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FINAL EXAMINATION

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**Open-book. Three hours.**

**Write your exam number here: \_\_\_\_\_**

**All exam materials (including this booklet and your response) must be turned in at the end of the period. You will not receive credit unless you return this booklet with your exam number written above. Do not turn the page until instructed to begin.**

Notes and Instructions

1. Assume that today's date is April 29, 2015.
2. You may write anywhere on the examination materials – e.g., for use as scratch paper. Only answers and material recorded in the proper places, however, will be graded.
3. Your goal is to show your mastery of the material presented in the Torts II course and your skills in analyzing legal problems. It is upon these bases that you will be graded.
4. During the exam: You may not consult with anyone – necessary communications with the proctors being the exception. You may not view, attempt to view, or use information obtained from viewing materials other than your own.
5. After the exam: You may discuss the exam with anyone, except that you may not communicate regarding the exam with any enrolled member of the class who has not yet taken the exam, and you must take reasonable precautions to prevent disclosure of exam information to the same.
6. Unless expressly stated otherwise, assume that the facts recited herein occur within one or more hypothetical states within the United States. Base your exam answer on the general state of the common law and typical statutory law in the United States, including all rules, procedures, and cases as presented in class, as well as, where appropriate, the theory and history discussed in class, plus any hypothetical laws presented in the facts. It is appropriate, if you wish, to note differences between minority and majority approaches in your answer, as well as statutory or other differences among jurisdictions.
7. Note all issues you see. More difficult issues will require more analysis. Spend your time accordingly.
8. Organization counts.
9. Read all exam question subparts before answering any of them – that way you can be sure to put all of your material in the right place.
10. Feel free to use abbreviations, but only if the meaning is entirely clear.
11. **Bluebooks:** Make sure your handwriting is legible. I cannot grade what I cannot read. Skip lines and write on only on one side of the page. Please use a separate bluebook for each subpart.
12. **Computers:** Please clearly label each subpart of your answer.
13. This Part II of the exam is administered on an "open-book basis." You may use any notes and books you like. No electronic or interactive resources (such as a tablet computer, smart phone, etc.) may be used or referenced. You may, of course, use a laptop to write your exam, but you may not reference files stored thereon during the examination session. No materials may be shared during the exam.
14. This exam will be graded anonymously. You may not waive anonymity. Do not write your name on any part of the exam response or identify yourself in any way, other than to use your examination I.D. number appropriately. Self-identification on the exam or afterward will, at a minimum, result in a lower grade, and may result in disciplinary action.
15. Good luck!

# Coulisse Canyon

IT WAS A SUNNY DAY IN **SAN FRANCISCO**, but Terrence Turner had anything but a sunny disposition. Which was ironic. Terrence, after all, was the newly installed Chief Enthusiasm Officer at Morgan Morgan & Co.

Morgan Morgan & Co. is a boutique investment bank that provides innovative capital solutions for high-risk/high-reward cutting-edge ventures. That is, Morgan Morgan & Co. gets financing for companies that are too risky to find financing elsewhere. The problem for Terrence was that the financial whizzes who worked for the bank acted bored and listless. Every morning, Terrence started the day by looking at a report on employee morale from Intellivator Investigations. Morgan Morgan & Co. had hired Intellivator to log employee keystrokes in order to surreptitiously gather their personal passwords, and then use those passwords to break into and monitor employees' personal social-media and e-mail accounts. The reports were always disheartening, but this was a new low: The report said that 52% of employees had, over a 24-hour period, communicated something to a friend or family member about wanting to find work elsewhere. The report provided examples, many of which involved personally embarrassing details, of communications from several employees. That emboldened Terrence to take action. He dug in his desk for a business card he'd pocketed a while ago from Exotique Extreme Expeditions Co., an adventure tourism operator.

Adventure tourism involves taking people "out of their comfort zone," typically putting them in unfamiliar environments, requiring them to do physically challenging tasks, and having them engage with nature. Most saliently, adventure tourism often involves exposing people to risk – either real or perceived.

*Risk*, Terrence thought to himself. *That's what it's all about at Morgan Morgan & Co.: High-risk, high-reward.* An employer-paid "risky" weekend adventure-tourism activity was exactly the right prescription to perk up the esprit de corps.

Terrence made the arrangements and then sent around an e-mail informing key investment bankers about the trip.

"Hello Morganeers! Confronting challenges and risks is what it's all about as a Morgan Morgan & Co. employee," he wrote. "The trip is optional, and it's not part of your work for Morgan Morgan & Co. But as important as this is to our core mission, I hope you will be there."



**FIG. 1:** Much of Coulisse Canyon, including Pinnacle Peak and Roaring Ravine, is federal land, administered by the National Park Service as part of the Coulisse Canyon National Monument. Another portion of Coulisse Canyon is privately owned.

§7-3 – Morgan Morgan & Co. agrees to indemnify and hold harmless Exotiquest for all claims, liabilities, and actions arising out of or connected with the tour for Morgan Morgan & Co. employees in Coulisse Canyon, regardless of fault.

FIG. 2: A portion of the Exotiquest contract with Morgan Morgan & Co.

Just a few weeks later, a group of 30 investment bankers from Morgan Morgan & Co. were trekking through the wilds of Coulisse Canyon on an expedition led by Nettie Naynor, Exotiquest's top guide.

THE MORGANEERS' FIRST DESTINATION WAS **PINNACLE PEAK**, a high point inside Coulisse Canyon National Monument that afforded views of most of the park.

"Just wait," Terrence said to the bankers against the impressive backdrop. "This is going to be amazing!"

People waited expectantly. But nothing happened.

An hour later, everyone was still waiting. People started to sit down. Many were yawning uncontrollably. For someone in Terrence's position, this was a disaster. The plan had been for the surprise appearance of Griff Gunderson, the chiseled celebrity naturalist of cable-television fame. Terrence had arranged – separate from the services that Exotiquest agreed to provide – for Griff to serve as an expert guide. But where was he? Terrence started dialing around trying to reach Griff by phone.

It was two hours after they arrived on Pinnacle Peak, and still nothing had happened.

"I am soooooo bored!" shouted one of the bankers to the heavens.

Terrence now wished he hadn't paid Griff in advance. Morgan Morgan & Co. had cut the celebrity a \$150,000 check for the weekend's worth of services. Of course, Griff had cashed it immediately. *Freaking cable TV celebrities*, Terrence thought. Finally, Terrence managed to reach Griff on the phone.

"Thanks for the 150 big ones!" Griff laughed uproariously. "You think I can be bought? You think I would sell out to an *investment bank*? I was never going to do that! You guys think you can bankroll polluters on Monday through Friday and then buy a nature experience on the weekend? Go to hell, jackasses! And oh – your money's gone. I bought some modern art with it – and it's already doubled in value!"

Terrence dejectedly zipped the cell phone back into his cargo pants and explained to the Morganeers what had happened.

Nettie spoke up. As the tourism professional, she knew it was time for her to take charge. "Look, Exotiquest Extreme Expeditions had nothing to do with Griff Gunderson. But the rest of the trip consists of a slate of activities that I have personally arranged, with encouragement from Terrence. Now, I can guarantee you that from here on out, things are going to be anything but boring. You can have five minutes to get ready, and then we are going to move out and come face to face with **EXTREME ADVENTURE!**"

Most of the bankers shuffled their feet. Only two of them seemed to be amused: Jerica Jernigan and Kevin Karling, who were lurking in the back of the group bent over an iPad. They were having a good time, it turns out, because they were using an

app to create a custom t-shirt design that they immediately offered for sale on the internet. Jerica had done the graphics and Kevin had come up with the text. It was an instantly recognizable likeness of Griff Gunderson. Underneath his face it said, "GRIFF GUNDERSON - GETTING YOU CLOSER TO NATURE\*" – with the asterisk referring to a footnote in small print that said, "\*by getting infected with sexually transmitted diseases from animals and spreading them to the human population!" Of course, this statement had no basis in fact. But given Griff's absurdly close contact with animals on TV, it struck many people as very funny. Jerica and Kevin, at least, couldn't stop snickering.

"Are we ready to have some fun?" Nettie yelled enthusiastically. Other than some mumbled insouciant *not reallys*, the only response was Jerica in the back. She piped up, "Me and Kevin are having fun. We've sold 56 t-shirts!"

**AN HOUR LATER, THE GROUP ARRIVED AT ROARING RAVINE**, where they gathered in a small clearing. Nettie addressed the group.

"Coulisse Canyon is home to a thriving population of cougars – also known as pumas or mountain lions," she announced. "You can see from the animal tracks here that this is a place where a lot of deer and elk come through. It's one of the most traveled game paths in Coulisse Canyon. And you can bet that means that there are plenty of cougars around. Normally they are pretty hard to see. But watch this."

Nettie pulled something that looked like a hand grenade out of her pack. She pulled the ring and threw it in the center of the group. It began spewing a cloud of thick, smelly vapor.

"That's one full pound of puma pheromone," Nettie explained. "Within a minute or two, you can expect to be surrounded by several very angry cougars."



**FIG. 3:** *The cougar (Puma concolor), also called the mountain lion, catamount, or puma, is a large cat native to North America. An ambush predator, cougars can reach up to 165 pounds. With cougars rebounding from low population levels caused by hunting in years past, attacks on humans have been increasingly common.*

Privately, Nettie had her doubts. She had never tried anything like this before. Exotiquest had purchased the pheromone grenade over the internet from Booker Belanger's Supply Co. – a dubious outfit.

For what it was worth, Nettie had carefully read the instruction manual cover to cover. The only warning it had was to not set off the pheromone grenade near a person's face. And Nettie hadn't

done that. She figured the thing probably didn't need any additional warnings because it wouldn't work at all to attract cougars. Of course, if it did, it would be extremely dangerous.

After a minute or so, nothing had happened. But Nettie knew that didn't matter. Terrence had emphasized to her that the trip should include *perceived* dangers. So Nettie raised her eyebrows dramatically and said in a loud whisper, "I hear growling. Do you?"

"Yes, I do," said Lyle Lothway, a recent MBA grad with a terrified look on his face.

And then, WHOOSH! a 150-pound mountain lion leapt from the bushes and jumped on Lyle's back. Immediately, everyone was screaming and running around in a panic. The only person more surprised than Lyle was Nettie. She had determined the puma lure was inert nonsense. Apparently not.

Luckily for Lyle, before the cougar could do much damage to him, a second cougar leapt out of the bushes and attacked the first. Lyle scrambled away and hid behind Nettie.

"And now I will deploy the pheromone antidote!" Nettie said grandly. Of course, there was no such thing, but with dramatic gestures, she began spraying puffs of mosquito repellent in the air. It was all she could think of to calm people down.

"And now we are walking away," Nettie said soothingly as she backed up and led the Morganeers away from the clearing and uphill.

The unhappy group was soon joined by Fernanda Fenner, a uniformed park ranger with the National Park Service (NPS), as well as Deputy Dwayne Delacroix of the Siskinmah Sheriff's Department, which has overlapping law-enforcement jurisdiction with the park rangers on the federal land.

"Well, we made a mistake issuing a guide permit to you, Nettie," Fernanda said in front of everyone. "I just spoke to a Park Service attorney at regional headquarters about you last week. He said NPS was just flat-out negligent to issue a permit to you and Exotiquet to guide tours through here - that is, knowing what we do about how incompetent you are and how likely you are to put park visitors in danger. And now our failure in issuing that permit has led to disaster. The worst thing is, all of us at the ranger station could foresee this."

Nettie put on a fake grin and stayed silent. Fernanda tended to Lyle. She determined he was lucky to have only one shallow bite wound to his shoulder and several superficial scratches on his back. "I'm taking Lyle here back to the trailhead, and I'll wait with him for the ambulance," Fernanda announced.

Dwayne sauntered up to Nettie after Fernanda had turned her back and gone around a bend in the trail.

WARNING: DO NOT USE BOOKER BELANGER'S COUGAR PHEROMONE GRENADE IN ANY PLACE WHERE COUGARS MAY BE PRESENT UNLESS ALL PERSONS ARE SAFE INSIDE A STURDY VEHICLE, DWELLING, OR SAFETY CAGE. IT MAKES COUGARS ACT INSANE. Cougar baiting is fun, but it's dangerous, so be careful!

*FIG. 4: Because of a printer's error, this warning did not appear in fine print on page 12 of the 24-page instruction manual for the pheromone grenade.*

“Nettie, in the name of the law, I need to ask you to stand still,” Dwayne said. Then, in utter violation of Nettie’s rights under the U.S. Constitution, he confiscated Nettie’s expensive sunglasses right off her face.

After Dwayne left, Nettie tried to shake it off.

“And now we are walking and continuing on our journey of exploration!” she said brightly.

IT WAS A TWO-HOUR HIKE TO THE TOP OF **HOLLERER’S HILL**, where Exotiquest had planned the next extreme experience. Arrayed along the crest of the hill was a set of mountain bikes – all from the upscale brand Umatilla Unlimited.

“Up until now, we were on federal land inside Coullisse Canyon National Monument,” Nettie explained. “But now we are on a stretch of private land, where we can engage in a wider and wilder variety of experiences. Are you ready for the most extreme mountain biking ever?”

Nettie got no reaction from the Morganeers other than some nervous fidgeting.

“Who would like to be the first one down?” Nettie asked. “Whoever goes first will have the easiest time.”

“Then I’ll be first,” Vlad Vossi volunteered. “I’m glad to get it over with.”

Quickly grabbing a bike, Vlad started down the mountain. Vlad actually knew what he was doing. He had worked in a bike store throughout college, and he had done a lot of mountain biking. And from Vlad’s perspective, he was happy to get away from the insane Exotiquest tour. Very quickly he made his way down the hill and out of sight of the rest of the group.

Vlad was just beginning to enjoy himself when he took a low jump over a little ledge, and the bike just fell apart underneath him. Vlad was tumbling through the air, and he landed with a crash, his right arm impacting hard rock. Disoriented and in extreme pain, he fought to understand what had happened to him. Then he caught sight of his arm. It almost made him throw up: He could see the broken end of a bone, the ulna, pushing up under his skin. Knowing what needed to be done, Vlad felt around with his left hand for something to splint it with. What he found was a piece of bike frame that had broken from the rest of the aluminum frame in two places. Once he’d used it to splint his arm, he noticed the manufacturing date (March 2000) and the model of the bike (the UUX8). He experienced a flash of recognition: *The notorious Umatilla Unlimited frame recall.*

The company had recalled thousands of bikes because of a welding problem. It was when Umatilla first started using robotic welding for their bike frames. The whole first lot – including this bike – had incomplete welds because of a software problem with the machines. Vlad had probably been injured on the last botched UUX8 that hadn’t been returned to the company.

Meanwhile, up on the summit, Nettie was winding up to the big reveal:

“The rest of you are going to face a more difficult challenge. Riding a mountain bike down a steep hill is hard enough. But it’s even more difficult to do when you are in a war zone! Exotiquest guides across the valley will be firing mortar rounds at those who lag behind! You’d better go!”

No one moved. Everyone just stared at Nettie in disbelief.

BOOM!

An explosion behind the group sent dirt flying everywhere. At that, all of the bankers got on their bikes and started pedaling as fast as they could downhill.

BOOM! Another blast went off in a clump of trees. People were screaming and pedaling furiously to get ahead of the shelling. BOOM! BOOM! BOOM!

Nettie watched the Morganeers ride away, terror-stricken. Then she had a good laugh. She was now standing alone on the top of the hill with Terrence.

"Those charges sure do make it seem like we are under attack, Nettie." Terrence chuckled.

BOOM! Another concussion echoed around them.

"I know. But they are basically just industrial-sized firecrackers. They don't send out any shrapnel," she explained. "They just make a lot of noise. And the whole thing is being done with the utmost care. We wouldn't want to blow up any of your employees."

BOOM!

And then the ground started shaking and vibrating.

Suddenly Terrence felt worried. "Is that another special effect, Nettie?"

"Um, no." Nettie said pointing to a gathering cloud of dust below. "I think it's a rock avalanche."

The force of the blasts had somehow started a landslide. Within seconds, the whole mountainside was coming apart in a thundering cascade rock and dust. Unable to see through the dust, Terrence couldn't tell if people were safe or in danger. Then Terrence's phone rang, and he started getting reports of what was happening below.

It was utter catastrophe. When it was all over, there were two fatalities.



*FIG. 5: Under the right circumstances, mountain biking can actually be fun.*

Wendy Wolkins, a vice president, was killed instantly when a huge boulder struck her in the head. Wendy had been earning over \$2 million a year and seemed to be on track to do even better over the next several years. She left a husband and three young children.

Yessenia Yarbrough, a third-year associate, was trapped under rubble, bleeding internally from a crushed ribcage. Despite being in excruciating pain, she was able, with the help of her co-workers, to speak on the phone with her fiancé, Zach Zarate. She told him how much she loved him. Then she said goodbye. She died

minutes later. Yessenia had been earning \$150,000 a year and was on track to be promoted to junior vice president with a huge pay raise. She had no children or siblings, and both her parents had died years ago.

In the end, Terrence's effort had done nothing to make people appreciate working at Morgan Morgan & Co. But it sure made a lot of them appreciate being alive.

### QUESTION

Analyze the parties' claims and liabilities, clearly labeling the subparts of your answer, as follows:

*Subpart A:* Discuss claims and liabilities related to what happened in San Frangeles.

*Subpart B:* Discuss claims and liabilities related to what happened on Pinnacle Peak.

*Subpart C:* Discuss claims and liabilities related to what happened in Roaring Ravine.

*Subpart D:* Discuss claims and liabilities related to what happened on Hollerer's Hill.

Do not repeat the exact same analysis from subpart to subpart or from party to party. Instead, you may, if appropriate, incorporate previously stated analysis by reference. If analysis of an issue is similar to but not exactly the same as what you have written previously, then I suggest you note your prior analysis and go on to discuss any differences. Note that the subparts will not be given equal weight. Divide your time among the subparts according to which ones require the most discussion and analysis. Plan ahead to put information where it belongs.

Some suggested abbreviations for your answer:

Booker Belanger's Supply Co.	BB
Coulisse Canyon	CC
Deputy Dwayne Delacroix	DD
Exotiquet Extreme Expeditions Co.	EE
Fernanda Fenner	FF
Griff Gunderson	GG
Hollerer's Hill	HH
Intellivator Investigations	II
Jerica Jernigan	JJ
Kevin Karling	KK
Lyle Lothway	LL
Morgan Morgan & Co.	MM
Nettie Naynor	NN
Pinnacle Peak	PP
Roaring Ravine	RR
Terrence Turner	TT
Umatilla Unlimited	UU
Vlad Vossi	VV
Wendy Wolkins	WW
Yessenia Yarbrough	YY
Zach Zarate	ZZ

#### CREDITS

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