

## Torts Midterm

Burt, Abby, and Chris are all invitees because they are on the property for Danny's benefit. Danny owes them a duty to inspect and render safe any concealed dangerous conditions. Danny breached his duty by acting in a negligent way because the OSHA regulations gave Danny a standard of care and a notice of the dangers. The dangers are still there even though the mill is being used as a tourist attraction. The fact that Danny was aware of the dangerous condition through the OSHA regulations makes Danny's actions willful and wanton. While Burt, Abby, and Chris were not employees, but rather invitees, Danny still had the duty to render safe any dangerous conditions. The tourists stepped in the shoes of employees when the activities offered by the mill were the activities a typical employee would involve in.

### Accident 1--Practical Joke:

It is foreseeable that someone jumping out of the way to prevent harm to himself would fall and get hurt or that by falling will cause someone else to get hurt. Danny's actions against Abby, Burt, and Chris meet all the elements for assault. Danny intentionally created an immediate apprehension of a harmful touching had by pushing the button and screaming "Get Down!" Danny had the intent to effect assault, which caused Burt's apprehension of an immediate danger.

### Accident 2--Chris hitting his head

Danny is the "but for" cause for Chris hitting his head because if he

had not scared Burt, Burt would not have fallen and knocked Chris over. Danny's negligence is also a proximate cause of Chris's injury. It is foreseeable that if one scares another through a practical joke, one may fall and in doing so cause others to fall as well. Without Danny's joke Burt would not have fallen down, knocking Chris off his feet and causing him to get hurt. Burt is not negligent or liable to Chris. Danny has the responsibility to aid his patrons because as a shopkeeper he has a duty toward any person who is an invitee on the property. Danny also had the duty to inspect and render safe any concealed dangerous conditions.

### 3. Abby saying Chris is ok.

Abby did not have the duty to rescue but once she had voluntarily undertaken in that rescue by stating that Chris did not have a concussion, she as the rescuer owed Chris a duty to perform the rescue with reasonable care. Abby did not perform with reasonable care because she did not follow the listed protocol; instead she just told him he was fine. When Abby undertook this aid by stating that Chris was ok, the others believed that Chris was Ok, which prevented them from taking any action. Danny still has a duty to rescue Chris because of the invitee relationship.

### 4. Lumber Surfing

Danny warned Burt that this game is dangerous. It must be noted that

Danny only had a duty to render safe any dangerous conditions and not activities. This “game” is an activity which a reasonably prudent person would presume to be dangerous. Burt has no claim against Danny because he chose to play the “game” and a reasonable person would know that Burt’s injury could occur from playing this game. As a public policy matter, it can be argued that just because Danny encouraged or gave Burt the idea for the game, it is not an excuse for Burt to use. The courts could be overloaded with plaintiffs bringing claims against others because they "tricked" them or encouraged them to participate in dangerous activities, which resulted in injuries incurred by the same plaintiffs. Therefore, Burt has no claim against Danny due to his own negligence in participating.

#### 5. Calling 911

Chris had no duty to rescue Burt after Burt’s accident because he was just a bystander. Danny had the duty to call 911 or take Burt to the hospital because he had the duty to aid patrons. Danny did not follow protocol (as listed in the First Aid instructions posted at the mill), but he did act. Abby is also liable because although initially she had no duty to rescue, she voluntarily undertook rescue when she came upon Chris's aid.

#### 6. Leaving Chris

Danny is liable for Chris’s coma because he left him there. The first aid protocol stated that a person with a concussion should be

monitored carefully and not allowed to fall asleep. Even though, Danny assumed Abby's "diagnosis" of Chris to be true (no concussion), he was still the inviter and as such had a duty to aid his patrons/invitees. Abby is also liable because she partook in his rescue and did not fully assist Chris.

#### 7. Hunters

Danny knew hunters might be present on his property because he timed the opening of the Ye Old Lumber Experience with hunting season. Therefore, even if the hunters were trespassers, they were anticipated trespassers and Danny had a duty to warn of of any concealed artificial conditions. Danny is not liable to the hunters. It was not foreseeable that because the machinery was running the dome would roll down the hill and kill the hunters. Their injury was not a proximate cause of Danny's actions.

#### Abby

Depending on the jurisdiction of this accident Abby may be able to bring a claim for NIED against Danny. Abby must first qualify as a proper plaintiff. To qualify as the proper plaintiff, the jurisdiction would have to allow a fiancé to bring this cause of action. Abby must show that she meets the other elements for NIED as well which may be Burt's serious bodily injury and the fact that she witnessed the occurrence of Burt's injury.

#### Chris

Chris has a claim against Danny for liability for the loss of his business. His employees on the other hand, are too remote to have a claim for their loss of employment.

#### Defenses

Assumption of Risk Waiver: when it is express--they signed the waiver it is relied upon as long as it is conscionable. The waiver is not valid because it cannot trump a statute (the OSHA regulations). In addition, Danny's acts constituted gross negligence and were willful and wanton because Danny had a notice from the OSHA regulations that the conditions at the mill were dangerous. Waivers do not apply in situations where there is gross negligence or willful and wanton acts. Finally, even if Danny argues that Burt's consent to the game was implied, implied assumption of risk is recognized in only four states.