

SAMPLE ANSWER TO MID-TERM EXAM

QUESTION 1

*This case is based upon Beasock v. Dioguardi Enterprises, Inc., 494 N.Y.S.2d 974, 130 Misc.2d 25 (1985). In that case the court upheld summary judgment granted to the trade association, finding that the "enterprise liability" theory of Hall did not apply.*

*Overview.* There are two primary defendants that I would focus on in this case: Kelly-Hayes ("KH") and General Tire ("GT"). I would also consider the addition of other defendants who might be liable under an enterprise liability theory. In order to hold a defendant liable, we would have to establish that the defendant breached a duty to Beasock and that such breach was a proximate cause of the injuries he suffered.

*Breach of Duty.* The only plausible breach of duty to be alleged in this case would be that KH or GT were negligent in failing to provide some kind of warning for the danger of tire/rim mismatch. The jury will be instructed to find negligence if the defendant failed to do something that a reasonably prudent person would have done in the same or similar circumstances. In this case we would argue that a reasonable person in the manufacturer's position would have either warned the user directly, or would have utilized the Tire and Rim Association ("TRA") as a means of adopting standards that would have educated the public in order to reduce the risk of injury. The evidence reflects that both GT and KH had employees who sat on committees where the problem of mismatch was discussed, and so each company would have foreseen the risk of continuing to sell products without warnings. If they did not inform their superiors, they would arguably be negligent in doing so, and their negligence would be attributed to the employer because of the principle of vicarious liability, which holds employers responsible for negligent acts committed during the course and scope of employment.

One difficulty we would have in this situation would be the fact that the defendants would use the custom of the industry as an index of what was reasonable care. It appears that none of the manufacturers of rims or tires made an effort to provide the kind of warning that would have prevented this accident, and therefore it would be hard to convince the jury that the defendants had a duty to go beyond what was customary in the industry. However, Learned Hand recognized such a duty in the *T. J. Hooper* case, and he also suggested a formula for analyzing reasonable care: the jury should compare the burden imposed on the defendants with the probability of harm multiplied by the magnitude of the expected injury. Since the burden of warning through the organization would be relatively slight, there would be some appeal to arguing that the failure of the industry as a whole to exercise reasonable care was negligent. On the other hand, we don't know exactly how the warning would be effectively communicated; on the tire or rim itself? Through educational campaigns?

*Proximate Cause.* In addition to proving that the defendants were negligent, we would also have to show that their negligence proximately caused the plaintiff's injuries. That requires two steps: first, to show (by a preponderance of the evidence) that, *but for* the defendant's negligence,

there would have been no injury; and second that the negligence led in a direct and unbroken sequence to the injury, thus constituting *legal cause*. I don't think it would be difficult to show that an adequate warning about the danger of the mismatched rims would have prompted the plaintiff to use additional precautions before attempting to mount this particular tire.

We would also consider a suit against the industry as a whole, that is, each of the members of the industry. That would flow from the case of *Hall v. Dupont*, which was a blasting-cap case in which an entire industry failed to adopt adequate safety measures. However, I would anticipate several difficulties with that approach. First, unlike *Hall*, we are able to identify the defendants who sold the particular products in this case. Thus, the need for an exotic theory is diminished considerably. Second, it would make each manufacturer individually liable for all of the injuries suffered by mismatched rims. That's a rather draconian result, and a court might shy away from it. Nonetheless, we should look into the possibility of naming all of the manufacturers who participated in the TRA<sup>1</sup> to find out if we could justify a creative approach; since each manufacturer could be held individually liable, they might be willing to settle for a portion of the damages.

## QUESTION 2

*This case is based upon Lewellen<sup>2</sup> v. Huber, 456 N.W.2d 94 (Minn. 1990). In that case the court reversed a summary judgment in favor of the dog owner, finding that a jury should consider whether the failure to warn about the dog's propensities proximately caused the plaintiff's death.*

The primary defendants in this case would be the housesitter (TDS) and the owner of the dog (Hubers). In each case we would need to show that the defendant breached a duty to Beasock and that such breach was a proximate cause of the plaintiff's death.

1. *Breach of Duty*. There are two vehicles for proving breach of duty: first, we would argue that TDS and/or Hubers were *negligent*; second, we would argue that the statute creates a kind of *strict liability* for failing to restrain a dog. Each defendant must be handled separately:

a. *TDS*. TDS may have been negligent in her operation of the vehicle. Negligence is the failure to use the care that a reasonably prudent person would exercise—in this case, the jury would be asked to consider what a reasonable person would do if a dog suddenly got frisky in the car while he or she were driving. This case is remarkably similar to the wasp case, *Lussan v. Grain Dealers Mutual Insurance Company*. There it was held to be a jury question whether a reasonable person would stop the car, or try to deal with the problem.

We might argue that TDS was negligent *per se*, since the statute (§ 347.22) makes any person who "harbors" a dog liable if the dog "injures" another person. (The negligence *per se* doctrine allows a plaintiff to get an instruction that the defendant is negligent *as a matter of law*) if a statute is violated without excuse.) As with the strict liability issue, to be discussed below, we would have

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<sup>1</sup>I wouldn't recommend suing the TRA directly, since they seem to have no assets that would satisfy a judgment. If we are entitled to use a theory like *Hall v. Dupont*, it would allow us to sue the individual members of the industry, who do have the ability to pay a judgment.

<sup>2</sup>This is his real name! No relation to Karl Llewelyn, so far as I know.

some difficulties persuading the judge that this statute was meant to apply to a case like this. It appears that the statute was designed to be applied to cases where the dog "without provocation" bit or otherwise physically attacked someone. Also, TDS would argue that she had an excuse, namely that she didn't know about the dog's propensity. Under the Restatement test for negligence per se, a statutory violation is excused if the actor "neither knows nor should know of the occasion for compliance." That would seem to fit pretty well here.

b. *Huber*. Some of the same arguments would apply to Hubers, although it's more attractive to hold Hubers liable since it was their dog. We could argue that Hubers were negligent because they failed to tell TDS about the propensity of the dog to get frisky in the car. However, it would be hard to claim that a reasonable person would tell the housesitter about this risk unless it could be reasonably anticipated that the housesitter would be driving with Lassie in the back seat. Unless there are facts suggesting that this was a big enough risk that a reasonable person would warn about, I'd be hesitant about arguing that it was negligent not to warn her.

Second, we might again try the negligence per se theory. Hubers again would argue that there was an excuse because of their lack of knowledge of the occasion for compliance.

2. *Strict Liability*. As mentioned above, we could argue that the statute in effect creates strict liability. While the common law made a dog owner liable for an animal that bit someone after the dog revealed vicious tendencies, the statute makes the dog owner liable regardless of previous knowledge. However, our problem is that the dog didn't bite anyone, and we would be hard-pressed to show that the statute was intended to create liability in a situation like this one. The statute refers to attack without provocation, and to the victim acting peaceably in a place where they have a right to be. I think a judge would find it a big stretch to impose strict liability on the strength of this statute.

3. *Vicarious Liability*. An additional way to get Hubers to be found liable is to argue that the housesitter was an employee of theirs, and if she was negligent Hubers would become vicariously liable. That too is a stretch. It's not clear that she was paid; even if she was, the test of whether someone is an employee (as opposed to an independent contractor) is whether the putative employer has a right to control the way the work was done. That also seems like a tough sell. Moreover, it presupposes a finding that she was negligent, which won't be easy to prove.

4. *Causation*. Even if we prove a breach of duty, we must also show that the breach was a proximate cause of the injury. With respect to TDS, that won't be so difficult, since her failure to control the car was a proximate cause of the death. However, Hubers would argue that the chain of causation was broken. Hubers might claim (1) that the negligence of TDS became a superseding cause of the injury. That's doubtful, since the very thing that would make Hubers' failure to warn negligent would be the foreseeability that it would cause someone to lose control of the car. Hubers might also argue that this is a case like *Palsgraf*. Whether the court or the jury would buy this argument depends upon the approach of the jurisdiction to such cases. According to Cardozo's approach, we would ask whether or not Chazdon Lewellin was in the zone of danger at the time of the negligent act by the Hubers. That's a tough question, and one the jury would have to wrestle with. On the other hand, if this jurisdiction follows Andrews, then it would be for the jury to decide whether or not the connection between the negligent act and the car running over the plaintiff became so remote in time and space that it could no longer be said that the Hubers' negligence proximately caused it.

## FALL '96 MID-TERM—CHECKLIST

### QUESTION 1

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|---|---|
| <input type="checkbox"/> Overview                                       | <input type="checkbox"/> Proximate Cause                            |
| <input type="checkbox"/> Breach of Duty                                 | <input type="checkbox"/> But-for Cause                              |
| <input type="checkbox"/> Suits against KH and GT                        | <input type="checkbox"/> Legal Cause                                |
| <input type="checkbox"/> Definition of Negligence                       | <input type="checkbox"/>  |
| <input type="checkbox"/> Was GT or KH negligent?                        | <input type="checkbox"/> Suit against other industry members        |
| <input type="checkbox"/> negligence of employee(s) who sat on committee | <input type="checkbox"/> Enterprise liability theory                |
| <input type="checkbox"/> vicarious liability to company                 | <input type="checkbox"/> Usefulness in suing other industry members |
| <input type="checkbox"/> Would a reasonable tire/rim manufacturer warn? | <input type="checkbox"/> distinction from <i>Hall v. Dupont</i>     |
| <input type="checkbox"/> custom of the industry                         | <input type="checkbox"/> no unknown cause                           |
| <input type="checkbox"/> Learned Hand test                              | <input type="checkbox"/> each defendant liable for all?             |
| <input type="checkbox"/>  | <input type="checkbox"/>  |
| <input type="checkbox"/>  | <input type="checkbox"/>  |

### QUESTION 2

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|---|--|
| <input type="checkbox"/> Overview                             | <input type="checkbox"/> Strict Liability                    |
| <input type="checkbox"/> Breach of Duty                       | <input type="checkbox"/> statutory interpretation by court   |
| <input type="checkbox"/> Suit against housesitter (TDS)       | <input type="checkbox"/> did dog "attack or injure" anyone?  |
| <input type="checkbox"/> Negligence Defined                   | <input type="checkbox"/> Vicarious liability for S's conduct |
| <input type="checkbox"/> Question for jury                    | <input type="checkbox"/> right to control her?               |
| <input type="checkbox"/> Similarity to the wasp case          | <input type="checkbox"/> Causation                           |
| <input type="checkbox"/> Negligence per se issue              | <input type="checkbox"/> But-for cause                       |
| <input type="checkbox"/> "harboring" a dog                    | <input type="checkbox"/> Legal Cause                         |
| <input type="checkbox"/> application of the statute           | <input type="checkbox"/> Superseding cause?                  |
| <input type="checkbox"/> excuse                               | <input type="checkbox"/> Was poor driving foreseeable?       |
| <input type="checkbox"/> <i>per se</i> or just evidence?      | <input type="checkbox"/> <i>Palsgraf</i> argument            |
| <input type="checkbox"/> proximate cause issues               | <input type="checkbox"/> Cardozo: was a duty owed?           |
| <input type="checkbox"/> Suit against Dog owner (Huber)       | <input type="checkbox"/> Andrews: was there proximate cause? |
| <input type="checkbox"/> Negligence theory                    | <input type="checkbox"/>                                     |
| <input type="checkbox"/> Tough jury question about negligence | <input type="checkbox"/>                                     |
| <input type="checkbox"/> Negligence per se                    | <input type="checkbox"/>                                     |
| <input type="checkbox"/>                                      |  |
| <input type="checkbox"/>                                      |  |