

MID-YEAR EXAMINATION

TORTS

PROFESSOR RUSSELL

INSTRUCTIONS:

1. **DEADLINE:** This is a three-hour examination. You may begin the exam at any time between 4 pm and 7 pm on 11 December 2003. The exam is due within three hours after you begin. If you start the exam at or after 7 pm, then the exam is due at 10 pm. This means, for example, that if you wait until 8 pm to start the exam, then you will have only two hours to complete it. In no cases are you permitted to turn the answers to your exam in after 10 pm. **If you take more than three hours to complete the exam or if you return the exam after 10 pm, you get zero points for the exam. NO EXCUSES.**
2. **TURNING IN YOUR ANSWER:** You may turn in your answer by following the instructions provided to you when you picked up the exam.
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 AND PAGE NUMBERS:** 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. Please also put page numbers 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 2,500 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 answer. 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 your first semester of law school.

“Left and Rights”

Several years ago, Professor Thomas visited the Republic of Trinidad in order to teach at the University of the West Indies. While there, Professor Thomas made a series of friends, several of whom he invited to visit him in the United States.

One such Trinidadian friend, Deopersad, came to visit the professor a few months after his return to the United States. Professor Thomas lives in the capital city of the state of Newstate, which recently joined the U.S.A. as the 51st state. As Professor Thomas was still a bit resentful about the poor accommodations and lack of local transportation provided to him when he had visited Trinidad, he resolved to model for his friend Deopersad the way that Americans provide hospitality to their foreign visitors. Professor Russell gave Deopersad a nice room in his own house. The room was equipped with Cable TV, a clock radio, air-conditioning, an Internet connection, a closet with hangers, a bed with cotton sheets, a pillow, and a roof that did not leak.

Professor Thomas also provided Deopersad with his Honda Civic to drive. The car was a small one, as is typical of the cars in Trinidad. The car was in perfect working condition, and Professor Thomas had a \$300,000 liability policy for the car, with an additional \$300,000 first-party coverage. He also had a \$2 million dollar umbrella policy as part of his homeowner's insurance.

Trinidad, a former colony of Great Britain, gained its independence in 1962. There are many lingering vestiges of colonial rule, and among them is driving on the left rather than the right side of the road. In Britain, one drives on the left side of the road rather than on the right, as Americans do. The driver's seat and steering wheel in British and Trinidadian cars are therefore on the right side of the car and not on the left side, as they are in the U.S.A.

Deopersad was very happy to have a car to drive, as he was used to being mobile in his home country. On the first evening of his arrival, he decided to go out for a drive in order to take a look at the city in which Professor Thomas lived. He hopped into the car, backed out of the garage, drove down the alley, and turned left on Elm St. At the first stop sign, he called his wife, Savitri, who was back in Trinidad with their two children, Catherine, a six-year-old girl and McDonald, a nine-year-old boy. Savitri answered on the first ring, and he told her that he had arrived safely in the United States and that he was enjoying driving Professor Thomas's Honda.

"The roads are very nice," Deopersad said. These were the last words that Savitri heard from her husband before he died. She heard a crash and a thud, and then the phone went dead.

Investigators have learned a number of things about the crash. The crash took place on Elm Street's blind left-hand curve, one that was adequately marked by three signs that said "Blind Curve," "Slow," and "Danger." The roadway curved to the left at a nearly 90 degree right angle, and when approaching the curve from either direction it was not possible to see through the curve to determine whether there was oncoming traffic. There was a huge boulder that blocked the view.

The investigators are entirely certain that Deopersad was on the left side of the road, that is, the wrong side of the road. They also know that he was talking on his cell phone.

Deopersad crashed into a car that was coming from the other direction around the curve. The other car, driven by Edward Badluck, was in the proper lane, that is, the right-hand lane. There is no evidence that Badluck was speeding. The investigators have determined, though, the Badluck did not have his headlights on.

Oddly, the exact time of the crash is in doubt. The investigators have determined with certainty that the crash took place between 5:45 pm and 6:05 pm. Although Deopersad was talking on the cell phone at the time of the crash, the Telephone Service of Trinidad (TST) records are accurate only within 15 minutes, due to software problems. That is, while the record of the call indicates that it took place at 5:55 pm, this means only that the call took place sometime between 5:40 and 6:10 pm. Using evidence from Edward's vehicle, the investigators have narrowed the time down to the twenty minute range from 5:45 pm to 6:05 pm.

The exact timing of the crash may be relevant because Newstate has a statute that requires drivers of automobiles to use their headlights after the sun has set. Sunset on the day of the crash was at 5:55 pm.

Remarkably, Badluck walked away from the crash with no physical injuries. His car was a sweet 1976 Barracuda—a classic, American muscle car. The car, which had a Blue Book value of \$18,000, was a total loss. Repairing the car would cost at least \$30,000.

The damage done by the crash was not limited to Deopersad and to Badluck's Barracuda. After the Honda that Deopersad was driving crashed into Badluck's Barracuda, the Honda skidded and then rolled into the right hand lane (the lane in which Deopersad ought to have been driving.) The car continued to move through the curve on its roof, skidded over the curve, and then thudded to a stop against a wall that ran along the sidewalk that bordered Elm Street along the curve.

Ms. Crush—an unfortunate name—had the misfortune to have been walking her poodle along the Elm St. Curve at the exact moment of the crash. The rolling Honda pinned her to the wall, damaging one organ—her Tobago organ.

The discovery of the Tobago organ was the medical research highlight of the year in which the crash took place. The research establishing the discovery of the Tobago organ was published just six months before the crash. Before that time, doctors did not know of the existence of this organ.

The publication establishing the existence of the organ also detailed the treatment procedure for damage to the Tobago organ. Typically, damage to the Tobago organ was fatal. In the best of circumstances, 60 percent of persons with injured Tobago organs die. More often, 80 percent of people with Tobago injuries die. The discoverers of the Tobago organ published a treatment protocol involving the administration of the drug Roti, which when administered within three hours of the injury, pushed the survival rate of those with injured Tobagos from 20 to 40 percent.

The doctor who treated Ms. Crush had not read of the Roti treatment for injured Tobagos and, consequently, did not administer the Roti treatment. The cost of her unsuccessful emergency medical treatment was \$20,000.

Deopersad worked as a prison guard back in Trinidad. The job, which was quite well-paying for Trinidad, paid the equivalent of \$16,000 per year. He was 30 years old when he died. His wife, Savitri, did not work outside their home.

You represent Professor Thomas (not his insurance company). Professor Thomas would like a candid assessment of the liability that he (or his insurance company) might face as a consequence of the injury caused after he lent Deopersad his car. As well, Professor Thomas would like your advice concerning any issues that might put him at odds with his insurance company. Another lawyer will be

handling the Duty and Proximate Cause issues connected with this case. As well, that same lawyer will explore in detail the comparative fault issues, if any, that emerge. If you encounter any issue that will require detailed exploration of Newstate's comparative fault statute, please indicate this, and suggest, as best you can, the general outline of the comparative issue. Also, ignore the city, which maintains the road and road signs, as a possible defendant.

You have 2,500 words to use for your advice to Professor Thomas.

Student Sample Answers from Fall 2003 Torts class (Russell).

All are high-scoring answers. The final answer is an example of a quite complete analysis that is a bit slim in its detail.

Scores and grades were distributed as follows:

>125	A	(5)
115-124	A-	(7)
106-114	B+	(7)
97-105	B	(13)
91-96	B-	(8)
85-90	C+	(6)
77-84	C	(6)
<76	C-	(4)

The mean score was 99.6. The highest score was roughly 30 points lower than the maximum that might be obtained. The median grade was B and the mean was 2.9.

From: Student Associate
To: Professor Thomas
Subj: Car Accident Analysis
Date: 12/11/03

The following report documents my analysis of the potential liability concerns you have as a result of Deopersad's accident. As a reminder, duty, proximate cause, detailed comparative fault discussions and the City's possible role are being handled in a separate memo.

FACTS

The pertinent facts are covered in the police report and hospital records.

DISCUSSION

Vicarious Liability

The owner of the Honda Civic (Professor Thomas) is probably the primary defendant in this case due to vicarious liability. Unfortunately, the owner can be held liable for injuries caused by someone else driving the owner's vehicle. The rule will vary by jurisdiction, but most State statutes will hold the vehicle owner liable if:

- a) There was death or injury to person or property
- b) The harm is the result of the operator's negligence
- c) The negligence arose from the use / operation of the vehicle
- d) The operator was using the car with the owner's permission.

Since you authorized Deopersad to use the Honda, and the facts indicate that Deopersad may have been driving on the wrong side of the road, this statute most likely applies to you as the owner.

In addition, your insurance coverage, and Desperado's minimal assets (all of which remain in Trinidad) mean that you have the "deep pockets" that any and all plaintiff's attorneys will pursue; even though your friend was mainly at fault, there is no financial incentive for bringing suit against his estate. Since the operator's conduct is embedded in the statute, your liability will hinge upon the degree to which Deopersad was negligent.

Insurance Implications

Your policy coverage includes \$300,000 first-party, \$300,000 liability and \$2 million umbrella homeowner's policy. The first-party insurance can be used to cover the medical expenses for anyone in the accident (Deopersad, Mrs. Crush, and Edward), and the damage to your Honda. The liability insurance will be applied to any suits brought vicariously against you, and then your homeowner's policy will be utilized against those claims as well.

To thoroughly understand your insurance coverage, a complete review of the policy provisions is required. Your insurance provider should retain an independent counsel to avoid any conflicts of interest generated by defending you, and minimizing their obligations.

As long as this type of accident was within the terms of your policy, the insurance company has a duty to defend you. If during the dispute

phase, any plaintiffs make offers to settle which are below your policy limits, the insurance provider has a good faith duty to review those offers and settle if the terms are reasonable. Lastly, at the end of the case, your provider has a duty to pay (indemnify) any judgments against you. If the company reneges on its obligation, a second suit can be brought by the plaintiff and yourself to compel the insurer to pay.

Comparative Negligence

Although this will be addressed in greater detail in a separate memorandum, the nature of this accident requires a cursory review of the implications of comparative fault. Deopersad was not the sole actor who may have committed negligence here. There is a question about the time of the accident's proximity to sunset, and Newstate's statute which requires the use of headlights after sunset. If it can be proven that the accident occurred after sunset, then Mr. Badluck's decision to drive without headlights may also be negligence per se.

While Mrs. Crush's sole injury was a result of the car accident, the hospital and doctor's who treated her may also be at fault for failing to treat her with the reasonable standard of care expected in a hospital in the capital city. (More on this time/space permitting)

Lastly, any potential claims that Deopersad's family may bring against you, would be balanced by the role Deopersad had in his own accident.

Negligence

For the sake of clarity, the following discussion on negligence will focus on Deopersad as the hypothetical owner of the Honda, however please remember that any findings against the operator may be transferred over to you as the true owner of the vehicle.

All negligence cases involve proving by a preponderance of evidence (50% +1) the following: duty; **reasonable standard of care; a breach; a cause in fact**; a proximate cause and **damages** to the plaintiffs. The four bold text elements will be examined.

Standard of Care

When a person has a duty to act in a certain manner, common law holds that person's conduct up to the standard of the average reasonable person. This is a theoretical human who sets an objective standard of behavior which the community recognizes as the minimum level of performance.

Although Deopersad was new to the United States, the law expects him to rise up the minimum level of reasonable conduct set forth by the community. Historically, this person is described as a man “who mows the yard in his shirtsleeves, and takes the magazines at home.” Tragically, common law would have expected Deopersad to exercise greater care in learning and following the traffic laws of the United States even though he had been in the country for only one day. There is nothing in any of the facts to indicate that Deopersad had any physical disabilities which would allow his actions to be judged against other people with the same affliction.

Deopersad was 30 years old, and apparently did not suffer from any mental illness either. Therefore he is compared to other adults, and unless a purported mental condition can be traced to a physical malady (diabetes / epilepsy / chemical imbalance) defendants with mental illness are held to the same objective standard as a sane person would be held.

The facts do not indicate any signs of recklessness by Deopersad, which is a positive development, because reckless conduct potentially can void an insurance obligation, and also open the door to punitive damage awards. Since there is no evidence that Deopersad willfully disregarded the increased risk to others, this should not be an area of dispute.

Although it will be very difficult to prove, the only possible excuse that might be offered would be that Deopersad acted under the emergency excuse doctrine. An emergency excuse holds a defendant to a standard of care that is reasonable during an emergency when there is no time to reflect. Since the boulder blocked all possible view around the curve, the sudden appearance of a vehicle heading toward him, in the “non-traditional” lane in Trinidad might have induced Deopersad to swerve in the opposite direction. The spatial disorientation Deopersad may have felt would be further compounded by sitting in the “wrong” seat with the wipers and turn signals on opposite sides. While all of this speculation may be interesting, the logic opens up the question of whether Deopersad should have been driving at all on his first day here, or should he have received some instructions on operating a U.S. vehicle. Most likely, Deopersad did not meet the reasonable standard of care.

Breach

A breach of the standard of care also needs to be proven by a preponderance of the evidence. A breach may consist of either a statutory violation, which is negligence per se, a failure to adhere to industry custom,

or in the event that an injury is so readily apparent that “it speaks for itself,” the legal term of art is *res ipsa loquitur*.

A breach of industry custom involves the defendant’s actions that fall below the level found across the profession. This is not really applicable to the facts in this case. *Res ipsa loquitur* is a legal concept that may be invoked when:

- a) the type of injury was usually associated with negligence
- b) the defendant had exclusive control of whatever caused the injury
- c) the plaintiff had no causal contribution to the harm
- d) The defendant had greater access to the information about the event than the plaintiff did.

Res ipsa loquitur is not applicable for either Mr. Badluck or Mrs. Crush but for different reasons. Mr. Badluck may have contributed to the harm by driving without his headlights on. Mrs. Crush was walking her dog at the scene of the accident; therefore she knows the cause of her injury.

That leaves negligence per se as the means to prove that a breach occurred. The application of negligence per se will vary by jurisdiction. Some states view it as “some evidence” that can be shown to the jury, while other states treat the violation of a statute as “prima facie” evidence of both the duty and a breach. A prudent lawyer will bring parallel claims of

negligence per se and ordinary negligence so that the breach can be proven regardless of how the statutory violation is treated. (This concept is analogous to wearing suspenders and a belt.)

In order to prove negligence per se, the plaintiffs must prove that they belong to a class of people intended to be protected by the statute; the intent of the statute is to prevent the harm associated with this accident; the defendant violated the statute; and the statute was enacted to regulate the conduct of members of the defendant's class.

Barring the emergency excuse, Deopersad's actions are subject to this test. Other motorists and pedestrians are part of a class protected by motor vehicle statutes, and U.S. traffic laws are enacted to prevent automobile accidents. Since the police have determined that Deopersad was driving on the incorrect side of the street, and he was operating the vehicle, Deopersad violated the statute and falls within the class of people regulated by the statute. More research is needed to determine if Newstate has a statute which prohibits talking on a phone while driving, or mandates the use of a headset. Thus, there is most likely a preponderance of evidence that Deopersad breached his obligation to exercise a reasonable standard of care.

Cause-in-Fact

Despite proving that a defendant failed to meet the reasonable standard of care, the law requires a causal connection between the defendant's conduct and the injury, known as a cause-in-fact. Elements of a cause-in-fact are referred to as the "but for" test, concert of action test, and multiple sufficient causes test.

A concert of action does not apply in this case, because no one encouraged or incited Deopersad to drive the car, let alone on the wrong side of the road.

Multiple sufficient causes occur where two actors commit a negligent act on the same plaintiff, and either act, as a stand-alone tort, would have injured the plaintiff. Although Badluck was driving without his headlights it is doubtful that this act can be viewed as an independent and sufficient cause for the accident. Therefore Badluck's driving without headlights is not a substantial factor in this accident.

The "but for" is generally the gold standard application of a cause-in-fact. The test is to remove the particular defendant's action from the chain of events, and see whether the injury would still occur. If the injury would not have happened in the absence of the defendant's conduct, then the cause-in-fact component is satisfied.

On Elm Street that evening, “but for” Deopersad driving on the incorrect side of the street, Badluck’s care would not have been damaged, and Mrs. Crush would not have been hit by the sliding vehicle after the impact.

Damages

The final component of a negligence suit is damages. These need to be examined on a case-by-case basis for each party.

Deopersad: (no Survival Statute)

Assuming he died instantly, Deopersad cannot bring action under a survival statute since he had no current litigation at the time of his death. If he did not suffer, then there is no cause of action on behalf of his estate. His family will be able to bring a wrongful death suit against the owner of the vehicle though.

Savitri & Children (Wrongful Death)

Special damages (economic/pecuniary) Can claim lost wages and any possible increase in earnings capacity if he was in the U.S. working with a professor to improve his job skills and funeral expenses. Replacement services for any jobs done around the house.

General damages (non-economic/pecuniary) can claim a loss of consortium for spousal affection & sexual relations; children can also claim the loss of the parental relationship and support/mentoring.

Badluck

Special damages – the lesser of the fair market value and repair costs of the car.

Mrs. Crush

Specials – medical expenses, lost wages or earnings capacity

Generals – pain and suffering and fear/terror as the car slid toward her and crushed her against the wall, until she blacked out.

Against the Doctors/Hospital, Mrs. Crush can also sue for the “lost chance of recovery.” Depending on the outcome of her injuries, the hospital in the capital city should have known of the new treatment, and be held to a national standard or a modified locality standard as to the level of care given by its physicians.

In summary, depending on how the comparative fault aspects pan out for Mr. Badluck’s use of headlights, and Deopersad family suing for damages in spite of his actions, Professor Thomas’s insurance company will need to

investigate ways to divert the blame for this accident away from the operator and toward the other driver and the hospital.

MEMORANDUM

Privileged Attorney Work Product

To: Senior Partner

From: Associate

Date: December 11, 2003

Re: The Trinidad Problem

Vicarious Liability: Most states hold vehicle owners liable for other drivers. Although it may slightly differ according to jurisdiction, most jurisdictions have enacted four requirements that the injured person must prove for Professor Thomas to be held fiscally liable for Deopersad's accident. The injured parties must demonstrate: 1) Death/injury to person/property, 2) Harm is a result of the operator's negligence 3) Negligence arose from the use or operation of the vehicle and 4) the operator was using the vehicle with the owner's permission. All four requirements have been satisfied so that Professor Thomas's car and homeowner's insurance have a duty to defend the three possible suits against Professor Thomas. Savaitri, Ms. Crush and Badluck ("Plaintiffs") will likely bring suits against Professor Thomas. Each plaintiff will have varying damage assessments and varying degrees of comparative fault (or contributory negligence depending upon the jurisdiction)¹ however each Plaintiff must first prove negligence.

Negligence

Under tort common law, Deopersad had a duty to Badluck and Ms. Crush to exercise a standard of care consistent with that of the reasonably prudent person. The Plaintiffs must demonstrate that Deopersad breached the reasonable person standard of care. The Plaintiffs must also demonstrate that the injuries were the cause in fact and the proximate cause of the breach, resulting in the suffered damages. The Plaintiffs must prove all six of these elements, by a preponderance of the evidence (51%), to establish Deopersad's negligence.

¹ Counter arguments that are in favor of Professor Thomas are in (parentheses).

Standard of Care

Reasonable Person Standard: Deopersad breached the objective standard of care of the reasonable person by driving on the wrong side of the road and talking on his cell phone while driving. (Badluck may also have breached the reasonable person standard by not having his headlights on while driving at dusk).

Breach

Negligence per se (“NPS”): In addition to breaching the ordinary standard of care, Deopersad also violated two possible statutes. By driving on the wrong side of the road, Deopersad violated a statute. In addition, depending upon the jurisdiction, Deopersad may have also violated a state statute when talking on his cell phone while driving. By demonstrating NPS, depending on the jurisdiction, the Plaintiffs will have either “some” evidence of negligence, be allowed to go to the jury, or in true NPS jurisdictions, establish duty, breach and standard of care. (Badluck may have also breached the standard of care via NPS by driving with his lights off, depending upon the exact time of the accident).

In order to demonstrate NPS, the Plaintiffs will have to prove by a preponderance of the evidence that Deopersad violated at least one statute. Depending upon the jurisdiction, unexcused statutory violations usually require 1) that the violation is the cause of the injury, 2) the Plaintiffs are members of the class the statute was enacted to protect, and 3) that the statute was enacted to prevent the type of harm caused. In addition, if the Newstate’s NPS statute has wording referring to behaving reasonably, the reasonable person standard would apply instead of negligence per se.

Cause in Fact

But for Causation: The golden standard, but for causation is the strongest argument when proving cause in fact. Although there are numerous other possible standards for cause in fact it is not necessary to evaluate the alternatives because Professor Thomas's two insurance policies should be sufficient to cover the damages and "but for" causation is the best argument. Moreover, Badluck's negligence is going to be difficult to prove due to the uncertainty of the time of the accident. Further, Badluck has no assets because he spent all of his money restoring his car and picking up girls on the strip.

The most obvious "but for" is "but for" Deopersad driving on the wrong side of the road none of the subsequent injuries to any of the Plaintiffs would have occurred. (Argue that "but for" Badluck driving without his lights there have been no accident).

Multiple Sufficient Causes (Significant Factor)

If Badluck meets the negligence requirements, the cause in fact standard could change to multiple sufficient causes (significant factor) since either Deopersad or Badluck could have caused the harm.

Lost Chance of Opportunity

In addition, Ms. Crush's estate would argue a lost chance of opportunity. (Most likely, the treating doctor will be held liable for Ms. Crush's reduced chance of survival if the Doctor is found negligent of malpractice). Depending upon the jurisdiction, Ms. Crush's estate may or may not have to prove that she was deprived of 51% opportunity to survive. In the absence of malpractice, Ms. Crush would have had a 20% greater chance of survival. The most common jurisdictional approach is to allow Ms. Crush to recover

20% of the value of her life. However, there are some jurisdictions that will not allow any recovery since Ms. Crush was deprived of less than 51% survival rate.

Ms. Crush's Doctor's Negligence

Standard of Care: Professional Standard

Professor Thomas's deep pockets (insurance policies) may indemnify for 80% of Ms. Crush's damages. (Ms. Crush's Doctor ("Doc") may be held liable for 20% of the value of Ms. Crush's life if the jury finds that Doc has breached the professional standard of care). When evaluating the professional standard of care for a doctor, the jury looks to the custom of similar practicing doctors. Depending upon the jurisdiction, the doctor may be compared to similar doctors in his locality, or he may be compared to the national custom of care for similar doctors. If Doc is held to a national standard, he will most likely be found negligent of malpractice for neglecting to administer Roti. However, if Doc is held to the standard of local doctors, he may not be held to such a new treatment, which may not be readily available locally. Doc will defend his interest by calling expert witnesses. Specifically, Doc will call doctors who testify that it is not yet the custom to administer Roti and that Roti is a new treatment still in experimental stages, thus not yet a customary treatment for damage to Tobago organs.

Damages

Deopersad Family's Damages

Wrongful death suit filed by Deopersad's Wife and Children ("Savitri")

1. Compensatory: Savitri will argue for the following damages (Although in a contributory negligence jurisdiction she will not receive anything if Deopersad is found to have had any negligence in the accident. In a comparative fault jurisdiction, Savitri may be able to recover the percentage of damages that Deopersad is not responsible for causing. However, the specifics vary by jurisdiction and will have to be researched by the new guy).

a. Specials (economic or pecuniary damages):

- i. Medical bills: If Deopersad brought to emergency room.
- ii. Transportation: Including ambulance and shipping Deopersad's body back to the West Indies for burial.
- iii. Incidentals such as airfare for Deopersad's family to retrieve the body and personal belongings.
- iv. Burial costs
- v. Deopersad's lost wages: approximately \$880,000 considering people in Trinidad work until they are at least 85 years old. (Will be discounted using present value calculation, if the concept of interest even exists in Trinidad).
- vi. Men in Trinidad do not do any chores around the house so Savitri will not be able to recover any \$ for loss of services.

b. Generals

- i. No pain and suffering for Wrongful death (although jurisdiction specific)
- ii. No damages for grief
- iii. Loss of consortium, loss of society and companionship (again, depending upon what the jurisdiction allows)
- iv. Destruction of Parent – Child Relationship for Catherine and McDonald who will have to grow up fatherless.

Ms. Crush's Damages

Survival action on behalf of Ms. Crush

Ms. Crush's estate will most likely continue her malpractice action for lost opportunity, and her survival action to recover for Ms. Crush's pain and suffering.

1. Compensatory Damages

a. Specials

- i. Medical bills incurred due to the accident and ambulance bills.
- ii. Lost of services: Walking the dog everyday. Will have to hire a dog walker and dog sitter.
- iii. No evidence of employment for any lost wage recovery.
- iv. Funeral costs

b. Generals

- i. Pain and suffering: Value for the pain and suffering Ms. Crush suffered upon impact until she finally died at the hands of Doc.

- ii. Most jurisdictions do not allow for loss of consortium, depends
Newstate's survival statute.

Badluck's Damages

1. Compensatory

a. Specials

- i. Ambulance ride to the hospital
- ii. Hospital bill giving Badluck a good bill of health.

- 2. Property Damages: Badluck will only be able to recover the Fair Market Value, 18K, for his beautiful Barracuda. Badluck will not be awarded the cost to fix his car because it exceeds the blue book value. (Hey, at least he has his health!).

Punitive Damages: No punitive damages will be awarded to any of those injured.

Punitive damages are only awarded for gross negligence and depending upon the jurisdiction intentional and reckless disregard. However, if any of the Plaintiffs plead intentional or reckless disregard the insurance will not cover the damages. Therefore, the Plaintiffs will stick to pleading "accident" in the various complaints.

Insurance

- 1. Professor Thomas's Liability Insurance

- a. Duty to Defend: There is no proof of intentional torts, therefore, both of Professor Thomas's insurance companies will be required to defend any suits arising out of the Trinidad problem. This duty is very broad so that if there is any chance that the claim may be within the policy the insurer has a duty to defend.
- b. Duty to Settle: The two insurance companies have a duty to settle for the policy limits otherwise the insurers could be held liable for any judgments against Professor Thomas that exceed the policy limits. I recommend being very careful with this aspect since the Plaintiffs may send settlement letters that will definitely get lost between the bureaucracy of not one, but two insurance companies! If either of the insurance companies does not settle, and judgments are entered against Professor Thomas above the policy limits, Professor Thomas may assign his right to the Plaintiffs to sue the insurers.
- c. Duty to Indemnify: Professor Thomas's insurance companies have a duty to pay any damages entered against Professor Thomas that are within the policy and the policy limits. However, invariably the two insurance companies will attempt to flip the liability on the other, each claiming they are not the primary carrier. Professor Thomas will have to look at both policies, and related Newstate statutes to see if both insurers are liable under vicarious liability and which carrier is primary. The auto insurer will most likely be liable, however, the homeowner's insurance may not cover a non-family member driving Professor Thomas's vehicle.

Apportioning Damages: Although the new guy is working on contributory negligence, some of the issues he will need to research are:

1. Contributory negligence jurisdiction v. Comparative fault jurisdiction. Determining which doctrine applies in Newstate will be very important in all aspects of the case since Deopersad will most likely be found responsible for a large portion of the damages that Savitri is seeking.
2. Joint and several liability jurisdiction v. several liability jurisdiction. If Badluck is found to also be negligent by breaching the standard or NPS, Newstate's statutes regarding joint and several liability will be very important. If Newstate is a joint and several liability jurisdiction, full liability can be placed upon either Professor Thomas or Badluck (even if Badluck was just a small contributor to the accident). If Newstate is a several liability jurisdiction, the liability will be distributed according to each party's liability.

Word Count: 1936

To : Professor Thomas

Re: Liability potentials – Deopersad’s accident

Scope: Examination of your Vicarious Liability for this accident; the Standard of Care and Breach of Duty of Deopersad (D) ; and potential damages from Badluck (B), Ms. Crush’s (C) survivors and Deopersad’s survivors. Also an analysis of insurance coverage issues. Duty and Proximate Cause will not be covered in this memo.

I. Vicarious Liability of Professor Thomas

Automobile owners are vicariously liable for injuries and property damage caused by the express or implied permissive use of their automobile if: the use resulted in an injury; the harm was the result of negligence; the negligence was from the operation of the automobile. Since D was using the Honda with your express permission and the Honda was involved in an accident which resulted in the loss of B’s property and the death of C and D, two of the criteria are met. Negligence on the part of D will have to be proved, but if it is, you will be liable for damages from the injuries caused by D.

II. Injuries to B and C

A. Standard of Care of D to B and C

1. The Duty of D will be analyzed by another partner, so this memo starts with the standard of care expected of D. Although D was used to driving on the “wrong” side of the road, the standard of care used under the law is that of a reasonable person. A reasonable person would not be driving on the wrong side of the road.

2. Since driving on the wrong side is also against traffic statutes, D's actions may constitute negligence per se. Negligence per se requires proof that D violated a statute, that the statute was designed to prevent the kind of injuries suffered; that it was designed to protect the class of persons who were injured. Driving on the right side of the road was designed so that all persons on or near the road would know where to expect the automobile to be. It was designed to prevent head-on collisions such as occurred in this case. B is definitely a person who was expected to be protected by such a law.

Negligence per se is not automatically proof of lack of standard of care and breach of duty. It depends on the jurisdiction and since this is a new state, the level of evidence must be researched further. The defenses against negligence per se are emergency, impossibility and incapacity. These defenses do not seem to apply. The parties to any suit may also bring up the use of the cell phone, which would have distracted D, but that is minor in comparison to his driving on the wrong side.

B. Breach of Duty by D to B

Since we probably have negligence per se, B can claim a breach of duty by D. B may be held comparatively liable for the accident since he was driving without his headlights on. This would have provided D with some forewarning of oncoming traffic. Unfortunately since we do not know the timing of the accident, we will have trouble proving negligence per se on B's part. If the accident occurred after 5:55, then B was violating a traffic law by not having his lights on. We can still argue that it was close enough, if not past time for his lights to be on, therefore he was comparatively negligent.

C. Breach of Duty by D to C

Negligence per se is not as strong an argument for C's survivors. While the purpose of the traffic law was to prevent accidents, it was not specifically designed to persons walking on a sidewalk. They can still claim negligence on the part of D, and his violation of the law would serve as evidence of such negligence.

D. Cause in Fact – B and C

But for the negligence of D, the accident would not have occurred. B's Barracuda would not be damaged and C would not have been injured. Here, B's comparative negligence could be brought in, showing that he was also negligent. Both D and B would then be substantial factors in the injury to C and both would be liable for damages.

E. Damages: Badluck

Damages to B are limited to repair or replacement of his automobile, since he did not suffer any injuries. Since the replacement cost is less than the repair costs, the damages should be limited to \$18,000.

F. Damages: Ms. Crush

1. Survivor actions

Ms. Crush's injuries were not immediately fatal, so her survivors can sue for both special and general damages relating to the injury. The special damages include the medical expenses of her internal injuries of \$20,000 plus any loss wages from the time of injury to time of death and incidental expenses. We can not estimate these damages since we do not know what Ms. Crush earned and what other expenses may have been incurred by her family. General damages include pain and suffering on the part of Ms. Crush up until her death and caused by the accident.

2. Wrongful Death

Since Ms. Crush died from her injuries, her family can sue for wrongful death. (Assumed she died since her emergency treatment was unsuccessful.) They can claim for the funeral expenses, lost future wages, any assistance such as child care needed by her family that she provided prior to her death. Her husband can claim loss of consortium. It remains to be determined if Newstate's law will provide loss of consortium for her children (if any.)

{They may also file a claim against the physician in charge of her treatment, since the prompt treatment with Roti would have increased her survival chances by 20 to 40 percent. The relative newness of the treatment may make it hard to prove malpractice on the part of the physician. But this might reduce your liability slightly.}

III. Death of D

A. Standard of Care of Professor Thomas to D.

In order for D's survivors to claim damages, they will have to prove negligence on your part. Again, we must determine what a reasonable prudent person would do in like circumstances. Since D was not familiar with driving in the US, D's survivors will question if you provided sufficient supervision of his driving.

B. Breach of Duty to D

They will have to prove by preponderance of evidence (>50%) that you did not act reasonably with D. Since you visited Trinidad, you would know that D was used to driving on the other side of the road, so allowing him to drive himself on the first day in the country may be seen as unreasonable.

C. Cause in Fact to D

D's survivors will have to prove by preponderance of evidence (>50%) that your actions were the cause of his injuries. Here, we can argue assumption of the risks by D. While you provided the Honda and did not supervise his driving, he chose to drive without practicing on safe streets. He also chose to be driving down a dangerous corner while talking on a cell phone.

D. Damages: Depersad's survivors

If D's survivors succeed in proving the elements of negligence, they can sue for wrongful death. The special damages include D's funeral expenses, including flight back to Trinidad, and his lost future wages. D earned \$16,000 per year and at 30 years of age, he probably had 30 years of earning capacity. This equates to \$480,000, but the amount would be reduced to its present value. D's wife could claim loss of consortium and his children may be able to claim loss of parental consortium.

IV. Insurance Coverage issues:

A. Coverage limits: Your insurance coverage on the Honda was \$300,000 liability. The sum of the potential awards may be greater than these limits. We need to examine your \$300,000 first-party coverage to see if it will cover suits brought against you, since it is normally coverage of your expenses in an accident such as your medical bills, repair bills, etc. You also have an umbrella policy under your homeowner's policy, so the policy should be examined to determine if it will cover accidents caused by someone not in your household.

B. Duties of insurers: Your insurers have a duty to defend you. They have a duty to settle for up to the policy limits if possible. If they choose not to settle and they lose in court, they must cover the additional damages awarded, even if they amount to more than the policy limits. Normally, they determine whether to settle based on the probability that the plaintiffs will win and what they think they might be awarded. They also have a duty to indemnify you up to such policy limits.

C. Comparative Fault: Since Newstate is a comparative fault state, if B is found to be partially at fault for the accident, he will be liable for some of the damages. But if Newstate has joint and several liability, the full burden of damages may fall on you and your insurance provider. You would then have to sue B for his share of the damages. Additionally, if the insurance company settles with any of the plaintiffs prior to trial, the jury will not be limited to awarding damages based on any allocations per the settlement. In other words, if you settle with B based on a 20% comparative fault, the jury for C and D may find B more or less at fault. Therefore you may end up paying more or less than if all the parties went to jury.

Student Answer

Russell may be vicariously liable depending on Newstate's statute on vehicle owner's liability.

One may also argue that Russell negligently entrusted Deopersad (De) because he knew De came from a culture where drivers drive on the left side of the road.

Because Russell is the insured and has relatively high limits he will be the target of litigation if De is found to be negligent.

Standard of Care

De standard of care is the reasonable prudent person. De is required to rise to the standards of the community he was in. He should have been driving on the right side of the road.

Badluck's standard of care was the reasonable prudent person. He also could have been acting in an emergency situation in an attempt to avoid De.

Proving Breach

Negligence in De case

De's driving on the left side of the road demonstrates negligence. De's cell phone care also be used to demonstrate negligence because it leads to lack of attention of the road.

Negligence Per Se in De case

De violated a statute by driving on the wrong side of the road. Due to this activity the duty, standard of care, and breach can all be demonstrated. Badluck is a member of the class that the statute is designed protect because all traffic should be traveling in the same direction. The accident is the type of harm which the statute is intent to prevent.

Negligence in Badluck's case

Badluck was driving without his headlights on this may be negligent if it was dark.

Negligence Per Se in Badluck's case

If the exact time of the accident can be determined to be after the sun has set Badluck has violated that statute. De is a member of the class that the statute is designed protect because all cars needs to be visible. The accident is the type of harm which the statute is intent to prevent. He may have an acceptable excuse if he was acting in an emergency.

Res Ipsa Loquitur in Crush's case

(1) Crush's injury is usually associated with negligence. (2) De and Badluck had exclusive control of the cars that caused the injury. (3) Crush had no casual contribution to the harm. (4) De and Badluck access to information about the event is superior to Crush. Thus, these four factors establish res ipsa loquitur and it in turns establishes standard of care and breach.

Cause-in-fact

But-for

But-for De driving on the wrong side of the road and talking on his cell phone the accident may not have occurred that destroyed Badluck's car.

But-for Badluck driving without his headlights the accident may not have occurred killing De.

Multiple Sufficient Causes

In respect to Crush, one would have to look at multiple sufficient causes because both De's and Badluck's conduct could have caused Crush's injury. In this case, the burden of proof would shift to the De's estate and Badluck.

Damages

Badluck's damages if it is determined that De is at fault.

Specials-are for readily calculable types of expenses

The property damage to Badluck's car

If one can argue that Badluck's car has sentimental value and it is irreplaceable then Badluck can recover the cost of repairs, \$30,000. On the other hand, if it is replaceable Badluck will get the cost of replacement, \$18,000.

Generals-are consequences like pain and suffering that are difficult to quantify in terms of money

Badluck maybe able to recover mental anguish and emotional stress because of his involvement with a fatal accident.

De damages if it determined that Badluck is at fault

De's estate may file a claim under a Survival Statute assuming De did not die instantaneously. The estate will be able to recover from the time De was injured until death. What the estate may recover will depend on the Newstate's statute but here is an example.

Specials

Medical expenses (Ambulance)

Generals

Mental anguish (from the time of the accident until he died)

Emotional distress

Wrongful death

De's family can file a claim for incidental damages suffered by his family the recovery will again depend on the jurisdiction.

Specials

Loss earnings will be based on \$16,000/year including pay raises for the amount of time a typical male will work in Trinidad after 30. Because his wife does not

work he is the sole income thus his whole salary should be recoverable less discounting.

Burial costs (Flying his body back to Trinidad)

Loss of property (Russell's car)

Cost of obtaining substitute domestic services (clean and taking care of children)

Generals

Loss of consortium for his wife and possibly the children and his parents depending on jurisdiction

Loss of society for the children if they cannot recover for loss of consortium

Crush's damages caused by De and Badluck before she went to the hospital.

Specials

Medical expenses (\$20,000)

Damage or Loss of the dog (depending)

General

Mental Anguish

Disability (for the damage to her organ before the doctor did any thing)

Emotional Distress

Loss of consortium (if she has a husband or any of family which she has a relationship with)

Hedonic Loss (loss of enjoyment) if it is aloud in this jurisdiction.

The Doctors who treated Crush for her Tobago organ injury maybe negligent in this case.

Standard of Care

The standard of care the doctors depends on custom that is found in their field. If they are specialties, they are held to a national standard. If they are general practice physicians then they will be held to whatever standard, their jurisdiction dictates (Locality, Modified Locality or National).

Breach

The breach for the doctors is not giving Crush the Roti treatment. This is if the treatment is established as their custom. Seeing as though the treatment is less than six months old this maybe hard to prove.

Cause in Fact

Liability for Lost Chance of Recovery

This will give Crush an opportunity to recover for the 20 to 40 % Crush lost by not being given the treatment. Depending on the jurisdiction,

(1)Crush can recover the portion of the damages actually attributable to the doctor's negligence, a decrease in chance of recovery, or

(2) If Crush can demonstrate that the doctor's negligence more likely than not "increased the harm" to Crush then she can recover damages for the entire underlying organ destruction, or

(3) She cannot recover anything because when she came into the hospital with less than a 50% chance of recovery.

Damages with respect to the Doctor

Not knowing about comparative fault, I am unclear were Crush's survival action and wrongful death action will be applied. To the doctors or De and Badluck assuming Crush is dead.

Crush's estate may file a claim under a Survival Statute. The estate will be able to recover from the time Crush was injured until death. What the estate may recover will depend on the Newstate's statute but here is an example.

Specials

Medical expenses

Generals

Mental anguish (for the time he had until he died)

Emotional distress

Wrongful death

Crush's family (assuming she has a family) can file a claim for incidental damages suffered by his family the recovery will again depend on the jurisdiction.

Specials

Loss earnings

Burial costs

Loss of property

Cost of obtaining substitute domestic services

Generals

Loss of consortium for his wife and possible the children and his parents

depending on jurisdiction

Loss of society for the children if they cannot recover for loss of consortium

Russell's Insurance

Russell's carrier will have a duty to defend if foreign drives are covered. Assume they are covered and De is found negligent Russell's insurance will need to settle or defend De.

The decision to settle or defend will be based on the value of Badluck's case and Crush case. If the insurance company decides not to settle and take their chances at trial the insurance company may be responsible for any overage over the policy limit if they lose.

Word Count: 1311