Professor DeWolf
Torts I

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SAMPLE ANSWER TO MINI-EXAM

This case is based on *Anderson v. Nashua Corporation*, 246 Neb. 420, 519 N.W.2d 275 (1994), which reversed a summary judgment for the defendant. While the court held that there was insufficient evidence form which to argue strict liability, and that the statute in question did not apply to the owner of the property where the injury occurred, there was a potential claim for Nashua's negligence in the way the injury arose.

There are a variety of possibilities for Anderson, but none by itself looks particularly promising. In order for Anderson to recover, he must prove that Nashua (or some other defendant) *breached a duty* that was owed to Anderson (and in other parts of the course we will be required to show that this breach of duty proximately caused compensable damages).

Breach of Duty. There are two relevant theories that Anderson might use to establish a breach of duty. First, Anderson might argue that Nashua was negligent, that is, that Nashua failed to use the care that a reasonably prudent person would use under similar circumstances. One thing we might look at is whether or not there is some kind of industry custom with respect to painting tanks that would suggest that precautions should have been taken which were not. Although industry custom is helpful in determining what a reasonable person would have done, it is not conclusive; thus, even if Nashua's practices were consistent with the practices ordinarily used by other tank owners, a jury could be asked to impose a standard that would require a greater degree of caution, if reasonable prudence would require it. Another, but less promising avenue, would be to examine whether Nashua had some standard or required company procedure that they violated by allowing Anderson to be exposed in this way.

Another avenue to consider would be to apply the statutory requirement of exhausting the fumes. A statutory violation can be considered negligence if it is unexcused and if the statute was meant to protect against accidents such as this. It's hard to tell whether this statute would apply, since it seems primarily aimed at preventing inhalation of fumes rather than their explosive character. Moreover, it's not clear that it applies to Nashua, as distinguished from Bunch. Finally, even if the statute applied, West Dakota may be a jurisdiction that treats statutory violations as suggestive, rather than conclusive, of the negligence issue.

Yet another theory of negligence would be that the jury should be able to infer negligence under the doctrine of *res ipsa loquitur*. That principle applies when the accident (1) belongs to a *type* of accidents that doesn't ordinarily occur unless there's been negligence; (2) other causes have been sufficiently eliminated; and (3) the defendant is the one responsible for whatever caused the accident. I don't think that doctrine would do any good in this case, because we may know what caused the accident. Moreover, even if there were an inference of negligence, it's not clear that Nashua had "exclusive" control (much like the hospital elevator case).

A final angle on the negligence issue would be to try to establish that Bunch was negligent and Nashua was vicariously liable for that negligence. A is vicariously liable for B's negligence if A has employed B and A has the right to control the way B's work is done. It appears that Nashua hired Bunch as an independent contractor, but perhaps with more investigation we might find some basis for arguing vicarious liability.

Strict Liability. Nashua would be strictly liable for the injury if it resulted from Nashua carrying on an abnormally dangerous activity. I don't know what the tank held, or whether the

activity of painting the inside would be considered abnormally dangerous. I wouldn't think so, but the court would use the six Restatement criteria to determine whether strict liability would be applied. Those criteria include whether the risk of occurrence is high, whether the gravity of injury is grave, whether reasonable care can eliminate the risk, whether it is uncommon or inappropriate to the place where it is carried on, and whether it lacks high social benefit. Again, without knowing what activity Nashua was carrying on, it's hard to precisely, but it doesn't appear promising.

Other defendants. The final and least promising avenue would be a claim against some other defendant, such as the manufacturer of the paint, or even of the tank itself (even the light bulb manufacturer). Are these products dangerous enough to require a warning of some kind to avoid this accident, and was the warning lacking from the product?

Overall, I'd want to do some additional investigation, but unless something promising turned up to serve as a basis of liability, I'd be reluctant to pursue the case.

CHECKLIST

- ☐ Overview
- ☐ Breach of Duty
- ☐ *Negligence* theory
- ☐ defined as failure to use reasonable care
- ☐ Custom of the industry?
- ☐ Rulebook
- ☐ Negligence per se
- ☐
- ☐ negligence per se
- ☐ elements
- ☐ does the statute apply to this situation?
- ☐ does the statute apply to Nashua?
- ☐ does the jx treat violation as conclusive?
- ☐
- ☐ res ipsa?
- ☐ elements of res ipsa
- ☐ do we know what happened to cause fire?
- ☐ Is this the *type* of accident that is usually b/c of negligence?
- ☐ No exclusive control
- ☐
- ☐ Vicarious liability issue
- ☐ Would Nashua be liable for Bunch's negligence?
- ☐ strict liability
- ☐ Restatement criteria
- ☐ abnormally dangerous activity
- ☐
- ☐ What about paint manufacturer?
- ☐ Tank manufacturer?

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