Professor DeWolf Fall 1999
Torts I October 4, 1999

SAMPLE ANSWER TO MINI-EXAM

[*This case is based upon* Wagner v. Anzon, Inc., *453 Pa.Super. 619, 684 A.2d 570 (1996). In that case the court affirmed a jury verdict finding that the former owner (who was sued after the current owner settled).*]

To be entitled to compensation (or to an injunction) the complainants ("Cs") would have to establish that NLI breached a duty toward them. That can be done either by establishing that NLI acted *negligently* or that their conduct is subject to *strict liability*.

Negligence

Cs would argue that NLI were negligent in operating their plant. Negligence is the failure to use reasonable care. Reasonable care is what an ordinary prudent person would do in the same or similar circumstances. Since most people don't have any experience operating a lead processing plant, they would rely on experts who would inform them of what is considered reasonable in this industry. What is customarily done in the industry is often a benchmark for reasonable care, but even if NLI is in compliance with that standard, Cs may argue that the whole industry has been acting unreasonably in failing to adopt more stringent standards for lead emissions.

Another standard that would likely be used is the statutory or regulatory standards set either by the City of Delphi or by the EPA. It appears that the City has adopted a policy (DAMC § 3-301(1)) that decries air pollution, but doesn't set any particular standard. If there is an applicable statutory or regulatory standard (and where the statutory regulation was designed to prevent the kind of harm that the plaintiff suffered—a requirement we have met here), then some jurisdictions treat the violation of that standard as negligence *per se* or negligence as a matter of law. (Other jurisdictions treat such violations only as evidence to be considered by the jury.) Even the times when the "bag house" caught fire and presumably sent particulates into the air, the violations might be considered excused. But we should look more carefully into whether NLI has violated these standards.

I'd also look to see if the failure of the cooling system or the fires were a result of any violations of company policy by any of the employees. That may be considered by the jury and would be strong evidence of negligence. Any negligence on the part of NLI's employees (assuming such negligence was committed in the course and scope of employment) would be the responsibility of NLI under the principle of vicarious liability.

Strict Liability

NLI might also be held strictly liable for Cs' damages. Two theories of strict liability might apply: liability for *abnormally dangerous activities* and *nuisance*.

(1) An *abnormally dangerous activity* is one that has a high degree of risk associated with it, coupled with a high degree of harm and an inability to avoid harm through the use of reasonable care. Although lead can be hazardous, I don't think it would be considered an abnormally dangerous activity.

(2) On the other hand. *nuisance* appears to be a promising avenue. The central test for a nuisance claim is whether or not the defendant's intrusion upon the plaintiff constitutes an interference with the plaintiffs' *reasonable expectations* to enjoy their property. Here Cs would

claim that the emissions from the plant constitute such an invasion. Cs' counsel will undoubtedly argue that the health hazards from lead exposure are unacceptable, and that Cs have a reasonable expectation to be free from them. On the other hand, NLI could argue that given the plant's existence since 1906 suggests that those who moved to its environs "came to the nuisance." Our cases indicate that in similar cases the courts have divided up the remedies either by allowing damages but not granting an injunction, or by granting an injunction but requiring the plaintiffs to pay for the cost of the move. Here the court might defer (as it did in the cement case) to the expertise of the EPA (or the City Council) in deciding what sort of pollution levels are acceptable.

We should find out whether the plaintiffs are seeking only damages or are also seeking an injunction. Although we might be able to avoid an injunction, the risk would make a settlement for damages attractive.

CHECKLIST

- ☐ Overview -- Breach of Duty
- ☐
- ☐ Negligence Theory
- ☐ Negligence Defined
- ☐ Reliance on Experts
- ☐ Custom of the Industry
- ☐ Potential Exception
- ☐
- ☐ Negligence per se
- ☐ City / EPA regulations
- ☐ Statutory purpose met
- ☐ Jurisdictional difference
- ☐ Potential excuse
- ☐ Rulebook violation
- ☐ Vicarious Liability
- ☐ Strict Liability
- ☐ Abnormally Dangerous Activity
- ☐ Restatement criteria
- ☐ probably not a good bet
- ☐ Nuisance
- ☐ reasonable expectations
- ☐ property interests
- ☐ "coming to the nuisance"
- ☐ injunctive remedy
- ☐ EPA/City pre-emption
- ☐ mixed damages/injunction cases
- ☐
- ☐
- ☐
- ☐