

## Lewis and Clark College Law School

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Exam Name: 19FL\_TortsI-R\_(Gomez-Arostegui)

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As Sam is dead, any reference to "Sam" as a party refers to his estate. The city is vicariously liable for Actions taken by their employees, as in this scenario the employees are acting within the scope of their relationship with the city. "city" and "city employees" are therefore used interchangeably when being referenced as parties.

Jacob v. City: NIED from time spent in water

**Duty:** We assume there is a duty unless a no duty rule applies. Here, this may first appear as a case of nonfeasance, because the city did not take an affirmative action that led to Jacob ending up in the water. However, the city owns the lake, so they may owe certain duties to entrants to the lake. Here, Jacob is likely a trespasser, as the lake is closed during this time of the year. A trespasser is still owed a duty by the landowner.

**Duty-Std.:** Normally the duty owed to a trespasser is a reduced standard of care to avoid willful, wanton, or reckless conduct. However, a child trespasser may be owed a reasonable standard of care under the attractive nuisance doctrine. To qualify for reasonable care under this doctrine, there must be an artificial condition on the land in a location where the landowner knows or should know children are likely to trespass, the condition must be one which poses a risk of death or serious bodily injury to children, and that children, due to their youth, would either not know of or not recognize the risk of. While the lake, from the facts presented, is not an artificial condition, the swim park itself, being fenced off, is an artificial condition, and the City knows that both residents and nonresidents (it is unclear which Jacob is, since he splits his time between his parents) often visit the Swim Park even when it's closed. The facts do not present any reason to doubt that these frequent trespassing residents and nonresidents include children. It is somewhat debatable whether the swim park poses a risk of death or serious bodily injury to children, as the facts do not indicate any conditions in the swim park would

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make it especially likely that a child could slip into the water. A child, due to their youth, would probably not realize how cold the water is and that the Swim Park presents a danger. Alternatively, the "artificial condition" could be the inner tube floating in the water. While it is not in the area where the City knows people frequently trespass (that would be the Swim Park-- the tube is in the lake, which the City doesn't know people swim in), the lake is in the Swim Park and the tube is in the lake. The tube poses a significant risk to children, because its weather worn seal would (and does) cause it to deflate under the weight of a child, leaving the child vulnerable to the cold of the lake. A child, due to their youth, would probably not realize that getting on the tube would be dangerous, both because they wouldn't realize it could deflate, and they probably wouldn't think of the consequences of the tube floating out into the lake with them on top. While the tube therefore might be an attractive nuisance, this doctrine may not apply to Jacob, because he is 12 and usually the attractive nuisance doctrine is for younger children, usually 10 and under. A 12 year old probably should have known better.

Jacob could be owed a reasonable standard of care as the City does know that people frequently trespass into the Swim Park, and while the lake may be considered a separate property into which the City doesn't expect frequent trespassers, it could also be looked at as a risk the city knows a trespasser might encounter. While Jacob is new to the area, he is of the class of people the city expects to enter the swim park and encounter the risk of the lake, so he likely is owed a reasonable standard of care by the City.

**Breach:** A reasonable person would physically close off access from the land section of the Swim Park to the water. The burden of doing so is probably fairly low, as it would require only a small section of fence, or so it seems in the picture. Because the City knows that people enter the Swim Park to enjoy the view, they should probably know that the potential harm of not having the fence close off access to the water is that someone might slip in, but the City probably only expects that if that were to happen, the person would just get back out of the water, and perhaps be a little cold. The City probably expects the probability of this to be medium, as plenty of people are coming near the water

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but given how cold it is, the City probably doesn't expect anyone to get close enough to fall in. Given the low burden of closing the fence, I would say the City may have breached its duty to Jacob.

However, it is unclear if Jacob was placed in the zone of danger, as it is not clear if he nearly missed a physical impact, was aware of it, and feared it. It is not clear if the city breached its duty to Jacob for failing to close off the lake.

Alternatively, the city employees (city is vicariously liable because employees were acting within the scope of their employment relationship when they prepared the Swim Park for the winter) should have properly secured the large rubber inner tube for winter break. I'll proceed with my analysis based on this shoulda done. The burden of doing so is likely very low. The employees probably wouldn't necessarily expect such a heavy tube to end up in the water, although we would need to know more about typical wind strength in Oswego lake to say this for sure. They also probably couldn't anticipate much harm coming from failure to secure the tube, although maybe they would expect the tube to blow into somebody, causing a low-medium gravity injury. Based on available facts, probability of the tube blowing into someone and hurting them is probably fairly low as well, although given the frequency of trespassers to the area perhaps it is more medium. The employees therefore likely breached their duty of reasonable care by failing to secure the inner tube. The tube being in the water did not, however, place Jacob in the zone of danger, however, so it is likely the city and its employees did not breach their duty in the context of NIED.

**LCH:** When Jacob fell in the water, it is not clear from the facts if he suffered severe emotional distress at that time. I will proceed assuming he did.

**CIF:** Had the employees better secured the tube, it is more likely than not that Jacob wouldn't have ended up in the water and suffer ED.

**SOR:** The employees would probably expect an injury to a bystander from the impact of the tube, not injury from someone on the tube in the water. SOR is likely not satisfied. City could claim Z's failure to

finish rescue was superseding act

**Affirmative defenses:** J was likely contributorily negligent. I will address that on a later, stronger claim.

City v. Zanetti-- ??

Sam v. City: negligence-- heart attack, death

**Duty:** We assume there is a duty unless a no duty rule applies. Here, this may first appear as a case of nonfeasance, because the city did not take an affirmative action that led to Sam's death. However, the city owns the lake, so they may owe certain duties to entrants to the lake. Here, Sam is likely a licensee, as he has entered the lake under a privilege of private necessity (his son is at risk of serious bodily injury or death). A licensee is owed a duty by the landowner, as is a trespasser, if that were what Sam was. I will proceed assuming Sam is a licensee.

**Duty-Std.:** A licensee is normally owed a lower standard of care, unless they are a discovered or frequent licensee. To be a discovered licensee, the landowner must know, or should know from facts available to them, that the licensee is on the land. The landowner must also know that there is a dangerous artificial condition on the land which puts the licensee at risk. To be a frequent licensee, the landowner must know, or should know from the facts available to them, that there are frequently trespassers on the land and that there is a dangerous artificial condition on the land which puts the licensee at risk. Here, Sam probably does not fit in either of these categories. While the City is aware that residents (which Sam is) frequently visit the Swim Park, they only know of residents doing this for the scenic view, not to swim in the water. It could be argued that they city should know that if people are going to the Swim Park they might be doing so to swim, this isn't really reasonable given how cold it is this time of year. The City therefore likely owes Sam only a lower standard of care to avoid wanton, willful, or reckless maintenance of the land.

**Breach:** The city should have closed off the access to the water, the burden of which is moderately low, as discussed above. By not closing off access, the city probably expects a medium probability (given number of people entering the area) of medium harm (being a little cold), so they've probably breached a reasonable standard of duty, but probably not the lowered standard likely owed Sam.

LCH: Sam suffered a heart attack and died. He also probably suffered generally while he was in the water.

**CIF:** If the city had closed off access to the water, it is more likely than not that Jacob wouldn't have fallen in, and more likely than not that Sam wouldn't have had to rescue him, so it is more likely than not S wouldn't have suffered a heart attack and died.

SOR: The rescue probably is within the scope of risk. This is a populated area, so it is not entirely unforeseeable that someone would fall into the water. The expected class of persons to perform the rescue is a person in the area, particularly a relative, which Sam is, so he is within the expected class. While Sam's severe injury of heart attack and death is probably more severe than expected, the city should probably know that someone entering the water would experience physical difficulty when it is that cold, and cold shock alone is the most common cause of death from entering very cold water. So under the thin skull rule, Sam's death, being fo the same general type as what an ordinary person would experience, is within the SOR.

As it is not likely the city breached its duty to sam, he likely can't recover for his heart attack and death.

**Affirmative defenses:**

If Sam did satisfy the prima facie case, the city probably would not be able to successfully argue contributory negligence because Sam was performing a rescue, which is an exception to contributory negligence. This exception is negated if the rescue is reckless, but Sam's rescue was probably not

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reckless, as it is what many parents would do seeing their child in danger.

Jacob v. City: NIED from witnessing father's death

Jacob would likely have a claim for negligent infliction of emotional distress against the city for the severe emotional distress he experiences from watching his father have a heart attack and drown, but only if there was indeed a case for negligence against the city for Sam's death, which as discussed above, there likely is not. For a plaintiff to assert a claim for NIED arising from witnessing sudden and serious bodily injury to a third person, it is first necessary to make out the case for negligence on behalf of the person who experienced the bodily injury. Here, that person is Samuel (see above). I'll proceed with the analysis despite my belief that there is no case for Sam, so Jacob probably can't recover.

For NIED for a bystander, the LCH witnessed must be sudden and serious bodily harm, which a heart attack and drowning likely is. The bystander must also be immediate family of the victim, which Jacob is. The bystander must actually experience serious emotional distress, which Jacob does. Some jurisdictions also require physical manifestation of the ED-- that's unclear here. The witnessing of the sudden and serious injury must be the CIF of the ED. This is unclear since Jacob's ED might also be related to his time spent in the water, but given the horror of watching one's father die, it's more likely than not that had J not had to watch Sam die, he wouldn't experience severe emotional distress. Severe ED is certainly the type of harm expected from seeing one's father die, and the son of the person who died is certainly of the expected class of persons to experience that ED. Jacob's ED is therefore within the SOR.

If there is a prima facie case for Sam v. the city for negligence resulting in Sam's death, then Jacob likely has a case for NIED. Without the prima facie case for Sam's death, however, Jacob's claim would not succeed.

Affirmative Defenses: Jacob may have been contributorily negligent.

Duty: always to self. Std: child standard of care-- whatever a reasonable 12 year old of same intelligence and experience would do under same or similar circumstances. Breach: shouldn't have gotten on the inner tube-- burden is low. A 12 year old who has experience in and around pools would probably expect a potential harm of falling into the water, but that the gravity of the harm being medium because he probably realizes the water is cold, but maybe not that cold, nor would he expect shock. WOuld probably think probability is low, because he thinks he'll just float around on the inner tube.he also probably doesn't expect the water to be so cold, isnce his prior experience is with heated pools. Because the burden of not getting on the inner tube is so low, Jacob probably breached his duty to himself.

LCH: NIED.

CIF: Had Jacob not gotten on the inner tube, it is more likely than not nothing that followed would have transpired, so he is likely a CIF of his own NIED.

SOR: There is almost no way for Jacob to have anticipated the events that transpired, between the inner tube deflating, his dad's attempt to rescue him, and his dad's heart attack and death. He therefore couldn't have anticipated his NIED. At most, he may have expected someone would have to rescue him, and that person would be uncomfortable in the cold water while doing so. He probably doesn't know about things like cold shock. Because these events are so outside of the scope of risk of Jacob's conduct, this element of contributory negligence is probably not satisfied.

Because of the failure on the SOR element, Jacob probably was not contributorily negligent.

Affirmative defense: Implied Assumption of the risk.

Jacob's dad told him not to go so close to the water and that he could be hurt if he fell in. Jacob was therefore aware of the risk of going near the water, but nevertheless freely understood this risk. He is likely barred from recovery under implied assumption of the risk.

Jacob v. Zanetti: negligence-- loss of financial support, emotional distress of losing father

Duty: Zanetti began to undertake to rescue Jacob, so he owed him a duty.

Std: reasonable care

Breach: Zanetti should have continued his rescue of Jacob. The burden of doing so was probably low, because he is such an experienced swimmer and is capable of swimming the length of the lake twice. From the facts we don't know how long he's already been swimming, so it's unclear if he's already exceeded his normal distance, but that he found it within his ability to begin the rescue, it's likely the burden of continuing was low. The facts sound like he did expect death or serious injury to come to Jacob, so the L is high, and the probability of the L is at least medium. Zanetti likely breached his duty.

LCH: Jacob ended up suffering the loss of his father, so loss of financial support and emotional distress of not having a father.

CIF: Had Z continued his rescue, it is more likely than not that he would have succeeded and none of the latter events would have transpired, including the loss of Sam. However, even before Z arrived Sam was getting ready to jump in the water. So if Z had not offered to help Sam probably would have still gotten in the water and still died. As the matter stands, Z did undertake to care, everyone behaved according to his statement he would do such an act, so he remains a CIF.

SOR: By abandoning his efforts to rescue, the expected risk of harm is probably either that Sam would attempt the rescue and be somehow injured, as Z knows you need special equipment and skills to execute such a rescue in such cold water. As discussed previously, under the thin skull rule Sam's death is likely within the SOR when expected risk is injury from entry into the water.

Affirmative defenses: contributory negligence, assumption of the risk as discussed above.

Jacob v. Zanetti: negligence-- NIED

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Same analysis as above, but Z might also be a CIF of the NIED since if he had completed his rescue, it is more likely than not that Sam wouldn't have attempted the rescue, he wouldn't have had a heart attack and died in front of his son, and J would therefore not suffer severe emotional distress.

Sam v. City: negligence-- NIED prior to death

Jacob and blood relatives v. City or Zanetti: Wrongful Death Claims

Other immediate blood relatives (i.e. parents) may be able to make out claims for emotional distress against the above discussed plaintiffs if it is found that these plaintiffs' negligent conduct caused Sam's death and the death was wrongful. Jacob's ability to recover may be reduced if he was contributorily negligent, as discussed above. There is likely no one who can make a claim for loss of consortium as S and his wife are divorced.

Jacob v. Zanetti: NIED from father's death

Sam's estate v. city-- NIED

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Sam's estate v. Zanetti-- negligence, NIED, physical harm prior to death

Jacob and blood relatives v. city-- loss of financial support

Jacob v. city-- emotional distress of not having father

Sam's parents v. city

**END OF EXAM**