

Fall 2000

MID-YEAR EXAMINATION

TORTS

PROFESSOR RUSSELL

**INSTRUCTIONS:**

1. **DEADLINE:** This is a six-hour examination due by 4:00 pm on 4 December 2000. **If you return the exam after 4:00 pm, you get zero points for the exam. NO EXCUSES.**
2. **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 answer.
3. **EXAM NUMBER:** Please put your exam number on each page. The easiest way to do this is to put the exam number in a header on each page. Do not put your name anywhere on the exam.

4. **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.

5. **LENGTH:** This examination consists of three sections on 1 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:** For grading purposes, the sections and questions are weighted according to the maximum number of words allowed for each section. You should divide your time with these weights in mind.

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 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 issues that are most important. **Do not spend too much time on easy or trivial issues at the expense of harder ones.** If you do not know relevant facts or relevant legal doctrine, indicate what you do not know and why you need to know it. You must connect your knowledge of 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 think that a court would resolve an ambiguous question one way rather than

another.

12. **CONCISION:** Quality, not quantity is desired. 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. **GOOD LUCK:** You're a fine group of students, and I have enjoyed sharing our first semester at DU's law school. Good luck with the remainder of your exams. Enjoy your break. I look forward to seeing you next semester.

**(Section One Begins on Next Page.)**

### Section One

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

1. **(50 words)** Do awards for pain and suffering play an increasing role in the Tort system?
2. **(50 words)** In light of the duty to settle, what does the phrase "policy limit of \$100,000" mean?
3. **(50 words)** Imagine that the Tort system incorporated Leslie Bender's ideas. Consider the cases in our textbook. Name a specific case that would have a different outcome under the Bender scheme. Describe the outcome.

**4. (50 words)** Explain what Learned Hand’s algebraic formula from *Carroll Towing* is supposed to accomplish.

**5. (50 words)** What is the difference between the physician rule and the patient rule with regard to informed consent?

**6. (50 words)** If plaintiffs in wrongful death suits could recover for their grief, would you expect this to have any effect upon the doctrine concerning bystander actions for negligent infliction of emotional distress?

**7. (50 words)** In *Imlay v. City of Lake Crystal*, the Minnesota Supreme Court considered a Minnesota statute that provided that:

In a civil action, . . . when liability . . . is determined by the trier of fact, and when damages include an award to compensate the plaintiff for losses available to the date of the verdict by collateral sources, a party may file a motion within ten days of the date of entry of the verdict requesting determination of collateral sources. If the motion is filed, the parties shall submit written evidence of, and the court shall determine:

(1) amounts of collateral sources that have been paid for the benefit of the plaintiff or are otherwise available to the plaintiff as a result of losses *except those for which a subrogation right has been asserted*. . . . (emphasis supplied)

Why did the Minnesota legislature include the phrase “except those for which a subrogation right has been asserted” in this statute?

**8. (50 words)** If the plaintiffs in *Summers v. Tice* had been acting in concert, would the analysis of the case have been different?

**9. (50 words)** What is the essential difference between the approaches of Cardozo and Andrews to *Palsgraf*?

**10. (50 words)** Is a bystander's action for negligent infliction of emotional distress an example of vicarious liability? Why or why not?

[High-scoring student answers to Section One.](#)

**END OF SECTION ONE**

**SECTION TWO**

**(500 words)**

11. What things are the plaintiff's and/or defendant's lawyers not allowed to tell the jury? What are the implications or effects of this lack of knowledge?

[High-scoring student answers to Section Two.](#)

**END OF SECTION TWO**

**Section Three**

**(1,000 words)**

12. Consider the following news story. Discuss the potential tort liability, including damages, that Chad Driver faces. (Note: although this injury took place in Colorado, you should not limit your discussion to Colorado law. That is to say, do not presume to know which jurisdiction's laws will apply to this injury and do not waste time researching Colorado law.)

### **Man dies after learning of wife's death**

**By Sarah Huntley**

*Denver Rocky Mountain News Staff Writer*

**ARAPAHOE COUNTY** — They were inseparable for more than 20 years.

Married in 1976, Jerry and Mary Pines shared the same house, worked in the same building and raised their three boys side by side.

On Saturday morning, the couple died hours apart in a tragic chain of events.

Mary Kathryn Pines, 45, was headed north on South Tower Road, en route to her second job at Denver International Airport at about 1:40 a.m., when her Ford Explorer was hit by a red 1996 Chevrolet Beretta. The collision, at the intersection of East Telluride Street, propelled Pines' Explorer into a nearby light post.

Pines died at the scene.

A little more than three hours later, Aurora police detective Pat Hardin and a member of the department's victim services unit knocked on the Pines' door in the 5400 block of South

Gibraltar Street.

As they broke the news to her shocked family, Jerry Pines called for his son to get him some medication. Minutes later, the 51-year-old husband and father collapsed.

Paramedics rushed him to the Medical Center of Aurora, but doctors were unable to save him.

"We believe he suffered a heart attack," Aurora Division Chief Doug Abraham said Saturday. "The information was just more than his system could tolerate."

Abraham said the family had no idea that Mary Pines hadn't made it to work. "As far as they knew, she was working her shift," he said.

The couple's 21-year-old son, Casey Pines, and 18-year-old twins, Gentry and Shane Pines, were home at the time.

"This is not something I'd ever wish on anyone," Casey Pines said Saturday afternoon, as a group of somber friends and relatives gathered on the front lawn.

Casey Pines said he wants his parents to be remembered for the support they gave him, his brothers and their circle of friends.

"They were honestly the greatest parents I've ever met. A lot of our friends have said they were like second parents to them," he said. "They let me live my life the way I wanted. They never judged me ... and they were always there."

Pines said his mother and father were very close. They worked in the same room at the bulk mail center for the U.S. Postal Service for more than two decades. Both were supervisors.

A neighbor, who preferred to remain anonymous, commented that the Pines' death was a "real tragedy. However," he noted, "they did fight all the time and were always threatening to kill each other. It's kind of ironic for both of their lives to end this way."

Jerry Pines had undergone triple bypass surgery six months ago after suffering a heart attack, his oldest son said, but his family expected him to recover.

"It's just a shame someone had to be so careless," Casey Pines said.

Police arrested 25-year-old Chad E. Driver of Aurora after the accident. He was released from jail Saturday afternoon after he posted \$1,000 bond.

He could not be reached for comment.

Driver, who suffered minor injuries in the crash, is expected to be charged with vehicular homicide in connection with the death of Mary Pines. At the time of the accident, he was driving while talking on his mobile telephone.

Investigators are looking into the possibility of additional charges stemming from Jerry Pines' fatal heart attack.

"We are exploring whether or not charges are applicable," Abraham said. "If he is determined to be the proximate cause of the husband's death, he could be charged with that as well."

The decision will be made by the Arapahoe County District Attorney's Office.

"I just hope the man pays for what he has done. I hope he atones for what he has done," Casey Pines said. "And hopefully, others will think twice before they phone and drive. It affects

everyone."

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*November 26, 2000*

[High-scoring student answers to Section Three.](#)

**END OF SECTION THREE**

**END OF EXAMINATION**

## Fall 2000 Torts Mid-year exam

### Student Sample Answers to Section One

**Two student answers to section one follow.  
Note that each is high-scoring though imperfect.**

1. According to Galanter, pain and suffering awards do not play a significant role in the Tort system. Since a miniscule amount of potential claims actually are litigated fully (1.9-2.7 cases and only 0.01% of plaintiffs win), their outcome is less determinative than the majority of claims which are settled out of court.
2. In light of the duty to settle, a policy limit of \$100K means that the insurer will pay up to \$100K and not more, unless the insurer acts imprudently in rejecting a settlement offer. If the insured then loses the lawsuit, the insurance company must pay the judgment that is more than the limit.
3. If Bender's stand of care applied in *Galanti*, the government would have been liable for King's failure to warn Galanti. The slight burden of taking precautionary steps would have led King to warn Galanti of the danger; just as King would want someone else to warn his friend if in the same situation.
4. Learned Hand's formula is to help determine the owner's duty. The owner acts unreasonably when the burden of avoiding harm is less than the probability of that harm occurring multiplied by the likely seriousness of the harm if it does occur ( $B < PL$ ). His formula incorporates a reasonable person standard.
5. The difference between the physician and patient rules turns on the perspective the reasonable person would use in analyzing informed consent. The physician rule compares the physician's decision based on custom and patients generally. The patient rule determines material risks based on what the physician knows or should know about the particular patient.
6. Recovery for grief in wrongful death suits would not have an effect on bystander actions since they are two different types of injuries. The wrongful death claim does not affect the separate, derivative claim of the bystander action. However, in certain circumstances, a plaintiff might be able to assert both claims against a defendant.
7. The Minnesota legislature included the phrase concerning subrogation so as to not overcompensate the plaintiff. The collateral sources which assert their subrogation right will be reimbursed for their payments from the judgment. Therefore, it would be unfair to not consider which sources will be paid from the judgment.
8. If all the defendants in *Summers v. Tice* were acting in concert, they would all be held liable as one defendant to the plaintiff. Therefore, the burden would not shift to them to prove who caused the actual injury since they would all be considered legally responsible. (I am assuming that "plaintiffs" in the question should have been "defendants." If not, then nothing would change in the original analysis.)
9. The essential difference in Cardozo and Andrews' interpretation of *Palsgraf* is whether the case is a duty or proximate cause issue. Cardozo contends that the plaintiff was unforeseeable, and therefore loses the case outright.

Andrews argues that the jury should decide the foreseeability issue as a matter of proximate cause.

10. The bystander's action for emotional distress is not an example of vicarious liability. In vicarious liability a third party who did not act is held liable for the actions of another person. In the bystander's action, the actor is being held liable for damages caused to a third party.

1. Awards for pain and suffering play a decreasing role in the Tort system. Pain and suffering amount used to be equivalent to the amounts awarded for actual economic loss. Galanter reports that in 1977, the share was 59%, in 1987, 53%. In 1994, the amount was closer to 47%.

2. A limit of \$100k, a 10% chance to win, and a plaintiff settlement demand of \$99k will end in settlement, regardless of D's wishes. If the insurer refuses settlement and the plaintiff wins at trial, the insurer could be liable for the entire award.

3. Under Leslie Bender's vision, Galanti v. United States would have had a different outcome. The professed mission of the FBI is to protect citizens. The burden of protecting Galanti would have involved a mere phone call. The duty to care and warn would be found.

4. It is supposed to be a simplified calculus for determining a level for the standard of care. B is the burden of preventing the injury. If B is less than the probability of the injury occurring times the likely extent of injury, this is supposed to define the defendant's duty to prevent the injury.

5. The physician rule is defined by professional custom (i.e., by doctors): doctors get to control information and make choices for patients. The patient rule is either based upon what the reasonable patient would want to know (objective) or upon what this particular patient wants to know (subjective).

6. If grief were allowed in bystander actions, awards would be difficult to calculate and probably enormous. There would most likely be a backlash: either the awards would be capped or the area of bystander recovery eliminated.

7. Subrogation is money already spent. The goal of award money is to make the plaintiff whole. The purpose of the statute is to prevent double recoveries. Allowing subrogated amounts to be deducted is forcing the plaintiff to pay those amounts twice out of the same award (i.e., to be "less than whole").

8. If the hunters were collectively liable, each would pay 50% of the damages. Under joint and several liability, each is responsible for 100% of the damages until one or the other proves s/he was not the cause of the plaintiff's injury.

9. Cardozo examines duty from the perspective of the foreseeable plaintiff: plaintiff was not foreseeable, therefore there was no duty. Andrew's scope is broader: he uses proximate cause and a substantial factor test to determine whether or not the question is appropriate for trial.

10. No. Vicarious liability is placed upon employers for the acts of employees and, in some cases, parents for the acts of their children. Bystander actions are derivative actions, but involve the injury of an underlying plaintiff.

1. The law is a clumsy remedy for pain and suffering. Nevertheless, awards for pain and suffering are an important way

to demonstrate an appropriate magnitude of loss. These awards are not necessarily playing an increasing role in the Tort system, as legislatures increasingly put a limit on them.

2. An insurance company has a duty to settle when the policy limit is \$100,000: if a plaintiff has offered to settle for no more than \$100,000, and her offer is less than the cost of litigation added to the product of her chance of winning multiplied by the amount she is likely to win at trial.

3. In *Fox v. Borkey*, although D's blasting caused an explosion that trembled the earth and sent P into shock, the court denied recovery. If Bender's scheme were used where standard of care is 'consideration of another's safety and interests,' the court would've found that D had a duty of care to P.

4. Learned Hand's algebraic formula is meant to articulate the degree of care demanded of a person as the result of 3 factors: the probability that his conduct will injure others, taken w/ the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk.

5. With regard to informed consent, under the physician rule a patient has whatever information comports w/ prevailing medical standard in the community regarding their illness. Under the patient rule, they have whatever information is necessary to make an evaluation of treatment, risks, and available options.

6. If plaintiffs in wrongful death suits could recover for their grief, I would expect bystander actions for negligent infliction of emotional distress to become more restrictive, as damage awards could escalate dramatically.

7. The Minnesota legislature included the phrase, "except those for which a subrogation right has been asserted" because the amount of any collateral source compensation received by the plaintiff that has a subrogation right, must be paid back to the collateral source from damages received at trial.

8. (assuming you mean 'defendants' in this question ) In *Summers v. Tice*, both defendants shot simultaneously in the direction of the plaintiff, and since it was impossible to establish which one had done the damage, both were found liable. If they had acted together in concert, the analysis would still lead to joint liability.

9. The essential difference between the approaches of Cardozo and Andrews to *Palsgraf* is that Cardozo felt there was no duty to the plaintiff for injuries she sustained on the railroad platform, and so dismissed the case. Andrews thought it was a proximate cause issue that should be decided by a jury.

10. A bystander's action for negligent infliction of emotional distress is an action against someone who inflicted the pain, and is not an example of vicarious liability, where the defendant is liable, through a particular relationship, for the injury done by someone else.

## Fall 2000 Torts Mid-year exam

### Student Sample Answers to Section Two

**Three student answers to section two follow.  
Note that each is high-scoring though imperfect.**

#### Section Two

11. The lawyers are not allowed to inform the jury about the plaintiff's collateral sources, subrogation rights of insurance companies, and the taxes which are applied to the judgment. These collateral sources include health and accident insurance, automobile liability insurance, employment health benefits, and income disability coverage. The collateral source rule does not affect the subrogation rights of the insurance carriers.

The collateral source rule ensures that the plaintiff's recovery against the defendant is not affected by the compensation that the plaintiff received from other sources. Although the court does not want to overcompensate the plaintiff, the main purpose of this rule is to prevent the defendant from benefiting from the plaintiff's prudence. If the defendant could be found to be less liable because a particular plaintiff was prudent enough or financially able to acquire insurance, then the defendant benefits from the plaintiff's insurance. Likewise, having insurance would penalize the plaintiff because she would receive a smaller judgment in her favor. The tort system does not want to encourage a damage system which encourages defendants to choose to harm wealthier individuals with insurance so as to be held less liable.

Also, the jury is not informed of the subrogation clauses of any insurance policies that the plaintiff has. The court wants the jury to decide what amount they think makes the plaintiff whole again. All the mathematical hocus pocus of deciding how the plaintiff will be actually compensated occurs after the jury renders their verdict. Therefore, the jury's function is to determine what the plaintiff's compensation should be, and it is the court's job to determine a payment plan. The courts do not want the jury to take into consideration what money they are awarding will immediately go to the insurance companies. If the jurors knew that, they might increase a verdict in favor of a plaintiff who is particularly sympathetic, to give the plaintiff more money. This would result in a type of overcompensation that the court wants to avoid.

Further, the jury is not informed about the taxes that are applied or not applied to the judgment. Again, the rationale is to prevent the jury from overcompensating the plaintiff by adding extra to the judgment. Especially in the cases of a sympathetic plaintiff, the court does not want the jury to give more money to the plaintiff in order to counteract any applicable taxes. That would punish the defendant for being sued in a country that has taxes, and unjustly enrich the plaintiff for being injured.

The jury is intentionally kept ignorant of the plaintiff's collateral sources, subrogation obligations, and taxes so as to not influence the judgment. The court does not want the defendant to benefit from the plaintiff having insurance, nor does it want the plaintiff to be overcompensated. Therefore, the jury makes the amount determination and the court makes the determination of how it is distributed.

## 11. Pink Elephants On Parade

There are three key issues that affect practically every Tort case: taxes, lawyer's fees and insurance. None of these issues are allowed to be presented to the jury at trial. The numerous effects and implication of this forced ignorance will be discussed. First, is the jury aware of these issues and are they taken into account when calculating a damages figure? And perhaps most importantly, if the jury does take these issues into account, does this lead to the plaintiff being overly compensated?

Juries are not stupid, at least not stupid enough to not see the small herd of pink elephants quietly standing in the back of the courtroom. These elephants are an analogy for the taxes that must be paid by the plaintiff on their judgment, the 30-40% of that judgment that will go directly to counsel and the insurance policies involved. The idea of a jury is founded on the desire to be judged by one's peers. If you are the plaintiff seeking recovery, you hope these peers have had the experience of hiring an attorney. You hope that they too have been billed \$52.73 for sending a three-page fax to opposing counsel. Also, it can rightly be inferred that most of the jurors have some type of insurance and pay their annual premiums, etc. Taxes are perhaps the most universal of all the above-mentioned evils. So, juries do consider taxes, lawyer's fees and insurance when deciding a verdict, even though they must do it silently.

How do juries use their knowledge and experience of taxes, lawyer's and insurance in deciding their verdict? I believe they factor these costs into the final judgment under the guise of some other injury. They take their own experience [30% to the government and 40% to the attorney, leaving only 30% for the poor injured plaintiff], and apply it, along with their mathematical skills. If the plaintiff is really only going to take home approximately 30% of whatever the jury returns, that 30% must be large enough to compensate the plaintiff's injury. So, often juries will inflate the dollar figure they might otherwise consider fair in lieu of taxes, damn attorneys and insurance.

However, what they don't know, can hurt them. Because, juries pay taxes, but since taxes are not discussed in the courtroom, the concept can be misconstrued and/ or misunderstood by the jury. Compensatory damages are not taxed. The goal of the Tort system is to make the plaintiff whole again, and this goal could not be achieved if the government were allowed to take a portion of the verdict. Only punitive damages are taxed. So, are plaintiffs being over compensated for their injuries? Maybe, it is difficult to say. But where juries might tend to pad a judgment here, it is evened out when insurance is taken into account. Insurance is the most elusive elephant. She is the most misunderstood and often unnoticed of the herd. For indeed, subrogation may swallow 80% of a judgment unbeknownst to the jury. On the other hand, maybe no subrogation clause existed in the case, and therefore the plaintiff really is being overcompensated. In short, I think it rather silly that we insist on denying the jury of chance to return a truly informed judgment by allowing taxes, lawyer's fees and insurance to be discussed.

11. Lawyers are not allowed to tell juries that: (1) compensable damages they award to the plaintiff won't be taxed; (2) parties on either side may have insurance coverage that may cover all or part of the injury; (3) any settlement negotiations have transpired between the parties; (4) plaintiff may have already received additional compensation from collateral sources for the injury; and (5) plaintiff's attorney fees will probably be deducted from whatever award plaintiff receives. Each of these non-disclosures could have potential impacts on jury decisions.

### No taxation on Compensable Damages

One of the major categories of compensable damages for personal injury cases is loss of income. This can be particularly significant if the injury is serious enough to affect plaintiff's earning capacity into the future. Members of the jury are generally working class people who are well aware that their earnings get taxed. If they knew the compensable damages they are awarding to plaintiff to make up for loss of earnings won't be taxed, they may be tempted to reduce the award. For example, in *Rodriguez v. McDonnell Douglas*, the trial court awarded plaintiff, a young man disabled by a negligent injury, \$4.1 million, much of which was for potential income he could no longer earn. That award may have been significantly diminished if they realized he would not have to pay any tax on it.

### Insurance Coverage of Parties

Knowledge of insurance coverage could significantly affect jury awards. For example, if the jury knew in *Crisci v. Security Insurance Company of New Haven, Connecticut* that Ms. Crisci, a helpless little lady, only had \$10,000 insurance coverage, they may not have awarded June Dimare \$100,000 for injuries she incurred falling through Ms. Crisci's stairway.

### Settlement Negotiations Between Parties

If juries knew anything about settlement negotiations, they would have more insight about how the parties valued the claim. That information would almost certainly influence their thinking. For example, if they had known that June Dimare's attorney had offered to settle with Ms. Crisci for \$10,000, they would most likely have awarded Ms. Dimare much less than the \$100,000 they did award her.

### Collateral Sources

With the exception of jurisdictions in which tort reform statutes allow disclosure of collateral sources, juries are not allowed to hear about compensation the plaintiff has already received for the injury. Not having this information may result in over-compensating the plaintiff for any income she has received that will not be subrogated by the collateral source.

### Attorney Fees

Juries cannot be told that ~30%-40% of plaintiff's award will be paid to her attorney. Having this information may influence juries to increase their award to plaintiffs.

## Fall 2000 Torts Mid-year exam

### Student Sample Answers to Section Three

**Three student answers to section three follow.  
Note that each is high-scoring though imperfect.**

12:

Supposing that the state has both a wrongful death statute and a survival statute, the following claims may be brought.

Mary Pines v. Driver. Mary's estate may bring a survival claim for personal injuries such as pain and suffering and probably the funeral expenses. However, there would probably be no pain and suffering award because death seems to have been instantaneous. However, if any time lapsed between Mary's injury and her death, pain and suffering damages may be sought.

Jerry Pines v. Driver I. Because Jerry was Mary's legal spouse, he may seek a wrongful death claim for Mary's death if he filed before having his heart attack. Because this is unlikely, this claim is not discussed. However, attorneys have occasionally been found wandering around hospitals... His claim would look much like the children's analyzed below.

Jerry Pines v. Driver II. Jerry's estate may also file a survival action to collect for any expenses associated with his heart attack as well as for pain and suffering *if* Driver is found to be the proximate cause of Jerry's death (would be the same as the children's analysis below). Loss of enjoyment of life may be sought or, in some jurisdictions like MI, it reserved for wrongful death claims.

Pines Children v. Driver I. As the legitimate children of Mary Pines, the Pines children may bring a wrongful death action against Driver for pain and suffering, such as grief over loss of companionship and moral guidance, and loss of enjoyment of life. The analysis involves proving all six elements of negligence by a preponderance of the evidence.

The first issue is whether Driver owed Mary, and therefore the Pines children, a legal duty. Most jurisdictions recognize that a negligent defendant owes a duty to a victim's legal children when they have caused death.

(If generalization not correct... Hocus Pocus → duty exists!) The next issue is whether the children were owed a standard of reasonable care by Driver. Would a "reasonable person" in his situation have acted this way? The jury may determine that the reasonable person talks on her/his phone *and* drives reasonably according to custom. If so, the standard of care Driver owed was to drive reasonably while on the phone. If the reasonable person does not use a cell phone while driving, Driver is negligent for being on the phone while driving. Either way, Driver owed a standard of care to the children to drive reasonably and not run into their mother, thereby causing her children pain and suffering. (However, see Hooper... compliance with custom still negligence).

The children would also allege that Driver was negligent-per-se. The vehicular manslaughter statute might be enough to establish a standard of care should the DA prove its applicability. The statute have to 1) add something to the reasonable person standard, 2) be designed to protect against pain and suffering through death of a close relative in a car accident, and 3) be protective of children in such a situation. It is arguable that the statute is only designed to protect

other drivers but the court may wish to make a call on cell phones and apply it anyway.

The third issue is whether Driver breached the standard of reasonable care. Because the police feel they can prosecute for vehicular manslaughter, even absent a witness, circumstantial evidence alone probably sufficiently points to Driver breaching the duty he owed the children to be reasonable when driving.

The evidence used to prove breach may prove that Driver was also the cause-in-fact, satisfying the fourth element of the negligence claim. The evidence has to point to Driver and not aliens or some other cause of the accident. The “but for” test shows that Driver’s unreasonable conduct was indeed the legal cause-in-fact: But for Driver’s conduct, Mary Pines would not have been killed and her children would not have suffered mental injury. The court need not go beyond “but for” causation and employ a “substantial factor” test to reach the defendant in this case.

The really questionable element (aside from finding a general duty) in this claim is the proximate cause element. Is the relationship between Driver and the children so attenuated as to compel the court to cut the chain of causation short of the children? If there is no duty, proximate cause would be tough to prove (not to mention it would be irrelevant). However, to prove proximate cause, plaintiffs must prove that both they and their injury were foreseeable. J. Andrews’ widely deferred to test in Palsgraf states that there must have been 1) a natural and continuous sequence between cause and effect, 2) a direct connection between them without too many intervening causes, and 3) a result not “too far remote from the cause” considering both time and space. The jury’s determination of “too far remote” will be determinative here.

Based on the analysis above, damages would probably be awarded in this case.

Pines Children v. Driver II. As the legitimate children of Jerry Pines, the Pines children may bring a wrongful death action against Driver for pain and suffering, such as grief over loss of companionship and moral guidance, and loss of enjoyment of life. This analysis would be similar to that above (Driver I) with the exception of the duty and proximate cause issues being attenuated one step more from the death of Mary.

Pines Children (Jerry) v. Driver III. The children (and their father before he died) may have a bystander action against Driver but bystander actions differ according to jurisdiction. However, the trend followed by most courts is toward foreseeability of the potential plaintiff.

Although bystanders can now recover without coming into physical contact with the accident, bystander actions have yet to be extended past the requirements established in Dillon v. Legg. Under that test, the plaintiff must have 1) been located near the scene of the accident, 2) suffered shock as a direct result of the “sensory and contemporaneous observance” of the accident, and 3) been closely related to the plaintiff.

Unfortunately for the children, there is probably no duty under the bystander rule as they were not 1) near the accident or 2) did not observe the accident.

It is unlikely but, assuming the jurisdiction had adopted the “negligent infliction of emotional harm” test, a duty to the children might be found based solely on their hearing of the news from a third party. Because duty is largely a policy issue, it is doubtful that the court would get into the specific facts of the case which may compel it to find for the plaintiffs. If a duty were found, the analysis would closely follow the wrongful death analysis.

12. Chad Driver may be liable to Mary Pines' Estate for wrongful death for crashing into her Ford Explorer; to Jerry Pines, her husband, for negligent infliction of emotional distress; to Jerry Pines' Estate for wrongful death; and to the Pines' children for negligent infliction of emotional distress. Driver probably won't be liable for a survival claim for personal injuries inflicted on Mary Pines, since she died almost instantly at the scene.

Mary Pines Estate v. Driver (wrongful death)

Estate's Argument: Driver had a **duty** to drive carefully; talking on a mobile telephone while driving on a super highway is reckless, and an accident is foreseeable. Driver's Argument: At 1:40 a.m., practically no one is usually on the road, so an accident is unforeseeable.

Estate's Argument: A **reasonable person** would take more care while driving, and would not divert attention by talking on a mobile telephone.

Presuming Driver is charged with vehicular homicide, **breach** would be negligence per se - no argument.

Estate's Argument: **But for** Driver's red 1996 Chevrolet Beretta crashing into Mary's Ford Explorer, propelling her into a nearby light post, Mary would not be dead. Driver's argument: intervening force - But for the light post, accident may not have been fatal. Jury would decide if such intervening force is superceding.

Estate's argument: An accident is foreseeable when a driver talks on a mobile telephone - Driver's actions were **proximate cause** of Mary's death. Driver's argument: Accident at that time was not foreseeable; intervening force of light post - his actions were not proximate cause of Mary's death.

*Possible Damages*

loss of earnings from both Mary's jobs - supervisor at Post Office and job at DIA - not all earnings would be compensable, however, since not all of Mary's earnings would go to survivors.

loss of services she performed for family

funeral expenses

blue book value of Mary's Ford Explorer

Jerry Pines v. Driver (emotional distress)

Jerry was so devastated at the news that his beloved wife of 20 years had been killed, he collapsed minutes after hearing the news. Under *Dillon v. Legg*, he may be eligible for bystander compensation for emotional distress. Although he died the same day, this complaint could be brought as a survival action.

Jerry's argument: It is foreseeable that injuries to victims will hurt others as well, so Driver has **duty of care** to all he hurts. Driver's argument: too attenuated; unforeseeable plaintiff - no duty.

Jerry's argument: A **reasonable person** will not talk on mobile telephone while driving - Driver **breached** his standard of care. No argument for Driver - negligence per se.

Jerry's argument: **But-for** Driver crashing into his wife, she wouldn't be dead and Jerry wouldn't have emotional distress. Driver's argument: but-for the light post (intervening post), accident wouldn't have been fatal.

Jerry's argument: because it was foreseeable that reckless driving will result in accident that will hurt victim's beloved family, Driver's reckless driving is **proximate cause** of Jerry's emotional distress. Driver's argument: Jerry is not foreseeable plaintiff resulting from actions on South Tower Road.

### *Damages*

Loss of consortium/society

Pain and Suffering

### Estate of Jerry Pines v. Driver (wrongful death)

After hearing the news of Mary's death, Jerry suffered a heart attack and died.

Estate's argument: It is foreseeable that injuries to victims will hurt others as well, so Driver has **duty** of care to all he hurts. Driver's argument: too attenuated; unforeseeable plaintiff - no duty.

Estate's argument: **Reasonable person** will not talk on mobile telephone while driving - Driver **breached** his standard of care. Driver - negligence per se.

Estate's argument: **But-for** Driver crashing into his wife, she wouldn't be dead and he wouldn't have suffered a heart attack. Driver's argument: but-for Jerry's previous heart attacks, he wouldn't have had one now (This wouldn't get him very far, since under the 'egg shell' plaintiff doctrine, a D takes a P as he finds him.)

Estate's argument: because it was foreseeable that reckless driving will result in an accident that will hurt victim's beloved family, Driver's reckless driving is **proximate cause** of Jerry's death. Driver's argument: not foreseeable that Jerry would die as a result of his actions on South Tower Road.

### *Possible Damages (may be reduced as a result of Jerry's previous heart condition)*

Loss of income

Loss of society

Funeral expenses

### Pines Children v. Driver (Negligent Infliction of Emotional Distress)

Under *Dillon v. Legg*, the Pines' three children, ages 18, 18 and 21, may be eligible for bystander compensation. They

watched as their father suffered a heart attack shortly after learning about the death of their mother.

Childrens' argument: It is foreseeable that injuries to victims will hurt others as well, so Driver has **duty** of care to all he hurts. Driver's argument: too attenuated; unforeseeable plaintiffs - no duty.

Childrens' argument: **Reasonable person** will not talk on mobile telephone while driving - Driver **breached** his standard of care. Driver - negligence per se.

Childrens' argument: **But-for** Driver crashing into their mother, she and their father wouldn't be dead. Driver's argument: but-for light post, accident probably wouldn't have been fatal, and both parents would still be alive.

Childrens' argument: because it was foreseeable that reckless driving will result in accident that will hurt victim's beloved family, Driver's reckless driving is **proximate cause** of parents' death. Driver's argument: not foreseeable that he would be in an accident at 1:40 a.m. - no proximate cause.

### *Damages*

Loss of society of parents (whom they relied on for support)

Loss of income

12. Chad Driver faces liability for his negligence to Mary and Jerry Pines and their children. Since Mary and Jerry both died their claims become survival claims. Their children all have claims against Driver, but for the ease of analysis, they will be considered together. Any neighbors or "adopted" children of the Pines are barred from recovery since they are not legally recognized to bring suit.

To begin with, Chad Driver is liable to Mary Pines for the car accident. Chad had a duty to other drivers on the road to drive reasonably, which Chad breached by talking on the phone while driving. But for Chad hitting Mary, she would not have hit the light post and would not have died. Chad is also the proximate cause of Mary's death in that he substantially caused it, he directly caused it, and Mary's injury was reasonably foreseeable from his negligence. Mary will be able to collect the value of her car. However, since she died at the scene, she most likely will not be able to collect for pain and suffering and mental distress. Only if further details prove that she was conscious and in agony prior to her death will the action be possible. Chad, realizing that he will lose this one, decides not to feebly argue his defenses.

Jerry also has actions against Chad resulting from the car accident. Jerry claims wrongful death of Mary, and negligent infliction of emotional distress. In his wrongful death claim, Jerry argues that Chad has a duty to other drivers when driving. He breached the reasonable driver standard by driving while talking on the phone, and was the but-for cause of Mary's death. He also contends that Chad is the proximate cause of Mary's death since it was a foreseeable result of his negligence. Since there were no superceding causes, Chad is therefore liable for Mary's death. Further, Jerry seeks to recover damages for his own emotional distress upon learning of his wife's death. Jerry relies on the same underlying analysis for his derivative claim.

Again, Chad realizes the futility of arguing against Jerry's wrongful death claim, but does take issue with the damages.

He argues that since Jerry and Mary fought and threatened to kill each other, that Jerry's losses of companionship and affection are not great. He also contends that Jerry's mental distress claim should not be recognized. Jerry collapsed within minutes of learning that Mary was dead, and did not have time to suffer. There was no time during Jerry's life to recover for loss of companionship, affection, or even income. Therefore, Jerry should not be entitled to recover for his own losses; and his damages for his wife's wrongful death should be limited to pecuniary losses such as medical and funeral costs.

The children inherit their parents' respective claims as survival actions. They cannot bring their own claims for loss of consortium since both parents died. They can, however, bring their own wrongful death claims for both their mother and their father. The analysis for their wrongful death claim for their mother is the same as Jerry's. The children would be able to recover for loss of companionship and affection, and possibly pecuniary losses if they could prove them. However, Chad will argue that all the children are legally adults, and therefore should not recover for their mother's loss of income.

The children also have a wrongful death action for their father's untimely death. The duty and standard of care analysis remains the same: Chad owed a duty to other drivers to drive reasonably, which he breached when by driving while talking on the phone. But for his breach Mary would not have died, and but for her death Jerry would still be alive. The children argue that Chad's negligence was directly responsible for their father's death. Even though Jerry's death was unforeseeable, it was foreseeable that Mary's death would have a traumatic effect on her husband. They contend that there were no other but-for causes between Jerry's death and Chad's negligence. Chad's negligence set a continuous chain of events unbroken by superceding events. They seek loss of companionship, affection, and pecuniary losses such as medical and funeral expenses.

Chad contends that he should not be held liable for Jerry's wrongful death. He maintains that the duty he owed to other drivers on the road does not extend to men at home with heart conditions. Jerry was not a foreseeable plaintiff when Chad acted. Therefore, recovery for this wrongful death suit should be barred. If, however, the judge determines that there is a duty, Chad contends that he was not the proximate cause of Jerry's death. Assuming that the standard of care, breach, and but-for cause are the same, there is no proximate cause. He counters that Jerry's health condition, while not a superceding factor, is a substantial factor in Jerry's death. Chad also maintains that his act of causing the accident is separate from the cause of death. The direct cause of Jerry's death was the knowledge of his wife's death, as opposed to the killing of his wife.

The children also claim a bystander action for witnessing Jerry's death. Although they were not in a physical zone of danger, they point to precedents such as *Sinn v. Burd* as exceptions to the fear of personal harm element. Chad counters that they are not entitled to recover in this derivative suit since the underlying claim is invalid. Chad's contends that Jerry's death was a physical manifestation of being upset at his wife's death. Since there is no recovery for upset in wrongful death actions, Chad is not liable for Jerry's "upset" which manifested in his heart attack. Therefore, both that claim and the bystander claim are invalid.

More likely than not, Chad will be held liable for Mary's claim for injuries, her wrongful death claim by her children, and possibly Jerry's wrongful death claim. He will be responsible for the damage to Mary's Explorer, her medical and funeral costs, as well as any appropriate loss of companionship. Chad will probably not be liable for the children's bystander action.