Professor DeWolf Torts I
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SAMPLE ANSWER TO MID-TERM EXAM

QUESTION 1

This case is based upon Peneschi, v. National Steel Corp., 170 W.Va. 511, 295 S.E.2d 1 (1982). In that case the court upheld a judgment in favor of the plaintiff based upon strict liability for an abnormally dangerous activity.

Peneschi ("P") would have a claim against the following companies: (1) National; (2) the drain-closer; (3) the designer of the pre-heater system, if that is someone other than Koppers. With respect to each defendant, it would be necessary to establish a breach of duty (either strict liability or negligence) that proximately caused compensable damages.

National

One theory against National would be liability for the explosion based on the fact that they supplied the gas that caused the explosion. Strict liability can be imposed on someone who carries on an abnormally dangerous activity. A court will decide whether an activity is abnormally dangerous by reviewing six criteria:

(a) does the activity carry a high degree of danger?
(b) is the damage severe if injury results?
(c) can reasonable care eliminate the risk?
(d) was the activity uncommon?
(e) was the activity appropriate to the area where it was carried on?
(f) does the activity have a high degree of social utility?

Applying these criteria, it appears that there is a very high degree of danger and severe damage can result from the transportation of fuel gas. Perhaps reasonable care could eliminate the risk, but then again perhaps it couldn't. The activity is uncommon (relatively speaking), and it seems appropriate to where it was carried on. It also has a moderately high degree of social utility. I'd say on balance that it's a good candidate for strict liability. It's quite analogous to the transportation of gasoline in *Siegler v. Kuhlman*.

Another theory against National would be liability for negligently causing the explosion. Although the explanatory mechanism of the explosion seems to be well-known, it may also be that there is some unknown reason for the explosion. In such cases we could use the theory of *res ipsa loquitur*, which allows an inference of negligence if the defendant is in charge of the injury-causing mechanism, the accident is of a type that doesn't normally occur in the absence of negligence, and there is no other plausible explanation.

The Drain-Closer

It appears from the way this system was designed to operate that someone failed to close the drain at the base of the heater. That apparently allowed the gas to escape. Assuming someone was responsible for this to occur, we could allege that they were negligent in failing to close the drain. A person can be found negligent if they fail to observe reasonable care, namely, the care that a reasonably prudent person would exercise under the same or similar

circumstances. We might look to the custom of the industry if there is some practice with respect to the sealing of fuel gas lines or safety procedures that should be followed. Also, if there were some responsibility set out in the design of the system itself, that would also help establish that one or more parties was negligent. We might even find safety policies on the part of one or more defendants that would require some precaution in this regard. The violation of a company safety policy is often strong evidence of negligence.

If it couldn't be determined who failed to close the drain, then we might be tempted to use a form of alternative liability such as in the case of *Summers v. Tice*. Conceivably there might be something along the lines of the enterprise liability theory in *Hall v. Dupont*, where an entire group of people were in a position to take responsibility for this situation and failed to do so. But it seems more probable that someone in the chain of command was designated as being responsible for ensuring that the fuel line was sealed during operation.

Perhaps there is some kind of statutory regulation that would specify precautions that must be taken in the course of transporting fuel gas. Any violation of such a regulation could be used as evidence of negligence (or in some jurisdictions as negligence per se--that is, conclusive of negligence without a need for jury consideration).

Negligence in the Design of the System

A number of entities participated in the design the system, and each was responsible for using reasonable care to avoid injury. It appears that it was National's idea to install the water spray device on the preheater, and apparently this design failed to include a vent pipe to carry escaping gas; and it didn't have any device for insuring that there was a seal or lid on the system to prevent the gas from escaping. As with the previous issue, we could allege that a reasonable person would have designed such safety precautious into the system, and the failure to do so was negligent. However, P wouldn't be able to sue Koppers, because under worker's comp. they are shielded from tort liability.

Causation

We'd also have to see whether or not the breach of duty of any of the parties proximately caused the injury. It seems that, if we can successfully establish that a duty was breached (either that National was conducting an abnormally dangerous activity, or that one or more parties was negligent in the design or operation of the preheater), that such negligence was a but-for cause of the injury. I don't think any of the defendants could claim that, even if they had not breached their duty, the accident would have happened anyway; each seems to be a but-for cause of the injury. However, if such a situation did present itself, we could ask the court to use a substantial factor test to overcome the suggestion of multiple redundant causes.

As far as legal cause, there seems to be a pretty direct connection between the negligent act (or ADA), and the injury to the plaintiff. Thus, I wouldn't anticipate any significant problems establishing proximate cause.

Damages

If P can't walk without pain, he will probably suffer significant wage loss. He will also have a lot of pain and suffering damages. Depending upon his expected life span and alternative available work opportunities (*cf.* Mrs. O'Shea), he will have significant damages.

QUESTION 2

This case is based upon *Leaf River Forest Products, Inc. v. Ferguson*, 662 So.2d 648 (Miss. 1995). In that case the court reversed a judgment in favor of the plaintiffs for compensatory and punitive damages. The evidence was held insufficient to constitute a nuisance or a claim for negligently inflicted emotional distress.

The plaintiffs will be able to recover if they can show that (1) Leaf River Forest Products ("L") breached a duty toward them; which (2) proximately caused (3) compensable damages.

I. Breach of Duty

L may have breached a duty toward the Fergusons and Mitchells ("F") if they either (1) acted negligently or (2) engaged in an activity subject to strict liability.

Negligence. L would be expected to exercise reasonable care in the operation of the plant. It does not appear that they have been in violation of any EPA levels for dioxin. If they violated state standards, and that violation proximately caused injury, then they could be found negligent per se. However, that doesn't appear to be the case here.

Nor does there seem to be any departure from the standards expected in the paper mill industry. In fact, L seems to be somewhat ahead of the curve in terms of reducing the levels of dioxin below mandatory levels. I would anticipate that on a negligence basis we would do pretty well.

Strict Liability. There are two theories that F might argue to try to impose strict liability. The first seems pretty weak, namely that the activity of operating a pulp mill is abnormally dangerous. That doesn't seem to apply here, because the danger is not very high, it is appropriate for the area, provides a lot of value to the community, and doesn't pose that high of a risk.

The strongest claim F will bring is that the operation of the pulp mill is a *nuisance*. L is strictly liable for causing a nuisance if the operation of the pulp mill invades a property interest of F in such a way that it deprives them of the *reasonable expectations* with regard to enjoyment of their property. The issue is whether the release of dioxin in relatively small quantities constitutes such a deprivation.

First of all, there is significant dispute over whether there has been an effect by the pulp mill. The color of the river is alleged to have changed, along with restrictions on the use of the river for fishing. Most seriously, F alleges that there are serious health effects caused by the release of dioxin. However, since they live between 100 to 125 miles downstream from the pulp mill, a jury might find that they are being hypersensitive.

Even if F can establish that there has actually been an effect upon the river caused by dioxin, they must also prove that it is an *unreasonable* invasion; the pulp mill also is entitled to the reasonable use of their property, and if the imposition on F is found to be within the bounds of a reasonable imposition, there will be no nuisance.

II. Proximate Cause

Closely related to the question of whether the dioxin release is interfering with F's use of their property is the question of whether, but-for the conduct of the defendants, plaintiffs would have suffered their injuries. There may be other factors at work in the river that have affected water quality or fish consumption, and if the injury would have occurred anyway, regardless of the dioxin levels, then plaintiffs may not recover.

One remote possibility is that the plaintiffs will have a condition that probably would have occurred anyway, but the exposure to dioxin took away a chance of avoiding it. In such cases, some jurisdictions allow a theory based on *loss of a chance*. If West York allows such cases, the plaintiff would be able to recover for the value of the lost chance of avoiding the disease or condition that has harmed them.

In addition to establishing but-for cause, F will also have to establish that the exposure was also a *legal cause* of the injury. In this case, despite the fact that F were more than 100 miles away from the original exposure, F would not likely have any difficulty establishing that the chain of causation was not broken.

III. Damages

Plaintiffs would be entitled to recover for the diminution in property damage resulting from a nuisance, if the court finds it to be such. Their right to recover for the emotional suffering is more questionable. Ordinarily, a plaintiff cannot recover for "mere" emotional injury in the absence of a physical injury. There is no showing that Fs have actually been injured yet, although they are afraid of such injury in the future. F's experts are certainly suggesting that injury from dioxin exposure is quite likely, but that remains rather speculative at present. The court might reject any emotional recovery at all, in the absence of demonstrated physical injury. As a corollary, however, it is likely that at some point a resident along the river will have a disease that corresponds to the health effects attributable to high-dose exposure to dioxin, and it will be for a jury to decide whether or not the injury was caused by the dioxin exposure. Thus, while the right to recover on this particular case is rather weak, the long-term prospects may be more frightening.

Another possibility is that Fs will ask for punitive damages. Punitive damages may be awarded where the defendant's conduct constitutes a reckless disregard for the rights of the plaintiff. Some courts have phrased it in terms of "conscious disregard." In this case there was a warning that dioxin was being released from the pulp mill, and the company chose to disregard that information. On a good day, the jury will agree that the levels are so minute that they would not justify preventive measures. However, on a bad day the jury might find that the company was callous. Particularly if a sympathetic plaintiff shows up with cancer, and convinces the jury that it was caused by exposure to dioxin, the proverbial floodgates might open.

Another damages issue relates to the ability of the plaintiff to enjoin future operation of the mill. It seems likely that, even if the court found some interference with the plaintiff's reasonable expectations, it would be reluctant (for the same reasons as those found in *Boomer v. Atlantic Cement*) to impose an injunction on the defendants to force them to stop operating. Instead, the court would likely make an assessment of compensation for the permanent injury suffered to their property.

SUMMER '97 MID-TERM—CHECKLIST

QUESTION 1

- ☐ Overview

- ☐ Claim v. National Steel Corporation
- ☐ Strict Liability
- ☐ Abnormally Dangerous Activity
- ☐ Restatement criteria
- ☐ High degree of risk & harm
- ☐ appropriate & useful
- ☐ mixed on other two

- ☐ Potential Res ipsa claim
- ☐ Elements of res ipsa
- ☐ Is there an unknown cause?

- ☐ Claim v. Drain-closer
- ☐ Negligence Theory
- ☐ Negligence as the lack of reasonable care
- ☐ Custom of the industry
- ☐ Safety policies?
- ☐ Statutory violations?

- ☐ Negligent Design of the system
- ☐ No claim against employer (Koppers)
- ☐ Potential alternative liability?
- ☐ Potential enterprise Liability?

- ☐ Proximate Cause
- ☐ Damages
- ☐

QUESTION 2

- ☐ Overview

- ☐ Breach of Duty
- ☐ Negligence Theories
- ☐ Possible exposure - NPS
- ☐ Pretty good prospects

- ☐ Strict Liability
- ☐ No ADA
- ☐ Nuisance
- ☐ F's Property Interest
- ☐ Standard of Reasonable Expectations
- ☐ Does release of dioxin violate R.E.?

- ☐ Dispute over facts
- ☐ River Color
- ☐ Effect on Fish
- ☐ Health Concerns
- ☐ Is the interference unreasonable?

- ☐ Proximate Cause Issues
- ☐ But-for causation
- ☐ Loss of a chance?
- ☐ 100 miles downstream???

- ☐ Damages Issues
- ☐ "Mere" Emotional Injury
- ☐ Are Fs entitled to an exception?

- ☐ Potential for Actual Injury
- ☐ Punitive Damages???
- ☐ Conscious Disregard

- ☐ Injunctive Relief
- ☐ Analogy to *Boomer v. Atlantic Cement*
- ☐
- ☐
- ☐
- ☐

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