

MID-TERM SAMPLE ANSWER

The facts for this question were based upon *Wirth v. Mayrath Industries Inc.*, 278 N.W.2d 789 (N.D. 1979), in which the Supreme Court of North Dakota affirmed the trial court's dismissal of the claim alleging strict liability on the part of the electric company.

On behalf of Gary's son Chad (whose eligibility for compensation is discussed in § III below), I would prepare to sue the Wirths as well as the electric company (REC). To recover damages for Gary's death, we would have to prove (1) that Wirths and/or REC breached a duty owed to Gary; (2) that such breach of duty proximately caused his death; and (3) that Chad is entitled to damages under the wrongful death statute.

I. Breach of Duty

The first step in pursuing a tort claim is establishing that the defendant breached a duty toward the plaintiff. That can be done either by showing that the defendant was *negligent*, that is, that the defendant failed to use reasonable care, or that the defendant is subject to a form of *strict liability*.

Negligence. Negligence is the failure to exercise reasonable care—that is, the care that a reasonable person would use under the circumstances. We would assert that the Wirths were negligent in the way that they planned or carried out the mounting of the auger on the bin, causing it to contact the electrical wire. We would similarly explore whether or not REC was negligent in the way that they placed and maintained the electrical lines.

One way to establish negligence is to show that there is a standard of care observed in the industry of which the defendant is a member, and that the defendant didn't follow it. For example, there may be a standard that farmers or grain bin operators use when they are elevating equipment like the grain auger to insure that accidents like this don't happen. Even if the defendant is compliant with the industry custom, we might find an expert who would testify that there are additional precautions that a reasonable person would have taken in light of the risk of fatal injury. Similarly, there may be standards for electrical utility companies regarding either placement of the wires, or insulation, or warning. Also, Wirth may have adopted safety policies addressing this kind of risk. A violation of such policies would be strong evidence of negligence.

Strict liability. Even if a defendant uses reasonable care, liability may be imposed if the activity is subject to strict liability. Here the strongest argument would be Restatement §§ 519 and 520, which describe the imposition of strict liability for carrying on an abnormally dangerous activity (ADA). It would be up to the trial judge (based on precedent if there is any) to apply the criteria in § 520 to determine whether REC's high-voltage electrical lines constitute an ADA. The criteria are: (1) Whether the activity carries a high risk of harm; (2) whether the expected harm is serious injury or death; (3) whether some accidents occur even when reasonable care is used; (4) whether the activity is relatively uncommon; (5) whether the activity is inappropriate to the area where it is being conducted; and (6) whether it is of limited value to the community. Further research would have to be conducted to assess the likelihood that a judge would rule that REC should be subjected to strict liability.

II. Proximate Cause

In addition to proving that one or both of the defendants breached a duty of care owed to Gary, we would have to show that such breach of duty proximately caused Gary's death. That wouldn't be difficult in this case. Proximate cause is composed of two elements: (1) but-for cause and (2) legal cause. To establish but-for cause, we would show that Gary's death would not have occurred but for the breach of duty—whether it is because of negligence on the part of one of the defendants or because of the abnormally dangerous activity being conducted by REC. Similarly, we would need to show that the breach of duty was also a legal cause of Gary's death, that is, that the death resulted from a natural and continuous sequence beginning with the defendants' breach of duty. Legal cause could be defeated if the occurrence of the accident resulted from the "merest chance," or if there was a superseding cause that broke the chain of causation, or if the injury was unforeseeable. None of those limitations appear to apply.

III. Damages

In a wrongful death case like this one, the measure of damages is determined by the statutory scheme adopted by the State of Everglade. Under the Annotated Code of Everglade (ACE) § 32-21-03, the eligible plaintiff(s) are listed in priority: first, a spouse; but since there is no spouse, the next in line is surviving children. That would mean Chad in this case. An action would be brought on his behalf. Someone would need to be appointed as the guardian ad litem for Chad in order to bring the action on his behalf. The next in line would be Martha Sprague, but since Chad occupies a prior position, I don't think that Martha Sprague would be entitled to any of the recovery. It's possible that the recovery of the beneficiaries is cumulative, but it seems unlikely that everyone on the list is entitled to recover, with the order of priority purely for the purpose of bringing the action.

ACE § 32-21-02 specifies the measure of damages that Chad would be entitled to recover. Everglade permits the jury to award "such damages as it finds proportionate to the injury" Although some wrongful death statutes limit recovery to economic harm, this statute seems to be more inclusive, allowing Chad to recover the emotional or non-economic loss resulting from his father's death. That could certainly be substantial. In addition, the jury would award the economic loss—the wages that Gary would have earned in his lifetime, reduced to present value. We have no information concerning Gary's employment status or his likely future, but the jury would be invited to award such damages as they think are proportionate.

Overall, if we can establish a breach of duty on the part of one or both of the defendants, it should be a significant recovery for Chad.

CHECKLIST

- ☐ **Overview**
- ☐ **Breach** of Duty defined
- ☐
- ☐ **Negligence**
- ☐ Defined as failure to use **reasonable care**
- ☐ Were the **Wirths** negligent?
- ☐ Was **REC** negligent?
- ☐ Industry **custom** in installing equipment;
- ☐ Industry **custom** in operating electrical lines;
- ☐ Company **rulebook**?
- ☐ **Expert testimony** regarding standard of Care
- ☐
- ☐ **Strict liability**
- ☐ Was activity **abnormally dangerous**
- ☐ Accident **resulted** from what made it ADA
- ☐ Applying **factors** for ADA
- ☐
- ☐ **Proximate** cause
- ☐ **Defined as** but-for cause + legal cause
- ☐ **But-for** cause test easily satisfied
- ☐ **Legal** cause defined
- ☐ Electrocution did not result from **mere chance**?
- ☐ There is no **superseding cause**?
- ☐ Death was **foreseeable**
- ☐
- ☐ Damages are determined by **statute**
- ☐ **Chad** is the beneficiary
- ☐ What is “proportionate” to injury appears to include **emotional** injury
- ☐ Recovery could be **substantial**
- ☐ Martha / Samantha get **nothing**, but Chad recovers
- ☐
- ☐
- ☐

Exam # _____