

# MID-YEAR EXAMINATION

## TORTS

### PROFESSOR RUSSELL

#### INSTRUCTIONS:

1. **DEADLINE:** This is a five-hour examination that starts at 10:00 a.m. on 17 December 2002 and is due by 3:00 pm on 17 December 2002. **If you return the exam after 3:00 pm, you get zero points for the exam. NO EXCUSES.**
2. **TURNING IN YOUR ANSWERS:** You may turn in your answers either by delivering a printed copy to the registrar's office or by sending your answers via E-MAIL to the registrar at [dricciardi@law.du.edu](mailto:dricciardi@law.du.edu). If you return your answers using e-mail, please send e-mail to [dricciardi@law.du.edu](mailto:dricciardi@law.du.edu) with your answers attached as either a Word or WordPerfect document. Please also send a copy of the answers to yourself. **YOU WILL LOSE POINTS IF YOU SEND MORE THAN ONE ATTACHMENT.**
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 answer, and you violate the Honor Code if you discuss this examination with anyone before you turn in your answer.
4. **EXAM NUMBER:** Please put your exam number on each page. The easiest way to do this is to put the exam number in a header on each page. Do not put your name anywhere on the exam.
5. **LENGTH:** This examination consists of one question. Your job is to produce a typed—that is, **not hand-written**—answer of no more than 2,000 words.
6. **SPACING:** Please try to double-space your answer. Avoid miniature fonts, okay?
7. **HOW TO ANSWER:** In answering, 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 law with the facts before you. **Avoid wasting time with lengthy and abstract summaries of general legal doctrine.** Discuss all plausible lines

of analysis. Do not ignore lines of analysis simply because you think that a court would resolve an ambiguous question one way rather than another.

8. **CONCISION:** Quality, not quantity is desired. Think through your answer before you begin to write. You have a lot of time to write your answers. Concision will win you points. Good organization will win you points as well.

9. **YOURS TO KEEP:** You may keep your copy of the exam.

10. **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.

11. **GOOD LUCK:** Good luck and congratulations on nearly finishing the first semester of law school.

## **QUESTION** (2,000 word limit)

### **Duane's Driving**

#### **Narrative:**

#### *Driving.*

Duane loved to drive. He loved the speed, the sense of progress that came with forward motion. He especially loved two lane roads through the rolling hills of the countryside. He liked to put his pickup near the middle of the road, so that his left front wheel traced the line that separated the two lanes of traffic. A character in a book that he had once read drove the same way, and he thought it was powerful and cool.

He listened to Eminem, his favorite musician, as he drove. His current favorite was a song called "Lose Yourself." He put in the CD, turned the volume as loud as he

could, and put the CD player on repeat, so that it played the song over and over and over again.

You better ...  
Lose yourself in the music, the moment you own it  
You better never let it go.  
You only get one shot, do not miss your chance to blow  
This opportunity comes once in a lifetime.

Eminem's chorus was his personal anthem. He could not hear it too often, nor could he hear it too loudly. He lost himself in the driving music.

Duane's favorite beer was Shiner Bock, brewed by the Spoetzl Brewery in Shiner, Texas. He wished he lived in Texas, because he thought Texas was the greatest of states. He was named after a character in books written by the Texas novelist, Larry McMurtry. He drove a truck, drank Shiner, listened to Eminem, and wished he lived in Texas.

Duane planned to move to Texas when he was old enough. Four more years and he would be eighteen years old. When Duane was thirteen years old, he had promised himself that on his eighteenth birthday, he would move to Lubbock, Texas. Lubbock, Shiner, Eminem, and his pickup—Duane anticipated the future with pleasure.

### ***Crash.***

The jolt surprised Duane and roused him from his thoughts about this future. He later reflected that he was surprised not to have heard anything when his

pickup crashed into front right side of the oncoming Ford Explorer, although he supposed that the music concealed the sound of the crash.

He had just taken his third sip of his first Shiner of the night when he crashed into the Explorer carrying Mr. and Mrs. Platte and their children. The remaining five bottles of the six-pack—nestled into the space between the two seats of his pickup—shattered as his pickup jerked to the right following the impact, turned sideways, rolled onto its top, and slid 150 yards down the highway. When he regained consciousness, he felt very thirsty, and numb. He wished that he had a Shiner to sip while he waited for the paramedics to free him from his pickup. But he could only lick the droplets of Shiner Bock from his upper lip as he waited, trapped in his vehicle.

### ***The Plattes.***

The Platte's Explorer flipped the instant that it made contact with Duane's pickup. The Explorer rolled counterclockwise toward the driver's side. Mrs. Platte was driving in order to let her husband check his e-mail with his new wireless Palm device. The rolling Explorer crushed Mrs. Platte and killed her instantly.

Mr. Platte looked up from his Palm device just after the impact and saw the horizon begin to rotate in front of him. He felt searing pain for a brief moment as the collapsing roof reached his head and broke his neck. He woke up again 24 hours later in the Intensive Care Unit, paralyzed from the neck down. His doctors have given him no hope of reversing the paralysis.

Paula, the Platte's nine-year-old daughter broke both her legs in the crash and suffered a ruptured spleen, which surgeons removed soon after they got her to the hospital. Actually, the crash rebroke her left leg, which at the time of the crash was already in a cast due to a soccer injury.

Peter, the Platte's two-year-old son was uninjured. When the Explorer started to roll, he held on tight to his Ziploc bag of Cheerios. When the paramedics arrived, he was upside down, strapped into his car seat, eating Cheerios, and saying nothing.

At the time of the injury, Mrs. Platte had a fine job working as a financial consultant. She was 40 years old, and she was at the end of the third year of a five-year contract that was paying her \$325,000 per year. Mr. Platte made much less money; he was a history professor. He was 38, two years younger than his wife. He had tenure, which meant that he could keep his job at the university for the remainder of his lifetime. He was making \$55,000 per year. He had nearly finished his first book, a monograph on the agricultural practices of the earliest Dutch settlers of New York. In keeping with her wishes, Mrs. Platte's body was cremated and her ashes were scattered at the top of K-2, a mountain peak in the Himalayas that she had climbed when she was 22. The cremation and scattering of her ashes—which involved equipping a small expedition to climb the mountain—cost a total of \$45,000.

Paula's injuries took a long time to heal. She had to spend a total of six months in the hospital, and when she got out, one leg was one-inch shorter than the

other. There was no negligence by the doctors, this was just the best healing possible given the extent of her injuries. Although she had shown great promise as a soccer player, she was not able to play the game again.

### **YOUR TASK:**

You are a junior associate in a law firm that specializes in defense work for automobile insurers. One of the firm's big clients is Acme Insurance, which is the insurer of the vehicle that Duane was driving at the time of the accident.

You are part of the defense team for this case, which has just arrived at the firm. One of the senior partners has just sent you an e-mail, as follows: "One of our insureds--a drunk, idiot kid without a driver's license wiped out a family. I want to know by 3:00 pm what you think of this case. Give me a memo in which you anticipate the plaintiffs' arguments as to why the drunk kid was negligent and then give me our firm's best counterarguments. Also, predict in detail what the plaintiffs' arguments will be about damages and then generate our best arguments for reducing those damages. Don't worry about Duty or Proximate Cause issues; other team members are handling those. You should probably address Cause-in-Fact, though, although it seems pretty cut and dried. And don't worry about the vicarious liability of the kid's parents for being such stupid parents that they let him drive; another team member will handle that issue. Oh yeah, another thing—the fool agent who sold the policy can't find a copy of it yet, but think about whether there might be some good reasons for us to just deny coverage altogether. And remember, it's bonus time. I'll be out at the Country Club all day playing with a new set of Nike Irons that I just bought, but I plan to be back at 3:00 pm to read your memo."

Write the memo.

END OF EXAMINATION

## Preliminary Memorandum

To: Senior Partner

From: Associate

Date: 12/17/02

R.e.: Analysis of Plattes v. Duane

### Facts

The facts are from the police report with Duane's testimony. Some facts are not yet available and some laws need to be researched.

### Standard of Care

In common law, Duane falls between children rebuttably incapable of negligence and those rebuttably capable. Normally he would be judged by a child standard of care, i.e. a 14 year old of like experience and intelligence. But since he was driving a car, which is an adult activity, or inherently dangerous activity, depending on the jurisdiction, he will be judged by an adult standard. This will also affect how the court judges his negligence per se. To check: is driving a strictly adult activity in this state?

The adult standard is that of an objective reasonable person who meets community standards and is aware of hazards; the mythic A man who mows the lawn in his shirtsleeves. @ Duane must have driven like a reasonable adult not to be negligent. He had no superior skills, so is not held to a higher standard.

In an emergency not created by Duane, he would have had to act as a reasonable person in an emergency, a slightly lower standard.

### Breach

#### Negligence Per Se:

Duane probably violated several statutes while driving. For there to be negligence per se, the statutes must be intended to prevent that type of harm, and to protect that type of persons.

He had no driver's license. Usually these are considered licensing statutes, and negligence must still be proven.

He was likely driving underage. This statute might be considered to prevent accidents (harm) to motorists (class), since young drivers are high risk. Defense can argue that it is regulatory, like licensing. To check: driving age in this rural state.

Duane had been drinking and had an open beer. To check: open container statute in this state. An open container statute is probably to prevent accidents to motorists, though possibly it relates to moral views about and control of alcohol.

Was he speeding? He might have been, as he slid for 150 yards upside down. To check: circumstantial evidence about the skids. The speeding statute was probably designed to prevent accidents to motorists.

Negligence per se usually establishes standard of care. If Duane is found negligent per se, the case will reach the jury. To check: does negligence per se also establish duty and breach in this court? If so, plaintiffs probably have a prima facie case. Duane does not have any good excuses, since even the sudden emergency is unrelated to violating the statutes. Even if he was not negligent per se, violating statutes goes towards showing ordinary negligence.

#### Negligence:

Duane played music VERY loudly. This is probably negligent, since he could not even hear the crash. Defense can argue that playing music is customary, to show it was not negligent, but will probably fail since it was so loud.

Duane was not driving drunk. He had taken three sips of a beer. The blood alcohol test will confirm this. That beer was no more related to the accident than a water bottle would have been.

Duane liked to drive hugging the center line. This is probably slightly negligent, though he was not in the oncoming lane.

He was driving at age 14. Using Judge Hand's formula, a variant way to determine negligence, the Probability of an accident is very high for a young driver, as is the magnitude of Loss. Since these are high, the Burden of Duane's waiting to drive is much smaller.  $B < P \times L$  shows negligence here. However, if the driving age is young in this state, the legislature has determined there is no negligence for driving at a certain age.

Was he speeding? If he was, he was probably negligent. See above.

Was he paying attention? He did not see the Ford coming. Perhaps he was not looking, or was lost in the music. If so, this was negligent. Maybe the accident happened over the top of a hill, or Mrs. Platte had her lights off.

If the emergency was created by Mrs. Platte, did he react as a reasonable person in an emergency? Probably not, as he didn't see or hear the car that hit him, much less swerve or brake.

### Cause in Fact

#### Pro:

The accident would not have happened A but for @ Duane's negligent driving; hugging the center line, drinking, and listening to loud music.

#### Defense:

For Duane to jerk and roll RIGHT he must have been hit from the LEFT. However, the Ford was hit on the RIGHT front side with a torque that rolled it LEFT.

In order to do this, Duane would not only have had to cross the highway but be positioned in a very peculiar way vis a vis the Ford.

On the other hand, if Mrs. Platte had crossed the center line and wandered in front of Duane, angled sideways, this is exactly what would have happened.

Was Mrs. Platte negligent; careless or asleep? Were her lights on, that Duane did not see her? If Mrs. Platte crossed to the wrong side of the road, the accident might have happened with any other car or no other car, and Duane may not be the cause in fact. Defense needs more evidence from the police.

Was there a mechanical failure of her car?

Neither the death nor the spinal injury would have happened A but for@ the collapse of the roof when the car flipped. There may be a res ipsa loquitur case against Ford. The car flipped instantly, which could be a design problem. A roof collapsing in a rollover would normally be due to negligence in construction; it would be the manufacturer who was culpable; and the manufacturer had nearly exclusive control of the roof. People do not usually tamper with their car roofs. Also, exclusive control is not always required for product liability suits.

Defense does not yet have enough evidence to determine if Duane was the cause in fact of this accident.

### Damages

#### Property:

Plaintiffs will try to recover for the totaled Ford, the Palm device, and miscellaneous property losses. The car's value is probably blue book, but may be the highest market value between the accident and the trial (or replacement of the vehicle). There may not be rental car costs and annoyance compensation with Mr. Platte paralyzed.

#### Compensatory--Mrs. Platte, age 40:

There is no survival suit, because her death was instantaneous.

There could be a wrongful death suit on behalf of both her husband and children, who are in a close legal and emotional relationship. Her own parents, if she were close to them or supported them, might also have a claim. To check: how broad is wrongful death in this jurisdiction?

\$45,000 funeral expenses (*Argue that being buried in the Himalayas is unreasonable; pay for normal cremation.*)

loss of wages to the household; \$325,000 a year plus bonuses and raises for 25 years (*Deduct her living expenses, and bad habits; argue that she would have not kept that salary, as she had only two more years on the contract; try to cut off when the kids are 18 or out of college.*)

loss of consortium for spouse with 40+ year life expectancy  
(*Was her health poor? Were marital relations poor so no real loss?*)

loss of society for children (*Was she a terrible mother?*)

lost services to household; i.e. driving, cooking, homework  
(*What did she do?*)

Compensatory--Mr. Platte, age 38:

Children can sue for loss of society of their father; no more playing, coaching, etc.

Specials: (*Get expert to estimate these low.*)

To check: how narrowly are economic damages defined in this jurisdiction?

medical expenses, now and forever related to injury

medications

rehabilitation and therapy

wheelchair, other equipment, home/vehicle modifications

loss of wages at \$55,000 a year for 27 years, including raises  
(*What was his previous health and life expectancy?*)

loss of income or pay raise from book (*He can still publish;  
a book like that will not sell anyway.*)

replace services; child care, housekeeping, chauffeuring

full-time care-giver

Generals:

physical pain and suffering (*How much pain if he is paralyzed? Not allowed while unconscious after accident.*)

mental distress and anguish over accident; worry (*too nebulous*)

suffering of being disabled

hedonic losses; no more teaching, writing, being active, hugging children, sex (*To check: does this jurisdiction allow hedonic losses?*)

shortened lifespan (*expert testimony otherwise*)

Defense should try to avoid per diem calculations, as damages will come out higher. Plaintiffs will not be allowed to make a Golden Rule argument that the jury should put themselves in these very sympathetic plaintiffs' position. Defense can expect the ratio of generals to specials to be slightly under 1 to 1.

### Compensatory--Paula, age 9:

#### Specials:

medical expenses, including 6 months in hospital

medications

impaired earning capacity for 40 years; no choice to play professional soccer or other active professions (*Argue that earning capacity is higher in intellectual fields and sports is a short career.*)

financial loss of not getting soccer scholarship (*Argue she's not that good; and her chances are remote.*)

therapy for legs (*Argue that she would have needed this with previous injury; however, court will probably make defense take victim as it finds her.*)

prosthetic devices; i.e. special shoes

life without spleen; compromised immune system (*Expert testimony that many people are fine without spleens*)

#### Generals:

physical pain and suffering

emotional distress from injury and six months in bed

hedonic loss of soccer and other physical activities (*Try to minimize; statistically most girls stop being active after puberty.*)

being disabled with a leg one inch shorter (*Expert testimony that leg would have shortened with previous injury*)

#### Compensatory--Peter, age 2:

There are no special damages, as no injury. General damages are the emotional trauma of being in the accident; pain and suffering plus psychological treatment. Plaintiffs will argue that his speechlessness was a state of withdrawal due to trauma. Defense can argue that most two year olds don't talk to strangers, and that he was eating Cheerios and not upset.

### Punitive:

If Duane was reckless, there may be punitive damages, though these are rare. Also, the jury may be sympathetic if Duane was injured. (To check: why was Duane numb?) Although insurance probably would not have to pay punitive damages, depending on the jurisdiction, they might be part of the defense's settlement discussion; i.e. waiving punitives in exchange for a settlement.

### ACME Insurance

#### Denying coverage:

ACME can refuse to cover on the grounds that Duane was not insured as a driver. Refusing to cover for an intentional tort is unlikely.

#### Duty to defend:

However, if an argument can be made without laughing that this accident falls under the policy, ACME has a legal duty to defend, or face a second lawsuit from Duane.

Unless it settles, ACME has the costs of the lawsuit in addition to the policy, an expensive lawsuit with expert witnesses.

#### Duty to indemnify:

If the plaintiffs win the suit, ACME will have to indemnify up to the policy limit.

#### Duty to settle:

ACME has a duty to settle in good faith with Duane's best interests in mind, as if there were no policy limit. The value of this case is the total damages (which are astronomically high in light of the wrongful death suit and Mr. Platte's lifelong quadriplegia), times the chances of winning the suit, plus the costs of the suit with all the expert witnesses. (To check: is there a damages cap in this jurisdiction? Is there tort reform to force disclosure of collateral sources in this jurisdiction? That would help the defense.) The value of this case is likely to be considerably higher than the policy limit.

If ACME refuses to settle, and the plaintiffs win, Duane will probably assign his cause of action to the plaintiffs, which will then sue ACME for not settling reasonably. This could crack open the policy, making ACME liable for the entire award.

1996 words

To: Senior Attorney

From: Brilliant but Underpaid Associate

Date: December 17, 2002

RE: Memo on Acme Insurance

### Negligence

The Plattes will argue that Duane was negligent because he had a duty to the Plattes to use a standard of care, that he breached the standard, that his breach was the cause-in-fact of the Plattes' injuries, that he was the proximate cause of their injuries, and that they suffered damages because of Duane's breach of this standard. They will alternately argue that because Duane violated several motor vehicle statutes, he was negligent per se. They must prove by a preponderance of the evidence (over 51%) that Duane met each of these elements to succeed on their claim.

### The Plattes' Arguments

The standard of care in negligence cases is a "reasonable person under the circumstances." Because Duane is a minor, he will be held to the child standard of care that generally allows "kids to be kids," in normal child activities. However, a minor who operates a motor vehicle will be held to a different, higher standard. Depending on our jurisdiction's precedent, the court may hold Duane to the standard of a child doing an adult activity (driving a car), and hold him to the adult standard of care. Alternately, the court may consider Duane's driving an "inherently dangerous" activity, and hold him to the adult standard. In either case, the Plattes will argue that the adult "reasonable person" is "the man who takes his magazines at home and mows the lawn in his shirtsleeves." The Plattes will argue that this reasonable person would have a valid driver's license attesting to his skills and knowledge of motor vehicle laws. This reasonable person would drive in his own lane, would listen to music at a level that is not distracting, and would not drink while driving. This reasonable person would also use extra caution while driving at night because of the reduction in visibility and depth perception after dark.

The Plattes will argue that Duane breached this standard by driving without the necessary skills, and by driving with a portion of his truck in the oncoming traffic lane. They will further argue that Duane breached the standard of care by blasting his stereo and drinking while driving.

### Our Counterarguments

Because the reasonable person standard can include a person's special skill, we should challenge the Plattes' definition of the standard if further research on Duane supports a challenge. Most of Acme's insured in this region are farmers, and the children on the farms start driving when they are eight or nine years old. They operate huge combines, which are very loud, so they have great skill with large motor vehicles and are quite used to concentrating despite deafening noise from the machines. Additionally, for fun, most of the farm kids play video games, giving them great hand-eye coordination and split-second reaction reflexes. If Duane fits this mold, we can argue that like the cement truck driver in the *Cervelli v. Graves* case that our DU intern was discussing this morning, Duane has special skills that make his driving behaviors not negligent.

We will also want to introduce evidence that Duane was not legally drunk nor was he even driving with ability impaired, if the lab results support this. Despite Duane's claims he had only three sips of his first beer before the accident, we will need these test results to minimize jury prejudice against Duane because he had beer in the truck.

To argue against the Plattes' claim of breach of duty, we will need more details on the way Mrs. Platte was driving immediately before the accident. Additionally, we should look into what was going on in the Plattes' car in the moments preceding the accident (2 year old screaming, 9 year old whining, Mrs. Platte reaching back to give Peter his Cheerios, etc.) If our jurisdiction uses a contributory negligence law, if we can show that Mrs. Platte was at fault in any way, Duane is off the hook entirely. If our jurisdiction uses a comparative negligence law, we will try to prove what percentage of the accident Mrs. Platte was responsible for and then reduce the total damage award to the Plattes by that percentage.

### Negligence Per Se

The Plattes will argue that a violation of state statute alternately proves that Duane breached the standard of care. If Duane violated a motor vehicle statute, the Plattes will use this violation to substitute for the standard of care and breach in the elements of their negligence claim. The Plattes will try to prove that the conduct required in the statute is clear. They will argue that they are in the class of people the statute was designed to protect (other motorists), and that the type of harm they suffered (an accident) was the type of harm the statute was designed to protect from. Finally, they will argue that the violation of the statute is the specific behavior that caused their injuries.

## Our Counterarguments

Our best argument against this argument will be that the statute was not designed specifically to protect from the type of harm that the Plattes suffered. If we can find legislative history indicating that the statutes were enacted for reasons other than to protect against accidents, we may be able to defeat this argument.

## Cause-in-Fact

The Plattes will argue that but-for Duane's driving behavior, they would not have been injured. Unless evidence comes in to the contrary, this point does not look contestable.

## Damages

### Survival Action

Because Mrs. Platte died instantly in the crash, her family will not be able to bring a survival action on her behalf.

### Wrongful Death

Mr. Platte and his children will bring a wrongful death claim for Mrs. Platte's death. This claim will involve special or economic damages. These "specials" will include the cost of Mrs. Platte's cremation and the ceremony on K-2, and any future lost wages that Mrs. Platte would have brought home. The Plattes will argue that because Mrs. Platte was only 40 years old and had 25 years until retirement, she would earn a minimum of \$8,125,000 over the next 25 years, exclusive of inflation or future wage increases, which the Plattes will argue were all but guaranteed by Mrs. Platte's employer. Future lost wages are adjusted to account for what Mrs. Platte would have actually brought home, so after taxes (assume 38%), it will likely be slightly more than \$5 million. That figure will be further reduced to account for the amount that Mrs. Platte would spend on personal expenses (probably about \$75,000 per year or \$1,875,000, reducing the "future lost wages" calculation to approximately \$3.2 million.)

Mr. Platte and his children will also claim general damages, to account for the loss of their relationship with Mrs. Platte and their pain and suffering. Mr. Platte will claim pain and suffering (sadness at loss of his wife) and hedonic loss, that may include loss of society (loss of the relationship), and loss of consortium (a separate loss of society claim that may include the loss of his sexual relationship with Mrs. Platte, depending on our jurisdiction.) Paula and Peter will bring claims of pain and suffering for the loss of their mother and hedonic loss, including loss of society. Their claim on loss of society will include damages for the loss of her guidance, love, support and teaching over their lifetimes.

### Mr. Platte's Injuries

Mr. Platte will have special damage claims for his past medical bills, future medical bills, the cost of a nurse to help him, and the cost of a nanny to help him raise his children. He will also have special damage claims for his future lost wages. At 38, Mr. Platte had approximately 25 years until retirement. In his tenured position, he would make \$1,485,000 pre-tax, or just under \$1 million post-tax. He will argue that his tenure, combined with the strong performance of the university and increase in charitable contributions indicate that his salary would increase well beyond this figure.

Mr. Platte will also have general damage claims for pain and suffering, disability, and hedonic loss, such as the loss of ability to coach Paula's soccer team or the loss of society from the loss of the ability to golf with his friends.

### Paula's Injuries

Paula, like her father, will have special damage claims for her past and future medical bills. She may also claim for the cost of assistance or special equipment due to her disfigurement. Further, Paula may claim that her disfigurement will preclude her from employment in a sports environment, such as a career as a professional soccer player.

Paula will have general damage claims for pain and suffering, disfigurement, and hedonic loss such as her loss of ability to play soccer and a loss of society if she can no longer participate in activities with her friends.

### Peter's Injuries

Although Peter did not suffer any physical injuries and did not incur medical expenses, he will have a claim for pain and suffering, if it is determined that he has been affected by the accident.

### Expected Structure of the Plattes' Claims

Because they stand to get a bigger judgment if they can argue their hedonic losses separately from pain and suffering, the Plattes will likely argue these as separate categories. Further, they will likely use a per diem argument to try to persuade the jury to consider their general damages on a per day amount because this type of argument tends to increase jury awards.

### Arguments to Reduce the Platte's Damages

In order to reduce the Platte's claims for future lost wages (for Mrs. Platte and Mr. Platte, and Paula if applicable), we should argue to apply the evidentiary method as

described *Kaczkowski v. Bolubasz* to evaluate the evolving pattern of the Platte's lives, such as college grades, employment history, and the employment history of a person with similar credentials to predict incremental salary increases. Then, to discount to present value and account for inflation, we should argue to use the "offset present value" method. In this method, inflation is ignored but the amount of the damages is discounted for present value. This method tends to give the smallest awards.

To reduce the general damage awards, we should present arguments to the jury against separate consideration for different types of general damages and explain how troubling these are as they tend to compensate plaintiffs twice by splitting the category up. We should further suggest a lump sum for general damages for the jury to consider against the per diem arguments the Plattes are likely to present.

### Denial of Coverage

Acme has a duty to defend Duane for any claim that could result in liability for *covered damages*, regardless of whether or not Acme believes that Duane is actually liable for the accident. You mentioned in your e-mail that Acme insures the vehicle that Duane was driving, but we have specifically advised Acme to exclude coverage for underage drivers on all of their policies. Because it is unlikely that Duane is a covered driver under Acme's policy on the truck Duane was driving, Acme may *not* have a duty to defend Duane against the Plattes' claims.

Acme also has a duty to settle claims that are arguably within the policy's limits. Because Acme has followed our firm's recommendations, we know that Acme's maximum coverage for personal injury on auto policies is \$100,000 per person per accident and \$300,000 per accident. Further, Acme's maximum coverage for property is \$100,000 on auto policies. If we find that Duane *is* a covered driver under the policy, we have a duty to settle for any amount that is arguably within these limits.

If Duane is covered under the Acme policy, Acme will have a duty to defend Duane against the Plattes' suit, regardless of whether or not he was negligent. However, if Duane is found to be negligent, Acme has grounds to deny coverage and will not have to pay any judgment against Duane.

Word Count of the above: 1,998