

COMPLETED

OLD EXAMINATION QUESTIONS

QUESTION ONE  
(Suggested time: 60 minutes)

Happy is a patient and inmate at the Sunny Side Facility for the Criminally Insane. He had been sent there several years ago after savagely attacking many elderly people. On one dark and stormy night the front gate was inadvertently left unguarded and Happy escaped into Cheerful, a nearby retirement village of one hundred residents. Sunny Side's warden immediately sent guards to search for Happy, but he did not issue a public announcement because he wanted to avoid "mass hysteria."

Meanwhile, Mrs. Parker drove to her home in Cheerful and went inside, leaving her car key in the ignition. A village ordinance in Cheerful provides that "anyone who leaves his or her automobile unattended with a key in the ignition shall be subject to a fine of not more than \$100." Mrs. Parker had never heard of this ordinance, however, and no one in Cheerful seemed to obey it. By chance, Happy came upon Mrs. Parker's car, stole it, and roared off into the worsening storm.

As he was leaving town, Happy saw an elderly resident named Wilma Widow standing by the side of the road. Wilma's car had broken down and she was frightened by the prospect of walking through the thunder and lightning. Happy stopped the car and shouted: "Hey, lady, I'll give you a lift. But before you say yes, you should know that I'm a terrible

driver." "Just get me out of here!" Wilma wailed and hopped into the car. She did not fasten her seat belt, however, because no law required her to do so.

Happy and Wilma drove merrily down the road, singing along with a duet by Barbara Streisand and Don Johnson on the radio. All appeared well until Happy decided to impress Ms. Streisand by making the car "fly like an eagle" to Hollywood. To gain acceleration for takeoff, Happy drove over 100 miles per hour until he lost control of the car and it crashed into a tree. Happy was not hurt by the crash but Wilma suffered severe injuries. "Help me!" she cried, but Happy skipped off into the nearby woods where he was subsequently recaptured. Left to her own resources, Wilma began to crawl toward the village hospital but bled to death before she could reach it.

You have been retained to represent Wilma's estate in an action for her wrongful death. Prepare a memorandum explaining who you might sue, what legal theories you would rely upon, what legal obstacles you would confront, and whether you think your suit against each of the possible defendants would be successful. You should assume that your jurisdiction does not have a "guest statute," that Wilma would not have been injured if she had been wearing a seat belt, and that it is not advisable to sue Don Johnson or Barbara Streisand.

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QUESTION TWO  
(Suggested time: 75 minutes)

Please assume the following:

Victor was walking down the street when a bus negligently jumped the curb, prompting Victor to dive into the street. The bus would not have touched Victor had he stood still, but he injured his left leg in his leap to apparent safety. He therefore consulted the yellow pages and made an appointment to see the man listed as "Peter Dylan, M.D."

In fact, Mr. Dylan was not a licensed physician. To the contrary, he was a precocious fifteen-year-old who looked much older and had been engaging in the unauthorized practice of medicine for two years. This practice violated a state statute stating, *inter alia*, that "it is a misdemeanor to practice the healing arts or prescribe medicine without a license to do so."

Victor knew none of this, however, and simply assumed that Mr. Dylan was a licensed physician. Mr. Dylan examined Victor's leg and decided that it probably was not fractured. He did not order X-rays of the leg, however, because he believed that they were too costly to patients except in cases where a bone was obviously broken. This decision was in keeping with the custom of his small backwater community but was contrary to accepted medical practice throughout most of the nation.

Mr. Dylan advised Victor that his leg was not broken and prescribed painkillers for the soreness. When Victor

asked whether the painkillers carried any side effects, Mr. Dylan responded that there was "only a negligible risk" of halitosis and dyspepsia." Victor did not understand these remarks, but he was too embarrassed to reveal his ignorance by requesting any elaboration.

Victor began taking the medicine but was dismayed when his breath became unbearably foul and he developed severe indigestion. Furthermore, his leg developed a horrible stench and his pain grew increasingly worse. He then consulted Dr. Cutter (a licensed physician) who correctly decided that the leg was broken, gangrene had set in, and the leg needed to be amputated. Dr. Cutter also correctly observed that an X-ray would have revealed the fracture and that the leg could have been saved if the fracture had been treated immediately.

Victor's leg was skillfully amputated by Dr. Cutter and he sought to resume his normal life. He was very unhappy, however, because he could not resume his former employment and he had continuous problems with bad breath and indigestion. (As Dr. Cutter informed him, there was only a twenty percent risk that the medicine would cause such ailments but if it did so the problems could last for more than one year.) Finally, he grew so morose that he decided to shoot himself. He accidentally shot his wife in the arm, however, when she attempted to wrest the gun from his grasp. Victor then realized that suicide was not the answer and decided to seek legal redress.

Please answer all of the following questions, paying careful attention to the suggested time limits.

(A) -- 5 minutes.

Could Victor successfully sue the negligent bus company even though the bus did not hit him and he would not have been injured if he had stood still? Explain.

(B) -- 15 minutes.

If the bus company were found liable, would it be held responsible for Victor's bad breath, indigestion, loss of a leg, and the harm to his wife? Explain.

(C) -- 10 minutes.

Suppose that Victor cannot identify the bus that hit him but demonstrates that there are only three bus companies that pass through the town. The Franks Company operates twenty percent of these buses, the Leader Company operates thirty percent of these buses, and the Lee Company operates fifty percent of these buses. Citing *Sindell v. Abbott Laboratories*, Victor argues that the court should adopt market share liability and hold each company liable in proportion to the mathematical likelihood that it owned the bus in question. How should the court rule on that assertion? Explain.

(D) - 45 minutes.

Assume that Victor and his wife do not sue any bus companies but seek to hold Mr. Dylan liable for the harms they have suffered. Discuss their causes of action, Mr. Dylan's possible defenses, and how you believe these matters would be resolved at trial.

**QUESTION THREE**  
(Suggested time: 60 minutes)

(A) -- 30 minutes.

You are an appellate judge confronted with a case virtually identical to *Palsgraf*. Do not restate all of the facts, but write an opinion explaining how you believe the case should be resolved. Your opinion should explain and contrast the approaches taken by Cardozo and Andrews, but you should not feel compelled to adopt either judge's viewpoint.

(B) -- 30 minutes.

Flushed with your success as a judge, you decide to write an essay discussing whether defendants should be held liable for the unforeseeable consequences of their negligence. Prepare that essay, being sure to discuss the relative merits of *Polemis*, *Wagon Mound (No. 1)*, *Kinsman (No. 1)*, and other possible approaches to the problem.