

SAMPLE ANSWER TO MINI-EXAM

[*This case is based upon Bennett v. Larsen Co., 348 N.W.2d 540, 118 Wis.2d 681 (1984). In that case the court found that the application of the pesticide was not an abnormally dangerous activity, nor was it a nuisance or trespass. However, the court applied the doctrine of negligence per se for failure to follow the labeling instructions.*]

Bob Benson ("B") might have a claim against Dan DeLuccia ("D") and/or Ag-Aire ("A"). He would have to show that either Dan or Ag either acted negligently or engaged in an activity that was abnormally dangerous.

Negligence

Either Dan or Ag-Aire may have been negligent in failing to prevent injury to the bees. Negligence occurs when a person fails to use the care that a reasonably prudent person would use in the same or similar circumstances. One measure of what is reasonable under the circumstances is what people in that industry customarily do. I would want to check into the commonly used procedures when spraying occurs near beekeepers. Even though customary practice is persuasive of what is reasonable care, we could still argue that reasonable care would require greater precautions. The label on the pesticide also employs a kind of economic test that suggests that the pesticide should not be used when it is economically inadvisable. We would argue that that is the case here, since it would have been easy to warn the beekeepers to take suitable precautions; instead, an almost certain loss resulted.

Another way to establish negligence would be to show that the defendants were negligent per se. That doctrine applies when there is an unexcused violation of a statute that was adopted to prevent the kind of harm that occurred here. [It also applies in most, but not all jurisdictions; in some jurisdictions a statutory violation is just evidence of negligence and it is up to the jury to decide whether a reasonable person would have obeyed the statute.] Here there is a statute prohibiting the application of pesticides contrary to label directions. Its purpose seems to be to avoid the kind of harm that occurred here. We wouldn't have any difficulty showing that Ag-Aire violated the statute, because they applied the pesticide without warning the beekeepers. However, the violation may be excused; Ag-Aire may claim that they didn't know about the presence of beekeepers. If that is the case, the jury would have to determine whether their behavior in applying the pesticide contrary to the labeling instructions was reasonable under the circumstances. Similarly, D might argue that he didn't know the contents of the label, and that he was therefore unaware of the need to warn his neighbors. Again, the jury would have to decide if his ignorance was excusable. If negligence per se applies then the defendant would be liable as a matter of law (assuming that proximate cause is satisfied).

*Vicarious Liability.* If Ag-Aire was negligent in applying the pesticide contrary to the label instructions, then D might be vicariously liable for their conduct. [This would matter if A couldn't pay the damages and we needed D as a deep pocket.] Unfortunately, vicariously liability only applies to a defendant for conduct of an *employee* rather than an independent contractor. The

question is whether D had the right to control how A did their work. We might want to find out how much control D had over the way A did their work.

### Strict Liability

A or D would be strictly liable for the damage if we could show that using pesticides is an abnormally dangerous activity. Most courts employ the test set forth in the Restatement of Torts, §§ 519 and 520. The judge is directed to consider six factors, including whether or not the activity produces a high likelihood of injury, the gravity of the injury, whether the risk can be eliminated through reasonable care, whether it is common to the place where it is carried on, and its value to the community. In this case there seems to be a high likelihood of injury, but the injury isn't all that grave, the risk can be eliminated through use of reasonable care, and the place where it is carried on is appropriate. Thus, I would be skeptical that we could persuade a judge to find pesticide use abnormally dangerous. Nonetheless, we should see if courts in other cases have adopted a strict liability theory in cases like this.

### Manufacturer of Pesticide

A claim might also be considered against the pesticide manufacturer. Perhaps a different formula, less toxic to bees, could have been sold, or better warnings provided. The standard would be whether or not reasonable care was used, as analyzed above in relation to the other defendants.

Mini-Exam, October 5, 1992

CHECKLIST

- Overview
- Claim v. Dan
- Claim v. Ag-Aire
- Standard of Negligence
- Definition of Negligence as Failure to use RC
- Custom of the industry
- Reasonable Person would have warned
- Learned Hand test used in label
  
- Negligence per se
- Jurisdictional question
- Statutory intent?
- Was violation excused?
- Was D or A excusably ignorant of facts?
- Vicarious liability of D for A
- Independent contractor / employee
  
- Strict Liability
- Abnormally dangerous activity?
- Restatement criteria
- Application of criteria
  
- Manufacturer of Pesticide
- Negligence / strict liability standards would apply