

SAMPLE ANSWER TO MINI-EXAM

This case is based on *Nutting v. Northern Energy, Inc.*, 874 P.2d 482 (Colo. 1994), which approved the trial court's rejection of *res ipsa* and negligence per se instructions and entered a judgment based upon a jury verdict for the defendant.

The Nuttings ("Ns") might have a case against Linden Gas & Electric ("LGE"). In order to prevail, they would have to prove either that LGE was negligent, or that they should be held strictly liable for their operations.

Negligence

LGE would be liable for the damage caused by the fire if it resulted from LGE's negligence. Negligence is the failure to use reasonable care -- the care that a reasonably prudent person would use under the same or similar circumstances. Here Ns would allege that Mike Jones was negligent in the installation of the propane gas line. (In turn, LGE would be vicariously liable for Jones' negligence.) The ultimate success of the case depends in part on the resolution of disputed facts concerning the condition of the line at the time it was installed. If the jury believes that there was a leaky connection at the time of the installation, then they might find that it was done negligently; however, the fact that they didn't smell any gas for two weeks, up to within an hour of the time of the fire, casts doubt on the likelihood of such a finding.

Several tools are used to establish negligence. One question is what standard procedures are used in the process of installing propane gas lines. Perhaps some kind of industry custom or guideline that is used will point to a failure on Jones' part, either in the installation, or in the follow-up to insure that there was no leak. Another possibility is that LGE's own procedures call for some kind of additional effort that wasn't made. Evidence of a departure from industry or employer standards is strong evidence of negligence.

Res ipsa loquitur. Another approach would be to argue *res ipsa loquitur*. Negligence can be inferred from an accident which (1) is of a type that doesn't ordinarily occur in the absence of negligence; (2) resulted from a process or instrumentality in the control of the defendants at the time of the accident (or the alleged negligence that produced the accident); and (3) could not reasonably be attributed to some other source, such as the negligence of some other party (including the plaintiff) or an independent force.

In this case the type of accident does suggest negligence, but there are problems with the exclusive control prong and the "other plausible explanation" prong. As to exclusive control, the plaintiffs were in control of the water heater, which is a possible source of ignition for the fire. Similarly, the downdraft theory offered by Smith seems like a plausible explanation, given the fact that the leak apparently wasn't a problem until an hour before the fire. Thus, it seems to me that the *res ipsa loquitur* theory has significant problems, and the judge might decline to give such an instruction. If the judge did give the instruction, the jury would still need to evaluate whether or not they think it is more probable than not that the fire was caused by LGE's negligence.

Negligence per se. An unexcused statutory violation may lead to the imposition of negligence as a matter of law; that is, the judge would decide the question of negligence and leave questions of proximate cause and damages for the jury. To take advantage of negligence per se, the

plaintiff has to show (1) that there was a statutory violation; (2) that it was unexcused; and (3) that the plaintiff's injury was one that the statute was designed to prevent. The statute in question, § 4.1.5., requires that the installation be leak-free. If the jury decides that there was in fact a leak as a result of Jones' installation, that would constitute a violation of the statute. However, since that point is disputed, it is doubtful that we could get the judge to remove the issue from the jury's consideration. Instead, it is likely that the jury would be told that, if they find that there was a leak, that such a leak would violate the statute and would constitute negligence. Thus, we cannot expect much help from the doctrine of negligence per se.

Strict Liability

We would not have to prove negligence if the activity in which the defendant was engaged is abnormally dangerous, and thus subject to strict liability. Here LGE's activity was the repair of gas lines. It doesn't appear that LGE actually supplied the propane gas, although that is not entirely clear from the facts. Whether an activity is abnormally dangerous depends upon the application of six criteria established by the Restatement of Torts, § 520. Although gas line installation and repair creates the potential for grave injury, injury can ordinarily be avoided through the use of reasonable care. Here it seems obvious that somebody was negligent -- either the homeowner or LGE. Moreover, the activity is common and appropriate to the area, and it is of high value to the community. Thus, it seems unlikely that strict liability could be applied.

Conclusion

This case is heavily dependent upon the jury's evaluation of the credibility of the various witnesses. If the jury believes that LGE negligently installed the gas line, and that the leak from the gas line caused the fire, then the Nuttings can probably obtain compensation for their fire loss. On the other hand, if the jury believes that the fire resulted from some other cause, then the Nuttings' loss will go uncompensated.

CHECKLIST

- Overview

- Negligence theory
- Negligence defined as lack of RC
- LGE is vicariously liable for Jones
- custom of the industry?
- rulebook violation?

- res ipsa
- elements of res ipsa
- type of accident suggesting negligence
- exclusive control?
- other explanations?

- negligence per se
- elements
- statutory violation in question
- probably a jury question

- strict liability
- Restatement criteria
- abnormally dangerous activity
- high degree of danger
- high degree of damage
- reasonable care could prevent
- common use
- appropriate
- value to the community
- probably no strict liability
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