

TORTS I
Summer 1994
July 8, 1994

PROFESSOR DEWOLF

MID-TERM SAMPLE ANSWER

QUESTION 1

I would consider claims against Larry Lacopo ("LL") and the Azure Shores Country Club. To establish liability, it would need to be proven that one of the parties breached a duty to Jason, either by being negligent or engaging in an activity for which strict liability is imposed, and that such a breach of duty was a proximate cause of injuries to him.

Lacopo's Potential Liability

We would argue that LL was negligent in striking the ball so hard without shouting "Fore!" To establish negligence, we would have to persuade the jury that a reasonably prudent person in the same or similar circumstances would have behaved differently. Perhaps reasonable golfers are aware of the need to avoid shots like the one that LL made; on the other hand, perhaps LL could convince the jury that he reasonably believed that the golf course had been designed so that shots would not pose a danger to anyone else. If the jury found LL negligent in hitting the ball so hard without having the skill to control it, then it would be easy to establish proximate cause. On the other hand, if the jury found that he should have shouted "Fore!" then it would still need to be shown that that failure was a proximate cause of injury. A jury would have to find that, more probably than not, the injury would not have occurred but for LL's negligence. Perhaps Jason or his grandfather would testify that, had someone shouted "Fore!" they would have at least kept an eye out for stray balls. I don't see any difficulty in meeting the legal cause test in addition to establishing but-for cause.

Jason v. ASCC

ASCC is a more promising defendant because they probably have more resources with which to pay a judgment. Also, if LL testifies that he assumed the course had been protected against the danger of stray balls, then it would help establish ASCC's responsibility toward Jason. We would argue two different ways in which ASCC breached their duty toward Jason: first, that ASCC was negligent in the way they designed or laid out the course; second, that they are strictly liable for maintaining a nuisance.

Negligence. ASCC had a duty to use reasonable care to prevent injury to someone like Jason. Learned Hand's test for negligence, *i.e.*, whether the burden to prevent the injury was less than the expected frequency of the accident and its probable magnitude, might help us here. The cost to redesign the course to avoid stray balls flying in that direction might be less than the risk of injuries like this. Another avenue we might pursue is to examine the standards followed by other members of the "industry"—other golf courses. If this kind of risk is minimized by preventive measures in other golf courses, it would help persuade the jury that it was negligent not to do so here. On the other hand, even if golf courses routinely impose this kind of risk on neighboring property owners, we could still persuade the jury that the entire industry had failed to use reasonable care.

Strict Liability. Even if ASCC used reasonable care, they might still be liable if their activity constituted a private nuisance. A property owner is entitled to compensation if his reasonable

expectations to enjoy his property have been violated by the defendant's failure to restrain some activity on his property. Even if it is so expensive for ASCC to prevent this kind of injury that it is not negligent to continue to engage in it, the invasion may still constitute an invasion of the Medleys' property rights. Unfortunately, there are a couple of complications here. First, Jason himself doesn't own the property; he apparently is a visitor, and perhaps his rights to enjoyment of the property would be more limited than those of the owner. Second, the Medleys bought the property next to the golf course. If the golf course was already in existence when the house was built, perhaps it would dilute the idea that the Medleys had a reasonable expectation to be free from stray golf balls. If a plaintiff is found to have "come to the nuisance," it may defeat an otherwise valid claim to be free from the particular offending activity.

If either negligence or a nuisance is established, there is no difficulty showing that the failure to prevent this kind of injury proximately caused the plaintiff's injury.

Damages

If liability can be established against either party, Jason would be entitled to extensive damages. His past and future medical expenses, including whatever treatment is necessary for his brain damage, would be recoverable. In addition, to the extent that either the scarring or the brain damage interfered with his ability to earn money, that lost income potential would be compensable. (Any future payments would be due to the plaintiff at the time the judgment is entered, but dollar amounts projected into the future would have to be reduced to present value). Most significant would be a pain and suffering award. If the scarring or brain damage would be a source of pain, embarrassment or emotional loss, Jason could ask the jury for an amount of money that would fairly compensate him for his inability to enjoy life as he would have been able to absent the injury.

QUESTION 2

Creighton ("CC") would face liability from the estate of Briggs ("EB") either for negligence or for a potential strict liability claim based upon the release of his horse from his property. To prevail, the estate would have to show that there was negligence (or other breach of duty) that proximately caused Briggs' death.

Negligence. CC could be found negligent if he failed to use reasonable care, which is what a reasonable person would have done in the same or similar circumstances. CC may have been negligent in a variety of different ways. First, although the barn-corrall enclosure appears to have been securely fastened, it may not be reasonable to leave animals on a regular basis without human supervision. Although CC hired McDaniel to feed the horses during the day on weekdays, a jury might find that more supervision would be required. One thing we might check out is the standard used by other people in the area who own animals. If we could find someone who would testify that they considered it negligent to leave animals unattended for long periods of time, that would help us convince the jury. Another avenue to establish negligence would be to find out if any statutes impose a duty on owners of domestic animals to prevent them from getting loose. If a statute intended for the prevention of this kind of injury was violated without excuse, then some jurisdictions would impose negligence as a matter of law; that is, the jury would not have to rule on whether a reasonable person would have obeyed the statute. On the other hand, CC might argue that he was excused because he was not aware of the occasion for compliance (he didn't know until after the accident that the horse had gotten loose).

CC would also be liable for any negligence on the part of McDaniel. As a preliminary matter, CC would be liable if he negligently selected an employee who was incapable of performing the job adequately. There's little to support that allegation in the current facts, but a jury might suspect that a prison inmate wouldn't be up to the responsibilities involved here. In addition, even if CC used reasonable care, he is vicariously liable for any negligence committed by an employee operating in the course and scope of employment. There is some suspicion that McDaniel left the gate open before he left. If that is the case, then such negligence would be attributed to CC.

Since it is unknown exactly how the gate got open, the plaintiffs might argue that the doctrine of *res ipsa loquitur* should be applied. An inference of negligence can be drawn by the jury if (1) the accident is of a type that doesn't ordinarily occur except where someone is negligent; (2) the instrumentality causing the accident was in the exclusive control of the defendant; and (3) other plausible explanations of the accident have been sufficiently eliminated. In this case it could be found that gates don't get left open without negligence; that the gate was in the control of CC, either directly or through his employee; and that no other explanation has been offered. If the judge permits the use of the *res ipsa* inference, then the burden would shift to CC to prove that the accident *wasn't* caused by negligence on his part. This would be a very difficult burden to overcome.

Strict Liability. An owner of a dangerous animal is strictly liable for injury that occurs from an escape of that animal causing injury to a third person. However, that theory is usually applied to the aspect of the animal that makes it dangerous. For example, if the horse had gotten out and trampled on someone, then the theory would apply. Since in this case the horse was hit by a car, that wouldn't necessarily be a "dangerous" propensity of the animal. We'd have to check the cases in this jurisdiction to see if strict liability had been applied in similar cases. The escape of the animal wouldn't constitute a nuisance, since the victim in this case wasn't on his own property, but instead was on the highway, where he can only expect reasonable care from the defendant. (*See Rylands v. Fletcher*).

Assuming either negligence or strict liability were established, it would be easy to prove that the injury was proximately caused by such a breach of duty; the accident more probably than not would not have occurred but for the failure to prevent the horse's escape, and it led to the injury in a direct and unbroken sequence. There is a remote possibility that the jury would find that the escape was caused by a vandal who unlocked the gate just for spite, and that might constitute a superseding cause, breaking the chain of causation, but I doubt we could be successful with that argument.

Damages. In the case of wrongful death, damages are determined by whatever formula is provided by statute. In this jurisdiction we seem to have both a survival action and a wrongful death action. The survival action (E.S.A. § 2A:15-3) allows the executor to recover whatever damages the decedent would have been entitled to had he lived. This would certainly include the pain and suffering Briggs endured between the accident and the death. That might be considerable, depending on how long he lingered. It may include damages into the future (based upon his inability to enjoy life because of his premature death), but that is more speculative.

The wrongful death statute (E.S.A. § 2A:31-1 to -5) gives the administrator or executor of the estate of the decedent the right to recover on behalf of certain beneficiaries. The damages are for the exclusive benefit of those who are entitled to take by intestate succession. They are listed in priority in E.S.A. § 4:95-3. That statute appears to give the property exclusively to the spouse if there is one. Here the wife appears to be exclusively entitled to the benefits. However, § 2A:31-4 talks about persons who are dependent upon the deceased, and gives them a right to recover as though they were the ones solely entitled to recover. The award is to be distributed in proportions

to be decided by the judge, but the amount of the award is to be determined by a jury according to § 2A:31-5.

Fortunately, the statute talks about determining an amount that is "fair and just with reference to the pecuniary injuries resulting from such death," and that seems to limit the damages to economic loss. On the other hand, a court might construe the statute liberally so that non-economic losses (*e.g.* the loss of the spouse's or the children's society and companionship with the decedent) might be included as being *in reference to* the economic loss. Again, we'd have to look at the cases interpreting this statute to be sure what measure of damages would be used.

SUMMER '94 MID-TERM—CHECKLIST

QUESTION 1

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|--|---|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Strict Liability |
| <input type="checkbox"/> Jason v. LL | <input type="checkbox"/> No Abnormally Dangerous Activity |
| <input type="checkbox"/> Negligence claim | <input type="checkbox"/> Nuisance |
| <input type="checkbox"/> standard of reasonable care | <input type="checkbox"/> Reasonable expectation of owner |
| <input type="checkbox"/> definition of reasonable care | <input type="checkbox"/> was Jason an owner? |
| <input type="checkbox"/> proximate cause | <input type="checkbox"/> Coming to the nuisance? |
| <input type="checkbox"/> but-for cause | <input type="checkbox"/> proximate cause |
| <input type="checkbox"/> legal cause | <input type="checkbox"/> Damages |
| <input type="checkbox"/> Jason v. Country Club | <input type="checkbox"/> medical expenses |
| <input type="checkbox"/> Negligence claim | <input type="checkbox"/> income loss |
| <input type="checkbox"/> standard of reasonable care | <input type="checkbox"/> pain and suffering |
| <input type="checkbox"/> custom of the industry | <input type="checkbox"/> |
| <input type="checkbox"/> Learned Hand Test | <input type="checkbox"/> |

QUESTION 2

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|---|--|
| <input type="checkbox"/> Overview | <input type="checkbox"/> proximate cause |
| <input type="checkbox"/> Negligence claim v. Creighton | <input type="checkbox"/> but-for cause |
| <input type="checkbox"/> standard of reasonable care | <input type="checkbox"/> legal cause |
| <input type="checkbox"/> definition of reasonable care | <input type="checkbox"/> Damages |
| <input type="checkbox"/> custom of "industry" | <input type="checkbox"/> statutory provisions for survival actions |
| <input type="checkbox"/> statutory prohibition against loose animals? | <input type="checkbox"/> pain and suffering before death |
| <input type="checkbox"/> negligence per se | <input type="checkbox"/> wrongful death statute |
| <input type="checkbox"/> excuse - lack of knowledge | <input type="checkbox"/> pecuniary losses |
| <input type="checkbox"/> vicarious liability theory | <input type="checkbox"/> "in relation to" pecuniary losses |
| <input type="checkbox"/> McDaniel was an employee | <input type="checkbox"/> |
| <input type="checkbox"/> did he commit a negligent act? | <input type="checkbox"/> |
| <input type="checkbox"/> res ipsa loquitur | <input type="checkbox"/> |
| <input type="checkbox"/> "Dangerous animal" theory | <input type="checkbox"/> |
| <input type="checkbox"/> but animal didn't bite | |
| <input type="checkbox"/> nuisance not applicable | |

Exam Number _____