

Torts II

Eric E. Johnson
Associate Professor of Law
University of North Dakota School of Law

FINAL EXAMINATION – MODEL ANSWER

Hollerer's Hill

PRACTICE EXAM NO. 2 FROM "COULISSE CANYON"

NOTES:

The "Hollerer's Hill" practice exam facts are a subset of the facts used on the Spring 2015 Torts II exam, "Coulisse Canyon." The model answer produced below comprises the relevant portions of the publicly released model answer for that Spring 2015 exam.

The following notes accompany the "Coulisse Canyon" model answer: *This model answer was made from amalgamating the work of multiple students. Because of the cherry-picking involved, what you have here is a composite that is better than any real response that was received. So, in many ways, this answer is better than the best. Yet this model answer is not perfect. Student-drafted work done under deadline pressure, of course, never would be perfect. And I have intentionally shied away from trying to make this answer perfect in the compositing process. All things considered, however, this is extremely good.*

What this all means for you is that you should be wary of comparing your own response to this one as a way of gauging your preparedness for the exam. This is a beyond-the-top-grade response. So don't worry if you can't do as well. Yet at the same time, if you see issues not represented here, it may not be because you are mistaken; it may be because you are perceptive.

What are good lessons to draw from this model? One thing this response does very well is the way in which the law is applied to the facts. Rather than copy-and-pasted blackletter law or needlessly reiterated facts, this exam response focuses on providing analysis. That's excellent, because the analysis is the key to doing well on the exam. Also laudable is the sense of judgment this exam response frequently displays with regard to conclusions: Close calls and toss-ups are presented as such. Rock-solid conclusions are made without hedging.

Note that the exams from which this response was composited used various abbreviations. But for this model answer, I have standardized references to names and not used abbreviations. I have also aimed for cohesive writing with cleaned up grammar, spelling, and punctuation. Real exams are not so tidy.

QUESTION

Analyze the issues as follows:

- 1. Liability of Umatilla Unlimited with regard to Vlad Vossi**
Discuss any claim or claims Vlad Vossi has against Umatilla Unlimited. Provide a full discussion of any prima facie case before discussing any affirmative defense. Omit any discussion of remedies issues for this question.
- 2. Liability of Exotiquest and Nettie Naynor with regard to Wendy Wolkins and Yessenia Yarbrough**
Discuss any claim or claims of Wendy Wolkins and Yessenia Yarbrough (against Exotiquest and Nettie Naynor. For this question, discuss compensatory damages, but omit discussion of any other remedies issues (such as punitive damages or equitable remedies).

RESPONSE

[513 words, including section headings]

1. Liability of Umatilla Unlimited with regard to Vlad Vossi

Vlad has a claim in strict products liability against Umatilla for the bike falling apart. Vlad can show a manufacturing defect under the consumer-expectations test because the bike had incomplete welds from a welding-machine issue that caused the bikes to depart from their intended design, and this departure caused the product to be unreasonably dangerous to the user—since the reasonable consumer does not expect a mountain bike to fall apart while riding down a mountain. The defect caused Vlad’s bike to fall apart while riding, actually and proximately causing Vlad’s broken ulna. Umatilla is the manufacturer, and therefore a commercial seller, so they are liable. Umatilla may have an affirmative defense, however, in a statute of repose. The bike was manufactured in March 2000, which is over 15 years ago. In many jurisdictions this exceeds the limit of the statute of repose.

2. Liability of Exotiquest and Nettie Naynor with regard to Wendy Wolkins and Yessenia Yarbrough

Wendy and Yessenia were injured and killed as a result of the rock avalanche caused by the use of explosives on Hollerer’s Hill. This use of explosives almost certainly counts as an ultrahazardous or abnormally dangerous activity giving rise to strict liability. Setting off charges resembling “industrial-sized firecrackers” seems to qualify as both igniting fireworks and blasting, two things that are traditional examples of ultrahazardous activities. In addition, relatively small explosives causing a part of the mountain to begin sliding off is an example of a small trigger unleashing a large destructive forces, which is another hallmark of ultrahazardous/abnormally-dangerous activity. The setting off of the charges actually and proximately caused Wendy’s and Yessina’s injuries and death. So this is a full prima-facie case for strict liability.

Wendy’s surviving husband and three young children can use strict liability as the basis of a wrongful death action. They can recover for lost pecuniary support in the form of Wendy’s lost earnings of over \$2 million a year. They may also be able to recover for lost affection and consortium.

Wendy’s estate will not have a survival action since she was killed instantly by the boulder and therefore did not have any suffering or injury that would have created an accrued tort cause of action before she died.

Yessenia had no parents, children, siblings, or spouse, so there is probably no one who can bring a wrongful death action. The wrongful death statutes vary a lot by jurisdiction, so perhaps her fiancé Zach might be able to recover. Some jurisdictions

allow wrongful death actions from the perspective of the estate, so recovery could be had if that's true in this jurisdiction.

Unlike Wendy, Yessenia will have surviving claims under the survival statute, since she died minutes after being struck. This leaves an action for the pain she suffered in the few minutes before she died.

These claims can be brought against Nettie Naynor directly, and also against Exotiquet who is vicariously liable since Nettie was acting within the scope of her Exotiquet employment in arranging for the blasting.