Professor DeWolf
Torts I

Summer 2005
June 27, 2005

SAMPLE ANSWER TO MINI-EXAM

The facts were drawn from *Boyd v. Allied Signal, Inc.*, 898 So.2d 450 (La.App. 1 Cir. 2004), which partially reversed the trial judge's certification of the case as a class action.

The plaintiffs could recover from AS if they could show that AS (or its agent) was negligent in transporting BF_3, or if the court rules that AS is strictly liable for injuries resulting its transportation.

On behalf of AlliedSignal ("AS"), I would be concerned about three basic issues: (1) Is AS vicariously liable for Quality Carriers ("QC")'s transportation of BF_3? (2) Was QC negligent? (3) Could strict liability be applied?

I. Vicarious Liability

Even if AS itself was using reasonable care, it could be held vicariously liable for QC's negligence if QC is determined to be an employee acting within the course and scope of employment. On the other hand, we would argue that QC is an independent contractor, and AS is not liable for their negligence unless AS were somehow negligent in selecting them to do this work (for example, by ignoring a poor safety record or other indications that QC were not qualified for this responsibility). In distinguishing whether or not an alleged agent is an employee or an independent contractor, the courts ask whether or not AS had the *right to control* the way QC operated its tanker-trucks. I'd want to know more about their relationship. Did QC operate exclusively for AS (suggesting that AS could control how QC transports BF_3)? Or did QC transport BF_3 (and, for that matter, other compressed gases) for a variety of different companies, and thus AS could show that it could not control how QC operated or maintained its equipment.

II. Negligence

Assuming that the jury finds that QC is AS's agent, then liability would be imposed if the jury found that QC was negligent. (Similarly, even if QC were not AS's agent, then a finding of negligence on the part of AS in selection QC, or for that matter, choosing this method of transporting BF_3) would result in liability.

Negligence is the failure to use reasonable care — the care that a reasonably prudent person would use in the same or similar circumstances. A variety of different factors would be evaluated in assessing reasonable care or its absence.

(a) *Industry Custom*. We don't know whether or not there are safety precautions that other companies in QC's industry take. The frequency of inspection, or the use of six separate manifolded tubes, or other aspects of the case, would be relevant. If QC is not following a precaution that is customary in the industry, that is strong evidence of negligence. By contrast, it would be persuasive evidence if QC complied with industry standards in the method of transportation. Nonetheless, a jury is at liberty to decide that the standard observed by the industry is too lax and that a reasonable person would do more to ensure safety.

On this point I would be anxious to find out what an expert in this industry would say about the safety policies used by QC (and/or AS).

(b) *Learned Hand calculus*. Some courts have used a standard comparing the **B**urden of the precaution to the **P**robability of injury multiplied by the Magnitude of **L**oss (Is B<P*L?). Perhaps there are safety precautions that, while costly, would have been desirable in light of the prospective safety benefit.

(c) *Statutory Violations*. If there were a statute or municipal ordinance specifying the method for transporting BF_3, and QC didn't abide by that standard, it would be strong evidence of negligence -- in some jurisdictions it would be ruled conclusively (as a matter of law).

(d) *Res ipsa loquitur*. The plaintiffs might argue that the escape of this gas falls under the doctrine of res ipsa loquitur -- the thing speaks for itself. This doctrine is used when evidence of what actually caused the accident is missing, and the burden should be shifted to the defendant to exonerate itself. However, to invoke this doctrine the plaintiff must show (1) that it is the *type* of accident that does not ordinarily occur in the absence of negligence, (2) that the defendant is in exclusive control of the instrumentality that caused the accident; and (3) that other plausible explanations have been ruled out. Here I would say that res ipsa should not be applied because we know that the accident originated from the bull plug of Tube No. 5. A failure in that plug could be a result of poor manufacture (by the manufacturer of the truck), or some other force that is not within our exclusive control.

(e) *Rulebook violation*. I would want to know if there are any company safety policies that QC's employees are supposed to follow that might be blamed for the accident. A defendant's failure to follow its own safety policies is strong evidence of negligence.

III. Strict Liability

The plaintiffs could argue two theories of strict liability.

ADA. The first is that the transportation of BF_3 is an abnormally dangerous activity. Most courts employ a test found in the Restatement (2d) of Torts, §§ 519-520. which considers six factors: We would argue with respect to each factor:

(1) Does the transportation of this gas pose a high risk of harm? [We would try to find evidence that accidents are rare]
(2) Is the gravity of the risk high? [We would argue that it's more irritating than perilous]
(3) Can reasonable care prevent injuries? [We would try to show that accidents other than those caused by negligent transportation are extremely rare]
(4) Is it uncommon? [I would imagine that we would have to admit that BF_3 is pretty rare, but maybe it's more common and I just haven't heard of it]
(5) Is it inappropriate to the area [It appears that the accident occurred in a residential area, which makes it inappropriate]
(6) Is it of low value to society [We would try to show its social importance, but it seems likely that it's not a critical material like gasoline]

Looking at the criteria, it seems plausible that a court could employ strict liability, but I would hope that we could find authority for the opposite conclusion.

Nuisance. Strict liability is also imposed for invading the plaintiffs' reasonable expectation to be free of injury or annoyance. Here the homeowners or residents of the community who experienced ill health effects would undoubtedly be able to show that this was an unreasonable interference with their expectations. On the other hand, persons injured who did not actually live in the area where the harm occurred would not be able to recover under a nuisance theory.

CHECKLIST

☐ **Overview**
☐ **Vicarious** Liability
☐ Did AS have the **right to control** QC's transportation?
☐ Was the contract **exclusive**?
☐ Is there any evidence of **negligent hiring**?
☐
☐ **Negligence** Theory v. AS or QC
☐ Negligence **defined** as lack of reasonable care
☐ Is there compliance with **industry custom**?
☐ Industry Custom is the "**floor**," not the ceiling
☐ What would **experts** say about safety practices?

☐ Does the **Learned Hand** Calculus suggest additional precautions?
☐
☐ **Statutory Violations**?
☐ **Res ipsa loquitur**
☐ List the **elements** of res ipsa
☐ Couldn't we show a lack of **exclusive control**?
☐ Were any **rulebook** procedures violated?
☐
☐ **Strict Liability**
☐ Abnormally **Dangerous** Activity theory
☐ **Restatement** factors
☐ **Application** leads to mixed results
☐ Are there any **precedents**?
☐
☐ **Nuisance** Theory
☐ Reasonable expectations of **those who owned property**
☐ Non-owners could **not** claim

Exam Number _____