

SAMPLE ANSWER TO MINI-EXAM

I would advise Bells ("B") that he had a good case against Ohmie ("O"), but would want to establish liability on the part of Delbert ("D"), since the claim against O would likely be worthless. Proof of liability against either would require (1) a showing of negligence or strict liability; and (2) a showing that such negligence was a proximate cause of B's injuries.

The Claim Against O

Negligence. O would probably be negligent for operating the machine while B was standing close by. Negligence is the failure to take the precautions that a reasonably prudent person would take in the same or similar circumstances. Knowing that the brush hog caused debris to fly out, B would argue that O should have either stopped mowing in that area or warned B to move.

Causation. Since the precautions listed above would, more probably than not, have prevented the injuries to B, the showing of proximate cause would be easy.

The Claim v. D

The claim against D would be more difficult. Four theories could be advanced on B's behalf: (1) Vicarious liability; (2) Negligence in failing to warn B; (3) Strict Liability for an Abnormally Dangerous Activity; and (3) Nuisance.

1. *Vicarious Liability.* An employer is responsible for the negligent acts of his employee if committed in the course and scope of employment. Here it would be important to determine whether or not O was an employee of D. If so, and if O was found negligent pursuant to the analysis above, then D would be liable for B's injuries. D would undoubtedly argue that O was an independent contractor, rather than an employee. D would not be vicariously liable for O's negligence. The distinction is whether D had the power to supervise or control the manner in which O conducted his activities. The power to control, even if it is not exercised, may indicate that O would be considered an employee rather than an independent contractor.

2. *Negligence in Using the Brush Hog or in Failure to Warn.* Since D knew that the brush hog was dangerous, and that it might throw objects toward B's house, perhaps reasonable care would require that he take preventive steps to protect B. (This would not be negligence for what O was supposed to do, but rather negligence for what D himself should have done.) Perhaps there were so many objects likely to be thrown that it was negligent even to use the brush hog. Even if it were an appropriate machine to use, perhaps it would be negligent not to warn B of the danger. Even if the jury found D negligent in failing to warn, they would also have to find, more probably than not, that such a warning would have prevented the injury that occurred here.

3. *Abnormally Dangerous Activity.* B might conceivably argue that the brush hog was an abnormally dangerous activity. Restatement of Torts § 520 outlines six criteria for determining an abnormally dangerous activity. I doubt that a court would impose strict liability, since (1) the risk of injury is not particularly high; (2) injury could usually be prevented through the use of reasonable care, and (3) the use is very appropriate to the place where it was carried on.

4. *Nuisance.* B might also argue that using the brush hog was a nuisance. A nuisance is an unreasonable interference with the plaintiff's expectation to be free from harm caused by his neighbor's use of his property. The situation might be analogized to *Rylands v. Fletcher*, where the

defendant was not negligent in bringing a potentially hazardous thing onto his land, but could be held strictly liable for its escape. Here it might be successfully argued that, even if it was reasonable for D to use a brush hog, it is still D's responsibility to prevent the dangerous "escape" of the by-products of the brush hog; in other words, D would employ the brush hog at his peril.