

MID-YEAR EXAMINATION

TORTS

HOUSE OF RUSSELL

INSTRUCTIONS:

1. **DEADLINE:** This is a 75-hour examination. You may begin the exam at any time after 3 pm on Friday, 9 December. You must submit your answers by 6 pm on Monday, 12 December. **If you turn in your answers after 6 pm on 12 December, then you will receive an F for your fall semester grade. NO EXCUSES.**
2. **TURNING IN YOUR ANSWERS:** Upload your answers as a single file at the following URL: <http://www.law.du.edu/exam/main.cfm?ID=68> If you have technical problems turning in your answers, please refer to the document titled "Online Exams – General, Technical and Emergency Procedures," which you received along with the exam. If you have additional difficulties, please contact Ms. Paula Jones at pjones@law.du.edu or 303-871-6332. **Do NOT contact Professor Russell with exam-related difficulties.**
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 discuss, show, or distribute this examination or your answers to anyone at all before 6 pm on Monday, 12 December. Once the exam starts, you may not discuss it with anyone at all before the examination ends at 6 pm on Monday, 12 December.
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. You may use no more than 2,500 words to answer the question. Reducing your answers to this word limit will be one of the challenges of this examination.
6. **SPACING:** Please try to double-space your answers. Avoid miniature fonts, okay?

7. **HOW TO ANSWER:** In answering, use judgment and common sense. Be organized. 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. **JURISDICTION:** Each of the injuries that form the foundation of the exam questions takes place in Newstate, the 51st state of the union. Newstate is NOT Colorado.

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

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

11. **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.

12. **GOOD LUCK:** Good luck and have an excellent break.

“A Series of Unfortunate Events”

During the summer of 2004, the Platter family drove through Newstate on their family vacation. Klauss Platter and his wife Violet Platter—both of whom were 40 years old at the time—loved Newstate’s mountains and enjoyed driving along the narrow roads high above rocky canyons. Sunny Platter, their 14-year-old daughter, was along for the ride, too. During the drive, Sunny mostly played handheld electronic games and, when in range of a cell phone tower, she sent text messages to her friends back home. Whether she enjoyed the majestic scenery we will never know for sure.

The tragedy began, as such tragedies so often do, with an argument. Klauss and Violet were disagreeing about the best, most elegant route they might use to traverse Newstate. They had stopped on the shoulder of the road to look at the map. Klauss favored two-lane, winding roads like the one that they were on. Violet enjoyed these winding roads, but after a few hours she started to feel a little bit carsick. She told her husband that she would prefer to use the interstate highways, which were faster and still very beautiful though perhaps not as scenic as the roads that her husband preferred.

As her parents argued, Sunny texted her friend Caitlyn with this message: “I h8 mtns.”

Klauss stopped the car well off the roadway on the ample shoulder. The road was a two-lane road, that is, there was one lane of travel in each direction. This stretch of road was straight, and drivers approaching from either direction

could see Klauss's stopped car from at least one-half mile away. Klauss worked as a risk-manager for the Village Inn Corporation, which ran restaurants in a number of states. He was a cautious fellow.

After stopping, Klauss got out of the driver's side door and walked around to the passenger side. He wanted to stretch his muscles, because an automobile accident from ten years before had made it uncomfortable for him to sit for long periods of time; the injury had left him with damage to his lower back and also a problem with his left hip joint. With time, he expected that he might need spinal surgery to deal with the problem. Klauss walked behind the car and—being a cautious man—he confirmed that the left rear corner of his bumper was well off the roadway. He then rounded the car and went to talk or argue with his wife as she sat in the front passenger seat with the window rolled down. He stood with his back to the canyon, which dropped down from the right-hand side of the Platter's car, and spoke with his wife. There was a cool breeze. He was standing there with his back to the canyon when the first vehicle hit.

Like the airplane that comes out of nowhere in Alfred Hitchcock's film *North by Northwest*, the minivan first entered Klauss's conscience as a droning in the distance. Out of the corner of his left eye, Klauss saw the minivan approaching. When next he looked, the minivan was approaching on the shoulder 50 yards away. The minivan slammed into the rear bumper of the Platter family car. He straightened his body and took one step back just before the minivan hit the bumper. Like a slow motion sports replay, he remembers watching helplessly as the minivan pushed his family's car forward and out into the roadway. Klauss watched

as his family's car was pushed in the right-hand lane of the roadway—the same lane in which his car and the minivan had been traveling. Miraculously, neither his own car nor the minivan touched Klauss as they went by.

As Klauss watched in horror, a car coming from the other direction—that is, the lane opposite the one in which Klauss and the minivan traveled—crossed the center line and struck his car on the front end. Klauss's car, when hit, was entirely within the right-hand lane but angled so that the rear end pointed somewhat toward the shoulder and the canyon below.

The second impact pushed Klauss's car, with his wife and daughter inside it, out of the lane of travel, over the shoulder, and then down into the canyon. His car did not hurtle through space and then crash in a fireball as happens in James Bond movies. At least not yet. The top part of the canyon was a slope of less than 45 degrees with some vegetation and small trees. About 100 yards down that slope, the canyon dropped off to a sheer stone wall that dropped 300 feet to the canyon floor below. Klauss watched his car roll and bound backwards down the upper slope. He caught a glimpse of the look of terror on his wife Violet's face. The car bounced but did not turn over.

Just before the edge of the canyon's sheer wall, the car ran through a small outcropping of pine trees—young trees with trunk diameters of 2-4 inches. The pines slowed the car down enough that it stopped just on the edge of the precipice, with the rear wheels hanging over the edge of the canyon. The car tilted backward. The front wheels rose about 6 inches off the ground, and then the teetering car

stopped. Klauss heard the raspy, hoarse scream of a Red-tailed Hawk (*Buteo jamaicensis*)—he was an avid birder—and then he screamed himself.

Klauss stared in disbelief for a fraction of a second. He glanced left and right and noticed that the two cars that had crashed into his car and sent his wife and daughter hurtling toward death were stopped, each about 50 yards away. And then he leaped from the shoulder down the hillside toward where his own car lay balanced like a seesaw on the edge of the canyon. After three great strides, Klauss's right foot gave way when he stepped on an unstable stone. The slip upended him and he fell hard on the ground. Pain shot through his back and through his left leg. He may have lost consciousness.

The next thing that he remembers is opening his eyes and seeing the Red Tail Hawk soaring on thermal currents hundreds of feet in the air. He was unable to move his left leg and his back hurt so much that he thought it must be broken. He was on his back, and his head was facing down the slope toward his car and family. By turning his head and craning his neck, he could just see into the car. His wife, he could see, was no longer conscious. The pain was searing. There was a cool breeze.

Meanwhile, the two drivers of the cars were still in their cars back on the roadway. Olaf Tortfeasor was the driver of the minivan. He waited in his car for the ambulance to arrive. His neck was injured, and he broke his arm as well. Later, when the police interviewed Olaf Tortfeasor, he told them that he pulled onto the shoulder in order to see if Klauss needed help. Olaf thought that Klauss looked like he was in trouble. Olaf admitted that he misjudged the distance to Klauss's car

and did not stop soon enough. He told the police, “I wasn’t negligent. It was just an accident.”

The driver of the second car to hit Klauss’s car was Danny Defendant. He was a 19-year-old honor student at a nearby religious college. He did not smoke, drink alcohol, take drugs, have sex, or swear. He jogged 5 miles every day, and he went to bed every night at 9 pm. As it turns out, he crossed the center line and crashed into Klauss’s car after he began to have what he said was his first ever epileptic seizure. The emergency room doctors confirmed that Danny had indeed had a seizure at the time of the accident, but they had no way of confirming whether this had been his first seizure. Consistent with his moral compass, he told the police investigators “I take full responsibility for my carelessness.”

As it happened, the first passersby to stop and offer to help were two professional mountain rescuers. Their names were Lauri Rescuer and Heather Climber. They pulled their vehicle onto the shoulder of the road near where Klauss had parked his car. They called 911 and asked for police and paramedics to be sent to the scene. Then, they pulled ropes, carabineers, and other climbing and first aid equipment from their vehicle and then hiked toward the precariously perched car. On the way, they stopped quickly to assess Klauss and told him that help was on the way. Within half an hour, paramedics loaded him onto a backboard and took him to the nearest emergency room.

Lauri Rescuer and Heather Climber climbed down to the Klauss’s car and tried to figure out what to do. On approaching the car, they could see that it was balanced on the edge. The breeze caused the car to seesaw lightly. From outside the

car, they could see that Violet was unconscious in the front seat and bleeding from a wound on her forehead. They could also see that Sunny, though crumpled in the back seat, was still breathing and was moving her body somewhat. She appeared to be conscious.

Lauri and Heather decided to attempt to risk entering the vehicle in order to remove Violet and her daughter Sunny. Lauri leaned on the front bumper of the vehicle in order to stabilize the seesawing car while Heather got into the car and tried to remove Violet from the passenger seat. Once Heather was in the car with Violet, then the seesawing of the vehicle stopped and the front wheels came to rest on the ground. At this point, Lauri opened the back door of the car in order to rescue Sunny. Lauri wanted to try to pull Sunny from the vehicle without putting much more weight on the back seat of the car. That is, Lauri tried to stay mostly out of the car while she tried to pull Sunny out of the car. As Lauri worked on extricating Sunny, Heather worked on Violet in the front seat.

Lauri asked Sunny if Sunny could hear her. "I'm so scared," the pre-teenager responded quietly. Sunny's cell phone lay on the car's floor with a reply message from Caitlyn still on the screen: "I h8 family vacations."

Suddenly, the breeze strengthened into a gust. The gust of wind caused the Platter's car--with Heather, Violet, and Sunny completely in the car and with Lauri partly inside--to lurch suddenly. The car began to slide toward the canyon. Lauri shouted to Heather: "Get out!" Heather pulled Violet's body out of the front passenger seat onto the ground. At the same time, Lauri pulled Sunny's body. But, a carabineer on Lauri's belt caught on the door handle and Lauri was unable to get

out of the car before it slid over the canyon wall. Just as the car began to slide in earnest, Sunny screamed. Violet, unconscious, did not hear her daughter's final scream, but Klauss did.

The Platter vehicle hurtled through space down to the canyon floor and exploded in a fireball on impact. Klauss heard the impact and explosion, and he could see the glow of the fireball. The coroner later determined that Sunny and Lauri died on impact.

Grief and pain overcame Klauss and he passed out. Ambulance workers found him on the ground when they arrived 20 minutes later. They transported him to the hospital. Klauss's left femur was broken, and repair of the leg required replacement of his left hip joint. Repairing the damage to his back necessitated spinal fusion surgery. Klauss's medical bills to date total \$95,000. He now walks with a limp and still has trouble sitting for very long. He is still working with physical therapists. So far, all of the medical care that he has received has been flawless.

Klauss was able to return to work after missing 4 months of work for recovery. After he returned to work, he could only work part-time for several months, but now he is full-time. He has found that the site visits that he formerly made as a risk manager are too taxing on him physically. So, he has shifted his work to inside the office.

Violet suffered a broken leg, 5 broken ribs, and a skull fracture. She's deeply depressed. Some combination of the physical damage to her brain and the depression required that she be hospitalized under the care of psychiatrists for a

month. She takes a lot of drugs for her mental condition, and she's sluggish and distant—a shadow of her former lively self. Her medical bills have totaled \$125,000 to date. She has not returned to her job as an accountant.

Sunny's funeral expenses totaled \$12,000.

Lauri's funeral also cost \$12,000. Lauri was gay and had lived in a committed relationship with Sally for 12 years. Sally was the biological mother of their daughter, Jessica. Sally was a stay-at-home mom for whom Lauri provided all financial support. Newstate's laws have defined marriage as between a man and a woman, and the state's voters had recently voted to ban statutory recognition of same-sex civil partnerships. Newstate's laws also prevented Lauri from adopting Sally. The only blood relative to attend Lauri's funeral was her father, who had stopped talking to her when she told him while in college that she was gay.

Heather was not physically injured, but she was upset by the death of her colleague.

YOUR JOB: Your job is to analyze negligence cases that the Platter family and Heather might bring along with any suits that someone might bring on behalf of Lauri. For purposes of this analysis, you should assume that Klauss was not negligent in any way. As well, disregard any claims that you imagine might exist regarding any manufacturers of the automobiles, because I know that you have no expertise regarding products liability. Also, a different lawyer with expertise in landowner cases and governmental immunity issues will discuss whether there should have been better protection of the shoulder and canyon with, for example, a

guard rail. You should disregard those issues. Finally, do not discuss either affirmative defenses or insurance.

END OF EXAM

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Student Sample Answer Number 1

To recover for negligence, the plaintiff(s) must establish with a preponderance of evidence a prima facie case:

Platter Family v. Olaf Tortfeasor

Duty

When active, Olaf must be reasonable. Olaf's duty to drive carefully is a legal obligation owed to plaintiffs. Olaf's duty is generally limited to foreseeable plaintiffs, but can differ depending on jurisdiction. When Olaf hit the Platter's car, he failed to do something a reasonable person would do while engaged in an activity and took an affirmative act of conduct or misfeasance. The Platter family, users of the road, are foreseeable plaintiffs who Olaf owes a duty.

Standard of Care

Olaf must act as an objective reasonable person under the circumstances, aware of the hazards and meeting community standards; like the mythical man who takes magazines at home and mows the lawn in shirt sleeves. No evidence presented of superior skills so Olaf is not held to a higher standard.

Breach

Negligence per se:

For negligence per se, Newstate's statutes must be violated but the statutes must be intended to prevent that type of harm and designed to protect a certain type of person.

- Was he speeding? Check marks, determine if Olaf violated Newstate's speeding statute (likely designed to prevent accidents to motorists).

Negligence:

Olaf acted unreasonable under the circumstances because the Platter's car was entirely off the roadway and Olaf still hit the car.

- Was he paying attention? Olaf claims he pulled on the shoulder to see if Klaus needed help but he still hit the car sitting completely on the shoulder.

- Was he speeding? If he was driving too fast for the shoulder, he could be negligent.

Olaf failed to act as a reasonable person but misjudging the distance and hitting the Platter's car.

Cause in fact

The Platters will argue that but for Olaf's driving, they would not have been injured. If the Platters rewound a tape, then played the tape with no accident and are not injured, you have "but for" or the gold standard of causation

Proximate Cause

First, the Platter's injuries are foreseeable consequences of mountain driving Olaf should have reasonably anticipated. "Who woulda thunk" - works in this circumstance.

Second, the harm of Olaf's risky mountain driving is exactly what happened. Regardless of the wind and Danny's car, this is precisely the type of harm that occurred

so mechanism does not matter (rat flambé). However, Olaf will only be responsible for Klaus's new injuries and not pre-existing conditions.

Damages

Nominal: not a realistic suit, typically symbolic.

Punitive Damages: If found reckless, used to punish but rare.

Property: Platters will try to recover for car, cell phone, clothing, and miscellaneous property losses. The market not sentimental value of items will apply.

Compensatory: Klaus, age 40 (subtract previous injury damage)

Pecuniary or Specials (Past/ Future, discount to present value, receipts, not taxed)

Wages:

Loss of wages

Future earning capabilities from staying inside, promotions

Medical/Medicine:

Medical bills \$95,000 plus future ones discounted

Physical therapy

Medication

Non-Pecuniary or General (no receipts)

Pain & Suffering (depending on jurisdiction):

Can't sit for too long

Pain recovery from surgery

Hedonic:

Loss of enjoyment of being a "risk-manager", must work inside

Loss of Consortium:

Sexual relationship with wife

Emotional Distress (depending on jurisdiction -may need physical
damage):

Zone of danger - Klauss feared impact evident by taking one-step
back, feared for life, possibility of direct danger

Dillon v. Legg test – Klauss was 1. Physically present

2. Sensory & contemporaneous observation of accident

3. Closely related to victims (Violet & Sunny)

Compensatory: Violet, age 40

Pecuniary or Specials

Wages: Lost accountant wages until working again

Loss of future promotions/raises

Medical/Medicine:

Medical bills \$125, 000 plus future ones

Psychiatrist care

Medication

Other incidentals:

Travel

Housekeeping

Non-Pecuniary or General

Pain & Suffering:

Continual pain from injuries

Hedonic:

Loss of enjoyment of life, now “shadow” of former self

Loss of Consortium:

Loss of affection

Sexual services

Disability:

Possible permanent mental problems

Emotional Distress:

Impact rule due to physical harm suffered

Compensatory – Sunny, age 14

Pecuniary or Specials

Funeral expenses \$12,000

Wrongful Death: “close relative” can recover damages defined by statutes

generally limited to pecuniary losses, replacement of value of services

provided by the decedent: would Sunny be a famous hip-genre

writer (evident from text message)?

Survival Actions: conscious during rescue- suffered, screamed before death

Platter Family v. Danny Defendant

Duty

Danny’s responsibility is to use ordinary care and skill to avoid causing physical harm to person or property. Danny’s scope of duty is limited to foreseeable plaintiffs, like the Platters.

Standard of Care

Danny is required to act as an objective reasonable person under the circumstances. Assuming adult age in Newstate is 18-years old, Danny would not fall under the reasonable child standard which evaluates objective/subjective comparisons to other children of “same age, experience and intelligence” under like circumstances. However, an exception to the child standard is when children engage in adult activities like driving.

The doctors were unable to determine if this was indeed Danny’s first seizure like he claims. If seizures are classified as a disability, he would fall under the disabled person standard and be required to act as a reasonable person with seizers. Additionally, if medical records could show Danny knew about this condition, was it reasonable for him to drive or not take medication?

Breach

Negligence per se:

Same as Olaf - See Above.

Negligence:

- Was he speeding? Even with the seizure, accident might not have occurred if Danny was speeding. Use Learned Hand’s formula: Probability of an accident while speeding is high on mountain road as is the magnitude of loss. Since these are

high, the burden of Danny to slow down is much smaller. $B < P \times L$ shows negligence here.

- Was he paying attention? Danny had one-half mile to see the Platter’s car, probably negligent.

- Did he know about his seizures? What is really his first one? If not, driving in general or without medication can be negligent.

Cause in fact

Since Danny was the second vehicle to hit the Platters car, it is difficult to prove “but for” causation and link the Platters’ injuries to the breach of standard of care.

However, the Platters may be able to use alternative liability theory. Since both Olaf and Danny did a “bad, bad thing”, the burden can be shifted to the tortfeasor so the defendants can sort it out.

Danny could also be considered a substantial factor because Platters may not be able to say exactly how much each factor injured but only that each factor contributed causing injury. Experts would be needed to show causation.

Proximate Cause

Hitting the Platters’ car is foreseeable because the initial hit from Olaf’s car did not put the Platters’ car in Danny’s lane so Danny had to leave his own lane to hit the Platters. The accident is a reasonably foreseeable result of two-lane mountain driving.

Damages

Same damages as Olaf - See above.

Additionally, the goal of damages is “to make the plaintiff whole” but the plaintiff should not be made more than “whole”. Plaintiffs will want to argue for per diem, collateral source rule and split pain & suffering from hedonic loss if jurisdiction allows maximizing the claim.

Defendants will invoke the evidentiary method, not allow the golden rule argument, combine pain & suffering with hedonic loss, discount damages to present

value minimizing the inflation cost, lump sum the damages to greatest extent possible, attempt a structured settlement if it reduces damages cost, and check jurisdiction for damage cap.

Platter Family v. Rescuers (Heather and Estate of Lauri)

Duty

Duty is a question of law. Generally, there is no duty to aid another so courts tend not to enforce moral obligations. However, a person can be held liable if he created the peril, had a special relationship with the plaintiff or volunteered to act.

Once the Heather and Lauri acted, they were obligated to act reasonably and not leave the Platters in a worse position than when they found the family. Some jurisdictions do protect rescuers with Good Samaritan statutes which insulate rescuers from liability for negligence but Newstate's jurisdictional position is unclear

The rescuers created a duty by starting to rescue so court can enforce that duty but it is unlikely the court would enforce nonfeasance. After the women initiated the rescue, they did follow through and the facts show nobody else was prevented from acting.

Standard of Care

The rescuers need to be objective reasonable people under the circumstances. Since both rescuers had superior abilities from skills/knowledge, the standard of care will not change but their skills may effect the jury's breach determination

In an emergency not created by Heather or Lauri, they would still have to act as reasonable people in an emergency, a slightly lower standard. Like superior skills, an

emergency does not remove liability but jury can use the emergency situation to determine the reasonableness of the conduct.

Breach

Negligence per se:

Not enough information to determine if the rescuers violated statutes.

Negligence:

Did rescuers the acts as reasonable people in an emergency? Need more evidence and experts to see if rescuers followed customs to determine if they acted as reasonable rescuers or were negligent.

Cause in fact

The rescuers could be a substantial factor making the car unstable before falling down the canyon. Furthermore, the Platters could use joint and several liabilities for Danny, Olaf and the rescuers. Although the defendants did not act in concert and there is time separation, Platters can sue all parties together and collect the entire amount of damages, shifting the burden to the all defendants to fight to determine who pays what part of the damages.

Proximate Cause

The prevailing rule for proximate cause is that the plaintiff's injuries be foreseeable consequences that a defendant should have anticipated. However, the defendants can avoid liability if there is a superseding intervening force that is highly improbable and extra ordinary. In this case, the jury may find that "the breeze (that)

strengthened into a gust” and the “gust of wind cause the Platter’s car...to lurch suddenly” is a superseding intervening force.

Damages

Same as Olaf’s/Danny’s damages - See above. Rescuers also need to acknowledge how awards are reduced or increased using remittiturs and additurs avoiding a new trial.

Heather v. Olaf

Duty

Scope of duty is limited to foreseeable plaintiffs so Heather must show that Olaf’s negligence created foreseeable risks of harm to persons in Heather’s position. As user of a mountain road, Heather is a foreseeable consequence of Olaf’s mountain driving. Defense may argue that Heather’s injury is similar to Palsgraf and must be strictly limited to foreseeable plaintiffs but the court will ultimately determine this factor. Olaf should use caution as a man of ordinary prudence would observe.

Standard of Care

Same standard as Olaf to Platters because Heather is a user of the road – See above.

Breach

Same breach as Olaf to Platters because Heather is a user of the road – See above.

Cause in fact

But for Olaf’s accident, Heather would not have attempted to rescue the Platters.

Proximate Cause

Heather must show her emotional injury is a foreseeable risk which would require Olaf to anticipate and thus alter his conduct. Regardless if the wind is not a superseding intervening force; both emotional and physical injury from a mountain accident is reasonably foreseeable. Additionally, Heather may have been emotionally frail from her other rescues but since the defendant takes the plaintiff as he finds her, it does not matter that Heather might be an eggshell plaintiff.

Damages

Since Heather suffered no physical harm, tests to determine emotional distress must be used to determine if she can recover.

Non-Pecuniary or General

Emotional Distress

Impact Rule: No, no touch – not duty!

Zone of danger: No, did not fear physical impact.

Dillon v. Legg test: Possibly due to physical closeness, observation of seeing car fall from the roadway but recovery hinges on what jurisdiction deems “closely related” to victim.

It will be difficult for Heather to collect for negligent infliction of emotional distress alone against v. Olaf.

Heather v. Danny

Heather’s case against Danny is very similar to her case against Olaf.

Duty

Same duty as Olaf – See above.

Standard of Care

Same standard as Olaf – See above.

Breach

Same breach as Olaf – See above.

Cause in fact

If “but for” causation cannot be used as in her case v. Olaf, Heather can say that Danny not noticing the Platter’s car from one-half mile away and subsequent accident is a substantial factor contributing to her subsequent emotional injury.

Proximate Cause

The chains of causation could stretch to find Heather’s injury as a foreseeable risk of driving on a mountain roadway.

Damages

Same damages as Olaf – See above.

On behalf of Lauri v. Olaf

Duty

Same Standard of Care as Olaf had to the Platters and Heather because Lauri is a user of the road.

Standard of Care

Olaf is required to act as an objective reasonable person under the circumstances while driving.

Breach

Negligence & Negligence per se:

Same as Heather's case v. Olaf – See above.

Olaf was unreasonable under the circumstances by hitting the Platter's car which was entirely off the roadway.

Cause in fact

But for Danny's accident, Lauri would not have attempted to rescue the Platters.

Proximate Cause

Lauri's death is a foreseeable consequence Olaf should have foreseen. Some jurisdictions do not require any superseding intervening force so the claim may proceed.

Damages

Due to the jurisdictional statutes of Newstate, Lauri's partner Sally or Sally's child will be not able to recover for any damages. Depending on the jurisdiction, the court may examine the strained relationship between Lauri and her father to determine if he can proceed with any action. If found that Lauri's father could bring suit, he could claim the following damages:

Compensatory – Lauri

Pecuniary or Specials

Funeral expenses \$12,000

Wrongful Death

Generally limited to pecuniary losses and replacement of value of services provided by the decedent to father – minimal in this case

Survival Actions

Decedent needs to be conscious to claim but court may consider the brief

time between when the car fell and when it impacted causing instant
death.

On behalf of Lauri v. Danny

Duty

Same duty as Olaf – See above.

Standard of Care

Same standard as Olaf – See above.

Breach

Same breach as Olaf – See above.

Cause in fact

If other cause in fact tests fail, res ipsa loquitur may be used to prove by a preponderance of evidence that Danny's conduct caused death. Since the car fell from the canyon when car was safely stopped off the roadway, someone was obviously negligent or else Lauri would still be alive. Any applicable test should be used examined to help combat the "salmon run".

Proximate Cause

The foreseeability of someone to rescue a victim of two-lane roadway in the mountains is foreseeable if a person drives in the mountains. Danny's driving is such a situation and Lauri's injury is foreseeable.

Damages

Same damages as Olaf – See above.

Word count of the above: 2,497

Student Sample Answer Number 2

MEMORANDUM

To: Professor Russell
From: (#919)
Date: December 12, 2005
Re: “A Series of Unfortunate Events”

Overview of Potential Claims

Klauss and Violet Platter may bring similar, but not identical, claims against the following defendants: Olaf Tortfeasor, Danny Defendant, Heather and Lauri’s estate. Although Klauss will bring his personal injury claim against only Olaf and Danny, Violet’s personal injury claim may be against all four defendants unless evidence can distinguish when her injuries occurred. Both Klauss and Violet may bring a wrongful death claim against all four defendants for Sunny’s death. Sunny’s estate cannot bring a survivor action because Sunny died instantaneously. Additionally, Klauss may bring claims against all four defendants for negligent infliction of emotional distress as a bystander to his wife’s injuries and his daughter’s death as well as a loss of consortium. Violet may bring a similar claim against the four defendants as a bystander to her daughter’s injuries and fright prior to her death. Finally, Klauss may allege an additional intentional infliction of emotional distress claim against Olaf and Danny for his own near miss.

Since Heather did not sustain any physical injuries in the accident, her best potential claim is one for negligent infliction of emotional distress for her own near miss with Olaf, Danny and Lauri’s estate as defendants.

Regarding claims on Lauri’s behalf, her father may bring wrongful death claims against Olaf, Danny, and Heather. Similar to Sunny’s situation, Lauri’s estate cannot bring a survivor action since Lauri died instantaneously. Given Newstate’s rejection of same-sex civil partnerships and adoptions of a same-sex partner’s biological child, Sally

and Jessica appear to have no standing under Newstate law to bring any wrongful death claim concerning Lauri's death.

Analysis of Prima Facie Elements by Defendants

Olaf /Danny:

The analysis of the first four prima facie elements of the plaintiffs' negligence claims against Olaf and Danny are similar. First, both men were active and had a duty to others traveling on this two-lane highway. Both Olaf and Danny's standard of care required them to operate their vehicles as a reasonably prudent person would do under similar circumstances. Olaf and Danny also had an additional duty to try to assist in rescuing the Platters since their conduct created the danger.

Additionally, Olaf and Danny had duties to Klauss and Heather due to their respective near misses and to Klauss and Violet as bystanders. Plaintiffs' success on this element will depend in large part on Newstate's rule on duty in bystander actions. Klauss will have difficulty satisfying the duty element on his near miss claim in an impact rule jurisdiction since neither vehicle touched him. Under a zone of danger rule, Klauss will more readily establish duty in a near miss action and possibly with a bystander action as well. In a *Dillon-Legg* jurisdiction, Klauss should definitely meet this element for both near miss and bystander claims since he was close enough to observe his wife and daughter's faces during the events, they were his immediate family members, and he contemporaneously observed his wife's terror and watched and heard his daughter go to her death. Violet can meet this duty element owed by Olaf and Danny as a bystander to her daughter's injuries and fright using any of these rules, but only based on what she experienced up until losing consciousness. Finally, Olaf and Danny owed a duty under either an impact or zone of danger rule to Heather due to her near miss, but not as a bystander to either death since she was not a family member.

Based on Olaf's own admissions, a strong case can be made that Olaf breached his standard of care when he failed to decelerate quickly enough and did not allow sufficient distance to pull off the highway and stop before colliding with the Platters' vehicle. Furthermore, the physical circumstances support a breach by Olaf: 1) the

Platters' car was visible from a half-mile distance; 2) it was a sunny, summer day so presumably the road conditions were dry; and 3) the Platters' car was well off the roadway on an ample shoulder. The plaintiffs will need to review Newstate's laws to determine whether Olaf violated any state laws thereby giving rise to an additional negligence per se claim.

Plaintiffs will allege that Danny breached his standard of care by negligently allowing his vehicle to cross the center line on a two-lane highway. If Danny's negligent driving was caused by his first ever epileptic seizure, as he has said, then in all likelihood he will not be found to have breached his standard of care since his conduct was not unreasonable under the circumstances. Danny's lifestyle and demeanor will tend to support his credibility; however, only investigation and discovery will help evaluate if non-medical evidence supports his assertion. If evidence indicates that this was not Danny's first seizure, Danny's choice to drive was unreasonable and breached his standard of care. Crossing a center line and driving with an uncontrolled seizure condition may violate Newstate's driving laws, but if Danny's action was excusable due to an unknown medical condition, his violation will not establish negligence per se.

Concerning any rescue duty, given Olaf's injuries, he will probably not be viewed as having breached that duty. If Danny's seizure incapacitated him during the rescue efforts, he will probably not be found to have breached this duty.

Both Olaf's and Danny's actions will satisfy cause-in-fact because "but for" their individual collisions with the Platters' vehicle, none of the plaintiffs' injuries or deaths would have occurred. But for Olaf's collision with the Platters' car, it is not pushed from the shoulder into a position where Danny can collide with the car as he crossed the center line. But for Danny's crossing the center line, the Platters' vehicle does not go off the roadway causing Sunny's death and inviting rescue efforts. To "belt up" plaintiffs' causation arguments in addition to their "but for" suspenders, Klaus and Lauri's father may also allege that Olaf and Danny's conduct were substantial factors in connection with the rescue efforts in causing the plaintiffs' injuries and deaths. Violet may also allege "but for" causation and alternative liability against Olaf and Danny since it may be difficult to determine which collision caused her head trauma.

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Olaf's and Danny's conduct should each be found to be the proximate causes of the Platters' injuries and Sunny's and Lauri's deaths. Olaf, and possibly Danny, may argue that the causal chain between their collisions with the car and Klaus's injuries and Sunny's and Lauri's deaths were too attenuated; Klaus's injuries and the deaths were not foreseeable; and the rescue attempts and gust of wind were superseding intervening events, thereby relieving them of liability. The general rule is that the extent and precise manner in which the harm occurred need not be foreseeable. These events occurred on a winding, two-lane mountain highway, therefore the mechanism of two collisions combined with a partially unsuccessful rescue effort was not particularly bizarre or unforeseeable. Furthermore, danger invited rescue and these defendants should have reasonably anticipated that injuries might occur to the Platters' rescuers. Even though Klaus's fall aggravated serious, pre-existing conditions, defendants take the plaintiffs as they get them even if the exact extent of their injuries were unforeseeable.

Neither the rescue attempts nor the wind gust should be considered superseding intervening events. A superseding event must be one which is extraordinary or highly improbable under the circumstances. As discussed above, a rescue attempt following a car accident is not extraordinary. Similarly, a sudden gust of wind on a mountain precipice is not extraordinary or unforeseeable, but part of foreseeable mountain weather conditions. Neither event should break the causation chain.

Heather/Lauri's Estate:

Both Heather and the Platters may bring claims against Lauri's estate. The Platters and Lauri's father may consider a claim against Heather as well. The claims against the rescuers or the rescuers' claims against one another are based on whether Lauri and/or Heather were negligent in their rescue efforts.

Had Heather and Lauri ignored the Platters' plight, they would not be found negligent as a person does not have a duty to aid another. However, once Heather and Lauri began to rescue the Platters, they then had a duty to the Platters and to each other to act reasonably. Heather and Lauri were not expected to be infallible. Nevertheless, Newstate law may require a standard of care as professional mountain rescuers based on

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professional local custom or requiring them to act as a reasonably careful rescuer would act under similar circumstances.

Similar to the bystander claims against Olaf and Danny, Lauri owed a duty to Heather with respect to Heather's near miss. Heather may pursue this claim in either an impact or zone of danger rule, but not a *Dillon-Legg* jurisdiction.

To establish whether Lauri and/or Heather breached their standard of care in rescuing the Platters, plaintiffs will need to prove by a preponderance of evidence that one or both women were negligent in their efforts based on what they knew at the time, not in hindsight. Up until they reached the car, Heather and Lauri's actions appeared reasonable: pulling their car off the road so it was not a hazard; immediately calling 911, gathering equipment; assessing Klaus; and deciding together how to approach the rescue effort. A jury will have to decide whether it was reasonable for one, and eventually two, of the rescuers to work on removing Violet and Sunny prior to further stabilizing the car. Lauri's decision to start assisting Sunny and whether she made that decision unilaterally are additional issues in assessing whether Lauri breached her standard of care. Any claim by Lauri's father against Heather may not establish a breach since if their mutually agreed upon approach was negligent, then Lauri's negligence was greater than Heather's in deciding to move Sunny. These defendants will look to any Good Samaritan or Emergency Doctrine laws to see if they offer any protection for their actions.

Regarding cause-in-fact, the Platters may allege that Heather and Lauri's negligent rescue efforts were a concerted action and a "but for" cause of Violet's injuries and Sunny's death. Alternatively, since Heather did rescue Violet, the Platters may choose to only assert a claim against Lauri alleging that her decision to stop stabilizing the car was a "but for" cause or a substantial factor in Sunny's death. Any claims alleged by the rescuers against one another would allege "but for" and substantial factor causation, but cause-in-fact element of "Lauri's" claim against Heather will be more difficult to establish due to Lauri's own actions.

The proximate cause chain with these defendants is less attenuated as compared to Olaf and Danny, but the defendants may still try to argue a superseding intervening act of

nature should relieve of them of liability. Such an argument should not be successful as discussed above.

Analysis of Damages by Plaintiff

Platters' Damages: The Platters will seek compensation for Sunny's funeral costs (\$12,000), their loss of her affection and companionship, and any future financial support they would have received from Sunny, which might be offset against discontinued child rearing expenses depending on the jurisdiction.

In Klauss' personal injury claim, Klauss' compensatory damages include: past medical expenses (\$95,000); costs of future physical therapists' expenses and medications; his permanent physical limitations; loss of enjoyment of life associated with these impairments: his significant pain and suffering from the time of injury into the future; four months of lost wages; several months of his wage differential between full and part-time pay; and lost promotional opportunities due to his leaving the field operations.

Klauss may seek compensatory damages for negligent infliction of emotional distress based on his near miss and bystander claims. Depending on Newstate's law, Klauss may be required to show a physical manifestation of his distress to collect any damages on these claims. Finally, Klauss may pursue damages for his loss of consortium claim due to Violet's deep depression.

In Violet's personal injury claim, her compensatory damages include: past medical expenses (\$125,000); costs of her future therapy and medications; loss of enjoyment of life due to her diminished mental condition; lost wages since the accident; future lost wages through retirement if she is unable to return to work; lost promotional opportunities she will not receive; and pain and suffering at all times she was cognizant of her fright and pain. Violet may pursue damages for negligent infliction of emotional distress as a bystander for the time Violet was aware of her daughter's injuries and fright. Violet should meet any requirements of a physical manifestation rule due to her depression and decreased mental functioning.

Both Platters should consider asking for punitive damages from Olaf and Danny, but they will in all likelihood not receive punitives. Although the Platters experienced severe, ongoing injuries and their daughter's traumatic death, each collision was a single occurrence, accidental in nature, and not motivated by malice. In Olaf's case, he was actually trying to help the Platters. A jury will not be motivated to assess punitives in any effort to punish these defendants or deter similar behavior.

Heather's Damages: Although Heather has a viable near miss claim, her damages appear negligible. Heather has experienced no physical manifestation of her emotional distress if this is required in Newstate to collect damages. Even if Newstate is a jurisdiction not requiring physical manifestation, her damages for emotional distress appear limited. Any compensation must be based on the distress Heather suffered, not what an ordinary person would suffer in similar circumstances. Since Heather is described as being upset by her friend's death, not her own near miss, she may not be able to recover any damages.

Lauri's Father Damages: Even if Lauri's father succeeded in a wrongful death action related to Lauri's death, damages are problematic for him. Lauri's father would be entitled for reimbursement of Lauri's funeral costs if he paid them (\$12,000). Normally, her father would be allowed damages to compensate him for the loss of affection and companionship and any future financial contribution Lauri would have made to him. However, Lauri and her father were estranged for at least eight years, therefore no compensatory damages are needed to make him whole.

Summary

Only the Platters' individual personal injury and wrongful death actions and Klaus Platter's intentional infliction of emotional distress and loss of consortium claims against Olaf fully satisfy all of the elements necessary to present a prima facie case. These same claims against Danny also meet the prima facie elements, but the Platters will eventually have to show by a preponderance of evidence that he knew or should have

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known of his condition and therefore, should not have been driving in order to be successful. The Platters' remaining claims against Heather and Lauri do not yet represent prima facie cases; research, discovery and analysis comparing Heather and Lauri's actions against any standard of care for professional mountain rescuers is needed to determine the claims' viability. Heather and Lauri's father's claims lack potential damages based on present knowledge.

END OF SAMPLE ANSWERS