# Torts

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**ESSAY EXAMINATION – ANALYSIS**

Some analysis regarding

# This is How We Yodel, People

Practice Exam

This document contains analysis about the essay/issue-spotter exam "This is How We Yodel, People" (Fall 2018).

In Torts Fall 2022, "This is How We Yodel, People" was an optional practice exam students could do and turn in. I reviewed the responses and then, in class, provided group feedback. As a way to have an interactive discussion about the practice exam responses, I picked language from many different students' responses and used that to synthesize essay answers that I thought would be usefully teachable—with various aspects that were discussable or improvable. I did this for Question 1 and Question 5.

Those synthesized/discussable/improvable responses are below, along with revisions done in class and bracketed notes inserted in class. I also added some explanation of the revisions to Question 1.

Please note that the revised version of Question 1 is greatly improved, but there are still myriad other ways to improve it. For instance, there's some additional issue-spotting that could have been done. And even insofar as the revised version covers various issues, don't think of it as an "ideal" response. It's certainly not perfect. Besides, there's no single "correct" way to answer an essay question—there are many correct ways.

The same sort of thing applies to Question 5: The inserted notes don't exhaust all the constructive comments one could make about Question 5.

## ORIGINAL synthesized/discussable/improvable response:

**Question 1**

For the first negligence claim JJ requested a lesson specifically aimed at novice skiers. It is reasonable for JJ, as a novice skier to select such a lesson. She was instructed to go down YY, which is problematic, because YY is an advanced slope. ZZ had a duty to ensure the safety of skiers, particularly beginning skiers who lack superior knowledge. A reasonable ski resort should never instruct a novice skier to do down an advanced slope. JJ can likely recover for her injuries under this theory of negligence.

 

JJ also has a negligence claim against ZZ under the land owner/occupier standards for the concealed depression on the slope as a condition of the land. JJ is an invitee because she is on the land as a customer of ZZ's business open to the public. ZZ breached its duty because the reasonable person would take care of fixing the depression or marking it off with a warning. But for filling in the depression or warning of it, JJ would not have been injured. Proximate causation is satisfied: it's foreseeable that this kind of injury would result from not fixing or marking off the depression. JJ has a broken leg. Thus, JJ will likely be able to prove a prima facie case for negligence against ZZ under land/owner occupier standards for the concealed depression as all the elements can be satisfied by a preponderance of the evidence.

In terms of defenses, two types are available to ZZ: rebuttal defenses and affirmative defenses. A rebuttal defense applies to the prima facie case where the plaintiff has the burden of proof by a preponderance of the evidence. Even if the plaintiff has met this burden, using a rebuttal defense, the defendant can prevail by putting on evidence rebutting the plaintiff's case with regard to any one essential element of a cause of action. The other kind of defense is an affirmative defense. If the defendant chooses to pursue an affirmative defense, the defendant then has the burden of proof. An affirmative defense available to ZZ is that of comparative negligence. JJ was foolish to follow the instructions of a hyperactive ski instructor and go down an advanced slope, heedless of her own safety. Ultimately, this will be decided by the jury. However, one would expect that it will be quite difficult for JJ to successfully argue that she was not comparatively negligent.

JJ has a strong claim for NIED against ZZ, because she was at the scene of an accident (her own accident), and she witnessed a person closely related to her (herself, who is 100% related), going through horrible physical injury. The facts do not directly state that she experienced severe emotional distress and witnessing her own injury, but this can be inferred—at least until the point at which she passed out from the pain.

JJ also has a strong claim for false imprisonment, since she passed out and was unable to move while unconscious, and thus was limited in her movement in all directions.

### Question 5

DD, is a doctor, and doctors are held to a higher standard than in the ordinary negligence case. That higher standard required ordering an x-ray. There is actual causation because but for failing to order the x-ray, JJ would not have received the additional bruising and tissue damage. DD's failure to order an x-ray was a proximate cause of the bruising and tissue damage because medical malpractice is always foreseeable. The injury was already talked about under Question 1.

# REVISING QUESTION 1 IN CLASS:

**Question 1**

For the first negligence claim, which JJ should win, ~~JJ requested a lesson specifically aimed at novice skiers. It is reasonable for JJ, as a novice skier to select such a lesson. She was instructed to go down YY, which is problematic, because YY is an advanced slope.~~ ZZ had a duty to JJ because she's a foreseeable plaintiff because she's a skier taking one of their lessons. ~~ensure the safety of skiers, particularly beginning skiers who lack superior knowledge. A~~ There is a breach of duty under the reasonable person test because a reasonable ski resort ~~should~~ would never instruct a novice skier to do down an advanced slope. There is actual causation because but for II taking her down YY she wouldn't have the leg break. Proximate causation can be shown because under the foreseeability test, it's foreseeable that if you send a new skier down YY she'll get grievously injured with a leg break. There's an injury because the leg break is an injury. ~~JJ can likely recover for her injuries under this theory of negligence.~~

JJ also has a great negligence claim against ZZ under the land owner/occupier standards for the concealed depression on the slope as a condition of the land. JJ is an invitee because she is on the land as a customer of ZZ's business open to the public. Thus, ZZ owed JJ the duty owed to invitees, to warn of or fix concealed hazards. ZZ breached its duty because it didn't warn of or fix concealed hazards, which the concealed depression was. Actual causation is met because but for not filling in the depression or warning of it, JJ would not have been injured. Proximate causation is satisfied~~:~~ because it's foreseeable that this kind of injury would result from not fixing or marking off the depression. There is an injury because JJ has a broken leg. ~~Thus, JJ will likely be able to prove a prima facie case for negligence against ZZ under land/owner occupier standards for the concealed depression as all the elements can be satisfied by a preponderance of the evidence.~~

~~In terms of defenses, two types are available to ZZ: rebuttal defenses and affirmative defenses. A rebuttal defense applies to the prima facie case where the plaintiff has the burden of proof by a preponderance of the evidence. Even if the plaintiff has met this burden, using a rebuttal defense, the defendant can prevail by putting on evidence rebutting the plaintiff's case with regard to any one essential element of a cause of action. The other kind of defense is an affirmative defense. If the defendant choose to pursue an affirmative defense, the defendant then has the burden of proof.~~ An affirmative defense available to ZZ is that of comparative negligence. JJ breached her duty of care to herself because she ~~was foolish to~~ did something the reasonable person would not have done -- follow the instructions of a hyperactive ski instructor and go down an advanced slope~~, heedless of her own safety~~. There is actual causation because but for her decision to go down YY, she wouldn't have been injured. It's foreseeable she would break her leg going down an advanced slope not knowing what she was doing, so proximate causation is met. Obviously she's already alleged her injury. ~~Ultimately, this will be decided by the jury. However, one would expect that it will be quite difficult for JJ to successfully argue that she was not comparatively negligent.~~

~~JJ has a strong claim for NIED against ZZ, because she was at the scene of an accident (her own accident), and she witnessed a person closely related to her (herself, who is 100% related), going through horrible physical injury. The facts do not directly~~

~~state that she experienced severe emotional distress when witnessing her own injury, but this can be inferred—at least until the point at which she passed out from the pain.~~

~~JJ also has a strong claim for false imprisonment, since she passed out and was unable to move while unconscious, and thus was limited in her movement in all directions.~~

# REVISED QUESTION 1, CHANGES ACCEPTED:

**Question 1**

For the first negligence claim, which JJ should win, ZZ had a duty to JJ because she's a foreseeable plaintiff because she's a skier taking one of their lessons. There is a breach of duty under the reasonable person test because a reasonable ski resort would never instruct a novice skier to do down an advanced slope. There is actual causation because but for II taking her down YY she wouldn't have the leg break. Proximate causation can be shown because under the foreseeability test, it's foreseeable that if you send a new skier down YY she'll get grievously injured with a leg break. There's an injury because the leg break is an injury.

JJ also has a great negligence claim against ZZ under the land owner/occupier standards for the concealed depression on the slope as a condition of the land. JJ is an invitee because she is on the land as a customer of ZZ's business open to the public. Thus, ZZ owed JJ the duty owed to invitees, to warn of or fix concealed hazards. ZZ breached its duty because it didn't warn of or fix concealed hazards, which the concealed depression was. Actual causation is met because but for not filling in the depression or warning of it, JJ would not have been injured. Proximate causation is satisfied because it's foreseeable that this kind of injury would result from not fixing or marking off the depression. There is an injury because JJ has a broken leg.

An affirmative defense available to ZZ is that of comparative negligence. JJ breached her duty of care to herself because she did something the reasonable person would not have done -- follow the instructions of a hyperactive ski instructor and go down an advanced slope. There is actual causation because but for her decision to go down YY, she wouldn't have been injured. It's foreseeable she would break her leg going down an advanced slope not knowing what she was doing, so proximate causation is met. Obviously she's already alleged her injury.

# Some explanation of the revisions to Question 1

Here's some of the thinking behind doing these revisions in class:

- In the first paragraph, before revision, there was: (1) almost no explicit discussion of elements, (2) no explicit use of tests, and (3) no instances of the word "because." Instead of connecting the dots and doing the analysis, the writer was making some relevant observations and—at best—implying various things about the analysis. In other words, the writer was depending on the reader to draw conclusions and fill in the reasoning. After revision, the response explicitly goes through the elements of the negligence claim, explicitly uses the tests, and uses the word "because" multiple times. This made the reasoning and analysis explicit.
- In the second paragraph, before revision, the writer set things up for the land owner/occupier standard for invitees but then abandoned that to analyze breach under the reasonable-person test. We fixed that. The writer never explicitly mentioned the elements of existence of duty, actual causation, or existence of an injury. We fixed that too. We also made analysis and reason-giving explicit in a number of instances by introducing the word "because." Notice how the original sentence about proximate causation seems to take pains to avoid the word "because." It uses a colon to strongly *imply*, but not explicitly *state*, the basis for the writer's reasoning. We fixed that by swapping the colon for "because." We cut out the last sentence because it didn't add anything content-wise. Writing that last sentence was thus wasted effort.
- In the third paragraph, we deleted the generic expository recitation of how defenses work. That wasn't wrong, but it was wasted effort, because it did nothing to advance the analysis with regard to the particular fact scenario provided by the exam. With the revised version, we just jump into the analysis. Then we transformed the writer's common-sense-style observations into true legal analysis by explicitly invoking elements, tests, and the word "because." And we went on to add discussion of missing elements. We removed the last two sentences because we figured they shouldn't have been written in the first place. Saying that something will be decided by a jury would be true (assuming it's a jury trial), but it's not advancing the analysis. And the last sentence—the expressed opinion that JJ's position here is quite difficult—isn't interesting without any reason offered to support it.
- The last two paragraphs we cut out because they were more examples of wasted effort. NIED and false imprisonment don't work here at all. The writer is stretching to try to apply doctrine that's hopelessly inapposite. The NIED discussion is particularly teachable, because the writer treats the requirements of NIED as if they are statutory provisions, susceptible to semantic cleverness. But NIED is a common-law doctrine, created by and ultimately answerable to case-law precedent. So this kind of exercise—particularly in the absence of any case marking this kind of path—is not fruitful. The writer would have been better served by working to strengthen the analysis of the already-found issues. Beyond that, it would have been better to look for additional straightforward opportunities for applying doctrine learned in the course.

# NOTES/COMMENTS TO QUESTION 5, INSERTED IN CLASS:

**Question 5**

DD, is a doctor, and doctors are held to a higher standard than in the ordinary negligence case. [← That's not true. Doctors are held to a different standard. At any rate, it's better to just go forward and apply that standard.] That higher standard required ordering an x-ray. [← It's true that the standard required ordering an x-ray, but what's missing is how we get to that conclusion. Use the standard; apply it to the facts.] There is actual causation because but for failing to order the x-ray, JJ would not have received the additional bruising and tissue damage. [← That's good. ☺] DD's failure to order an x-ray was a proximate cause of the bruising and tissue damage because medical malpractice is always foreseeable. [← No, that doctrine is misapplied. The med-mal-always–being-foreseeable thing is putting the original tortfeasor on the hook for the worsening of the injury. So that's relevant to expanding the scope of ZZ's liability in terms of proximately caused damages. But you need to do regular proximate causation analysis for DD – not that it's hard, of course.] The injury was already talked about under Question 1. [← No, that's wrong. DD didn't cause the leg break. DD caused the worsening – the tissue damage and bruising. That's the injury we need to point out.]