

Torts II

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FINAL EXAMINATION - MODEL ANSWER

The Voyage of Captain A. Von Shure

NOTE:

This model answer was made from amalgamating the work of multiple students. Because of the cherry-picking involved, what you have here is a composite that is better than any real response that was received. So, in some ways, it is better than the best. But this model answer is not perfect. Student-drafted work done under deadline pressure, of course, never would be perfect. And I have intentionally shied away from trying to make it perfect in the compositing process. Analysis could be better in places. So could coverage – there are quite a few stones left unturned. And there are other places you could quibble with it. But, all things considered, this is extremely good.

What this all means for you is that you should be circumspect about comparing your own response to this one as a way of gauging your preparedness for the exam: You likely wouldn't need to do this well to get the top grade. Yet at the same time, if you see issues not represented here, it may be not because you are mistaken. It may be because you are perceptive.

What are good lessons to draw from this model? One thing this response does very well is the way in which the law is applied to the facts. Rather than cut-and-pasted blackletter law or needlessly reiterated facts, this exam response focuses on providing analysis. That's excellent, because the analysis is the key to doing well on the exam. Also laudable is the sense of judgment this exam response frequently displays with regard to conclusions: Close calls and toss-ups are presented as such. Rock-solid conclusions are made without hedging.

Note that the exams from which this response was composited used various abbreviations. But for this model answer, I have standardized references to names and not used abbreviations. Naturally, I have also cleaned up grammar, spelling, and punctuation.

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: *[omitted; see the exam booklet]*

RESPONSE

SUBPART 1 – LIABILITY OF VON SHURE AND CATHER

The taking of the Dauntless

Hexetron has a winning claim against Amelia Von Shure and Carl Cather for the taking of the Dauntless as a trespass to chattels. They intended to steal it owing to the bad blood they had from their former employment experiences, so intent is satisfied. And taking it so that Hexetron doesn't have it anymore clearly constitutes an interference with Hexetron's right of possession in the Dauntless.

The theft of the Dauntless additionally qualifies as a conversion, since Von Shure and Cather had it for at least several weeks, and now they can't return it because it's sunk. That level of dispossession easily warrants a forced sale.

Hexetron also seems to have a good fraud claim against Von Shure and Cather. They took the boat under the false pretenses of crewing it for its shakedown cruise. This is a material misrepresentation, and they had scienter because they knew it to be false, and they had intent because they meant to take the boat. Hexetron actually relied on Von Shure and Cather's misrepresentation, because they let them take the boat out. But was Hexetron's reliance justifiable? There might be an argument that Hexetron should have had enough sense to investigate these people and figure out that they were a flight risk. But I believe a court would find Hexetron's reliance to be justifiable, since Von Shure was a seasoned Navy officer and Cather was a CIA operative who would have had high-level government clearance. In other words, there were strong indications they could be trusted. Damages is satisfied by Hexetron's loss of a super-expensive boat.

The collision with the Moana

Von Shure and Cather will incur liability as a result of the collision with the Moana. We can take Von Shure's word that the collision wasn't intentional. Without intent, there can be no assault or battery claim.

Von Shure seems to think she was not negligent in causing the collision – she says she was "scrupulously careful." But that doesn't matter to a strict liability claim. Operating the Dauntless would likely be held an ultrahazardous activity. I would argue that operating an experimental submarine at 300 mph – faster than a torpedo – is way beyond abnormally dangerous and thus gives rise to strict liability. Cather is on the hook, too, since he "encouraged" Von Shure to test the boat at top speed. He says it was Von Shure's decision, but encouragement is all that's needed for acting in concert to make Cather a joint tortfeasor.

Von Shure and Cather are strictly liable for all damages actually and proximately caused by the collision. That includes damages for the loss of the vessel.

The immediate families of the Moana's crew will be able to sue for wrongful death. We know Steiner had a wife and child, so they definitely have a winning wrongful death claim based on the underlying strict liability of Von Shure and Cather for Steiner's death.

Additionally, Steiner's estate will have a survival claim for the pain and suffering experienced by Steiner prior to his death. The facts indicate he was alive for a while and that he experienced horrifying pain and suffering, including intense anxiety about his impending death. Those noneconomic damages are recoverable.

Von Shure says that everyone else died instantly. Assuming she's telling the truth, then there would be no survival claims for their estates.

The capture and keeping of Fahrlander and Paxton

Fahrlander and Paxton have a winning claim for false imprisonment. Once Von Shure rescued them, Paxton and Fahrlander were confined physically within the submarine – a confinement in all directions. Even if Von Shure had a privilege to confine them initially in rescuing them, she had a legal duty to take them to land pursuant to 46 U.S.C. §70, and the omission to take the affirmative action to release someone, when one is under a legal duty to do so, constitutes a sufficient confinement for false imprisonment. One wrinkle to the false imprisonment claim is the existence of an escape pod. A known, reasonable means of escape prevents any claim of false imprisonment. However, it is not clear that Paxton or Fahrlander knew about the escape pod until they were told about it right at the end. And even if they had known about it, it might not be a reasonable means of escape, since it would have left them stranded in the open ocean.

Von Shure and Cather will also incur strict liability from the keeping of a wild animal – Billy the Bottlenose. The facts say Billy was docile and trained since birth to be helpful to humans, but he was still wild because he's not from a line of domesticated animals. So Von Shure and Cather are strictly liable for the bite to Fahrlander's ankle.

The battle with the Narwhal

There's a good claim against Von Shure and Cather for trespass to chattels for the damage to the Narwhal. They intentionally damaged the Narwhal's screw, and that counts as an interference with the chattel. It's probably not a conversion, because this wasn't a total loss of property so as to warrant a forced sale of the whole ship to Von Shure and Cather – just compensation to repair the ship to working order.

But there is a possible public-necessity defense here. Von Shure and Cather disabled the Narwhal to prevent 10,000 cancer deaths. If they convince a jury of this, then under public necessity, no damages are owed for the trespass.

The torpedoing of the Narwhal also creates a battery claim in favor of all of the crew aboard the Narwhal. Since the Narwhal's sailors were all physically connected to the

Narwhal, and since torpedoing a vessel is clearly a harmful/offensive touching, all should be able to sue Von Shure and Cather for battery. (As discussed above, the torpedoing was intentional.) Note there was probably no assault since there is no indication that any of the sailors saw the torpedo coming.

Hexetron also has a possible claim against Von Shure and Cather for intentional economic interference. Hexetron had a contract with Endodais Energy and the Navy to dump the waste. By firing the torpedo to disable the Narwhal, Von Shure and Cather interfered with Hexetron's ability to fulfill its contractual obligations.

SUBPART 2 – LIABILITY OF FAHRLANDER AND PAXTON

Amelia has a good claim for assault against Paxton. Paxton tried to punch her, and would have, but for Amelia's quick reflexes in catching the punch. That necessarily means she apprehended the punch, and the punch is a harmful/offensive touching. Intent is satisfied because Paxton intended to connect the punch – intent to inflict a battery – and under transferred intent doctrine, that's sufficient intent for an assault.

There is a question of whether Paxton and Fahrlander could be liable for defamation. Paxton called Von Shure a "thug" and "common pirate," and Fahrlander called Von Shure a "crazed freak." These statements are defamatory in meaning because they are reputation-harming. But these would almost certainly be held to be statements of opinion, not fact, and only statements of purported fact are actionable. Also, as a high-level civilian contractor and former Navy captain, Von Shure is likely a public figure. That means that actual malice would have to be shown, and that can't be the case here, because both Paxton and Fahrlander had a good-faith basis for believing their statements were true. Moreover, the accusations aren't necessarily false, and Von Shure would have to prove falsity as part of the prima-facie case. So no defamation claim here.

SUBPART 3 – LIABILITY OF HEXETRON

Hexetron will be liable in strict products liability to Paxton for the hand injury caused by the Hexesuck 7000, which, because of its design, can crush one's fingers between hot metal gears when one attempts to turn a knob. This is a design defect under the consumer-expectations test, because the average consumer would not expect that they might mangle their fingers by just trying to turn a knob. It would also seem to be a design defect under the risk-utility test, because it would presumably have been easy to design the unit so that the knob was away from the gears.

Hexetron may also be liable to Endodais Energy and the Navy for fraud. Hexetron covered up test results, which is a knowing misrepresentation. This was material because the test results mattered, and Endodais Energy and the Navy relied on them. Endodais and the Navy will have damages because they paid for putting the waste into casks that are ineffective, and so they didn't get what they paid for.

Finally, Hexetron will be liable to all the sailors who died on the Moana for workers compensation death benefits. The deaths occurred on the job so it was in the course of employment, and the risk of drowning is, for a sailor, clearly a risk arising out of employment.

SUBPART 4 – LIABILITY OF ANYONE ELSE

The U.S. Navy participation in the torpedoing of the Dauntless can't give rise to claims for battery or assault because the federal government has sovereign immunity. Furthermore, the Federal Tort Claims Act does not provide for claims based on battery or assault.

Paxton, Fahrlander, Von Shure, and Cather could bring claims against the Navy under the FTCA for negligence, but there are two exemptions that may stop such an action. First, combatant actions of the military are exempted from the FTCA. Although this was not a Navy vessel, a naval officer, Larsenby, assisted Hexetron in firing the torpedo. So it might be considered a combatant action of the military. But even if plaintiffs could get past that, they are not likely to be able to overcome the discretionary-function exemption. Deciding to fire a torpedo at a stolen government-funded submarine and doing that to protect the government-funded disposal of nuclear waste is probably going to be considered a discretionary function, as it inherently involves making a policy judgment.

Failing an FTCA claim, the plaintiffs could try a Bivens claim, which, since it is founded in the Constitution, is not subject to a sovereign immunity defense.