

## “Nile Delivery”

### Spring 2018 Torts Examination—House of Russell

The Spring 2018 Torts exam covered two incidents. The first was a crash between a truck and a motorcycle. The second was a school shooting. During the semester, we had the Parkland School shooting on Valentine’s Day, and as I finished grading, a Texas high school student took his father’s shotgun and handgun to school and killed ten people.

Analysis of the truck-motorcycle crash was a straightforward Duty/Standard of Care/Breach/Cause in Fact/Proximate Cause/Damages Analysis. There were only a few wrinkles. This part of the analysis should not have been very challenging.

There were a couple of issues related to the breach of the standard of care. Analysis of Driver’s breach needed to include that he was eating while driving and that he drifted out of his lane. For Nile Prime, analysis needed to include and distinguish Nile’s direct negligence from its vicarious liability. Nile was directly negligent by having a policy that encouraged drivers to work through lunch and therefore eat while driving. Nile may have been directly negligent by failing to check Driver’s MVR.

Nile was vicariously liable for Driver’s actions because he was on the job when the injury took place.

Nile’s direct negligence and vicarious liability are distinct issues. Cramming them together in a paragraph with Driver’s negligence was bad organization.

In class—particularly with the deposition video that we watched—we discussed these three separate lines of analysis. In addition, I discussed the matter in the pre-exam Q&A session. Good answers discussed Nile’s vicarious liability in tandem with Driver’s negligence rather than creating a whole separate section for vicarious liability.

Regarding breach of the standard of care, good answers questioned whether not checking driver’s MVR was a breach and, if it was, whether not checking the MVR was a cause-in-fact of the injury. Sure, Nile might not have hired him, but that does not mean Nile was negligent. Many, many times in class, I discussed the importance of identifying how a breach of the standard of care caused the harm rather than just how an activity led to harm.

The only other issue of any difficulty in the first part of the exam related to Ms. Cycle’s helmet. Her not wearing a helmet might have led to more harm, but her riding helmetless did not cause the crash to take place. As I discussed during the exam Q&A, this is an issue that some call anticipatory mitigation. Students should have identified the issue and said that some jurisdictions would count this against Cycle, and others would not.

The school-shooting section of the exam was more complicated. Most important, there were multiple defendants. **Any time there are multiple defendants, the analysis has to include**

**the apportionment of fault.** Very few students discussed the apportionment of fault among Shooter, Driver, Nile, Gramps, and Peterson. That was disappointing.

The analysis breaks into three big parts. First is the claim by the Estate of Shooter against all the defendants: Shooter, Driver, Nile, Gramps, and Peterson. The best way to discuss this is to analyze separately the liability of each defendant and then, having done that, discuss apportionment of fault. The worst way is to write paragraphs that discuss the duty of each defendant and then another paragraph that discusses the standard of care for each defendant and etc. This analysis is unreadable and seems never to lead to the crucial question of apportionment.

The strongest students understood that the Estate of Boyness had to make the claim per the wrongful death statute, and that the same statute limited what could be claimed as damages.

The best answers discussed the intentional tort/negligence issue with regard to Shooter. Weak answers imagined or assumed that somehow Shooter's parents were liable.

Regarding Driver and Nile, strong answers discussed Driver's negligence and the vicarious liability of Nile Prime for Driver's negligence. Strong answers considered the possible negligence of Nile Prime for not doing a background check, but as with regard to the crash, doubted that this was unreasonable. Strong answers raised doubts regarding proximate cause for Driver or Nile. There's no clear answer, but there's a good argument that leaving the door open should not put the delivers on the hook for murder. OTOH, Nile Prime specializes in weapons delivery, and so they should know that a stolen package might well contain a gun and not a pyrex measuring cup and, too, that the delivery recipients might well be gun owners.

Officer Peterson did nothing. Strong answers questioned—with statutory help—whether he had a duty, and noted that even if he did, by the time he could act, Boyness was dead. This was different than the Parkland shooting. Officer Peterson was not a cause in fact of Boyness's death.

Gramps, of course, was negligent in leaving his gun in his bedside stand. Whether Shooter might have found another way in, even though she did not have a plan, is something we could investigate. But, Gramps is at least a substantial factor. In real life, I'd like to sue people who leave their guns available to children and upset young adults.

Note that when apportioning, almost all fault will fall on Shooter. (See the Posner opinion in the sexual assault case.) If Shooter's intentional, criminal actions are excluded under the insurance policy, then there's not going to be much in the way of money to collect for any of the plaintiffs.

The second part of the analysis concerned negligent infliction of emotion distress claims. Mom and Gramps had *Dillon v. Legg* claims. Soccer's claim is different because he was in the Zone of Danger; he also has an assault claim. Gramps's own comparative fault limits his damages. (Some students analyzed contributory negligence and comparative fault—that's a conceptual error, because comparative fault replaced contributory negligence.)

Gramps also has a conversion claim because his granddaughter threw his gun in the river. He also has a trespass claim against her. These claims are perfectly sound and probably valueless.

Gramps also signed a release, which might apply against him but cannot apply against third persons. One smart student cited UCC 2-719, which I found to be heartwarming.

There were no premises liability issues. There were no product liability issues, although the few students who discussed a product defect in Nile Prime's delivery service—why not have a warning when the door does not close?—were not hurt by this foray into territory that I said was not part of the course content.

Overall, the exam answers were not strong. The sample answer attached below is a good exemplar. Grades were distributed as follows:

A	2
A-	3
B+	5
B	10
B-	7
C+	3
C	4
D	1
F	1
<b>TOTAL</b>	<b>36</b>



PROFESSOR RUSSELL. If you have technical problems turning in your answer, please contact the registrar. **Do NOT contact Professor Russell with difficulties related to exam submission.**

4. **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 the exam ends at 3 pm on Monday, May 7, 2018. Be cautious, for example, about posting anything on Facebook that anyone might think is a request for assistance. Once the exam starts, you may not discuss it with anyone at all before the examination ends at 3 pm on Monday, May 7, 2018.
  
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. **Include the word count at the end of your answer.**
  
6. **SPACING:** Please 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:** The laws of the 51st state of the union, which is called Newstate, apply to all the issues in this examination. This state has adopted the Uniform Commercial Code. The 51st state 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 answer. You will earn a better grade by being thorough and concise. And, of course, well-organized answers will be the best answers that earn the highest grades.
  
10. **EXPERTISE:** Please note that sometimes House of Russell exams deal with subject matter about which some of you may have expertise or outside knowledge. You have to accept the exam's presentation as true. For example, if there is lava in the exam, the exam indicates that lava is 1,500 degrees Fahrenheit, but you happen to know that lava is much hotter, then you should put aside your superior knowledge and accept the lava as being the temperature that the exam says it is. Typically, House of Russell exams try to simplify some issues by mashing down the science just a bit.
  
11. **KEEP A COPY:** You should feel free, of course, to keep a copy of the exam. Please keep your answer also.
  
12. **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.
  
13. **SAMPLE ANSWERS:** After he completes the grading, Professor Russell will issue a memo that includes high-scoring sample answers for your review. Do not ask to review your exam until you have reviewed the sample answers and exam memo. You may never argue your way to a higher grade.
  
14. **GOOD LUCK:** Good luck and have a great summer.

### **Nile Delivery**



Don Deliver's last day as a delivery driver for Nile Prime was the worst day of his life. Early in the day, he made a mistake that caused a boy's death. Later in the day—before he had even learned of the morning mistake—he struck and injured a motorcyclist with his delivery vehicle. She's now a paraplegic. If Nile Prime had not terminated him, he would have quit anyway.

The worst day of Don Deliver's life was not quite a year ago on May 22, 2017, a Monday. Mr. Deliver had had a restful weekend and was looking forward to a good week of

work. He enjoyed his job delivering packages for Nile Prime, which was an online shopping and delivery business that competes with the better-known Amazon Prime. The principal difference between Nile and Amazon is that Nile specializes in the delivery of handguns, rifles, and ammunition. Amazon sells and delivers guns and ammo, but Amazon does not emphasize weapons and ammunition to the extent that Nile does. Nile sells household items, clothing, books, and pretty much everything that Amazon sells. But Nile's big marketing emphasis is on the fact that they securely and efficiently deliver guns and ammo to buyers. Roughly 20 percent of the packages that Nile Prime delivers are in some way related to weaponry.

Mr. Deliver had worked for Nile Prime for two years. He really enjoyed the job. The pay and the benefits—health insurance, 401K, two weeks of vacation—were excellent. He liked to drive and working for Nile made him feel like he was an important part of Newcity's infrastructure and economy. People were always happy to see him arriving to deliver packages, and he enjoyed interacting with people in different neighborhoods, businesses, and homes.

One of many things that Mr. Deliver liked about Nile Prime was that the company paid him for a full day even if he finished his deliveries early. His managers determined how many parcels and boxes should go into his truck at the warehouse, and if Mr. Deliver managed to deliver all the packages before the end of the day, then he still got paid for a full day's work. Because of this generous policy, Mr. Deliver typically ate his lunch while driving rather than parking and sitting down to eat. Doing so allowed him to finish work a bit earlier than if he stopped to eat lunch.



When Nile hired Mr. Deliver in 2015, he was a little surprised that his driving and criminal record had not kept him from getting the job. Mr. Deliver had done a short stint in jail in his home state of Wisconsin during 2005 for a misdemeanor marijuana conviction. That conviction also led to his losing his driving license for year in 2005-06. Mr. Deliver later learned that Nile Prime only checked the previous seven years of the driving records of job applicants. He was unsure whether the company knew about the marijuana conviction, and in any event, he no longer consumed cannabis and did not think the conviction mattered. Nile never asked him about it, and he never brought it up.

The first bad thing—at least the first bad thing he knew about—happened at 12:30 pm. Mr. Deliver was on his route in the east end of Newcity. He liked the east end, because he could stop and get a Santiago's burrito to eat while out on his rounds. As he was eating the carne asado burrito, he drifted—or maybe swerved—from his lane and into the right-hand lane of the four-lane boulevard. Just as he was about to swerve back into his lane, he heard the motorcycle crash.

The motorcyclist whom Mr. Deliver struck with his truck was a woman named Crystal Cycle. She a 30-year-old architect at an innovative Newcity architecture firm. Newcity was growing wildly as millennials flooded into the city. The firm at which Ms. Cycle worked was one of the few that was designing attractive and innovative new housing. Video footage from a nearby business showed that Cycle was doing nothing wrong when Mr. Deliver's truck moved right and hit her. She was riding in her lane, and she was not speeding. She was even wearing a high-visibility vest.

The only thing that Mr. Deliver faults Cycle for is that she was not wearing a helmet. Newstate does not have a mandatory helmet law for motorcyclists, so Cycle was not breaking the law. Mr. Deliver learned through the grapevine that some of the doctors who treated Ms. Cycle for her injuries believe that she might have fared better if she had been wearing a helmet. Specifically, some of the doctors believe that a helmet would have spared Ms. Cycle from the traumatic brain injury that has left her unable to work at her old job. She certainly would have had some broken bones and other injuries, but if a helmet had protected her brain from colliding with a curb, then she might not have faced living the rest of her lifetime in a nursing home.

Ms. Cycle suffered brain injuries and a spinal injury at the first of her thoracic vertebrae (T-1). She can still move her arms but is unable to control or feel her body below her chest. She has significant cognitive deficits. She can no longer read nor speak clearly. In the time since the accident, Ms. Cycle's medical bills have been substantial. To date, her medical bills are as follows:

<b>MEDICAL PROVIDER</b>	<b>BILLING AMOUNT</b>
Newstate Valley EMS	\$942.40
Medical Center of the Newstate	\$177,383.66
Doug Hospital	\$207,854.04
Numotion (ATG)	\$34,716.30
Shield-Newcity Healthcare	\$523.98
Complete Home Health Care	\$33,616.00
Dr. Anton Good (PCP)	\$377.00
Newstate Valley Medical Center	\$59,928.05
University of Newstate Hospital	\$32,928.95
Peak Center	\$407.32
Newstate Ridge Family Medicine	\$80.00
Bright Eyes Vision Clinic	\$270.00
SCI Recovery Project	\$3,587.50

Sláinte Family Health Center	\$337.00
Newcity Foot and Ankle Clinic	\$414.00
Advanced Urgent Care	\$925.00
Public Partnerships of Newcity, Inc.	\$17,116.14
The Gochanda Plan	\$2,300.00
Newcity Orthopedics	\$688.00
University Physicians	\$6,727.00
Advanced Medical Imaging	\$5,291.00
Northern Newstate Medical Center	\$308.50
CNS Medical Group (Doug Hospital Physicians)	\$102,405.00
Walgreens	\$658.88
Caring Hands Pharmacy	\$73,203.98
Quest Diagnostics	\$2,932.35
United Seating and Mobility	\$449,036.62
Newstate Valley	\$2,408.00
Newstate Urology Center	\$969.00
Dr. Ben Richels	\$3,199.00
Diversified Radiology	\$1,384.00
Radiology Imaging Associates	\$1,341.00
Rural / Metro of Central Newstate	\$12,102.15
<b>TOTAL</b>	<b>\$1,236,361.82</b>

Ms. Cycle is unmarried, though she has lived for eight years with her boyfriend. They have talked about marriage, but neither thought getting married was important to their relationship. Ms. Cycle has no children.

Not until Newcity detectives came to visit him a few days later did Mr. Deliver learn about the death of the little boy. He was a nine-year-old boy with a happy grin and a gift for playing soccer. The boy, Billy Boyness, died at school. His 13-year-old first cousin, Sally Shooter, had come to the school with a gun and killed Billy with three quick shots as he was playing in a soccer match with his grandfather and mother on the sidelines watching, horrified, as the tragedy took place. Sally Shooter has been charged with homicide, and the District

Attorney has said he will try her as an adult. She admitted to the detectives that she shot Billy because he made fun of her when they played electronic games together. Billy's mom and dad lost their only child.

Mr. Deliver's mistake led directly to the boy's death. Billy and Sally's grandfather, Ryan Gramps, was a Nile Prime customer. (Billy's mother and Sally's mother are sisters.) Specifically, Gramps had signed up in 2017 for a new Nile service called "Nile Key." Nile advertised the service in late 2017 as a way to combat holiday season "porch pirates." The new delivery system allowed Nile Prime delivery persons to leave packages inside the house or apartment of customers. The entire process is done without a key or code—and the entire delivery is recorded on a camera that uploads to the cloud. Becoming a Nile Key customer required that Gramps install a smart lock on his door and video camera inside his condominium. He also signed a set of terms and conditions. (See Appendix 1)

Nile Key works like this: when the Nile Prime delivery driver arrives, Nile verifies the address and delivery time and operates the smart lock to allow the delivery driver into the customer's home. The driver simply puts the package inside the door and then closes the door. The camera records the delivery and uploads the video to the cloud. Customers can, if they want, watch while the delivery happens, review the video later, or, of course, they can ignore the video. Gramps likes the system because he has snoop neighbors who used to look at the packages left at his door to see what he was ordering. For the first few deliveries, he watched the delivery-in-progress on his smartphone, but after the first few times, he felt perfectly comfortable with the process.

On the afternoon before the shooting, Mr. Deliver had delivered a package—that included a book, some shaving cream, and a set of Pyrex baking dishes—to Gramps’s condominium. The Nile Key system unlocked the door; Mr. Deliver put the package inside; and then he closed the door—or thought he did. Newcity detectives reviewed the video of the delivery, which shows that Mr. Deliver left the door ajar. Mr. Deliver is sick about it.

About an hour after Mr. Deliver had left Gramps’s condominium, Sally Shooter arrived. She was angry, and she knew that her grandfather kept a handgun in the drawer of his bedside table. He had once told her never to touch it or even open the drawer. Before leaving for her grandfather’s place, Shooter did not have a plan for getting the gun, and she was surprised to find the front door open. Shooter entered Gramps’s place, went to his bedroom, put the gun in her Hello Kitty backpack, and went back home. The next day, she took the gun with her to her cousin’s soccer game after school and shot him dead. After shooting him, she ran away and avoided capture for a few hours. During that time, she threw the gun into the Newcity River. The police have not been able to retrieve it.

After she shot her cousin three times in a tight pattern to his chest—killing him instantly—Shooter thought to herself: “See there, Billy, I am a good shot.” Just before she fired, a boy from the opposing team, Hans Soccer, who just three feet away from Boyness saw Sally and screamed “gun.” Hans Soccer saw the gun pointed straight at him just before Shooter shot Boyness. Luckily, Soccer was not injured. He was not even spattered with blood. He continues to have nightmares, and his therapist says that only time will tell what impact surviving the shooting will have on him.

While investigating, detectives learned that a school resource officer had been on the school grounds near the soccer field at the time of the shooting. The school resource officer was a Newcity police officer named Peterson. Officer Peterson was in the parking lot just west of the soccer field when he heard the shots, radioed in, and told Newcounty Communication Dispatch (which handled police communications and 911 calls) “Be advised, we have possible — could be firecrackers. I think we have shots fired, possible shots fired.” Officer Peterson, who would become eligible for retirement at the end of the week, did not move toward the shots or the soccer field. He had promised his wife that he would avoid putting himself in unnecessary danger before he could retire with full benefits.

**Your job:** Your job is to analyze the tort liability of Nile, Mr. Deliver, Gramps, Shooter, and Officer Peterson. (Do not consider possible suits against the school nor against the manufacturer of the gun or the ammunition.) You should consider all the claims connected to the shooting and the motorcycle collision. No one has filed a lawsuit yet. Do not analyze criminal law issues.

**Appendices begin on next page**

## Appendices

### Appendix 1: Terms of Use for Nile Key

# Nile Key

## Terms of Use

This is an agreement between you and Nile Digital Services LLC (and its affiliates, "Nile" or "we"). Before using Nile Key, please read these Nile Key Terms of Use and the other applicable rules, policies, and terms posted on the Nile.com website or available through your Nile Key app (collectively, this "Agreement"). By using Nile Key, you agree to be bound by the terms of this Agreement. If you do not accept the terms of this Agreement, then you may not use Nile Key.

For the purpose of these Nile Key Terms of Use:

"Nile Key" means Nile's remote access management services, including the Nile Key app and other related services.

"Compatible Product" means any product, device, software or application designated for use with Nile Key, such as Nile Key-compatible smart locks and cameras.

"Recordings" means any audio, image, video, or other types of recordings made in connection with your use of Nile Key.

"Software" means all software (including any updates or new versions), and any related documentation, that we make available to you for use in connection with Nile Key.

**1. In-Home and In-Car Delivery.** With Nile Key, you can enable in-home or in-car delivery at eligible addresses. If you place an order with in-home or in-car delivery, you are authorizing Nile and its delivery providers to access the home (or other location) that you designate as the order shipping address or your linked vehicle, for the purpose of delivering your order. By placing an order with in-home or in-car delivery, you are confirming that you have the right to authorize Nile and its delivery providers to access the designated home or vehicle. Nile and its delivery providers reserve the right to decline to deliver your order in-home or in-car for any reason.

**2. Guest and Service Provider Access.** You can use Nile Key to provide and manage access permissions for guests and service providers. If you receive access permission from somebody else, such as a one-day keypad code for a lock, information about your use of Nile Key with respect to that permission will be shared with the person who provided the permission.

### **3. Compatible Products.**

**3.1.** If you use a Compatible Product that is connected to a third-party account, you can link that account with your Nile account to enable certain Nile Key functionality. If you link an account that you have with a third party, we may exchange related information with that third party, and send commands to Compatible Products that are connected to your account. For example, when you link a connected car service account, we may receive information about your vehicle's location, and send lock, unlock, alert horn and flash lights commands to the associated vehicle, for the purpose of delivering your order. There may be additional third-party terms applicable to third party accounts and related services. If you do not accept the third-party terms, do not use that account.

**3.2.** Nile may automatically update the firmware for certain Compatible Products on behalf of the applicable manufacturer.

### **4. Information Provided to Nile; Your Recordings.**

**4.1.** The Software provides Nile with information about your use and the performance of Nile Key, the Software, and Compatible Products, as well as information regarding the devices on which you download and use Nile Key. For example, this may include information about Compatible Products and how they were operated; access permissions for guests and service providers and when guests and service providers used Nile Key; and occurrences of technical errors. We will handle any information we receive in accordance with the Nile.com Privacy Notice.

**4.2.** If you use a Compatible Product capable of creating Recordings, we will process and retain your Recordings in the cloud to provide and improve our services. You give us all permissions we need to do so.

### **5. General.**

**5.1. Nile Key Requirements.** Certain Nile Key features require one or more Compatible Products. In addition, some Nile Key services may not be available in all areas and may require separate subscriptions, memberships, a data plan, or an internet connection.

**5.2. Applicable Law.** This agreement is subject to the laws of Newstate.

**5.3. Limitation of liability.** In no event shall Nile be liable to you or to any third parties for any indirect, special, incidental, or consequential damages, or any loss or damages whatsoever (even if Nile has been previously advised of the possibility of such damages), in a warranty, contract, or negligence action that in any manner arises out of or in connection with the use, inability to use, performance of, or services provided on or through the sites. These limitations shall apply notwithstanding any failure of essential purpose of any limited remedy.



In no event shall Nile's total liability to you for all damages, losses and causes of action, whether in warranty, contract, or negligence exceed (a) the amount paid by you to Nile or a Nile seller, if any, or (b) \$1000 (whichever is less). Because some jurisdictions do not allow the exclusion or limitation of liability for consequential or incidental damages, the above limitations may not apply to you.

You and Nile agree that the warranty disclaimers and limitations of liability in this agreement are material, bargained-for bases of this agreement, and that they have been taken into account in determining the consideration to be given by each party under this agreement and in the decision by each party to enter into this agreement. You and Nile agree that the warranty disclaimers and limitations of liability in these terms of use are fair and reasonable.

**5.4. Disclaimers.** Nile has no responsibility or liability for the following: third party accounts or services; Compatible Products that Nile does not manufacture or develop and manufacturer-provided firmware for such products; any guests or service providers to whom you provide access permission.

**5.5. Changes to Nile Key.** We may change, suspend, limit, or discontinue Nile Key, or any part of it, at any time without notice. We may amend any of this Agreement's terms at our sole discretion by posting the revised terms on the Nile.com website. Your continued use of Nile Key after the effective date of the revised Agreement constitutes your acceptance of the terms.

**5.6. Contact Information.** For help with Nile Key or resolving other issues, please contact Customer Service.

## **Appendix 2: Statutes**

### **Statute 1. When action survives death.**

If any person entitled to bring any action dies before the expiration of the time limited therefor and if the cause of action does by law survive, the action may be commenced by the personal representative of the deceased person at any time within one year after the date of death and not afterwards.

### **Statute 2. Wrongful Death**

(1) Whenever the death of a person, injuries resulting in death, or death shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured or death, and although the death was caused under circumstances that constitute a felony.

(2) Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased. Within 30 days after the commencement of an action, the personal representative shall serve a copy of the complaint and notice upon the person or persons who may be entitled to damages under subsection (3) in the manner and method provided in the rules applicable to probate court proceedings.

(3) the person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased:

(A) The deceased's spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.

(B) The children of the deceased's spouse.

(C) Those persons who are devisees under the will of the deceased, except those whose relationship with the decedent violated Newstate law, including beneficiaries of a trust under the will, those persons who are designated in the will as persons who may be entitled to damages

under this section, and the beneficiaries of a living trust of the deceased if there is a devise to that trust in the will of the deceased.

(4) In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased.

**Statute 3. Modified comparative fault standard established**

(1) For purposes of this article, “comparative fault” means the degree to which the fault of a person was a proximate cause of an alleged personal injury or death or damage to property, expressed as a percentage. Fault shall be determined according to Statute 5.

(2) In any action based on tort or any other legal theory seeking damages for personal injury, property damage, or wrongful death, recovery shall be predicated upon principles of comparative fault and the liability of each person, including plaintiffs, defendants and nonparties who proximately caused the damages, shall be allocated to each applicable person in direct proportion to that person's percentage of fault.

(3) The total of the percentages of comparative fault allocated by the trier of fact with respect to a particular incident or injury must equal either zero percent or one hundred percent.

**Statute 4. Liability to be several; amount of judgment; allocation of fault**

(1) In any action for damages, the liability of each defendant for compensatory damages shall be several only and may not be joint. Each defendant shall be liable only for the amount of compensatory damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against each defendant for his or her share of that amount. However, joint liability may be imposed on two or more defendants who consciously conspire and deliberately pursue a common plan or design to commit a tortious act or omission. Any person held jointly liable under this section shall have a right of contribution from other defendants that acted in concert.

(2) To determine the amount of judgment to be entered against each defendant, the court, with regard to each defendant, shall multiply the total amount of compensatory damages recoverable by the plaintiff by the percentage of each defendant's fault and, subject to subsection (4) of this section, that amount shall be the maximum recoverable against that defendant.

(3) Any fault chargeable to the plaintiff shall not bar recovery by the plaintiff unless the plaintiff's fault is greater than the combined fault of all other persons responsible for the total amount of damages, if any, to be awarded. If the plaintiff's fault is equal to or less than the combined fault of all other persons, the plaintiff's recovery shall be reduced in proportion to the plaintiff's degree of fault.

(4) Notwithstanding subsection (2) of this section, if a plaintiff through good faith efforts is unable to collect from a liable defendant, the plaintiff may, not later than one year after judgment becomes final through lapse of time for appeal or through exhaustion of appeal, whichever occurs later, move for reallocation of any uncollectible amount among the other parties found to be liable.

(A) Upon the filing of the motion, the court shall determine whether all or part of a defendant's proportionate share of the verdict is uncollectible from that defendant and shall reallocate the uncollectible amount among the other parties found to be liable, including a plaintiff at fault, according to their percentages at fault: *Provided*, That the court may not reallocate to any defendant an uncollectible amount greater than that defendant's percentage of fault multiplied by the uncollectible amount: *Provided, however*, That there shall be no reallocation against a defendant whose percentage of fault is equal to or less than the plaintiff's percentage of fault.

(B) If the motion is filed, the parties may conduct discovery on the issue of collectability prior to a hearing on the motion.

(5) A party whose liability is reallocated under subsection (4) of this section is nonetheless subject to contribution and to any continuing liability to the plaintiff on the judgment.

(6) This section does not affect, impair or abrogate any right of indemnity or contribution arising out of any contract or agreement or any right of indemnity otherwise provided by law.

(7) The fault allocated under this section to an immune defendant or a defendant whose liability is limited by law may not be allocated to any other defendant.

**Statute 5. Product Liability: comparative fault as measure of damages.**

(1) In any product liability action, the fault of the person suffering the harm, as well as the fault of all others who are parties to the action for causing the harm, shall be compared by the trier of fact in accordance with this section. The fault of the person suffering the harm shall not bar such person, or a party bringing an action on behalf of such a person, or his estate, or his heirs from recovering damages, but the award of damages to such person or the party bringing the action shall be diminished in proportion to the amount of causal fault attributed to the person suffering the harm. If any party is claiming damages for a decedent's wrongful death, the fault of the decedent, if any, shall be imputed to such party.

(2) Where comparative fault in any such action is an issue, the jury shall return special verdicts, or, in the absence of a jury, the court shall make special findings determining the percentage of fault attributable to each of the persons to whom some fault is attributed and determining the total amount of damages sustained by each of the claimants. The entry of judgment shall be made by the court, and no general verdict shall be returned by the jury.

(3) The provisions of Statute 3 do not apply to any product liability action.

**Statute 6. Premises liability. Actions against landowners**

(1) For the purposes of this section, “landowner” includes, without limitation, an authorized agent or a person in possession of real property and a person legally responsible for the condition of real property or for the activities conducted on real property.

(2) In any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, the landowner shall be liable only as follows:

(A) A trespasser may recover only for damages willfully or deliberately caused by the landowner.

(B) A licensee may recover only for damages caused:

(I) By the landowner's unreasonable failure to exercise reasonable care with respect to dangers created by the landowner of which the landowner actually knew; or

(II) By the landowner's unreasonable failure to warn of dangers not created by the landowner which are not ordinarily present on property of the type involved and of which the landowner actually knew.

(C) An invitee may recover for damages caused by the landowner's unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew or should have known.

(3) It is the intent of the general assembly in enacting the provisions of subsection (2) of this section that the circumstances under which a licensee may recover include all of the circumstances under which a trespasser could recover and that the circumstances under which an invitee may recover include all of the circumstances under which a trespasser or a licensee could recover.

(4) In any action to which this section applies, the judge shall determine whether the plaintiff is a trespasser, a licensee, or an invitee, in accordance with the definitions set forth in subsection (5) of this section. If two or more landowners are parties defendant to the action, the judge shall determine the application of this section to each such landowner. The issues of liability and damages in any such action shall be determined by the jury or, if there is no jury, by the judge.

(5) As used in this section:

(A) "Invitee" means a person who enters or remains on the land of another to transact business in which the parties are mutually interested or who enters or remains on such land in response to the landowner's express or implied representation that the public is requested, expected, or intended to enter or remain.

(B) "Licensee" means a person who enters or remains on the land of another for the licensee's own convenience or to advance his own interests, pursuant to the landowner's permission or consent. "Licensee" includes a social guest.

(C) "Trespasser" means a person who enters or remains on the land of another without the landowner's consent.

(6) A landowner owes a duty of reasonable care under the circumstances with regard to activities conducted on the land.

**Statute 7. Immunity of Governmental Entity or Employee**

A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from the following:

- (1) The natural condition of unimproved property.
- (2) The condition of a reservoir, dam, canal, conduit, drain, or similar structure when used by a person for a purpose that is not foreseeable.
- (3) The temporary condition of a public thoroughfare or extreme sport area that results from weather.
- (4) The condition of an unpaved road, trail, or footpath, the purpose of which is to provide access to a recreation or scenic area.
- (5) The design, construction, control, operation, or normal condition of an extreme sport area, if all entrances to the extreme sport area are marked with:
  - (A) a set of rules governing the use of the extreme sport area;
  - (B) a warning concerning the hazards and dangers associated with the use of the extreme sport area; and
  - (C) a statement that the extreme sport area may be used only by persons operating extreme sport equipment.

This subdivision shall not be construed to relieve a governmental entity from liability for the continuing duty to maintain extreme sports areas in a reasonably safe condition.

- (6) The initiation of a judicial or an administrative proceeding.
- (7) The performance of a discretionary function; however, the provision of medical or optical care shall be considered as a ministerial act.
- (8) The adoption and enforcement of or failure to adopt or enforce:
  - (A) a law (including rules and regulations); or

(B) in the case of a public school or charter school, a policy; unless the act of enforcement constitutes false arrest or false imprisonment.

(9) An act or omission performed in good faith and without malice under the apparent authority of a statute that is invalid if the employee would not have been liable had the statute been valid.

(10) The act or omission of anyone other than the governmental entity or the governmental entity's employee.

(11) The issuance, denial, suspension, or revocation of, or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization, where the authority is discretionary under the law.

(12) Failure to make an inspection, or making an inadequate or negligent inspection, of any property, other than the property of a governmental entity, to determine whether the property complied with or violates any law or contains a hazard to health or safety.

(13) Entry upon any property where the entry is expressly or impliedly authorized by law.

(14) Misrepresentation if unintentional.

(15) Theft by another person of money in the employee's official custody, unless the loss was sustained because of the employee's own negligent or wrongful act or omission.

(16) Injury to the property of a person under the jurisdiction and control of the department of correction if the person has not exhausted the available administrative remedies and procedures.

(17) Injury to the person or property of a person under supervision of a governmental entity and who is:

(A) on probation; or

(B) assigned to an alcohol and drug services program or a community corrections program.

(18) Design of a highway, toll road, or project if the claimed loss occurs at least twenty (20) years after the public highway, toll road project, tollway, or project was designed or substantially redesigned; except that this subdivision shall not be construed to relieve a responsible



governmental entity from the continuing duty to provide and maintain public highways in a reasonably safe condition.

(19) Development, adoption, implementation, operation, maintenance, or use of an enhanced emergency communication system.

(20) Injury to a student or a student's property by an employee of a school corporation if the employee is acting reasonably under a:

(A) discipline policy or

(B) restraint and seclusion plan.

(21) An act or omission performed in good faith under the apparent authority of a court order that is invalid, including an arrest or imprisonment related to the enforcement of the court order, if the governmental entity or employee would not have been liable had the court order been valid.

(22) An act taken to investigate or remediate hazardous substances, petroleum, or other pollutants associated with a brownfield unless:

(A) the loss is a result of reckless conduct; or

(B) the governmental entity was responsible for the initial placement of the hazardous substances, petroleum, or other pollutants on the brownfield.

(23) The operation of an off-road vehicle by a nongovernmental employee, or by a governmental employee not acting within the scope of the employment of the employee, on a public highway in a county road system outside the corporate limits of a city or town, unless the loss is the result of an act or omission amounting to:

(A) gross negligence;

(B) willful or wanton misconduct; or

(C) intentional misconduct.

**Statute 8. General limitation of actions - one year.**

(1) The following civil actions, regardless of the theory upon which suit is brought, or against whom suit is brought, shall be commenced within one year after the cause of action accrues, and not thereafter:

- (a) The following tort actions: Assault, battery, false imprisonment, false arrest, libel, and slander;
- (b) All actions for escape of prisoners;
- (c) All actions against sheriffs, coroners, police officers, firefighters, national guardsmen, or any other law enforcement authority;
- (d) All actions for any penalty or forfeiture of any penal statutes;
- (e) All actions for negligence, fraud, willful misrepresentation, deceit, or conversion of trust funds.

**Statute 9. General limitation of actions - two years.**

(1) The following civil actions, regardless of the theory upon which suit is brought, or against whom suit is brought, shall be commenced within two years after the cause of action accrues, and not thereafter:

- (a) Tort actions, including but not limited to actions for negligence, trespass, malicious abuse of process, malicious prosecution, outrageous conduct, interference with relationships, and tortious breach of contract.
- (b) All actions for strict liability, absolute liability, or failure to instruct or warn;
- (c) All actions, regardless of the theory asserted, against any veterinarian;
- (d) All actions for wrongful death.
- (e) Repealed.

- (f) All actions against any public or governmental entity or any employee of a public or governmental entity for which insurance coverage is provided.
- (g) All actions upon liability created by a federal statute where no period of limitation is provided in said federal statute;
- (h) All actions against any public or governmental entity or any employee of a public or governmental entity.
- (i) All other actions of every kind for which no other period of limitation is provided.

**Statute 10. General limitation of actions - three years.**

- (1) Except as provided in section (2), the following actions shall be commenced within 3 years or be barred:
  - (A) An action to recover damages for injuries to the person, including an action to recover damages for injuries to the person caused or sustained by or arising from an accident involving a motor vehicle.
  - (B) An action brought to recover damages for death caused by the wrongful act, neglect or default of another.
- (2) An action brought to recover damages for death caused by the wrongful act, neglect, or default of another and arising from an accident involving a motor vehicle shall be commenced within 2 years after the cause of action accrues or be barred.

**Statute 11. Action for wrongful taking of personal property.**

- (1) An action to recover damages for the wrongful taking, conversion or detention of personal property shall be commenced within 6 years after the cause of action accrues or be barred. The cause of action accrues at the time the wrongful taking or conversion occurs, or the wrongful detention begins.

**Statute 12. Limitation of actions against architects, contractors, builders or builder vendors, engineers, inspectors, and others.**

(1)(a) Notwithstanding any statutory provision to the contrary, all actions against any architect, contractor, builder or builder vendor, engineer, or inspector performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property shall be brought within two years after the claim for relief arises, and not thereafter, but in no case shall such an action be brought more than six years after the substantial completion of the improvement to the real property.

(b) A claim for relief arises under this section at the time the claimant or the claimant's predecessor in interest discovers or in the exercise of reasonable diligence should have discovered the physical manifestations of a defect in the improvement that ultimately causes the injury.

(c) Such actions shall include any and all actions in tort, contract, indemnity, or contribution, or other actions for the recovery of damages for:

(I) Any deficiency in the design, planning, supervision, inspection, construction, or observation of construction of any improvement to real property; or

(II) Injury to real or personal property caused by any such deficiency; or

(III) Injury to or wrongful death of a person caused by any such deficiency.

**Statute 13. Action for damages for injury to property.**

(1) Except as provided in section (2) and in any other case where a different period is expressly prescribed, an action, not arising on contract, to recover damages for an injury to real or personal property shall be commenced within 6 years after the cause of action accrues or be barred.

(2) An action, not arising on contract, to recover damages for an injury to real or personal property that are caused or sustained by, or that arise from, an accident involving a motor vehicle shall be commenced within 3 years after the cause of action accrues or be barred.

**Statute 14. Endangering safety by use or storage of dangerous weapon.**

(1) Whoever does any of the following is guilty of a misdemeanor:

(A) Endangers another's safety by the negligent operation, handling, or storage of a dangerous weapon.

(B) Operates or goes armed with a firearm while he or she is under the influence of an intoxicant.

(C) Operates or goes armed with a firearm while he or she has a detectable amount of a restricted controlled substance in his or her blood. A defendant has a defense to any action under this paragraph that is based on the defendant allegedly having a detectable amount of methamphetamine, gamma-hydroxybutyric acid, or delta-9-tetrahydrocannabinol in his or her blood, if he or she proves by a preponderance of the evidence that at the time of the incident or occurrence he or she had a valid prescription for methamphetamine or one of its metabolic precursors, gamma-hydroxybutyric acid, or delta-9-tetrahydrocannabinol.

(D) Except as provided in d(1) intentionally points a firearm at or toward another.

(D)(1) Whoever intentionally points a firearm at or towards a law enforcement officer, a fire fighter, an emergency medical services practitioner, an emergency medical responder, an ambulance driver, or a commission warden who is acting in an official capacity and who the person knows or has reason to know is a law enforcement officer, a fire fighter, an emergency medical services practitioner, an emergency medical responder, an ambulance driver, or a commission warden is guilty of a felony.

(E) While on the lands of another discharges a firearm within 100 yards of any building devoted to human occupancy situated on and attached to the lands of another without the express permission of the owner or occupant of the building. "Building" as used in this paragraph does not include any tent, bus, truck, vehicle or similar portable unit.

**Statute 15. Carrying firearm in public building.**

(1) Any person who goes armed with a firearm in any building owned or leased by the state or any political subdivision of the state is guilty of a Class A misdemeanor.

(2) This section does not apply to any of the following:

(A) Peace officers or armed forces or military personnel who go armed in the line of duty or to any person duly authorized by the chief of police of any city, village or town, the chief of the capitol police, or the sheriff of any county to possess a firearm in any building. Peace officer does not include a commission warden who is not a state-certified commission warden.

**END OF EXAM**

# I. Personal Injury

## Actions:

Under Statute 10(A), Cycle can bring the following actions within three years of the date of her injury:

A. **Cycle v. Deliver/Nile (vicarious liability):** Cycle can bring an action against Deliver for negligence. She may also hold Nile liable for Deliver's negligence by invoking *respondeat superior*.

1. **Duty:** Deliver was active while driving and therefore had a duty to act reasonably.
2. **Standard of Care (SOC):** To act as a reasonably prudent person (RPP).
3. **Breach:** Deliver breached the SOC when he swerved into the right lane. He was likely distracted by eating. Since the burden of pulling over to eat his burrito was extremely low but the probability of causing an accident by failing to do so and the magnitude of potential injuries were high, Deliver acted unreasonably.
4. **Cause in Fact (CIF):** But for Deliver swerving, Cycle would not have been injured.
5. **Proximate Cause (PC):** Cycle's injuries were a reasonably foreseeable result of Deliver's veering into her lane.
6. **Defenses:**
  - i. **Failure to Avoid Consequences:** Deliver will argue that Cycle's decision to drive without a helmet constitutes a failure of anticipatory mitigation.
7. **Vicarious Liability:** To invoke *respondeat superior*, Cycle must demonstrate that Deliver was an employee acting within his scope of employment at the time of the injury.

- i. **Employee Status:** Nile will argue that Deliver was an independent contractor because he had control over when he delivered packages. However, because Deliver received benefits and his work was a crucial part of Nile's business, a court would likely find that he was an employee.
- ii. **Scope of Employment:** Nile will argue that because Deliver was eating his lunch at the time of the injury, he was not operating within the scope of his employment. However, because the burrito store was along his delivery route and he did not take a lunch break, a court is likely to find that he was acting within the scope of his employment.

B. **Cycle v. Nile:** Cycle can bring an action directly against Nile due to its negligent hiring and supervision of Deliver.

1. **Duty:** Nile actively conducted business and had a duty to do so reasonably.
2. **SOC:** To operate as a reasonable business.
3. **Breach:** Nile likely breached the SOC when it hired Deliver despite his poor driving record. Furthermore, it appears that Nile had no policies in place to prohibit eating while driving and that the flexibility it afforded its drivers may have actually encouraged this behavior. The burden of conducting background checks and instituting policies against distracted driving is relatively low. Therefore, a court is likely to find that Nile acted unreasonably.
4. **CIF:** But for failing to properly vet and manage employees, Deliver would not have been driving for Nile in a distracted manner and would not have caused Cycle's injuries.



5. **PC:** Cycle’s injuries were a reasonably foreseeable result of hiring a driver with a dangerous track record as well as failing to take precautions against distracted driving.
6. **Defenses:** See I(A)(6).

## Damages and Apportionment of Fault:

### C. Compensatory Damages:

	Past	Future
<b>Special</b>	Medical Bills, Lost Wages, Damage to Property (e.g. Motorcycle)	Medical Bills, Lost Wages, Assisted Living
<b>General</b>	Pain & Suffering	Pain & Suffering, Loss of Enjoyment, Emotional Distress

1. **Medical:** Past medical bills are over one million dollars and future medical bills will be substantial. As an employed architect, Cycle likely has private insurance. Assuming Newstate follows the collateral source rule, defendants will be held liable for the full amount of billed costs, regardless of insurance reimbursements.
2. **Lost Wages:** Cycle will likely contend that as a young architect in a city with a housing boom, she stood to increase her earning potential over time.
3. **General Damages:** Cycle suffered extensive cognitive and physical injuries, can no longer ride her motorcycle, and may suffer from embarrassing issues (such as incontinence). Defendants will be liable for significant general damages.

**4. Loss of Consortium:** Unless Newstate recognizes common law marriage, Cycle's boyfriend cannot recover for loss of consortium

**D. Comparative Fault:** Per Statute 4(3), a plaintiff who is responsible for *up to and including 50 percent* of the fault can recover damages. Because video evidence shows that Cycle did nothing to cause the accident, she is entitled to recover damages. However, jurisdictions vary in how they handle failures of anticipatory mitigation. Although Cycle did not cause the accident, Newstate may limit her recovery because she was not wearing a helmet.

**E. Several Liability:** Per Statute 4, Deliver and Nile would be severally liable for compensatory damages, with each defendant liable only for the proportion of damages that corresponds with his percentage of fault. However, if Cycle is unable to collect from one defendant, she could later move to reallocate the uncollected amount to the other defendant. (Statute 4 (4)). Therefore, if both parties are found to be independently negligent, Nile may ultimately pay for Deliver's share of damages, even in the absence of vicarious liability.

## II. Wrongful Death

### Actions:

A personal representative of the Boyness estate (Estate) may bring a wrongful death action within two years of Boyness's death (Statute 9(1)(d)). Since Boyness was an only child, his parents and grandparents are the only parties who can recover damages. (Statute 2(1)(A)). Gramps cannot serve as the representative of the Estate because he may be named as a co-defendant.

A. **Estate v. Shooter:** Estate can bring an action against Shooter for her intentional tort.

However, intentional torts are not covered by insurance. Depending on the laws of Newstate and the assets of Shooter (e.g. whether she has a trust fund) Estate may instead plead in negligence, hoping for an insurance settlement.

1. **Duty:** Shooter was active when she went to school and had a duty to behave reasonably.
2. **SOC:** Shooter is expected to behave as a reasonably prudent 13-year-old.
3. **Breach:**
  - i. **Negligence:** Shooter breached the SOC when she brought a gun to school and discharged it.
  - ii. **Negligence *per se*:** Shooter violated Statute 14(A) through “negligent operation of a dangerous weapon” and “intentionally point[ing] a firearm...towards another.”
4. **CIF:** But for Shooter’s firing the gun, Boyness would not have died.
5. **Proximate Cause:** Boyness’s death was a reasonably foreseeable result of firing a loaded gun.
6. **Defenses:** None.
7. **Vicarious liability:** If Newstate permits vicarious liability of parents, Estate may try to demonstrate that Shooter had a history of violence and claim negligent supervision, thereby allowing Estate to access parental assets and insurance.

B. **Estate v. Gramps:** Estate may sue Gramps for negligence.

1. **Duty:** Gramps actively possessed a gun and had a generalized duty to protect others from its misuse.

2. **SOC:** To behave as a RPP.

3. **Breach:**

i. **Negligence:** Gramps breached the SOC by informing Shooter of the location of the gun, failing to lock it, and failing to realize it had gone missing.

ii. **Negligence *per se*:** Gramps violated Statute 14(A) when he endangered another's safety through "negligent...storage of a dangerous weapon."

4. **CIF:** But for leaving his gun in an unlocked drawer, Shooter would not have stolen it and killed Boyness.

5. **PC:** A shooting death is a reasonably foreseeable result of leaving an unlocked gun where children can access it. Gramps may try to argue that because Shooter committed an intentional tort, she was a superseding intervening force. However, jurisdictions have largely moved away from viewing all intentional torts as breaking the chain of causation; Gramps is likely liable.

6. **Defenses:** See PC.

C. **Estate v. Deliver/Nile (vicarious liability):** Estate may sue Deliver for negligence.

However, it is unclear whether Estate can establish that Deliver was a proximate cause of the death.

1. **Duty:** Deliver was active when delivering packages and had a duty to do so reasonably.

2. **SOC:** To act as a RPP.

3. **Breach:** Deliver breached the SOC when he failed to ensure that he locked Gramps's door.

4. **CIF:** But for Deliver leaving the door ajar, Shooter would not have stolen the gun and Boyness would not have been killed.
5. **PC:** It is unclear whether a court would find that Deliver was a PC of the death. Deliver will argue that the box contained only household items and that while he could have foreseen that damage to *property* would result from his actions, he could not have foreseen *personal injury*, much less a homicide. He will also argue that Shooter was a superseding intervening force. Estate will counter that because twenty percent of Nile packages contain weapons, a shooting was a reasonably foreseeable consequence of leaving a Nile box in an unlocked house. Estate will claim that the exact mechanism of the harm is immaterial and that Deliver was the proximate cause.
6. **Defenses:** See PC above & III (D)(6)(i).
7. **Vicarious liability:** As discussed in I(A)(7)(i), Deliver was likely an employee of Nile. He was working within the scope of his employment when he left the door ajar. Therefore, Nile can be held liable for Deliver's negligence.

**D. Estate v. Nile:**

1. **Duty:** Nile actively conducted business and had a generalized duty to do so reasonably.
2. **SOC:** To operate as a reasonable business.
3. **Breach:** Nile may have breached the SOC by failing to take adequate measures to ensure that deliverymen leave homes secure. Nile could have potentially used the Nile Key technology to alert the company/driver/homeowner if a door remained unlocked for an extended period after a delivery. The fact that Nile hired Deliver despite his criminal record may also constitute an unreasonable practice. Estate can investigate what protocols Nile had in place and compare them with industry standards (such as those of Amazon).

Even if no deviations are found in Nile's practices, Estate may argue that the entire industry standard is unreasonable. It may also argue that Nile should be held to a higher standard because a significant amount of its business comes from selling weapons. Nile will argue that Gramps could have viewed the delivery and should have noticed the open door.

4. **CIF:** But for Nile's failure to take adequate precautions against leaving homes unsecured after deliveries, Shooter would not have been able to enter Gramps's house, steal the gun, and kill her cousin.
5. **PC:** A PC analysis largely mirrors that of Deliver's. (III (C)(5)). Nile will contend that it could not have reasonably foreseen a homicide and that Shooter was a superseding intervening force.

6. **Defenses:**

- i. **Express assumption of the risk:** Nile will assert that by participating in Nile Key, Gramps entered into an exculpatory agreement that exempts Nile from liability. Estate will argue that because the Terms of Use did not require a signature and were non-specific regarding liability, they cannot be used as a defense.

E. **Estate v. Peterson:** Estate may attempt to hold Peterson liable. However, due to issues arising from the public duty doctrine and difficulties proving causation, Estate is unlikely to succeed.

1. **Duty:** As a school resource officer, Peterson may have had a duty to rescue based on a special school-student relationship. Because Peterson called 911, he may also have had a duty generated by his undertaking to act. However, many jurisdictions follow a public

duty doctrine that bars individuals from recovering for a government actor's failure to respond.

2. **SOC:** To behave as a reasonably prudent police officer.
3. **Breach:** By failing to approach the situation and provide aid, Peterson breached the SOC.
4. **CIF:** Boyness died instantly. Therefore, Peterson's failure to respond was neither a but for cause nor a substantial factor in the death. To establish causation, Estate would need to prove that Peterson failed to prevent the threat or could have provided life-saving assistance directly after the shooting, both of which are unlikely.
5. **Proximate Cause:** Plaintiff may claim that the death of a victim is a reasonably foreseeable result of failing to render aid after shots are fired. However, without establishing CIF, this argument is irrelevant.
6. **Defenses:**
  - a. **Immunity:** Peterson's failure to act does not fall within the specific provisions of governmental immunity outlined in Statute 7, but a public duty doctrine may still protect him from liability by limiting his duty.

## Damages and Apportionment of Fault:

**F. Compensatory Damages:** Statute 2 permits Estate to recover the following damages:

	<b>Past</b>	<b>Future</b>
<b>Special</b>	Medical bills (if any incurred), funeral expenses	Loss of financial support (difficult to establish and may be reduced by costs of raising Boyness)
<b>General</b>	None (Boyness died instantly)	Loss of society/companionship

- G. Punitive Damages:** Shooter’s malice would make her liable for punitive damages. Estate may also try to seek punitive damages from Nile, arguing that because Nile’s emphasis is on the secure delivery of guns, its lack of security protocols were particularly egregious. Punitive damages are unlikely to be awarded against other parties and are not covered by insurance.
- H. Comparative Fault:** Boyness was simply playing soccer and was not at fault. Therefore, his estate can recover the damages listed above.
- I. Several Liability:** As discussed in section I(E), compensatory damages must be allocated severally. While Shooter acted consciously, she did not act in concert within any other defendants, and therefore joint liability does not apply. (Statute 9(1)(d)).
- J. Apportionment of Fault:** The facts support a finding apportioning the most fault to Shooter, followed by Gramps, and then Deliver/Nile. However, although Shooter is responsible for the majority of fault, she is the least likely party from which Estate can recover damages. Therefore, although the case against Nile is less strong, bringing an action against them may be critically important to the plaintiffs, who can eventually move to reallocate any uncollected compensatory damages to Nile (Statute 4 (4)).

### III. Emotional Distress

Since the events that gave rise to the death also resulted in the emotional distress, please refer to the actions above for an analysis of defendant liability/apportioning fault.



**A. Soccer v. Shooter/Deliver/Nile/Gramps:** Soccer may be able to recover for mental distress.

If Newstate follows “the impact rule,” he will not be able to recover since he was never touched in the incident. However, if Newstate adopts a “zone of danger” rule, then Soccer can recover because Shooter’s gun was pointed directly at him from three feet away.

**B. Mom\* v. Shooter/Deliver/Nile/Gramps:** Mom may recover for mental distress via a bystander action. If Newstate follows the zone of danger rule, Mom will argue that she could have been struck on the sidelines. If Newstate adopts the *Dillon v. Legg* standard, she is entitled to recover because she contemporaneously observed her son’s death.

To recover damages, plaintiffs may be required to demonstrate physical manifestations of emotional distress.

\*Gramps may also bring an emotional distress claim, but the damages he can recover will be reduced by his percentage fault.

## IV. Other Potential Actions

**A. Gramps v. Shooter/Nile:** Gramps could bring an action against Shooter/Nile to recover damages for his gun. However, conversion is not covered by insurance and damages are too low to make the action worthwhile. Gramps is unlikely to bring an action against Shooter for trespass because he could only recover nominal damages.

**Word Count: 2,500**