

**Torts – McCormack
Practice Exam
Fall 2010**

Question: It was a dark and stormy night. Paula was driving, with her friend Jill as a passenger, on their way to a concert. Paula took a turn too fast to avoid a cow, belonging to Farmer Dale, which was crossing the road. The cow was knocked cold and the car ended up in farmer Dale's corn field after hitting an electric utility pole. Paula left the car to go talk to Farmer Dale but there was nobody home. When Paula returned to the car, the cow suddenly got up and charged, viciously mauling her. In the meantime, Jill had left the car trying to make her way back to the road but made contact with a fence that had become electrified when the pole fell on the fence. Jill suffered severe hair loss as a result of the electric shock. Paula wishes to bring a law suit against Farmer Dale. Jill is wondering whether she has a valid law suit against Paula, farmer Dale, or both.

Provide a memo outlining 1. the arguments supporting Paula's law suit as well as the likely defenses available to Farmer Dale, and 2. the theories supporting Jill's claims as well as the defenses that can be raised and their chances for success. In both instances, indicate what facts or additional information will be critical to development of the cases.

MEMORANDUM

SUBJECT: Negligence and strict liability in cow accident

CLIENTS: Paula and Jill

I. PAULA'S CLAIMS

Paula has two claims, for injury to her car from the collision and injury to her from the charging cow.

It is likely that she will be successful in the accident claim through the doctrine of strict liability because Farmer Dale violated the "fenced-in" rule, which allowed his cow to enter the road and was the proximate cause of Paula's accident. In the alternative, if Paula needs to show negligence, she may be able to rely on *res ipsa loquitur* to establish a presumption in her favor.

British law originally made animal owners responsible for trespass by their animals, but the western state of the U.S. went to an "open range" concept in which those who wanted to protect themselves from livestock damage should "fence out" roaming animals. As urbanization has changed the dynamics and weight of rural-urban interests, the former "fencing out" rule has been replaced in most places by a "fencing in" rule, which requires animal owners to fence in or otherwise restrain their animals, and that they will be strictly liable for damages that result from their failure to fence in their animals. Some states apply the "fencing in" rule to create strict liability whenever livestock escape the premises and harm another person or property.

Even if Paula must show negligence on the part of Farmer Dale, *res ipsa loquitur* could operate because the cow was in his exclusive control and escape from the fence would not ordinarily occur in the absence of negligence. That would throw the burden on Dale to show that there was another explanation for the escape.

It is likely that a court will find that Farmer Dale's cow was the proximate cause of Paula's accident. Such an accident would be foreseeable and is a natural consequence of the cow's escape onto the road.

In addition to the damages to the automobile, the cow also injured Paula when it attacked her.

When a domestic animal causes an injury to a person, the owner will only be strictly liable if he has knowledge or should have knowledge of the animal's dangerous propensities. In this case, to establish that Farmer Dale had knowledge of his cow's violent propensities, evidence would have to be submitted showing that the cow had attacked other people prior to Paula or some other showing of her violence.

Farmer Dale could, in his defense, claim that Paula was driving negligently when the accident occurred. In common law, contributory negligence would defeat any recovery. In a comparative negligence setting, damages would be apportioned according to the relative proportion of their fault. Evidence of her speed will be important to determine if she were exceeding the speed limit (negligence per se) or exceeding reasonable standards for the rainy conditions. He may also attempt a defense of assumption of risk, claiming that Paula was assuming some risk by driving her car on a dark and stormy night in what was likely a rural area with lots of livestock.

II. JILL'S CLAIMS

Thesis: It is somewhat unlikely that Jill has a claim of strict liability against Farmer Dale, but she may have a claim of comparative negligence against both Farmer Dale and Paula.

Rule/Analysis: First, when looking at Jill's claim of strict liability against Farmer Dale, she has a weaker case because it is not clear that Farmer Dale's actions were the proximate cause of Jill's electrocution. Farmer Dale's cow was not the direct cause of Jill's injuries – it was the fence that became electrified as a result of the pole falling as a result of the accident, which was caused by the cow being in the road. As we learn from *Ryan v. New York Central RR*, courts do not like to extend causation far along the chain of reaction. Even though Farmer Dale's cow was a necessary condition to Jill's injury, there were other intervening factors that reduce his liability. The injury to Jill was not foreseeable, and it appears too indirect.

However, there could be a stronger case against both Farmer Dale and Paula in a case of comparative negligence. Jill will first claim that she did not contribute to the negligence, but that Farmer Dale and Paula were both equal contributors: Farmer Dale for negligently allowing his animal to escape to the road, and Paula for driving negligently. In order to prove their negligence, Jill must show 1) that there was a duty of care, 2) that the defendant's breached the duty 3) that the breach is the actual or proximate cause of her injury, 3) show that damages are required. Because it maybe that Jill was also negligent in some way (Jill leaving the car under dangerous circumstances), the court may factor her negligence into the equation. It is highly likely that Jill's negligence was less than 50% such that she is likely to recover some damages.

Finally, Jill may also have a claim of Negligent Infliction of Emotional Distress. Since her loss of hair is physical evidence of the damage, a court may find that sufficient evidence of NIED.

Farmer Dale's defenses are the same as above. Paula's best defense is to simply claim that she was not negligent, that she fulfilled her duty of care to drive safely, and that the accident was not at all caused by any negligence on her part.