

SAMPLE ANSWER TO MID-TERM EXAM

QUESTION 1

*The facts for Question 1 are taken from Erbrich Products Co., Inc. v. Wills, 509 N.E.2d 850 (Ind. 1987), in which the court decided that there was no liability for escape of the gas because it was not an abnormally dangerous activity, was not a nuisance, and left for trial the issue of negligence.*

In order for the neighbors [ $\pi$ s] to have valid tort claims, they must establish that Erbrich ["E"] (1) breached a duty owed to the plaintiffs; (2) that proximately caused (3) compensable damages.

1. *Breach of Duty.* To establish a breach of duty, the  $\pi$ s will need to show either that E was negligent, or that E should be held strictly liable for the release of the gas.

*Negligence.* To establish negligence,  $\pi$ s would need to show that E failed to use reasonable care. Reasonable care is that degree of care that a reasonably prudent person would use in the same or similar circumstances. One benchmark for reasonable care in a case like this is the "custom of the industry"—the level of precautions taken by other members of the same industry. Perhaps the equipment, given its age, is not "state of the art." Under *Hooper*, a plaintiff may argue that the custom of the industry is inadequate to reasonable care. Learned Hand's formula for reasonable care (is the burden ("B") < probability of loss ("P") \* magnitude of loss ("L")) might establish that the cost of improvements to eliminate the risk of this kind of injury would have been worthwhile.

The second method of proving negligence would be to argue *res ipsa loquitur*, literally, the thing speaks for itself. Where the evidence of what caused an injury is unavailable to the plaintiff, the mechanism causing the injury is in the exclusive control of the defendant, the accident is of a type that normally doesn't occur in the absence of negligence, and no other plausible explanation for the accident exists, then the jury will be instructed that they can infer negligence from the happening of the accident itself. We would oppose this theory on the ground that the accident isn't of a type that suggests negligence, but (depending upon expert testimony) the judge might permit this theory to be used.

*Strict Liability.*  $\pi$ s won't need to prove negligence if they can establish that strict liability applies. One theory is that the activity is *abnormally dangerous*. Under Restatement §§ 519-520, E could be held strictly liable if the judge finds that six factors weigh in the  $\pi$ s' favor. These factors are whether the activity (1) creates a significant risk (2) of grave injury, (3) which reasonable care can't eliminate; (4) which is uncommon, (5) inappropriate to the place where it is carried on; and (6) not of great social value. The fact that the release of the gas caused irritation rather than grave injury; that it is relatively common (swimming pools use chlorine gas), appropriate to the area and has significant social value should weigh in our favor. A second theory of strict liability is *nuisance*;  $\pi$ s can recover for damages caused by an invasion of a property interest based upon reasonable expectations of quiet enjoyment. In this case E can

argue that the  $\pi$ s "came to the nuisance": that because the industrial nature of the area at the time the activity first began, the  $\pi$ s couldn't have a reasonable expectation that they should be free from it. On the other hand, the  $\pi$ s may say that the change in the neighborhood was a natural evolution and that their expectation to be free from random releases of gas is a reasonable one. Tough call.

2. *Proximate Cause.* The  $\pi$ s must show that the breach was a proximate cause of damage. In this case it would be easy to say that, but for the release of the gas (assuming that is found to be a breach of duty),  $\pi$ s would not have been injured. Also, it is a legal cause of the injury, since it occurred in a direct and unbroken sequence.

3. *Compensable Damage.* Even if there was a breach of duty, it must proximately cause a legally recognized form of damages. Any of the plaintiffs who suffered property damage can recover the lesser of (1) the cost to repair; or (2) the difference in fair market value before and after the injury. Any of the  $\pi$ s who suffered physical injury may recover the following: wage loss for any work that they missed, medical expenses, and pain and suffering, including any fear and anxiety associated with the release. On the other hand, those who have not suffered physical injury, but claim emotional injury, such as grief caused by injury to a child or loved one, or anxiety or fear of future injury—such claims would ordinarily not be compensable. However, if a  $\pi$  was a bystander to a severe injury, or if the emotional injury was especially convincing, the court might permit a recovery even in the absence of physical injury.

## QUESTION 2

The facts for Question 2 are taken from *Fleege v. Cimpl*, 305 N.W.2d 409 (S.D. 1981), in which the court decided that strict liability did not apply but the jury should have been instructed on *res ipsa loquitur*.

I would recommend considering an action against Azure Resort and Country Club, and possibly against the installer and/or seller of the motor/pump. To succeed, Nancy would need to show a breach of duty, proximate cause and damages.

1. *Breach of Duty* (Azure). One form of breach of duty would be negligence. If Azure failed to use the care of a reasonably prudent person, they could be found negligent. There is significant evidence that the pump was installed in a negligent manner, with wires improperly spliced. It may also be that in consulting with others who use pumps like this that there is a custom of the industry compared to which this installation was unsafe. If Azure either installed it itself, or had control over the manner in which it was installed, they could be considered negligent. I would also consider a claim based upon *res ipsa*, since this might be an accident that doesn't ordinarily occur in the absence of negligence, where the instrumentality causing the injury was under the exclusive control of the defendants, and other plausible explanations have been eliminated. However, there are issues about control in this case, and there is also some question as to what really caused the injury. Thus, the judge might not allow a *res ipsa* instruction on these facts.

*Strict Liability.* The only claim that would not require proof of negligence is to argue that Azure was engaged in an abnormally dangerous activity. Nancy would need to establish

strict liability based upon six factors: whether the activity (1) creates a significant risk (2) of grave injury, (3) which reasonable care can't eliminate; (4) which is uncommon, (5) inappropriate to the place where it is carried on; and (6) not of great social value. Because reasonable care would eliminate the risk, and the use of electricity is very common, appropriate to where it is carried on, and of significant social value, strict liability would be an unlikely choice.

*Breach of Duty* (Installer/Seller). If the negligent installation was performed by an independent party, they could be held liable for reasons similar to those discussed in relation to Azure. Also, it may be that the motor itself contained some kind of electrical anomaly; it is not clear from the facts as to what the most likely explanation is for the excess electricity. Perhaps a *res ipsa loquitur* theory could be brought relative to a possible defect in the motor, but again we would have problems showing that the instrumentality was in anybody's exclusive control

2. *Proximate Cause*. The major problem in this case will be to establish proximate cause. To establish proximate cause, Nancy must establish that, more probably than not, the injury to her son would not have occurred *but for* the defendants' breach of duty; and that the breach of duty led by a direct and unbroken sequence to the injury. The experts' testimony is conflicting, but on the basis of this testimony, plus the evidence from other witnesses, a jury could believe that, more probably than not, it was the defendant's negligence that created an electrical charge in the water, causing James' death. On the other hand, the jury might find the evidence unconvincing, and that the plaintiffs did not meet their burden of proof. But if the jury finds that the defendants' negligence was a *but-for* cause of the death, they would have no problem finding that it was a legal cause; it occurred in a direct and unbroken sequence, and it was neither a result of mere chance, there was no superseding cause of the injury, and the plaintiff was within the zone of danger, and thus foreseeable.

3. *Damages*. If liability is established, Nancy's right to recover damages is determined by the statute. G.S. § 28A-18-1 and -2 gives the personal representative a right to file an action for wrongful death; § -2 states the remedies that the personal representative is entitled to collect. The remedies are relatively generous. They include (1) the economic loss suffered as a result of premature death (the income James would have earned throughout his lifetime, discounted to its present value), (2) the loss of "services" (such as helping around the house), plus (3) the loss of society and companionship. The latter would allow Nancy to tell the jury how much she would suffer as a result of the lost relationship with her son. Properly presented, that could be a significant sum. Finally, in the event that the negligence of one of the defendants could be shown to be so extreme as to demonstrate a reckless disregard for the safety of others, the court might permit the jury to award punitive damages.

## FALL '94 MID-TERM—CHECKLIST

## QUESTION 1

- Overview
- Breach of Duty
- Negligence
- definition of negligence
- custom of the industry / *Hooper*
- Learned Hand formula
- Res ipsa
- elements of res ipsa case
- Type of accident usually neg?
- Strict liability
- Ultrahazardous activity
- Restatement criteria
- Irritation vs. Permanent injury
- Appropriate to place where carried on
- Of value to the community
- Nuisance
- Interference with reasonable expectations
- Coming to the nuisance?
- Proximate cause not an issue
- Damages
- property damage
- Physical injury requirement
- pain and suffering

## QUESTION 2

- Overview
- Azure
- Breach of Duty
- Negligence
- Defined
- Custom of the industry / other golf courses
- Negligence per se
- Abnormally dangerous
- Proximate Cause
- Cause in fact / but-for cause
- Testimony appears to be enough for jury
- Legal cause
- Not a mere chance
- No superseding cause
- Foreseeable victim
- Seller / installer of motor
- Negligence
- Failure to warn adequately
- Some defect in the motor???
- Res ipsa loquitur
- Damages
- Survival Action
- [Very generous]
- Economic Loss
- Loss of "services"
- Loss of Society/Consortium
- Punitive damages?

Exam Number \_\_\_\_\_