

SAMPLE ANSWER TO MINI-EXAM

Jane should consider a lawsuit against John Smithers, Luke Smithers, and Homer. The claims would depend upon an analysis of whether or not Homer was negligent and whether or not he caused the injuries to Jane.

Establishing Homer's Responsibility for the Accident

In order to prevail in a tort action against one of the defendants, Jane would have to establish that such defendant acted negligently and that such negligence was a proximate cause of injury to Jane.

*Negligence.* Negligence is the failure to use reasonable care. Whoever ran over Jane in her front yard was acting negligently. In addition to the common sense notion that reasonable people would maintain control over their snowmobile to avoid injury, there are probably statutes that prohibit driving snowmobiles on public streets or on private property without permission. The difficulty is identifying who it was. That is an issue relating to proximate cause.

*Proximate Cause.* We don't know for sure that the person who caused the injury was Homer, or even that it was someone in Homer's group. However, to prevail a plaintiff only needs to establish proximate cause by a finding of "more probable than not." Perhaps there are witness statements or physical evidence (such as identifying characteristics of a snowmobile) that will persuade the jury that Homer was the one who was responsible. On the other hand, such evidence may be unavailable. Jane should consider a claim against Homer and the group alleging that some based on the concept of "concerted action." The doctrine of concerted action allows liability to be assigned to a defendant who participated in the planning of a joint activity that was negligent, and evidence is lacking to establish which defendant actually did the damage to the plaintiff. That might very well be the case here.

Luke Smithers / John Smithers' Estate

Depending on who owned the property at the time of the accident (whether Luke Smithers or John Smithers' Estate—it's not clear from the facts which one—so we'll just call the owner Smithers), the owner might also be a defendant. The first argument would be that the owner was vicariously liable for Homer's actions; the second argument would be that the owner was allowing a nuisance on his property.

(a) *Vicarious Liability.* Liability can be imposed on Smithers if Smithers had someone acting as an employee at the time the accident was committed and the act was committed in the course and scope of employment.

(1) *Was Homer an Employee?* Homer probably wasn't an employee; he was more like a guest of the Smithers. However, he did perform work for them in exchange for his being allowed to stay there, and so perhaps an argument could be made that, however informal the arrangement was, Homer was an employee. Smithers certainly had the right to control Homer's behavior, so that prong of the test could easily be satisfied.

(2) *Did the Act occur during the course and scope of employment?* If Homer acted negligently in encouraging someone to ride snowmobiles up and down the street, then that act might be considered part of his caretaking duties. If Homer's job was to be a caretaker of sorts, then failing to keep someone from using the area as a staging ground for various forms of mischief would be considered bad caretaking, and would fall within the course and scope of employment. If Homer himself were riding the snowmobile, then that would be a harder case.

(b) *Nuisance.* An owner can be held strictly liable for injuries caused to neighbors resulting from an unreasonable use of property. What is reasonable depends upon the nature of the property, the history of use in the neighborhood, and the reasonable expectations of those who live there. Since the neighbors had complained before, it would probably be reasonable to expect that the property not be used as a recreational vehicle site. It would create an unreasonable interference with the other property owners' legitimate expectations. However, it would be more difficult to saddle Luke Smithers with that responsibility, since he was a relatively new owner.

If the court were to find that Smithers allowed a nuisance to exist, then damages could be awarded as well as injunctive relief to prevent the property from being used for such purposes in the future.

Overall, I would recommend that further investigation be conducted to see whether or not the culprit(s) could be identified and whether or not the Smithers' deep pocket could be tapped either through vicarious liability or through a nuisance theory.