
FINAL EXAMINATION - ESSAY PORTION

Open book. Three and a half (3.5) hours.

This is the essay portion of the Fall 2020 Torts final exam. For the multiple-choice portion, please go to http://ericejohnson.com/exam_archive/#ccc

The following instructions are included for the use of this exam as practice.

INSTRUCTIONS:

1. You have three and a half hours to complete this essay portion.
2. Your goal is to show your mastery of the material presented in the course and your skills in analyzing legal problems. This is what you will be graded on.
3. Unless otherwise provided, base your legal analysis on the general common law and typical statutory law in the United States, including all rules, procedures, and cases from the course, plus any hypothetical laws presented in the facts.
4. Organization counts. Read all questions before answering any of them - that way you can be sure to put all of your material in the right places.
5. 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. 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.
6. Clarity counts. Clearly label each question separately in your answer. Be aware that there are no points to be won or lost for spelling, grammar, or stylistic aspects of writing - so long as I can understand what you are saying. Feel free to use abbreviations, but only if the meaning is entirely clear.
7. A failure to follow exam requirements and instructions is an academic misconduct issue, and violations will presumptively be treated as such, even if inadvertent.
8. **Use your exam number.** (Your examination identification number, of course, means your examination number for this semester - not one from a prior semester.) Each exam will be "blind graded," so that I will not know the identity of the student as I am grading her or his exam. **You may not waive anonymity. Do not include your name in your exam response, and do not write your name on any exam materials.** Self-identification on the exam or otherwise compromising anonymity will presumptively result in both a deduction from your exam grade and a referral for disciplinary action.

(This cover page was posted in 2021. The remainder of the document is the same the original exam booklet except the page numbers. For the original exam booklet, including the multiple choice questions and the instructions that applied because of pandemic contingencies, see http://www.ericejohnson.com/exam_archive/oth/Eric_E_Johnson_Torts_Final_Exam_2020_Booklet.pdf.)

ESSAY PORTION

Your Kiwi Cousins

THE FIRST SEMESTER OF LAW SCHOOL IS ALMOST OVER. And the pandemic has certainly made things hard for everyone. Or, almost everyone. Not so much for you. That's because you were smart enough to accept an invitation from your cousins to spend the semester in Welland, New Zealand.

Lucky you! Thanks to its isolated island geography and science-based tracking, tracing, and quarantining programs, New Zealand has largely dodged the impact of covid. Plus, it's one of the most beautiful places on earth, and the cost of living is even reasonable. So while most people you know back in the States are having one of the worst years ever, you've spent the last few months safely attending your online law classes before heading out to a nearly normal life of restaurants, bars, and sporting events with your awesomely fun cousins Amaia Akeau, Bodhi Branson, and Cooper Clarke. The hardest part about the arrangement has been the time zone difference (getting up to attend class at 4 a.m.!). But other than that, it's been fantastic. And since New Zealand is a common law jurisdiction like the United States, you're counting on what you've learned in your American law school classes to help you score a part-time paid internship at a New Zealand law firm during the upcoming Southern Hemisphere summer.

On the other hand, after last weekend, you are starting to wonder if things have taken a permanent unlucky turn.

It had originally shaped up to be the best weekend ever. Two friends of the cousins were getting married – on an alpine glacier no less! Bodhi would be a best man. Cooper was officiating. And Amaia was deejaying the reception. You didn't have an official roll to play. But on Friday night you'd be helping Amaia her set up her mobile deejay equipment. Then on Saturday you'd go to the wedding as a guest. After that, on Sunday night, you'd planned to have dinner on a sightseeing trolley with your cousins.

None of it went according to plan.

AMAIA ALREADY OWNED TURNTABLES, a mixing console, and big powered speakers. She also had a decent collection of lights. But for the wedding, Amaia wanted to take the lighting up several notches. She had her eye on a new lighting appliance called the Disco Dazzlemaster. It was a computer-controlled lighting unit consisting of a light-studded globe held by rotating arms that allowed the globe to be spun and twisted in all manner of ways. The whole thing weighed just over 7 kilograms (15 pounds). It looked like glammed-up alien super weapon encrusted with multi-colored jewels – and that was before it was turned on.

On Friday afternoon, you rode in Amaia's pickup truck to Sonorous Sounds, a store in downtown Welland stocked with musical instruments, professional sound system equipment, and deejay lighting. Happily, they had a Disco Dazzlemaster already assembled behind the counter in the showroom. Amaia paid for it and you were off to the reception venue, a winery out in the "wop wops," as Amaia said – Kiwi-speak for *out in the middle of nowhere*.

You and Amaia set up the speakers, equipment table, and lighting truss, and laid-out and taped down all the cabling. Once everything else had been correctly set up, Amaia climbed a ladder and – correctly and securely – attached the Dazzlemaster to the lighting truss. Then she came down and turned on the power to test it. Immediately, the machine sprang to life, twisting and turning while emitting uncountable rays of rainbow luminescence. It was a whirling, gyrating galaxy of joyful light. Standing underneath it, Amaia gazed up in wonder. “It’s the most beautiful thing ever!” she exclaimed.

Then, *SNAP!* The Dazzlemaster’s globe came crashing down from the truss, right where Amaia was standing. It hit the floor with a sickening crack. Looking up, you saw the machine’s arms gyrating emptily. Looking back to Amaia, you saw her face screwed up in agony.

“It hit my arm,” she groaned. “I think I broke it.”

“Yeah, it’s broken for sure,” you responded, “but I think the floor broke the Dazzlemaster more than your arm did.”

“No,” she said wincingly, “I’m saying my arm is broken.” And then you saw it. Her whole forearm was rendered into a new, unnatural shape. You gingerly helped Amaia back to her truck and drove to the nearest hospital. There, doctors reduced (i.e., set) her fracture, put her arm in a cast, and gave her much needed pain medication.

When Cooper arrived at the hospital to check on Amaia, you suggested that he should take up the task of figuring out what had gone wrong – since he was a master’s student in mechanical engineering.

It would be late on Monday when Cooper gave his report.

Based on Cooper’s inspection of the remains of the Dazzlemaster, and based on his conversations with the manager at Sonorous Sounds, Cooper figured out that when the Dazzlemaster was sold to Amaia, it was missing two bolts that were used to bear most of the load where the globe was attached to the arms. One bolt was missing because the employee at Sonorous Sounds, who had assembled the Dazzlemaster from the box before putting it in the showroom, didn’t think the bolt was needed. So he omitted it. The manager thought the other bolt might have been missing because a ne’er-do-well customer named Rhonda Ridgley had, he believed, been going around removing bolts and other parts from products in the showroom. As Cooper relayed this story, you immediately suspected that the manager was trying to deflect blame. How could a customer manage to get back behind the counter to where the Disco Dazzlemaster was and fiddle with it to remove a bolt – all without being stopped by someone? It seemed improbable to you.

As to whether the lack of one bolt was enough to precipitate the collapse or whether it took two missing bolts for the globe to fall, Cooper said that at the present time he couldn’t be sure which was the case.

ON SATURDAY, IT WAS UP INTO THE MOUNTAINS in a caravan of all-wheel-drive vehicles. The destination was Volja Glacier. The two grooms were both outdoorsy guys who craved doing something unique for their wedding – so they dreamed up the plan of getting married on a glacier. To identify a location for the ceremony and to guide the wedding party and guests on the big day, the grooms hired mountaineer

and glacier guide Garm Gjesdal. Garm, who hailed from Norway, had recently earned a glacier guide certification from New Zealand's national mountain guides association. The certification meant that Garm had been trained in the safe guiding of hiking parties on glaciers.

The Volja Glacier is an alpine glacier – one that begins and ends high up in the mountains. It happens to sit on private land owned by Kiwi tycoon Frankie Fuemana. Volja Glacier terminates in a small valley where its snout (i.e., its front end or downhill-most end point) can be viewed from a nearby rocky overlook. This is why Garm picked it as the wedding location. The majority of guests gathered at the overlook to watch, while the grooms, the wedding party, and some intrepid guests – you included – were guided by Garm onto the glacier.

With instructions from the grooms to go as close to the edge of the snout as would be safe – in order to be more visible to guests on the overlook and to make for better pictures – Garm took the group within 3 meters (10 feet) of the edge, where they stood about 10 meters (33 feet) above the gravelly terrain below.

Glaciers are rivers of ice. To human eyes they generally seem to be standing still. But glaciers are always slowly flowing downhill as their icy mass is relentlessly drawn by gravity. Glaciers occur naturally. They start with accumulations of massive amounts of snow in areas where surface temperatures inhibit melting. The snow accumulates until the weight compresses the layers underneath into hard ice, which is often blue in color when viewed close up. The ice then flows at a slow pace – a *glacial* pace – downhill. At the snout, where the glacier ends, pieces break off. If it's a tidewater glacier, which terminates in a body of water, the big broken off pieces become icebergs. On an alpine glacier, like Volja Glacier, the pieces tumble down onto the rock-strewn terrain in front of the glacier where they eventually melt away.

As he was to say later – after the ceremony, when he was blubbering apologetically – Garm really shouldn't have led the group so close to the glacier's edge. He knew from his training that it was unstable and particularly hazardous right near the edge. He also knew, from scouting it out a couple of days beforehand, that there were cracks and crevasses in the area that had since been covered up by a fresh snowfall. Yet he led the group to so close to the edge of the glacier because, he thought, the risk would pay off in making for great photos and great view – and, most importantly, lots of five-star ratings for Garm's glacier guiding service.

The ceremony was lovely. There was, of course, a best-efforts attempt by Cooper, as officiant, to make thoughtful remarks about how a glacier symbolically represents a loving, committed relationship. (Not easy.) That was followed by vows, I-dos, a kiss, and then a sharp crack – followed by a thunderous rumble.

In that first instant, you couldn't understand what was happening. But within a second you realized it: The portion of ice that everyone was standing on was detaching from the glacier. The guests and wedding party went from standing on what felt like solid ground to surfing on a fast moving mass crumbling ice. Within seconds, everyone was sprawled across a terrain of loose rocks and pebbles, surrounded by freshly cleaved chunks of blue ice.

It could have been much worse. No one was overcome or buried by the ice. Instead, everyone unwittingly rode on top of the jumble of ice mass as it collapsed into the valley floor. There was, however, one person who was seriously injured.

Bodhi, the best man, was howling in pain. The reason was plain: His leg was bent at a sickening angle. Bodhi's femur (thigh bone) had broken clean through.

Instantly, dozens of people were jabbing at cell phones and announcing aloud what everyone already knew: No cell phone coverage.

"Garm, do you have a satellite phone?" you asked. "We've got to call for help. I think Bodhi has to be helicoptered out of here to a hospital."

"Unfortunately, I do not," Garm said. "I know I should probably have one. All the other professional glacier guides I know have them. They're not that expensive when you consider how important they would be in an emergency. But to be honest I didn't know how long I would be working here since my temporary work visa expired last month. Yeah, I'm not even allowed to be working in New Zealand! And I know I said we had permission to be here. But we actually don't. This is private land and the owner has no idea we're here. That's why it's so pristine and why there's nothing in eye's view that's not a part of nature. I wanted the wedding to be as beautiful as possible – and then this happens! Now they're going to kick me out of New Zealand for sure!"

"How bizarre," you said with raised eyebrows. Then you turned to your friends. "Let's figure out how to help Bodhi."

As Garm uselessly continued his whimpering, self-loathing confessional, you and other members of the group set about fashioning a splint and a makeshift stretcher so that you could carry Bodhi back to the vehicles. You rode with Bodhi back down the mountain and tried to comfort him. Every bump and jostle on the rough road elicited from Bodhi a fresh squeak of pain.

NEARING THE HOSPITAL, Bodhi began to deteriorate badly. Something was clearly very wrong with him, and you and others in the truck were worried he was going to die. His lips began turning blue, and when the truck pulled up to the emergency department, Bodhi was unconscious. Hospital staff whisked him away and began treating him.

It turned out that Bodhi had suffered a pulmonary embolism – a blood clot that travelled into his lungs, where it began depriving him of oxygen. As a doctor explained, the leg fracture damaged a vein in Bodhi's thigh, which caused the clot to form. It travelled from there to his lungs.

According to doctors, if Garm had been carrying a satellite phone and been able to call for help at the glacier, Bodhi would have been brought by helicopter to the hospital fast enough that treatment would have prevented the occurrence of the pulmonary embolism. As it was, the doctors were able to dissolve the embolism with a tissue plasminogen activator delivered through a tiny catheter that was inserted surgically. All of this happened before Bodhi regained consciousness. As it was, thanks to the quick work of doctors and nurses, Bodhi only sustained minor additional injury due to the pulmonary embolism – mostly some lung tissue damage. Happily, doctors said that in time they expected Bodhi to make a full recovery.

That didn't stop you from being mad at Garm. On your phone, you looked up information on temporary work visas, and you found a government site that said immigration regulations provided that to get a temporary work visa in New Zealand,

visa applicants had to demonstrate good moral character, not pose a security risk, and not threaten New Zealand's international reputation. You showed it to Amaia.

"Hmmm," she said. "I think Garm is exactly the kind of person who's not supposed to be working here."

Later, at the reception, which got off to a late start, Amaia did her best with one working arm to spin some cheerful, danceable music.

THE NEXT DAY, SUNDAY, was when you and your cousins planned to ride the Twickham Trolley Tour around Welland, a city that oozes colonial charm. Granted, it was kind of a touristy thing to do – but it was a touristy thing none of you had done before. And you had coupons. Unfortunately, because of Amaia's and Bodhi's injuries, it was down to you and Cooper.

The Twickham Trolley Tour promised riders a round-trip sightseeing tour of the city on a vintage trolley while being feed a three-course meal. The trip started out great. But then you met your waiter. He was, according to his nametag, Quinn Quigley, hailing from Australia. For reasons you couldn't entirely understand, he seemed to take an instant dislike to you and Cooper.

It started when Quinn scolded you for using the word "champagne" in a way that he considered incorrect for Australian sparkling wine. Then, when you asked about something you didn't understand on the menu, Quinn thought you were making fun of him. When you tried to smooth over the awkward moment with a little joke that you intended to be self-deprecating, it backfired and just made Quinn angrier. Things escalated completely out of control when Quinn came to your table while Cooper was boasting about New Zealand's national rugby team, the All Blacks, calling them the best team ever after their recent 43-5 beat down of the Australian national team, the Wallabies.

"I guess you're an idiot, since the Wallabies won the following week, 24-22," Quinn said.

"I think that's uncalled for, saying I'm an idiot," Cooper responded.

"I only called you an idiot because I thought it would be rude to call you what you actually are, which is a shit-eating maggot," Quinn retorted.

"Whoa, look, I'm sorry mate," Cooper tried to de-escalate. "Me and my cuz are just trying to have a fun night out."

"Maybe I'm in a bad mood because when I come by your table," Quinn said loudly, so the diners all around could hear, "I hear you talking to your friend about how you're planning to cheat on your exams to get certified as a mechanical engineer."

This was totally untrue, by the way. You and Cooper were only talking about how the exams were tough to pass.

"Or more likely," Quinn continued, "I'm in a bad mood because I just got a positive covid test. And the last thing I need is to deal with a nasty garbage-faced customer like you."

Cooper couldn't help but glance down suspiciously at his food.

"Afraid I coughed on your food, eh? Why should I do that when your face is right in front of me." And with that, Quinn leaned in and coughed within inches of Cooper's face. With Cooper backlit by a passing street light, you could see the little

droplets connect with his forehead, eyes, and cheeks. “Now you’re going to be in quarantine for 14 days, you piece of human scum,” Quinn said, “and if I’m lucky, you’ll die.”

Cooper’s eyes went wide with panic. As you happened to know, Cooper has some underlying medical conditions, including diabetes, and he’s been told that he’s at risk for severe complications should he catch covid. You could tell from looking at him that Cooper was in serious distress. He turned to you. “Wow, cuz,” he said quietly with a look of wide-eyed terror. “That may be it. I might die now.”

Then, before anything else could happen, the manager of the Twickham Trolley came over and intervened. He fired Quinn on the spot and ordered him off the trolley. The police were called. Quinn was arrested – which was good. But Cooper was told he was not free to leave either – which was bad. Cooper was immediately escorted back to his apartment where he was told by police that he was legally required to remain in his apartment in quarantine – under penalty of criminal prosecution – because of his potential exposure to the covid virus.

The next day, public health investigators were able to determine that Quinn had never tested positive for covid and was never infectious. On that basis, the police told Cooper he was free to leave his apartment.

A COUPLE OF DAYS LATER, YOU ARE KEEPING BODHI COMPANY as he convalesces at home.

“You should really think about hiring a lawyer and suing,” you say. “Amaia too. And Cooper. I’ve been learning tort law, and I think there are a lot of claims you guys have.”

“Yeah naw,” Bodhi says, using Kiwi-speak for *no thanks*. “Back in the 1970s, New Zealand passed a law creating a government-run no-fault accident compensation scheme, and that ended up legislating away most of what you learned in your American tort course.”

“WHAT!?!” you exclaim incredulously. “You’ve got to be kidding me!! All this time, throughout all of this, all I could think about was who would have a tort claim against whom!!”

“Well cuz,” Bodhi says. “Tell me all about it. I’ve got nothing but time to listen. What would happen under your American tort law?”

ESSAY QUESTIONS

Provide analysis for the following. For all questions: **Omit all discussion of remedies. Omit analysis and discussion of vicarious liability, including respondeat superior. Omit any discussion of affirmative defenses based on the plaintiff's negligence (contributory negligence and comparative negligence) and assumption of risk.** Heed the call of each question and don't provide discussion not asked for.

In your response, please label the portions of your response in correspondence to the questions below. For example, write "1" on a line by itself or "QUESTION 1" to mark your answer to Question 1.

- 1. Discuss prospects for recovery on the part of Amaia against Sonorous Sounds for her broken arm.** Because at this point it is unclear whether it took one missing bolt or two for the globe component to fall, consider both possibilities: Do the alternative views of the facts affect the analysis? And if so, how? Also, because you don't trust Sonorous Sound's allegation that customer Rhonda Ridgley tampered with the Dazzlemaster, consider separately how that allegation, if proven true, would affect the analysis of Amaia's claims against Sonorous Sounds.
- 2. Discuss prospects for recovery on the part of Amaia against Rhonda Ridgley for negligence for Amaia's broken arm, assuming that Rhonda Ridgley really did remove one of the bolts from the Disco Dazzlemaster.** Again, because at this point it is unclear whether it took one missing bolt or two for the globe component to fall, consider both possibilities. Limit your discussion to a claim for negligence and do not discuss other possible claims against Rhonda.
- 3. Discuss prospects for recovery on the part of Bodhi Branson against Garm Gjesdal for Bodhi's broken leg.** Within your discussion, consider whether it matters that Garm's visa had expired.
- 4. Discuss prospects for recovery on the part of Bodhi Branson against Frankie Fuemana, owner of the land where the wedding ceremony took place, for Bodhi's broken leg.**
- 5. Discuss whether Frankie Fuemana could win a trespass to land claim against the grooms.**
- 6. Very briefly, in no more than two or three sentences, opine as to whether Bodhi Branson could win a battery claim against the doctors for the procedure involving the surgically inserted catheter that occurred while Bodhi was unconscious, and give the reasoning for your conclusion.** (I'm not looking for a full going-through-all-the-elements analysis. Start with a yes, no, or maybe, and say why. Keep it concise and cut to the chase.)
- 7. Discuss prospects for recovery on the part of Cooper Clarke against Quinn Quigley for any personal intentional torts and defamation.** Do not discuss privacy torts (including public disclosure, intrusion, and false light), and do not discuss intentional torts against property (i.e., trespass to land, trespass to chattels, conversion).

8. Very briefly, in no more than two or three sentences, would Cooper Clarke have been in the clear to do something to Quinn – like knock him down or push him away – to prevent being coughed on after Quinn said “your face is right in front of me” and started to lean in? Or would that have made Cooper liable in tort?

Important: Limit your discussion to the questions posed. Also: Please do not repeat the exact same analysis when discussing a different party or answering a different 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 you might refer to 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.

Here are some suggested abbreviations for your answer:

AA Amaia Akeau
BB Bodhi Branson
CC Cooper Clarke
DD Disco Dazzlemaster
FF Frankie Fuemana
GG Garm Gjesdal
QQ Quinn Quigley
RR Rhonda Ridgley
SS Sonorous Sounds
TT Twickham Trolley Tour