

SAMPLE ANSWER TO MID-TERM EXAM

QUESTION 1

*This case is loosely based upon Lever Bros. v. Langdoc, 655 N.E.2d 577 (1995). In that case the court imposed liability on Lever Bros., particularly in view of a statutory violation; the damages issues were not in the original case, however.*

In order to hold Lever Bros. ("L") liable for Tharon ("T")'s injuries, we would need to establish (1) a breach of duty that (2) proximately caused (3) compensable damage.

1. Breach of Duty

L could be shown to have breached a duty toward T if either (a) they acted negligently or (b) if their activity was subject to strict liability.

*Negligence.* Negligence is the failure to use reasonable care. It appears that the discharge of this fatty substance was something that was out of the ordinary. Although L had a permit to discharge waste, there are probably restrictions on what kinds of waste they can discharge. If there was a violation of the wastewater permit, or some other statute prohibiting this kind of discharge, then we could argue that they were negligent per se. Some jurisdictions make an unexcused statutory violation conclusive proof of negligence, while others simply allow the use of a statutory violation as evidence from which the jury can find negligence.

Another theory might be that the discharge of the fat was a result of some negligent act on L's part. The evidence appears to have excluded the City as a responsible party, and coupled with the subsequent flooding incident, we can reasonably conclude that the fatty substance came from L. If this is the kind of accident that doesn't ordinarily occur in the absence of negligence, and if it was within the control of L, and if no other explanation is plausible, then the judge may allow the *res ipsa loquitur* inference, that is, that the accident "speaks for itself."

Another factor that might come into play is the actions of L in paying for the plumber's services after the first incident. Ordinarily post-accident repairs are not admissible to prove negligence on the part of the defendant, but there is an exception to this rule where it is used to prove ownership. If L is denying that the fatty substance came from its plant, then the payment of the plumber's services might be admissible to show that it was from their plant.

Finally, we might find out more about any customary practices within the manufacturing industry of which L is a part. Custom of the industry may be used by the jury to approximate the standard of reasonable care, although the jury is free to set a higher standard if industry practices are too lax.

*Strict Liability.* I don't think there is anything abnormally dangerous about L's activity, but it might be considered a nuisance to deposit the fatty substance in other people's homes. A defendant is subject to strict liability for a nuisance, that is, an imposition upon a neighbor in violation of the neighbor's reasonable expectation to be free from what the defendant is doing. In this case it seems that all of the neighbors of L's plant could reasonably expect that they should not have this fatty substance deposited all over their belongings. Although T was only a renter, she still enjoyed a kind of property interest that should entitle her to complain of a nuisance that causes her

damage. In essence, T could rely on a kind of *Rylands v. Fletcher* principle that when you operate something potentially dangerous (in this case discharging wastewater into the sewer system) you are liable if it gets out and causes mischief. That's what happened here.

## 2. Proximate Cause

T must show that her injuries were proximately caused by L's breach of duty. Proximate cause consists of two elements: first, that the injury would not have occurred but for the defendant's breach of duty; and second, that the breach was also a *legal* cause of the injury—in other words, that there was a natural and continuous sequence between the cause and the injury. Here it has not been formally admitted that the fatty substance was L's responsibility, but it seems pretty obvious, particularly in view of the post-accident repair and the radius of damage from the flooding. The more serious question is what the nature of the damage would have been from the flood in the absence of the fatty substance. The facts state that the flood was caused by heavy rain and a power failure. Although the goods were "unsalvageable" because of the fatty substance, it's not clear what damage would have occurred if there had just been a flood, as distinguished from a flood plus the fatty substance. But assuming that we can show that, but for the fatty substance, we could have salvaged her goods, then she is entitled to the difference. It's even possible that we might have a loss of a chance theory, if it was still likely that the flood would have destroyed the goods, but the fatty substance deprived her of a chance of salvage. Some jurisdictions permit the use of a loss of chance theory, while others do not.

Legal cause should also pose no problem. The flood would not be considered a superseding cause, the discharge certainly increased the risk, and it is quite foreseeable that such damage would occur.

## 3. Damages

T should be able to recover the value of the property that she lost in the flooding. The more difficult question is whether her emotional injuries are also recoverable. Ordinarily, there must be physical injury in order to permit recovery of emotional damages. However, in extreme cases courts sometimes permit recovery if the plaintiff can establish a "guarantee of genuineness" with respect to the emotional injuries. Here the flooding by itself isn't the kind of event (cf. *Johnson v. State of New York*) suggesting such emotional injuries, much less providing a *guarantee*, but perhaps the plaintiff's understandable reaction, in light of her family history, might serve as a basis for permitting a court to allow emotional damages.

As a related matter the test for property damage is ordinarily fair market value. In this case the shawl might not have much fair market value, but had enormous sentimental value to the plaintiff. If the fair market value test is inadequate, courts sometimes allow a different test to be used that includes sentimental value.

## QUESTION 2

I would anticipate potential claims from C.J. Francis ("CJ") and F.N. Francis ("FN"). To recover, they would have to show that AALAR negligently caused compensable injury to them.

*This case is based upon AALAR v. Francis, 1998 WL 178787 (1998). In that case the court reversed a \$60,000 verdict in favor of the plaintiffs, finding that the evidence was insufficient for a case of negligently inflicted emotional distress, and the defendant's conduct was not "wanton."*

1. Negligence

It seems fairly clear that AALAR was negligent in renting the automobile without first removing it from the NCIC computer. Negligence is the failure to use reasonable care. One method of proving negligence is to show that the defendant's employee failed to follow a practice or procedure adopted by the defendant. In this case there appears to be a policy of doing so, and that our employees' failure to do this was inconsistent with company policy. "Rulebook violations" are admissible against the employer to show negligence.

Similarly, the custom of the industry might be admissible to show the steps that other companies follow in getting automobiles removed from the NCIC computer. While industry custom is admissible to show what is commonly done, the jury may decide that the whole industry was unreasonably lax. Another consideration would be a kind of Learned Hand analysis: what is the burden of preventing the injury in comparison with the likelihood that an injury will occur, multiplied by the magnitude of the anticipated injury. This case illustrates that sooner or later something will occur.

2. Proximate Cause

AALAR is only liable for those injuries proximately caused by its negligence. The first prong of the proximate cause test is whether the injury would have occurred, more probably than not, but for AALAR's negligence. Obviously, if the car had been taken off the NCIC computer, CJ never would have been stopped by the police.

The second prong might give us more hope. A defendant is only liable if its breach of duty is also a *legal* cause of the plaintiff's injuries, that is, if the negligence led in a direct and natural sequence to the injury. We could argue that the police conduct was a superseding cause of the injury, breaking the chain of causation. However, I don't think that argument would be successful. In the first place, the police conduct was precisely what would be expected from our negligence; it is the very risk that makes it important to get the car cleared from the list of stolen vehicles. In addition, the police conduct was not itself reprehensible; they were simply doing their job.

Finally, it might be said that this was an unusual chain of events, similar to the *Palsgraf* case. But since the car was rented to the very person who was injured, the plaintiffs are clearly foreseeable victims. Thus, we would have no defense based on arguing lack of proximate cause.

3. Damages

The major area where we might be hopeful is to argue that the plaintiff didn't suffer any legally compensable damage. There was no physical injury, and ordinarily the plaintiff can't recover damages for emotional injury unless it is accompanied by a physical injury. On the other hand, many courts utilize some kind of "guarantee of genuineness" exception to permit recovery in egregious cases. Ours might be considered such a case, thus allowing the fright, inconvenience, and humiliation caused by the police conduct. If so, CJ and FN could recover damages for the emotional injuries.

A more frightening prospect is punitive damages. Punitive damages may be awarded if the defendant has acted with reckless disregard of the plaintiff's safety. In this case the car was rented, knowing that it hadn't yet been cleared from the NCIC computer. Something like this was bound to happen sooner or later. On the one hand, it was an act of inadvertence, but on the other it seems as though this was pretty shoddy behavior. Even if CJ and FN don't have much in the way of compensatory damages, they might be able to get a big award if the jury gets mad at AALAR and thinks that they need a wake-up call.

## CHECKLIST

## QUESTION 1

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|--------------------------|----------------------------|--------------------------|------------------------------------|
| <input type="checkbox"/> | Overview                   | <input type="checkbox"/> | strict liability                   |
| <input type="checkbox"/> | Claim v. Lever Bros.       | <input type="checkbox"/> | nuisance                           |
| <input type="checkbox"/> | Negligence                 | <input type="checkbox"/> | reasonable expectations test       |
| <input type="checkbox"/> | Definition of negligence   | <input type="checkbox"/> | Rylands v. Fletcher                |
| <input type="checkbox"/> | Res ipsa loquitur          |                          |                                    |
| <input type="checkbox"/> | exclusive control?         | <input type="checkbox"/> | proximate cause                    |
| <input type="checkbox"/> | negligence per se          | <input type="checkbox"/> | but for test                       |
| <input type="checkbox"/> | jurisdictional differences | <input type="checkbox"/> | more probable than not standard    |
| <input type="checkbox"/> | post-accident repair       | <input type="checkbox"/> | loss of a chance?                  |
| <input type="checkbox"/> | exception for ownership    | <input type="checkbox"/> | legal cause not an issue           |
| <input type="checkbox"/> | custom of the industry     |                          |                                    |
| <input type="checkbox"/> |                            | <input type="checkbox"/> | Damages                            |
| <input type="checkbox"/> |                            | <input type="checkbox"/> | emotional injury w/o physical harm |
| <input type="checkbox"/> |                            | <input type="checkbox"/> | guarantee of genuineness?          |
| <input type="checkbox"/> |                            | <input type="checkbox"/> | property damage                    |
| <input type="checkbox"/> |                            | <input type="checkbox"/> | FMV rule                           |

## QUESTION 2

- |                          |                             |                          |                                |
|--------------------------|-----------------------------|--------------------------|--------------------------------|
| <input type="checkbox"/> | Overview                    | <input type="checkbox"/> | superseding cause issue        |
| <input type="checkbox"/> | Overview                    | <input type="checkbox"/> | high foreseeability            |
| <input type="checkbox"/> | negligence                  | <input type="checkbox"/> | not out of proportion          |
| <input type="checkbox"/> | custom of the industry      | <input type="checkbox"/> | police were doing normal thing |
| <input type="checkbox"/> | rulebook violation          | <input type="checkbox"/> | Palsgraf issue?                |
| <input type="checkbox"/> | Learned Hand test           |                          |                                |
| <input type="checkbox"/> | vicarious liability         | <input type="checkbox"/> | Emotional injury alone         |
|                          |                             | <input type="checkbox"/> | guarantee of genuineness?      |
| <input type="checkbox"/> | proximate cause             | <input type="checkbox"/> | punitive damages               |
| <input type="checkbox"/> | but-for cause not a problem | <input type="checkbox"/> | reckless disregard standard    |
| <input type="checkbox"/> | legal cause                 | <input type="checkbox"/> |                                |