Midterm Memo - Torts Fall 2023

This memo carefully reviews the midterm exam. The purpose of this memo is to provide you with information that will help you prepare for taking the final exam and improve your test-taking skills in general.

Included in the memo are sample student answers. These answers are not perfect and each have their flaws, but taken together they represent a set of thoughtful approaches to addressing different exam questions.

Grading

For each question on the exam, students were rewarded for identifying the correct legal issues, applying the correct legal rules, and crafting thoughtful, persuasive, credible legal arguments that dealt with nuances, gaps, contradictions, and ambiguities in the law. Extra credit was occasionally awarded to answers that were particularly thoughtful and precise. Even when students identified the incorrect issues or rules, they could earn partial credit by writing strong legal arguments applying those rules.

In accordance with Loyola Law School policies, I graded each exam anonymously. To minimize bias, I also graded each question separately and randomly sorted the exams for each question.

The character limit instructions — which were discussed in class, provided on our course website prior to the exam, and given at the time of the exam — stated that the character limit for each of the three parts of the exam was 5,000 characters. A separate instruction stated, "Do not exceed the character or bluebook limits. Failure to comply with these limits will result in a severe loss of points." Students received credit for the first 5,000 characters of each part of their exam answers and did not receive credit for any writing past the 5,000 character limit for each question. Some students kept their exam notes below their answers on the exam. That was fine. These exams were not penalized for technically exceeding the character count. I did not read the notes, and they did not factor into anyone's grade on the exam.

As stated in the class syllabus, the midterm exam was worth 25% of your grade in this class. The final exam will be worth 75%.

General Advice

Before diving into the particular questions on the exam, I would like to offer some big-picture feedback based on the class's exam answers as a whole. This is advice to keep in mind as you prepare for the final exam.

Only address the issues that matter to resolve the legal question being asked

Do your job. For each exam question in this class, you have a role and an assignment. You will receive credit for how well you perform on that task.

Don't include trivia. Answers were not rewarded for reciting or referencing legal rules that were unnecessary to answer the legal question in a given case. This uses up your character count and distracts the reader from what matters to decide the particular legal issue.

Resist the tendency to show off how much you know. You won't be rewarded for that. A busy partner at a law firm doesn't care how many legal rules you have memorized. She only cares that you can identify the rules that matter and use them to make a compelling argument.

Ground your argument in legal rules

All of your arguments should be under the umbrella of a legal rule. If your answer mentions facts from the prompt, make sure that you are connecting those facts to a legal rule that makes those facts legally significant. Facts mean nothing on their own. You must show the reader why a fact matters under the governing legal rule.

Separate duty and reasonable care analysis

Whether the defendant owed the plaintiff a duty and whether the defendant breached that duty are two separate legal inquiries that follow different rules. The tools used to determine a reasonable standard of care cannot be used to determine the existence of a duty.

Abide by the character limits

For those students who lost points by exceeding the character count, this is a good lesson to learn early in your legal career. In the practice of law, word and page limits often matter. Courts will reject your brief in its entirety if it exceeds the court's word or page count or otherwise doesn't meet formatting requirements. This is no joke. A state Supreme Court once rejected a brief that I filed because I printed the cover page of the brief on the wrong color card stock.

Use this midterm exam as a learning opportunity

This exam is only worth 25% of your grade in this class. If you performed well, keep up your strong efforts. If you did not perform as well as you'd hoped, use this memo as a springboard for improvement. Read through my commentary on each question and mark out on the exam the issues that you missed. Take notes on how you would rewrite your exam if given the chance. Compare your answers to the sample student answers to understand how you can better structure your answers, string together arguments, and write more precisely and succinctly.

None of these efforts will be wasted. Our final exam will closely mirror the format of the midterm. And the final exam is cumulative, meaning that any of the topics from the midterm may reappear on the final.

Once you have taken these review steps, I am more than happy to meet with you individually (or in groups) to go over your exams. If you finish your review of this exam and still have questions about how to approach an exam for this class, this is great timing for meeting with me one-on-one so that I can understand your approach and coach you for the final. At some point in the beginning of the semester, I will put a form on our class website for students to schedule one-on-one meetings with me. Depending on the number of students who request these meetings, we may need to spread them out across the first half of the semester.

Part I: Short Answer Questions

Short Answer Question #1

You are an attorney at a plaintiff-side firm in a small town nestled in a valley of Mount Posner in the State of Loyola. In this town, an elderly woman, Evelyn Harris, lives next door to Gabe Leggett, a first-year law student who volunteers with his local "Neighbors Helping Neighbors" program. This program, organized by the Mount Posner Community Association for Advancing Overall Public Welfare, encourages residents to assist elderly and disabled neighbors with household tasks.

Last week, the Mount Posner area experienced a heavy snowstorm typical for the area. Harris, who has mobility issues, was unable to clear the snow from her driveway and walkway. Leggett, aware of Harris's situation and her reliance on the cleared walkway for essential activities like fetching mail and groceries, had previously assisted her with various outdoor chores and snow removal through the volunteer program.

On the day of the storm, Leggett cleared his own driveway using his snowblower. He was in a cranky mood because he had just realized that his Torts class was a year-long course and was only halfway over. Harris opened the front door of her house, inched out onto her front stoop, and waved to Leggett. He waived back. She called out, "Can you help me clear this snow? I have a doctor's appointment." Even though Leggett could hear her, he called back, "What did you say? I can't hear you! This snowblower is so loud!" They repeated this exchange ten times until Harris gave up and went back inside.

The next morning, Harris attempted to leave her house for a doctor's appointment, slipped on her snow-covered walkway, and broke her hip. Harris's adult son, Jeff, who flew in from Los Angeles to attend to his mother in the hospital, is now considering whether his mother should sue Leggett for negligence. He has requested your legal advice. What do you tell him?

Prof. Doyle Commentary

You should tell Jeff that this lawsuit is not worth pursuing. For a plaintiff to prevail in a negligence lawsuit, they must prove that the defendant owed them a duty of care. Leggett did not owe Harris a legal duty to clear her driveway. A

plaintiff typically establishes that the defendant owed the plaintiff a duty of care by showing that the defendant's actions created a risk of physical harm to the plaintiff. If Leggett had blown snow from his driveway onto Harris's walkway, then he would have created a risk of physical harm for Harris. But Leggett is not responsible for the weather and did not create the snowstorm that created the risk for Harris.

None of the common law exceptions for existence of duty apply. The closest call would be special relationship. Leggett was in a position of power as he was able-bodied and had a snowblower. Harris was dependent on external help because she could not clear the walkway herself. And Leggett had helped her before. But that prior assistance did not create an ongoing legal obligation to take affirmative action to help Harris, even if helping Harris was the morally right thing for Leggett to have done. If Harris had been paying Leggett to help her manage her affairs generally, then the special relationship exception may apply because of an ongoing commercial relationship between the parties. But prior voluntary acts of assistance do not create an ongoing legal obligation to assist that person. The undertaking exception does not apply because Leggett never began administering aid to help Harris with this particular risk of harm. The other affirmative duty exceptions do not fit the fact pattern.

Advice for future exams: use common sense and pay close attention to the difference between moral and legal obligations. In general, our legal system is not going to impose liability on people for failing to shovel their neighbors' walkways.

Examples of strong student answers:

Harris should not sue Leggett for negligence because he is unlikely to owe her a legal duty. Under common law, a legal duty arises if your actions create a risk of physical harm, or if you have an affirmative duty to act imposed by a special relationship, an undertaking, non negligent creation of risk, non negligent injury, or statute. Here, Leggett didn't create the risk of physical harm through any act of his own, nor was there any affirmative duty imposed on him to act. The only affirmative duty at question is the existence special relationship, but this situation is unlikely to amount to a special relationship under the law.

There was no special relationship between Leggett and Hariss. A special relationship is created when a a person holds custody of another under circumstances in which that other person is deprived of normal opportunities of self protection. In Harper, a defendant was found to owe no duty to a guest on a boat who had dived into shallow waters and become paralyzed. The court reasoned the victim was not deprived of normal opportunities for self protection and there were no circumstances such as an exchange of money which may impose a duty. Thus, the defendant had no duty to act. Similarly, Leggett did not owe Harris a duty because he was not in custody of her under circumstances where she was deprived of normal opportunities for self protection. Leggett was a volunteer who occasionally helped Harris out with household tasks. However,

this does not impose a special relationship by itself, as courts are hesitant to impose a duty when there is no exchange of money. Here, Harris, though physically limited, could have paid someone to clear her driveway or rescheduled her doctor appointment. While Leggett may have had a moral duty to Harris due to to his previous actions, the existence of a moral duty does not necessarily create a legal duty.

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I would tell Jeff that his claim of negligence would likely fail. Leggett did not have a duty to Harris to exercise reasonable care. Reasonable care is when a person has a duty to others to prevent reasonable and foreseeable risks of harm. If they do not create the risk of harm, they may still have a duty to intervene in some way under the general rule of affirmative duty. Three of the affirmative duty exceptions are a special relationship, undertaking, non-negligent injury. Here, Leggett did not create the physical risk of harm, and he also does not fit under any of the affirmative duty exceptions to provide reasonable care.

Special relationships are formed through joint ventures, or transactional relationships. Leggett and Harris did not have a special relationship because he only volunteers for the elderly assistance program which does not create a duty to care, it only encourages assistance. Therefore a duty was not owed to Harris under this exception.

An undertaking is when a person assumes voluntary care of injured person, and now has a duty continue aid or prevent future harm. While Harris has assisted Leggett in the past, he did not assume care on that day, so an undertaking did not occur. Also, Harris was not injured when she first asked for help. Therefore, Harris ignoring her request was not a breach. It is not illegal for a person to follow the libertarian view and put personal autonomy over assisting others.

Lastly, there was no affirmative duty under non-negligent injury which is when a person has reason to believe they created a harm, even innocently and now have a duty to care for the person harmed. Harris did not unintentionally put the snow in Leggetts driveway, so therefore non-negligent injury does not apply. Harris will likely not be able to sue Leggett for negligence because he did not owe a duty of care.

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Harris is unlikely to win a negligence suit against Leggett. Leggett did not create a risk of physical harm, since he did not make Harris' walkway slippery. It was due to heavy snowstorm. The second step is to examine whether an affirmative duty exception applies. Affirmative duty exceptions include a special relationship, voluntary undertaking of care, non-negligent injury, the non-negligent creation of risk, and a statutory duty.

A special relationship is unlikely present. The strongest argument of a special relationship is that Harris looks to Leggett for assistance or protection and thus Harris may be in Leggett's custody. But it cannot be said Harris is under Leggett's custody of care by virtue of his previous assistance to her or due to her

old age. The program that Leggett participates in is voluntary. There is no contractual relationship. Like Harper, where the defendant was not receiving any financial gain from the plaintiff, to which the court found if there was a financial relationship, the defendant may have a duty to protect plaintiff. Absent one, the defendant does not have a special relationship with the plaintiff and thus does not owe a duty to him.

There is also no voluntary undertaking. Leggett, who is aware of Harris' reliance on the cleared walkway for essential activities, had previously assisted her with snow removal through the program. On the day of the snowstorm, Leggett did not help Harris whatsoever. Unlike Farwell, Harris and Leggett are not on a social venture together that would mutually obligate them to render care if one is deprived of normal opportunities to do so. To undertake care in this situation, Leggett would need to initiate the clearing of Harris' walkway. However, Leggett and Harris simply had an exchange in which Leggett pretended to not hear Harris' request for him to clear her walkway.

Short Answer Question #2

You are an attorney representing a plaintiff, Harris Barron, in a negligence suit against the Traynor Running Club. The Traynor Running Club recently organized its annual half-marathon in Loyola City. Despite the event's increasing popularity, Traynor Running Club decided against implementing safety measures that included creating wider running lanes, limiting the number of runners, and providing more water stations along the route, all aimed at reducing runner congestion and the risk of dehydration.

During this year's event, your client, Barron, an amateur runner, was nearing the final stretch of the half-marathon. Due to the overcrowded track, Barron was unable to maintain a safe distance from other runners. In an attempt to navigate through the crowd, Barron tripped over a discarded water bottle, which — as you convincingly argued in your closing argument at trial — should have been cleared by the event organizers. As a result, Barron fell and suffered a broken wrist and severe dehydration, necessitating hospitalization and causing him to miss important work deadlines.

Pretrial discovery revealed that the Traynor Running Club had deliberately chosen not to implement recommended safety measures to maximize participant entry fees. Internal emails from the club's board showed a disregard for these safety concerns, with one board member commenting, "A few stumbles are part of the race excitement."

Barron sued the Traynor Running Club for negligence, and the case went to trial. The jury awarded Barron $20,000 in compensatory damages for medical expenses, lost wages, and pain and suffering. In response to the club's disregard for runner safety, the jury awarded Barron $300,000 in punitive damages.

Following the verdict, Traynor Running Club filed a motion for remittitur, arguing that the punitive damages award is excessive. As Barron's attorney, construct a compelling legal argument for why the court should find that the damages award is not excessive and deny the motion for remittitur.

Prof. Doyle Commentary

On its face, the punitive damages award would seem to violate due process under *State Farm* and *BMW v. Gore*, particularly since the punitive damages award is in excess of a single digit ratio to the compensatory damages award. But your job was to argue that things are not as they seem at first blush and that the punitive damages award was proper.

This question was catnip for Posner fans who had the opportunity to channel their favorite reasoning from *Matthias.* The strongest arguments were rooted in the deterrence rationale for punitive damages, contending that punitive damages in excess of a single digit ratio were the only way to hold Traynor Running Club accountable. The club is responsible for widespread tortious harm but other harmed racers, like the other hotel guests in *Matthias*, are unlikely to sue because they do not understand the club's role in creating these harms. Optimal deterrence requires punitive damages that exceed the single digit ratio. *Matthias*'s justification of punitive damages based on purely dignitary harm is a bit of a harder sell here. Students who were attentive to counterarguments recognized that the plaintiff suffered physical injuries and was compensated substantially for those injuries, which can cut against the *Matthias* reasoning and make the case seem more like *State Farm* or *BMW v. Gore*. The fact pattern also gave students the opportunity to marshall facts showing the club's reprehensibility under the first *Gore* factor.

Advice for future exams: Address the most important issue. *State Farm* is really not great for you here. When writing this motion, you should answer the question that is foremost on the judge's mind: Why doesn't *State Farm* require me to reduce the punitive damages award? When precedent has you pinned in a corner, find a way to win. Don't pretend that you're not pinned in that corner.

Examples of strong student answers:

The court should find that the damages award is not excessive and deny the motion. Typically, punitive damages are available in cases where a defendant displayed gross negligence. They serve the purpose of deterring the defendant's future misconduct, and are generally bound by the restrictions outlined in Gore and Campbell. However, in Campbell, the court demonstrated that a punitive damages award can exceed a single digit ratio if it fulfills a 'Gore' test. Further, the holding in Mathias showed that a high punitive damages award can be necessary to properly serve the purposes of damages in tort law.

Following Gore, the reprehensibility of a defendant's conduct is imperative when looking at punitive damages. Here, the defendant was aware that the event was getting more popular, and deliberately chose not to implement safety

precautions in order to maximize profits. Board members even commented on the potential risks in a mocking way.

Although the current damages award may properly restore the plaintiff, alone it does not serve tort law's aims. Following Matthias, a lower punitive damages award can make it cheaper for defendants like The Club to continue its conduct. While concerns of due process for punitive awards are valid, reducing the punitive damage award provides The Club and actors alike no incentive to take proper precautions to mitigate risk. By lowering the award, the court would indicate that defendants can continue their conduct. Thus, the punitive damages award is both appropriate and essential here.

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The punitive award is not excessive. The purpose of a punitive award is to act as a deterrent mechanism to prevent future harm. It is usually only awarded to punish conduct that is especially willful or wanton. Punitive damages cannot be awarded for conduct that occurred outside of the state, or only awarded purely because of the overall reprehensibility of the defendant (unspecific to the plaintiff). When considering whether a punitive award is excessive, BMW established 3 guideposts. Here, based on the facts, the first two will be applied.

Reprehensibility: When determining what is reprehensible, the Supreme Court in State Farm outlined "reprehensibility" factors, only one of which is required to establish reprehensibility. These include: whether the harm was physical; whether the conduct was reckless to the safety of the public; and whether the conduct is likely to occur again.

Here, the defendant meets several. First, the harm that Plaintiff suffered was physical from a broken wrist. Second, the email from the board member demonstrates a reckless disregard for the safety of the public. Third, the apparent admission of putting profits over public safety likely demonstrates that this action will occur again, something the court in Mathias considered paramount. As in Mathias, where there was fear that the hotel would continue to rent out bed bug-infested rooms to turn a profit, it is very likely that Defendant will continue its conduct in every race moving forward unless adequate deterrence is addressed.

Ratio: In State Farm, the Supreme Court held that punitive awards should not be higher than a single digit ratio. However, in Mathias, the court there reasoned that the ratio need not be strictly kept to single digits-- that it was merely a guideline. Furthermore, in State Farm, the ratio there was 145:1. Here, the ratio is is 15:1. This is barely over the single-digit threshold. It is unlikely the court will see this as excessive. Therefore, the motion should be denied.

Short Answer Question #3

You are a trial court judge in the State of Loyola overseeing a medical malpractice lawsuit. The plaintiff, Clara Clearchoice, a 45-year-old patient with a long-

standing and severe phobia of anesthesia and needles, sued her orthopedic surgeon, Dr. Ivan Opere, for medical malpractice. The case concerns surgery for a torn ligament in Clearchoice's knee.

Clearchoice's medical history, which Dr. Opere had access to, documented her longstanding phobia of anesthesia and needles. Despite this, Dr. Opere recommended and performed a standard arthroscopic surgery for her torn ligament, a procedure that required general anesthesia and multiple injections. Unfortunately for Clearchoice, the surgery was not successful. Her torn ligament failed to heal and she continues to receive medical treatment for the injury. Clearchoice claims that she was not informed of an alternative treatment option: a specialized physiotherapy regimen combined with a knee brace, which, while having only a 30% success rate (as opposed to the 85% success rate of the surgery) and requiring a longer recovery period, did not involve anesthesia or needles.

During the trial, Clearchoice testified about her phobia and stated that — had she been aware of the non-surgical option — she would have chosen it despite its lower success rate and longer treatment duration. She also testified to experiencing significant post-surgical trauma due to the anesthesia and injections, exacerbating her phobia. After Clearchoice rested her case, Opere moved for a directed verdict, arguing that Clearchoice had not established a prima facie case of medical malpractice.

How do you rule on the motion and why?

Prof. Doyle Commentary

The legal issue is whether the plaintiff made out a prima facie case that the defendant failed to obtain informed consent from the plaintiff for the medical operation of arthroscopic surgery.

The jurisdictional rules provided in the exam packet specify that the State of Loyola uses a reasonable patient standard for determining informed consent. So the question is whether Clearchoice has made out a prima facie case that a reasonable patient would have wanted to be informed of this alternative treatment. Like the reasonable person standard, the reasonable patient standard is an objective standard. Clearchoice's particular phobia should play no role in the analysis. The question is only whether a reasonable patient seeking treatment for the same injury would want to be informed of this alternative treatment. Given that the alternative treatment had a dramatically lower success rate and involved a much longer recovery time, it's not clear that information about this alternative treatment would have been material to a reasonable patient's informed decision about what course of treatment to follow.

Students could grant or deny the defendant's motion, but arguments denying the defendant's motion were more difficult to make because they required proving that a prudent patient would want to know about a course of treatment with a much lower success rate and longer recovery and could not depend upon

Clearchoice's particular phobia to prove that the doctor had failed to obtain informed consent.

Examples of strong student answers:

I'd approve the motion for directed verdict. Opere did not violate Clearchoice's informed consent, so she failed to establish a prima facie case. Doctors cannot be expected to inform patients of every treatment option as it would hinder efficiency in the medical industry. Instead, the objective reasonable patient standard requires a doctor to inform the patient of all treatment alternatives, risks, and outcomes a reasonable patient would want to know. The purpose of the reasonable patient standard is to eliminate the potential for a flood of litigation, as patients will likely say they would have chosen a different treatment option in hindsight after the one they chose fails. Though characteristics about the patient's lifestyle should sometimes be considered to provide personalized care, like how a patient's value of their ability to walk in Mastromonaco, a patient's fear of needles should not be considered here. The reasonable patient, even with a fear of needles, would not want to be informed of a treatment option 55% less effective just to avoid multiple injections. Holding as much would open floodgates of litigation, increase medical costs, and place a sub-optimal degree of liability on doctors.

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I deny the directed verdict because a genuine question of fact that should be presented to a jury. Loyola uses a reasonable patient standard to determine issues of informed consent. Under common law, a patient should be told of any reasonably viable medical alternatives, even ones that a doctor wouldn't recommend, so they may make an informed decision about their health. There is a genuine question of fact as to circumstances here, so it should go to a jury.

Informed consent is an objective question of fact that should be presented to a jury. A patient's personal preferences are important to decide if a treatment method should have been offered. In Matthies, a defendant wasn't informed of a riskier surgical method and was proscribed with another method instead. The defendant claimed she would have preferred the riskier method if offered, as it aligned more with her personal preferences and preferred outcome. The court ruled it was a question of fact that should be presented to a jury and it was an error to not allow the defendant to present her side. Similarly, Clearchoice's distaste for anesthesia and needles should have been taken into account when proposing treatments. There is a concern here that Clearchoice is speaking with the hindsight that the surgical method was unsuccessful, but this is why the question should be presented to a jury.

Part II (Question 102) Essay Question

You are a junior attorney at a plaintiff-side law firm. A potential client, the Poole family, reached out to your firm following their child's injury at a local playground, "Learned Hand Park." Known colloquially as "Splinter Haven,"

this playground is known for its rustic charm, featuring old-fashioned wooden playground structures that echo the area's fondness for a natural, woodsy aesthetic.

The Pooles' daughter, Trina Poole, suffered a serious personal injury while climbing on a wooden ladder connected to a fort-like structure, a popular attraction among the local children. As she reached the top, a nail that was protruding from a rung tore into her leg, causing a deep, jagged laceration that extended from her knee to her ankle. The injury resulted in profuse bleeding and required immediate medical attention. Trina was rushed to the emergency room, where she underwent emergency surgery to repair the damage. The surgery involved complex stitching and was followed by a blood transfusion due to significant blood loss. After surgery, Trina faced a prolonged and challenging recovery period. She developed a severe infection in the wound, requiring a lengthy course of intravenous antibiotics and extended hospitalization. This further complicated her recovery process, leading to multiple additional hospital visits and ongoing medical treatments. The physical impact of the injury was severe, leaving Trina with limited mobility in her leg and requiring physical therapy to regain basic functions. The injury also had profound psychological effects on her; she developed a fear of outdoor play and experienced nightmares and anxiety, for which she needed psychological counseling. The injury left Trina with a permanent and prominent scar.

The Poole family is now contemplating a lawsuit against the park for negligence. A partner at your firm has asked you to consider some preliminary issues before the firm decides whether to take the case. Here are some additional facts that may be helpful for your analysis:

A state statute, the "Safe Playgrounds Act," was passed in Loyola fifteen years ago. This law mandates that all newly constructed playgrounds use materials and designs that minimize the risk of injury, favoring rubber and plastic over traditional wood. Because the law does not apply retroactively, Splinter Haven, built several decades prior, was not required to update its structures.

"Learned Hand" park is on a privately owned property, managed by the Hand Estate. The playground features an adjacent parking lot with a large sign, "All Are Welcome to Play at Learned Hand Park!" Since the incident, the park has reached out to the Pooles, pleading with them not to pursue legal action. The park claims that, due to financial constraints, if it was required to meet current safety standards for new construction, rather than update the playground the park would be forced to demolish the playground and prohibit the public from entering the grounds.

Over the past year, the park has experienced a troubling increase in vandalism including minor graffiti and littering. This vandalism has been primarily attributed to a gang of local teenagers, known in the community as the "BPL." In response, the park has hired a part-time security guard, but the guard is responsible for multiple parks and has been unable to prevent all acts of vandalism

due to the large area she is responsible for patrolling. The severity of the vandalism came to light following the injury of Trina Poole, when a detailed inspection of the playground equipment revealed multiple instances of tampering, including apparent attempts to pull out nails and dismantle playground equipment.

The park's management has expressed frustration over the situation, citing their limited resources to both repair ongoing damage and implement more robust security measures. The financial strain has been exacerbated by the threat of a lawsuit, which could potentially divert funds from maintenance and safety improvements, further complicating the park's efforts to provide a safe environment for its visitors.

Email #1

From: Process, Drew <Drew.Process@deweycheatemhowe.com>

Sent: Tuesday, November 21, 2023 10:49 PM

To: You

Subject: Need your big brain on playground case

If we're going to take this case on, we need a solid legal argument that the defendant failed to exercise reasonable care under the circumstances. What have you got? If your response doesn't address the park's best counterarguments, you're fired.

Because we have other attorneys analyzing issues of contributory and comparative negligence, assumption of risk, factual causation, and proximate cause, please don't address those issues.

Best,

Drew

Email #2

From: Process, Drew Drew.Process@deweycheatemhowe.com Sent: Tuesday, November 21, 2023 11:39 PM To: You Subject: Playground case - Reasonable Care vs. Res Ipsa Loquitur

Did you get my last email? Chop chop. Let's go.

I was thinking, what about res ipsa? Seems like it might work? Am I a legal genius? What's our best argument there?

Let's not forget that under Loyola state law, we can establish the defendant's negligence by proving either that the defendant failed to exercise reasonable care or that res ipsa loquitur applies. Unfortunately, we practice in a lousy state where we can't present both theories of the case to the jury.

Given that we're stuck between making out a res ipsa case and making out a case where the defendant failed to exercise reasonable care, which is the better option for us?

Also, same as the last email: because we have other attorneys analyzing issues of contributory and comparative negligence, assumption of risk, factual causation, and proximate cause, please don't address those issues.

Best,

Drew

Prof. Doyle Commentary

You knew this kind of question was coming your way. The fact pattern gave students flexibility with how they chose to respond to the question. The foremost issue was, what constituted reasonable care under the circumstances? Was the park legally obligated to replace the wooden structures with newer, safer ones? Should the security guard have been inspecting the playground more closely to look for any loose nails? Did the park just have to put up warning signs for children and parents? Next, students had to assemble their arguments, using some combination of the methods we discussed in class: foreseeability, the reasonable person standard, custom, statute, and the hand formula. A good answer did not have to include each of these lines of argument but needed to be convincing. Exam answers fell short when they did not fully connect the dots to argue what constituted reasonable care under the circumstances. For example, it was not enough to argue that a child being injured by a nail on a wooden playground was foreseeable and leave it at that. Foreseeability of injury must be used to establish reasonable care under the circumstances. A stronger answer would argue how the foreseeability of this kind of injury required the park to take a particular, reasonable course of action such as more frequently inspect the premises or post warning signs or use other materials. Remember, as a plaintiff's attorney, you are arguing that the defendant acted unreasonably in maintaining the safety of the park, not that the defendant should be liable for any harm that happens to a child in the park. Making a plaintiff-side argument, you don't want to set the standard of reasonable care too high. You want to show the jury how the defendant failed to do what any decent person in their position would have done.

This was not a case of negligence per se because the law requiring parks to construct playgrounds from rubber and plastic did not apply to the park. Nonetheless the law could be used to show that it was customary and feasible to construct playgrounds using these safer materials. The park's claims that financial constraints prevented them from updating the park does not fully answer the question of reasonable care, even under the hand formula. If the park is sufficiently dangerous, it might be better for it to be closed down rather than open to the public. The park cannot escape liability by pinning the blame on the teenagers who have been vandalizing the property. Under the common law duties of land possessors, the park has a duty to the Poole family as invitees to protect them from dangers that would be revealed by inspection. But the existence of this duty doesn't fully answer the question of breach, because the duty is not absolute. The park's duty is to exercise reasonable care to protect invitees from

dangers on the premises. The plaintiff still must prove that the park did not exercise reasonable care.

Given this set of facts, res ipsa is tricky. Res ipsa loquitur applies when the accident is one that ordinarily does not occur in the absence of negligence, and the instrumentality causing the injury was under the exclusive control of the defendant. Depending on how one defined the accident and defined exclusive control, res ipsa may or may not apply. Children suffer all kinds of cuts and scrapes on playgrounds without anyone being negligent. But children don't ordinarily receive deep, jagged lacerations from exposed nails unless someone was negligent. Although the park had exclusive control of the playground as the playground's proprietor, the actions of the third-party vandals complicate this question as they seem to be the likely culprits who exposed this nail in the first place. This was an opportunity to retrieve the reasoning from cases like Larson v. St. Francis Hotel: "The Falling Armchair," Connolly v. Nicollet Hotel: "The Chaotic Convention," and McDougald v. Perry: "The Flying Tire" to help settle the issue.

The question of whether to make out a res ipsa case or make out a case where the defendant failed to exercise reasonable care depended largely on the strength of the arguments that a student built for each theory of the case. Even if res ipsa applies, it's not always in the plaintiff's best interest to put forth a res ipsa case instead of making a typical reasonable care argument. Thoughtful answers balanced the relative advantages and disadvantages of each approach.

All in all, there were many different ways to write a good answer to this question.

Examples of strong student answers:

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First we must look at the duty the playground owed to those who entered onto the property. Loyola is a jurisdiction that uses the traditional apporach, Trina poole was not a tresspasser since the park was opened to the public particulary children.There was a sign in the parking lot that said all are open to hand park. she was either an invitee or Licensee, section 332 extends invitee statuts to a person who is invited to enter or remain on land as a member of the public for purposes for which the land is held open to the public. Land posesors owes invitees the duty to excersise reaosnable care to protect them from both known dangers and dangers revieled from inspection. Since trina was there for purposes of which the land is open to the public she was there to play and enjoy the land meaning she is an invitee for legal purposes.

For the second issue of whether we should do traditional negligence or Res Ipsa. I would advise to do Traditional over Res Ipsa. Generally speaking the bar for res Ipsa is far higher then the bar for entry for traditional negligence and the judge serves as the gatekeeper for resipsa claims. While Res IPSA only, requires that the accident be one that only happens when negligence is present and that

the defendant had exclsuive control over the instrument of harm. We would not need to put forward a standard of care. The park will fist argue that this is a type of accident that can occur without negligence, a nail can preetrude form a wooden structure without neglignce present it happens all the time in construction sites, every wooden home has a nail pretruding somewhere. Secondly, that the presence of the BPL and there actions takes away the exclsuive control from the park. They may cite larson v. Saint francis hotel and make the argument that the hotel guest in that case are similar to the park guest in this case and that having a guard waiting and wacthing park actvities is unreasoanble. the fact that the park was open to the public suggests that they do not control who enters the park taking away exclusive control.

While the park has the duty to inspect, they may argue that they lack the resources for constant expection and that if they where required to have 24 hour servaliance to prevent BPLS activities then they could no longer be able to operate public parks to the benefit of the public. This may be enough to sway a judge to dismiss the res ipsa claim.

on the other hand, For traditional negligence the park has to defend against forseability, reasonable person standard, statute, custom, and the hand formula. The standard of care we would need to put forward would be simple inspections and repair. The accident was foreseable the park was known colloquiolly as splinter heaven, since the structure was made of wood it was forseeable that a nail could extend out of the structure. The operators of the park fall under the reasonable person standard and therefore be compared to how an objective reasonable person would have managed the park. While The statute the safe playgorunds act may not be retroactive, the standards it puts forward may be enough to advise a jury of a custom, that there is a modern standard of safety that the defendant failed to meet. under T.J. Hooper, a defendant could be liable for failing to update to a newer technology or standard even if its not widely used. Our case can rely heavily on custom, if the custom in the state of loyola is to update the parks to the legal standard set forth in legislation then we can argue that the park failed to meet that custom therefore failing to practice reasonable care. Our firm can call the owner of other parks in the state that could testify to the custom. The Learnad hand park operators main argument is that they lack the finacial resources to repair the ongoing damage and implement more robust safety measures, and that a lawsuit will further exacerbate this issue.

However, under the hand formula they would have to prove that the burden of having someone inspect the parks and potentially closing them for repair is greater than the chance of an severe injury and the harm caused by that injury. this injury could have happened to any child and the extent of the physical injury let alone the emotional trauma trina suffered is well worth the minor burden of what their legal duty already is. Therefore the park would most likely loose on this argument since the chances of trinas injury and the severity of the

injury is far greater then the burdern the defendant was already legalily required to do.

Since the bar for entry for traditional neglignece is lower than for res ipsa the judge simply needs to decide wherther or not there is a controversary for a jury to hear. Since the park may be liable under multiple prongs for traditional negligence the judge would most likely allow the case to move forward to a jury. Lastly judges tend to be more comfortable allowing Traditional negligence claims to move forward over res IPSA claims.

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We should argue a prima facie case of negligence for the harm Poole suffered at Learned Hand Park.

We have a compelling case on the grounds of traditional negligence, so we don't need to invoke the seemingly weaker argument of res ipsa. If we used the doctrine of res ipsa, the park would likely argue that the instrument of harm was not under their exclusive control. Similar to Larson v. St Francis Hotel, the park could argue that though the accident was on their premises there were a variety of people with access to it that would have created the risky conditions. However, we could invoke Connolly v. Nicollet and point out that the park had adequate notice of the issues and as they were aware of the dangerous conditions they should have maintained the park in better conditions. It still seems like a weaker argument though, because a child getting a cut on a playground is not the type of injury that only results from negligence on the park owner's behalf.

The playground had a duty to exercise reasonable care towards those on its premises. Though it is a private only owned park, it is open to the public as evidenced by the 'All are Welcome to Play' sign out front. Restatement Section 332 extends invitee status to any member of the public who is invited to enter the land for it's intended purposes. A playground in a park should be assumed to have the intended purpose of allowing children to play on it. The possessor of land owes all invitees a duty to exercise reasonable care to protect them from known dangers and to inspect the grounds for dangers that may be revealed.

I think our strongest arguments for breach of reasonable care are Custom and Foreseeability. Reasonable care under the circumstances should have been for the park to use materials that minimized the risk of injury as illustrated by the Safe Playground Statute. Though the statute does not apply to this park, it can be used to illustrate what customary reasonable care for playgrounds is. In Trimarco v. Klein the court recognized that a statute can be invoked to illustrate a custom, even if the defendant is not in violation of said statute. Thus in this circumstance, reasonable care could have been using materials like foam padding around the sections of the structures containing nails to reduce the risk of injury. Additionally, with the known dangers posed by the ongoing vandalism in the park, the park should have made it a point to inspect their structures frequently. Having already hired the part time security guard, that guard could

also inspect the premises at the start of each shift to determine any risks. It would not cost the park much more to make that a responsibility of the guard, as security guards are genuinely meant to patrol and inspect the grounds in search of danger anyways. Or they could pay the guard to work an additional hour to account for the additional responsibility, which would also be a minimal increase in costs.

We should also emphasize the customs associated with playgrounds in determining that the injury was foreseeable. The target audience is young kids, and they are meant to explore the grounds, play on the structures, investigate the nooks and crannies. That is precisely what one would assume was their presumed purpose for being invited on to said land. Any location specifically designed for children to exercise their curiosity has to be held to a high standard of reasonable care to prevent injuries to those children. It is quite foreseeable the kids will crawl around and fall down, and encounter anything protruding from the surface of the structure, thus reasonable care should be taken to protect the children

The park will likely counter with a cost-benefit analysis and a policy argument, saying that they cannot afford to take any such measures. However if you apply the Hand Formula the burden of installing foam padding or giving the security guard one extra duty is far less than the probability that a child will be injured while playing at a park and the gravity of such an injury. Defendant may broach a policy concern that local parks will be forced to close because they cannot afford the negligence suits created by this duty.Just because the parks are found to have a duty to those on the premises does not mean they are de facto liable for any injuries, so long as the demonstrate reasonable care. Implementing these fairly simple and inexpensive fixes as a matter of reasonable care would prevent such crushing liability. In this case, the park breached their duty but not implementing reasonable care measures. The purpose of having this type of standard is to establish what parks need to do to avoid creating the risk of injury. Particularly when a location's sole purpose is for children to explore and play, a park should be held to a fairly stringent standard of reasonable care to avoid harm. If they cannot afford to take any such measures, they should not be open to the public.

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Email 1

As a public landowner, the management had a duty to inspect the premises and make it safe to the public. It was evidently not made safe and harm resulted. Our best argument for reasonable care relies on foreseeability and custom.

Firstly, a defendant can fail to exercise reasonable care when the harm is foreseeable and they could have taken the precautions to prevent it. In Braun, it was seen as broadly and obviously foreseeable that the uninsulated wires at the construction site would harm someone. In our case, like Braun, it is blatantly

foreseeable that protruding nails and dismantled equipment would likely harm an individual.

The defendant even nearly admits to this foreseeability by placing a security guard to prevent this tampering and subsequently, harm. Further, the custom may provide evidence for community norms that can be expected and followed, providing that ignoring these customs would result in failing to exercise reasonable care. In Trimarco, a statute requiring shatterproof shower door glass was enacted after the construction of the shower door and was not retroactive, but the custom was so overwhelming the court found that not providing shatterproof glass failed to exercise reasonable care. Further, a custom can be found as more important to abide by than a statute, if it is an attempt to be safer (see Tedla).

In our case, even though the Safe Playgrounds Act did not apply retroactively, and the defendants were not statutorily required to implement rubber and plastic, like Trimarco, the statute is likely merely demonstrating a long-time custom. Since this law was passed fifteen years ago, it is likely all newer parks implement these safety features and demonstrate community norms. Additionally, like Tedla, it is evident that the custom of these features would increase the safety that was not required by the statute and therefore should be the dominant principle in this case.

The defense may argue with the economic theory of negligence, claiming that the burden of preventing the harm would be so significant that the park would have to close. However, this theory is only valid if the burden is greater than the probability of the harm and the magnitude of the loss. In this case, we are only asking for reasonable care, not that they adhere to the new statutory safety standards, so the burden will be lower than they claim. Further, as mentioned above, the probability of this harm is enormous, and nearly admitted by the plaintiffs through their security guard. Further, Trina's complex surgery, challenging recovery, and long-lasting trauma point to the magnitude of harm also holding significant weight. Each child this happens to suffers enormous loss. In this case the burden on the plaintiff does not outweigh the probability of harm and magnitude of loss, so the defendant should have taken on that burden.

Email 2

To establish a res ipsa claim we must establish 1) this kind of harm would only occur from negligence and 2) the defendant had control of the instrument of harm.

First, we can claim this kind of harm would only occur if the security guard and the park's management were not successfully doing their job at keeping the park up to date. It is their duty as landowners open to the public to warn of issues, inspect the land, and make it safe. In McDougald, the court negligence can be inferred where a tire would not have fallen off the man's car, causing injury, if he had properly inspected the connection points holding it to the car.

Like McDougald, the child would not have gotten injured had the management inspected the park, warned of the dangers, or made them safe, so negligence can be inferred.

Second, the defendant may argue that they did not have exclusive control of the park because individuals were pulling nails. We can disagree. In Connolly, where the defendant was put on notice of rowdy guest behavior that caused injury, the court found the hotel had fair notice of this behavior and could have restricted it. Here, like Connolly, where the defendants knew of the issue and could made is safe, the management knew people were pulling the nails and could have warned patrons of the safety issues (instead of inviting them in) or cleaned up the issues. While this does lean toward reasonable care, we can make a case of exclusive control here.

I do think we are in a place to make a case of reasonable care because the duty to the public is evident and a jury would very likely agree with us on the custom and foreseeability. However, I do think it could be valuable to make a res ipsa argument because of the power imbalance we suffer. Since our plaintiff is a child, she could be difficult to elicit the appropriate amount of information from to make our reasonable care case. If we choose res ipsa, that burden of proof lands on the defendant. I also think we successfully can argue both points of the res ipsa claim, with relevant cases or statutes to back it up, so I choose a res ipsa case.

Part III (Question 103) Essay Question

A case has recently come before the Supreme of the State of Loyola. The plaintiff, Willa Frayed, recently attended a tech expo at the Loyola Convention Center. The expo featured a variety of booths presenting cutting edge technologies. Among them, Unforeseeability, Inc., had set up a "Virtual Reality Experience" booth, draped in tapestries, surrounded by faux crystal formations, emitting soft ambient lighting, and projecting interactive displays of chakra alignments.

Frayed was drawn to Unforeseeability's main attraction: a virtual reality headset experience titled "Your Own End," in which the user witnessed — from a third person perspective — a simulation of the final moments of their life. The staff at Unforeseeability, dressed in flowing garments and necklaces made of flowers, assured visitors that the experience was transformative and life-affirming. The staff reminded visitors that death is guaranteed for all of us and assured users that the simulation's purpose was to empower users to accept that truth and live their lives fully in the present. Prior to the simulation, none of the staff knew what experience Frayed would have as each user's death is determined by an algorithm and kept secret until the user experiences it firsthand. The user's depicted death scenario is somewhat randomized but is also influenced by machine learning models' predictions of how the user will die based upon publicly available information about the user. The Unforeseeability staff assured Frayed

that the experience of almost all users at the expo was bearing witness to a geriatric version of themselves surrounded by loved ones in a hospital room or hospice care.

Frayed was not so lucky. In her simulation, she watched a replica of herself at her present age go for a jog around her neighborhood only to be set upon by a pack of wild dogs that viciously mauled her and tore her apart piece by piece. In the simulation, Frayed watched helplessly as her avatar screamed out in agonizing pain and eventually succumbed to her injuries.

The aftermath of this virtual experience has had a profound and debilitating impact on Frayed. She has developed an intense and overwhelming fear of encountering dogs, to the extent that it has severely disrupted her daily functioning. Simple activities like walking through her neighborhood, previously a source of relaxation, have become fraught with anxiety and fear. The mere sound of barking triggers acute panic attacks, leaving her feeling trapped and unsafe even within her own home. Professionally, Frayed's performance as a personal organizer has deteriorated due to her inability to focus, haunted by the vivid imagery from the simulation. Her social interactions have dwindled as she avoids any situation where dogs might be present. A psychiatrist has diagnosed Frayed's condition as PTSD, requiring ongoing psychological treatment and medication.

Frayed sued Unforeseeability for negligent infliction of emotional distress. To date, the Loyola Supreme Court has recognized NIED claims based upon physical impact, "zone of danger," and "bystander liability." Finding that none of those bases for liability applied, the trial court dismissed the case. Frayed now appeals that dismissal.

The issue on appeal is whether the Loyola Supreme Court should recognize a cause of action for negligent infliction of emotional distress under these circumstances. Keep in mind that the issue on appeal is fundamentally a question of whether Loyola should recognize a legal duty in these kinds of cases — not about whether Unforeseeability breached their duty in this particular case.

Part 1

Write the majority opinion for the Loyola Supreme Court.

DO NOT address issues that we haven't covered yet in class, including contributory and comparative negligence, assumption of risk, factual causation, and proximate cause. Those issues may matter for the outcome of a particular case, but those issues do not need to be addressed to determine whether Loyola should recognize this cause of action in general.

Part 2

Write the dissenting opinion for the Loyola Supreme Court.

DO NOT address issues that we haven't covered yet in class, including contributory and comparative negligence, assumption of risk, factual causation, and

proximate cause. Those issues may matter for the outcome of a particular case, but those issues do not need to be addressed to determine whether Loyola should recognize this cause of action in general.

Prof. Doyle Commentary

See? I told you there might be a policy question on the exam. By having students write a majority opinion and a dissenting opinion, the question gave students the opportunity to explore all aspects of this issue, developing the strongest arguments for and against expanding the scope of NIED.

Because the Loyola Supreme Court has only recognized NIED claims based upon physical impact, "zone of danger," and "bystander liability," the trial court was bound by precedent and was correct to dismiss the case. The Loyola Supreme Court, however, has the opportunity to revisit its rules regarding NIED. None of the cases we read for class presented a fact pattern quite like this one. But it shares some features in common with other grounds for NIED. The plaintiff was a bystander not to the death of a loved one but to their own simulated death. The plaintiff was never in real danger and did not experience any physical impact from the events in the simulation, but the completeness of the immersive virtual reality experience may have made the plaintiff experience a similar emotional reaction to plaintiffs in a "zone of danger" case. None of this determines exactly what the Loyola Supreme Court should decide, but the fact pattern gave students the opportunity to craft analogical arguments rooted in the rules and cases we discussed in class.

Strong student answers also addressed the underlying concerns with expanding the grounds for NIED claims that we read about and discussed in class. There's no question that Unforeseeability caused the plaintiff severe emotional harm and acted unreasonably with how they ran their simulation. But it's hard for the Loyola Supreme Court to craft a rule that would allow the plaintiff to recover in this case without opening the floodgates of litigation, inviting frivolous lawsuits, and drowning judges and juries with impossible questions of proof. There are unavoidable tradeoffs here, and strong student answers wrote compelling arguments both for expanding NIED and for keeping the existing rules as-is.

Examples of strong student answers:

1)

New technology creates new frontiers of experience that demand new duties. VR is one such experience. In the past, we required proof of physical impact, zone of danger, or bystander liability to successfully bring a NIED complaint before the court. However, the instant case provides occasion to reevaluate this standard. In other states it has been decided that a duty is established when one's action create significant risk of causing the ordinarily sensitive person to suffer emotional harm under the same circumstances.

One such is Gammon, where the plaintiff inadvertently received a severed leg in the mail from the hospital where his father just died, and suffered emotionally as a result. The court held that an ordinarily sensitive person mourning their father could be expect to be emotionally harmed by such an occurrence. This resulting harm is the same in the instant case. Seeing oneself ripped apart by dogs is violent, gruesome, and traumatic, as is seeing a severed leg one believes to be their farther's. Such an experience carries the risk of inflicting emotional harm to the ordinarily sensitive person. Indeed, it could also be said that the defendant was effectively placed within zone of danger by the defendant, albeit a virtual one, thus creating a duty. Despite there being no real threat of physical harm, advances in technology could override a logical evaluation of the scenario, and instead cause the ordinarily sensitive person to believe they are in immediate danger, thus inflicting emotional harm. For these reasons the rule should be amended to establish a duty to avoid causing foreseeable emotional harm that would affect the ordinarily sensitive person. A highly realistic VR experience can be classified as one such occasion to exercise this duty, but it will have other applications yet to be seen.

Common Law categories of duty often result in arbitrary distinctions that bar plaintiff from the recovering the remedies they need to become whole, despite the existence of clear harm. Frayed clearly suffers as a result of this experience, and has a diagnosis to prove it. Why should she be excluded from recovering from this harm, just because the highly realistic, violent depiction of her death was not real? Should this excuse Unforseeability from any real emotional duty, despite claiming an intention to emotionally empower its users?

The court in the past has stated mere fright is insufficient for a NIED claim. This is not mere fright, it is an unprecedented and sophisticated simulation of torture that demands reevaluation of old legal doctrine. Unforseeability has gone to great lengths to make this experience as proximate to reality to an unprecedented degree.

Frayed's suffering is evident and expected of the ordinarily sensitive person. The court would be unjust in denying her recovery merely because common law could not have contemplated the necessity of a duty in these circumstance. For this reasons we reverse and remand with instruction on the existence of duty established when creating risk of emotional harm that the ordinarily sensitive person would be expected suffer.

2)

In keeping with a trend to adopt increasingly vague standards and duties, today the Court has decided to forgo its long established procedures for NIED claims in favor of an amorphous duty of emotional care to the ordinarily sensitive person. This will cause confusion and increase the already overwhelming burden on civil courts. Therefore, I must dissent.

What is an ordinarily sensitive person? Their character will likely be speculated upon in new and minute detail in every case. Unlike the reasonable person

standard, sensitivity is subjective and more directly related to individual experience and diverse emotional reactions. The marks a further departure from the crucial objectivity required in deciding cases using the reasonable person standard, by increasingly permitting arguments to delve into the minds of the parties. The court is incompetent in carrying out this task, as evidence by the long history of using an objective standard in lieu of arguing about the feelings of respective parties. Indeed, such argument will inevitably make for longer proceedings, draining resources on all fronts. In some cases, a defendant might realize its cheaper to settle with the plaintiff regardless of whether they are truly liable, just to avoid the high cost of lengthy proceedings.

The court in Gammon erred in adopting this new standard. The harm in that case could have been better addressed with the established duty to not mishandle corpses and body parts. Instead the court saw fit to further erode precedent and categorical rules with clear applications to adopt another vacuous standard. This court now follows suit.

For these reasons, I dissent.

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The Loyola Supreme Court will recognize a legal duty in these kinds of circumstances. Recently, courts have moved away from the strict rules of the past preventing NIED claims that do not meet specific requirements. Originally, the impact rule required some minor physical impact or injury to a plaintiff in order for them to recover for NIED. In Falzone v. Busch, the court declined to follow the Impact Rule, stating that its justifications were no longer relevant. The court reasoned that recently, there had been an increase in medical knowledge relating to the connection between emotional disturbance and physical harm. Further, within the jurisdictions that abandoned the impact rule, there was no indication of a flood of litigations. The court highlighted that the issue of determining causality between a defendant's conduct and the harm that occurred is an issue that is present in all types of injury cases. Lastly, the court emphasized its confidence in the ability of courts to handle false claims. These justifications for abandoning previous restrictions on NIED claims are valid, and support this Court's decision.

In many other jurisdictions, the threshold for bringing an NIED claim is now some objective manifestation of harm. In Gammon, the court further broadened the ability for a plaintiff to recover for NIED, by holding that a plaintiff may recover where negligence causes severe emotional distress that is the reasonably foreseeable result of the defendant's actions. Restricting a defendant's liability for NIED to those harms which could foreseeably be expected to befall the ordinarily sensitive person will prevent overly burdensome claims that force people to regulate their conduct too restrictively. For example, there is no legal duty to protect against hurt feelings or the "eggshell psyche". In Gammon, the court found a mortician, should have reasonably foreseen that his actions of sending a severed leg to a family who's loved one had just past would cause ex-

treme emotional distress. An NIED claim should not be barred by previous distinctions requiring physical impact, objective manifestation, underlying or accompanying tort, or other special circumstances. Overall, the ruling and reasoning of the court in Gammon supports this Court's decision concerning NIED claims for harms such as watching oneself die gruesomely in virtual reality.

Declining to follow strict and arbitrary requirements would allow for greater flexibility and sensitivity to specific circumstances unique to each case. The law should value protection of mental wellbeing as much as it does for physical wellbeing and allow plaintiff's to recover accordingly.

P2

Loyola should not recognize a cause of action for NIED under these circumstances. Traditional requirements for bringing an NIED claim are still highly valuable and should be maintained. The law can should continue to recognize classic rules such as the impact rule, because even with advances in medical knowledge, the issue of causality between emotional harms and physical injury is still more difficult to determine than in other types of cases. Expanding liability for NIED ultimately ruins the predictability previously established by strict rules for NIED claims.Traditionally, rules promote greater fairness and predictability in the outcome of a lawsuit. Moreover, firm rules provide guidance to the public on how to conform their conduct. By eliminating these rules, individuals and business's will have no notice of when their conduct will result in liability. Be eliminating these rules in favor or standards tailored more specifically to the facts of a specific case, litigation costs will increase.

Recent rulings form courts in cases such as Falzone and Gammon leave many questions to be answered. The court in Falzone denied applying the impact rule in favor of the zone of danger rule, which states that when negligence causes fright that results in a reasonable fear of immediate injury, and that fear can be demonstrated to have caused bodily injury or sickness, a plaintiff may recover. But how can it be determined whether a plaintiff has a "reasonable" fear of immediate injury? Additionally, in the holding from Gammon, it is difficult to determine when emotional distress is "reasonably foreseeable" and hard to define the "reasonably sensitive person".

Overall, there is value in having uniform rules. By expanding a legal duty to cases like this, people and businesses will have to restrict their actions in such ways that do not benefit society, out of fear of a NIED claim being brought against them. Past courts declining to follow the traditional rules are overly confident in the court's ability to deal with false claims. By placing this burden on courts, more time and resources must be devoted to determining whether an NIED claim is valid at all. Loyola should not recognize a legal duty in these kinds of cases.

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Part 1: Affirming.

The Loyola Supreme Court holds that NIED claims shall only be permitted if they be based upon physical impact , "zone of danger", and bystander liability. We rule this way because the administrative burden on the courts would we be too great if we allowed virtual or simulated experiences, such as those in VR, that are of a graphic, violent, or disturbing nature to be causes of action. As it would be allow people to bring actions to court after seeing a film they didn't enjoy in a theater or playing a violent video game or VR experience and have the possiblity to flood the court with claims from people who are easily offended or don't like the nature of the content. While we understand that emotional distress can be inflicted in such scenarios these experiences are not mandatory nor do they happen at random on the street, as serious physical injuries do. instead they are voluntary experiences a viewer or patron consents to experiencing. The holding from the New Jersey court in Portee V. Jaffee which found 4 elements necessary to establish NIED will now hold here as well. For the cause of action for NIED to be brought to Loyola state court there must have been: 1. death or serious physical injury 2. an intimate or familial relationship between plaintiff and victim, 3. plaintiff must have observed death or or injury in person, and 4. the experience must have resulted in severe emotional distress.

Additionally, The specific content of a VR experience is not for the court to discuss nor will we debate on the disclosure of the content of the experience by the company. We also don't want to censor people's creation of art or virtual experiences, to a reasonable degree, by holding in a way that would discourage artists from creating new experiences.

Part 2: Dissenting

We dissent from the majority opinion that in cases where extremely violent, graphic, or disturbing content is shown in a public setting without prior warning to viewers, visitors, or patrons, businesses cannot bring an cause of action for NIED. We believe they should be able to bring these claims on these grounds.

While the Loyola Supreme court has previously only recognized NIED claims which resulted from physical impact, "zone of danger", or "bystander Liability" the court should now aknowledge that in an age of New Technology where seeing or experiencing yourself being violently injured in a simulation is both plausible and possible to experience that we have to expand the scope of NIED claims. This is ,of course, not to say that we are allowing all producers, sellers, or exhibitors of disturbing, violent, or graphic content to be open to NIED claims, it will only apply to claims for specific scenarios in which consumers or viewers of the content have not been previously warned of both its graphic nature and it's ability to inflict emotional harm.

The dissent has no desire to see art or VR experiences be censored in such a way as to impede on peoples right to free speech but we argue that people have a right in whether or not they want to participate in or view that graphic, violent, or disturbing content. While we understand the administrative reasoning behind the original holding, which attempts to limit NIED claims to those

which occur from serious physical harm by defendant and the subsequent observation of such injury or death by person with a special relationship to victim we think that same line of logic applies in VR, especially in cases where a physical representation of one's own self can be subjected to simulated atrocities.

Limiting the claim of action in this way will not flood the courts with superfluous claims from easily offended people but instead allow people who have been hurt by their lack of informed consent to seek justice.