

SAMPLE ANSWER TO PRACTICE EXAM

On behalf of Reese ("R"), I would consider claims against Hawkins and NYPSCO, as well as the owner of the property ("O"). To establish liability we would have to show that a duty was breached, that such breach of duty proximately caused injury to R, and that R's damages are legally compensable.

R v. Hawkins

To recover from Hawkins we would need to show that Hawkins acted negligently or that Hawkins is subject to strict liability. I don't see any basis for hold Hawkins strictly liable, so the inquiry would focus on negligence.

Negligence. Negligence is the failure to exercise reasonable care. We would need to show that Hawkins (or one of its employees, for whom Hawkins would be held vicariously liable) acted in a way other than the care that a reasonable person would exercise. The facts aren't clear as to whether Franks did anything negligent to permit the bulldozer to be operated, but perhaps we could invoke the theory of *res ipsa loquitur*, which is an inference of negligence that is permitted under the following conditions: (1) the accident must be of the *type* that normally doesn't occur in the absence of negligence; (2) the instrumentality must be in the exclusive control of the defendant; and (3) other plausible causes have been sufficiently eliminated. Here we might infer that Franks left the keys in the ignition or otherwise left the bulldozer in a condition making it easy to be driven by a third person.

As aids to establishing negligence we might investigate whether there is a custom of the industry that dictates how to secure a bulldozer from being operated without the owner's permission. Similarly, perhaps Hawkins has a policy that requires certain precautions to be taken to prevent unauthorized use of the bulldozer. If Franks violated such a provision, that would be strong evidence of negligence.

Another way to establish negligence is through a statutory violation. West York requires operators of motor vehicles to remove the keys from the ignition. If Franks failed to do so, it could be a statutory violation, which was clearly intended to protect the public from vehicles driven by thieves. If this is a jurisdiction that follows Cardozo's approach to negligence *per se*, then an unexcused statutory violation could be considered negligence as a matter of law and the issue would not have to be submitted to the jury. Otherwise, it would still be for the jury to decide whether or not Hawkins (through its employee Franks) acted negligently.

Proximate Cause. If Hawkins breached a duty to R, then R would have to show that it proximately caused the property damage listed in the question. To satisfy proximate cause, R must satisfy both the *but-for* test as well as *legal cause*. The *but-for test* requires a showing, more probably than not, that the injury would not have occurred but for the defendant's negligence. That seems to be relatively easy to satisfy in this case. If better measures had been taken to secure the bulldozer, it could not have been so easily operated by a thief. Hawkins might argue that the second prong of proximate cause is not satisfied here, because the thief constitutes a superseding cause of the injury. Moreover, Hawkins might claim that the damage to R was not reasonably foreseeable because it was caused by the explosion of the natural gas pipeline. As to superseding cause, R has a

strong argument that injury to neighboring property was very foreseeable as a result of the negligent act of leaving the bulldozer accessible. Even though the explosion of natural gas might not be easily foreseen, some type of damage to neighboring property from a wandering bulldozer is not unforeseeable. Moreover, the culpability of the joyriding thief and the negligent bulldozer owner are sufficiently comparable to permit a finding that the defendant's negligence caused the subsequent injury.

Claim v. NYPSCO

The major claim against NYPSCO is that they should be held strictly liable for the escape and explosion of natural gas. This would fall under the heading of an "abnormally dangerous activity." Most courts employ a test based on the Restatement (2d) of Torts, which imposes strict liability for an abnormally dangerous activity, identified by considering six factors, including whether there is a high risk of harm, a high gravity of harm, the inability to eliminate the risk of harm through the exercise of reasonable care, the uncommon character of the activity, its lack of appropriateness to the area, and a relatively low level of social benefit. It's hard to know how those criteria would be applied to this case. While there is similarity in some respects to the overturned tanker truck in *Siegler v. Kuhlman*, there are differences in terms of the ubiquity of natural gas pipelines. If the court found this to be an abnormally dangerous activity then it could impose strict liability. Otherwise, there doesn't seem to be a strong case for negligence on the part of NYPSCO.

If NYPSCO is strictly liable, then there should be no difficulty establishing proximate cause. The abnormally dangerous character of the pipeline (if that's what the court finds) was clearly both a but-for cause as well as a legal cause of the injury.

Landowner

I suppose one could make a claim against the landowner, perhaps arguing that the presence of a natural gas pipeline was a nuisance. However, since most natural gas pipelines are placed in the ground by a utility exercising a form of eminent domain, it seems hard to characterize what the landowner did by allowing the gas pipeline to be on his land as a form of voluntary conduct such as triggered liability in *Rylands v. Fletcher*. I can't see how this claim would advance R's position.