Professor DeWolf Fall 2001
Torts I October 14, 2001

SAMPLE ANSWER TO MINI-EXAM

This case is loosely based on *Edwards v. Post Transportation Co.*, 228 Cal.App.3d 980, 279 Cal.Rptr. 231 (1991), which rejected the plaintiff's argument that strict liability should be applied to the defendant's transportation of sulfuric acid, and entered judgment on a jury verdict for defendant.

To recover damages, Jones would have to prove that Norris Industries (or possibly Gregory Construction Co.) breached a duty to Jones. Two major candidates are *negligence* and *strict liability*.

Negligence

Negligence is the failure to use reasonable care. To establish a negligence case, Jones would have to prove that Norris did something (or failed to do something) that a reasonably prudent person wouldn't have done (or failed to do something a reasonable person would have done). Apparently Norris tried to save money in the first instance by switching the tank labels rather than redoing the pipes, and then they were lulled into complacency by forgetting that the old labels were still there.

There's nothing particularly technical about the mistake involved here, so it might be that the jurors would form their own conclusion on the basis of their own experience, somewhat like the wasp case. On the other hand, it might be helpful to have some kind of expert on the handling of dangerous chemicals to describe what is commonly done in the industry to prevent accidents like this. Another thing the jury might find helpful is a comparison of the cost of proper labeling with the risk of this kind of accident. Using Learned Hand's test (comparing the burden of risk prevention to the risk of accident) might make the defendant's behavior look particularly slipshod. On the other hand, it might appear that what they were doing was reasonable and that accidents like this wouldn't happen simply as a result of faded paint. It should be pointed out that if there is a "custom within the industry" on these matters it will set a minimum threshold for the defendant, but the jury might find the standard inadequate and conclude that reasonable care required additional safety precautions.

There might also be some statutory guidance in this area. Perhaps the storage of sulfuric acid or sodium bisulfite is subject to regulations including labeling. A violation of the statute would be considered negligence per se (that is, negligence as a matter of law, leading to a directed verdict on that issue) in some jurisdictions, although in other jurisdictions, it is simply evidence of negligence and the jury is free to decide for themselves whether they think the defendant is negligent.

As to Gregory Construction, I wouldn't think they are a very good prospect, unless Norris is somehow financially troubled and/or uninsured and couldn't pay a judgment. The mistake made in construction has in effect been ratified by Norris, and Norris is certainly responsible now for the poor labeling job. Norris wouldn't be vicariously liable for the construction work (because Gregory was an independent contractor), but since Norris knew about the problem and chose to solve it by using paint, if that was a bad idea then Norris is now responsible for it. In short, I don't see a claim against Gregory succeeding that wouldn't be effective against Norris.

Strict Liability

Jones wouldn't be required to show negligence if Norris' conduct was subject to some form of strict liability. The first candidate would be strict liability for an abnormally dangerous activity (ADA) under the Restatement (2d) of Torts, §§ 519-520. The real question is whether Jones could convince the court that Norris' conduct of storing sulfuric acid is an ADA. Although there is a high risk of harm and the magnitude of harm is great, it appears that reasonable care would ordinarily prevent injury. It's also appropriate to the area and in that sense not uncommon. Moreover, it's not really the storage of sulfuric acid that caused the problem here but rather the mislabeling of a tank of sodium bisulfite. Unless the storage of sodium bisulfite is an ADA, it's hard to say that Norris was engaged in an ADA, at least in one that caused this accident. I think a much stronger case could be made for Post engaging in an ADA for driving around with sulfuric acid, but of course they're not the target here.

Neither is any nuisance claim viable because Jones didn't enjoy any kind of property right at the time he was injured. Had Jones been a neighbor that would have been one thing, but here he's a visitor on the property. So I don't think nuisance will get us anywhere.

A final, wild thought would be if there is some kind of statutory liability imposed upon hazardous waste transporters, to see if there is some kind of statute that creates strict liability for the escape of dangerous chemicals like this. Unlikely, but possible.

In short, I think the best case to establish liability is to convince the jury that Norris was negligent in the way they maintained their chemical tanks. If we can't win on that issue, I don't think Jones will be able to recover.

CHECKLIST

- ☐ Overview
- ☐ Breach of Duty
- ☐ Claim v. Norris
- ☐ *Negligence* theory
- ☐ defined as failure to use reasonable care
- ☐ jury experience?
- ☐ Learned Hand test
- ☐ expert opinion?
- ☐ industry custom only a floor
- ☐ negligence per se--any statutes?
- ☐
- ☐ Any company policies regarding paint?
- ☐ Vicarious liability for employee negligence
- ☐
- ☐ Claim v. Gregory Construction
- ☐ (Norris not vicariously liable for them)
- ☐ Decision to relabel rather than switch plumbing was joint decision
- ☐ Unless Norris is broke, nothing new from Gregory Construction
- ☐
- ☐ Strict Liability?
- ☐ Abnormally Dangerous Activity
- ☐ Restatement (2d) §§ 519-20
- ☐ Norris had bisulfite, but Post carried acid
- ☐ Acid storage was common & appropriate to location
- ☐
- ☐ No nuisance claim
- ☐ No property interest invaded
- ☐
- ☐ Strict liability statute?
- ☐
- ☐
- ☐

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