

## Question 4

Gayle is 16 years old and attends high school in School District.

One day, Gayle's teacher was relaxing in the teacher's lounge during the first ten minutes of class time, as he usually did, leaving the students unsupervised. School District had long been aware of the teacher's practice, but had done nothing about it.

That day, in the teacher's absence, Gayle walked out of class and out of school. She got into her car and drove to the house of an adult friend, Frances. Gayle had promised Frances that, for \$10, she would help her move some paintings.

Arriving at Frances' house, Gayle carelessly parked her car several feet from the curb and entered the house. She came out later, carrying paintings to her car. In a patrol vehicle, Paula, a police officer, spotted Gayle's car. Frances caught sight of the patrol vehicle and told Gayle, "Quick, move your car to the curb."

Gayle jumped into her car just as Paula was walking towards it. Suddenly, without looking, Gayle swung her car toward the curb, hitting and severely injuring Paula.

After Paula was transported to a hospital, she was visited by her husband, Harry. Shocked at Paula's condition, Harry collapsed and suffered a broken arm in the fall.

1. Under what theory or theories, if any, might Paula bring an action for damages against (a) Gayle, (b) Frances, and (c) School District, and how is she likely to fare? Discuss.
2. Under what theory or theories, if any, might Harry bring an action for damages against any defendant, and how is he likely to fare? Discuss.

## Answer A to Question 4

1. What theories may Paula bring [in] an action for damages against the following defendants:

(a) Paula v. Gayle

### Negligence

In a negligence case, the plaintiff must show that the defendant owed a duty of care to the plaintiff. They also must show that the defendant's conduct breached the standard of care owed to the plaintiff and the breach was the actual and proximate cause of the injury to the plaintiff. The plaintiff must be able to show damages to recover in a negligence case.

### Duty of Care

The defendant owes a duty of care to all foreseeable plaintiffs. Under the Cardozo view, foreseeable plaintiffs are those who are within the zone of danger. Under the Andrews view, the test is broader, and considers all plaintiffs to be foreseeable plaintiffs. In this case, Paul was a foreseeable plaintiff under the Cardozo view because as a driver on the street she was within the zone of danger of other cars on the street, including Gayle's parked car that was far away from the curb and onto the street. Similarly, Paula would be a foreseeable plaintiff under the Andrews view because all plaintiffs are foreseeable.

### Police Officer Exception

Members of certain professions, like police officers and firefighters, cannot recover for injuries that are inherent in the risk of their job. Gayle may argue that as a police officer with a patrol vehicle, the risk of being hit by someone's car is inherent to the job. Paula will argue that being hit by a car is a general risk that everyone on the street takes, and is not a special risk that comes along with being a police officer. If Paula is successful

in rebutting the exception, she must prove that Gayle acted below the standard of care expected.

### Standard of Care

The standard of care determines the particular duty of care the defendant owed to the plaintiff so it can be determined whether the defendant breached the duty or complied with the duty. Generally, in a negligence action, the plaintiff must exercise the level of care of a reasonably prudent person in the plaintiff's position. Since Gayle is a child, she will argue that the child standard should be used. Under the child standard of care, the child must exercise the level of care of a child of similar age, intelligence, education, and experience. Paula will argue that the adult standard should be applied because Gayle was engaging in an adult activity. Because driving a car is an adult activity, Paula is correct and the court will hold Gayle to the standard of a reasonably prudent person in her position.

### Breach

Paula must show that Gayle breached a duty owed to her by acting below the standard of care. Paula will argue that Gayle breached a duty to her by parking far away from the curb, and suddenly, without looking, swinging her car to the curb. This is wrongful because a reasonably prudent driver always looks both ways before they move their car on the street, to look for other vehicles. Moreover, Gayle knew Paula was in the vicinity since Frances told Gayle that a police officer was around and suggested she move her car. Thus, this element is met.

### Causation

The breach must be the actual and proximate cause of the plaintiff's damages for the defendant to be held liable.

### Actual Cause

An act is the actual cause of an injury when it is the but for cause. If the injury would not have occurred, but for the defendant's act, the actual causation element is satisfied.

Paula will argue that but for Gayle jumping into the car and swinging it toward the curb without looking, Paula would not have been hit by Gayle's car, and would not have been injured. The court will agree. It should be noted that Frances' act of yelling at Gayle to move her car was not a superseding force that cuts off Gayle's liability because it occurred before Gayle's negligent act. Thus, this element is also met.

### Proximate Cause

The defendant also must prove that the act was the proximate cause. To be the proximate cause, the act must have been foreseeable at the time the act was committed. Here, this was a direct cause case. As soon as Gayle swung her car toward the curb, Paula was hit and injured. There was no superseding intervening act that would cut off Gayle's liability. Thus, Gayle's breach was the actual and proximate cause of Paula's injury and if Paula can prove damages, she will recover.

### Damages

The plaintiff must prove her damages. Under the "eggshell" plaintiff rule, the defendant must take the plaintiff as she finds them and is liable for the recovery no matter how surprisingly great it is considering the particular plaintiff. Here, Paula was injured from Gayle's car.

### Compensatory Damages

The purpose of compensatory damages is to put plaintiff in the position she would have been in had the injury not have occurred. Paula may recover general damages for her injuries as well as the cost of the treatment of the injuries at the hospital. If she lost earnings, she may recover special damages subject to the certainty, avoidable, and mitigation principles.

### Defenses

There are no applicable defenses because there is no indication Paula was contributorily negligent, assumed the risk, or comparatively negligent in a jurisdiction that recognizes these respective principles.

## Conclusion

Gayle is liable for negligence against Paula and Paula may recover the damages noted above.

## (b) Paula v. Frances

### Negligence

Paula will have to prove the same elements above to hold Frances liable for negligence.

### Duty/Standard of Care

Paula was a foreseeable plaintiff under the Cardozo view because Paula was within the zone of danger as a driver on the street. When Frances told Gayle to move her car, it was foreseeable that Paula was within the zone of danger. Paula is also a foreseeable plaintiff under the Andrews view because all plaintiffs are foreseeable using this standard. Since Frances is an adult, she must exercise the level of care that a reasonably prudent person in her position would. Paula will argue that Frances owed a duty of care to Paula because Frances, as an adult, should have supervised Gayle and made sure she never carelessly parked her car far from the curb, and made sure she was careful when trying to move her car to the curb. She may also argue that Frances had a duty to make sure that Gayle was not skipping school.

Frances will argue there is no duty to act affirmatively. Frances, as an adult friend, is not responsible for Gayle's actions, and therefore had no duty to supervise her. The only time a duty to act affirmatively arises is when there is a close relationship (usually a familial one), when the defendant puts the plaintiff in peril, when the defendant undertakes to rescue the plaintiff or when there is a duty imposed by law or by statute. A duty also arises when an employer is vicariously liable for employees.

### Vicarious Liability

Paula will argue that because Gayle promised to pay Frances \$10 for moving her paintings, Gayle was an employee of Frances, making Gayle vicariously liable for

Gayle's torts. Vicarious liability attaches to an employer, when the employee commits a tort while performing an act in the scope of their employment. In this case, Gayle was loading paintings into her car when Frances told Gayle to move her car so the police would not see the car parked illegally. Because Gayle was performing an act in the scope of her employment with Frances, Frances may be held vicariously liable for the negligent torts of Gayle.

#### Breach

Paula will argue that Frances breached a duty by allowing her employee to park in the middle of the street and telling her to move her vehicle to avoid the police. She will say this is wrongful because someone could have been injured by Gayle moving her car so quickly toward the curb. However, Gayle had no duty to review the way her employee parked her car before she arrived at Frances' house to do the job.

Still, because Frances is vicariously liable for the torts of her employee, she will be liable for Paula's injuries and damages in the same manner that Gayle will be liable, as indicated above. Because Frances did not independently breach a duty owed to Paula, it is unnecessary to continue with the causation and damages analysis since she will only be liable for Gayle's negligence which was analyzed above.

#### (c) Paula v. School District

#### Negligence

##### Duty/Standard of Care

The same rules above apply here. Paula was a foreseeable plaintiff under the Andrews view because all plaintiffs are foreseeable. Under the Cardozo view, it is less clear whether Paula was in the zone of danger. Paula will argue that she was in the zone of danger because Gayle left school in a car and Paula was a driver on the road. School District may argue Paula was not in the zone of danger because Paula was not on school property, or anywhere near the property. Moreover, Gayle is 16 years old and

presumably has a license to drive a vehicle. Thus, there is no clear indication that the School should have a duty to protect third parties from a licensed driver. However, because students are in custody of schools during school hours, it is foreseeable that children who are not in school at the time they are supposed to be will injure a third party. Thus, School District likely owed a duty to Paula under both the Andrews and Cardozo views.

School District owed the duty of care of other reasonably prudent school districts.

#### Vicarious Liability

Because the school district itself did not commit a tort, Paula will have to hold it liable on a theory of vicarious liability. As mentioned above, an employer is liable for the torts of its employees during the scope of their employment. Gayle's teacher was on school hours, relaxing in the lounge. Class had already started, thus she was in the scope of her employment when she left the students unsupervised and School District will be vicariously liable.

#### Breach

Paula will argue that School District breached the duty of care owed to Paula when it knowingly allowed Gayle's teacher to leave Gayle's class unsupervised. This is wrongful because children in high school need to be supervised. School District will argue that Gayle is 16 and is almost an adult; thus it was not wrongful to leave her unsupervised for only ten minutes. Although this is a close call, because schools are responsible for students during school hours in the same manner that a parent is responsible for a child during other hours, Gayle's teacher, and the school district through vicarious liability, probably breached a duty.

#### Actual Cause/Proximate Cause

School District was the but for cause because but for the negligent supervision, Gayle would not have been allowed to leave the property. School District will argue the teacher was not the proximate cause because Gayle's actions of hitting the teacher in

the car was a superseding intervening act. Because it was not foreseeable that a student would leave school and drive negligently into a police officer, School District will not be liable and Paula cannot recover damages.

#### Defenses

There are no defenses for the same reason noted above.

## 2. Harry's Theories

### Negligent Infliction of Emotional Distress

To make a claim for negligent infliction of emotional distress, Harry must show that the defendant was negligent, and that he was part of a near miss situation, or a bystander on the scene who witnessed a close family member's injury. He also has to show some manifestation of a physical injury.

Gayle and Frances were negligent. Harry was not in a near miss situation himself, and he was not a bystander present on the scene. Although he suffered a physical injury, it is not enough to make out a case for bystander emotional distress because he did not collapse until he saw Paula in the hospital, which was not the scene of the accident.



## Answer B to Question 4

### Paula v. Gayle

#### Negligence

Paula has a good cause of action for a negligence claim against Gayle. To make out a prima facie negligence case, Paula must show that Gayle (1) owed a duty to Paula, (2) breached that duty, (3) the breach was both the cause-in-fact and proximate cause of Paula's injuries, and (4) that Paula sustained damages.

#### Duty

Under the Cardozo standard, plaintiffs owe a duty of due care to all foreseeable victims of their conduct. Under the broader Andrews standard, plaintiffs owe a duty of due care to everyone else in the world. The law defines "due care" as that of a reasonably prudent person. However, since Gayle is only 16, she will argue that she be held to a lesser standard: that of a reasonably prudent person of like age and experience. Paula will contend, however, that since Gayle was engaged in an adult-oriented activity, that of driving an automobile, that the law should make no exception for Gayle's age. Courts have consistently held that children engaged in adult activities must perform those activities with the care of a reasonable person, so Gayle will not be able to lower her standard of care to take her age into consideration.

#### Breach

A duty is considered breached when the defendant's conduct falls below the standard of care. Here, Gayle swung her car towards the curb "suddenly" and "without looking," conduct which clearly falls below the standard of care. Automobiles are inherently dangerous and heavy, and proper vision and care are required. Moreover, since Frances caught sight of the patrol vehicle and told Frances, "Quick, move your car to the curb," it likely put Gayle on notice that someone was coming, making her sudden and quick movement of the car without looking that much more unreasonable. Paula will probably have no problem proving this element.

Another theory of breach would be that Gayle breached when she "carelessly" parked too far away from the curb, as a reasonable person would have parked next to the curb.

### Causation

Courts have traditionally divided the causation element into two parts: (1) cause in fact and (2) proximate cause. Under the cause in fact, the traditional test is whether the harm would have occurred "but for" defendant's breach. Under proximate cause, the harm will be said to proximately cause the injury if the harm is a foreseeable result of the breach. Here, Paula will be able to establish both cause-in-fact and proximate cause. If not for the fact that Gayle quickly turned her car into Paula, it would not have "hit and severely injured" her. As for the proximate cause, the very reason prudent care is required while driving a car is because they are extraordinarily heavy and can cause severe damage to people and property they come into contact with. This makes the danger of hitting someone clearly a foreseeable result of driving negligently. Paula will satisfy both elements of causation.

On the second breach theory, that Gayle parked too far from the curb, the proximate cause prong will be harder to satisfy. It is true that, had she parked closer to the curb, Paula would not have had to get out of her car, and therefore the "but for" cause is met. But not parking near a curb is not reasonably prudent because you do not leave space for other cars on the road, and generally accidentally hitting someone is not something thought of as a foreseeable risk of parking too far from the curb. However, since Paula satisfies both elements under the first theory, she will probably stick with that one, and jettison the second theory of breach.

### Damages

In a negligence action, the plaintiff must prove damages. The damages need not be economic, but must be real. Here, Paula will once again have no problem making out a case for damages because she was "severely injured" and taken to a hospital.

## **Defenses**

### Comparative Negligence

Gayle will try to argue that Paula was comparatively negligent because Paula saw the car near the curb and could likely have seen Gayle walking towards the car. After all, she would be hard to miss carrying some paintings. Gayle would also point out that since Frances called out "Quick, move your car to the curb," that Paula had notice that the car was about to be quickly moved to the curb. Therefore, by standing within a reasonable distance from a car that Paula knew was about to be quickly moved, Paula was also negligent. Paula will reason that as a police officer she has a duty

### Fireman's Rule

Under the fireman's rule, firefighters and police officers who engage in dangerous activities in connection with their jobs are barred from bringing suits for injuries sustained from those activities. The rationale is that the nature of the job is such that the police assume the risk of their jobs. Under this theory, Paula will not be able to recover for damages incurred if she was acting in connection with her job. Since she was coming to the curb to talk to Gayle about her car being illegally parked, it is clear that she was doing something in connection with her job. On this theory, Paula will probably be barred from recovery.

### Battery

Paula may be able to make out a battery action against Gayle, but it will be more difficult. Battery is defined as the (1) intentional, (2) harmful or offensive contact (3) with Plaintiff's person.

### Intentional

Contact is intentional if the conduct is voluntary and there is a substantial certainty that the contact will occur. This is the most difficult for Paula to prove. There is nothing in the facts to indicate that Gayle acted voluntarily, or that she had any intention of hitting Paula. While her conduct was likely negligent and maybe even reckless, it does not contain the requisite intent. So while elements 2 and 3 will easily be met--hitting

someone with a car is indisputably harmful, and the car hit Paula directly--the first element will not be proven, and the battery action will fail as a result.

## **Paula v. Frances**

### Agency

In order for Frances to be liable for Gayle's negligence, there needs to be an agency relationship between Frances and Gayle. This may be established under the doctrine of Respondeat Superior.

Under the doctrine of Respondeat Superior, employers are liable for the torts of their employees, so long as the conduct was within the scope of employment. So Paula must first prove that Gayle was an employee of Frances. If so, Paula must then establish that Gayle was acting within the scope of her employment when she injured Paula. If it is found that Gayle was merely an independent contractor, Paula must prove that either the duty was non-delegable or that [sic].

### Employee versus Independent Contractor

The major test to determine whether someone is an employee or an independent contractor is whether the employer had a right to control the method and manner of the work. Factors that the court looks to include the degree of control, whether the pay was hourly or by piece, whether the employer furnished the tools and other items, whether the job was for the benefit of the employer's business, and the length of the working relationship.

Here, the job was done at Frances' house, was for a seemingly short duration, and does not appear to have much supervision. Moreover, the fact that Gayle received a one-lump sum of 10 dollars for the work suggests that it was not an employee relationship, but rather an informal, independent contractor type relationship. There is nothing to suggest a long-term commitment, and the movement of paintings is the type of job that needs to be done only once in a great while. Additionally, there was no benefit to

Frances' business objectives because the paintings were being moved from Frances' home. This is in fact a prototypical independent contractor relationship.

### Scope of Employment

Assuming Gayle is considered Paula's employee, [sic].

### Negligence

Paula might also be able to make out a negligence action against Frances' own negligence. For the negligence framework, see above.

### Duty

See above.

Since Frances is an adult, she owes that of a reasonable person. Clearly she saw that Paula was approaching the car, otherwise she would not have shouted to Gayle to quickly move her car. Therefore, Paula was a foreseeable victim.

### Breach

See above.

The theory would be that Frances breached the duty of reasonable care by instructing a sixteen year-old to "quickly" move her car to avoid being cited for a minor traffic ticket. A reasonably prudent person would not have instructed an impressionable minor to move such heavy machinery "quickly."

### Causation

See above.

As for cause-in-fact, Frances will argue that even in the absence of her instruction, Gayle would have likely moved her car quickly and hit Paula. Paula will counter that Gayle was in fact acting under Frances' instructions and would not have moved the car quickly unless Frances did not tell her. Since Gayle "jumped" into her car right after being told to move it quickly, it is more probable than not that Gayle was acting at the direction of Frances, and therefore Frances' instruction was the "cause in fact" of

Paula's injury. However, Frances probably has the better argument on the issue of "proximate cause." While instructing someone to move their car quickly might not be the most prudent thing to do, it is likely not foreseeable that the mere suggestion that someone act in haste will result in a haste so overwhelmingly that it would cause injury to someone who, at the time of your instruction, was in their own car. Paula will argue that when police officers see something suspicious or in violation of the law, it is reasonable to expect them to get out of their cars. However, while true, this is probably not enough to overcome the foreseeability on the part of Frances.

#### Damages

See above.

#### **Defenses**

Frances will avail herself of the same defenses that Gayle did.

#### **Paula v. School District**

##### Agency

Paula will argue that the school district is acting as the agent.

##### Negligence

Paula once again will have a negligence claim against the School district. Her claim will be based on the school district's own negligence in allowing their students to roam freely.

##### Duty

See above. Here, however, it is unlikely that Paula is a foreseeable plaintiff. The chain of events leading from Gayle's ditching school to Paula's injury is extraordinarily remote, and has several intervening forces.

### Breach

See above. Paula will claim that the district breached their duty by knowing that the teacher relaxed in the teacher's lounge during the first ten minutes of class time, and permitting him to do so. The reasonably prudent school district would make sure the teachers are supervising the children so they do not leave or otherwise misbehave.

### Causation

See above. Here, Paula will claim that, but for the teacher's negligence in leaving the students unsupervised--and but for the school's negligence in allowing the teacher to do so--the injury would not have occurred. Once again, however, Paula has the problem of proximate cause. While the school district understands that schools have to protect their students, and the students could have dangerous propensities if permitted to leave school grounds, the situation here is pretty remote from those duties. However, if the jury finds that the student is likely to commit some harm while ditching school, Paula could be a foreseeable victim of that harm.

### Damages

See above.

### **Defenses**

The district will avail themselves of the same defenses that Gayle and Frances did, above.

### Respondeat Superior

Paula may also have the claim that the school is negligent due to the teacher's negligence. Since the teacher was an employee of the school district (see respondeat superior discussion, above), the district is vicariously liable for his conduct. The teacher here is likely an employee of the school because the manner of his work is substantially controlled by the district. Moreover, since he was on school property and during school hours, the harm will be said to be within the scope of his employment. The rest of the analysis is substantially the same as the school district's own negligence, above.

## **Harry v. Gayle**

### Negligent Infliction of Emotional Distress

Harry can possibly bring a negligent infliction of emotional distress action against Gayle. Under this theory, Gayle is liable for (1) negligent conduct (2) in plaintiff's presence, and (3) plaintiff suffers subsequent physical symptoms.

### Negligent Conduct

See above.

### In Plaintiff's Presence

This is where Harry will have trouble. Since Harry did not see the accident, and only later saw Paula in the hospital he was not in the presence of the negligence, nor was he in the zone of physical danger.

### Physical Symptoms

Under Negligent Infliction of Emotional Distress, plaintiff has to suffer subsequent physical manifestations of the distress. Here, since Harry collapsed at the sight of Paula's condition, breaking his arm, he should be able to prove subsequent physical manifestations. And since the broken arm was a result of the collapse, under the eggshell-skull principle, he would be able to recover for all damages.

However, since he cannot prove he was in the plaintiff's presence, he will not be able to recover.

## **Harry v. Frances / Harry v. School District**

Harry can claim Negligent Infliction of Emotional Distress under the theories of respondeat superior and vicarious liability, the analysis of which will be identical to the analysis above, and will lose once again due to his lack of presence.

Therefore, Harry will be unlikely to succeed against any of the parties for his damages.