

SAMPLE ANSWER TO MINI-EXAM

This case is based on *Pahanish v. Western Trails, Inc.*, 69 Md.App. 342, 517 A.2d 1122 (1986), which affirmed a judgment in favor of the defendant entered after a bench trial; the trial judge found that *res ipsa loquitur* did not apply and the failure to obtain a license was not a proximate cause of the injury.

To successfully sue on a tort theory, John would need to show that Western Trails, Inc. ("WTI") breached a duty to him, either by showing that WTI was *negligent* or that they are subject to some form of *strict liability*.

### Negligence

Negligence is the failure to use reasonable care. To establish negligence, John would have to show that WTI did something (or failed to do something) that a reasonably prudent person wouldn't have done (or failed to do something a reasonable person would have done). WTI would be vicariously liable for any negligence on the part of its employees, Danielle or Eric. In this case there are several possible avenues to establish negligence. Perhaps a reasonable person would have provided more instruction on how to handle the horse. Perhaps a reasonable person would have chosen a different horse for John. Perhaps the saddle was not secured properly.

With respect to the instructions or the method of choosing a horse, we might look to industry custom. We should find out whether there is a standard operating procedure for riding stables to insure that the horses are properly matched to their riders. Industry custom is only persuasive evidence, and the fact that industry custom was met does not mean that the actions of WTI were reasonable; the jury would have the final word.

Another method to establish negligence would be to show a failure to comply with a policy adopted by the employer. This is sometimes referred to as a rulebook violation: if the employer had prescribed, or the other employees adopted as a matter of routine, some safety precaution such as checking the saddle before the rider was placed on the horse, then the failure to follow this practice is persuasive evidence of negligence.

We might try to use the statutory violation (failure to obtain a license) to show negligence. Some jurisdictions treat a statutory violation as a matter of law (negligence *per se*), while other jurisdictions only use statutory violations as evidence of negligence, leaving it to the jury to decide whether the defendant acted reasonably. Also, to invoke the negligence *per se* doctrine, the statute must have been designed to prevent injuries like this one. If the failure to obtain a license was connected to safety, that would suffice, but if it's only a matter of collecting taxes or otherwise unrelated to safety, it wouldn't apply.

A final method of establishing negligence would be to argue that the case falls within the *res ipsa loquitur* doctrine. *Res ipsa* allows a jury to infer negligence if (1) the accident is of a *type* that does not ordinarily occur in the absence, (2) the defendant is in exclusive control of the instrumentality; and (3) other plausible explanations have been sufficiently eliminated. We might find an expert who could say that saddles don't ordinarily fall off of a horse unless someone has been negligent, and WTI was the only one involved. However, WTI might claim that there are other possible causes of the saddle coming off (an unknown weakness in the strap, which was not observable by reasonable inspection) that explains the accident.

### Strict Liability

I don't see any basis for strict liability in this case. Strict liability is applied when (1) an activity is abnormally dangerous (this one isn't); (2) there is a nuisance that interferes with the plaintiff's reasonable expectations for the enjoyment of the plaintiff's property (no property interest here) or (3) an animal causes harm after the owner is on notice of the animal's dangerous propensity. As to #3, it isn't clear that any of the horses were actually dangerous (like having a

tendency to bite), and thus any knowledge of the erratic behavior of the horse would probably be looked at under a negligence theory rather than subject to strict liability. Finally, there's a remote possibility that some statute makes horse owners liable for damages caused by their horse, but again I wouldn't hold out much hope for it.

## CHECKLIST

- Overview**
- Breach of Duty
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- Negligence* theory
- Defined** as the failure to use reasonable care
- (Western Trails would be **vicariously liable** for D, E
- Failure to **match horse** to rider could be negligent
- Failure to **secure saddle** could be negligent
- Industry custom?**
- Rulebook** violation?
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- Res ipsa** for saddle coming off?
- Type** of kind of accident suggesting neg.?
- Are other plausible causes **sufficiently eliminated?**
- Negligence **per se**
- Was **purpose of statute** to prevent accidents like this?
- Jurisdictional variations** on NPS
- Suggestion of **post-accident repair** of saddle inadmissible
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- Strict Liability?**
- Not an abnormally **dangerous** activity
- No **nuisance** b/c no property interest
- SL for **Animals?**
- Was either horse **dangerous?**
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Exam Number \_\_\_\_\_