

SAMPLE ANSWER TO MINI-EXAM

This case is based (except for the vicarious liability issue) on an unpublished opinion, *Dadras v. Kempe*, 2003 WL 21419802, which affirmed a jury verdict in favor of Kempe. The plaintiff argued *res ipsa* on appeal, but failed to present it to the trial court.

To recover damages, Perry Dadras ("P") would have to prove that Kempe ("K") acted negligently.¹

Negligence

Negligence is the failure to use reasonable care. To establish a negligence case, K would have to prove that K 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, K looked down to find out what had hit her heel and she failed to maintain a safe distance from the car in front of her. A jury could find that negligent.

Negligence per se. P might argue that K should be held *negligent per se* because she violated a statute, Vehicle Code § 21703. Some jurisdictions treat statutory violations as negligence as a matter of law, if three conditions are met: first, there must be a statutory violation. Here, although K was following too closely, she would say that she was acting reasonably and prudently by trying to identify what had struck her heel. P, on the other hand, would say that the statute was violated. Second, the statute must be intended to prevent injuries like the one suffered by the plaintiff. That clearly applies here. Third, there must be no excusing condition. Here K would argue that responding to what struck her excused taking her eyes off the road momentarily. Again, P would say that this is not an objectively reasonable excuse, but the judge might send it to the jury anyway. Moreover, if this jurisdiction is one (like Washington) where negligence per se only applies to a narrow class of statutes rather than to ordinary statutes, then the statutory violation would only be evidence of negligence and the jury would still have the last word.

Res ipsa loquitur. The defendant might try to get the case presented to the jury with a presumption of negligence based on *res ipsa loquitur*. *Res ipsa* requires proof of three elements: (1) that accidents of this type don't ordinarily occur in the absence of negligence; (2) that the defendant was in exclusive control of the instrumentality that caused the injury; and (3) other plausible explanations of the accident (such as the plaintiff's negligence) have been sufficiently eliminated. Each of the elements actually fits pretty well to this case, but a judge might still reject a *res ipsa* instruction because *res ipsa* is typically used where evidence about what caused the accident is missing, and that can't be said of this case. In any event, even if the judge did instruct

¹The other way to establish liability is to show that the defendant is subject to *strict liability*. Strict liability applies, for example, when a defendant engages in an abnormally dangerous activity, where the plaintiff has been subjected to a nuisance that violates the plaintiff's reasonable expectations for use of his property, or where the defendant's conduct is covered by a statute that creates strict liability. None of those categories applies here, so the plaintiff must prove negligence in order to recover.

on res ipsa, K could still come back and persuade the jury that in this case the accident was not a result of negligence. I'm not sure arguing res ipsa would really make much of a difference.

Vicarious Liability. If P's damages turned out to be very large (or if K turned out not to have insurance), it would be advantageous to establish the liability of her employer. In the event that P could establish that K was negligent, there is the potential to hold her employer vicariously liable. Vicarious liability can be imposed upon an employer if an employee acts negligently in the course and scope of employment. In this case K was on her lunch hour, and was not in the course and scope of employment, but she also seems to have contemplated going on an errand for her boss. If we could establish that K was on her way to perform an errand for her boss, would then be in the course and scope of employment and thus her employer would be vicariously liable.

CHECKLIST

- Overview
- No** Strict liability
- SL **explained** and rejected

- Negligence** Claim
- Defined**: failure to use reasonable care
- Juror** experience
- Negligence **per se**
- Jurisdictional** variants
- Was the statute **violated**?
- Statutory **intent** incl. injuries like this
- Was the violation **excused**?
- Jury would **probably** decide
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- Res ipsa loquitur**
- (1) **Type** of injury
- (2) Exclusive **control**
- (3) No other **plausible** explanations
- But cause not really of **unknown** origin
- Defendant can still **persuade** that accident was not caused by negligence
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- Vicarious liability** of employer?
- Rule: **Course and scope** of employment
- Trip didn't **start out** in C&S
- But might have **changed** to employment
- If so**, employer vicariously liable
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