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MIDTERM EXAM SAMPLE ANSWER

The facts for this question were based upon *Comet Delta, Inc. v. Pate Stevedore Co. of Pascagoula, Inc.*, 521 So.2d 857, (Miss. 1988), in which the court reversed a summary judgment for the defendant, finding that the facts stated a cause of action for the owner of the rice for recovery based upon a public and private nuisance.

QUESTION 1

On behalf of CDI I would consider filing tort suits against (a) Pate Enterprises ("PE") and secondarily against the barge owners. In order to prevail, we would need to show that the defendant (1) breached a duty to the plaintiff, which (2) proximately caused (3) compensable damages to the plaintiff.

I. Breach of Duty

A. Claim v. PE

CDI could argue two different categories of breach of duty: either negligence or strict liability.

1. *Negligence* is the failure to use reasonable care. Reasonable care is what a resonably prudent person would do in similar circumstances. In this case we have a pure property damage case, and the defendant might use a Learned Hand analysis: that the cost to prevent injuries like this is greater than the potential benefit in terms of injuries avoided (probability of injury times magnitude of loss). After all, the rice would ordinarily be enclosed, but was instead opened to the air in order to be fumigated and inspected. The cost to prevent the spread of coal dust would have to be compared to the number of cases in which harm actually occurs, as opposed to the inconvenience of having coal dust blowing around. As an alternative to claiming that PE was negligent in failing to prevent the coal dust from blowing, we could at least argue that a reasonable person would have warned neighboring properties about the coal dust blowing around, or would have moved the coal barges or taken some other precaution to minimize the chance that the coal dust would contaminate a sensitive commodity like the rice.

We would want to look at *industry custom* in terms of coal storage facilities. If most coal storage facilities are left uncovered, that would be good for the defendant (of course, if they take precautionary measures, that would be very good for us), but even if PE is consistent with industry custom, we could argue that a reasonable person would exercise greater care, and the jury would be free to set a higher standard. There may also be some kind of internal standard at PE for precautionary measures or for warning about contamination. If there were such, we could use it to show that their failure to follow those procedures was negligent.

Conceivably there are state or local laws or regulations that require certain kinds of commodities to be covered or otherwise to prevent spread of coal dust. If there were, we could use them to establish negligence. Some jurisdictions treat an unexcused statutory violation as negligence as a matter of law, while others simply permit use of the violation as evidence that the defendant failed to use reasonable care.

2. *Strict Liability*. A second method of establishing a breach of duty would be to show that the defendant should be held strictly liable for the injury. There are other methods of establishing strict liability,[1] but the one that would apply here is *nuisance*. To establish a nuisance, the plaintiff has to show that (s)he enjoys a property right that was infringed contrary to the plaintiff's *reasonable expectation* to be free from the harm. The first question is whether CDI has a property right that was infringed. At the time, CDI's property was being stored in the warehouse; there might be some difficulty in showing the exact property right that was infringed, but assuming we could overcome that hurdle, we would also have to show that CDI had a reasonable expectation to be free of coal dust. PE might argue that this was an industrial area, and if CDI had a sensitive cargo, they should have covered it up rather than expect the neighbors to refrain from activities that might contaminate it. On the other hand, CDI might have a good case that blowing coal dust is not something that PE could reasonably expect other people to put up with, and that it is a nuisance. A final consideration would be the idea that if you "come to the nuisance," you lose the right to complain. If PE had an established operation, they might argue (like Spur Industries) that the plaintiff "came to the nuisance." Again, while coming to the nuisance would not necessarily bar a claim (particularly if it was also considered a public nuisance), the timing would factor into the question of whether CDI's expectation was reasonable.

B. Claim v. Barge Owners

My client came in looking for a remedy against PE, but it may turn out that we have to use a claim against the barge owners as a means of getting at PE, or it may also turn out that we need to go after the barge owners directly because PE is insolvent or otherwise not as desirable a defendant. Many of the same issues would be raised with regard to the standard of care and the potential for a strict liability claim based upon nuisance. However, in both cases I would say the case against the barge owners is weaker because we would expect less of a reasonable person who transports things in a barge; after all, they don't know from moment to moment what will be in the immediate environment of the barge (whereas PE does); to put it in terms of the Learned Hand formula, the burden is greater and the probability of harm smaller. Similarly, the nuisance claim would be harder to make because the barges move in and out frequently.

To consider another variant on the facts, if the barge owners were insolvent, but the case against them were strong, we might show that PE was liable for the barge owners' negligence. While it is doubtful that PE could be held *vicariously liable*—even if PE had the right to control the way in which the barge owners loaded or unloaded their coal, the barge owners are not "employees" of PE—some kind of "negligent supervision" might fit these facts.

II. Proximate Cause

In addition to establishing a breach of duty, CDI would have to show that the breach of duty proximately caused the damages. Proximate cause consists of two elements, "but-for" cause and legal cause. In the case of PE, it would not be difficult to show that their negligence (or nuisance) proximately caused the injury. On the other hand, with respect to the barge owners, we lack

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1. The only one that might be considered would be that the exposure of coal dust to the air is an *abnormally dangerous activity*. However, this would be a dead-end, because the factors in the Restatement test used to establish an ADA would not be met here. Primarily, the gravity of harm from coal dust is not high; it just happens that it contaminates rice.

information about who actually owned the barges that generated the coal dust. It seems odd that we don't have that information, and after more investigation is done, the identity of the parties whose barges were in port should be available. On the other hand, it might be useful to ask for an exception to the but-for cause requirement based on market-share liability. (Alternative liability wouldn't work because we couldn't get all coal barge owners in court; concert of action requires an agreement, which doesn't seem to be in play, and enterprise liability requires some kind of industry-wide cooperation, which we don' see here either). We could allege that the 80% market share of Ajax and Bentham is sufficient to trigger a market-share liability theory, and at least force them to show that their barges weren't in port during the week in question.

Multiple redundant causes. If more than one barge was in port, with multiple sources of coal-dust contaminating CDI's rice, we might have the problem that the defendants would each argue that their negligence was not a but-for cause of the injury. To avoid this situation we could ask the judge to use a *substantial factor* test, which is applied where multiple defendants contribute similar acts which combine to cause the plaintiff's harm.

III. Damages

CDI would want to recover for their property damage; in most cases this is the difference between the fair market value of the property before and after the casualty. It's hard to know what contaminated rice is worth, but if it's worth more than zero (maybe it can be used for animal feed or something like that) then CDI would get $6 million minus the salvage value of the rice. There may in fact be a way to "repair" the rice by decontaminating it, but that seems unlikely.

In addition, CDI might seek an injunction against the defendant(s) who is found to have caused the injury. The threat of injunction might produce considerable leverage in negotiating a settlement on CDI's behalf. Before issuing such an injunction, however, the court would weigh the public policy questions for and against such an order.

Miscellaneous

As a final thought, there might be additional defendants, such as the buyer (SGS) or the owner of the terminal (RWI), but since it was CDI that ordered the removal of the protective plastic, it seems hard to see how they could be found liable for the damages.

QUESTION 2

The facts of this case were drawn from *Barnes v. Taylor*, 347 So.2d 972 (Miss., 1977), which affirmed a dismissal of the case after the plaintiff failed to satisfy the judge that the case warranted a res ipsa instruction. The wrongful death issue was drawn from *In re Estate of England*, 846 So.2d 1060 (Miss.App., 2003), which held that the decedent's will could not supersede the statutory scheme for awarding wrongful death benefits.

To recover damages, Michelle would have to show (1) a defendant breached a duty toward her by acting negligently or doing something subject to strict liability; which (2) proximately caused (3) damages authorized by the wrongful death statute.

To summarize, we're going to have difficulty with #1 and #2, but the only silver lining to these rather dark clouds is the generous scope of the wrongful death statute.

I. Breach of Duty

As noted, the first element of a tort case is to identify a breach of duty by the defendant. It doesn't appear that there is any basis for strict liability, because there are no abnormally dangerous activities, the decedents didn't enjoy any property rights which would be the subject of a nuisance claim, no animals are involved, and no statutory provision (that we know of) imposes strict liability for this kind of accident.

Negligence. There are a number of defendants who might have been negligent in causing the deaths of Daisy and Dexter. The prime suspect would be the golf course (GC). After all, they accepted the duty to inspect and repair the bridge. We'd like to be able to show that their negligence caused Daisy to drive off the bridge into the Bayou. However, we're just guessing about that. Sometimes courts will allow a plaintiff to use the theory of *res ipsa loquitur*, but that would face significant hurdles here: the doctrine requires (1) that this *type* of accident doesn't happen in the absence of negligence; (2) that the defendant was in exclusive control of the instrumentality that caused the accident; and (3) the evidence sufficiently eliminates other plausible explanations for the accident. The best we could hope for is that the missing plank would be something that an expert would say is ordinarily the result of bad maintenance, and we could show that GC was in exclusive control of maintaining the bridge. Even if that could be shown, we would have a tough time showing that there are no plausible explanations for the car winding up in the Bayou. After all, Daisy could have fallen asleep at the wheel and her driving off the bridge caused the plank to be missing, not the other way around. Unless we can convince the judge that there is something other than raw speculation at work, we won't get a res ipsa instruction.

The farmers who strike the guard rails as they pass might also be potential defendants, but there are several problems with causation (discussed below) in attempting to hold the farmers liable.

II. Proximate Cause

Related to the problems establishing breach of duty, we can think of people who might have caused these deaths, but we can't identify anyone who, more probably than not, caused the injury. The burden on the plaintiff is to establish that the defendant's negligence *proximately caused* the plaintiff's injury, which is a two-part test consisting of (1) but-for cause; and (2) legal cause. The primarily problems in this case center around but-for cause.

We're still speculating that it might have been a bad plank that caused Daisy to go into the bayou, but there's no real evidence of that. We can't use any of the exceptions to but-for causation based on inability to identify the defendant because it could just as easily have been Daisy's poor driving or mechanical failure that caused the accident. With respect to the farmers who knocked down the guard rails, it doesn't seem likely that the guard rail by itself would cause the injury; for the guard rails to become relevant, Daisy would have had to be going off the bridge anyway. In such a case, Daisy's negligence might be seen as a superseding cause of the injury.

A very wild thought would be to take a kind of *Ybarra v. Spangard* approach to the problem, whereby several defendants would be considered a collective entity and the burden of proof shifted to the group. But unlike *Ybarra*, there is no joint action by these defendants; the golf course, the farmers, and Daisy are all independent, and I can't imagine a court allowing the plaintiff to bypass traditional negligence and causation requirements.

Daisy as a defendant. One additional possibility is that Dexter's estate could sue Daisy's estate for negligence. If we found evidence that Daisy had been drinking, or other indications that it was her negligence that caused the accident, Dexter's estate would be entitled to recover from any insurance proceeds Daisy had. Again, we would face the same obstacle that we are wildly

speculating about what could have happened rather than looking at evidence that, more probably than not, Daisy's negligence was a but-for cause of the deaths.

Assuming we could establish but-for causation, I see no difficulty with legal cause except for the superseding cause argument raised above with regard to Daisy's negligence.

III. Damages

Wrongful Death Statute. Recoveries for wrongful death are controlled by statute. The statute in Linden provides that any tort recovery would go to Michelle. The statute says that the persons entitled to sue may "recover such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit." This would presumably include both economic and non-economic damages.

Both Daisy and Dexter were unmarried. The statute provides that damages for the death of an unmarried person shall go to the children equally and if there are no children, to the father and mother, or to sisters and brothers. We don't know if Dexter's father is living, or whether Dexter has brothers or sisters. If so, they would share equally with Michelle. Similarly, if Michelle has sisters or brothers, they would share equally in the recovery for Daisy's death.

Summer 2003 Torts Midterm Checklist

QUESTION 1

- ☐ **Overview**
- ☐ Claim v. **PE**
- ☐ **Breach** of Duty
- ☐
- ☐ **Negligence** Claim
- ☐ Negligence **defined** as failure to use RC
- ☐ **Learned Hand** formula
- ☐ Should PE have **warned**?
- ☐ Industry **custom**
- ☐ Custom is only a **floor**
- ☐ PE policies or **Rulebook**?
- ☐
- ☐ **Statutes** or **regulations** re coal dust?
- ☐ Jurisdictional **variants**
- ☐
- ☐ **Strict Liability**
- ☐ Not an **ADA**
- ☐ Private (or Public?) **Nuisance**
- ☐ Did CDI have a **property interest**?
- ☐ Reasonable **expectations**
- ☐ Short **duration** of possession
- ☐ Did plaintiff "**come to** the nuisance"?
- ☐
- ☐ Claim v. **Barge** Owners
- ☐ **Similar** liability theories
- ☐ Negligence: harder to **anticipate**
- ☐ Nuisance: weaker **property** claim
- ☐ No **Vicarious** Liability

- ☐ **Proximate cause** issues
- ☐ Prox. cause defined as **2-part test**
- ☐ **But-for** causation
- ☐ Who caused injury: **identity** problems
- ☐ **Facts should** resolve whose barges
- ☐ But if unknown, could try **Summers v. Tice**
- ☐ But **alt. liability** only if all defs. named
- ☐ No **concert** of action;
- ☐ No **enterprise** liability
- ☐ **Market share**? if all else fails
- ☐ **Fungible** product, but policy difficulties

- ☐ **Multiple redundant** causes if more than one barge in port during the week
- ☐ No **legal cause** issues
- ☐
- ☐ **Damages**
- ☐ **Property loss** measured by diminution in FMV
- ☐ What is the cost to **"repair"?**
- ☐ No **punitive** damages
- ☐ Maybe an **injunction** for leverage
- ☐ Public **policy** issues for judge
- ☐
- ☐ **Other** defendants:
- ☐ **SGS**
- ☐ **RWI**
- ☐
- ☐

QUESTION 2

- ☐ **Overview**
- ☐ Breach of **Duty**
- ☐ (No **Strict Liability** theory)
- ☐ **Negligence** claim
- ☐ Negligence **defined**
- ☐
- ☐ **Golf course** as defendant
- ☐ **Res Ipsa** theory
- ☐ Maybe **type** and **exclusive control**
- ☐ But no way to eliminate other **causes**
- ☐
- ☐ **Farmers** as defendants
- ☐ Can't identify **which one**
- ☐ **Inspectors** as defendants
- ☐ Probably **vicarious liability** for GC
- ☐ **Contractors** would not make GC vic. liab.
- ☐
- ☐
- ☐
- ☐
- ☐

- ☐ **Proximate Cause** issues
- ☐ Proximate cause **defined**
- ☐ **But-for cause** can't be established
- ☐ **Car** might have gone in through Daisy's negl.
- ☐ Daisy's negl. might be **superseding cause**

- ☐ Claim by Dexter **v. Daisy**
- ☐ **Same** problems with res ipsa
- ☐ **Ybarra v. Spangard** theory?
- ☐ Same problems with **causation**
- ☐
- ☐ **Damages**
- ☐ Wrongful death **statute** controls
- ☐ Statute permits recovery of **all damages**
- ☐ **Will** not dispositive of statutory relief
- ☐ Both to the **decedent** as well as to **Michelle**
- ☐ **Wage loss** for Dexter would be substantial
- ☐ No issue about **illegitimacy**
- ☐ Would have to share with M's **siblings**

Exam # _____