

Torts II

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FINAL EXAMINATION - MODEL ANSWER

Coulisse Canyon

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 many ways, this answer is better than the best. Yet 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 this answer perfect in the compositing process. All things considered, however, this is extremely good.

What this all means for you is that you should be wary of comparing your own response to this one as a way of gauging your preparedness for the exam. This is a beyond-the-top-grade response. So don't worry if you can't do as well. Yet at the same time, if you see issues not represented here, it may not be 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 copy-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. I have also aimed for cohesive writing with cleaned up grammar, spelling, and punctuation. Real exams are not so tidy.

QUESTION

Analyze the parties' claims and liabilities, clearly labeling the subparts of your answer, as follows:

- Subpart A:* Discuss claims and liabilities related to what happened in San Frangeles.
 - Subpart B:* Discuss claims and liabilities related to what happened on Pinnacle Peak.
 - Subpart C:* Discuss claims and liabilities related to what happened in Roaring Ravine.
 - Subpart D:* Discuss claims and liabilities related to what happened on Hollerer's Hill.
- [various admonitions omitted; see the exam booklet]*

RESPONSE

SUBPART A -- SAN FRANGELES

Employees v. Intellivator Investigations

Morgan Morgan & Co.'s employees could sue Intellivator Investigations for the intrusion-upon-seclusion-type tort of invasion of privacy. Snooping to get passwords and using those to access password-protected e-mail accounts is intruding into a zone where a person would have a reasonable expectation of privacy. The employees would have a reasonable expectation of privacy because it is logical that people will not be able to get into your password-protected e-mail account. A jury could find this highly offensive, since e-mail includes intimate communications people don't intend to share.

Employees v. Morgan Morgan

The employees can also sue Morgan Morgan for the intrusion tort as a joint tortfeasor, since Morgan Morgan specifically hired Intellivator to conduct this intrusion, and that goes well beyond the mere encouragement needed to prove acting in concert, thus making Morgan Morgan vicariously liable.

Workers Comp Analysis

I will talk about workers compensation issues under this subpart since the actions that took place in San Frangeles will make Morgan Morgan liable under workers comp for injuries that happen on the trip. In addition to requiring personal injuries that result by accident, workers comp requires that they arise in the course of employment. Terrence Turner sent out an e-mail that can be used to establish that the course-of-employment requirement will be met. Employer-sponsored recreational activities may or many not be covered by workers comp. But employees here would likely be covered since they would have had a reasonable expectancy that participating was part of their job, as demonstrated by Terrence saying the trip was "important ... to our core mission" and that he hoped employees would be there. This makes it clear, despite his protestation that the trip was "optional" that it was expected of employees. Also, if the recreational activity benefits the employer, that tends toward finding it is covered, and Terrence wrote that "Confronting challenges and risks is what it's all about" to be a Morgan Morgan employee, implying that the activity helps Morgan Morgan in getting a better-adapted workforce.

Indemnification Analysis

I will talk about indemnification issue here as well, since the contract with Exotiquet in Fig. 2 happened before they got to Coullisse Canyon. It seems that Morgan Morgan has contractually agreed to indemnify Exotiquet for the liability it incurs in what

follows. This does not change Exotiquest's liability to Lyle, Vlad, Wendy, Yessenia, or others. Those parties are not deprived of their causes of action against Exotiquest. But the clause does mean that if forced to pay a judgment, Exotiquest will be able to sue Morgan Morgan for reimbursement.

SUBPART B -- PINNACLE PEAK

Morgan Morgan v. Griff Gunderson

Morgan Morgan has a sure-fire claim against Griff for fraud. Griff made a misrepresentation in saying he would show up on Pinnacle Peak, and this was material because his appearance was the entire point of hiring him. There's scienter because Griff knew he wouldn't show up -- that was his plan all along, as he explained in the phone call. It's obvious that Griff intended to induce Morgan Morgan to rely on his misrepresentation -- as that's how he would be able to get Morgan Morgan to send the check. Morgan Morgan actually relied on the misrepresentation as demonstrated by their sending the check and showing up on Pinnacle Peak. And I think it is clear that the reliance was justifiable, since there is nothing to indicate that Morgan Morgan would have known Griff to be an unreliable trickster. In general, it seems justifiable to rely on someone who is a famous naturalist to show up where they say they will for nature-guide services. Finally, Morgan Morgan was actually damaged because they lost their \$150,000 payment and had two hours of downtime during which they could have gained the benefit of other employee-morale-boosting activities.

Morgan Morgan should be able to get the doubled-value of the modern art with a constructive trust because Griff acquired the modern art with the money he got from cashing Morgan Morgan's check -- so the property is traceable to the tortiously obtained funds -- and because Griff's retention of the art would unjustly enrich him, because even after reimbursing the \$150,000 fee, Griff would have gained a windfall from his fraud with the \$150,000 increase in value of the art. With the constructive trust, Morgan Morgan can capture the increased value of the art.

Morgan Morgan also has a good chance at punitive damages for the fraud claim since it was willful (and even beyond that, it was intentional and calculated), as demonstrated by Griff's gloating. A jury could be persuaded that punitive damages are appropriate to deter such conduct in the future.

Griff Gunderson v. Jerica Jernigan & Kevin Karling

Jerica and Kevin were acting in concert because they were working together in a joint enterprise, so they are equal tortfeasors vis-à-vis Griff, and they will be jointly and severally liable.

Griff has a good right of publicity claim against Jerica and Kevin because they used Griff's name and recognizable likeness on merchandise, which counts as an actionable commercial use. There is no reason to expect that there is a good First Amendment defense in this case, as this is a core merchandise case, and First Amendment defenses seem not to succeed in such cases.

Griff might have a plausible defamation claim against Jerica and Kevin. The First Amendment comes into play because Griff is a public figure -- he is a famous celebrity with a cable-television show. Thus, Griff must show falsity. This will be the toughest part of the defamation case for Griff. We can assume it's not true that he got STDs from animals. The problem, however, is that there's a good argument that this is not a statement of purported fact, as it can be argued that it is so silly and over-the-top, that it cannot reasonably be taken as anything but a joking way of expressing an opinion. Also tending in this direction is the medium of a t-shirt, which one would be less likely to take seriously. The rest of the analysis is not problematic for Griff: Public-figure status also requires Griff to show actual malice, but he can do this since Jerica and Kevin knew their statements had no basis in fact. Moving to the common-law analysis, the statement that Griff has gotten STDs from animals is definitely defamatory -- since it harms his reputation with regard to his profession as a naturalist, a per-se category; says he has a loathsome disease, another per-se category; and it even implies a lack of chastity, for a per-se-category trifecta. The statement is of and concerning the plaintiff, since it names him, and we know it was published to at least one person, since third persons have bought shirts over the internet. Further, the extra condition is met because the defamatory communication falls within the per-se categories.

Griff has a plausible claim against Jerica and Kevin for false light. Jerica and Kevin, by putting this shirt online, made a public statement about Griff. They acted with actual malice because they acted with reckless disregard as to whether the statement was true or not -- the facts say it had no basis in fact. The hardest issue is whether it truly places Griff in a false light, since a court might hold the statement not to be purported fact since it is arguably so silly. It certainly is highly offensive to the reasonable person, because no one wants to be thought of as having contracted STDs from animals.

SUBPART C -- ROARING RAVINE

Lyle Lothway v. Nettie Naynor & Exotiquest

Lyle has a claim in strict liability against Nettie and Exotiquest (together, the "company").

The company arguably might have had absolute responsibility for safety via the wild animal category. But this generally requires that the wild animals were kept or possessed by the defendant. That's not true here. Lyle could argue that the company

purposely brought the animals around, but Nettie would testify that she thought the cougar pheromone wouldn't work. So I think the company will not be found to have kept or possessed the cougars, meaning that the wild animal category would not work for Lyle's lawsuit.

A more sure way to an absolute duty here is ultrahazardous activities. Releasing cougar pheromone in a place known to have cougars is certainly abnormal to any area, and it's super dangerous. Moreover, this is a situation where a small trigger can release far larger destructive forces. So I think there is a good chance this can be categorized as ultrahazardous.

Lyle's cougar-attack injuries were actually and proximately caused by the failure of absolute safety here, so he has a full claim.

Exotiquet is vicariously liable for the tortious actions of Nettie, because of their employer-employee relationship and because Nettie was acting as an employee when causing people to be injured.

Lyle Lothway v. Booker Belanger's Supply Company

Lyle has a claim against Booker for strict products liability. The spray did not have an adequate warning -- the only warning was not to set it off in someone's face, and the Fig. 4 warning was missing because of a printer's error. So this could be categorized as a warning defect (a kind of design defect) or even a manufacturing defect given the printing error. For a manufacturing defect, Lyle has to show that the product differed from the intended design and this rendered the product unreasonably dangerous. This he can do because (1) the original design was to have a warning that the product makes cougars go insane and to use it only when there is no chance of being attacked, and (2) exposing one to cougar attacks is incredibly dangerous. Thus, the lack of the warning renders the product unreasonably dangerous. Using the consumer-expectation test, Lyle can show that a reasonable consumer would not expect to be mauled by a cougar (at least absent a warning). So there's a defect. We can see that the defect actually and proximately caused Lyle's scratches and bite wound, so he can prove all the needed elements for a products liability claim.

Lyle Lothway v. Morgan Morgan

Lyle will also have a workers compensation claim against Morgan Morgan. The scratches and bite wound are a personal injury, and it arose from an accident. I would conclude that it occurred in the course of employment (analysis in Subpart A), and it arose out of employment because it was an occupational risk directly related to the job at hand, which was being in the nature preserve for corporate enthusiasm-building. Lyle will have his medical care covered and will get cash payments for temporary disability if he must miss work.

Lyle Lothway v. National Park Service

NPS has sovereign immunity as an arm of the federal government. But Lyle has a colorable claim against the NPS for his injuries under the FTCA, which waives immunity, to an extent, for negligence claims. The facts appear to stipulate that there was negligence in giving Nettie a permit. The only problem here is that the activity of the NPS would have to be characterized as ministerial for the claim to be compensable. Although courts seem to differ on what is discretionary and what is ministerial, it appears that the decision to give Nettie a permit in this case would fall under the discretionary category. This is because the NPS had room for discretion in deciding who is issued a guide permit.

Nettie Naynor v. Deputy Dwayne Delacroix

Nettie will have a 1983 claim against Dwayne. Here, Dwayne is a person, since he is a natural person, who is acting under color of state law, since he is a uniformed sheriff's deputy who said "in the name of the law." And the facts stipulate that the seizure of the sunglasses was a violation of federal constitutional rights.

Nettie does not have a 1983 claim against the Siskinomah Sherriff's Department because local governments are not vicariously liable under 1983, and there is nothing in the facts showing that the Sherriff's Department directly caused the violation through, for instance, a policy or training program.

Nettie Naynor v. Fernanda Fenner

Nettie might have a defamation claim against Fernanda for saying she was incompetent at her job and likely to put visitors in danger, except, first of all, that's arguably true, and, second, Fernanda is immunized from liability by the Westfall Act. If Fernanda is sued, the United States will substitute itself for Fernanda as the defendant, since this is a purported tort Fernanda committed on the job. And once substituted in, the U.S. will have no liability because the FTCA does not waive sovereign immunity for defamation claims.

SUBPART D -- HOLLERER'S HILL

Vlad Vossi v. Umatilla Unlimited, et al.

Vlad has a claim in strict products liability against Umatilla for the bike falling apart. Vlad can show a manufacturing defect under the consumer-expectations test because the bike had incomplete welds from a welding-machine issue that caused the bikes to depart from their intended design, and this departure caused the product to be unreasonably dangerous to the user—since the reasonable consumer does not expect a mountain bike to fall apart while riding down a mountain. The defect caused Vlad's bike to fall apart while riding, actually and proximately causing Vlad's broken

ulna. Umatilla is the manufacturer, and therefore a commercial seller, so they are liable. Umatilla may have an affirmative defense, however, in a statute of repose. The bike was manufactured in March 2000, which is over 15 years ago. In many jurisdictions this exceeds the limit of the statute of repose.

Vlad has a good workers comp claim against Morgan Morgan. Since the bike riding is part of Morgan Morgan's adventure expedition, the analysis is precisely the same as it was for Lyle.

Re Wendy Wolkins and Yessenia Yarbrough, claims against Exotiquest, et al.

Wendy and Yessenia were injured and killed as a result of the rock avalanche caused by the use of explosives on Hollerer's Hill. This use of explosives almost certainly counts as an ultrahazardous or abnormally dangerous activity giving rise to strict liability. Setting off charges resembling "industrial-sized firecrackers" seems to qualify as both igniting fireworks and blasting, two things that are traditional examples of ultrahazardous activities. In addition, relatively small explosives causing a part of the mountain to begin sliding off is an example of a small trigger unleashing a large destructive forces, which is another hallmark of ultrahazardous/abnormally-dangerous activity. The setting off of the charges actually and proximately caused Wendy's and Yessina's injuries and death. So this is a full prima-facie case for strict liability.

Wendy's surviving husband and three young children can use strict liability as the basis of a wrongful death action. They can recover for lost pecuniary support in the form of Wendy's lost earnings of over \$2 million a year. They may also be able to recover for lost affection and consortium.

Wendy's estate will not have a survival action since she was killed instantly by the boulder and therefore did not have any suffering or injury that would have created an accrued tort cause of action before she died.

Yessenia had no parents, children, siblings, or spouse, so there is probably no one who can bring a wrongful death action. The wrongful death statutes vary a lot by jurisdiction, so perhaps her fiancé Zach might be able to recover. Some jurisdictions allow wrongful death actions from the perspective of the estate, so recovery could be had if that's true in this jurisdiction.

Unlike Wendy, Yessenia will have surviving claims under the survival statute, since she died minutes after being struck. This leaves an action for the pain she suffered in the few minutes before she died.

These claims can be brought against Nettie Naynor directly, and also against Exotiquest who is vicariously liable since Nettie was acting within the scope of her Exotiquest employment in arranging for the blasting.

Workers comp death benefits are payable for Wendy and Yessenia for exactly the same reasons as medical and disability benefits are payable to Vlad and Lyle.