Torts Mock Final

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1 Fact Pattern

Alan Anderson and Elmo Ermine were construction workers employed by BuildCo, Inc., a building contractor. On Dec. 1, 2023, they were working at a job site in Keene, New Hampshire. Elmo's job was pipefitting. Alan's task was cutting wood planks. Although BuildCo provided Alan with a SafeRite chainsaw to perform the work, Alan felt that the tool was dangerous and opted instead to use his personal equipment: a circular saw manufactured by DexoTool Industries, Inc. BuildCo's site supervisor was Carol Crumb, who was unaware that Alan was performing work using his personal equipment.

After completing his work for that day, Alan left his circular saw plugged into a functioning power outlet, positioned upright, with the blade exposed. To prevent potential injuries, he engaged the device's "safety lock," a plastic cover on the trigger switch preventing accidental operation of the motor.

The following day, Elmo arrived onsite early in order to get a head start on his work. When Carol arrived, she found that Elmo had performed a substantial portion of his work using pipe manufactured by Cohoes Rolling Mill Co., whereas the contract required all piping be manufactured by Reading Manufacturing Co. She informed Elmo that he would have to remove all the piping he had done that morning and redo it using Reading pipe.

"There's no difference. Reading pipe and Cohoes pipe are identical in every way," Elmo informed Carol.

"I know that, but I told you not to take the Cohoes pipe," Carol replied sternly.

"What difference does it make?"

"No difference," Carol shrugged, "But that's what the client ordered."

"He'll never see it. It'll be in the walls," Elmo insisted.

"Do it over," Carol commanded.

"No."

"No?"

"The pipe is fine. I'm not going to do it again."

Carol sighed, "Elmo—*this* is why I wouldn't give you a second date. You're stubborn. You don't listen."

"Oh, is that right, Carol? Is that why I didn't 'get a second date'? Well, let me tell you something, Carol. Okay? Let me tell you something: I only asked you to be polite. Frankly, after our first date, I found you to be quite jejune. Uh huh. That's right."

"What did you call me?"

"You heard me."

Carol took a step closer. "*What* did you call me?"

"You want me to say it again?"

"Say it."

"I'll say it."

"Say it!"

After a pause, Elmo repeated, "I found you to be quite *jejune*."

"You cad. How dare you!"

Carol placed her hands on Elmo's chest and shoved him with all her might. Elmo fell backward onto Alan's circular saw. His left elbow bumped against the controls, shattering the safety lock and engaging the trigger switch. The circular saw immediately spun up as Elmo's right arm came down upon it, severing it entirely. Carol placed a tourniquet on Elmo's stump. Elmo would ultimately survive his injury, however the loss of his arm rendered him incapable of continuing to work as a pipefitter.

Elmo sued Alan, BuildCo, Carol, and DexoTool. Subsequent investigation revealed that Alan's circular saw had several labels attached to the device, warning of various dangers associated with mishandling the tool. However, there was no warning relating to the safety lock specifically. Additional investigation revealed that when designing the safety lock, several alternative designs were considered, including a more durable metal safety lock, which DexoTool did not adopt due to the additional cost.

BuildCo established that Carol had not previously been involved in any physical altercations with subordinates. She had performed, up to the time of the incident,

as a competent manager in every respect. Carol's supervisors did not know of her past romantic relationship with Elmo.

2 Questions

1. Assume that BuildCo is not liable for Elmo's injury on the basis of *Alan's* conduct. Choose the strongest argument. (Vicarious liability through Carol)

   (a) BuildCo is not liable. Carol was acting outside the scope of her duties when she pushed Elmo. *Respondeat superior* does not apply because her actions were a personal frolic, and there was no direct negligence by BuildCo.

   Points: **4**

   Explanation: **It is doubtful whether she was acting "outside the scope of her duties." The incident was triggered by Elmo's refusal to redo the piping, which falls within the remit of Carol's responsibilities as his supervisor. Although the *manner* in which she carried out the task was not sanctioned by BuildCo, she was nevertheless (arguably) acting in the interest of the BuildCo. More importantly, this answer ignores the foreseeability of physical altercations in the workplace, and BuildCo's responsibility to prevent them. See *Forster v. Red Top Sedan Service* (p. 377, Note 3 from the casebook).**

   (b) BuildCo is not liable. Carol's pushing Elmo was intentional, and principals are not responsible for intentional torts committed by their agents. There being no breach of a duty, BuildCo is not liable.

   Points: **3**

   Explanation: **This is not a total misstatement of the law. In general, principals are not liable for intentional torts committed by their agents. However, it is too strong to treat this as an absolute rule. For example, a private security guard who uses excessive force is still an agent of his employer, even though his use of excessive force is intentional. Again, see *Forster v. Red Top Sedan Service*.**

   (c) BuildCo is liable. A physical altercation between a supervisor and subordinate is a foreseeable risk of workplace conflict. Since the shove arose

directly from a dispute about Elmo's work performance, it falls within the scope of Carol's employment. The law ought to encourage BuildCo to exercise all reasonable means to curb such behavior. Therefore, under the doctrine of *respondeat superior*, BuildCo is liable for Carol's actions.

Points: **9**

Explanation: **This answer correctly identifies that the duty of the principal arises from the foreseeable risk of workplace conflict and situates the shove within the scope of Carol's employment. The remark about incentivizing BuildCo to exercise "all reasonable means" of curbing its employees' misbehavior implies that strict liability should be used to incentivize efficient investment in *unobservable* precautions. That connects it to the policy purpose.**

(d) BuildCo is not liable. While workplace altercations are foreseeable, Carol's shove was motivated by personal animus stemming from Elmo's insult, not by her supervisory duties. Thus, her actions fall outside the scope of employment, and BuildCo is not liable under *respondeat superior*.

Points: **7**

Explanation: **This answer recognizes that the motivation matters. However, the central question is still foreseeability. Just because the primary motivation of the agent is something *other than* advancing the interests of the principal, so long as there is a close relationship with the interests of the principal, *respondeat* will apply. Contrast *Forster v. Red Top Sedan Service* and *Reina v. Metropolitan Dade County* (Notes 3 and 4 on p. 377).**

(e) BuildCo is not liable. BuildCo is an independent contractor, and the doctrine of *respondeat superior* applies only to employees—not to contractors.

Points: **2**

Explanation: **The only merit to this answer is that it correctly states the rule—i.e., *respondeat* applies to employees and not contractors. However, it totally confuses the meaning of the rule. *BuildCo* is a contractor in relation to the owner/client. Carol is an employee of BuildCo—not an independent contractor. The relevant relationship is between Carol and BuildCo, not between BuildCo and the unnamed owner/client.**

(f) BuildCo is liable. Although Carol's pushing Elmo was intentional, the effect of severing Elmo's arm could not have been foreseen—much less *intended*. Ergo, the loss of Elmo's arm was *not* an intentional tort, and vicarious liability is applicable. Therefore, BuildCo is liable.

Points: **3**

Explanation: **First, this answer repeats the mistaken reasoning from Answer (b) above. Second, even if principals were *never* liable for the intentional torts of their agents (which is not the law), the absence of foreseeability implies that Carol could not have been the proximate cause of Elmo's injury. In effect, this answer repairs the absence of duty and breach by giving up causation. But the plaintiff needs *all* the elements to be present.**

(g) BuildCo is not liable. Although physical altercations between supervisors and subordinates may be foreseeable, BuildCo had no reason to anticipate that Carol would use physical force. Employers cannot reasonably be expected to prevent unforeseeable, isolated acts of violence by supervisors.

Points: **8**

Explanation: **This is a reasonable alternative to Answer (c). It is very slightly worse because Answer (c) provides a "tie-breaking" policy argument (i.e., incentivizing investment in unobservable precautions).**

2. Assume that BuildCo is not liable for Elmo's injury on the basis of *Carol's* conduct. Choose the strongest argument. (Vicarious liability through Alan)

(a) BuildCo is not liable. Alan was not using BuildCo's equipment. Hence, Alan was functionally an *independent contractor*—not an employee. Therefore, *respondeat superior* does not apply.

Points: **5**

Explanation: **While it's true that the use of tools is a *factor* to consider when determining whether a worker is an "employee" or an "independent contractor," it is not dispositive. Moreover, Alan was not *supposed* to bring his own tools. He simply did so on his own initiative—not as part of his agreement with BuildCo. The agreement with BuildCo was that he use their tools, which implies that he was an employee rather than an independent contracotr.**

(b) BuildCo is not liable. Alan's use of his own equipment was unauthorized and deviated from company policy. Since unauthorized acts can fall outside the scope of employment, *respondeat superior* does not apply.

Points: **6**

Explanation: **This answer is more right than wrong, but it conflates "unauthorized conduct" with "deviating from company policy." It is the difference between doing something *without permission* versus doing an *impermissible* thing. That's not the same.**

(c) BuildCo is not liable. BuildCo is an independent contractor, and the doctrine of *respondeat superior* applies only to employees—not to contractors.

Points: **2**

Explanation: **See the explanation for Question 1 Answer (e) above.**

(d) BuildCo is liable. Alan was acting within the scope of his duties as an employee when he brought the unauthorized circular saw to the construction site. The loss of Elmo's arm resulted from Alan's negligent failure to secure the saw, making BuildCo vicariously liable under respondeat superior.

Points: **9**

Explanation: **This is better than Answer (g) below, because although Carol's intervening act *seems* to supersede, it is ultimately foreseeable. See *Brauer v. NY Central* (p. 318).**

(e) BuildCo is not liable. Alan's use of his personal circular saw was intended to mitigate workplace hazards posed by the company-issued chainsaw. Although unauthorized, this act was reasonable under the circumstances and not negligent. Without negligence, there is no basis for vicarious liability.

Points: **3**

Explanation: **This answer conflates negligence with the scope of employment. The relevant negligence was leaving the saw upturned and plugged in at the end of the workday. That his decision to bring his own equipment was non-negligent does not affect whether his subsequent acts were negligent, nor whether it was within the scope of his employment.**

(f) BuildCo is liable. By supplying Alan with a dangerous chainsaw to cut wood, BuildCo breached its duty of care. This resulted in the loss of Elmo's arm. Therefore, BuildCo is liable for that harm.

Points: **2**

Explanation: **This answer attempts to establish direct (not vicarious) liability. The critical problem is that *even if* supplying Alan with the chainsaw were unreasonable, *the chainsaw didn't cause the injury*! The circular saw did.**

(g) BuildCo is not liable. Alan negligently left his circular saw in an unsafe condition. However, Carol's pushing Elmo onto the saw was a superseding act that broke the chain of causation. Since Alan's negligence was not the proximate cause of the injury, BuildCo is not vicariously liable.

Points: **7**

Explanation: **Carol pushing Elmo was the act of an independent third party, which ordinarily supersedes. However, it is worth considering more carefully whether this was foreseeable *despite* being the act of an independent third party. See *Brauer v. NY Central* (p. 318).**

(h) BuildCo is not liable. Alan's bringing the circular saw onto the job site and failing to secure it safely was the proximate cause of Elmo's injury. Therefore, Alan—not BuildCo—should be liable.

Points: **2**

Explanation: **Alan's being a proximate cause of Elmo's injury doesn't preclude BuildCo *also* being a proximate cause. If it did, then vicarious liability would *never* exist for *any* cases.**

3. Choose the strongest argument. (Alan's liability)

(a) Alan is liable. The foreseeable dangers inherent in construction trigger a duty to work with care. By bringing his personal equipment onto the job site, Alan was not behaving as a reasonable person. Therefore, he breached his duty of care to those who might come into contact with his unauthorized circular saw. But for his bringing the saw onto the site, Elmo would not have lost his arm, which is a foreseeable consequence of introducing dangerous machinery to the site. Therefore, Alan is liable.

Points: **6**

Explanation: **This answer systematically works through the various elements of negligence. However, bringing his personal equipment is not the strongest factual basis for "breach." It was leaving the circular saw in an upright position, still plugged in at the end of the workday. Additionally, there was other—arguably more dangerous—machinery already on the site, so it's doubtful that bringing machinery to the construction site was "unreasonable."**

(b) Alan is not liable. Regardless whether he was negligent in securing the circular saw, *Carol's shove* was the act of an independent third party actor, which breaks the chain of causation. Therefore, since Alan was not a proximate cause of Elmo's injury, Alan is not liable.

Points: **7**

Explanation: **It's debatable whether Carol's shove supersedes. Although the actions of an independenty third party do presumptively supersede, in this instance it also seems foreseeable that physical altercations could occur on a construction site. Or at least that someone might fall upon the saw left upturned and plugged in. See *Brauer v. NY Central* (p. 318).**

(c) Alan is not liable. His bringing his own equipment was a reasonable precaution aimed at mitigating the danger inherent in woodcutting. Since he undertook reasonable precautions to prevent the harm, he did not breach. Therefore, Alan is not liable.

Points: **3**

Explanation: **This misses the critical issue. The breach was not bringing his own equipment onto the site. The breach was leaving it unsecured.**

(d) Alan is liable. The foreseeable dangers inherent in construction—including physical altercations among rowdy construction workers—trigger a duty to work with care. Alan's leaving the blade upturned and plugged into power was unreasonable, as it would have taken negligible effort to secure it properly. But for the positioning and powered state of the saw, Elmo would not have lost his arm. Therefore, Alan is liable.

Points: **7**

Explanation: **This is a strong argument. However, it's debatable how foreseeable physical altercations among rowdy construction**

workers are. This makes the existence of the "duty" element questionable.

(e) Alan is not liable. Although he was negligent, he was acting as an agent of BuildCo. Therefore, BuildCo is liable—not Alan.

Points: **1**

Explanation: **The fact that BuildCo is also liable does not mean that Alan cannot *also be* liable.**

(f) Alan is not liable. But for DexoTool's defective design, Elmo would not have lost his arm. Ergo, Alan was not the cause-in-fact of the accident. Therefore, Alan is not liable.

Points: **1**

Explanation: **This is a total misapplication of the rules, conflating products liability and vicarious liability.**

(g) Alan is not liable. The proximate cause of the harm was the fragile safety lock, for which DexoTool is strictly liable. Since DexoTool *must* be liable, Alan cannot be liable.

Points: **1**

Explanation: **This is a total misunderstanding of strict liability.**

(h) Alan is not liable. The construction workers were all invitees onto land owned by BuildCo's client. Hence, it was the duty of the owner—not the construction workers—to ensure that the land was safe. Since the duty was the land owner's, Alan had no duty to ensure that the land was safe, and therefore Alan cannot have been liable for negligence.

Points: **1**

Explanation: **First, the property-based analysis of duty is totally irrelevant. Second, duty can attach to more than one party. Just because the land owner has a duty of care does not preclude other people from having a duty of care also.**

(i) Alan is liable. The use of power tools is an "abnormally dangerous" activity, for which strict liability applies. Since Alan owns the circular saw and brought it onto the construction site, he is strictly liable for the harm it caused.

Points: **3**

Explanation: **A power tool is not something which is typically regarded as "abnormally dangerous." Consider Restatement §520 (page**

362), which includes such factors as "(c) inability to eliminate the risk by the exercise of reasonble care," "(d) extent to which the activity is not a matter of common usage," "(e) inappropriateness of the activity to the place where it is carried on," and "(f) extent to which the value to the community is outweighed by its dangerous attributes," all of which militate against classifying power tools as "abnormally dangerous." The more straightforward argument is simply that Alan's leaving it unsecured was unreasonable.

4. Choose the strongest argument. (Carol's liability)

   (a) Carol is liable. Her shoving Elmo was an intentional act. Injurers are strictly liable for intentional harms. Therefore, Carol is liable.

   Points: **5**

Explanation: **While this isn't false, it is a conclusory argument which merely observes that intentional torts are subject to "strict liability."**

   (b) Carol is not liable. Although her shoving Elmo was intentional, she did not intend for him to lose his arm. The "intent" element is absent. Therefore, she is not liable.

   Points: **4**

Explanation: **The "intent" element in battery is merely an intention to touch offensively. It is irrelevant whether the ultimate injury was "intended." See *Vosburg v. Putney* (page 1).**

   (c) Carol is liable. She intended to push Elmo, without his consent, causing him to fall onto the circular saw, which injured him. Therefore, Carol committed a battery against Elmo.

   Points: **7**

Explanation: **This argument ticks off all the elements of battery.**

   (d) Carol is liable. But for her intention to push Elmo, he would not have been pushed. Therefore, her intention was the cause of offensive physical contact. There being no consent, the elements of battery are present, and Carol is therefore liable.

   Points: **4**

Explanation: **This argument uses causation to connect the "intent to touch" to the touch—rather than connecting the touch *to the injury*.**

(e) Carol is liable. If an injurer does not intend physical contact with the victim, then they cannot be liable for a battery. Since Carol *did* intend physical contact with the victim, she *is* liable.

Points: **2**

Explanation: **This is a logical error of the form:**

i. If not X then not Y.
ii. X.
iii. Therefore, Y (from i, ii).

This is logically invalid.

(f) Carol is liable. Although she did not *intend* to mutilate Elmo, she was *negligent* in failing to exercise due care to assure that he not fall onto dangerous equipment on the construction site. He did in fact fall upon dangerous equipment, which was a foreseeable consequence of her shove. He would not have fallen upon the circular saw but for her shove. Therefore, on a theory of negligence, Carol is liable.

Points: **2**

Explanation: **For battery, Carol need only intend the offensive contact—not the injury caused thereby. See explanation for Answer (b) above. The gist of this argument—that Carol pushed Elmo *negligently*, even though she *intended* to push him—seems paradoxical.**

(g) Carol is liable. Although it is unclear whether Alan or Carol was the proximate cause of Elmo's injury, it is more likely than not that Carol was the proximate cause. Therefore, under the doctrine of *res ipsa loquitur*, Carol is liable.

Points: **0**

Explanation: **This argument confuses *res ipsa* (which is a substitute for breach) as relating to proximate cause. Additionally, it operates on the assumption that there can be only one proximate cause of an injury, which is false. It is profoundly bad for multiple reasons.**

(h) Carol is liable. Although it is unclear whether Alan or Carol was the proximate cause of Elmo's injury, it is more likely than not that Carol was the proximate cause. Therefore, under the doctrine of comparative negligence, Carol is liable.

Points: **0**

Explanation: **This argument confuses *comparative negligence* (which is a damages rule involving mutually negligent plaintiffs) as relating to proximate cause. Additionally, it operates on the assumption that there can be only one proximate cause of an injury, which is false. It is profoundly bad for multiple reasons.**

5. Choose the strongest argument. (DexoTool Liability)

(a) DexoTool is not liable. Since either Alan, BuildCo, or Carol were the superseding cause of Elmo's injury, DexoTool cannot be the proximate cause, and therefore DexoTool cannot be liable for Elmo's injury.

Points: **3**

Explanation: **This does not make sense temporally. The breaking of the safety lock happened immediately prior to the mutilation of Elmo's arm. Not action of Alan, BuildCo, nor Carol occurred between the breaking of the safety lock and Elmo's injury.**

(b) DexoTool is not liable. Since either Alan, BuildCo, or Carol were contributorily negligent, DexoTool cannot be liable for Elmo's injury.

Points: **0**

Explanation: **This answer is utter gibberish.**

(c) DexoTool is liable. Since Alan was using DexoTool's circular saw within the scope of his duties, and Alan was not an independent contractor, DexoTool is strictly liable for the harm under a theory of *respondeat superior*.

Points: **0**

Explanation: **Conflating vicarious liability with products liability.**

(d) DexoTool is liable. DexoTool produced the circular saw for purchase by the public. Therefore, they owed a duty of care to the end consumer. They are therefore subject to strict liability for defectively manufacturing the fragile "safety lock," which was the but-for and foreseeable cause of Elmo's injury. Therefore, DexoTool is liable.

Points: **2**

Explanation: **This is not a manufacturing defect. There is no evidence that the plastic lock failed to perform as designed. The problem was the design.**

(e) DexoTool is not liable. Although the fragility of the "safety lock" was due to a manufacturing defect, the intervening acts of Alan, BuildCo, Carol, and Elmo himself were superseding causes, breaking the chain of causation. Therefore, DexoTool is not liable.

Points: **1**

Explanation: **This combines the problems of Answers (a) and (d).**

(f) DexoTool is liable. Assuming the more costly metal safety lock would not have broken, their failure to adopt the safer design constitutes a design defect, which was a but-for and foreseeable cause of the injury to Elmo. Therefore, DexoTool is liable.

Points: **7**

Explanation: **This is good, but not as good as Answer (h). The question is not merely whether a safer design *exists*. There is *always* a safer possible design. The question is whether the reduction in the expected costs of accidents justifies its adoption.**

(g) DexoTool is liable. They had a duty to warn consumers of the fragility of the safety lock, which they failed to do. That breach was the but-for and foreseeable cause of Elmo's injury. Therefore, DexoTool is liable.

Points: **3**

Explanation: **The duty to warn arises when a product is inherently dangerous or has some hidden hazards. That a plastic cover can shatter is not subtle or non-obvious.**

(h) DexoTool is not liable. Although the metal safety lock may have been more resilient to impact, the use of a plastic safety lock was reasonable given industry standards and cost considerations. The force of the impact from Elmo's falling upon it was an extraordinary circumstance. Since it is common knowledge that plastic breaks upon impact and this risk was neither inherent nor hidden, DexoTool did not have a duty to inform consumers of the risk of breakage.

Points: **8**

Explanation: **This argument goes through the quasi-negligence rule for design defects. The consideration of industry standards and cost imply the use of the risk-utility test, which makes it slightly better than Answer (f). It also correctly rebuts the claim that there was a marketing defect.**