used in this section, the term “passenger car” means every motor vehicle designed for carrying ten persons or less and used for the transportation of persons; except that, the term “passenger car” shall not include motorcycles, motorized bicycles, motor tricycles, and trucks with a licensed gross weight of twelve thousand pounds or more.

2. Each driver and front seat passenger of a passenger car manufactured after January 1, 1968, operated on a street or highway in this state, and persons less than eighteen years of age operating or riding in a truck on a street or highway of this state shall wear a properly adjusted and fastened safety belt that meets federal National Highway, Transportation and Safety Act requirements. The provisions of this section shall not be applicable to persons who have a medical reason for failing to have a seat belt fastened about their body, nor shall the provisions of this section be applicable to persons while operating or riding a motor vehicle being used in agricultural work-related activities.

(a) Each person who violates the provisions of section 2 of this section is guilty of an

infraction for which a fine not to exceed ten dollars may be imposed. All other provisions of law and court rules to the contrary notwithstanding, no court costs shall be imposed on any person due to a violation of this section.

3. Each driver of a motor vehicle transporting a child less than sixteen years of age shall secure the child in a properly adjusted and fastened restraint.

4. In any action to recover damages arising out of the ownership, common maintenance or operation of a motor vehicle, failure to wear a safety belt in violation of this section shall not be considered evidence of comparative negligence. Failure to wear a safety belt in violation of this section may be admitted to mitigate damages, but only under the following circumstances:

(a) Parties seeking to introduce evidence of the failure to wear a safety belt in violation of this section must first introduce expert evidence proving that a failure to wear a safety belt contributed to the injuries claimed by plaintiff;

(b) If the evidence supports such a finding, the trier of fact may find that the plaintiff's failure to wear a safety belt in violation of this section contributed to the plaintiff's claimed injuries and may reduce the amount of the plaintiff's recovery by an amount not to exceed one percent of the damages awarded after any reductions for comparative negligence.

5. The Newstate highways and transportation commission shall initiate and develop a program of public information to develop understanding of, and ensure compliance with, the provisions of this section.

Statute 9. 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 Appendix**

**END OF EXAM**

**Suit 1: Santos Estate (“Estate”) v. PM Club (“PM”)/Storm Gator (“SG”)/Tony Thomas (“TT”)/Melinda Aries (“MA”)**

*Wrongful Death*

Duty

Bartender/Manager (“PM”= vicariously liable for employees’ actions- *respondeat superior*) were actively running a bar, so they had a duty to patrons. PM’s duty extended to persons suffering personal injury/death caused by patrons who were knowingly overserved while visibly intoxicated. (Stat. 7(2)).

SG was actively driving, so SG had a duty to other drivers. TT is a joint tortfeasor because he acted in concert with SG, encouraging SG to drive drunk.

MA was actively driving, so she had a duty to other drivers.

SOC

PM had a duty to act reasonably under the circumstances. The circumstances include that it was July 4<sup>th</sup> (aka National Drive Drunk Day).

SG/TT had a duty to act reasonably under the circumstances. The circumstances include that it was dark.

MA had a duty to act reasonably under the circumstances. The circumstances include that it was dark.

Breach

PM breached by unreasonably serving SG (visibly intoxicated) alcohol under the assumption that TT was driving. The burden of not serving SG was less than the likelihood of injury times the severity. (B<PL). Estate argues there is a well-established custom to stop serving visibly intoxicated patrons, even if the patron says they are not driving. Deviation from custom

evinces breach because custom evidence suggests a degree of probable harm and that following custom is not burdensome.

PM breached under NPS. PM violated Stat. 7 by knowingly serving a visibly intoxicated patron. Santos was within the class of person protected by the statute (people who die because of a violation), and the injury was the type that the statute sought to prevent (death).

SG/TT breached by unreasonably driving a car drunk, driving 20mph over the speed limit, and failing to stop at a stop sign. SG may have breached under NPS because he was driving without a license. A statute is necessary to establish this breach.

MA breached by unreasonably failing to turn her headlights on while driving at night. MA may have breached under NPS if there was a statute prohibiting driving at night without headlights.

### CIF

Unclear. But for PM unreasonably overserving SG alcohol, they would not have run the stop sign and killed Santos. PM counters that it continued serving SG under the assumption that TT was driving, and SG could have crashed even if PM cut them off. In the alternative, PM's negligence was a substantial factor causing Santos's death.

Yes. But for SG's driving drunk, driving too fast, and failing to stop, Santos would not have died.

Unclear. But for MA's headlights being off, SG would have stopped and avoided the accident. However, SG was driving so fast that MA's negligent omission is likely immaterial. In the alternative, MA's negligence was a substantial factor causing Santos's death.



## PC

Yes. Santos's death was a foreseeable (not too attenuated) consequence of PM overserving SG. PM will argue that SG/TT's negligence was a superseding, intervening cause of the accident because SG drove—rather than TT—and he drove extremely recklessly. However, drunk people driving recklessly is not sufficiently extraordinary to preclude PC. PM argues that Santos's death was an unforeseeable type of harm because of her C4 defect and SG's negligence. However, the extent and mechanism of the injury need not be foreseeable, only that an injury would likely occur. (Eggshell plaintiff/rat flambe). Estate can prove PC by clear and convincing evidence that PM knowingly overserved a visibly intoxicated person. Estate will depose the bartender who knew SG was hammered, introduce PM's video of SG staggering, and introduce SG's BAC as relevant evidence. (Stat. 7(3)).

Yes. Santos's death was a foreseeable consequence of SG/TT's concerted drunk driving efforts because drunk driving kills people.

Unclear. Santos's death may be a foreseeable consequence of MA's negligence because driving in the dark without headlights causes accidents. However, SG's negligence intervenes, and likely supersedes, here because they were driving so fast that MA's negligent omission is probably immaterial.

## Damages

The Estate must make strategic considerations regarding who should bring suit and how to allocate fault. Wrongful death actions can be brought by Santos's children or by her parents. (Stat. 3(1)(a)). However, only one action may be brought against any one defendant. (Stat. 3(2)). A defendant who is > 51% at fault becomes jointly and severally liable for the total judgment rendered against all defendants. (Stat. 2(1)). Estate should bring one suit against all defendants

and try to allocate >51% onto PM (considerable insurance) and away from SG/TT (no insurance) and collect the total damages from PM. While Santos’s parents received substantial support from Santos, the children should bring the claim as they have substantial loss of society damages which can extend past their 18<sup>th</sup> birthdays. (Stat. 5). Estate should seek punitive damages against PM for “willful and wanton conduct” in overserving SG/TT. Estate should not seek punitive damages against SG/TT because defendants are severally liable for punitive damages and SG/TT have no money. Additionally, P&S damages are barred by Stat. 5.

	Past	Future
Special (Economic)	<p><b>Medical Expenses</b></p> <ul style="list-style-type: none"> <li>• Paramedics</li> </ul> <p><b>Property</b></p> <ul style="list-style-type: none"> <li>• If any (clothes, shoes, etc.)</li> </ul> <p><b>Incidentals</b></p> <ul style="list-style-type: none"> <li>• Funeral Expenses= \$35k (defendants argue the funeral expenses were excessive)</li> <li>• \$40,000 loss for house (defendants argue non-recoverable by the children)</li> </ul>	<p><b>PV of Lost Earning Capacity</b></p> <ul style="list-style-type: none"> <li>• \$150k/year (for working years)- possibly subject to caps</li> </ul>
General (Non-Economic)		<p><b>Loss of Society</b></p> <ul style="list-style-type: none"> <li>• See Stat. 5 for recoverable losses</li> </ul>

## Defenses

### *Failure to Mitigate/Avoid Consequences*

Santos’s failure to wear a seatbelt cannot be considered as evidence of comparative fault but can be considered as a failure to mitigate damages. (Stat. 8(4)). Defendants will introduce expert testimony (Medical Examiner) that Santos’s failure to wear a seatbelt contributed to her death. If the jury agrees, it may reduce Estate’s damages by no more than 1%. (Stat. 8(4)(b)).

Defendants argue failure to avoid consequences because of Santos's C4 defects, but she was unaware of the defect, so this defense fails.

#### *Assumption of Risk*

Defendants allege that Santos impliedly assumed the risk of accident by knowingly riding in the car while MA was being negligent (no headlights). Any secondary implied assumption morphs into comparative negligence. However, it is unknown whether Santos knew the headlights were off, and Santos's comparative negligence (if any) is miniscule in comparison to PM and SG/TT's.

#### *Allocation of Fault*

Defendants will allocate as much fault to each other as possible. PM/MA argue that SG/TT's negligence primarily caused the accident (>51%), so they are jointly and severally liable for the damages. SG tries to either spread the fault such that they are <51% or place >51% of the fault on PM.

#### *No Duty*

PM claim no duty to Santos because she was not a patron, but Stat. 7 creates a duty to those injured/killed when a bar knowingly overserves a visibly intoxicated patron.

### *No Breach*

PM argues compliance with bartender custom because it checked that SG was not driving prior to overserving him. However, custom can be negligent, PM did not make sure SG was not driving, and PM breached under NPS.

### *Proximate Cause*

See Suit 1 PC.

### *SOL*

WD actions by July 4, 2023. (Stat. 9).

## **Suit 2: MA v. PM/SG/TT**

There is no bystander action for negligent infliction of emotional distress because MA was not a close relative of Santos.

### *Negligence*

#### Duty

PM, and SG/TT owed the same duties to MA as Santos. (See Suit 1).

#### SOC

PM and SG/TT had a duty to act reasonably under the circumstances. (See Suit 1 circumstances).

#### Breach

See Suit 1.

CIF

But for defendants' negligence, MA would not have been injured. (See Suit 1, including substantial factor).

PC

MA's injuries were a foreseeable consequence of defendants' negligence. (See Suit 1).

Damages

AM will allocate > 51% of fault onto PM to access insurance. AM's medical expenses were likely covered by insurance, but AM's recovery is not affected by compensation from other sources. (Collateral Source). She may have to pay back her insurer. (Subrogation). AM seeks punitive damages against PM, but not against SG/TT (See Suit 1).

	Past	Future
Special (Economic)	<b>Medical Expenses</b> <ul style="list-style-type: none"><li>• Paramedics, all reasonable care/expenses, bi-weekly therapy, in-patient psychiatric care</li></ul> <b>Property</b> <ul style="list-style-type: none"><li>• Clothes, shoes</li><li>• Truck</li></ul> <b>Lost Wages</b> <b>Incidentals</b> <ul style="list-style-type: none"><li>• If any</li></ul>	<b>PV of Future Medical Expenses</b> <ul style="list-style-type: none"><li>• Therapy, psychiatric care</li></ul> <b>Loss of Earning Capacity (discounted to PV)</b> <ul style="list-style-type: none"><li>• Inability to work \$250k/year job</li></ul>
General (Non-Economic)	<b>P&amp;S (Pre-Trial)</b> <ul style="list-style-type: none"><li>• Physical/emotional pain (depression), shock, fright, fear</li></ul> <b>LOE</b> <ul style="list-style-type: none"><li>• From depression</li></ul>	<b>P&amp;S (Post-Trial)</b> <ul style="list-style-type: none"><li>• Post-trial depression</li></ul> <b>LOE</b> <ul style="list-style-type: none"><li>• From depression, inability to work</li></ul> <b>Emotional Distress</b>

## Defenses

### *Comparative Negligence*

Defendants argue that MA was comparatively negligent because she negligently failed to use her headlights at night. The jury may find some comparative negligence, but the reduction in damages is likely minimal because SG was driving so fast that, had MA's headlights been on, the accident still likely occurs given SG's decreased reaction time.

### *Assumption of Risk*

Defendants argue that MA assumed the inherent risks of driving on at night on July 4<sup>th</sup> (National Drive Drunk Day). Alternatively, defendants argue that MA knowingly engaged in a risky activity by driving without headlights. However, driving on July 4<sup>th</sup> is not an inherently risky activity, and any implied secondary assumption of risk morphs into comparative negligence. (See above).

### *Allocation of Fault.*

PM and SG/TT each try to place >51% of the fault on the other party to make them jointly and severally liable.

### *SOL*

Negligence actions by July 4, 2025. (Stat. 9) (same for suits hereafter, though intentional tort SOL is unknown).

### Suit 3: SG v. AM

SG cannot bring a claim against PM because he was voluntarily intoxicated. (Stat. 7(4)).

#### *Assault/Intentional Infliction of Emotional Distress*

SG has a strong case for assault because AM intentionally caused SG reasonable apprehension of immediate harmful conduct by pointing a gun at their head (which they saw). AM intentionally inflicted emotional distress because, by shooting a gun at SG (extreme and outrageous conduct), she intentionally caused SG severe mental distress (harder to prove without showing of severe distress). SG pleads intentional torts as negligence to access insurance, but MA has deep pockets for an intentional tort.

#### *Negligence (for accident/assault)*

##### Duty

See Suit 1 for AM's duty to drivers. AM was actively brandishing a gun, so she had a duty to SG.

##### SOC

AM had a duty to act reasonably under the circumstances. The circumstances include that it was night and she had just been in a car crash.

##### Breach

Unclear. See Suit 1 for accident.

AM breached the SOC by unreasonably firing a gun at SG's head. Breach could be proven by *res ipsa loquitur* because firing a gun at someone is probably negligent and AM was

probably the defendant. However, under traditional *res ipsa*, SG cannot contribute to their harm (but they made AM angry by killing Santos).

CIF

Unclear. See Suit 1 for accident.

Unclear. But for AM firing the gun, SG would not have suffered injuries. AM counters that SG’s injuries were from the accident, not from ducking bullets.

PC

Unclear. See Suit 1 for accident.

Unclear. SG’s personal injuries were a foreseeable consequence of AM firing a gun at time. AM counters that they were not injured from ducking bullets.

Damages

SG argues the injuries were caused by the gun incident. If the injuries resulted from the accident, recovery is minimal due to high degree of comparative fault. Recovery is not affected by SG’s insurer’s payments, but they will have to reimburse. SG seeks punitive damages for willful/wanton conduct.

	Past	Future
Special (Economic)	<p><b>Medical Expenses</b></p> <ul style="list-style-type: none"> <li>• Paramedics, all reasonable care/expenses for broken ribs/laceration</li> </ul> <p><b>Property</b></p> <ul style="list-style-type: none"> <li>• Clothes, shoes</li> </ul> <p><b>Lost Wages</b></p> <ul style="list-style-type: none"> <li>• \$3,000 three weeks of missed work</li> </ul> <p><b>Incidentals</b></p> <ul style="list-style-type: none"> <li>• If any</li> </ul>	<p><b>PV of Future Medical Expenses</b></p> <ul style="list-style-type: none"> <li>• Any PT/OT, future plastic surgery for scars</li> </ul>



General (Non-Economic)	<b>P&amp;S (Pre-Trial)</b> <ul style="list-style-type: none"> <li>Physical/emotional pain, shock, fright, fear, embarrassment from scars</li> </ul>	<b>P&amp;S (Post-Trial)</b> <ul style="list-style-type: none"> <li>Physical/emotional pain, embarrassment</li> </ul>
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### Defenses

AM does not have a defense to her intentional tort (consent, implied consent, self-defense, defense of others, recovery of property, necessity). There is no insanity defense because the reasonable person (even veterans triggered by the death of a friend) is judged to be sane. Instead, AM claims the damages were from the accident.

### *Comparative Negligence*

SG was very negligent in driving drunk, speeding, and failing to stop, so any damages they receive will be substantially diminished.

### Assumption of Risk

SG assumed the risk (plus the inherent risks) of getting into an accident when they decided to drive drunk/recklessly. Any damages will be diminished accordingly.

### **Suit 4: TT v. AM**

TT claims battery (intentional touching that was harmful) against AM because AM's intent to assault SG transferred to TT. See Suit 3 for TT's negligence claim against AM for the accident.

*Negligence (battery as negligence)*

Duty

See Suit 3.

SOC

See Suit 3.

Breach

See Suit 3.

CIF

Yes. But for AM shooting the gun, TT would not have received brain injuries.

PC

TT's injuries were a foreseeable consequence of AM shooting at him. The extent of the injuries need not be foreseeable.

Damages

TT seeks damages for injuries caused by both the accident and shooting. Recovery for injuries resulting from the accident are minimal due to his high degree of comparative fault/assumption of risk. TT must reimburse Medicaid for his bills. AM tries to separate damages arising from the shooting versus the accident. TT seeks punitive damages for willful/wanton conduct.

	Past	Future
Special (Economic)	<b>Medical Expenses</b> <ul style="list-style-type: none"><li>• Paramedics, all reasonable care/expenses, medication, OT/PT</li></ul> <b>Property</b> <ul style="list-style-type: none"><li>• Clothes, shoes</li><li>• Taurus (likely non-recoverable)</li></ul> <b>Incidentals</b> <ul style="list-style-type: none"><li>• Home modifications</li></ul>	<b>PV of Future Medical Expenses</b> <ul style="list-style-type: none"><li>• Life care plan, assistive care, all reasonable expenses</li></ul> <b>Loss of Earning Capacity (discounted to PV)</b>

	<ul style="list-style-type: none"> <li>• Travel</li> </ul>	
General (Non-Economic)	<p><b>P&amp;S (Pre-Trial)</b></p> <ul style="list-style-type: none"> <li>• Physical/emotional pain after regaining consciousness, worry about decreased life expectancy, embarrassment</li> </ul> <p><b>LOE</b></p> <ul style="list-style-type: none"> <li>• From loss of cognitive ability + opioid addiction (AM argues failure to mitigate)</li> </ul>	<p><b>P&amp;S (Post-Trial)</b></p> <ul style="list-style-type: none"> <li>• Future physical/emotional pain, worry, embarrassment</li> </ul> <p><b>LOE</b></p> <ul style="list-style-type: none"> <li>• Same</li> </ul>

### Defenses

AM does not have a defense to her intentional tort. Damages for the shooting are likely recoverable under either intentional tort or negligence theory. Regarding the crash, defenses proceed as in Suit 3 plus failure to avoid consequences. (See Suit 5)

### **Suit 5: TT v. PM**

TT sues PM, despite his voluntary intoxication, for PM's negligent serving of SG. (Stat. 7(4)).

### *Negligence*

### Duty

PM's duty under Stat. 7(2) extended to TT because he was injured due to PM knowingly overserving SG.

### SOC, Breach, CIF, PC

Same as Suit 1, except AM's negligence is a supervening, intervening cause for injuries arising from the shooting. TT argues that the mechanism does not matter, but AM's conduct was sufficiently extraordinary.

## Damages

See Suit 4. However, damages are limited to accident-related injuries (fractures to skull, eye sockets, nose, sternum, ribs, pelvis, left femur, and lower legs). No LOE or diminished earning capacity relating to decreased cognitive function. TT seeks punitive damages.

## Defenses

### *Assumption of Risk*

TT assumed the risk of accident when he knowingly agreed to ride with a drunk driver (substantial reduction).

### *Failure to Avoid Consequences*

TT's failure to replace his side airbag caused most of his injuries. PM points to SG's lack of injuries as evidence.

### *Comparative Negligence*

TT was comparatively negligent in agreeing that SG was the less drunk of the two to drive.

**Word Count: 2,500**

### All Cases:

Under *Respondeat Superior*, an employer can be held liable for the actions of employees. Because Bartender served Gator drinks while working, Bartender was within the scope of his employment (not “on a detour and a frolic”). Therefore, PM Club (“PM”) is vicariously liable for Bartender’s negligence and all actions against Bartender include PM.

Thomas acted in concert with Gator because he aided and encouraged Gator to drive (Gator was “less” drunk). Therefore, Thomas has no claim against Gator and is as liable as Gator. Depending on Newstate statutes, Thomas and Gator may be jointly and severally liable for their specific damages. Any action against Gator also includes Thomas.

### ***Santos’ Estate (“Estate”) v. Gator et al.***

Estate will bring a wrongful death (“WD”) claim on behalf of Santos for Santos’ children and parents. Estate will sue Gator, Aries, and Bartender together because their actions caused an indivisible injury.

Gator is likely the largest contributor, but they only have a policy limit of \$25,000. Therefore, Estate should push fault onto Bartender (policy limit of \$10 million) or Aries (policy coverage of \$3 million). If Bartender is  $\geq 51\%$  liable, PM can be held jointly and severally liable for all defendants and make Estate whole.

Estate may consider not bringing claims against both Gator and Thomas. Gator and Thomas are both covered by the same \$25,000 capped policy. Because their fault is likely high, Estate may consider suing only one so more fault can be allocated to deeper pockets. And, the insurance company will not represent Gator/Thomas when there is a conflict of interest.

## **Estate v. Gator**

**Duty**: Gator was active driving and therefore had a duty.

**Standard of Care ("SOC")**: Gator must act reasonably under the circumstances, which include driving at night.

**Breach of the Standard of Care ("Breach")**: Gator acted unreasonably by driving with a 0.15 Blood Alcohol Content ("BAC"), speeding, and running a stop sign.

Expert testimony can show that driving with a 0.15 BAC is negligent.

**Negligence Per Se (NPS)**: To establish NPS, Gator must have violated a specific statute, the harm created by the violation must be of a kind the statute intended to prevent, and the injured person(s) must fall within a class of persons the statute intended to protect.

Gator violated three laws: driving 0.08 BAC over Newstate's legal limit, 20 mph over the speed limit, and through a stop sign.

BAC limits, speed limits, and stop signs intend to prevent accidents and protect other drivers and passengers. Santos and her death injuries fall within the harm and class protected by the laws.

Gator's expired Florida driver's license is no evidence of NPS. Licensing statutes are designed to protect against drivers without the proper skills. Gator once had a valid license prior, meaning they have proper driving skills.

**Cause in Fact ("CIF")**: But for Gator driving drunk, speeding, and running a stop sign, Santos would not have died.

**Substantial Factor ("SF")**: At a minimum, Gator's breach was a cause under the SF test.

Gator's drunk driving and speeding materially contributed to the crash.

**Proximate Cause (“PC”):** Injuries and death from a car accident are foreseeable consequences of driving drunk, speeding, and running stop signs.

**Defense:** Santos’s C4 vertebrae was a supervening cause of death. But, extent of injury need not be foreseeable (eggshell), so death is foreseeable.

**Damages:**

WD	Past (up to trial)	Future (after trial)
Special/Economic	<ul style="list-style-type: none"> <li>- Funeral Expenses</li> <li>- \$150,000 portion earned</li> <li>- \$2,000 monthly payment</li> <li>- \$40,000 house sale</li> <li>- Mom/daughter services:               <ul style="list-style-type: none"> <li>o Dishes</li> <li>o Packing lunches</li> <li>o Laundry, etc.</li> </ul> </li> </ul>	Present value of: <ul style="list-style-type: none"> <li>- Future earnings (\$150,000/year)</li> <li>- Monthly future payments (\$2,000+)</li> <li>- Mom/daughter services</li> </ul>
General/Noneconomic	<ul style="list-style-type: none"> <li>- Loss of consortium, companionship, comfort, instruction, guidance, counsel, training</li> </ul>	<ul style="list-style-type: none"> <li>- Loss of consortium, companionship, comfort, instruction, guidance, counsel, training</li> </ul>

Defense will argue that \$35,000 for carrying ashes to Space X rocket should not be included.

**Punitive (for a “bad, bad thing”):** Depending on Newstate’s rules, punitive damages may be awarded because Gator’s drunk driving was a conscious disregard for a high degree of risk. The Supreme Court wants punitive damage limited to a single digit multiplier compared to compensatory damages, and Gator’s wealth may possibly be considered. These damages will be

solely owed by Gator/Thomas (Statute 1(2)). Because these damages are for Gator's reckless conduct, they may be included under insurance policies.

**Defenses:**

**Statute of Limitations ("SOL"):** Statute 9(3)(c) bars this claim after July 4, 2023 (2 years).

**Comparative Fault (CF):** Newstate is a pure comparative fault regime, meaning plaintiff can recover regardless of their CF. The only indication of fault by Santos was her failure to wear a seatbelt.

Statute 8(4) does not allow Santos' failure to wear her seatbelt to "be considered evidence of" CF. This failure can diminish her damages only if Gator introduces expert testimony proving Santos' seatbelt failure contributed to her death.

Because a defendant who is  $\geq 51\%$  at fault will be jointly and severally liable for defendants, Gator will try and push more blame onto other defendants and Santos.

Estate should allocate 5% CF to Santos (good strategy).

**Assumption of Risk ("AOR"):** One does not assume the risk of crashing. Riding as a passenger is not negligent.

**Estate v. Aries**

**Duty:** Aries was active driving and therefore had a duty.

**SOC:** Act reasonably under the circumstances, which include driving at night.

**Breach:** Aries acted unreasonably by driving with her headlights off at night.

**NPS:** Aries may have a statutory duty to drive with her headlights on at night.

Confirmation needed through research.



**CIF:** But for Aries driving with her headlights off, Santos would not have died. May be difficult to prove.

**SF:** Aries' failure to turn her headlights on while driving materially contributed to the crash.

**PC:** Injuries or death from a car accident are foreseeable consequences of driving at night without the headlights on.

**Supervening cause:** See *Estate v. Gator*.

**Damages:**

See *Estate v. Gator*, not punitive.

**Defenses:**

See *Estate v. Gator*. Will argue to push blame on Gator and Bartender.

**Estate v. Bartender**

Estate can bring an action against bartender because Santos died from bartender knowingly serving intoxicating liquor to Gator. (Statute 7(2)-(3)). Gator is a "visibly intoxicating person" because he had a 0.15 BAC and was staggering while ordering drinks from the bar (video).

**Duty:** Bartender was active serving drinks and therefore had a duty.

Depending on statutes, possible landowner duty: Santos was injured off the property from activities (serving) on the property.

Duty to control.

**SOC:** Act reasonably under the circumstances, which include working at a bar surrounded by drunks.

Landowner duty: Reasonably prudent person.

Control Gator.

**Breach:** Bartender acted unreasonably by continuing to serve Gator, a visibly intoxicated person, and believing Gator's promises.

**CIF:** But for Bartender's continued serving of Gator and belief of Gator's promises, Gator would not have killed Santos. Proving this may be difficult.

**SF:** Bartender's failure to stop serving Gator drinks materially contributed to the crash.

**PC:** Injuries or death from a car accident are foreseeable consequences of serving a "visibly intoxicated" person who "promises" not to drive.

**Defense:** "whoddathunk?" that Gator would drive, speed, run a stop sign, and crash?

However, mechanism need not be foreseeable (rat flambé).

**Supervening cause:** See *Estate v. Gator*.

**Damages:**

See *Estate v. Gator*, not punitive.

**Defenses:**

See *Estate v. Gator*. Will argue to push blame on Gator and Aries.

### ***Aries v. Gator and Bartender***

Arie will bring a negligent claim including emotional distress ("ED"). Because there was physical harm (bruises), there is no need for "zone of danger" or a bystander claim.

See allocation of fault strategy under *Estate v. Gator et al.*

See strategy for suing Gator/Thomas under *Estate v. Gator et al.*

**Aries v. Gator**

**Duty, SOC, Breach:** See *Estate v. Gator*.

**CIF:** But for Gator drunk driving, speeding, and running a stop sign, Aries would not have been injured.

**SF:** See *Estate v. Gator*.

**PC:** See *Estate v. Gator*, excluding supervening cause.

**Damages:**

**Property:** Ram damage.

Negligence & NEID	Past	Future
Special/Economic	<ul style="list-style-type: none"><li>- Medical bills</li><li>- Any other medical expenses not covered by bills (prescriptions, doctor care)</li><li>- Therapy costs</li><li>- Psychiatric care costs</li><li>- Lost wages (if not covered under leave)</li></ul>	Present value of: <ul style="list-style-type: none"><li>- Therapy costs</li><li>- Psychiatric care costs</li><li>- Physical manifestations from ED that will require medical attention</li><li>- Lost wages</li></ul>
General/Noneconomic	Shock, fright, fears, anxiety, ED	Fears, anxiety, ED

**Punitive:** See *Estate v. Gator*.

**Defenses:**

**SOL:** Statute 9(2)(a) will bar this action after July 4, 2025 (4 years).

**CF:** Aries' percentage of responsibility will likely be higher than Santos' because Aries drove negligently. Aries will not have CF more than 51%, so she will not be jointly and severally liable.

Gator will have the same strategy as in *Estate v. Gator*.

**AOR:** One does not assume the risk of crashing. Choosing to drive a car is not negligent.

Driving without the headlights on at night was something that Aries should have noticed. Knowledge would constitute AOR.

Newstate blends AOR into comparative fault, which would be compared to other defendants.

### **Aries v. Bartender**

Aries can bring claim against Bartender. See *Estate v. Bartender*.

**Duty, SOC, Breach:** See *Estate v. Bartender*.

**CIF:** But for Bartender's continued service to Gator and believing Gator's promises, Gator would not have injured Aries. May be difficult to prove.

**SF:** See *Estate v. Bartender*.

**PC:** See *Estate v. Bartender*, excluding supervening cause.

**Damages, Defenses:** See *Aries v. Gator*, excluding punitive damages.

### ***Gator and Thomas v. Aries and Bartender***

Gator and Thomas have claims against Aries for negligent driving. Aries should implead Bartender as a non-party.

**Gator and Thomas v. Aries**

**Duty, SOC, Breach:** See *Estate v. Aries*.

**CIF:** But for Aries driving with her headlights off, Gator would not have injured Aries. May be difficult to prove.

**SF:** See *Estate v. Aries*.

**PC:** See *Estate v. Aries*.

**Damages:**

**Gator:**

**Property:** Any damage to Gator’s clothing or property on Gator at the time of the crash.

To prevent double compensation, Gator cannot recover his \$2,700 out-of-pocket costs. No wage loss for vehicular manslaughter.

Negligence	Past	Future
Special/Economic	Amounts related to crash <ul style="list-style-type: none"><li>- Portion of \$60,000</li><li>- Medical expenses not included in the \$60,000</li><li>- Cost of therapy</li><li>- Incidentals (cost of going to/from appointments, medical supplies, etc.</li><li>- \$3,000 lost wages</li></ul>	Present value of: <ul style="list-style-type: none"><li>- Expenses related to dermatologists or plastic surgeons for face scar</li><li>- Cost of therapy for crash</li></ul>
General/Noneconomic	P&S from car crash <ul style="list-style-type: none"><li>- Fear</li><li>- Pain from recovery</li><li>- Other mental and emotional distress suffered</li></ul> LOE due to time spent in therapy	P&S from car crash <ul style="list-style-type: none"><li>- Fear</li></ul> Embarrassment from face scar

**Thomas:**

**Property:** Any damage to Thomas' clothing or property on him at the time of the crash; T3.

Depending on Newstate's laws, Thomas can either ask for the entire medical bill (\$750,000) or only the reduced amount paid by Medicaid (\$45,000).

Negligence	Past	Future
Special/Economic	Amounts related to crash <ul style="list-style-type: none"><li>- Medical bills</li><li>- Medical expenses not included in bills</li><li>- Incidentals: same as above.</li></ul>	<ul style="list-style-type: none"><li>- Rehab needed for injuries from crash</li><li>- Future cost of opiates (crash led to addiction)</li><li>- Incidentals: making house livable with injuries</li></ul>
General/Noneconomic	P&S from car crash: <ul style="list-style-type: none"><li>- Fear</li><li>- Anxiety</li><li>- Recovery pain</li></ul> LOE of life due to time spent in recovery	P&S from car crash: <ul style="list-style-type: none"><li>- Pain</li><li>- Embarrassment from addiction</li></ul>

**Defenses:**

**SOL:** See *Aries v. Gator*

**CF:** Gator drove negligently, Thomas acted in concert with Gator, and Bartender supplied alcohol. Their combined CF will be much higher than Aries.

Aries will push as much blame as possible onto Bartender (non-party) and Gator/Thomas.

**AOR:** One does not assume the risk of crashing. Choosing to drive is not negligent.

Aries can argue Gator assumed risks by driving drunk.

Aries can argue Thomas assumed risks by riding with a drunk driver and knowingly riding in a front seat with an unworking airbag.

**Failure to Mitigate**: No evidence Gator or Thomas failed to get adequate medical treatment.

### **Gator and Thomas v. Bartender**

**Duty, SOC, Breach, CIF, PC**: See *Estate v. Bartender*, excluding supervening cause

**Damages**: See *Gator v. Aries*.

**Defenses**: See *Gator v. Aries*.

Statute 7(4) bars recovery for Gator and Thomas against Bartender.

### **Gator and Thomas v. Aries (Intentional Tort)**

Gator: Assault.

Aries intentionally pointed a gun at Gator, causing Gator reasonable apprehension of immediate harm.

Thomas: Transferred intent to battery and assault.

Aries intentionally pointed and fired a gun at Gator. When Gator ducked, the bullet hit Thomas. Because intent to batter is transferrable, intent to batter Gator transfers to Thomas.

If Thomas saw the bullet coming, then he had reasonable apprehension of immediate harm, and the intent to batter Gator transfers to intent to assault Thomas.

Pleading intentional tort may preclude either plaintiff from collecting from Aries' insurance policy for all claims against Aries. If Aries' policy contains no exclusion for intentional injury, or

Aries has deep pockets, then plaintiffs should plead claims as intentional torts and negligence. Otherwise, claims should be pleaded as negligence, so the insurance company must defend.

**Duty:** Aries was active, and therefore had a duty.

Duty to rescue: Aries created Thomas' peril when she shot him.

**SOC:** Act reasonably under the circumstances, which include holding a gun.

Rescue the victim when Aries caused the peril.

Aries is a US Army veteran. She may have superior knowledge about or skill of guns. If so, the jury can consider this when judging Aries' conduct.

**Breach:** Aries acted unreasonably when she pointed and shot the gun at Gator.

Aries did not help Thomas or call 911 after shooting him.

**CIF:** But for Aries pointing and shooting her gun, neither Gator nor Thomas would have had reasonable apprehension of being shot, and Thomas would not have been shot.

But for failing to rescue Thomas, he would not have had cognitive injury.

**PC:** It is foreseeable that pointing and shooting a gun could cause apprehension of harm and injury.

It is foreseeable that failing to rescue someone who has been shot could cause injury.

**Damages:**

**Gator:**

Intentional Tort	Past	Future
Special/Economic	Amounts related to shooting: <ul style="list-style-type: none"><li>- Part of \$60,000 related to shooting</li><li>- Other medical expenses not included in the \$60,000</li></ul>	Present value of: <ul style="list-style-type: none"><li>- Therapy from shooting</li></ul>



	- Therapy from shooting	
General/Noneconomic	P&S from shooting: <ul style="list-style-type: none"> <li>- Fear</li> <li>- Anxiety</li> </ul> LOE due to time spent in therapy	P&S from shooting: <ul style="list-style-type: none"> <li>- Fear</li> <li>- Anxiety</li> </ul>

**Thomas:**

Intentional Tort	Past	Future
Special/Economic	Amounts related to shooting: <ul style="list-style-type: none"> <li>- Bills</li> <li>- Other medical expenses not included in the bills</li> <li>- Incidentals: same as above</li> </ul>	Present value of: <ul style="list-style-type: none"> <li>- Future appointments related to cognitive injury</li> <li>- Any future help (life plan) because of cognitive injury</li> <li>- Loss of earning capacity – most would be \$23,000 a year (probably not because he was not working)</li> </ul>
General/Noneconomic	P&S from shooting: <ul style="list-style-type: none"> <li>- Anxiety</li> </ul> LOE due to cognitive injury	<ul style="list-style-type: none"> <li>- P&amp;S from shooting (cognitive injury)</li> <li>- Embarrassment from cognitive injury</li> </ul>

**Defenses:**

**SOL:** Newstate’s SOL is unknown for battery/assault.

**CF:** After the accident, Gator and Thomas were not active when sitting in the car. They had no duty to Aries.

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