

SAMPLE ANSWER TO MINI-EXAM

This case is based on *Cloverleaf Car Co. v. Phillips Petroleum Co.*, 213 Mich.App. 186, 540 N.W.2d 297 (1995), which affirmed a dismissal of all claims against Phillips.

To recover from Phillips, Arthur and Judy Hambley ("Hs") would have to establish a breach of duty on the part of Phillips. That could consist either of negligent acts on their part, or a theory of strict liability.

Negligence

Negligence is the failure to use reasonable care. Reasonable care is what a reasonably prudent person would have done in the same or similar circumstances. Here we could allege that it was negligent for Phillips to install the flexible neoprene hose, which may have resulted in the gasoline contamination.

It might be advisable for us to consult an industry expert on the use of neoprene hoses and find out what the experience is in the industry in using them. We might find an expert who would testify that reasonable people don't use such hoses in light of the risk of leakage. On the other hand, Phillips might have an expert who could show that this was a custom in the gasoline station industry. Fortunately, industry custom is not dispositive of the issue of negligence; a jury could find that, even though such practices were common, they nonetheless fail to meet the standard of reasonable care. A related consideration is whether or not, using a cost-benefit analysis, the cost of additional precautions to prevent contamination are justified in terms of the risk of contamination. This is referred to as the Learned Hand test (is the Burden less than the Expected Loss discounted by the Probability of Harm?).

We might also research whether or not there is some statutory or regulatory treatment of this issue. Perhaps Phillips' installation of this kind of hose would violate a statutory or regulatory standard that would establish negligence as a matter of law. Some jurisdictions treat an unexcused statutory violation as negligence per se, whereas other jurisdictions regard a statutory violation merely as evidence for the jury to consider in determining whether reasonable care was used.

A final theory that might be used would be *res ipsa loquitur*. We could ask the jury to infer negligence from the fact of contamination. *Res ipsa* applies when the plaintiff lacks access to the kind of evidence that ordinarily shows whether reasonable care has been used. Here the evidence about the connector was destroyed (by one of the other defendants) and the exact mechanism of the spreading of the contamination is unknown. We could probably satisfy the first element of the test, namely that accidents like this (contamination) don't ordinarily occur in the absence of negligence. Our problems would arise in the second and third prongs of the test, namely that we would have to show that Phillips was in exclusive control of the instrumentality and that no other plausible explanations have been provided. Wykstra was in control of the premises after Phillips sold the station, and other acts of contamination could have resulted in what now affects the property.

Strict Liability

If we could establish a basis for strict liability we would not have to prove that Phillips was negligent.

*ADA*. An alternative basis for establishing a breach of duty would be showing that Phillips is subject to strict liability. One basis for imposing strict liability is where a defendant engages in an abnormally dangerous activity. The transportation of gasoline has been held to be an abnormally dangerous activity, and it appears that Phillips continuously supplied gasoline.

However, the aspect that makes it abnormally dangerous (the potential for fire and explosion) is not what caused the problem in this case -- it was contamination rather than fire or explosion. Under Restatement of Torts § 519, unless the injury arises from the aspect of the activity that makes it abnormally dangerous, strict liability doesn't apply.

*Nuisance.* A nuisance is an interference with the plaintiffs' reasonable expectations to enjoy their property. Here Hs' reasonable expectations have been injured by the gasoline contamination. The issue is whether Phillips is responsible for the nuisance. For one thing, Phillips continues to supply gasoline which caused the contamination. But unless Phillips was responsible for the leakage of the gasoline onto Hs' property, it seems difficult to make them liable for the nuisance just because they originally sold the product.

Alternatively, we could try to show that the contamination was caused by a leak that occurred when Phillips owned the property. If we could do that, we should be successful in showing that Phillips is responsible for a nuisance. However, the evidence appears to conflict over whether the nuisance was caused by Phillips prior to the sale, or resulted from something that Wykstra did in the course of removing the old tank. As with the negligence claim, we will need to find out more information about what experts think regarding the cause of the leak.

*Statutory/Public Nuisance.* There may also be statutory provisions that establish leakage of gasoline like this as a subject of strict liability or make leakage of gasoline a public nuisance. I'm not sure it would make any difference to find these additional provisions, since the same issue arises as to whether or not it was Phillips' conduct that caused the leak.

#### CHECKLIST

- Overview**
- Breach of **Duty**
- Negligence** Claim
- Negligence **Defined**
- Expert** testimony
- Industry **Custom** re neoprene hose
- Industry custom not **dispositive**
- Learned Hand** test
- Statutory / Regulatory **violations**?
- Cardozo** jurisdiction?
  
- Res ipsa loquitur**
- Missing** evidence -- albeit not Phillips
- Element 1: **type** of accident?
- Problems with **exclusive control**?
- And **other explanations** can't be eliminated
  
- Strict Liability**
- Is supplying gasoline **ADA**?
- Did injury result from dangerous aspect (§ **519**)
- Nuisance** Claim
- Hs' **Reasonable Expectations** were violated
- Could **continuing sale** of gasoline itself be sufficient for nuisance?
- Did Phillips invade **before sale**?
  
- Statutory** Strict Liability?
- Public** Nuisance?

Exam Number \_\_\_\_\_