

Torts I

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FINAL EXAMINATION - MODEL ANSWER

Hollerer's Hill

PRACTICE EXAM

NOTES:

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.

ABOUT THE CREATION OF THIS EXAM AND MODEL RESPONSE: This "Hollerer's Hill" practice exam concerns subject matter covered in the Fall 2017 Torts I course. It uses a subset of the facts from 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, but it has been modified such that it will serve as a good model answer for Torts I in 2017.

QUESTIONS

Analyze the following:

- 1. Liability of Umatilla Unlimited with regard to Vlad Vossi for strict products liability**
Omit discussion of any affirmative defenses.
- 2. Liability of Exotiquet with regard to Wendy Wolkins and Yessenia Yarbrough**
Omit discussion of comparative fault (a/k/a comparative negligence) as an affirmative defense.

RESPONSE

[690 words, including section headings]

1. Liability of Umatilla Unlimited with regard to Vlad Vossi for strict products liability

Vlad has a claim in strict products liability against Umatilla for the bike falling apart. Umatilla is the manufacturer of the bike, and therefore a commercial supplier, so they meet the first element of a strict products liability case. Vlad can show the existence of a manufacturing defect using 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 was the actual cause of Vlad’s injury under the but-for test, because without the bad weld, the bike would not have fallen apart, and without the bike falling apart, Vlad would not have broken his ulna. Proximate causation is met because it is foreseeable that someone in Vlad’s position would be injured if the welds didn’t hold up. Also, the kind of injury scenario here – bike falling apart on the mountain and hurting the rider – is among the risks that make weak welds a defect. Finally, Vlad has a sufficient injury – his broken ulna is a personal injury.

2. Liability of Exotiquet with regard to Wendy Wolkins and Yessenia Yarbrough

Wendy and Yessenia have a good claim for negligence. Exotiquet had a duty to Wendy and Yessenia because they were foreseeable plaintiffs – it was foreseeable they could be hurt by setting off charges near them and above them on the hill. Breach of duty is clear because the reasonable tour operator would not set off actual explosions on a hillside while people are biking down it. The setting off of the charges was an actual cause of Wendy’s and Yessenia’s injuries because but for the setting off of the charges, there would have been no avalanche, and but for the avalanche, Wendy would not have been struck in the head by the boulder and Yessenia would not have been trapped by rubble and crushed.

Wendy and Yessenia also have a good claim for strict liability for ultrahazardous activities. 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 force, which is another hallmark of ultrahazardous/abnormally-dangerous activity. This also seems to be an activity where there is no way to render it safe – setting off blasts on a mountainside might set off an avalanche no matter how careful you are, so that further indicates ultrahazardous status. Actual causation, proximate causation, and injury elements are the same as with negligence, discussed above, and are satisfied.

Against both negligence and strict liability, Exotiquet could try to raise the affirmative defense of implied assumption of the risk. But it likely will not work. Wendy and Yessenia would have to know and appreciate the risk. I would say they did not, because although the facts suggest they anticipated cuts and bruises, it seems clear they didn't appreciate the true extent of the risk – a landslide that unleashed boulders and rubble. And while a reasonable person might objectively understand that explosions could set off a landslide, what matters for assumption of the risk is whether Wendy and Yessenia subjectively appreciated the risk, and the facts suggest they did not, because it says they had been thinking along the lines of a rock avalanche. Also, assumption of the risk requires voluntariness. That could go either way here. But while they did get on the bikes of their own volition, I would argue was an absence of genuine choice when they were told "You'd better go!" while explosions were going off, making it seem like they could suffer more harm staying where they were than by heading down the mountain.