

SAMPLE ANSWER TO MINI-EXAM

This case is based on *Ken Thomas of Georgia, Inc. v. Halim*, 2004 WL 584349, in which the court dismissed the plaintiff's claim, rejecting both the argument for application of *res ipsa* and a negligence theory.

Kabir Halim ("KH") should consider claims against both the dealer Ken Thomas as well as Koreem Campbell ("KC").

Claim v. Ken Thomas ("KT")

In order to recover from KT, KH would need to establish that KT breached a duty he owed to KH. In this case proving a breach of duty would require proving that KT was negligent.¹ Negligence is the failure to use reasonable care. Reasonable care is what a reasonable person would have done under the same or similar circumstances. There are two aspects of negligence that might come into play. First, KH could argue that KT did not maintain the vehicle properly. Although there is no direct evidence that the car veered sharply because of poor maintenance, KH might argue that this case justifies the use of a *res ipsa loquitur* doctrine. *Res ipsa* applies when three elements are met: (1) the accident is an example of a type of accident that does not ordinarily occur except where there is negligence; (2) the defendant had exclusive control over the instrumentality that caused the accident; and (3) other plausible explanations have sufficiently been eliminated. Assuming the jury credits Campbell ("KC")'s testimony as to what happened, they might believe that the car suddenly jerked to the left. Perhaps an expert could be found who would say that such things don't ordinarily occur except where there has been negligence either in the maintenance or in the manufacture of the car. As to criterion #2, the car was in the immediate control of KC at the time of the accident, but the maintenance was arguably in the exclusive control of KT. On the other hand, KT didn't have control over the manufacture of the car. Thus, it might be difficult to say that KT had exclusive control. Similarly, KT would certainly argue that the accident could with equal plausibility be explained by a defect in the car or in the careless driving of KC. Thus, I would be skeptical that a judge would permit a *res ipsa* theory to go to the jury.

As an alternative, we will be looking at evidence that KC was negligent in his operation of the vehicle. That will have its own attraction (see below), but if KC has a particularly egregious driving record, we might argue that KT was negligent in entrusting the vehicle to someone like KC. We might inquire what information was readily available about KC (e.g., a driving record). I would be interested in the practices of other dealerships in providing loaner cars. (The "custom of the industry" offers a reference point for what is reasonable care; failure to meet the custom of the industry is strong evidence of negligence, but compliance with industry custom does not preclude the imposition of liability if reasonable care would suggest a higher standard). I would also be interested in knowing what *safety policies* KT has adopted for its employees in loaning out cars; perhaps we could use evidence that those policies weren't being followed. That would be persuasive evidence of negligence.

Claim v. KC

The claim against KC would be less attractive because of KC's potentially limited assets. But the combination of alleging negligence on the part of KC, and against KT, might be a helpful combination. If the jury finds KC a credible witness, it would bolster the claim against KT. On the other hand, if the jury

1. As an alternative to proving negligence, a plaintiff can recover tort compensation if the defendant has engaged in an activity for which strict liability is imposed. However, there is nothing in the fact pattern suggesting that either defendant engaged in an abnormally dangerous activity, conducted a nuisance, allowed a wild animal to escape, or fell within some statutorily imposed form of strict liability.

finds the accident investigator's report credible, it would damage (if not eliminate) the claim against KT, but at least there would be a strong likelihood of a finding that KC was negligent.

One theory we would find useful is negligence per se. In many jurisdictions negligence per se requires a judge to find negligence as a matter of law if (1) a statute is violated, (2) the statute was designed to prevent injuries like this, and (3) there is no excuse for the violation. Assuming the jury finds from the evidence that KC was speeding, the case for negligence per se would be strong. (There is no question that the purpose of the law against speeding is to prevent loss of control such as what apparently happened here.) On the other hand, some jurisdictions do not treat statutory violations as negligence as a matter of law but allow the jury to decide for themselves whether the statutory violation was in fact negligent. The same logic would apply to the loss of control of the car, if a statute requires drivers to maintain control of their vehicle. However, KC might argue that his loss of control of the car was excused by a situation beyond his control. Again, this theory would only succeed if the jury was inclined to disbelieve the investigator, to credit KC's account of the steering wheel pulling to the left, and thus support a theory that KT was negligent in maintaining the car.

Conclusion

On balance, the more plausible outcome is that the jury will find KC at fault. Only if the dealer had reason to think that KC would be a bad driver would we likely succeed in suing them on a negligent entrustment theory.

Checklist

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| <input type="checkbox"/> Overview | <input type="checkbox"/> (3) can other plausible explanations be excluded? |
| <input type="checkbox"/> Claim v. Ken Thomas | <input type="checkbox"/> Theory doesn't look promising |
| <input type="checkbox"/> Breach of Duty | <input type="checkbox"/> |
| <input type="checkbox"/> No Strict Liability | <input type="checkbox"/> Negligent entrustment |
| <input type="checkbox"/> Negligence is required | <input type="checkbox"/> What did KT know about KC's driving record ? |
| <input type="checkbox"/> Negligence defined as failure to use reasonable care | <input type="checkbox"/> Custom of the industry |
| <input type="checkbox"/> | <input type="checkbox"/> Were KT's safety policies regarding loaner cars followed? |
| <input type="checkbox"/> Res ipsa loquitur | <input type="checkbox"/> |
| <input type="checkbox"/> Elements of res ipsa claim | <input type="checkbox"/> Claim v. Campbell |
| <input type="checkbox"/> (1) Type of accident | <input type="checkbox"/> Negligence per se |
| <input type="checkbox"/> (2) Did KT have Exclusive control ? | <input type="checkbox"/> Elements of negligence per se |
| <input type="checkbox"/> What about manufacturer ? | <input type="checkbox"/> Jurisdictional variants |
| <input type="checkbox"/> What about Campbell ? | <input type="checkbox"/> Excuse for loss of control? |