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Torts

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### MID-TERM SAMPLE ANSWER

The facts for this case were (loosely) derived from *Fechtman v. U.S. Steel Corp.*, 994 N.E.2d 1243 (Ind.App., 2013), which approved of the trial court's rejection of the plaintiff's request to hold the operator of the blast furnace strictly liable.

National Steel ("NS") should anticipate a lawsuit filed by Hernandez' widow ("HW"), as well as by the estate of Roberto Hernandez ("EH"). If HW and EH are successful in establishing that NS breached a duty toward Roberto Hernandez ("RH"), and that the breach of duty proximately caused his death, then each would be able to recover the damages specified in the Evergreen statutes.

#### I. Breach of Duty

In order to recover damages, HW and EH must establish that NS breached a duty to RH. There are two avenues that would be pursued in this case. The first would be a claim that NS was negligent in the operation of the blast furnace. The second is that NS is subject to strict liability for operating an abnormally dangerous activity.

*Negligence.* Negligence is the failure to use reasonable care. Although NS had procedures in place to prevent injuries resulting from the release of carbon monoxide, they weren't sufficient to prevent an injury in this case. One question is whether NS actually followed their own procedures. It's unclear from the facts whether or not they did what they were supposed to do. If an NS employee failed to follow NS' own safety procedures, that would be strong evidence of negligence. Even if they did follow their own procedures, it might be shown that their policies were insufficient. One method of doing this is to compare NS' policies and practices to those that are followed by other steel mills or industrial plants that have similar equipment. If other plants using similar equipment have more effective safety measures, that too would be strong evidence that NS was not using reasonable care. On the other hand, if the "custom of the industry" is similar to what NS does, NS could argue that its policies were reasonable. However, the jury could still find that the custom of the industry was inadequate. They might be asked to apply some version of the "Learned Hand" calculus, which compares the cost of additional precautions to the probability of injury multiplied by the magnitude of potential harm. Yet another avenue HW and EH would likely pursue is to look for statutes or regulations applicable to blast furnaces or the release of carbon monoxide. A violation of a statute or regulation is evidence of negligence (or in some jurisdictions, may conclusively establish it).

*Vicarious liability for Rogers Contracting ("RC").* Another potential source of liability would be vicarious liability for any negligence on the part of RC. An employer is vicariously liable for the acts of an employee acting in the course and scope of employment. Although RC is a contractor rather than an employee, for purposes of vicarious liability what matters is whether NS had the right to control the way in which RC performed the work. It seems likely that NS did have such a right, particularly with respect to prescribing procedures for contractors who might be working in the vicinity of the blast furnace. Thus, if it turns out that RC was negligent in failing to follow NS' directions regarding dust catcher safety, it seems likely that NS would be vicariously

liable for such negligence. To put it another way, NS couldn't blame RC for failing to follow its directions.

*Strict Liability.* Even if NS were able to show that its procedures were those that a reasonably prudent person would employ, and that they (and their employees and those working under their direction) followed those procedures, NS could still be held strictly liable if the operation of a blast furnace and the release of carbon monoxide was found to be an abnormally dangerous activity. In deciding whether to impose strict liability, courts follow § 520 of the Restatement of Torts. There are six criteria that are weighed: whether the activity poses a high risk of injury, whether the injury is grave, whether reasonable care can eliminate the risk, whether the activity is commonly engaged in, whether it is appropriate to the area, and whether it has offsetting social value.

In this case it would seem that the case for strict liability is weak; carbon monoxide is a by product of lots of activities, including emissions from motor vehicles, improperly adjusted stoves or furnaces, etc. While the quantity in this case is large, it is also appropriate to the area where it is carried on, and it seems that reasonable care would adequately protect against injury. To be sure, the consequences of injury are grave, but it's not clear that the risk is high. I hope we can limit the plaintiff's liability theory to the claim based on negligence.

## II. Proximate Cause

HW and EH would also have to prove that RH's death was proximately caused by the NS' negligence (or from the conduct of an abnormally dangerous activity, if the trial judge permits that claim). There are two elements of proximate cause: but-for causation and legal cause. To establish the first element, HW/EH would have to show that, but for NS' negligence RH would not have died. That seems easy.

The second prong of the proximate cause test, legal cause, would also be straightforward. Since NS' negligence (if proved) led in a direct and unbroken sequence to RH's death, legal cause could be easily satisfied.

## III. Damages

The measure of damages in a wrongful death case depends upon the statutory scheme adopted in the relevant jurisdiction. In Evergreen there are two forms of recovery. One is on behalf of the "heirs" of the decedent. In this case it would be HW. The statute provides that each heir is entitled to recover the "pecuniary damages for the person's grief or sorrow, loss of probable support, companionship, society, comfort and consortium, and damages for pain, suffering or disfigurement of the decedent." In other words, HW appears to be able to recover economic damages ("loss of probable support") plus grief, loss of society and companionship. This is a generous measure of recovery. The economic loss would depend upon the evidence regarding RH's employment prospects. Although at the time of his death he was employed as a delivery man, his future earnings might be enhanced if the jury finds that he would have switched to a more lucrative vocation. In addition, the pain and suffering or disfigurement of the decedent would be recoverable. (It's unknown what preceded RH lapse into unconsciousness and whether he was disfigured as a result.) Regardless, HW would be entitled to quite a bit of damages on her own behalf. It would be an expensive case if we were found liable.

In addition, EH is also entitled to recover damages. However, those damages are limited to the medical expenses from the time of injury to death (which in this case do not appear to be substantial, because he died at the scene), funeral expenses, and punitive damages. Punitive damages may only be recovered if the defendant acted with actual malice or implied malice (reckless disregard of the safety of the plaintiff). The only evidence thus far revealed could lead to a finding that NS was negligent, or may be held strictly liable, but nothing so far suggests that punitive damages would be justified.

## CHECKLIST

- Overview**
- Breach of Duty**
- Negligence**
- Defined as failure to use **reasonable care**
- Procedures in place / Rulebook**
- Did NS' **employees** follow their own procedures?
- What is **custom** of the industry?
- Would **Learned Hand** calculus apply?
- Were any **statutes** or **regulations** violated?
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- Vicarious liability**
- RC was a contractor
- Did NS have the **right to control** RC
- If so, NS vicariously liable for RC's negligence
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- Strict liability**
- Abnormally** dangerous activity
- § 520 **criteria**
- weak** case for strict liability
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- Proximate cause**
- but-for cause **plus** legal cause
- But-for** cause test easily satisfied
- Legal** cause: Direct and **unbroken** sequence
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- Damages**
- HW is an "**heir**" under the statute
- HW entitled to **economic loss**
- What would RH have earned in his **lifetime**?
- Non-economic** damages are permitted
- Large exposure** if NS found liable
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- EH can recover
- Medical** and **funeral** expenses
- Punitive** damages
- No evidence supporting **punitive award**
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