Torts

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Some notes about practice answers for
The Great Northwoods Lumberjack Show

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For an optional, ungraded practice exam exercise, several Fall 2021 students submitted responses to questions 1, 3, 4, and 5 of the Fall 2019 Torts final exam, *The Great Northwoods Lumberjack Show* (available at ericejohnson.com/exam_archive).

The responses were generally very good! But the purpose here is not grading or assessment—it's helping everyone get better—so I'm just focusing on areas for improvement. Thus, for this document, I only picked out snippets where something went wrong. No snippet below is verbatim from any student's response. They are generally re-written composites based on similar material from *multiple* students.

1. Discuss prospects for liability of Lawson Loblolly's Great Northwoods Lumberjack Show to Payne Pinyon for negligence; include in your analysis a prospective defense of contributory negligence based on Payne's conduct. Treat the lumberjack show employees' actions as the actions of Lawson Loblolly's Great Northwoods Lumberjack Show. And because of S.R.S. §88-88, do not use the traditional special land owner/occupier rules for duty.

> PP has a good negligence case against LL. The element of duty is met because PP can be considered a foreseeable plaintiff, since PP is at LL's show. LL breached its duty because the 44-44 statute requires some sort of physical barrier where the guy wire is anchored to the floor. Actual causation is satisfied because PP would not have been hurt but for LL violating the statute. The fourth element is satisfied because it's foreseeable that not supplying the barrier required by the statute could cause a tripping injury to PP. The injury element is met because PP's kneecap was broken.

- This is talking about negligence per se -- in which case, it should use the legal words: "negligence per se." But perhaps even more importantly, it doesn't use the class-of-persons/class-of-risks test. Not obeying a statute does not automatically mean a breach—the statute has to meet the class-of-persons/class-of-risks test in order to set the standard of care in a negligence case.
- Saying "the fourth element" is not the best. I know what you're talking about, but different courts and commentators (and maybe bar exam graders) have different ideas about how many elements there are and which is first, second, third, etc. So use the legal words and call the thing by its name: "proximate causation."

PP has a strong prima facie negligence case against LL. PP is a foreseeable plaintiff, therefore, the element of existence of duty is met. The breach element is met because LL can be shown to have breached their duty when we consider the reasonable person standard in conjunction with S.R.S. §44-44: LL breached its duty of due care because the reasonable person would have obeyed the §44-44 statute requiring safety cones or some physical barrier at the anchor point. Actual causation is met because but for LL's failure to give even a verbal warning, PP would not have been injured. We can also say actual causation is met because but for tripping over the guy wire, PP wouldn't have been injured. Proximate causation is met because its foreseeable that not complying with SRS 44-44 would cause someone to trip and get hurt. Injury is met because PP suffered a shattered kneecap.

- This analysis is mushing together the reasonable person standard and negligence per se. Take everything one at a time. If you want to apply the reasonable-person standard, do that on its own. If you want to apply negligence per se, do that separately and make sure you use the class-of-person/class-of-risks test, when you do.
- Actual causation analysis employs the right test (but for), but to the wrong thing. Causation needs to connect the breach to the injury.
    - In the first sentence about actual causation, the but-for test is being used on the failure to give a verbal warning, which could be a theory of breach, but it was not mentioned in the student's breach analysis.
    - The second sentence about actual causation applies the but-for test to "tripping." But tripping isn't the student's theory of breach—in fact, it's not a theory of breach at all.

LL might have a contributory negligence defense. Because PP volunteered to go on stage, and was not required to, it can be established that his own actions contributed to his own injury. But this defense may fail because contributory negligence is not available against very young plaintiffs, and that may apply to the nine-year-old PP.

- This doesn't go through the elements. Contributory negligence is not because the plaintiff wasn't compelled to be in the place where the injury happens. The plaintiff must be shown to have breached the duty of due care they owe themselves. The reasonable person would not have declined to go on stage out of the exercise of due care.
- This answer pulls out a potentially on-point piece of doctrine about very young plaintiffs. But that was just one sentence in the casebook. Meanwhile, the student is missing the big thing here …
- The plaintiff was a hyperactive, impulsive nine-year-old! The exam hypo is chockablock with examples of this. The standard for children is adjusted for age, judgment, etc. That's an obvious thing to engage with here in terms of discussing breach.

3. Discuss prospects for liability of Couperez Chainsaws to Don Douglas for strict products liability.

> *[After having done a nice job of going through the elements and doing good analysis for strict products liability …]* There are two additional ways in which DD could prove products liability—negligence and breach of warranty. But the best option for DD is to use strict products liability because the other claims are harder to prove under these facts.

- I put this here as an example of an exam that's expending effort in an unproductive direction.
- As a grader, I'm not sure what to do with something like this. It's true that there's two additional sorts of claims that can be pursued for defective products, those being negligence and breach of warranty. But there's no analysis of either.
- And as you may recall, I didn't teach you anything about breach of warranty claims in products liability cases. I only told you that such claims exist. (When you get out there in practice, if you know at least that something exists, you can look it up.) But given that we learned nothing about how breach of warranty claims work, it is not clear what the student's basis would be for the statement that it would be harder to prove breach of warranty under these facts.
- My guess is that the student is looking for a way to show off additional knowledge. But it's kind of an information-dump type of technique—perhaps a throwback to undergrad exams. It's not what law exams are about.
- Yet note that in the effort to try to find a way to work in this additional knowledge, the student has stumbled into implying that a plaintiff must choose one claim from among strict products liability, negligence, and breach of warranty. And this is extremely worrying! Because one claim doesn't preclude the others! A plaintiff could sue on all three simultaneously.
- As it turns out, when I wrote the exam, I foresaw that some students might want to talk about negligence and even perhaps breach of warranty for this question. And that is why I put "**for strict products liability**" right in the question! So remember to stick to the question asked.

4. Discuss prospects for liability of Couperez Chainsaws to Amelia Ashworth for strict products liability for her broken toe. Please do not repeat analysis from the preceding question.

> CC will not be liable to AA for strict products liability because AA's injuries did not result from the product defect.

- This student is applying common sense, not legal analysis. It's not wrong, but it's not a creditable right answer either. It's the student's job to dig into the legal doctrine—in this case revolving around causation—to provide analysis as to why AA's strict products liability claim will fail.

In this situation, CC will not be liable for strict products liability because the product defect did not harm AA, since the manufacturer should not have known that an F-16 could startle Amelia, causing her to drop the chainsaw as she was inspecting it.

- Same comment.

Actual causation is not satisfied in this case because but for the two espressos AA had, she wouldn't have been jumpy and wouldn't have dropped the saw.

- This is a misapplication of the actual causation test. The test is applied to the existence of a defect in the product supplied by the defendant. (Analogously, in negligence, it's applied to the defendant's breach.) The test is not applied to the plaintiff's conduct.
- And, there's another problem …
- Actual causation is satisfied here! But for the defect, AA never would have been holding the chainsaw when she was, and thus she wouldn't have dropped it on her toe when the jet flew overhead.
- The issue here is a lack of proximate causation.
- I also note that the best exam answers took to heart the admonition "**Please do not repeat analysis from the preceding question.**" Their answers were thus very concise.

5. Discuss prospects for liability of Hexetron Hospital Supplies Corp. and Intravenous Innovations, Inc. to Payne Pinyon for negligence. Remember, do not discuss other causes of action.

Actual causation is satisfied in this case against both HH and II under Summers v. Tice doctrine, because even though there's only a 50% chance that either one actually caused the injury, the burden shifts to both defendants to each disprove causation.

- This is wrong. Summers v. Tice applies where the multiple parties are negligent—i.e., breached their duty. Here, only one defendant breached their duty. So Summers won't save PP's case, and actual causation cannot be demonstrated by a preponderance of the evidence against either HH or II.
- One thing that may have helped people get this right is carefully going through the elements, because with breach, there's no way for the plaintiff to know that HH or II breached by a preponderance of the evidence standard. And, analyzing breach carefully, you get a sign there that the case is starting to come apart.