

SAMPLE ANSWER TO MIDTERM EXAM

This case draws most of the facts from *Turner v. Ohio Bell Tel. Co.*, 118 Ohio St.3d 215, 887 N.E.2d 1158 (2008), which reversed (4-2) an appellate court decision reinstating the plaintiff's claim against the telephone company.

I would focus my attention primarily on Western Telephone Company ("TC"). In order to establish their liability, LT would have to show (1) WTC breached a duty to LT's husband; (2) that breach of duty proximately caused his death; and (3) her damages are legally compensable.

Before analyzing the claim against WTC, I should first point out that there is obvious liability on the part of the driver, Bryan Hittle ("BH"). Based on his conviction for vehicular manslaughter, he was obviously at fault. Unfortunately, it also appears that he is in no position to pay any part of a judgment, since he is both in prison (presumably spending whatever resources he had on his defense to the criminal charge) and uninsured. If we could show that he was in the course and scope of employment, we could hold his employer vicariously liable, but since he was only driving to work (not yet *at work*), that seems doubtful.¹

TC's Breach of Duty

Strict Liability. There are two ways to establish that a defendant breached a duty to the plaintiff. One is to establish a form of strict liability. In this case that seems doubtful. The activity of placing telephone poles is not abnormally dangerous, and therefore is not subject to strict liability on that basis; the factors used to establish what is an abnormally dangerous activity (high degree of risk, failure of reasonable care to avoid harm, etc.) would not apply here. Second, this is not a nuisance; there is no property right enjoyed by the decedent which TC invaded. Finally, there is no apparent form of statutory strict liability.

Negligence. A second means of a breach of duty is to prove that TC was negligent. To do so we would need to show that TC failed to use the care that a reasonably prudent person would use in the same or similar circumstances. Our primary argument would be that a reasonably prudent person wouldn't place a telephone pole so close to the highway where it could be struck, as it was in this case. I would first want to know if there are industry standards regarding the placement of utility poles. If we could show that there was a standard that TC did not meet, that would be strong evidence of negligence. Even if TC met the industry standard, we are not precluded from showing that a reasonable person would find the industry standard inadequate in light of the risks involved. In a related way, an expert might make use of the Learned Hand calculus, which compares the burden of greater safety precautions to the likelihood of injury multiplied by the anticipated gravity of the injury (Is $B < P * L$?). If the pole was located at a place that would place drivers and their passengers at risk, and it wouldn't be that costly to move it to a safer location, a reasonable person would take the precaution.

Another standard for negligence is TC's own policies or internal procedures. How do they

¹ Moreover, while this lies beyond the scope of the question, if Turner worked for the same employer he would be unable to recover from BH's employer because of worker's comp.

decide whether to place a utility pole in relation to a highway? Is there some standard they have set that we could use against them? Again, this would be persuasive evidence that they failed to use reasonable care.

There is a statute that applies to utility poles, but it doesn't appear to provide much benefit. It states that utility poles should be placed in such a way as to avoid "inconvenience" to the public; by contrast, it forbids causing a "danger" to navigation. That doesn't make a strong argument that the statute requires avoiding a danger to the public. Moreover, in order to show that the statute was violated, we would have to show something very similar to showing negligence in fact. As a final limitation, not all jurisdictions treat a statutory violation (even if we could show one) as anything more than *evidence* of negligence.

As a side note, TC might employ someone else to place the utility pole. If so, they might claim that an independent contractor, rather than an employee, was responsible, and therefore they are not vicariously liable for such negligence. My response would be that TC still had the right to control the way in which their work was done (and also presumably engaged in regular inspection of their lines) and thus could not avoid liability for negligent placement of the pole.

Proximate Cause

Assuming we could establish negligence, we would still need to show that it was a proximate cause of RT's death. To do so we need to show that TC's negligence was both a but-for cause as well as a legal cause of the death. With respect to but-for cause, there appears to be no question that, but for the placement of the pole so close to the highway, the injury either would not have occurred or would not have been fatal.

With respect to legal cause, the only plausible argument TC might make is that BH acted as a superseding cause of the injury. After all, he was convicted of vehicular manslaughter. TC would say that BH's poor driving broke the chain of causation. In response, we could convincingly argue that such negligence was foreseeable (it's precisely the reason why a reasonable person would have moved the utility pole further from the highway), and that BH's negligence (even if criminal) was not so disproportionately culpable as to make the imposition of liability unfair.

Damages

Any wrongful death claim is governed by statute. Here the statute is quite generous. It not only allows LT as the widow to recover "pecuniary damages"--the loss of income that LT would have provided--it also permits the widow to recover damages for "grief, sorrow and mental suffering." Assuming we could show that LT and RT were a reasonably happy couple, that amount would be considerable.

Another feature of the statute is that it allows the children of the decedent to make similar claims for bereavement and pecuniary loss. We don't know if LT has children, but if she does, they would be entitled to their own recovery and the total amount of damages would be allocated according to their relative dependency upon RT.

DeWolf, Torts Fall 2010, Midterm Checklist

- Overview**
- Liability = Breach of duty + prox. Cause + damages
- Claim v. **Driver**
- Clear** liability
- Not much chance of **recovering damages**
- Vicarious Liability**: Was driver in course and scope of employment?
- On the way *to* work; not *during* work
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- Claim v. **Telephone Co.** ("TC")
- No **strict** liability
- Not an **abnormally** dangerous activity
- Factors** (common, appropriate, high social utility)
- Not a **nuisance** (no property interest invaded)
- No **statutory** strict liability
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- Negligence?**
- Defined** as failure to use reasonable care
- Pole appears **dangerously close** to the highway
- Is there an **industry custom** regarding placement of poles?
- Even if TC meets industry custom, it's a **floor**, not a **ceiling**
- Learned Hand** calculus might be useful yardstick for negligence
- Does TC have its own "**rulebook**" (standards for placement, employee practice, etc.)?
- NPS**: Was the statute violated?
- Statute: "**inconvenience**" to public vs. "**danger**" to navigation
- Would proof of statutory violation be any **easier** than proving neg. in fact?
- Even if statutory violation were proven, is it negligence *per se* (à la **Cardozo**)?
- If TC blamed **subcontractor** for placement, TC would still have right to control
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- Proximate **cause**
- PC = **but-for** + **legal**
- But-for** test is easily satisfied
- TC might argue driver was **superseding** cause
- But driver's neg. was neither **unforeseeable** nor **disproportionately** culpable
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- Damages**
- Wrongful death cases determined by **statute**
- If liability were established, measure of damages is quite **generous**
- Statute permits recovery of "**pecuniary** damages" -- **economic** damages
- What sort of **economic benefits** did Robert Turner provide?
- Widow is also entitled to **grief, sorrow** and mental suffering
- Did LT have **children**? If so, non-economic damages distributed **proportionately**
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Exam # _____