

MIDTERM EXAM SAMPLE ANSWER

QUESTION 1

The facts for this question were based upon *Hartford Steam Boiler Inspection & Ins. Co. v. White*, 775 N.E.2d 1128 (2002), in which the court affirmed a verdict against the inspection company).

I would anticipate claims brought by the estates or personal representatives of Erickson and White. To succeed, they would have to show that Hartford ("H") breached a duty that proximately caused damages that are legally compensable. A breach of duty can be established either by negligence or strict liability.

Negligence

Negligence is defined as the failure to use reasonable care. Reasonable care is what a reasonably prudent person would have done in the same or similar circumstances. In this case H's employee Nasatka was working in the course and scope of employment, and therefore any negligence on his part would be attributed to H.

One tool that may be used to establish the standard of reasonable care is to compare the burden of precautions against the probability of injury multiplied by the magnitude of the expected loss. This is known as the Learned Hand formula ( $B < P * L$ ). Here the plaintiff might argue that the burden on H was slight to check not only what was on the usual checklist, but anything unusual, like the oxidized cover plate. In light of the horrendous damage from a boiler explosion, even a very low probability of harm would still be compatible with a reasonable person taking some precaution.

One measure that might help us is the custom of the industry. The way in which others similarly situated perform the same task (in this case, boiler inspection) is persuasive evidence of what would have been reasonable care. The fact that all boiler inspectors that ARPC is familiar with have not inspected the burner suggests that we were in compliance with this standard of the industry. On the other hand, courts have held that industry custom is only persuasive; a jury may set a higher standard if they believe that reasonable care requires it.

Another measure of reasonable care is what is required by statute. There are certainly statutes requiring boiler inspection, but there may be more detailed statutes or regulations dealing with *how* the inspection is conducted. We would want to make sure that there is nothing that would be cited as a statutory violation. More than just evidence of negligence, in some jurisdictions a statutory violation may be treated as negligence as a matter of law.

Along similar lines, we should be sure that there is no company practice or "rulebook" that H's inspectors follow that suggest further activity if something like an oxidized cover plate is observed. Any such noncompliance would be used as evidence that N was negligent.

Strict Liability

The only possible strict liability theory that could be applied would be an argument that the operation of a boiler is an abnormally dangerous activity, because of its potential to explode with such devastating results. However, it is the owner or operator of the boiler who would face strict liability; the inspector shouldn't expect such liability to be imposed.

Proximate Cause

In addition to establishing a breach of duty, plaintiffs would have to show that H's negligence proximately caused the damages. Proximate cause is composed of but-for cause and legal cause. A cause is said to be a but-for cause of injury where, more probably than not, the injury would not have occurred but for the defendant's breach of duty. Here the plaintiffs would certainly argue that a more thorough inspection would have led to repair of the boiler, but I would at least question whether that is true. ARPC had lived with this condition for some time, and had itself removed the

support for the burner, causing the ultimate explosion. The bad news for us is that there was a 9-month period between the inspection and the explosion. One other unknown is whether the questions raised about the condition of the burner would have affected the inspection certificate issued by the state. If the problems noted by a more thorough inspection would have prevented a certificate from being issued, then immediate repairs would have been likely. On the other hand, if the boiler itself was okay, but the burner was a separate issue, then even if N had gratuitously pointed out the problems with the burner, it might not have triggered repairs in a timely fashion to avoid the injury.

If the evidence suggests that a better inspection still probably would not have avoided the injury, but deprived ARPC of a chance to make timely repairs, the plaintiffs might argue a loss of a chance theory, but most jurisdictions would reject anything outside the medical malpractice arena.

On the other hand, if but-for causation is satisfied, I see no difficulty in establishing legal cause; the injuries are certainly foreseeable, there are no apparent superseding causes (all of the other causes occurred prior to the inspection), and the failure to conduct an adequate inspection certainly increased the risk of injury.

### Damages

If found liable, H would be liable according to the wrongful death statute in Linden. The statute authorizes an award in "such an amount as may be determined by the court or jury." The award permits damages "including, but not limited to" medical and funeral expenses and lost wages. This leaves open the possibility of non-economic damages, but H could certainly argue that the lack of explicit authorization for non-economic damages should be read as a rejection of them.

With respect to Joan Erickson, the statute directs the award of lost wages to a widow(er) or dependent children or dependent next of kin. Since her son is 27 years old, with children of his own, it's doubtful that he's a dependent. If not, he wouldn't be entitled to the lost wages recovery, and neither would anyone else. The only recovery would be for medical and funeral expenses, to be paid to the estate, along with the cost of administration. That's almost too good to be true. Even if her son was a dependent, the amount of lost wages would only reflect her remaining work years (she was already 55).

With respect to Linda White, the damages are more substantial. She had a much longer career ahead of her, and she left a widower and dependent children. In addition, if the statute has been interpreted to permit noneconomic damages, they would certainly qualify, but it's unclear how they would be measured -- loss of companionship, loss of Linda's ability to enjoy life's nonremunerative activities, etc.

I see now basis for an award of punitive damages. Courts award punitive damages when a defendant has engaged in malicious conduct or displays flagrant indifference. H may have been negligent, but wasn't flagrantly indifferent.

### QUESTION 2

The facts of this case were drawn from *Bridges v. Kentucky Stone Co.*, 425 N.E.2d 125 (1981). The trial court originally dismissed the case based on lack of proximate cause, but the intermediate court of appeals reversed. In turn, the Indiana Supreme Court reinstated the trial court's dismissal, finding that the murderer was a superseding cause.

Parker Miske ("PM")'s ability to recover from Appalachian Stone Company ("ASC")<sup>1</sup> depends upon his ability to establish (1) a breach of duty that (2) proximately caused (3) compensable damage.

### 1. Breach of Duty

There are two ways to establish a breach of duty: negligence and strict liability. To take the strict liability question first, we could argue that the storage of dynamite is an abnormally dangerous activity and therefore subject to §§ 519-520 of the Restatement. To satisfy § 520, we'd have to satisfy a preponderance of the following criteria: that there was a high degree of risk associated with storing dynamite, that the damage from an accident is likely to be severe, that reasonable care can't eliminate danger, that the activity is uncommon, and is inappropriate to the area, and has low social value. I think we might be able to satisfy these criteria, but I'm concerned that a court would find that it wasn't storage of dynamite that is what caused the harm here; that is, the reason storing dynamite is abnormally dangerous is because of accidental igniting of the dynamite. The idea that it could be stolen and then fashioned into a bomb might not qualify as the kind of injury that makes the activity abnormally dangerous.

*Negligence.* If we were unsuccessful in establishing strict liability, we'd have to show that ASC was negligent, that is, that they failed to use the care that a reasonable person would have used in the same or similar circumstances.

*Negligence per se.* Our first inquiry would be whether there was a violation of the extensive statutes and regulations that cover the storage of dynamite. It appears that Webb used sophisticated equipment (an acetylene torch) to disable the security system employed by ASC. While there are regulations in place, it's not clear that ASC violated any of them. We'd want to look further, and perhaps consult an expert, but ASC may have satisfied the statutory minimum. On the other hand, a reasonable person might have employed more sophisticated means than the statute requires, such as surveillance cameras, alarms, etc. In evaluating the desirability of such additional precautions, we might use the Learned Hand test, that compares the burden of a precaution with the probability that injury can be prevented, multiplied by the expected magnitude of injury ( $B < PL?$ ). Along the same lines, we might look to what other dynamite users do to secure their facilities; such evidence is persuasive of what reasonable care requires.

### 2. Proximate Cause

Even if we established that ASC was negligent, or that they are subject to strict liability, we still need to show that such breach of duty proximately caused PM's injuries. To do so, we have to show that the breach of duty was (a) a but-for cause of the injury, as well as (b) a legal cause.

*But-for* causation means that the injury more probably than not would have been avoided if the defendant had not breached its duty. Here there might be some question as to what Webb would have done if he had been unable to break into ASC's storage facility. Would he have found another source of dynamite? Another way to make an explosive device? Another way to try to kill Bridges? The plaintiff needs only to show this by a preponderance, but the evidence might suggest that this was only one of several sources Webb could have used.

*Legal* cause will be more daunting. A legal cause must (a) increase the risk of injury, (b) not be interrupted by a superseding cause; and (c) injure a foreseeable plaintiff. The biggest stumbling block here would be a superseding cause argument. ASC would persuasively argue that Webb broke the chain of causation by his heinous criminal conduct. In evaluating superseding cause, it is helpful to consider (1) the degree of foreseeability, along with (2) the comparative culpability of the defendant and the alleged superseding cause. While criminal conduct flowing from the loss of dynamite is certainly foreseeable, Webb's conduct could hardly be more disproportionate in terms

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1. In theory, PM could also sue Webb, who fashioned the bomb, but he's on death row. There is no question of his liability, not only for compensatory damages, but punitive damages. However, there is no likelihood that he would have resources to pay for the damage.

of culpability. This will hurt our cause. We could try to use the statute to establish that just such intentional, criminal conduct was foreseen by Congress in drafting the extensive statutory regulation of this activity, but it may be insufficient. Adding to our woes is the problem that the injury took place 100 miles away and two weeks later. It would be hard to claim that, no matter how far away or how much later the criminal act occurred, if the raw materials were traceable to a defendant, that defendant could be held liable. Using either Cardozo's "zone of danger test" or Andrews' consideration of the distance in time and space between the negligent act and the injury, we might have problems.

### 3. Damages

On a more positive note from the standpoint of preparing this case, the compensatory damages will be very large. To begin with, they would include all of PM's medical treatment, both past and future. In addition, if the visual impairment causes PM to be more limited in his career choices (sight is a useful attribute in a wide variety of career pursuits), then he would be entitled to compensation for his diminished earning capacity. More significantly, he would be entitled to pain and suffering damages, not only for the plastic surgery, but for the embarrassment and pain caused by facial disfigurement. Also, any lost enjoyment from visual impairment would be compensable.

I don't foresee (so to speak) any potential for punitive damages. We'd have to show flagrant indifference, and ASC, even if found to be negligent, would not have its conduct interpreted as a form of implied malice.

Summer 2004 Torts Midterm Checklist

QUESTION 1

- Overview**
- Claims on behalf of **Erickson / White**
- Breach** of Duty
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- Negligence** Claim
- Negligence **defined** as failure to use RC
- Vicarious Liability for **Nasatka**
- Learned Hand** formula
- Small **Burden** (cost to inspect)
- P** (probability) hard to measure
- Damage** obviously enormous
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- Custom** of the industry
- Custom seems to **favor no** inspection
- But custom is only a **floor**
- Any **statutes** / regulations?
- Potential of violation for neg. **per se**
- Rulebook** violations?
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- Strict Liability?**
- ADA would **not** apply
- Boiler **owner** subject to SL; not inspector
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- Proximate cause** issues
- Prox. cause defined as **2-part test**
- But-for** causation
- Did limited inspection make any **difference?**
- Employer/PPS) seem to have **ignored** problem
- Loss of a chance** wouldn't be viable exception
- Legal cause** defined
- Injury was certainly **foreseeable**
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- Damages**
- Wrongful death **Statute**
- How **broad** is "such an amount as may be determined by the court or jury"
- Is "**including**, but not limited to" *inclusive?*
- Are **non-economic** damages recoverable?
- Joan **Erickson's** economic claims seems modest
- Did JE leave "widower" or "**dependent** child"?
- Only **10 years left** of wage-earning in any event
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- Linda's** claim more substantial
- Left a **widower** and dependent children
- On top of economic loss, **noneconomic** loss,
- How would noneconomic loss be **measured?**
- No **Punitive** damages
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QUESTION 2

- Overview**
- Breach of **Duty**
- What about **Strict Liability?**
- ADA**: Restatement criteria
- § 519**: Did injury result from ADA danger?
- Would **reasonable care** prevent injuries?
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- Negligence**
- Negligence **defined** as failure to use RC
- No apparent statutory/reg. **violation**
- Would RPP use **better** theft-prevention?
- Learned Hand** test
- Custom** of the dynamite storage industry
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- Proximate Cause**
- Defined** as 2-pronged test
- But-for causation: **other** murder weapons?
- Legal Cause** defined
- Big problem with **superseding** cause
- Misuse was certainly **foreseeable**
- Webb was **highly** reprehensible
- Injury separated by **time** and **space**
- Are the **Palsgraf** problems surmountable?
- Statutes** could help, but not decisive
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- Damages**
- Wage loss /med. expense for **vision** loss
- Noneconomic** damages (P&S) extensive
- No **Punitive** damages
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