

Question MEE 1 – July 2023 – Selected Answer 1

(1) Establishing a Negligence Claim

The issue here is whether the wife can prove all the elements required to establish a negligence claim against the farmer. In order to establish a negligence claim, a party must prove the elements of duty, breach, causation, and damages. The wife must prove that the farmer owed a duty of care. The standard duty of care is that which a reasonable person would undertake, owed to foreseeable plaintiffs. The wife must prove she is a foreseeable plaintiff and that the farmer therefore owed her a duty of care regarding his pesticide use. The wife must prove the farmer breached his duty of care by using the pesticide GS gas on his crops for the last two planting seasons. The wife must prove that this breach was both the actual and proximate cause of her injury. To prove actual cause, the wife must provide evidence that GS gas was what actually caused her cancer. To prove proximate cause, the wife must prove it was [reasonably foreseeable] that GS gas would cause cancer in a human in her position. Finally, the wife will need to prove that she suffered damages from the farmer's use of GS gas which can be redressed by the court through this suit.

Duty of Care & Breach

The wife will likely be able to establish that the farmer owed a duty of care towards his close neighbors when using pesticides. It is reasonably foreseeable that individuals living less than a mile from areas where pesticides are used could suffer health consequences from the negligent use of those pesticides. GS gas is a commonly used pesticide, despite being banned in the county for ten years. A farmer in State A, particularly one that needed effective pesticides to grow valuable crops, would know about its effects. It has been twelve years since the health department researched and produced findings on GS gas, which included the tendency of the gas to drift to nearby land up to one mile in each direction and remain near ground level for several days at high concentrations. A farmer following legislation which impacted his crops would likely be aware of the health department's findings. Additionally, the health department re-released its initial study on GS gas when it lifted the ban on GS in the county, and the farmer was required to and did attend the department's safety seminar. Therefore, the farmer owed a duty of care to the wife who was a foreseeable plaintiff, living within one mile of his pesticide use and GS gas being a common, dangerous pesticide.

The wife will have a difficult time proving breach. The farmer applied GS to his fields according to the application safety recommendations presented in the seminar. It does not appear that he acted unreasonably when using the pesticide, or breached the duty

of care owed to his neighbors when using a dangerous pesticide by disregarding safety standards or risks. Further, it is unlikely that there is a different, less dangerous pesticide the farmer could have used, since the only other effective pesticide was taken off the market, which led to the lifted ban on GS gas.

Causation

It will be difficult for the wife to prove that GS gas was the actual cause of her cancer. No facts are provided regarding the wife's medical history, such as if other family members have suffered from cancer. Additionally, the facts do not state when the wife's cancer first manifested, only that she was diagnosed two years ago. Additionally, there is not perfect scientific evidence supporting the claim that GS gas causes cancer, as no study has definitively linked GS exposure to cancer in humans. It is helpful that GS has been linked to cancer in mice, but that likely will not be sufficient to prove that GS gas exposure from the farmer was the actual cause of the wife's cancer.

Proximate cause will also be difficult for the wife to prove. As with actual cause, the link between GS gas and cancer is tenuous and likely difficult to prove. Although it is apparent that pesticides, particularly GS gas, can cause health risks in humans, such that the health department banned its use twelve years prior, the health department did lift the ban two years ago and the cancer rates in the county remain consistent with the state rate.

Damages

The wife will be able to prove damages, as she clearly will have medical expenses linked to her cancer, as well as pain and suffering.

It is unlikely that the wife will prevail, due to the above stated lack of causation.

(2) The issue is whether the pesticide constitutes an intentional physical intrusion onto the husband's property. The husband must prove that the pesticide is tangible such that it constitutes a "physical" intrusion when it drifted over his property. The husband must then prove that it was intentional on the part of the farmer that the pesticide would intrude upon the husband's property. The husband likely will not prevail. A court might find that the pesticide is tangible enough to constitute a physical intrusion, in the way GS gas lingers in high concentrations near the surface and moves over adjacent property. However, the gas is much more like light, air, or sound, such that it is intangible and would not constitute a physical intrusion. The husband will likely be able to prove intent to intrude on the part of the farmer, as he applied GS gas in the manner he learned at the health department seminar, meaning

he knew that the pesticide rouse from the ground after two weeks and would drift up to one mile in different directions. Therefore, when he applied the pesticide, he had the requisite intent that it would move up to one mile, including onto the husband's property. The lack of physical intrusion will likely prevent the husband from prevailing on his claim.

(3) The court is unlikely to permanently enjoin the farmer from using GS within one mile of the couple's house. A Permanent injunction is a serious and burdensome remedy in equity, and courts prefer not to employ them when damages are available and suitable to resolve the injury. The husband only suffered respiratory problems due to the pesticides, and his land suffered no damage. Additionally, the facts indicate that the ban on GS was lifted because the only other pesticide which was effective was taken off the market, and that preventing its use would cause an estimated \$500 million losses annually. The interest of the farmer in continuing to use GS is significant, and likely outweighs the husband's need for an injunction, particularly when his injury could be property addressed through damages.

Question MEE 1 – July 2023 – Selected Answer 2

1. The wife must prove the farmer owed her a duty, that duty was breached, resulting in harm to the wife that was actually and proximately caused by the farmer's actions to establish her negligence claim, and will unlikely prevail.

At issue is whether wife can make out a prima facie case for negligence. A prima facie case of negligence requires plaintiff to establish duty, breach of duty, causation, and damages. Wife can likely make out duty and breach, but will be unable to establish that the defendant was the cause of her cancer, and is therefore unlikely to prevail.

All persons owe a general duty to use reasonable care to avoid causing harm to foreseeable plaintiffs, consistent with an ordinarily prudent person. Here, the farmer would have owed the wife a duty to act with reasonable care. If farming is a profession that requires specialized knowledge or skill, the farmer will be held to the standard of an average farmer. Therefore, whether the farmer met or breached the standard of care in this circumstance will be determined by one of those standards.

The evidence here shows that the farmer was in compliance with all state laws (given the exception to the GS ban in the county the parties reside), applicable safety recommendations for GS application, and attendance at the seminar required by state law. However, compliance does not conclusively show an actor did not breach their duty and act negligently. Breach of duty, negligence, is a jury question and therefore will be left to the jury at trial. However, the jury may find that this practice, despite being compliant with county laws, is negligent given the demonstrated risks of GS: it is highly toxic and can be fatal to people in a confined area, slight exposure can cause

severe respiratory problems, and the linkage of GS to cancer in mice. As of ten years ago, GS was banned due to health hazards, but the ban was lifted in this county only because the other effective pesticide was taken off the market. Given the health hazards, and the fact that an average farmer in the nation does not use GS, the jury may find that the farmer was negligent in applying GS with the husband and wife living so close because the risk of harm greatly outweighs the benefit of growing the crop.

The wife will have to establish that the farmer's application of GS was both the actual cause, a but-for cause, and the proximate, or legal cause, of her cancer. Proximate cause exists when the plaintiff's harm is the natural and foreseeable result or consequence of a defendant's conduct. Actual cause requires a plaintiff to show both that the alleged negligent act of the defendant generally causes the kind of harm they complain of--that the spraying of GS generally causes cancer--and that this specific defendant's negligence caused this particular harm to this particular plaintiff. Wife will have a difficult time establishing general actual cause here, given that several studies have linked GS exposure to cancer in mice, but it has never been conclusively linked to cancer in humans. Courts differ on whether they admit evidence of animal studies to help support a causation case for an effect in humans. Further, the cancer rates in the country are consistent with the cancer rates in State A. Given these facts, it will be difficult for the wife to establish that farmer's GS application is a but-for cause of her cancer, and will likely prevent her from prevailing.

2. The husband must prove that the farmer's acts constitute an intentional physical invasion of his land in order to establish his trespass claim, and will unlikely prevail.

At issue is whether husband can establish the elements of trespass and whether he can show he is entitled to an injunction against the farmer's GS use within a mile of the couple's house. A prima facie case of trespass to land requires a plaintiff show an intentional physical invasion of the land of another (as well as causation). "Intentional" in this context means that the defendant must have intended the physical presence of their person or object. Physical invasion requires an entrance onto the land of plaintiff that is tangible, physical object, rather than a gas or smell. Finally, the plaintiff must be the lawful possessor of the land in order to bring the claim. No harm is required, nominal damages can be awarded for the trespass.

Here, husband rents the house on land adjacent to fields owned by farmer. A tenant has exclusive rights to possession during their lease term, so that is sufficient for husband to sue for trespass. Husband can show that the farmer has intentionally caused the GS to enter their land because the farmer attended the safety seminar required by the health department of State A before using GS that presents information on the risks of GS use including the risks associated with the drift of GS

to nearby land up to one mile from the application point. Husband and wife live adjacent to the farmer's fields, and therefore he is likely aware that the GS travels to their land. However, husband is unlikely to establish that the GS gas constitutes a "physical, tangible" invasion. Typically, gas and smells do not constitute tangible invasions, but droplets do. GS is injected into the ground as a gas, and presumably rises into the air in the form of gas.

3. Assuming the husband prevails, it is likely that the court will permanently enjoin the farmer from using GS within one mile of the couples house.

At issue is whether an injunction against the farmer preventing him from using the pesticide within one mile of the couple's house would be an appropriate remedy for the trespass alleged. Injunctions are equitable remedies, awarded at the court's discretion.

Before awarding injunctive relief in these sorts of circumstances, akin to nuisance, the court will balance the utility of the activity conducted with the burden and harm caused to the plaintiff. Here, the utility of the farmer's conduct is great: the farm produces valuable crops that are difficult to grow without effective pesticides, with GS being the only effective one available in the county, and there is a substantial need to grow the crops here because the estimated cost of the crop losses county wide without GS are \$500 million annually. Further, there is an overall low population density in the county which lowers the risk in general. Therefore a court is likely to find that the utility of the GS use is great. In contrast, the husband likely can show that the burden on him due to the interference by the GS is great: there are documented health hazards and the reports of severe respiratory problems, known to be associated with GS, have increased by 50% since the county allowed GS use, and during planting season the rate of respiratory illness in this county is well above the rate of other surrounding counties. Given that there are severe risks, and demonstrated interference and harm placed on plaintiff, balanced with the utility of the activity -- the court is likely to grant this injunction. The injunction is only for fields within one mile of the couple's house, which leaves plenty of room for the benefit of GS use to be realized by the farmer while minimizing the demonstrated harm to the plaintiffs.

Question MEE 1 – July 2023 – Selected Answer 3

1. To establish her negligence claim, the wife will have to prove that the farmer owed a duty to the wife, that the duty was breached by the farmer, and that the breach was the legal and proximate cause of harm that was suffered by the wife connected to her injury.

Generally, one has a duty to behave as a reasonable person. This is the sort of duty that is owed to a neighbor. The farmer had a duty to act as a reasonable person would in his application of GS to his crops.

Breach of a duty of reasonable care can be proven by evidence that one did not act as a reasonably prudent person would have under the circumstances. Adherence to an industry custom or law is generally *not* dispositive proof that a breach did not occur-- this is because an industry can behave negligently based on their custom or standards. Therefore, while the farmer will be able to present evidence that he adhered to the instructions on prudent GS application provided by the health department, the wife can still potentially show that the farmer's duty of reasonable care was breached. The jury could look to evidence that the farmer complied with law in its determination of whether a breach occurred, but would not be forced to find that no breach existed because of his compliance. The wife could present evidence of measures the farmer could have taken to behave reasonably-- perhaps additional safeguards were warranted by the potential danger of GS. This evidence would be stronger if the wife stressed that it was known that GS could remain near ground level for days and that it could "drift from nearby land up to one mile from each application point." Based on that fact, it could be argued that the farmer should only have applied GS in areas over one mile from a neighbor.

To succeed on her negligence claim, the wife will also have to prove that the farmer's failure to exercise reasonable care was the but-for and proximate cause of her cancer. Legal cause is established if the injury would not have occurred but-for the breach of the duty and proximate cause is established by proving that the damage suffered was a harm-within-the-risk posed by the breach of a duty. The wife would need to prove that she would not have been diagnosed with cancer without the farmer's failure to take reasonable care in applying GS to his fields. This could be difficult given that "no study has definitively linked GS exposure to cancer in humans," especially given that "cancer rates in the county are consistent with the state rate." Unless the wife could produce evidence establishing that the farmer's application of GS was a but-for cause of her cancer, the wife would be unlikely to prevail because she cannot prove legal causation, an element required for a successful negligence claim. Proximate cause likely would exist because the application of GS is a harm-within-the-risk of applying a pesticide that "some scientists believe... likely causes cancer." Since this harm is one that would be contemplated in running the risk of applying GS to a field, proximate causation could likely be established by the wife.

Turning to damages, the wife would have to prove that she suffered bodily harm or property damage as a result of the farmer's failure to exercise reasonable care in applying GS. On this front, the wife would likely have no issues if she established

causation-- assuming causation, the wife would be able to point to her cancer diagnosis, which is a significant bodily harm. She could also point to pain and suffering and other damages such as loss of consortium (perhaps if her cancer treatment interfered with her relationship with her husband), loss of income associated with treatment, and pain and suffering.

In sum, the wife could likely prove that the farmer owed her a duty to behave reasonably in the application of GS to his crops and that he breached that duty, but is unlikely to prove that the farmer's failure to exercise reasonable care was the legal cause of her cancer. Since the wife is unlikely to establish causation, a required element for a successful negligence claim, she is unlikely to prevail.

2. Trespass is a tort that requires an intentional intrusion on the real property of another which results in damages. The required intent associated with trespass is *not* the intent to trespass on the property of another, but is instead the intent to enter into the property at issue (whether or not they knew it was the property of another).

Courts tend not to find trespass when the alleged trespass at issue is a trespass of particulates or is physically distanced from the property. For example, a court may be hesitant to find trespass when a plane flies over a property unless it flies so low as to result in damages. Courts are similarly hesitant to find trespass when the trespass is only noise-- while sound waves have physically invaded the property, it tends not to be sufficient for a finding of trespass. Instead, the law of nuisance tends to be used to address these sorts of deprivations of the enjoyment and use of real property-- this would require a finding that the neighbor's activity would have deprived an ordinary person in the man's position of the use and enjoyment of his property.

However, under the law of trespass, given that the alleged trespass was only of GS, the husband will be unlikely to prevail on his claim. The farmer's intent was likely sufficient for a finding of trespass-- he applied GS with the knowledge that the pesticide could drift to nearby land up to one mile from each application point.

Here, the farmer should have been aware of the fact that GS injected into the soil eventually rises and can drift up to a mile away from its application point, which was known by the State A health department for over ten years, especially since the Department reiterated these findings in the safety seminar that the farmer attended.

The husband could likely show that actual damages resulted from the travel of GS onto his property. The husband could point to the fact that "respiratory problems in the county have increased by 50%" since the department lifted the ban on GS. He

could compare this rate to the lower "rate of respiratory illness in other counties in the state at the same time of year."

However, since the trespass was only the trespass of particulates, although the husband's claim would meet all other elements of negligence, he would be unlikely to prevail because the trespass was merely the trespass of a gas rather than a concretely physical invasion of the property.

3. Assuming that the husband prevails, the issue is whether or not the court will permanently enjoin the farmer from using GS within one mile of the couple's house.

Injunctive relief is an extraordinary remedy that is only available under limited circumstances. To obtain permanent injunctive relief, a court will require that damages are insufficient as a remedy, that irreparable harm would be prevented by the issuance of the injunction, that the balance of the equities favor the plaintiff, and that the public interest be served by the issuance of the injunction.

Here, damages would likely be insufficient as a remedy-- while they may compensate the husband for the "respiratory ailments" he has suffered during the last two planting seasons, compensation is likely insufficient for the sort of "severe respiratory problems" that can be posed by the pesticide. Instead, the only way to return the husband to his rightful place before the wrong is to abate the application of GS, which was the cause of his respiratory illnesses.

The balance of equities likely also favor the plaintiff. The man has suffered for multiple seasons from severe respiratory problems through no fault of his own as a result of the application of GS, so a court would likely see the balance of the equities as favoring the man.

Finally, while it is a difficult call, a court would likely find that public policy interests did *not* favor granting the injunction. While the man has suffered as a result of his respiratory issues, it appears that the health department, aware of the risks of serious respiratory problems, has made a conscious decision to allow the application of GS according to their guidelines. While this is not a dispositive defense for the farmer in a negligence action, a court could consider this equitable issue in deciding whether or not to grant a permanent injunction-- there is a \$500 million annual benefit from allowing GS because of the unavailability of other pesticides. While it may harm the man, the court would likely refuse to issue a permanent injunction because the injunction would not serve the public interest.