

Torts
Meier ©
Quiz 2
Sept. 8, 2006

(Do Not Turn to the Next Page Until Signaled)

One summer afternoon Derrick Duncan, who is ten years old, decided to play a practical joke on his older sister, Susan. Susan was in the Duncan's backyard in Omaha sunbathing by the pool with her friend, Patty. Knowing that Susan hates to be splashed with water while she is sunbathing, Derrick filled up a bucket of water from the Duncan's bathtub, and proceeded to sneak up on the sunbathing girls. Once he was sufficiently close, Derrick screamed "You're gonna get wet Susan" and tossed the water out of the bucket. Derrick intended to toss the water over Susan so that she would not actually get wet. What happened, however, was that the bucket slipped slightly when Derrick was throwing the water, and that instead of the water going over Susan and in the pool, it struck Patty. Unbeknownst to Derrick, because of a malfunction in the Duncan's water heater, the water was scalding hot, and Patty was severely burned. Because Susan had fallen asleep with her Ipod turned up all the way, she was not even aware of the incident until her brother shook her and woke her up. Patty has sued Derrick for battery. Discuss.

Quiz 2 Model Answer ©

Whether Patty can recover from Derrick for battery will depend on how the court treats the questions of transferred intent and the liability of children for intentional torts. The four elements of battery are intent, causation, bodily contact, harmfulness or offensiveness.

Bodily Contact

It is clear that there is bodily contact in this case. The hot water directly hit Patty. It does not matter that Derrick himself did not touch Patty “skin to skin.” *Ghassemieh, Garratt*.

Harmful or Offensive

Whether the bodily contact is harmful or offensive is determined by an objective standard. A jury will undoubtedly determine that hot water on skin is harmful.

Causation

Assumed (per instructions in class)

Intent

Patty can show the requisite intent by proving that Derrick intended to cause a bodily contact which is harmful or offensive. Intent means that Derrick either wanted the bodily contact to occur, or knew to a substantial certainty that the bodily contact would occur. It is clear, from the facts given, that Derrick did not intend to splash Patty with water (hot or otherwise). Derrick wanted to scare his sister, not splash Patty. In addition, Derrick did not know that a splash was substantially certain to occur. Granted, perhaps Derrick should have known that there was a possibility that the bucket might slip. What Derrick should have known, however, is not relevant to determining intent under battery. Even if Derrick did know that there was a *possibility* that the bucket might slip and thus cause a splash on Patty, this is different than knowing to a *substantial certainty* that the splash would happen.

Patty will thus have to argue that the intent element can be met under the theory of transferred intent. Transferred intent applies when the defendant intends to commit an assault but causes a bodily contact which is harmful or offensive. Here, Patty will argue that Derrick intended to commit an assault on Susan. An assault occurs when the defendant intends to cause apprehension of bodily contact which is imminent and harmful/offensive. “Intent,” under the tort of assault, is defined the same way as “intent” under battery. Here, it is clear that Derrick wanted to cause his sister Susan to be apprehensive about getting splashed with water. That Susan never was, in fact, apprehensive, because of her loud Ipod, is not relevant. If Derrick had the requisite intent, it does not matter under transferred intent that an actual assault did not occur. Because Derrick wanted the apprehension of bodily contact to occur, the only question is whether this intended apprehension is of a bodily contact which is imminent and harmful/offensive. Derrick wanted Susan to be apprehensive about an immediate splashing with water, so the apprehension Derrick intended was clearly of an imminent nature. Whether the apprehension Derrick intended was of a harmful or offensive bodily

contact is a closer question. This question is normally viewed from an objective standard. Most people would probably not consider getting splashed suddenly on a hot summer day as harmful, but reasonable minds might disagree over whether it is offensive. In this case, however, Derrick knew that his sister “hate[d] to be splashed with water while sunbathing.” The purpose of the objective standard is to protect the Defendant from the idiosyncratic plaintiff. Here, however, Derrick knew that his sister considered this to be offensive. Thus, Derrick should probably not benefit from this objective standard, particularly when one considers that the theory of transferred intent asks only whether the defendant has the faulty intent, not whether an assault actually occurred. Thus, it seems plausible that Derrick’s intent to commit an assault might be transferred to Patty’s battery cause of action.

Even if Derrick did intent to commit an assault, Patty faces additional potential difficulties in establishing liability. Here, Derrick intended to cause an *apprehension* in Susan of (arguably) *offensive* bodily contact. What occurred was *actual* (not apprehension of) *harmful* bodily contact with *Patty*. Although transferred intent applies when a defendant intends to commit an assault and in fact commits a battery, and when a defendant intends an intentional tort on one individual but the tort occurs on another individual, and when the defendant intends offensive conduct but commits harmful conduct, it is not clear that the doctrine is applicable when *all three* theories of transferred intent are present in the same case. Intentional torts look to the intent of the defendant as a basis for fault. Here, however, the wide discrepancy between what Derrick intended and what actually occurred makes the theory of Derrick’s fault attenuated, and supports an argument that all three theories of transferred intent should not be applied in the same case.

This argument is strengthened by the fact that Derrick is only 10 years old. Although some cases apply the same legal standard to children defendants (*Garratt*), the trend appears to be towards applying a different intent standard for children sued for an intentional tort. Indeed, the Ohio courts have flatly rejected liability of children under seven for intentional torts. Colorado courts have altered the intent requirement for infant defendants, so that the infant must appreciate the harmfulness or offensiveness of the bodily contact. Granted, Derrick is older than the children involved in the Ohio and Colorado cases. However, he is a sympathetic defendant under the facts of this case, and it seems plausible that the Nebraska court would at least modify the intent requirement similar to what was done in the Colorado courts, to require that Derrick appreciate the harmfulness or offensiveness of the bodily contact.

If this is done, an interesting question arises due to the fact that Patty will have to rely on transferred intent to state a claim for battery. Under the Colorado approach, what exactly must Derrick “appreciate?” Must Derrick appreciate the harmfulness or offensiveness of the bodily contact which occurred with Patty, or the harmfulness or offensiveness of the intended bodily contact apprehended by Susan? Clearly, Derrick appreciated the offensiveness (to Susan, at least) of the bodily contact apprehended by Susan. And Derrick surely appreciated the harmfulness of pouring hot water on somebody. However, Derrick did not know that the water was hot, and in this sense did not appreciate that the

contact might be harmful. Regardless of how the judge would sort out this particular messy legal issue, whether Derrick appreciated the harmfulness or offensiveness (again, assuming that the Nebraska court followed the Colorado approach to liability of children for intentional torts) would be a subjective question to be decided by a jury, which would likely be very sympathetic to Derrick.

Conclusion

It seems likely that a court would either determine that all three theories of transferred intent cannot apply in the same case or that Derrick, because of his age, must have appreciated the harmfulness or offensiveness of the bodily contact. In either event, although it is a difficult case, the most likely conclusion is that Patty will not be able to recover from Derrick for battery.

Property

Meier ©

Quiz 2

Feb. 1, 2008

30 Minutes

(Do not start until signaled)

Cousteau owns a large amount of ocean-front property in Southern California. Years ago, in order to better pursue his love of scuba-diving, Cousteau had a portion of his property dredged so as to create a bay on his property. Once the bay was dredged, it filled with ocean water, and Cousteau could scuba dive on his own property without risking the dangerous currents that can occur in the Pacific Ocean off the Southern California coast.

One night, while partaking in a midnight dive, Cousteau came face-to-face with a coelacanth fish. Coelacanth fish are abundant in the deepest ocean waters, but rarely venture to shallow waters. In fact, the fish (which cannot be eaten and has no other commercial value) is so rarely encountered by humans that the East London Museum had offered a reward of \$100,000 for any coelacanth captured alive. Cousteau, however, being a nature lover, had no intention of attempting to capture the coelacanth he encountered. Instead, Cousteau stocked his private bay with a variety of cuttlefish and eels, which constitute the diet of the coelacanth. After the bay was stocked, the coelacanth occasionally returned to Cousteau's property to feed, and Cousteau even managed on two occasions to scuba relatively close to the normally-reclusive fish.

Word that a coelacanth had been frequenting Cousteau's private bay eventually reached Ernest, a veteran salt-water fisherman. Naturally, when Ernest heard that there was a coelacanth in the area, he developed a plan to catch the fish and collect the bounty from the East London Museum. Ernest's plan caught the attention of his wealthy fishing rival Santiago. Upon learning that Ernest was attempting to catch a coelacanth, Santiago followed suit, motivated solely by the desire to deprive his rival the joy of catching this rare fish.

After a few weeks of fishing by both men in the ocean water off of Cousteau's property, Ernest was finally able to snag the coelacanth on his fishing rod. Unfortunately for Ernest, however, the line he was using was designed for catching smaller ocean fish, and it snapped when the coelacanth struggled. The coelacanth swam away with Ernest's lure still stuck to its jaw.

A week later, Santiago saw the coelacanth floating in the open ocean. The fish was still alive, but, because of the lure attached to its jaw, it had not been able to feed properly. Santiago scooped up the weakened fish and removed the lure from its jaw. Santiago contacted the East London Museum and informed the Museum of the details of his catch. At the request of the Museum, Santiago nursed the fish back to health, and then collected the \$100,000 award from the Museum.

Litigation promptly ensued. Both Cousteau and Ernest are claiming that they were the rightful owners of the fish and are thus entitled to the \$100,000 bounty that was paid to Santiago. (Cousteau is now satisfied with the way the Museum is handling the fish and is not seeking a physical return of the fish.) Ernest has also asserted a malicious interference with trade claim against Santiago. Using the materials and discussions from class, discuss this litigation.

Model Answer ©

Santiago can claim ownership in the coelacanth fish pursuant to his actual capture, which is sufficient for proving occupancy. *Pierson v. Post*. His ownership claim can be defeated, however, under the first-in-time principle, if either Cousteau or Ernest can demonstrate a vested ownership in the fish that precedes Santiago's actual capture. The ownership claims of Cousteau and Santiago will be addressed first, followed by an examination of Ernest's malicious interference with trade claim that has been asserted against Santiago.

Cousteau's Assertion of Property Rights

Cousteau will ultimately not be able to show property ownership in the coelacanth fish.

Had the fish been captured in Cousteau private bay, he would be able to claim ownership in the fish under the principle of "*ratione soli*." Under this theory, a landowner has constructive possession of any wild animal located on his real property. See Problem 1, pg. 31. Although the examples of *ratione soli* discussed in class involved wild animals on *land*, there is no readily apparent reason that this same principle would not apply to privately owned *bodies of water* such as Cousteau's bay. Here, however, the coelacanth was captured in the open ocean off of Cousteau's property, so he will not be able to rely on this theory to show property ownership.

Cousteau might also attempt to argue that he retained a property right in the coelacanth even after the fish swam off of his private bay. One approach Cousteau might take is to argue that the coelacanth was a "domesticated," as opposed to "wild," animal. For domesticated animals, a property owner does not lose possession of the animal once the animal escapes from his or her possession. For wild animals, however, the owner loses any property rights once the animal escapes from possession (actual or constructive).

Cousteau will probably not be able to show that the coelacanth was a domesticated animal. First, it is relevant to note that the "domestication" question appears to be answered with regard to the specific animal involved in the litigation, rather than the class or breed of the animal involved. See Problem 2, pg. 32. Thus, although coelacanth fish as a breed are clearly not domesticated, Cousteau can argue that this particular coelacanth was domesticated. Cousteau has a few valid arguments to assert on this question. Cousteau had fed the fish on a few occasions, and the fish had returned to his bay a couple of times. Both of these are factors a court will look at in determining whether an animal is wild or domesticated. On the other hand, there is no indication that the coelacanth was dependent on Cousteau for survival. In addition, although the fish had returned to his bay a few times, these incidents do not constitute a "habit of return," as with the deer on Problem 2, pg. 32. The coelacanth apparently swam freely between the ocean and Cousteau's bay, and Cousteau made no effort to restrain the animal on his property. Usually, with most domesticated animals (dogs, cows, sheep, horses, pigs, goats), the owner takes some precautions against the animal leaving the property. (Cousteau will be sure to note that this apparently was not the case with the deer discussed in Problem 2, pg. 32. And, Cousteau will probably note other examples of

domesticated animals that are often allowed to roam freely by their owners—like house cats. But, these examples appear to be the exception rather than the rule.) Cousteau is also likely to note that the animal had “warmed up” to Cousteau by letting Cousteau scuba alongside the fish. Again, this is a factor that courts consider in determining whether the animal is domesticated, but it will not likely tip the scales in Cousteau’s favor. If Cousteau’s “domesticated animal” argument were accepted in this case, Cousteau could gain a property interest in any fish that swam into his bay from the ocean, returned there periodically for feeding, and allowed Cousteau to get near the animal. This result would be inconsistent with the purpose behind the domesticated animal rule, which is to encourage humans to invest time into domesticating potentially useful animals. Cousteau spent relatively little time in “domesticating” the coelacanth. Basically, Cousteau fed the animal when it was in his bay and swam beside it on a couple occasions. If this constituted a “domestication,” landowners could gain a property interest in an animal with relatively minor efforts. For instance, if Cousteau were adjudged here to have domesticated the coelacanth, a landowner could gain a property interest in a deer through “domestication” simply by putting out a feeder and watching the deer eat. This liberal rule would likely engender much litigation and would not accomplish the objective of the “domestication” rule, which is to encourage humans to invest energy in domesticating animals that might be of benefit to society. In addition, although the coelacanth is an interesting fish, there is no indication that Cousteau, or, for that matter, anyone else, would benefit much from “domesticating” the animal. Unlike the deer in Problem 2, pg. 32, the coelacanth is apparently not even valuable as a food source. Most domesticated animals serve some over-arching human purposes, such as being a source of food (pigs, cows), a source of labor (horses, oxen, dogs), or a companion (dogs, cats). It is difficult to place the coelacanth in this category, despite the fact that the Museum coveted the animal because of its reclusiveness and despite the fact that Cousteau apparently felt some companionship from his few chance encounters with the fish. (In fact, one might argue that the Museum’s interest in the fish speaks to the “wild,” as opposed to “domesticated,” nature of the coelacanth. Places like museums and zoos *usually* covet wild, rather than domesticated, animals.) Despite Cousteau having some legitimate arguments in favor of domestication, a court will most likely conclude that this coelacanth was still a wild animal and thus not owned by Cousteau once the animal left his property.

Cousteau might try another tactic in asserting a property interest in the coelacanth: Cousteau might argue that, although the animal was wild, he retained a property interest in the animal once it escaped his property because it was non-native to the area. There are some cases holding that a non-native animal will be treated as domesticated if it escapes from captivity. Cf. Problem 3 on pg. 32. With non-native wild animals, some of the policy reasons for the usual treatment of wild animals do not apply. For instance, most potential capturers will recognize that the non-native animal was probably previously owned by someone else. Moreover, there is likely to be less disputes regarding the previous owner of a non-native wild, escaped animal as opposed to a native, wild, escaped animal. See class discussion of Panda bear escaping from zoo and roaming streets of New York City.

Here, Cousteau will point out that it is odd for the coelacanth to exist in shallow ocean water. Thus, there is probably little doubt that the coelacanth which frequents Cousteau's bay was the one ultimately captured by Santiago, and there is no indication that the parties have disputed this fact. Thus, the strong administrative argument in favor of the normal wild-animal rule might not exist here. Moreover, both Ernest and Santiago had actual knowledge that the coelacanth had been swimming in Cousteau's bay. Thus, they were actually aware that Cousteau had made some efforts to assist the animal when it was on his property. In this sense Cousteau's argument is perhaps even stronger than the defendant in Problem 4 on pg. 32, who might have known that the silver gray foxes were non-native and imported by someone in general but did not know exactly who the silver gray foxed had previously belonged to.

Ultimately, however, Cousteau's argument suffers some of the same defects as his domestication argument. Here, Cousteau had neither consciously imported the animal from its native habitat of deep ocean water nor had he attempted to confine the fish once it was on his property. In this respect, Cousteau's case is completely different than either the silver fox or panda examples. In both those examples, the non-native animal had been consciously imported (or, at least with the Panda, the animals ancestors had been consciously imported) and the land-owner had made efforts to prevent the animal from escaping. Again, Cousteau's argument is simply too strong. Permitting Cousteau to recover the fish under the non-native wild animal theory, without taking any steps to import and restrain the animal, would discourage landowners from extensive efforts to keep these wild-animals from escaping. If property owners want to retain an ownership interest in a non-native wild animal, it seems logical to at least require them to attempt to restrain the animal. Thus, a judge is unlikely to conclude that Cousteau can assert a property interest under the non-native animal rule.

Ernest's Assertion of Property Rights

Assuming that Cousteau is not able to establish an ownership interest, the coelacanth was a wild animal on non-private property when it was "hunted" by both Ernest and Santiago. Usually, in this situation, a hunter can only claim a property interest in the animal under the established rule of capture. Under the rule of capture, a hunter gains a property interest in a wild animal on non-private property only by actually capturing the animal or by mortally wounding the animal followed by close pursuit of the animal. *Pierson v. Post*.

Ernest will not be able to assert a claim under the traditional rule of capture. He was not able to actually capture the coelacanth due to his fishing line breaking. Nor can he claim possession under the "mortal wounding followed by close pursuit" rule. Although, in some respects, he did injure the fish when the fish escaped with Ernest's lure still in its jaw, Ernest cannot claim that he continued in close pursuit. Once Ernest's line broke, the coelacanth swam away without pursuit by Ernest. Thus, even if the lure can be considered a "mortal wound," which is doubtful, Ernest cannot establish close pursuit after the incident in which the fish swam away.

Ernest will thus have to rely on another rule of law to establish a property interest. Ernest might attempt to rely on Judge Livingston's dissent in *Pierson v. Post*, in which Judge Livingston advocated for a "reasonable prospects" rule. This argument would be a loser. First, it is imperative to note that this was a *dissenting* position in the *Pierson* case. Thus, even if Ernest could demonstrate compliance with this rule, he would need to convince the court of the propriety of adopting this dissenting position. Ernest will not even get that far, however. Ernest did not have a reasonable prospect of catching the coelacanth. The fish broke his line and swam off without pursuit by Ernest. Thus, unlike Post, who was still in hot pursuit when Pierson shot the fox, Ernest was not tracking the fish when Santiago caught the fish. Thus, Santiago was not aware of continued pursuit by Ernest at the time Santiago caught the fish, as also seems to be required by Judge Livingston's opinion. Moreover, Ernest did not have "large hounds" when hunting the coelacanth and, even if this requirement from Judge Livingston's opinion were viewed metaphorically as requiring the hunter to have the right equipment, Ernest still loses: He was not using the proper equipment when he snagged the coelacanth. In short, Ernest loses under Judge Livingston's "reasonable prospects" rule, so there is no need to even consider whether a court might be inclined to adopt this dissenting position.

Ernest has a stronger argument under *Ghen v. Rich*, although it, too, will be ultimately unsuccessful. In *Ghen*, the court modified the rule of capture in the context of whaling in light of established custom within the industry. In *Ghen*, the plaintiff had mortally wounded a fin-back whale with a bomb-lance distinctively marked by the plaintiff's crew. After the whale was subsequently found a few days later on the beach, Ghen asserted a property interest in the whale according to the standard custom which allowed whalers to retain their property interest in a fin-back whale killed by a properly-marked bomb-lance despite the inability to capture the whale immediately following the mortal wound. The court discussed various circumstances in which courts had deferred to various similar customs within the whaling industry, and ultimately awarded Ghen the whale against the finder and a purchaser who had bought the whale with presumable knowledge of the seller's dubious ownership claim. Generally, these various customs can be seen as a slight modification of the "mortal wounding followed by pursuit" rule. The *Ghen*/whaling cases can be summarized as a rule which requires a mortal wounding followed by the pursuit which is practical considering the type of fish and methods commonly used to capture the fish.

Ernest will probably argue that *Ghen*'s mortal wounding/practical pursuit rule should apply to him. Superficially, at least, Ernest can rely on the fact that both *Ghen* and the current litigation involve the capture of fish on the open sea. Beyond that surface similarity, however, there are serious weaknesses in Ernest's argument. First, it is not at all clear that Ernest delivered a "mortal blow" to the coelacanth. The fish swam off and was still alive weeks later, albeit in a weakened state from the attached lure. In *Ghen*, and in the various cases referred to in the *Ghen* opinion, the various customs upheld by the court involved the instant or imminent death of the whale. In this respect, then, Ernest's case is perhaps distinguishable. Moreover, there is no indication that an alteration of the traditional mortal wounding/ followed by pursuit rule is necessary with regard to coelacanth. Had Ernest been properly equipped for the hunt, he presumably

would have landed the fish. This is devastating to Ernest's case. The industry customs that were discussed in *Ghen* were based on the fact that actual capture of the whale in question was not always possible. Here, that does not appear to be the case. Finally, it is problematic (from the perspective of Ernest) that there is no industry custom to support his proposed deviation from the rule of capture. Granted, Ernest might argue that this was a rare hunt and a custom had not yet had time to develop. Nevertheless, a court will likely be unwilling to break from the rule of capture without a developed industry custom. And, even if an industry custom could develop, there is no indication that the custom would allow a hunter who was poorly equipped to catch a coelacanth to claim a continued property interest in a fish that has escaped because of the fisherman's poor preparation. Fisherman would probably not develop an industry custom that rewarded shoddy craftsmanship.

In summary, Ernest is unlikely to be able to establish a property interest in the coelacanth.

Ernest's Claim of Malicious Interference with Trade

Ernest has also asserted a claim for malicious interference with trade. In *Keeble v. Hickeringill*, the court relied on this theory to find liability against Hickeringill, who had shot off a gun with the express purpose of scaring ducks off of Keeble's duck decoy pond.

Ernest will note that there are some similarities between the facts of this case and that of *Keeble*. First, Ernest, like Keeble, was interfered with in the performance of his trade or employment. Moreover, Ernest can note that Santiago appeared to act with the same maliciousness that Hickeringill acted with. Hickeringill shot his gun because he wanted to scare away the ducks from Keeble's pond. The facts indicate that Santiago pursued the coelacanth fish only because he wanted to prevent Ernest from capturing the fish. In this respect, Ernest's plight is very similar to Keeble's; they were both interfered with in their profession by a hostile neighbor motivated solely by a desire to obstruct their efforts.

Santiago, however, will surely note some distinctions between this case and the *Keeble* case. First, Keeble was duck-hunting on his own property, while Ernest was fishing in the open ocean waters. Ernest will likely argue that this distinction does not matter, and that the result in *Keeble* would have been the same had Keeble been hunting on non-private property. In support of this contention, Ernest will note that many modern state legislators have passed legislation preventing animal-rights activists from interfering with hunters on government property. Ernest will argue that this legislation indicates a desire to avoid interference with hunting even if the hunting occurs on non-private property. Moreover, Ernest can rightly note that Chief Justice Holt did not appear to place much emphasis on the fact that *Keeble* was hunting on his own land. Indeed, Chief Justice Holt specifically rejected the rationale argument in that case, which would have been a much more straightforward theory for deciding the case had Chief Justice Holt focused on Keeble's land ownership.

It is a close question whether *Keeble* can be distinguished because this litigation involves hunting on non-private property; both Santiago and Ernest have plausible arguments on this issue. Santiago, however, has a stronger distinction he can assert to avoid the precedent of *Keeble*. In *Keeble*, Hickeringill did not capture the ducks; his efforts merely scared the ducks away and prevented Keeble from capturing the ducks. Here, Santiago did capture the coelacanth. Santiago will thus argue that his activities did not constitute “interference,” but rather were simply fair competition. In support of this argument, Santiago can rely on Chief Justice Holt’s opinion in *Keeble*, in which he indicated that Hickeringill would not have been liable had Hickeringill simply “outhunted” Keeble by placing decoys on his own property and luring the ducks away from Keeble’s decoy pond. In essence, this is precisely what Santiago did when he captured the coelacanth. Santiago was able to actually capture the fish (albeit it appears that Ernest’s previously failed attempts resulting in the attached lure probably assisted Santiago in his capture); Ernest was not able to capture the fish. Thus, although Santiago’s motivation for acting was a desire to obstruct Ernest’s pursuit, the end result of Santiago’s activity was a captured coelacanth fish. Generally, the common law assumes that the capture of wild animals and natural resources is a good thing, and rewards those who are able to capture these fugitive resources. See, e.g., the Rule of Capture. Santiago achieved that objective. There is no indication in the fact pattern that this widely-held assumption of the common law should not apply in these circumstances. Indeed, it appears that there was a readily available market for the fisherman who was able to capture a live coelacanth. And, there is no indication that coelacanth are scarce and that a different rule should apply to conserve this abundant deep-ocean fish.

Thus, Santiago will be able to distinguish his activity from that of Hickeringill because he actually captured the animal in question. Chief Justice Hold indicated in *Keeble* that a defendant cannot be liable by simply out-performing a rival in his trade. That is precisely what Santiago did in this case. There is no reason to think that the policy reasons supporting Chief Justice Holt’s decision in *Keeble* have changed. Thus, Ernest will not be able to recover for malicious interference with trade against Santiago because Santiago did not “interfere” as that term was defined by Chief Justice Holt in *Keeble*.

9.5

Please type the answer to Question 1 below. (Essay)

Cousteau's right to be the owner of the fish would depend on the rule of "constructive possession". That landowners have possession of animals on their land. The bay that he created was his private property and if the fish was caught in the bay he might have a claim on the fish. However, the fish was caught in open waters and once a wild animal escapes or leaves the private property the animal is no longer the property of the landowner. Cousteau could make an argument that the fish was domesticated because he had been feeding it and it periodically returned to his property however it is not clear that the fish depended on these resources for survival and there does not seem to be any predictability to the fish's return. There is also a different rule for animals in their non-native environment that are then found loose away from the landowner's property but this would appear to apply to wild animals that are held in captivity and then escape. In this case, Cousteau was only feeding the animal and was not holding it in captivity so this would most likely not apply. Cousteau would most likely not be able to establish any property rights to the fish.

Kerry Nice

Good

Ernest is claiming that he is the rightful owner of the fish. If the rule from Pierson v. Post is used, Ernest would have had to mortally wound the fish and continue pursuit in order to have property rights to the fish. Ernest had inadequate fishing lines that were designed for a smaller fish and lost pursuit of the fish when his line snapped. Tompkins would assert that he lost his right to the fish at that point. Ernest would also likely lose under Livingston's rule of reasonable capture because it does not appear that he had the right equipment to actually catch the fish. The policy interest of the courts in Pierson v. Post was to actually encourage the capture and killing of foxes. If Ernest was given property rights to the fish it would not encourage the actual capture of fish and would lead to more disputes between fisherman. Santiago would have property rights under Pierson v. Post. However Ernest might have a stronger claim under Ghen v. Rich. The rule from Ghen was that mortal wounding and then practical pursuit warranted possession of the fish. The question would be whether Ernest had done enough in his pursuit of the fish to meet this test. Ernest would also have a stronger case under this rule because like the whaler's in Ghen, Ernest was able to mark the fish with his lure and Santiago was most likely aware that the lure belonged to Ernest. There is not information about the fishing customs in this area but if the custom is to return a fish that is marked by a lure, Ernest might also have a stronger case. The court would be likely to follow the custom of the fisherman if the values of society matched those of the industry customs. If the industry custom is in place to catch fish and reward those that first mark the fish or find the fish and the court views that first claim of a fish is valuable and likely to increase the wealth of the community, Ernest would have a strong argument for possession of the fish. However it is more likely that the efficiency argument of the court is that the actual catching fish is more valuable than a rule that favors the pursuing of the fish would lead to Ernest losing claim to the fish. Santiago actually was able to catch the fish would accomplish society's goal and purpose of a rule of capture.

Great!

Great Analysis

Ernest's claim regarding malicious interference with trade against Santiago would be difficult for him to win. Santiago and Ernest are involved in the same trade of fishing and have the same goal of catching the fish. Although Santiago had the sole motivation of depriving his rival of the joy of catching this rare fish he did ultimately catch the fish, nurse it back to health and sell it to the museum. They were both participating in the trade of fishing with the goal of catching the fish for display at the museum. The end goal of providing the educational opportunity to the public by displaying this rare fish was accomplished so there was no real interference. If Ernest had been better prepared to catch the fish he would have been the one to reap the profits but he was not well equipped. Also, if Santiago had just killed the fish instead of selling it to the museum, Ernest might have a stronger argument because society's interest had not been

Good Discuss Keable and C.J. Holt's

language regarding "luring ducks" & "better schools"

served and that would appear as if Santiago just wanted to interfere with Ernest catching the fish and would demonstrate a more malicious state of mind.

END OF EXAM

Great Answer!

Institution **University of Nebraska College of Law**
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Course / Session **F06 Torts A -Meier**
Instructor **NA**
Section . Page 1 of 3

Institution **University of Nebraska College of Law**

Course **F06 Torts A -Meier**

Instructor **NA**

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Exam ID

Word Count(s)

Section 1 **430**

8.5

Answer-to-Question-_1_

I do think that in this case Patty will be able to recover from Derrick for the cause of battery. For battery the plaintiff must prove Intent, Causation, and Bodily Contact that is Harmful of Offensive. Causation will be assumed for this exam because it has not been discussed in class.

Bodily Contact: Derrick did not actually touch his physical body to Patty's but Derrick did set in motion a chain of events that caused scolding hot water to touch Patty's body. In the cases of Ghassemieh and Garratt it was determined by the courts that actual physical touching is not necessary to show bodily contact, a person must simply set in motion events that cause the plaintiffs body to contact something or somebody.

Good

Harmful or Offensive: This is an objective test that is left to the jury to decide based on a what a reasonable person would feel. The scolding hot water is very clearly harmful to a person and caused sever burns. Because this is an OR test it doesn't have to be both harmful and offensive just one or the other. With that said it is also offensive to cause somebody to be burned.

Good

Intent: This part of the tort of battery is much harder to prove. It is clear that Derrick neither wanted nor knew that the water would make contact with Patty's body. But, there is the possibility of transferring intent. So then we must decide if he intended to cause bodily contact to Susan. He clearly did not because he said he was going to throw the water into the pool and not on Susan. He slipped and the water went on Patty. Not something he wanted or Knew would happen. We still have one area to look at that may cause intent. He did express intent to cause Susan apprehension of bodily contact (the water being thrown on her). He yelled "You're gonna get wet." as he was about to throw the water. So, he wanted to cause Susan the apprehension of getting wet. Therefore, he met the Intent portion of the tort for Assault on Susan and all of that

Good

Is that apprehension of imm. and harmful/off. B.C.?

What about fact that Derrick is a child?

can be transferred to the Patty case.

One final note. Susan will not be able to bring a tort of Assault against Derrick because she did not hear the warning, "you're gonna get wet" because she had here IPOD on and she was asleep. There is no assault if the person feels no apprehension of the bodily contact.

Patty should be able to recover for battery based on the analysis above.

Good Answer.
Keep up good work

F. -2-1*

Institution **University of Nebraska College of Law**
Control Code **N/A**
Extegrity Exam4 >

Course / Session **F06 Torts A -Meier**
Instructor **NA**
Section . Page 1 of 2

Institution **University of Nebraska College of Law**

Course **F06 Torts A -Meier**

Instructor **NA**

Control Code **N/A**

Exam ID **1000**

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8.5

Answer-to-Question-1_

In order to have a cause of action for an intentional tort of battery, the plaintiff must prove that the defendant intended to cause bodily contact which is harmful or offensive. In this case, Patty may not have a claim of battery against Derrick, even under the argument of transferred intent.

What is def of "intent"?

Intent: Although Derrick did not intend for the water to have contact with the girls, transferred intent demonstrates how intent can be prevalent if you intended to cause apprehension, but instead made actual contact. Even though Derrick only intended to cause apprehension, transferred intent could potentially be argued because the water made contact. On the other hand, Derrick's intent was to cause apprehension for his sister, not her friend Patty, and no apprehension or contact was made with his sister in any way. Derrick could argue that there was no transferred intent because his intent was for Susan to experience the apprehension, not Patty.

Good analysis - what about Derrick being a kid?

Bodily contact: Another form of transferred intent is prevalent if you intend to cause contact to one person, and end up making contact with another, however Derrick never intended to cause bodily contact with Susan and then accidentally hit Patty, he only intended to cause Susan's apprehension. Although there was bodily contact evident when the water hit Patty, Derrick never intended bodily contact of any kind toward either girl. An example of lack of intent for bodily contact would be in White vs. University of Idaho, Battery was evident in this case because a piano teacher intended to make contact with the plaintiff. If intent for contact is there, battery is potentially there, but this element must be met in order to constitute a battery. Had the water made contact with Susan rather than Patty, Susan would have a claim for battery based on Derrick's transferred intent from apprehension to actual contact. Or had Derrick intended contact with Susan, Patty would have a claim of battery against Derrick for transferred intent of bodily contact.

Analysis unclear here

What about combs of the two.

Harmful or Offensive: The result of the contact (severe burns) was undoubtedly harmful or offensive from an objective standard of a reasonable person, however without the requisite intent or transferred, the court would not be able to find for the plaintiff on a charge of battery.

For all of these reasons, it could be argued that the plaintiff will not be able to recover for battery. The idea of transferred intent is not necessarily applicable in this case because the intent for apprehension was not directed at the person who was the victim of the bodily contact.

Very good. Come to a resolution on this question.

-F.-2-1*

Institution **University of Nebraska College of Law**
Control Code **N/A**
Extegrity Exam4 >

Course / Session **F06 Torts A -Meier**
Instructor **NA**
Section . Page 1 of 2

Institution **University of Nebraska College of Law**

Course **F06 Torts A -Meier**

Instructor **NA**

Control Code **N/A**

Exam ID

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Section 1 **475**

8.5

Answer-to-Question-1_

Patty probably has a good case for battery against Derrick.

Battery has four elements

1. Intent
2. Casue
3. bodily Contact
4. Harmful or offensive

In regards to intent it is obvious that Derrick didn't intend the water to hit anyone. The facts say that he never wanted or knew to a substantial certainty that he would hit them

Secondly, cause can be assumed in class

Bodily contact did happen and in this regard Patty for sure has a case. Although derrick didn't hit her directly, he did set into motion actions that did affect her. It is obvious to all that she was indeed hit by the water. If we follow the fact it isn't obvious that Dderrick want to cause this contact

Good

Finally, the question of if the contact was harmful or offensive is pretty obvious as well. Harmful or offensive contact is an objective standard and any reasonable person would see that scalding water is indeed harmful and offensive to a person hit by such a thing.

There are a few points of interest here that need to be discussed. Derrick may have never intended to cause bodily contact under a battery definition but he did inted to scare people. This intent to scare would fit under Assault. In assault the intent must only be to casue apprehension that was imminent and was harmful or offensive contact. Under assulat Derrick would indeed be guilty. As the bucket slipped and even though he was aiming for his sister Susan, under the transfer of intent, this would be sufficient to transfer his intent of assault to the battery issue.

With the facts as they are and with the transfer of the intent of assault to that of battery it would seem that Derrick is indeed guilty of battery. The best defense Derrick has at this point would be to point out his age. As Derrick is a young person it has been pointed out in courts that young people and people with diminished mental capacity don't have a full understanding of what they were doing. The fault theory breaks down with these groups. Derrick may not have the understanding that what he was going to do would in fact be a tort. His idea of "scare" may not at all include the idea of apprehension. The question of how much he understood the circumstances needs to be explored more.

Good - would be better if you talked about Garratt and the Ch. + Co. cases.

Additionally, throwing water may not by an objective test bee seen to be a harmful or offesive action udner normal circumstances. Becasue there wasw a malfunction that caused the water to get very hot, it couldnt be e xpected to have caused such harm. This objective standar

Was the b.c. he intnd to cause apprehension of harm. This might be a closer call than what you imply.

OK - I think you were getting to this.

You picked up on most of the main issues. Try to work on organization. Your best analysis came ~~at~~ after you said "few points of interest." Would be better if this good analysis came when you were initially discussing the elements. Keep up the good work.