Professor DeWolf | Summer 1997
Torts I | July 28, 2002

MINI-EXAM SAMPLE ANSWER

[*This case is based upon* Hornsby v. Bishop*, 758 P.2d 959 (1988). In that case the court found that neither strict liability, negligence per se, nor res ipsa loquitur applied to the case.*]

I would consider suing Eggers Meats, Inc., Giblett and Sutton. The defendants[1] are liable to Hornsby if we can prove that one or more of the defendants breached a duty toward the Walkers [and other elements, not to be analyzed here, are proven]. The two main areas in which this could be done would be by establishing negligence or by establishing strict liability.

Negligence

The defendants would be found negligent if they failed to exercise the care that a reasonably prudent person would exercise in the same or similar circumstances.

Here there are a variety of issues affecting the negligence analysis. First, we would examine whether Sutton and/or Giblett were negligent in allowing the cow to escape from the corral. They tried to steer the cow into the trailer, but they caused the cow to knock down the gate. Perhaps we would want to consult with others in the cattle business to find out how they would go about performing this task. If we could identify a *custom of the industry* that would suggest how to load cattle and avoid escape, then we could use any departure from such a custom as evidence of negligence. By contrast, if S&G were complying with industry custom, that would be persuasive of the standard of reasonable care, but would not preclude our arguing that a reasonable person would have been more careful.

Apparently Sutton's daughter Mary and two boys were also assisting in the efforts. Presumably they were working for Sutton at the time. We could allege that she was negligent in waving at Hornsby; instead of making it look like a greeting, she should have blocked the road. Assuming Mary is under the age of 18, we might hold her to a standard of a reasonably prudent child of that age. The question is whether she was engaged in an activity appropriate for children (helping her father in an emergency) or an adult-type activity (one which she engaged in by choice, and which carried with it some inherent risk of injury to others). If it's an adult-type activity, she would be held to the standard of a reasonably prudent person, diregarding her age. Also, assuming that they were working for Sutton, then Sutton would be vicariously liable for any negligence on their part.

Negligence per se. There might be a statute that forbids people from allowing animals to run at large. If so, we might use such a violation as evidence of negligence. In fact, if the statute was violated without excuse, some jurisdictions would apply negligence as a matter of law. However, it would probably be a jury question as to whether the violation was excused.

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[1]It's not clear exactly how all of these parties are related. Further investigation might require some additional legal analysis as to whether they would be jointly liable. That's beyond the scope of this memo.

Res ipsa loquitur. If a plaintiff's injury occurs in such a way that evidence has been destroyed or is unavailable, and if the nature of the activity is such that we can infer negligence from the fact that the accident happened, and if the defendant has control over that aspect of the injury-causing process where we think the negligence occurred, then we could ask the court to apply the doctrine of *res ipsa loquitur*. However, in this case there doesn't appear to be any missing evidence, and the court would probably not allow us to use that theory.

Egger's. A final thought would be whether or not Egger's would be responsible for allowing the cow to escape in the first place. We don't really know why the cows got onto Sutton's property, but perhaps they were negligent in allowing the escape, and in failing to retrieve them sooner.

Strict Liability

A defendant is strictly liable for damages caused by certain kinds of activities. In this case there would be no abnormally dangerous activity, and there isn't anything that could be considered a nuisance (since the plaintiff was not injured on his own property). There might be strict liability for the escape of an animal, but in this case the animal wasn't ferocious or dangerous (like a tiger or a vicious dog). Thus, it is doubtful whether the court would make the owner strictly liable. If so, then Egger's would be responsible even if they hadn't been negligent. Also, if Sutton were considered the "possessor" of the cow when she caused the injury, then Sutton might also be considered strictly liable.

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CHECKLIST

- ☐ Overview
- ☐ Claims against Sutton / Giblett
- ☐ Negligence Claim
- ☐ Neg. Defined as Failure to use RC
- ☐ Custom of the industry
- ☐ Custom is the floor, not the ceiling

- ☐ "child" helpers
- ☐ standard of adult or child?
- ☐ Mary's negligence in flagging down H
- ☐ Vicarious liability

- ☐ Negligence per se
- ☐ Is there a statute?
- ☐ Was the violation excused?
- ☐ Jury question on excuse

- ☐ Res ipsa theory
- ☐ Elements of Res ipsa
- ☐ No missing evidence

- ☐ Egger's liability

- ☐ Strict liability
- ☐ No ADA
- ☐ No nuisance
- ☐ Animals?
- ☐ Not a vicious animal
- ☐ Sutton as possessor
- ☐

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