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FALL SEMESTER SAMPLE ANSWER

QUESTION 1

Some of the facts for this question were based upon Grube v. Daun, 213 Wis.2d 533, 570 N.W.2d 851 (1997), which affirmed a finding of no liability on the part of Achter, ruling that the tank was not an abnormally dangerous activity and that it was not negligent in light of the custom of the industry. Apparently a nuisance claim was not raised.

There are several potential claims that could be brought in this case. One would be by Julie and Gorden Grube ("JGG") against Achter for their property damage. The other would be against Achter for the illness (and potential wrongful death claim) arising from Stacy's leukemia. I'll take the second and more serious case first.

The Claim for Stacy's Leukemia

In order to recover tort compensation, a plaintiff must prove (1) that the defendant breached a duty, either by acting negligently or because of strict liability; (2) that the defendant's breach of duty proximately caused (3) legally compensable damage. Each element needs to be addressed.

I. Breach of Duty

As noted above, this element can be proven by negligence or strict liability.

A. *Negligence*

Negligence is the failure to use reasonable care; reasonable care is the care that a reasonably prudent person would use in the same or similar circumstances. Here Achter could be accused of negligence in two respects: first, he negligently installed the underground storage tank ("UST"). Second, when it was discovered to be leaking, he failed to report the leak to the authorities.

Custom. One relevant consideration is the custom of the defendant's industry, in this case farming. Achter would argue that he was following the custom of the industry in installing the UST, but industry custom is only suggestive of reasonable care; a jury could in effect set a higher standard and find that he acted negligently. Of course, there would be no custom of the industry with respect to failure to report the leak,

Negligence per se. There is a statute, ALC § 292.11, which requires reporting of spills to the Department of Natural Resources. JGG would argue that Achter violated this statute by failing to report the spill in 1985. To make use of this in their negligence case, JGG would have to establish several things. First, it would need to be shown that the statute was violated. This appears to be the case, since JGG were notified by DNR that they would be responsible for remediation costs. Second, JGG would also need to show that the statute was designed to prevent injuries such as the one that Stacy has suffered. One would think that part of the purpose of reporting spills and requiring cleanup is to prevent health problems. Finally, a violation of the statute might be excused. Here Achter might claim that he was ignorant of the occasion for compliance, and the fact that he

continued to drink water from the surrounding wells might support his claim that he was unaware of the leak, but one could be aware of the leak without being aware that it was hazardous.

Even if there was an unexcused violation of the statute, its effect depends upon the jurisdiction. Some jurisdictions treat unexcused statutory violations as negligence as a matter of law, whereas other jurisdictions leave the question for the jury to decide according to their own judgment of how a reasonable person would behave.

B. *Strict Liability*

There are two forms of strict liability that might be relevant. The first is strict liability for an abnormally dangerous activity ("ADA") and the second is nuisance.

ADA. Most courts have adopted the standard established in the Restatement (2d) of Torts, which imposes strict liability for an ADA (so long as the harm for which liability is sought arises from the aspect of the activity that makes it abnormally dangerous, § 519); in determining what is an ADA, the Restatement looks to six factors (§ 520): (1) does the activity pose a high risk of harm? (2) is the harm grave? (3) is the risk one that cannot be eliminated by reasonable care? (4) is it inappropriate to the place where it is carried on? (5) is it uncommon? and (6) is it of low social value? Strict liability can be imposed even if not all six questions are answered in the affirmative, but there should be a preponderance of positive answers. Gasoline storage tanks of course would pose the risk of explosion, but that's not what happened here (§ 519), so it would be the risk of environmental harm that would have to be the basis of the ADA claim. It's hard to say that a UST fits enough of the criteria to constitute an ADA (#3 and #4 are clearly inapplicable, and the others appear to be at best equivocal), but perhaps a judge would be sympathetic to it.

Nuisance. One can be held strictly liable for causing an invasion of another's property rights, but here the leaking gasoline was initially on his own property, and didn't invade the property of anyone else. It was only when JJG later received title to the property that the experienced any damage, and thus it would not be a typical nuisance claim in which one property owner causes damage to someone else's property rights. However, if a nuisance claim could be made, it would require that JGG show that they had a reasonable expectation to be free of this kind of invasion, and the facts seem to fit that standard fairly well.

II. Proximate Cause

The second element that JGG would have to prove is that the gasoline leak proximately caused Stacy's leukemia. This is a more doubtful proposition, at least with respect to the largest element of damages, which would be S's leukemia. Proximate cause is composed of two prongs, or tests: first, JGG must show that, more probably than not, the leukemia would not have occurred *but for* the defendant's negligence / ADA / nuisance. Second, JGG must also establish legal cause (which in this case would not be difficult). However, while the first prong can be satisfied relatively easily with respect to the property damage, with respect to S's leukemia it will be quite difficult. As to the property damage, JGG would have to show that gasoline actually migrated into the drinking water that Stacy consumed, and that Stacy was exposed to whatever toxins are present in gasoline that might cause leukemia.[1] That would require some kind of soils expert. JGG would next have to find

1. Another avenue for consumption might be that Julie absorbed the water and then passed the gasoline contamination either in utero or through breast milk, but this sounds like a speculative medium of transmission.

a medical expert who was familiar with leukemia who could say that, more probably than not, Stacy's leukemia resulted from the exposure to gasoline in this setting.

If the expert was unwilling to state that opinion, it is possible that the gasoline exposure was a contributing factor. Perhaps Stacy had a genetic condition that made her unusually susceptible to leukemia, and the exposure to gasoline hastened contracting the disease. It might be said that S lost a chance to avoid the disease, even if it couldn't be said to be a but-for cause. But such testimony seems highly speculative, and a jury would have to be convinced by a standard of the preponderance of the evidence.

III. Damages

If the jury found that Stacy's leukemia was proximately caused by negligence or some form of strict liability, then the damages would be enormous. Stacy would be entitled to the economic harm that resulted from the medical condition and any permanent disability that would otherwise have been avoided. Second, she would be entitled to the pain and suffering. Finally, JGG would individually make claims for loss of society and companionship with Stacy. JGG might also claim that they suffered fear of the potential that they might develop cancer, but that is the kind of claim that courts typically deny recovery until there is actual physical manifestation of a disease.

And if Stacy died, there would be a wrongful death claim, which would permit a maximum of $500K in damages for loss of consortium.

Property Damage Claim. Even if JGG could not recover for Stacy's illness, they should still be able to recover for the property damage suffered when they had to clean up the mess. The breach of duty analysis would be the same as for Stacy's claim, and there would be no proximate cause issues such as the ones identified for Stacy's claim. If JGG established a breach of duty that proximately caused a diminution in the value of their property, they would be entitled to the amount of that diminution, or the cost to repair, whichever was less.

Punitive Damages. I don't see that there is a good argument for punitive damages in this case. To present that issue to the jury, the judge has to be convinced that the defendant(s) acted with malice, or with flagrant disregard for the plaintiffs' safety. Since the defendant continued to drink the very water that is now the subject of controversy, it would be difficult to show flagrant disregard.

No Role for Daun

Daun is Stacy's father, and beyond that it doesn't seem that he did anything that would warrant a claim against him.

QUESTION 2

Some of the facts for this question are based on *Estate of Becker v. Olson*, 218 Wis.2d 12, 579 N.W.2d 810 (1998) (later overruled), which affirmed the trial court's dismissal of the plaintiff's case, finding that even though Olson's conduct was negligent, it did not proximately cause the fatal injury. It is also based on *Pierce v. American Family Mut. Ins. Co.*, 2007 Wi.App. 152, 736 N.W.2d 247 (2007), which held that an adult child could recover under the statute for loss of society and companionship.

Olson would face a claim from Ariel Pinkston ("AP") for Becker's death. In order to recover, she would have to show that Olson (1) breached a duty of care, that (2) proximately caused (3) compensable damage. Each is an issue in this case.

I. Breach of Duty

There are two ways to establish that Olson breached a duty toward AP: one is to show that Olson acted negligently; the other would be to show that Olson is subject to strict liability. There is only one category of strict liability that might be considered in this case, and that is that the keeping of a sawed-off shotgun would be an abnormally dangerous activity. However, because reasonable care (not keeping such a gun in the first place) would ordinarily be sufficient to eliminate the risk, it seems unlikely that the courts would create a rule of strict liability for sawed-off shotguns.

On the other hand, AP might argue that Olson acted negligently in storing a sawed-off shotgun in her home, particularly when she knew that Perez had a tendency toward violence. Negligence is the failure to use reasonable care. Reasonable care is what a person of ordinary prudence would do under the same or similar circumstances. Jurors would likely use their own intuitive judgment about whether to take the risk of permitting someone with a history of violence to keep a weapon in the house, particularly where there were children in the home.

Some of the tools that are ordinarily used to assess negligence, such as custom of the industry, or employer safety policies, or res ipsa loquitur, would likely have no bearing on this case. On the other hand, there is a statute, § 941.28, that prohibits the possession of a "short-barreled shotgun" (§ 941.28(2)), and although there might be some question about whether Olson "possessed" the shotgun, and whether it met the measurements prescribed in the statute, it could result in a finding of negligence. None of the excuses that are permitted for a statutory violation would appear to apply in this case. Jurisdictions differ in how they treat unexcused statutory violations. Some treat them as conclusive of negligence, whereas others regard them only as evidence for the jury to consider.

Regardless of the jurisdiction, it seems likely that Olson would be found negligent for letting Perez keep the shotgun, or in leaving the scene just as it was clear that the violence was escalating.

II. Proximate Cause

Even if Olson was negligent, she is not liable unless her negligence was a proximate cause of Becker's death. To prove proximate cause, AP would have to show both (1) that Olson's negligence was a but-for cause of the injury; and (2) that it was a legal cause.

With respect to but-for causation, it doesn't appear that AP would have much difficulty. After all, the suddenness of the fatal shooting was greatly facilitated by the availability of a deadly weapon. It would not be difficult for a jury to find, more probably than not, that if Olson had not permitted Perez to store the shotgun there, Perez would not have acted on what appears to be a sudden impulse to shoot Becker. We could argue that Perez might have found some other weapon, but other weapons would have been much more difficult to use than a sawed-off shotgun.

The more promising angle for us to take would be to argue that, even if Olson's negligence was a but-for cause of the injury, it was not a legal cause. Legal cause may be defeated by showing that there is a superseding cause of the injury. In this case the superseding cause would be Perez' decision to use deadly force. Whether a cause is likely to be found to supersede the defendant's negligence is a function of the lack of foreseeability and disproportionate culpability. In this case it works against us that the use of the shotgun by Perez was relatively foreseeable. On the other hand,

homicide, compared with negligence in allowing Perez to store the shotgun, or failing to summon help, is disproportionately culpable.

In another sense, we could argue that if the burden is on the plaintiff to show that our client caused the death of Becker, it is a misuse of language to say that, by permitting the shotgun to be stored in her house Olson *caused* Becker to be shot.

Another way of looking at the case is to deny that Olson owed a duty to Becker (this is in fact what the court in the real case held). We could say that, unless there is a duty to Becker to protect him from injury, there is no duty and therefore no negligence.

III. Damages

The final element of this case is proof of damages. Olson would face a wrongful death claim from Ariel Pinkston ("AP"). The statute itself is not crystal clear in allowing an adult child to sue for wrongful death, or on behalf of the estate in a survival action. However, assuming she does qualify, she would be able to collect the pecuniary damages (§ 895.04(4)), which would include the wages that Becker would otherwise have earned. However, in light of his limited earning potential, the wage loss claim would be modest. If Becker suffered any pain and suffering prior to death, it appears that it may be recoverable under § 895.03, which is a general survival statute. In addition, there is specific authorization for the recovery of damages for loss of consortium by "lineal heirs," of which AP would be one, but in the case of a deceased adult there is a maximum of $350,000 permitted by the statute for loss of consortium. How close to that maximum AP could get would depend on how close their relationship was, and how sympathetic a jury might be to AP's claim for the loss of her father's society and companionship. Nonetheless, I would be reluctant to suggest that even a troubled relationship was not of value if my client is found to be liable for causing Becker's death.

As far as punitive damages, I doubt that there is a strong case. While O may have violated the statute and would otherwise be found negligent for permitting Perez to store the shotgun, I don't think it is plausible that she displayed a flagrant disregard for the victim's safety.

Torts I (DeWolf) Fall 2007 Checklist

QUESTION 1

☐**Overview**
☐Claims v. **Achter**
☐
☐**Breach** of Duty
☐**Negligence** Claims
☐Negligence **defined** as lack of RC
☐
☐Negligent **installation** of UST?
☐**Custom** of the industry -- only the **floor**
☐ Failure to **Warn** about leak
☐**Statutory** violation
☐Statutory **purpose** to prevent illness
☐Was the violation **excused**?
☐**Conclusive** or merely **evidence** of Neg.
☐
☐**Strict** Liability
☐**ADA** theory
☐**Restatement** criteria
☐**Application** of § 520
☐§ **519**: Did injury result from AD aspect?
☐Any claim for **Nuisance**?
☐No **property right** when spill occurred
☐

☐**Proximate Cause**
☐**Defined** as But for + legal cause
☐Did gasoline **migrate** to drinking water?
☐Did gasoline **cause** leukemia
☐**Expert testimony** re causation
☐**More probable than not** standard
☐Would "loss of a **chance**" apply?
☐**Legal** cause not an issue
☐
☐**Damages**
☐Stacy's **Leukemia**
☐**Economic Loss**
☐**Pain and suffering**
☐Potential **Wrongful Death** Claim
☐
☐Grubes' **Property** Damage claim
☐ Lesser of **Diminution** / **repair** cost
☐**Punitive** Damages?

☐No role for **Daun**
☐
☐

QUESTION 2

☐**Overview**
☐**Breach** of Duty
☐
☐**Negligence** Theory
☐Negligence defined as **failure to use RC**
☐Was allowing shotgun in house **negligent?**
☐Negligence in **leaving house**?
☐**Juror** Experience
☐Statutory Violation / Negligence **per se**
☐Did she **"possess"** the shotgun?
☐No plausible **excuse**
☐Is this a **Cardozo** jurisdiction?
☐
☐**Strict** Liability
☐No good **ADA** argument
☐(**RC** would prevent injury)
☐
☐**Proximate Cause**
☐**Defined** as BFC **+** legal cause
☐**But-for** cause wouldn't be difficult

☐**Legal** cause would be **difficul**t
☐**Superseding** cause
☐Foreseeability/Culpability **measure**
☐Use of shotgun was **foreseeable**
☐But culpability was **disproportionate**
☐Did Olson ***cause*** killing?
☐
☐***Palsgraf*** analysis -- lack of duty
☐
☐**Damages**
☐Wrongful death **statute**
☐Are **adult children** eligible?
☐**Pecuniary** loss would be modest
☐Pain and suffering / loss of **consortium**
☐Maximum of **$350K**
☐How **close** was their relationship?
☐**Punitive** Damages?
☐
☐
☐

Exam # _____