Professor DeWolf Fall 2006
Torts I October 2, 2006

SAMPLE ANSWER TO PRACTICE EXAM

The facts were drawn from *Pullen v. West*, 278 Kan. 183, 92 P.3d 584 (2004), which reversed a jury determination that Pullen was 92% at fault. The court held that it was error to exclude evidence about the NFPA, but rejected the argument that the NFPA would support negligence per se. The court also held that strict liability for abnormally dangerous activities does not extend to those who participate in the abnormally dangerous activity.

Brent Pullen (BP) would be entitled to tort compensation if one of the defendants breached a duty, which could be established either by showing that a defendant acted negligently or is subject to strict liability.[1]

Negligence

Negligence is the failure to use reasonable care. Reasonable care is what a reasonable person would do under the same or similar circumstances. Here BP could argue that Milo and Laura West (MLW), Brian West (BW) or Shane Krehbiel (SK) acted negligently in the way that the set off the fireworks. There are a variety of ways that BP could make a case for negligence:

Statutory Violation / Negligence per se. One way to establish negligence is to use the doctrine of negligence per se. If the defendant violates a statute, without excuse, that is intended to prevent accidents like this, some jurisdictions will treat such a violation as negligence per se, or negligence as a matter of law. Other jurisdictions will inform the jury of the violation and allow them to decide whether the violation was negligent. Applying this rule, we first must analyze the nature of the statutory framework in Linden. It is unclear whether there is a statute that directly prohibits what the defendants did. The statute authorizes regulations, and regulations that prohibit the behavior, but I'm not sure that's enough. Even if the judge rejects the negligence per se argument (or the jurisdiction makes statutory violations only evidence of negligence), I would think that the existence of these regulations makes a strong case for a finding of negligence. On the other hand, it wouldn't appear that there could be any excuse for failing to follow the regulations.

Industry Custom. On a related note, the existence of the regulations makes it highly probable that there is an industry custom following these regulations. I would think that we could find an expert in pyrotechnics who would describe what is ordinarily done by people who discharge Class B fireworks. Evidence that the defendant's conduct fell below industry standards is persuasive, but not dispositive; that is, it is still for the jury to decide if the defendant acted reasonably.

Res ipsa loquitur. We don't know exactly what happened with the mortar tube. There is a doctrine that allows the jury to infer negligence where evidence about what caused the accident is no longer available, and three conditions can be met: (1) the accident is of a type that doesn't ordinarily occur in the absence of negligence; (2) the defendant had exclusive control over the instrumentality that caused the accident; and (3) no other plausible explanation (such as the plaintiff's own negligence) suggests itself. Here we don't know whether any of these elements could be met. We would probably need an expert to establish element #1, and the defendant(s) would probably deny that any of them individually, or even as a group, had exclusive control. Finally #3 is problematic because the plaintiff had a direct role in lighting the fireworks. I wouldn't be too hopeful of using res ipsa to establish negligence.

Rulebook? If an employer establishes safety policies and an employee violates one of those

[1] In addition, a plaintiff must show proximate cause and damages, but those issues are beyond the scope of this exam.

policies, the violation can be used as evidence of negligence. Here it' s a more informal relationship; neither SK nor BW was an " employee" of MLW, but perhaps we could argue in analogous fashion that in agreeing to the " safety policies" that MLW established, SK and BW agreed to a standard of reasonable care that they subsequently violated.

Strict Liability

Strict liability applies if the defendant's activity is abnormally dangerous (ADA) or a nuisance, involves dangerous animals, or is made subject to strict liability by statute. A nuisance claim must be based on some kind of property right enjoyed by the plaintiff (which doesn't seem to apply here). There are no wild animals, and there don't seem to be any statutes that create strict liability, but BP might argue that pyrotechnics is an ADA. Most jurisdictions use the test for an ADA laid out in the Restatement (2d) of Torts. The judge applies six factors to determine whether the activity fits the description of an ADA. Here we could show that Class B fireworks (1) pose a high risk of harm, (4) are uncommon and (6) have low social utility, but the defendant might argue that such fireworks (3) don't produce harm when reasonable care is used, (2) don't typically produce grave harm (unlike true explosives or large quantities of dangerous or flammable chemicals), and (5) were appropriate to the location. It's hard to know how this question would be resolved.

CHECKLIST

☐ **Overview**
☐ **Breach** of Duty
☐ Negligence = **Failure to use RC**
☐ **RC** Defined
☐
☐ Negligence **per se**
☐ Was a ***statute*** violated?
☐ No plausible **excuse**
☐ Is this a **Cardozo** jurisdiction?
☐ If not a Cardozo jx, strong **evidence**
☐
☐ Industry **Custom**
☐ **Expert testimony** concerning practices
☐ Custom is persuasive, but **not dispositive**
☐
☐ **Res ipsa** loquitur
☐ **Elements**
☐ Is this the ***type*** of accident suggesting negligence?
☐ Did defendants have **exclusive control**?
☐ Did the plaintiff **contribute**?
☐ **" Rulebook"** violation?
☐ Argument by **analogy**
☐
☐ **Strict Liability**
☐ Other forms **don't** seem to **apply**
☐ **ADA**
☐ Description of **Restatement** factors
☐ **Application** of Rstmt factors debatable
☐
☐
☐

Exam Number _____