

SAMPLE ANSWER TO MIDTERM EXAM

QUESTION 1

The facts for this case were drawn from Schwabe ex rel. Estate of Schwabe v. Custer's Inn Associates, LLP, 303 Mont. 15, 15 P.3d 903 (2000), which held 4-3 that the trial court properly dismissed the wrongful death claim based on the plaintiff's failure to supply medical evidence of causation sufficient to create a jury question. (The case was later overruled on other grounds.)

Custer's Inn ("CI") could expect a lawsuit from Janice Renville ("JR") and possibly from Darrin Dickson ("DD"). In order to recover, each would have to prove that CI (1) breached a duty; (2) that such breach of duty proximately caused damage, and (3) that the damages are legally compensable. Since the claims as to (1) and (2) are identical for each plaintiff, I will consolidate them, and then identify the damages claims of each potential plaintiff.

I. Breach of Duty

CI can only be held liable if they either acted negligently toward the plaintiffs or are subject to a form of strict liability.

*Negligence.* Negligence is the failure to exercise reasonable care -- the care that a reasonable person would exercise under the same or similar circumstances. There are a variety of ways of establishing negligence, but in this case the most striking is the violation of the statute that requires if a public swimming pool does not have a lifeguard, it must have a person "accessible to the pool, and currently certified as competent in cardiopulmonary resuscitation by either the American Red Cross or the American Heart Association." AEC § 50-53-107. It is clear in this case that when DD went to the front desk to summon help, no one was able to perform CPR.

*Negligence per se.* A statutory violation is evidence of negligence, and may be deemed negligence as a matter of law (depending on the jurisdiction) if (1) the statute has been violated, (2) the statute was designed to prevent injuries such as the one suffered by plaintiff; and (3) the violation is unexcused. In this case the statute was clearly violated, and it appears obvious that this kind of injury is the one that the statute was designed to prevent, and there doesn't appear to be any excuse for its violation. In some jurisdictions an unexcused statutory violation is treated as negligence per se; that is, the judge will instruct the jury that the defendant is negligent as a matter of law. In other jurisdictions a statutory violation is merely evidence for the jury to consider.

*Other means of proving negligence.* There may be other ways to prove negligence, such as failure to conform with a custom of the industry, such as standards for pool safety (e.g., warning devices to call attention to potential drowning victims. Also, there might be evidence of CI's own safety practices, such as encouraging motel employees to keep a close eye on the pool, or some other safety measure that was not followed on that day. Finally, one might argue that under a Learned Hand test the risk of operating a pool would be outweighed by the burden of not having a pool.

*Strict Liability.* Alternatively, plaintiffs might argue that CI should be held strictly liable for the injury. There is a statute that makes the operation of a public pool a "public nuisance" if it is operated "contrary to the provisions of this chapter." Typically the damages from a public nuisance are diminution in property value, and the remedy includes enjoining the further operation of a public nuisance. It could be argued that this statute creates a kind of statutory strict liability, but that seems a little strained.

II. Proximate Cause

Even if CI breached a duty toward the plaintiffs, they would have to show that the breach proximately caused the injuries sustained. A proximate cause must be both a but-for as well as a

legal cause of injury.

*But-for cause.* In this case it would be hard for the plaintiffs to show more probably than not that, but for the defendant's violation of the statute, Boeckel would still be alive. It is possible that providing him with CPR at 2:48 p.m. instead of 2:51 p.m. would have made a difference, but that seems speculative. This case is somewhat like *Hull v. Merck*, in which the plaintiff was diagnosed with leukemia after exposure to carcinogenic chemicals. He failed to produce an expert who could establish a causal link between the exposure and the injury, and the appellate court sustained a dismissal of the case. We would argue that a similar logic applies here. The evidence (Boeckel's body was blue; it was the same temperature as the pool) suggests that he had been in the pool for a while, and therefore it seems unlikely that the three-minute differential in providing him with CPR made a difference. However, maybe the plaintiff will find such an expert. On the other hand, in the absence of such evidence, it appears that our client should be entitled to summary judgment.

*But-for cause under the strict liability theory.* If the court were to permit a cause of action based on the "public nuisance" theory, then it's possible that the plaintiffs could argue that, but for the operation of the facility contrary to state law, there would have been no pool in which the plaintiff could drown. This would also apply to the Learned Hand theory mentioned above. However, these seem fairly remote and unlikely to succeed.

*Loss of a chance.* There is an exception to the requirement of but-for causation if the plaintiff was probably going to suffer the injury anyway, but the defendant deprived the plaintiff of a chance to avoid the injury. This doctrine probably wouldn't apply here, for several reasons. First, there is no showing that there is a specific chance of survival that was lost by the failure to perform CPR right away. It's not that the chance of survival steadily diminishes, so much as that once you reach a certain point no resuscitation is possible. Also, loss of a chance has been consistently rejected outside the context of medical practice. I doubt it would be accepted here.

*Legal Cause.* If, contrary to the expectation just expressed, the plaintiff were able to establish but-for causation, there are no superseding causes or unforeseeable or chance relationships that would raise legal cause questions. Thus, in this case the proximate cause question boils down to whether or not the plaintiff can satisfy the but-for cause standard.

### III. Damages<sup>1</sup>

#### A. Janice Renville ("JR")

JR will sue for wrongful death. The measure of damages in a wrongful death case is a creature of statute. In Evergreen there is a survival statute, which permits a recovery by the estate of the decedent for the losses that the decedent would otherwise have been entitled to, had the decedent survived. Evergreen has a generous measure of damages, stating simply that the estate is entitled to collect "such damages as . . . may be just" (AEC § 27-1-323). This would permit both economic loss (BB's lifetime earnings) as well as non-economic losses. BB was a young man (22), so his lifetime earnings could be significant. One thing that is not clear from the statute is whether or not the non-economic damages would be along the lines of a "loss of enjoyment of life" similar to the airplane case (*Feldman*) in which the decedent's non-economic losses are measured; or whether it would be a loss of society and companionship by JR. In either event, it would be a substantial loss.

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<sup>1</sup>One odd thing in the statute is the provision for payment of any claim exceeding \$100,000 through periodic payments. AEC § 25-9-403 permits a court, upon request, to order the payment of a judgment in periodic payments rather than a lump sum. The amount of the payment is to reflect the actual future damages rather than the present value of those future damages (which would be the total amount). The court must find that payment in this form "is in the best interests of the claimant." In effect, this permits the entry of a structured settlement by court order rather than by private agreement. I don't think it would affect the overall assessment of the value of the case.

*Bystander damages.* Another element of damages would be the claim that JR would claim for her emotional reaction when she was told of the death of her son. Most courts use some variant of the standard in *Dillon v. Legg*, under which a "bystander" can recover based upon the evaluation of three criteria: (1) was the plaintiff at the scene of the accident? (2) did she suffer a direct emotional shock? and (3) how closely related are the parties? The second and third criteria clearly favor JR, but she wasn't really at the accident scene. Some jurisdictions have held that so long as the plaintiff was "at the accident scene before substantial change took place" it is sufficient, even if the plaintiff didn't actually witness the accident. However, JR wasn't at the accident scene. She saw her son's body at the hospital (presumably), but that isn't really at the accident scene. I don't think there would be a separate claim for a bystander injury.

B. Darrin Dickson ("DD")

Following up on the bystander theme for JR, DD would have a much better claim for a bystander injury, since he was at the accident scene, and he undoubtedly suffered some kind of emotional shock from discovering BB's body. What's missing is element #3 -- a close relationship. If they were simply coworkers, it seems doubtful that DD would suffer much of an emotional shock simply because he found BB's body and unsuccessfully tried to summon help. On the other hand, maybe they had a closer personal relationship and DD wound up feeling responsible for not finding BB in time or not coming down sooner. Still, I doubt a jury would be inclined to award a large sum, even if DD managed to avoid an outright dismissal of his claim.

QUESTION 2

This question is based on the facts in *Northern Indiana Public Service Co. v. G.V.K. Corp.* 713 N.E.2d 842 (Ind.App. 1999), which affirmed a judgment against NEPSCO, including an award of punitive damages.

In order to succeed, Robert Cauffman ("RC") would need to show that NEPSCO (1) breached a duty of care; that (2) proximately caused (3) compensable damage. Each of these issues will be addressed in turn.

I. Breach of Duty

To establish a breach of duty, RC would need to show that NEPSCO was either negligent or was engaged in an activity subject to strict liability.

*Negligence.* It appears that NEPSCO negligently marked the transmission line. Negligence is the failure to exercise the care of a reasonably prudent person. What constitutes reasonable care (or its opposite, negligence) in a given situation is typically a question for the jury. The jury is likely to be influenced by industry custom (in this case, what is normally done by other utility companies), the policies and procedures established by the defendant for its employees (particularly if they were violated in this instance). There may also be statutes or regulations establishing the proper procedure for marking a transmission line where digging is contemplated. If the regulation or statute was violated, some jurisdictions treat an unexcused violation of a statute or relevant regulation as negligence *per se*; that is, the jury would simply be instructed that NEPSCO was negligent. In other jurisdictions statutory violations are considered evidence for the jury, but the jury must still decide whether the violation was negligent. One issue that is likely to be raised by NEPSCO is the typical prohibition on post-accident repairs. In this case NEPSCO apparently moved the flags after the accident occurred. If the defendant takes safety precautions after the accident that are designed to reduce the risk of further accidents, public policy generally prohibits the use of such evidence to show that the defendant was negligent in failing to take such a precaution prior to the accident. On

the other hand, there are exceptions to the rule: if the defendant denies ownership, or feasibility of the safety precaution, or "opens the door" to such testimony by introducing evidence that the post-accident repair evidence serves to impeach, then the trial court may admit such evidence.

Overall, it seems fairly clear that the failure to mark the line was negligent.

*Strict liability.* Even if NEPSCO wasn't negligent, they can be held liable if their activity is subject to strict liability. The primary application of that principle in this case would be strict liability for an abnormally dangerous activity. Most jurisdictions follow the Restatement (2d) of Torts, §§ 519-520, which provides strict liability for abnormally dangerous activities, which are identified using six different factors: (1) whether the activity poses a high degree of risk; (2) whether the gravity of harm resulting from the risk is high; (3) whether reasonable care cannot eliminate the risk; (4) whether the activity is inappropriate to the location where it is being conducted; (5) whether the activity is uncommon; and (6) whether the activity has relatively low social value. If enough of these factors deserve a "yes" answer, then the court is likely to find that it is abnormally dangerous and impose strict liability. Here, the transmission of natural gas is likely to meet all of the factors except #6. Factors #4 and #5 are not as strong as #1-#3, but overall there seems to be a strong case for applying strict liability.

## II. Proximate Cause

RC would also have to prove that the breach of duty established in §I was a proximate cause of his damage. Proximate cause is composed of two elements: but-for cause and legal cause. Both must be established to satisfy the burden of proof. In this case there seems to be no difficulty with respect to either prong. But-for the negligence of NEPSCO's employees in failing to mark the line properly, RC would not have mistakenly hit the gas line with resulting injury. Similarly, legal cause requires that the connection between the breach of duty and the injury not be one of mere chance, or overtaken by a superseding cause, or causing injury to an unforeseeable plaintiff. None of these objections could plausibly be raised here.

## III. Damages

RC would be able to recover the damages proximately caused by the accident. It appears that someone in our office has calculated his compensatory award to be \$500,000.<sup>2</sup> In addition, however, he might ask for punitive damages. Punitive damages are permitted where the defendant has engaged in malicious conduct, or with a conscious disregard for the plaintiff's safety. In this case it appears there was an accidental failure to mark the lines properly, not likely the result of any personal malice toward RC. On the other hand, NEPSCO's behavior after the accident, in trying to conceal their previous wrongdoing, might be considered part of a pattern of conduct that is analogous to other cases where punitive damages have been awarded -- such as the insurance company's bad faith in *State Farm v. Campbell* or the conscious disregard of safety in the Pinto case. As noted above, a court might find that the moving of the flags was a post-accident repair and thus inadmissible, but we could argue that the purpose of moving the flags was not to prevent future accidents, but instead to mislead regarding NEPSCO's liability for this one. It would be an interesting argument. If we successfully got the issue in front of the jury it could make the jury pretty mad at NEPSCO and enhance our ability to recover punitive damages.

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<sup>2</sup>See note 1 regarding the effect of the periodic payment statute.

## QUESTION 1

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|---|--|
| <input type="checkbox"/> <b>Overview</b>                                  | <input type="checkbox"/> <b>But-for</b> cause defined                      |
| <input type="checkbox"/> <b>Breach of Duty</b>                            | <input type="checkbox"/> More <b>probable</b> than not standard            |
| <input type="checkbox"/> <b>Negligence</b> claim                          | <input type="checkbox"/> But-for cause under <b>SL</b> standard            |
| <input type="checkbox"/> Negligence <b>defined</b> as failure to use RC   | <input type="checkbox"/> Loss of a <b>chance</b>                           |
| <input type="checkbox"/>  | <input type="checkbox"/> Most jurisdictions have <b>rejected</b> it        |
| <input type="checkbox"/> Negligence <b>per se</b>                         | <input type="checkbox"/> <b>Legal</b> cause defined                        |
| <input type="checkbox"/> <b>Elements</b> of NPS                           | <input type="checkbox"/> No apparent <b>legal cause</b> problems           |
| <input type="checkbox"/> Evidence only, or <b>conclusive</b> of neg.?     | <input type="checkbox"/>   |
| <input type="checkbox"/> Industry <b>custom</b>                           | <input type="checkbox"/> <b>Damages: JR</b>                                |
| <input type="checkbox"/> <b>Rulebook</b> / safety policies                | <input type="checkbox"/> Statutory provision for <b>Periodic</b> Payment   |
| <input type="checkbox"/> <b>Learned Hand</b> calculus                     | <input type="checkbox"/> Wrongful death <b>statute</b>                     |
| <input type="checkbox"/>  | <input type="checkbox"/> "as may be just": relatively <b>generous</b>      |
| <input type="checkbox"/> <b>Strict</b> liability                          | <input type="checkbox"/> <b>Economic</b> loss: wages, funeral              |
| <input type="checkbox"/> Statutory definition of <b>nuisance</b>          | <input type="checkbox"/> Loss of <b>society and companionship</b>          |
| <input type="checkbox"/> But does statute <b>impose</b> strict liability? | <input type="checkbox"/> <b>Bystander</b> recovery?                        |
| <input type="checkbox"/>  | <input type="checkbox"/> Doesn't look good under <b>Dillon</b> criteria    |
| <input type="checkbox"/> <b>Proximate</b> Cause                           | <input type="checkbox"/> No significant risk of <b>punitive</b> damages    |
| <input type="checkbox"/> Defined as <b>But-for</b> + <b>Legal</b> Cause   | <input type="checkbox"/>   |
| <input type="checkbox"/>  | <input type="checkbox"/> <b>Damages: DD</b>                                |
| <input type="checkbox"/>  | <input type="checkbox"/> Application of <b>Dillon</b> criteria             |
| <input type="checkbox"/>  | <input type="checkbox"/> Even if DD recovered, <b>insignificant</b> amount |

## QUESTION 2

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|---|--|
| <input type="checkbox"/> <b>Overview</b>                                | <input type="checkbox"/> <b>Proximate</b> cause                                      |
| <input type="checkbox"/> Breach of <b>Duty</b> : Negligence or SL       | <input type="checkbox"/> <b>PC</b> = But-for + legal cause                           |
| <input type="checkbox"/> <b>Negligence</b> = failure to use <b>RC</b>   | <input type="checkbox"/> Both <b>easily</b> satisfied                                |
| <input type="checkbox"/>  | <input type="checkbox"/>   |
| <input type="checkbox"/> <b>Failure to mark</b> real pipeline was neg.  | <input type="checkbox"/> <b>Damages</b>  |
| <input type="checkbox"/> Relevance of industry <b>custom</b>            | <input type="checkbox"/> \$500K Compensatory damages are <b>given</b>                |
| <input type="checkbox"/> What about <b>statutes</b> , regulations?      | <input type="checkbox"/> Provision for <b>Periodic</b> payment                       |
| <input type="checkbox"/> Any company policies, <b>rulebooks</b> ?       | <input type="checkbox"/> Are <b>punitive</b> damages available?                      |
| <input type="checkbox"/> <b>Subsequent</b> behavior in moving the flags | <input type="checkbox"/> Standard is <b>malice</b>                                   |
| <input type="checkbox"/> Post-accident <b>repair doctrine</b>           | <input type="checkbox"/> Malice is <b>implied</b> from reckless disregard            |
| <input type="checkbox"/> Would <b>exceptions</b> to doctrine apply?     | <input type="checkbox"/> Is case <b>analogous</b> to <i>Campbell</i> or <i>BMW</i> ? |
| <input type="checkbox"/>  | <input type="checkbox"/>   |
| <input type="checkbox"/> <b>Strict</b> liability                        | <input type="checkbox"/>   |
| <input type="checkbox"/> <b>Abnormally</b> dangerous activity?          | <input type="checkbox"/>   |
| <input type="checkbox"/> <b>Restatement</b> criteria                    | <input type="checkbox"/>   |
| <input type="checkbox"/> Application <b>favours</b> ADA                 | <input type="checkbox"/>   |
|   | <input type="checkbox"/>   |
|   | <input type="checkbox"/>   |

Exam # \_\_\_\_\_