

Torts I

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FINAL EXAMINATION - MODEL ANSWER

Hong Kong By Air and Sea

PRACTICE EXAM

NOTES:

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 might be better than any real response. 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. Don't worry if you can't do as well. Yet at the same time, if you see issues not represented here or reach different judgments, 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.

ABOUT THE CREATION OF THIS EXAM AND MODEL RESPONSE: This "Hong Kong By Air and Sea" practice exam concerns subject matter covered in the Fall 2017 Torts I course. It uses a subset of the facts, slightly modified, from the Fall 2016 Torts I exam, "It's On In Hong Kong."

QUESTIONS

Analyze the following:

1. Liabilities, if any, of Constellation Air for injuries to Sam's forehead.
2. Liabilities, if any, relating to the occurrences on the Star Ferry, including liability, if any, of Analyt Achoe, Feng Fu, Tain Tuan.

RESPONSE

1. Constellation Air / Sam's forehead

Sam has a good negligence claim against Constellation Air and crew for failing to secure the oxygen tank in the overhead compartment. Passengers are foreseeable plaintiffs for the airline, so there was a duty. The airline breached its duty because the reasonable airline would always, at all times, lock up the tank so that only crew members could loosen it, and the airline didn't do this. Even if it was the turbulence that caused the oxygen tank to fall, the reasonable airline would account for the fact that turbulence could happen. But for the tank not being better secured, it wouldn't have fallen and hit Sam on the head, therefore actual causation is satisfied. And proximate causation is satisfied because it is foreseeable that if you do not lock up the tank properly it will fall and hit someone on the head. A second test for proximate causation is harm-within-the-risk, and a tank falling on someone is exactly the type of harm that makes not properly securing an oxygen tank negligence; therefore proximate causation is satisfied. Finally, Sam suffered an injury because he was gashed by the tank, bleeding.

Additionally, Sam can invoke the doctrine of *res ipsa loquitor* (as is common with gravity-driven injuries) to show that the airline breached its duty, since it can be said that we can't be sure what happened to cause the tank to fall. The falling oxygen tank was likely negligence, and it was almost certainly the conduct of the airline, because the compartment is crew-only access, so *res ipsa loquitor* seems appropriate.

Another theory of negligence that arises is the affirmative duty of the common carrier to help patrons. Because the airline is a common carrier and because Sam is a patron, the airline had an affirmative duty to help Sam by a reasonable standard of care. Although Wendy went over to help him, she did not exercise a reasonable standard of care because a reasonable airline would have provided a first aid kit, even if it meant bothering the pilot. Furthermore, while custom is not dispositive, the fact that every other airline carries a first aid kit in the passenger cabin may be convincing to a jury that Constellation Air breached their duty of care. But for their failure to provide a first aid kit with clean bandages, Sam wouldn't have gotten an infection, so there's actual causation, and it's foreseeable that the lack of a clean bandage would cause infection, so there's proximate causation. And infection counts as an injury.

2. Star Ferry

Sam has a potential negligence claim against Fu and Tuan, but it is unlikely to succeed against Fu and is only a possibility against Tuan. Someone standing on the ferry was a foreseeable plaintiff to the boys running around the ferry. As children, the boys will be held to a low standard of care -- children of the same age, intelligence, and skill. Being 10 years old, Tuan should have some reasonable judgment that it's

not a good idea to run around on a ferry because you might crash into someone and make them fall overboard. But then again, lots of 10 year olds get carried away. It sounds like breach will be a close call and will need to go to a jury. Fu, at five years old, is probably behaving within the bounds of what one can expect of a five-year-old, so I doubt there's a breach there. At any rate, there's actual causation because but for the actions of each of Fu and Tuan, Sam would not have fallen overboard. And proximate causation is satisfied because when crashing into someone leaning over a railing, it's foreseeable that person could fall overboard and lose what they are holding. Injury is fulfilled by the property damage of Sam losing his phone.

Sam also has a negligence case against Analyn. People who are injured or made to fall or drop something because of a lack of supervision of the boys are foreseeable plaintiffs, so there is a duty. Analyn breached the duty because she failed to supervise the boys, since the reasonable person taking care of two young boys on a ferry would watch them closely. The actual causation, proximate causation, and injury are the same as with Tuan and Fu.

Penelope has a good negligence claim against Tuan, Fu, and Analyn -- the analysis is the same for all three. To the same extent they owe a duty to Sam, they owe as well a duty of care to Penelope, because a rescuer is always considered a foreseeable plaintiff. But for Sam going overboard -- precipitated by Tuan, Fu, and Analyn's negligence already discussed -- Penelope would not have jumped in the water and hit something underwater, so actual causation is met. It's foreseeable that if a person jumps into rescue someone who has gone overboard that they might get hurt by something beneath the surface of the water, so proximate causation is met. Finally, damages are satisfied because Penelope has a gash in her ankle from jumping in the water and hitting something.

Sam is likely not liable to Penelope because he did not negligently put himself in danger.

Penelope could sue Constellation Air for negligence for her injury. The airline was an actual cause of her injury, because but for Sam having been woozy from his head wound, it appears he wouldn't have fallen off the side of the ferry even with the boys hitting him. And breach would be satisfied for the same reasons as discussed above with regard to Sam. But proximate causation and duty likely will not be satisfied, since it is unforeseeable that someone would fall over a railing on a ferry while leaning over and getting jostled by hyperactive boys the day after getting hit in the head with an oxygen tank.