
FINAL EXAMINATION - ESSAY

Limited open-book. Two hours.

Write your exam number here: _____

All exam materials (including this booklet and your response) must be turned in at the end of the period. You will not receive credit unless you return this booklet with your exam number written above. Do not turn the page until instructed to begin.

Notes and Instructions

General Notes and Instructions

1. Assume that today's date is May 2, 2012, unless indicated otherwise.
2. You may write anywhere on the examination materials – e.g., for use as scratch paper. Only answers and material recorded in the proper places, however, will be graded.
3. Your goal is to show your mastery of the material presented in the course and your skills in analyzing legal problems. It is upon these bases that you will be graded.
4. During the exam: You may not consult with anyone – necessary communications with the proctors being the exception. You may not view, attempt to view, or use information obtained from viewing other student examinations or from viewing materials other than your own.
5. After the exam: You may discuss the exam with anyone, except that you may not communicate regarding the exam with any enrolled member of the class who has not yet taken the exam, and you must take reasonable precautions to prevent disclosure of exam information to the same.

Specific Notes and Instructions for PART TWO:

- a. Unless expressly stated otherwise, assume that the facts recited herein occur within one or more hypothetical states within the United States. Base your exam answer on the general state of the common law and typical statutory law in the United States, including all rules, procedures, and cases as presented in class, as well as, where appropriate, the theory and history discussed in class. It is appropriate, if you wish, to note differences between minority and majority approaches in your answer, as well as statutory or other differences among jurisdictions.
- b. Do not dwell on negligence or other topics from Torts I, to the extent you mention them at all.
- c. Note all issues you see. More difficult issues will require more analysis. Spend your time accordingly.
- d. Organization counts.
- e. Be complete, but avoid redundancy. Specifically, do not repeat the exact same analysis with substituted parties. For instance, computer users should probably not use the cut-and-paste function. Instead, to the extent called for, you may incorporate analysis by reference to another portion of your answer.
- f. Feel free to use reasonable abbreviations.
- g. **Bluebooks:** Make sure your handwriting is legible. I cannot grade what I cannot read. Skip lines and write on only on one side of the page
- h. This exam is "limited open book." The only materials to which you may refer during the exam, other than this exam booklet, scratch paper provided as part of the exam administration, and any special references specifically authorized by the Dean of Students office, are: (a) the authorized copy of the Spring 2012 Torts Wypadki, which will be distributed to you in the exam session, (b) a "reference sheet," consisting of a single 8.5-inch-by-11-inch sheet of paper, upon which anything may be written and/or printed, including on both sides, front and back, and (c) sticky tabs labeled with subject headings to insert into the wypadki, if you so choose. You may not consult or access any other piece of paper, including, but not limited to, a copy of the wypadki that you have printed out yourself. No materials may be shared during the exam.
- i. Do not write your name on any part of the exam response or identify yourself in any way, other than to use your examination I.D. number appropriately. Self-identification on the exam will, at a minimum, result in a lower grade, and may result in disciplinary action.
- j. This Part Two is worth approximately two-thirds of your overall exam grade.
- k. Good luck!

The Voyage of Captain A. Von Shure

YOUR DESK HAS NOTHING ON IT. It's your third day on the job as a staff attorney at the National Oceanic and Atmospheric Administration (pronounced "noah"). NOAA is the national science agency focused on the seas and the weather. In addition to providing weather forecasting, NOAA undertakes research on the oceans in the same way NASA undertakes research in space. Exciting agency. But for you, so far, it's been a pretty boring job. The phone rings. It's the FBI. You have just been granted your top-secret clearance.

Congratulations. That's very cool. But you can't help wondering about the bureaucratic overkill involved here: Whatever would be the need for top-secret clearance at NOAA? At that moment, Gwendolyn Galstrom strides into your office. Gulp.

Galstrom is Under Secretary of Commerce for Oceans and Atmosphere, a presidentially appointed, Senate-confirmed position, and that makes her NOAA's top administrator. She is also a lawyer.

"I'd like to get you started analyzing something," she says, setting a file folder on your desk. She slides it over to you. The edges are lined with red-and-yellow-striped tape.

"This is code-word-classified top secret," she says. "Code-word FATHOM. I want you to read the report and give me a memo analyzing the liability of the parties."

As Galstrom walks out of your office, you open up the folder. Wow, you think. This job's not boring any more.



NOAA's Satellite Operations Facility in Suitland, Maryland.



TOP SECRET – EYES ONLY
CODEWORD CLASSIFIED << FATHOM >>

REPORT OF PROF. P. PAXTON

I am Professor Parker Paxton, the Downing-Whewellian Chair of Oceanography and Marine Architecture at the Oxbridge Oceanographic Institute. This report contains a true and accurate statement of my recollection.

I was aboard the *M.V. Moana* on a mission to investigate the disappearance of the *D.S.V. Dauntless*. The *Dauntless* was a top-secret research submarine built, owned, and operated by Hexetron Heavy Industry and Experimental Marine Systems, Ltd. under contract with the National Oceanographic and Atmospheric Administration's Office of Ultra-Advanced Projects. The goal in building the *Dauntless* was to push submarine technology at least two generations ahead in a single step. A hull made of nano-organic-fibered polycarbonium gave it the strength to dive to any depth on Earth, and its extonic-proton-spin propulsion system allowed it to maintain speeds of up to 260 knots (300 mph or 500 km/h), all while slipping silently under the waves with an articulated hydrodynamic cross-section that reduced acoustic signatures to undetectable levels. Its sheer size – a submerged displacement of 53,000 tons and a length of 270 meters – made it by far the largest submarine ever made.

The *Dauntless* first set sail on an initial three-hour shakedown cruise under the command of Amelia Von Shure, Captain (Retired) U.S. Navy, employed as a civilian by Hexetron. Assisting her was First Officer Carl Cather, a former CIA field operative, also employed as a civilian by Hexetron. With the *Dauntless* having the latest in automation, it could be crewed more like an airplane than a ship, and thus Capt. A. Von Shure and her First Officer were the only souls aboard as the *Dauntless* began her sea trials. Fifteen minutes from shore, the *Dauntless* undertook her first dive. She was not heard from again.

There were nine of us aboard the *Moana*. All of us were employed by Hexetron. My junior research partner Fiona Fahrlander and I were brought on special for this mission. The rest of the crew comprised regular full-time sailors for Hexetron. Fiona and I signed up to consult on the voyage for the scientific challenge inherent in the quest. But I will confess the financial benefits were suitable. Our room and board were provided for, and, if we were able successfully to locate the *Dauntless*, we would receive a handsome finders' fee.

It was our 44th day of searching. We were operating in a quadrant of ocean that had been cleared of all other marine traffic under the pretext of a live-fire air-launched torpedo exercise. It was Fiona, standing in the crow's nest with me, who spotted it first. "Fast moving disturbance in the water at 2 o'clock!"

I looked to starboard and saw an ominous sight: A line of whitewater, spearheaded by a heavy upwelling, moving at incomprehensible speed on a collision course with our vessel. Fiona sounded a collision warning, but there was nothing that could be done. The comet-like thing was upon us too soon. It was so terrifying, I wondered if it might be some kind of apparition. But when it hit, it was all too real. It merely scrapped us, but the force of the impact was enough to hurl Fiona and me into the water – well clear of our ship. When we righted ourselves in the sea, we saw that the *M.V. Moana* was sawed in half. The two lengths of the ship quickly flooded, turned vertical, and sank.

Fiona and I looked at each other astonished. Then we quickly surveyed the horizon. There were no other survivors. The ship had been rendered so quickly and so completely, there was nothing left on the surface of the water except the two of us, treading water with a sense of hopeless dread.

“I think we found the *Dauntless*,” Fiona said.

“Ms. Fahrlander,” I began. But I stopped. Then I began again: “My dear Fiona, it has been a pleasure serving with you. You are a fine research collaborator and ...”

Before I could spit out another syllable of my farewell, the sea opened up. We were sucked under in a vortex of foam and froth. I tried to grab for Fiona and kick against the undertow, but just as quickly as I reached out, I found myself hammocked in quilted elastic netting, suspended over a perforated-plate metal deck. The netting gently lowered us to the floor and opened.

As I blinked my eyes clear of seawater, I saw an imposing figure standing above us.

I got up to my feet. “Captain A. Von Shure, I presume.”

“Indeed. Come with me, we are in a hurry,” she said.

Fiona and I quickly followed her forward through a spacious passage way.

“I’m getting a sinking feeling,” Fiona whispered to me.

“It’s not just a feeling,” Von Shure said ahead of us without breaking her brisk pace. “We are diving.”

We emerged on the vessel’s bridge. The view was breathtaking. The bridge was enclosed by a giant transparent dome, affording an expansive view of the ocean around us. As the waters darkened, Von Shure flipped a toggle switch and on came powerful floodlights, illuminating our surroundings. As Von Shure deftly worked the boat’s many levers and wheels, we found ourselves approaching the *Moana*, newly rested on the ocean bottom.

Strange sounds like sonar pings and computer bleeps echoed around us.

“Scanning for life,” Von Shure explained, not taking her eyes off the many monitors, dials, and meters. “There is only one. Starboard amidships. There is something hot there.”

“The galley!” I cried in anguish. “Our faithful steward Stevie Steiner! ‘Twere better to have thought he perished quickly, like the others.”

Von Shure twiddled some knobs and pressed several buttons. Distorted static poured from speakers. Then Steiner’s voice emerged. “Oh my god!” he was yelling. “I’m gonna die! I’m not ready to die! I’ve got a wife and a kid! What are they gonna do without me? They’ll have nothing! Oh dear god, somebody please help me!”

“How do I get in?” Von Shure asked. She looked at me with piercing sobriety.

“Get in? Whatever do you mean? We are 500 meters deep!” I was astonished. “The world record scuba dive is 330 meters! And should you have a hard-shelled atmospheric dive suit, its bulk would prevent your entrance through any hatch in the ship.”

“I will go out there. Just tell me how to get in!” Von Shure said this with such utter command, I felt helpless but to stammer a response.

“There is a hatch on the fo’c’sle. There, by the anchor windlass,” I said, pointing. “Down the ladder and aft right into the galley.”

Von Shure sprinted away from us and slid down a pole below deck. Fiona and I looked at each other speechless. Presently, a well-built man of about 30 years age appeared at our side.

“Carl Cather, I presume.” I introduced my companion and myself.

“Great to meet you,” Cather said gruffly, not ceasing in his attention to the control console, his hands deftly flying across it in efficient rapidity.

In a few moments, we saw out the great window a figure bounding across the seafloor in a sleek atmospheric dive suit that was far advanced beyond anything I’d seen. It was Von Shure. Lugging a bundle of equipment, she scrambled up the wreck and found the hatch. She exerted herself upon it, but it was jammed. She then began using a hyperbaric welding torch to cut away at the hinges. As Von Shure worked, Cather continued to probe the wreck with all manner of instrumentation that I could not begin to fathom. And through it all we heard the heart-rending cries from poor Steiner.

“My ears! Oh, my ears!” he was moaning. As we all knew, his eardrums must have burst from the rapid pressurization of the descent. Within a few moments, it became clear that hyperbaric paranoia and visual disturbances were beginning to take hold of the man. “What’s in front of my face?” he screamed. “Demons! Oh, God! Save my soul! Don’t let Hell take me! No!!!!”

“Six souls lost, and one more seems surely to be consigned to a slow, tortuous death,” I said, shaking my head. Fiona was speechless. Cather took the moment to apologize.

“I encouraged Captain Von Shure to test the top speed of the vessel,” he said. “You know, it was her decision. She’s the skipper. She made the call. But I still feel terrible about this.”

We continued our helpless vigil, watching Von Shure work away at the steel. Steiner soon fell silent. When Von Shure finally broke through the hatch and made her way up the passageway, the man was already dead. Maybe 20 minutes later, Von Shure walked back across the seafloor. Fiona and I met her at the airlock door, where she had her helmet in her hands.

“I surveyed the wreck and accounted for the entire crew,” Von Shure said. “Other than Steiner, everyone else suffered injuries that would have killed them virtually instantly. I am deeply sorry.”

“You odious thug!” I shouted, and I threw a punch at her. With nonplussed effort, she deftly caught my fist in one hand.

“I assure you that you are no match for me, Professor. Please don’t exert yourself.”

“You’re a crazed freak!” Fiona vented at her. “Why would you sink our ship?”

“I didn’t do it intentionally,” Von Shure said. “I intercepted radio transmissions saying the area had been cleared for a live-fire, air-launched torpedo exercise by the United States Navy. That means no marine traffic in the quadrant. Torpedoes can’t catch the *Dauntless*, so I took advantage of the open ocean to run my boat as fast as I could. I was scrupulously careful.”

“Seven souls are lost, Von Shure!” I raged. “You, you thief of the *Dauntless* – you can now add murderer to your list of proper appellations!”

“I will not,” Von Shure said. “I have not stolen anything. I’ve taken my just compensation for what was stolen from me. I had a brilliant career in the Navy. I served this nation proudly. Then, in a hearing of the House Intelligence Committee, Representative Richard Rinsley – a classmate of mine at the Naval Academy – called me an incompetent coward. His chief of staff said the same to the press. It was a lie. But I lost my command because of it, and I was forced to retire from the Navy.”

“There is no excuse for what you’ve done, Captain Von Shure,” I roared. But she merely continued brooding as she looked out pensively into the blue.

“Initially, the Navy tried to destroy me psychologically,” she said. “I was humiliated, forced to swab decks like an apprentice seaman, and when I was assigned to clean out a torpedo tube, I was locked inside with the lights off for 20 hours. I was driven temporarily mad. Yet I did not relinquish my commission voluntarily. They finally discharged me. All because of the U.S. House of Representatives, a corrupt institution, and Richard Rinsley, a backstabbing cretin. Mr. Cather has suffered similar injustices. We can no longer abide by a government and society that tolerates such

villainy. We took advantage of the sea trials to seize this marvelous boat in the name of decency, honor, and the common good.”

My language turned vulgar. “You common pirate!” I shouted, “Take us to port immediately.”

“I will not,” said Von Shure. “I will not return the *Dauntless*, and I cannot permit you to go about on land revealing what you have seen and leading our pursuers to us. But you are my guests, and I invite you to find a truer liberty – here, under the sea – than you can enjoy on land in the employment of despots. There’s real good to be done down here. There’s treasure to find and evil to undo. I am sorry that you two find yourselves here. But now that you are here, you will see the wonders of the planet’s last frontier. As oceanographers, you will find an endlessly fulfilling life here. As for the crew of the *Moana*, unfortunately there is nothing I can do.”

“Poppycock!” I responded, having completely taken leave of my temper. “The next of kin of the *Moana* will now get Hexetron’s pittance of a \$5,000 life-insurance benefit. Is that the sum total they should receive? They are owed an explanation! You owe it to them to provide it!”

“I regret that they’ll never get one,” Von Shure said. “You will find your quarters down the ladder and aft.” With that, she turned her back and walked away.

Over the next few days, Fiona and I, in spite of ourselves, grew to feel at home on the magnificent vessel. Three times a day, we were treated to a delicious and filling, yet healthy, feast. For attending to one’s constitution, there was a well-equipped gymnasium and even a small pool – albeit one we were obliged to share with the ship’s no. 3 – a dolphin named Billy the Bottlenose.

I surreptitiously took this picture of Carl Cather brushing Billy’s teeth:



As you can see, the creature appeared quite docile. In fact, the cetacean had been trained since birth to be a servant to humans under the waves. And after some time, I found Billy to be a highly agreeable companion, being possessed with an extraordinary sense of loyalty and duty.

Animal personality aside, I initially thought it quite unsanitary to swim in the same pool with a dolphin. But then Carl showed me the ingenious filtering system – a machine sold by Hexetron called the Hexesuck 7000.

My admirations for the infernal machine were, however, short-lived. One day Fiona was taking a swim and I put my hand inside the control box to try adjusting a knob. I suddenly found my fingers squeezed by burning-hot metal gears. I reacted by howling in pain. And unfortunately, my sudden cries startled Billy. The next thing I knew, Fiona was swearing a blue streak, scrambling out of the pool with blood gushing from her ankle. Billy – perturbed by my anguished utterances – had bitten my faithful associate.

A couple of days later, when we were supping in the captain’s mess, an alarm bell rang. Fiona and I followed Von Shure and Cather to the bridge. The scopes indicated a target bearing south-southwest. The monitors identified the vessel as the *N.S. Narwahl*, a merchant ship belonging to Hexetron.

“Now that we’ve found her, Mr. Cather, turn off the extonic propulsion system. We need to cycle the flux thermocouplers,” Von Shure ordered. “And draw up a firing solution on the *Narwahl*!”

I was thunderstruck. “Captain Von Shure, surely you are joking,” I said.

“No. I’m not,” Von Shure replied. “Hexetron is preparing to use the *Narwahl* to dump casks of high-level nuclear waste at sea. I’m in possession of documents that show these casks failed engineering tests. That is, they’re leaky. What’s more, Hexetron covered up the test results, allowing them to win a contract with Endodais Energy Corp and the U.S. Navy for the waste disposal. It is now our duty to stop them. My very careful mathematical models indicate that these casks, once they leak, will lead to an additional 10,000 cancer deaths over the next 40 years. I can’t allow that to happen.”

“That vessel must have 50 people aboard!” I protested. “You can’t sink it!”

“We aren’t going to kill anyone,” Von Shure said. “We are going to take out their screw. They’ll be forced to return to port by tug. It will take them a few days, but they’ll make it.”

“Skipper,” Cather said, “I have the firing solution.”

“Fire,” Von Shure ordered.

The hull of the *Dauntless* shuddered as a torpedo was ejected out of a port-side tube. We heard a rattling, zipping sound over the sonar monitors as the weapon propelled itself through the water. When it reached its target, my body tensed for the explosion. But we heard only a thud, followed by a metal-on-metal grinding sound.

“Screw destroyed,” Cather announced, listening to the passive sonar through headphones. “No explosion. No other damage. The *Narwahl* is dead in the water. Another good deed done, and another \$50 million not in the pocket of Hexetron,” Cather was saying with satisfaction. Then he interrupted himself: “Wait! What’s that? Torpedo in the water!! The *Narwahl* has launched on us!! And there’s no time to re-start the propulsion system!”

“GO TO ESCAPE POD ONE! TOPSIDE! RIGHT NOW!” Von Shure barked at Fiona and me. We scrambled up the ladder, found the hatch, got inside, and belted ourselves in. Through a porthole, we saw the torpedo coming through the water. It was a terrible sight. Unlike the weapon fired by the Von Shure, this was no dud. When it hit, it exploded with terrible force. Inside our escape pod, Fiona yanked hard on the release lever, and our escape pod popped off the hull and began floating on the surface like a cork. As we stared out the porthole, we witnessed the last throes of the *Dauntless*. She flipped up vertical, half her length above the water, and she displayed a gaping wound in her side. Water poured through the breach. Seconds later, the submarine vanished beneath the blue.

The crew of the *Narwahl* picked us up directly, deploying a small inflatable boat for the task. Fiona and I declined to make any report to the crew of the *Narwahl* except to give them our agency contact at NOAA. We learned that active-service naval officer Lieutenant Lars Larsenby, on assignment with Hexetron from the U.S. Navy, assisted the Hexetron crew in its launch of the torpedo. We were well treated until we were retrieved by helicopter later that day.

This report contains my true and accurate recollection.



Professor Parker Paxton



TOP SECRET – EYES ONLY
CODEWORD CLASSIFIED << FATHOM >>

**MEMORANDUM
OFFICE OF THE GENERAL COUNSEL**

To: File, FATHOM
From: Kevin Frandsen, Legal Extern
Re: D.S.V. Dauntless

Please find below some statutes from Title 46 (Shipping) of the United States Code that may be relevant:

46 U.S.C. § 66

The captain of any research submersible shall ensure the safety of all persons aboard.

46 U.S.C. § 70

All research submersibles with a greater than 500 tons displacement shall, upon demand, return any person to port as soon as reasonably possible regardless of any consent obtained before embarkation.

46 U.S.C. § 30302

When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond three nautical miles from shore, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.

When you are through reading, the phone rings. It's Galstrom.

"What do you think?" she asks.

"Well, I have to admit to you that this is not my area. Most of this took place at sea, and I never took a course in admiralty law. I went to the University of North Dakota, and they don't offer it. Did you know that UND is the furthest from the ocean of any ABA accredited law school? Anyway, I'll do the research and figure it out."

"I want it quicker than that," Galstrom says. "Look, the applicable admiralty law is pretty much the same as common-law torts, with a few statutory tweaks similar to what you would find in any state jurisdiction. Just analyze the file according to what you learned in Torts II."

"Got it," you say.

You open up a secured document and begin your analysis.

QUESTION

Analyze the parties' claims and liabilities. Please organize your response, to the extent you reasonably can, in the following order, clearly labeling the subparts in your answer:

Subpart 1: Analyze liability on the part of Amelia Von Shure and Carl Cather, if any.

Subpart 2: Analyze liability on the part of Fiona Fahrlander and Prof. Parker Paxton, if any.

Subpart 3: Analyze liability on the part of Hexetron, if any.

Subpart 4: Analyze liability on the part of anyone else, if any, and discuss anything else you wish, if any, that is not appropriate for subparts 1–3 above.

Here are a few things to keep in mind in writing your answer:

- The subpart structure is provided for organizational purposes. Do not think of the subparts as separate questions – they certainly will not be given equal weight. Divide your time proportionately among the subparts according to which ones require the most discussion and analysis. Plan ahead to put information where it belongs.
- Avoid needless repetition. (See item “e” in the notes and instructions.) Do not repeat the exact same analysis with substituted parties. Computer users should generally avoid the cut-and-paste function. You may incorporate analysis by reference to another portion of your exam answer to the extent appropriate.
- Keep in mind the subject matter of the Torts II course. Do not dwell on negligence or other concepts covered primarily in Torts I.

Some suggested abbreviations for your answer:

AV	Amelia Von Shure	LL	Lieutenant Lars Larsenby
BB	Billy the Bottlenose	MM	<i>M.V. Moana</i>
CC	Carl Cather	NN	<i>N.S. Narwahl</i>
DD	<i>D.S.V. Dauntless</i>	PP	Professor Parker Paxton
EE	Endodais Energy	RR	Representative Richard Rinsley
FF	Fiona Fahrlander	SS	Stevie Steiner, the steward
HH	Hexetron Heavy Industry and Experimental Marine Systems, Ltd.		

Some nautical terms defined:

aft – toward the rear of a ship

amidships – the center of a ship, between bow and stern

anchor windlass – the machinery used to haul up the anchor

bow – the front of a ship

bridge – the control center of the ship, from which it is steered

embark – go aboard a ship

fo'c'sle – forecastle, a ship's superstructure near the bow

fore, forward – toward the bow of a ship

galley – kitchen

hatch – door

hyperbaric – having to do with great ocean depth

ladder – stairs

mess – a place on a ship for eating

port – the left-hand side of the ship

screw – propeller

skipper – the captain, having ultimate authority on a ship

starboard – the right-hand side of the ship

stern – the rear of a ship

steward – cook

superstructure – the built-up part of a ship above the main deck

topside – on top of a ship

NOTES AND CREDITS: (The following real-life information is not part of the hypothetical facts of the exam.) This exam borrows heavily from *Twenty Thousand Leagues Under the Sea* by Jules Verne and from *Moby-Dick* by Herman Melville. The character of Captain A. Von Shure appears courtesy of Joe Johnson. Satellite facility photo by NOAA. Dolphin photo courtesy of the U.S. Navy, Navy News Stand.