

UNIVERSITY OF NORTH DAKOTA SCHOOL OF LAW

Torts I
Fall 2015

Eric E. Johnson
Associate Professor of Law

FINAL EXAMINATION – MODEL ANSWER

Drones

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 circumspect about 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 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. 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 the possibilities, if any, for tort recovery in favor of Ai Ann Dinson.
- Subpart B:* Discuss the possibilities, if any, for tort recovery in favor of Bo Brandt Dinson.
- Subpart C:* Discuss the possibilities, if any, for tort recovery in favor of Lara Lopez.
- Subpart D:* Discuss the possibilities, if any, for tort recovery in favor of Mel Morgenthau.
- Subpart E:* Discuss the possibilities, if any, for tort recovery in favor of the Jaspersons and/or the Kialuhfs.
- Subpart F:* Discuss the possibilities, if any, for tort recovery in favor of Natalie Nikau.
- Subpart G:* Discuss the possibilities, if any, for tort recovery in favor of Paul Pliau.
- Subpart H:* If there is anything else you wish to discuss, which does not belong under any of subparts A through G, you may put it under this Subpart H.

[various admonitions omitted; see the exam booklet]

RESPONSE

SUBPART A: AI ANN DINSON

Ai v. Natalie

Ai Ann Dinson should be able to recover for trespass to chattels against Natalie Nikau. By switching around all the wiring, Natalie substantially interfered with Ai's possession – further evidenced by her inability to use the HeliHawk for a substantial time until she fixed it.

Ai may also be able to recover for conversion. The analysis is the same except for whether the interference is substantial enough to warrant a forced sale. It's a close call, but rearranging all the wiring and rendering the HeliHawk inoperable to me would count as substantial enough an interference for the court to make Natalie buy it. Conversion's particularly favorable for Ai, because the HeliHawk is destroyed anyway – so she shouldn't mind letting Natalie have it.

Ai v. Bo

Similarly, Ai can sue her brother Bo Brandt Dinson for trespass to chattels and conversion. Bo took the HeliHawk without Ai's permission, and his use of it is enough for trespass to chattels. But since he totaled it while he was using it, that raises it to conversion. Bo might have a defense of implied consent, because maybe siblings can play with each other's toys in the Dinson household (which would be pretty normal). That's not a problem for Ai, however, because she can sue Bo for negligence, as I discuss next.

Here is the analysis of Bo's negligence in piloting the HeliHawk: Ai, as owner of the drone, was clearly a foreseeable plaintiff to whom a duty is owed: Playing with property can of course cause harm to that property. Bo breached his duty, in my view, because he "stopped paying attention." The reasonable person is careful at all times, so it does not matter that the lapse was momentary. An argument to the contrary is that maybe it's reasonable to not watch the skies ahead when piloting a drone in 2014, since there's not a lot of drone traffic. Orinoco Online's program is still experimental. Ultimately it will be a jury issue about whether there was a breach, and it might depend on how well-known these other drone flights were. There is actual causation, because but for Bo's lapsed attention, the HeliHawk would not have crashed. The crash is a direct and foreseeable result of the lapse, so proximate cause is satisfied. The HeliHawk is destroyed, so there's damages.

Ai v. Orinoco

Ai can sue Orinoco (and the pilot) for negligence for the loss of her drone. Orinoco owed a duty to persons and property near where the drone was operating, because

the Orinoco drone, in an accident, could foreseeably cause damage or injury to those persons and property. The rest of the analysis is the same as with Ai vs. Bo, with the possible exception that Orinoco should be held to a higher standard of care since they have extra knowledge and experience in drone operation that the ordinary person does not have. So Ai seems to have a good negligence cause of action against Orinoco.

SUBPART B: BO BRANDT DINSON

Bo can sue Orinoco for negligence for his shrapnel wound. The analysis for Orinoco's negligence is virtually the same as for Bo's in Subpart A – both had a momentary attention lapse. Here there's a different injury, but people getting hurt by ejecta from a crash is foreseeable, so duty and proximate cause seem satisfied. The wrinkle for Bo is Orinoco's defense of Bo's negligence. Bo's negligence doesn't necessarily bar recovery, because Minnesota Revised Statutes §820.101 overrules contributory negligence. But it's not pure comparative negligence: it's partial of the tie-goes-to-the-plaintiff variety. As I said, Bo seems just as negligent as Orinoco. Assuming a jury agrees, Bo ducks under the bar and can recover compensatory damages, subject to a 50% reduction.

Bo can sue Rodney Rendeltz for intentional torts. Rodney committed a battery on Bo when he "grabbed him," which is an intentional touching. It's offensive because it's not okay in society to go around grabbing people.

We don't know if Bo saw the grab coming, but if he did, that's an immediate apprehension of a battery and therefore an assault. He might be able to sue for assault regardless, because Rodney said "Move and I'll spank you." Most jurisdictions, however, require some physical act to accompany words to count as assault – but we don't know from the facts if he raised his hand up or anything like that.

Either way, that threat is good enough for false imprisonment. Bo was confined to the curb – so he was limited in movement in all directions – by threat of a battery. It doesn't matter that Bo suffered no harm from the grab or from the confinement to the curb. No real damages are needed. He can sue for nominal damages.

SUBPART C: LARA LOPEZ

Lara Lopez can sue Ai for negligence and win. People who could get hit by an out-of-control drone are foreseeable plaintiffs when you are flying a drone. Thus, duty is satisfied. Breach is established by Ai neglecting to run the bug check. Ai is a minor, so she can be held to a lower standard than the hypothetical reasonable adult. But with all her intelligence and MOOC education, she'll be held to an even higher standard than a regular adult anyway. The facts say the bug check is something "pretty much all programmers" run. This is custom evidence. While not dispositive,

since this is not a professional negligence case, it is strongly indicative of what the reasonable programmer would do. Looking at it from a Learned Hand perspective also indicates a breach of due care: The bug check is "very simple" – so the burden is very low, and the probability that without it the HeliHawk would go out of control seems high, and the potential harm is a relatively big one – substantial personal injury. So even without plugging in numbers, the Hand Formula indicates negligence. All in all, it seems very clear that Ai breached the duty of due care. There's actual causation because but for the unmatched parenthesis, Lara would not have been injured. The injury was direct, and the kind of thing that makes an un-bug-checked drone dangerous (harm-within-the-risk), so there's proximate cause. And, of course, Lara was injured – meeting the injury element.

Lara can also allege a second theory of negligence against Ai in terms of Ai's failure to call 911. Ai owed an affirmative duty to render aid because it was her negligence that caused Lara's peril.

Lara can also sue the hospital and doctors for negligence for failing to diagnose bacterial pneumonia and causing Lara to endure a lengthy hospital stay. Patients are obviously foreseeable plaintiffs. We'll need expert testimony to establish that the doctors fell below the customary standard of care, but the fact that they failed to use a "standard test" suggests that they did. The facts as much as say that but for not running this test, Lara would have recovered quicker – which means actual causation is satisfied. That's the direct cause, so proximate causation is not a problem for Lara. And her lengthened hospitalization counts as damages.

Ai is additionally on the hook for the medical malpractice damages, because malpractice is always considered foreseeable.

I'll note that Lara can't sue Ai for trespass to land, because Ai never intended the HeliHawk to enter upon the portion of the Earth that is Lara's property. Lara has no battery claim also because of a lack of intent. Ai had no intent to touch Lara, nor is there any transferred intent that would work.

SUBPART D: MEL MORGENTHAU

Mel Morgenthau can recover in negligence against Ai as well for the out-of-control drone mishap. The analysis is the same as Subpart C, except that damages and proximate cause issue are different: Mel got a bite that required medical care. Those are compensable damages, and they finish the negligence case. But proximate cause could be an issue with Mel. Foreseeability? Mel's a foreseeable plaintiff. But this is possibly an unforeseeable type of harm. Courts differ on whether unforeseeable types of harms will satisfy proximate causation, going case-by-case. Is a squirrel bite foreseeable? Arguably not. Maybe it's foreseeable that the drone terrifies small animals. The general rule is that recovery is not precluded unless the type of harm is truly extraordinary. The squirrel bite does seem pretty extraordinary.

SUBPART E: JASPERSONS AND/OR THE KIALUHFS

Both the Jaspersons and the Kialuhfs have solid claims against Ai for trespass to land. Though Ai didn't enter either the Jaspersons or Kialuhfs land herself, a device controlled by her did. And this fits with "causing an intrusion" on to the Jaspersons and Kialuhfs real property. The Jaspersons and Kialuhfs both can only recover nominal damages, since there is no real damage.

SUBPART F: NATALIE NIKAU

Natalie v. Ai & the Dinsons

Natalie does not have any possibility for tort recovery. Maybe the reasonable person would cap rebar. But it doesn't matter, because the rebar is a condition on the land, and Natalie was an unanticipated trespasser. Ai was not aware of her presence on the land and had no reason to anticipate it. Therefore, as an unanticipated trespasser, Natalie was owed no duty by Ai.

SUBPART G: PAUL PLIAU

Paul has a good negligence case against both Bo and Orinoco for injury resulting from the drone crash. The analysis is the same as under Subparts A & B for negligence liability in favor of Ai against Orinoco and Bo (for the loss of the drone) and in favor of Bo against Orinoco (for the shrapnel injury). Both Bo and Orinoco owed a duty of care to bystanders as foreseeable plaintiffs. Both breached their duty of care, as discussed above. But for the lapsed attention of each, Paul's shrapnel injury would not have happened, so there is actual causation. And the shrapnel injury – his eye is "severely hurt" – meets the injury element.

This case seems superficially similar to *Summers v. Tice*, but in that case you couldn't tell which defendant's action was a but-for cause of the injury. One was and one wasn't. Here, it took the negligent actions of both Bo and Orinoco to cause the crash that ejected the shrapnel that hit Paul, so both are but-for causes, and actual causation is satisfied as to both.

SUBPART H: ANYTHING ELSE

The Dinsons likely have a claim against Natalie for trespass to land: Natalie entered onto the Dinsons' real property. We know she did so intentionally because she went for the purpose of "investigating" the mysterious drone that AA owned.