© 2003 P.A.S.S., LLC. All Rights Reserved

PASS Sample Answer to Performance Test A

(February 2003 California Bar Exam)

[This sample answer was drafted by PASS founders and faculty members Sara Berman-Barrett, Steven Bracci and Bruce Landau —creators of the PASS Bar Review and PASS the Performance Test On-line. The exam question text may be viewed on the State Bar website at www.calbar.ca.gov/calbar. To learn more about PASS, the PASS faculty, and PASS Bar Review courses, go to www.passlaw.com, or call (310) 288-4374.]

To: Jane Kimmel

From: Applicant

Re: Theories of liability in potential action, Morales and Vargas v. Parsons

I have reviewed both the factual and legal materials you provided regarding the case we are investigating and looking into filing on behalf of Mr. Morales and the family of the deceased, Mr. Vargas, against Mr. Parsons, owner of the Parsons Strawberry Farm.

You have asked for the arguments that will most likely allow our clients to prevail on either or both the theory of *1) premises liability* and *2) negligence per se*. I will analyze each theory in turn below, but as you can see, just to let you know up front, it appears we have fairly strong causes of action on both theories.

1) Premises Liability

The crux of the case under this first theory, premises liability, will be to prove that Parsons had a *duty* to Morales and Vargas and *breached* that duty, thus *causing* the *injury* that hurt Morales and killed Vargas.

Parsons had a general duty to farm tenants including Morales and Vargas.

First, in order to find that Mr. Parsons owed our clients a duty of care, we will have to demonstrate that Parsons had some *control* over, maintained, or at the very least had knowledge of the tenants' living situation. This control issue was at the heart of the two 1997 Esteban cases, Columbia cases you included in the Library and mentioned in your memo. The Esteban cases are companion cases involving the same plaintiffs but different defendants. Both cases, Esteban v. Murai and Esteban v. Pollack were brought by plaintiffs who, like our clients were tenant farm workers whose injuries stemmed from a fire in temporary living structures such as those which housed our clients at the time of the fire on the Parsons Farm. In both Esteban cases, the Court granted summary judgment to the respective defendants concluding there was no duty on the part of those defendants owed to the tenant farm worker plaintiffs. Our case is distinguishable from both Esteban cases in several critical ways:

1). In the first Esteban case, the tenant housing where the fire occurred was not on the defendants' property, but on land adjacent to it. (According to our investigator, T.C. Gutierrez, the tenant housing camp where our clients lived *is* on Parsons' property. Gutierrez ordered documents that would prove this from the County Recorder, and we will have to review those documents to confirm, but assuming this is true, it will be critical to distinguishing Esteban and establishing a duty on the part of Parsons.)

© 2003 P.A.S.S., LLC. All Rights Reserved

2) Also in the first Esteban case, the plaintiffs sought to establish control via the defendants' employment of a security firm that patrolled the farm camp on the adjacent land, and/or through the defendants' indirect encouragement of the workers to live on the land by providing minimal supplies to them. The court, as mentioned, did not find either of these sufficient to hold defendants accountable for warning about or remedying dangers in the structures, which again were not on their property.

Not only, as stated above, were our clients housed on Parsons' property, but Parsons clearly exerted much more control over their living conditions than did the defendants in the Esteban cases. To begin with, our clients were living on the Parsons Farm because Parsons proposed the arrangement (either directly or through his agent, Rudy). According to Cruz, Parson's foreman, Rudy, initially proposed that the workers live on the Parsons' farm rather than at the Sanchez camp where they had been residing. Sanchez was a third party who housed the workers and drove them to the Parsons farm to work, for a fee. Cruz said he thought that Parsons/Rudy proposed the deal to cut out "the middleman," and to create a mutually beneficial working situation (saving the workers time and money and having them readily available on-site to begin work in the fields in the early morning. (We may stress this fact and cite to Griggs which found, "In regard to those working on the land, the landowner who induces or knowingly permits a workman to enter the land for performance of duties mutually beneficial to both parties, is required to use reasonable care to protect the workman by supplying him with a reasonably safe place in which to work.")

Next, not only is the fact Parsons proposed the living arrangement proof of his knowledge and control, but, further, Parsons and Rudy provided the workers materials and tools with which to build their "tents" (again, per Cruz) —including cardboard, plywood, tarps, and plastic from the strawberry fields. This fact also distinguishes our case from the facts of the first Esteban case because, in Esteban, though plaintiffs used materials from defendants' *trash*, defendant forbade workers from taking any materials, including plastic, from the *ranch*, even materials that had been discarded.

Further, Parsons *published* "Parsons Strawberry Farm Camp Rules and Regulations" –a most obvious public statement and personal acknowledgment of Parsons' ownership, control and management of the employee housing camp.

3) Our case is also readily distinguishable from the second Esteban case, the suit against the defendant property owner. In that case, the landowner defendant Pollack did not consent to or encourage the building or maintaining of the camp (and at one point, the defendant even denied knowing of its existence), the tenants did not work for defendant Pollack, and the plaintiffs were not open about their living situation. At least one of the Esteban plaintiffs, Lucas, did not seek permission to live in or even reveal that he lived in the camp out of immigration concerns. This is in stark contrast to our situation where the landowner Parsons (who *was* also the employer of these plaintiff workers) and his foreman Rudy proposed the arrangement, helped the workers build their housing, provided some assistance to the tenants (albeit sub-standard, see Section 2 on *negligence per se* below), put up an employee mail box so resident workers could receive mail at the farm camp, had a food service truck come in regularly to supply lunch and dinners, and regulated many aspects of the daily living conditions (including but not limited to restricting visitors and alcohol consumption).

For all of these reasons, it appears indisputable that Parsons had knowledge and control over the plaintiffs and their employee housing.

Parsons breached his duty of care to Morales and Vargas

Second, after establishing control and/or knowledge, we will be required to address those seven factors (from the Columbia Supreme Court's seminal Rowland decision) that the trier of fact will use to help determine whether a duty is owed to third persons: 1) the foreseeability of harm to the plaintiff; 2) the degree of certainty that the plaintiff

© 2003 P.A.S.S., LLC. All Rights Reserved

suffered injury; 3) the proximity between the defendant's conduct and the injury suffered; 4) the moral blame attached to the defendant's conduct; 5) the policy of preventing future harm; 6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach; and 7) the availability of insurance for the risk involved.

We will not be required to necessarily establish each of these factors conclusively, but rather to prove that, based on the factors as a whole, there is a duty. (See Griggs at p. 6, where the Court found a duty based on four out of six similar factors being present, holding that the "sum total of policy considerations" led to the conclusion of holding the defendant accountable.)

Here, it appears that we will be able to convince a trier of fact by a preponderance of the evidence that:

1) The harm to the plaintiff was foreseeable. Discussed in further detail below in connection with specific ways in which Parsons appears to have violated the Columbia Housing Act, it seems abundantly reasonable to predict that where tenants have no electricity or gas to light and/or heat their "homes," they will use less safe methods such as oil lamps or candles which are much more likely to lead to fire. Fire is especially foreseeable in housing made largely of cardboard, which is tightly packed together –one tent against the next. (Note: the Morales interview, at pages 2 and 3, details these living conditions.)

2) It is certain that the plaintiffs suffered injury. We know that Vargas was killed and Morales badly burned. We will in discovery, of course, obtain necessary medical and coroner's office documentation.

3) There is a proximate causal link between the defendant's conduct and the injuries suffered.

This will be the thorniest issue we are likely to face. We must expect that the defense will counter our claims asserting, per Esteban v. Pollack, that the landowner is not under "any duty to protect [plaintiffs] from their own activities." In other words, Parsons is going to assert that it was Vargas' own negligence that proximately caused the fire. Parsons may admit that he has a duty to the workers in so far as their activities on the strawberry field but he will argue that once they are in their own "homes" it is their choice to use an oil lamp, and if they so choose, they should assume responsibility to use due care. Parsons may use the very fact that oil lamps are known to be dangerous against the plaintiffs, relying on the rule from Griggs that where dangers are blatantly obvious, the condition itself serves as a warning thus absolving the landowner from further duties.

We will respond by focusing on the extreme nature of allowing, encouraging, in effect nearly requiring people, as a condition of employment, to live without utilities, and that doing so makes injury due to fire completely foreseeable and within the defendant's control to prevent. While the plaintiffs could have refrained from using the oil lamps, to do so would mean no light at all, and requiring people to live in darkness is not reasonable.

Further, while Parsons may stress that the relationship was voluntary and that plaintiffs were not required to live on the Farm, it appears from the evidence we have that living on the Farm was essentially a necessary condition of employment. (See Cruz' account of how there really is no other place to live, and how the choice, if there was one given the lack of transportation, was to live at a place like the Sanchez camp and be driven in an unsafe truck to work each day –the situation in which Cruz had been prior to the establishment of the Parsons camp.)

4) The defendant's conduct is morally blameworthy, and 5) There are clear policies preventing this type of harm in the future. [Note: these factors are discussed together as they are interconnected.] The Housing Act makes clear that sub-standard living conditions in farm labor camps is a social problem, one for which rules and regulations must be established and enforced, clearly setting into law the policies necessary to prevent such harm, or at least to

© 2003 P.A.S.S., LLC. All Rights Reserved

sanction those like Parsons who allow the harms to continue. How easy it would have been for Parsons to have simply complied with the law and provided decent living conditions to his workers. Had he even provided a hose for the tenants to use, the injuries might have been prevented or made much less severe.

6) The burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach is reasonable and contemplated by the legislature. As evidenced by the Columbia Housing Act, any burden to the defendant is one the legislature believes reasonable and appropriate in conditions such as these, where the farm tenant labor camps fall within the Housing Act's definition of "employee housing." (See below for more on why the Parsons camp accommodations fall within that definition.)

7) The availability methods to insure against or reduce the risk of harm. Insurance would not have prevented or reduced the risk in question; however, compliance with the Housing Act, and even something as easy and inexpensive as buying a hose would have helped prevent or at least reduce the harm from this obvious and foreseeable risk.

2) Negligence Per Se

The second theory upon which we may bring suit against Parsons is the theory of liability known as "negligence per se," which the court in Michael R. sets forth as follows:

> *Violation of a statute without justification constitutes presumptive failure to exercise due care if the violation proximately caused the injury and the person injured was one of a class of persons for whose protection the statute was adopted.*

The argument we would be making if we file this action against Mr. Parsons is that his failure to comply with the Columbia Employee Housing Act proximately caused the injuries and that the plaintiffs were clearly among the class of persons the Housing Act was meant to protect, "tenants of farm labor camps."

Violation of the Statute

The Parsons Strawberry Farm tenant labor camps fall within the Housing Act's definition of "employee housing" (Housing Act, Section 8). At the time of the injury, the farm workers:

- -lived in tent-like housing "accommodations,"
- -that were "maintained" in a "site" or "area set aside,"
- -for "five or more employees by the employer." (Our client, Mr. Morales, said there were some 30-35 tents housing about 50 workers.)

Such employee housing *must* comply with building standards (per Section 2). Among those standards of health and safety (per Section 61) include several defective conditions that appear to have been present at the Parsons Farm including:

© 2003 P.A.S.S., LLC. All Rights Reserved

– Serious defects or lack of gas, water, or electric utility, unless caused by tenant's failure to pay for these services. (Section 61, Subsection 1). According to residents/workers Morales and Cruz (who worked for Parsons for some 12 years), there was no gas or electricity for the workers. There was a water pipe but not maintained in such a way as to provide running water to tenants. (Note: Parsons did not charge rent to the tenants, therefore he should not be able to claim that a failure to pay for services caused the lack of utilities.)

It also appears that numerous other violations existed in the housing on the Parsons farm including lack of space, hot water, and perhaps a lack of adequate garbage service and/or plumbing (see subsections 2 and 5). We should research these further as and when the case progresses. But regardless of the other conditions, from the lack of electricity, water and gas alone, we will be able to demonstrate that Parsons violated the Housing Act. To prove negligence per se, we must next show that this violation *proximately caused the injury* and that *plaintiffs were among those the statute sought to protect*.

Parsons' violations of Housing Code proximately caused the injuries

Morales was injured and Vargas died as a result of a fire in Vargas' tent; that fact appears clear from the account of Morales (File at page 2). What is not clear at this point, and what we will need to investigate further and determine precisely during discovery is the exact cause of the fire. (Morales admits in the interview in response to the first question about how the fire happened, "No one knows for sure.")

Morales speculated that Vargas was "doing something in his tent" that required light, perhaps "mending a shirt" and that the oil lamp Vargas and "most" of the other workers used tipped over causing something flammable to catch fire. Morales noted that Vargas had "a lot of flammable things in his tent."

As discussed above in the analysis of the premises liability theory, the defense will likely use this to argue that Vargas' lighting of the oil lamp (or tipping it over) is what proximately caused the injury, and not Parson's failure to provide electricity. Parsons will contend that had Vargas simply been more careful, the fire would not have occurred. Parsons will argue therefore that Vargas' action of lighting the fire should be deemed an intervening action which breaks the causal chain and relieves Parsons of liability.

Our response will again be to rely on *foreseeability*. We will stress that oil lamps are so dangerous that where one is forced to use them, it is entirely foreseeable that fires will result. Here, but for Parson's failure to comply with the Housing Act, Vargas would not have had to use an oil lamp. Further, even if Vargas had no flammable materials of his own in the structure, the materials Parsons provided the tenants with to build their "tents" were highly flammable (mostly cardboard some plywood) and thus the fire was entirely foreseeable based on the highly flammable structures themselves, regardless of what a tenant kept in his particular tent. Lastly, we will make clear that Parsons could have easily taken measures to prevent such disasters, including, at the very least, the inexpensive measure of making sure there was a hose attached to the pipe so that if a fire did occur it could quickly be put out. (Gutierrez noted even as of his recent visit, there still was "no hose in sight.)

Plaintiffs were among those the statute sought to protect.

The first section of the Housing Act expressly states that it was created to stem the problems to health and safety caused by tenant labor camps, and to close loopholes with which owners of farms such as the Parsons Strawberry Farm had previously escaped liability. Plaintiffs fall squarely under the umbrella of the Housing Act, and deserve to benefit from the policies it was enacted to ensure —namely decent living conditions for farm workers. It appears that we can and will be able to convince a judge or jury that had Parsons followed the law and not violated the

© 2003 P.A.S.S., LLC. All Rights Reserved

Housing Act, Mr. Vargas would be alive today, and Mr. Morales would have avoided the terrible suffering he endured in the tragic fire.

Conclusion

As you can see from the foregoing analyses, I believe that we can represent to our clients, from the facts we current have access to and the law we have reviewed, they have bona fide legal claims for relief against Mr. Parsons that are well grounded in law and fact and likely to succeed on the merits.