

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) it

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 their 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