

FALL EXAM SAMPLE ANSWER

QUESTION 1

The facts for this question were loosely based upon *Bahrle v. Exxon Corp.*, 279 N.J. Super. 5, 652 A.2d 178 (1995), which rejected claims for emotional distress on the part of neighboring landowners.

Texaco could be held liable if the plaintiffs ("Ps") could establish that (1) Texaco breached a duty that they owed Ps, (2) that such breach proximately caused injury to Ps, and (3) that they suffered legally compensable damages.

I. Breach of Duty

Ps might argue that Texaco breached their duty in two different ways: First, that their operations were *negligent*; and second, that they should be held *strictly liable* for selling gasoline products.

A. Negligence

Texaco owed Ps a duty to use reasonable care in their operations. Reasonable care is what a reasonably prudent person would do in the same or similar circumstances. Here the question is whether Ps can identify something Texaco failed to do that a reasonably prudent person would have done. One concept would be that the standards for control of the users of gasoline were lax. Apparently there is evidence that in the delivery of gasoline there were periodic spillages; or that the containers used for underground storage were subject to corrosion. Would a reasonable person in Texaco's position worry about this and do something to avoid it? One indicator of reasonable care is industry custom. If other oil companies like Texaco did the same thing (i.e., nothing), then that is evidence that Texaco's behavior was reasonable. On the other hand, it is not conclusive; if Ps can show that a reasonable person would have recognized the need for a higher level of care than what was common in the industry, then the jury could find Texaco negligent. Negligence per se might apply if Texaco's conduct violated an applicable statute, but there is no indication that such a violation has occurred.

If someone employed by Texaco negligently caused the harm, then Texaco would be vicariously liable for that negligence. However, it appears that both K-L and Rule were independent contractors -- that is, Texaco did not have the right to control they way they conducted their operations, and thus would not be liable for negligence on their part.

B. Strict Liability

A second avenue for establishing liability is to show that Texaco was engaged in an activity for which they could be held *strictly liable*.

*Abnormally Dangerous Activity* (ADA). One is strictly liable for harm caused by an ADA, which is defined by the Restatement according to the application of six criteria. It is conceivable (though doubtful) that someone could say that refining and distributing gasoline is itself an

abnormally dangerous activity, and that all the harm flowing from that activity should be charged to Texaco. I doubt that such a sweeping claim would be accepted. Instead, it would be necessary to focus on some aspect, like selling gasoline to local distributors or dealers, that could be characterized as abnormally dangerous. Although there are hazards, they are not ones that cannot be eliminated through reasonable care. Moreover, the risk of contamination is not so hazardous as is the explosion of truckloads of gasoline, so the claim of a big hazard is not so great.

*Nuisance.* One is strictly liable for allowing injurious substances to trespass or migrate to neighboring property. Again, it is not Texaco that put the gasoline into the environment—at least, not directly—so it doesn't seem likely that a nuisance claim would be applicable against Texaco.

## II. Proximate Cause

The second step is to see whether Ps could establish proximate cause. Ps must show by a preponderance of the evidence that Texaco's breach of duty was both a *but-for* cause of the injury as well as a *legal* cause.

### A. But-for Cause

Even if Ps could establish that Texaco breached a duty, Ps don't seem to have very strong evidence that Texaco gasoline actually caused a problem. Ps' expert seems to be engaged in a lot of speculation rather than having a scientifically valid opinion. Perhaps this would wind up like the Woburn case in which the jury is lost in a lot of technical geological testimony. I don't think that's good for us, but it makes it tough for Ps as well.

However, *legal cause* would appear to be easy, since (if the other tests are met) the kind of injury Ps have suffered is foreseeable and didn't result from superseding causes.

## III. Damages

Ps would have a pretty substantial damage claim. They would be entitled to economic loss suffered from the contamination, and perhaps for non-economic loss (fear of cancer, etc.). Again, establishing causation with any kind of cancer-causing agents would be difficult, but jurisdictions are split on how to handle cases where plaintiffs allege fear of cancer from exposure to toxic chemicals. Although the case is weak, the damages would be very high if proven.

## QUESTION 2

Most of the facts in this case (except for the alcohol facts) were drawn from *Estate of Strever v. Cline*, 278 Mont. 165, 924 P.2d 666 (1996). The trial court granted summary judgment to the gun owner, finding that Cline's acts operated as a superseding cause of the death).

To recover, Samantha Prescott ("SP") would need to establish (1) negligence<sup>1</sup> by one or more defendants; (2) that such breach proximately caused injury to SP, and (3) that she is entitled to compensable damages. It is probably most helpful to review the breach of duty and causation questions for the two primary defendants and then address damages separately. Also, although Cline is obviously responsible for the wrongful death, his conviction makes him a poor prospect for recovery, so we won't waste much time addressing the claim against him.

I. Claim v. Tom Susanj ("TS")

TS would be liable if his negligence proximately caused Tyrone's death.

*Negligence.* Negligence is the failure to use reasonable care. In this case the issue is whether TS was negligent in leaving his gun in the car. In particular, he would be negligent if the gun was left loaded, since that is both a dangerous thing to do, and is specifically forbidden by statute. Obviously, there is a significant factual dispute over this issue, since Morris and Cline claim the gun was loaded, and TS says that it was not.

*Negligence per se.* If the jury finds that the gun was loaded, then TS would be subject to the principle of negligence per se, which finds a defendant negligent as a matter of law for violating a statute where the statute was designed to prevent injuries of this type. Again, the jury will have to determine if the gun was loaded or not; even if they do, not all jurisdictions hold a statutory violation to be a matter of law for the judge; some allow the jury simply to consider it as evidence. Moreover, the judge would have to determine that part of the statutory purpose for requiring guns to be unloaded was to prevent accidents of this kind.

*Proximate Cause.* SP would have to show by a preponderance of the evidence that the death would not have occurred *but for* TS' negligence, and in addition that it occurred in a direct and unbroken sequence. As for but for causation, it seems closely related to the question of whether the gun was loaded or not; if the jury finds the gun was loaded, that makes it likely that the jury would find that the accident wouldn't have happened with an unloaded gun. On the other hand, if the jury believes the gun was unloaded and Cline loaded the clip into the .22, then it would be hard to establish any but-for cause relationship.

*Legal Cause.* Worse for SP, legal cause might be a problem; if either the convenience stores or Morris/Cline are viewed as superseding causes of the injury, then the chain of causation would be broken and SP could not recover. Does the statute speak to this issue? Was one of the purposes in requiring transportation of unloaded weapons to prevent kids from breaking into cars and causing harm while playing with the weapon? That seems like a stretch. Unlike the cases involving stolen vehicles, the connection between the statutory violation and the injury is much more tenuous.

I. Claim v. Convenience Stores ("CS")

A second avenue of investigation would be a claim against CS. The legal theories would be similar to the ones against TS.

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1. Technically, SP would be allowed to prove a breach of duty either by establishing negligence or by showing that one or more defendants is strictly liable. However, since none of the defendants were engaged in an abnormally dangerous activity, or was there any property interest that could be subject to a nuisance claim, the case can be simplified to refer to a series of negligence claims.

*Negligence.* The sale of alcohol to Cline was obviously a mistake. A reasonable person wouldn't sell alcohol to a minor. In particular, a statute (§ 16-3-301) forbids it. However, in this case there are generous excuse provisions that require only that the seller relied on documentary evidence that a reasonable person would accept (§ 301(6)(a)). The real question is the quality of the fake ID and whether a reasonable person would accept it. Since all four convenience stores accepted his fake ID, there might be a kind of "safety in numbers" showing that reasonable people would accept it.

*Causation.* The first question is whether the alcohol was a but-for cause of the injury; would a sober Cline have made better decisions and thus avoided the tragedy? That seems like a reasonable assumption; moreover, in order to tie each of the CS to the tragedy, SP would have to show that Cline consumed beer from each CS or that there is some effect of each sale on his intoxication. CS might argue that no one sale caused the injury, but in cases of multiple redundant causes courts employ a "substantial factor" test that would require only that each sale of alcohol was a substantial factor in causing the injury.

*Legal Cause.* Like TS, CS would argue that the conduct of Cline was a superseding cause of the injury. If the jury believed that, then they would find that there was a break in the causal chain and that CS is not liable for SP's injuries.

### III. Damages

The state of Linden uses a survival statute to handle wrongful death cases. The statute, § 27-1-501, simply gives the decedent's estate the right to sue for whatever he would have been entitled to. Further, § 27-1-323 states that damages in such a case shall be awarded in an amount "as ... may be just." Thus, it appears that Tyrone's estate would file an action to recover both economic and non-economic damages in the jury's discretion. Presumably, Samantha as Tyrone's widow would be the chief beneficiary of Tyrone's estate.

Economic damages would include wages that Tyrone would have earned had he lived. It is unclear what non-economic damages would be recoverable; perhaps the loss of the ability to enjoy life or some other measure of damages would be used to compensate the estate for Tyrone's loss. Another wrinkle is whether or not there would be a separate loss of consortium claim for Samantha, on top of what is permitted to the estate. I don't think that's a very good argument, since the statute talks in terms of recovery for the decedent, rather than for the surviving relatives. On the other hand, the open-ended quality of the statute might make such an argument interesting.

Finally, there doesn't appear to be a strong case for punitive damages, since neither CS or TS was engaged in behavior that could be characterized as reckless or malicious. Nor would there be any effect of the collateral source statute, which appears directed at cases in which there is no subrogation right. (If Tyrone were entitled to worker's comp., he would have to reimburse worker's comp. On the other hand, if there were a life insurance policy that didn't require reimbursement, then such an amount might reduce the estate's overall award.)

Fall '99 Torts I Checklist (DeWolf)

QUESTION 1

- |   |   |
|---|---|
| <input type="checkbox"/> <b>Overview</b>                            | <input type="checkbox"/> <b>Proximate Cause</b> defined                   |
| <input type="checkbox"/> <b>Negligence</b> Theory                   | <input type="checkbox"/> <b>But-for</b> cause                             |
| <input type="checkbox"/> Was failure to control negligent?          | <input type="checkbox"/> Their <b>expert</b> testimony weak               |
| <input type="checkbox"/> <b>Custom</b> of the Industry              | <input type="checkbox"/> Like Woburn case?                                |
| <input type="checkbox"/> <b>Learned Hand</b> Test                   | <input type="checkbox"/> <b>Legal Cause</b> easy                          |
| <input type="checkbox"/> Negligence <b>per se</b>                   | <input type="checkbox"/>  |
| <input type="checkbox"/>  | <input type="checkbox"/> <b>Damages</b>                                   |
| <input type="checkbox"/> <b>Vicarious</b> Liability                 | <input type="checkbox"/> <b>Economic</b> harm                             |
| <input type="checkbox"/> K-L was an <b>independent contractor</b> ? | <input type="checkbox"/> Are <b>non-economic</b> damages recoverable?     |
| <input type="checkbox"/> Any <b>right to control</b> conduct?       | <input type="checkbox"/> <b>Jx</b> test / e.g. " <b>guarantee</b> "?      |
| <input type="checkbox"/>  | <input type="checkbox"/>  |
| <input type="checkbox"/> <b>Strict</b> Liability                    | <input type="checkbox"/> <b>Conclusion:</b> Damages large, liability weak |
| <input type="checkbox"/> <b>Abnormally dangerous</b> activity?      | <input type="checkbox"/>  |
| <input type="checkbox"/> Did <b>Texaco</b> engage in ADA?           | <input type="checkbox"/>  |
| <input type="checkbox"/> <b>Nuisance</b>                            | <input type="checkbox"/>  |
| <input type="checkbox"/>  | <input type="checkbox"/>  |
| <input type="checkbox"/>  |   |
| <input type="checkbox"/>  |   |

QUESTION 2

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|---|--|
| <input type="checkbox"/> <b>Overview</b>                          | <input type="checkbox"/> <b>Proximate Cause</b> Qs for CS                      |
| <input type="checkbox"/> (No <b>strict liability</b> claim)       | <input type="checkbox"/> But-for: Did alcohol <b>change</b> behavior?          |
| <input type="checkbox"/>  | <input type="checkbox"/> Multiple <b>redundant</b> causes                      |
| <input type="checkbox"/> Negligence Claim v. <b>Tom Susanj</b>    | <input type="checkbox"/> <b>Substantial factor</b> test                        |
| <input type="checkbox"/> Negligence <b>defined</b>                | <input type="checkbox"/> <b>Legal Cause</b> questions                          |
| <input type="checkbox"/> Was <b>gun loaded</b> or unloaded?       | <input type="checkbox"/> <b>Superseding</b> cause                              |
| <input type="checkbox"/> Important <b>Jury</b> question           | <input type="checkbox"/> Effect of <b>statute</b> on legal cause?              |
| <input type="checkbox"/> Negligence <b>per se</b> ?               | <input type="checkbox"/>   |
| <input type="checkbox"/> Statutory <b>purpose</b> ?               | <input type="checkbox"/> <b>Damages</b> - Wrongful Death                       |
| <input type="checkbox"/> Jurisdictional <b>variation</b>          | <input type="checkbox"/> <b>Survival</b> Action (§ 27-1-501)                   |
| <input type="checkbox"/>  | <input type="checkbox"/> Presumably Samantha is <b>beneficiary</b>             |
| <input type="checkbox"/> <b>Proximate Cause</b>                   | <input type="checkbox"/> Damages "as ... may be <b>just</b> " (-323)           |
| <input type="checkbox"/> Same question w/ loaded/unloaded gun     | <input type="checkbox"/> <b>Economic</b> harm - what was his earning capacity? |
| <input type="checkbox"/> <b>Legal</b> cause:                      | <input type="checkbox"/> What <b>non-economic</b> harm is recoverable?         |
| <input type="checkbox"/> Strong <b>superseding</b> cause argument | <input type="checkbox"/> Loss of <b>consortium</b> in addition?                |
| <input type="checkbox"/>  | <input type="checkbox"/> <b>Punitive</b> ? -- no "malice" by T or CS           |
| <input type="checkbox"/> Claim v. <b>Convenience Stores</b>       | <input type="checkbox"/> <b>Collateral</b> source -- only if no subro right    |
| <input type="checkbox"/> <b>Negligence</b> Theory                 | <input type="checkbox"/>   |
| <input type="checkbox"/> Negligence <b>per se</b> (§ 16-3-301)    | <input type="checkbox"/> <b>Conclusion:</b> weak case, big damages             |
| <input type="checkbox"/> <b>Excuse</b> for ID? (§ -301(6)(a))     | <input type="checkbox"/>   |
| <input type="checkbox"/> <b>Quality</b> of fake ID?               | <input type="checkbox"/>   |
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Exam # \_\_\_\_\_