

UNIVERSITY OF MISSOURI-COLUMBIA
School of Law
Torts §2

Mid-Term Examination

SAMPLE ANSWERS

Mr. Fischer

October 14, 2005
8:30 a.m.–9:30 a.m.

ESSAY
[60 Minutes]

On December 29, 2004, Nancy Smith, the mother of Laura and David, was killed in a truck accident in Guerrero, Mexico. Thirteen-year-old David was seriously injured and, ten-year-old Laura suffered minor injuries. An ambulance drove the children to the nearest medical facility. At 8:00 PM that evening, Robert Smith (Smith), Nancy's husband and the father of the children, was contacted in the Los Angeles area by the hospital staff. They told him that David had suffered a head injury and was in a coma. Believing his son might not live through the night, Smith contacted two air transport services (Air Evac and Emergency Air) in order to arrange for immediate evacuation of the children to the United States. After discussions with representatives of both companies, Smith authorized Air Evac to evacuate the children. Air Evac agreed to deliver the children to the Montgomery Field airport at 1:00 AM the next morning. Disappointed at not receiving the evacuation contract, Emergency Air decided to evacuate the children without a contract to do so. It hoped to collect the evacuation fee, even in the absence of a contract, in the event the evacuation was successful.

Air Evac pilot, Richard Jones, got a crew ready to fly to Guerrero. Jones obtained a United States customs number, and was informed Emergency Air was also planning a flight to Guerrero. Jones telephoned the Air Evac flight coordinator for clarification. The flight coordinator told Jones to continue with his flight plan. At approximately 9:00 PM on December 29, 2004, Jones and his crew left Montgomery Field, flying toward Guerrero, Mexico. Immediately after the Air Evac plane completed its take-off, Emergency Air's plane took off from a different runway at Montgomery Field.

The Emergency Air pilot, Sara Bachman, knew an Air Evac plane was also flying to Guerrero. As the two planes approached the Guerrero airport, Bachman maneuvered her plane in front of and below Air Evac's plane, forcing the Air Evac plane to turn to avoid a collision. As a result, the Emergency Air plane landed first, proceeded through customs, and left ahead of the Air Evac plane.

Emergency Air's plane, which bore no distinctive markings or logo, arrived in Guerrero about 20 minutes before the Air Evac flight. Bachman did not tell anyone on the ground the plane was from Emergency Air, not Air Evac. The Emergency Air crew, whose clothing had no distinctive markings, quickly loaded the Smith children onto the plane. Bachman took off before the Air Evac plane landed in Guerrero.

Smith had spoken with Laura on the telephone and told her he was sending a plane to take her and David back to the United States. Laura says that if anyone had told her the plane

was not the one her father had sent for her, she would not have boarded.

At 11:00 PM Smith arrived at Montgomery Field to await the arrival of the Air Evac flight. The Air Evac representative told him although she had dispatched the Air Evac plane to retrieve his children, Emergency Air had interfered and also had sent a plane to Mexico. She informed Smith she was not sure which service would transport the children. She also did not know at which airstrip Emergency Air would land in the event it brought the children to the United States. Smith became extremely upset because he had authorized Air Evac to transport his children, not Emergency Air, and he worried that a change in airports would cause a critical delay in his son's medical treatment.

At approximately 1:00 AM, Emergency Air's plane landed at Montgomery Field. The children were taken off the plane, loaded into an ambulance and taken to the nearest hospital. David, who had been in a coma since the accident, later regained consciousness and recovered from his injuries.

Smith, Laura, and David sue Emergency Air. What are their rights with respect to Emergency Air arising out of this incident? Fully discuss the reasons for your conclusions. You may assume Emergency Air is responsible for the actions of all of its employees.

SAMPLE ANSWER

False Imprisonment. Emergency Air (EA) would be liable for false imprisonment to Laura, but is probably not liable to David. Emergency Air intended to confine both David and Laura because it was their purpose to bring the children into the plane, where there would clearly be no means of escape. Actual confinement did occur, because David and Laura were brought into the plane, and there was no means of escape after the doors were closed and the plane took off. The Restatement rule requires that the plaintiff either be aware of the confinement or be harmed by it. David was not aware of his confinement because he was unconscious. Also, there is no evidence that David was harmed by the confinement. In a jurisdiction following the Restatement rule, Emergency Air would not be liable to David for false imprisonment. Laura was conscious and therefore aware of her confinement during the flight. She knew she could not get off the plane.

Another requirement for false imprisonment is that there is no consent to the confinement. Clearly, David did not consent because he was unconscious. Emergency Air will argue that Laura consented to this confinement by boarding the plane. This argument will fail. First, Laura was a minor and therefore unable to consent. Her father is her legal guardian, and has the right to give or withhold consent on her behalf. Smith did not consent to her being confined on an Emergency Air flight. Even if Laura could consent, her consent was vitiated by fraud. Usually consent is not invalidated by the consenting person's mistake. However, this is

not so when the mistake is caused by the defendant. In this case, Laura would not have boarded the plane if she had known it was not the plane her father authorized to transport her. This knowledge was kept from her by the Emergency Air crew, who knew Smith had chosen a different airline. Emergency Air concealed the information by hiding its identity and creating the impression that it was the authorized carrier. Therefore, even if a court ruled that Laura had capacity to consent, her consent was vitiated by a unilateral mistake induced by Emergency Air.

Emergency Air may also argue that consent was implied because of the emergency necessitating evacuation to the U.S. for medical treatment. This argument will fail because Emergency Air knew Smith had withheld consent for Emergency Air to evacuate the children. Consent is implied by law only if the defendant has no reason to know that the patient, or his legal guardian, would withhold consent.

I believe Emergency Air will be liable to Laura, but not to David, for false imprisonment.

EA is probably not liable to Smith for Intentional infliction of emotional distress. It is unlikely that Emergency Air intended to cause Smith severe mental distress. Their purpose was to make money, not to cause distress. Also, it is unlikely that they knew with substantial certainty that their actions would cause Smith severe distress. They probably hoped he would not find out about their deception until after the safe arrival of the children. In this event he was unlikely to suffer severe distress because of Emergency Air's misconduct. But this tort can be committed recklessly, and Emergency Air showed a reckless disregard of a very high risk that emotional distress would result from its actions. This is because of the great risk that Smith would learn that Emergency Air abducted his children before the landing in the U.S., and Smith would worry about their welfare prior to their delivery in the U.S. Smith was probably especially susceptible to emotional distress because he just learned that his wife had died and one of his children was in grave danger. Emergency Air knew these circumstances and should have anticipated Smith's enhanced susceptibility to mental distress.

It is also necessary to show that Emergency Air's conduct was extreme and outrageous. Emergency Air abducted the children while the family was in a state of crisis, and they should have known about Smith's special susceptibility to mental distress. Under these circumstances, their behavior is outrageous and beyond the bounds of civilized society.

Next, Smith would have to show that he suffered severe emotional distress as a result of Emergency Air's conduct. For two hours before the children landed safely he was "extremely upset" and "worried" about a possible delay in medical treatment for his comatose son. Emergency Air clearly caused this worry. Whether Smith's testimony will support a finding of severe distress is unclear. Yet, I believe the judge would permit the jury to find the distress to be severe because the above-circumstances lend themselves so clearly to the creation of severe distress. I think a jury would find the distress to be severe under the circumstances.

Smith's greatest problem is persuading the court that Emergency Air's reckless conduct was directed at him. If the conduct was not directed at Smith, and he was upset because of concern for what Emergency Air had done to his children, Smith can recover only by showing that he was a close relative and that he was present. Smith clearly is a close relative. He can argue that he was present because he was at Montgomery Field when Emergency Air's plane landed. Thus, if he saw the plane land, and the children deplane, he personally witnessed a portion of their false imprisonment. If this argument fails, Smith can argue that he was a direct victim of Emergency Air's reckless conduct. Smith directly negotiated with Emergency Air, and their misconduct grew out of Smith's refusal to authorize Emergency Air to evacuate the children. They committed a wrong to him by acting without his consent. I doubt these arguments will work. Therefore, it is unlikely that Smith will prevail against Emergency Air.

The Smiths can argue that Emergency Air negligently created a risk of harming David by causing a delay in his treatment. By cutting off the Air Evac plane, it created a foreseeable risk of causing a plane crash that would have delayed David's evacuation. The risk was unreasonable because Emergency Air was not protecting a legitimate interest. It just wanted to steal some business from Air Evac. This negligence claim is not actionable, however, because damages did not result. The plane did not crash, and David's treatment was not delayed. Emergency Air's careless conduct did cause Smith to suffer mental distress, but without accompanying physical harm, such distress is not actionable damage. Without actionable damage, the negligence action will not lie.

Explanation of Grading Marks

ASL	abstract statement of law unrelated to facts
CF	confused
CN	conclusory
CON	contradictory
DF	doesn't follow
EA	erroneous analysis
FA	failure to answer question
FC	failure to state a conclusion
GA	good analysis
IA	incomplete analysis
ID	incomplete definition
IL	illegible
IR	irrelevant
MA	misapplication of rule
MQ	misread question
MR	misstatement of rule
RF	repeating facts unnecessarily

Common Errors

- 1) Concluding Laura was not aware of her confinement. She knew she was in a plane and could not get out until it landed.
- 2) Arguing Emergency Air is liable for intentional infliction of mental distress because its “conduct was intentional.” The real question is whether it intended to cause severe mental distress, not whether it intended to act.
- 3) Arguing that Emergency Air is liable for battery to the children without specifying how they made a contact with the children and how that contact is either “harmful” or “offensive”.
- 4) Arguing Emergency Air committed a trespass to chattels or conversion by intermeddling with the children. Children are not chattels. The logical result of holding Emergency Air liable for conversion of the children is a “forced sale” where Emergency Air gets title to the children and Smith gets paid their full value as of the time of the conversion.
- 5) Arguing Emergency Air is liable for intentional infliction of mental distress because its “conduct was reckless.” The real question is whether Emergency Air recklessly disregarded the risk of causing Smith severe mental distress, not whether its acts are reckless.
- 6) Arguing that battery requires the children to be aware that the touching was offensive at the time of the touching. This is not the case. See, *De May v. Roberts* at page 99 of casebook.

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