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Answer-to-Question-\_1\_

## POTENTIAL PLAINTIFFS & DEFENDANTS

Pierre and his mother are potential plaintiffs.

Potential defendants include Sweepclean, the driver of the vehicle and perhaps the employee responsible for maintenance of the vehicle.

We'll handle Pierre first.

## ALLEGED GROUNDS OF NEGLIGENCE

Pierre can argue that the driver, Dayton, was negligently operating the street sweeper by driving too fast and by not paying adequate attention and thus was responsible for killing Ginger and injuring Pierre's arm. Pierre can also try to argue that the accident caused emotional distress to him and his mother.

## DUTY

Generally, one owes a duty to exercise reasonable care under the circumstances to those who are foreseeably exposed to risks of harm arising from the actor's conduct. There is misfeasance (active conduct that causes harm) and nonfeasance (a failure to act that creates a risk of harm). There is also a professional standard of care that requires people who are performing their jobs to follow custom and standard procedures common in the industry and followed by professionals of like skills and training. (The role of custom is not determinative but it can be influential under common law.)

Here, Pierre can argue that the driver owed a duty to handle his vehicle not only with reasonable care but also according to the policy manual given by his superiors. He had a duty not to exceed 10 mph and not to use headphones while driving.

The company, Sweepclean also has a duty to train its employees properly and to make sure they follow procedures (and to make sure those procedures provide safety). Under the policy of respondeat superior and vicarious liability, Sweepclean is responsible for the actions of its employees whenever they are performing their jobs and are working within the scope of their employment.

Here, it is clear that Dayton was working within the scope of employment. So both he and Sweepclean owe a duty of reasonable care and industry custom to Pierre.

There is no general duty to rescue, unless there is a special relationship between the defendant and victim; there is a contractual obligation to provide aid; a statute requires rescue; or if you create the harm.

*Why*  
Here, Pierre can perhaps argue that the driver had a right to attempt to rescue the dog. But it's not clear under common law if the duty to rescue extends to animals. Probably not.

## BREACH

Generally, there are two prongs to determining breach:

- \* A foreseeable risk.
- \* Unreasonable conduct in light of that risk.

One who fails to act reasonably under the circumstances in light of foreseeable risks to others arising from his conduct has breached a duty.

The general standard one is held to is the reasonably prudent person. The role of custom also comes in to play in determining whether items or machinery should be held to a certain safety standard.

Under the professional standard of care mentioned above, the driver and the company could be held to the standards of other companies. The driver had a duty to act reasonably under the circumstances.

Here, Pierre can argue that the company had specific guidelines set out for drivers, and that those guidelines were intended to prevent the type of accident that occurred here. It was foreseeable that a driver going too fast and wearing headphones could swerve and hit a dog, killing the dog and injuring the person walking the dog with a leash.

The company would be in breach if it failed to exert adequate control over its driver. Evidence would be gathered to determine whether the company properly trained the driver, made sure that he was aware of all the rules and that his performance was monitored regularly.

The company also would be responsible for the operation of the equipment. Was this a standard machine commonly used? Did it have all the required safety features? Should it have had an automatic shut-off to prevent a small animal from being sucked into the vacuum and collection bin?

The driver and company might argue that this was an emergency situation, because the driver was swerving to avoid a speed bump. This would be a weaker argument, because an emergency situation normally, under common law, requires the need for immediate action and avoidance of a serious injury.

Pierre would argue that avoiding a speed bump is not as important as avoiding injury to people and pets. He could also argue that a street sweeper would logically expect to encounter speed bumps, especially if

that was a regular route.

One other way to prove breach is to use Hand's Calculus (Carroll Towing) to show that the burden of preventing the harm was lower than probability of such an occurrence multiplied by the gravity of potential harm that could occur.

Here, Pierre could show that the burden of precaution might have been for the company to install a safety device that would shut down the vacuum/brush system before sucking a small animal into it. That probability of this occurring is fairly high, because it is a dog-walking neighborhood (and maybe even one without sidewalks) and the harm would be fairly severe -- killing an animal and injuring the arm of the person at the other end of the leash. (It also had the potential to seriously harm small children, too.)

If Pierre could show that the burden of precaution was that much lower, it would go a long way toward helping him prove breach.

There are no village safety statutes in play here, so there would be no issue of a statutory violation or negligence per se.

## CAUSATION

Causation is determined in two ways:

- \*But-for causation asks if the accident would not occurred but for the negligent conduct.
- \* Substantial factor does pretty much the same thing but is usually used when there are multiple defendants. In most jurisdictions, the substantial factor test is commonly used.

There also is the issue of joint & several liability when there are:

- \* Multiple tortfeasors acting in concert

- \* Multiple tortfeasors acting independently to cause one harm.
- \* Vicarious liability involving employee and employer.

Here, Pierre can argue that but-for the actions of the driver, his dog would not have been killed, his arm would not have been injured by the yank of the leash, and he would not have suffered emotional harm.

There was not reliable intervening event that caused the injury.

Pierre also could show that Sweepclean played a substantial role in the accident, because it employed the driver and had its trucks out on the street cleaning.

#### SCOPE OF LIABILITY

It's not enough to show that a breach of duty caused the harm; the plaintiff also must show that it was the primary cause of the harm and was not superseded by any ancillary risks or behavior by other forces.

There are three ways to cut off the chain of causation:

- \* An unforeseeable plaintiff
- \* An unforeseeable injury
- \* An intervening event.

If any of these occurs, there may be a case in which scope of liability cannot be proved.

There are three exceptions to the foreseeability standard, as well:

- \* Subsequent medical malpractice
- \* An eggshell plaintiff who is more fragile than the defendant might have expected
- \* Protection given some rescuers based on a policy of encouraging people to rescue those who injure

themselves.

Here, Pierre would argue that he is clearly a foreseeable plaintiff. The neighborhood encourages residents and nonresidents to walk the streets and walk their dogs. Pierre could also argue that it would be foreseeable that a person and his dog could have sustained the injuries that occurred. Small dogs would be susceptible to the machine's brooms and could get sucked in, and most people use leashes to walk their dogs. Therefore, if a dog got sucked in, the leash would get yanked and the person could suffer an arm injury.

The company and driver would frame the question to the court in a way that makes the accident seem unforeseeable. They would state that it was not foreseeable that a driver, when encountering a speed bump, would swerve and just happen to do so when a person walking his dog along the curb would be there, causing the dog to get sucked into the machine, in turn yanking the leash and thus tearing ligaments in the arm of the dogwalker.

Pierre here has the stronger argument. This is a foreseeable occurrence.

There is no intervening event that would seem to cut off the scope of liability here.

#### DAMAGES

General damages allowed include: Lost earnings (past & future), medical expenses (past & Future), pain & suffering, loss of enjoyment of life, loss of consortium, punitive damages and attorney fees. The latter two are rarely allowed.

Here, Pierre's main damages are the injuries to his arm. It requires surgery. Those medical expenses would be likely involved. He could also cite lost earnings because (a) he has had to take a leave of

absence from work and (b) he might lose more time because of the surgery.

His current leave of absence, however, is related to his emotional distress, but his emotional distress is not great enough to pass muster in most common law jurisdictions. Merely being tired and weepy is not enough; the emotional anguish must manifest itself in exceptional ways, beyond just being tired and weepy. It must be beyond mere pain and suffering.

He could show some pain and suffering. The pain in his arm is consciously felt and affects his work and his life. He must show with reasonable certainty that this is the case.

It would be tough to show loss of consortium or loss of enjoyment of life. He hasn't loss full use of his arm, and the loss of a pet doesn't rise to the level of loss of consortium, which is confined to spouses and close relatives.

In general, for him and his mom, the loss of a pet likely would fail to sway the court that he should be compensated for being "devastated."

Punitive damages must involve grossly negligent or reckless behavior, so Pierre probably wouldn't collect there. And his attorney fees probably would be handled by our office on a contingency bases. Our firm would collect 33% to 50% of his total recovery under that set-up.

#### DEFENSES / IMMUNITIES

Sweepclean and Dayton would argue that Pierre was contributorily negligent here.

It's not entirely clear from the scenario, but it seems that Pierre was walking IN THE STREET when the accident occurred. It's also not clear whether there are sidewalks in this neighborhood.



Either way, if Pierre and the dogs were in the street and not on the sidewalk or lawn, Sweepclean could argue that Pierre contributed to his own injury by walking in the street, especially when the street sweeper was cleaning the streets.

In most jurisdictions, contributory negligence has been replaced by comparative fault.

Contributory negligence is a per se bar to recovery. If the plaintiff is shown to be AT ALL negligent (that is, the defendant has proved all five elements of negligence against him), then the plaintiff can recover nothing.

Under comparative fault, the blame is allotted on a percentage basis, and the plaintiff's recovery is reduced by the percentage by which he has contributed to the injury. Under pure comparative fault, the plaintiff can recover any amount, as long as there is at least 1% negligence on the part of the defendant. Under modified comparative fault, the plaintiff may not be at least 50% to blame for the injury. If he is, then he recovers nothing.

Here, it could be shown that, if Pierre and the dogs were in the street, that he contributed to the incident.

If so, if this is a jurisdiction that enforces contributory negligence, then Pierre would not recover. More common these days is comparative fault, and it's likely here that Pierre might be marginally to blame, but that he would not be found to be nearly 59% to blame.

## CONCLUSION

Pierre could sue for injuries to his arm, including medical costs and lost wages. There might be pain & suffering that goes along with that.

There also might be a claim against the manufacturer and/or designer of the street sweeper, but that isn't part of the call of this question.

PIERRE'S MOM

POTENTIAL PLAINTIFFS & DEFENDANTS

Carmen could try to sue as a bystander for emotional distress, but her claim is weak. She would sue the driver and Sweepclean.

ALLEGED GROUNDS OF NEGLIGENCE

Carmen would try to argue that the injury to her son (and death of his dog) caused her emotional distress.

DUTY

Same as above. In addition, the company and driver have a duty to those who foreseeably could suffer emotional distress by observing an accident to someone close to them.

Standards developed by the California Supreme Court (from Dillon, Thing and through Clohessy v. Bachelor) have established four requirements that have been followed in other jurisdictions. For a claim of emotional distress, the third party must show that:

- \* She is closely related to the victim
- \* She saw or heard the accident or saw the victim immediately after the accident and in the same condition he was in when the accident happened.
- \* There must be death or serious injury to the victim
- \* The emotional distress suffered must go beyond that which would have been experienced by a disinterested observer.

Here, only the first applies. She didn't experience the accident, the injury is not severe, and her emotional distress is not inordinately severe.

There seems to be no duty to her.

#### BREACH

If a duty WAS found, the breach analysis would be similar to above.

#### CAUSATION

There does seem to be a causal link between the events and her suffering.

#### SCOPE OF LIABILITY

Here, there probably is no foreseeability, because a street sweeper and his employer would be expected to know that an injury caused by the street sweeper would cause a grown man's out-of-town mother to become so distraught as to experience severe emotional trauma.

#### DAMAGES

She really has no damages, because her emotional distress does not rise to the level required to collect damages. Mere loss of sleep or depression at the loss of a pet does not count. While she was distraught and nearly collapsed, she shows no signs of physical or severe emotional injury or pain & suffering.

#### DEFENSES / IMMUNITIES

Sweepclean would argue successfully that Carmen was not a foreseeable 3rd-party victim and that she suffered no damages.

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Course / Session F08 Torts-Suzuki  
Instructor NA  
Section . Page 12 of 21

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## CONCLUSION

Carmen doesn't have a case.

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Answer-to-Question- 2

TO: Senior associate C. Suzuki

FROM: Junior associate # 181

RE: Pena body bag injury

DATE: 12-18-08

Pascal Pena has come to us to see whether he has a negligence claim against the Chicago City Coroner's Office and its employees. Below is an examination of his case and the likelihood of its success.

#### POTENTIAL PLAINTIFFS & DEFENDANTS

Pascal could sue the estate of Dr. Medici, the Chico City Coroner's Office and perhaps the town's Police & Fire Departments if it can be shown that adequate medical personnel were not called to the scene or did not act responsibly on the scene of the accident.

#### ALLEGED GROUNDS OF NEGLIGENCE

It could be argued that the Coroner's Office has a duty to not order bodies placed in body bags until a certain declaration of death has been established. This might also extend to police and fire personnel. But note that Police generally are immune from duties to individuals. The only exception -- based on Cuffy v. NY -- doesn't apply here, because there was no promise of protection made in advance to Pascal (presumably). We will focus here on out on just the Coroner's Office and its employees.

#### DUTY

Generally, one owes a duty to exercise reasonable care under the circumstances to those who are foreseeably exposed to risks of harm arising from the actor's conduct. Additionally, the professional standard of conduct requires medical personnel to exhibit a degree of skill and care of the average doctor in the region he works in. Specialists are held to a national standard.

Here, Dr. Medici would be held to the standard of like medical examiners in the region or state. If he is considered a specialist, he would be held to the standard required of coroners across the nation.

It is not clear whether another physician was at the scene or whether Dr. Medici was the only one. And it's not clear whether he declared Pascal dead, but he did order Pascal put in a body bag, so the inference is that he did. Medici owed a duty to Pascal to act reasonably under the circumstances as the average coroner would.

Under vicarious liability and respondeat superior, Medici's employer would owe a duty to the public to have its employees act according to the duty outlined above. The Coroner's Office would be joint and severally liable for the actions of its employee if the employee was performing his duties and reasonably within the scope of his employment.

Here, Medici was acting under his official duties for the medical examiner's office.

#### BREACH

Generally, there are two prongs to determining breach:

- \* A foreseeable risk.
- \* Unreasonable conduct in light of that risk.

One who fails to act reasonably under the circumstances in light of foreseeable risks to others arising from his conduct has breached a duty.

As stated above, medical personnel are held to the standard of like professionals in the region or like specialists nationwide. It could be argued that Medici breached that duty because a typical coroner would not order a victim to be zipped up into a body bag without examining him first or without another physician declaring the victim dead.

While that might seem obvious in this case, proving a breach (and, below, causation) would be helped with the testimony of expert witnesses. A medical emergency responder could testify as to how victims are handled in situations in which it is presumed that the victim has died. The EMT or emergency physician would testify as to procedure for declaring someone dead. Another expert could be a coroner who would testify as to procedure when it comes to treating bodies at the scene of an accident and afterward. ✓

That medical expert testimony must be reliable. If it's scientific or technical in nature, to be allowed as evidence, it would be subject to the Daubert test. These are guidelines, but not requirements. They are:

- \* Have the conclusions been tested to assess their scientific reliability?
- \* Have the conclusions been scrutinized by the scientific community?
- \* What are potential error rates of technical methods?
- \* Is the evidence generally accepted in the scientific community?

Because Pascal was left for dead and probably was unconscious, he likely would not be able to adequately identify the specific tortfeasor in his situation. He might not be able to prove that it was Medici who was directly to blame for his injuries. There may have been others who breached a duty and led to the injuries Pascal suffered.

In that case, he might have to employ the doctrine of *res ipsa loquitur*, which assists a plaintiff who has no

way of directly proving who caused his injuries. Three conditions must be met to use res ipsa:

- \* It must be an accident that doesn't normally occur.
- \* The agent causing the injury must have had exclusive control (or the right of control) over the instrumentality that caused the harm.
- \* There must be no contributory negligence on the part of the plaintiff.

If multiple tortfeasors possibly had control in the situation, then all those defendants should be brought into court. They then would have the burden of proving that they did not cause the harm.

Here, it clearly is a situation that doesn't normally occur -- getting zipped up alive in a body bag. Dr. Medici had the right of control over the instrumentality, but others could have, too. As stated above, there might have been other medical personnel at the scene, one of whom may have declared Pascal dead. Those potential defendants would have to be brought into court, as well.

It's not clear whether Pascal could be blamed for the resulting injury. While (see below) he may have been wrong to have tried to cross the highway, once his injury occurred, his liability regarding the medical personnel's behavior can be separated out. It can't be argued that he contributed to his own injuries suffered in the body bag.

It is apparent that Medici (and perhaps other medical personnel on the scene) breached the duty to provide reasonable, customary care to Pascal.

## CAUSATION

Causation is determined in two ways:

- \*But-for causation asks if the accident would not occurred but for the negligent conduct.
- \* Substantial factor does pretty much the same thing but is usually used when there are multiple



defendants. In most jurisdictions, the substantial factor test is commonly used.

There also is the issue of joint & several liability when there are:

- \* Multiple tortfeasors acting in concert
- \* Multiple tortfeasors acting independently to cause one harm.
- \* Vicarious liability involving employee

Here we have a case of vicarious liability, under the doctrine of respondeat superior, in which the employer is equally responsible for the harm caused by its employee.

Here we would ask: But-for the actions of Medici, would Pascal have suffered the harm?

It's fairly obvious that at least some of Pascal's injuries would not have occurred had he not been zipped up -- alive -- in a body bag for five hours. But it might help to bring in the experts to help show that this situation was caused by improper medical care. Again, an emergency medical responder and a coroner would help identify proper procedure and warn of the dangers of improper care. ✓

#### SCOPE OF LIABILITY

It's not enough to show that a breach of duty caused the harm; the plaintiff also must show that it was the primary cause of the harm and was not superseded by any ancillary risks or behavior by other forces.

There are three ways to cut off the chain of causation:

- \* An unforeseeable plaintiff
- \* An unforeseeable injury
- \* An intervening event.

If any of these occurs, there may be a case in which scope of liability cannot be proved.

There are three exceptions to the foreseeability standard, as well:

- \* Subsequent medical malpractice
- \* An eggshell plaintiff who is more fragile than the defendant might have expected
- \* Protection given some rescuers based on a policy of encouraging people to rescue those who injure themselves.

Here, the certainly was a foreseeable plaintiff. And it's foreseeable that someone zipped alive in a body bag for five hours would be severely traumatized and would be denied immediate medical care for serious physical injuries.

An intervening event might have involved other medical personnel at the scene. If that's the case, then those others would have to be brought in either as defendants or witnesses to assess whether an intervening event caused the injuries.

The Coroner's Office could argue that most of the injuries occurred as a result of the crash, but it would be hard for them to argue away the legitimate claims of fear of the dark, fear of doctors and fear of knives.

Here, it's pretty clear that we're in the scope of liability.

## DAMAGES

Pascal's damages are extensive. Possible categories are: Lost earnings (past & future), medical expenses (past & Future), pain & suffering, loss of enjoyment of life, loss of consortium, punitive damages and attorney fees. The latter two are rarely allowed.

First, if we're just suing the coroner, we must separate out the injuries that occurred from the accident and those that occurred from the negligent behavior of Medici and the Coroner's office.

The broken leg and broken tooth probably occurred during the contact with the car. They might have been aggravated, though, by the negligence that prevented him from getting timely medical attention. The amputated finger certainly was caused by the lag in medical care caused by the body-bag incident.

He can sue for any past earnings lost during his recovery and any earnings he may lose in the future if his injuries prevent him from doing his job or limit his ability to earn money. All of his medical expenses incurred before this case is brought can be sought: the broken leg, finger amputation, dental work and psychiatric care. He likely will have future medical expenses, perhaps related to his physical injuries, and certainly related to his psychiatric problems, which likely will require ongoing care.

His pain & suffering could be great. He walks with a limp and is missing a finger. He has consciously suffered that pain and it has clear physical and mental manifestations. His sleeping at night is often interrupted by nightmares of fear of death.

There could be a case of loss of enjoyment of life, because he is missing a finger and is afraid of the dark, which could affect his personal relationships. Perhaps he was an avid runner and now he can't do that, either.

Punitive damages might be in order, because the court could find that such an occurrence -- zipping up a live person in a body bag for five hours -- is so egregious that it constitutes gross negligence and/or reckless behavior that requires additional punishment. Policy issues would call for punishment to send a message to all public coroner offices that such behavior is beyond the bounds of decency.

Any recovery would be gathered in a lump sum and then be subject to reduction to present value. The total amount would be recalculated to a lower number, based on what amount of money now would be equivalent to the amount awarded over his life and working career. Usual factors would involve investment options and the rate of inflation, as well as Labor Dept. valuations on his earnings potential.

#### DEFENSES / IMMUNITIES

There are no immunities allowed in this jurisdiction.

The Coroner's Office might argue that Pascal was contributorily negligent, because he was crossing a highway. If this wasn't a standard pedestrian passageway, it could be argued that a reasonable person would not have tried to cross a highway and thus put himself in harm's way.

Contributory negligence is a per se bar to recovery. If the plaintiff is shown to be AT ALL negligent (that is, the defendant has proved all five elements of negligence against him), then the plaintiff can recover nothing.

Under comparative fault, the blame is allotted on a percentage basis, and the plaintiff's recovery is reduced by the percentage by which he has contributed to the injury. Under pure comparative fault, the plaintiff can recover any amount, as long as there is at least 1% negligence on the part of the defendant. Under modified comparative fault, the plaintiff may not be at least 50% to blame for the injury. If he is, then he recovers nothing.

Here, it is unlikely that Pascal would be seen as being at least half to blame for his own injuries. But there could be a percentage reduction under comparative fault for his trying to cross a busy highway. Most

common law states follow pure comparative fault, so there shouldn't be a per se bar to Pascal's recovery.

## CONCLUSION

Pascal has a good case against the estate of Dr. Medici and against the Coroner's Office that employed him based on medical negligence and infliction of physical injury and emotional suffering.

The key to the case is bringing in other potential defendants because of the uncertainty regarding what exactly happened at the accident scene. That could be complicated by the immunity presumed to protect police and fire personnel.

Knowing that this could be costly -- because of additional defendants and the need for expert testimony -- Pascal should know that he has a good case but that it could be expensive and lengthy.