

Torts

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Yodeler's Yaw

ESSAY EXAMINATION

This is an exam given in Fall 2017. It is designed for 1.25 hours or 75 minutes (administered in a 30/45 format).

The next year, in 2018, I expanded the exam with more content so that it would be appropriate for a 2.0-hour or 120-minute time slot (administered in a 30/90 format). I then used that as the practice exam for my Fall 2018 Torts class.

For just about everybody, including my own students, **I recommend you look at that 2.0-hour expanded version, which is titled "This is How We Yodel, People."** It can be found here: http://www.ericejohnson.com/exam_archive/sa/Torts_This_Is_How_We_Yodel_People.pdf

That 2.0-hour version has accompanying analysis and model answer material that you can find in the exam archive (http://www.ericejohnson.com/exam_archive/).

Note that this Fall 2017 exam (the booklet you are looking at now) was originally titled "This is How We Yodel, People." But to avoid confusion with the later-created 2.0-hour version, I renamed this one "Yodeler's Yaw."

WRITE YOUR
EXAM ID
NUMBER HERE:

UNIVERSITY OF NORTH DAKOTA SCHOOL OF LAW

Torts I
Fall 2017

Eric E. Johnson
Associate Professor of Law

ESSAY
ISSUE
SPOTTER

FINAL EXAMINATION - ESSAY

Open-book.
30 minutes reading/outlining
45 minutes writing

Write your exam number in the box in the upper-left corner!

GENERAL INSTRUCTIONS:

1. All exam materials (including this booklet and your response) must be turned in at the end of the period. Do not forget to write your exam number in the box above in the top-left part of this page. If no booklet is returned with your exam number, you will presumptively be denied all credit for the affected portion of the exam. Expect no leniency in this regard.
2. You may not waive anonymity. Use only your exam ID number on your response. Self-identification on the exam or afterward will, at a minimum, result in a lower grade, and may result in disciplinary action.
3. You may not copy, transcribe, or distribute the material in this booklet or attempt to do the same.
4. You may write anywhere on the examination materials – e.g., for use as scratch paper. Only answers and material recorded in the proper places, however, will be graded.
5. During the exam, you may not consult with anyone – necessary communications with the proctors or administering staff being the exception. You may not view, attempt to view, or use information obtained from viewing materials other than your own.
6. After the exam, you must take deliberate, reasonable precautions to prevent disclosure of any and all information about the exam to any enrolled member of the class who has not yet taken the exam.
7. Your goal is to show your mastery of the material presented in the course and your skills in analyzing legal problems. It is upon these bases that you will be graded.
8. Base your analysis and answers on the general state of the common law and typical statutory law in the United States, including all rules, procedures, and cases as presented in class, plus any hypothetical laws presented in the facts, as well as the various assigned readings for the course and, where appropriate, the theory and history discussed in class.
9. For any question involving time, assume that today's date is the regularly scheduled date for the exam administration.
10. You have a total of 1 hour 15 minutes.
11. 30-MINUTE RO PERIOD: The first 30 minutes is a reading-outlining period (RO Period). This is your time to carefully read the exam booklet (that is, the facts and the question or questions), to take notes, to reference your outlines or books, and to outline your response on scratch paper. **During the 30-minute RO Period you may not begin recording the response upon which you will be graded.** That is, if you are taking the exam on computer, you may not type any characters at all into the exam response file on your computer during the RO Period; and if you are taking the exam by handwriting, you may not make any mark in any blue book (that is, an exam-response booklet, sometimes labeled a "green book") during the RO Period.
12. 45-MINUTE EW PERIOD: **Next you will have a 45-minute exam-writing period (EW Period) during which you will write your response.** For the avoidance of doubt, it is acknowledged that during the EW Period you may also continue to do what was allowed during the RO Period (e.g., refer back to the exam booklet, reference your books and notes – including any notes you created during the RO Period).
13. This portion of the examination is **open book**. You may use any notes and books you like. No electronic or interactive resources (such as a tablet computer, smart phone, etc.) may be used or referenced. You may, of course, use a laptop to write your exam, but you may not reference files stored thereon during the examination session. No materials may be shared during the exam.
14. Organization counts. Read all exam questions before answering any of them – that way you can be sure to put all of your material in the right places.
15. Within the confines of the questions you are asked, note all issues you see. More difficult issues will require more analysis. Spend your time accordingly.
16. As appropriate, you may, if you wish, note differences between minority and majority approaches in your answer, as well as statutory or other differences among jurisdictions.
17. Clarity counts. Feel free to use abbreviations, but only if the meaning is entirely clear. **Bluebooks: Make sure your handwriting is legible. I cannot grade what I cannot read. Skip lines and write on only on one side of the page. Computers: Please clearly label each question separately in your answer.**
18. Do not turn the page until instructed to begin.
19. Good luck!

SPECIFICS FOR THIS ESSAY PORTION:

This Is How We Yodel, People

AS SHE DROVE AROUND THE LAST BEND, Jenny could suddenly see the whole mountain—the spectacular granite peak and snow-clad slopes of Zum Zucker, Wyorado’s most elite ski resort. Zum Zucker lived up to its name—derived from the German for “to the sugar”—by having some of the sweetest snow in the USA. Coming into view at the same time was the glittery little hamlet of Vraaka Valley—only 4,000 residents but enough high-end jewelry and watch boutiques to rival Beverly Hills.

Jenny was beyond psyched to be going skiing for the first time. Looking up at the mighty Mount Zum Zucker, she felt a little thrill of fear. Her natural inclination toward sports was mostly limited to playing on her Nintendo Wii videogame console at home. But she was determined to give skiing a try. Tomorrow she would be joined by her Aunt Amy, a former Olympic ski athlete and now a hot-shot sports medicine doctor. She’d feel safe then. In the meantime, for today, she’d arranged to take a beginners lesson through the Zum Zucker resort. That seemed harmless enough.

The first stop for Jenny was Rodelberg Rentals, an equipment shop that was independent from the Zum Zucker resort. When Jenny got to the counter, she was asked to sign and initial an assumption of risk and waiver form.

“Can I rent the skis, boots, and poles without signing and initialing this?” she asked.

“Nope,” said the guy behind the counter, sunburned all over his face except right around the eyes. “And if you don’t, you won’t be skiing, because every other place in town is out of equipment except us.”

Hearing that, Jenny initialed and signed the form without reading it.

Already having pre-purchased her wildly expensive lift ticket, Jenny went to the Zum Zucker ticket kiosk to pick it up. She then took the aerial tramway up the mountain to meet her ski instructor.

THE SKI INSTRUCTOR ENDED UP BEING EASY TO SPOT, as he was waiving a huge purple and lime-green flag emblazoned with the Zum Zucker logo.

“Welcome new skiers!!!” he yelled. “I’m Ian Irvin, and I’m your instructor! AND I AM SO PUMPED TO BE HERE!!! Before we start skiing, we need to loosen up and start having fun. Anyone have any ideas?”

Everyone was quiet. Finally, a guy broke the awkward silence with, “We could yodel.”

“AWESOME! I LOVE IT! What’s your name?”

“Keung,” the guy said. “Keung Ko.”

“Awesome to meet you, Keung! Okay! Let’s yodel!”

Several people gave it a shot. And against all odds, Ian’s enthusiasm reached a new height. “THIS IS HOW WE YODEL, PEOPLE!!!! YEAH!!!!!! You know, this yodeling has given me an idea I never would have had otherwise! Let’s go down Yodeler’s Yaw!! It’s not, technically speaking, a beginner slope, but I think you guys have the enthusiasm to handle it!” Ian took about one minute to show the beginning skiers how to hold their poles and point their skis. Without further ado, he led them straight to the trail named Yodeler’s Yaw.



Zum Zucker

FIG. 1: The resort’s logo. All the kids in Wyorado know that nothing beats coming back to school in January with a Zum Zucker lift ticket dangling from your ski jacket.

RODELBERG RENTALS ASSUMPTION OF RISK AND WAIVER

Rodelberg Rentals (RR) feels it is important that all customers understand and appreciate the inherent risks involved in skiing and using RR equipment. Those risks include, but are not limited to, collisions (including, without limitation, with trees, rocks, stumps, forest growth, debris, lift towers, fences, vehicles, signs, other artificial or natural obstacles, and with skiers and other people); falls; landing awkwardly; over-exertion; failure to successfully complete a movement; loss of control and injury-producing twisting, pulling, crushing, or other mechanical stress on one's body (due to snow/ice conditions, terrain features, variations in surface and/or terrain conditions, slope design, terrain modifications, and various other hazards, whether artificial or natural, marked or unmarked); failure of equipment; inclement weather and cold temperatures; and erratic or negligent behavior of others, including by RR staff (including, without limitation, errors in adjusting, providing, preparing, repairing, storing, and selecting equipment). These inherent risks can lead to injuries, including without limitation bruises, contusions, cuts, lacerations, abrasions, sprains, strains, broken bones, ligament and joint injuries, back and neck injuries, concussions, internal injuries, brain injuries, and even death.

ASSUMPTION OF RISKS: I have read the above, and I know that RR rentals are associated with these and other inherent risks, and I hereby attest that my rental and use of any and all RR equipment is purely voluntary, and I knowingly assume all risks. _____ ← INITIAL HERE for assumption of risks.

WAIVER OF LIABILITY FOR NEGLIGENCE: I have read the above and I agree on behalf of myself and my spouse, heirs, personal representatives, assigns, and all others making a claim connected with me that I do hereby waive all claims and release and discharge RR, its owners, directors, officers, employees, volunteers, and agents. _____ ← INITIAL HERE for waiver of negligence.

CUSTOMER SIGNATURE: I have read and agree to the above: _____

FIG. 2: The form that Jenny signed and initialed where indicated at Rodelberg Rentals.

Jenny was determined to be brave as she started down the trail. Gravity started pulling her downhill at a moderate pace. Then a little faster. And faster. She tried to stay on the far right side of the trail, keeping out of the way of more experienced skiers. Whoa, she was really moving now! She was scared, but the trail looked smooth ahead, albeit steep. Then all at once, she was sinking into the snow. It was as if one moment there was solid ground beneath her skis, and then there wasn't. She realized she had hit a hidden hollow filled with powdery snow. She was now out of control. And inexperienced as she was, she couldn't get back her balance. In a flash she was pinwheeling down the slope. CRACK! Something snapped in her left leg. The pain was the most horrible she'd ever felt. Mercifully, she quickly passed out.

THE AFTERNOON OF THE NEXT DAY, JENNY WAS IN A HOSPITAL ROOM with Aunt Amy at her bedside. After she got into town, Aunt Amy had gone to work trying to figure out what had gone wrong for her niece.

"You ready for the lowdown?" Aunt Amy asked.

"You bet," said Jenny.

"You fell into a small depression in the slope of the mountain. It's part of the natural terrain. Normally, skiers could see it and avoid it, but as chance would have it, blowing snow had filled it in yesterday. It really makes me mad, because in my opinion they should have found this while inspecting the trails and should have marked it off. That's just normal ski trail care and maintenance. But what do I know, I just managed a ski resort after the Olympics and before going to medical school," Aunt Amy said, rolling her eyes.

“Now, your leg,” she continued. “You fractured your tibia, that’s the larger of the two bones of your lower leg. You’ve got a tibial shaft fracture, and that’s actually the most common fracture among skiers – about 63% of ski fractures. Now, I’m quite sure you would not have broken it if your ski bindings had released. The binding is what connects your boot to the ski, and it’s supposed to release in an accident to prevent your leg from being forced in a different direction than your body. Over the past 30 years since they’ve been introduced, releasable bindings have decreased the rate of leg fractures in skiing accidents by 90%. But yours didn’t release. Why not? Because Rodelberg Rentals improperly repaired this one on your left ski, disabling the safety function.” Aunt Amy held the ski up for Jenny to see. “No doubt they did this to save money. Anyone in the industry would regard this as an outrageous and reckless thing to do in terms of ski equipment maintenance.”

“Then, more bad luck for you,” Aunt Amy said, lowering her voice. “Your doctor yesterday, Dr. Delinda Deland. She’s a general practitioner, not a specialist in orthopedics¹ or sports medicine. But regardless, she should have been able to diagnose a broken bone. The quality of medical care up here in Vraka Valley is extremely good – despite it being a small town. Owing to the wealth up here and the amazing skiing, this place attracts highly excellent doctors and has a better minimum level of care than most medium-sized cities. Sadly, Dr. Deland is probably the only doctor in Vraka Valley who wouldn’t have ordered an X-ray for you. You only got one this morning because I demanded it. And since Dr. Deland didn’t know you had a tibial shaft fracture, she gave you the wrong treatment, making things worse and leaving you with additional bruising and tissue damage and a lot of additional, needless pain.”

“Ugh. Well, I’m glad you’re up here to look out for me, Aunt Amy,” Jenny said with a grateful, if beleaguered smile.

“In the meantime, we are still having quality aunt-niece bonding time! I insist! So I got you an early Christmas present,” Aunt Amy said. She pulled a new Nintendo Switch videogame console out of a bag. “And what should we play on it? Well, I selected this.”

Aunt Amy held a new videogame up for Jenny to see. It was *Mt. SteepFace Xtreme Winter Sportz Ultimate Challenge Edition*.

Maybe it was partly the pain killers, but Jenny had never laughed so hard in her life.



FIG. 3: Yodeler’s Yaw. *The trail is considered to be at an “advanced” level, a category above “intermediate.” Most people have many, many days of on-the-slopes experience before they are ready for an advanced trail.*

¹ Orthopedics is a medical specialty concerned with muscles, bones, and joints.

QUESTIONS

Provide analysis for the following. For all questions, **omit any discussion of a claim based on informed consent or medical battery, and omit any discussion of an affirmative defense based on contributory negligence or comparative negligence.**

1. **Discuss prospects for liability of Zum Zucker resort to Jenny for negligence.** In your discussion, you should, of course, treat Ian Irvin's actions as Zum Zucker's.
2. **Discuss prospects for liability of Keung Ko to Jenny for negligence.**
3. **Discuss prospects for liability of Rodelberg Rentals to Jenny 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 Dr. Delina Deland to Jenny for negligence.** Remember, do not discuss claims for informed consent or medical battery. Analyze a regular professional negligence claim only.

Important: **Limit your discussion to the liability of the parties specified for the claims specified.** As one example, you should not be speculating about products liability for the ski bindings. Also important: **Please do not repeat the same analysis from question to question.** Instead, I strongly encourage you to incorporate previously stated analysis by reference. If analysis of an issue is similar to but not exactly the same as what you have written previously, then I suggest you note your prior analysis and go on to discuss any differences. **Note that the questions are not separately weighted; instead, they will be lumped together for assessment.** So divide your time among the questions according to what requires the most discussion and analysis. Plan ahead to put information where it belongs. And correspondingly: **Do not expect that each question calls for an equal share of your time or words.** **Consider that any given question might be appropriately answered with substantial brevity or might require in-depth treatment.**

Some suggested abbreviations for your answer:

Aunt Amy	AA
Dr. Delinda Deland	DD
Jenny Jens	JJ
Keung Ko	KK
Ian Irvin	II
Rodelberg Rentals	RR
Vraka Valley	VV
Yodeler's Yaw	YY
Zum Zucker	ZZ