

# FINAL EXAMINATION

## TORTS

### HOUSE OF RUSSELL

#### INSTRUCTIONS:

1. **DEADLINE:** This is a 75-hour examination. You may begin the exam at any time after 3 pm on Friday, 11 May 2012. You must submit your answers by 6 pm on Monday, 14 May 2012. (I am sorry about Mother's Day.) **If you turn in your answers after 6 pm on 14 May, then you will receive an F for your grade. NO EXCUSES.**

2. **TURNING IN YOUR ANSWERS:** Turn in your answer by sending the file to [registrar@law.du.edu](mailto:registrar@law.du.edu). It's a good idea to send your answer with either a send receipt or a delivery receipt. As well, send yourself a copy of the message that you send to the registrar. This will verify the fact and time of your sending your answer. **DO NOT SEND A COPY OF YOUR ANSWER TO PROFESSOR RUSSELL; YOU VIOLATE THE HONOR CODE IF YOU SEND A COPY OF YOUR ANSWER TO PROFESSOR RUSSELL.** In the subject line of your email, put the following text: "Russell-Torts-[exam number]" where [exam number] is your exam number. Name the file that contains your answer using the same convention: Russell-Torts-[exam number]. If you have technical problems turning in your answer, please contact the registrar. If you have additional difficulties, please contact Ms. Diane Bales at [dbales@law.du.edu](mailto:dbales@law.du.edu) or at 303-871-6580 or Ms. Stephanie Aragon at [saragon@law.du.edu](mailto:saragon@law.du.edu) or at 303-871-6111. **Do NOT contact Professor Russell with exam-related difficulties.**

3. **OPEN-BOOK:** This is an open-book, take-home examination. Your answer must be of your own composition. You may work on this examination wherever you wish, and you may consult any written material that you wish. However, you violate the Honor Code if you discuss, show, or distribute this examination or your answers to anyone at all before 6 pm on Monday, 14 May. Be cautious, for example, about posting anything on Facebook that looks like a request for assistance. Once the exam starts, you may not discuss it with anyone at all before the examination ends at 6 pm on 14 May 2012.

4.     **EXAM NUMBER:** Please put your exam number on each page. The easiest way to do this is to put the exam number in a header on each page. **Do not put your name anywhere on the exam.** You should name the file Russell-Torts-[Exam Number]
  
5.     **LENGTH:** This examination consists of one question. You may use no more than 2,300 words to answer the question. Reducing your answers to this word limit will be one of the challenges of this examination. **Please include the word count at the end of your answer.**
  
6.     **FORMATTING:** Please double-space your answers. Avoid miniature fonts, okay? Avoid putting bullet points in front of every paragraph as this is oddly distracting to Professor Russell. Note, too, when the registrar rechecks the word count, bullet points are sometimes counted as words. This generates needless confusion.
  
7.     **HOW TO ANSWER:** In answering, use judgment and common sense. Be organized. Emphasize the issues that are most important. Do not spend too much time on easy or trivial issues at the expense of harder ones. If you do not know relevant facts or relevant legal doctrine, indicate what you do not know and why you need to know it. You must connect your knowledge of law with the facts before you. Avoid wasting time with lengthy and abstract summaries of general legal doctrine. Discuss all plausible lines of analysis. Do not ignore lines of analysis simply because you think that a court would resolve an ambiguous question one way rather than another.
  
8.     **ERRORS:** Sometimes, there are typos or continuity errors in House of Russell exams. (Note that these are different than information gaps, which Professor Russell always includes.) For example, you may meet someone named Helen on one page and two pages later, she may be called Jane. If you spot such errors in the exam, please send a correction to Professor Russell. If the correction is warranted, then Professor Russell will send a note to the entire class using the class listserv. Please note that the cutoff for such corrections will be 10 a.m. on Saturday

morning. After that, the exam stands as written.

9.     **EXPERTISE:** Please note that sometimes House of Russell exams deal with subject matter about which some of you may have expertise. You have to accept the exam's presentation as true. For example, if there is lava in the exam, and the exam indicates that lava is 1,500 degrees Fahrenheit, but you happen to know that lava is much hotter, then you should put aside your superior knowledge and accept the lava as being the temperature that the exam says it is. Typically, House of Russell exams try to simplify some issues by mashing down the science just a bit.

10.    **JURISDICTION:** The laws of New State, the 51st state of the union, apply to all the issues in this examination. New State is NOT Colorado. New State's comparative fault statute appears on pages 18-19.

11.    **CONCISION:** Quality, not quantity is desired. Think through your answer before you begin to write. You have a lot of time to write and edit your answers. You will earn a better grade by being thorough and concise. And, of course, well-organized answers will be the best answers that earn the highest grades.

12.    **KEEP A COPY:** You should retain a copy of your exam answer. You should feel free, of course, to keep a copy of the exam.

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

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

### **“Dolphin Safe?”**

Dolphinarama is a privately owned resort located in the Village of Any Town, on the coast of New State. In order to reach Dolphinarama, Ellen Brody and her 13-year-old son Sean Brody arrived at the Any Town airport around dusk and then hired a private car that transported them over one hour to Dolphinarama.

Dolphinarama is a gated property and visitors must have reservation credentials that are approved and sent to guests prior to visiting. No one may enter Dolphinarama without credentials.

At check-in, the concierge treated Ellen and Sean to tropical drinks with little umbrellas (Sean’s was non-alcoholic). They received room keys, souvenirs, a Dolphinarama Hawaiian shirt (although they were in New State), and maps of the Dolphinarama grounds.

Like every guest who stayed at Dolphinarama, Ellen also signed a liability release for herself and also for her son Sean. Like pretty much every guest, she did not read the release. (The release appears as Exhibit 1.)

As Ellen and Sean’s driver brought them through Dolphinarama’s front gates, Ellen noticed an ambulance passing in the other direction toward the Dolphinarama exit. There were no lights or sirens, and Ellen gave it little thought. By the time she had finished checking in, Dolphinarama staff had already cleaned up the blood from Mr. Senter’s unfortunate accident.

Arthur Senter, a 47-year-old lawyer, had spent the day swimming with dolphins in the dolphin program in the Great Pool and relaxing on the beach. Mr. Senter was a good friend of the owners of Dolphinarama, who invited him each year to be their guest for a week at the resort.

Senter loved the resort and loved to see his good friends; he also liked to take advantage of the opportunity for free lodging. He did insist, however, on paying for his own meals, drinks, and souvenirs, and during the week, he tipped the staff generously since as a guest of the owners, he paid nothing for his room.

That evening, Mr. Senter had dined with the Dolphinarama owners in the resort's restaurant. Senter insisted on picking up the tab. Senter was not a heavy drinker, but he did have three glasses of wine during the 90-minute dinner.

Mr. Senter preferred to stay on the second floor of any hotel in which he stayed on the theory that if an emergency arose, he would be as close to the safety of the ground floor as possible. As his resort owner friends knew, Senter was also just a bit claustrophobic and disliked elevators. After dinner, the resort owners pointed Senter toward a doorway that said "Staff Only." They told him that this doorway led to an exterior (that is, outside) concrete stairway that would take him to the second floor. This route, the one used only by the staff, was the quickest route to the second floor where his room was.

The stairway was on the north, shady side of the building. On the thirteenth step, there was a slimy little green spot that had formed on the front edge of the concrete step. Water from an air-conditioning unit on the 5th floor dripped down the side of the building, ran along part of the tile roof, collected at the end of a gutter that had become clogged with a hand towel that a guest had accidentally let slip out a third-floor window a few months before, and then dripped onto the step. There was one drip every 4-5 seconds during the day; at night, when it was more humid, the pace of the drips increased to every 2-3 seconds. The dripping water pooled slightly and allowed a little bit of greenish, slippery moss or perhaps mold or mildew to accumulate on

the step. The pooled water slid northward off the step and down to the ground level landscaping below. There, the day lilies thrived.

Whether it was the slippery spot or the wine or both remains difficult to say, but Senter stepped on the spot in such a way as to lose his balance. He fell as if a stuntman in a movie, except that at the bottom of the steps he did not brush himself off and walk away. Instead, Senter suffered a traumatic brain injury that caused the paramedics to be concerned that he might die as they transported him to the hospital. Senter bled profusely for several minutes before a room service staff member discovered him lying at the bottom of the outside staircase.

Later, Mr. Senter's attorneys would claim that the paramedics, recognizing the seriousness of his injury, should have called for the Flight for Life helicopter to come to Dolphinarama to transport Mr. Senter to the Big Town General Hospital, which had a top-notch trauma unit. By helicopter, the travel time to Big Town General Hospital would have been 23 minutes including the time to get the helicopter to Dolphinarama. Instead, the paramedics first drove him to Any Town Community Hospital's less well-equipped hospital emergency department, where the doctors assessed Senter. The ER doctors at the Community Hospital determined that Senter's head trauma was so significant that he needed to be transferred to Big Town General Hospital. They then loaded him onto a helicopter and transported him to Big Town General Hospital. Mr. Senter arrived there 90 minutes later than he would have if the original paramedics had summoned Flight for Life.

Mr. Senter was injured almost three years ago. He spent a month in Big Town General Hospital after his injury and initial surgery. He's had surgeries, medical treatment, hospitalization, rehabilitation, and physical and occupational therapy. He has not been able to

return to work as a lawyer and is not likely to practice law again. Poignantly, Senter’s dry cleaner said to an investigator for his personal injury lawyers: “Arthur used to give me stock market tips; now he has trouble counting out his change.”

Below is a table of Mr. Senter’s medical bills to date.

<b>Provider</b>	<b>Billed</b>
Emergency Services (ambulance)	\$947.25
Any Town Community Hospital (facility)	\$13,567.00
Flight for Life	\$9,000.00
Big Town General (facility)	\$353,018.82
Big Town General (physicians)	\$35,028.00
Big Town General Emergency Services (ambulan	\$615.00
New State Rehab (facility)	\$20,936.63
Big Town Internal Medicine (physicians @ Spaldi	\$415.00
HealthSouth Physical Therapy	\$18,500.00
Lab Corp	\$58.00
Karl Young, Psy.D.	\$2,000.00
<b>Subtotal</b>	<b>\$454,085.70</b>
<b>Prescriptions</b>	
Walgreens and Walmart	\$1,123.25
<b>Adaptive Assistance</b>	
bed lounger	\$139.95
leg lounger	\$79.95
hands-free book light	\$47.90
ID bracelet	\$134.95
Annual membership, Medic Alert	\$29.95
closet supplies for handicap	\$78.61
<b>Subtotal</b>	<b>\$511.31</b>

During their check-in, Ellen and Sean had no sense that there had just been a serious injury at the resort. The Dolphinarama staff were highly trained professionals who could present

calm demeanors even when they themselves were upset. Ellen and Sean settled into their room, ordered room service, and watched *Free Willy* on the resort's sea mammal movie channel. Tired after traveling that day, they rested up to begin their dolphin adventure the next day.

Dolphinarama had several dolphin programs scheduled throughout the day. The beginner programs took place in the Great Pool, a huge salt-water pool connected to other pools where Dolphinarama kept its dolphins. The pools were interconnected with tunnels, pipes, and systems of locks that allowed the direction of animals into different pools. Dolphinarama also had open-sea dolphin adventures in which the Dolphinarama staff took resort guests out into the open ocean to pods of dolphins tracked by sonar and radio collar. Ellen and Sean, though, were not participating in one of those programs.

Ellen and Sean watched an earlier dolphin program in the Great Pool before their own dolphin experience was scheduled to begin. As they watched, Ellen noticed that one of the animals had several lacerations and appeared to be acting up a bit. In a written statement that Ellen later provided to an insurance investigator, she wrote that "One of the dolphins had several cut marks on it. There were chunks taken out of it all over, including a chunk taken out of its nose. The tail looked as though it had been bitten up. It looked like it had been scratched with teeth. That was the dolphin that attacked me."

Before the program for Ellen and Sean began, Ellen spoke with one of the dolphin program instructors, Barb. Ellen thought Barb worked for Dolphinarama, but Barb actually worked for a contractor called "Swim with the Fishes." Dolphinarama subcontracted the Great Pool dolphin programs to "Swim with the Fishes" in order to avoid having to pay benefits and also to avoid checking the immigration status of the dolphin program instructors.



Barb told Ellen that the scratched up dolphin she had noticed was “in season” and ready to mate. During this time, Barb said, it is not unusual for the female dolphins to fight each other. However, Barb emphasized that even with the female dolphins going after each other, there was not a threat to humans in the water with them.

Somewhat reassured by what Barb told her, Ellen was eager to get into the pool with the beautiful creatures when Sean and Ellen’s turn approached. The experience began well for the two of them. "To me, they were like big kittens passing by," Sean said.

All was going smoothly until, suddenly, the injured dolphin went for Ellen. Ellen was standing near the edge of the pool, with her back close to the pool’s edge. The water there was just about four feet deep. The scratched-up, “in season,” female dolphin leaped from the water and smacked Ellen right in the face, breaking her nose, pushing her against the pool’s wall, and snapping her head back with such force that Dr. Samor later said that her injuries were equivalent to what she might have sustained in a 35 m.p.h. car crash. Ellen certainly experienced the dolphin whiplash as substantially more severe and painful than the 4-6 mph rear-end collision that she had experienced just four months before the Dolphinarama misadventure.

Just before the dolphin smacked Ellen, Sean was at the other end of the great pool. Sean was paired with Mitzie, a colleague of Barb’s who preferred to work with children. Mitzie preferred to work with a particular dolphin named



Duck, a female. Duck earned her name because she somehow had even less of a chin than the other dolphins and looked very duck-like when seen in profile against a bright sky. Sean really enjoyed playing and swimming with Duck. At one point, Duck the dolphin floated belly up. Mitzie invited Sean to rub the dolphin's belly, which Sean did.

As Sean finished rubbing Duck's belly, he swung his arm away from Duck. This was just before his mother was attacked. As Sean swung his arm away, Duck rolled over, lifted herself out of the water, and grabbed Sean's hand in her mouth. Sean was able to wrestle his hand out of Duck's mouth, but not before Duck bit his right thumb off. (Sean was right-handed.) When police, firefighters, and paramedics were on the scene, the police shot Duck in the head with a small caliber pistol, and paramedics cut open his belly in order to find the thumb for possible re-attachment. But what they found was not useable. Doctors later considered but rejected amputating one of Sean's big toes in order to attach it to his hand for use as a thumb. In mathematics class, sometimes Sean jokes that he uses a Base-9 system rather than the more prevalent Base-10 system. Even though he jokes about his loss, Sean does not like that his nickname at school is "Gimme Five."

Later, Ellen's lawyers hired a dolphin expert from Chicago's Shedd Aquarium. The expert, Dr. Federal, opined that getting into a pool with an "in-season" dolphin was dangerous. In his report, he suggested that perhaps Barb had little or no understanding of dolphin behavior. Dr. Federal also viewed a video that Dolphinaroma had recorded of the video program. The video included underwater and above-water audio tracks. Dr. Federal believes that the scratched-up female transmitted an underwater audio/sonar signal that triggered Duck's attack on Sean.

After she returned home, Ellen went back to see Dr. Samor, the doctor who had treated her for the rear-end collision she had been in a few months prior to the vacation. Dr. Samor was an M.D. who specialized in the treatment of auto injury cases. Recently, Dr. Samor had earned a law degree, passed the bar, and opened a law practice, advertising himself as New State's "Law Doctor."

While still practicing mostly medicine, Dr. Samor had treated Ellen. He had treated her neck pain from the prior rear-end collision. That pain had largely though not completely resolved by the time of the dolphin attack. (Ellen's was the first dolphin-related neck injury that Dr. Samor had ever treated.) Following the dolphin attack, Dr. Samor had treated Ellen's neck using a combination of physical therapy, medication, acupuncture, pilates, and referral for chiropractic manipulation. (Ellen saw a different physician for her broken nose, the repair of which left her nose a little crooked and, she thinks, causes her to snore.) The combined billed cost of Dr. Samor's treatment was \$17,000, \$1,500 of which Ellen paid as her share or as copays. Her insurer paid a total of \$11,500, and the medical providers wrote off the balance.

Because Ellen has not found relief from her pain with this conservative course of treatment, Dr. Samor diagnosed something called cervical facet syndrome, which relates to damage to the surfaces between the cervical or neck vertebrae. Dr. Samor referred her to a radiology group, which conducted an MRI for \$1,600; an injection using fluroscopy for \$7,000; cervical facet joint injections for \$6,000; and a procedure called a rhizotomy, which involves burning some nerve roots in the neck. The cost of the rhizotomy was \$12,000.



The rhizotomy has given Ellen tremendous relief from her neck pain, which pain has been debilitating for her since the dolphin attack. Unfortunately, the rhizotomy is a procedure that must be repeated, because the nerve roots grow back. The medical literature says that on average, the rhizotomy must be repeated every 422 days or approximately every 14 months. According to New State's statutes, Ellen's life expectancy is 42.3 years.

**Your job is to evaluate the personal injury claims including damages and defenses that Arthur Senter, Ellen Brody, and Sean Brody have against all defendants. Note that there are no product liability claims with which you should be concerned. You may use no more than 2,300 words to answer the question.**

**Exhibit 1.**

**Structured Dolphin Swim Program  
Pre-Incident Release of Liability  
(Including a Release for Negligence, Assumption of Risk, and Indemnification)**

**Introduction**

**Dolphinarama, Inc.**, a New State corporation (hereinafter "Dolphinarama"), agrees to permit the participant whose name and address is shown below (hereinafter "Participant"), for the duration of Participant's participation, attendance, and entry into the Dolphinarama facility located at 132 Flipper Place, Any Town, New State and the Dolphinarama, Inc. facility located at 150 Loraine Place, Any Town, New State (hereinafter collectively "the Facility") to participate in the following program:

**Structured Dolphin Swim Program** (hereinafter "Dolphin Program") which involves observing, physically contacting, or participating with, either in or out of the water, the dolphins and other marine mammals and other animals that are located at the Facility.

The permission granted by Dolphinarama for Participant to participate in the Dolphin Program is granted expressly and conditioned upon Participant, or Participant's Parent, Guardian, Agent, or authorized representative (individually and on behalf of Participant) executing this Agreement to warrant and agree as follows:

**Representations and Agreement on Behalf of Participant and Participant's Parent or Guardian**

Participant, or Participant's Parent, Guardian, Agent, or authorized representative (individually and on behalf of Participant) warrants and agrees with Dolphinarama that:

- (a) This Release has been executed on behalf of Participant individually or by Participant's Parent, Guardian, Agent, or authorized representative on behalf of Participant, who represents to Dolphinarama that he or she has authority to execute this Release on behalf of Participant;
- (b) Participant is over the age of seven (7) years in order to take part in the Dolphin Program. If Participant is under the age of eighteen (18) years, or unable to execute this Release for any reason, the following applies: (i) if Participant is between the ages of seven (7) and twelve (12) years, Participant must be accompanied in the Dolphin Program by a participating Parent, Guardian, Agent, or authorized representative and the Parent, Guardian, Agent, or authorized

representative must also sign this Agreement on behalf of Participant; and (ii) if Participant is between the ages of thirteen (13) and seventeen (17) years, Participant must be accompanied in the Dolphin Program by a participating or observing Parent, Guardian, Agent, or authorized representative and the Parent, Guardian, Agent, or authorized representative must also sign this Agreement on behalf of Participant;

(c) Participant is in good health, a good swimmer, is in sufficient mental and physical condition to participate in the activities, has a good understanding of English, and at the time Participant participates in the Dolphin Program, Participant will not be under the influence of alcohol or drugs, or taking any medications that would adversely affect Participant's participation in the Dolphin Program and, in the case of a female, Participant is not pregnant;

(d) Participant agrees to follow all written and verbal directions given to Participant during Participant's presence at the Facility and during Participant's participation in the Dolphin Program;

(e) Participant, or Participant's Parent, Guardian, Agent, or authorized representative (individually and on behalf of Participant) understands that refusal to abide by safety rules and any actions that compromise the safety of the Dolphinarama staff and members of the public engaged in the Dolphin Program will result in Participant being asked to leave the Dolphin Program immediately, in which event Participant will be dismissed from the Facility with no refund made to Participant and that the determination of Participant's poor conduct or breach of any of Participant's agreements will be in the sole and complete discretion of Dolphinarama;

(f) Participant agrees not to, in any way, harm the dolphins or other animals while within the Facility.

### **Participant Assumes All Risk**

Participant, or Participant's Parent, Guardian, Agent, or authorized representative (individually and on behalf of Participant) agrees to assume all risk of injury, damage or loss in connection with Participant's use of, or presence upon, the Facility, and/or the participation in the Dolphin Program, including the risk of injury, damage or loss as a result of negligent acts of Dolphinarama, Inc. and their Officers, Directors, employees, and Agents, and those of independent third parties, and the risk that Participant will be injured as a result of Participant's own negligence during the period of time that

Participant is within or upon the Facility, participating in the Dolphin Program, or participating in activities conducted by third parties as aforesaid.

By the execution of this Agreement, Participant, or Participant's Parent, Guardian, Agent, or authorized representative (individually and on behalf of Participant) voluntarily assumes all risk of accident or damage to Participant's person or property, and the persons or properties of all others brought upon the Facility which may be incurred from or be connected in any manner with Participant's use or entry into the experiences resulting from Participant's entry into the Facility, Participant's participation in the Dolphin Program, and/or the activities conducted by third parties, including injury or damage resulting from the negligent acts of Dolphinarama, Inc. and their Officers, Directors, employees and Agents, and as a result of Participant's own negligence.

### **Release of Liability Including Release for Negligent Acts**

Participant, or Participant's Parent, Guardian, Agent, or authorized representative (individually and on behalf of Participant) hereby releases Dolphinarama, Inc. and their Agents, Officers, Directors, employees and Members from all claims of every nature arising out of, or connected with, Participant's presence or any activities while Participant is present upon and within the Facility, and while Participant is participating in the Dolphin Program, arising out of any cause, matter or thing, including but not limited to, negligent acts on the part of Dolphinarama, Inc., and Participant's own negligence.

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### **Indemnity From Participant**

Participant, or Participant's Parent, Guardian, Agent, or authorized representative (individually and on behalf of Participant) agrees to indemnify and save Dolphinarama and Dolphinarama, Inc., and their Officers, Agents, Directors, employees and Members from all claims, damages, cautions or causes of action including attorney's fees, expenses, and costs of whatsoever nature, kind, or description, which may arise out of or in any manner be connected with or caused by Participant's presence upon or within the Facility or in participation in the Dolphin Program or by anyone brought upon or in the Facility by Participant, Participant's Parent, Guardian, Agent, or authorized representative, including claims for alleged negligence of Dolphinarama, Inc. and their Agents, Officers, Directors, and employees and claims for Participant's own negligence. The term "brought upon" as used in this Agreement includes persons brought upon this Facility or accompanying Participant.

**Agreement Binding Upon Others**

This Agreement including the representations of Participant, the assumption of risk by Participant, the release of liability by Participant, and the indemnity from Participant, shall be effective from the time executed and at all times thereafter and shall be binding upon the heirs, executors, administrators, and assigns of Participant and his Parent or Guardian.

**PARTICIPANT, OR PARTICIPANT'S PARENT, GUARDIAN, AGENT, OR AUTHORIZED REPRESENTATIVE (INDIVIDUALLY AND ON BEHALF OF PARTICIPANT) HAS READ AND VOLUNTARILY SIGNS THIS DOCUMENT, INCLUDING THE RELEASE OF ANY SUBSEQUENT NEGLIGENCE OF DOLPHINARAMA, INC. AND ANY THIRD PARTIES DESCRIBED HEREIN, AND FURTHER AGREES THAT NO ORAL REPRESENTATIONS, STATEMENTS, OR INDUCEMENTS, APART FROM THE FOREGOING WRITTEN AGREEMENT HAVE BEEN MADE.**

**[1] PARTICIPANT:** Sean Brody

**SEX: () MALE () FEMALE PLEASE CIRCLE YOUR AGE GROUP:**

() 7-12 () 13-17 () 18-25

Sean Brody  
(Participant's Signature)

Dated: June 21, 2012

**[2] PARTICIPANT'S PARENT OR GUARDIAN (required if Participant is under the age of eighteen):**

() 26-35 () 36-50 () over 50

Name: Ellen Brody (Please Print)

Ellen Brody  
(Signature of Parent or Guardian)

Dated: June 21, 2012



**[4] Dolphinarama, INC., a New State corporation**

By: Jason Flipper

(Authorized Representative)

Dated: June 21, 2012

**Statute 1. Comparative negligence**

(a) General rule.--In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

(b) Recovery against joint defendant; contribution.--

(1) Where recovery is allowed against more than one person, including actions for strict liability, and where liability is attributed to more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of that defendant's liability to the amount of liability attributed to all defendants and other persons to whom liability is apportioned under subsection (a.2).

(2) Except as set forth in paragraph (3), a defendant's liability shall be several and not joint, and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability.

(3) A defendant's liability in any of the following actions shall be joint and several, and the court shall enter a joint and several judgment in favor of the plaintiff and against the defendant for the total dollar amount awarded as damages:

(i) Intentional misrepresentation.

(ii) An intentional tort.

(iii) Where the defendant has been held liable for not less than 60% of the total liability apportioned to all parties.

(4) Where a defendant has been held jointly and severally liable under this subsection and discharges by payment more than that defendant's proportionate share of the total liability, that defendant is entitled to recover contribution from defendants who have paid less than their proportionate share. Further, in any case, any defendant may recover from any other person all or a portion of the damages assessed that defendant pursuant to the terms of a contractual agreement.

(5) Apportionment of responsibility among certain nonparties and effect.--For purposes of apportioning liability only, the question of liability of any defendant or other person who has entered into a release with the plaintiff with respect to the action and who is not a party shall be transmitted to the trier of fact upon appropriate requests and proofs by any party. A person whose liability may be determined pursuant to this section does not include an employer to the extent that the employer is granted immunity from liability or suit pursuant to the Workers' Compensation Act. An attribution of responsibility to any person or entity as provided in this subsection shall not be admissible or relied upon in any other action or proceeding for any purpose. Nothing in this section shall affect the admissibility or non-admissibility of evidence regarding releases, settlements, offers to compromise or compromises as set forth in the New State Rules of Evidence. Nothing in this section shall affect the rules of joinder of parties as set forth in the New State Rules of Civil Procedure.

## SENER'S CLAIMS

### SENER v. DOLPINARAMA

Arthur Sener should file claims against Dolpinarama, Inc., and against the individual owners and managers of Dolpinarama promptly because tort actions usually have a statute of limitations ("SoL") of three years. Each party's liability mirrors one another, and I will refer to this collective group of defendants as Dolpinarama. Sener's damages will be discussed after the paramedic's liability has been established.

Sener's strongest argument is that Dolpinarama had constructive notice of the green slime, and if New State employs traditional land possessor duties, Sener will want to push hard to categorize himself as an invitee to give him the best potential for recovery. Dolpinarama will attempt to classify Sener as a licensee to avoid liability. A Unitary land possessor standard will mirror the duty to an invitee.

### **Sener as Invitee/Unitary Standard:**

Sener must argue his status narrowly and broadly. First, he should argue the stairwell was a part of the restaurant, that the owners told him to take the stairwell, and because he paid for dinner that financial benefitted the restaurant, he was an invitee of the restaurant. Second, he should explain that he was also an invitee for the entire resort. Although he did not pay for lodging, he clearly financially benefitted the resort by paying for his own drinks, meals, souvenirs, and tipping the staff generously.

**Land Occupier Duty:** Dolphinarama must make affirmative steps to discover dangers on the property and to exercise reasonable care in maintaining the premises.

**Standard of Care (“SoC”):** If Dolphinarama knew or should have known of the dangerous condition, it must remedy or warn invitees where the risk is not obvious. Additionally, Dolphinarama would have an increased duty because it likely advertises the resort as a place where guests can relax, which would reduce the guests’ ordinary alertness.

**Breach:** Likely. Senter must argue Dolphinarama breached its SoC and should have been aware of the dangerous condition under a theory of constructive notice because this slimy green spot did not grow overnight but developed over days or weeks; an expert on slimy green spots growth may be necessary.

**Cause in Fact:** Analysis must go beyond a res ipsa loquitur argument, and Senter must instead prove that Dolphinarama’s negligence in failing to discover the slimy spot was a “but for” cause in Senter falling down the stairwell by introducing circumstantial evidence, such as Senter slipping on the same thirteenth step that had the slime, and any skid mark left by his shoe through the slime. A slipperiness PhD may be necessary to discuss the friction co-efficient of the slime.

**Proximate Cause:** Dolphinarama will argue that Senter’s injury was not reasonably foreseeable, “whoda thunk poor Senter would have slipped and fallen in the staff stairwell.” However, the exact manner or scenario of injury is not the focus of foreseeability, but only that someone, such as room service staff, could reasonably foreseeability have been injured.

**Senter as Licensee:**

Dolphinarama will argue Senter did not add a financial benefit to the resort and was, therefore, merely a social guest and classify him as a licensee. This assumes Dolpinarama admits that the owners gave express consent for Senter to take the staff stairwell and do not try to downgrade him to a trespasser.

**Land Occupier Duty:** Only to warn of dangers known to exist.

**SoC:** Dolphinarama does not have to discover dangerous conditions; Senter takes the property as is.

**Breach:** Difficult, but proving that Dolphinarama had actual knowledge of the green slim could be found by deposing janitors, the head of maintenance, or other employees who frequented the stairwell.

**Cause in Fact/Proximate Cause:** See above.

SENER v. PARAMEDICS

If the paramedics worked for the government, they likely have immunity from any negligence actions, and if they don't have immunity, actions against government agencies usually have a drastically reduced SoL to only a few months. However, if the paramedics worked for a private company, then the SoL may still be running, and Senter could possibly bring a general tort or malpractice claim.

**Duty:** Assumed care.

**SoC:** The reasonable paramedic duty involves establishing professional custom standards from protocols, which could require training manuals and expert paramedic testimony.

**Breach:** Difficult. Senter will have to prove that the paramedics acted unreasonably in not initially bringing Senter to Big Town General Hospital (“General”) and that resulted in his aggravated brain injuries. The paramedics will argue they feared that Senter may die in transport and hoped to stabilize him at Any Town Community Hospital (“Community”). If the trip to Community is significantly less than the 23 minute Flight for Life to General, the paramedics have a strong argument. Additionally, a judge may incorporate some seemingly negligent behavior into the reasonable paramedic standard because of the necessity of quick on-scene decisions in high stress environments.

**Cause in Fact/Proximate Cause:** Experts battle. Physician testimony will be essential to establish that “but for” the paramedics failing to call for Flight for Life and transporting Senter to the General trauma unit, Senter would not have suffered as severe brain damage. Additional expert testimony must establish further brain damage was reasonably foreseeable without immediate transfer to General; the fact that Community doctors transferred Senter once realizing the injury’s severity will help the argument.

## **Damages**

### **Pecuniary:**

**Past/Future Medical:** Medical expenses for past 3 years from Provider/Prescriptions totals \$455,208.95. Future costs may include additional surgical treatments, physiological care, physical therapy, and medications.

**Lost Wages:** Senter should recover the lost wages incurred while being hospitalized for a month, as well as for his lost future earnings that his steadily growing firm would have afforded him if he continued to practice.

**Incidental:** The \$511.31 “Adaptive Assistance” falls into this category, as well as any future additional assistance to aid Senter in his diminished mental capacity, like the \$1.99 iPhone app. that quickly calculates proper change.

**Non-Pecuniary:**

**Pain and Suffering:** Senter may recover from Dolphinarama for any mental distress that occurred while he fell down the stairs and, if he stayed conscious, any distress that occurred while he waited to die, alone, at the bottom of the stairs. Any mental anguish attributed to the realization of his weakened mental facilities may be split between Dolphinarama and the paramedics. This award likely capped by statute.

**Loss of Enjoyment of Life:** Senter loved lawyering, and the jury should determine an appropriate award to compensate for his inability to continue his fulfilling profession.

**Defenses:**

**Comparative Negligence:** Modified 50% system; plaintiff’s negligence was not greater than defendants’ and damages will be diminished by plaintiff’s negligence. Dolphinarama will argue Senter fell because he was intoxicated, and Senter will recover if can argue that his negligence is less than the defendants’. Additionally, if Senter does

not join the paramedics as defendants, then Dolphinarama will definitely designate them as nonparties at fault to lessen liability; however, if the jury decides Dolphinarama was at least 60% at fault, then under Statute 1(b)(3)(iii), joint and several liability kicks in, and Dolphinarama can still be liable for all damages (minus Senter's proportioned negligence). Under Statute 1(b)(4), Dolphinarama could potentially collect against the paramedics.

**Collateral Source Rule:** Depending on New State's statutes, Senter's insurance payouts may reduce Dolphinarama's liability.

#### ELLEN & SEAN BRODY'S CLAIMS

The Brodys should bring actions against Dolphinarama, Inc., Swim with the Fishes ("SwtF"), Barb, and Mitzie as soon as possible because most tort SoL terminate after three years. Although the Brodys should bring one suit joining all four parties, Dolphinarama's liability is distinct and will be analyzed separately. The Brody's damages will apply to all parties and will be discussed once each party's liability has been established.

#### BRODYS v. SWIM WITH THE FISHES (& BARB & MITZIE)

Both Barb's and Mitzie's negligence occurred within the scope of their employment, and as a result, SwtF would be vicariously liable for any damages resulting from their negligence under a respondeat superior theory. Although suing Barb and Mitzie may bring the Brody's a sense of justice, only SwtF likely has sufficient insurance and assets to meet the judgment award. However, if Dr. Federal is correct, and if Barb (and Mitzie) really had little or no understanding



of dolphin behavior, SwtF may be directly liable for employing incompetent staff and creating an unreasonably dangerous dolphin experience for guests.

**Duty:** Contractual duty.

**SoC:** To act as reasonable dolphin program instructors. Expert testimony and training manuals will be required to establish accepted customs and procedures within dolphin swimming programs.

**Breach:** Yes. Barb and Mitzie are presumably trained dolphin instructors and should know the elevated risk that “in-season” dolphins present to guests. Finding SwtF training manuals forbidding the use of “in-season” dolphins would be gold. However, even if the custom is to use “in-season” dolphins, the Brodys can use expert testimony like Dr. Federal’s to argue the custom is unreasonable and is still a breach of due care. Additionally, if the Brodys can categorize Barb’s and Mitzie’s behavior as beyond mere negligence and as reckless, the Dolphin Swim Program Release (“Release”) could be bypassed entirely.

**Cause in Fact:** Most likely. Ellen would not have taken a dolphin in the face and Sean would not have lost his thumb “but for” Barb and Mitzie negligently allowing the guests into the water with “in-season” dolphins.

**Proximate Cause:** An essential place for expert testimony. The Brodys should reenlist Dr. Federal to explain the reasonable foreseeability of “in-season” dolphins attacking humans. Additionally, the defendants will attempt to limit liability for Ellen’s severe and costly neck problems by arguing her injuries were a result of the earlier car accident and were not foreseeable. As a result, Ellen must classify herself as a “egg-shell” plaintiff

and argue that although her injuries may be unpredictably severe, the dolphin headbutt aggravated her weakened and vulnerable condition and the defendants must take her as she is.

### BRODYS v. DOLPHINARAMA

Dolphinarama could be liable for the Brody's injuries through exceptions to independent contractor non-liability or by ownership of the dolphins.

#### **Independent Contractor Non-liability Exceptions (Vicarious Liability):**

As a general rule, the hiring party, Dolphinarama, would not be liable for torts of the independent contractor, SwtF. However, there are two relevant exceptions that can trigger liability for Dolphinarama.

First, the Brodys could show that Dolphinarama exercised some form of control over SwtF employees, such as setting schedules, or implementing programs or policies. Second, the Brodys should categorize swimming with dolphins as containing the "peculiar risk" of dangerous "in-season" dolphins, and that Dolphinarama failed to make special precautions for the danger even though they knew or should have known of the risk.

#### **Ownership of Vicious Dolphins (Direct Liability):**

Similar to an owner being liable when his dog attacks a child, Dolphinarama should be liable when its dolphins headbutt and snack on guests' appendages.

**Duty:** When active, be reasonable.

**SoC:** By offering to facilitate swimming with dolphins for children as young as eight, Dolphinarama would be held to great levels of care to make sure the dolphins are properly trained and controllable.

**Breach:** Yes. Negligently allowed their “in-season” dolphins to interact with guests that resulted in serious injuries. Dolphinarama runs an elaborate operation, tracking open ocean dolphin pods by sonar and radio collar, and therefore, should at least have reason to know that “in-season” dolphins pose a perilous risk. The Brody’s could argue that Dolphinarama was even reckless in allowing “in-season” dolphins to interact with guests and circumvent the release form.

**Cause in Fact/Proximate:** See analysis for SwtF (Barb & Mitzie) liability.

## **Damages**

**Sean:**

**Pecuniary:**

**Past/Future Medical:** Stitching up lost thumb, any physical therapy. Minimal future medical.

**Diminished Earning Capacity:** To maximize compensation with no stable work history, Sean must present evidence that losing an opposable thumb prevents him from continuing to work on automobiles and become the elite NASACR mechanic like his grandfather.

**Incidentals:** Special 4 fingered gloves, etc.

**Non-pecuniary:**

**Pain & Suffering:** Compensation for physical pain and emotional distress as a result of dolphin attack and for embarrassment of kids poking fun at him at school.

**Loss of Enjoyment of Life:** Compensation for not being able to throw his curve ball and enjoy American's favorite pastime.

**Ellen:**

**Pecuniary:**

**Past/Future Medical:** Ellen should recover for surgery costs for her nose and any future corrective surgery she may have due to the snoring and crookedness. Additionally, she has already incurred \$43,600 in medical bills relating to her neck. If Ellen continues to utilize the rhizotomy procedure every 14 months for the rest of her life, then future medical bills begin at \$435,000, which is not including any other procedures she attempts.

**Lost Income:** Any loss of work due to surgeries or the debilitating neck pain.

**Incidentals:** The TemperPedic® pillows she bought to hopefully alleviate the neck pain.

**Non-pecuniary:**

**Pain & Suffering:** Compensation for the emotional distress as a result of dolphin attack and the resulting debilitating pain. May be statutorily capped.

**Defenses:**

**Release:** Both Dolphinarama and SwtF will attempt to hide behind the signed release form arguing Ellen signed away any negligence claims and expressly assumed all risk. However, if Ellen categorizes Dolphinarama and SwtF's behavior as reckless, as suggested earlier, she may bypass the release. Also, Ellen can argue she only assumed ordinary risks reasonably thought to exist when swimming with dolphins but did not assume risks that the program personnel would place her and Sean's lives in peril. Finally, Sean may still have legal rights because Ellen arguably was unjustified in signing them away.

**Comparative Fault:** A jury may assign some percentage of fault to Ellen and Sean, although Ellen only entered the pool after relying on Barb's comments that the lacerations should not trouble her. However, this negligence is minimal and will not likely preclude compensation under the modified 50% statute. Statute 1(b)(3)(iii) may apply.

**Collateral Source Rule:** Ellen and her insurance covered \$17,000 in treatment costs. Depending on New State's statutes, this compensation may unfortunately be used to decrease the defendant's liability.

**Word Count: 2,299**

## “Dolphin Safe?”

### General Notes:

1. All actions will be framed as negligence only so as to access defendant’s insurance policies.
2. *Res ipsa loquitur* is not required in addressing any of the claims.
3. *Punitive Damages*: none of the subsequent claims will rely on punitive damages for recovery; the defendants did not act with ill will or malice.

### *Senter’s Claim Against Dolphinarاما/Paramedics:*

Senter claims Dolphinarاما employees, effectively Dolphinarاما through *respondeat superior*, acted negligently through their omission, resulting in damages. Through vicarious liability, Senter will also name the paramedics who responded (injuries caused by their negligence are indivisible from those caused by Dolphinarاما’s negligence).

### Establishing a Case Against Dolphinarاما:

#### Duty:

Under *Heaven v. Pender*, Dolphinarاما employees owed Senter (and all others) a RPP standard.

This duty of care was elevated given Senter’s legal status as an invitee (entered Dolphinarاما to do business, evidenced by his payment for meals,

souvenirs, etc.); therefore, Dolphinarama had a duty to warn Senter of all potential dangers, both actual dangers and dangers of which Dolphinarama should have reasonably known.

S.O.C.:

Dolphinarama has a duty to inspect for dangers and warn guests of dangers of which they knew or of which they reasonably should have known.

Breach:

Dolphinarama breached the standard of care by failing to warn Senter of the slippery accumulation on the step. Dolphinarama either knew or should have known of the accumulation because the drip lasted several months and accumulated near the ground level landscaping (a task which requires employer presence). The danger was increased by the fact that the staircase was shaded, reducing visibility. Further, the danger was easily and inexpensively corrected by removing the towel from the gutter (B<PxL).

Breach would also be established through *negligence per se*, if New State has statutes that set forth training/working guidelines for employers to train employees, effectuated to protect patrons. Senter could claim Dolphinarama breached based upon failure to adequately train employees.

Cause-In-Fact:

But-for Dolphinarama's negligent omission to warn Senter of the danger, he would not have fallen and sustained injury. In the alternative, Dolphinarama's negligent omission constitutes a substantial factor in Senter's injuries (suspenders & belt).

Proximate Cause:

Senter's fall does not constitute an event so far attenuated from Dolphinarama's breach so as to preclude establishing proximate cause (*Palsgraf*); his fall was reasonably foreseeable based upon the existence of the danger and the failure to warn of the danger. The mechanism of the injury (perhaps attributed to the arguably odd existence of a towel in the gutter) need not be foreseeable (rat flambé).

Establishing a Case Against Paramedics:

Duty:

The paramedics owed Senter a professional standard of care established by professional custom.

S.O.C.:

Standard of care is established through custom; the paramedics had standard of care of a reasonable paramedic under the same or similar circumstances.



Breach of S.O.C.:

Breach is established by showing deviation from the custom of the paramedic profession. Expert testimony is typically required to prove such deviation, but it is likely that the delay in transferring Senter to Big Town General Hospital deviated from the professional standard of care (paramedics knew Senter had serious head trauma).

Cause-In-Fact:

But-for the paramedics negligence in delaying Senter's transport, he would not have been injured to the extent of his present state.

Proximate Cause:

Senter's injuries are not so far attenuated from the Paramedic's negligence so as to preclude constituting proximate cause. Increased head trauma and subsequent brain damage are foreseeable results from delayed access to appropriate medical care.

Compensatory Damages: Senter mitigated damages by seeking medical care.

A finder of fact will apportion the appropriate liability for damages claimed between Dolphinarama and the paramedics.

<u>Senter's Damages:</u>	Past:	Future:
Pecuniary	\$455,085.70 (total expenses from providers, prescription costs, and adaptive assistance) + lost wages from DOA to present (~3 yrs.) + any property damaged as a result of the fall (cell phone, clothing, etc.)	Include all future medical expenses + future earning capacity (determined by economic loss expert)
Non-Pecuniary	Pain and suffering as result of accident (several minutes before found at stairs, extra time in transport to hospital) + pain and suffering from medical procedures	loss of enjoyment of life (career)+ any loss of consortium

Notes on Damages Strategy:

1. Collateral Source Rule: Dependant upon New State's recognition of a collateral source rule, compensation will not be reduced by any payments made on behalf of Senter from health insurance or outside sources (e.g. a rich uncle). Medicals costs will likely be reduced through negotiation with providers/outside entities; however, Senter is still entitled to the full amount expensed in treatment.

2. Per New State's Statute 1(3)(iii), based upon the percentage of liability assigned to each party by the finder of fact, the defendant will pay that

percentage of the total damages awarded. However, if the finder of fact allocates 60% or more liability to either Dolphinarama or the paramedics, Senter may recover the total amount in damages from the party assigned the greater portion of liability (in the event of insolvency of any defendant assigned liability).

3. New State may have caps on recovery. Reframing the loss as part of pecuniary losses will mitigate any caps on non-pecuniary losses.

Defenses:

1. Standard of Care: Δ will argue that Senter's legal status was a *licensee* because he was there for pleasure and did not pay for his room. This defense is rebutted by the fact that Senter paid for meals on the premises.
  
2. Express Assumption of the Risk: Δ will likely claim Senter expressly assumed risk by signing the exculpatory release upon arrival. The defense may be rebutted on two grounds:
  - a. Reckless conduct: Dolphinarama's failure to warn Senter was reckless given the duration of the existence of the danger and the ease of correcting the danger.

- b. Unspecified risks: the waiver disclaims all risks generally arising from negligence; however, for an exculpatory waiver to be valid it must specify the assumed risks.
3. Comparative Fault/Implied Assumption of the Risk: (Given that New State a comparative fault state, the delineation between the two defenses blurs in their applicability.) Δ will claim that Senter violated the RPP, and his own negligence in consuming alcohol and proceeding through a staircase labeled “staff only” make him liable for his own injuries. A jury must find that Senter’s actions constituted *more* than 50% liability to bar his recovery of damages.
4. Statute of Limitations: New State’s statute of limitations for negligent tort claims is not included. If, like Colorado, the SOL is 3 years, Senter must file within that period (DOA + 3 yrs. – 1 day = filing deadline).
5. Governmental Immunity: If the paramedics are state-employed then Senter will likely not be able to pursue a claim due to government immunity. If he can pursue a claim against state-employed paramedics, he will need to ensure a specific SOL that pertains to claims against the government does not bar his claim. If Senter cannot name the

paramedics in the claim, we will attempt to establish 60% liability or greater to Dolphinarama so that Senter may still recover the full amount in damages (Statute 1(3)(iii)).

*Ellen and Sean's Claims Against SWTF/Dolphinarama*

Based upon their vicarious liability, Ellen, on behalf of herself and as the guardian of Sean Brody, will bring a claim against “Swim With the Fishes” (SWTF) (*respondeat superior*, employee acting within the course and scope of employment) and Dolphinarama (deep pockets) in order to maximize recovery. Dolphinarama is not insulated from suit based upon “SWTF” status as an independent contractor for the following reasons:

1. Inherently Dangerous Activities: “SWTF” provides a service that is inherently dangerous (allows untrained patrons to swim with large, potentially dangerous sea creatures).
2. Day-to-Day Supervision: The resort likely supervises “SWTF” and its employee’s actions daily because they operate on the resort’s premises.

Duty:

Under *Heaven v. Pender*, Dolphinarama/SWTF employees owed Ellen and Sean Brody (and all others) a RPP standard.

This duty of care was elevated given the Brody’s legal status as an invitee; therefore, the employees had a duty to warn the Brody’s of all potential dangers, both actual dangers and dangers of which Dolphinarama/SWTF

should have reasonably known. We will attempt to frame the existence of dangerous sea mammals as a condition of the land (the dolphins are continually present in the Great Pool) in order to elevate the SOC.

S.O.C.:

Dolphinarama/SWTF has a duty to inspect for dangers and warn guests of dangers of which they knew or of which they reasonably should have known.

Breach of S.O.C.:

Dolphinarama/SWTF breached the standard of care when they failed to warn Ellen and Sean of the danger of swimming with an “in season” dolphin. Even after Ellen inquired about the safety of the experience, Barb reassured her it was safe. Expert testimony will indicate that swimming with dolphins “in season” is dangerous. Barb, as a trained employee, should have reasonably known of this danger.

Breach would also be established through *negligence per se*, if New State has statutes that set forth training/working guidelines for employees, effectuated

to protect patrons. The Brodys could claim that Barb's less than adequate training led to their injuries.

Cause-in-Fact:

But-for Dolphinarama/SWTF's negligent omission in failing to warn Ellen of the danger of swimming with an "in season" dolphin, she and Sean would not have entered the pool and sustained injuries from the attacks. As evidenced by her inquiry and prior conversation with Barb, Ellen would not have put herself and her son in the pool if she did not believe it was safe.

In the alternative, Dolphinarama/SWTF's negligent omission was a *substantial factor* that led to the injuries of both Sean and Ellen (suspenders and belt).

Proximate Cause:

Ellen: The attack by the "in season" dolphin was not so far attenuated from the breach of Dolphinarama/SWTF so as to preclude establishing proximate cause. In light of the expert opinion, "in season" dolphins present danger to humans, and the type of harm (personal injury) is reasonably foreseeable.



Also, Ellen is a classic “egg shell plaintiff” because she is suffering from pre-existing injuries from a car accident; however, the extent of injury to a plaintiff need not be foreseeable and the pre-existing injury will not preclude her from claiming damages resulting from this injury (as well as those indivisible from the former accident).

Sean: Establishing that Dolphinarama’s/SWTF negligent omission was the proximate cause of Sean’s injuries proves more difficult. According to the expert opinion, the injured dolphin triggered an underwater sonar signal that instigated Duck’s attack on Sean. Proving proximate cause for Sean would likely require further expert testimony speaking to whether this type of communication and dual attack was or should have been reasonably foreseeable to the trained employees/Dolphinarama.

Compensatory Damages: Ellen and Sean *mitigated* damages by seeking treatment.

<u>Ellen's Damages:</u>	Past:	Future:
Pecuniary	\$43,600.00 (expenses from Dr. Samor's treatment, plus cervical facet treatment) + lost wages from injury from DOA to present (~3 yrs.) + property damaged as a result of the attack (swimwear, etc.)	Rhizotomy procedures \$438,135.78 (based on life expectancy will occur 36.5 times @ 12,000 ea.) + future earning capacity lost (determined by economic loss expert)
Non-Pecuniary	Pain and suffering as result of accident + pain and suffering from medical procedures	loss of enjoyment of life (pain of repeated surgical procedures)+ any loss of consortium

<u>Sean's Damages:</u>	Past:	Future:
Pecuniary	Medical expenses (paramedics, ER visit, subsequent treatment, physical therapy) + any property damaged as a result of the attack (swimwear, etc.)	Future medical procedures/treatment required + future earning capacity lost (determined by economic loss expert)
Non-Pecuniary	Pain and suffering as result of accident + pain and suffering from medical procedures	loss of enjoyment of life (endures teasing at school) + any loss of consortium

### Notes on Damages Strategy:

1. Collateral Source Rule: see Senter. Ellen's co-payments, payments from insurers, and written off balances do not preclude her from claiming the full amount in medical costs.
2. New State may have caps on recovery. Reframing the loss as part of pecuniary losses will mitigate any caps on non-pecuniary losses.
3. Per New State's Statute 1(3)(iii), see Senter. If one party is discovered insolvent, we will attempt to frame the alternate party at least 60% liable so the Brody's may still recover fully.

### Defenses:

1. Express Assumption of the Risk: Δ will likely claim Ellen, on behalf of herself and as the guardian of Sean, expressly assumed risk by signing the exculpatory releases upon arrival. The defense may be rebutted on two grounds:
  - i. Reckless conduct: Dolphinarama's/SWTF's failure to warn Ellen and Sean of the danger of an "in season" dolphin was reckless

given the gross deviation from the standard of care Dolphinarama/SWTF owed their guests.

ii. Unspecified risks: the waiver disclaims all risks generally arising from negligence; however, for an exculpatory waiver to be valid it must specify the assumed risks.

➤ NOTE: The court will more likely uphold the express assumption of the risk for Carol because she was taking part in a dangerous recreational pursuit. The court is less likely to uphold the exculpatory release signed for Sean because they look unfavorably upon parents assuming risk on behalf of their children.

2. Comparative Fault/Implied Assumption of the Risk:  $\Delta$  may claim that Ellen contributed to her own risk when she noticed the injured dolphin and proceeded with the activity anyway. A jury must find that Ellen's actions constituted *more* than 50% liability to bar her recovery of damages.

3. Statute of Limitations: See Senter.

4. Reduction in Pay Out: Defense will likely attempt to reduce damages by purporting that Ellen's care was excessive (acupuncture, Pilates, etc.), given that her attorney is also her doctor and he likely collects his fee from the total amount of bills/expenses incurred. Her attorney acting as her medical provider creates a conflict of interest that has potential to weaken her case.

Word Count: 2,295

**Dolphinarama and Paramedics as Joint and  
Several Tortfeasors**

We will approach Dolphinarama and the paramedics as joint and several tortfeasors in a negligent injury claim because of the **Indivisibility of Harm caused to Senter by their separate acts of negligence.**

Although liability for Senter's injuries is analyzed individually below, a strategy for joint liability should be explored as well.

Although several liability could be assigned pro-rata, **our goal is to push the side with deeper pockets into Joint and Several liability** by establishing 60% or more of total liability (Statute 1(b)(3)(iii)). This allows us to collect the full award from one party and leaves defendants to attack each other for contribution.

We should probably push Dolphinarama towards J&S liability, assuming they have deeper pockets (liability insurance). Medical malpractice claims are notoriously hard to win and paramedics are potentially covered by limited immunity from this type of claim. In the alternative, slip and fall cases aren't easy and paramedics may carry hefty coverage for this type of situation.

A more risky, but potentially lucrative approach, would be to establish that Dolphinarama and the paramedics had an understanding whereby

injured guests would be discreetly removed from the resort (via ambulance sans flashing lights and sirens.) If the decision not to call helicopter was based on such an agreement, we have a particularly despicable tort that might merit putative damages and Senter could end up the proud owner of Dolphinarama. It would be worth hiring a detective to explore this possibility, but for the remainder of this analysis we assume the paramedics' decision was made without influence from Dolphinarama.

### *Senter v. Dolphinarama*

Senter claims Dolphinarama's failure to discover and warn of slippery step constitutes negligence that resulted in injury.

#### 1. Duty

*Heaven v. Pender* "When Active, Be Careful" – Obligation to behave as **Reasonably Prudent Person** (RPP) under similar circumstances.

Normally there is **no affirmative duty to act**. However, **landowners have a special duty to entrants**. Senter's status on Dolphinarama's property determines whether Dolphinarama's failure to guard against endangering Senter was misfeasance.

## 2. Standard of Care

We argue Senter was an **Invitee**, pointing to food, drink, and souvenirs Senter purchased as **evidence of bidness**. When dealing with Invitees, landowners must use **reasonable care in maintaining their property** and **take affirmative steps to discover and warn of danger** on the property such as a slippery 13<sup>th</sup> step.

Dolphinarama will argue that Senter was an old friend who entered the property with **express consent as a social guest**, and was therefore a **Licensee**. When dealing with Licensees, Landowners have **no duty to inspect** their property for dangers, and must only warn of **known** dangers.

## 3. Breach of Standard of Care

Failure to inspect premise and warn of danger created by dripping gutter is **negligence and breach of Invitee SoC**, especially when condition existed for months. If Dolphinarama succeeds in arguing Licensee status, whether the condition was known becomes the issue. **We argue they must have known** about a drip that existed for months, creating a bright green spot on the stairway all employees use daily. Alternately, failure to remedy was a breach of SoC because burden of **removing towel from gutter was easy fix** compared to probability of someone falling on slippery stair and being seriously injured.



#### 4. Cause in Fact

**Golden Rule:** But For Dolphinarama's breach of SoC by allowing a slippery slime patch to grow on stairwell, Senter would not have fallen and been injured (*Rewind the tape of life* – if slime isn't on the 13<sup>th</sup> step, Senter passes safely.) Alternately, Dolphinarama's negligence in maintaining the premises was a **substantial factor** in causing Senter's injuries (suspenders and belt.)

#### 5. Proximate Cause

It is reasonably foreseeable that someone might slip on a patch of slime on a step and fall down a stairway. The extent or exact nature of Senter's injuries need not be foreseeable.

#### 6. Damages

**The goal is to make Senter whole, so damages are estimated from the time of the incident to the end of Senter's life.**

**Specials - Medical Bills** from time of fall to present (\$454,085.70), as well as current value of estimated future medical services our medical expert will prove are necessitated by his fall. **Incidentals** such as adaptive assistance devices (\$511.31), prescriptions (\$1,123.25), pocket calculator to help him count change, etc. **Lost Wages** from time of fall until judgment, as well as estimate of future earnings (as a lawyer, the sky is the limit here.)

**Generals – Hedonic, Pain and Suffering.** We don't know much about pain and suffering Senter endured. If he was in a coma or his injury limited his awareness of the situation, he may not be able to recover much for pain and suffering. We will try to show that he was fully aware of the great physical and psychic pain he suffered, and will likely suffer such pain for the rest of his life.

We will also try to recover loss of hedonic enjoyment by painting Senter as a man who liked to take vacations, have a little wine, and share his financial insights with his dry cleaner. All these things are lost to him now as he struggles to count his change.

## **7. Defenses**

**Comparative Fault – Statute 1** allows plaintiff to recover if their causal negligence is not greater than defendant(s). We assume New State follows majority practice of allowing a plaintiff to recover when negligence is shared 50/50. **Dolphinarama** will argue that Senter's causal negligence is more than 50%. We will argue that 3 glasses of wine over 90 minutes is reasonable and Senter had no problem with the first 12 steps that were free of slime. **It is vital we establish that Senter's drinking is not more than 50% of the cause.**

**Statute of Limitations** - We are not given New State's Statute of Limitations for negligent injury claims. Unless SoL > 3yrs, claim may be barred unless filed immediately.

### **Senter v. New State Paramedics**

Senter claims negligent injury resulting from paramedics' failure to call life flight.

#### **1. Duty**

*H. v. P.* **"When active, be careful."** Duty to act reasonably was created when paramedics assumed care for Senter.

#### **2. Standard of Care**

**We will push for higher professional standard of care**, which requires paramedics to behave as would a reasonable paramedic in good standing in their field. If paramedics don't qualify as highly trained professionals, we look to RPP standard.

#### **3. Breach of Standard of Care**

**Failing to call life flight was negligent by either professional SoC or RPP standard.** If professional SoC is applicable, we find the best paramedic money can buy to serve as an expert witness and testify that it is

a **custom in the paramedic profession to call for life flight** when dealing with a trauma patient like Senter. If RPP standard applies, we argue that a reasonably prudent person would know that a man with such injuries needed to be transported to a hospital capable of treating his injuries ASAP.

#### **4. Cause in Fact**

**Golden Rule** – But for extra 90 minutes without medical care, Senter’s injuries would not have been so extensive. Alternately, **medical uncertainty claim** that paramedic’s negligence was a **substantial factor** reducing Senter’s chances for complete recovery.

#### **5. Proximate Cause**

It is reasonably foreseeable that extent of traumatic injuries will be exacerbated by lack of treatment for 90 minutes.

#### **6. Damages**

See *Senter v. Dolphinarama* damages.

#### **7. Defenses**

**Immunities** – New State law may grant Emergency responders limited immunity that raises negligence standard. If so we argue responder’s failure to call helicopter was gross negligence.

**SoL-** Unless SoL > 3yrs, claim may be barred unless filed immediately.

### **Ellen v. Barb et al**

Ellen will join Barb, Swims With The Fishes (WTF), and Dolphinarama as joint tortfeasors in a negligent injury claim.

**WTF is vicariously liable** for Barb's negligence via *Respondeat Superior* because Barb's negligent supervision of the beginner program was within the scope of her employment with WTF.

**Dolphinarama was also vicariously liable** for Barb's actions via *Respondeat Superior*. Dolphinarama had a **non-delegable duty** to keep their grounds and great pool safe for invitees and is liable for their sub-contractor's negligence in this regard. This argument is especially important if Dolphinarama has deeper pockets than WTF.

#### **1. Duty**

*H. v. P.* **"When Active, Be Careful"** or in this case "When instructing humans to enter a pool with dolphins, be careful that it is reasonably safe for humans to swim with such dolphins."

## 2. Standard of Care

**Invitee** – Ellen was an invitee because she was a **paying, credentialed customer**. Dolphinarama had a **duty to take affirmative steps to discover dangers on the property**, such as in-season Dolphins, and **warn Ellen of the danger**. There may be a heightened standard of care if dolphin trainers rise to the level of highly trained professionals, otherwise RPP SoC applies.

## 3. Breach of Standard of Care

Failure to remove the in-season dolphin from the great pool and/or warn Ellen constitutes *gross* negligence and breach in the SoC owed an invitee. We will rely on Dr. Federal's report to establish that it is custom in the trade not to allow humans to swim with in-season dolphins. Alternately, we argue that a reasonable prudent person would recognize the potential danger based on the animal's appearance and behavior.

## 4. Cause in Fact

**Golden Rule** – But for Barb encouraging Ellen to swim with an in-season dolphin, Ellen would not have been injured. Alternately, Barb's negligence in allowing humans in the same pool as an in-season dolphin was a **substantial factor** in Ellen's injury.

## 5. Proximate Cause

It is reasonably foreseeable that human/in-season dolphin interactions could result in injury.

**6. Damages** –Defense will try to claim Ellen’s injuries were pre-existing, Dr. Samor will have to establish dolphin attack as cause of **current pain**. Ellen sought treatment for injuries, *mitigating* extent of damage.

**Specials – Medical Bills** – Ellen can recover medical expenses created by dolphin attack from time of the incident to the present, as well as current value of estimated future medical services our medical expert will prove are necessitated by the attack. This includes combined \$17,000 in initial treatment by Dr. Samor, cost of repair for her broken nose, as well as past and future treatment for cervical facet syndrome (including present cost of rhizotomy every 14 months for estimated life expectancy of 42.3 years = \$435,085.72.) Ellen can also recover costs of incidentals necessitated by the injury, as well as lost wages she can prove resulted from the attack (did she miss work because of debilitating neck pain?)

**Generals** – Ellen can recover for pain and suffering she endured during and immediately after the attack, as well as debilitation from persistent neck pain until treated by rhizotomy. We will also try to recover for embarrassment from snoring and loss of facial symmetry caused by her broken nose.

## 7. Defenses

**Express Assumption of Risk** - Although Ellen voluntarily signed release, **it does not specify enumerated assumed risks** and is therefore invalid. Allowing an in-season dolphin to swim with humans was **gross negligence, for which liability cannot be waived.**

**SoL**- Unless SoL > 3yrs, claim may be barred unless filed immediately.

### *Sean v. Barb et. al.*

Sean will join Barb, WTF, and Dolphinarama in a negligent injury claim. The relationship between parties is identical to those in *Ellen v. Barb et al, supra.*

#### 1. Duty

Same as *Ellen*

#### 2. Standard of Care

Same as *Ellen*

#### 3. Breach of Standard of Care

Same as *Ellen* – Barb was negligent towards everyone in the pool with the in-season dolphin.



#### 4. Cause in Fact

**Golden Rule** – But for in-season dolphin being placed in the pool with Sean, he would still have two thumbs. Alternately, Dolphinarama’s negligence in allowing humans in the same pool as an in-season dolphin was a **substantial factor** in Seans injury.

#### 5. Proximate Cause

It is reasonably foreseeable that a human in a pool with an in-season dolphin could be injured. The fact that the in-season dolphin incited Duck to violence is a **rat flambé** type situation. However, the **unlikely extent and/or precise manner** in which Sean’s injuries occurred will not preclude his claims. Whoda’ Thunk dolphins could communicate and illicit behavioral responses from each other?? – people who know about dolphins, that’s who.

#### 6. Damages

Sean can recover **medical expenses** resulting form the dolphin attack from time of incident to present, as well as current value of estimated future medical services our medical expert will prove are necessitated by the attack. Sean can also recover **incidentals** such as adaptive school supplies (left-handed scissors, etc), thumb prosthesis and accouterments, and any other expenses created by adjusting to a single-thumbed life. **Lost Wages** will be more difficult to establish for young Sean. We are forced to rely on

**achievements of others in his family**, as well as **evidence of his intelligence** (jokes about Base-9 don't hurt) to persuade the court he had a bright future, now dimmer without a dominant-hand thumb.

What Sean lacks in lost wages we can gain in loss of enjoyment and pain and suffering. We will ask the jury to put a very high price on the loss of enjoyment endured by a young boy who can't grip a baseball bat or cast a fishing rod. We'll focus on the cruel taunts of classmates (Gimme Five) as evidence of the emotional suffering he is likely to face for years to come. Of course, He can also make a claim for the pain and suffering that accompanied the actual attack and recovery.

## **7. Defenses**

**Statute of Limitations** – As a minor, Sean's claim is **subject to tolling** - no SoL issues exist.

**Express Assumption of Risk** – In addition to the negligence issued discussed in *Ellen v. Barb et al*, Section 7, waiving liability for the negligent injury of children is **against public policy and the moral code of the House of Russell**.

**Word Count - 2298**