

FINAL EXAMINATION

TORTS

HOUSE OF RUSSELL

INSTRUCTIONS:

- 1. DEADLINE:** This is a 72-hour examination. You may begin the exam at any time after 6 pm on 6 May 2005. You must submit your answers by 6 pm on Monday, 9 May 2005. **If you turn in your answers after 6 pm on 9 May, then you will receive an F for your spring semester grade. NO EXCUSES.**
- 2. TURNING IN YOUR ANSWERS:** Upload your answers as a single file at the following URL: <http://www.law.du.edu/exam/main.cfm?ID=10> If you have technical problems turning in your answers, please refer to the document titled "Online Exams – General, Technical and Emergency Procedures," which you received along with the exam. If you have additional difficulties, please contact Ms. Paula Jones at pjones@law.du.edu or 303-871-6332. **Do NOT contact Professor Russell with exam-related difficulties.**
- 3. OPEN-BOOK:** This is an open-book, take-home examination. Your answer must be of your own composition. You may work on this examination wherever you wish, and you may consult any written material that you wish. However, you violate the Honor Code if you discuss, show, or distribute this examination or your answers to anyone at all before 6 pm on Monday, 9 May. Once the exam starts, you may not discuss it with anyone at all before the examination ends at 6 pm on 9 May 2005.
- 4. EXAM NUMBER:** Please put your exam number on each page. The easiest way to do this is to put the exam number in a header on each page. **Do not put your name anywhere on the exam.**
- 5. LENGTH:** This examination consists of one question. You may use no more than 2,500 words to answer the question. Reducing your answers to this word limit will be one of the challenges of this examination.
- 6. SPACING:** Please try to double-space your answers. Avoid miniature fonts, okay?

7. **HOW TO ANSWER:** In answering, use judgment and common sense. Be organized. Emphasize the issues that are most important. **Do not spend too much time on easy or trivial issues at the expense of harder ones.** If you do not know relevant facts or relevant legal doctrine, indicate what you do not know and why you need to know it. You must connect your knowledge of law with the facts before you. **Avoid wasting time with lengthy and abstract summaries of general legal doctrine.** Discuss all plausible lines of analysis. Do not ignore lines of analysis simply because you think that a court would resolve an ambiguous question one way rather than another.

8. **JURISDICTION:** Each of the injuries that form the foundation of the exam questions takes place in Newstate, the 51st state of the union. Newstate is NOT Colorado.

9. **CONCISION:** Quality, not quantity is desired. Think through your answer before you begin to write. You have a lot of time to write and edit your answers. Concision will win you points. Good organization will win you points as well.

10. **YOURS TO KEEP:** You may keep your copy of the exam.

11. **CHEATING:** If, in preparing for this examination you have violated the Honor Code, or if, during this examination, you violate the Honor Code, the best course of action is for you to report to the Dean of Students immediately after this examination ends.

12. **GOOD LUCK:** Good luck and have an excellent summer.

The Shores of Rock Lake

Paula Pender was just fifteen years old at the time of the injury. She was injured on 10 January 2004. Now, Paula is getting ready to graduate from high school in two weeks.

Paula smashed 4 vertebrae in her lower back when she hit the rock. When she regained consciousness, she was lying face down on the ice of Rock Lake. Her legs were numb, and she was not able to stand. Fortunately, some of the Good Church Youth Group staff had first aid training, and the Youth Group staff members had sense enough to go to the Camp swimming pool for a rescue backboard when they saw that Paula was injured. Paula remembers feeling very cold and frightened as she lay face down on the ice awaiting their return with the backboard.

Despite the injury, Paula has been able to complete high school along with her classmates, although doing so required that she attend summer school between her junior and senior years. She attends the Newstate Magnet School for the Arts. She's an accomplished singer and, before the accident, was a fine dancer. The accident interrupted Paula's voice training as a mezzo soprano, and she no longer dances. Paula is able to walk, although her diminished gait resembles a shuffle more than the confident stride of a 17-year-old young woman. During her senior year, Paula continued with her voice/singing training, and she began taking acting classes. She feels that although she can no longer dance, she can still act. She still plans to be a film star. Since the accident, she has gained weight—some of this weight gain has been the normal growth of a teenager, but Paula definitely looks a bit huskier than she did before the injury. She is not able to exercise as much as she did before the injury, and she thinks that she is fat.

Northwestern University, in Evanston, Illinois, has accepted Paula Pender as a freshman in next year's entering class. Among Northwestern's many strengths is its School of Drama, which graduated a number of successful actors and singers, including Ann Margret, Charlton Heston, Sherrill Milnes, and Garry Marshall. Paula plans to continue singing and acting as an undergraduate at Northwestern.

Paula's parents have not sought to recover any compensation for Paula's injuries before now. They have not done so for a couple of reasons. An important reason for not seeking the help of lawyers is that they did not want to have to sue a church—this just did not seem right. They also have believed that a waiver that they signed in advance of Paula's visit with the Good Church Youth Group precluded them from suing. As well, they have thought that their insurance would be adequate to cover Paula's treatment and care. Now, though, it turns out the Penders are on the brink of bankruptcy.

Paula and her parents are members of The Good Church. Over the years, Paula has participated occasionally as part of the church's Youth Group. The Good Church Youth Group focuses on both religious training and social or recreational activities. The Good Church's Pastor, Rev. Don Divine, oversees the Youth Group's religious

instruction. Typically, other employees of The Good Church organize the recreational and social activities.

For the weekend of 9-11 January 2004, Pastor Divine planned a weekend retreat for Youth Group at Mountaintop Camp. Mountaintop Camp is a privately owned commercial enterprise that has cabins, a lodge, and recreational facilities including an indoor swimming pool, horseback riding, mountain biking, hiking, ice-skating, ATV-riding, and also tubing. Pastor Divine paid Mountaintop Camp \$3,000 for the use of several cabins and the other facilities of Mountaintop Camp. Paula paid a \$300 fee to attend the camp that weekend, and before going her mother signed a permission slip, a blank copy of which is at the end of this document. When she signed the slip, Paula's mother thought that her daughter would be studying the bible, hiking, and perhaps swimming that weekend.

At Mountaintop Camp, the ice-skating and also the tubing take place on Rock Lake when the lake is frozen. Rock Lake is an oblong lake that is about 200 hundred yards long and about 75 yards wide. The lake gets its name from a rock that protrudes above the surface of the water. The rock is about 25 yards from shore, roughly 100 hundred yards from both ends of the lake. The rock extends 6 feet above the surface of the water and is 3 feet wide at its base. On the day of Paula's injury, the lake was frozen solid and the rock extended above the ice just as it did when the water was not frozen.

Four inches of fresh snow had fallen on Friday, 9 January 2004. Using a pickup truck mounted with a snowplow, the Mountain Top Camp staff had cleared the snow from the lake in order to allow for both ice-skating and tubing. The snowplow was not nearly as effective as a Zamboni machine might have been, so it was rare that guests at the Camp actually ice-skated. But, on Saturday morning, Paula decided to try out the tubing after some cajoling from other members of the youth group and from the Church Staff member who would drive the ATV that pulled the tube.

Here's how tubing worked: the ATV, which is a gasoline-driven vehicle that resembles a four-wheeled motorcycle with thick, fat tires, was outfitted by its manufacturer with a tow ring on the back of the ATV. To this tow ring, the Church's Employee, Billy, attached a 15 foot rope on the end of which was an inflated inner tube from a truck. Billy then drove the ATV around the ice in an oblong or oval pattern parallel to Rock Lake's shores. The passenger lay in the inner tube and was towed along by the ATV. The effect was something like water skiing, except that when tubing, the passenger had no control over the path of the tube. At speeds of from 5-20 miles per hour depending on the passenger, Billy would tow the tube around the lake. Near the lodge, Billy passed through what he called the "Chute," which was the 25 yard gap between the shore and the rock that gave Rock Lake its name.

Unfortunately, Paula never made it through the Chute. She was a little bit afraid to try tubing, but Billy and her friends encouraged her enough to overcome her reluctance. She climbed aboard the tube, told Billy to keep it slow, and Billy started the

ATV and went down the ice. At first he went slowly. They followed the track on the icy surface of the lake and successfully rounded the southern end of the lake. As they went through the turn at the southern end of the oval, Paula was a bit frightened but also excited. Billy accelerated a bit down the long straightaway between the ends of the lake. He slowed a bit before reaching the northern of the lake. Billy swung her through the turn, and she started to enjoy herself. “This is more fun than a rollercoaster,” she thought to herself. Billy then accelerated into the next straightaway—the one that includes the Chute. This is where something went horribly wrong.

Since the accident, Paula has been wondering whether Billy was trying to scare her. She remembers that her tube swung inward toward the rock, but she can't be sure whether a patch of snow on the ice deflected the tube or whether Billy steered the ATV in such a way as to swing the inner tube toward the rock. She thinks she remembers him laughing, but she's not sure. The last thing that she remembers is feeling very frightened as she saw the rock approaching her. She noticed a sparkling line of minerals in the rock just about an inch above the ice. The next thing she knew, she woke up on the ice, feeling cold, and her legs numb.

Paula's Youth Group friends watched in horror as the tube and then her body hit the rock. They saw her leg hit first and then her back, and they all remember the sickening thud that they heard as her body hit the rock and the inner tube bounced free from the rock and from the ATV. The tube slid all the way to the far end of the lake. Billy stopped the ATV within 50 yards, and he ran back to help. It was Billy who drove his ATV to the indoor swimming pool in order to retrieve the backboard onto which they strapped Paula as they waited for the ambulance to arrive. Paula's parents rushed to the hospital to see the injured daughter, and they arrive one-half hour after the ambulance.

Two days after the injury, neurosurgeons performed surgery on Paula's back. They fused the damaged vertebrae together, so that her lower back no longer bends. After a month in the hospital and another two months in a rehabilitation center, Paula was able to walk again. She sang a few songs at the Rehab Center's spring festival. For several months, the doctors held out hope that her bowel and bladder function would return, but to date, Paula still has no bowel or bladder control. The total cost of her hospitalization and treatment so far has been \$300,000, of which amount her father's health insurance has paid \$250,000. The remaining \$50,000 is the responsibility of Mr. and Mrs. Pender, according to the insurer, and the Penders think that they'll need to declare bankruptcy because they cannot see how they can pay that amount of money.

Without success, Billy has tried to approach Mrs. Pender to tell her how sorry he is. Mrs. Pender blames Billy, which Billy thinks is unfair. After the accident, Billy discovered that the tow ring that tethered the tube to the ATV had broken. Billy has explained to everyone who will listen that the tow ring broke and the rope detached, which caused Paula and tube to crash into the rock on that fateful day. Paula, who has heard this story, is not so sure.

The Good Church

Permission Slip

(Name) _____ has my permission to go to
(Destination) _____ on the following dates
(Date) _____ leaving and arriving at
(Departure Time) _____ (Arrival Time) _____

Person to contact in case of emergency _____
Number to call in case of emergency _____

Please list any medical or physical needs that could arise with your child during the times indicated.

Medical needs _____

Are there any more details that the workers should know about your child concerning the above event?

Comments _____

The undersigned recognizes that injuries sometimes occur in connection with church activities and hereby exonerates The Good Church, its employees, board members and volunteers for any liabilities in connection therewith. The Good Church does not provide individual accidental insurance.

In the event of an injury, medical treatment will be administered through the local emergency units and dispatched to the nearest hospital or medical facility. If other instructions are necessary, please advise accordingly.

Parent or Legal Guardian

(Relation to Child)

YOUR JOB:

Paula's parents have approached this firm to ask whether they should consider suing. Your job is to assess the situation and write a memo for the managing partner describing how this firm might help the Penders with some sort of personal injury claim. Assess the case completely, including any pitfalls that the Penders might face. Be sure to indicate additional investigation that we need to do.

Keep it brief, too. Remember that the managing partner never reads beyond 2,500 words. Your assignment is due by 6 pm on Monday.

END OF EXAM

Russell_Torts

#1494

To: Personal Injury Zen Guru

From: Padwan Learner

RE: Paula Pender's Personal Injury Claim

I have outlined below the possible claims and defenses relating to each possible defendant.

Right off the bat, we must find out 51st's Statute of Limitations (SOL) for Negligent and Intentional Torts. As Paula was only 15 when the accident happened, the SOL will be tolled until the age of majority in 51st. She is 17 years old now, so if in 51st it is 16, and the SOL is only 1 year, no claim can be filed, but if the SOL is 2 years, we need to hurry and file before she turns 18.

We also need to see if 51st is a contributory negligence state or has some comparative fault scheme, and how 51st blends Joint & Several Liability or any Uniform Contribution Among Tort Feasers Act with the comparative fault scheme. This will affect the distribution of fault among the various defendants, but Paula does not seem to have contributed to the accident in anyway.

Insolvency may become a problem with many of the defendants, including The Good Church (TGC), the Mountaintop Camp (MTCamp), and Billy, but should not affect the manufacturer of the ATV (although the Retailer who sold the ATV might also become insolvent if all the dominoes fall).

It is also important to find out if there is a Recreational Land Use Statute that protects landowners, which could be a knife to the heart of our claim against MTCamp.

A quick note on possible causes of the accident: The rope was not hooked properly, the ring on the ATV broke, Billy drove too fast and too close to the rock, Billy tried to steer the tube towards the rock to scare Paula, or an ice chunk caused the tube to veer into the rock.

Paula's injuries can be found in the Damages portion for all of the claims at the end.

Billy

Assets may include: Personal money, Home-Owners Policy, Autopolicy (transfers to ATV he drove), along with assets of TGC who is Vicariously Liable as Billy's employer & MTCamp who is Vicariously Liable as the Bailor of the ATV.

Negligence of Billy's ATV driving

Billy was negligent in: Hooking up the rope, speeding, driving recklessly—trying to swing Paula towards the rock, not properly inspecting the ATV before use.

Duty: Act Reasonably under the circumstances.

Standard of Care (S/C): That of a Reasonably Prudent Person, plus maybe a slightly heightened standard if he is in a position of trust, as a Church Youth Leader mentoring teens, engaging in a dangerous activity.

Breach: Billy either did not hook the rope properly, drove the ATV too fast (+20mph), and/or drove recklessly, steering the tube too close to the rock. It took Billy 50 yards (150 feet of the 200 foot lake) to stop and the tube ended up all the way on the other side of the lake!)

Cause in Fact: But-for Billy's negligent operation of the ATV, Paula wouldn't have hit the rock causing the injuries.

Proximate Cause: The only superseding causes could be the ring breaking and releasing the rope, and a bump in the ice deflecting the tube towards the rock, but Billy would have to mitigate this while driving anyway.

Negligent/Intentional Torts of Battery, Assault, and Emotional Distress

These traditionally intentional torts may be argued as negligent torts if the defendant's assets are minimal and the insurance is likely to pay.

Prima Facie Negligent Argument for Torts Formerly Known as Intentional

Duty: Be Reasonable—*Don't over thrill.*

Standard of Care: Reasonably Prudent Person—*Thrill, not kill.*

Breach: Billy was unreasonably trying to scare Paula, and aimed her at the rock negligently—*Billy over killed the thrill.*

Alternative Intentional Torts

Emotional Distress: Standard: *Extreme or outrageous conduct of Defendant intentionally or recklessly causes severe mental distress.*

Billy tried to scare Paula, laughing, and intentionally and recklessly drove the ATV at an extreme speed of over 20 mph on bumpy ice, close to the rock causing Paula's fear of injury and death as she watched the rock crystals crystallize as she pummeled towards them.

Assault: Standard: *Defendant's acts intentionally caused Paula's reasonable apprehension of immediate harm.*

Billy's intentional speeding and aiming the tube at the rock, caused Paula to apprehend that she would hit the rock within moments and be harmed.

Battery: *Defendant causes an intentional touching that's harmful or offensive.*

Billy intentionally aimed the tube towards the rock causing Paula to hit the rock and be injured.

Cause in Fact: But-for Billy's intentional or negligent actions, Paula would not have suffered the fear of death, fear of harm, and actual harm.

Proximate Cause: no superseding cause, unless the ATV's ring broke.

Defenses

Intentional Tort Defenses

Consent: Paula consented to going on the tube, but only at a slow speed.

Invalidation of Consent: Paula's age, 15, might invalidate the consent.

Negligence Defenses

Express Assumption of Risk (knife to the heart): Paula's mom signed TGC's Permission Slip, but it should not be enforced because it is too broad. Paula did not assume the specific risk of ATV tubing on frozen ponds dodging 54 cubic feet of rock at 20+mph at close range. Paula's

mom thought the risks would include Bible Study, hiking, and at the extreme, swimming—not high-speed pond dodge ball—“*if you can dodge a 6’ Rock, you can dodge a ball.*”

Implied Primary Assumption of Risk (knife to heart if inherent risk): Paula volunteered and knowingly assumed the risk of tubing on site, seeing the rock. However, Paula consented only to going slow and maybe getting bumps and bruises, not hitting the rock at 20+mph. This is not the normal inherent risk of tubing and is outside the bounds covered by her implied consent. Also, Billy’s actions could be characterized as willful and wonton, but that may evaporate insurance money.

Recreational Land Use Statute: If not Billy, the Landowners, MTCamp might find shelter under a Rec-Statute. However, comparing the ATV activity to a ski resort, the ATV might require the highest standard of care similar to the operation of a ski lift, and again the inherent risks of tubing is not body checking boulders at 20+mph. Additionally, Billy’s negligence would still be actionable, providing insurance is available.

The Good Church (TGC)

Assets available: Church Assets, Church Liability/”homeowners” policy, Autopolicy.

Defenses: Per above, Express Assumption of Risk, Implied Secondary Assumption of Risk, Billy’s willful and wanton behavior.

Vicarious Liability for Employee's action: TGC VL for Billy's negligence unless he acted outside his scope of employment or acted willful and wantonly.

TGC's negligence in sponsoring ATV-Tubing—an extremely dangerous sport

Duty: Be reasonable.

S/C: Reasonably Prudent Church plans reasonable and safe youth activities.

Breach: ATV-tubing is an unreasonable and unsafe activity for a youth retreat (unless in Michigan or Minnesota!).

Causation: But-for the unreasonable/negligent activity taking place, Paula would not be hurt

Proximate Cause: If Billy acted wantonly or the ring broke, it would be an intervening cause.

Negligent Entrustment of Billy as ATV driver

Duty: Be reasonable when entrusting a risky activity to an employee.

S/C: Reasonably Prudent Church would not entrust to unreasonable employee.

Breach: TGC unreasonably entrusted the ATV to a verified speed demon, who increased his speed and aimed at the rock to scare Paula. (Look into prior similar behavior).

Causation: But-for TGC negligently entrusting Billy to drive the ATV, Paula would not have hit the rock and would not be injured.

Proximate Cause: Billy acted wantonly or the ATV ring broke.

Mountaintop Camp (MTCamp) (MTC)

Assets available: Camp Assets, Business Liability/Premises Insurance, Auto insurance for ATV

Defenses: Per above, a Recreational Statute, but probably not the Express Assumption of Risk as it did not name them, perhaps the Implied Secondary Assumption of Risk..

Vicariously Liable as Bailor of ATV for Bailee's negligent operation of ATV:

Standard: 1) Injury 2) Arising out of operation of vehicle 3) negligence 4) permission to use vehicle.

Paula's injuries arose out of the negligent operation of MTCamp's ATV, and TGC had MTC's permission to use the ATV.

Landowner Duties: Fight over Invitee v. Licensee

Invitee: Paula wants MTCamp to have the duty of an Invitee as it is more stringent. TGC paid \$3,000, and Paula \$300 to MTCamp, a commercial business, to stay and play at the camp-this should be enough to characterize Paula as an invitee and not a licensee or social guest.

Invitee Duty: MTC has duty to inspect and warn of dangers that it knows of or reasonably should have known unless they are open and obvious.

S/C: Inspect the ice for large chunks that could cause an accident & warn of reducing speeds around the rock, as ATV tubing was surely a frequent and "known" activity at MTCamp and hitting the rock is a known and foreseeable danger.

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Breach: MTC failed to inspect the ice for deflective chunks or warn about reducing speeds around the rock.

Causation/Proximate Cause: But-for the breach in inspecting and warning, Paula would not be injured, unless the ring broke.

Licensee: MTC will try to downplay their duty to that of Licensee as it requires only warning about known dangers created by MTC, and *not inspecting* and *warning* about dangers that they *should have known* and *did not create*. They will try to say Paula was a social guest.

Licensee Duty: Warn about known dangers created by landowner.

S/C: Warn of hidden dangers such as ice chunks that the snow might be covering that could cause tube to veer into rock.

Breach: MTC did not warn of the ice chunks hidden under the snow; however they would not have to inspect or warn of dangers that they should have known about.

Causation/Proximate Cause: But-for the breach in warning of the known danger of ice chunks, Paul would be o.k., unless the ring broke.

Vicariously Liable for Employee's Negligence in maintaining and inspecting the ATV.

Duty: Be careful

S/C: Reasonably Prudent Mechanic inspect ATV and Ring.

Breach: MTCamp did not inspect the ATV's ring for possible failure.

Cause in Fact: If the ATV ring broke and fatigue was visible, But-for the failure to inspect, Paula would still walk normally.

Proximate Cause: Billy's excessive speed and maneuvering may be an intervening cause.

ATV Manufacturer, Retailer, (+ Ring Manufacturer) (if the ATV ring broke)

Assets Available: Money, Money, Money!! Lots of money and insurance too! (though the Retailer could become insolvent if small or under insured).

Defenses: Affirmative Defense: Contributory Negligence/Comparative fault of Billy's excessive speeding and dangerous maneuvering created contributing excessive forces that broke the ring.

Privity: Check if 51st follows old privity doctrine, however if follows 3rd Restatement, no privity is required to sue the manufacturer who is subject to liability for persons harmed by the defect.

Claims against Manufacturer/Retailer/and pre-Manufacturers

Warranty (Contract Claim): breach of express, implied, and merchantability, etc.

Misrepresentation: If the Manufacturer or Retailer said the ATV (& ring) was "tough enough to pull a tree out of the ground"

Negligence:

Duty: Manufacturer must manufacture products that are reasonably safe to users.

S/C: Manufacturer should manufacture for foreseeable uses such as pulling something or even someone.

Alternative Consumer Expectation test: A product should conform to the reasonable expectations of consumers as to the products abilities and uses.

Breach: The ring broke while hauling a 15 year old girl (a mere 110 lbs); this is unreasonable.

Cause in Fact: But-for the ATV ring breaking, the tube would not have slid into the rock injuring Paula.

Proximate cause: But-for the intervening cause of Billy's negligent driving at excessive speeds and forces, the ring would not have broke.

Strict Liability for Products Liability: Imputes knowledge of the defect to seller/manufacturer.

Strict Liability Theories: It broke and caused harm, so you're liable.

Defects: A Defect is something unreasonably dangerous to the user

Manufacturing Defect: Manufacture in conformity to specifications; this ATV ring was not within specifications and broke too easily

Design Defect: The ATV ring was poorly designed and should have easily hauled the foreseeable weight of such a light load without breaking.

Warning Defect: The ATV ring should have had an adequate warning denoting the maximum weight it could haul and type of load, if it was going to break so easily.

Cause in Fact: But-for the manufacturing defect/design defect, the ATV ring would not have broken, and Paula would not have slid into the rock, breaking her back. If a warning was

present, the ring would not have been used to haul people; therefore, But-for the lack of warning, the ATV ring would not have been used for an unfit purpose, assuming 110 lbs is too heavy.

Proximate Cause: Possibly, But-for the intervening cause of Billy's negligent driving at excessive speeds and forces, the ring would not have broke.

Injuries & Damages

Paula's Injuries:

Loss of ability to bend lower back: Paula suffered four broken vertebrates, which had to be fused and she can no longer bend at the back.

Loss of Bladder and Bowel Control: Paula has not regained use of her bowels and bladder and must suffer this at 17 years old for the rest of her life.

Loss of Ability to Walk/Run/Dance: Now Paula can only shuffle with her reduced gait.

Damages

Special Damages: Pecuniary damages, Receipts, medical bills, etc..

Medical Bills: \$300,000 in past bills plus future surgeries, bladder infections, and medical expenses \$100,000.

Wages: \$\$Millions

Past Lost wages: for summer spent in Summer School instead of working, along with any additional cost of summer school.

Future reduction in wages: Paula will never be a dancer (Earnings probably low). However, Paula's high paying Movie Star career is unlikely now, as she cannot walk properly or run, and if she did land a role, Paula would be confined to lesser roles, which would pay less. Delay of financial rewards from Paula's setback from lost time training as Mezzo Soprano (Loss increase in wage for period of delayed training)

General Damages: Pain and suffering, emotional distress, loss of enjoyment of life.

Emotional Distress: Paula suffered from the fear of hitting the rock as she saw it approaching, she awoke face down on the ice, unable to move, panicked, cold, afraid, and numb.

Pain and Suffering: Paula spent 1 month in the hospital and 2 months in painful rehab. She has gained weight and is huskier than before, as she can't exercise as well; this is a physical ailment and a psychological distress for a 17 year old high schooler.

Hedonic/Loss of Enjoyment of Life: Paula has lost much function in her legs, can't bend her lower back, and can't control her bowels. The pain from her lack of bowel movement and embarrassing loss of bladder control weighs heavily on Paula's psyche. Paula can no longer dance, which she loved and was good at. She lost time singing and can never run or walk normal again. She can't exercise like she used to and the poor 17 year old at the pinnacle of her youth cannot leap for joy, but merely shuffles along. Suffering through a summer of summer school!

☺

Russell_Torts

To: Senior Partner Russell

Fr: **Associate 552**

Re: Personal injury claims for Paula Pender

Overview

This memo identifies eight potential causes of action Paula Pender could bring arising from the injuries she suffered in a tubing accident in January 2004. They include:

- Suing Billy and Good Church in negligence;
- Suing Mountaintop Camp in negligence;
- Suing the ATV manufacture in strict products liability;
- Suing the ATV manufacture in negligence;
- Suing the ATV manufacture under a warranty claim;
- Suing Paula's doctors for medical malpractice;
- Suing Billy and Good Church under Negligence Per Se; and
- Suing Billy for assault

This memo will analyze each in turn, including likely defenses. I will also highlight topics for additional research.

Billy and Good Church

We could bring an action against Billy, and, via vicarious liability, Good Church, for Billy's negligence driving the ATV. Billy is an employee of the church so under respondeat superior they are liable for his negligent actions. The vicarious liability element is critical as it is unlikely Billy has any money to fund an award. The church, on the other hand, is undoubtedly insured.

Duty - Under the *Heaven v. Pender* standard of when active, be careful, Billy owed a duty of care to Paula. He was obviously active the day of the accident – he encouraged her to go tubing and he was driving the ATV when the crash occurred.

Standard of Care - The standard Billy owed Paula was to be reasonable under the circumstances. In other words, act as the “man who takes his magazines at home and mows the lawn in his shirtsleeves.” The standard for driving a vehicle on ice with a person in tow is to drive slowly and safely enough so as to not lose control of the ATV or cause the person to fall off or crash.

We do not know how old Billy is but even if he is under eighteen, the standard of care would still be that of a reasonably prudent person since he was engaging in an adult activity when he was driving the ATV.

Breach of the Standard of Care - A reasonably prudent person would have driven the ATV safely so as not to crash and cause injury. Paula asked him to drive slowly but he picked up speed as he rounded the northern end of the lake as he was approaching the 25 yard wide “Chute” between the protruding rock and the shore.

It may be useful to determine Billy’s approximate speed by finding out how fast he would have had to been going for the tube to slide all the way to the far end of the lake from the point of the crash.

Cause in Fact - But for Billy's breach of the standard of care, namely driving too fast for the conditions or in an unsafe manner, the crash would not have occurred.

Proximate Cause - Paula's injury was clearly connected to the tortious act. Her injuries were not at all attenuated from the crash. Without the crash, Paula would not have been injured.

Compensatory Damages

Specials - Paula's injuries were significant, including four smashed vertebrae. She could sue for past medical expenses including her month long hospital stay, the two month rehabilitation stay, the back surgery, the follow up care she has received, any prescriptions she has needed, transportation to the hospital, additional doctor appointments, and any other medical expenses she has incurred as a result of the accident.

She can also hope to recover for future medical expenses such as on-going rehabilitation, future doctor and therapy visits and hospital stays connected to her loss of bladder and bowel functions, prescriptions, and transportation to appointments.

We would also ask for loss of future earnings since she can no longer dance and she had hoped to pursue that as part of her career. The other side will resist this contention and argue there is no evidence she would have ever succeeded in making a living dancing.

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Her medical expenses total \$300,000 to date. Her father's medical insurance has paid \$250,000.

We would request the \$300,000 paid out to date, plus the cost of the future medicals outlined above and the pain and suffering and hedonic loss described below. It is likely her father's health insurance will attempt to subrogate for the \$250,000 they have paid. We will need to make sure that Paula is "made whole" before the insurance company subrogates.

Generals - Paula experienced pain and suffering as a result of the accident. She shuffles around school now and can no longer walk with a normal gait. She has gained weight and lost the confidence of her youth. She is emotionally harmed. In addition, she does not have control of her bowel and bladder functions, an obvious source of suffering.

We would also pursue recovery under loss of enjoyment of life or hedonic loss. It is unclear if Newstate awards hedonic damages separately from pain and suffering but given that dancing was one of her great joys in life and that she can no longer dance, we will ask for compensation for this loss.

Defenses – Billy and Good Church will rely heavily on the waiver Paula's parents signed before the trip. They will point to the waiver as an express assumption of the risk for all activities that weekend. If they succeed with this defense it would be a knife to the heart of our case that would destroy our duty argument.

We will argue that 1) the tubing was not a "church activity" because the Pender's did not have any knowledge that the weekend would include tubing, and 2) the waiver is overbroad and can

not be construed to cover every possible risk someone could face while on the retreat.

Specifically, the waiver is overbroad because Paula and her parents did not know all of the actual risks the weekend would hold. They can not contract away all of their rights connected to the weekend if they don't know what the risks are.

The church will also argue that there was an implied assumption of the risk when Paula got on the tube. In other words, tubing is dangerous and Paula knew that when she voluntarily decided to do it. Further, organizers of recreational activities do not have a duty to warn participants of the inherent risks of the activity.

We will counter that while there are inherent risks in tubing, smashing into a rock is not one of them. It could be expected that Paula might fall off the tube and get banged up or even break a bone, but not crush four vertebrae after being hurtled into a massive rock outcropping.

Mountaintop Camp

Duty - Paula was an invitee to the camp. Pastor Devine paid Mountaintop for the use of the camp and Paula paid the church to attend the weekend. This business relationship affords Paula the highest level of protection vis-à-vis the camp's duty to her.

As an invitee, the camp had an affirmative duty to inspect the property and fix any dangerous conditions that they knew or should have known about. A camp employee cleared the snow from the lake. The camp knew the lake was used for ice-skating and tubing. The camp had a

duty to make sure the snow was sufficiently cleared for safe ice skating or tubing. Paula believes she may have hit a patch of snow that caused the accident.

The camp breached the standard of care when they did not meet their duty to Paula.

Causation – But for the camp breaching its duty to look for and clear hazards on the property, namely the excess snow on the lake, the accident would not have happened.

The analysis for proximate cause and damages are the same as above. It is likely that the camp is insured and would be able to pay out on any damage award.

Defenses - The camp will argue the rock was an open and obvious danger which defeats any duty they had to Paula. We will argue that while the rock was obvious it was not an open and obvious danger in terms of tubing. The Chute was 25 yards wide and the rock was avoidable while tubing.

We will need to research whether or not Newstate has a recreational use statute which could lower the duty status the camp owes to Paula.

ATV Manufacturer – Product Liability

Strict Liability - Billy claims the tow ring broke, causing the accident. If this is true, we could sue in strict liability. Under the 402A standard we would argue the manufacturer put a defective product that was unreasonably dangerous into the stream of commerce. To prove it was

unreasonably dangerous we would need to show that the average consumer would not expect that a tow ring would break when towing a fifteen year-old of average weight on an inner tube on ice. Given that ATV's are often used to tow much heavier objects, such as branches or tree trunks on uncertain terrain, it is easy to imagine us prevailing on the unreasonably dangerous argument.

The ring was defective due to either mis-manufacturing, mis-design, or lack of a suitable warning. Our best argument may be that this particular ring had a manufacturer's defect. We should also investigate whether the ring breaking is part of a larger pattern of this ATV's tow ring failing, which would indicate a design defect. In the unlikely event the ring was not designed to tow Paula's weight, we would want to know if there was an effective warning telling consumers not to use the ring for that purpose.

Assuming we prevail in the unreasonably dangerous argument, we would not need to prove duty, standard of care, or breach. We would still need to prove causation, proximate cause and damages.

For causation, but for the defect the accident would not have occurred. Moreover, it was foreseeable that a tow ring failing would result in the towed cargo, in this case a person, careening out of control and getting damaged.

The analysis for the remaining two categories, proximate cause and damages, is the same and we could assume the ATV manufacturer has deep pockets to fund a damage award.

Negligence – If we did not prevail on the 402A strict liability test, we could still prevail in a negligence action.

Duty – The manufacturer was active and had a duty when they sold the product, in this case a product that could easily be dangerous.

Standard of care – The court will balance the likelihood of the product causing an injury and the seriousness of that injury if it occurs against the burden of taking precautions to prevent the risk. The risk of serious injury is high if a tow ring fails. Even if it is not towing a person, the object in tow would break free and could easily cause serious damage or injuries. The burden of producing a ring that does not fail under ordinary use is very low. Dozens of ATVs and other vehicles are equipped with tow rings that are not prone to failure.

Breach of the standard – By not properly balancing the risk and seriousness of injury against the burden of prevention, the manufacturer breached.

Causation, proximate cause and damages are the same as above.

Warranty – An additional products liability cause of action to investigate is breach of warranty. There is an implied warranty of merchantability with the sale of goods. The threshold question is whether or not the product was unreasonably dangerous, as discussed above. If it was, then it was not merchantable and the warranty was breached. We will need to investigate whether there was an express warranty as well.

Defenses – The manufacturer will argue the ATV was not meant to tow people tubing on a frozen lake. They will argue this use goes beyond likely consumer misuse and that the manufacturer could not have anticipated this use. If this defense was successful, it would defeat

our products liability claims. Through research, I believe we will be able to show that it is not out of the ordinary for ATVs to be used to tow people for tubing and other activities.

Paula's doctors for medical malpractice

From the information we have, Paula's doctors had hoped that she would recover bowel and bladder functions. It may be the case that she has not recovered them because the doctors botched that portion of the procedure.

We would need to hire an expert to determine if her doctors did not conform to the standard of care ordinarily possessed and exercised by doctors in the applicable field.

This may well be a hard claim to bring as her injuries were extensive and the defense would only need to prove their care was within the custom and met a minimal level of competence. Any damages would be limited her loss of the functions and not to the entirety of her accident-related injuries.

Billy and the church in Negligence Per Se

In addition to the negligence claim against Billy and Good Church, we will investigate whether or not there is a statute prohibiting driving on frozen bodies of water. If there is, whether we can bring an action in NPS will depend on what type of harm the statute is intended to protect against. It may be that the statute, if it exists, is designed to protect people from drowning and not from other accidents associated with driving on ice.

Billy for assault

Paula knew she was about to hit the rock and she suspects that Billy intentionally scared her into thinking that. If Billy did intentionally scare her, he would be guilty of assault.

However, it is almost certain the SOL has expired on this action as the limit is typically one year for an intentional tort. Additionally, Paula would have a proof problem with the assault claim as it would be “she said, he said” whether or not Billy intentionally scared her. Even if she were able to bring a successful assault claim, she would not recover any money for it without insurance coverage.

Additional thoughts

We need to investigate the statute of limitations. It appears that the accident occurred nearly two and a half ago years ago so we need to find out if any of these contemplated actions are time barred. Regardless of the SOL, any actions will need to be filed before Paula turns eighteen as her suit would likely be barred once she is no longer a minor.

If our investigation turned up evidence that Billy had a bad driving record when the church hired him, we could bring a negligent entrustment case against the church.

Conclusion

Based on what we know now, the strongest cases are against Billy, and through vicarious liability, the church, for negligently operating the ATV; against the camp for its failure to inspect

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and improve their land; and against the ATV manufacture under strict liability for a manufacturing defect.

#681

MEMO

The potential liability for each defendant in the Paula Pender case is presented below, including negligence, negligence per se, intentional torts, strict liability, and product liability. If New State follows the doctrine of comparative responsibility in multiparty litigation the court may treat Paula's injuries as a single unit and compare the contributions of the defendants.

BILLY

Negligence

- *Duty* – When active (pulling Paula with the ATV) be careful.
- *Standard of Care* – Act reasonable under the circumstances.
- *Breach of the Standard of Care* – Billy did not act reasonable when he accelerated and swung Paula toward the rock. Direct evidence is available from the witnesses, who observed Billy pulling the tube.

Negligence per se

Does New State have a statute concerning the operation of ATVs? Was Paula in the class of person intended to be protected, and are her type of injuries the type that the statute was

implemented to protect? Was there a violation of the statute? Assuming they are answered in the affirmative, Billy can be held liable under negligence per se.

- *Cause in Fact* - But for Billy unsafely pulling the tube, Paula would not have been injured.
- *Proximate Cause* – Paula hitting the rock protruding from the ice was a reasonably foreseeable consequence that Billy should have reasonably anticipated.
- *Damages* – Experts may be required to define some of the damages.
 - General damages will include Paula’s pain and suffering from the physical injuries, as well as the mental anguish associated with her lack of bowel and bladder control. If New State allows, Paula should ask for damages associated with loss of enjoyment of life because she can no longer dance, has gained weight, and has a diminished gait.
 - Special damages will include the present value of all of Paula’s past (\$300,000) and future medical bills, diminished earning capacity (this may be difficult to prove because few actors attain success), and other incidental expenses she has or may incur associated with her injury.
 - Punitive damages are not warranted.

Strict Liability

Although pulling a tube by ATV on a frozen lake with a rock protruding may be considered abnormally dangerous, if reasonable care is exercised the risk can be mitigated; therefore strict liability is not applicable.

Intentional Torts

Paula can pursue an intentional tort claim, but unless Billy or his parents are wealthy, it is not advised because most insurance policies exclude them.

- Assault - Billy may be found liable for assault because Paula had apprehension of immediate harmful or offensive contact with the rock. Paula's account indicates that Billy desired that his actions would cause the apprehension of immediate harmful or offensive contact.
- Battery - Billy may be found liable for battery because the touching of Paula and the rock was harmful. Billy and others would have to be interviewed to determine if he had intent to cause harmful or offensive contact.

Defenses

Billy's defenses are grouped by those that may dismiss an action versus those that may impair it.

Billy will try to push liability to the other parties in this memo.

Dismiss

- What is the statute of limitations (SOL) and statute of repose in New State for negligence and intentional torts, and is the SOL tolled for minors?

- Did Paula expressly assume the risk of tubing by her parents signing the Church waiver?
This may be a total or partial bar depending on New State law. In New State are parents allowed to sign away the rights of their children? If she did consent it may be invalidated because she may not have the capacity to consent as a minor, or if the activity was illegal.
- Billy will plead contributory negligence by Paula, if allowed.
- Billy might not have a duty under implied primary assumption of the risk. However, is hitting rocks one of the inherent risks of tubing? In New State there may be no duty for recreational activities (guard against or warn of risks that are inherent in the activity).
- Paula consented to go tubing, but asked Billy to go slow; therefore, consent may be invalidated because his actions went beyond the scope of her consent. If Paula would have been injured going slower she may only claim the incremental damages from the increased speed.
- Billy may state that the tow ring breaking was a superseding intervening cause. The manufacturer may counter that it was a dependant intervening force because Billy's actions stimulated the breaking.
- If Billy violated a statute and New State follows the preclusion doctrine the action may be dismissed if it is found that her injuries stems from the combination of her negligent conduct and Billy's illegal conduct.

Impair

- Any award may be reduced by Paula's negligence. Does New State use a pure comparative fault system, a modified 51% or 50% system, or slight system? Depending

on which system is used will determine the potential impact to any damage award, or may be used as a total bar to recovery.

- Secondary implied assumption of the risk may impact any damage award. Paula saw that the activity was dangerous and decided to partake anyway.

Other Questions

- How old is Billy and does he have an insurance policy that might pay?
- If he is a minor, do his parents have a policy to attack? Are parents vicariously liable for the torts of their children in New State?
- Do the insurance policies have exclusions for accidents with ATVs?
- What training was required or given to Billy by the owner of the ATV? Is there a statute that governs ATV usage?
- Does New State allow joint and several liability?

THE GOOD CHURCH (INCLUDING THE YOUTH GROUP)

The analysis assumes the Youth Group uses the Church's insurance coverage. The Church may be held liable through vicarious liability for the torts of their employee. It is assumed that Billy is not an independent contractor and that his actions were within the scope of his employment.

The Church should have had constructive notice that the tubing activity was taking place, should have discovered it, and should have remedied it.

Negligence

- *Duty* – The Church had a duty to Paula, through the actions of Billy, to make sure he was careful. The Church had a special relationship with Paula because they were taking responsibility for her at camp. Paula was an invitee (parents paid \$300 for camp) by the Church and they owed her a duty.
- *Standard of Care* – Act reasonable under the circumstances, including overseeing the activities of their employees.
- *Breach of the Standard of Care* – Billy did not act reasonable when he accelerated and swung Paula into the rock. The burden of prevention (not allowing tubing by Church staff) was small when compared to the probability and likely extent of injury.
- *Cause in Fact* - But for the Church allowing Billy to drive the ATV, Paula would not have been injured.
- *Proximate Cause* – The injury that befell Paula was among the array of foreseeable risks which should have made the Church prohibit tubing.
- *Damages* – see damages under Billy.

Defenses

The Church will repeat the defenses raised by Billy and try to push liability to the other parties.

In addition, the Church will raise the following defenses:

- The Church may be immune if New State has an immunity statute for churches/charities.
- Church may claim that Billy's activities were not within his scope of employment (frolic).
- Church may argue he was an independent contractor.

Other Questions

- Does the Church have an insurance policy that would cover the accident?
- Did the Church sign a waiver and indemnify the Camp when Devine paid for use of the facilities?
- Does New State have a nonfeasance rule where the Church can be liable for failure to take positive steps to protect others from harm?
- Does New State impose other affirmative duties on the employer by statute, contract, franchise, charter, or common law?
- The text states that the Youth Group strapped Paula to the backboard. The waiver states that medical treatment will be administered by EMS. Did Paula's friends exacerbate her injuries before professional help arrived? Does New State have a Good Samaritan statute or emergency doctrine that would absolve them and the Church of liability?

MOUNTAIN TOP CAMP

The Camp may be liable under general negligence, as well as negligent entrustment for allowing the Church employees to operate the ATV. The Camp had to know or should have known that the Church was not fit to operate the ATV.

Negligence

- *Duty* – When active (plowing the lake) be careful. In addition there is a duty to invitees to fix dangerous conditions (rock protruding from the ice).
- *Standard of Care* – Act reasonable under the circumstances, including putting snow around the protruding rock to cushion any potential impact.
- *Breach of the Standard of Care* – It was unreasonable for the Camp to plow the snow off the lake and not put some snow around the rock to mitigate impact.
- *Cause in Fact* - But for the Camp not putting snow around the rock, Paula would not have been injured.
- *Proximate Cause* – The injury that befell Paula was among the array of foreseeable risks that should have made the Camp put snow around the rock.
- *Damages* – see damages under Billy.

Negligent Entrustment

- *Duty* – When active (lending the ATV) be careful.

- *Standard of Care* – Act reasonable under the circumstances, including giving an ATV to people who may not know how to reasonably use it.
- *Breach of the Standard of Care* – It was not reasonable for the Camp to give the ATV to someone that did not know the risk involved with speed when pulling tubes around a lake with a rock protruding in the middle.
- *Cause in Fact* - But for the Camp giving the ATV to the Church to use, Paula would not have been injured.
- *Proximate Cause* – The injury that befell Paula was among the array of foreseeable risks which should have prevented the Camp from loaning the ATV to the Church.
- *Damages* – see damages under Billy.

Defenses

The Camp will raise the same defenses as Billy and will try to push liability to the other parties.

In addition, the Camp will raise the following defenses:

- If New State has recreational statutes there is a lesser duty than the common law and Paula may have to show willful and wanton conduct in order to recover.
- Does New State have classifications for people on land or do they just impose a general duty of reasonable care?
- Does New State allow an open and obvious danger defense to absolve the landowner from liability?
- Does New State have a vicarious liability statute?

Other Questions

- Did the Camp sufficiently train Billy and others on the proper usage of the ATV?

MANUFACTURER AND RETAILER

The tow ring manufacturer and retailer may be held liable for the defective tow ring under negligence, strict tort liability, and breach of warranty. The negligence claim is weak due to the attenuated proximate cause linkage.

Negligence

- *Duty* – When active manufacturing and selling a product be careful.
- *Standard of Care* – Act reasonable under the circumstances, including not selling a defective tow ring.
- *Breach of the Standard of Care* – It was unreasonable for the manufacturer and retailer to sell a defective tow ring.
- *Cause in Fact* - But for the manufacturer and retailer not selling a defective tow ring Paula would not have been injured.

- *Proximate Cause* – The injury that befell Paula was among the array of foreseeable risks which should have precluded the manufacturer and retailer from selling a defective tow ring. Tow ring sellers around camps know that they will be used for tubing.
- *Damages* – see damages under Billy.

Strict Tort Products Liability

Paula must prove that the product was defective under the Consumer Expectation Test or the Risk Utility Test. The reasonable expectation of the ordinary consumer is that a tow ring will not break while towing a tube and person; therefore the tow ring is defective. The tow ring is defective under the Risk Utility Test because the magnitude of the risk outweighs the individual or broader utility to society. The cost of designing or manufacturing a slightly stronger or non-defective tow ring is small compared to the risks of not doing so. Because the product is defective we can proceed to a strict liability analysis:

- *Duty* – When active designing, manufacturing, labeling, and selling a tow ring be careful.
- *Cause in Fact* - But for the mis-manufacture of the tow ring it would not have broken while pulling Paula, resulting in her injuries. But for the defective design (e.g., not enough tensile strength in the steel) of the tow ring it would not have broken, resulting in her injuries. But for the lack of a warning to not tow tubers with the tow ring, Paula would not have been injured.

- *Proximate Cause* – The injury that befell Paula was among the array of foreseeable risks which should have precluded the manufacturer and retailer from selling a defective tow ring.
- *Damages* – see analysis under Billy above.

Breach of Warranty

Research is required to determine the age of the tow ring, and any implied or express warranties, and disclaimers. New State UCC and warranty statutes need to be researched to determine if Paula is covered as a third-party beneficiary (horizontal privity) of the warranty. The retailer must be a commercial seller (merchant) of such products. It must be determined if the tow ring was fit for its ordinary purpose. In addition, there may be a privity issue in New State because the Camp loaned the ATV to the Church.

Defenses

The manufacturer and retailer will raise the same defenses as Billy and will try to push liability to the other parties. In addition, they will raise the following defenses:

- They did not create a foreseeable, unreasonable risk of injury, judged from the perspective of their expertise concerning the product. They will argue the proximate cause link is very weak.

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- The tow ring was modified or altered during improper intermediate handling, which substantially altered the product and is the proximate cause of the plaintiff's injuries.
- The tow ring was old and normal wear is not sufficient to establish that it was defective when sold.
- The tow ring was not used for its intended purpose, and it was an unpredictable misuse beyond the range you would expect the manufacture to predict and warn about.
- The Camp or Billy negligently failed to discover or guard against the defect.
- The product was not in a defective condition unreasonably dangerous to the user.

Other Questions

- Was the manufacturer or retailer aware that tow rings have been breaking?
- Can the tow ring be located and examined, and the retailer and manufacturer identified?

#245

Analysis of prima facie case RE: Pamela Pender

Issue

Mr. and Mrs. Pender, Pamela's ("Pender") parent's, have asked the firm to assess the potential liability against The Good Church (the "Church"), Mountain Top Camp (the "Camp"), and the All Terrain Vehicle ("ATV") manufacturer ("ATV Manufacturer").

The Church maybe vicariously liable, under the *Respondeat Superior* doctrine, for their employee's actions. Also, the Church may also be liable if it is found to have been a tenant/lessee, generally taking on the duty of an owner.

The Camp maybe liable under the Landowner doctrine because they've known or should have known about the danger.

The ATV manufacturer maybe liable under the products liability defects doctrine.

Defenses

Duty

Defendants will claim no duty

Assumption of the Risk ("AR")

Express AR

Primary Implied AR

Standard of Care

Defendants will say "low standard of care."

Express AR

Breach

Defendants will say no breach of the low standard of care.

Contributory Negligence

Last Clear Chance doctrine. Just before the accident, Pender had opportunity to prevent the harm by releasing herself from the rope before she entered the “Chute.”

Secondary Implied AR

Failure to avoid consequences

If Pender had worn a protective device for her lower back, she would have been better off.

If Newstate is a comparative fault regime, plaintiff can recover reduced damages and provide a formula for calculating those reduced damages. Plaintiff’s fault may be compared to all defendants or to each individually. If not, then look to contributory negligence.

Cause In Fact/Proximate Cause

Failure to Mitigate

Damages

Failure to Mitigate—seeking any medical care that would limit the extent of the injury.

Failure to avoid consequences (also under Breach).

If the statute of limitations or repose are not available, defendants may look to other defenses such as:

Depending on Newstate’s immunities, the Church may be entitled to charitable immunity.

Assumption of the Risk:

Although a permission slip was signed, this is not enough to insulate The Church from liability. Pender is entitled to protection from the type and extent of injury that she sustained due to the negligence of both the Church and its employee.

In an effort to thwart Pender's claim, The Church might try to characterize Billy's behavior as intentional and a superseding cause in Pender's injuries.

Duty

When hiring an employee, an employer has a duty to properly supervise that employee.

When undertaking an activity, such as driving an ATV, the driver has a duty to be careful. The driver must take reasonable precautions to ensure passengers' safety while towing them behind an ATV over a slippery surface (frozen lake—ice).

Res Ipsa Loquitur is tempting, but cannot be taken advantage of it because Pender knows and can directly prove the details of Billy's conduct.

If the Church is determined to be a tenant/lessee; then the duty owed to Pender is the same as if the Church itself was the landowner. That is, the Church had a duty to inspect the premises for any known dangers and to make everyone on the premises aware of the danger(s). This avenue will be harder to exploit. The Church may also have been an invitee.

A landowner owes an invitee a duty to exercise ordinary care to protect him from risks of which the owner is actually aware of and those risks of which the owner should be aware of after reasonable inspection. This could be a possible special relationship between The Camp and Pender.

If Newstate is not a Zone of Danger regime, then we will look to the impact rule.

S/C

The standard of care is to act as a reasonably prudent person under the circumstances.

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A reasonable employer would realize that most employees require supervision. The Church should have supervised Billy closer because he was in direct contact and interaction with members of the Church's youth group.

A reasonable person would realize that speeding while towing passengers tethered behind an ATV over a frozen lake can be unreasonable under certain circumstances. In this case, a reasonable person also realizes that speeding over an icy surface increases the likelihood of injury to both the operator and passenger. Billy was unreasonable because his speed was excessive.

The Camp would realize that in posting no signs, warning of a known danger, injury to person(s) would result. The Camp knew the danger the rock posed to invitees on their land.

The Church's standard of care, if found to be a lessee, would be the same as the Camp.

A reasonable manufacturer would take more precautions to ensure that their products are not defective.

In the cases of the defendants, the burden of preventing the harm is less than the probability of harm, thus, the defendants maybe called negligent.

Breach

We will try for both negligence and negligence *per se*. It is tempting to try for an intentional tort of recklessness, but that may limit the amount of compensation our client is entitled to.

Negligence *per se*. Breaking a statute is negligent on the face of its action. There could be possible Recreational Use statutes that could be used both to the benefit/detriment of our client.

The occupier of rural land generally owes licensees, if that is how Pender is classified, a lesser duty than whatever is imposed by the common law, because of these statutes. If this is the case, Newstate may require that Pender show something like willful and wanton conduct in order to

recover. Therefore, the court may hold the Church/Camp to the common law duties whenever possible.

Negligence: The Church breached the standard of care by negligently hiring and negligently retaining Billy, as well as negligently supervising him.

The Church also breached the standard of care by failing to inspect the premises, especially since they knew about the rock protruding above the lake's frozen surface. Furthermore, the Church also failed to post signs around the premises notifying everyone of this well-known danger.

The Camp breached the standard of care by failing to inspect the premises and post signs warning of a notorious danger. The Camp must use reasonable care in maintaining the premises and in their activities.

The ATV Manufacturer breached the standard of care by placing a defective product on the ATV. More stringent control measures should have been taken to ensure that only safe products are placed on the ATV. The tow ring was carelessly designed and manufactured. The ATV Manufacturer carelessly performed (or failed to perform) reasonable inspections and tests of finished products, and possibly did not take reasonable care to obtain quality components from a reliable source.

Cause In Fact

But for the Church not properly supervising Billy, Pender would not have been injured.

But for Billy driving the ATV excessively fast under the conditions, Pender would not have been injured.

But for the Church not inspecting the premises and posting warning signs, Pender would not have been injured.

But for the Camp's lack of signage warning of known/existing dangers, Pender would not have been injured.

But for the defective tow ring, Pender would not have been injured.

In the event the Newstate courts use a "substantial factor" causation test in lieu of or in addition to the "but for" test, Billy's actions will be evaluated to determine if they materially contributed to Pender's injuries. The court will use the same analysis for the rest of the defendants. If the court concludes their actions materially contributed to Pender's injuries, the defendant's actions will be considered causative. These two tests appear to be difficult for the defendants to overcome.

Proximate Cause

Proximate cause will be determined by ascertaining if the defendants had reasonable foreseeability of harm (extent and manner in which the harm occurred need not be foreseeable), no superseding, intervening forces, if Pender is an "egg-shell" plaintiff, whether the defendants conduct was substantial in causing the harm and the nonexistence of any rule of law that precludes liability due to the manner of defendant's negligence causing the harm.

It is foreseeable that the Church would hire an employee that may cause injury to others while performing work within the scope of his employment.

Respondeat Superior doctrine: