

SAMPLE ANSWER TO MINI-EXAM

This case is roughly based on *Rynchnovsky v. Cole*, 119 S.W.3d 204, (Mo.App. 2003) which reversed a trial court's dismissal on summary judgment, finding that the plaintiff's complaint stated a cause of action for nuisance and negligence, but not for strict liability based on an abnormally dangerous activity.

To recover compensation (and other remedies), Francis Rynchnovsky ("FR") would need to show that the Brainerds ("Bs"), or perhaps a contractor who constructed the sewer line was *negligent* or could be held *strictly liable*.

Claim v. Brainerds

*Negligence.* Negligence is the failure to use reasonable care. Reasonable care is what a person of ordinary prudence would do in the same or similar circumstances. Here it is unclear what, if anything, the Bs did to cause their sewage to wind up in FR's basement. Presumably there is some kind of blockage, but whether that was a result of action by Bs? Perhaps they were careless in what they put into the sewer; perhaps investigation would reveal who or what caused the blockage.

If indeed the blockage could be traced to Bs' conduct (for example, if a wad of disposable diapers belonging to Bs were found as the source of the blockage), then the jurors would likely use their own experience to judge whether the conduct resulting in the blockage was negligent.

In cases where the exact cause of an accident is unknown, a plaintiff may attempt to invoke the concept of *res ipsa loquitur* ("the thing speaks for itself"), which will allow an inference of negligence if (1) the kind of accident doesn't ordinarily occur in the absence of negligence; (2) the instrumentality causing the accident was in the exclusive control of the defendant; and (3) other plausible explanations for the harm have been sufficiently eliminated. Here there is a distinct possibility that FR rather than Bs was a cause of the sewer blockage, and therefore the doctrine may be inapplicable. On the other hand, if the source of the blockage is positively identified as coming from Bs, a stronger case for RIL could be made.

*Strict Liability for Nuisance.* FR wouldn't have to prove negligence if she could show that Bs were strictly liable based on the doctrine of nuisance. Nuisance applies when the defendant's activity results in harm to the plaintiff, and the plaintiff's property interest includes a reasonable expectation to be free of that kind of harm. Here we have Bs' sewage in FR's basement. That sounds like a nuisance. On the other hand, the sewage may be there because of something someone else did (e.g. poor construction of the sewer line, or blockage caused by FR's activity). In that case it might be harder to show that FR has a reasonable expectation that Bs would reroute the sewer line.

One good feature is that a successful nuisance claim not only entitles the plaintiff to damages, but permits the imposition of an injunction forcing the defendant to cease the offending activity.

Claim v. Contractor ("C")

It is possible that neither Bs nor FR is to blame for the sewage backup, but that it resulted from faulty construction.

As with the claim against Bs, FR would have to show that C was either negligent or strictly liable.

*Negligence.* One problem in establishing negligence is that the sewer line is probably hard to inspect. Assuming we could examine the way in which the sewer line was constructed, we might have a strong case that C didn't use reasonable care. One point of reference would be *industry custom*--the practices that other contractors use. (Even if C's construction was consistent with industry practice, we might argue that it was not reasonable in light of the risk involved. For example, perhaps a larger sized pipe would have been preferable.) As another approach, we might inquire whether C complied with building codes that specify how private gravity sewer lines should be constructed. Failure to comply with a statute might be treated as negligence as a matter of law.

As far as *res ipsa*, we would have the same problem as with Bs, namely that we might have difficulty showing that C had exclusive control over the sewer line. But if we can ascertain that, for example, there is a flaw in the sewer line that caused the sewage in FR's basement, it would be logical to infer negligence during construction.

*Strict Liability.* I don't see any basis for seeking to hold C strictly liable.

### CHECKLIST

- Overview**
- Breach of **Duty**
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- Claim v. **Bs**
- Negligence** theory
- Defined** as the failure to use reasonable care
- Juror** Experience
- Res ipsa** loquitur
- Elements** of *res ipsa*
- Exclusive **control**?
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- SL for **Nuisance**
- Nuisance **defined**
- Reasonable **expectations**?
- Damages plus **injunction**
- 
- Claim v. **Contractor**
- Breach** of Duty
- Industry **Custom**
- Custom might be **inadequate** to protect
- 
- Building code **violation**
- Negligence **per se**?
- Res ipsa**
- Exclusive **control** problem
- 
- No Strict Liability**
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