Torts Tutorial Chapter 1 – Establishing a Breach of Duty

INTRODUCTION

This program is designed to provide a review of basic concepts covered in a first-year torts class and is based on DeWolf, Cases and Materials on Torts (http://guweb2.gonzaga.edu/~dewolf/torts/text). You have accessed the tutorial for Chapter 1, "Establishing a breach of Duty." Included with Chapter 1 is the "Introduction" (which deals with introductory material, including how to read a case and basic principles of civil and appellate procedure). Prior to doing these exercises you should read the relevant material in DeWolf, Cases and Materials on Torts. A brief overview is provided below.

OVERVIEW

The classic definition of a tort case places the burden upon the plaintiff to show (1) that the defendant breached a duty that he owed to the plaintiff; (2) that this breach was a proximate cause of the plaintiff's injury; and (3) that the plaintiff suffered legally compensable damages. Each subsequent chapter describes one of these components.

I. ESTABLISHING A BREACH OF DUTY

In General. Tort law deals with cases where the plaintiff has suffered a loss and is trying to shift the responsibility for that loss to one or more defendants. To do so, the plaintiff must first prove that the defendant's conduct was of a type that entitles the plaintiff to be compensated. The two most common forms of conduct on the defendant's part that justify such loss-shifting are negligence and strict liability.

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A. Negligence

1. *The Standard of Reasonable Care—In General*

Negligence is the failure to exercise reasonable care; reasonable care is what a reasonably prudent person would do in the same or similar circumstances. It is judged objectively, although it may be "customized" where appropriate (*i.e.,* reasonably prudent blind person standard for a person who is blind). When children engage in adult activities (driving, power boating), they are held to an adult standard.

In determining reasonable care, one should consider both the potential for an accident and the cost of taking measures to avoid one. Learned Hand's test (Is B < P*L?) is simply a mathematical expression of the intuitive judgment that reasonable prudence, not perfect safety, is expected.

2. *What Evidence Establishes Negligence?*

a. *Juror Experience.* The simplest way to prove negligence is to suggest to a jury, based upon their experience, that a reasonable person would not have done what the defendant did. Sometimes it is difficult for the jury to identify what it is that a reasonable person would have done, and whether the defendant departed from that standard. Therefore the following aids are often employed:

b. *Custom*. To suggest what standard of care a reasonably prudent person might exercise, the plaintiff (or the defendant) may invoke custom: what do other people customarily do in such circumstances? Although early cases made compliance with custom dispositive, more recent cases suggest that compliance with custom is a minimum expectation, but not the ceiling.

c. *Statutory violations*. Where a defendant violates a statute, the plaintiff may have dispositive proof of what a reasonable person would have done. If the statute is intended to prevent the kind of injury the plaintiff suffered, and if the defendant has no excuse for his behavior, the court may find that violation of the statute is negligence as a matter of law. This still leaves the question of whether the statutory violation caused the injury.

d. *Res ipsa loquitur*. Where the plaintiff's injury occurs as a result of a process that does not ordinarily produce injury in the absence of negligence, and where the evidence concerning negligence is more readily available to the defendant than the plaintiff (because the "instrumentality" or process causing the injury was in the defendant's control), the plaintiff may invoke the res ipsa doctrine. If the plaintiff makes this showing, the case will go to the jury with a presumption of negligence; if the defendant can show that he was not negligent, he can overcome the presumption. Some courts (Ybarra) have extended this concept to include cases where there is ignorance of who caused the injury, not just whether there was negligence.

e. *Employer's Adoption of Safety Practices*. To encourage defendants to correct potentially unsafe conditions, courts refuse to allow plaintiffs to use evidence of post-accident repairs as evidence that the condition prior to the accident was unsafe. However, where employers instruct their employees on safety procedures (e.g. through company rulebooks), the employee's failure to obey such instructions may be used as evidence of negligence.

3. *Establishing Vicarious Liability (Respondeat Superior)*

Where an employee acts negligently, he makes his employer liable for damages caused by his negligence so long as the negligence occurs within the course and scope of his employment.

B. Strict Liability

1. *The Distinction Between Strict Liability and Negligence*

A determination that the defendant is strictly liable doesn't mean that the defendant was wrong to carry on the injury-causing activity; it simply means that where an innocent plaintiff is injured by this particular activity, the plaintiff is entitled to be compensated.

2. *When Is Strict Liability Imposed?*

a. *Where the defendant's activity is "abnormally dangerous"*

Some activities are so dangerous that even with reasonable care injury cannot be avoided. Based on a number of factors (listed in the Restatement), courts may classify an activity as ultrahazardous or "abnormally dangerous"; when they do, the defendant is strictly liable for injuries resulting from that danger. The fault of third parties, or of the plaintiff himself, may or may not affect the plaintiff's right to recover, depending on the jurisdiction.

b. *Where the plaintiff's rights are invaded: Nuisance*

Even though an activity is not ultrahazardous, and even though it is carried on with reasonable care, the plaintiff may be entitled to be free from injury from the activity because of his right to enjoy his own property. Where water is artificially dammed up, or vicious animals or livestock are kept, the owner may be strictly liable for their escape. In cases of nuisance, the law traditionally permits not only damages, but an

injunction against further nuisance; to determine a nuisance the court looks to whether the plaintiff's reasonable expectations have been violated by the defendant's activity.

c. *Animals*

Traditionally courts made the keeping of "ferocious" animals subject to strict liability. Owners of "domesticated" animals were only held to the standard of reasonable care. However, once an owner of an animal was put on notice of an animal's ferocity, the owner then became strictly liable for future damage, even if the injury occurred through no negligence of the owner (*e.g., neighbor allows dog to escape). Many jurisdictions now have special statutes dealing with dog bites.*

d. *Statutory Strict Liability*

By statute the legislature may apply strict liability to an activity that it believes should bear the risk of injury, or where the determination of fault is unduly burdensome. For example, the disposal of hazardous wastes, or the sale of alcoholic beverages, may (with certain limits) be the basis of strict liability.

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EXERCISE

Each question gives you a fact pattern, and then you must choose an answer that best reflects the law as you understand it. Be careful to read the question and the suggested answers thoroughly. Select your answer by clicking on it. If you give an incorrect answer, you will be given feedback on what was wrong with your answer. By clicking on the feedback you will be taken back to the question to try again. Once a correct answer is selected, click on the feedback to go to the next question.

You may begin the exercise by click on a question number below. Throughout the tutorial three Shortcut Buttons will be located in the bottom right-hand corner of each page. The Return Button  brings you back to this page allowing you jump to questions of your choice if you prefer. The Information Button  takes you to the Torts Glossary. The Home Button  takes you to the Torts Tutorial Home Page.

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Question #1

Barry Bostwick operated an automotive brake repair center. Charlie Cantrell got into an accident shortly after Barry had repaired Charlie's brakes. In order to prevail in a negligence action against Barry, the plaintiff would be required to show:

(1)Barry didn't do as good a job repairing Charlie's brakes as he was capable of doing.

(2)Barry violated standards established by the state agency regulating brake repair shops

(3)Barry didn't use the care that a reasonably prudent person would have used.

(4)Barry was the sole cause of Charlie's accident

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Sorry, that's incorrect. That would make the standard of negligence *subjective*. Instead of basing our expectations on how hard Barry tried, we measure whether Barry met an *objective* standard of reasonable care. Try again.

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Sorry, that's incorrect. The fact that Barry violated state-mandated standards will help the plaintiff prove negligence, but it isn't something that the plaintiff MUST do in order to prove negligence. Try again.

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That's correct. The standard in negligence cases is whether the defendant used the care of a reasonably prudent person in the same or similar circumstances. It is an objective, not a subjective standard.

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(3)Barry didn't use the care that a reasonably prudent person would have used.

(4)Barry was the sole cause of Charlie's accident

Sorry, that's incorrect. In the chapter on causation you will learn that there can be multiple causes of a single accident. For our purposes here, the important question is whether Barry was negligent in repairing Charlie's brakes. Try again.

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Question #2

Tommy Trucker was driving an 18-wheeler loaded with 80,000 pounds of bananas down the interstate. As he was negotiating a curve the rear end of the truck encountered a slick portion of the road and slid out of control. The truck then hit a car driven by Mary Motorist in another lane and her car came to a stop in a ditch. Although there was minor damage to the car, the collision caused a blood clot in Mary's leg to travel to her heart, leading to a paralyzing stroke. If Motorist sues Tommy Trucker, which of the following statements correctly describes the law that would be applied?

(1)Motorist can recover damages from T only if she proves that her injuries were caused by T's negligence.

(2)Motorist can recover damages from T if she can prove that someone was negligent, and that T was in control of the instrumentality that hit her.

(3)Motorist can recover damages from T only to the extent that her injuries were foreseeable.

(4)Motorist can recover damages from T only if she can prove that T's conduct fell below the standard currently observed in the trucking industry.

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(4)Motorist can recover damages from T only if she can prove that T's conduct fell below the standard currently observed in the trucking industry.

That's correct. Unless Motorist could prove her injuries were a result of some conduct on the part of T that would justify the imposition of strict liability (not present here), negligence must be proven in order to justify the award of compensation.

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Sorry, that's incorrect. You may be thinking of the res ipsa loquitur doctrine, which permits the jury to infer negligence merely from the happening of the event. However, this is not a good statement of the elements of res ipsa. An unknown SOMEONE may have been negligent, but unless there is proof that T was that someone, no recovery. Simply being in charge of the instrumentality that caused the plaintiff's injury is not enough for res ipsa. M might be able to argue res ipsa, but she would have to show (1) that the accident is of a TYPE that doesn't occur in the absence of negligence; (2) control by T (which we're assuming here); and (3) no other plausible explanation of the cause of the accident. Here the accident could plausibly be explained by the negligence of another party.

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Sorry, that's incorrect. A defendant must be able to foresee SOME risk to the plaintiff, but the plaintiff need not prove that the defendant was able to foresee the extent of injury to the plaintiff. This is often called the thin-skulled plaintiff doctrine.

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Sorry, that's incorrect. Although the custom of the industry is relevant to the determination of negligence, it is not dispositive. In cases like *T.J. Hooper* and *Helling v. Carey*, courts have held that an entire industry may lag behind the standard of reasonable care. If a plaintiff can prove that a reasonably prudent person would have done more than the industry standard, she is entitled to recover.

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Question #3

George Graham was mowing his lawn with a rotary power mower on Saturday afternoon. The lawn had a number of pine cones on it, but George didn't want to bother picking all of them up. As he went over one of the pine cones it was picked up by the suction of the mower, struck by one of the blades, and a portion of it was hurled at high speed out into the street, striking Julia Jasper, who was walking her dog. Which of the following is correct?

(1)If George were 12 years old, his conduct would be judged by what a reasonably prudent 12-year-old would have done;

(2)George is negligent as a matter of law, regardless of age;

(3)If George were an adult, he would be judged negligent as a matter of law

(4)If Julia were a child, George would be negligent as a matter of law.

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(3)If George were an adult, he would be judged negligent as a matter of law

(4)If Julia were a child, George would be negligent as a matter of law.

That's correct. The standard of negligence for a child is the care that would be exercised by a child of the same age, intelligence and experience. The exception that applies is where the child is engaged in an adult activity. It is conceivable that in this case a court could call mowing lawns an adult activity, but I don't think so. In any event, since the other answers are obviously incorrect, this one is the best of the bunch.

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(4)If Julia were a child, George would be negligent as a matter of law.

That's incorrect. Judges decide the issue of negligence as a matter of law only where the evidence is so clear that reasonable minds could not differ; or in situations where there is a statutory violation that requires the court to find negligence. Neither situation is present here.

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That's incorrect. Even if George were an adult, his conduct would be judged by the standard of reasonable care. Judges decide the issue of negligence as a matter of law only where the evidence is so clear that reasonable minds could not differ; or in situations where there is a statutory violation that requires the court to find negligence. Neither situation is present here.

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That's incorrect. Julia's age has no bearing upon whether or not George would be found negligent.

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Question #4

George Gandalf drives through an intersection at 35 miles per hour. The light in his direction is green and the posted speed limit is 30 miles per hour. After stopping for the red light Bilbo Baggins attempts to make a right turn in front of Gandalf. Gandalf is unable to slow sufficiently and strikes Baggins car from the rear. Baggins is injured and sues. Which statement correctly states the law?

(1)Baggins can recover only if the jury decides that a reasonable person in Gandalf's position would have traveled less than 35 miles per hour.

(2)Gandalf will be liable as a matter of law because he has violated a safety statute.

(3)Gandalf will be liable unless he can persuade the jury that most people travel 35 miles per hour on that road.

(4)Gandalf will be liable only if the jury finds that his violation was a proximate cause of Baggins' injuries.

Torts Tutorial Chapter 1:Establishing a Breach of Duty

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(3)Gandalf will be liable unless he can persuade the jury that most people travel 35 miles per hour on that road.

(4)Gandalf will be liable only if the jury finds that his violation was a proximate cause of Baggins' injuries.

Sorry, this answer is only partially correct. It would be true in those jurisdictions that have rejected Cardozo's approach in *Martin v. Herzog*. But in many other jurisdictions proof of an unexcused statutory violation (there is no evidence of an excuse here), where the statute is designed to prevent the type of accident suffered (here the accident resulted from inability to stop in time) would be negligence per se or negligence as a matter of law. Thus the jury would not be asked to determine whether a reasonably prudent person would have obeyed the statute or not.

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Sorry, this statement is only partially correct. In jurisdictions that follow Cardozo's approach in *Martin v. Herzog*, an unexcused statutory violation is negligence per se (negligence as a matter of law). However, other jurisdictions only use the statutory violation as evidence of negligence, and the jury must still decide the question of whether a reasonably prudent person would have obeyed the statute or not.

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(3)Gandalf will be liable unless he can persuade the jury that most people travel 35 miles per hour on that road.

(4)Gandalf will be liable only if the jury finds that his violation was a proximate cause of Baggins' injuries.

Sorry, that's incorrect. The fact that most people travel above the speed limit would not establish that it would be reasonable care to do so. There is an important difference in the way jurisdictions treat statutory violations; some do not recognize the doctrine of negligence per se, and would make it a jury question as to whether or not the statutory violation was negligent. Those jurisdictions that make statutory violations negligence as a matter of law would not let the question of reasonable care go to the jury. The only issue for the jury would be whether or not the violation was excused.)

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That's correct. The determination of the negligence issue depends upon whether this jurisdiction follows Cardozo's approach, making a statutory violation negligence per se (negligence as a matter of law), or the other approach, which uses a statutory violation simply as evidence of negligence for the jury to consider. But in either case, the plaintiff must also establish that the negligence was a proximate cause of the injury. Although there is nothing in this fact pattern to suggest that the negligence was not a proximate cause of Baggins' injury, it is still correct to say that Baggins must establish proximate cause before he can recover.

Question #5

Same facts as the preceding question. (Gandalf traveling 35 in a 30 mph zone, unable to stop for Baggins, who is turning right on a red light into Gandalf's direction of travel.) It would be an excuse to the statutory violation if Gandalf could prove that:

(1)Baggins was himself negligent by turning right at red light.

(2)Gandalf was unaware of the speed limit in that particular area.

(3)Gandalf applied his brakes as quickly as he could when he saw Baggins approach the intersection.

(4)None of the above.

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Same facts as the preceding question. (Gandalf traveling 35 in a 30 mph zone, unable to stop for Baggins, who is turning right on a red light into Gandalf's direction of travel.) It would be an excuse to the statutory violation if Gandalf could prove that:

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(2)Gandalf was unaware of the speed limit in that particular area.

(3)Gandalf applied his brakes as quickly as he could when he saw Baggins approach the intersection.

(4)None of the above.

That's incorrect. It would be a defense (partial or complete, depending upon the jurisdiction) to the claim against Gandalf that B was himself negligent. However, it would not constitute an excuse that would alter the finding that Gandalf was negligent.

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(2)Gandalf was unaware of the speed limit in that particular area.

(3)Gandalf applied his brakes as quickly as he could when he saw Baggins approach the intersection.

(4)None of the above.

That's incorrect. It is an excuse if the actor is unaware of the conditions that make compliance appropriate. For example, if the speedometer on his car was inaccurate, and G wasn't aware of the speed at which he was traveling. However, in this case G's ignorance of the speed limit would be ignorance of the law, rather than of the circumstances that would make compliance appropriate. Ignorance of the law is not a valid excuse.

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(3)Gandalf applied his brakes as quickly as he could when he saw Baggins approach the intersection.

(4)None of the above.

That's incorrect. It is an excuse to a statutory violation that the actor was unable, even through the exercise of reasonable care, to comply with the statute. For example, if G was speeding because the brakes on his car failed as he was going down the hill, that would create a jury question as to excuse. However, here the statutory violation (speeding) was not out of the control of the driver. Stopping, of course, was no longer in his control, but he *would* have been able to stop if he had not already been violating the statute.

Torts Tutorial Chapter 1:Establishing a Breach of Duty

Same facts as the preceding question. (Gandalf traveling 35 in a 30 mph zone, unable to stop for Baggins, who is turning right on a red light into Gandalf's direction of travel.) It would be an excuse to the statutory violation if Gandalf could prove that:

(1)Baggins was himself negligent by turning right at red light.

(2)Gandalf was unaware of the speed limit in that particular area.

(3)Gandalf applied his brakes as quickly as he could when he saw Baggins approach the intersection.

(4)None of the above.

That's correct. Only excuses which are objectively reasonable (such as inability to comply with the statute, or an emergency justifying the violation of the statute) will be accepted as defenses.

Question #6

Ace Construction Company was working on a portion of Interstate 17. They had an orange sign a quarter of a mile before the construction site stating "Slow—Loose Rock Ahead." A motorist lost control on the gravel surface and crashed, suffering injury. After the accident an Ace employee placed a flashing light in front of the sign to illuminate it. Evidence concerning the subsequent use of a flashing light would be:

(1)*inadmissible*, unless Ace had already instructed its employees to illuminate all signs.

(2)*inadmissible*, and so would evidence suggesting that a reasonable person would have done so under the circumstances.

(3)*admissible*, if Ace denied the feasibility of using such lights.

(4)*admissible*, if other companies customarily use such lights.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Ace Construction Company was working on a portion of Interstate 17. They had an orange sign a quarter of a mile before the construction site stating "Slow—Loose Rock Ahead." A motorist lost control on the gravel surface and crashed, suffering injury. After the accident an Ace employee placed a flashing light in front of the sign to illuminate it. Evidence concerning the subsequent use of a flashing light would be:

(1)*inadmissible*, unless Ace had already instructed its employees to illuminate all signs.

(2)*inadmissible*, and so would evidence suggesting that a reasonable person would have done so under the circumstances.

(3)*admissible*, if Ace denied the feasibility of using such lights.

(4)*admissible*, if other companies customarily use such lights.

That's incorrect. The fact that Ace had previously instructed its employees to illuminate warning signs would itself be admissible, but it would not make the evidence of *post-accident repairs* admissible.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Ace Construction Company was working on a portion of Interstate 17. They had an orange sign a quarter of a mile before the construction site stating "Slow—Loose Rock Ahead." A motorist lost control on the gravel surface and crashed, suffering injury. After the accident an Ace employee placed a flashing light in front of the sign to illuminate it. Evidence concerning the subsequent use of a flashing light would be:

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(2)*inadmissible*, and so would evidence suggesting that a reasonable person would have done so under the circumstances.

(3)*admissible*, if Ace denied the feasibility of using such lights.

(4)*admissible*, if other companies customarily use such lights.

That's incorrect. Plaintiff is not barred from arguing that the failure to use lights before the accident was negligent; he's only barred from using as evidence of negligence the post-accident repair.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Ace Construction Company was working on a portion of Interstate 17. They had an orange sign a quarter of a mile before the construction site stating "Slow—Loose Rock Ahead." A motorist lost control on the gravel surface and crashed, suffering injury. After the accident an Ace employee placed a flashing light in front of the sign to illuminate it. Evidence concerning the subsequent use of a flashing light would be:

(1)*inadmissible*, unless Ace had already instructed its employees to illuminate all signs.

(2)*inadmissible*, and so would evidence suggesting that a reasonable person would have done so under the circumstances.

(3)*admissible*, if Ace denied the feasibility of using such lights.

(4)*admissible*, if other companies customarily use such lights.

That's correct. Ordinarily the evidence is inadmissible. But if the defendant makes an issue either of ownership of the premises (usually not in dispute) or feasibility, then the evidence can come in. Note that the defendant can still argue that reasonable care wouldn't require the defendant to do whatever he later did as a subsequent remedial measure; the only thing he must concede is that it was feasible to do so.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Ace Construction Company was working on a portion of Interstate 17. They had an orange sign a quarter of a mile before the construction site stating "Slow—Loose Rock Ahead." A motorist lost control on the gravel surface and crashed, suffering injury. After the accident an Ace employee placed a flashing light in front of the sign to illuminate it. Evidence concerning the subsequent use of a flashing light would be:

(1)*inadmissible*, unless Ace had already instructed its employees to illuminate all signs.

(2)*inadmissible*, and so would evidence suggesting that a reasonable person would have done so under the circumstances.

(3)*admissible*, if Ace denied the feasibility of using such lights.

(4)*admissible*, if other companies customarily use such lights.

That's incorrect. The evidence that Ace used the lights after the accident is still inadmissible. Of course, plaintiff can still use evidence that other companies DO use such lights, and therefore Ace's failure to do so was negligent. The point is that plaintiff shouldn't be able to use evidence that Ace subsequently made the area safer, since that would act as a disincentive toward safety.

Question #7

Herbert Huber was killed in an airplane crash. In order to recover from the airline on a res ipsa loquitur theory, Herbert would be required to produce:

(1)Evidence that the airline was in violation of a safety standard intended to prevent injuries;

(2)Evidence showing that the airline was probably negligent.

(3)Evidence that the operation of the airline was abnormally dangerous

(4)Evidence that sufficiently excludes causes other than the airline's negligence as an explanation for the crash.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Herbert Huber was killed in an airplane crash. In order to recover from the airline on a res ipsa loquitur theory, Herbert would be required to produce:

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(4)Evidence that sufficiently excludes causes other than the airline's negligence as an explanation for the crash.

Sorry, that's incorrect. Evidence of a violation of a safety standard applies in negligence per se cases, but not in res ipsa loquitur cases. Try again.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Herbert Huber was killed in an airplane crash. In order to recover from the airline on a res ipsa loquitur theory, Herbert would be required to produce:

(1)Evidence that the airline was in violation of a safety standard intended to prevent injuries;

(2)Evidence showing that the airline was probably negligent.

(3)Evidence that the operation of the airline was abnormally dangerous

(4)Evidence that sufficiently excludes causes other than the airline's negligence as an explanation for the crash.

Sorry, that's incorrect. The reason for using the res ipsa loquitur doctrine is that the plaintiff usually doesn't know what caused the plane to crash. Herbert may not have any evidence to show that the airline was negligent. The res ipsa doctrine applies in cases where such evidence is missing, but based upon experience with this TYPE of accident, the courts will allow the jury to infer that, if the accident occurred, it probably was due to negligence.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Herbert Huber was killed in an airplane crash. In order to recover from the airline on a res ipsa loquitur theory, Herbert would be required to produce:

(1)Evidence that the airline was in violation of a safety standard intended to prevent injuries;

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(3)Evidence that the operation of the airline was abnormally dangerous

(4)Evidence that sufficiently excludes causes other than the airline's negligence as an explanation for the crash.

Sorry, that's incorrect. If the operation of airplanes is abnormally dangerous, it would subject the airline to strict liability, but it wouldn't justify the use of the res ipsa loquitur doctrine. Try again.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Herbert Huber was killed in an airplane crash. In order to recover from the airline on a res ipsa loquitur theory, Herbert would be required to produce:

(1)Evidence that the airline was in violation of a safety standard intended to prevent injuries;

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(3)Evidence that the operation of the airline was abnormally dangerous

(4)Evidence that sufficiently excludes causes other than the airline's negligence as an explanation for the crash.

That's correct. In addition to proving that the type of injury suggests that negligence was involved, the plaintiff must also show that the defendant controlled the instrumentality that caused the injury, and that other possible causes have been sufficiently excluded by the evidence to make it logical to conclude that negligence did cause the injury.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Question #8

Eric Engelbert was a welder working in Wyoming. He was employed by Well-Done Welders. One day his boss asked him to go to the Griffith Gas Co. to weld some additional reinforcing plates onto a gasoline storage tank. While Eric was engaged in welding, fumes from the inside of the tank were ignited by a spark from his welding apparatus and caused an explosion, injuring Polly Darton, a government engineer inspecting a nearby tank. Polly sued. Based on these facts, which of the following is correct?

(1)Well-Done could be held liable on a vicarious liability theory even if Eric used reasonable care.

(2)Well-Done could be found liable even if it used reasonable care in selecting, training and instructing Eric

(3)Griffith Gas Co. could not be found liable unless the company or one of its employees acted negligently

(4)If Polly were herself negligent in failing to avoid the danger, she would have to prove negligence in order to recover.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Eric Engelbert was a welder working in Wyoming. He was employed by Well-Done Welders. One day his boss asked him to go to the Griffith Gas Co. to weld some additional reinforcing plates onto a gasoline storage tank. While Eric was engaged in welding, fumes from the inside of the tank were ignited by a spark from his welding apparatus and caused an explosion, injuring Polly Darton, a government engineer inspecting a nearby tank. Polly sued. Based on these facts, which of the following is correct?

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(3)Griffith Gas Co. could not be found liable unless the company or one of its employees acted negligently

(4)If Polly were herself negligent in failing to avoid the danger, she would have to prove negligence in order to recover.

That's incorrect. If the plaintiff can prove that the EMPLOYEE was negligent, the EMPLOYER becomes vicariously liable even if not at fault; but the plaintiff must still prove that the EMPLOYEE was negligent. If you were thinking of strict liability for an abnormally dangerous activity, note that the answer stated that Well-Done would be liable on a vicarious liability theory.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Eric Engelbert was a welder working in Wyoming. He was employed by Well-Done Welders. One day his boss asked him to go to the Griffith Gas Co. to weld some additional reinforcing plates onto a gasoline storage tank. While Eric was engaged in welding, fumes from the inside of the tank were ignited by a spark from his welding apparatus and caused an explosion, injuring Polly Darton, a government engineer inspecting a nearby tank. Polly sued. Based on these facts, which of the following is correct?

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(3)Griffith Gas Co. could not be found liable unless the company or one of its employees acted negligently

(4)If Polly were herself negligent in failing to avoid the danger, she would have to prove negligence in order to recover.

That's correct. The whole idea of vicarious liability is that the employer is liable for the negligence of the employee, even if the employer has used all reasonable care in the selection and supervision of the employee.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Eric Engelbert was a welder working in Wyoming. He was employed by Well-Done Welders. One day his boss asked him to go to the Griffith Gas Co. to weld some additional reinforcing plates onto a gasoline storage tank. While Eric was engaged in welding, fumes from the inside of the tank were ignited by a spark from his welding apparatus and caused an explosion, injuring Polly Darton, a government engineer inspecting a nearby tank. Polly sued. Based on these facts, which of the following is correct?

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(3)Griffith Gas Co. could not be found liable unless the company or one of its employees acted negligently

(4)If Polly were herself negligent in failing to avoid the danger, she would have to prove negligence in order to recover.

That's incorrect. You seem to be forgetting the concept that Griffith might be strictly liable. This is, after all, a gasoline storage container, and a court might hold that the storage of gasoline would be abnormally dangerous, leading to strict liability.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Eric Engelbert was a welder working in Wyoming. He was employed by Well-Done Welders. One day his boss asked him to go to the Griffith Gas Co. to weld some additional reinforcing plates onto a gasoline storage tank. While Eric was engaged in welding, fumes from the inside of the tank were ignited by a spark from his welding apparatus and caused an explosion, injuring Polly Darton, a government engineer inspecting a nearby tank. Polly sued. Based on these facts, which of the following is correct?

(1)Well-Done could be held liable on a vicarious liability theory even if Eric used reasonable care.

(2)Well-Done could be found liable even if it used reasonable care in selecting, training and instructing Eric

(3)Griffith Gas Co. could not be found liable unless the company or one of its employees acted negligently

(4)If Polly were herself negligent in failing to avoid the danger, she would have to prove negligence in order to recover.

That's incorrect. Whether Polly is negligent or not has no bearing on the issue of whether or not she must prove negligence on the part of the defendant. Negligence on the part of the plaintiff may or may not have an effect upon the recovery. (The Restatement rule originally provided that contributory negligence would NOT be a defense to strict liability; more modern statutes and cases have permitted contributory negligence as a percentage offset to strict liability, similar to what is done in negligence cases.) However, it shouldn't affect Polly's burden of proof in order to make the defendant liable.

Question #9

Same facts as before (Polly Darton was injured by an explosion of gasoline fumes). Which of the following would count IN FAVOR of the imposition of strict liability against Griffith Gas Company for an abnormally dangerous activity?

(1)The fact that the activity (gasoline storage) was appropriate to the area where it was being carried on;

(2)The fact that the risk of injury can be eliminated through the use of reasonable care

(3)The fact that the activity is of high value to the community

(4)None of the above

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Same facts as before (Polly Darton was injured by an explosion of gasoline fumes). Which of the following would count IN FAVOR of the imposition of strict liability against Griffith Gas Company for an abnormally dangerous activity?

(1)The fact that the activity (gasoline storage) was appropriate to the area where it was being carried on;

(2)The fact that the risk of injury can be eliminated through the use of reasonable care

(3)The fact that the activity is of high value to the community

(4)None of the above

That's incorrect. If the activity is INAPPROPRIATE to the place where it is carried on, that is a factor in favor of imposing strict liability. This statement says just the opposite.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Same facts as before (Polly Darton was injured by an explosion of gasoline fumes). Which of the following would count IN FAVOR of the imposition of strict liability against Griffith Gas Company for an abnormally dangerous activity?

(1)The fact that the activity (gasoline storage) was appropriate to the area where it was being carried on;

(2)The fact that the risk of injury can be eliminated through the use of reasonable care

(3)The fact that the activity is of high value to the community

(4)None of the above

That's incorrect. One of the criteria in the Restatement, ^s 520, is "whether the risk cannot be eliminated by the exercise of reasonable care." If the risk CAN be eliminated through using reasonable care, then that indicates that there is no need for strict liability, since when accidents occur they must be due to negligence.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Same facts as before (Polly Darton was injured by an explosion of gasoline fumes). Which of the following would count IN FAVOR of the imposition of strict liability against Griffith Gas Company for an abnormally dangerous activity?

(1)The fact that the activity (gasoline storage) was appropriate to the area where it was being carried on;

(2)The fact that the risk of injury can be eliminated through the use of reasonable care

(3)The fact that the activity is of high value to the community

(4)None of the above

Sorry, that's incorrect. Many abnormally dangerous activities are also of high value to the community--one of the reasons that one would engage in something like the transportation of gasoline is that, despite its high risk, it is still very valuable. However in some communities an activity may be so much a part of community life (eg. an oil well in the middle of a residential community dependent on the oil industry) that it would not be considered by those who live in the area as ABNORMALLY dangerous.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Same facts as before (Polly Darton was injured by an explosion of gasoline fumes). Which of the following would count IN FAVOR of the imposition of strict liability against Griffith Gas Company for an abnormally dangerous activity?

(1)The fact that the activity (gasoline storage) was appropriate to the area where it was being carried on;

(2)The fact that the risk of injury can be eliminated through the use of reasonable care

(3)The fact that the activity is of high value to the community

(4)None of the above

That's correct. None of the answers correctly states the rule.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Question #10

Ajax Fertilizer Company operates a plant making ammonia for use in commercial agriculture. Periodically the weather conditions and seasonal demand combine to cause noxious smells to drift from the Ajax plant onto a neighboring property owned by Bill Blatz. Blatz has filed a complaint asking the court to declare the Ajax plant a nuisance. Pick the correct statement:

(1)Bill will be able to recover damages, but not an injunction, unless the value of the plant is less than the nuisance it causes.

(2)Bill will not be able to obtain an injunction if he knew of the plant before he began construction of his own house.

(3)Ajax's plant will not be found a nuisance unless the court finds that some aspect of plant's operation is negligent.

(4)Bill will have to prove more than just that the plant is irritating to him.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Ajax Fertilizer Company operates a plant making ammonia for use in commercial agriculture. Periodically the weather conditions and seasonal demand combine to cause noxious smells to drift from the Ajax plant onto a neighboring property owned by Bill Blatz. Blatz has filed a complaint asking the court to declare the Ajax plant a nuisance. Pick the correct statement:

(1)Bill will be able to recover damages, but not an injunction, unless the value of the plant is less than the nuisance it causes.

(2)Bill will not be able to obtain an injunction if he knew of the plant before he began construction of his own house.

(3)Ajax's plant will not be found a nuisance unless the court finds that some aspect of plant's operation is negligent.

(4)Bill will have to prove more than just that the plant is irritating to him.

That's incorrect. The court will certainly weigh the relative value of the activity creating the nuisance and the plaintiff's interest of being free from the offending use, but the plaintiff needn't go so far as to prove that it would be economically advantageous to eliminate defendant's activity. That would amount to a negligence test. For example, in *Boomer v. Atlantic Cement*, it was a close case for the court when a plant worth millions of dollars caused only several hundreds of dollars in damages. As important as the relative dollar values involved is the question of whether the plaintiff can reasonably object to the defendant's offending use.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Ajax Fertilizer Company operates a plant making ammonia for use in commercial agriculture. Periodically the weather conditions and seasonal demand combine to cause noxious smells to drift from the Ajax plant onto a neighboring property owned by Bill Blatz. Blatz has filed a complaint asking the court to declare the Ajax plant a nuisance. Pick the correct statement:

(1)Bill will be able to recover damages, but not an injunction, unless the value of the plant is less than the nuisance it causes.

(2)Bill will not be able to obtain an injunction if he knew of the plant before he began construction of his own house.

(3)Ajax's plant will not be found a nuisance unless the court finds that some aspect of plant's operation is negligent.

(4)Bill will have to prove more than just that the plant is irritating to him.

That's incorrect. Although "coming to the nuisance" is a relevant criterion in determining the reasonableness of the plaintiff's expectation of being free from the irritation, it is not dispositive. A plaintiff's use may actually come after the existence of the defendant's offending use, but still be found to be entitled to protection. For example, in *Spur v. Del Webb Industries*, the plaintiffs constructed houses long after the defendant's feed lot had been in existence. Although they had to pay damages for the cost of moving, they were given an injunction to eliminate defendant's offending use.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Ajax Fertilizer Company operates a plant making ammonia for use in commercial agriculture. Periodically the weather conditions and seasonal demand combine to cause noxious smells to drift from the Ajax plant onto a neighboring property owned by Bill Blatz. Blatz has filed a complaint asking the court to declare the Ajax plant a nuisance. Pick the correct statement:

(1)Bill will be able to recover damages, but not an injunction, unless the value of the plant is less than the nuisance it causes.

(2)Bill will not be able to obtain an injunction if he knew of the plant before he began construction of his own house.

(3)Ajax's plant will not be found a nuisance unless the court finds that some aspect of plant's operation is negligent.

(4)Bill will have to prove more than just that the plant is irritating to him.

That's incorrect. Negligence is not required in a nuisance action. The court must find that the defendant's operations create an UNREASONABLE INTERFERENCE with the plaintiff's reasonable expectations, but the defendant may be doing exactly what a reasonable person would do in the same circumstances. For example, in *Boomer v. Atlantic Cement*, the defendant's operation of the cement plant was not negligent, but it was nonetheless found to be a nuisance.

Torts Tutorial Chapter 1 – Establishing a Breach of Duty

Ajax Fertilizer Company operates a plant making ammonia for use in commercial agriculture. Periodically the weather conditions and seasonal demand combine to cause noxious smells to drift from the Ajax plant onto a neighboring property owned by Bill Blatz. Blatz has filed a complaint asking the court to declare the Ajax plant a nuisance. Pick the correct statement:

(1)Bill will be able to recover damages, but not an injunction, unless the value of the plant is less than the nuisance it causes.

(2)Bill will not be able to obtain an injunction if he knew of the plant before he began construction of his own house.

(3)Ajax's plant will not be found a nuisance unless the court finds that some aspect of plant's operation is negligent.

(4)Bill will have to prove more than just that the plant is irritating to him.

That's right. The plaintiff must show that the irritation reflects a violation of his REASONABLE EXPECTATIONS for use of his property. A night owl may be irritated at his neighbor's mowing the lawn at 9:00 a.m. on Saturday, but that doesn't establish that it's a nuisance. The point is that one can reasonably expect silence at 5:00 a.m., but not at 9:00 a.m.

You have now completed the section on Chapter 1, Breach of Duty. You will now be returned to the menu.

END

Find more exercises at the Torts Home Page by clicking the Home Action Button