

SAMPLE ANSWER TO MINI-EXAM

The facts are based on *Diffenderfer v. Staner*, 722 A.2d 1103 (Pa.Super., 1998), which reversed a jury verdict in favor of the plaintiff based on abnormally dangerous activity and nuisance; the appellate court found that the activity was not abnormally dangerous and that the landlord-tenant relationship precluded a finding of nuisance. The case was remanded for reconsideration of the negligence claim.

To recover damages from Staner, Polson ("P") would have to prove some kind of breach of duty by Staner. The two ways to do this would be by showing that Staner acted *negligently* or that he is subject to *strict liability*.

I. Negligence

P would attempt to show that Staner is liable as a result of his *negligence*, that is, that he failed to use the care that a reasonably prudent person would use in handling the Thimet. There are several ways P would try to do this.

Juror Experience. It seems unlikely that the average juror would have an opinion about whether Staner acted negligently in leaving the Thimet around.

Industry Custom. The standards and practices of others in the same industry are evidence of what constitutes reasonable care. Here we don't have any information concerning how other people handle pesticides.

Negligence per se. Violation of a statute is presumptive or possibly (depending on the jurisdiction) dispositive evidence of negligence. To be treated as negligence as a matter of law (that is, not allowing the jury to find otherwise), there must be a statutory violation, that is unexcused, and that falls within the protective purpose of the statute. Here there was a new statute in 1981 regulating the use of Thimet, which would have had the effect of preventing people like Staner from purchasing it and using it. However, it doesn't suggest that Staner actually violated the statute or other regulations simply by keeping it around. Nonetheless, the jury might believe that the use restrictions on Thimet would lead a reasonable person to be more careful about storage or disposal of the pesticide.

Res ipsa loquitur. This theory is ordinarily used where the cause of the accident is unknown. Here there is only uncertainty about how the Thimet got spilled, so I don't think it is likely to be used. However, Staner's uncertainty about how the Thimet was stored suggests a kind of cavalier attitude that might work against us. Even if *res ipsa* is not formally used, our uncertainty would work against us.

II. Strict Liability

Ps wouldn't be required to show negligence if Staner's conduct was subject to some form of strict liability, which could arise from (a) an abnormally dangerous activity; or (b) a claim for nuisance.

Abnormally dangerous activity. The pesticide is very toxic, but I'm not sure it would be considered abnormally dangerous. Most courts use the test set forth in the Restatement, § 520, which requires consideration of six factors, including whether the activity has a high risk of injury, high gravity of risk, and so forth. Maybe a case could be made for a pesticide being treated as

abnormally dangerous, but I would doubt it.

Nuisance. Someone who keeps a noxious substance can be held strictly liable if it gets out and injures a neighbor, where the injury conflicts with the neighbor's reasonable expectation with regard to quiet enjoyment of their property. Here the confusing thing is whether or not the relationship between P and Staner is one of neighbors. By leasing the property to P, maybe Staner becomes a neighbor who is can be liable for creating a nuisance by allowing the Thimet to cause injury to P's cows. On the other hand, this is different from the typical case of nuisance where the property lines are clearly drawn.

CHECKLIST

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| <input type="checkbox"/> Overview | <input type="checkbox"/> Strict Liability |
| <input type="checkbox"/> Breach of Duty | <input type="checkbox"/> Abnormally dangerous activity |
| <input type="checkbox"/> <i>Negligence</i> theory | <input type="checkbox"/> Restatement criteria |
| <input type="checkbox"/> defined as failure to use reasonable care | <input type="checkbox"/> probably not |
| <input type="checkbox"/> jury experience? | <input type="checkbox"/> Nuisance theory |
| <input type="checkbox"/> industry custom? | <input type="checkbox"/> Defined |
| <input type="checkbox"/> negligence per se | <input type="checkbox"/> What is P's legal status |
| <input type="checkbox"/> is there a violation? | <input type="checkbox"/> |
| <input type="checkbox"/> ignorance of the law | <input type="checkbox"/> |
| <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> Res ipsa theory | <input type="checkbox"/> |
| <input type="checkbox"/> implication of negligence | |
| <input type="checkbox"/> | |

Exam Number _____

