

MIDTERM EXAM SAMPLE ANSWER

QUESTION 1

The facts for this question were based upon *Hoy v. Miller*, 146 P.3d 488, (Wyo. 2006), in which the trial court affirmed the dismissal of the plaintiff's claim against the reservoir owner.

I would want to know more about the expert opinions and whether the conclusions of Hoy's expert will stand up under cross-examination, but it appears to be a jury question of whether or not he should recover for the damage to his septic system. In order to recover, Hoy will have to show that (1) Miller breached a duty to Hoy that (2) proximately caused his injury; resulting in (3) compensable damages.

I. Breach of Duty

A defendant is liable for damages proximately caused by a breach of duty owed to the plaintiff. Hoy can show that Miller breached a duty if Miller either (a) was negligent; or (b) acted in a way that is subject to strict liability.

Negligence. Miller might have constructed his reservoir negligently. Negligence is the failure to use reasonable care. It is determined by looking to what a reasonable person would do in the same or similar circumstances. One aspect that might become relevant is the custom of people who make reservoirs. The experts hired by Miller dispute whether or not the reservoir caused the problems, but we also need to know whether or not the reservoir was properly constructed. Are there industry standards or construction standards that might be consulted? Similarly, are there issues about whether or not the construction of the dam met codes or other legal requirements for such things. If Miller violated a standard commonly observed in the industry, that is strong evidence of negligence. Even if his construction was consistent with industry custom, it might still be found negligent if the industry isn't using reasonable practices. As far as codes or statutes are concerned, if Miller violated a statute designed to protect against this kind of harm, then that violation could constitute negligence as a matter of law (depending on the jurisdiction). A final possibility would be *res ipsa loquitur*, but the big problem there would be the lack of agreement as to what caused the high water table on Hoy's property. If we don't know that it resulted from the construction of the reservoir, we can't invoke *res ipsa*.

Strict Liability. Even if Miller wasn't negligent, he can be held strictly liable for the damages if he is subject to strict liability. I don't think there is any basis for strict liability based on conducting an abnormally dangerous activity, since there is nothing abnormally dangerous about creating a reservoir, at least this quantity of water. Another form of strict liability is nuisance, which requires a defendant to pay damages when the plaintiff's reasonable expectations for the quiet enjoyment of their property are infringed upon by the defendant's activity. Here it would be the deposit of water into Hoy's property such that the groundwater rises and doesn't permit proper drainage of his septic tank. In order to constitute a nuisance, this must be something that conflict with Hoy's *reasonable* expectations. It's unclear whether Miller's actions actually caused the problem, and therefore whether there's any interference by Miller with Hoy's expectations. Even if there were such interference, it might not be unreasonable, like waking up your neighbor at 10 am with the sound of a lawnmower.

II. Proximate Cause

Even if Hoy can show that the construction of the reservoir was negligent or subject to strict liability, he would still have to show that the septic tank problems were proximately caused by the reservoir. Proximate cause consists of two prongs: (1) but-for cause and (2) legal cause. With respect to but-for cause, the plaintiff has to show, more probably than not, that but for the defendant's breach of duty, the plaintiff would have avoided injury. Here Hoy claims that Miller's construction

of the reservoir resulted in raising the water table and ruining his septic system. We would have to convince a jury more probably than not that this is the case. It sounds like there is a significant conflict between the experts on what is causing the problem. If the jury believes our expert, and disbelieves their experts, then we will have satisfied the but-for test. On the other hand, if they disbelieve our expert, then we won't be entitled to any recovery. Again, the standard is just a preponderance of the evidence -- it could go either way. Perhaps more investigation will reveal who's likely to win.

In addition to but-for causation, the plaintiff must establish legal cause, which is a consideration of factors that would make it not unjust to impose liability. If we succeeded in proving but-for causation, I do not think the defendant could argue successfully that this was "mere chance," or that there was a superseding cause, or that the plaintiff was unforeseeable.

III. Damages

If Hoy were successful on the first two issues, he'd be entitled to the value of his property loss, which would be the lesser of the cost to repair his septic system or the diminution in value between what the property was worth before the groundwater and what it's worth afterward. I wouldn't ask for punitive damages since, even if the jury believes that the reservoir caused Hoy's damages, there is no way that we could show that Miller acted in conscious or flagrant disregard of Hoy's rights. In addition, if Hoy established that the Miller's reservoir was a nuisance, Hoy would be entitled to an injunction to prevent it from causing further damage. If Miller likes his reservoir, he might be willing to pay Hoy to avoid a costly injunction.

QUESTION 2

The facts for this question were based upon a combination of *Walden v. Morgan*, 635 S.E.2d 616 (N.C.App. 2006) and *Jackson v. Fitzgibbons*, 127 Cal.App.4th 329, 25 Cal.Rptr.3d 478, (Cal.App. 2005); in *Walden* the court affirmed the dismissal of the claims against the landlord and tenant of the convenience store; in *Jackson* the court affirmed the dismissal of the wrongful death claim brought by Kaleesha.

This question presents a complex set of issues. In order to recover in a tort case, a plaintiff must establish that a defendant (1) breached a duty that (2) proximately caused (3) compensable damage. To organize the discussion I will discuss the claims against Pace and then against BRC and Basyooni ("BRC/B"). Then I will discuss the measure of damages if liability could be imposed, separated into the damages that Kalesha could recover along with what Ronald could recover.

A. Suits against Pace

1. *Breach of Duty*. The first issue is whether Pace breached a duty to KRJ. This could occur either through strict liability or through negligence. *Strict liability* would apply to the transportation and storage of gasoline if it is classified as an abnormally dangerous activity (ADA). Since this fatal injury arose from the aspect of the activity that makes it (arguably) abnormally dangerous (its flammability), the requirement of § 519 would be met. To determine whether the activity is abnormally dangerous, most courts use the criteria found in Restatement § 520. The criteria look to whether the activity (1) poses a high risk of injury (transferring gasoline does); (2) whether the harm is grave (yes; here there was at least one fatal injury); (3) whether reasonable care can eliminate the risk (it would seem that at least some explosions occur even without negligence); (4) whether the activity is uncommon (transferring gasoline is relatively uncommon; (5) whether it was appropriate to the location where it was being carried out (here it is relatively appropriate, so that would count against the application of the ADA doctrine); and (6) whether the activity has low social value (here, that is not the case, but as in *Siegler v. Kuhlman* the court may apply SL anyway).

Negligence. We could argue alternatively that the gasoline explosion was a result of Pace's negligence. Negligence is the failure to use reasonable care. Under the doctrine of vicarious liability an employer is liable for negligent acts committed by their employees while in the course and scope of employment. Here Morgan and Taylor were clearly in the course and scope of their employment. Perhaps they were negligent in the way that they transferred the gasoline.

Evidence of negligence. One source of information about negligence is the custom of the industry. We might look to see whether there are standards or customs within the petroleum industry regarding procedures for transferring gasoline; if Morgan or Taylor acted inconsistently with such standards or customs that would be strong evidence of negligence. Along the same lines, Pace might have practices or standards that the employees should have followed and failed to do so. That again would be strong evidence of negligence. A final argument would be based on the doctrine of *res ipsa loquitur*. When an accident happens whose cause is unknown (as in this case), a plaintiff may rely on the doctrine of *res ipsa loquitur* if he or she can prove three elements: first, that accidents like this one don't ordinarily occur in the absence of negligence; second, that the defendant was in control of the process; and third, that there are no other plausible explanations. All three criteria seem to be met here. We could probably find witnesses (experts) who could say that gasoline explosions during transfer don't ordinarily occur in the absence of negligence. Second, Pace's employees were in exclusive control of the transfer. And finally, there doesn't seem to be any alternative explanation. If the court permits a *res ipsa* instruction (as seems likely), the burden would shift to Pace to show that that they were *not* negligent.

2. *Proximate Cause.* In order to establish proximate cause, the plaintiff has to prove both but-for cause and legal cause. Here, neither seems to be an issue; whether the basis for breach of duty is strict liability or negligence, that aspect of the activity seems to be a cause without which the injury would not have occurred. Similarly, there is no break in the chain of causation that would prevent a finding of legal cause.

3. *Damages.* (Damages will be considered below.)

B. Suits against BRC / Basyooni ("BRC/B")

I will consider the suits against BRC and Basyooni as essentially the same, since both were functioning in a similar capacity.

1. *Breach of Duty.* Under principles explained earlier, BRC/B could be considered to be conducting an abnormally dangerous activity—the storage of gasoline. While they did not conduct the transportation and transfer of gasoline, they did operate a convenience store. Perhaps they would be subject to strict liability for the same reasons described above, but in light of the fact that convenience stores that dispense gasoline are common and appropriate to the place where they are located, it would seem less likely that strict liability would be imposed. I also don't think that a nuisance theory would do any good, since (although there may be some intrusion upon the neighbors in this case), our clients do not possess any property interest that was infringed by BRC/B.

2. *Negligence.* First, one might consider a vicarious liability theory based upon the transfer of the gasoline by Pace. BRC/B could only be held vicariously liable for Morgan and Taylor's negligence if BRC/B had a *right to control* the way in which the transfer occurred. Because Morgan and Taylor reported to Pace, and there is no indication that BRC/B had the right to exercise control over Morgan or Taylor, I believe a vicarious liability theory would be unavailing. Possibly a reasonable person would do something to minimize the risk from this procedure (such as scheduling it when no one would be around), but BRC/B could reasonably assume that Pace would prescribe and follow whatever procedures would be necessary for a safe transfer. The facts indicate a statutory violation involving the location of the station near a church. In order for a statutory violation to serve as the basis for negligence (including negligence as a matter of law), the statute has to be enacted for the purpose of preventing injuries like the one that the plaintiff suffered. In this case the statute requires gasoline stations to be located 200 feet or more from a church, and BRC/B violated that statute. But it would be hard to show that the purpose of that requirement was to prevent accidents *like this one*.

3. *Proximate Cause*. If the strict liability theory (or one of the non-negligence per se theories of negligence) against BRC/B were successful, it would not be difficult to establish proximate cause, since that breach of duty would be both the but-for and legal cause of Nichole's death. On the other hand, even if the negligence per se theory were successful, it could not be the basis for liability because the violation of the statute (building close to a church) did not proximately cause the injury. Even if it was a but-for cause, which is doubtful, it would be considered a "mere chance" rather than something that increased the risk of injury.

C. Damages (All Defendants)

There are two kinds of damages that could be sought in this case. The first, is the recovery for the wrongful death of Nichole Cochran. The second form of damage would be for the bystander injuries that Ronald suffered.

(1) *Wrongful death/Survival Statute: Kalesha*. Recovery of damages in a wrongful death case is dependent upon the statutory framework adopted by the jurisdiction for wrongful death cases. In this case the accident occurred in North Carolina, but the only statutory framework we have applies to the state of Evergreen.¹ (Regardless of whose law applies, we have the initial problem of figuring out Kalesha's relationship to Nichole. Since Nichole has been adopted by Ronald, and Nichole's parental rights were terminated, she is no longer a "child" for purposes of the Evergreen wrongful death statute, or any other wrongful death statute.) Evergreen appears to have both a survival statute (§ 377.20) and a wrongful death statute (§ 377.60). The wrongful death statute provides for damages as "may be just" (including, presumably, non-economic damages), but Kalesha probably doesn't qualify. On the other hand, K may turn out to be the beneficiary of Nichole's will (although the termination of her parental rights suggests that this is unlikely). The statute provides that, if there is no surviving spouse or children, there is standing for persons who are "entitled to the property of the decedent by intestate succession." It is conceivable that this statute might allow Kalesha to recover, but it seems more probable that, once Nichole's parental rights were terminated, Kalesha is in effect a stranger to Nichole. The one wrinkle to this is that Kalesha, after the adoption by her uncle Ronald, has in effect become Nichole's niece, and thus might have some right to recover under the rules of intestate succession. We will simply have to find out what the rules of intestate succession are in this jurisdiction, or the improbable event that Nichole left a will that listed Kalesha as a beneficiary.

Ronald. As far as a wrongful death recovery, it doesn't appear that Ronald is in a much better position than Kalesha. He might be named in her will, and he might be the beneficiary of intestate succession, but both seem doubtful. Even if he would qualify, he would have a tough time showing that there is much that he could recover by way of lost pecuniary benefits or even lost emotional benefits.

(2) *Bystander injuries*. Most jurisdictions employ a rule that is similar to the one adopted in *Dillon v. Legg*: a bystander can recover for emotional injuries suffered from witnessing a gruesome accident if (1) the bystander was at the scene of the accident; (2) the bystander suffered a direct emotional shock from witnessing the accident; and (3) the bystander has a close relationship to the victim. Applying this test, Ronald could probably meet criterion #1; although he was in the restroom at the time of the explosion, he came out immediately, and tried to prevent his sister from dying. I think most jurisdictions would find that he was close enough to the scene to qualify. (2) presumably

1. The professor in this case intended to substitute "Evergreen" for "North Carolina" in the fact pattern, and a student could reasonably assume that this was the case. However, a student could also assume that this was an intentional variation. Even if the accident occurred in North Carolina, it is possible that the law of Evergreen could apply to the case under choice of law rules. On the other hand, it is possible that the law of North Carolina (or some other law) would also apply. Thus, the analysis is tempered by the uncertainty on this point. Students would be entitled either to assume that the reference to North Carolina was either (1) a mistake, and that what was meant was Evergreen; or (2) an intended reference to a state other than Evergreen.

Ronald suffered a direct emotional shock; it wasn't just that his sister died, but that she died in his arms. Again, I think this would qualify. Some jurisdictions impose a "medically diagnosed" emotional injury, but that wouldn't seem difficult to establish. Finally, (3) Ronald was Nichole's sister, and while they were undoubtedly estranged by the Ronald's adoption of Kalesha they might have been bonded to each other for that reason as well. Again, I think he would qualify.

As to the amount of recovery, it is hard to tell. Ronald might be able to make a convincing case that the trauma of losing his sister, and the fortuity that she was making a phone call while he was out of the zone of danger, would justify a large recovery. On the other hand, a jury might view his loss as being relatively modest. Perhaps the jury could recognize that he wouldn't be able to obtain a wrongful death recovery and could therefore tack on the damages they would have liked to give in the wrongful death case to a guy who seems to be doing the right thing.

(3) *Punitive damages*. Although they are permitted by the survival statute, there is nothing in the evidence thus far that suggests that any of the defendants acted in flagrant or reckless disregard of plaintiffs' rights. But if something turned up in discovery to show that the danger was known and ignored, that might change.

Fall 2006 Torts Midterm Checklist

QUESTION 1

- Overview**
- Breach of Duty**
- Negligence claim**
- Negligence **defined** as failure to use RC
-
- Industry Custom**
- Conflict** of Experts
- Juror **experience** may come into play
- Any relevant **codes** or statutes?
- Res ipsa** probably wouldn't work
-
- Strict Liability**
- No **ADA** theory
- Nuisance**
- What is **reasonable expectation**
-
-
- Proximate Cause**
- Defined as **But-for + Legal Cause**
- But-for** cause defined
- Wd septic tank have leaked **but for** r'voir?
- More **probable** than not standard
- Experts **conflict** on this Q
- Legal** cause defined
- No apparent **legal cause** problems
-
- Damages**
- Diminution** in value
- Cost to **repair**
- Punitive** damages?
-
- Potential for an **injunction**?
-
-

QUESTION 2

- Overview**
-
- Claim v. **Pace**
- Breach** of Duty
- Strict Liability**
- Nuisance** would require property right
- ADA**
- Restatement § 520 **criteria**
- Application** of § 520
-
- Negligence**
- Defined as **lack of reasonable care**
- Employer would be **vicariously** liable
- Custom** of the industry
- Rulebook** violation?
- Statutory violation / Negligence **per se**?
-
- Res ipsa loquitur**
- Elements** of Res ipsa case
- Res ipsa elements **applied**
-
- Proximate cause**
- Defined as **But-for + Legal Cause**
- Evidence supports **both** elements
-
-
-
- Claim v. **BRC/B**
- Strict Liability**
- ADA theory **weaker** than v. Pace
- No **nuisance**
- Negligence** theories
- Vicarious** liability for M/T?
- (No right to **control**)
- Statutory** violation
- Injury doesn't fit **statutory purpose**
-
- Proximate cause**
- w/i 200' of church not a **legal cause**
-
- Damages**
- What is the **controlling statute**?
- Kalesha wouldn't qualify as **child**
- Is Kalesha a beneficiary of **will / intestate**?
- Would **Ronald** qualify under will / intestate?
- Damages include **economic and non-economic**
- Amount** of damages wouldn't be great
-
- Ronald's **bystander** injury
- Dillon criteria**
- As **applied**, Ronald seems to qualify
- Emotional shock damages could be **significant**
- No **punitive** damages
-
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Exam # _____