

MINI-EXAM SAMPLE ANSWER

[See *Benjamin v. Nelstad Materials Corp.*, 625 N.Y.S.2d 281 (1995), in which the court affirmed the denial by the trial court of relief to the homeowners. A dissenting opinion thought the case for a nuisance so compelling that the judgment should be reversed and relief granted as a matter of law to plaintiffs.]

In preparation for my meeting with Lou, I would analyze the standard of liability as follows: in order to recover, the residents would have to prove that there was a breach of duty on Nelstad's part, and that this breach of duty was a proximate cause of injury to them. This memo will focus on whether or not there was a breach of duty.

I. Breach of Duty

There are two ways to establish a breach of duty: first, by showing that the defendant(s) engaged in an activity that is subject to strict liability, or secondly, by establishing that the defendant(s) failed to use reasonable care. Each has an application here.

A. Strict Liability

The residents might try to show that Lou's company was operating a nuisance, thus subjecting them to strict liability. A nuisance is found when the defendant interferes with the plaintiff's *reasonable expectations* to enjoy his or her property. Applying that standard in this case would be difficult. One factor that goes into the determination of what expectations are reasonable is whether or not the character of the neighborhood has been established over time. Thus, what may be inappropriate in a residential neighborhood may be perfectly appropriate in an industrial neighborhood, and therefore the expectations of surrounding neighbors will change. The facts do not suggest any zoning code violations, and we might want to emphasize that the zoning for the area in which the plant is located favors us. Another relevant factor is the timing of the development. Apparently the cement plant was there first, followed by residential development. That would lead to an argument that the plaintiffs "came to the nuisance." However, the plant's capacity was expanded *after* the neighboring residential area was established, which would work against us.

If a nuisance were found, the court could award damages for past invasions, as well as injunctive relief that would prohibit the nuisance from continuing in the future. There is some authority for allowing permanent damages in lieu of an injunction, but that would require a showing that the public interest in maintaining the plant was so strong as to override the ordinary rule.

Another theory permitting strict liability is where the activity is abnormally dangerous, but I do not believe we need to worry about that here because there danger is not particularly high and it is not really inappropriate to the place where it is being carried on.

B. Negligence

A second theory allowing recovery is to establish that the defendant acted negligently. Negligence is defined as the failure to use reasonable care. The ultimate question is what a jury would think of how well the plant was being operated. It sounds as though there is a "state of the art" that would eliminate many of the problems encountered here, but they would be too costly to implement. At least for economic loss cases, many courts recognize the use of a cost-benefit analysis to permit taking risks where the cost to prevent them exceeds the expected damage. However, there might be cheaper ways for the defendant to reduce the collateral damage and at the same time operate the plant economically.

I'd also be worried about the EPA standards. It sounds as though the plant might be in violation of, or getting close to violating, EPA standards. Where a defendant violates a statutory enactment that was intended for the protection of people like the plaintiff, then the court may declare negligence as a matter of law. We need to ask Lou more about the status of the EPA regulatory efforts.

CHECKLIST

- Overview
- Concept of Breach of Duty
- Strict Liability Theories

- Nuisance
- Do Ps have "reasonable expectations" to be free from harm
- Relevance of character of neighborhood
- Zoning issues?
- Relevance of timing
- "Coming to the nuisance"
- Remedy of damages + injunction
- Potential to split the two

- Not abnormally dangerous
- Restatement criteria

- Negligence theory
- Definition: failure to use reasonable care
- What would a jury think?
- custom of the industry?
- Cost-benefit analysis
- EPA violation: negligence per se?
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