

Torts — Gómez-Arostegui — FINAL EXAM —

....

- D. Explain your essay answers. Make sure to consider all sides. Predict whether you think a claim or affirmative defense will be successful or not and tell me why. At the same time, remember that your time is limited, so manage your time with care. If your analysis of an issue or statement of law has already been undertaken earlier, simply refer back to it rather than repeat it. If you find that you need additional facts in order to analyze or reach a conclusion on an issue, state the facts you believe are needed and how they would affect your answer. Factual inferences based on your common sense or on common knowledge are permitted and expected, but you must explain to me what you believe the common sense or knowledge to be. Do not presume, infer, or speculate about the existence of a statute not mentioned in the exam, no matter how common. If the statute is not mentioned on the exam, it does not exist. Your answer does not have to be Shakespeare-level prose but please do not present your entire answer in skeletal or bullet-point form. It should read like ordinary prose or narrative.

....

[Question begins on the next page]

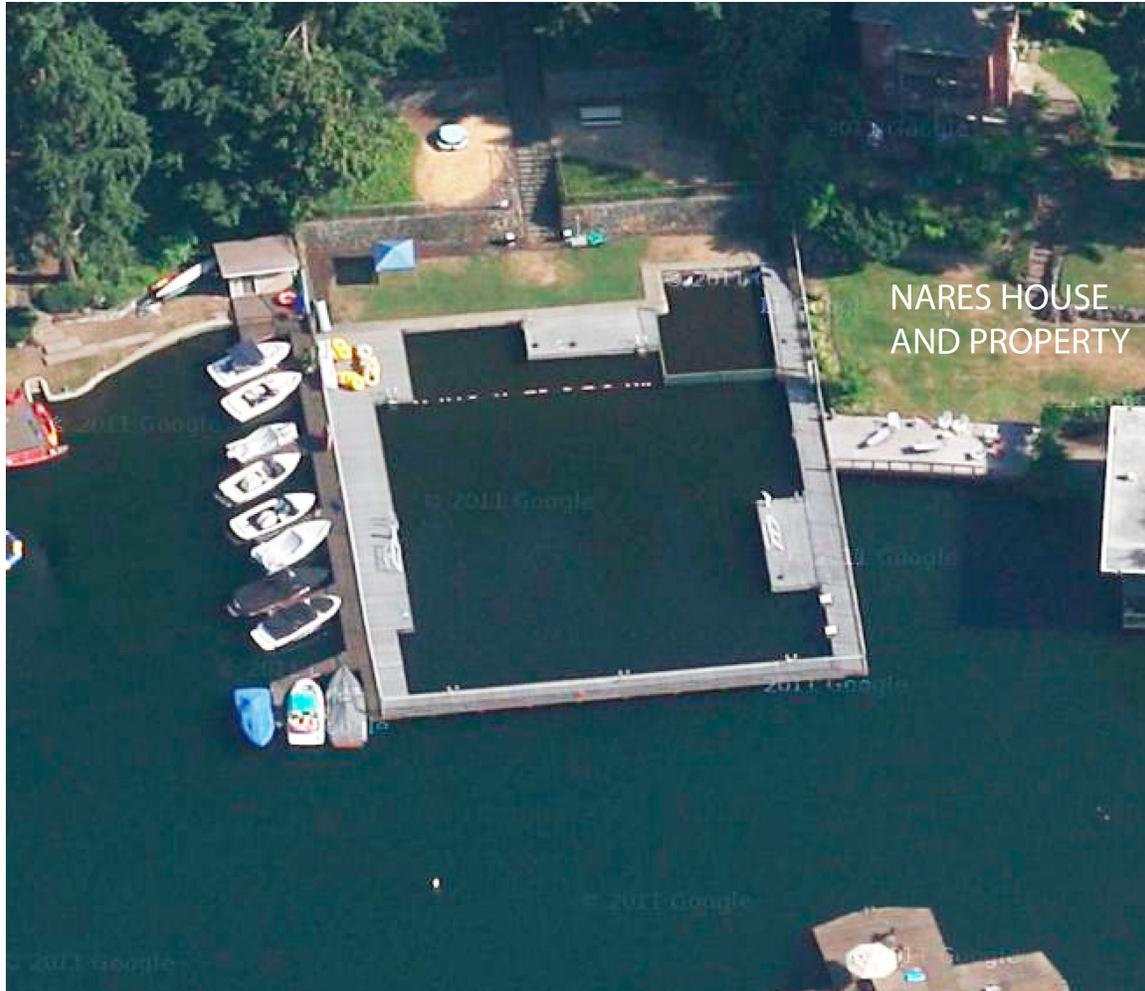
QUESTION 1 (65%) [Suggested time: 130 minutes; 3,250 word limit]

Zorro Zanetti is a professional triathlete who lives in the City of Portlandia in the State of Oreglorida. His physical prowess is legendary. His favorite event is swimming and thus, apart from competing in triathlons, he also competes in open water endurance races of either 3 or 6 miles. As part of his usual workout, Zanetti swims 5 miles every other day.

Zanetti often swims in nearby Oswego Lake, which at its longest point is 2.5 miles long. He prefers swimming there for two reasons. First, he needs to swim in open water (rather than in a swimming pool) because all of his races occur in open water. Apart from being choppier than a swimming pool, the temperature is also much lower than a pool. Second, the water in the lake is not as polluted as the rivers that run through Portlandia.

The lake is completely surrounded by the City of Lake Oswego. The lake is private property and is owned by the City. It therefore can restrict access to the lake. Because the lake is surrounded by private homes, there is only one way that persons can access the lake (apart from their own backyards). That is through an open facility called the Oswego Lake Swim Park, which is pictured here and on the following page:





The Swim Park is essentially a fenced-off part of the lake and is only “open” during July and August. It can only be used by residents of the City of Lake Oswego. When open, the City posts certified lifeguards on duty at the Swim Park. When the Park is closed, as it is now during this time of the year, the City simply posts signs indicating that the entire area is closed. It does not physically close off access to the Swim Park. Thus, any person can walk into the Swim Park unobstructed. The City knows that residents and nonresidents often visit the Swim Park when it is closed—albeit, for the scenic view rather than to swim in the water.

Additionally, by City Ordinance, the City prohibits anyone, whether they are residents or nonresidents of the City, from swimming in other parts of the lake. Swimming outside the Swim Park is a Class A misdemeanor and punishable by a fine of \$100. The City enacted the Ordinance for safety reasons, as it thought it could reduce the chance of boats colliding with recreational swimmers if swimmers were not allowed in the open water.

Being that it is now December, there is currently a sign at the entrance to the Swim Park that states: “THE SWIM PARK IS CLOSED—NO LIFEGUARD ON DUTY—SWIM AT YOUR OWN RISK.” The same sign appears in three other places in the Swim Park, so

that there is effectively one sign on each side of the Swim Park.

Zanetti regularly ignores all of this. When he wants to swim in the lake, he just goes to the Swim Park, jumps over the fence that stands between the Swim Park and the lake—which as you can see from the first picture is not very high—and dives into the lake.

Zanetti decided to swim at the lake today, a Saturday. The air temperature is 50 degrees Fahrenheit (10 Celsius), and the water temperature is 40 F degrees (4 C). In temperatures this cold, Zanetti always swims with a wetsuit, hood, boots, and gloves. He is accustomed to swimming in water this cold. But for most people, especially those that are not wearing special swimming gear, a fall into water this cold will result in cold shock. According to expert scientists:

Cold shock lasts for only about a minute after entering the water and refers to the effect that cold water has on your breathing. A typical cold-shock response involves hyperventilation, which is an increased rate and depth of breathing beyond what ordinarily is required. Although this physiological response will subside, panic can cause a psychological continuance of hyperventilation. Prolonged hyperventilation can lead to a faint and drowning. The other significant response is heart related. As the arteries narrow from the cold, the heart has to work harder to pump the same volume of blood throughout the body. For people with underlying heart disease, this additional workload will cause a heart attack 50% of the time.

Cold-shock response is the most common cause of death from immersion in very cold water. Some people, due to body type or mental and physical conditioning, are much better able to survive swimming in very cold water.

Zanetti arrived at the Swim Park at about 11:00 am and jumped into the lake.

While Zanetti was swimming, Jacob Nares, a child who was 12 years old, was staying with his father Samuel Nares. Jacob's parents were divorced, and they had joint custody over him. Jacob lived with his mother during the week and with his father on the weekends. Samuel Nares lived in the house next to the Swim Park, as you can see from the second picture. Samuel had just moved into the house a few days ago, and this was Jacob's first visit to it.

The backyard of the Nares house has a fence between it and the Swim Park. But it is easy to walk around it and enter the Swim Park through the main entrance. Jacob asked his father if he could play in the backyard. Samuel responded that he could, but he told Jacob to be careful and not to go too close to the lake as the water in the lake was very cold and that Jacob could get hurt if he fell in. Jacob went outside, unsupervised, and saw the lake and what looked to be a swimming pool. He did not realize that the Swim Park was just a fenced off part of the lake. Jacob had gone swimming many times before in swimming pools, including at the house of his mother, and his experience was that pools were always heated.

Jacob walked around the fence and entered the Swim Park, where he walked around the pool. The pool had a large rubber inner tube floating in the water, which City employees had not properly secured during the winter break and had been blown into the water by the wind. While standing on the edge of the Swim Park pool, Jacob reached out to grab the inner tube. The tube was heavy, and when he lifted it, the weight pulled him over. Jacob fell on top of the tube and both he and the tube floated to the center of the swimming pool where the tube stopped. Jacob decided to kick his way back to the edge of the pool, while still on the tube, but the tube quickly deflated. As it turns out, the combination of his weight, and a weather-worn seal on the tube, emptied it in seconds.

From inside his house, Samuel heard splashing and thought the worst. He ran outside into the backyard and saw Jacob struggling in the middle of the Swim Park. He ran around the fence and stood at the edge of the water of the pool. Frozen in a panic, Samuel did not immediately jump into the pool. He knew the water was very cold. And he worried what it would do to him if he jumped in. He would have to swim about 20 feet to get to Jacob and then 20 feet back with Jacob in his arms. Jacob weighed about 100 pounds (45 kilos), a fact well known to his father. Samuel himself was overweight, weighing 350 pounds (158 kilos) at 5' 3" (1.6 meters) height. Although Samuel did not know it at the time, Samuel suffered from heart disease. After about 10 seconds of encouraging Jacob to swim to the edge, Samuel decided to jump in. But just as he was about to jump, Zanetti swam up, as he had finished his swim in the lake. Samuel called out for help. Zanetti saw what was happening and said to Samuel: "Go and call 911, hurry, I'll take care of this!" Samuel, seeing that Zanetti could handle the cold water and was nearby, ran to the house to call emergency services.

Zanetti jumped the fence from the lake, but just as he was about to jump into the Swim Park, he started to think that if the boy died, that the child's father would probably sue him, even if Zanetti had taken reasonable steps to rescue the child. Zanetti freaked out and ran off, leaving poor Jacob to fend on his own.

Shortly thereafter, Samuel came running to the pool; he had called 911 and the paramedics were on their way. As he arrived at the Swim Park, he could see that Zanetti was nowhere to be found, and that Jacob was still in the water. Samuel jumped into the pool fully dressed. The cold was overwhelming. He struggled to overcome it, but, with the help of an adrenaline boost, he did, reaching Jacob and swimming with him to a step ladder in the pool. This enabled Jacob, who was still conscious but scared, to climb out. Samuel then started to climb out of the pool on the ladder. Jacob reached out to his father to help him, but then tragedy struck—a heart attack. Samuel fell back into the pool and just out of reach of Jacob. Jacob sat there crying, not knowing what to do. Samuel struggled for a minute or so and then slipped under the water and died. By the time the paramedics arrived two minutes later, Samuel could not be revived. Jacob now suffers severe emotional distress but is otherwise unharmed.

Relevant Statutes/Rules:

Here are some statutes and rules in Oreglorida of which you should be aware:

1. Oreglorida continues to adhere to the traditional doctrine of contributory negligence and all the other doctrines usually associated with it.
2. Oreglorida follows the traditional rules and exceptions of premises liability.
3. Oreglorida has a survival statute. It also has a wrongful-death statute whose only beneficiaries are immediate blood relatives; it permits recovery for loss of consortium, loss of financial support, and emotional distress.

Directions:

1. Assume all of the above facts and persons are now known to all parties.
2. Discuss relevant and colorable tort claims and affirmative defenses, except:
 - a. Do not discuss any intentional tort claims.
 - b. Do not discuss any contribution or indemnity claims that one tortfeasor could bring against another.
3. Do not discuss the damages that would be available to a plaintiff.

[Rest of exam omitted]