

Torts

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ESSAY EXAMINATION - MODEL ANSWER

This is How We Yodel, People

PRACTICE EXAM

NOTES:

This is the model answer for the Fall 2018 practice exam "This is How We Yodel, People." That practice exam is an expanded form of the real final exam for Fall 2017 Torts I, which is also named "This is How We Yodel, People."

This model answer was made from reviewing and cobbling together the work of multiple students. Because of the cherry-picking, polishing, etc., this is better than any real response. In other words, this model answer is better than the best. Yet this model answer is not perfect. Student-drafted work – particularly under deadline pressure – 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, as a student, 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 probably a beyond-the-top-grade response. So don't worry if you can't match it. Yet at the same time, if you made different or additional points or analyzed issues not represented in the model answer below, that might 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: Strong claims are identified as such. Solid conclusions are made without hedging. But things that are less certain are appropriately discussed as possibilities rather than likelihoods.

Note that the responses from which this model was composited used various conventions for referring to places and people. Many exams spelled-out names. Others used abbreviations. For this model answer, I have standardized references using abbreviations that were suggested in the exam booklet. I have also aimed for cohesive writing with cleaned up grammar, spelling, and punctuation. Real exams tend not to be so tidy.

QUESTIONS

Provide analysis for the following. For all questions: **Omit all discussion of remedies. Omit any discussion of a claim based on informed consent or medical battery. Omit analysis and discussion of respondeat superior**; treat employee's actions as the employer's actions. **Omit any discussion of an affirmative defense based on comparative fault, except as indicated.**

1. **Discuss prospects for liability of Zum Zucker resort to Jenny Jens for negligence – including whether a defense of comparative negligence applies – and any intentional torts, if applicable.** In your discussion you should, of course, treat Ian Irvin's actions as Zum Zucker's. **Assume Wyorado is a pure comparative negligence jurisdiction.**
2. **Discuss prospects for liability of Keung Ko to Jenny Jens for negligence.**
3. **Discuss prospects for liability of Rodelberg Rentals to Jenny Jens for negligence.** Be sure to include in your discussion what legal effect there is, if any, of Jenny's signing and initialing of the form.
4. **Discuss prospects for liability of Selecta Skitech to Jenny Jens for strict products liability.**
5. **Discuss prospects for liability of Dr. Delina Deland to Jenny Jens for negligence.** Do not discuss claims for informed consent or medical battery. Analyze a regular professional negligence claim only.

RESPONSE

1

JJ has a strong negligence case against ZZ on the basis of II's actions. ZZ owed JJ a duty of care because JJ was a foreseeable plaintiff—it was foreseeable that being negligent as JJ's ski instructor could lead to JJ getting injured. ZZ breached its duty when II led JJ down the advanced YY slope, because the reasonable ski instructor would not have taken a person who's never skied before down a slope that is for advanced skiers. This breach was an actual cause of JJ's injuries, because but for being led down YY, JJ wouldn't have lost control and broke her leg. There is proximate causation under the foreseeability test because it's foreseeable that taking a beginning skier, JJ, down an advanced trail would cause a broken leg. The harm-within-the-risk test also proves proximate causation: avoiding crashes is exactly the type of harm that makes leading a beginning skier down an advanced slope negligent. Finally, a broken bone counts as an injury.

A separate theory of negligence is based on ZZ's role as land owner/occupier of the ski resort. JJ is an invitee to ZZ because she is a member of the public allowed on the land for ZZ's business. ZZ breached the duty owed to invitees by not marking off or fixing the depression in the slope—which was a concealed hazard since it couldn't be seen by a skier, and it was a knowable hazard, findable by inspection, because AA tells us so. There is actual causation because but for the hollow being hidden as it was, JJ would not have broken her leg by falling into it. There is proximate causation because it is foreseeable that a person would receive injuries when falling into a hidden hollow while skiing. The injury is the same.

It is possible that JJ would be found comparatively negligent, since a jury could be persuaded that the reasonable beginning skier would not go down what was revealed to be an advanced slope just because she is told to—particularly by a person who seems to be acting strange like this—almost manic. On the other hand, a jury could find it's reasonable for a learning skier to think that the ski instructor knows what he is doing and should be trusted to not lead a student into an unreasonably dangerous situation. That's the breach element—which will be the key issue here. The other elements are a given: she owed a duty to herself, of course. Actual causation, proximate causation, and injury are the same as discussed for the theory of II being negligent of leading her down YY. But if a jury does think that JJ negligently contributed to her injury, that will not destroy her negligence claim, only reduce damages.

JJ has a solid case against ZZ for trespass to chattels. ZZ acted with intent to interfere with JJ's phone by confiscating it. Taking it away is a dispossession and thus counts as an interference. And JJ had the right to the phone because she owns it.

2

KK is not liable for JJ's injury. Now, it is true that KK's suggestion was an actual cause of JJ's injuries—but for the suggestion, II wouldn't have gone down YY causing JJ to fall. And it's true there's an injury—JJ's broken leg. Nonetheless, the claim doesn't work for multiple reasons. First, KK did not owe JJ a duty with regard to suggesting yodeling, because JJ was not a foreseeable plaintiff when it comes to suggesting yodeling—who could have foreseen that suggesting a group yodel would cause II to take the group down YY as a result of the inspired enthusiasm? No one. Next, if we go with the general duty that KK might owe to JJ for being a fellow classmate being near her, that duty is not breached, because the reasonable person wouldn't refrain from suggesting yodeling. Finally, there's no proximate causation, because, under the foreseeability test, there's no way of KK knowing that bringing up yodeling as an activity would cause the chain of events that led to JJ's injuries.

3

JJ has a strong case against RR for negligence.

Because RR is in the rental business, this would be a bailment for hire with RR as the bailor and JJ as the bailee. As such, RR had a duty to inform JJ about known and reasonably discoverable defects in the chattel (the skis and bindings). It was known to RR, because RR did the repair that created the defect of a disabled safety function. RR breached because they didn't tell JJ about the defect. A jury will likely find actual causation because they will believe that but for JJ's ignorance of the problem, she would not have been injured since she would have rejected unsafe skis. There's proximate causation because it's foreseeable someone will break their leg when you disable a safety function meant to prevent leg breaks. And the leg break is the injury.

I would note that if the courts didn't use the bailor/bailee standards, JJ could still recover because the reasonable ski rental place wouldn't disable a safety feature for maintenance convenience—AA tells us as much. Or, if for argument's sake they did, the reasonable ski rental store would at least inform the renter of the problem.

RR will argue that the agreement JJ signed gives rise to an express-assumption-of-risk defense. Both elements of the defense are a problem, however: First, it seems that JJ did not truly appreciate the risk. She understood there are regular risks of skiing—those are disclosed on the form and they are obvious—but there is no indication she knew about, much less appreciated, the additional needless risk of the disabled safety function. To the contrary, she didn't know about this until AA told her after the accident. So RR will lose on this defense. The second element also could fail, since she can say her signing of the form wasn't truly voluntary since she was told this was the only equipment in town and she was already heavily invested in the ski trip.

RR can also argue the agreement has effect by creating an equitable defense of waiver. But that's based on fairness, and this situation seems really unfair since JJ was told she had to accept the agreement to go ahead with her ski vacation and since she wasn't told of the safety problem.

An additional reason RR should lose on this defense is that assumption of the risk agreements and waivers are generally held invalid in cases of gross negligence. And purposefully disabling the safety function on skis sounds like it would be considered to be gross negligence.

4

JJ also has a strong case against SS for products liability. First, SS manufactured the bindings, so SS is a commercial supplier of this product. Second, the bindings were defective when sold because they had a design defect—SS's decision to opt for a screw instead of a spot weld. This is a defect under the risk-utility test because it would have been less than 1% of the price of

the bindings to use a spot weld, and this would have made the product much safer since it would have eliminated the possibility that the bindings wouldn't release in an accident. The custom of the industry—everyone else uses a spot weld—supports the notion that the risks avoided outweighed the increased cost. Third, the design defect was an actual cause of JJ's injury because but for the screw on the binding, the safety function would not have been disabled and JJ's injury wouldn't have happened. Fourth, proximate causation is met with the foreseeability test because it is foreseeable at the time of the supplying of the product with the defect that a person in JJ's position would be injured. Last, the injury requirement is met because of JJ's leg break.

A complicating factor, however, is that the product was changed by RR before it reached JJ: RR disabled the safety function. If the courts of Wyoming have unchanged condition as an additional prima facie element, as some states do, this may be a problem for JJ. But the theory of defect JJ will pursue is that the susceptibility of safety function to being disabled is the defect (not the disabled safety function, as such). And the defect of using the screw instead of a spot-weld was a but-for cause and a foreseeable cause of JJ's injury, so I think SS loses on the changed-condition issue.

5

DD will almost certainly be liable to JJ for professional negligence. DD's patients are foreseeable plaintiffs, so DD owed JJ a duty. As a general practitioner, DD is held to the standard of other general practitioners in her community, and the facts say in this community an X-ray would have been ordered. DD didn't order the x-ray; therefore she breached her duty. Had DD ordered this X-ray, as other general practitioners would have done, JJ would not have suffered the additional pain and bruising, and therefore actual causation is met. Proximate causation is met because it is foreseeable that JJ could suffer additional injuries if DD were to misdiagnose her. Lastly, there is injury because JJ suffered the additional pain and bruising.