Professor DeWolf | Summer 2000
Torts I | June 26, 2000

SAMPLE ANSWER TO MINI-EXAM

This case is based on *Lewis v. Krussel, --- P.2d ----, 2000 WL 772411 (Wash.App. Div. 2, June 16, 2000)*, affirming summary judgment for the defendants. The court held that there was insufficient evidence to maintain a negligence claim against the defendant; moreover, the nuisance claim was disallowed as being indistinguishable from the negligence claim. [Note from DKD: I think the court was pretty stingy in its application of the nuisance doctrine, but it's not completely unexpected.]

To recover damages from the Davidsons ("Ds") for the repair of their roof, the Parkers ("Ps") would have to prove some kind of breach of duty by Ds. Two major candidates are *negligence* and *strict liability*.

Negligence

Ds would be liable for the damages if they were negligent, that is, if they failed to use the care that a reasonably prudent person would use in managing their trees. They clearly knew that falling trees were a danger, but they felt the risk was so small that it did not justify taking precautionary measures. A jury would decide this question. Many jurors would have some experience with this issue as homeowners, and so the composition of the jury might be very important. At the same time, this might be an opportunity for the plaintiff to suggest the use of the "Learned Hand" test, which suggests that a reasonable person would take a precaution if the burden of doing so is less than the probability of loss times the magnitude of the loss to be expected. Given the potential risk of loss of life, perhaps the advisability of cutting down trees on the property line that might fall on the house would be advisable.

Obviously the expert testimony would be relevant. One question is what is the "custom of the industry" or the common practice among homeowners. To the extent that Truax is taken as an authority on the question, it might influence the jury on whether it was advisable to take the trees down. On the other hand, industry custom is only evidence of what is reasonable care; the jury has the authority to decide that the custom of the industry is insufficient to meet the test of reasonable care.

I'd also like to know if there are any statutes or ordinances that regulate how a homeowner takes care of such trees. I doubt that there is anything like a "lease law" for trees that is in effect, but I'd certainly want to check that out. Moreover, even if there is an expectation that homeowners will trim or remove dangerous trees, Ds might be entitled to an excuse in this case because he was unaware of the danger.

Another approach to proving negligence is the doctrine of res ipsa loquitur. Where evidence of what caused an accident has been destroyed, the plaintiff may be allowed to present the case to the jury by asking them to infer negligence from the accident itself rather than from any specific evidence of negligent conduct. To be permitted to use res ipsa, Ps would have to show that (1) this is the kind of accident that doesn't ordinarily occur except where someone has been negligent; (2) other plausible explanations have been sufficiently eliminated; and (3) Ds were in control of the injury-causing mechanism. I don't know that we would be able to meet criterion #1, although there is some suggestion that healthy, well maintained trees don't fall over; secondly, it might be argued that there was an alternate explanation -- high winds. But if we were successful on #1 and #2, #3

doesn't seem to be a problem.

As final comments on the negligence theory, Gary's statements about planning to do something about the trees would be admissible as a kind of "rulebook" that he made for himself. So would his conduct in having his mother stay at a different place in high wind events. That is strong evidence that he thought the risk was high. On the other hand, Ds' actions after the accident (removing the trees at the suggestion of the utility district) would be inadmissible as a post-accident repair.

Strict Liability

Ps wouldn't be required to show negligence if Ds' conduct was subject to some form of strict liability. I don't think that growing hemlock trees would be considered an abnormally dangerous activity, but there is a possibility that it could be considered a nuisance. Property owners can recover for injuries caused by someone who invades the reasonable expectations that they have for the enjoyment of their property. The issue would be whether Ps had a reasonable expectation that the Ds would keep their hemlock trees from falling on them. On the one hand, that seems like a sensible proposition. On the other hand, Ds would argue that they have a right to their hemlock trees and shouldn't be required at their peril to remove any tree that might conceivably fall on the Ps or else be liable for the injuries that are caused by an unexpected storm. One factor that would probably count against a finding of nuisance is that the hemlock trees were naturally there, rather than planted by the Ds in a way that made an exaggerated risk.

Ps would certainly like to take the position that Ds kept the trees at their peril, but the counterargument is that leaving trees in place serves a valuable aesthetic and ecological function, and that this shouldn't be treated as something that is the tree owner's "fault." I would have a hard time predicting the outcome of this one.

CHECKLIST

- ☐ Overview
- ☐ Breach of Duty
- ☐ *Negligence* theory
- ☐ defined as failure to use reasonable care
- ☐ jury experience?
- ☐ Learned Hand test
- ☐ expert opinion?
- ☐ industry custom only a floor
- ☐ negligence per se--any statutes?
- ☐ might be excused anyway
- ☐
- ☐ Res ipsa theory
- ☐ Is this the kind of accident that doesn't ordinarily occur absent negligence?
- ☐ would the wind be considered an "other cause"?
- ☐
- ☐ Would Gary's statements be persuasive? (a kind of "rulebook"?)
- ☐ His post-accident repairs would not
- ☐ Strict Liability
- ☐ Nuisance theory
- ☐ Could the plaintiff reasonably expect removal of trees from the boundary?
- ☐ Could we say he kept the trees at his peril?
- ☐ Note that the trees were natural, not an artificial condition
- ☐ On the other hand, it wasn't a really high wind
- ☐
- ☐
- ☐

Exam Number _____