Professor DeWolf Fall 2002
Torts I October 7, 2002

SAMPLE ANSWER TO MINI-EXAM

This case is loosely based on *State Farm Fire & Cas. Co. v. Municipality of Anchorage*, 788 P.2d 726 (Alaska 1990), which refused to apply strict liability to the broken water main, but reversed the trial court's refusal to instruct on res ipsa loquitur.

To recover damages, Perry Olmstead and Phillip Tenzing ("Ps") would have to prove that Heritage Estates (or some other defendant, but Heritage Estates ("HE") looks like the only viable defendant) was *negligent* or is subject to *strict liability*.

Negligence

Negligence is the failure to use reasonable care. To establish a negligence case, Ps would have to show that HE did something (or failed to do something) that a reasonably prudent person wouldn't have done (or failed to do something a reasonable person would have done). In this case the question is whether a reasonable person in HE's position would have taken more steps to prevent the frost jacking which led to the subsequent flooding. One perspective on this question would be to look at the Learned Hand formula (Is B<P*L?), which would compare the risk and potential magnitude of harm to the burden that would be required to avoid it. In this case it seems that the burden is relatively slight compared to the likelihood in a cold climate that something bad could happen, and the damage could be extensive.

Another question would be whether there is a standard observed in the building industry that could be used to show that most builders use this practice. Even if they don't, it could be argued that a reasonable person would observe a higher standard. More helpful to our side would be the fact that HE itself apparently uses preventive measures in its other developments. The failure of a defendant to follow its own practices and procedures (sometimes called a "rulebook violation") is strong evidence of negligence.

Another angle might be to see if any building codes address this issue. A building code can be considered a statutory requirement, and in some jurisdictions a violation of a statutory standard is negligence *per se*, or negligence as a matter of law. Also, we might try to use the fact that HE used greater precautions when they installed the new fire hydrant, but ordinarily post-accident repairs would be inadmissible. The exception we might be able to use to this rule is to show ownership; if HE denies that it was responsible for the water main, their conduct in repairing it could be used to show that they thought it was their job to insure that the water main functioned properly.

Ps might also consider trying to hold HE vicariously liable for Jackson Construction's negligence. Ordinarily an independent contractor does not make the person who hired the independent contractor vicariously liable, but in this case, we may be able to show that HE had the right to control the way that JC did its work, which would make HE vicariously liable if JC negligently installed the pipe.

A final negligence theory would be res ipsa loquitur ("the thing speaks for itself"). Res ipsa loquitur applies if the accident is of a type that ordinarily doesn't occur in the absence of negligence, the defendant has exclusive control over the instrumentality, and other plausible explanations have sufficiently been eliminated. In this case it seems likely that a court would find that water mains don't break within the first decade of use unless someone has been negligent in installing them. Ps might have difficulty showing that HE was in exclusive control, but as the discussion above

indicates, it may be that HE had enough control over JC, or in specifying how JC did the work, or in inspecting it later, to be found in exclusive control. Finally, Ps would argue that there are no other plausible explanations; the defendant might say that it could also have been a defect in the discarded shoe, but HE threw that away, perhaps estopping them to rely upon that argument.

Strict Liability

The second possible avenue for recovery would be to show that the broken water main is subject to strict liability. One form of strict liability is "abnormally dangerous activities," which are determined by applying a six-factor test in the Restatement (2d) of Torts, §§ 519-20. I don't think this is a strong candidate, because of the six criteria, none seems particularly weighted in our favor. On the other hand, another application of strict liability is *nuisance*, which is the invasion of the reasonable expectations of the property owner. This would certainly fit that description, and it sounds just like the "right to be free of foreign water" from *Rylands v. Fletcher*. On the other hand, it could be that by the time the flood occurred it was actually the responsibility of the Pheasant Run Water District.

CHECKLIST

- ☐ Overview
- ☐ Claim v. HE
- ☐ Breach of Duty
- ☐ *Negligence* theory
- ☐ defined as failure to use reasonable care
- ☐ Would RP have prevented frost jacking?
- ☐ Learned Hand test
- ☐ industry custom is relevant
- ☐ Rulebook violation?
- ☐
- ☐ Building code provisions?
- ☐ Would building code violation be negligence per se?
- ☐ Jurisdictional variations on NPS
- ☐ Post-accident repair prob. inadmissible
- ☐ But could show to prove ownership
- ☐
- ☐ Vicarious liability for contractor?
- ☐ Did HE have right to control work?
- ☐ Res ipsa claim
- ☐ Type of accident ordinarily b/c of neg?
- ☐ Did HE have exclusive control?
- ☐ Are other causes sufficiently eliminated
- ☐ Strict Liability?
- ☐ Abnormally Dangerous Activity
- ☐ Restatement criteria
- ☐ Not high degree of risk
- ☐ Common Activity
- ☐ High Value
- ☐
- ☐ Nuisance claim?
- ☐ Ps' reasonable expectations were violated
- ☐ "Right to be free of foreign water"
- ☐
- ☐ Defect in the shoe?
- ☐
- ☐