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FINAL EXAMINATION - MODEL ANSWER

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## Lucky Lagoon

NOTE:

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 parties' claims and liabilities. Do not, however, analyze the claims of the unnamed 12-year-old girl injured by the amoeba infection. Discuss that event only insofar as it is relevant to analyzing the claims of the parties discussed directly in the facts above.

Clearly label the subparts of your answer, as follows:

*Subpart A:* Discuss claims and liabilities related to what happened with Abby, Bram, and Chandra, insofar as they are directly related to the amoeba. Do not include in this subpart claims or liabilities relating to anything that happened in the Express Emporium parking lot, and do not include claims or liabilities directly relating to care received at the Magnolia Memorial Medical Center.

*Subpart B:* Discuss any other claims and liabilities related to what happened with Abby, Bram, and Chandra.

*Subpart C:* Discuss claims and liabilities related to what happened with Ian and Jennifer.

*[various admonitions omitted; see the exam booklet]*

## RESPONSE

### SUBPART A -- ABBY, BRAM, CHANDRA, AND THE AMOEBA

Chandra Cannik has a good prima facie negligence case against Lucky Lagoon and Holiday Haven. The analysis is the same for both, except for affirmative defenses.

Lucky Lagoon and Holiday Haven owed a duty to Chandra because water park patrons and hotel patrons are foreseeable plaintiffs when they are on premises.

Breach of duty requires more analysis. The facts show that industry custom is to chlorinate pools. Since this is not a professional negligence case, custom is not dispositive, yet it is strong evidence that the reasonable pool operator chlorinates its pool in amoeba-prone Floribama. The fact that several waterpark operators said it's too dangerous not to chlorinate also is strong evidence that chlorination is part of the care exercised by the reasonable person. It seems Lucky Lagoon and Holiday Haven were convinced that what they were doing was safe, but their subjective view is not what counts for reasonable care -- it's an objective standard. And the views of other operators and industry custom indicates that non-chlorination was objectively too dangerous.

My above analysis assumes that operating a pool and filling it with unchlorinated water is an activity. But another way to conceive of the amoeba-infested water is that it is a condition upon the land. This analysis as well leads to showing a breach of duty: Chandra is an invitee at both Lucky Lagoon and Holiday Haven, since she was a customer, someone invited on to the land for the owner's business. Landowners such as Lucky Lagoon and Holiday Haven owe invitees a duty to adequately warn of or make safe known, concealed dangerous conditions. The amoebas were concealed because they were invisible, and they were dangerous because they could cause disease. Neither Lucky Lagoon nor Holiday Haven warned of this condition, and they didn't render the condition safe either. Thus, they breached their duty of care.

Actual causation is satisfied here as well. At first there's a dilemma. The application of the but-for test by a preponderance-of-the-evidence standard is problematic for Chandra: We cannot say that it is more likely than not that the injury was caused by a particular defendant. This is because you only need one amoeba to enter your system from one pool operator in order to contract the disease. This means the amoeba could have come from either Holiday Haven or Lucky Lagoon. The doctor said it's a 50/50 chance either way. Thus, for any given defendant, we cannot say that it is more than 50% likely that but for that defendant's actions, Chandra would not have gotten sick. Summers v. Tice doctrine, however, offers an alternative way to prove actual causation: Both Holiday Haven and Lucky Lagoon are at fault (both breached their duty of care) and its unknowable which is the source of the amoeba, thus under Summers v. Tice the burden shifts to each of Holiday Haven and Lucky

Lagoon to negate actual causation. And this is something it appears they will not be able to do.

There's one more thing that can be said about actual causation. While it is the case that only one amoeba is needed to cause the disease, it's possible that Chandra got one amoeba each from both Holiday Haven and Lucky Lagoon. If that's true, there were two events, either of which would have been enough on its own, according to the facts, to cause the disease. This creates a different problem for but-for causation against either Holiday Haven or Lucky Lagoon: Taking away the contribution of either Lucky Lagoon or Holiday Haven, Chandra still would have gotten the disease anyway. So no but-for causation. But the doctrine of multiple sufficient causation allows actual causation to be proved anyway: Holiday Haven's amoeba was sufficient to cause the disease, therefore Holiday Haven is deemed an actual cause. The same goes for Lucky Lagoon. The bottom line is that between *Summers v. Tice* and multiple sufficient cause doctrine, Lucky Lagoon and Holiday Haven are boxed in on actual causation.

Proximate causation is easily satisfied here. Since the 12-year-old girl was infected several weeks earlier, it was clearly foreseeable that another person could be injured in the same way. The one thing that does not seem actually foreseeable is the additional injury suffered because of the misdiagnosis and improper treatment of Chandra by Dr. Danya Dacosta, especially considering everyone was talking about the amoeba and Dacosta had just attended a lunch-and-learn about *Naegleria fowleri*. But medical malpractice is considered foreseeable as a matter of law, so Lucky Lagoon and Holiday Haven will be on the hook even for the additional damages that could have been prevented by competent medical care.

Damages for the prima facie negligence case are obvious. Chandra's disease is the injury. What's more, it seems she will have permanent impairment.

Lucky Lagoon will, of course, try to use the affirmative defense of express assumption of the risk because Chandra downloaded the Lucky Lagoon app and agreed to "assume all risks associated with visiting" including "injury from swimming." The voluntariness element seems to be provable here, since Chandra voluntarily clicked agree on the app and voluntarily entered the park and had a genuine choice about doing so. The knowing/appreciating element, however, is more problematic for Lucky Lagoon. The app itself does not provide enough information for someone to know and appreciate the risk of life-threatening amoeba infection. It says nothing about amoebae or disease. It just causes the reader to think of generic risks associated with swimming and running around.

There is, however, a decent argument Chandra actually knew of the risk since she read the story about the girl with the amoeba infection on her phone. This could create an implied assumption of the risk defense. But ultimately Chandra should win. The standard is subjective, and the facts state that Chandra believed that if the park

had been truly unsafe, the government would have shut it down. Thus, it seems she did not truly appreciate the risk.

Abby Abeyta and Bram Banzer don't have a negligence case against Lucky Lagoon or Holiday Haven. That's because neither Abby nor Bram have not been personally injured or had any of their property damaged. So their costs incurred in renting a hotel room and whatnot are not recoverable.

#### SUBPART B -- ABBY, BRAM, CHANDRA, AND OTHER ISSUES

The owner of the parked Range Rover has a good negligence claim against Abby for hitting the shopping cart that then hit the Range Rover. Owners of parked cars are foreseeable plaintiffs, so Abby had a duty. Abby arguably breached her duty in driving despite the obscured windshield, since it can be argued that the reasonable person would stop to clear the windshield before continuing to drive. On other hand, in an emergency context, the standard asks what the reasonable person would under those emergency conditions. In a rush to get a sick person to the hospital, trying to prevent a greater harm, perhaps the reasonable person would drive despite an obscured windshield. Overall, however, it looks to me like what really happened is that Abby panicked. And the reasonable person doesn't panic. So I think there's a breach. But for driving with the obstructed view, Abby would not have hit the cart that hit the Range Rover, so there's actual causation. Knocking a shopping cart into a parked car and damaging it is foreseeable, so proximate causation is satisfied. And the busted taillight meets the damages element.

The Range Rover owner could try suing Lucky Lagoon and Holiday Haven in negligence for the taillight. The amoeba was a but-for cause of this, and breach of duty is the same as described above. But there's a problem with proximate causation and duty: A busted taillight is not a foreseeable consequence of amoeba-contaminated water.

Whoever owned the car the friends were driving (Abby or someone else) might have a negligence case against Lucky Lagoon and Holiday Haven based on damage to the car caused by the projectile vomiting. But again, there's a duty and proximate causation problem for the same reason as for the Range Rover owner.

The car owner could sue Chandra for vomiting on the windshield, arguing that the reasonable sick person would have opened the door and vomited outside. But what I glean from the facts is that Chandra didn't have much choice about it.

Chandra has an easy win against Dacosta for professional negligence. There's a duty, because patients are always foreseeable plaintiffs. The standard of care is dictated by custom, and as specialist (in emergency medicine), Dacosta will be held to the standard of a minimally qualified emergency medicine specialist on a national basis. We have the expert opinion of Dr. Nellie Narimatsu that most physicians

wouldn't suspect *Naegleria fowleri* because it's so rare. So, on the face of it, it appears that Dacosta did not breach her duty of care. But if a defendant has superior knowledge, she must use it. A minimally qualified emergency medicine specialist who had just attended a lunch-and-learn on *Naegleria fowleri* WOULD suspect *Naegleria fowleri*, since Chandra's symptoms fit perfectly with the information Dacosta had about the disease. So Dacosta breached her duty of care by not treating the amoeba. Actual causation is clear, since but for the misdiagnosis and improper treatment, Chandra would have avoided additional injuries, including possible permanent impairment.

## SUBPART C -- IAN AND JENNIFER

### Federal Freight claims against Ian and Jennifer:

Federal Freight has a good claim for trespass to chattels against Ian Iacobelli and Jennifer Jadotte. They intended to act on the chattel (the truck) since they got in it and drove it. This amounts to an interference because Federal Freight will have the loss of use of the chattel for an appreciable amount of time since their driver will have to cross a wide street and head into to the Lucky Lagoon property to reclaim it.

Federal Freight has no claim for conversion because this was not substantial enough a deprivation to warrant a forced sale.

### Lucky Lagoon claims against Ian and Jennifer:

Lucky Lagoon has a good trespass to land claim against Ian and Jennifer since they intended to drive the truck on to the property. Gianella Golcetti waved them through, which is an argument for the affirmative defense of consent. But the consent was invalid since it was obtained through false pretenses because Ian and Jennifer weren't really making a delivery. And if there wasn't trespass to land with the truck, there certainly was when Jennifer and Ian set off on foot into an area they clearly were not allowed to go.

### Negligence claims against Lucky Lagoon, Gianella, and Oscar:

Jennifer may have a claim against Lucky Lagoon for negligence for injuries sustained to her leg by the hole in the ground. Jennifer was an trespasser, as established. But we know trespassers such as Jennifer were anticipated, because Gianella mentioned to Oscar Outenharch a shared understanding that there had been ongoing problems with kids trespassing through that area. Thus, Jennifer was an anticipated trespasser, and, as such, she was owed a duty to warn of or make safe known, concealed, artificial hazards that pose a threat of death or serious bodily harm. This hole was concealed, since vines obscured it. It seems to be a hazard capable of causing serious bodily harm since it caused a compound leg fracture. We know it was known because Gianella said to Oscar "another one," meaning another

trespassing kid, had fallen in. The real question is whether it is artificial or not. If this is an area that has been landscaped, it may be artificial. If that's the case, then there's a duty. But if this is just an unimproved area, this would be a natural hazard, and then there's no duty. But for the breach of duty, Jennifer would not have been injured, and proximate causation is satisfied because it was foreseeable – as Gianella's words indicate. And clearly the injury element is satisfied by the fracture.

Jennifer may also have a negligence claim against Gianella related to her actions after the injury. Generally, there is no affirmative duty to act, so there would be no duty for Gianella to help with Jennifer's broken bone. But Gianella undertook a duty by acting. Gianella then breached her duty then by not acting with the care of a reasonable person. The reasonable person would obtain medical assistance, which Gianella did not do. The reasonable person would also not reject the offered help of a park guest who is a doctor, nor would the reasonable person have instructed a person losing so much blood that they could not leave under a phony legal threat. But for Gianella's failure to obtain medical assistance and her detention of Jennifer, Jennifer would not have lost a great deal of additional blood, which counts as the injury. Proximate causation is clear because it is foreseeable that a failure to get medical assistance would result in the continued loss of blood.

Jennifer has a negligence claim as well against Oscar and Lucky Lagoon for hiring Gianella. When hiring a security guard, trespassers who might be targeted by that guard are foreseeable plaintiffs. The duty of care was breached in hiring Gianella because the reasonable person would not hire as a security guard a person with a criminal record and known violent tendencies. Gianella's abuse of Jennifer is a foreseeable result of the hiring, and thus a proximate cause. But for the hiring, Jennifer would not have suffered the additional injuries caused by Gianella, so there's proximate causation and injury.

#### Intentional tort claims against Gianella:

Ian has a good battery claim against Gianella. Gianella intended to slap handcuffs on Ian, which is intent to effect a harmful or offensive touching. Handcuffing is a harmful or offensive touching because, obviously, it's not socially sanctioned to handcuff people to chairs.

Ian likely also has a good assault claim since it can be inferred that he saw the handcuffs coming and thus would have had the immediate apprehension of being handcuffed, which is the immediate apprehension of a battery (discussed above). Intent is satisfied because Gianella intended a battery, and intent transfers to assault.

Ian likely also has a good false imprisonment claim. He was handcuffed to a chair so tightly he could not sit upright. Maybe the chair could move, but hopping or shuffling along while tightly bound to a chair probably does not allow a reasonable means of escape from the security office. It can be inferred that Gianella intended to confine

Ian, since she bragged to her boss that she was “detaining” Ian and Jennifer. Ian clearly was aware of the confinement.

Jennifer has a solid claim for false imprisonment. Gianella intended to confine Jennifer, as evidenced by her bragging about “detaining” Jennifer. Gianella accomplished a confinement of Jennifer to a bounded area by keeping her in a particular room in the security office. A false-imprisonment confinement can be accomplished by an invalid legal threat, and that’s what Gianella used here, falsely threatening Jennifer with a felony conviction. We know Jennifer was aware of the confinement because she was conscious -- even if woozy -- when Oscar got to the security office.