



Fall 1999

FINAL EXAMINATION

TORTS

PROFESSOR RUSSELL

INSTRUCTIONS:

1. DEADLINE: This is a six-hour examination due by 4:00 pm on 16 December 1999. If you return the exam after 4:00 pm, you get zero points for the exam. **NO EXCUSES.**

2. HONOR CODE: The full text of the Honor Code is as follows:

HONOR CODE: The study of law is an integral part of the legal profession. Students engaged in legal studies should learn the proper ethical standards as part of their education. All members of the legal profession recognize the need to maintain a high level of professional competence and integrity. A student at The University of Texas at Austin School of Law is expected to adhere to the highest standard of personal integrity. Each student is expected to compete honestly and fairly with his or her peers. All law students are harmed by unethical behavior by any student. A student who deals dishonestly with fellow law students may be dishonest in the future and harm both future clients and the legal profession. Under the honor system, the students must not tolerate unethical behavior by their fellow students. A student who knows of unethical behavior of another student is under an obligation to take the steps necessary to expose this behavior. Students in The University of Texas at Austin School of Law are governed by the Institutional Rules on Student Services and Activities. Students may be subject to discipline for cheating, plagiarism, and misrepresentation.

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

4. EXAM NUMBER: Please put your exam number on each page. The easiest way to do this is to use your

software to put the exam number in a header on each page. Do not put your name anywhere on the exam.

5. LENGTH: This examination consists of three sections on 9 pages. Your job is to produce printed--that is, not hand-written--answers that total no more than 2,000 words. Each question specifies the maximum number of words that you may use to answer a question.

6. SPACING: You may single-space or double-space your answers, as you prefer.

7. WEIGHT: This exam accounts for 80 percent of the grade in the course. For grading purposes, the sections and questions in this exam are weighted according to the maximum number of words allowed for each section. You should divide your time with these weights in mind. Keep in mind that many students spent too much time on the short-answer questions.

8. SHORT ANSWERS: The first section consists of ten (10) short-answer questions. For each, you should supply an answer totaling not more than 50 words. For Section One, you should answer each question and offer a brief explanation of your answer. You should print your answers to questions 1-10 with just a line or two between answers. That is, do not use a new sheet of paper for each short answer.

9. MEDIUM ANSWER: The second section has one question. Your answer may be up to but not longer than 500 words. Please begin this answer on a new sheet of paper.

10. LONG ANSWER: The third section is longer and you may use up to 1,000 words to answer this question. Please begin this answer on a fresh sheet of paper.

11. HOW TO ANSWER: In answering each question, use judgment and common sense. 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 or relevant legal doctrine, indicate what you do not know and why you need to know it. You must connect your knowledge of tort law with the facts before you. Avoid lengthy and abstract summaries of general legal doctrine. Discuss all plausible lines of analysis. Do not ignore lines of analysis simply because you believe that, *clearly*, a court would resolve an ambiguous question one way rather than another. Pay attention to the call of the question, that is, do what the question asks you to do.

12. CONCISION: Professor Russell desires quality not quantity. Think through your answer before you begin to write. You have a lot of time to write relatively brief answers. Concision will win you points.

13. YOURS TO KEEP: You may keep your copy of the exam questions.

14. 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 Assistant Dean of Student Affairs immediately after this examination ends.

15. GOOD LUCK: You are a fine group of students, and I have enjoyed our semester together. Please keep in touch.

(Section One begins on next page.)

SECTION ONE

(500 words: 10 answers @ 50 words/answer)

1. (50 words) Why is there general agreement that *res ipsa loquitur* is available to plaintiffs in cases where the plaintiffs have undergone surgery and later discovered that surgical sponges were left inside them?
2. (50 words) Describe three circumstances in which you would have a legal duty to save a drowning person.
3. (50 words) Describe an instance in which the Duty to Defend leads to a conflict of interest between the insurance company and its insured.
4. (50 words) If Australia had been a comparative fault jurisdiction in 1960, would The Wagon Mound cases have turned out differently?
5. (50 words) In the movie *The Sweet Hereafter*, the lawsuit ends after Nicole's deposition. What about the story that Nicole tells makes the lawyer give up the lawsuit?
6. (50 words) Describe an intentional tort that the movie *The Verdict* depicts.
7. (50 words) What is market-share liability?
8. (50 words) In *Tarasoff*, Justice Tobriner wrote for the California Supreme Court that "In our view, however, once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger." Why not also say that that "In our view, however, once a bartender does in fact determine that a patron poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger"? Make your strongest argument against there being a duty of a bartender to a foreseeable victim of a patron.
9. (50 words) You are Mrs. Palsgraf's lawyer. Describe her case as one involving injury to a business invitee.
10. (50 words) Some judges and law professors describe *Palsgraf* as a case involving an unforeseeable plaintiff. You are her lawyer. Describe her as a foreseeable plaintiff.

END OF SECTION ONE

SECTION TWO

(500 words: 1 answer @ 500 words/answer)

11. (500 words)

Dr. Sue Mie is your boss. She is also the president of the American Medical Association. She is entirely freaked out a recent CNN story, which reports that mistakes by medical professionals kill from 44,000 to 98,000 people each year.

Two years ago, Dr. Mie lost a wrongful death suit. The judgment against her was for \$1 million dollars, which included a punitive damage component. She predicts that the 44,000 to 98,000 yearly deaths will lead to around 40,000 lawsuits. At \$1 million per lawsuit, that will be a total of \$40,000,000,000 in damages, which she thinks will wipe out American medicine.

Dr. Mie would like you to consider the CNN story (which you will find in the box on the next page) and make litigation and damages projections for her. She says, "I was found guilty of malpractice myself, and I know that the judges and juries hold doctors liable for every little mistake. Given that, I want you to tell me how many lawsuits we can expect to see from this yearly toll. I know, from personal experience, that jurors are hostile to doctors. How many suits will doctors lose and how much will they have to pay?"

Write a memo in which you use your expertise to answer Dr. Mie's questions.

[The CNN story is on the next page.]

WASHINGTON (CNN) -- More people die each year in the United States from medical errors than from highway accidents, breast cancer or AIDS, a federal advisory panel reported Monday.

The report from the National Academy of Sciences' Institute of Medicine cited studies showing between 44,000 and 98,000 people die each year because of mistakes by medical professionals.

The groundbreaking report urged Congress to create a National Center for Patient Safety within the Department of Health and Human Services to set goals for avoiding medical mistakes, track progress in meeting them and to fund research on better ways to prevent such errors. It suggested as a minimum goal a 50 percent reduction in medical errors within five years.

The American Medical Association said that while any error that harms a patient is one error too many, "overwhelmingly the system of medicine in the United States is safe ... when you consider the millions of doctor/patient interactions each day."

Most errors involve medication

The institute said medication errors are among the most widespread -- everything from the stocking of full-strength drugs in hospitals that may be toxic if not diluted, to improper administering of medicines that results

from illegible writing in a patient's medical record. In addition, the report said, "when a patient is treated by several practitioners, they often do not have complete information about the medicines prescribed or the patient's illnesses."

The institute said tens of thousands of people die in hospitals alone each year as the result of medical errors. It cited one study that put the number of such deaths at 44,000 annually and another that more than doubled that figure. "Even using the lower estimate," it said, "more people die from medical mistakes each year than from highway accidents, breast cancer or AIDS." It said medication errors that take place both in and out of hospitals total more than 7,000, exceeding those from workplace injuries.

"These stunningly high rates of medical errors -- resulting in deaths, permanent disability and unnecessary suffering -- are simply unacceptable in a medical system that promises first to 'do no harm,'" said William Richardson, chairman of the committee that wrote the report and chief executive officer of the W.K. Kellogg Foundation of Battle Creek, Michigan.

Hospital administrators say they have been putting in more machine-driven backstops, such as automated drug dispensers. But, they say, it is impossible to eliminate all errors. Medical care is "people taking care of people, one patient at a time -- and as long as we have human beings doing that ...the potential is going to be there for human beings to make mistakes," said the Vice President of the American Hospital Association Rick Ward.

Correspondent Eileen O'Connor and The [Associated Press](#) contributed to this report.

END OF SECTION TWO

SECTION THREE

(1,000 words: 1 answer @ 1,000 words/answer)

12. Clark Kent is a young male, a bit of a troublemaker with a taste for life in the fast lane. Bored with life in Smallville, Clark posted notices around town that a drag race would take place on the afternoon of 15 December 1999 on Main Street. Main Street is a major thoroughfare (by Smallville's standards) that is usually filled with cars, bicyclists, and pedestrians. One section of Main Street runs directly past the Smallville Casino. The Casino is a riverfront property.

When the appointed hour rolled around, however, no one showed up to race. Undeterred by this, Clark began to drive at 60 miles an hour down the street. The posted speed limit is 35 miles an hour.

Driving down the street at the same time and in the same direction was Bruce Wayne, on his way home from work. When Bruce saw Clark pass him, Bruce decided to join the fun, and Bruce began driving as fast as Clark. Bruce was still a quarter-mile behind Clark when he saw Clark suddenly lose control of his car. Horrified, Bruce saw Clark's car go off the street onto the sidewalk and then onto the driveway of the Smallville Casino. Clark's car rammed the rear end of a casino shuttle bus, which then rolled into the Wannabe River.

The shuttle bus came to rest upside down and partially submerged in the river. Jane Beanstalk, the driver, freed herself from the wreckage, and civilians on the scene helped to rescue her almost immediately. Jane, who is an ex-Navy seal, was completely unhurt in the crash. There was one passenger in the shuttle bus-- Victoria Haunter. Victoria remained inside the shuttle bus after Jane escaped.

A number of people in the area observed the crash and placed emergency calls to notify the Police Department and media. The Police Department immediately dispatched a boat from its River Patrol unit. The boat arrived at the site within approximately three minutes of the crash. At least one of the Police officers on board was a certified diver. However, none of the officers had his or her scuba diving equipment on board the boat. As a result, they left the scene of the accident to retrieve the equipment.

While the River Patrol officers went to retrieve their equipment, other River Patrol officers and members of the Fire Department secured the crash scene. Sandy Diver, an experienced civilian scuba diver, was present at the scene and had access to diving equipment. She told the officers that she wanted to rescue the passengers, but the officers ordered Sandy and all civilians to stay out of the water. Dustin Paddler, an inexperienced scuba diver, became angered at the lack of police activity, took Sandy's scuba gear, and dived in. However, he became entangled in the shuttle bus wreckage and rescued no one.

More than 20 minutes later, the River Patrol divers returned with their gear and commenced rescue

operations. The River Patrol divers rescued Dustin, who suffered only minor injuries. Although the police divers were able to remove Victoria from the shuttle bus, she died later in the day.

WPXR-TV, the local public-access cable TV station, broadcast the entire rescue. The broadcast was live, but few people were watching. However, among the few who were watching was Victoria's fiancé, Frank Loss.

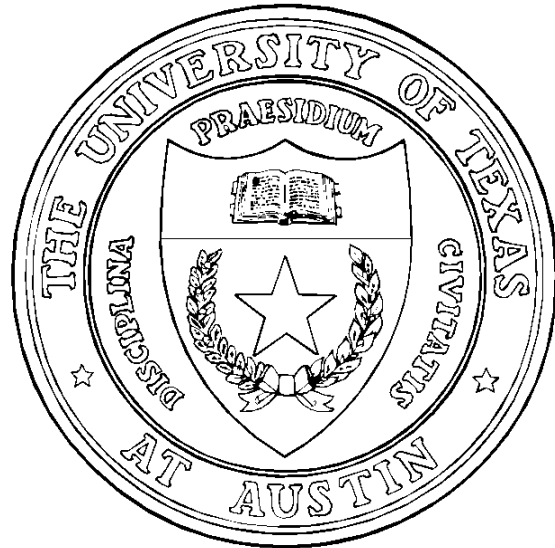
According to the coroner, Dr. Michael Smarty, Victoria did not die from the impact of the crash. Victoria died because of being submerged for an extended period of time. Dr. Smarty thinks that if rescuers had removed Victoria within the first ten minutes after the crash, then Victoria would have had a 40-60 percent chance of survival.

Here's your job: Pa Kent, Clark's stepfather, wants you to help him think through Clark's liability for Victoria's death, including Clark's liability to all those whom Victoria's death has affected. Is Clark liable and if so, to whom and for what? Jane, the ex-Navy seal, is uninjured and also too macho to sue. Pa Kent has already given Dustin \$500 to quiet him and received in exchange an enforceable release. So, you need not concern yourself with Clark's possible liability to Jane or Dustin. Your concern should only be about persons who have suffered damage as a consequence of Victoria's death. Pa Kent is particularly interested in knowing whether Bruce Wayne would also be liable; Bruce Wayne is a millionaire and witnesses did identify him at the scene in spite of his attempts to evade detection. Pa Kent also wonders whether there is anyone else who might share in the liability for Victoria's death.

END OF SECTION THREE

END OF EXAMINATION

Memorandum



To: Fall 1999 Torts Students
From: Thomas D. Russell
Date: 22 April 2011
Re: Student Sample Answers

Attached please find some high-scoring student sample answers from the December exam. Although these answers scored well, there is room for improvement with each answer.

Short Answers. The hardest question seemed to be number 8, which dealt with the *Tarasoff* principle and bartenders. The best answer is that bartenders lack the control over patrons that psychotherapists have over patients. Many students emphasized that bartenders lacked the training to identify those who posed serious threats, which is true. However, the question took that issue out of contention by specifying that the bartender knew that the patron was dangerous to a foreseeable victim.

The other difficult question seemed to be number 4. Many students neglected to comment on both of the *Wagon Mound* cases.

Medium Essay. Almost no one made the first analytical step correctly. Most students calculated that for every 1,000 injuries, there would be 38 filed suits. However, Galanter explained that we would expect 38 suits from every 1,000 grievances, which are different than injuries. With regard to medical injuries, we would expect only 3-12.5 percent of all injuries to yield a grievance. From the stage of a grievance, there is further winnowing. When all is said and done, I calculated that from 98,000 medical mistakes that resulted in death, the highest number of plaintiff wins in lawsuits that we would expect is about 6. Remarkable, isn't it? As for damages, we would expect something on the order of a few million dollars, tops.

Long Essay. Most of you did fairly well on this essay. The key was to keep focused on the call of the question, that is, to look for those who had a claim as a consequence of Victoria's Haunter's death. This means a wrongful death suit by her family (with a survival action on Haunter's behalf, perhaps) and a suit by her fiancé. As defendants, Clark Kent, Bruce Wayne, and the River Patrol were of principal interest. Most students did well in writing organized, complete answers with regard to Kent's liability. However, most students also tended to write incomplete analyses of the liability

April 22, 2011

of other potential defendants. Generally speaking, your best strategy in writing exams will be to address each plaintiff/defendant grouping separately and completely. Mushing them together almost never serves you well.



TORTS
PROF. THOMAS RUSSELL
DECEMBER 16, 1999

Section 1

1. Sponges do not remain inside a patient without negligence. The defendants rendered the patient unconscious and, therefore, unable to prove which individual left the sponge inside him, normally precluding recovery. The operating team was acting in concert and together had exclusive control over the sponge. Forcing each individual to show he/she wasn't negligent circumvents doctors hesitancy to testify against each other.
2. 1: You negligently created the peril (pushed victim into deep water knowing he could not swim)
2: You undertook an obligation to rescue (took a job as a lifeguard)
3. You have a "special relationship" with the victim (a ship captain must attempt to rescue his seaman who falls overboard)
3. D (the insured) injures his wife and she files suit. If D is found guilty he wants a verdict based on negligence (insurance must pay damages), while the insurance company wants a verdict based on an intentional act (no duty to indemnify). Since insurance has a duty to defend D there is a conflict of interest in presenting the defense.
4. WM1: Yes, WM2: No
P's welding operations in WM1 constituted contributory negligence (barring recovery) if the fire was foreseeable. Therefore, the court assumed an unforeseeable fire to give P a chance of recovery (but no proximate cause, so no recovery). WM2 indicated the court really thought the fire was foreseeable (proximate cause), so under comparative fault WM1 would go to the jury.
5. *Res ipsa loquitur* - no accident without negligence. By establishing the bus driver behaved reasonably, the only parties left to negligently cause the accident are the designer and builder of the bus - deep pocket defendants. Nicole said the bus driver was speeding, constituting negligence, leaving no *res ipsa* case against the deep pockets.
— negligence case.
6. Assault - the plaintiff threatened to beat up Paul Newman when he saw him in the lobby after discovering Newman did not settle the claim. He intended to put Newman in fear. There is some question as to whether Newman was actually fearful of immediate harm.
7. When P is injured by a defective product made by a number of companies and it is impossible to show which company manufactured the specific product that injured P all companies are held liable. Each company pays damages in proportion to its share of the market for the product.
8. For a duty to exist, the bartender must be able to either exercise control over the patron or warn the potential victim. Unlike a psychiatrist, a bartender cannot legally detain a drunk person because he poses a danger to others. Likewise, a drunk has no specific, warnable victim, only the public at large.

1-89

1-50



5 9. Palgraf bought a train ticket at the platform, providing economic gain to the defendant, making her a business invitee. D has a duty to warn her of dangers he should have been aware of, including the danger of the scale (an artificial condition) falling, since minor shocks (like fireworks) could knock it over.

5 10. It is foreseeable that pushing a passenger on a train could cause his package to fall, producing a loud, unexpected noise when the train ran over it. A loud noise could foreseeably cause people to run from the platform. Running people could foreseeably bump into the scale, knocking it over and injuring Palsgraf - making her a foreseeable plaintiff.

1-49

Question Two

Dr. Mie's experience losing a lawsuit has colored her perception of real world torts. For purposes of clarity, we will use the high end of the range suggested by the article, and round up to 100,000 deaths per year resulting from medical mistakes. We will rely on available empirical data to arrive at a predicted number of trials and verdicts for plaintiff, and the awards that might follow.

Generally, of 100,000 grievances, only 3800 will result in court filings. Others will be disregarded by the injured party, settled amicably, settled by alternative means such as arbitration, or abandoned at some point along the way. If we are concerned with the cost to the medical industry, we must allow that the tally of settled cases will be quite expensive. But here we treat only litigation and resultant damages.

We should note that claiming behavior for medical malpractice is even lower than the general pattern noted above. The general pattern of claiming is around 86% of grievances. With malpractice, the rate is closer to 12%. So we might expect 12,000 of our 100,000 injured persons to even notice their injuries and request redress. *To proceed further, we must presume that the general pattern, or dispute pyramid, applies to these 12,000. This may lead to statistical error.* Some, 3/4, or around 8000, will settle or abandon their claims before a dispute arises. We have then some 2000 disputes over compensation.

Around 1200 of these persons will contact a lawyer for assistance, at which point many disputes will be settled. Perhaps 400 will go on to file suit, and some of these will be dismissed on the merits or, again, settled privately. We can expect to see some 300 trials out of 100,000 malpractice grievances.

Dr. Mie is concerned that jurors are biased against doctors, but research indicates that juries and judges disagree over verdicts only 22% of the time, and those disagreements are split evenly between findings for plaintiffs and defendants. This correlation is favorable when compared to other pairs of complex decision makers, so Dr. Mie's fear of juries is unfounded.

Jurors find for plaintiffs only slightly more than half the time. Around 56% of our 300 trials will result in verdicts for plaintiff, around 170. Jurors will award compensatory damages in all of these cases, but will award punitive damages in only around 10 of these (6% of verdicts for plaintiff). Only in the rarely does the court fail to reduce a punitive damages award, and generally the reduction is dramatic.

In summation, of 100,000 malpractice grievances, only 10 will likely lead to the exposure to liability Dr. Mie fears. The remainder will be settled or adjudicated with the economic loss sustained by patients hardly compensated. Dr. Mie apparently believes that the tort system is dramatically changing for the worse. In

total
12% of
injuries
yield
grievances
85% of
grievances
yield
claims

Then

removable
more like
4-6
made
close
2 of 7

Exam [REDACTED]

fact, the recent trends indicate a reduction in frequency of torts claims. Sleep tight, Dr. Mie. American Medicine is safe in the hands of the HMOs.

Words: 496

Section 2

How many lawsuits?

In tort law just b/c there is an injury doesn't mean there is a lawsuit. A Harvard study showed that only about 12% victims of medical malpractice ever file a claim in court. Of the others some are dropped while others are settled between the victim and the responsible institution. So looking at the numbers from the article you can expect 5000-12,000 filings.

Hostile Jurors

Although jurors are often perceived as having a pro-P bias this isn't true. Jurors rule for Ps about half of all cases that go to trial and actually find for Ds more often than do judges. Medical malpractice juries return verdicts comparable to judgements of physicians.

How many wins?

In reality many claims that are filed are settled between the parties out of court. But in order to give a maximum liability I will proceed as though all claims filed will come to trial. As mentioned above Ps win in about 50% of all trials, so you can expect to see verdicts for the P in 2500-6000 of the cases that get to trial.

How much in damages?

COMPENSATORY – P will get pecuniary damages to include lost services and support and any other financial cost. Non pecuniary damages will be awarded for loss of society. Although difficult to calculate juries usually award about \$1 in nonpecuniary damage for every \$1 of economic damage.

PUNITIVE – Punitive damages are only awarded in 0.5-1.0% of medical malpractice cases, which translates to 2.5-3.0% of cases won by P's. Using the above numbers this leads us to expect PD awards in 75-180 cases out the original 44,000-98,000 possible claims. Even when PD are awarded they are often reduced. On average only half of PD awards are actually collected.

ESTIMATION – There is no way to know exact dollar amounts b/c they vary w/ the circumstances. However I will try to give you an idea of maximum liability. I'll use the amt. Of you're award (\$1 million) for the average award containing PDs and half that (\$500,000) for the awards not receiving PD. Please keep in mind that these figures are probably very high estimates. However the total awards w/ PD would be \$180 million and the other awards would come to $(6000-180) \times 500,000 = \2.9 billion. Altogether this comes to just over \$3 billion. This will most likely be reduced many times by judges and post trial appeals and settlements. I would be very surprised if the total liability from trying all these cases was much over \$1 billion.

Please also keep in mind that I used the highest estimates in all cases. There is some suggestion that far fewer than 12% of victims ever file complaints and many of these cases would have been settled out of court for significantly less. So rather than \$40 billion dollars you are probably looking at something closer to the millions.

Section 3

CLARKS LIABILITY

To V's estate

V's estate may file a survival action for pain and suffering of V while trapped in the bus and any medical expenses before her death as well as lost wages. Under the Heaven v. Pender scheme C was being active so he had a duty of reasonable care to V. Breach shouldn't be difficult to prove since a reasonable person wouldn't speed down a congested street. There is also no problem w/ cause in fact b/c "but for" C negligence V wouldn't have been killed. C may claim no PC b/c not foreseeable that his speeding would lead to P drowning. P will say manner of harm doesn't matter. It was foreseeable that person near the path of the speeding car could be injured or killed. P may also use violation of a statute (posted speed limit prob. Pursuant to stat.) and call neg. per se. This should work b/c purpose of statute is to protect the public from injuries caused by excessive speed.

To V's heirs

Depending on the juris someone (probably V's parents) may be able to file a wrongful death suit and recover for funeral expenses, medical expenses, loss of services, and maybe loss of society. Their recovery can be only for their own expenses and money V would have spent on them – can't duplicate recovery under survival action. Some states allow only spouses to file while others allow parents, children, or other heirs. P will have to prove the same elements as above.

To Frank

FL will sue for neg. infliction of ED on a bystander theory. If jurisdiction has impact rule, zone of danger, of dillon v. legg (would have to be close relative) FL is out of luck. If state has a pure foreseeability std. FL may have a chance though slim. Court are only willing to go so far w/ foreseeability and someone at home watching the news probably won't make the cut. Even if court found FL to be foreseeable P he probably couldn't recover w/o physical manifestations which aren't mentioned.

BRUCES LIABILITY

C will try to bring B in on a theory of concerted liability. He will need to prove that he was aware that B had joined the competition and was encouraged by that to continue. B will argue there was no common plan to commit tort – he never even spoke to C. C will say common plan may be implied from actions. B will also say he was still 1/2 mile behind and there was no way C could have known he was trying to catch him. If C convinces the jurors they will be jointly and severally liable and any judgements resulting from C's neg. and the P can recover the full amount from either one.

OTHER LIABILITY

Jane – may be found liable if P can prove duty to rescue created by a special relationship btwn V and J. This is likely as the court is expanding the definition of relationship. If duty is found and jury finds J had opportunity to rescue (which is likely given past occupation), J will be substantial factor and may be jointly and severally liable w/ C and/or B. Jurors may apportion liability, but P may collect entire amt. From any one if others are insolvent.

Casino – may be vicariously liable for Jane's negligent failure to rescue. J was acting in the scope of her employment so if she's found guilty casino may also be held liable on respondeat

superior. They will then be jointly and severally liable and there will be one more pocket for Ps to collect from.

Radio Station – FL may sue for neg infliction of ED but he'll have to meet the same criteria as above, and this seems unlikely.

Police Dept. – the original rescue team on the scene may be sued on the theory of duty to rescue arising preventing other assistance. Although no initial duty to rescue they would owe a duty if others didn't try to rescue in reliance on their efforts. An expert scuba diver was stopped from attempting rescue. Had the diver gone in V would probably (40-60%) still be alive, so even though not more prob. Than not still lost substantial opportunity to avoid harm. PD may argue that rescue was stopped to protect civilians, not in reliance on rescue by other officers. If found guilty of neg. blame may be apportioned by jury and PD held jointly and severally liable. There may be statutory limit on amt. P can collect from government entity.

SECTION THREE

Clark's Liability

In proving a negligence case, 5 elements are required; 1) Duty, 2) Breach of Duty, 3) Cause in Fact, 4) Legal Cause/Proximate Cause, and 5) Damages. Clark, by engaging in a hazardous activity, e.g. driving a car, owed people outside of the car a duty to behave in a reasonable manner. Clark breached his duty to Victoria by unreasonably driving 60-mph in a 35-mph zone. Clark's impact is the cause in fact for the bus going into the water, and the bus going into the water is the proximate cause for Victoria's drowning. The damages are the wrongful death of the victim. All of these elements constitute a *prima facie* case for negligence.

Negligence Per Se

Victoria's estate could argue that the *prima facie* case need not be proven because of *negligence per se*, or negligence shown by disobeying a legal statute. The theory is that reasonable people follow laws and unreasonable people do not. Therefore, if the plaintiff violated a statute, he must have been unreasonable and breached his duty. The only requirements are that the victim be in the protected class of the statute and that the harm be what the statute intended to prevent. Speed limits are there to protect people from a driver losing control of his vehicle by driving too fast for the road and conditions. Victoria was in this protected class. The prevented harm is personal injury.

Legal/Proximate Cause

Clark could try to argue that the negligence of the patrol boat in not having scuba equipment led to an intervening event that broke the chain of causation and removes him from liability. He could also argue that it wasn't foreseeable that a person would drown due to a car accident. The jury would decide both issues. The negligence of the patrol boat officers is probably not enough of an intervening cause to allow Clark to escape liability and the drowning is a very foreseeable consequence of a bus being pushed into the river.

Clark will most likely be found liable for the wrongful death of Victoria.

Bruce Wayne – Acting in Concert

Bruce Wayne could be jointly liable as acting in concert with Clark. Bruce contributed to the dangerous situation by drag racing with Clark even though Clark would probably have been speeding without Bruce being there. Bruce may be able to argue that Clark had no idea that Bruce was behind him, and therefore defeat the theory. Unfortunately for Bruce, it would be in Clark's best interest to say he knew of Bruce's presence, even if this is not factually correct. Having Bruce jointly liable enables the victim's estate to go after either party for the entire award amount. Since Bruce is a millionaire, they would probably target him. This is especially so if the signs inviting people to drag race turns the case into an intentional tort. As an intentional tort Clark could not rely on an insurance settlement and would have to pay damages out of his own pocket, making him judgment proof if he is not wealthy.

City of Smallville – Substantial Factor

Typically two issues would present themselves in a case where a city failed to rescue a person, the duty to rescue and the immunity of the city. Normally there is no duty to rescue unless an exception is met. In this situation, beginning a rescue and preventing other's from making a rescue attempt form the exception to the no duty rule. Sandy could have saved Victoria if it were not for the actions of the River Patrol officer's in preventing her. The city could argue that since Dusty found his way into the water, Sandy could have attempted to rescue as well. This is a weak argument because Sandy was legally obeying officers at the scene.

The other issue is the usual immunity of a city from lawsuits. The immunity refers to discretionary, not proprietary or ministerial actions. Since this is not a situation where the will of the electorate is involved, the city could be found liable.

Since the city had a duty to rescue Victoria, their negligently leaving scuba equipment on shore would constitute a breach of their duty.

If the city is liable, the next question is for how much. The doctor testified that Victoria suffered an average of a 50% loss of chance for survival due to the delay in getting the scuba equipment. This means that the city is a substantial factor in wrongful death and could be joined in the lawsuit. Barring any statutes limiting the liability of the city, they could be liable for the entire damage amount.

Bystander Action – Frank Loss

Frank will argue that he is entitled to damages due to witnessing the crash on TV. The majority of courts require being in the zone of danger. Frank is at home, well outside the danger of bodily harm. A minority view follows Dillon v. Legg and creates 3 criteria that must be met; 1) Plaintiff was located near the scene, 2) The shock resulted from a direct emotional impact, and 3) Plaintiff and victim were close. For the first element, most courts would not consider the TV as close to the event. For the second element Frank would have to know that Victoria was on the bus and that she was severely injured, both items not ascertained until later. The majority of courts would have trouble defining this situation as a direct emotional impact. The final element is that his engagement to Victoria makes her a close relationship. However, courts view engagement and marriage as a legally different, in most cases denying an engaged plaintiff the same legal rights as a spouse. Therefore, Frank is likely to lose on his bystander action.

If the case goes to trial, Clark will probably have his auto insurance represent him but there is a possible conflict of interest if the insurance company wants this case viewed as an intentional tort to escape insurance liability. Bruce Wayne and the City will probably be joined in the lawsuit and Victoria's estate could go after any of the three in seeking damages. Clark may not have to pay at all.