Professor DeWolf Torts I
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SAMPLE ANSWER TO MID-TERM EXAM

QUESTION 1

This case is based upon Crovetto v. New Orleans City Park Improvement Ass'n*, 653 So.2d 752 (La. 1995). In that case the court affirmed a summary judgment dismissing the driving range, finding that there was no duty to prevent freak accidents such as the one suffered by the plaintiff.*

In order to recover, Crovetto would have to show that someone breached a duty to him and that this breach proximately caused his injuries. The logical defendants to such an action would be Arthur, Self, and Sunset Hills ("SH").

Claim v. Arthur. Crovetto would allege that Arthur acted negligently in his handling of the golf club. It is important to note that Arthur would be held to a standard of reasonable care, but that standard would be modified to what a reasonable 12-year-old would do. Although children who carry on adult activities can be held to an adult standard (as in the snowmobile case), here there is no special danger or inability to anticipate his childlike behavior. Thus, I think we would be limited to proving that a reasonable 12-year-old would have prevented this kind of accident.

Claim v. Self. Self appears to be acting as an instructor of some type. He would be held to the standard of reasonable care: that is, would a reasonably prudent person have done something different to have prevented this kind of accident from occurring? We might look to any standards commonly observed among golf instructors. There might even be some kind of "rulebook" or safety policy established to insure the safety of people receiving golf instruction. As a related issue, we would want to know if Self was employed by some larger entity (perhaps SH itself), leading to vicarious liability. This would allow us to obtain compensation from a deeper pocket than Self's personal ability to pay.

Claim v. SH. As with the claim against Self, we would want to know if there are precautions that SH should have taken to prevent accidents of this type. Perhaps the design of the booths is subject to some kind of guideline or industry standard that would show that they are substandard. (By contrast, we may be faced with the fact that the standards have been met by SH, in which case it would count in their favor as evidence that they have acted reasonably.) One consideration would be the likelihood of this kind of injury, multiplied by the magnitude of injuries when they occur, compared with the cost of trying to avoid such injuries. Again, it may be accepted that to preserve a reasonably good experience at an acceptable cost, the potential for this kind of injury can't be completely eliminated. Finally, it's conceivable that there would be regulations covering the design of such booths. In the unlikely event that such a regulation was violated, it would serve as strong evidence of negligence -- in some jurisdictions it could even be ruled negligence as a matter of law.

Proximate Cause. With respect to any defendant who was found to be negligent, we would also need to show that such negligence proximately caused Crovetto's injury. Proximate cause consists of the convergence of "but for cause" (*i.e.*, the injury would not have occurred *but for* the defendant's negligence) and legal cause (*i.e.*, the injury occurred in a direct and unbroken

sequence beginning with the defendant's negligence). As to Arthur, proximate cause would seem to be relatively easy -- if he hadn't lost control of the club it wouldn't have caused the injury, and it's relatively foreseeable that such injuries could occur. On the other hand, both Self and SH would argue that any negligence on their part was superseded by the conduct of Arthur, and that the unlikely event of an injury made it too remote to establish a "direct and unbroken sequence" between them and the injury. Thus, they could argue that legal cause hasn't been satisfied.

QUESTION 2

This case is based upon Burman v. Golay & Co., Inc., 420 Pa.Super. 209, 616 A.2d 657 (1992). *In that case the court upheld summary judgment granted both to the electric utility and to the multivalve manufacturers. As to the electric utility, the court held that no duty extended to a spectator on the sidewalk. As to the manufacturers, the court refused to apply an "enterprise liability" theory, and in the absence of evidence linking the product to a specific manufacturer, held that the plaintiff could not recover.*

To recover compensation, Burman would have to establish that a defendant (either CARELEC or Sherwood / RegO) breached a duty owed to her, and that this breach proximately caused her injury.

Claim v. CARELEC

There are two choices in establishing a breach of duty. First, CARELEC is obligated to use reasonable care, and a failure to do so would result in a finding of negligence. In the alternative, CARELEC may be subject to strict liability for carrying on an abnormally dangerous activity.

Negligence. It sounds from the description of the accident that there was negligence in the installation of the "house drop." It should be relatively easy to use the standard for such procedures established by the electric utility industry. (If there is some kind of regulation or electrical code that applies to this procedure we may even be able to show that there has been "negligence per se" -- negligence as a matter of law.) Alternatively, there may be an internal procedure within CARELEC that was violated. This can also be used to establish negligence. Any negligence by a CARELEC employee would be attributed to CARELEC (the deep pocket) by the principle of vicarious liability.

Strict Liability. Although the negligence claim seems quite strong, we should also consider whether the provision of electricity is subject to strict liability. Abnormally dangerous activities (determined by application of six factors in the RESTATEMENT, § 520) would result in liability regardless of fault. Since fault seems pretty easy to establish in this case, I don't think we'd need to go very far, but it's worth considering as a back-up.

Proximate Cause. The more difficult question is whether or not CARELEC's negligence (or abnormally dangerous activity, if we need to use that theory) proximately caused the injury. Proximate cause is a combination of "but for cause" (*i.e.*, the injury would not have occurred *but for* the defendant's negligence) and legal cause (*i.e.*, the injury occurred in a direct and unbroken

sequence beginning with the defendant's negligence). As to but-for causation, it seems clear that the injury would not have occurred if there hadn't been a negligent installation of the wire. However, it's more of a stretch to find legal cause. To begin with, some jurisdictions apply a "zone of danger" test (following Cardozo) that would limit the defendant's duty of care to those that are within the reach of what is a foreseeable consequence of negligence. A court might find that CARELEC's employee couldn't reasonably foresee that a spectator on the sidewalk would be at risk from a negligent installation of the house drop. Along similar lines, CARELEC will certainly argue that there was no direct and unbroken sequence, since the explosion of the propane tank was a superseding cause of the injury. I don't think this is a strong argument, but it will certainly be raised. We would hope that the jurisdiction follows something more like Judge Andrews' approach in *Palsgraf*, which makes liability turn on whether the jury finds that the connection is close enough to make it fair to impose liability.

Claim v. Manufacturers

The manufacturers of the multivalve are also potential defendants. Again, the same burden of proof is upon us to establish breach of duty and proximate cause.

Negligence. We have a strong advocate in Drake that a reasonable person would have redesigned the multivalve. We might want to make use of the Learned Hand calculus, comparing the burden of redesign with the cost of such accidents, discounted by their improbability. It might be counted against us that the industry has not yet adopted a higher standard of care, but as in the *Hooper* (tugboat) case we might argue that the entire industry has lagged behind. If Drake turns out to be a solid witness, this will be very convincing. On the other hand, if Drake is a flake, then we might look foolish to the jury. (As a final thought, there might be some argument that strict liability should apply, since propane is a dangerous substance. However, the multivalve itself might not be considered an abnormally dangerous activity, so I wouldn't be too excited about this approach.)

Proximate Cause. The more difficult challenge will be to establish proximate cause. Ordinarily the plaintiff must identify the tortfeasor who caused her injury. Here we can't do so. Courts have recognized four possible exceptions to relieve us of that burden. *Alternative Liability* is applied when all of the defendants who might have caused the injury are sued, and each one acted negligently toward the plaintiff. That doesn't appear to apply in this case, since we have only 85% of the manufacturers in Sherwood and RegO. (If we could get the last 15% then we could use this theory.) *Concerted action* applies when the defendants have agreed amongst themselves to engage in negligent conduct. That doesn't seem to apply here, because there's no evidence of collective action. *Enterprise Liability* would apply if there is some kind of standard-setting organization to which the defendants belong who should have set the standard higher, but they negligently failed to do so. I don't see any evidence of that here, but if there were such evidence, it would help us. Finally, *market-share liability* has been applied in cases involving a fungible product, like DES or asbestos. The problem here is that the multivalve is not really a fungible product. If the court did accept such a theory, we'd be limited to recovering the market shares of the defendants, but if we can get 85%, then that's a pretty good approximation of a full recovery.

Legal Cause would be considerably easier; assuming that we can establish but-for cause (or one of the exceptions), then there is no reason to resist imposition of liability.

SUMMER '99 MIDTERM CHECKLIST

QUESTION 1

- ☐ Overview
- ☐ Claim v. Arthur
- ☐ Breach of Duty
- ☐ Negligence
- ☐ Duty of Reasonable Care
- ☐ Adjusted to reasonable child standard
- ☐ (No adult risk involved)
- ☐
- ☐ Claim v. James Self
- ☐ Custom of the industry
- ☐ Rulebook?
- ☐ Vicarious liability?
- ☐
- ☐
- ☐ Claim v. Sunset Hills
- ☐ Design of booths
- ☐ Learned Hand calculus
- ☐ Regulations / Statutes?
- ☐
- ☐ Proximate Cause Issues
- ☐ Tucker
- ☐ But-for causation - easy
- ☐ Self - more difficult
- ☐ Legal cause - harder for Sunset Hills
- ☐
- ☐
- ☐

QUESTION 2

☐ Overview
☐
☐ Claim v. CARELEC
☐ Breach of Duty
☐ Negligence Claim
☐ Negligence defined / Standard
☐ Rulebook violation
☐ Vicarious Liability
☐ Res ipsa loquitur theory

☐ Strict liability - if necessary
☐
☐ Proximate Cause
☐ But-for causation is easy
☐ Legal cause: Scope of danger/foreseeability
☐ Superseding cause
☐ Cardozo
☐ Andrews
☐
☐
☐
☐

☐ Claims v. Sherwood / RegO
☐ Negligence theory
☐ Learned Hand calculus
☐ Does industry custom support Δs?
☐ Employee testimony will be helpful
☐ Would strict liability apply?
☐
☐ Proximate Cause
☐ But-for + legal cause
☐ But-for is iffy ("might")
☐ Inability to identify
☐ Alternative L - elements
☐ - won't work because only 85%
☐ Concert of Action - elements
☐ - no evidence
☐ enterprise liability
☐ - did they have a trade ass'n?
☐ Market share liability
☐ - are products "fungible"?
☐
☐ Legal Cause would be easier
☐ (injury is foreseeable)

Exam Number

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