Professor DeWolf Fall 1995
Torts I July 28, 2002

MINI-EXAM SAMPLE ANSWER

[*This case is based upon* Williams v. Amoco Production Co.*, 734 P.2d 1113 (Kan. 1987). In that case the court found that drilling and operation of natural gas wells was not an abnormally dangerous activity; and that the farmers could not recover from the gas company on a nuisance theory.*]

I would tell the Williamses ("Ws") that they should consider an action against MajorOil based upon several theories. Nothing in the facts reveals any claim against Weber, but we should perhaps investigate further.

Action Against MajorOil

The first thing we would have to prove in our case against MajorOil is that it breached a duty owed to the Williamses. A breach of duty could be predicated either upon negligence or upon a strict liability theory.

1. *Negligence*. Negligence is the failure to use reasonable care. Reasonable care is what a reasonably prudent person would do under the same or similar circumstances. One way to measure reasonable care is to find out what is customary in the industry. It may be that in the process of drilling or maintaining the gas well some customary precaution was omitted that would have prevented the leakage of natural gas into the Ws' water well. That would be good evidence of negligence. On the other hand, even if MajorOil complied with all of the customary procedures we could still argue that some additional precaution would be worthwhile based upon an analysis of the cost/benefit ratio. Experts are often willing to testify concerning their belief that a reasonable person would have used greater caution.

Another technique to prove negligence is res ipsa loquitur—the thing "speaks for itself." That doctrine applies where the happening of the accident itself suggests negligence. To apply that doctrine we would have to show that this is the type of injury that doesn't normally occur in the absence of negligence—that might be difficult here—plus, we would have to show that the gas well was under the defendants' (easy to show) and that no other plausible explanation for the harm exists. I don't have much confidence in this argument because we pretty much know what caused the leakage of natural gas; the only question is whether it was negligent.

If a statute or regulation governing the production of natural gas was violated, we could use that violation as evidence of negligence, or even in some jurisdictions we could ask the judge to rule that it was *negligence per se*—negligence as a matter of law.

Although the defendants' conduct in trying to repair the Ws' water well might appear to be good evidence that they thought they were at fault, most courts will exclude evidence of post-accident repairs on the ground that it would be contrary to public policy, since it would discourage defendants from doing the right thing after an injury has occurred. On the other hand, I wonder if we could use that as evidence that they were "owners" of the natural gas in question. If there is a denial that they in fact were the origin of the natural gas, we could use their subsequent conduct to establish they thought they owned the gas that was infiltrating the Ws' well.

2. *Strict Liability*. Another way of establishing a breach of duty is to show that the

defendants engaged in an activity subject to strict liability. Two forms might apply here: abnormally dangerous activities and nuisance.

a. *Abnormally Dangerous Activities*. One who engages in an abnormally dangerous activity is subject to strict liability if the characteristic that makes it abnormally dangerous results in harm to another. In this case one might argue that natural gas production is abnormally dangerous activity, but it would probably fail the six-part test articulated in the Restatement. Even if it were abnormally dangerous, the harm in this case did not result from that which made it so (the risk of explosion); rather, the harm arose from the fact that the gas kept infiltrating the water pump.

b. *Nuisance*. A nuisance is an invasion of the plaintiff's reasonable expectation to enjoy his property. In this case the defendants' natural gas invaded the plaintiffs' well. That might be considered an invasion, but we would have to find out what is common to this area. It might be that the area is generally used for the production of natural gas, that escape is common, and that water wells are essentially subject to this risk. That sounds unusual, but again the question will be whether or not the Ws would have a *reasonable* expectation of being free from this problem.

Weber Supply

Although the dropping of a match into the well caused an explosion, it's not clear that this had anything to do with the accident, or that it was negligent. As discussed above, we'd have to know what was customary in that circumstance. Considering that natural gas is colorless and odorless, there would be no advance warning of the presence of natural gas. If, however, the risk was sufficiently great that it would have been known to a reasonable person and avoided, then we might find Jack negligent. His negligence in turn would be attributed to Weber Supply via the principle of vicarious liability, since his negligent act occurred during the course and scope of employment.

CHECKLIST

- ☐ Overview
- ☐ Claim v. MajorOil
- ☐ Breach of Duty
- ☐ Negligence Claim
- ☐ Standard of Negligence
- ☐ Neg. Defined as Failure to use RC
- ☐ Custom of the industry
- ☐ Custom is the floor, not the ceiling
- ☐ Learned Hand test?

- ☐ Res ipsa loquitur
- ☐ Are the criteria met?
- ☐ Statutory violation?
- ☐ Post-Accident Repair evidence inadmissible
- ☐ Will "ownership" be in dispute?

- ☐ Strict Liability
- ☐ Abnormally dangerous activity?
- ☐ Restatement criteria
- ☐ Injury didn't result from what which makes it abnormally dangerous

- ☐ Nuisance
- ☐ What are Ws' reasonable expectations?
- ☐ Timing of the different wells

- ☐ Question about Weber Supply
- ☐ Jack doesn't appear to be negligent
- ☐ Explosion revealed rather than caused injury
- ☐ Vicarious Liability would apply to Weber Supply
- ☐ Further investigation is needed.

Exam Number _____