

SAMPLE ANSWER TO MID-TERM EXAM

QUESTION 1

[This case was taken from *January v. Peace*, 738 S.W.2d 355 (Tex. 1987). In that case the court affirmed summary judgment against the children, holding as a matter of law that January Sr.'s murder of his wife was a superseding cause of the injury to the children.]

I would consider lawsuits on behalf of the Billy and Betty ("Bs") against Peace Drug ("PD") and against Slade's Drug ("SD"), based upon violation of the statutes governing the use of pesticides. In order to recover against either one it would be necessary to establish (1) a breach of duty; (2) proximate cause; and (3) recoverable damages.

1. *Breach of Duty*. In order to prove a breach of duty, Bs would have to show that PD or SD either acted negligently or else engaged in an activity that created strict liability.

Negligence. A person acts negligently if he or she fails to use reasonable care—reasonable care is what a reasonable person would do in the same or similar circumstances. The issue here is whether a reasonable person in either PD's or SD's situation would have sold strychnine to January Sr. One way of establishing negligence is by examining the custom of the industry. What procedures do drug stores usually follow in determining whether to sell a poison like strychnine? If SD or PD were out of compliance with those industry standards, then that would be a strong indicator of negligence. On the other hand, compliance with that standard doesn't prevent Bs from showing that industry standards are lax. (As a related matter, I would look to see whether any employee manuals addressed procedures to be used when dispensing poisons like strychnine.) Second, Bs might argue that PD or SD violated a statute intended to protect them. If this jurisdiction follows the doctrine of negligence per se, then an unexcused violation of the statute creates negligence as a matter of law. To invoke this doctrine, Bs would have to show (a) that there was a statutory violation; (b) that the statute in question was designed to prevent this type of injury; and (3) there was no excuse. As to (a), it seems pretty clear that PD and possibly SD violated the statute by selling a pesticide without a license. However, with respect to (b), it's not clear that the statute was designed to prevent sales to potential murderers. I would argue that it was designed generally to prevent use of pesticides in an unsafe fashion, and this is certainly an example. (3) There is no evidence that there was any excuse for this sale. PD and SD knew all of the facts that would give rise to their duty to comply with the statute, and it could not be argued that complying with the statute would have increased the risk, à la *Tedla v. Ellman*. (If this is a state like Washington, where negligence per se has been largely abandoned, then we could still use the statutory violation as *evidence* of negligence, but the jury would be allowed to decide that the statutory violation was not negligent.)

Strict Liability. A person is strictly liable for injuries caused by engaging in an abnormally dangerous activity. I don't think that sale of strychnine would be considered abnormally dangerous [the plaintiffs didn't even argue it in *January v. Peace*.] Use of reasonable care will avoid injuries in the use of strychnine. It was simply misused on this occasion.

2. *Proximate Cause*. A more difficult hurdle for Bs would be proximate cause. To constitute a proximate cause, the breach of duty must be both a cause-in-fact ("but-for" cause) as well as a legal cause (directly related to the injury). As to but-for cause, it's not clear that Mrs. January would have lived but for the sale of strychnine. January Sr. might have used some other method. However, even if the sale was a but-for cause, it must also be a legal cause. The defendants

could defeat liability if they established that the sale was too remote because there was a superseding cause of the injury. The murderous conduct of January Sr. would be an obvious candidate for a superseding cause. It is usually a jury question as to whether or not there was a "direct and unbroken sequence" connecting the defendant's conduct and the injury. However, courts usually look to whether or not the conduct of the allegedly superseding tortfeasor was foreseeable, and whether the wrongfulness of the two tortfeasors' conduct is wildly disproportionate. Sometimes statutes provide their own determination of foreseeability. (*See Ross v. Hartman*). We would argue that one of the reasons for enacting legislation on pesticide use was to prevent harmful uses of dangerous pesticides. On the other hand, while it is foreseeable that pesticides will be misused, it is less foreseeable that they will be used as means to commit murder. Moreover, the disproportion between the two would be much greater than, say, the serving of alcohol and driving while intoxicated.

Damages. The wrongful death statute in this state provides that the action to recover for the death of the decedent is "for the exclusive benefit of the surviving spouse, children, and parents of the deceased." (§ 71.004) Thus, Billy & Betty would be entitled to recover. The statute further provides that those who are eligible to recover are to be awarded "shares" according to the jury's distribution of the total award. (§ 71.010) There is no information concerning any parents of the decedent, so therefore the jury might be required to make an award to them as well. However, it is likely that the jury would concentrate their award on the children. Unfortunately, the statute is vague with respect to what the proper measure of damages would be. It simply speaks of awarding "an amount proportionate to the injury resulting from the death." (§ 71.010) In addition to compensatory damages, the statute permits an award of punitive damages where it is caused by a wilful act or omission or gross negligence of the defendant. (§ 71.009) We could argue that this was a case of gross negligence, but unless there was something that would have suggested January Sr.'s sinister purpose, I doubt that we would be able to recover punitive damages for the children.

As far as compensatory damages, they would certainly include the economic loss suffered by the children. That would be the amount it would take to compensate for the out-of-pocket costs suffered by the premature death of their mother. It might also include medical costs associated with the therapy that will undoubtedly be necessary to deal with this traumatic situation. The larger dollar item will be the emotional costs associated with the loss of their mother, particularly in this tragic way. Those costs would be very large. However, it is not clear from the statute that those will be recoverable. I would have to do further research to determine whether they are considered part of the "injury resulting from the death."

QUESTION 2

[This case was taken from *Walker v. Rinck*, 1992 WL 354247 (Ind. 1992), in which the Supreme Court of Indiana decided that a cause of action could be maintained by the three Walker children against the doctor and the laboratory.] In order to recover, the children would have to establish that (1) there was a breach of duty (2) that proximately caused (3) compensable damages.

1. *Breach of Duty.* The laboratory admits that it erroneously reported the lab results. It would seem fairly obvious that this was negligent. Negligence is the failure to use reasonable care, which is the care that a reasonably prudent person would use. It is possible that the mistake was one that could occur anyway, even with the use of reasonable care, but that doesn't seem likely from the description of the event. It is described simply as an "error."

2. *Proximate Cause.* An act of negligence does not lead to liability unless it is a proximate cause of damage suffered by the plaintiff. In this case each of the children would have to show that the laboratory's negligence was both (1) a but-for cause as well as (2) a legal cause of their injuries. As far as but-for causation, each child would have to show that, more probably than not, reasonable care by the laboratory would have prevented the injury. Although the doctor was told by the patient that she was Rh negative, the laboratory's mistake could still be found to be a but-for cause, since a jury could find that, more probably than not, the inaccurate report from the lab made the difference in whether or not Dr. Rinck ordered the RhoGAM treatment.

As to legal cause, the primary issue is whether or not there was a "direct and unbroken sequence" between the laboratory's error and the birth of the children with defects (e.g. asthma, hearing impairments, etc.). We would argue on behalf of the laboratory that there were two superseding tortfeasors. The first is the doctor, who was told that Mrs. Walker was Rh negative and should have questioned the lab report. However, I believe the jury will just consider him an intervening tortfeasor. Similarly, we could argue that the parents' decision (or nondecision, as the case may be) to have children was a superseding cause of injury to the children. However, I think it would be hard to show that it was in fact a superseding cause. First, the fact that a person with this condition would have more children is eminently foreseeable. It is precisely the risk that reasonable care in reporting the lab results would have avoided. Secondly, their having additional children, whether as a result of a conscious choice to have children or simply through accident, would not be so reprehensible that it would break the causal chain between the initial act of negligence and their injuries. Thus, I think we would lose that argument.

3. *Damages.* The children would be entitled to recover the economic loss sustained as a result of whatever conditions they have. For example, Kathy's hearing impairments, motor skill deficiencies, and possible mental retardation could result in lowered earning capacity and higher medical costs. Special therapy might be required. Similarly, Jennifer's asthma may impair her ability to participate in activities that a person without asthma can engage in, limiting her earning capacity and causing additional medical expenses. The jury would have to engage in quite a bit of speculation in comparing life without the Rh complications compared to life with these complications. However, they would be permitted to make their best estimate of what the difference will be in out-of-pocket expenses. In addition, each child would be able to recover pain and suffering damages for both their actual physical pain (e.g. asthma attacks) as well as the emotional distress resulting from these conditions. It could be a very substantial damage award for each child.

Incidentally, this would not be a case that involves any wrongful life questions or the application of the statute (§ 72.001) prohibiting recoveries for a person who would have been aborted but for the defendant's negligence. Here, reasonable care by the defendant would not have resulted in abortion, but would have resulted in a normal birth. Therefore the claim is no different from a standard negligence claim.

TORTS MIDTERM, '92 CHECKLIST

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|------------------------------------------------------------|---------------------------------------------------------------|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Proximate cause |
| <input type="checkbox"/> Breach of Duty | <input type="checkbox"/> But-for cause |
| <input type="checkbox"/> Negligence Claims | <input type="checkbox"/> Legal cause |
| <input type="checkbox"/> Definition of Negligence | <input type="checkbox"/> Superseding cause |
| <input type="checkbox"/> Custom of the Industry | <input type="checkbox"/> Reprehensible intervening conduct |
| | <input type="checkbox"/> Marginally foreseeable |
| <input type="checkbox"/> Negligence per se | <input type="checkbox"/> Statutory cause (<i>Ross</i>) |
| <input type="checkbox"/> Jurisdictional issue | |
| <input type="checkbox"/> Even if not dispositive, evidence | <input type="checkbox"/> Damages |
| <input type="checkbox"/> Statutory violation | <input type="checkbox"/> Statutory beneficiaries |
| <input type="checkbox"/> Statutory purpose | <input type="checkbox"/> Jury determines allocation of award |
| <input type="checkbox"/> No excuse | <input type="checkbox"/> An amount "proportionate to damages" |
| <input type="checkbox"/> Strict liability | <input type="checkbox"/> Punitive damages? |
| <input type="checkbox"/> Not applicable | <input type="checkbox"/> Non-economic recovery? |

QUESTION 2

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|------------------------------------------------------------------------------|--------------------------------------------------------------------|
| <input type="checkbox"/> Overview | <input type="checkbox"/> Damages |
| <input type="checkbox"/> Breach of Duty | <input type="checkbox"/> Economic costs |
| <input type="checkbox"/> Negligence is obvious | <input type="checkbox"/> Discounted to present value |
| | <input type="checkbox"/> Speculative nature of recovery |
| <input type="checkbox"/> Proximate cause | <input type="checkbox"/> Not a wrongful birth / wrongful life case |
| <input type="checkbox"/> But-for cause | <input type="checkbox"/> Non-economic damages would be high |
| <input type="checkbox"/> More probable than not standard | |
| | <input type="checkbox"/> statute (§ 72.001) not applicable |
| <input type="checkbox"/> Legal cause | |
| <input type="checkbox"/> Direct and unbroken sequence | |
| <input type="checkbox"/> Parents as superseding cause? | |
| <input type="checkbox"/> Foreseeable injury | |
| <input type="checkbox"/> Not particularly reprehensible | |
| <input type="checkbox"/> Particularly if subsequent births were "accidental" | |