

SAMPLE ANSWER TO MINI-EXAM

In order for Paula to recover against any of the defendants, she would have to prove that (1) the defendant was negligent; and (2) that such negligence was a proximate cause of her injury.

Negligence. Paula's first task would be to show that at least one of the defendants was negligent.¹ Negligence is the failure to use ordinary care—the care that a reasonably prudent person would use in the same or similar circumstances. Negligence can be established in a number of ways: first, sometimes a custom or standard of practice exists for the activity in question; if it was common for certain precautions to be taken by hunters before firing, and the defendants didn't take those precautions, then the jury could be asked to find that they failed to use reasonable care. Another avenue is negligence per se: if a defendant violates a statute that was designed to prevent this kind of injury, then that may (in some jurisdictions) be found negligent as a matter of law; in other jurisdictions it would simply be evidence upon which the jury could base a finding of negligence. Here, George violated a statute requiring the purchase of a hunting license. However, the license is probably designed to raise revenue rather than prevent injuries, so it probably wouldn't be admissible to show that George was negligent. The fact that Bill was drinking might also be negligent, depending upon how much he had been drinking and whether or not it impaired his ability to use his rifle properly.

Paula might also ask the jury simply to find that all of them were negligent in selecting a reasonable person would not have engaged in target practice in a way that permitted a bullet to travel far enough to hit someone that far away means that they didn't use reasonable care in selecting a location for the contest that created a risk that a bullet would travel so far. If it was reasonable to engage in target practice, they should at least have selected a site where a stray bullet could not travel to hit someone else.

Causation. The second task for Paula is to establish that, more probably than not, but for the negligence of the defendant(s), she would not have been injured. Assuming the behavior of the defendants was negligent, she can show that *someone's* negligence caused her injury, but she may have trouble proving which one. Paula might argue that, more probably than not, the negligence of George caused her injury, since he was a poor shot, and the bullet was more likely to have come from his gun than from the other defendants. However, the jury might not accept this, and might think it equally likely that the bullet came from any of the three. Paula should therefore ask the

1. Paula could eliminate the need to prove negligence if she could establish that one or more of the defendants was subject to strict liability. However, strict liability is limited to (a) abnormally dangerous activities; (b) nuisances; and (c) failure to control a dangerous animal. Item (b) doesn't apply because there is no interest in real property that was being invaded; (c) doesn't apply because no escaping animal was involved. Paula might argue (a), that the activity was abnormally dangerous, but it is doubtful that she would succeed. Courts consider whether or not the activity poses a high risk of harm, whether the harm cannot be eliminated through the use of reasonable care, whether it is of common usage, was appropriate to the place where it was carried on, and was of high value to the community. Since hunting accidents can be eliminated through use of reasonable care, and since it is relatively common and appropriate to the area, I don't think a court would find it abnormally dangerous.

court to apply either of two doctrines: (1) *Alternative Liability*. This case is like *Summers v. Tice*, where the plaintiff was struck by a bullet fired by one of two hunters, but it was unknown which one. The court granted the plaintiff's request to shift the burden of proof to the defendants to establish which one *did not* shoot. Alternative liability requires the presence of all of the potential tortfeasors in the courtroom, and a finding that each was negligent and could have caused the injury. In this case those criteria could be met, shifting the burden to the defendants to show which one did not hit her. If the jury can't decide, they would impose liability upon all three. If they could decide which one caused the injury, they would impose it only upon that defendant.

(2) A better option would be to argue *concerted action*. In cases where the defendants agree amongst themselves to jointly engage in the negligent behavior that causes the injury to the plaintiff, it doesn't matter which one "pulled the trigger," so to speak; each would be liable for the actions of the actual tortfeasor, since each had encouraged him to act in that way. Here the defendants encouraged one another to engage in target shooting, and that activity led to the injury to the plaintiff. The advantage of the concerted action theory is that it would allow the plaintiff to recover against all three rather than give the jury the chance to conclude that only one (or possibly two) of the defendants caused the injury, exonerating the other(s).

CHECKLIST

- Overview
- Negligence or Strict Liability
- Not nuisance or animal case
- Abnormally dangerous activity?
- Probably not

- Definition of negligence
- custom of "industry"?
- Negligence per se?
- Purpose of the statute
- Intoxication as negligence
- Negligence in setting up the target

- Causation
- But-for concept
- More probably than not standard
- Claim against George by itself?
- Alternative Liability
- Elements would be met
- Burden of proof would shift to defendants

- Concerted action
- Encouragement of the negligent act
- All three would be liable.