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Torts

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### MID-TERM SAMPLE ANSWER

The facts for this case were (loosely) derived from *Jenkins v. Big City Remodeling*, 2015 WL 5695177 (Tenn. 2015), which found that the trial court properly rejected a *res ipsa loquitur* instruction.

To recover damages, Jim Peters (“JP”) would need to prove that Hemlock (1) breached a duty they owed; (2) which proximately caused (3) compensable damages. Each of these issues is addressed in the following analysis:

#### I. Breach of Duty

There are two avenues to establish a breach of duty that Hemlock owed toward Margaret. The first would be a claim that Hemlock was negligent. The second would be to show that Hemlock is subject to strict liability.

*Negligence.* Negligence is the failure to use reasonable care. We don’t have much evidence as to why the fire started. There is speculation that the fire resulted from negligence on the part of Luu or the other parties who worked with him. Ordinarily Hemlock would not be responsible for the work of an independent contractor. However, there might be a claim that Hemlock was negligent in failing to insure that Luu was obeying procedures designed to promote safety. There might be regulations regarding the storage or disposal of the rags that Hemlock blames for the fire. There might also be regulations about cigarette smoking or disposal of cigarettes. If so, Hemlock might be found at fault for not enforcing the regulations if Hemlock was aware of Luu’s unsafe procedures and failed to take appropriate remedial measures. It is even possible that Hemlock was in violation of a regulation or even a statute that regulates the behavior of contractors, and if so, it would be strong (possibly even dispositive) evidence of Hemlock’s negligence.

On a related front, we might ask for Hemlock to be held vicariously liable for negligence on Luu’s part. To apply vicarious liability, the evidence would have to show that Hemlock had the *right to control* Luu’s operations, and that Luu committed a negligent act in the course and scope of his employment by Hemlock. It’s not clear whether Hemlock had the right to control Luu; presumably the contract between Hemlock and Luu would spell out their respective rights and duties, and a court would likely find that Luu was an independent contractor rather than an employee for purposes of vicarious liability. However, if Hemlock was responsible for keeping a safe work environment, it might turn out that Hemlock could be held responsible for failing to ensure that Luu was following good safety practices.

*Res ipsa loquitur.* Even if there is no direct evidence of negligence, a jury can infer negligence under the principle of *res ipsa loquitur*—the thing speaks for itself. Typically *res ipsa* is invoked when the evidence that would otherwise point to negligence has been consumed by a flood, fire, explosion, or the like. This case fits that description, since the fire consumed all of the evidence of what caused the fire to start. *Res ipsa* requires three elements: (1) the plaintiff’s injury must result from a type of accident that ordinarily doesn’t occur in the absence of negligence. (2) the defendant must have exclusive control of the process and (3) there are no plausible alternative explanations (including the plaintiff’s own negligence). Applying this test, (1) the fire is definitely a type of accident that doesn’t ordinarily occur in the absence of negligence. (2) As to the defendant’s

exclusive control, we'd have more difficulty, since Hemlock delegated the work to its subcontractor. We might try an argument similar to the approach in *Ybarra v. Spangard* where a team of health care workers was held jointly liable despite the fact that they were independent actors. Following that logic, we could argue that the subcontractors were working at Hemlock's direction and were part of their "team." Finally, (3) if we survived the other prongs, Hemlock might still argue that there are other plausible explanations. I wouldn't be too optimistic about *res ipsa* succeeding.

*Strict liability.* Although the fire consumed the residence and caused an explosion that killed Margaret Peters, I don't see any basis for strict liability. The closest theory would be abnormally dangerous activities, but building a house is extremely common and ordinarily reasonable care will suffice to prevent injuries. Similarly, nuisance wouldn't apply if Margaret was walking her dog past the house unless she was on her own property.

## II. Proximate Cause

JP would also have to prove that Hemlock's negligence proximately caused Margaret's death. There are two elements of proximate cause: but-for causation and legal cause. To establish the first element, JP would have to show that, but for NS' negligence RH would not have died. That seems easy.

The second prong of the proximate cause test, legal cause, would also seem relatively straightforward. A legal cause is one that occurs in a direct and unbroken sequence, which was reasonably foreseeable at the time of the defendant's negligent conduct. Although the explosion that killed Margaret was unusual, it would be reasonably foreseeable that if you cause a fire that consumes an entire residence, it could result in an explosion that would kill a passerby.

## III. Damages

The measure of damages in a wrongful death case depends upon the statutory scheme adopted in the relevant jurisdiction. Evergreen appears to have adopted a survival action (§ 20-5-106(1) : "The right of action . . . shall not abate or be extinguished by the person's death but shall pass to the person's surviving spouse . . ."). The damages that the surviving spouse may recover include:

- The mental and physical suffering suffered by the decedent prior to death (§ -113), along with the "damages resulting to the [surviving spouse]." If Margaret's death was more or less instantaneous, this would be either modest or nonexistent. On the other hand, if she lingered, even 24 hours, and was conscious for some or all of that period, it might be substantial.
- Any economic damages that Jim might have suffered as a result of Margaret's death. Whether she was employed outside the home or not, Jim presumably would suffer economic damage from losing his wife and the mother of his children
- noneconomic loss Jim suffered as a result of his wife's death. While the mental and physical suffering are explicitly listed for the decedent, there are simply "damages" recoverable by the surviving spouse. We would hope this would be interpreted to include noneconomic loss, but this statute might be interpreted to exclude them.

## CHECKLIST

- Overview**
- Breach** of Duty
- Negligence**
- Defined as failure to use **reasonable care**?
- What is **custom** of the construction industry?
- Would **Learned Hand** calculus apply?
- Were any **statutes** or **regulations** violated?
- Effect of statutory violation
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- Vicarious** liability
- Luu** was a subcontractor
- Did H have the **right to control** Luu?
- If so, NS vicariously liable for RC's negligence
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- Res ipsa loquitur**
- Type** of accident satisfied
- Exclusive control** would be a problem
- Perhaps an *Ybarra v. Spangard* argument
- Hemlock would argue **other plausible** explanations
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- Strict liability**
- Abnormally** dangerous activity
- § 520 **criteria**
- weak** case for strict liability
- Nuisance** might apply if Margaret was on her property
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- Proximate** cause
- but-for cause **plus** legal cause
- But-for** cause test easily satisfied
- Legal** cause: Direct and **unbroken** sequence; reasonably foreseeable
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- Damages**
- Evergreen has a **survival statute**
- JP is the **surviving spouse**
- JP entitled to Margaret's **pain and suffering** if death was not instantaneous
- JP entitled to **economic** loss
- Non-economic** damages are questionable
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