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SUMMER 2000 July 7, 2000

MID-TERM SAMPLE ANSWER

QUESTION 1

The facts for this question were loosely based upon *Hansler v. Bass*, 106 N.M. 382, 743 P.2d 1031 (1987), in which the court rejected the argument that Bass could be held vicariously liable for the conduct of the contractor.

To recover for her injuries, Chedly ("C") would have to identify someone who breached a duty to her and proximately caused her injury. Several possible defendants should be considered: (1) Johann; (2) The owner of the ranch, Bass; and (3) Synopco Construction Co.

Johann. Although Johann was the immediate cause of the explosion that injured her, there is no reason to think that Johann would be found liable for C's injury. A person is obligated to use reasonable care for others based upon the foreseeable risks of injury. In this it is not foreseeable that a shot could cause an explosion. Therefore I would eliminate Johann as a potential defendant. (Other defendants may attempt to identify Johann as a superseding cause, but as discussed below, I don't think that would be successful.

Bass (the ranch owner). The owner of the ranch, Stanley Bass, could be sued for negligence in failing to use reasonable care in setting up the shooting range. Negligence is the failure to use reasonable care. The question is whether a reasonable person would exercise caution in placing objects like a refrigerator on a shooting range. I don't know much about the operation of such a range, so I would want to check with experts who could provide testimony on what, if anything, is customarily done in verifying that something is a suitable target for a shooting range. The fact that the refrigerator was contained dynamite obviously came as a surprise, and the question is whether someone was negligent in failing to insure that there was nothing about this target that would pose a danger to someone else. Bass would be vicariouly liable for the acts of his employees, even if we can't identify who among his employees placed the refrigerator on the range.

A related issue is whether or not Bass is responsible for what was done by his contractor, Synopco. Usually there is no vicarious liability for independent contractors, unless the putative employer has a right to control the manner in which the work was done. In this case the issue is whether Bass had the right to control the way in which dynamite was stored, which seems doubtful. It's not even clear that Bass was aware of the fact that dynamite was being stored on site. Nonetheless, if for some reason Synopco'sability to pay a judgment is in doubt, we might want to pursue a vicarious liability theory in the hope of making Bass responsible for Synopco's negligence.

Another avenue we might pursue is to use the res ipsa loquitur inference, which applies when an accident occurs without identifiable cause, but which is normally the result of negligence and the defendant is in control of the process leading to the injury. Here there's no particular mystery about what happened, and I don't think a court would be inclined to permit the use of res ipsa. Nor is there any evidence that there are regulations or statutes requiring a particular method for the storage

A final possibility for holding Bass liable would be on the basis of strict liability for engaging in an abnormally dangerous activity -- the storage of dynamite. Courts impose strict liability when an injury is caused by a defendant's choice to carry on an abnormally dangerous activity. Although storing dynamite is clearly an abnormally dangerous activity, the evidence seems lacking to establish that Bass (as distinguished from Synopco) was engaged in this activity, and so I wouldn't be very sanguine about this prospect.

Synopco. The facts are somewhat unclear about how the dynamite came to be left in the refrigerator. Hawes recalls that everything was removed from the site, but it should be easy to establish that he failed to do so. The fact that he acknowledges the need to do so indicates that if the evidence shows that his employee didn't follow through, that would be strong evidence of negligence. In general, an employee's failure to follow policies established by the employer can be used as evidence of negligence. Moreover, Synopco is vicariously liable for any negligent acts on the part of its employees.

Proximate Cause. No defendant can be held liable unless there is a finding that the defendant's breach of duty (negligence or strict liability activity) is a proximate cause of the plaintiff's injury. Proximate cause consists of both but-for cause (without which the injury would probably not have occurred) as well as legal cause (a direct and natural sequence between the defendant's conduct and the plaintiff's injury). I don't anticipate any difficulty proving but-for causation, assuming that either Bass or Synopco is found to have been negligent in the storage of dynamite or the placement of the dynamite on a shooting range. If either one had intervened to remove dynamite to a safe place, this injury would clearly not have occurred.

With respect to legal cause, Bass and certainly Synopco will argue that the chain of causation was broken by a superseding event -- in Synopco's case either the placement of the dynamite on a shooting range or for Bass the firing on the refrigerator by Johann. I don't think either argument would be successful, since the aspect that makes their conduct dangerous -- the explosive quality of the dynamite -- was precisely what occurred. There was nothing unforeseeable about the subsequent events in relation to the defendants' negligent acts.

Damages. C will obviously be entitled to significant damages. Since her work will likely be affected by the damage to her physical appearance, she will have wage loss as well as medical expenses. More importantly she will be entitled to pain and suffering damages, as well as compensation for any permanent disfigurement. I don't think she'd be able to recover punitive damages, since it requires proof of reckless indifference to her welfare, and while the defendants may have been careless I don't think it's fair to characterize their behavior as reckless.

QUESTION 2

The facts in this case were drawn from *Paige v. Saint Andrew's Roman Catholic Church*, 250 Conn. 14, 734 A.2d 85 (1999), which reversed a jury verdict of $3.2 million, finding insufficient evidence of proximate cause.

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St. Andrews Church ("StA") faces potential liability from Paige. To recover, he must prove that (1) StA breached a duty toward him; (2) such a breach of duty proximately caused his injury; and (3) he suffered legally compensable damages.

I. Breach of Duty

The primary method of establishing liability would be to claim that StA was negligent in the operation of the boiler. It is unclear from the facts exactly how the accident took place, and perhaps more factual investigation will reveal exactly how the boiler got switched on even when it appeared to be turned off.

Res ipsa loquitur. Paige would undoubtedly attempt to establish liability by asking the judge to instruct the jury on the doctrine of *res ipsa*. To do this, he would need to persuade the judge that (1) this was the type of injury that doesn't ordinarily occur in the absence of negligence; (2) StA had control over the instrumentality or process that produced the injury; and (3) no other plausible explanation can explain what happened. As to #1, I think the judge might accept the notion that this kind of accident (a boiler turning on while someone is in it) doesn't ordinarily occur absent negligence. In fact, we don't have a clear idea of just what happened, and so it might seem like an appropriate case to invoke the doctrine. However, as to #2, StA can persuasively argue that they lacked "exclusive" control. After all, Cano's testimony reveals some doubt as to the state of the switches, and Paige and Cano did have control. Again, we don't know exactly what in the chain of events led to this event, but unless Paige can show that it *had* to be someone under our control, I think the judge would reject this argument. Similarly, on #3, there is another plausible explanation for this accident, namely some mistake on the part of Cano or some kind of defect in the mechanism that is not in StA's control. Unless Paige can more effectively narrow the range of possibilities, I don't think he will get a res ipsa instruction.

Negligence per se. We should do some research on whether there are any statutes or regulations that apply to our use of the boiler. It's more likely that regulations apply to the workers or the service company, but if there is a regulation that states what we have to have in the way of safety gear or "fail-safe" switches, we could be in trouble. An unexcused statutory violation is either evidence of negligence, or in some jurisdictions may be treated by the judge as negligence as a matter of law. That would obviously be bad news.

Strict liability. Paige wouldn't have to prove negligence if we were engaged in an activity that is subject to strict liability. One form of SL is engaging in an abnormally dangerous activity, defined according to six factors in the Restatement. I don't think running a boiler would qualify, since it is a relatively common activity, and injuries can be avoided through the use of reasonable care.

II. Proximate Cause

Even if a breach of duty is established, Paige must show that that breach of duty was a proximate cause of the injury, which consists of (1) but-for causation (but for the defendant's breach, there probably would have been no injury) plus (2) legal cause (a natural and direct sequence leading from the breach to the injury). As to but-for cause, I think Paige would have little difficulty; assuming the jury found some negligence on the part of StA, like flipping a wrong switch, it would have a pretty clear connection to the injury. With respect to legal cause, we could argue that some other influence, like Cano, represented a superseding cause. Again, given the confusion on this point, the jury might find that, while somebody in the church may have done something negligent, it was some error on the part of Cano that really made a difference. His equivocal testimony puts this all in a fog of uncertainty.

III. Damages

The bad news is that, if the jury finds a breach and proximate cause, the damages will be horrific. First, the burns appear to be so extensive that his working career will be jeopardized, and his medical bills will be enormous. Moreover, his pain and suffering, including disfiguring scars and such, would yield a very hefty remedy. We have to hope that the jury never gets that far. The final element of damages, a punitive award, would not be a significant risk since it would require a finding of callous indifference by StA toward the Paige. There may be enough evidence for a compensatory award, but nothing suggests that StA was acting with conscious disregard. I'm confident the judge would reject such an instruction, at least based on the evidence we have.

Summer '00 Torts I Checklist (DeWolf)