

# Fall 1998

## MID-YEAR EXAMINATION

### TORTS

#### PROFESSOR RUSSELL

#### INSTRUCTIONS:

1. **DEADLINE:** This is a six-hour examination due by 4:00 pm on 17 December 1998. If you return the exam after 4:00 pm, you get zero points for the exam. NO EXCUSES.
2. **HONOR CODE:** The full text of the Honor Code is as follows:

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HONOR CODE: The study of law is an integral part of the legal profession. Students engaged in legal studies should learn the proper ethical standards as part of their education. All members of the legal profession recognize the need to maintain a high level of professional competence and integrity. A student at The University of Texas at Austin School of Law is expected to adhere to the highest standard of personal integrity. Each student is expected to compete honestly and fairly with his or her peers. All law students are harmed by unethical behavior by any student. A student who deals dishonestly with fellow law students may be dishonest in the future and harm both future clients and the legal profession. Under the honor system, the students must not tolerate unethical behavior by their fellow students. A student who knows of unethical behavior of another student is under an obligation to take the steps necessary to expose this behavior. Students in The University of Texas at Austin School of Law are governed by the Institutional Rules on Student Services and Activities. Students may be subject to discipline for cheating, plagiarism, and misrepresentation.

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3. **OPEN-BOOK:** This is an open-book, take-home examination. Your answer must be of your own composition. You may work on this examination wherever you wish, and you may consult any written material that you wish. However, you violate the Honor Code if you show or distribute this examination to anyone at all before you turn in your answers, and you violate the Honor Code if you discuss this examination with anyone before you turn in your answer.
4. **EXAM NUMBER:** Please put your exam number on each page. The easiest way to do this is to put the exam number in a header on each page. Do not put your name anywhere on the exam.
5. **LENGTH:** This examination consists of three sections on 1 pages. Your job is to produce printed--that is, not hand-written--answers that total no more than 2,500 words. Each

question specifies the maximum number of words that you may use to answer a question.

6. SPACING: You may single-space or double-space your answers, as you prefer.

7. WEIGHT: For grading purposes, the sections and questions are weighted according to the maximum number of words allowed for each section. You should divide your time with these weights in mind.

8. SHORT ANSWERS: The first section consists of ten (10) short-answer questions. For each, you should supply an answer totaling not more than 50 words. For Section One, you should answer each question and offer a brief explanation of your answer. You should print your answers to questions 1-10 with just a line or two between answers. That is, do not use a new sheet of paper for each answer.

9. MEDIUM ANSWERS: The second section has two questions that require longer answers. Your answers may be up to but not longer than 500 words. Please begin each of these answers on a new sheet of paper.

10. LONG ANSWER: The third section is longer and you may use up to 1,000 words to answer this question. Please begin this answer on a fresh sheet of paper.

11. HOW TO ANSWER: In answering each question, use judgment and common sense. Emphasize the issues that are most important. Do not spend too much time on easy or trivial issues at the expense of harder ones. If you do not know relevant facts or relevant legal doctrine, indicate what you do not know and why you need to know it. You must connect your knowledge of contract law with the facts before you. Avoid lengthy and abstract summaries of general legal doctrine. Discuss all plausible lines of analysis. Do not ignore lines of analysis simply because you think that, clearly, a court would resolve an ambiguous question one way rather than another.

12. CONCISION: Quality, not quantity is desired. Think through your answer before you begin to write. You have a lot of time to write relatively brief answers. Concision will win you points.

13. YOURS TO KEEP: You may keep your copy of the exam questions.

14. 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 Assistant Dean of Student Affairs immediately after this examination ends.

15. Good luck: You're a fine group of students. Enjoy your break.

(Section One Begins on Next Page.)

## Section One

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

1. (50 words) On Monday, a psychotherapy patient tells her psychotherapist that she (the patient) plans to put her sister-in-law's baby on the railroad tracks at 55<sup>th</sup> and Wabash Avenue at 5:30 p.m. on the following Friday. The psychotherapist does nothing. That Friday, a train runs over the sister-in-law's baby at the specified time and place. May the psychotherapist be found liable?
2. (50 words) You work as a clerk in a state supreme court. The justice for whom you work would like your strongest argument against the state adopting *Rowland v. Christian* (CA, 1968). What is your argument?
3. (50 words) A 12-year-old girl drove a motor boat across the plaintiff's fishing line, which caused the reel to fly off the fishing rod. The reel hit the fisher's eyeglasses, which caused injury to the fisher's eye. To what standard of care will the 12-year-old girl be held?
4. (50 words) Professor Leslie Bender suggests that "[w]e could convert the present standard of 'care of a reasonable person under the same or similar circumstances' to a standard of 'conscious care and concern of a responsible neighbor or social acquaintance for another under the same or similar circumstances.'" Describe how one of the cases from the casebook would come out differently if we applied Professor Bender's standard.
5. (50 words) Bachek Tedla was deaf (See *Tedla v. Ellman*, Franklin & Rabin, *Tort Law and Alternatives*, p. 66). If he had been walking alone, how would the New York Court of Appeals's opinion in the case have been different?

6. (50 words) What is the role of custom in determining negligence?
7. (50 words) Distinguish *Negri v. Stop and Shop, Inc.* and *Gordon v. American Museum of Natural History*. (See Franklin & Rabin, *Tort Law and Alternatives*, pp. 76-77).
8. (50 words) In 1972, Richard Posner wrote: "Perhaps, then, the dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient--the cost-justified--level of accidents and safety." Explain what Posner meant by this.
9. (50 words) Does the Collateral Source Rule mean that an insurance company can reclaim money from its policyholder if the policyholder wins a judgment against the person who caused the policyholder's injury?
10. (50 words) The California Supreme Court justices decided *Ybarra v. Spagnard* in 1944. In the 54 years since then, have changes in discovery practices weakened or strengthened the rationale for the holding in that case?

END OF SECTION ONE

SECTION TWO

(1,000 words: 2 answers @ 500 words/answer)

11. (500 words) Consider, for the last time, *Liebeck v. McDonald's*.
  - A. If the following statute applied to Ms. Liebeck's suit, would she have received punitive

damages? (Hint: focus carefully on the definitions in the statute.)

B. Assume that she would have received punitive damages. Under the terms of the following statute, what would the dollar amount of the punitive award have been?

## CHAPTER 41. EXEMPLARY DAMAGES

§ 41.001. Definitions In this chapter:

(1) "Claimant" means a party, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff, seeking recovery of exemplary damages. In a cause of action in which a party seeks recovery of exemplary damages related to injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes both that other person and the party seeking recovery of exemplary damages.

(2) "Clear and convincing" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

(3) "Defendant" means a party, including a counterdefendant, cross-defendant, or third-party defendant, from whom a claimant seeks relief with respect to exemplary damages.

(4) "Economic damages" means compensatory damages for pecuniary loss; the term

does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.

(5) "Exemplary damages" means any damages awarded as a penalty or by way of punishment. "Exemplary damages" includes punitive damages.

(6) "Fraud" means fraud other than constructive fraud.

(7) "Malice" means:

(A) a specific intent by the defendant to cause substantial injury to the claimant;

or

(B) an act or omission: (i) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

#### § 41.002. Applicability

(a) This chapter applies to any action in which a claimant seeks exemplary damages relating to a cause of action.

(b) This chapter establishes the maximum exemplary damages that may be awarded in an action subject to this chapter, including an action for which exemplary damages are awarded under another law of this state. This chapter does not apply to the extent another law establishes a lower maximum amount of exemplary damages for a particular claim.

(c) Except as provided by Subsections (b) and (d), in an action to which this chapter applies, the provisions of this chapter prevail over all other law to the extent of any conflict.

(d) Notwithstanding any provision to the contrary, this chapter does not apply to Section 15.21, Business & Commerce Code (Texas Free Enterprise and Antitrust Act of 1983), an action brought under the Deceptive Trade Practices- Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) except as specifically provided in Section 17.50 of that Act, or an action brought under Chapter 21, Insurance Code.

#### § 41.003. Standards for Recovery of Exemplary Damages

(a) Except as provided by Subsection (c), exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from:

(1) fraud;

(2) malice; or

(3) wilful act or omission or gross neglect in wrongful death actions brought by or on behalf of a surviving spouse or heirs of the decedent's body, under a statute enacted pursuant to Section 26, Article XVI, Texas Constitution. In such cases, the definition of "gross neglect" in the instruction submitted to the jury shall be the definition stated in Section 41.001(7)(B).

(b) The claimant must prove by clear and convincing evidence the elements of exemplary damages as provided by this section. This burden of proof may not be shifted to the defendant or satisfied by evidence of ordinary negligence, bad faith, or a deceptive trade practice.

(c) If the claimant relies on a statute establishing a cause of action and authorizing exemplary damages in specified circumstances or in conjunction with a specified culpable mental state, exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the damages result from the specified circumstances or culpable mental state.

#### § 41.004. Factors Precluding Recovery

(a) Except as provided by Subsection (b), exemplary damages may be awarded only if damages other than nominal damages are awarded.

(b) A claimant may recover exemplary damages, even if only nominal damages are

awarded, if the claimant establishes by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from malice as defined in Section 41.001(7)(A). Exemplary damages may not be awarded to a claimant who elects to have his recovery multiplied under another statute. . . .

§ 41.008. Limitation on Amount of Recovery

(a) In an action in which a claimant seeks recovery of exemplary damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages.

(b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:

(1) (A) two times the amount of economic damages; plus

(B) an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or

(2) \$200,000.

(c) Subsection (b) does not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if, except for Sections 49.07 and 49.08, the conduct was committed knowingly or intentionally:

- (1) Section 19.02 (murder);
- (2) Section 19.03 (capital murder);
- (3) Section 20.04 (aggravated kidnapping);
- (4) Section 22.02 (aggravated assault);
- (5) Section 22.011 (sexual assault);
- (6) Section 22.021 (aggravated sexual assault);
- (7) Section 22.04 (injury to a child, elderly individual, or disabled individual);
- (8) Section 32.21 (forgery);
- (9) Section 32.43 (commercial bribery);
- (10) Section 32.45 (misapplication of fiduciary property or property of financial institution);
- (11) Section 32.46 (securing execution of document by deception);
- (12) Section 32.47 (fraudulent destruction, removal, or concealment of writing);
- (13) Chapter 31 (theft) the punishment level for which is a felony of the third degree or higher;

(14) Section 49.07 (intoxication assault); or

(15) Section 49.08 (intoxication manslaughter).

(d) In this section, "intentionally" and "knowingly" have the same meanings assigned those terms in Sections 6.03(a) and (b), Penal Code.

(e) The provisions of Subsections (a) and (b) may not be made known to a jury by any means, including voir dire, introduction into evidence, argument, or instruction.

. . .

#### § 41.010. Considerations in Making Award

(a) Before making an award of exemplary damages, the trier of fact shall consider the definition and purposes of exemplary damages as provided by Section 41.001.

(b) The determination of whether to award exemplary damages and the amount of exemplary damages to be awarded is within the discretion of the trier of fact.

#### § 41.011. Evidence Relating to Amount of Exemplary Damages

(a) In determining the amount of exemplary damages, the trier of fact shall consider evidence, if any, relating to:

- (1) the nature of the wrong;
- (2) the character of the conduct involved;
- (3) the degree of culpability of the wrongdoer;
- (4) the situation and sensibilities of the parties concerned;
- (5) the extent to which such conduct offends a public sense of justice and propriety; and
- (6) the net worth of the defendant.

(b) Evidence that is relevant only to the amount of exemplary damages that may be awarded is not admissible during the first phase of a bifurcated trial.

12. (500 words) Identify and define the principal goals of tort damages. Give an example, drawn from the reading, of the application of each goal. What is the importance of the various goals in relationship to each other? Is there a hierarchy among the goals? In practice, how well does the system of civil litigation meet these goals?

END OF SECTION TWO

Section Three

(1,000 words: 1 answer @ 1,000 words/answer)

13. (1,000 words) While driving his car last weekend, Dawkins hit Pam and her 5-year-old

son Sonny while Pam and Sonny were crossing a street on foot.

Sonny is now hospitalized and in a coma. Sonny's doctors think that Sonny has a 25 percent chance of living. The doctors also predict that if Sonny does survive, then he will probably be unable to walk without using a cane due to the severity of the injury to both of his legs and also his brain. There is, however, some chance that if he regains consciousness, he may lead a full, normal life without any residual disability from the injury that Dawkins caused.

Pam suffered a comparatively minor injury. She broke her left arm. Specifically, one of the bones of her forearm is broken at her elbow. This fracture, known as a radial head fracture, will keep her in a cast for a week. After one week, the doctor will remove the cast and allow her arm to heal without her having to wear a cast. She can expect to recover fully or nearly so. She may lose a few degrees of extension; that is, she may not be able to straighten her arm quite completely after healing and physical therapy.

The injury took place in the state of Ames, one of the 51 states in the United States. Pam and Sonny are visiting Ames from northern California, where Pam and Sonny have lived their entire lives. Pam and Sonny were doing some holiday shopping in the shopping district of the town of Metropole. They crossed the street at a crosswalk, which the city of Metropole had marked with signs and by painting lines on the street, although there was no stoplight. Such crosswalks were entirely typical in northern California and fairly ordinary in the state of Ames.

In California, Pam is accustomed to cars stopping for pedestrians in crosswalks. The cultural practice in northern California is that when a pedestrian steps into the street where

there is a marked pedestrian walkway, drivers will stop to let them cross whether or not there is a stoplight at the crosswalk. This cultural practice operates in conjunction with the following section from the California Motor Vehicle Code:

§ 21950. Right-of-way at crosswalks

(a) The driver of a vehicle shall yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this chapter.

(b) The provisions of this section shall not relieve a pedestrian from the duty of using due care for his or her safety. No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close as to constitute an immediate hazard. No pedestrian shall unnecessarily stop or delay traffic while in a marked or unmarked crosswalk.

(c) The provisions of subdivision (b) shall not relieve a driver of a vehicle from the duty of exercising due care for the safety of any pedestrian within any marked crosswalk or within any unmarked crosswalk at an intersection.

Pam saw Dawkins's car approaching as she and Sonny stepped into the crosswalk, but Pam could see that Dawkins's car was far enough away that the driver could stop the car well before the crosswalk. Pam did not realize that in the state of Ames, the cultural practice of pedestrians and drivers is different than in California. Ames's drivers generally expect

pedestrians to stay out of the crosswalks when a car is approaching, and Ames's drivers are unaccustomed to yielding to pedestrians. Likewise, Ames's pedestrians are more wary than California pedestrians when crossing the street.

As in California, there is an Ames statute that addresses the relative entitlements of drivers and pedestrians. The relevant part of this statute is as follows:

§ 552.003. Pedestrian Right-of-Way at Crosswalk

(a) The operator of a vehicle shall yield the right-of-way to a pedestrian crossing a roadway in a crosswalk if:

(1) no traffic control signal is in place or in operation; and

(2) the pedestrian is:

(A) on the half of the roadway in which the vehicle is traveling; or

(B) approaching so closely from the opposite half of the roadway as to be in danger.

(b) Notwithstanding Subsection (a), a pedestrian may not suddenly leave a curb or other place of safety and proceed into a crosswalk in the path of a vehicle so close that it is impossible for the vehicle operator to yield.

(c) The operator of a vehicle approaching from the rear of a vehicle that is stopped at a

crosswalk to permit a pedestrian to cross a roadway may not pass the stopped vehicle.

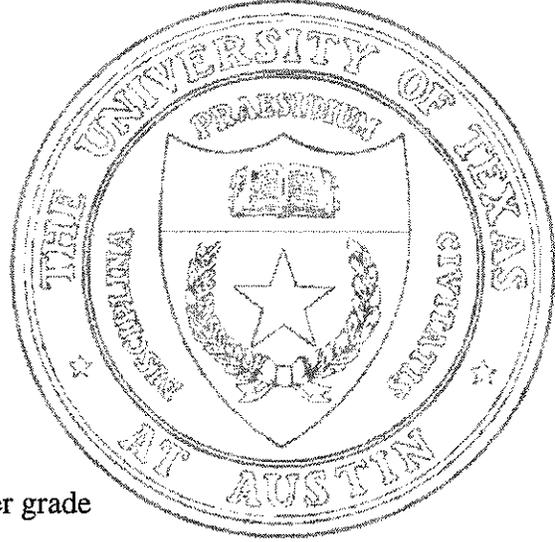
Although Dawkins was driving no faster than the speed limit, he failed to stop the car in time and ran his car into Sonny. Sonny was holding his mother's hand while walking a step in front of her. Dawkins's car did not hit Pam, because she was one step behind Sonny. However, the shock of seeing the car hit her son caused Pam to pass out, and when she hit the ground, she broke her arm.

I would like you to analyze the Pam and Sonny's situation. Is Dawkins liable for their injuries? Assume that causation is not an issue; that is, assume that Dawkins's actions satisfy the legal requirements for causation. I also want you to focus on the damages that Pam and Sonny might want to try to recover. Even if you have concluded that Dawkins is not liable, you should discuss the question of damages fully.

END OF SECTION THREE

END OF EXAMINATION

# Memorandum



**To:** «Mynum»  
**From:** Thomas D. Russell  
**Date:** 18 January 1999  
**Re:** Torts mid-year exam and semester grade

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This memo reports your mid-year exam results and your semester grade.

## GRADING METHODOLOGY

I graded the exam in four parts. The first part included the ten short-answer questions. The remaining parts were the three essays: question 11 (McDonald's and punitive damages), question 12 (goals of tort damages), and question 13 (the crosswalk injuries). I weighted the short-answer section and the first two essays equally. The last essay, which could be up to 1,000 words as opposed to the 500 words of the other parts, was worth twice as much.

In grading each section, I first determined a raw score for each part. Because the range of raw scores for one part bears no relationship to the raw scores for other parts, I converted them to a standardized scale using a statistical technique called z-scores. Put simply, a z-score is a representation of the raw score's distance from the average score for that part. For ease of use, I convert the z-scores into adjusted scores. For the first three parts, these adjusted scores had averages of 50 points and standard deviations of 10 points. For the final part--the long essay--the adjusted score had an average of 100 with a standard deviation of 20.

The next step was to add the adjusted scores together for each section of the mid-year exam. I then determined the average and standard deviation for the exam and next converted the writing assignment score to an adjusted score that made it equal to one-third of the exam. I then added the writing assignment to the exam score, sorted these totals from highest to lowest, and assigned grades.

## SAMPLE ANSWER

We will review the exam during the first class meeting of the spring semester. During that class, I plan to have a student sample answer available for your review. I will post this answer on the tortsboard as soon as possible.

**YOUR SCORES**

The table below includes your scores for the different parts of the exam as well as your score on the writing assignment. The first table reports your raw scores; the second reports your adjusted scores. The tables also include the highest and lowest scores as well as the average score and the standard deviation of answers.

**RAW SCORES**

	<b>Q1-10</b>	<b>Q11</b>	<b>Q12</b>	<b>Q13</b>	<b>Writing</b>
<b>Your Score</b>	«M_1raw»	«M_11raw»	«M_12raw»	«M_13raw»	«Total»
<b>Lowest</b>	31	6	4	14	30
<b>Highest</b>	50	21	20	41	40
<b>Average</b>	43.4	13.4	14.2	25.9	34.0
<b>Std. Dev.</b>	5.0	3.7	3.8	6.1	2.8

**ADJUSTED SCORES**

	<b>Q1-10</b>	<b>Q11</b>	<b>Q12</b>	<b>Q13</b>	<b>Writing</b>
<b>Your Score</b>	«M_1adj»	«M_11adj»	«M_12adj»	«M_13adj»	«Wriadj»
<b>Lowest</b>	25.2	30.0	22.9	60.8	67.1
<b>Highest</b>	63.1	70.5	65.4	149.6	107.3
<b>Average</b>	50.0	50.0	50.0	100.0	83.3
<b>Std. Dev.</b>	10.0	10.0	10.0	20.0	11.2

Your point total for the semester (the exam plus the writing assignment) is: «TOTALV»

**GRADES**

Grades were as follows:

	<b>Point Totals</b>	<b>Number</b>
A+	> 420	1
A	375.5 to 419.9	3
A-	358.6 to 375.4	4
B+	326.1 to 358.5	6
B	311.6 to 326.0	5
B-	302.4 to 311.5	5
C+	296.1 to 302.3	2
C	255.6 to 296.0	2
D/F	< 255.6	0

Your semester grade is: «Grade1»

Please see me if you have any questions.

Section One

1. **Some** jurisdictions have a *Tarasoff* rule: the psychotherapist had a duty to warn the sister-in-law of threatened physical harm to the baby, a readily identifiable victim, if she knew or should have known the patient was serious. Others say no duty to control without a closer special relationship.
2. *Rowland v. Christian* standard has little affect on the results of most cases, but it increases the cost of litigation because cases are less likely to be disposed of by pretrial motions. The traditional status approach provides more predictable guidelines.
3. Normally, the child would be compared to children of like age, experience, and intelligence. However, since driving a motor boat is an inherently dangerous, adult activity, the girl will be held to the adult standard of care, a reasonable person under the circumstances without regard to her particular mental conditions.
4. A case like *Harper v. Herman* might come out in the favor of the plaintiff. A standard that included conscious care and concern would seriously call the “no duty to warn” rule into question. A reasonably concerned person would not fail to warn a guest that diving would be dangerous.
5. If Tedla had been walking alone, the court would probably not have accepted his excuse that it would have been worse to walk on the other side of the road with more traffic. Without a good excuse for violating the statute, he would have likely been found negligent.
6. Compliance with or deviation from custom is a factor in determining whether a person has breached the standard of care. It may inform the fact finder of the probability of injury as well as the burden of prevention. Custom only sets the standard of care in professional negligence cases. .
7. In *Negri*, the plaintiff showed constructive notice; the baby food was likely on the floor awhile since it was dirty and messy. In *Gordon*, the plaintiff failed to show constructive notice; he presented no evidence that the defendant had the opportunity to discover and remedy the danger.
8. Posner meant that the fault system helps achieve balance between cost and safety. By imposing costs on people when they are at fault, they will weigh the costs and choose prevention when it is less then the liability for injury. This maximizes the benefit for society as a whole.
9. No, the collateral source rule means that an injured person can recover from the tortfeasor even if he has already recovered from a third party. Subrogation allows an

insurance company to reclaim money from the policyholder if he wins a judgment against the tortfeasor.

10. Changes in discovery practices have weakened the rationale of *Ybarra* because a plaintiff has a better chance of finding evidence of specific wrongdoing. Therefore, plaintiff's have less need to rely on *res ipsa loquitur*.

## Section 2

11(A). Arguably, Liebeck might still be entitled to punitive damages though the statute makes it substantially more difficult. Under the statute, Liebeck would have to prove by **clear and convincing** evidence that McDonald's acted with malice. Section 41.001 defines malice, as relevant to this case, as an act or omission that posed an extreme degree of risk and of which the actor had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the safety of others. Liebeck will point out that coffee at the temperature at which McDonald's served it would cause third-degree burns within seven seconds, a very serious risk. McDonald's had received over 700 claims from individuals burned by its coffee between 1982 and 1992. A McDonald's quality assurance manager testified that McDonald's knew the coffee, served at 185 degrees on a company directive, was too hot for human consumption. Despite this awareness, McDonald's had no intention of reducing the temperature.

However, McDonald's could argue that while it knew of the risk of burns, the company directors had no idea that burns would be so serious or occur so quickly. Thus, they were not subjectively aware of the level of the risk involved. Liebeck may suggest that McDonald's failed to consult a burn expert to assess the risk to avoid this very type of liability. They probably knew the risk was high but disregarded it to maintain sales. This argument may be persuasive, but a jury might feel that it does not meet the standard of clear and convincing evidence required by the statute.

B. If Liebeck received punitive damages, the dollar amount would be limited to two times the economic damages plus an amount equal to any noneconomic damages or \$200,000, whichever is greater. The jury awarded a compensatory award of \$160,000 but did not separate economic damages versus noneconomic damages. Perhaps she had about \$20,000 in medical expenses (the pre-trial settlement amount she sought). If this was the case, she would receive \$200,000 because that is greater than  $\$20,000 \times 2 + \$140,000$  (\$180,000). The only way she could receive more than \$200,000 is if her economic damages **exceeded** \$40,000.

12. The principal goals of tort damages include compensation, deterrence, prevention of windfalls, expression of justice, and punishment of wrongdoing. Compensation, the primary goal, attempts to restore the victim to the position he/she was in before the injury. For example, in *Seffert v. Los Angeles Transit System*, the plaintiff received damages for her economic losses due to the injury. The jury also compensated for her pain and suffering. Although it is a non-monetary injury, money is all the system has to offer.

Deterrence, a secondary goal of tort damages, functions to discourage both the defendant and others from committing torts. The system tries assess damages so that the appropriate balance might be struck between injuries and safety. For example, in *Wellborn v. Sears, Roebuck, & Co.* (pg. 639, Note 6), a boy was killed by an automatic garage door, and his estate sued for his pre-death pain and suffering. Although the defendant could not compensate the boy, damages were important to ensure that the defendant would make a safer product in the future. Otherwise, the defendant would feel free to sell unsafe products as long as anyone injured died. This example also serves to show the goals of expressing justice and the preventing windfalls. The defendant caused very real losses to Wellborn. The person at fault should have to bear that loss, whether or not payment could realistically compensate the victim. It would violate our basic sense of justice to let him off the hook. The defendant should not receive a windfall by not paying for his wrongdoing simply because the victim died.

Finally, tort damages sometimes seek to punish a tortfeasor who has acted maliciously or willfully. For example, in *Taylor v. Superior Court*, the plaintiff received punitives to punish the defendant for his wanton disregard for the safety of others in driving drunk.

Punishment provides greater deterrence to potential defendants for this dangerous activity and reflects public outrage with drunk driving. However, punitive damages are the exception in torts mainly because of the concern about the windfall to the plaintiff, something damages should avoid with regard to both the plaintiff and the defendant.

Unfortunately, in practice, the tort system does not meet these goals very well. Because of the excessive costs, injured victims rarely file claims. Only 1.6% of filed cases yield trials; many victims go entirely uncompensated. Most others go undercompensated because contingency fees cut into their award and the system tends to underpay large losses. This affects the function of deterrence as well. A business will only take their potential liability into account in choosing among alternative levels of safety, and their potential liability does not reflect the true cost of unsafe activity when few injured victims receive full compensation. Undercompensation also means that defendants receive windfalls and justice fails. In regard to punishment, only 0.05% of filed cases yield punitive damages. While punishment should not be the norm, such a low number of punitive awards may mean that the system is not punishing when warranted.

### Section 3

#### Duty

Dawkin's driving, a risk-creating activity. Therefore, he owes a duty to use reasonable care to avoid causing foreseeable injuries to foreseeable plaintiffs. As a pedestrian, Pam and Sonny were foreseeable plaintiffs. Sonny's injuries from being hit by the car were foreseeable. Dawkin's will also probably be liable for Pam's emotional distress and broken arm. Although her emotional distress did not result from a fear for her own safety, courts almost universally permit bystander recovery when the plaintiff was in the zone of danger and witnessed the serious injury of a close relative. Pam was in the zone of danger; she was at risk of being hit by the car herself. Sonny, her five-year-old son, went into a coma.

#### Breach of Standard of Care

The standard of care for Dawkins is that of a reasonable person under the circumstances. The jury must decide what the community standard should be, not what it is. Therefore, the fact that it is **customary** for cars not to stop for pedestrians does not necessarily mean that it is reasonable. A jury may find that this practice is unreasonable and hold Dawkins liable for following it.

In support of Pam and Sonny's case, Dawkins did not comply with the pertinent Ames **statute**. The statute says that a driver must yield to a pedestrian when there is no traffic control signal in place and the pedestrian is on the half of the roadway in which the vehicle is traveling. There was no traffic signal at the intersection in question here, and the plaintiffs were on Dawkins' side of the street.

The court may choose not to adopt the statute as the standard of care (assuming this is a criminal statute), in which case the jury would be left to decide whether Dawkins acted as a reasonable person. The violation of the statute may still be a factor to consider but will not make the defendant negligent per se. However, the court will note that the legislature designed the statute to protect against this type of injury, injuries sustained at being hit by a car, and that the plaintiffs, as pedestrians, were in the class that the legislature meant to protect. Therefore, adoption may be appropriate. If the court adopts the statute, the fact finder may only determine if Dawkins violated it. If he did, they must conclude that he breached the standard of care unless he has a good excuse for the violation. Assuming that Dawkins has no excuse and that the legal requirement of causation is met, Dawkins would be liable for Sonny and Pam's injuries.

#### Contributory Negligence

Dawkins may try to raise the defense of contributory negligence. He will probably be unable to claim that Sonny contributed to the accident. Sonny is five years old; depending on the jurisdiction, he will either be presumed incapable of negligence or held to a standard of care that compares his acts to those of other five-year-olds of similar experience and intelligence. Most five-year-olds would have acted as Sonny did, especially since his mother was guiding.

Dawkins may be more successful in claiming that Pam negligently contributed to the accident. He will claim that she did not act as a reasonable person under the circumstances according to the Ames' community standards. A reasonable person has the knowledge of members of the community in which the event took place. Although

Pam did not violate the relevant statute since Dawkins' car was not so close that it was impossible for him to yield, in Ames' pedestrians are more wary when crossing the street. If the jury agrees that Pam was unreasonable, she may be unable to recover or the jury may reduce the award in proportion to her share of the blame.

There is also the possibility that her negligence could influence Sonny's recovery. She negligently guided him into the street. Some jurisdictions say that a defendant cannot bring a contribution action against the parent of the victim unless the victim could sue the parent. Some jurisdictions have a parent-child immunity for all negligence suits; that is, a child cannot sue a parent for negligence. Others bar such suits only when they involve negligent supervision. Arguably, Pam put Sonny in danger by actively guiding him into the street, not because of negligent supervision. Thus, Sonny might be able to bring a suit against Pam in these jurisdictions. Other jurisdictions may not even require that the parent-child suit be permissible for a contribution action.

### Damages

Sonny will want to recover the medical expenses involved with his hospitalization and coma. He will also want to recover any future medical expenses that may arise, including expenses if the coma continues and for treating his injured leg. Sonny will be unable to recover for any pain and suffering while he is in the coma because he is unconsciousness. However, he may seek to recover for the pain and suffering he is likely to have if he wakes up and must use a cane for the rest of his life.

Loss of enjoyment of life for the time he is in the coma may be recoverable, but some courts require consciousness. Perhaps he can also recover for loss of enjoyment for

activities in which his injured leg prevents him from participating. Sonny's attorney would have to prove that he regularly engaged in such activities before the accident or was very likely to do so in the future. Lost wages are not relevant, and lost earning capacity would be difficult to show since the injury to the leg may only limit him physically.

Pam may recover for the past and future medical expenses for her broken arm and the mental distress of seeing her son hit. If Sonny dies before the trial, she may also recover the economic loss of Sonny's services, such as care in her old age. Some courts might also allow her to get damages for the loss of society, companionship, and affection of her son.