

1 **TITLE: MELINDA-WILBUR-CHIP-JACK**
2 **SUBJECT: TORTS**
3 **FILE: TORTS04J.QUE**

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6 Jack owned the world's largest uncut diamond, the "Star," worth \$1 million uncut, but \$3
7 million if cut into finished gems. Of the 20 master diamond cutters in the world, 19 declined to
8 undertake the task because of the degree of difficulty. One mistake would shatter the Star into
9 worthless fragments.

10

11 One master diamond cutter, Chip, studied the Star and agreed with Jack in writing to cut
12 the Star for \$100,000, payable upon successful completion. As Chip was crossing the
13 street to enter Jack's premises to cut the Star, Chip was knocked down by a slow moving car
14 driven by Wilbur. Wilbur had driven through a red light and did not see Chip, who was crossing
15 with the light. Chip suffered a gash on his leg, which bled profusely. Though an ordinary person
16 would have recovered easily, Chip was a hemophiliac (uncontrollable bleeder) and died as a
17 result of the injury. Chip left a widow, Melinda.

18

19 Jack, who still has the uncut Star, engaged Lawyer to sue Wilbur in negligence for the \$2 million
20 difference between the value of the diamond as cut and as uncut. Lawyer allowed the applicable
21 statute of limitations to expire without filing suit.

22

- 23 1. What claims, if any, may Melinda assert against Wilbur, and what damages, if any, may
24 she recover? Discuss.
- 25
- 26 2. What claims, if any, may Jack assert against Lawyer, and what damages, if any, may he
27 recover? Discuss.

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6 **MELINDA V. WILBUR**

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8 Melinda will claim damages for the wrongful death of her husband Chip.

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10 At common law, she would receive no damages. The cause of action which Chip had against
11 Wilbur, just prior to his death, would not have survived him. At common law, it was cheaper to
12 kill than to injure.

13
14 Nowadays, by statute, all jurisdictions allow recovery for wrongful death. There are two types of
15 wrongful death statutes: (1) Survival statutes, and (2) "True" wrongful death statutes.

16
17 **SURVIVAL WRONGFUL DEATH STATUTES**

18
19 Survival statutes provide that the causes of action which the decedent had before death, survive
20 the decedent.

21
22 Here, Chip had a cause of action against Wilbur for negligence, and then died. Under the
23 survival statutes, Melinda could become Chips personal representative, and sue Wilbur for the
24 harm caused by Wilbur's negligence.

25
26 **Negligence-** Wilbur was surely negligent. Driving through a red traffic signal is
27 negligence per se. It is an unexcused violation of an applicable criminal statute. The statute
28 which prohibits driving through a red traffic signal is a criminal statute. It is applicable to our
29 facts because it was intended to protect this type of plaintiff, a pedestrian, against this type of
30 injury, being hit by a car.

31
32 **Actual Cause-** Wilbur's negligence is the actual cause of Chip's injuries, since but for
33 Wilbur driving negligently Chip would not have been injured.

34
35 **Proximate Cause-** Wilbur's negligence is also the proximate cause of Chips death.
36 Wilbur would not expect that Chip would bleed to death, since, according to the facts, a normal
37 person would have easily recovered from the injury. However, for personal injuries, the
38 defendant's liability is not terminated by the unexpected severe consequences of the injury. The
39 defendant takes his plaintiff as he finds him, including having a bleeding disorder which lead to
40 Chip's death.

41
42 Thus, since Chip's cause of action survived him in the survival jurisdictions, and Chip would
43 have won the cause of action against Wilbur (based on negligence per se), Chip's estate is
44 entitled to the damages Chip would have received from this cause of action, had he lived.

45
46 **Damages-** The damages to Chip's estate include Chip's medical expenses and loss of

1 wages which occurred during Chip’s lifetime. Some jurisdictions also allow Chip’s estate to
2 recovery for Chip’s pain and suffering during his life time. Here, Chip “suffered a gash and bled
3 profusely,” which probably constitutes pain and suffering.

4
5 In addition to the causes of action which survived Chip, Chip’s personal representative is
6 permitted to sue for future harm to Chip’s estate. These include Chips loss of future earnings,
7 less his living expenses.

8
9 Since the cause of action belongs to Chip’s estate, the damages recovered will belong to Chip’s
10 estate, not to Melinda personally. The damages are then distributed from the Chip’s estate, to the
11 beneficiaries of his estate. Melinda would most likely be one of the beneficiaries of her late
12 husband’s estate.

13 14 **“TRUE” WRONGFUL DEATH STATUTES**

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16 “True” wrongful death statutes create a new cause of action in favor of specific relatives such as
17 surviving spouse, child, parent, etc.

18
19 Here, the plaintiff Melinda is a surviving spouse, and therefore has a right to recover under the
20 “true” wrongful death statutes. The plaintiff must prove the *wrongfulness* of the decedent’s
21 death, and then may collect all *pecuniary* damages.

22
23 **Death was wrongful-** Chip’s death was wrongful because it was caused by Wilbur’s
24 negligence per se as discussed above.

25
26 **Pecuniary Damages-** *Pecuniary* damages are those which can be reduced to a monetary
27 amount. These include loss of companionship, support, services, and contributions.

28
29 Loss of companionship and services is measured by the cost of purchasing replacements, for life.
30 Loss of support is loss of future earnings by Chip, less his living expenses, for his expected life
31 time. Loss of contribution is loss of expected gifts. For example, property which Chip would
32 have inherited and might have devised to Melinda, may be a loss gift to Melinda if Chip will no
33 longer inherit because he is deceased.

34
35 All these *pecuniary* damages are reduced to present value, and paid directly to Melinda. The
36 cause of action belongs to the surviving spouse, not to the estate of Chip.

37
38 In addition to Melinda’s statutory right to recover under the “true” wrongful death statutes,
39 Chip’s estate was damaged. The damages include medical expenses and loss of income which
40 occurred during Chip’s lifetime. Pain and suffering is recoverable in some jurisdictions.

41
42 These damages to Chip’s estate are paid to his estate, and then distributed from his estate
43 according to his will, or intestate. Melinda would most likely be one of the beneficiaries.

44 45 **JACK VS. LAWYER**

46

1 Jack might sue Lawyer for malpractice; i.e., for professional negligence. However, Jack would
2 lose.

3

4 **Requirements for malpractice suit-** In Jack's malpractice suit against Lawyer, the
5 plaintiff, Jack, must prove (1) Lawyer was negligent, (2) But for the negligence of the lawyer,
6 Jack more likely than not would have won a judgment against Wilbur, and (3) The judgment
7 would have been collectable.

8

9 **Lawyer was negligent-** Here, Lawyer's negligence is not disputable. He let the statute
10 of limitations run on the claim.

11

12 **Jack would not have won against Wilbur-** However, Lawyer could not have won a
13 judgment against Wilbur, as a matter of law. Jack's cause of action against Wilbur would have
14 been for negligent interference with contract. There is no such cause of action, therefore Lawyer
15 would have lost, as a matter of law.

16

17 The public policy regarding this type of law suit is that Wilbur, the negligent actor, does not owe
18 Jack, the victim of the non performance of the contract, a duty to not negligently interfere with
19 Jack's contract. The damages would be too speculative, causation would be unclear, and
20 insurance against negligence would sky rocket.

21

22 **Damages too speculative-** Even if there were such a cause of action, Jack's damages
23 must be actual in amount, and these are too speculative. Clip might have shattered the Star
24 diamond into worthless fragments. Nineteen other diamond cutters had refused to cut the Star
25 because of this concern.

26

27 **Damages not foreseeable-** Damages must also be proximately caused by the negligence.
28 Negligent interference with contracts with a third party are considered unforeseeable, as a matter
29 of law, and therefore not recoverable.

30

31 **Unjust enrichment-** Finally, Jack seeks \$2M in damages, without taking the risk of
32 cutting the diamond. This would constitute unjust enrichment of Jack.

33

34 Jack will recover nothing from Lawyer.

35

36 1035 words.