

SAMPLE ANSWER TO FINAL EXAM

QUESTION 1

This case is based upon *James v. Chevron*, 301 N.J. Super. 512, 694 A.2d 270 (1997), in which the manufacturer was found to have a duty to warn about the dangers of exposure to benzene.

I would consider a claim against Shell Oil Co. and possibly some additional defendants. The primary claim would be based upon product liability, and there would be several important issues about the defenses that would be applicable. In addition, the damages based upon the wrongful death and survival statute will be addressed.

Claim v. Shell

The basic claim would be against Shell Oil Co. ("Shell") on the theory that it manufactured a defective product that injured Walter. Under modern product liability law, a manufacturer is liable for injuries caused by a defective product.

The first problem is to identify the type of defect. One might say that the barrel contained a manufacturing defect, since, pursuant to federal law, it contained an excessive amount of residue in the product. But I'm not sure that the barrels were "manufactured" when they were sent to Bessemer for processing. Instead, it might be an ordinary negligence case if they were supposed to be emptied prior to being processed.

The more likely claim for product liability would be to describe the barrels<sup>1</sup> as being defective because they lacked an adequate warning of the dangers associated with their use. Jurisdictions differ on how to address the standard for determining whether a product has a warning defect. Some apply a so-called *strict liability* standard; this standard can be based either on (1) a consumer expectations test to judge whether or not a reasonable consumer would expect to find the kind of risk that was present; or (2) an "imputed knowledge" test, whereby today's knowledge of the risk is imputed to the manufacturer to decide whether a reasonable manufacturer would have placed the product in the stream of commerce in that condition, assuming that the manufacturer knew of the risks which have now become apparent.

The alternative to strict liability is a form of the negligence test, which has been recommended by the most recent version of the Restatement on Product Liability. Under this standard, the manufacturer is liable if it acted negligently in failing to provide an adequate warning.

Applied to this case, the question is dependent upon how early it was known (or should have been known) that the barrel residue was potentially cancerous, and whether a reasonable person

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1. One side issue is whether or not other parties other than Shell could be considered manufacturers of the barrel. Presumably Shell did not manufacture the barrels themselves, but purchased them from some kind of barrel manufacturer. However, it is doubtful that the barrel manufacturer would be under any duty to provide a warning as to the contents of the barrel, since it is not the barrel that actually causes the injury, but the contents of the barrel. Not knowing what the barrel would ultimately contain, the barrel manufacturer could hardly be faulted for failing to warn of potentially dangerous contents.

would have known about it. Since our expert says that benzene was a known health danger as early as 1948, we could certainly argue that Shell was negligent in failing to pass along to workers such as Walter health warnings that would have helped him avoid his fatal exposure. The advantage of a "strict liability" standard is that it would be no defense that some of the health information that is known today was not known at the time that the initial exposure occurred; today's knowledge would be imputed to Shell for purposes of deciding what a reasonable person would have done.

### Defenses to the Claim v. Shell

Unfortunately, a variety of defenses could be asserted in reply to Walter's claim.

*Employer Immunity.* A significant part of Walter's problem was the employer's failure to provide a safe working environment. Every jurisdiction has replaced the ordinary tort claim against the employer with some kind of statutory scheme requiring the employer to pay worker's compensation in exchange for immunity from tort liability. That would undoubtedly apply here to shield Bessemer from any liability. However, it might have an effect on how the damages are calculated, since (as will be discussed below) the liability for non-economic damages is several rather than joint.

*Contributory Fault.* Another problem would be that Shell would argue that Walter was contributorily negligent in the way he exposed himself to the chemicals. Apparently he didn't take any precautions. It isn't clear whether a reasonable person would have taken any precautions at the time, but this could be an issue. Also, the argument might be made that Walter in some way assumed the risk of his exposure. I don't believe that this claim would have any significance independent of a contributory negligence argument. In any event, this jurisdiction follows a *pure* comparative fault rule (Civil Code § 1430) and thus a finding of contributory fault would only reduce the recovery by whatever percentage of fault is found.

*Statute of Limitations.* Although Walter's exposure occurred many years ago, and his damage may have been sustained more than three years before he filed his claim (the usual statute of limitations period), Walter didn't discover his injury until October 1996. Thus, under the discovery rule, the statute didn't begin to run until he became aware of the existence of his claim. Similarly, I do not anticipate any problem with a possible statute of repose, even though the product caused the injury more than 12 years ago, because the product did not behave safely for a period of time before it caused injury.

### Additional Defendants and Joint Liability

*Governmental immunity.* Another potential defendant would be the regulatory bodies who failed to require adequate warning labels or protective information to Walter. OSHA is a federal agency, but whether the responsibility was OSHA's (and thus governed by the Federal Tort Claims Act) or state (*see* Govt. Code § 815 et seq.) there is no liability for injuries caused by the exercise of a "discretionary function" (GC § 820.2).

*The incinerator.* Yet another potential defendant would be the manufacturer of the incinerator facility. If in fact the incinerator is a product, the analysis would be similar to the analysis of the claim against Shell. On the other hand, it might not be considered a product (if it is a unique construction, it might be a fixture to real property) and therefore would only be covered by a negligence standard. There is nothing about the facility that suggests that a reasonable person would have to provide warnings (since an incinerator could be used for a wide variety of products, no single warning or set of warnings would be effective or appropriate).

*Joint Liability.* In this jurisdiction defendants are jointly liable for economic damages (CC § 1431) but only severally liable for non-economic damages (CC § 1431.2). If there is a finding that the employer was partially at fault for allowing Walter to be exposed to hazardous chemicals (or if other defendants were added under one or more of the theories discussed above), then the loss might be allocated so that Shell would only have to pay its percentage of fault for the non-economic damages (including loss of consortium). Shell would still be liable for the whole of the economic loss (lost wages he would have earned if he hadn't died prematurely, and any health care or funeral costs).

### Measure of Damages

The wrongful death statute (CC § 377.20 et seq.) is in two parts. The first part (§ 377.34) allows Walter's estate to recover whatever damages he suffered prior to death, excluding pain and suffering. That would mean any lost wages or medical expenses. Walter died of stomach cancer and the pain and suffering associated with that might be considerable, but it is apparently not recoverable. On the other hand, Ida is permitted under § 377.61 to recover "damages . . . that, under all the circumstances of the case, may be just." This would presumably include the full range of economic and non-economic damages, including arguably loss of society and companionship, but it excludes damages recoverable under § 377.34 (because they would be duplicative).

The statute also authorizes Ida to recover punitive damages. Ordinarily punitive damages are only recoverable where the defendant acts with malice or demonstrates a reckless disregard for human life. In this case the failure to provide proper warning appears to have been negligent, but it is not a strong case for punitive damages. I would at least allege it in the complaint, and see what evidence we could find that Shell knew about the risk and willfully refused to warn workers like Walter about the risk.

### QUESTION 2

This case is based upon *Henry v. Taco Tio, Inc.*, 614 So.2d 772 (1993). In that case the Louisiana Supreme Court rejected any wrongful life claim on behalf of the children.

I would feel quite confident that the plaintiff's wrongful life claims will be unsuccessful. A wrongful life recovery is based upon the claim that the child's birth is an injury to the child, and that, in effect, the child would have been better off never to have been born. That seems particularly difficult to sustain in this case, for several reasons.

First, in the typical wrongful life case (like *Harbeson v. Parke Davis* the child has a significant disability (in that case, fetal hydantoin syndrome) that would prevent the child from enjoying normal existence. The birth of a normal child (while it might give rise to a wrongful birth claim) does not support a wrongful life claim. In this case the children are normal in every way except that they are illegitimate. This seems to be a weak basis upon which to claim that the children would be better off if they had never been born.

Second, the typical wrongful life case involves a third party whose negligence leads to the birth of a child (for example, in *Harbeson* it was a physician and/or a pharmaceutical manufacturer). The parents in such a case are innocent of any wrongdoing. Here the mother consented to sex with the father, who is the defendant. Neither the mother nor the father is innocent with respect to the child's disability. Moreover, although this is not a typical parental immunity case, the notion of allowing an illegitimate child to sue its father for wrongful life would be a bad precedent. Aside

from the sexual harassment issues, this case is no different from many other cases in which children are brought into the world as a result of irresponsible behavior by one or both parents, without the benefit of marriage. If this case were held to be the basis of a wrongful life recovery, little would distinguish this case from many other cases. The "floodgates" argument against expanding tort liability would be a strong one.

Finally, the difficulty in measuring damages would militate against recognizing a wrongful life claim in this case. In a wrongful life case, the court typically awards the difference between the cost of raising a normal child and the costs of raising a child with the particular disabilities that the child endures. Costs of special medical equipment, or compensatory education, or other special care are permitted; but no general damages for pain and suffering are typically awarded. Here it is difficult to identify any special damages caused by being illegitimate, so an award would be almost impossible to measure. In addition, in cases like *Harbeson* the court has already made a wrongful birth award to the parents, and so the wrongful life award is necessary only to compensate for expenses beyond the years of minority that are not covered in the wrongful birth award. Coming up with those damages would be difficult.

SPRING '98 FINAL—CHECKLIST

QUESTION 1

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| <input type="checkbox"/> Overview                            | <input type="checkbox"/> Contributory Fault                      |
| <input type="checkbox"/> Claim v. Shell                      | <input type="checkbox"/> Contributory Negligence                 |
| <input type="checkbox"/> Product Liability Claim - Defect    | <input type="checkbox"/> Pure comparative fault                  |
| <input type="checkbox"/> Nature of Defect?                   | <input type="checkbox"/> Assumption of Risk                      |
| <input type="checkbox"/> Manufacturing Defect?               | <input type="checkbox"/> No different from C.N.                  |
| <input type="checkbox"/> Use of violation to show defect     | <input type="checkbox"/> Joint tortfeasor issues                 |
| <input type="checkbox"/> Strict Liability                    | <input type="checkbox"/> Joint liability for econ. damages       |
| <input type="checkbox"/> Warning Defect                      | <input type="checkbox"/> Several Liability for non-econ. damages |
| <input type="checkbox"/> Question of jurisdictional standard | <input type="checkbox"/>   |
| <input type="checkbox"/> Consumer expectations               | <input type="checkbox"/> Statute of Limitations                  |
| <input type="checkbox"/> Relevance of knowledge of danger    | <input type="checkbox"/> Statute of Repose                       |
| <input type="checkbox"/> Strict Liability standard           | <input type="checkbox"/>   |
| <input type="checkbox"/> Negligence standard                 | <input type="checkbox"/> Other potential defendants              |
| <input type="checkbox"/> Employer's role                     | <input type="checkbox"/> Barrel/Incinerator Mfr                  |
| <input type="checkbox"/> Immunity of employer                | <input type="checkbox"/> Wrongful death statute                  |
| <input type="checkbox"/>                                     | <input type="checkbox"/> His estate gets economic \$\$           |
| <input type="checkbox"/> OSHA / state regulator              | <input type="checkbox"/> W's pain and suffering not recoverable  |
| <input type="checkbox"/> discretionary function immunity     | <input type="checkbox"/> Ida gets economic damages: Lost wages   |
| <input type="checkbox"/>                                     | <input type="checkbox"/> also non-economic (consortium)          |
| <input type="checkbox"/>                                     | <input type="checkbox"/> punitive damages?                       |
| <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"/> Measure of damages would be difficult    |
| <input type="checkbox"/>   | <input type="checkbox"/> No special damages from illegitimacy     |
| <input type="checkbox"/> Nature of Wrongful Life Claim                   | <input type="checkbox"/> P&S damages not usually allowed          |
| <input type="checkbox"/> <i>Harbeson</i>                                 | <input type="checkbox"/> No duplication of wrongful birth damages |
| <input type="checkbox"/> Child would be better off not to have been born | <input type="checkbox"/> Conclusion: very weak case.              |
| <input type="checkbox"/> Hard to apply to this case                      | <input type="checkbox"/>  |
| <input type="checkbox"/> Parents are not innocent                        | <input type="checkbox"/>  |
| <input type="checkbox"/> "floodgates" problem                            | <input type="checkbox"/>  |
|  | <input type="checkbox"/>  |

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