

Widener University
School of Law

Torts Final Exam
Fall 2009

Model Answer

1. Abel Pigg v. Strawman and Vaughn Prefab Homes, Inc. (action for deceit). – 30%

To establish a claim for fraudulent misrepresentation against Strawman, plaintiff must show the following: (1) false representation of material fact; (2) scienter; (3) intent to induce reliance; (4) justifiable reliance; and (5) damages.

False representation – There are four types of “representations” that may fulfill this requirement. First, there may be an affirmative statement by the defendant. Second, the defendant may by some action conceal the true state of affairs thereby making discovery of the truth by the plaintiff difficult. Third, assuming the parties are in certain relationships or under other circumstances that give rise to a duty to speak, a failure to disclose may be treated as a misrepresentation of that which should have been said. Finally, there are the so-called “half truth” cases. The facts here lead one to believe that this case involves a “half truth.”

The basic idea underlying the claim is that normally liability may not be based on a defendant’s failure to act. Nevertheless, even though there may be no duty to act initially, if one assumes a duty by commencing to act, he must thereafter meet the established standard of care. Thus, even if we assume that Strawman was under no duty to speak, once he elected to speak by responding to Pigg’s question regarding U.L.’s examination of the house, i.e. the house’s “wolf-proof” qualities, he assumed a duty to disclose fully. Please note: this was an arms-length sales transaction. There was no fiduciary relationship between the parties that would give rise to an obligation to disclose, although under the Second Restatement a duty to disclose can arise in a sales transaction.

Here, in response to Pigg’s inquiry, the defendant asserted that the house in question had never been rated. Although this was technically true inasmuch as U.L. had declined to rate the house after it failed their test, it was grossly misleading. In effect, the assertion that the house had not been rated implied that if it had been tested by U.L. it would have passed the test. At the very least, the implication was that the house in question was every bit as good as those that carried a U.L. rating. This was simply untrue.

Materiality – To determine whether a statement is material or not, court’s commonly employ an objective test – i.e. whether a reasonable person would have entered the transaction on the same terms or at all had he known the true state of affairs. It is hard to know on the facts given whether the ORP purchaser would be concerned over a structure’s “wolf-proof” qualities (although, to the extent that a home “wolf-proofness” also deals with its overall structural integrity, it is probably something most people would consider

important). In any case, there is an exception to the use of an objective standard. If the buyer, for some idiosyncratic reason, attaches importance to some fact or quality that would be considered trivial to most people, and the defendant knows that the buyer attaches such importance to such a fact, a misrepresentation as to the existence of that fact will be judged material under a subjective standard. Thus, for example, if a buyer is collecting art work painted by some obscure artist because the artist is the buyer's distant relative, a misrepresentation as to who painted the work may be deemed material as to that buyer even though most people wouldn't care.

Here, Pigg conveyed his concern about "wolf-proofness" to Strawman. If, armed with that knowledge, Strawman traded on Pigg's idiosyncratic desire, the implied assertion of "wolf-proofness" will be deemed material.

Fact vs. opinion – The older cases sought to distinguish the two. Statements of fact were actionable, whereas statement of opinion were not. Here, the implied assertion that the house would have passed U.L. testing if it had been done would probably be treated as an objectively verifiable fact. On the other hand, the "Cadillac of houses" claim sounds like the speaker's personal view, i.e. opinion. The "Cadillac...light as a feather...strong as steel, etc." statements are also trade talk or sales puffery, not to be considered assertions of fact although the modern trend is to deal with those types of statement as ones upon which a person is not justified in relying.

Scienter – To establish fraudulent misrepresentation, the defendant must either know his statement is false or act with reckless disregard for the statement's truth or falsity. The latter requires that the speaker (or writer) have no reason to believe was he is saying is true.

Here, the facts tell us that Strawman was present at U.L. during the testing of this particular house (or, at least, an identical one) and witnessed its failure. Therefore, it is clear that he had actual knowledge that his implied assertion of quality was false.

Intent to induce reliance – Fraudulent misrepresentation is an intentional tort. To satisfy the intent requirement, one must show that the defendant acted for the purpose of inducing (someone's) reliance (not necessarily the plaintiff's) or subjectively knew with substantial certainty that someone would be relying.

Here, Strawman is a salesman who is in the process of attempting to close a deal. Pigg has expressed reservations about the quality of the house and Strawman is seeking to reassure him by implying the house possesses U.L. ratable quality. In other words, he is making the statements for the purpose of inducing Pigg's reliance.

Of course, Pigg must actually be relying on Strawman's statement (although he might be relying on other information as well). If he is not relying on the defendant's assertion, the misrepresentation is not a "but for" cause of his harm—he would have been harmed anyway. Here, there is no factual basis upon which to argue that he was relying on anyone but Strawman.

Justifiable reliance – The traditional formulation of the definition of the tort requires that the person who relies (to the plaintiff’s detriment) be justified in relying. The test for whether the reliance was justified was subjective. Therefore, one could defraud a fool who relies under circumstances where a reasonable person would not. Although many courts have switched over to an objective “reasonable reliance” standard, others seem to be using a reasonableness standard even where the jurisdiction purports to use a “justifiable reliance” standard.

In any case, there are two separate factual issues that deal with the question of whether Pigg should be deemed to have been justified in his reliance on Strawman’s implied assertion. First, the facts tell us that Pigg engaged in a lengthy inspection of a model home identical to the one he purchased. If the true state of affairs was readily discoverable upon inspection, plaintiff’s claim to have been justified in relying on Strawman’s implied assertion is unfounded. In that sense, the case is facially similar to the “car with air conditioning” case.

It is distinguishable, however. In that case, all the plaintiff had to do was to pull or push the button marked “air.” Here, he would have had to “huff and puff and blow the house down” (or try to). It seems inconceivable that any court would require or even allow destructive testing. Moreover, as many of you pointed out, we do not know what is involved in “huff and puff” testing (or whether a pig can huff and puff as well as a wolf). In other words, there is a good chance that Pigg could not, by reasonable inspection, have discovered the falsity of defendant’s statement. Therefore, reliance was probably justified.

Additionally, the other statements (i.e. Cadillac of houses, strong as steel....) must be considered. These are trade talk or puffery – the kind of non-specific hyperbole that salesmen might be expected to engage in in the course of trying to close a deal. Courts routinely hold that one is not justified in relying on such statements because reasonable people expect a certain level of BS in those situations. Although it appears that courts are utilizing an objective test, they do so even in jurisdictions that otherwise purport to use a subjective test for justifiable reliance.

Damages – The basic measure of damages deals with the economic loss resulting from the deceit. Under the benefit of the bargain (bob) test used in a majority of states, the plaintiff can recover the difference between the value of the house as represented and the value actually received. Since the facts tell us that U.L. rated homes in the area are selling for \$1000 and the home Pigg purchased is only worth \$200, under a bob measure, plaintiff is entitled to \$800.

Since the implied representation by the defendant was that the house he was selling was as good as U.L. rated homes, the \$1000 figure seems to be a fair approximation of value. Some people argued that the U.L. rating itself would have value, thus making a U.L. rated home worth more than one that was as good, but didn’t carry the rating. Although I didn’t have that in mind when I drafted the problem, I think it’s a good point.

In any case, a minority of states do not permit bob, but insist on “out-of-pocket” (oop) damages only, i.e. the difference between the amount paid (\$500) and the actual fair market value (\$200). Under an oop measure, the plaintiff gets \$300. [by the way, oop is always used in negligent misrepresentation cases].

Some states permit the plaintiff to elect between bob and oop. Since bob is normally more favorable to plaintiffs and is so here, this would be elected. However, if the plaintiff fails in proving bob because the represented value has arguably not been shown, he could fall back on oop.

In addition to recovering the basic economic loss, the plaintiff is entitled to recover consequential damages provided they are proximately (foreseeably) caused by the reliance on the misrepresentation. Certainly, the house falling down was foreseeable and the intentional criminal misconduct of Wolfe would not be deemed superseding (since it is precisely the risk to be guarded against). Therefore, the property damage to the house loss of fair market value of \$200 or possibly the cost of restoration (even if it exceeds \$200) would be recoverable.

Along the same lines, the personal injury damages to Pigg sustained when he was beaten by Wolfe would probably be deemed a foreseeable consequential loss.

Punitive damages – Fraud, if found to be sufficiently egregious, will support an award of punitive damages to punish and deter Wolfe and deter others from engaging in such misconduct. The amount of such damages is hard to determine on these facts. Under *Gore*, plaintiff would probably not be entitled to more than nine times the compensatory damages (if that). However, since we are not told of the extent of the consequential personal injury damages, it is impossible to come up with a number here.

Burden of proof – In most states, fraudulent misrepresentation, both as the basis of compensatory damages and punitive damages, must be shown by clear and convincing evidence (though this is not constitutionally required).

Vicarious liability of Vaughn – The facts provide no basis for arguing that Vaughn has engaged in any misconduct. Therefore, if they are to be held jointly and severally liable with Strawman, it would be on the basis of having been found vicariously liable for Strawman’s misconduct.

Whether there is vicarious liability turns on whether Strawman was an employee of Vaughn or an independent contractor. Unless there is a non-delegable duty (and no basis for a non-delegable duty appears here), one who hires an independent contractor is not vicariously liable for harm caused by the contractor’s tortious misconduct.

The basic test for determining whether one is an employee or independent contractor turns on whether and to what extent the employer has the right (whether exercised or not) to control the details of the other’s work. Generally speaking, employers hire

independent contractors to accomplish a particular result without exercising control over how they go about accomplishing it. In the case of employees, on the other hand, the employer retains the right to tell the other how to do the job.

Many factors are considered by courts insofar as they bear on this basic issue. What relationship the parties think they are creating is relevant, but not dispositive. Here, the facts that Strawman was carried on the company's books as an "employee" and had income tax withheld from his check (evidenced by the W-2) seems to indicate that the parties viewed themselves as being in an employment relationship. This is further supported by the fact that Strawman was provided with an employee handbook setting forth the company's rules and expectations regarding sales staff conduct.

By the way, the fact that the company had a written policy forbidding dishonesty which was violated by Strawman here is of no consequence. Employers cannot insulate themselves from vicarious liability by establishing rules of staff behavior.

Although the facts are not all that clear, if this was an on-going relationship between Vaughn and Strawman (evidenced by the W-2s), this tends to be indicative of an employee-employer relationship inasmuch as independent contractors are often hired for a single or short-term project. His occasional attendance at sales meetings doesn't add all that much, although it tends to show independence and a lack of control actually being exercised. The issue, however, is the right of control which is not the same thing.

In fact, it is true that Strawman had a great deal of independence. He made his own hours, developed his own leads, worked from home, etc. Nevertheless, that type of independence is not inconsistent with the behavior of out-of-store sales personnel. Furthermore, the fact that he was paid on a straight commission basis (in a sense paid per job completed) is also consistent with many sales positions.

If he was an employee, it is clear that he was acting in the course of his employment as a salesman. In cases of intentional torts such as this one, the vicarious liability of Vaughn may be said to depend on whether Strawman was acting with the "intent to benefit the master." Of course, that test is fairly meaningless here since he was paid on commission and, therefore, simultaneously benefited both himself and Vaughn each time he closed a sale.

On balance, I think the argument that he was an employee is the stronger one, but there was plenty of room to go both ways.

Assuming he was an employee and assuming that he was held liable for punitive damages, Vaughn's vicarious liability for punitive damages is a separate issue. Most states have taken the position that employers may be held liable for punitive damages if the employee was in a managerial position, was acting at the direction of his employer or if the employer ratified the conduct after learning of it. A salesman would probably not be considered management and, given the statement regarding honesty in the manual, probably didn't direct him to act tortiously. We are not told whether they did anything

that could be construed as ratification, although if they allowed the employment relationship to continue after the fact, that would evidence ratification.

In all probability, there would not be vicarious liability for the punitive damage portion of any award here.

2. *S. T. Bear v. Phoenix Construction Co.* (action seeking damages for harm to property based on negligence and negligence per se). – 70%

a) Negligence – There are five elements to the tort of negligence: duty; breach of duty; actual cause; proximate cause; and damages.

Duty – The basic concept of duty is relational. Sometimes the parties stand in certain established relationships with one another such that the law imposes an obligation on one to exercise reasonable care for the safety of the other. Thus, common carriers and passengers, innkeepers and guests; spouses; public utilities and customers, etc. fall into such recognized categories. Here, we are dealing with the vendor/builder of residential housing and a resident of the community. In other words, none of the traditional relationships exist.

In the absence of one of the specified relationships, courts commonly fall back Cardozo's famous pronouncements from *Palsgraf*. One owes a duty of reasonable care to those who foreseeably will be affected given the nature of the conduct which is alleged to have been negligent. The orbit of the danger reasonably to be foreseen is the orbit of the duty. In other words, if Bear was a foreseeable victim given the nature of the conduct that Phoenix was engaging in, they owed him a duty to exercise reasonable care.

Here, it is questionable whether Bear would be deemed to have been within the orbit of the duty. As will be discussed in a moment, it will be alleged that Phoenix was building homes which were made of materials which were excessively flammable. This clearly created a risk to the purchasers of Phoenix-built homes, their families, friends, etc. Given that fires spread, those who live near homes built by Phoenix are undoubtedly endangered as well. The problem is that we don't know how far away Bear's vacation home stood in relation to Baker's home. If, as many argued, it was distant, it was arguably outside of the zone. Nevertheless, since we all know that fires can and do spread long distances, in all probability a court would find the zone to be very large. If so, Bear would be a foreseeable victim and thus owed a duty.

If, of course, the court were to adopt Andrews' dissent in *Palgraf* (arguing that a duty is owed to the world, limited only by proximate cause, New York style) the duty issue would be moot.

Breach – Assuming that there is a duty, the next is breach (small “n” negligence). There are two parts to the analysis. First, one must establish the relevant standard of care

(assuming that this was not done as part of the duty analysis). The standard of care is the ordinary, reasonable prudent person – an objective standard. More specifically, the ORPP takes on some of the characteristic of the defendant. Thus, in this case, the standard would be that of the ordinary, reasonable prudent builder/vendor.

The second part to the analysis necessitates making a determination of whether Phoenix met or failed to meet the applicable standard. To determine whether the defendant's conduct was reasonable, it is helpful to look to the custom within the trade or industry in which the defendant is operating. Although conduct which conforms to the industry custom is not necessarily satisfactory since courts can find the practices of an entire industry to have been negligent, conformity is strong evidence that the conduct in question was not negligent. On the other hand, a failure to meet the industry custom when such conduct creates a greater risk of harm to others than would result from conformity is generally powerful evidence of breach.

The facts here tell us that stick builders commonly use materials with a flame-retardant rating of "3." Phoenix complied with that custom. Thus, absent more, it would appear that their conduct in this case would be considered acceptable. Of course, the facts go on to say that in the community where this particular house was built there was a statute mandating the use of materials with a rating in excess of 5. Since, in all probability, builders in this community normally comply with the statutory mandate, it follows that the local custom was to use the more flame-resistant materials. In other words, if the court were to hold Phoenix to the local standard, they failed to meet it and may be found negligent. If held to the general industry custom, there was no breach.

Moreover, in a jurisdiction that treated a violation of statute as evidence of negligence (apparently on the theory that reasonable people comply with legislative commands), the violation of statute would be admissible to show a failure to exercise reasonable care.

In this context, one might also consider Hand's calculus of the risk. In *Carroll Towing*, Learned Hand reasoned, in effect, reasonable conduct was the same as economically rational behavior. If the cost of accident avoidance exceeded the discounted magnitude of the accident cost (probability of harm times magnitude of the harm), it would not be reasonable to avoid the accident. If, on the other hand, the cost of accident avoidance was less than the discounted accident cost, it would be unreasonable not to take that action necessary to avoid the harm.

Here, it is difficult to know how the calculus would play out. The cost of accident avoidance would be those costs associated with using materials with a higher fire resistance. We are also told this would double the cost of construction. This increased cost needs to be compared to the increased probability of fires starting if the cost is not incurred, i.e. the increased probability of fire with 3 rated sticks as opposed to 5+ rated sticks. While we don't know what that is, it is probably very small. On the other hand, the magnitude of fire damage to persons and property if a fire does occur is very great. On balance, does it make sense to increase everybody's construction cost to avoid a very

limited number of fires caused by the use of marginally more flammable materials? Probably not, but you can go either way depending on just how risk averse you are.

Assuming that Phoenix's conduct is found to constitute a breach of duty, the next question is whether the use of 3 rated sticks is an actual cause of the harm here.

Cause in fact – The cause-in-fact problem here is a little tricky. One needs to use both the “but for” test and the substantial factor test. First, the facts tell us that Wolfe lit a fire under Baker's residence and then left. Baker returned home exactly four minutes later having just purchased a fire extinguisher. Since 3 rated sticks ignite in three minutes and since 5+ rated sticks take more than 5 minutes to ignite, if 5+ sticks had been used, Baker would have had more than a minute to extinguish the little fire set by Wolfe before damage was done. (Of course, he would have had to discover the fire in time as well, but we'll ignore that for the sake of argument.) In other words, the fire at Baker's house would not have occurred but for the use of 3 rated sticks and, therefore, the defendant's breach was a necessary condition (sort of).

This does not, however, resolve the question given that the fire at Baker's house was not a “but for” cause of the property damage to Bear's vacation home. The facts tell us that the fire at Baker's house spread to the forest. A second fire started by lightning was already burning a section of forest. The two fires combined into one really big forest fire and that burned down Bear's house. Either the Baker's house origin fire or the lightning fire by itself would have burned down Bear's house, i.e. neither of those fires was a “but for” cause of the harm to Bear.

In cases where there are multiple independent causes, any one of which would have caused all of a plaintiff's losses, courts use the substantial factor test in lieu of the “but for” test. Since a little forest fire is undoubtedly a substantial factor in the creation of a big forest fire, both fires would be deemed to be actual causes of the plaintiff's loss. Since only one resulted from a culpable act, i.e. the negligent use of flammable building materials, the culpable actor may be held liable provided the negligent act that is an actual cause of the harm is also a proximate cause.

Proximate Cause – Various courts at various times have taken different approaches to determining whether a particular negligent act which is a cause in fact should be deemed legally relevant for purposes of imposing liability. The Third Restatement largely relies on the so-called “hazard test.” Under the hazard test, one must determine what risks or hazards led to the determination that the defendant's act was a breach of duty. In other words, by definition we are dealing with unreasonable conduct, but what risks made the conduct unreasonable? Here, if the use of 3 rated sticks is determined to be unreasonable it is because the associated risk of fire is too great. We then look at the outcome. What happened here was that a fire started. Since the harm that actually occurred is precisely the risk that made the conduct negligent in the first place, that conduct is a proximate cause of the harm.

Closely related to the hazard test is the foreseeability approach. Given the nature of the negligence conduct (use of unduly flammable building materials), is fire damage foreseeable. Clearly it is. If the outcome is foreseeable or if the danger of the harm occurring is what made the conduct negligent, the mechanism by which it comes about is normally irrelevant. Thus, the facts that the fire spread to another house by wind and a rat moved the fire to the forest are completely irrelevant to the analysis.

The older cases did not use either a foreseeability or a hazard approach. Rather, courts used to look to “directness,” i.e. did the harm (regardless of the type) occur as the result of a traceable chain of events unbroken by any intervening human agency? Here, the original negligent act (building with unduly flammable materials) was followed by Wolfe’s conduct in lighting a fire under the house which caused it to ignite. Regardless of whether Wolfe’s conduct was accidental or intentional, he was a human actor whose conduct broke the chain. Therefore, under this approach there would not be proximate cause. By the way, the lightning and rat were not human interveners and, therefore, would not have broken the chain under this approach.

At various times courts (most notably New York) have opened advocated and implemented overtly political limitations on the scope of liability (often using foreseeability language). Thus, under the *Ryan* court’s “one house rule,” the court asserted that liability for fires would not be extended beyond the first house. Later, this was converted into a “two-house” rule. If a court were to adopt such an approach, in this case Phoenix’s liability would be arbitrarily cut off either after Baker’s house or after the second house. It is unlikely that the liability of Phoenix would extend to Bear.

Although, as I noted earlier, the mechanism or manner by which the harm comes about is normally ignored under the hazard and foreseeability approach, there is one exception. When there is an intervening act (coming between the defendant’s negligent conduct and the occurrence of the harm to the plaintiff) that consists of intentional criminal misconduct of a third party, courts often characterize that intentional criminal intervening act as a “superseding cause.” By definition, a superseding cause cuts off the liability of the negligent defendant.

Here, the relevant negligent act, if any, is Phoenix’s use of flammable sticks. They were ignited when Wolfe built a fire under Baker’s house. Wolfe will testify that he lit the fire to roast marshmallows, but then inadvertently forgot about it. If he is believed, his conduct would be considered negligent. As a concurrent tortfeasor he might well become liable too, but his conduct will not affect Phoenix’s liability to Bear. However, because Wolfe’s marshmallow tale is so wildly implausible, the trier of fact would probably find as a factual matter that he lit the fire with the intent to burn down Baker’s house. If that is the finding, his conduct would be superseding and Phoenix would not be considered a proximate cause of the harm.

Damages – The question only called for a discussion of the property damage suffered by Bear. Assuming all other elements are satisfied, Phoenix (or Phoenix and Wolfe) would be liable for compensatory damages. Normally, in the case of damage to real property,

the measure of damages is either the cost to repair or restore the property to its pre-damage condition or the loss in market value occasioned by the damage, whichever is less. In the case of residential real estate, however, many courts will allow the owner the cost to repair even if that amount exceeds the loss in market value provided that the cost of repair is not wholly disproportionate to the loss in market value.

Since this is a case based on “mere negligence,” the award of punitive damages would not be appropriate.

Defenses – The true affirmative defenses to a negligence claim are voluntary assumption of risk, contributory or comparative negligence and the plaintiff’s failure to mitigate damages. There is nothing in the fact pattern upon which to base any of these defenses.

Negligence per se (nps)

In nps cases, courts may adopt the standard of care set forth in a criminal statute and use that statutory standard of behavior in lieu of the ordinary reasonable prudent person standard of common law negligence. It is, however, widely agreed that it is not always appropriate to adopt the standard of behavior set forth in criminal legislation and use it in a tort case.

In this case, there is an ordinance that requires the use of 5+ rated building material for home construction. Failure to comply with the ordinance is punishable by a fine and/or imprisonment. Therefore, the first issue is whether the court should adopt this legislative standard.

By the way, although there is a statement in your book to the effect that ordinances may be treated differently than statutes, the former just as evidence of negligence and the latter as negligence per se, the book cites no authority for this and I can find none (other than possibly Florida).

Appropriateness for judicial adoption – In deciding whether to adopt a particular statutory standard courts commonly look to three factors: (1) is the plaintiff a member of the class that the legislative body was trying to protect when it enacted the law; (2) is the type of harm suffered by the plaintiff the type of harm that the legislative body was trying to prevent; (3) was there a pre-existing common-law duty that obligated the defendant to exercise due care toward the plaintiff.

Here, the facts tell us that the 5+ standard was promoted by a local company (Stickbuilders) and the insurance industry. The former saw the enactment as a means by which their profits could be increased. The latter also sought to increase their profits and simultaneously argued that the law would stabilize premium levels.

Which constituents favored the law and why is largely irrelevant, however. The question is what the legislative body was trying to accomplish, not the motivation of the law’s backers or detractors. While legislative history can be useful if it exists, ultimately courts

are forced to look at the terms of the law itself to determine what the legislative body had in mind. Moreover, what individual legislators had in mind really doesn't matter either. It is the intent and purpose of the body as a whole that courts must look to.

The law in question mandates the use of materials that are less likely to ignite (and will, perhaps, burn more slowly). This will result in fewer fires and less severe property damage when fire does break out. Therefore, the court will almost certainly view it as a public safety/fire reduction law.

Protected class – Even if one characterizes it as a public safety/fire reduction law, the legislative intent to protect someone in Bear's position is questionable. First, it is unclear whether he was a resident of (or had his vacation home in) the municipality that enacted the law. Perhaps they were only trying to protect their citizens rather than the world at large. Moreover, even if one argues that he was an intended beneficiary as a member of the public, there is no reason to believe that he owned a type of building that was the subject of this law. Was it enacted just to protect buyers of stick homes or was it enacted to protect anyone who might be harmed as a consequence of any fire?

Harm to be avoided – The harm to be avoided question, on the other hand, is easier. If it was a public safety/fire reduction law, the loss of one's house due to fire certainly must fall under the legislative intent.

Pre-existing common-law duty – The cases that have discussed this requirement almost invariably have dealt solely with the problem of a criminal law that requires one to act, where no duty to act existed at common law. Thus, for example, in *Perry*, the Texas court had to deal with the question of adopting a criminal statute that required strangers to report suspicions of child abuse to the Texas authorities. Because people have no common-law obligation to act for the benefit of strangers, the court refused to use the statute as the basis of tort liability.

Here, the act-omission problem doesn't exist. Home builders have a duty to exercise reasonable care for the safety of foreseeable plaintiffs. Of course, as discussed earlier, whether Bear was a foreseeable plaintiff in a *Palsgrafian* sense is not clear. If the requirement is limited to not imposing some new obligation to act, there is no problem here. If it is intended to trigger a broader look at duty, the decision on its adoption could go either way.

If we assume that the court does choose to adopt the statutory standard of behavior for use in a tort case, the analysis is not difficult.

Duty – If the court has concluded that Bear was a member of the protected class and there was a pre-existing common-law duty owed to him in the process of deciding to proceed on the basis of negligence per se, it would again find a duty was owed to Bear under the statute.

Breach – In traditional negligence cases one must decide what standard of conduct should apply to the defendant. As previously noted, here it would be the ordinary, reasonable, prudent builder/vendor. In a negligence per se case, the statutory standard of behavior replaces the ORPP standard. In this case, the statute mandates the use of 5+ rated sticks. Because the defendant used 3 rated sticks, they breached the statutory standard.

Procedural effect of breach – In some limited types of cases, courts have adopted a true per se liability standard. Proof that the standard was not followed creates a conclusive presumption of breach. Why the defendant violated, whether it was reasonable or not, whether there were extenuating circumstances are all irrelevant.

Most courts, however, don't go that far. Commonly, it is asserted that an unexcused violation of statute is negligence (i.e. breach). In these jurisdictions the defendant is permitted to explain why he or she violated the statutory standard and why it should be excused. Excuses normally fall into a limited number of classes. Compliance, for example, might, under the particular circumstances surrounding the case, be more dangerous than non-compliance. The plaintiff may have been unable to comply after diligently attempting to comply, and so on.

On the facts given, however, there is no excuse. While its true that following the statute would have been more expensive, the defendant cannot substitute his or her judgment for that of the legislative body to decide when the law ought to be followed. If one doesn't like or agree with the law, the only remedy is political.

Some courts reach essentially the same position by adopting a rule that a violation of the statutory standard creates a rebuttable presumption of breach. This serves to shift the burden of producing evidence of non-negligence (due care) or both the burden of producing evidence and the ultimate burden of persuasion to the defendant. Normally, the defendant would attempt to rebut the presumption by offering one the excuses for the statutory violation. Although there is some question about it, most courts would not accept that the defendant's testimony of due care (without more) as sufficient to rebut the presumption.

Finally, some courts do not recognize the doctrine of negligence per se at all. In those states, the violation of statute could be used to show a failure to exercise reasonable care or to show custom together with any other evidence of negligence.

Actual Cause – It must be shown that the failure to obey the statute was a “but for” cause of the plaintiff's harm or that it was a substantial factor. The analysis is the same as in the traditional negligence case discussed earlier.

Proximate Cause – Logically, there really shouldn't be a proximate cause issue in negligence per se cases. Once the plaintiff convinces the court that the type of harm that occurred is the type of harm that the legislation was intended to avoid the plaintiff has, in effect, established proximate cause under the hazard test. In fact, the hazard test itself arose out of the purpose of the statute test developed in negligence per se cases.

Nevertheless, as was obvious in *Ney*, some courts treat proximate cause in nps cases the same as in any other negligence case. Under those circumstances, directness, foreseeability, hazard, etc. are issues. As before, Wolfe's intentional criminal misconduct might well be found to supersede.

Damages – Same as before.

Defenses – Same as before.