SAMPLE ANSWER TO MINI-EXAM

> This case is based on *Lui v. Barnhart*, 987 P.2d 942 (Colo. 1999), in which the court affirmed a jury verdict for the defendant, rejecting a strict liability interpretation of the statute and approving the refusal to instruct the jury on res ipsa loquitur.

Mr. Lui ("HL") could sue Barnhart, but in order to recover damages he would have to prove that Barnhart breached a duty to him, either by way of (1) acting negligently or (2) by being held strictly liable for the escape of his horse.

Negligence

HL could argue that Barnhart was negligent in allowing his horse to escape. Negligence is the failure to use the care that a reasonably prudent person would exercise in the same or similar circumstances. Barnhart claims that he closed the corral in his normal way, but he doesn't have a distinct recollection of it. Evidence might be found to show that Barnhart in fact was negligent in failing to close the gate. Also, we might look to the customary practices of other horse owners to find out whether gates are locked or otherwise secured. If we could show that Barnhart didn't follow the customary practices of other horse owners, that would give us a good chance of persuading the jury that Barnhart was negligent. On the other hand, if Barnhart was doing everything that horse owners customarily do, we could still try to persuade the jury that a reasonable person would have recognized the need for additional precautions, but that's not a promising avenue.

The fact that the gate came open and no one seems to know how gives us a chance at establishing the legal principle of *res ipsa loquitur*--"the thing speaks for itself." In order to have the judge instruct the jury on this theory, we would have to show (1) that this kind of accident (a horse escaping) doesn't ordinarily happen in the absence of negligence; (2) the defendant had exclusive control over the instrumentality that caused the accident; and (3) other plausible explanations have been sufficiently eliminated. As to #1, I don't know if a horse escaping from its corral is usually a result of negligence, but that seems like a reasonable argument. As to #2 and #3, there seems to be some question as to whether someone else might have been involved. Whether that possibility has been "sufficiently eliminated" might prevent the judge from finding that a *res ipsa* instruction is justified.

Another method of establishing negligence is through negligence per se. In some jurisdictions when a statute is violated without excuse, the judge will instruct the jury that the violation constitutes negligence as a matter of law, and the only questions for the jury are whether the violation proximately caused damage and how much damages to award. (Other jurisdictions just consider statutory violations to be evidence of negligence, and the jury is permitted to find that the defendant's conduct was reasonable even if it violated a statute.) To qualify for negligence per se, the statutory violation must be unexcused, and the statute must have as one of its purposes the prevention of injuries like this. We would argue that Barnhart violated the statute requiring the owner to keep the animal on his premises. We wouldn't have any problem showing that the statute

was intended to prevent accidents like this. However, Barnhart would certainly argue that his violation of the statute was excused because he did not know that the gate was open. That would probably make it a question for the jury. We can hope that the jury will find that he failed to close the gate rather than that some third party opened it, but if the jury believes him they may find that the violation was excused.

Strict Liability

Barnhart is liable without proving negligence if he engaged in an activity for which there is strict liability, which is imposed in a few contexts.

One is for an abnormally dangerous activity, but that hardly seems plausible. The Restatement's treatment of ADA is a six-factor test that looks for a high degree of risk and grave danger that cannot be eliminated with reasonable care, as well as being uncommon and inappropriate to the area. I don't think we have a viable case on that point, since horses are quite common and don't pose a grave risk. Also, we wouldn't be able to argue for a nuisance, since the plaintiff wasn't on his own property at the time.

Strict liability is also imposed in certain kinds of cases involving animals. The traditional common law rule was that an owner was strictly liable for injuries caused by animals that were dangerous by nature (like tigers or poisonous snakes). On the other hand, an owner was only liable for negligence in controlling a dog unless the owner knew of the dog's dangerous proclivities. Here we might argue that the horse was dangerous (in terms of causing injury on the highway) and therefore the animal should be subject to strict liability, but I don't think that's a very good argument. But these arguments wouldn't probably go very far because of the statute that was already cited.

We would argue that the statute should be interpreted like a "leash law" that makes owners strictly liable for injuries regardless of whether the owner was negligent, or even whether the owner knew of the animal's propensity to bite. If this interpretation is adopted by the judge, then we would not need to prove negligence or knowledge of danger. Otherwise, the court will view the statute as an ordinary requirement of conduct, which would then be subject to the negligence per se rules described above.

CHECKLIST

- ☐ **Overview**
- ☐ **Breach of Duty**

- ☐ **Negligence** theory
- ☐ **defined** as failure to use reasonable care
- ☐ **Custom** of the "industry"?
- ☐ **Res ipsa** loquitur
- ☐ Three **elements**
- ☐ Q about **third party** involvement
- ☐
- ☐ Negligence **per se**
- ☐ **Elements**
- ☐ Statutory **purpose** OK
- ☐ Problem with **excused** violation
- ☐ Would probably go to **jury**

- ☐ **Strict Liability**
- ☐ **Abnormally Dangerous Activity**
- ☐ Restatement criteria **not** favorable
- ☐ No **nuisance**

- ☐ **Animals**
- ☐ Is horse "dangerous by **nature**"?
- ☐ What is the meaning of the **Statute**?
- ☐ Is "**leash law**" interpretation correct?
- ☐ **Otherwise**, only a negligence per se rule
- ☐

Exam Number _____