MINI-EXAM SAMPLE ANSWER

[For a case based upon similar facts, see Klein v. Pyrodyne Corporation, ___ Wn.2d ___, ___ P.2d ___, 1991 WL 84186 (1991)]

In order to recover against any potential defendant, Danny ("D") would have to establish either that the defendant acted negligently, i.e., failed to exercise the care of a reasonably prudent person in the same or similar circumstances, or else that such conduct constitutes an abnormally dangerous activity for which the defendant would be strictly liable.

I. Claims Against Pyrodyne ("P")

D could sue P either on the basis of negligence or strict liability.

Negligence. D would need to show that P was negligent using one of the following methods. D could argue that a reasonably prudent person would have placed the mortars in the ground to avoid the accident. One measure of reasonable prudence is the Learned Hand test, which balances the cost of accident prevention against the probability of an injury multiplied by the anticipated severity of the injury. In this case, severe injuries were relatively likely, and the cost of burying the rocket rather small. Another consideration would be what other fireworks companies do to avoid such risks. Although not dispositive, industry custom is strong evidence of what is reasonable care. Statutes and administrative regulations should be consulted to see whether P violated any relevant statutes. If so, such violations would either be evidence of negligence, or in some jurisdictions conclusive proof of negligence (negligence per se). Here P appears to have violated the insurance statute, but it may not be considered negligence per se because in order to be used to establish negligence per se the statute must be enacted to prevent injuries such as the one suffered here. Requiring a company to obtain insurance doesn't seem oriented toward preventing injuries (except in an indirect way), but rather toward providing compensation for injuries that do occur. Also, P might argue that their violation was excused.

An additional method of proving negligence would be to argue res ipsa loquitur. D can get the jury to infer negligence from the mere happening of the event if (1) there is excusable ignorance as to what caused the accident; (2) the accident is of a type that usually does not occur except where someone has been negligent; (3) the instrumentality causing the accident was in the exclusive control of the defendant; and (4) other potential causes have been sufficiently eliminated by the evidence. D would have a strong case for res ipsa with the possible exception of item 4. Since there is a distinct possibility that the rocket was defective, then it may be the alternative explanations have not been sufficiently eliminated. However, D would argue that in this case the burden should be on P to disprove negligence rather than upon him to prove it.

P's memo issued after the accident would not be admissible because of policy restrictions on use of such proof.

Strict Liability. D could also argue that setting off fireworks was an abnormally dangerous activity and therefore should subject P to strict liability. Most courts would use the six-factor test contained in the Restatement (2d) of Torts, § 520. That section provides that an abnormally dangerous activity usually exhibits most of the following characteristics: (1)
carries with it a high degree of some risk; (2) the harm it may cause is likely to be great; (3) the
danger of injury cannot be eliminated through the use of reasonable care; (4) it is not a matter of
common usage; (5) it is inappropriate to the place where it is carried on; and (6) it is of high
value to the community. Weighing these factors, a court might find that the fireworks display
would be an abnormally dangerous activity, and therefore make it subject to strict liability.

II. Claims Against International Technologies (IT)

Since P may be unable to pay any judgment obtained, it would be wise to consider
whether or not IT might be liable for the injuries to D. IT would not be vicariously liable for P's
negligence, since P was probably an independent contractor. The principle of respondeat
superior makes employers liable for the acts of their employees, but this rule does not extend to
independent contractors. The critical issue is whether IT had a right to control the way P
conducted the fireworks exhibition. It sounds like there wasn't much control exerted here.

Another theory would be that IT negligently hired P. If there was something about P that
would suggest they were incompetent to handle the job, then IT could be negligent in selecting
them. Again, however, this doesn't seem to be the case here.

Overall, the claim against IT appears weak.

III. Claims Against the Rocket Manufacturer ("RM")

The alternative explanation for the explosion is a potential defect in the rocket itself,
which arguably would be a result of negligence on the part of RM. D would be wise to name
RM and P, claim res ipsa, and ask the court to place the burden of proof upon them to establish
which of the two caused the injury. D could argue that, like the case of the explosion of the
rocket at the site, a rocket would not ordinarily explode prematurely unless it were negligently
made. If D named both defendants, he would have a case similar to Ybarra v. Spangard, in
which a man injured during the course of a surgical procedure; the court there placed the burden
of proof upon the defendants to establish which one did not injure the plaintiff. Such a method
would work to D's advantage here.

In addition to arguing negligence, D might argue that strict liability should be applied to
rocket manufacturers if there activity is found to be abnormally dangerous, using the analysis
described above.
MINI-EXAM CHECKLIST

☐ Claim v. P
☐ Negligence or SL required
☐ Definition of Negligence
☐ Would a reasonably prudent person bury the mortars?
☐ Learned Hand Test
☐ Learned Hand test applied
☐ Custom of other industries

☐ Negligence per se concept
☐ Insurance violation
☐ Purpose of the Insurance Statute?
☐ Excused violation?
☐ Res ipsa Loquitur
☐ Res ipsa elements spelled out
☐ Problems with other potential cause
☐ Use of Ybarra v. Spangard shift of proof
☐ No Post-accident repairs are admissible

☐ Strict Liability
☐ Restatement criteria
☐ Decision would be for the court

☐ Claim v. International Technologies
☐ No vicarious liability if an independent contractor
☐ Right to control?
☐ Negligent selection of contractor?

☐ Claim v. Rocket Manufacturer
☐ Was the rocket negligently made?
☐ Res ipsa theory
☐ Strict liability if abnormally dangerous