
APPENDIX 5. SAMPLE OFFICE MEMOS AND ASSIGNMENT

Appendix 5.E. Additional Office Memos and E-Memos

1. Sample 1: Office Memorandum 1

Imagine that an attorney from the fictitious state of Calzona drafted the following office memorandum using only authority from the Calzona Supreme Court. Study the memorandum and consider the questions that follow it.

Memorandum

TO: Susan Elias

FROM: James Nelson

RE: Enforceability of Julie Week's Promise to Act as Guarantor for Her Cousin's Loan Obligation; File 22-127

DATE: July 31, 2022

I. Issue

By stating that he would refrain from demanding payment from Borrower on a loan obligation until he "needs the money," did Lender state a promise that provided consideration for Guarantor's promise to pay the obligation in the event that Borrower failed to pay on demand?

II. Brief Answer

Probably yes. Although the Lender's promise arguably is illusory, it probably satisfies the consideration requirement by committing the Lender to a performance, subject only to economic events not entirely within the Lender's control.

III. Facts

One of our regular business clients, Julie Week (Guarantor), asserted the following facts in an interview.

On December 15, 2021, Guarantor's cousin, Don Caslin (Borrower), purchased two rare antique automobiles from a private owner, Thomas Beatty (Lender), for a total of \$200,000. In a self-financing arrangement, Borrower paid \$80,000 on delivery and agreed in writing to pay the remainder of the purchase price in 12 monthly installments of \$10,000 each, beginning January 1, 2022.

From January to April 2022, Borrower paid Lender a total of \$40,000 in monthly installments. In late April, however, Borrower suffered unusual losses in his private business, and he failed to pay the installments due on May 1 and June 1. After Lender threatened to sue for the return of the automobiles, Guarantor and Lender entered into a written agreement (the Guarantee Agreement) designed to give Borrower time to recover from his temporary financial difficulties. Dated June 6, 2022, the Guarantee Agreement refers to the agreement between Lender and Borrower as the "CREDIT/SALE AGREEMENT," and it contains the following statement of mutual obligations:

1. LENDER will refrain from asserting his claim against BORROWER and from demanding payment on the CREDIT/ SALE AGREEMENT until LENDER needs the money.

2. In the event that BORROWER fails to pay all amounts due under the CREDIT/SALE AGREEMENT upon demand by LENDER, GUARANTOR will pay those amounts immediately and will pay further installments as they become due under the CREDIT/SALE AGREEMENT.

On July 1, 2022, Lender demanded payment from Borrower of sums due from May through July, but Borrower explained that he could not yet pay anything. On July 5, 2022, Lender demanded immediate payment of \$30,000 from Guarantor; he also stated that he expects either Borrower or Guarantor to pay the remaining five installments as they become due on the first of each month. Borrower states that he will not be able to make further payments for at least the remainder of the year, and Guarantor hopes to avoid responsibility for the debt.

We do not yet have any evidence that Lender engaged in fraud during formation of the Guarantee Agreement or that he lacked a genuine “need” for the money in early July. You have asked me to analyze the question whether the Guarantee Contract is unenforceable on its face for lack of consideration.

IV. Discussion

Lender’s promise to refrain from asserting his claim and demanding payment until he “needs the money” arguably is illusory. If so, Guarantor’s promise is not supported by consideration and is unenforceable.

An enforceable contract requires consideration in the form of a bargained-for exchange in which a promisor exchanges his own promise for a return promise or performance. *Smith v. Newman*, 161 Calz. 443, 447, 667 P.2d 81, 85 (1984). The exchange can satisfy the consideration requirement even if one party’s promise runs solely to the benefit of a third party rather than to the other party to the contract. *Id.* The requirement of an exchange, however, is not satisfied if one party gives only an illusory promise, which does not commit the promisor to any future performance. *Atco Corp. v. Johnson*, 155 Calz. 1211, 627 P.2d 781 (1980).

In *Atco Corp.*, the manager of an automobile repair shop purportedly promised to delay asserting a claim against the owner of an automobile for \$900 in repairs. Specifically, he promised to forbear from asserting the claim “until I want the money.” In exchange, a friend of the owner promised to act as guarantor of the owner’s obligation. *Id.* at 1212, 627 P.2d at 782. The word “want” stated no legal commitment because it permitted the manager at his own discretion to refuse to perform any forbearance at all. Because the manager incurred no obligation, the guarantor’s promise was gratuitous and unenforceable. *See id.* at 1213-14, 627 P.2d at 783-84.

On the other hand, even if a promise leaves open the possibility that the promisor will escape obligation, the promise is valid if the promisor does not have complete control over the events on which the promisor’s obligation is conditioned. *Bonnie v. DeLaney*, 158 Calz. 212, 645 P.2d 887 (1982). In *Bonnie*, an agreement for the sale of a house provided that the buyer could cancel the agreement if the buyer “cannot qualify for a 30-year mortgage loan for 90% of the sales price” at or lower than a specified interest rate, with any of several banks listed in the agreement. *Id.* at 213, 645 P.2d at 888. In enforcing the agreement against the seller, the court distinguished *Atco Corp.* because the word “cannot” referred to the buyer’s ability to obtain a loan rather than to his desire. Because his ability to obtain a loan was partly controlled by events and decisions outside his control, the promises in the sale agreement were nonillusory and binding. *Id.* at 214-15, 645 P.2d at 889-90.

Despite the superficial similarity of the guarantee agreements in both our case and *Atco Corp.*, our client's case probably is more nearly analogous to *Bonnie*. Lender's promise to forbear until he "needs" the money appears to condition the length of his forbearance on financial events that are at least partly outside his control: So long as his income and expenses create no need for the money, Lender has a commitment to forbear from demanding payment.

To convince a court to draw an analogy to *Atco Corp.* rather than to *Bonnie*, we could argue that the word "need" refers to a subjective perception of deprivation that is inseparable from one's desires. Lender arguably can control his financial needs through his personal spending decisions, subject only to his own discretion.

Unfortunately for Guarantor, the analogy to *Bonnie* is stronger because financial need is normally viewed as a matter that is controlled at least partly by external factors. Lender's promise probably is not illusory.

V. Conclusion

The promises stated in the Guarantee Agreement appear to satisfy the consideration requirement, because Lender assumed a legal obligation by promising to refrain from asserting his claim and demanding payment until he "needs" the money. Unless we discover other serious defects in the Guarantee Agreement or Lender's performance of it, Guarantor appears to be obligated to pay, and her defenses will not be worth litigating. We should urge Guarantor to settle Lender's claim, and we should try to persuade Borrower to indemnify Guarantor and to assume responsibility for further payments, even if he must sell the cars or other property to generate funds.

Questions on Sample Memorandum 1

- a. Did the substantive labels assigned to the parties serve as helpful reminders of the respective roles of the parties, or would you have retained the parties' last names as less distracting references?
- b. Does the statement of facts include any facts that you would omit or summarize further? Does it omit any important facts to which the author likely had access?
- c. Identify the parts of the "Discussion" section that illuminate the issue, discuss the legal standards, analyze the facts, and state a conclusion.
- d. Do you agree with the author's analysis? Does it adequately explore both sides of the dispute? Is it too pessimistic?

2. Sample 2: Essay Exam Answer to Problem in Office Memo 1

The skills that you develop when writing an office memorandum will directly transfer to your law school essay exams, and eventually the bar exam. The example below applies the analytical paradigm of the office memorandum Discussion section to an essay exam answer.

Imagine that the dispute described in the fact statement of Office Memo 1 formed the basis for an essay exam question. A good essay answer might look like the Discussion section of the office memorandum, in a more simplified format. In many courses, for example, the examination answer normally would omit citations and in-depth case analysis.

Identify the elements of IRAC in the following sample exam answer:

Lender v. Guarantor

Consideration – Illusory Promise: The lender’s promise to refrain from asserting his claim until he “needs the money” arguably is illusory, thus creating doubt about whether the guarantor’s promise is enforceable.

An enforceable contract requires a bargained-for exchange in which a promisor exchanges his own promise for a return promise or performance. The requirement of an exchange is not satisfied if one party gives only an illusory promise, which does not commit the promisor to any future performance but leaves performance to the promisor’s complete discretion. Nevertheless, if a promise leaves open the possibility that the promisor will escape obligation, the promise is valid if the promisor does not have complete control over the events on which the promisor’s obligation is conditioned.

The lender’s promise to forbear until he “needs” the money appears to condition the length of his forbearance on financial events that are at least partly outside his control: So long as his income and expenses created no need for the money, the lender had a commitment to forbear from demanding payment. If lender’s promise thus is not illusory, the guarantor’s promise is supported by consideration and is enforceable. The guarantor could respond that the lender could create financial need at his whim by spending money, or that the word “need” refers to a subjective perception of deprivation that is inseparable from one’s desires, which are subject to the promisor’s unfettered discretion. More than “want,” however, the word “need” normally is viewed as a matter that is subject to the influence of external events. Because the formality of the written agreement suggests that the parties must have intended to create binding obligations, a court probably would interpret the word “need” to impose objective restrictions on the lender’s rights and conduct, thereby satisfying the consideration requirement.

On balance, I conclude that the Lender’s promise is not illusory and that the guarantor’s promise is supported by consideration and is enforceable. [On this close, debatable issue, the opposite conclusion would also be acceptable – the grade would largely be based on the statement of the legal rules and the application to facts, using facts to argue both sides].

3. Sample 3: E-Memo 1

Now imagine that your assigning attorney asked you for a short follow-up memo on a single facet of the office memorandum in Sample 1 above, again set in a fictitious state for purposes of illustration. The following sample assumes that your follow-up analysis is sufficiently short and simple to convey in the body of an email.

From: James Nelson

Sent: Wednesday, August 07, 2022 11:39 a.m.

To: Susan Elias

Subject: Follow-up on File 22-127. Consideration in Absence of Direct Benefit to Guarantor

Attachments [pdf of *Green v. Day*, or link to a webpage that presents it]

Susan,

Below is my analysis of the consideration issue you assigned to me this morning.

ASSIGNMENT:

Specifically, you asked me to: (1) assume the facts as stated in my legal memorandum dated July 31, and (2) determine whether Guarantor’s promise to guarantee payment of Borrower’s debt lacks consideration because Lender’s “return” promise provided no benefit directly to Guarantor.

CONCLUSION:

Consideration can consist of a promise to provide a service to a third party. Therefore, a commitment by Lender to delay asserting his claim against Borrower could provide consideration for Guarantor’s promise. It does not matter that Lender’s performance would not directly benefit Guarantor.

ANALYSIS:

Lender's promise to delay collecting a debt from a third party, such as Borrower, can be exchanged for Guarantor's promise to Lender. *See Green v. Day*, 175 Calz. 32, 37, 865 P.2d 1204, 1209 (1993) (finding consideration in similar guarantee context). If Guarantor sought Lender's promise in exchange for her own, it is irrelevant whether she received a direct benefit from Lender's performance of the promise. *Id.* at 38, 865 P.2d at 1210 (citing to Restatement (Second) of Contracts §§ 71(2), 79 (1981)).

RECOMMENDATION:

On the facts currently known to us, Guarantor's best argument remains her claim that Lender's promise is illusory. As explained in the main memorandum, however, the claim of illusory promise is a relatively weak argument, because the phrase "until Lender needs the money" is not easily interpreted to leave Lender's performance to his unrestricted discretion. Nonetheless, it may introduce enough uncertainty regarding consideration to convince Lender to compromise his claim against Guarantor in a reasonable settlement.

4. Sample 4: Alternative Presentation of E-Memo 1, with Bullet Points

From: James Nelson

Sent: Wednesday, August 07, 2022 11:39 a.m.

To: Susan Elias

Subject: Follow-up on File 22 -127: Consideration in Absence of Direct Benefit to Guarantor

Attachments [electronic copy of *Green v. Day*]

Susan,

Please see my analysis below of the consideration issue you assigned to me this morning.

ASSIGNMENT

You asked me to:

- (1) assume the facts as stated in my legal memorandum dated July 31, and
- (2) determine whether Guarantor's promise to guarantee payment of Borrower's debt lacks consideration because Lender's "return" promise provided no benefit directly to Guarantor.

CONCLUSION

Consideration can consist of a promise to provide a service to a third party. Therefore, the guarantee promise is supported by consideration even if Guarantor received no direct benefit in return.

ANALYSIS

The absence of a direct benefit from Lender to Guarantor does not undermine a finding of consideration:

- Lender's promise to delay collecting a debt from a third party, such as Borrower, can be exchanged for Guarantor's promise to Lender. *See Green v. Day*, 175 Calz. 32, 37, 865 P.2d 1204, 1209 (1993) (finding consideration in similar guarantee context).
- If Guarantor sought Lender's promise in exchange for her own, it is irrelevant whether she received a direct benefit from Lender's performance of the promise. *Id.* at 38, 865 P.2d at 1210 (citing to Restatement (Second) of Contracts §§ 71(2), 79 (1981)).

RECOMMENDATION

The additional research does not change the conclusion of the July 31 memo:

- On the facts currently known to us, Guarantor's best argument remains her claim that Lender's promise is illusory.
- As explained in the main memorandum, however, the claim of illusory promise is a relatively weak argument, because the phrase "until Lender needs the money" is not easily interpreted to leave Lender's performance to his unrestricted discretion.
- Nonetheless, it may introduce enough uncertainty regarding consideration to convince Lender to compromise his claim against Guarantor in a reasonable settlement.

5. Sample 5: Office Memorandum 2

The following memorandum, which is set in a fictitious jurisdiction, is prepared by the law firm that represents Humane Hospital.

Memorandum

TO: James Clapton

FROM: Ginger Jackson

RE: Souza v. Humane; strict liability and negligence—File No. 22 -63

DATE: September 9, 2022

I. Questions Presented

A. Under New Maine’s strict liability statute, does the phrase “any toxic material” encompass a generally safe anesthetic that produced a fatal reaction in a patient with a rare nerve disorder?

B. Is Humane Hospital liable to Souza’s estate for negligent administration of the anesthetic?

1. Did Humane’s anesthesiologist breach a duty of care by administering the anesthetic without assistance and by failing to monitor Souza’s reactions to anesthesia?

2. Did Souza’s nerve disorder constitute a supervening cause that broke the chain of causation between the anesthesiologist’s conduct and Souza’s death?

II. Brief Answers

A. Probably no. A restrictive interpretation is supported by the legislative history and by a public policy in New Maine encouraging the provision of affordable medical services. The legislature probably did not intend the statutory term “toxic material” to include medically prescribed substances that ordinarily produce a beneficial result or otherwise facilitate medical treatment.

B. Probably yes.

1. *Probably yes.* Under generally accepted hospital procedures, at least two trained medical personnel must monitor the administration of anesthesia, with at least one person monitoring the patient’s reactions. In this case, a jury likely will find that the anesthesiologist breached a duty of care to the patient by administering the anesthesia alone.

2. *Probably no.* The jury likely will also find that the patient’s nerve disorder was not a supervening cause and that the anesthesiologist’s negligence proximately caused the patient’s death.

III. Facts

On February 17, 2022, our client, Humane Hospital, Inc. (Humane), admitted 22-year-old Teresa Souza to its facility in Greenville, New Maine, for surgery to correct a bone deformity in her foot. Souza’s bone deformity was not life threatening, but it severely hampered her mobility. The planned surgery required general anesthesia.

Dr. Roberta Unger, an anesthesiologist for Humane, studied Souza’s medical history and discovered that she suffered from a rare nerve disorder that slightly increased the risk that she would suffer an adverse reaction from anesthesia. Unger carefully informed Souza of the advantages and risks associated with each of the three safest and most effective general anesthetics. Souza decided to proceed with the operation and with the administration of general anesthesia. Unger and Souza ultimately agreed that Unger would administer ethane, a widely

used and generally safe form of ether. Unger had initially recommended Forane, a potent muscle relaxant that maintains a stable heart rate. Souza, however, rejected Forane because of its greater cost.

At 10:00 A.M. on February 18, Souza was prepared for surgery. While the circulating nurse was occupied with another patient, and before the surgical team arrived, Unger began administering the prescribed anesthetic to Souza. Unger and Souza were alone in the room. Apparently because she was concerned that an overdose might trigger an adverse reaction, Unger concentrated intensely on the anesthetic intake gauge, which monitored the flow of anesthetic. Consequently, she failed to watch either Souza or the equipment monitoring Souza's reactions. Approximately one minute after Unger began administering the anesthetic, the monitoring equipment sounded an alarm, as Souza's heart stopped beating. Efforts to revive her failed. According to computer records, the monitoring equipment reflected growing signs of distress in Souza beginning approximately 10 seconds before her death and before the alarm sounded.

An autopsy showed that the anesthetic combined with Souza's nerve disorder to trigger a reaction that caused cardiac arrest. Mary L. Richards, Ph.D., a professor at the University of New Maine School of Nursing, has told us that hospitals throughout the nation ordinarily require the anesthesiologist to be accompanied by a nurse during the administration of anesthesia. Both the nurse and the anesthesiologist are expected to continuously assess the patient's reaction to anesthesia by reading monitoring equipment and by observing the patient directly. Although she cannot be certain, Richards guesses that the fatal reaction was triggered largely by the final 10 seconds of Unger's administration of anesthesia.

Souza's estate has sued Humane in tort for wrongful death. It advances two theories of tort liability: (1) statutory strict liability for use of toxic materials and (2) negligence in the administration of the anesthetic.

IV. Discussion

A. Strict Liability for Use of Toxic Materials

If a statute or the common law imposes strict liability for Souza's death, then Souza's estate can establish liability without proving negligence. New Maine's common law doctrine of strict liability for injuries caused by ultrahazardous activities does not apply to noncriminal medical practices engaged in by licensed physicians. *Stanislaus v. Good Samaritan Hosp.*, 212 N. Me. 113, 115 (1989). New Maine has enacted a statute, however, that imposes strict liability for injuries stemming from the use of "any toxic material": "A commercial enterprise is liable for injuries proximately caused by its use of any toxic material, without regard to the degree of care exercised by the enterprise." 12 N. Me. Rev. Stat. Ann. § 242 (rev. 2021) (effective Jan. 1, 2022).

The New Maine courts have not yet had an opportunity to interpret the strict liability statute in a published opinion. As a profit-making hospital, Humane presumably is a "commercial enterprise" within the meaning of the statute. It is less certain, however, that the anesthetic administered to Souza would qualify as a "toxic" material.

The common meaning of the word "toxic" is "poisonous." *E.g., The Random House Dictionary of the English Language* 1500 (unabridged) (1970). Souza's estate might plausibly argue that the anesthetic was a toxic material because it was poisonous to Souza, even though it would not have been poisonous to most others. The word "toxic," however, applies more naturally to substances that are universally harmful to humans, such as cyanide, DDT, or sulfuric acid. It strains the common meaning of "toxic" to apply it to an anesthetic that might occasionally be harmful to persons with unusual allergies or other extraordinary conditions.

Legislative history also supports a restrictive interpretation of the statutory term “any toxic material.” The report of the New Maine Senate Committee on Health and Welfare suggests that the legislature was concerned only with the deadliest of substances:

The purpose of this bill is to reallocate the cost of unavoidable accidents from victims to industry and its consumers, to discourage unnecessary use of deadly chemicals and other hazardous materials, and to encourage the development and use of substitute materials that are generally safe for human contact.

N. Me. Comm. on Health and Welfare, S. 78-112, 2d Sess., at 2 (2021). The anesthetic in this case is closer to the materials “generally safe for human contact” condoned by the legislature than it is to the “deadly chemicals and other hazardous materials” condemned by it.

Finally, general state policy appears to support an interpretation that excludes medically prescribed substances from the reach of the statute. The legislature and judiciary of New Maine have recognized a policy of limiting the liability of physicians to encourage the ready availability of affordable medical services. For example, under the New Maine “Good Samaritan” statute, physicians who provide certain emergency medical services are not liable for adverse consequences unless they engage in culpable conduct amounting to at least gross negligence. 12 N. Me. Rev. Stat. § 229 (2010). This protective policy is also reflected in the courts’ refusal to extend common law strict liability for ultrahazardous activities to even experimental medical practices. *See Stanislaus*, 212 N. Me. at 115. The legislature presumably was aware of these laws when it enacted the toxic materials statute in 2021.

Souza’s estate might argue that the legislature intended to retreat from the protective policies of these laws by imposing strict liability on a limited segment of the activities of commercial medical practices. Absent more specific evidence of legislative intent to depart from existing legal policies, however, it is more likely that the legislature retained its protective attitude and assumed that the term “any toxic material” would not include routinely prescribed medicines or anesthetics.

In this case, the prescribed anesthetic, ethane, was not the safest available at the time of Souza’s operation. Nonetheless, it is a frequently prescribed substance that produces beneficial results with only minor side effects in all but the most unusual cases. The strict liability statute probably does not apply to Souza’s death.

B. Negligence

Assuming Humane is not strictly liable for Souza’s death, it may nonetheless be liable to Souza’s estate if its agent caused the death through negligence. *See Kityama v. Mercy Hosp.*, 183 N. Me. 752, 759-60 (1974) (hospital liable for negligence of its nurse). An action for negligence requires proof of a negligent act or omission that proximately causes injury. *Baker v. Bruce*, 153 N. Me. 817, 820 (1967).

In our case, the injury to Souza is obvious. In greater doubt are the elements of negligent act and proximate cause.

1. Negligent Act

A negligent act or omission consists of the breach of a duty of care owed to another. *Id.* at 821. A medical specialist owes a duty to patients to exercise at least the ordinary skill and care that is reasonable and customary nationwide in that medical specialty. *Kityama*, 183 N. Me. at 760. Furthermore, under the “thin-skulled plaintiff” rule, that duty of care encompasses the special care necessary to address increased risks created by a patient’s unusual susceptibility to injury. *Id.* In this case, Humane’s anesthesiologist, Unger, may have breached duties of care in

her unassisted administration of general anesthesia in the face of Souza's known nerve condition.

Unger exercised care in determining Souza's disorder of the nervous system and in informing her of the risks presented by each of the most suitable anesthetics. Moreover, when administering the anesthetic selected by Souza, Unger took care to provide the prescribed dosage by monitoring the anesthetic intake gauge.

On the other hand, Unger's intense concentration on the anesthetic intake gauge may have been an act of carelessness, rather than enhanced care, because it diverted Unger's attention from Souza and from the equipment monitoring Souza's vital signs. Faced with Souza's known nervous disorder, Unger probably had a duty to follow the standard medical practice of summoning a nurse to assist her in administering the anesthesia. Had she done so, the team could have monitored both Souza's vital signs and the intake gauge, and a team member undoubtedly would have detected signs of distress at least 10 seconds before death, arguably enough time to cease anesthesia and take corrective measures.

On these facts, a jury could find that Unger was negligent in her administration of the anesthetic.

2. Proximate Cause

Even if its agent was negligent, Humane will not be liable to Souza's estate unless the negligence proximately caused Souza's death. *See, e.g., Baker v. Bruce*, 153 N. Me. 817, 821 (1967). Proximate cause is a flexible doctrine that precludes liability if the relationship between negligence and an injury is so attenuated that it would be unfair to hold the negligent party responsible for the injury. *Id.* at 821-22.

In this case, Humane can argue that the signs of distress appearing for 10 seconds on the monitoring equipment prior to the alarm would not have given even two observant medical workers sufficient time to reverse Souza's fatal reaction. If so, even careful administration of anesthesia would have resulted in death, suggesting that Souza's reaction was truly an unforeseeable accident rather than the proximate result of any negligent act. Unfortunately, the factual premise of this argument may be unsound: According to our own expert, cessation of the anesthesia at the first signs of distress could have prevented the fatal reaction. We may want to investigate this further with other experts.

As a fallback position on proximate cause, Humane could try to characterize Souza's rare nerve condition as a supervening cause. Such an intervening cause may break the chain of causation between the negligence and the injury, particularly if the intervening event was unexpected. *See Safehouse Ins. Co. v. Rainbow Landscaping Co.*, 223 N. Me. 29, 31, 35 (1987) (dictum). Unfortunately, a court may be reluctant to analyze this issue within the framework of supervening cause. Under the more conventional approach, a court would simply apply the "thin-skulled plaintiff" rule to expand Unger's duty of care to encompass responsibility for increased risks of injury created by Souza's known nerve condition. However, if we can persuade the court to depart from the conventional approach and to analyze the increased risk within the less clearly applicable framework of supervening cause, we will gain the opportunity to develop an additional argument to avoid liability.

To develop a supervening-cause argument, we must distinguish *Rainbow Landscaping*, which liberally allocates the risks of some intervening causes to the tortfeasor. In *Rainbow Landscaping*, a landscaping company agreed in writing with a general contractor to install a sprinkler system in the yards surrounding a new house in its final stages of construction. The written contract specifically obligated the landscaper to perform its work "in a manner that does not interfere with the ongoing work of other subcontractors or deface their finished product." *Id.*

at 32. On the day that the landscaper began its work, its employees knew that another subcontractor was painting the interior of the house. While welding a sprinkler pipe to a house water line, an employee of the landscaper ignited paint fumes that had accumulated in a room recently painted by the painting subcontractor. The resulting fire entirely destroyed the nearly completed house.

In a suit brought against the landscaper by the owner's insurer, the landscaper argued on its motion for a directed verdict that, even if the landscaper had acted negligently, the paint fumes constituted an intervening cause that precluded a finding of proximate cause. The trial court denied the motion, and the jury returned a verdict for the insurer. The New Maine Supreme Court affirmed. It held that the landscaper was responsible for the consequences of the combustion of paint fumes that it had triggered because its employee should have been aware of the paint fumes and the danger they posed. *Id.* at 35. In dictum, the court stated that it might have reached a different result had the landscaper reasonably failed to foresee that the welding could trigger such a blaze. *See id.*

We can try to distinguish our case from *Rainbow Landscaping* by arguing that the landscaper's agreement to accommodate the work of other subcontractors justified the finding that the landscaper should have known of the hazard. Under this reasoning, the agreement was critical to the allocation of responsibility to the landscaper for the consequences of igniting the paint. That contract has no direct counterpart in our case. Moreover, in light of New Maine's policy of limiting the liability of medical care providers, a court might be willing to apply the doctrine of proximate cause more stringently in a hospital setting than in a construction setting.

On the other hand, although Souza's adverse reaction to the anesthetic was not highly probable, it was certainly foreseeable as a possible consequence of Souza's known nerve condition. Indeed, Unger's intense concentration on the intake gauge shows that she indeed specifically anticipated such a reaction. The absence of a contract such as the one in *Rainbow Landscaping* might be viewed as a technical and immaterial distinction.

Therefore, even if we can persuade a court to analyze Souza's nerve condition within the framework of supervening cause, the court probably will not find the doctrine satisfied on the facts of this case. If Souza's estate can prove that Unger was negligent, it almost certainly can show proximate cause as well.

V. Conclusion

Because legislative and judicial policies favor limits on physicians' liability, the strict liability statute regulating toxic materials probably will not apply to the administration of the anesthetic in this case. The courts will be even less likely to retreat from precedent by applying the common law doctrine imposing strict liability for ultrahazardous activities. A jury could find, however, that Humane's anesthesiologist was negligent in failing to summon assistance for the administration of the anesthesia and to monitor Souza more closely. We can try to characterize Souza's nerve condition as a supervening cause, but *Rainbow Landscaping* will not be easy to distinguish.

Because the risk of substantial liability is great, I recommend that we advise Humane to settle. Souza's estate may be willing to compromise; its negligence claim is not appropriate for summary disposition and thus is subject to the unpredictability of a jury.

Questions on Office Memorandum 2

a. Distinguish between the statutory and common law claims discussed in Office Memorandum 2. How does the legal method differ in the analysis of each claim?

b. Review the statutory analysis in section IV.A of Office Memorandum 2. Its original analysis of language, legislative history, and policy is indispensable precisely because no court had yet interpreted the statute. Imagine instead that the author of the memorandum had found a New Maine case that discusses the applicability of the strict liability statute to a restaurant that sold raw oysters infected with the *vibrio vulnificus* bacteria. Most oysters naturally absorb these bacteria, and almost all persons who ingest the bacteria after eating raw oysters suffer no ill effects. However, in a tiny percentage of persons, particularly those with liver or kidney problems, the bacteria can lead to septicemia, which often results in death. In the New Maine case, *Spratt v. Shuck*, a man developed a bacterial infection and died after eating raw oysters served in a restaurant. [The facts for this fictitious case are inspired by those of *Simeon v. Doe*, 618 So. 2d 848 (La. 1993)].

Imagine that the New Maine Supreme Court examined the language, legislative history, and policy of the New Maine statute governing strict liability for toxic materials. Imagine further that it found that a raw oyster infected with the *vibrio vulnificus* bacteria is not a “toxic material” within the meaning of the statute. Would the author of the memorandum discuss the issue of statutory liability in the same manner if a case like *Spratt v. Shuck* were available? Would the author rely as heavily on her own analysis of language, legislative history, and policy? How would the analysis differ if it focused on case law such as *Spratt v. Shuck*?

c. Review the subsection discussing the element of proximate cause in a negligence action. Most professors of Tort Law readily conclude that a court would analyze Souza’s nerve condition within the “thin-skulled plaintiff” rule regarding the scope of duties and not within the framework of proximate cause. In that light, note how the author of the memorandum nonetheless recommends nudging the court away from the framework of “thin-skulled plaintiff” to one of supervening cause, which would provide Humane with a moderately better argument for escaping liability. Is this a sound strategy? Can it be used in other contexts? In this specific case, is the discussion of supervening cause a welcome exercise in creative argument, or is it a misleading waste of time for the reader?

d. Notice the frequent use of the word “we” in the section on proximate cause. Should the author of a memorandum avoid using such first-person pronouns in a legal analysis? Are first-person pronouns appropriate when referring to the law firm’s development of facts or legal theories? Are they better than passive voice or other abstractions?

6. Sample 6: E-Memo 2

The following e-memo assumes that a supervising attorney assigns a preemptive analysis of recently enacted legislation, outside the context of any current dispute.

From: Ginger Jackson

Sent: Wednesday, November 13, 2021 3:19 p.m.

To: James Clapton

Subject: Strict Liability Statute on Toxic Materials, as Applied to Anesthesia

Attachments [Word file of this e-memo]

James,

Below is my analysis of the strict liability statute’s definition of toxic materials as it applies to anesthesia. Please let me know if you have any questions or if you’d like me to conduct additional research.

I. Overview: Background and Issue

Our client, Humane Hospital (“Humane”), is concerned about recent legislation in New Maine. When it

becomes effective January 1, 2022, it will impose strict liability for injuries caused by commercial use of toxic materials. Humane is particularly concerned about liability for careful administration of anesthesia to a patient who has an unexpected adverse reaction.

You asked me to address the following issue: Does the phrase “any toxic material” in New Maine’s strict liability statute encompass a generally safe anesthetic that produces a fatal reaction in a patient with a rare and previously undetected intolerance for the anesthetic?

II. Conclusion

Based on the statutory text, legislative history, and state policy, the new legislation almost certainly will apply only to substances that are generally poisonous or otherwise hazardous to health. Humane can safely conclude that its administration of anesthesia will not trigger strict liability under the new statute.

III. Discussion

New Maine recently enacted a statute that imposes strict liability for injuries stemming from the use of “any toxic material”: “A commercial enterprise is liable for injuries proximately caused by its use of any toxic material, without regard to the degree of care exercised by the enterprise.” 12 N. Me. Rev. Stat. Ann. § 242 (rev. 2021) (effective Jan. 1, 2022).

The common meaning of the word “toxic” is “poisonous.” *E.g.*, *The Random House Dictionary of the English Language* 1500 (unabridged) (1970). A generally safe anesthetic conceivably could be viewed as a toxic material under this definition because it could produce a fatal reaction in some patients with a rare intolerance for the anesthetic. The word “toxic,” however, applies more naturally to substances that are universally harmful to humans, such as cyanide, DDT, or sulfuric acid. It strains the common meaning of “toxic” to apply it to an anesthetic that might occasionally be harmful to persons with unusual allergies or other extraordinary conditions.

Legislative history also supports a restrictive interpretation of the statutory term “any toxic material.” The report of the New Maine Senate Committee on Health and Welfare suggests that the legislature was concerned only with the deadliest of substances:

The purpose of this bill is to reallocate the cost of unavoidable accidents from victims to industry and its consumers, to discourage unnecessary use of deadly chemicals and other hazardous materials, and to encourage the development and use of substitute materials that are generally safe for human contact.

N. Me. Comm. on Health and Welfare, S. 78-112, 2d Sess., at 2 (2021). The anesthetic in this case is closer to the materials “generally safe for human contact” condoned by the legislature than it is to the “deadly chemicals and other hazardous materials” condemned by it.

Finally, the legislature and judiciary of New Maine have recognized a policy of limiting the liability of physicians to encourage the ready availability of affordable medical services. For example, under the New Maine “Good Samaritan” statute, physicians who provide certain emergency medical services are not liable for adverse consequences unless they engage in culpable conduct amounting to at least gross negligence. 12 N. Me. Rev. Stat. § 229 (2010). This protective policy is also reflected in the courts’ refusal to extend common law strict liability for ultrahazardous activities to even experimental medical practices. *See Stanislaus v. Good Samaritan Hosp.*, 212 N. Me. 113, 115 (1989). The legislature presumably was aware of these laws when it enacted the toxic materials statute in 2017. Absent evidence of legislative intent to depart from these legal policies, it is likely that the legislature retained its protective attitude toward the medical profession and assumed that the term “any toxic material” would not include routinely prescribed medicines or anesthetics.

IV. Recommendation

The new statute almost certainly will not impose strict liability for injuries stemming from Humane’s administration of generally safe medical procedures such as anesthesia. Thus, negligence will remain the only basis for tort liability stemming from Humane’s delivery of medical services. Accordingly, we should advise Humane to avoid negligence by continuing to exercise the utmost care with patients, such as by informing patients of known risks, allowing the patient to choose between alternative treatments when appropriate, and refraining from administering an anesthetic to a patient with a known allergy or intolerance to that anesthetic.

We should monitor our state’s case law for any judicial interpretations of the statute, to determine whether we should update our analysis and advice.